No. 22-___

In the Supreme Court of the United States

LANNETTE LINTHICUM, ET AL., PETITIONERS

v.

ROBIN WAYNE SMITH.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has repeatedly held that cases postdating a government official's allegedly unlawful acts are of "no use" in analyzing the clearly established prong of qualified immunity. *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam); *see also, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004) (per curiam). The decision below created an exception from this rule for caselaw published after the defendant's acts that discusses pre-existing law. The Fifth Circuit joined the Second, Sixth, Ninth, and Tenth Circuits in embracing this rule despite this Court's clear precedent to the contrary.

This Court has also warned lower courts against "defin[ing] clearly established law at a high level of generality." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam). And it has summarily reversed decisions that fail to heed that warning. *E.g.*, *Kisela*, 138 S. Ct. at 1154-55. Nevertheless, as the dissenting judge noted, the decision below holds that an authority from an altogether different factual context clearly established the constitutional right at issue.

The questions presented are:

1. Whether the Fifth Circuit manifestly departed from this Court's precedent by holding that authority that postdates the defendant's alleged acts can clearly establish the law for purposes of overcoming qualified immunity.

2. Whether the Fifth Circuit defined inmates' rights to care for serious medical needs at an impermissibly high level of generality.

PARTIES TO THE PROCEEDING

Petitioners Lannette Linthicum, Director of Health Services Division, Texas Department of Criminal Justice; Denise DeShields, Executive Medical Director, Texas Tech University; Sheri J. Talley, Medical Director, Texas Department of Criminal Justice, were defendants–appellants in the court of appeals.

Respondent Robin Wayne Smith was plaintiff–appellee in the court of appeals.

Dennis Melton, Unit Health Administrator, was an unserved defendant in the district court.

RELATED PROCEEDINGS

Smith v. Linthicum, No. 4:19-cv-0787, U.S. District Court for the Southern District of Texas. Order entered March 30, 2021.

Smith v. Linthicum, No. 21-20232, U.S. Court of Appeals for the Fifth Circuit. Judgment entered October 12, 2022.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is not reported but is available at 2022 WL 7284285. The opinion of the district court (Pet. App. 26a-44a) is not reported but is available at 2021 WL 1742328.

JURISDICTION

The Fifth Circuit rendered judgment on October 12, 2022. It denied petitioners' petition for rehearing en banc on November 10, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the appendix. Pet. App. 45a-46a.

STATEMENT

I. Factual Background

Respondent Robin Smith is a Texas inmate who has a chronic pain condition. Pet. App. 27a. In 2002, years before his incarceration, Veterans Administration physicians treated Smith's condition by surgically implanting a device, called a spinal-cord stimulator ("SCS"), that sends low levels of electricity to his spinal cord. Pet. App. 2a, 28a. Smith used the SCS device to manage his pain in 2014 when he was sentenced to 35 years imprisonment for continuous sexual abuse of a child under the age of fourteen. Pet. App. 28a.[1]

In 2015, Smith complained that his SCS malfunctioned at times, causing him discomfort. Pet. App. 28a-

[1] *See also Inmate Information Details*, TEX. DEP'T OF CRIM. JUST., https://inmate.tdcj.texas.gov/InmateSearch/viewDetail.action?sid=08275188 (last accessed Feb. 4, 2023).

29a. Prison medical personnel treated Smith's pain with medication and granted him work restrictions. Pet. App. 4a, 29a. In addition, Smith's doctors explored the replacement of Smith's SCS device between 2016 and 2018. Pet. App. 30a-33a. Smith claimed that the Veterans Administration had approved the replacement of his device in 2011, but that scheduling difficulties prevented him from receiving the surgery before he was imprisoned in 2014. Pet. App. 28a.

While in prison, Smith received a number of referrals for SCS-replacement surgery. The first was rejected by non-party Dr. Benjamin J. Leeah, Northern Regional Medical Director of the Texas Tech University Health Sciences Center, on February 1, 2016. Pet. App. 30a. Dr. Leeah described the procedure as "most[] likely . . . medically beneficial but not medically necessary." *Id.*

In August 2016, Petitioner Dr. Sheri Talley, a management-level official serving as the Southern Regional Director of the Texas Tech University Health Sciences Center, also rejected the request to refer for surgery, explaining:

> We don't service, place, replace batteries, or remove any of those stimulators. It will still be there when his sentence is over. We don't even have a specialist on contract, such as a pain specialist that he can be sent to anyway. He'll be treated for his chronic pain the same way all of our patients are treated.

Pet. App. 31a.

Another doctor treating Smith sought a surgical consultation referral in October 2016. *Id.* Dr. Talley responded:

> General surgery stated that [patient] didn't have physiological basis for his pain. Pain specialty not available. Treat chronic pain at the local level.

Id. (alteration in original). Smith's doctor revisited the question with Dr. Talley again in January 2017. Pet. App. 32a. Dr. Talley's response in February 2017 reiterated her earlier direction:

> Care, upkeep, removal of pain stimulators will not occur while offender is in TDCJ. Batteries will not be replaced. Please manage pain according to [Disease Management Guidelines].

Id.

In February 2018, following another surgery request, Dr. Talley again directed Smith's physicians to treat Smith as they would any other pain patient:

> Care, upkeep, and/or removal of pain stimulators will not occur while offender is in TDCJ. Batteries will not be replaced. Please manage pain at unit according to policy.

Pet. App. 33a n.36. Consistent with Dr. Talley's direction, Smith's physicians treated his pain with pain medication. He alleges the pain worsened over time. *See, e.g.*, Pet. App. 32a, 34a.

II. Procedural History

On March 4, 2019, Smith filed a section 1983 suit in the U.S. District Court for the Southern District of Texas alleging that Dr. Talley's denial of SCS-replacement surgery violated the Eighth Amendment. In addition to Dr. Talley, Smith sued Petitioners Dr. Lannette Linthicum, the Director of the Health Services Division of the Texas Department of Criminal Justice, and Dr. Denise DeShields, the Executive Medical Director for the Texas Tech University Health Science Center. Pet.

App. 1a. Smith sued Drs. Linthicum and DeShields under a supervisory theory of liability, alleging that Dr. Talley enforced a categorical policy against SCS-replacement surgery for which Drs. Linthicum and DeShields also bore responsibility. Pet. App. 4a. After Smith filed suit, his SCS device was surgically removed for unrelated reasons. Pet. App. 19a n.2.

In the district court, Petitioners asserted qualified immunity in a motion for summary judgment. Pet. App. 26a, 42a. The district court rejected Petitioners' qualified immunity arguments in a three-sentence analysis concluding that "it was clearly established that 'a prison inmate could demonstrate an Eighth Amendment violation by showing that a prison official refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.'" Pet. App. 42a (quoting *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006) (per curiam)).

A divided panel of the Fifth Circuit affirmed the district court's denial of qualified immunity. Pet. App. 2a. The majority concluded that "one particular decision" by the Fifth Circuit, *Delaughter v. Woodall*, 909 F.3d 130, 137-39 (5th Cir. 2018), clearly established the right in question. Pet. App. 12a. *Delaughter* denied qualified immunity to prison officials who delayed a needed surgery for financial reasons. Pet. App. 13a (citing *Delaughter*, 909 F.3d at 137-39).

Judge Duncan concurred in part and dissented in part. Pet. App. 17a-22a. He concluded that *Delaughter* could not have put Petitioners on notice because it was decided after Dr. Talley's last-reported denial of the

surgery. Pet. App. 21a-22a.[2] In addition, he distinguished *Delaughter* from Smith's claim because "[n]o evidence suggests the policy against SCS devices was driven by cost." Pet. App. 20a. The panel was unanimous in its agreement that fact disputes precluded judgment on the merits of Smith's Eighth Amendment claim. Pet. App. 19a.

Petitioners sought rehearing en banc, which was denied. Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Holding Is So Contrary to this Court's Recent Precedent That Summary Reversal Is Appropriate.

The Fifth Circuit denied qualified immunity and held that a single circuit case—*Delaughter*—clearly established that a prisoner has a right to be considered for a medical treatment even when that treatment is not permitted by medical policy. This Court has never recognized such a right—to the contrary, it has refused to grant review where such a right was demanded. *See Gibson v. Collier*, 140 S. Ct. 653 (2019) (denying a petition for a writ of certiorari). Nevertheless, the Fifth Circuit held that such a right was so clearly established that Petitioners could be held liable for monetary damages. This was error twice over. *First*, *Delaughter* could not put Petitioners on notice of the law because it was decided after the allegedly unlawful conduct. *Second*, even if *Delaughter* could be considered in the qualified immunity analysis, the Fifth Circuit stated the right at issue at too high a level of generality. Under this Court's precedent, such

[2] Dr. Talley's February 2018 rejection, which was cited by the district court but not the court of appeals, also preceded *Delaughter* (by about nine months). *See* Pet. App. 33a n.36.

errors merit summary reversal. *E.g.*, *City of Tahlequah*, 142 S. Ct. at 12; *Kisela*, 138 S. Ct. at 1153; *Brosseau*, 543 U.S. at 200 & n.4.

A. This Court has never recognized a clearly established Eighth Amendment right not to be subject to generally applicable medical policies.

According to the panel majority, Petitioners are subject to suit for monetary damages because they applied "a blanket and non–medically considered policy" to deny a prisoner an invasive medical treatment that falls outside the scope of the practices of the prison-contracted physicians. Pet. App. 14a (footnote omitted). The panel made no attempt to cite this Court's precedent as clearly establishing such a right. Instead, it applied "one particular decision" of its own, Pet. App. 12a—even though it acknowledged that this "Court has explicitly left open the question of whether Circuit law alone can clearly establish the law for qualified immunity purposes," Pet. App. 12a n.5. This was error.

1. This Court's precedent clearly establishes inmates' rights against having their "serious medical needs" met with "deliberate indifference." *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). But deliberate indifference is an incredibly high burden to meet; "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). This Court has always held that mere medical malpractice or inadvertent failure to proscribe adequate care is not deliberate indifference. *Estelle*, 429 U.S. at 105-06. And critically, a disagreement over "a matter for medical judgment" is not deliberate indifference. *Id.* at 107. To be liable, the

medical official must *knowingly* "disregard[] an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837.

But this Court has expressly held that this broad rule does not put officers on notice of the type of policies prisons must implement to ensure safety. For example, this Court has held that a right to adequate suicide screening is not clearly established because "[n]o decision of this Court even discusses suicide screening or prevention protocols." *Taylor v. Barkes*, 575 U.S. 822, 826 (2015) (per curiam).

This Court has never adopted a rule that prisons may not adopt rules of general applicability for inmate care. To the contrary, this Court has been asked to hold that the Eighth Amendment prohibits prisons from applying uniform medical policies that do not contemplate a prisoner's preferred form of treatment. Petition for Writ of Certiorari, at i, *Gibson*, 140 S. Ct. 653 (2019) (No. 18-1586), 2019 WL 2711440, at *i (seeking certiorari from this Court on a question presented of whether a "claim for deliberate indifference . . . can be disposed of without any individualized medical evaluation"). This Court has declined to adopt such a rule. *See Gibson*, 140 S. Ct. 653 (denying the petition). And this Court has cautioned that departing from prison medical policy can be deliberate indifference. *See Erickson v. Pardus*, 551 U.S. 89, 91 (2007) (per curiam) (holding that an inmate's allegation that hepatitis C treatment was withheld "in violation of Department protocol" was sufficient to withstand a motion to dismiss).

2. Under this Court's precedent, this was an easy case. Far from refusing to treat Smith, Petitioners repeatedly instructed Smith's doctors to manage his pain in "the same way all of our patients are treated," Pet.

App. 3a, namely "at the local level," Pet. App. 31a, and "according to [Disease Management Guidelines]." Pet. App. 32a. Even if Smith *had* received the SCS-replacement surgery he desired, medications would likely have been necessary. *See, e.g.*, Eellan Sivaanesan, *Spinal Cord Stimulator*, JOHNS HOPKINS MED., https://tinyurl.com/2aubuf6x (last visited Feb. 4, 2023). This course of treatment was evidently more conservative than Smith would have preferred, but this Court's caselaw clearly establishes that such a choice was "a matter for medical judgment." *See Estelle*, 429 U.S. at 107.

The Fifth Circuit held that Dr. Talley's decision was not medical judgment because it held her decision arguably involved a categorical policy against SCS replacement. Pet. App. 14a. But because no precedent of this Court establishes the requirements for a prison's medical policy, the Fifth Circuit instead relied on its own precedent for the proposition that a medical officer could not deny treatment based purely on medical policy.

This reliance on a single circuit-court precedent is itself troubling. The Court has repeatedly reserved the question of whether a circuit may rely on its own precedent when analyzing clearly established law. *See, e.g.*, *Reichle v. Howards*, 566 U.S. 658, 665 (2012) (assuming "arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law"); *District of Columbia v. Wesby*, 138 S. Ct. 577, 591 n.8 (2018) (reserving the question of whether Circuit precedent may "qualify as controlling authority for purposes of qualified immunity"); *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam) (assuming "that Circuit precedent can clearly establish law"). And it was particularly inappropriate for the Fifth Circuit to charge a state officer with liability for applying policies that this

Court's precedent would have held her liable for disregarding. *Cf. Erickson*, 551 U.S. at 91 (withholding treatment required by departmental policy may be deliberate indifference).

B. The Fifth Circuit violated this Court's precedent by relying on circuit authority postdating the allegedly unlawful conduct.

But "[e]ven assuming that Circuit precedent can clearly establish law for purposes of § 1983," *Rivas-Villegas*, 142 S. Ct. at 8, *Delaughter* could not have done so here because it was not decided until after the alleged misconduct. This Court has repeatedly held that cases decided after a defendant's allegedly unlawful conduct "are of no use in the clearly established inquiry." *Brosseau*, 543 U.S. at 200 n.4; *see also City of Tahlequah*, 142 S. Ct. at 12; *Kisela*, 138 S. Ct. at 1154. The reason is plain: "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Brosseau*, 543 U.S. at 198. "[A] reasonable officer is not required to foresee judicial decisions that do not yet exist;" thus, authority postdating an officer's acts is ignored. *Kisela*, 138 S. Ct. at 1154.

1. The Fifth Circuit's opinion does not seriously dispute that its only relevant authority is *Delaughter.* It references two earlier decisions: *Easter v. Powell*, 467 F.3d 459 (2006) (per curiam), and *Miles v. Rich*, 576 F. App'x 394 (5th Cir. 2014) (per curiam). But, as Judge Duncan explained in dissent, neither creates clearly established law under this court's jurisprudence. Pet. App. 22a n.4.

Assuming Fifth Circuit precedent *can* clearly establish law for this purpose, its *Miles* decision does not because it states on its face that it "is not precedent," 576 F. App'x at 394 n.*, so it cannot enter the qualified

immunity analysis, Pet. App. 22a n.4; *see also infra* part I.B.2.b.

Easter is also irrelevant. The panel majority cited *Easter* because the defendant there "failed to follow a prescribed course of treatment." Pet. App. 14a (quoting *Easter*, 467 F.3d at 464). But Smith does not allege that Dr. Talley failed to follow a prescribed course of treatment. Indeed, Dr. Talley is a regional director responsible for approving referrals made by Smith's treating physicians. Pet. App. 3a & n.2. The *Easter* defendant was a nurse who allegedly failed to follow a prison doctor's prescription to provide the plaintiff with nitroglycerin when he complained of chest pain. 467 F.3d at 464. Thus, *Easter* establishes only that medical providers may be held liable for *departing* from medical policy. As already explained, this type of precedent did not put Petitioners on notice that the alleged policy against surgical replacement of SCS devices violated the Eighth Amendment.

Delaughter is the only authority the Fifth Circuit cited as clearly establishing a right against having certain treatments barred by medical policy. Because even the majority found it was "of course notable that *Delaughter* was decided . . . after" the allegedly unconstitutional acts, Pet. App. 12a-13a n.6, this Court's precedent squarely holds that such a decision cannot reflect clearly established law for the purposes of qualified immunity analysis, *e.g.*, *Brosseau*, 543 U.S. at 200 n.4.

2. Instead of disregarding *Delaughter* as irrelevant, the Fifth Circuit concluded that *Delaughter* still had the "capacity to give 'reasonable warning' for two reasons." Pet. App. 12a-13a n.6. *First*, the majority claimed that the "legal developments" discussed in *Delaughter* "were already long in motion" when Dr. Talley acted. Pet. App. 13a n.6. *Second*, the majority concluded that Dr. Talley

could have changed her decision—that is, ordered the surgery—after the Fifth Circuit decided *Delaughter*. *Id.* Neither justification squares with this Court's qualified immunity decisions. *See* Pet. App. 19a-22a.

a. Authority postdating a defendant's conduct is not relevant even if, in the Fifth Circuit's words, that authority "codified legal developments that were already long in motion," Pet. App. 13a n.6, or "strengthened existing law," Pet. App. 14a. To say the law needed to be "strengthened," *id.*, is to confess that the law did not clearly exist before *Delaughter*. *Delaughter* "of course[] could not have given fair notice" to defendants who acted before it existed. *Brosseau*, 543 U.S. at 200 n.4.

Indeed, this Court has implicitly rejected this "codification" justification before—and done so through summary reversal. For example, in *Bond v. City of Tahlequah*, 981 F.3d 808 (10th Cir. 2020), the Tenth Circuit claimed it could rely on authority "decided after the underlying events" so long as the authority discussed other cases "issued before the officers' actions." *Id.* at 825. This Court rejected the Tenth Circuit's analysis, holding that an opinion "decided after the shooting at issue, is of no use in the clearly established inquiry." *City of Tahlequah*, 142 S. Ct. at 12.

So too in *Kisela v. Hughes*. There the Ninth Circuit concluded that actions in 2010 violated clearly established law even though it concluded the "most analogous" decision was not decided until 2011. *Hughes v. Kisela*, 862 F.3d 775, 783 & n.2 (9th Cir. 2017) (discussing *Glenn v. Washington County*, 673 F.3d 864, 864 (9th Cir. 2011), as "illustrative" of clearly established law). Even then, the court acknowledged, the relevant decision was "illustrative," *not* "indicative of the clearly established law in 2010." *Id.* at 783 n.2. This Court again reversed, noting

that "[t]he panel failed to explain the difference between 'illustrative' and 'indicative' precedent, and none is apparent." *Kisela*, 138 S. Ct. at 1154. Even "illustrative" precedent is "'of no use in the clearly established inquiry.'" *Id.* (quoting *Brosseau*, 543 U.S. at 200 n.4).

Here, the Fifth Circuit's error goes well beyond the Tenth or Ninth Circuits' mistakes. The Tenth Circuit in *City of Tahlequah* held the relevant decision merely "bolstered" the "conclusion" that a different case clearly established the law. *See City of Tahlequah*, 981 F.3d at 826. In *Kisela*, the Ninth Circuit considered the relevant decision "illustrative" of a trend in caselaw. *See Kisela*, 862 F.3d at 783 & n.2. But here, the Fifth Circuit identified *Delaughter* not merely to bolster or illustrate, but as the "one particular decision" clearly establishing the relevant right. Pet. App. 12a. *Kisela* and *City of Tahlequah* foreclose the Fifth Circuit's approach.

b. The "codification" justification also fails on its own terms. The panel majority emphasized that a *Delaughter* footnote states that the Fifth Circuit "ha[d] previously suggested that a non-medical reason for delay in treatment constitutes deliberate indifference, and several of our sister circuits ha[d] held so explicitly." Pet. App. 13a n.6 (quoting *Delaughter*, 909 F.3d at 138 n.7). For support, *Delaughter* cited an unpublished decision of the Fifth Circuit, two out-of-circuit unpublished decisions, and one out-of-circuit published decision. Pet. App. 13a-14a (citing *Thibodeaux v. Thomas*, 548 F. App'x 174, 175 (5th Cir. 2013) (per curiam); *Reed v. Cameron*, 380 F. App'x 160, 162 (3d Cir. 2010) (per curiam); *Blackmore v. Kalamazoo County*, 390 F.3d 890, 899 (6th Cir. 2004); *Clinkscales v. Pamlico Corr. Facility Med. Dep't*, No. 00-6798, 2000 WL 1726592, at *2 (4th Cir. Nov. 21,

2000) (per curiam) (unpublished)). Yet "suggest[ions]" do not clearly establish law for two reasons.

First, this Court has repeatedly held that the right must be so clearly defined as to be "beyond debate." *E.g.*, *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). This means that the qualified immunity "inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau*, 543 U.S. at 198 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Yet the panel cited the *Delaughter* footnote cases only for the broad general proposition that a "nonmedical reason for delay in treatment constitutes deliberate indifference." *See* Pet. App. 13a-14a. The Panel cited *Delaughter*, and no other case, for specific facts and context. *See id.* Without those facts—which were published after the time of the relevant conduct—the constitutional question was not "beyond debate."

Second, the *Delaughter* authorities did not put Petitioners on notice of anything. The Fifth Circuit's *Thibodeaux* decision states on its face that it "is not precedent." 548 F. App'x at 174 n.*. The unpublished decisions of the Third and Fourth Circuits also state, respectively, that they are "not precedential" and "not binding precedent."[3] A reasonable officer would not read such

[3] The opinions published by the courts of appeals on their websites bear these disclaimers. *See Reed v. Cameron*, No. 09-1804, at 1 (3d Cir. May 17, 2010) (per curiam), http://www2.ca3.uscourts.gov/opinarch/091804np.pdf; *Clinkscales v. Pamlico Corr. Facility Med. Dep't*, No. 00-6798, at 1 (4th Cir. Nov. 21, 2000) (per curiam), https://www.ca4.uscourts.gov/opinions/006798.U.pdf. The versions published by West state that they are unpublished. *Reed*, 380 F. App'x 160; *Clinkscales*, 2000 WL 1726592, at *1.

cases for clearly established law when they explicitly warn readers that they do not set law.[4]

Even if a reasonable officer looked past the disclaimers atop unpublished decisions, it remains doubtful that a reasonable officer would even access such decisions. While these cases appear on the courts of appeals' websites, the court's decision to not publish a case is, by its name, a choice to limit its circulation to the public. "It means that the opinion is not mailed (or otherwise transmitted) to West Publishing Company or any other legal publisher with the intention that it be printed in a book commercially available." Judge Richard S. Arnold, *Unpublished Opinions: A Comment*, 1 J. APP. PRAC. & PROCESS 219, 220 (1999); *see also* 1st Cir. Loc. R. 36.0(a). Consistent with these realities, numerous courts of appeals (including the Fifth Circuit) have held that unpublished decisions cannot clearly establish the law for purposes of qualified immunity. *See, e.g.*, *Bell v. City of Southfield*, 37 F.4th 362, 368 (6th Cir. 2022); *Williams v. Hansen*, 5 F.4th 1129, 1132 (10th Cir. 2021); *Garcia v. Blevins*, 957 F.3d 596, 602 (5th Cir. 2020), *cert. denied*, 141 S. Ct. 1058 (2021).

The final case cited by *Delaughter*, a precedential decision of the Sixth Circuit, also could not put Petitioners on notice of the law. *See Delaughter*, 909 F.3d at 138 n.7 (citing *Blackmore*, 390 F.3d at 899). Although this Court has suggested that a robust "consensus of cases of persuasive authority" might under certain circumstances clearly establish law for this purpose, *Wilson v. Layne*, 526 U.S. 603, 617 (1999), it has since recognized that the

[4] Courts of appeals' local rules reinforce the conclusion that reasonable officers would not think these opinions "in any way interest" them: if they did, the opinions "should be published." *E.g.*, 5th Cir. R. 47.5.1.

question remains open, *see, e.g.*, *Wesby*, 138 S. Ct. at 591 n.8. And no circuit has held that a single decision of *one* sister circuit can do so. *See, e.g.*, *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 706 (4th Cir. 2018) (three circuits insufficient); *Lincoln v. Turner*, 874 F.3d 833, 850 (5th Cir. 2017) (two circuits insufficient). A reasonable officer is not expected to have knowledge of every published decision of every court of appeals, or to conform his conduct to the most expansive interpretation of the law appearing in the *Federal Reporter*.

Even if *Delaughter*'s cited authorities bore the requisite factual similarity to Petitioners' alleged conduct, they were incapable of giving Petitioners fair notice.

3. The Fifth Circuit also erred in relying on subsequent authority where the plaintiff alleges "ongoing . . . harm" that defendants could have stopped after *Delaughter* was decided. Pet. App. 12a n.6. That is so for three reasons.

First, Smith has never argued that *Delaughter* triggered an obligation for Dr. Talley to take action and "stop[] withholding" Smith's surgery. *Id.* Instead, the only live claim in his complaint seeks damages based on Dr. Talley's pre-*Delaughter* refusals. It was Smith's burden to plead a route around qualified immunity. *See al-Kidd*, 563 U.S. at 735. And it was reversible error for the Fifth Circuit to hold that he met that burden based on a theory he never asserted. *See Wood v. Moss*, 572 U.S. 744, 757-58 (2014) (explaining the complaint must state the violation on its face).

Second, even if he had included that allegation in his complaint, by turning the focus to Dr. Talley's inaction after the Fifth Circuit decided *Delaughter*, the panel majority implies that it may be an Eighth Amendment violation to not revisit and reverse previous decisions that

would have been handled differently under the new legal rule. *See* Pet. App. 12a n.6. This is irreconcilable with the notion that "deliberate indifference" is a standard that "describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835. "It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Whitley v. Albers*, 475 U.S. 312, 319 (1986). Dr. Talley's failure to *sua sponte* review her previous medical decisions for compliance with the Fifth Circuit's new case—if that is even deemed a failure given that health conditions change—is at most negligence or inadvertence. *See Estelle*, 429 U.S. at 106. Smith cannot prove an Eighth Amendment claim on Petitioners' post-*Delaughter* conduct alone. *See Farmer*, 511 U.S. at 835.

Third, the panel majority created a mismatch by relying on post-*Delaughter* facts for its analysis of the second prong of qualified immunity and different, pre-*Delaughter* facts for the first prong. There is supposed to be symmetry: that is, the two-pronged qualified immunity analysis begins with a determination of whether the officers "violated a federal statutory or constitutional right." *Wesby*, 138 S. Ct. at 589. It concludes by considering whether "the unlawfulness of their conduct was 'clearly established *at the time*.'" *Id.* (quoting *Reichle*, 566 U.S. at 664) (emphasis added). Instead, the Fifth Circuit relied on pre-*Delaughter* conduct to satisfy the first prong and post-*Delaughter* conduct for the second.

Specifically, on the first prong, the Fifth Circuit held that "[t]wo statements by [Dr.] Talley stood out" as evidence of a constitutional violation. Pet. App. 8a. Both statements preceded *Delaughter*. The Fifth Circuit and district court "found a genuine dispute of fact as to

whether [*Dr.*] *Talley's categorical refusal* of Smith's pleas for SCS-replacement surgery violated the Eighth Amendment." *Id.* (emphasis added). Those "refusals" all precede *Delaughter*, and the amended complaint does not identify a single post-*Delaughter* instance of Petitioners rejecting surgery.

On the second prong, the Fifth Circuit held that the continued treatment of Smith's condition through medication—or, as the Fifth Circuit framed it, Dr. Talley's failure to "stop[] withholding" the surgery after *Delaughter*—allegedly violated clearly established law. Pet. App. 13a n.6. There is no allegation that Dr. Talley rejected a surgery referral post-*Delaughter*. And the Fifth Circuit found that omission itself violated the Constitution. But, if failure to order an invasive surgery based on a two-year old referral constitutes deliberate indifference, *but see Estelle*, 429 U.S. at 106, there are going to be a lot more deliberate-indifference claims being litigated in federal court.

In sum, the Fifth Circuit in effect found that Smith had overcome qualified immunity because the cases that preceded *Delaughter* adequately foreshadowed *Delaughter*'s ruling. Such reasoning is squarely foreclosed by this Court's qualified-immunity jurisprudence. *E.g.*, *Brosseau*, 543 U.S. at 200 & n.4.

C. The Fifth Circuit violated this Court's precedent by stating the right at issue at an impermissibly high level of generality.

Even if *Delaughter* could enter the qualified immunity analysis, it is insufficiently factually analogous to Smith's claim to satisfy this Court's test for clearly established law. "The dispositive question is 'whether the violative nature of particular conduct is clearly established.'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per

curiam) (quoting *al-Kidd*, 563 U.S. at 742)). Courts should not "define clearly established law at a high level of generality." *City of Escondido*, 139 S. Ct. at 503. Instead, "[t]he rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 138 S. Ct. at 590 (quoting *Saucier*, 533 U.S. at 202).

1. *Delaughter* does not clearly establish the right underlying Smith's claim. The panel majority read *Delaughter* to give "reasonable warning that any policy of categorically denying SCS replacements without regard to an inmate's serious medical need constitutes Eighth Amendment deliberate indifference." Pet. App. 12a. But as Judge Duncan explained, "*Delaughter* is quite different from this case" and did not establish the wrongness of Petitioners' alleged blanket policy. Pet. App. 19a-20a.

Delaughter held that the Eighth Amendment prevents officers from delaying necessary medical treatment for financial reasons. 909 F.3d at 138-39. The *Delaughter* plaintiff's "claim ar[ose] from the fact he ha[d] yet to receive a prescribed course of treatment; it d[id] not arise from his subjective opinion of the sufficiency of his medical treatment that is either contradicted or unsupported by medical professionals." *Id.* at 138. By contrast, Smith's claim springs from Dr. Talley's judgment that chronic pain can be treated without the surgical replacement of SCS devices. As Judge Duncan explained, "[t]he policy prefers one treatment for chronic pain (pain medications) over another" (SCS-replacement surgery). Pet. App. 20a-21a. Unlike *Delaughter*, "[n]o evidence suggests the policy against SCS devices was driven by cost." Pet. App. 20a.

Whereas *Delaughter* observed that "[n]o party point[ed] to evidence that any medical professional ha[d] disagreed with" the plaintiff's need for surgery, 909 F.3d at 138, Smith repeatedly points to emails containing such disagreement. The same emails that Smith uses to support his claim reflect Dr. Talley's judgment that multiple treatments exist to treat pain and that patients who had a SCS device implanted before their incarceration do not receive special treatment. And as already discussed, emails submitted by Smith show that Dr. Talley actually directed treatment for Smith's pain through other means. *See supra* part I.A.2. Further distinguishing *Delaughter*, Dr. Talley ordered multiple courses of pain treatment for Smith while the *Delaughter* defendant ordered nothing for the plaintiff. *See* Pet. App. 21a. This "isn't the money-over-medicine calculus *Delaughter* turned on." *Id.*

2. This Court has repeatedly summarily reversed where lower courts have wrongly held that factually dissimilar cases gave defendants fair notice. *See, e.g.*, *Rivas-Villegas*, 142 S. Ct. at 8-9. It should do so again.

For example, in *Taylor*, this Court summarily reversed the denial of qualified immunity in another Eighth Amendment challenge to prison policies. The Third Circuit held that two of its cases clearly established a right to the proper implementation of adequate suicide-prevention protocols. 575 U.S. at 826-27. This Court examined both cases, concluding that neither case "clearly established the right at issue." *Id.* at 826. One case "said that if officials 'know or should know of the particular vulnerability to suicide of an inmate,' they have an obligation 'not to act with reckless indifference to that vulnerability.'" *Id.* (quoting *Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir. 1988)). That

case was sufficiently distinguishable from the *Taylor* plaintiff's claim because it "did not say . . . that detention facilities must implement procedures to identify such vulnerable inmates, let alone specify what procedures would suffice." *Id.* at 827.

The second case also failed to put the *Taylor* defendants on notice of a constitutional right to the implementation of suicide-prevention protocols because it only "reiterated that officials who know of an inmate's particular vulnerability to suicide must not be recklessly indifferent to that vulnerability." *Id.* (citing *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1023 (3d Cir. 1991)). That case "did not identify any minimum screening procedures or prevention protocols that facilities must use." *Id.*

Here, as in *Taylor*, *Delaughter* failed to give Petitioners fair notice that the Eighth Amendment bars blanket policies against the surgical replacement of SCS devices. *Delaughter* held that officers may not delay necessary surgeries for financial reasons, but it did not "place[] . . . beyond debate" the question whether a prison may maintain blanket policies against particular treatments for other reasons. *Taylor*, 575 U.S. at 825 (quoting *al-Kidd*, 563 U.S. at 741). And here, as in *Taylor*, the Court should summarily reverse the Fifth Circuit's decision to allow this case to proceed.

II. In the Alternative, the Court Should Grant Plenary Review.

As explained above, the Fifth Circuit's reliance on *Delaughter* directly contravenes this Court's qualified immunity jurisprudence, and summary reversal is warranted. In the alternative, the questions presented are worthy of this Court's plenary review. The issues of whether post-conduct authority may enter the clearly established inquiry and the appropriate level of generality

has caused serial errors in the courts of appeals. Further, issues of qualified immunity are important to society as a whole, and this case is an excellent vehicle.

A. The Fifth Circuit is not alone in denying immunity based on cases postdating a defendant's acts.

If this Court does not summarily reverse, it should grant plenary review because a growing number of circuits have adopted various exceptions to this Court's rule that authority postdating the defendant's acts cannot overcome qualified immunity. Specifically, the Second, Sixth, Ninth, and Tenth Circuits have all relied on cases published after the defendant's conduct and justified their citations by claiming those cases discuss pre-existing law. The First Circuit has approved of the same rule in dicta. At the same time, different recent decisions in the Ninth and Tenth Circuits have agreed with Petitioners that subsequent authority does not enter the clearly established inquiry even if such cases describe pre-existing law.

1. The Second Circuit has stated that it will "consider[] cases published after the conduct at issue that do not establish a right in the first instance, but rather address whether a right was clearly established by case authority before the time of such conduct." *Jones v. Treubig*, 963 F.3d 214, 227 (2d Cir. 2020) (emphasis omitted). *Jones* held that two cases post-dating the defendant's allegedly unlawful act in 2015 had "precedential force" on the clearly established prong because they concluded that the right at issue was clearly established for conduct in 2008 and 2013, respectively. *Id.*

2. The Sixth Circuit, *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 282 (6th Cir. 2020), quoted a case decided after the defendant's allegedly unlawful conduct

that said a point of law was "well-settled." *Id.* (quoting *Wesley v. Campbell*, 779 F.3d 421, 435 (6th Cir. 2015)). Acknowledging that *Wesley* was "decided after [the] Plaintiff's false arrest," the panel majority nonetheless claimed it could rely on the case because it "show[ed] that later panels" of the court had "also interpreted our earlier case law" similarly. *Id.* at 282 n.6. Judge Griffin's partial dissent concluded that because the court "issued *Wesley* after the events occurred here, . . . it is of no value to the clearly established calculus." *Id.* at 291 n.3 (Griffin, J., concurring in part and dissenting in part).

3. Although these Circuits have adopted the wrong rule, they have at least been consistent. The Ninth Circuit does not even have that advantage. In 2018, the Ninth Circuit refused to consider a case postdating the defendant's conduct even while hinting that case might "reflect clearly established case law that pre-date[d]" the defendant's conduct. *Reese v. County of Sacramento*, 888 F.3d 1030, 1039 (9th Cir. 2018). But in the last three years, the Ninth Circuit has committed the same error perpetrated by the Fifth Circuit at least three times. *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1020 (9th Cir. 2020), held that a 2019 case, *Capp v. County of San Diego*, 940 F.3d 1046, 1054 (9th Cir. 2019), clearly established the right at issue in a case involving 2015 conduct. The Court explained: "Although *Capp* was decided in 2019, it held that the right at issue was clearly established by August 2015," several months before "the relevant date here." *Sampson*, 974 F.3d at 1020.

Judge Hurwitz dissented in part. He acknowledged that "[a]s a matter of pure logic, because *Capp* found the asserted constitutional right clearly established at the time of the official's actions in that case . . . it ought to mean that the same right was clearly established several

months later, when the allegedly [unlawful] conduct in this case occurred." *Id.* at 1027 (Hurwitz, J., concurring in part and dissenting in part). But he concluded that *Kisela* precluded that inference. *Id.* at 1027-28. "The 'clearly established' inquiry focuses on the judicial opinions extant at the time of the conduct at issue, not on how subsequent cases characterize pre-existing law." *Id.* at 1028. "Decided years after the relevant conduct here, *Capp* is of no use." *Id.*

Similarly, the qualified immunity analysis in *Garcia v. McCann*, 833 F. App'x 69, 71 (9th Cir. 2020), determined that the relevant issue "ha[d] been well-settled law in this circuit for two decades" because a case decided two years earlier stated "that existing Ninth Circuit precedent" had put an issue "beyond debate." *Id.* (quoting *Demaree v. Pederson*, 887 F.3d 870, 883 (9th Cir. 2018) (per curiam)). Judge Collins dissented in part, calling "the majority's reliance on *Demaree* . . . plainly improper[] because that decision postdates the events in this case." *Id.* at 76 (Collins, J., concurring in part and dissenting in part). "To the extent that the majority apparently thinks that it can cite *Demaree* for its explanation of what the earlier law was, that too is wrong: the Supreme Court reprimanded us for that as well in *Kisela*." *Id.*

And the Ninth Circuit has also held that courts may rely on subsequent authority if the cited case concerns facts from the same time frame as the plaintiff's case. *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1001-02 (9th Cir. 2020), relied on that justification for its citation of *Zion v. County of Orange*, 874 F.3d 1072, 1076 (9th Cir. 2017). While admitting "*Zion* was decided after the shooting at issue here," the Ninth Circuit held it could "still look to *Zion*" because the case "involve[d]

analogous conduct that occurred around the same time as the underlying incident in the matter before us." *Tan Lam*, 976 F.3d at 1001. Judge Bennett's dissent disagreed, citing *Kisela* and explaining that *Zion* was "of no use . . . because it was decided after the events here occurred." *Id.* at 1012 n.6 (Bennett, J., dissenting).

4. The Tenth Circuit's case law is similarly confused. In *City of Tahlequah*, this Court rejected the Tenth Circuit's assertion that authority postdating conduct may bear on the qualified-immunity inquiry if it discusses authority preceding the conduct. *See supra* part I.B.2.a. Nevertheless, in the intervening years, the Tenth Circuit has still held twice that "a case decided after the incident underlying a § 1983 action can state clearly established law when that case ruled that the relevant law was clearly established as of an earlier date preceding the events in the later § 1983 action." *Paugh v. Uintah County*, 47 F.4th 1139, 1168 n.28 (10th Cir. 2022) (quoting *Wilkins v. City of Tulsa*, 33 F.4th 1265, 1276 n.8 (10th Cir. 2022)). *Paugh*'s qualified-immunity analysis cited a case that the panel admitted was decided four years after the underlying facts occurred "because it relied on" cases "which were decided before" the allegedly illegal conduct. *Id.* Similarly, *Wilkins*, upon which *Paugh* relied, cited two post-conduct cases that "reenforce[d] that the law was clearly established" at the relevant time. 33 F.4th at 1276. The court explained that "[a]lthough these cases were decided after [the relevant time], both recognized the law was clearly established before that date." *Id.* at 1276 n.8.

Against *Paugh* and *Wilkins*, the Tenth Circuit correctly rejected the same justification in *Perry v. Durborow*, 892 F.3d 1116, 1124 (10th Cir. 2018). *Perry*, which arose out of 2013 conduct, criticized the district court's

citation of a 2016 case that stated a point of law "ha[d] been clearly established since 2007." *Id.* (citing *Keith v. Koerner*, 843 F.3d 833, 850 (10th Cir. 2016)). The *Perry* court held that "the district court should have looked to . . . the cases upon which [the 2016 case] relied in reaching that conclusion, not to [the 2016 case]'s 'general statements of the law.'" *Id.* (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)).

5. Finally, two other circuits have suggested that they will join this erroneous trend. Specifically, the First Circuit recently stated in dicta that "a plaintiff may rely on cases published after the date of his incident where the cases reiterate or summarize clearly established law at the time of the plaintiff's incident." *Lachance v. Town of Charlton*, 990 F.3d 14, 27 (1st Cir. 2021). And a concurring opinion filed in *Thomas v. Tice*, 948 F.3d 133, 148 (3d Cir. 2020) (Greenaway, J., concurring in part and dissenting in part), concluded that a case postdating the relevant conduct "demonstrate[d]" that the law was clearly established because "it relies on an array of cases decided well before the instant case." *Id.* That five circuits have made this error, and two indicated that they want to do so, is strong evidence that the Court should grant review and reaffirm that cases decided after the conduct at issue "are of no use in the clearly established inquiry." *Brosseau*, 543 U.S. at 200 & n.4

B. The questions presented are important, and this case is an excellent vehicle.

The questions presented merit review because they recur with frequency, as shown by the number of courts of appeals that have confronted them. *See supra* part II.A. Because cases involving qualified immunity are legally complex and often take years to litigate (as here), courts are often presented with citations to cases

postdating the defendant's acts. And the cited decisions reflect confusion over the status of such authorities under this Court's precedents.[5]

Further, this Court regularly finds it necessary to summarily "revers[e] federal courts in qualified immunity cases." *White*, 580 U.S. at 79. Correcting errant denials of qualified immunity "is important to 'society as a whole,'" *id.* (quoting *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015)), because it protects the public interest in a workforce that can do its job free of the fear that objectively good-faith efforts to apply state law might later prove to be unconstitutional. Moreover, because the immunity from suit is "irretrievably lost" once officers have stood trial, *Plumhoff v. Rickard*, 572 U.S. 765, 772 (2014), this Court should exercise its supervisory powers to grant qualified immunity at the summary-judgment stage.

This case is an excellent vehicle to clarify the status of cases postdating a defendant's acts in the clearly established inquiry. This Court's previous cases addressing this issue have focused on other issues, *see*, *e.g.*, *Kisela*, 138 S. Ct. at 1153; *Brosseau*, 543 U.S. at 200, but all members of the panel majority acknowledged that the timing question predominates in this case, Pet. App. 12a n.6, 21a-22a.

Moreover, the timing question is cleanly presented because the Fifth Circuit identified *Delaughter* as the "one particular decision" clearly establishing the right at issue. Pet. App. 12a. In other cases, the materiality of

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[5] Although these cases nominally address only the first question presented, that is illusory. It is not uncommon for courts to avoid the timing issue by raising the level of generality at which the analysis is performed—as happened here in the panel majority's cursory discussion of *Miles* and *Easter*. *Supra* part I.B.1.

this error might be unclear if the lower court relied on a combination of authorities predating and postdating the acts at issue. *See, e.g.*, *Garcia*, 833 F. App'x at 71. *City of Tahlequah* falls within this category. *See City of Tahlequah*, 981 F.3d at 826 (explaining that the lower court held its earlier decision only "bolstered" the "conclusion" that a different case clearly established the law). But by anchoring its analysis in *Delaughter* alone, such confounding factors are absent from the Fifth Circuit's opinion. As a result, this case is an excellent vehicle to resolve an issue that has percolated enough to generate split panel-decisions in the Fifth, Sixth, and Ninth Circuits. *See* Pet. App. 17a; *Garcia*, 833 F. App'x at 69; *Sampson*, 974 F.3d at 1012; *Ouza*, 969 F.3d at 265. This percolation will aid this Court's consideration of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2023

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals Fifth Circuit
FILED
October 12, 2022
Lyle W. Cayce
Clerk

No. 21-20232

ROBIN WAYNE SMITH,

Plaintiff—Appellee,

versus

LANNETTE LINTHICUM, DIRECTOR OF HEALTH SERVICES DIVISION, TEXAS DEPARTMENT OF CRIMINAL JUSTICE; DENISE DESHIELDS, EXECUTIVE MEDICAL DIRECTOR, TEXAS TECH UNIVERSITY; SHERI J. TALLEY, MEDICAL DIRECTOR TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-787

Before KING, DUNCAN, and ENGELHARDT, *Circuit Judges*.

KURT D. ENGELHARDT, *Circuit Judge*:[*]

This Eighth Amendment § 1983 case pits a Texas prisoner with a rare medical condition causing severe pain against state medical officials whose collective refusal to approve a pain-alleviating procedure allegedly constitutes cruel and unusual punishment. The defendants unsuccessfully invoked qualified immunity in failed motions for summary judgment. On this interlocutory appeal, they reassert their entitlement to qualified immunity. Jurisdictionally cabined by the procedural posture of this case, we AFFIRM and leave what appear to be difficult fact questions to the jury.

I

The plaintiff Robin Smith is a Texas prisoner and Marine Corps veteran who suffers from a rare condition called loin pain hematuria syndrome (LPHS). Smith's LPHS afflicts him with a "constant [and] sharp stabbing pain in his left loin, abdomen, and groin area that is exacerbated by almost all everyday physical activities, including walking." In 2002, Smith had a spinal cord stimulator (SCS)[1] implanted to ease his pain. In 2003 and 2005, VA physicians adjusted Smith's SCS to improve its functionality. In 2011, the VA approved Smith for a full-

[*] Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

[1] "A spinal cord stimulator is an implanted device that sends low levels of electricity directly into the spinal cord to relieve pain." EELAN SIVANESAN, M.D., JOHNS HOPKINS MED., SPINAL CORD STIMULATOR, https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/treating-painwith-spinal-cord-stimulators.

scale replacement of his by-then-malfunctioning SCS. Before the procedure could take place, Smith received a 35-year prison sentence without possibility of parole. He is now slated to be a Texas prison inmate until 2048.

Smith's altered legal situation did not alter his unfortunate medical situation. In prison as in society, Smith's LPHS continued to ail him, and his suboptimal SCS continued not to help much. Beginning shortly after his commitment to Texas Department of Criminal Justice (TDCJ) custody and repeatedly for the next several years, Smith complained of severe pain and sought the SCS replacement the VA had prescribed him before his legal troubles interfered. On two occasions most salient here—in August 2016 and October 2016—defendant Dr. Sheri Talley[2] categorically rebuffed referrals Smith received from third-party medical professionals for SCS repair or replacement. In response to a first doctor's referral, Talley stated flatly:

> We don't service, place, replace batteries, or remove any of those stimulators. It will still be there when his sentence is over. We don't even have a specialist on contract, such as a pain specialist that he can be sent to anyway. He'll be treated for his chronic pain the same way all of our patients are treated.

Talley's response to a second physician's referral was equally categorical:

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[2] Dr. Talley is the Southern Regional Director of the Texas Tech University Health Sciences Center and the state official most directly involved in the TDCJ's refusal to grant Smith's ongoing request for SCS repair or replacement.

> Care, upkeep, removal of pain stimulators will not occur while offender is in TDCJ. Batteries will not be replaced. Please manage pain according to [Disease Management Guidelines].

For the next few years, prison medical staff did just that, prescribing a series of "conservative" palliatives like ibuprofen and work restrictions in lieu of the SCS replacement that multiple doctors agreed Smith needed. In "uncontrolled" pain and with little hope of receiving a working SCS before his projected release in 2048, Smith filed a pro se § 1983 complaint against—as relevant on this appeal—Talley and two higher-ups: Dr. Denise Deshields, the Executive Medical Director of the Texas Tech University Health Sciences Center (TTUHSC), and Dr. Lannette Linthicum, the Director of the TDCJ Health Sciences Division. Smith claims that Talley's categorical defiance of his requests for surgical repair or replacement of his SCS in the face of his deteriorating medical condition, the lengthy duration of his sentence, and the counter-recommendations of multiple other physicians constitutes deliberate indifference to his serious medical needs in violation of the Eighth Amendment. He also sues Deshields and Linthicum on a supervisory liability theory. For relief, he seeks damages from all three defendants and an injunction ordering the defendants to allow his transfer to a VA hospital for "surgery to replace his [SCS]."

In the district court, the defendants filed initial motions to dismiss that were granted in part. After answering Smith's remaining claims, the defendants moved for summary judgment on qualified immunity grounds. The district court denied their motions and withheld qualified immunity, finding triable fact issues

as to "whether Talley acted in deliberate indifference to [Smith's] medical needs and whether the Defendants created and implemented a categorical policy not to treat medical issues regarding a SCS device that is malfunctioning regardless of the duration of a prisoner-patient's incarceration, in deliberate indifference to an inmate's serious medical needs." On this interlocutory appeal, the defendants reassert their entitlement to qualified immunity and to summary judgment on Smith's claim for injunctive relief.

Hemmed in by the interlocutory nature of the defendants' appeal, we agree with the district court on the lone legal question we have jurisdiction to address.

II

A district court's denial of qualified immunity at the summary judgment stage is subject to "circumscribed" de novo review. *Kokesh v. Curlee*, 14 F.4th 382, 391 (5th Cir. 2021). "In a typical summary-judgment case, we review the district court's analysis de novo, asking the same question that the district court did—whether the movant has shown 'that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.' " *Id.* (quoting FED. R. CIV. P. 56(a)). By contrast, in reviewing a denial of qualified immunity, we "accept the district court's determination that there are genuine fact disputes" and "ask only 'whether the factual disputes that the district court identified are *material* to the application of qualified immunity.' " *Id.* (first citing *Melton v. Phillips*, 875 F.3d 256, 261 (5th Cir. 2017) (en banc); then quoting *Samples v. Vadzemnieks*, 900 F.3d 655, 660 (5th Cir. 2018)). Accordingly, when a district court identifies disputes of fact it deems sufficient to preclude qualified immunity, this court

assesses only whether the resolution of such facts in either party's favor would affect the defendants' entitlement to qualified immunity. *Cf. Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000) (per curiam) (detailing "materiality" standard) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1996)). We review questions of law in this subset of qualified immunity cases, not disputed questions of fact. Materiality, not genuineness. In fact, "[w]e lack *jurisdiction* to decide whether the fact disputes the district court identified are genuine." *Sims v. Griffin*, 35 F.4th 945, 949 (5th Cir. 2022) (some emphasis added some emphasis omitted).

So it goes here—despite some 500 pages of medical records before us[3] and the defendants' consistent contention that Smith's suit is simply rooted in his otherwise unactionable disagreement with the alternative LPHS treatments Talley has directed for him[4]—that the sole question we have power to address is

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[3] Much of these records pertain to Smith's medical history before his incarceration. In any event, though, the district court's findings control for present purposes. The district court found that "[t]he medical records reflect that Smith has an existing, albeit nonfunctional, SCS implanted in his body that was effective in managing his pain when it was working correctly," but that the TDCJ's refusal to grant him corrective surgery and the total failure of the prison's "conservative" pain treatments have "[left] him to suffer with uncontrolled pain." *Smith v. Linthicum*, 2021 WL 1742328, at *4, 6 (S.D. Tex. Mar. 30, 2021).

[4] Without question, an inmate's simple difference in opinion with prison medical officials denying him his preferred course of treatment is not actionable under the Eighth Amendment. We have repeatedly held that "[t]here is no Eighth Amendment claim just because an inmate believes that 'medical personnel should have attempted different diagnostic measures or alternative methods of

an entirely legal one: whether a categorical policy prohibiting any repair or replacement of an implanted SCS constitutes deliberate indifference to the serious medical needs of an inmate who requires such repair or replacement. The district court found a genuine fact dispute as to whether the defendants maintained such a policy and whether Smith is such an inmate. Unable to review those findings, we take them for granted in tackling the legal question at issue and hold that a prison's refusal to repair or replace an inmate's SCS in service of a blanket policy to that effect violates the clearly established law of this Circuit.

A

"Qualified immunity shields public officials . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Kokesh*, 14 F.4th at 391 (cleaned up). This lends itself to a familiar two-part inquiry. "In the first [inquiry] we ask whether the officer's alleged conduct has violated a federal right; in the second we ask whether the right in question was 'clearly established' at the time of the alleged violation, such that the officer was on notice of the unlawfulness of his or her conduct." *Cole v. Carson*, 935 F.3d 444, 451 (5th Cir. 2019) (en banc).

We address each question in turn and answer both affirmatively.

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treatment.' " *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019) (quoting *Norton v. Dimazana*, 122 F.3d 286, 292 (5th Cir. 1997)).

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In 1976, the Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)). This court has long since held that a prisoner "can demonstrate an Eighth Amendment violation by showing that a prison official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.' " *Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006) (per curiam) (quoting *Domino v. TDCJ*, 239 F.3d 752, 756 (5th Cir. 2001)).

Here, the district court found a genuine dispute of fact as to whether Talley's categorical refusal of Smith's pleas for SCS surgery violated his Eighth Amendment right to be free from the aforementioned forms of medical mistreatment. Two statements by Talley stood out in that regard. First, her statement that: "We *don't* service, place, replace batteries, or remove any of those stimulators. It will still be there when his sentence is over." (Emphasis added.) And second, her statement on a later occasion echoing that: "Care, upkeep, removal of pain stimulators *will not* occur while [Smith] is in TDCJ." (Emphasis added.) The district court found that a jury could reasonably construe these statements as representative of "more than a mere disagreement about treatment," but rather of "a fixed, categorical refusal to treat a painful medical condition." *Smith v. Linthicum*, 2021 WL 1742328, at *6 (S.D. Tex. Mar. 30, 2021). This,

the district court found, was further confirmed by the fact that "several of [Smith's] medical providers, who performed his physical examinations and afforded him with primary care at the unit level, recommended referral to pain management and an evaluation regarding his SCS, but Talley refused the requests . . . each time."

We have held that a "serious medical need is one for which treatment has been recommended," *Gobert v. Caldwell*, 463 F.3d 339, 345 n.12 (5th Cir. 2006), and that an inmate "can demonstrate an Eighth Amendment violating by showing that a prison official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for [his] serious medical needs.' " *Easter*, 467 F.3d at 464 (quoting *Domino*, 239 F.3d at 756). If proved at trial, Talley's wanton disregard for the "excruciating" pain Smith claims he may well experience for another quarter-*century* without corrective SCS surgery would be textbook deliberate indifference under this caselaw and, accordingly, a constitutional violation. The district court found a genuine dispute as to whether such deliberate indifference is ongoing in this case, so a jury must ultimately decide if that is in fact true.

Smith's claims against supervisory-official defendants Deshields and Linthicum must likewise proceed to trial because "[s]upervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy 'itself is a repudiation of constitutional rights' and is 'the moving force of the constitutional violation.' " *Thompkins v. Belt*, 828 F.3d 298, 304 (5th

Cir. 1987) (quoting *Grandstaff v. City of Borger*, 767 F.2d 161, 169, 170 (5th Cir. 1985)); *see also Gates v. Tex. Dep't of Prot. & Regul. Servs.*, 537 F.3d 404, 435 (5th Cir. 2008) ("A supervisory official may be held liable . . . if . . . he implements unconstitutional policies that causally result in the constitutional injury."). As the district court concluded, Talley's statements that "*We*" don't fix "*any* of *those* stimulators" show that it may well be the case here that Talley's potentially unconstitutional refusals to treat Smith were made in accordance with a policy Smith's supervisors enacted to that effect. *See Smith,* 2021 WL 1742328, at *6 ("Talley's categorical denial of the multiple requests from Smith's medical providers for referral or repair of that device creates triable issues of fact as to whether [TTUHSC] or TDCJ instituted a policy not to treat SCS issues regardless of the circumstances and whether that policy was implemented in deliberate indifference to an inmate like Smith's serious medical needs."). The district court couldn't rule that possibility out on summary judgment and we can't second guess its determination in that regard, so again, a jury must decide on a full airing of the facts at trial.

The defendants' attempt to recharacterize the right Smith is claiming as one to choose an inmate's own course of medical treatment among several viable alternatives hides the ball and misapprehends the narrow scope of our present review. Strange as it may sound, the sole question before us now is not what is actually happening in Smith's prison—or how well the prison's "conservative" treatment measures are working on Smith's LPHS—but instead whether the genuine fact disputes the district court identified on those matters

have a material effect on the defendants' entitlement to qualified immunity. As explained, they do.

2

As for countless plaintiffs before him, the "clearly established" inquiry is the more challenging one for Smith. The Supreme Court has repeatedly reaffirmed the importance of ensuring that state officials in challenging jobs (and often, though not necessarily here, making hasty decisions) be afforded every benefit of the legal doubt before losing their qualified immunity from § 1983 suit. Thus, even when an official violates a plaintiff's legal rights, she is still entitled to qualified immunity if her actions were "objectively reasonable under the circumstances." *Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004). To further protect "officers who reasonably but mistakenly commit a constitutional violation," objective reasonableness in this sense is no tall order. *See Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 537 (5th Cir. 2004). This court deems a defendant's actions objectively reasonable "unless *all* reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001).

Additional guardrails abound. For one, we are "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). For another, we are instructed to undertake the clearly established inquiry "in light of the specific context of the case [and] not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Thus, "[t]he dispositive question is 'whether the violative

nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (alteration in original) (quoting *al-Kidd*, 563 U.S. at 742). All the while, it is the plaintiff's burden to identify a favorable case that defines the law with sufficient clarity. *See, e.g.*, *Vann v. City of Southaven*, 884 F.3d 307, 310 (5th Cir. 2018) (per curiam).

Still, doing so is not impossible. We've held that "[t]he law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct at issue violated constitutional rights.' " *Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740 (2002)).

We hold here that one particular decision of our court[5] reiterated and strengthened existing law such that the defendants had reasonable warning that any policy of categorically denying SCS replacements without regard to an inmate's serious medical need constitutes Eighth Amendment deliberate indifference: *Delaughter v. Woodall*, 909 F.3d 130, 137–39 (5th Cir. 2018).[6] There,

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[5] Although the Supreme Court has explicitly left open the question of whether Circuit law alone can clearly establish the law for qualified immunity purposes, *see Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) ("assuming" the proposition that "controlling Circuit precedent clearly establishes law for purposes of § 1983"), we've established a prior practice of assigning our own decisions such legal weight, *see Sims*, 35 F.4th at 952 (holding that "our [i.e., the Fifth Circuit's] decision in *Easter* clearly established [the plaintiff's] rights before the [defendants] allegedly violated them").

[6] It is of course notable that *Delaughter* was decided more than a year after Talley's latest-recorded rejection of Smith's requests

we denied prison medical officials qualified immunity from an inmate's claim that an unjustified delay in a surgery he needed was motivated not by medical disagreement on the prison's part but instead by financially motivated deliberate indifference. *See id.* at 137–39. The prison officials in *Delaughter* delayed the inmate plaintiff's surgery because they didn't want to pay for it, not because they disagreed with the plaintiff as to whether the surgery was medically necessary or whether an alternative treatment was equally viable. *See id.* That kind of delay for a reason other than genuine medical judgment, the panel mused, "could under certain circumstances evince a wanton disregard for a serious medical need." *Id.* at 138 (cleaned up). As the panel further observed, the Fifth Circuit had "previously suggested," albeit in an unpublished case, "that a non-medical reason for delay in treatment constitutes deliberate indifference, and several of our sister circuits

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for an SCS replacement. But we are nonetheless satisfied of its capacity to give "reasonable warning" here for two reasons. First, as we discuss below, because *Delaughter* codified legal developments that were already long in motion when Talley categorically denied Smith's requests in 2016. *See Delaughter*, 909 F.3d at 138 n.7 ("We have previously suggested that a non-medical reason for delay in treatment constitutes deliberate indifference, and several of our sister circuits have held so explicitly."). And, second, because of the ongoing nature of the harm Smith claims in this case; Talley could have stopped withholding Smith's needed medical procedure for nonmedical reasons in 2018—when this court handed *Delaughter* down—but never chose to do so. This case is accordingly a far cry from the typical § 1983 case (like, say, a shooting, an excessively forceful takedown, an illegal search). The defendants here received reasonable warning that their *ongoing* treatment of the plaintiff might be unconstitutional but never reconsidered the issue.

[had] held so explicitly." *Id.* at 138 n.7 (citing *Thibodeaux v. Thomas*, 548 F. App'x 174, 175 (5th Cir. 2013) (per curiam); *Reed v. Cameron*, 380 F. App'x 160, 162 (3d Cir. 2010) (per curiam); *Blackmore v. Kalamazoo County*, 390 F.3d 890, 899 (6th Cir. 2004); and *Clinkscales v. Pamlico Corr. Facility Med. Dep't*, 2000 WL 1726592, at *2 (4th Cir. Nov. 21, 2000) (per curiam).

More significantly, *Delaughter* merely reiterated and solidified what has long been the law in this circuit: that a prison medical official's decision to deprive an inmate of a medically needed surgery like Smith's forbidden SCS replacement here must be the product of a genuine and considered *medical* judgment, not a nonmedical reason like a refusal to pay (as in *Delaughter*) or a blanket and non–medically considered[7] policy against the procedure (as the district court found could genuinely be the case here). In one such prior case, our circuit found deliberate indifference when, for nonmedical reasons, the prison official "failed to follow a prescribed course of treatment." *Easter*, 467 F.3d at 464. In another case, though unpublished, we held that despite multiple x-rays and provision of "various pain medications," a prison's arguably incorrect treatment of a prisoner's medical need could constitute deliberate indifference where the

[7] This fact is crucial. To be sure, we do *not* hold today that an inmate has an Eighth Amendment claim any time a prison refuses him medical treatment he would prefer to receive, previously received, or would be able to pursue if not incarcerated. We hold merely that a prison must simply articulate some legitimately considered basis for its alternative medical opinion and treatment regime or for its non–medically indifferent policy against a certain procedure an inmate may need. Talley's puzzling (and blunt) failure to do so here may make this case a one-off.

fact issues remaining included the potentially non-medical nature of the justifications for the lack of other medical treatment. *Miles v. Rich*, 576 F. App'x 394, 396 (5th Cir. 2014) (per curiam).

If anything, Smith's situation here could prove even *worse* than the situation this court found unconstitutional in *Delaughter*. Whereas Delaughter's claim arose from the fact that his medically required procedure had merely been *delayed* for nonmedical reasons, Smith's claim here raises the possibility that he is being deprived of any effective treatment *whatsoever* for nonmedical reasons. Indeed, the district court here found a triable issue of fact as to whether Smith's "SCS is no longer functioning and [the prison's alternative] medications have lost their effectiveness, [thereby] leaving him to suffer with uncontrolled pain." *Smith*, 2021 WL 1742328, at *4. As our review is cabined at this stage to whether or not the genuine factual disputes found by the district court are material as a matter of law, we can go no farther than to say that, if these issues of fact are resolved in Smith's favor, they would have a material impact on the Defendants' qualified immunity claim. Likewise, further discovery might support a renewed motion based on qualified immunity.

III

The district court found that summary-judgment evidence in this case raised genuine issues of fact regarding whether a dire medical need of the plaintiff is going uncorrected for no reason more than a prison system's blanket policy against allowing a surgery that third-party physicians have recommended to address such need. Without jurisdiction to consider the genuineness of that fact dispute, we deem it legally

material to the defendants' ability to successfully invoke their qualified immunity defense at the summary judgment stage because such a categorical and non–medically considered policy would indeed violate our Circuit's clearly established law on the Eighth Amendment if proved at trial. This holding has no effect on the defendants' ability to reassert their qualified immunity defense at trial, where a jury can determine whether the facts of this case indeed demonstrate the defendants' implementation of an unconstitutional policy.[8] That question is not for this panel to decide on interlocutory review.

The district court's denial of the defendants' motions for summary judgment is accordingly **AFFIRMED**.

[8] *See* Fifth Cir. Pattern Jury Instruction (Civ. Cases) 10.3.

STUART KYLE DUNCAN, *Circuit Judge*, concurring in part and dissenting in part:

Smith claims to suffer from a rare condition—loin pain hematuria syndrome ("LPHS")—that sometimes causes him severe abdominal pain for no identified physiological cause. He sued Texas prison officials under the Eighth Amendment for refusing to repair or replace his malfunctioning spinal cord stimulator ("SCS"), a device implanted by the Veterans Administration to alleviate Smith's pain before Smith's sentence began. Finding material fact disputes, the district court denied the officials qualified immunity. Those fact disputes deprive us of jurisdiction to decide the merits of Smith's Eighth Amendment claim on interlocutory appeal. I therefore concur in Part II.A.1 of the majority opinion, with the qualifications noted below. But I respectfully dissent from Part II.A.2 of the majority opinion, because Smith fails to show the officials violated clearly established law. I would therefore reverse the district court's judgment denying qualified immunity, except to the extent that Smith is seeking injunctive relief.[1]

I.

The gist of Smith's Eighth Amendment claim is that the officials showed "deliberate indifference to [his]

[1] Our precedents hold that qualified immunity does not bar claims for injunctive relief. *See Singleton v. Cannizzaro*, 956 F.3d 773, 778 n.3 (5th Cir. 2020) (citing *Chrissy F. by Medley v. Miss. Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991)); *see also Striz v. Collier*, 2022 WL 1421834, at *1 (5th Cir. May 5, 2022) (unpublished); *Sinclair v. Fontenot*, 216 F.3d 1080, 2000 WL 729367, at *3 (5th Cir. 2000) (unpublished).

serious medical needs" by enforcing a policy of excluding SCS devices to treat chronic pain. *See Estelle v. Gamble*, 429 U.S. 97, 104 (1976). The district court found that fact disputes prevented it from deciding that claim. It's important to specify what those fact disputes were—especially because there's *no* dispute that the prison tried to treat Smith's condition with various courses of pain medication (including codeine, naproxen, meloxicam, ibuprofen, tramadol, carbamazepine, and nortripyline). The district court found some evidence, however, that these medicines weren't helping Smith and that a working SCS was the only way of treating LPHS. That may or may not be true. But if it is, Smith may have a claim that the officials showed deliberate indifference by "refus[ing] to treat" his LPHS with the only medically effective treatment. *See Easter v. Powell*, 467 F.3d 459, 464 (5th Cir. 2006) (per curiam).

The majority decides only that and nothing more. Importantly, it does not decide that the Eighth Amendment requires prisons to let inmates "choose . . . [their] own course of medical treatment among several viable alternatives." *Ante* at 9. The majority recognizes that such a holding would fly in the face of settled law. *See ante* at 6 n.4 (noting "[w]e have repeatedly held that '[t]here is no Eighth Amendment claim just because an inmate believes that "medical personnel should have attempted different diagnostic measures or alternative methods of treatment" ' ") (quoting *Gibson v. Collier*, 920 F.3d 212, 221 (5th Cir. 2019)). To prove deliberate indifference, Smith must show more than "a genuine debate . . . within the medical community about the necessity or efficacy of [SCS]" for treating LPHS. *Gibson*, 920 F.3d at 221. He must show "universal

acceptance" that a SCS is the only way to treat that rare condition. *Ibid.*

Based on that understanding, I agree that the genuine factual disputes identified by the district court deprive us of jurisdiction to decide the merits of Smith's Eighth Amendment claim. *See, e.g.*, *Ramirez v. Escajeda*, 44 F.4th 287, 291–92 (5th Cir. 2022) (concluding fact disputes precluded our jurisdiction to decide first prong of qualified immunity). If Smith can prove that claim at trial, he may be entitled to injunctive relief.[2]

II.

But the majority errs by concluding the officials violated clearly established law. The majority relies on "one particular decision of our court" to clearly establish the unreasonableness of the officials' conduct—*Delaughter v. Woodall*, 909 F.3d 130 (5th Cir. 2018). *Ante* at 11. Even assuming[3] one circuit decision can clearly

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[2] The content of any such relief is another matter, however. At oral argument, both parties represented that Smith's SCS has been removed. O.A. Rec. at 13:04–13:30; 22:38–23:02. Given that changed state of affairs, I express no opinion on whether Smith—assuming he proves his Eighth Amendment claim—should be granted an injunction.

[3] Both the Supreme Court and our precedents say this is an open question. *See, e.g.*, *Ramirez*, 44 F.4th at 293 & n.9 ("[T]he plaintiffs' argument requires us to assume that Fifth Circuit precedent alone can clearly establish the law for qualified immunity purposes, something the Supreme Court has left open.") (citing *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam); *Betts v. Brennan*, 22 F.4th 577, 584–85 n.6 (5th Cir. 2022); *Crittindon v. LeBlanc*, 37 F.4th 177, 199 n.4 (5th Cir. 2022) (Oldham, J., dissenting)). I'm aware of no decision from our court that has settled this issue.

establish the law, *Delaughter* is quite different from this case.

In *Delaughter*, a doctor determined a prisoner required hip replacement and reconstructive surgery, a diagnosis "no medical professional . . . disagreed with." 909 F.3d at 138. Yet evidence suggested the surgery was denied because the Department of Corrections "refuse[d] to pay for [it]" *Id.* at 139. If true, that cost-driven decision violated the Eighth Amendment by denying necessary treatment for a "non-medical reason." *Id.* at 138–39 & n.7. And such an "unjustified delay in obtaining necessary. . . surgery for a prisoner," we held, violates clearly established law. *Id.* at 140 (citations omitted).

Delaughter doesn't clearly establish that the officials' actions in this case were unreasonable. No evidence suggests the policy against SCS devices was driven by cost. That was the key in *Delaughter*. *See id.* at 139 ("Delaughter testified that Dr. Nipper told them 'they'—presumably MDOC—would not pay for his surgery."); *id.* at 139 (delaying surgery "because MDOC refuses to pay for [it] . . . could under certain circumstances evince a wanton disregard for a serious medical need") (cleaned up). But here the evidence shows the SCS policy was driven by medicine, not cost. Look at the quotes from Dr. Talley the majority relies on. *Ante* at 3. In the first, right after stating the policy against using "stimulators," Dr. Talley says Smith will "be treated for his chronic pain the same way all of our patients are treated." In the second, right after stating TDCJ doesn't use "pain stimulators," Dr. Talley says: "Please manage pain according to [Disease Management Guidelines]." The policy prefers one treatment for chronic pain (pain medications) over

another (SRS). That isn't the money-over-medicine calculus *Delaughter* turned on. Moreover, in *Delaughter* the prisoner got *no* treatment; here, Smith has received *numerous* courses of pain medication.

Trying to tailor *Delaughter* to this case, the majority stretches it beyond its facts. It says *Delaughter* "clearly established" that a prison's decision not to provide surgery "must be the product of a genuine and considered *medical* judgment, not a nonmedical reason like a refusal to pay . . . or a blanket and non-medically considered policy against the procedure[.]" *Ante* at 12. *Delaughter* isn't that broad. As discussed, *Delaughter* addressed a prison's cost-driven decision to deny necessary surgery, not a failure to use its "genuine and considered medical judgment." The Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (citation omitted). Unfortunately, that's what the majority does here. Telling prison doctors they must use "genuine and considered medical judgment" wouldn't have notified these defendants that the SRS policy violated the Constitution. *See, e.g.*, *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.") (cleaned up).

Finally, putting all that aside, there's the added problem that *Delaughter* came out too late to inform Dr. Talley's judgment. Dr. Talley last denied Smith's request for SCS replacement on February 8, 2017. As the majority recognizes, *Delaughter* was published "more than a year" later on November 19, 2018. *Ante* at 11 n.6.

The majority says this doesn't matter because of the "ongoing nature of the harm Smith claims" and speculates that "Talley could have stopped withholding [the SRS replacement] in 2018—when this court handed *Delaughter* down—but never chose to do so." *Ibid.* I disagree. Smith seeks damages from Dr. Talley from something she *did* that allegedly violated his Eighth Amendment rights. Nothing in the record suggests Dr. Talley was presented with, and denied, Smith's request for SCS replacement after *Delaughter* was issued. So, that decision couldn't have given Dr. Talley "fair notice that her conduct was unlawful." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).[4]

Accordingly, I would reverse the district court's judgment insofar as it denies the defendant officials qualified immunity. I would remand solely for the purpose of deciding whether Smith is entitled to injunctive relief.

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[4] The majority also asserts that "*Delaughter* merely reiterated and solidified what has long been the law in this circuit[.]" *Ante* at 12. I disagree. The majority cites two prior decisions but, in my view, neither clearly establishes the unconstitutionality of Talley's conduct. One, *Miles v. Rich*, 576 F. App'x 394 (5th Cir. 2014) (per curiam), is unpublished and so "cannot be the source of clearly established law for qualified immunity analysis." *Salazar v. Molina*, 37 F.4th 278, 286 (5th Cir. 2022) (citation omitted). The second, *Easter v. Powell*, 467 F.3d 459 (5th Cir. 2006), is distinguishable. There, an official knew a prisoner with severe chest pain needed his prescribed nitroglycerin, knew the pharmacy was closed, but nonetheless "sent Easter back to his cell without providing him any treatment." *Id.* at 463–64. That is different from disagreeing over treatment options for chronic pain.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of
Appeals
FILED
November 10, 2022
Lyle W. Cayce
Clerk

No. 21-20232

ROBIN WAYNE SMITH,

Plaintiff—Appellee,

versus

LANNETTE LINTHICUM, *Director of Health Services Division, Texas Department of Criminal Justice*; DENISE DESHIELDS, *Executive Medical Director, Texas Tech University;* SHERI J. TALLEY, *Medical Director Texas Department of Criminal Justice*,

Defendants—Appellants.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:19-CV-787

ON PETITION FOR REHEARING EN BANC

Before KING, DUNCAN, and ENGELHARDT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P. 35 and 5TH CIR. R. 35), the petition for rehearing en banc is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

November 10, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 21-20232 Smith v. Linthicum
USDC No. 4:19-CV-787

Enclosed is an order entered in this case.

Sincerely,
LYLE W. CAYCE, Clerk
By: /s/ Christina C. Rachal
Christina C. Rachal, Deputy Clerk
504-310-7651

Ms. Easha Anand
Ms. Jeanine Marie Coggeshall
Ms. Sheaffer Kristine Fennessey
Mr. Daniel Greenfield
Mr. Nathan Ochsner
Mr. Daniel Syed
Mrs. Karin Dougan Vogel

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ROBIN WAYNE SMITH, (TDCJ #01948750)	§	
Plaintiff,	§	
v.	§	CIVIL ACTION NO. 4:19-cv-0787
LANNETTE LINTHICUM, *et al.*,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Pending in this *pro se* state inmate civil rights lawsuit are motions for summary judgment filed by defendant physicians Denise Deshields and Sheri Talley (Docket Entry No. 29) and Lannette Linthicum (Docket Entry No. 31). Plaintiff Robin Wayne Smith filed responses to each motion (Docket Entry Nos. 34 & 35). After Deshields and Tally filed a reply, (Docket Entry No. 36), Smith responded with a sur-reply, (Docket Entry No. 40). The Court has carefully considered the motions,

responses, replies, sur-reply, evidence in the record, and applicable law, and concludes as follows.

I. BACKGROUND AND CLAIMS

Plaintiff Robin Wayne Smith ("Smith") is an inmate in custody of the Texas Department of Criminal Justice ("TDCJ"). Smith claims that Dr. Sheri Talley ("Talley"), who serves as the Southern Regional Director of the Texas Tech University Health Sciences Center ("TTUHSC"), violated his Eighth Amendment rights by refusing to approve surgical repair or replacement of his spinal cord stimulator ("SCS") medical device. He claims that Talley was deliberately indifferent to his serious medical needs because she categorically and repeatedly denied all requests for SCS repair, replacement, or maintenance, regardless of his medical condition or the recommendations of his treating physicians. He also sues Dr. Denise Deshields ("Deshields"), the Executive Medical Director of TTUHSC, and Lannette Linthicum, the Director of the TDCJ Heath Sciences Division, alleging that they failed to intervene or correct the policy evidenced by Talley's categorical denial of medical treatment regarding all SCS procedures, maintenance, replacement, or repair. He seeks declaratory, injunctive, and monetary relief against them in their official and individual capacity.

The medical records reflect that on November 15, 2001, Smith was medically discharged from the United States Marine Corps ("USMC") for chronic pain in his lower left abdomen that was diagnosed as loin pain hematuria syndrome ("LPHS").[1] After pain

[1] Docket Entry No. 29-4 at 200, Ex. C 199 (Smith's VA medical records). Hereinafter, all citations to Smith's VA medical records

management with medications failed to control Smith's pain, medical providers at the Veteran's Administration ("VA") determined in 2002 that Smith was a candidate for an SCS for pain management.[2] On September 25, 2002, Smith underwent surgery at the VA North Texas Hospital System to implant his SCS.[3] VA physicians reprogrammed the SCS in 2003, and revised it in 2005.[4] In 2011, the VA approved surgical replacement of the original device, but the procedure was cancelled due to a conflict in Smith's work schedule and a pending legal issue.[5] He was rescheduled for the surgery when he was arrested and subsequently sentenced to 35 years' imprisonment, without the possibility of parole in August 2014, resulting in a discharge date in 2048.[6]

In September 2014, Smith was transferred into TDCJ custody. The TDCJ medical records show that the SCS was working, at least most of the time, in 2014 and early 2015. In September 2015, Smith requested pain medication to use when the SCS was off.[7] At that time,

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will be noted as "Ex. C ---," reflecting the Bates stamped pagination at the bottom of the page in Exhibit C to the Motion for Summary Judgment filed by Dr. Sheri Talley and Dr. Denise Deshields.

[2] Ex. C 163.

[3] *Id.* at 166-67.

[4] *Id.* at 098-99, 144.

[5] *Id.* at 037; Docket Entry No. 1 ("Complaint") at 3.

[6] Complaint at 3.

[7] Docket Entry No. 31-2 at 169-70, Ex. B 168-69 (Smith's TDCJ medical records). Hereinafter, citations to Smith's TDCJ medical records will be noted as "Ex. B ---," reflecting the Bates-stamped pagination at the bottom of the page in Exhibit B to the Motion for Summary Judgment filed by Director Lannette Linthicum.

Smith reported that the SCS was working well but that he was using it for longer periods of time.[8] The provider prescribed ibuprofen 600 mg twice a day for thirty days.[9]

In November 2015, Nurse Practitioner Amanda Watson evaluated Smith for complaints of lower back pain. During the evaluation Smith reported that although his SCS turned on, it did not turn on all the time.[10] Watson referred Smith to general surgery for evaluation of the SCS.[11]

Specialty Clinic Notes reflect that Dr. Brooks evaluated Smith and referred him to TTUHSC pain management services related to the SCS on December 9, 2015.[12] Dr. Coleman, who also signed the December 9, 2015 clinic note, referred Smith to pain management for SCS replacement.[13]

On December 22, 2015, Nurse Practitioner Watson examined Smith for chronic left side abdominal pain, which Smith described as a dull pain all of the time.[14] At that visit, Smith reported that he came to the medical clinic daily and turned his SCS on for approximately four hours and occasionally overnight, but that it only worked

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[8] Ex. B 168-69.

[9] *Id.*

[10] *Id.* at 164-65.

[11] *Id.*

[12] *Id.* at 243, 351.

[13] *Id.*

[14] Ex. B 164.

if he lay down in his bunk and not if he stood up or bent to the side.[15]

On February 1, 2016, Dr. Benjamin J. Leeah ("Leeah"),[16] Northern Regional Medical Director for TTUHSC, conducted a review of Smith's chart based on the referral from general surgery regarding the replacement of Smith's SCS.[17] Leeah noted that, per the unit provider, Smith had access to the SCS remote and turned it "on in the am and off in the pm" and supplemented pain management with ibuprofen.[18] Leeah deferred the surgeons' referrals at that time.[19] Leeah stated that "[g]iven current contract for inmate health services, this SCS is mostly likely level 3 care, i.e. medically beneficial but not medically necessary, and as such would most likely be removed versus replaced and maintained," and that "[n]onetheless, patient may qualify for transport to VA for procedure."[20]

On August 16, 2016, Smith saw a provider on a sick call request for lower back pain.[21] He stated that the SCS battery had been at 20% two years before and that he had been approved for surgery at the VA and could get

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[15] *Id.*

[16] Leeah also submitted an affidavit as an unretained medical expert in support of the Motion for Summary Judgment filed by Dr. Sheri Talley and Dr. Denise Deshields. *See* Docket Entry No. 29-1 (Ex. A).

[17] Ex. B 163.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] Ex. B 159-60.

the procedure for SCS repair or replacement done there.[22] The provider referred the case to Dr. Talley for consideration, emailing her that same day.[23] In response, Dr. Talley stated:

> We don't service, place, replace batteries, or remove any of those stimulators. It will still be there when his sentence is over. We don't even have a specialist on contract, such as a pain specialist that he can be sent to anyway. He'll be treated for his chronic pain the same way all of our patients are treated.[24]

In October 2016, Dr. Aillon, another medical provider treating Smith, sought a referral for Smith to obtain a surgical consultation for his SCS replacement. Dr. Talley again refused to refer Smith for a surgical consultation, stating:

> General surgery stated that [patient] didn't have physiological basis for his pain. Pain specialty not available. Treat chronic pain at the local level.[25]

On October 28, 2016, Smith saw Dr. Aillon, complaining of extreme pain in his abdomen that had started at 2 a.m. that morning and that the Meloxicam was not working for the pain.[26] Dr. Aillon noted that Smith was hunched

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[22] *Id.*

[23] *Id.; see also* Docket Entry No. 1-1 at 2-3.

[24] Docket Entry No. 1-1 at 2.

[25] Ex. B 252.

[26] *Id.* at 157-58.

over and had intense pain in his abdomen. Aillon indicated that he would try to coordinate with the VA for replacement of the SCS and noted that he would request a referral for replacement of the SCS.[27]

On January 9, 2017, Dr. Aillon again requested a referral for a surgical consultation and treatment for Smith regarding the implanted SCS.[28] On January 23, 2017, Dr. Aillon followed up on his second request for Smith, stating in an email: "Please let me know if there is anything else we can do to make this happen w/VA services for the pain stimulator."[29] On February 8, 2017, Dr. Talley denied Dr. Aillon's second request for a surgical consultation or referral to pain services for Smith, stating:

> Care, upkeep, removal of pain stimulators will not occur while offender is in TDCJ. Batteries will not be replaced. Please manage pain according to DMGs.[30]

On April 7, 2017, Dr. Robert Martin examined Smith for complaints of pain, including a new pain to the left of his umbilical area. Dr. Martin noted that Smith's pain was not well controlled with medication and that his SCS was not working.[31] Martin increased the dosage of Tegretol and prescribed carbamazepine, but the

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[27] *Id.*

[28] Ex. B 248-49.

[29] *Id.* at 242.

[30] *Id.* at 225.

[31] *Id.* at 221-22.

carbamazepine was discontinued about ten days later because it caused headaches and dizziness.[32]

On September 7, 2017, Smith saw Dr. Martin about adjusting his medication and getting the remote for his SCS so he could use it when he wanted to. Dr. Martin noted that he would talk to Dr. Talley about the requests. Smith did not appear to be in pain at this visit.[33]

Medical records further reflect that on January 17, 2018, Smith again saw Dr. Martin regarding replacing his SCS.[34] At this visit, Martin noted that Smith tried not to take the tramadol unless he really needed it, and that frequently he only took it once or twice per day. Martin also noted that Smith appeared alert and seemed to move without obvious pain and that he would talk to Dr. Talley about the SCS replacement surgery.[35] The Step Two grievance record from Grievance #2018119359 regarding Smith's complaints of constant pain indicate that Dr. Talley denied the request for a referral for the SCS on February 1, 2018.[36]

On August 27, 2018, Smith saw Dr. Martin again for his abdominal pain and an umbilical hernia, complaining that his SCS stopped working altogether.[37] The progress

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[32] *Id.* at 218-19.

[33] *Id.* at 130-31.

[34] Ex. B 122-23.

[35] *Id.*

[36] Docket Entry No. 31-1 at 6, Ex. A at 5 (Grievance Records noting that Dr. Talley stated on February 1, 2018 that "Care, upkeep, and/or removal of pain stimulators will not occur while offender is in TDCJ. Batteries will not be replaced. Please manage pain at unit according to policy.")

[37] Ex. B 111-12.

notes reflect that his pain was treated before with the SCS and tramadol, but that he was now without either form of pain relief.[38] Dr. Martin requested a refill of the tramadol at that visit.[39] On February 26, 2019, Smith saw Dr. Martin again, explaining that his main issue was his SCS that no longer worked, and Dr. Martin submitted another request for a non-formulary prescription for tramadol.[40]

On September 11, 2019, Smith again saw Dr. Martin about his abdominal pain.[41] The medical records reflect that Smith requested more tramadol because the dosage was not working, and Smith reported that the pain was more frequent, lasted longer, and the medications did not get rid of his pain.[42] Dr. Martin noted that Smith was alert and did not appear to be in pain at that time, but noted an increased aortic pulse and ordered an abdominal ultrasound to check the size of the abdominal aorta.[43] When Smith saw Dr. Martin a week later, Smith reported that he had to take ibuprofen with tramadol and that the pain medications were not working, so they decided to try Cymbalta.[44]

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[38] *Id.*

[39] *Id.*

[40] *Id.* at 107-08.

[41] *Id.* at 103-04.

[42] Ex. B 103-04.

[43] *Id.*

[44] *Id.* at 101-02.

On October 9, 2019, Smith reported that the Cymbalta was not helping.[45] Dr. Talley reviewed Smith's restrictions, which include a work restriction, no lifting more than 15 pounds, and bottom bunk, and determined that no changes to the restrictions were needed.[46]

On February 10, 2020, Smith came to medical complaining of back pain and that the tramadol did not help.[47] He complained that the pain was so bad that his cellmates had to carry him to his bunk.[48] The provider noted that Smith's blood pressure was elevated probably secondary to pain and that he walked with an antalgic gait.[49] On February 20, 2020, Dr. Martin followed up with Smith, who indicated that he thought the Cymbalta was helping with the pain.[50] On March 13, 2020, Smith requested tramadol in addition to Cymbalta because he said he needed both for the pain.[51]

In May 2020, Smith complained of a pain at his SCS site, and the provider ordered an x-ray.[52] On June 5, 2020, Smith had a follow-up appointment with Dr. Martin regarding the results of his x-rays.[53] The x-ray results of the SCS showed that a wire had broken at a bend in the

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[45] *Id.*

[46] *Id.*

[47] Ex. B 90-91.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 88.

[51] *Id.* at 85.

[52] Ex. B 76-77.

[53] *Id.* at 71-72.

wire that looked like a couple of small very faint spiral wires in the space between the broken ends, and Dr. Martin noted that he planned to speak with the Regional Director regarding what could be done at this point.[54]

The most recent medical record submitted by Defendants reflects that on June 22, 2020, Smith requested more medication and increased doses for his pain, which Nurse Practitioner Gregory noted that she was uncomfortable prescribing, particularly when Smith had been on long-term, controlled substances for pain.[55] Gregory referred Smith to a medical doctor for a follow-up.[56]

Smith claims, and Defendants do not dispute, that he is not eligible for parole and his 35-year sentence is not due to be discharged until 2048, about 27 years from now. Smith, who is currently 43 years of age, argues that Talley's policy that "we don't service, place, replace batteries, or remove any of those stimulators" and her insistence that the SCS "will still be there when his sentence is over" constitute a blanket refusal of medical care with deliberate indifference to his serious medical need. In particular, according to Smith and the TDCJ medical records, his SCS is no longer functioning and the medications have lost their effectiveness, leaving him to suffer with uncontrolled pain.

Smith additionally contends that the defendants refused his requests to undergo surgical replacement of the SCS through the VA. According to Smith, the VA would perform the surgery at its own cost even though

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[54] *Id.*

[55] *Id.* at 68.

[56] *Id.*

he is a convicted felon in prison.[57] The defendants dispute Smith's allegation, citing federal law that prohibits prisoners from receiving medical care through the VA if the prison is required to provide medical care to its prisoners. *See* 38 C.F.R. § 17.38(c)(5) ("In addition to the care specifically excluded from the 'medical benefits package,' under paragraphs (a) and (b) of this section, the 'medical benefits package does not include the following: . . . (5) Hospital or outpatient care for a veteran who is either a patient or inmate in an institution of another government agency if that agency has a duty to give the care or services"). The defendants, while simultaneously refusing to provide care for Smith's condition, contend that TDCJ is required to provide medical care to its prisoners, and, therefore, the exclusion in 38 C.F.R. § 17.38(c)(5) applies.[58]

On February 10, 2020, the Court granted, in part, the defendants' motion to dismiss claims against them for monetary damages in their official capacity as state employees, but denied the motions as to the individual-capacity claims and Smith's claims for injunctive relief. *See* Docket Entry No. 18.[59] On July 28, 2020, the Court

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[57] Smith contends that, once discovery has commenced, he will be able to produce evidence that other prisoners who are also veterans have obtained medical care from the VA hospital. Regardless of where it may be obtained, fact issues preclude summary judgment concerning his medical care.

[58] To the extent that Smith seeks to obtain outside medical care from the VA, that issue is immaterial to whether the named Defendants, either directly or through a policy they implemented, were deliberately indifferent to the plaintiff's serious medical issue regarding his SCS.

[59] The Court further noted in its February 10, 2020 Order that Smith's claims regarding the denial of his grievances or claims

denied Smith's motion for leave to amend without prejudice and dismissed the claims against individual defendant Dennis Melton with prejudice for failure to state a claim. Docket Entry No. 37. Talley, Deshields, and Linthicum (collectively, "Defendants") now move for summary judgment, contending that Smith does not raise a fact issue on his Eighth Amendment medical deliberate indifference claims. Smith responds that the medical records show that his SCS has stopped functioning, that the pain medications have stopped being effective for his pain, and that the Defendants have a blanket policy to refuse a medical procedure while an inmate is in custody regardless of his medical need for that procedure and without regard for the duration of his incarceration. Smith contends that a blanket policy categorically denying treatment for an SCS, where that denial will result in requiring him to live in uncontrolled pain for thirty years, is cruel and unusual punishment.

II. LEGAL STANDARDS

A. Summary Judgment

To be entitled to summary judgment, the pleadings and summary judgment evidence must show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56. The moving party bears the burden of initially pointing out to the court the basis of the motion and identifying the portions of the record demonstrating the absence of a genuine issue for trial. *Duckett* v. *City of Cedar Park, Tex.*, 950 F.2d 272, 276 (5th Cir. 1992).

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based on *respondeat superior* were not actionable under 42 U.S.C. § 1983. *Id.* at 7.

Thereafter, "the burden shifts to the nonmoving party to show with 'significant probative evidence' that there exists a genuine issue of material fact." *Hamilton* v. *Seque Software, Inc.,* 232 F.3d 473, 477 (5th Cir. 2000) (quoting *Conkling* v. *Turner,* 18 F.3d 1285, 1295 (5th Cir. 1994)). In ruling on a summary judgment motion, " '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.' " *Tolan* v. *Cotton,* 572 U.S. 650, 651 (2014) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986)).

B. Qualified Immunity

Public officials acting in the scope of their authority generally are shielded from civil liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). As a result, courts will not deny qualified immunity unless "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd,* 563 U.S. 731, 741 (2011). Therefore, a plaintiff seeking to overcome qualified immunity must show: "(1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Id.* at 735 (citation omitted).

III. DISCUSSION

A. Medical Deliberate Indifference

A prisoner may succeed on a claim under 42 U.S.C. § 1983 for inadequate medical care if he demonstrates

"deliberate indifference to serious medical needs" on the part of prison officials or other state actors. *Estelle v. Gamble,* 429 U.S. 97, 104 (1976). A prison official acts with the requisite deliberate indifference "if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan,* 511 U.S. 825, 847 (1994).

Deliberate indifference is an "extremely high standard to meet." *Domino v. Texas Dep't of Criminal Justice,* 239 F.3d 752, 756 (5th Cir. 2001). It requires a finding that the defendant "disregards a risk of harm of which he is aware" and does not permit such a finding based on mere "failure to alleviate a significant risk that [the person] should have perceived but did not[.]" *Farmer,* 511 U.S. at 836-40. A plaintiff must show that the defendant "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Brewster v. Dretke,* 587 F.3d 764, 770 (5th Cir. 2009) (citation and internal quotation marks omitted).

Smith claims that Dr. Talley refused to refer him to pain management or surgery to have his SCS repaired or replaced. In response to her motion for summary judgment, Smith argues that Dr. Talley based her decision on a "blanket policy" that prohibited any care, upkeep, repair, or replacement of SCS devices when she stated, without qualification, that "we don't do that."[60] Citing to the medical and grievance records provided by the Defendants, he contends that Dr. Talley was

[60] Docket Entry No. 40 at 2.

deliberately indifferent to his serious medical need for pain abatement despite the recommendations of several of his treating physicians, who repeatedly requested a referral for him to pain management and for a surgical consult regarding his SCS.

Contrary to Talley's contentions, Smith has raised a fact issue regarding whether Talley's blanket policy of refusing to address any problems with an SCS device and her statement that "it will still be there when his sentence is over" — regardless of his medical need and the duration of his sentence — is more than a mere disagreement about treatment and tends to indicate a fixed, categorical refusal to treat a painful medical condition. Smith points out that several of his medical providers, who performed his physical examinations and afforded him with primary care at the unit level, recommended referral to pain management and an evaluation regarding his SCS, but Talley refused the requests from his providers each time.

Taking the evidence in the light most favorable to the nonmovant and drawing justifiable inferences in his favor, the Court concludes that Smith raises a fact issue about whether Dr. Talley "refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Brewster*, 587 F.3d at 770. The medical records reflect that Smith has an existing, albeit now non-functional, SCS implanted in his body that was effective in managing his pain when it was working correctly. Talley's categorical denial of the multiple requests from Smith's medical providers for referral for repair of that device creates triable issues of fact as to whether

TTUSCH or TDCJ instituted a policy not to treat SCS issues regardless of the circumstances and whether that policy was implemented in deliberate indifference to an inmate like Smith's serious medical needs. Therefore, the Court finds that summary judgment is also not appropriate as to Deshields and Linthicum, who, as Directors of the health care divisions of their respective institutions, allegedly instituted and authorized this policy. *See Porter v. Epps,* 659 F.3d 440, 446 (5th Cir. 2011) (holding that supervisory officials may be liable if they implemented an unconstitutional policy that resulted in constitutional injury).

B. Qualified Immunity

As explained above, Smith has raised a fact issue regarding whether Talley acted in deliberate indifference to his medical needs and whether the Defendants created and implemented a categorical policy not to treat medical issues regarding a SCS device that is malfunctioning regardless of the duration of a prisoner-patient's incarceration, in deliberate indifference to an inmate's serious medical needs. At the time of the events in question, it was clearly established that "a prison inmate could demonstrate an Eighth Amendment violation by showing that a prison official 'refused to treat him, ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs.' " *Easter v. Powell,* 467 F.3d 459, 465 (5th Cir. 2006) (quoting *Domino,* 239 F.3d at 756). Similarly, it was clearly established that a supervisory official may be held liable for implementing a constitutionally deficient policy that caused constitutional harm. *See Porter,* 659 F.3d at 446.

Therefore, at this stage of the case, dismissal based on qualified immunity is not warranted.

C. Injunctive Relief under the Prison Litigation Reform Act

Defendants contend that Smith cannot meet the standard for obtaining injunctive relief under the Prions Litigation Reform Act ("PLRA"). Under the PLRA, any prospective injunctive relief "shall extend no further than necessary to correct the violation of the Federal right," and a court "shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(l)(A).

As set forth above, Smith raised fact issues regarding an ongoing violation of his constitutional rights in connection with the denial, without qualification, of a referral to evaluate and treat his SCS, and whether there is a policy to deny all such requests, in deliberate indifference to a prisoner's serious medical needs. According to the Defendants, TDCJ has the duty to provide adequate medical treatment to address Smith's medical needs, and, therefore, they argue that Smith's request to go to the VA for treatment for his SCS is not available under federal law. Smith contends that he is asking to be allowed to go to the VA only if it is found that TDCJ does not have the duty to provide treatment for his non-functioning SCS, citing the exception in 38 C.F.R. § l7.38(c)(5) for medical services coverage for veterans like him in cases where the correctional institution has no duty to treat a medical issue. At this stage of the litigation, fact issues preclude summary

judgment on whether some form of narrowly-drawn injunctive relief, extending no further than necessary to address the claimed ongoing violation of Smith's constitutional rights, would be appropriate. Therefore, summary judgment on this issue will be denied.

IV. CONCLUSION AND ORDER

For the reasons set forth above, it is

ORDERED that Defendants Dr. Talley and Dr. Deshields's Motion for Summary Judgment, (Docket Entry No. 29), and Defendant Lannette Linthicum's Motion for Summary Judgment, (Docket Entry No. 31), are **DENIED.** It is further

ORDERED that Smith shall file any motion for appointment of counsel to assist him in prosecuting this case within 30 days of the date he receives this Memorandum Opinion and Order. It is further

ORDERED that this case is temporarily **STAYED** pending consideration of any motion for appointment of counsel. After a decision regarding any motion for appointment of counsel is made, the Court will convene a pretrial scheduling conference and set this case for trial.

The Clerk will provide a copy of this order to the parties.

SIGNED at Houston, Texas, on /s/ **MAR 30 2021** .

/s/Alfred H. Bennett
ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX D

U.S. Const. amend VIII. Excessive Bail, Fines, Punishments:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX E

42 U.S.C. § 1983. Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.