No. 22-____

IN THE
Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

SUSAN PRENTICE, ET. AL.

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented is:

> Whether punitively depriving a prisoner in solitary confinement of virtually all exercise for three years notwithstanding the absence of a security justification violates the Eighth Amendment, as ten circuits hold, or whether such a denial only violates the Eighth Amendment if it is imposed in response to an "utterly trivial infraction," as the court below, but no other circuit, holds.

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Petitioner Michael Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the Seventh Circuit in this case.

OPINIONS BELOW

The Seventh Circuit's opinion (Pet. App. 1a-36a) appears at 29 F.4th 895, and its order denying en banc review (Pet. App. 61a-74a) appears at 47 F.4th 529. The district court's relevant ruling (Pet. App. 37a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2022. Petitioner timely filed a petition for rehearing en banc, which was denied on August 25, 2022. On November 9, 2022, Justice Barrett granted an extension of the period for filing this petition to December 23, 2022. On December 2, 2022, Justice Barrett granted an extension of the period for filing

this petition to January 22, 2023.[1] This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the U.S. Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[1] Because that period concludes on a Sunday, this petition is timely pursuant to Supreme Court Rule 30(1) if filed on or before January 23, 2023.

INTRODUCTION

For more than three years, Michael Johnson, who is classified seriously mentally ill, was denied virtually all access to exercise—whether indoors or outdoors—while he languished in solitary confinement. That deprivation was not imposed to ensure the safety and security of the exercise yard, but rather to punish Mr. Johnson for engaging in misconduct that was born of mental illness and unrelated to exercise.

Forced to spend virtually every moment in a windowless cell that was sealed with a solid-steel door, Mr. Johnson's physical and mental health deteriorated. His muscles withered, he repeatedly smeared feces on his body, endured hallucinations, and compulsively picked at his own flesh, and he required "suicide watch" time and again.

In a 2-1 opinion, the court below held that deprivations of exercise—of any duration—including those imposed punitively and without a security justification, categorically cannot violate the Eighth Amendment unless such punishment is instituted in response to an "utterly trivial infraction." Pet. App. 14a. In dissent, Judge Rovner explained that "exercise"—no less than nutrition and shelter—is among life's minimal civilized necessities, and therefore cannot be withheld punitively. *E.g.*, Pet. App. 31a-32a (Rovner, J., dissenting). Rather, such deprivations must be necessitated by safety and security imperatives. *Id.*

Mr. Johnson petitioned for rehearing en banc. In a 5-5 vote, the court below denied the petition. Judge Scudder, who concurred in the denial of rehearing,

recognized that the majority opinion was "hard to square" with this Court's precedent and acknowledged that the "issue is important and cries out" for en banc review. Pet. App. 62a-63a (Scudder, J., concurring in denial of reh'g en banc). The dissenters went further, explaining that the majority's error "sends the message that an inmate who behaves . . . badly" is "fair game for torture," "take[s] the liberty of deleting" enumerated rights from this Court's jurisprudence, creates a lopsided circuit split, and warrants Supreme Court review. *Id*. at 65a-66a, 74a (Wood, J., dissenting from denial of reh'g en banc).

Exercise, like shelter, food, and medical care, is one of the "minimal civilized measure[s] of life's necessities" that prison officials must provide. *Wilson v. Seiter*, 501 U.S. 294, 304 (2001) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). Accordingly, every federal court of appeals to reach the question other than the court below—the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits—holds that prison officials can only impose prolonged and near-total exercise denials on those in solitary confinement if exercise cannot be provided without jeopardizing prison security. In holding otherwise, the Seventh Circuit stands alone.

And with good reason. For more than a century, this Court has called attention to the plight of prisoners in solitary confinement, a condition that Justice Kennedy labeled a "regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. 257, 287, 288 (2015) (Kennedy, J., concurring). An extensive body of scientific research confirms the devastating physical and psychological effects of prolonged isolation. But

Defendants subjected Mr. Johnson to something far worse: "'24/7' solitary confinement" unrelieved by occasional access to exercise. Pet. App. 19a (Rovner, J., dissenting).

On any given day, several thousand men and women are held in solitary confinement in carceral facilities in Illinois, Indiana, and Wisconsin. This Court should either grant plenary review to answer the question presented or summarily reverse the decision below to ensure that the panel majority's errors are not construed as a license for prison officials in three states to impose a punishment—solitary confinement without access to exercise—that few, perhaps no, humans can tolerate.

STATEMENT OF THE CASE

1. For more than three years, Michael Johnson, who is diagnosed seriously mentally ill by the Illinois Department of Corrections,[2] spent virtually every moment in a cramped isolation cell at Pontiac Correctional Center. Pet. App. 3a-4a, 11a; 19a (Rovner, J., dissenting). Generally, prisoners held in solitary confinement like Mr. Johnson are entitled to one hour of out-of-cell exercise five days a week. Pet. App. 5a. They may take that exercise alone in an outdoor exercise cage, weather permitting, or alone in an indoor recreation room, collectively referred to as "yard." *Id*.

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[2] Mr. Johnson's bipolar disorder, severe depression, excoriation disorder, and other diagnosed mental illnesses, App. 52-65, combined with his treatment in prison, have led him to attempt suicide more than 15 times, *id*. at 458; Pet. App. 3a-4a; 19a-20a (Rovner, J., dissenting).

But Defendants designated Mr. Johnson for "yard restriction"—on top of his solitary confinement—as a superadded punishment for the behavior his mental illness induced.[3] Pet. App. 18a (Rovner, J. dissenting); App. 7-10, 29-30, 575-78. The record below shows that Defendants restricted Mr. Johnson's yard access purely as punishment; Defendants did not assert that his participation in yard would threaten security, and none of his misconduct occurred during yard time. Pet. App. 32a-36a (Rovner, J., dissenting); App. 521-23, 575-86. The "yard restriction" classification theoretically entitled Mr. Johnson to one hour of out-of-cell recreation per *month*. Pet. App. 19a (Rovner, J., dissenting). Even that monthly breather was frequently denied for insignificant reasons—*e.g.*, a messy cell—or no reason at all. *Id.* at 34a; App. 8-9, 15, 29-30, 48-49, 115-17, 138-39, 148, 202, 548-49. In fact, for more than one year, Mr. Johnson did not receive even a single *hour* of exercise. Pet. App. 68a (Wood, J., dissenting from denial of reh'g en banc).

These exercise denials "essentially result[ed] in '24/7' solitary confinement" in "a windowless cell . . . and behind a door that for most or all of his placements was a solid one." Pet. App. 19a (Rovner, J.,

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[3] One consequence of Mr. Johnson's mental illness has been "his refusal, or inability, to comply with prison rules." Pet. App. 18a (Rovner, J., dissenting). For example, he sometimes "spit[] at or in the direction of others." *Id*. at 34a. He disobeyed orders to clean his cell. *Id*. He once threw an "unknown liquid substance" in the direction of guards or prisoners. *Id.* He damaged property in his cell. Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc); App. 573-75. He possessed contraband. Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc). And he frequently covered himself in his own feces. Pet. App. 20a (Rovner, J., dissenting).

dissenting). Making matters worse, Mr. Johnson's cell "was too small to permit in-cell exercise." Pet. App. 73a (Wood, J., dissenting from denial of reh'g en banc); Pet. App. 19a (Rovner, J., dissenting).

The "impact of that prolonged isolation without the critical outlet of exercise was both terrible and predictable." Pet. App. 20a (Rovner, J., dissenting). Left only to "stare[] at walls and ceilings … until his mind played tricks on him," App. 742, Mr. Johnson was "regularly on suicide watch," "suffered from hallucinations," "excoriated his flesh," and repeatedly "smear[ed] feces in his cell and on himself,"[4] Pet. App. 20a (Rovner, J., dissenting); App. 65, 191, 199, 549, 735.

2. Proceeding pro se, Mr. Johnson filed a complaint pursuant to 42 U.S.C. § 1983, claiming that this prolonged exercise denial violated the Eighth Amendment. App. 21-22. After concluding that the deprivation was not unconstitutional, the district court granted Defendants' motion for summary judgment.[5] Pet. App. 53a-55a.

3. On appeal, the panel majority affirmed. Pet. App. 14a. It reasoned that the deprivation of exercise categorically "does not violate the Eighth Amendment unless the sanctions were meted out for 'some utterly trivial infraction of the prison's disciplinary rules.'"

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[4] Mr. Johnson "experienced physical deterioration," too—atrophied muscles, shaky hands, persistent headaches, chest pain, and overwhelming fatigue. Pet. App. 20a (Rovner, J., dissenting); App. 8, 10, 13, 539-40, 660, 663, 712.

[5] Mr. Johnson also raised other claims, but they are not relevant to this petition. App. 21-25.

Pet. App. 14a (quoting *Pearson v. Ramos*, 237 F.3d 881, 885 (7th Cir. 2001) (Posner, J.)).

Judge Rovner dissented. Recognizing that both the Supreme Court and the federal courts of appeals have long considered "exercise," much like "food, clothing or warmth," to be "a basic human need," Judge Rovner explained that exercise "cannot be denied as a punishment unrelated to serious immediate security and safety needs." Pet. App. 32a (Rovner, J., dissenting). And she explained that Mr. Johnson's isolated conditions of confinement multiplied his need for exercise, which is "even more critical for inmates in segregation." *Id.*

As Judge Rovner pointed out, however, the record established that Defendants imposed a total denial of yard without any "indicat[ion] that Johnson would present a security risk or a safety threat if allowed access to the yard, with its individual cages, to exercise." *Id.* at 35a. In fact, Defendants did not claim that "any infraction occurred during yard time" or even offer "any argument" that the "yard restrictions were necessary for safety and security reasons." *Id.* at 36a.

Illustrating the absence of an adequate justification, Judge Rovner noted that Mr. Johnson was deprived of yard for *eighteen months* for "impair[ing] surveillance, disobeying an order, insolence, property damage, and giving false information to an employee" and another *eight months* for "covering his door window with feces," possessing another prisoner's social security number, and overflowing his toilet. *Id.* at 33a-34a. Indeed, the most serious of the infractions, the only infractions classified by Defendants as "assaults," consisted of

"spitting at or in the direction of others" and "throwing an unknown liquid substance." *Id.* at 34a. For that spitting and throwing, Defendants denied Mr. Johnson yard for an additional *eleven months*.[6] *Id.*

4. Following the panel decision, Mr. Johnson petitioned for rehearing en banc. An evenly split court denied Mr. Johnson's petition. Judges Sykes, Easterbrook, Brennan, and Kirsch voted to deny rehearing. Pet. App. 61a (order denying reh'g en banc).

Judge Scudder concurred in the denial of rehearing en banc, but described the majority opinion as "hard to square" with this Court's precedent, and emphasized that "the issue is important and cries out for the full court's consideration." *Id.* at 62a (Scudder, J., concurring in denial of reh'g en banc). Five members of the court—Judges Wood, Rovner, Hamilton, St. Eve, and Jackson-Akiwumi—voted to grant rehearing en banc. *Id.* at 65a (Wood, J., dissenting from denial of reh'g en banc). Judge Wood, writing for the dissenting judges, explained that "[n]o decision from either the Supreme Court or the lower courts justifies carving out exercise from the Supreme Court's list" of fundamental needs. *Id.* By doing so, the majority "puts the Seventh Circuit at odds with many other courts" on a critical issue, a circumstance "mak[ing] this case a suitable candidate for Supreme Court attention." *Id.*

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[6] Although the precise start and end date for each exercise restriction—amounting to more than three years in total—are difficult to discern from the prison disciplinary records, Pet. App. 5a, it is clear that Mr. Johnson endured at least two years of yard restrictions with no break in between, *id.* at 2a; 19a (Rovner, J., dissenting).

REASONS FOR GRANTING THE PETITION

I. This Court Should Resolve Whether The Eighth Amendment Permits Prison Officials To Punitively Impose Lengthy, Virtually Total Exercise Deprivations On Prisoners In Solitary Confinement Without A Security Justification.

This Court has held that exercise, like food and warmth, is one of "life's necessities" guaranteed prisoners by the Eighth Amendment. *Wilson*, 501 U.S. at 304. Accordingly, every federal court of appeals to reach the question—other than the Seventh Circuit—has concluded that prison officials cannot deprive incarcerated people of nearly all exercise for an extended period of time as mere punishment. The Eighth Amendment permits extended exercise deprivation if, and only if, exercise would jeopardize prison security.

A. In A Lopsided Split, The Seventh Circuit Stands Alone.

In holding that a prolonged exercise deprivation triggers no Eighth Amendment protection as long as it is imposed to punish an infraction that is not "utterly trivial," the Seventh Circuit is on its own.

i. Ten Circuits Hold That The Eighth Amendment Only Permits Prolonged Exercise Denials From Prisoners In Solitary Confinement That Are Necessitated By Security Requirements.

The Second Circuit's "safety exception" illustrates the consensus among the circuits. *See Williams v. Greifinger*, 97 F.3d 699, 704 (2d Cir. 1996). In

Williams, a prisoner's refusal to take a tuberculosis test did not justify infringing the Eighth Amendment's command that "some opportunity for exercise *must* be afforded to prisoners." *Id.* at 704 (quoting *Anderson v. Coughlin*, 757 F.2d 33, 35 (2d Cir. 1985)). Instead, the Eighth Amendment would have permitted the deprivation only in "unusual circumstances" making "exercise 'impossible' because of disciplinary needs." *Id.* (quoting *Mitchell v. Rice*, 954 F.2d 187, 192 (4th Cir. 1992); *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (Kennedy, J.)). Because the prison had produced no evidence that providing the prisoner "with an opportunity for exercise would have posed an immediate danger," the "safety exception" did not apply and the exercise deprivation violated the Eighth Amendment. *Id.* at 706-07; *see also Edwards v. Quiros*, 986 F.3d 187, 191 (2d Cir. 2021) (recognizing a "right to some meaningful opportunity to exercise[,] subject to a safety exception and adequate consideration of alternatives").

The Ninth Circuit employs the same rule. The court permitted the extended deprivation of exercise from a prisoner who consistently exhibited "manifestly murderous, dangerous, uncivilized, and unsanitary conduct," including multiple acts of violence specifically "when he is permitted to engage in *outdoor* activities." *LeMaire v. Maass*, 12 F.3d 1444, 1448, 1453 (9th Cir. 1993) (emphasis added). Essential to the court's holding was that the plaintiff's "loss of [] exercise privileges [was] directly linked to his own misconduct" because he "represent[ed] a grave security risk when outside his cell." *Id.* at 1458. By contrast, the Eighth Amendment forbade limiting exercise to 45 minutes per week for a prisoner who, despite multiple disciplinary infractions, "did not lose

his exercise privileges based on a determination by prison officials that he presented a 'grave security risk when outside his cell'" and posed no "particular problems in the exercise yard." *Allen v. Sakai*, 40 F.3d 1001, 1004 (9th Cir. 1994); *see also Thomas v. Ponder*, 611 F.3d 1144, 1155 (9th Cir. 2010) (explaining that "deprivation of exercise may be 'reasonable' in certain situations, such as during a 'state of emergency' in a prison, or when a prisoner poses such a threat to inmates or guards that his confinement without exercise is the only way to maintain the security of the facility"—but, where exercise deprivation is not "necessary to maintain order in the prison, it is difficult to conceive of how a deprivation of a 'basic human necessity' may be deemed reasonable"(cleaned up)).

The Eleventh Circuit, too, requires a security justification. The court permitted a three-year deprivation of outdoor exercise from two prisoners who had attempted to escape from the yard because "it would be hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison." *Bass v. Perrin*, 170 F.3d 1312, 1316 (11th Cir. 1999). But it upheld a preliminary injunction ending five years of little to no out-of-cell exercise where a prisoner had committed some "non-violent" but "serious" infractions—but had not exhibited "the pervasive violent conduct" that "penologically justified the *Bass* inmates' complete deprivation of out-of-cell recreation." *Melendez v. Sec'y, Fla. Dep't of Corr.*, No. 21-13455, 2022 WL 1124753, at *13 (11th Cir. April 15, 2022); *see also Sheley v. Dugger*, 833 F.2d 1420, 1429 (11th Cir. 1987) (raising "serious constitutional questions" about the constitutionality of twelve years in solitary with two

hours of out-of-cell exercise per week and noting that the "punitive . . . nature" of the deprivation strengthened the Eighth Amendment claim).[7]

The Tenth Circuit agrees. In *Housley v. Dodson*, 41 F.3d 597 (10th Cir. 1994), a prisoner who was not "a particularly high security risk" stated an Eighth Amendment claim where he was restricted to thirty total minutes of out-of-cell exercise during a three-month period. *Id.* at 599. By contrast, the Eighth Amendment permitted depriving a "dangerous and legendary" prisoner of outdoor exercise—but giving him two hours daily indoor exercise—because he posed "a continuing security concern." *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 750, 755 (10th Cir. 2014).

The Fourth Circuit similarly holds that the Eighth Amendment guarantees "meaningful opportunities to exercise" that may be withheld only "under exigent circumstances that necessitate constriction of these rights." *Mitchell*, 954 F.2d at 193. In that case, the plaintiff's "incorrigibly assaultive nature," which manifested in multiple escape attempts and attempted murders while incarcerated, "may" have

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[7] In dissent, Judge Wood suggested that the Eleventh Circuit is the only court of appeals that has not recognized exercise "as one of life's necessities." Pet. App. 66a (Wood, J., dissenting from denial of reh'g en banc). That is a questionable characterization of Eleventh Circuit law, *see Melendez*, 2022 WL 1124753, at *15 (describing "the allowance of any out-of-cell time for recreation" as one of "life's necessities"), but whether the Eleventh Circuit has adopted that precise formulation is irrelevant. Regardless of its word choice, the Eleventh Circuit requires "pervasive violent conduct" to "penologically justif[y]" exercise deprivation. *Id.* at *13 (citing *Bass*, 170 F.3d at 1316-17).

justified a yearslong exercise deprivation—if prison officials could demonstrate the "infeasibility of alternatives." *Id.* at 188-89, 192-93.

The Sixth Circuit also centers "prison security requirements" in its exercise-deprivation analysis. *Walker v. Mintzes*, 771 F.2d 920, 927-28 (6th Cir. 1985). Accordingly, that court held that a 46-day "total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees." *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983).

The Fifth Circuit followed the same rule in permitting a deprivation of outdoor exercise from a member of a violent prison gang engaged in "planning a gang war." *Hernandez v. Velazquez*, 522 F.3d 556, 558 (5th Cir. 2008). The deprivation was "not punitive in nature" but rather was compelled by concerns "for the safety of the suspected gang members and others in the prison system," and lasted only as long as necessary to "investigate[] suspected gang members and . . . defuse tensions between the rival gangs." *Id.* at 558-59. By contrast, that court held that restricting a prisoner who posed no particular security threat to twenty annual days of outdoor exercise violated the Eighth Amendment. *Maze v. Hargett*, 200 F.3d 814, *3, *6 (5th Cir. 1999) (unpublished).

Likewise, the Eighth Circuit permits depriving out-of-cell exercise only for "those inmates who would jeopardize security if released from their cells." *Campbell v. Cauthron*, 623 F.2d 503, 507 n.4 (8th Cir. 1980). In *Campbell*, the Eighth Circuit had "no trouble" concluding that the Eighth Amendment forbade restricting prisoners to "a few hours each week" of out-of-cell time and ordered that "each

inmate that is confined to his cell for more than sixteen hours per day shall ordinarily be given the opportunity to exercise for at least one hour per day outside the cell"—subject to the security exception. *Id.* at 506-07. One such exception arose in *Leonard v. Norris*, 797 F.2d 683 (8th Cir. 1986), where the court held that the Eighth Amendment permitted a 15-day exercise deprivation for prisoners who led "a potentially explosive attempt to disrupt [prison] security." *Id.* at 684-85.

The First Circuit has adopted the Ninth Circuit's rule, relying on that court's decision in *LeMaire*, 12 F.3d 1444, for the proposition that the Eighth Amendment permits depriving prisoners of exercise if they pose an out-of-cell security risk. *See, e.g.*, *Giacalone v. Dubois*, 121 F.3d 695, *1 (1st Cir. 1997) (unpublished per curiam) (45-day exclusion from the yard for a prisoner who assaulted another prisoner by striking him in the head with fists and a typewriter); *McGuinness v. Dubois*, 86 F.3d 1146, *2 (1st Cir. 1996) (unpublished per curiam) (endorsing the district court's application of *LeMaire*).

And the D.C. Circuit has expressed doubt that thirty minutes of daily indoor exercise would satisfy constitutional requirements where there were no "dangers or risks involved in providing outside recreation to maximum security prisoners," and reaffirmed that recreation is "necessary" to the health of incarcerated people. *Campbell v. McGruder*, 580 F.2d 521, 544 n.48, 546 (D.C. Cir. 1978).

Although it hasn't squarely addressed what circumstances justify depriving exercise, the Third Circuit has made clear that restrictions on even less fundamental rights, like daytime mattress use, violate

the Eighth Amendment if imposed as punishment for "wholly unrelated misconduct" that did not make "provision of the deprived needs difficult or dangerous." *McClure v. Haste*, 820 F. App'x 125, 129-32 (3d Cir. 2020). Because providing a mattress around the clock "would not have placed correctional officers or other inmates at risk," the Eighth Amendment obligated officials to do so. *Id.* at 131.

Most of the above cases addressed only the constitutionality of limiting outdoor exercise while permitting indoor exercise in a gym, day room, or other interior space. A few suggested that serious security concerns could justify limiting all out-of-cell exercise, where in-cell exercise remained available. *See, e.g.*, *LeMaire*, 12 F.3d at 1458; *Hernandez*, 522 F.3d at 559; *Mitchell*, 954 F.2d at 189, 193; *Campbell*, 623 F.2d at 507 n.4; *McGuinness*, 893 F. Supp. 2, 4 (D. Mass. 1995), *aff'd*, 86 F.3d 1146. But counsel has identified no case, under any circumstances and in any other court of appeals, approving an extended total deprivation of all exercise, in or out-of-cell. The Seventh Circuit's decision is *sui generis*.

ii. The Seventh Circuit Holds That The Eighth Amendment Permits A Long-Term Near-Total Denial Of Exercise From Prisoners In Solitary Confinement Without A Security Justification.

In holding that indefinite, virtually total exercise deprivations do not trigger Eighth Amendment concerns so long as they are imposed to punish infractions that are "not utterly trivial"—never mind if providing exercise raises no security concerns—the Seventh Circuit stands alone. As Judge Rovner

pointed out in dissent, the "critical distinction" for Eighth Amendment purposes falls between "punishment after the fact and immediate coercive measures necessary to restore order or security." Pet. App. 27a-28a (Rovner, J., dissenting) (quoting *Rodriguez v. Briley*, 403 F.3d 952, 953 (7th Cir. 2005) (cleaned up)). Where no "security concerns" justify the deprivation, the Eighth Amendment forbids it. *Id.* at 33a.

Here, however, not even "the defendants . . . assert that there are . . . any . . . security concerns" associated with honoring Mr. Johnson's constitutional right to exercise somewhere, anywhere. *Id.* at 36a. If any other circuit governed Mr. Johnson's jailers, the Eighth Amendment would forbid his years-long total denial of exercise unmotivated by security concerns.

B. The Decision Below Was Wrong

The decision below is contrary to Eighth Amendment jurisprudence in at least four respects.

First, the panel majority erred by disregarding this Court's admonition that "[*s*]*ome* conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise." *Wilson*, 501 U.S. at 304.

The majority baldly rejects that principle and the sole example this Court offered to illustrate it. In *Wilson*, this Court specifically contrasted the necessity of providing "outdoor exercise" to prisoners "otherwise confined in small cells almost 24 hours per day" with the permissibility of depriving outdoor

exercise where "prisoners otherwise had access to [a] dayroom 18 hours per day." *Id.* at 304-05 (citing *Spain*, 600 F.2d at 199 (Kennedy, J.) and *Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980).

Nonetheless, the panel majority expressly refused *Wilson*'s directive to contextualize Mr. Johnson's exercise deprivation by considering the attendant circumstances—*i.e.*, solitary confinement. Pet. App. 10a, 14a. That innovative approach is, as Judge Scudder remarked, "hard to square" with *Wilson*. Pet. App. 62a (Scudder, J., concurring in denial of reh'g en banc). Rather, the Eighth Amendment is concerned with the "sum total of the deprivation." *Id.*; *see also id.* at 69a (Wood, J., dissenting from denial of reh'g en banc) (similar). Mr. Johnson suffered a three-year denial of out-of-cell exercise coupled with confinement in an isolation cell too cramped to permit in-cell exercise. Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc). The panel majority's decision to strip the deprivation of context contravenes this Court's longstanding Eighth Amendment case law.

Second, Mr. Johnson's three-year exercise denial violates the Eighth Amendment because it (a) posed a "substantial risk of serious harm"; and (b) was inflicted with "deliberate indifference" to his "health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Yet the panel majority elected not to apply this framework to Mr. Johnson's claim. Had it done so, the Eighth Amendment violation would have been obvious.

a. To start, Mr. Johnson has already suffered "serious harm" of both a psychological and a physical nature. *Supra*, 7. And it is reasonable to assume that Mr. Johnson's lifespan will be shortened because of

the three years of forced idleness he endured. *Infra*, 22. The probability of such future harm raises additional Eighth Amendment concerns. *E.g.*, *Helling v. McKinney*, 509 U.S. 25, 33 (1993) (holding that prison officials cannot "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering").

b. Mr. Johnson also presented sufficient evidence at summary judgment to establish that Defendants were "deliberately indifferent"—that is, that they knowingly disregarded the risk. *Farmer*, 511 U.S. at 837. As an initial matter, Mr. Johnson repeatedly told them that solitary confinement without access to exercise was injuring him. *E.g.*, App. 15-16, 29-30, 32-33, 35-36, 38-39, 42-43, 48-49, 125-26, 136-41, 145-48, 186-87, 193, 537-39. But that is not the only evidence of Defendants' knowing disregard. For example, prison mental health staff reported that "yard restriction" left Mr. Johnson with "no outlet" that would blunt the effects of his mental illness. App. 291.

Neither Mr. Johnson's words nor the staff report was necessary to put Defendants on notice, however. Prison policies explicitly recognized the risks of solitary confinement generally, the "heightened risk" imposed on those with mental illness, and the ameliorating impact of "opportunities for fitness." Dist. Ct. ECF 59 at 30-31, 54. Likewise, the administrative code governing the Illinois Department of Corrections mandated that "[o]ffenders in segregation status shall be afforded the opportunity to recreate outside their cells a minimum of eight hours per week." Ill. Admin. Code tit. 20 § 504.670(a) (2017). In fact, the Department's own medical director had previously testified that "four to seven hours of

exercise outside the cell . . . are the weekly minimum necessary to prevent serious adverse effects on the physical and mental health of inmates confined . . . in . . . a form of solitary confinement." *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988); *see also* Pet. App. 22a (Rovner, J., dissenting). And, finally, the risk of harm posed by the three-year deprivation of exercise for a prisoner otherwise isolated day and night in a cell too small to permit movement, let alone exercise, is sufficiently obvious to permit the inference that Defendants were aware of but disregarded the clear danger to Mr. Johnson. *Farmer*, 511 U.S. at 837; *Wilson*, 501 U.S. at 300; *Hope*, 536 U.S. at 745 (holding that "[t]he obvious cruelty inherent" in relegating inmates to flagrantly "degrading and dangerous" conditions provides officers "with some notice that their alleged conduct violate[s]" the Eighth Amendment).

Third, because exercise—like shelter, food, and medical care—is among the "minimal civilized measure of life's necessities," *Wilson*, 501 U.S. at 304, there is a "critical 'distinction, for purposes of applying the eighth amendment in the context of prison discipline, between punishment after the fact and immediate coercive measures necessary to restore order or security.'" Pet. App. 27a-28a (Rovner, J., dissenting) (quoting *Rodriguez*, 403 F.3d at 953). In deference to this principle, the circuit cases establish that no "total deprivation" of a "basic human need" can be imposed as a "punishment unrelated to serious immediate security and safety needs." Pet. App. 32a (Rovner, J., dissenting). This holds for exercise, no less than for "food, clothing or warmth." *Id.* And, thus, when it comes to exercise, "the presence (or absence) of a particularly compelling security justification has,

rightly, played an important role in the analysis of the Courts of Appeals," since "[i]t should be clear by now that our Constitution does not permit such a total deprivation [of outdoor exercise] in the absence of a particularly compelling interest." *Apodaca v. Raemisch*, 139 S. Ct. 5, 7-8 (2018) (statement of Sotomayor, J., respecting denial of certiorari).

Here, Defendants asserted no security justification for depriving Mr. Johnson of virtually all opportunity to exercise for *three years*, and the summary judgment record confirms none existed. Pet. App. 32a-36a (Rovner, J., dissenting). Rather, Defendants withheld exercise to punish past misconduct that was unrelated to and did not occur in connection with exercise. *Id.* The panel majority, apparently "tak[ing] the liberty of deleting 'exercise'" from the Court's "list of 'minimal' needs that must be addressed," saw no constitutional problem with exercise deprivation as punishment, never mind that "[n]o decision from either the Supreme Court or the lower courts justifies" its approach. Pet. App. 65a (Wood, J., dissenting from denial of reh'g en banc).

Fourth, and finally, the conditions endured by Mr. Johnson violate the Constitution because they are contrary to the "evolving standards of decency that mark the progress of a maturing society." *Rhodes*, 452 U.S. at 346. For decades, courts have recognized exercise as both "an indispensable component of preventive medicine," *Anderson v. Romero*, 72 F.3d 518, 528 (7th Cir. 1995), and "a necessary requirement for physical and mental well-being," *Delaney v. DeTella*, 256 F.3d 679, 683 (7th Cir. 2001). And, as with solitary confinement, *see infra* 27-28**,** a vast body of scientific research warns of the harm caused by lack

of exercise. A "three-millennia history . . . recognizes that physical inactivity reduces functional capacity and health," and "[o]verwhelming evidence proves the notion that reductions in daily physical activity are primary causes of chronic diseases/conditions." Frank W. Booth et al., *Lack of exercise is a major cause of chronic diseases*, 2 COMPREHENSIVE PHYSIOLOGY 1143, 1143-44 (April 2012). The American College of Physicians has specifically recommended that U.S. jails and prisons "offer incarcerated persons regular opportunities for healthy exercise as recommended by federal Physical Activity Guidelines." Newton E. Kendig et al., *Health Care During Incarceration: A Policy Position Paper From the American College of Physicians*, ANNALS OF INTERNAL MED. 2 (Nov. 22, 2022). Those guidelines emphasize that "only a few lifestyle choices have as large an effect on mortality as physical activity." U.S. Dep't of Health and Human Servs., *Physical Activity Guidelines for Americans* 34 (2018 2d ed.).[8]

Given the undisputed scientific consensus, it comes as no surprise that the courts of appeals have long recognized that the wholesale deprivation of exercise offends the Eighth Amendment. *E.g.*, *Williams*, 97 F.3d at 704 (noting that the Second Circuit has "described the right to exercise in unequivocal terms, stating that '[c]ourts have recognized that some opportunity for exercise *must* be afforded to prisoners.'"); *Mitchell*, 954 F.2d at 191 ("It may generally be considered that complete deprivation of exercise for an extended period of time violates Eighth Amendment prohibitions against

[8] Available at https://health.gov/sites/default/files/2019-09/Physical_Activity_Guidelines_2nd_edition.pdf.

cruel and unusual punishment."); *Ruiz v. Estelle*, 679 F.2d 1115, 1152 (5th Cir. 1982) ("[C]onfinement of inmates for long periods of time without opportunity for regular physical exercise constitutes cruel and unusual punishment."); *Housley*, 41 F.3d at 599 ("[T]here can be no doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment."), *abrogated on other grounds by Lewis v. Casey*, 518 U.S. 343 (1996); *Thomas*, 611 F.3d at 1152 ("Like food, [exercise] is a basic human need protected by the Eighth Amendment."). And although Defendants deprived Mr. Johnson of exercise for years on end, the panel majority condoned the practice notwithstanding the fact that such deprivations have long been recognized as both dangerous and constitutionally infirm.

C. This Is An Ideal Vehicle To Resolve The Question Presented.

This case presents the ideal vehicle to resolve the question presented for four reasons.

First, this petition "sharply present[s]" a single, well preserved, pure question of law: May prison officials punitively deny virtually all exercise to a prisoner in solitary confinement for years on end without a security justification, or must that deprivation be necessitated by security requirements? *See* Pet. App. 70a (Wood, J., dissenting from denial of reh'g en banc); Pet. App. 18a (Rovner, J., dissenting). That question has already been addressed in five reasoned opinions (one in the district court; four in the court of appeals), incorporating the views of eleven different federal judges, five of whom expressly noted its suitability for Supreme Court review. Pet. App.

37a-60a; Pet. App. 1a-17a; Pet. App. 18a-36a (Rovner, J., dissenting); Pet. App. 62a-64a (Scudder, J., concurring in denial of reh'g en banc); Pet. App. 65a-74a (Wood, J., dissenting from denial of reh'g en banc).

Second, the record is straightforward and appropriately developed. Concurring in the denial of rehearing en banc, Judge Scudder identified several facts that would "have benefitted from full development and sound adversarial presentation in the district court." Pet. App. 63a (Scudder, J., concurring in denial of reh'g en banc). But this Court need not wait for a (vanishingly unlikely) counseled trial in a similar case for additional fact development.[9] The summary judgment posture of this case obligates a reviewing court to take as true Mr. Johnson's evidence. Thus, this Court must accept that Defendants subjected Mr. Johnson to a "total deprivation" of exercise—his cell was too small to exercise within and he was denied virtually all out-of-cell exercise opportunities—for more than three *years* based on misconduct that did "not involve any apparent security risk to yard access." Pet. App. 36a (Rovner, J., dissenting); Pet. App. 67a (Wood, J., dissenting from denial of reh'g en banc). And this Court must accept that the deprivation imposed a "terrible and predictable" price: physical and psychological deterioration. Pet. App. 20a (Rovner, J., dissenting).

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[9] 0.5% of prisoners' rights cases go to trial. *See Table D: Outcomes in Federal District Court Cases by Case Type, Cases Terminated FY 2021*, INCARCERATION AND THE LAW: CASES AND MATERIALS, https://incarcerationlaw.com/resources/data-update/#TableD (last visited Jan. 23, 2023).

In any event, the panel majority ruled against Mr. Johnson because it believed that, *as a matter of law*, such a deprivation could not violate the Eighth Amendment. Pet. App. 14a. Thus, current Seventh Circuit case law renders "the factual details that the concurrence claims are essential to review . . . irrelevant." Pet. App. 70a-71a (Wood, J., dissenting from denial of reh'g en banc). Simply put, "there are no quirks in the record . . . that stand in the way" of reaching the question presented. *Id*. at 66a (Wood, J., dissenting from denial of reh'g en banc).

Third, the unusually prolonged nature of Mr. Johnson's exercise deprivation makes this case the ideal vehicle to address the question presented. As Judge Wood noted, some exercise deprivations may, by virtue of their comparatively short duration, involve complicated constitutional line-drawing. Pet. App. 69a-70a (Wood, J., dissenting from denial of reh'g en banc). This is not such a case. Indeed, counsel is unaware of *any* case involving such a lengthy, near-total exercise deprivation. If the Eighth Amendment imposes any durational limit on the deprivation of exercise, *three years* surely surpasses that limit. *Id.*

Fourth, and finally, by failing to properly raise qualified immunity in the trial court, Defendants have forfeited it at the summary judgment stage, Pet. App. 36a n.4 (Rovner, J., dissenting), so the question before this Court is presently unencumbered by thorny questions of clearly established law that typically accompany similar constitutional claims raised by incarcerated people. *See, e.g.*, *Apodaca v. Raemisch*, 864 F.3d 1071, 1077-79 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 5 (2018).

For each of these reasons, the question presented is well suited to the Supreme Court's review.

II. The Question Presented Is Exceptionally Important.

The split created by the Seventh Circuit presents a question of fundamental importance.

1. Mr. Johnson endured his time at Pontiac almost entirely inside "a windowless cell, with a cell light that remained on 24/7, and behind a door that for most or all of his cell placements was a solid one." Pet. App. 19a (Rovner, J., dissenting). He had little to no meaningful social contact with guards or other prison personnel and his interactions with other prisoners, many of whom were also mentally ill, appeared to consist of "listening to [them] screaming and hollering and banging and kicking." App. 544.

These conditions of confinement are not unusual among prisoners housed in solitary. And they are not per se unconstitutional. But members of this Court and the scientific community alike have repeatedly warned against the deleterious effects that these sorts of conditions wreak on the human mind and body. Over 130 years ago, this Court noted that, at our nation's founding, solitary confinement "was found to be too severe." *In re Medley*, 134 U.S. 160, 168 (1890). For, as this Court observed, "[a] considerable number of the prisoners" consigned to solitary fell "into a semi-fatuous condition … others became violently insane; others still, committed suicide; while [others] … did not recover sufficient mental activity to be of any subsequent service to the community." *Id.* In fact, at common law, solitary confinement was considered a rare punishment: one that was only prescribed as

"punishment of the worst crimes of the human race," and "'a further terror and peculiar mark of infamy' to be added to the punishment of death." *Id.* at 170, 171.

More recently, Justice Kennedy noted that "[t]he human toll wrought by extended terms of isolation long has been understood" as a "regime that will bring you to the edge of madness, perhaps to madness itself." *Davis v. Ayala*, 576 U.S. 257, 287, 288 (2015) (Kennedy, J., concurring). And Justice Breyer repeatedly raised concerns regarding the psychological and physical injury inflicted by prolonged solitary confinement. *E.g.*, *Glossip v. Gross*, 576 U.S. 863, 926 (2015) (Breyer, J., dissenting); *Jordan v. Mississippi*, 138 S. Ct. 2567, 2568-69 (2019) (Breyer, J., dissenting from denial of certiorari); *Ruiz v. Texas*, 137 S. Ct. 1246, 1246-47 (2017) (Breyer, J., dissenting from denial of certiorari).

Consistent with the commentary by Supreme Court justices for the past century, an extensive and growing body of research from the scientific community "confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Ayala*, 576 U.S. at 289 (Kennedy, J., concurring). Prisoners exposed to solitary confinement consistently develop some or all of the following injuries: severe depression, hallucination, anxiety, panic attacks, withdrawal, lethargy, cognitive dysfunction, paranoia, memory loss, insomnia, and stimuli hypersensitivity. *E.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH U. J. L. & POL'Y 325, 335-36, 349, 370-71 (2006). Life-threatening behavior, such as suicidal ideation, is all too common among prisoners in solitary confinement. *Id.* at 349; Stuart Grassian,

Psychopathological Effects of Solitary Confinement, 140 AM. J. PSYCHIATRY 1450, 1453 (2006). And prisoners suffering from mental illness—whether preexisting or solitary-induced—are disproportionately vulnerable to the well documented harms caused by solitary confinement, and are also at the greatest risk of having their suffering "deepen into something more permanent and disabling." Craig W. Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 142 (2003); Craig Haney, *Restricting the Use of Solitary Confinement*, 1 ANN. REV. CRIMINOLOGY 285, 290 (2018).

Corrections professionals, too, have increasingly called attention to the dangers of solitary confinement. *See* Pet. App. 22a n.2 (Rovner, J., dissenting) (citing to Br. for Amici Curiae Former Corrections Directors & Experts at 3, 9-11, 13, 17-18, 26). They have likewise noted the lack of a countervailing benefit, explaining that the "decreased use of isolation and an increase in out-of-cell exercise . . . has consistently resulted in a substantial decrease in violence, resulting in an improvement in prison security and a reduction of operating costs." *Id.*

2. The concerns expressed by jurists, researchers, and correctional officials apply to the use of solitary confinement far less brutal than that at issue here; the rigors of Mr. Johnson's near-total isolation served as a multiplier for the decision to deny him virtually all opportunities for exercise—both indoors and outdoors—for a period in excess of three years. Typically, prisoners in solitary confinement receive some minimal time outside of their cells for exercise each week—as then-Judge Kennedy explained

decades ago, the isolation of solitary confinement made out-of-cell exercise "a necessity." *Spain*, 600 F.2d at 199. Indeed, this Court recently denied certiorari in a case where petitioners in solitary confinement were allowed to spend five hours per week in a designated indoor exercise cell, but were otherwise denied outdoor exercise. *Apodaca*, 139 S. Ct. at 5-7 (2018).

Justice Sotomayor, in a statement respecting the denial, pointed to the well-documented ravages of solitary confinement and urged that "[i]t should be clear by now that our Constitution does not permit such a total deprivation [of outdoor exercise] in the absence of a particularly compelling interest." *Id*. at 8 (statement of Sotomayor, J., respecting denial of certiorari). This case is categorically more troubling—unlike in *Apodaca,* where the petitioners had access to almost daily exercise in a dedicated recreation room, Mr. Johnson was stripped of virtually all access to exercise for years on end.

3. Though Mr. Johnson's three years in solitary confinement without any opportunity for out-of-cell exercise is "unusual," solitary confinement is commonplace. For example, 2021 saw some 25,000 prisoners across the country in solitary confinement, nearly a quarter of whom had been isolated for a year or more. The Correctional Leaders Assoc. & The Liman Center for Pub. Interest Law at Yale Law Sch., Time-in-Cell 2021: A Snapshot of Restrictive Housing 10-11 tbl.2 (Aug. 2022). In the states that make up the Seventh Circuit alone, thousands of prisoners are regularly held in solitary confinement. *Id*. at 8, 11. The panel majority's unmistakable message that prisoners are "now fair game" for the "wholesale

deprivation of exercise" risks subjecting any number of the thousands of people held in solitary confinement in Illinois, Wisconsin, and Indiana to conditions that "come[] perilously close to a penal tomb." *Apodaca*, 139 S. Ct. at 10 (statement of Sotomayor, J., respecting denial of certiorari).

This Court should grant certiorari to resolve the circuit split created by the decision below.

III. In The Alternative, This Court Should Summarily Reverse Because The Decision Below Cannot Be Squared With This Court's Precedents.

If the Court does not grant plenary review, it should summarily reverse the decision below because it is blatantly incompatible with the Court's Eighth Amendment precedents for at least four reasons.

First, as both Judges Scudder and Wood noted, the majority opinion is irreconcilable with this Court's decision in *Wilson v. Seiter*. Pet. App. 62a-63a (Scudder, J., concurring in denial of reh'g en banc); Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc). Contrary to *Wilson*, the majority explicitly refused to consider context—*i.e.*, that Mr. Johnson endured a three-year exercise deprivation while he was otherwise held in solitary confinement—but rather insisted on reviewing the exercise deprivation in a vacuum, despite this Court's clear direction to the contrary. *See* Pet. App. 69a (Wood, J., dissenting from denial of reh'g en banc) (explaining that "[t]he panel majority has attempted to avoid the question Johnson has presented in his briefs" by analyzing the issues of solitary confinement and exercise separately). In fact, this Court has not only made clear that conditions of

confinement with a "mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise" must be analyzed "in combination," it has also described (as the only provided exemplar of that rule's application) the precise situation faced by Mr. Johnson—the necessity of out-of-cell exercise when prisoners are "otherwise confined in small cells almost 24 hours per day." *Wilson*, 501 U.S. at 304-05.

Second, the panel decision deletes from the case law the Court's long-established conditions of confinement analytical framework. In its place, the court below substituted a novel rule: It categorically cannot violate the Eighth Amendment to punish prisoners by withholding exercise (or, presumably, any other of the minimal civilized measures of life's necessities) "unless the sanctions were meted out for some utterly trivial infraction of the prison's disciplinary rules." Pet. App. 14a (quotations omitted).

But that is not the law. Rather, for decades, this Court has held that conditions of confinement cases are reviewed under the familiar deliberate indifference framework. *See Estelle v. Gamble*, 429 U.S. 97 (1976); *Wilson v. Seiter*, 501 U.S. 294 (1991); *Farmer v. Brennan*, 511 U.S. 825 (1994); *Hope v. Pelzer*, 536 U.S. 730 (2002). That framework makes sense. The Eighth Amendment "imposes duties on [prison] officials, who must provide humane conditions of confinement." *Farmer*, 511 U.S. at 832. Thus, prison officials may not be deliberately indifferent to "conditions posing a substantial risk of serious harm." *Id.* at 834. That approach, which balances risk, on the one hand, with the prison's knowledge of and ability to avoid that risk, on the

other, is eminently suitable for evaluating conditions of confinement, including those imposed when prisoners commit infractions. The Eighth Amendment's promise to provide humane conditions of confinement simply does not evaporate in the face of disciplinary infractions. Pet. App. 35a (Rovner, J, dissenting); Pet. App. 70a (Wood, J., dissenting from denial of reh'g en banc).

Third, Defendants deprived Mr. Johnson of one of life's essential needs for approximately three years, as a consequence of which his physical and mental health deteriorated—yet Defendants have not asserted (and the record would not support any such assertion) that the deprivation was necessitated by security. On these facts, "the Eighth Amendment violation is obvious." *Hope*, 536 U.S. at 738. For, "[d]espite the clear lack of an emergency situation," Defendants "knowingly subjected [Mr. Johnson] to a substantial risk of physical harm [and] to unnecessary pain," conduct that is incompatible with this Court's rule that gratuitous, punitive treatment is forbidden by the Eighth Amendment. *Id*.

Fourth, and finally, withholding all opportunities for exercise—one of very few identified minimal civilized necessities of life, *Wilson*, 501 U.S. at 304—violates contemporary standards of decency. For decades this Court has recognized that "[t]he [Eighth] Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . .,' against which we must evaluate penal measures." *Estelle*, 429 U.S. at 102 (citation omitted). Jurists, scientists, and corrections officials have long recognized the life-preserving necessity of exercise, a necessity that becomes all the more essential for those

confined in isolation cells. *See supra*, 22 & 27-28; *see also* Pet. App. 21a-23a (Rovner, J., dissenting) (citing cases). Holding Mr. Johnson in a cramped, isolation cell for *three years* without the temporary relief of exercise, is not only "antithetical to human dignity," *Hope*, 536 U.S. at 745, it is the stuff of nightmares.

For each of these reasons, the decision below should be summarily reversed.

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the decision below should be summarily reversed.

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