No. 22-756

IN THE
Supreme Court of the United States

LANNETTE LINTHICUM ET AL.,

Petitioners,

v.

ROBIN WAYNE SMITH,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in its unpublished decision in this "one-off" case that will proceed regardless on respondent's live injunctive relief claim, the Fifth Circuit appropriately applied its own precedent to deny qualified immunity to prison health administrators who maintain a yearslong, blanket, non-medical policy against even *considering* the surgery that multiple doctors have deemed medically-necessary to treat respondent's rare pain disorder.

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INTRODUCTION

Petitioners have—for years—denied respondent's doctors' orders that he receive a replacement spinal cord stimulator to treat his rare pain disorder. And they've done so not for any *medical* reasons, but because of a blanket policy—they just "don't service[or] place . . . any of those stimulators." Pet. App. 3a. Over the years, and in response to a series of orders and pleas from doctors and requests from respondent and his family, petitioners have simply declined to even consider the surgery respondent needs. In light of these facts, the Fifth Circuit correctly held that petitioners' "wanton disregard" for respondent's " 'excruciating' pain" was "textbook deliberate indifference" under its caselaw, and that petitioners were not entitled to qualified immunity. Pet. App. 9a. The Fifth Circuit reiterated multiple times that this is not a "difference of opinion case," *see* Pet. App. 10a, 14a n.7, and noted that petitioners' "puzzling" and "blunt" failure to "articulate some legitimately considered basis" for its no-SCS-repair-or-replacement policy "make[s] this case a one-off," Pet. App. 14a n.7. So the Fifth Circuit, in an unpublished opinion, sent the case back to the district court, for respondent to pursue a claim for damages alongside his pending injunctive-relief claim.

Petitioners ask this Court to summarily reverse the Fifth Circuit's narrow, unpublished opinion. But though they seek error correction, there's no error here. The Fifth Circuit correctly applied its own precedent to petitioners' longstanding and continuing (to this day) policy against considering replacing respondent's device. Finally, though petitioners—half-heartedly—seek plenary review, there's nothing to see

there either. The courts of appeals, far from using cases in the clearly established analysis willy-nilly, are sensibly applying this Court's precedent about how to (and not to) conduct the clearly-established-law inquiry. This Court should deny certiorari.

STATEMENT OF THE CASE

I. Factual Background

Respondent Robin Wayne Smith is a Marine Corps veteran and Texas prisoner who suffers from a rare condition called loin pain hematuria syndrome, which inflicts "constant [and] sharp stabbing pain . . . that is exacerbated by almost all everyday physical activities, including walking." Pet. App. 2a. In 2002, VA doctors implanted a spinal cord stimulator (SCS) to treat respondent's condition. *Id.*[1]

By 2011, respondent's SCS had started malfunctioning, and the VA recommended replacing it with a new one. Pet. App. 2a-3a. But before the procedure could take place, respondent received a 35-year prison sentence, with a release date of 2048. Pet. App. 3a.

During his incarceration, respondent repeatedly complained to officials within the Texas Department of Criminal Justice (TDCJ) about his severe pain, and sought the SCS replacement that the VA had prescribed to him. At least three separate prison doctors

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[1] "A spinal cord stimulator is an implanted device that sends low levels of electricity directly into the spinal cord to relieve pain." Pet. App. 2a (quoting Eellan Sivanesan, M.D., Johns Hopkins Med., Spinal Cord Stimulator, https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/treating-pain-with-spinal-cord-stimulators).

who saw respondent agreed—all three ordering replacement and two zealously advocating for years on respondents' behalf with petitioners. Pet. App. 3a-4a; ROA.1177; ROA.1043; ROA.915; ROA.1011; ROA.935; ROA.907; ROA.938; ROA.855-56.[2] Yet defendant-petitioner Dr. Sheri Talley "categorically rebuffed" referrals "from third-party medical professionals for SCS repair or replacement." Pet. App. 3a & n.2.

In response to a first doctor's referral for SCS repair or replacement, Talley stated in August 2016:

> 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. 3a.

A second physician referred respondent for SCS repair or replacement, and Dr. Talley's February 2017 response "was equally categorical." Pet. App. 3a; Pet. App. 32a. She said:

> 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].

Pet. App. 4a.

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[2] Record cites are to the Fifth Circuit Record on Appeal (ROA).

In February 2018, following a surgery order from yet a third doctor, *see* ROA.907, Dr. Talley similarly stated 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.

Pet. App. 33a n.36.

As a result of this policy, for years prison medical staff prescribed "a series of 'conservative' palliatives like ibuprofen and work restrictions in lieu of the SCS replacement that multiple doctors agreed Smith needed." Pet. App. 4a.

But these limited measures failed to treat respondent's rare pain syndrome, and respondent's pain worsened over time. *See, e.g.,* Pet. App. 32a, 34a. Respondent made petitioners well aware of this, complaining at least seventeen times regarding his malfunctioning SCS device. *See generally* ROA.784-1177. Yet Dr. Talley noted in respondent's file in October of 2019 that "no changes" were "needed" to respondent's treatment. ROA.883.

Consistently, and for *years*, physicians ordered repair or replacement of respondent's SCS—often urgently—and the prison steadfastly refused to follow the doctors' orders. *Id. See* ROA.1177 ("expedite" circled at the top of first doctor's 2015 order); ROA.1009, ROA.1043 ("expedite" marked in second doctor's 2016 and 2017 orders respectively indicating that respondent should be treated "within 1 month"). In addition to Dr. Talley's earlier refusals, the third physician who ordered servicing of respondent's SCS multiple times, most recently on June 5, 2020, stated, "I will

talk with the regional medical director about this and what is to be done." ROA.854-56. At least two of the three physicians to have recommended SCS replacement for respondent—obviously concerned with respondent's lack of care spanning years—lobbied the prison and even Dr. Talley directly to obtain approval for the procedure.[3] In all, in response to respondent's grievances detailing his severe and continuous pain, and multiple medical professionals' recommendation that respondent's SCS device be serviced or replaced, the prison simply repeatedly invoked its policy against servicing his SCS.

Based on all this evidence, the district court found that a jury could reasonably conclude that Dr. Talley evinced "a fixed, categorical refusal to treat a painful medical condition," Pet. App. 8a, that was "in accordance with a policy [Talley's] supervisors enacted to that effect," Pet. App. 10a.

II. Procedural History

"In 'uncontrolled' pain and with little hope of receiving a working SCS before his projected release in 2048," respondent filed a pro se § 1983 complaint against petitioners—Dr. Talley and two other executives involved in providing him with healthcare. Pet.

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[3] *See* ROA.938 (On 1/9/17 second doctor stated, "Try to coordinate w/VA for replacement of pain stimulator. Will request referral as such."); ROA.1011 (On 1/23/17 second doctor stated, "Please let me know if there is anything else we can do to make this happen w/VA services for the pain stimulator."); ROA.915 (On 9/12/17 third doctor stated, "These requests will be discussed with Dr. Talley."); ROA.907 (On 1/17/18 third doctor stated, "I will again talk to Dr. Talley about this."); ROA.855 (On 6/5/20 third doctor stated, "I will talk with the regional medical director about this and what is to be done.").

App. 4a. He claims that petitioners' "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 constitute[d] deliberate indifference to his serious medical needs in violation of the Eighth Amendment." *Id.* He seeks damages and an injunction requiring petitioners to allow his transfer to a VA hospital for "surgery to replace his" SCS. *Id.*

Petitioners moved for summary judgment on qualified immunity grounds. *Id.* The district court denied those motions, determining that material factual disputes regarding "whether Talley acted in deliberate indifference to [respondent's] medical needs"; and, second, "whether the [petitioners] 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." Pet. App. 5a.

The Fifth Circuit affirmed in an unpublished opinion. Pet. App. 5a, 16a. At the outset, the panel opinion—authored by Judge Engelhardt—noted that this case is *not* one involving "an inmate's simple difference in opinion with prison medical officials denying him his preferred course of treatment." Pet. App. 6a n.4. Such a suit, of course, "is not actionable under the Eighth Amendment." *Id.* And the panel rejected petitioners' "attempt to recharacterize" this as a difference-of-medical-opinion case, and concluded their argument on this front "hides the ball and misapprehends the narrow scope" of interlocutory appeal from the denial of qualified immunity. Pet. App. 10a.

Indeed, "the sole question" before the Fifth Circuit, given the posture of the case, was "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." Pet. App. 6a-7a. The panel answered that question in the affirmative, and held that such a blanket policy "violates the clearly established law of th[at] Circuit." Pet. App. 7a.

On the constitutional issue—which petitioners do not challenge here—the court of appeals concluded that "[i]f 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." Pet. App. 9a. The Fifth Circuit also found liability appropriate for the other two defendants because "Talley's statements that '*We'* don't fix '*any* of *those* stimulators' " indicates her steadfast refusal to consider an SCS replacement was "made in accordance with a policy [Talley's] supervisors enacted to that effect." Pet. App. 10a.

As to the second prong of the qualified immunity analysis, the court of appeals concluded that it had "long been the law" in the Fifth Circuit that "a prison medical official's decision to deprive an inmate of a medically needed surgery," as is the case here, "must be the product of a genuine and considered *medical* judgment," and not simply a "blanket and non-medically considered policy against the procedure." Pet. App. 14a (footnote omitted). The Fifth Circuit noted that a recent decision, *Delaughter v. Woodall*, 909 F.3d 130 (5th Cir. 2018), had "reiterated" that legal

principle such that petitioners 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." Pet. App. 12a.

First, the Fifth Circuit concluded that *Delaughter* was appropriately part of the qualified immunity analysis "because of the ongoing nature of the harm [respondent] claims in this case." Pet. App. 13a n.6. Although the *Delaughter* opinion was issued after Dr. Talley's latest rejection of respondent's requests for an SCS replacement in the record, Pet. App. 12a-13a n.6, petitioners could have provided respondent with the SCS replacement any time after the Fifth Circuit decided *Delaughter*, "but never chose to do so." Pet. App. 13a n.6.[4] The Fifth Circuit further observed that the facts of this case are "accordingly a far cry from the typical § 1983 case (like, say, a shooting, an excessively forceful takedown, an illegal search)" because "defendants here received reasonable warning that their *ongoing* treatment of the plaintiff might be unconstitutional but never reconsidered the issue." *Id.*

Second, the Fifth Circuit observed that *Delaughter* merely repeated what has long been the law in that 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." Pet. App. 14a. The

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[4] To date, respondent has not received his SCS replacement surgery, and his injunctive-relief claims on this issue remain pending. Oral Argument at 22:50, https://www.youtube.com/watch?v=7DJex1UTkoI&ab_channel=U.S.CourtofAppealsfortheFifthCircuit.

court pointed to *Easter v. Powell*, 467 F.3d 459 (5th Cir. 2006), in which the Fifth Circuit found deliberate indifference when, for nonmedical reasons, a prison official "failed to follow a prescribed course of treatment." Pet. App. 14a (quoting *Easter*, 467 F.3d at 464). In another prior case, the Fifth Circuit applied the same rule: where a jury could find a non-medical reason for depriving a specific treatment ordered by physicians, defendants are not entitled to qualified immunity. Pet. App. 14a-15a (citing *Miles v. Rich*, 576 F. App'x 394, 396 (5th Cir. 2014) (per curiam)).

Ultimately, the Fifth Circuit noted the significant limitations of its decision: "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." Pet. App. 14a n.7. The court also observed that its decision "has no effect on the defendants' ability to reassert their qualified immunity defense at trial." Pet. App. 16a. And it noted that it was leaving "what appear to be difficult fact questions to the jury." Pet. App. 2a. The opinion, as noted above, is unpublished, and states that, consistent with 5th Circuit Rule 47.5, it "is not precedent," outside of the parties and facts presented. Pet. App. 2a n.*; 5th Cir. R. 47.5.4.

Judge Duncan concurred in part and dissented in part. He agreed with the majority as to the merits of the constitutional issue—which, again, petitioners don't dispute here. Pet. App. 17a. And he noted that qualified immunity had no bearing on respondent's claims for injunctive relief. *Id.* But he would have held

that respondent failed to show petitioners violated clearly established law. *Id.*

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

REASONS FOR DENYING THE PETITION

The Fifth Circuit's unpublished opinion in this "one-off" case was correct and consistent with this Court's precedent. This case is about both a rare pain disorder and a rare blanket, non-medical policy for refusing to even *consider* a particular medically-necessary treatment. This case is *not* about a "difference of medical opinion" between a prisoner-plaintiff and his treating physicians. Just the opposite, actually: all of respondent's doctors agree that his SCS needs to be repaired or replaced, but prison administrators refuse. In concluding this ongoing policy was "textbook" deliberate indifference, the Fifth Circuit applied its own precedent consistent with this Court's teachings. And that includes *Delaughter*, which did not "post-date" the conduct in this case—that conduct was and is ongoing, as evident from respondent's live injunctive-relief claim (on which qualified immunity has no bearing). As the Fifth Circuit concluded, petitioners "received reasonable warning that their *ongoing* treatment of the [respondent] might be unconstitutional" and yet to this day refuse to replace respondent's SCS device. Pet. App. 13a n.6.

Petitioners in the alternative seek plenary review, but review is unwarranted because the courts of appeals are sensibly applying this Court's rules in qualified immunity cases. At any rate, this case does not come close to warranting review by this Court in any form for a multitude of reasons, including that the

case is continuing regardless on respondent's injunctive relief claim related to petitioners' continuing blanket refusal to even consider this medically-necessary surgery.

This Court should deny certiorari.

I. The Decision Below is Correct and Consistent with this Court's Precedent.

A. This is Not A "Difference of Opinion" Case.

Given the interlocutory posture of this appeal (and petition) petitioners are required take as a given the district court's factual determinations, and bother this Court only with legal disputes. But petitioners flout this rule, and ask this Court to summarily reverse a version of this case that doesn't exist. Indeed, petitioners would have this Court believe this case stems from a prisoner unhappy with the course of treatment prescribed by his medical providers, and that his claim is just a disagreement over a matter of medical judgment. Pet. 6-8. In fact, it's just the opposite: all of respondent's doctors agree that his SCS needs to be repaired or replaced, but prison administrators—to this day—continue to refuse.

The doctors who have treated respondent—doctor*s*, plural; three who have seen him during his incarceration, plus the VA physicians who saw him prior—actually *ordered* respondent's SCS be replaced. ROA.1177; ROA.938; ROA.915. And in the face of those medical judgments, petitioners shook their heads, maintaining their *non-medical* "categorical defiance" of the requests because "[they] don't service[or] place . . . any of those stimulators." Pet. App. 3a-4a. It simply "will not occur" while respondent is in

TDCJ custody—until 2048. Pet. App. 3a-4a. In categorically refusing to consider this medically-necessary care, petitioners are defying the medical judgment of three separate doctors, two of whom engaged in prolonged advocacy efforts to get Dr. Talley to at least *consider* the requested surgery. ROA.855, ROA.907, ROA.915, ROA.935, ROA.938, ROA.1011, ROA.1043.

Based on these facts, the district court determined that a jury could conclude this was "more than a mere disagreement about treatment" but instead "a fixed, categorical refusal to treat a painful medical condition." Pet. App. 8a. These facts, the Fifth Circuit observed, if borne out at trial, would constitute "wanton disregard for the 'excruciating' pain [respondent] claims he may well experience for another quarter *century* without corrective SCS surgery [and] would be textbook deliberate indifference." Pet. App. 9a.[5]

As they do before this Court, petitioners tried to dress up this "textbook" deliberate indifference case as one about a prisoner-plaintiff's disagreement with his treating prison medical professionals. But the Fifth Circuit saw through petitioners' "attempt to recharacterize" respondent as wanting "to choose an inmate's own course of medical treatment among several viable alternatives." Pet. App. 10a; *see also* Pet. App. 6a (noting "defendants' consistent contention that Smith's suit is simply rooted in his . . . disagreement with the alternative" treatments provided). That court appropriately rejected this gambit as "hid[ing]

[5] Petitioners' offer of ibuprofen and other "conservative" palliatives in response to respondent's "excruciating" pain (as petitioners highlight, Pet. 7-8), is irrelevant; respondent's pain is still "uncontrolled" and his medical condition is "deteriorating." Pet. App. 4a, 9a.

the ball," Pet. App. 10a, and this Court should too. *Of course*, the Fifth Circuit recognized—as has respondent during this litigation—"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." Pet. App. 6a n.4; *see also* Pet. App. 14a. n.7. But that's just not this case.[6]

Not only does petitioners' reframing hide the ball, but it "misapprehends the narrow scope of [this Court's] present review." Pet. App. 10a. Because of the interlocutory posture of this case, the necessity of a new SCS to treat respondent's pain must be taken as a given, and the sole constitutional question is "whether a categorical policy prohibiting" SCS replacement "constitutes deliberate indifference to the serious medical needs of an inmate *who requires*" this replacement. Pet. App. 7a. It does—and notably petitioners seem to concede this; they do not seek review of the Fifth Circuit's ruling on the constitutional question.[7]

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[6] That petitioner Talley is a doctor does not somehow transform her blanket non-medical denials into medical-based decisions. *See* Pet. 19. The Fifth Circuit explained 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." Pet. App. 14a. n.7. Dr. Talley "puzzling[ly] (and blunt[ly]) fail[ed] to do so here." *Id.* Because of this head-scratching omission, this case may be "a one-off." *Id.*

[7] Petitioners' one glancing attempt to shoot at the constitutional rule in the opinion falls flat, because it again misapprehends (or misleads). The opinion did not "impl[y] that it may be an Eighth Amendment violation to not revisit and reverse previous decisions," Pet. at 15-16, but rather held that an unwavering "blan-

B. The Fifth Circuit's Analysis of its Clearly Established Law is Consistent with this Court's Precedent.

The Fifth Circuit correctly analyzed the state of its own caselaw at the second step of the qualified immunity inquiry, and did so consistent with this Court's precedent. Specifically, the Fifth Circuit appropriately relied on *Delaughter* in holding the law was clearly established.

1. At the outset, there is nothing "troubling" about the Fifth Circuit relying on its own precedent in the clearly-established analysis, as petitioners argue. Pet. 8. This Court has never prohibited courts of appeals from relying on their own law in conducting the clearly-established inquiry, and has assumed without deciding that this is acceptable—as seen in the cases petitioners cite. In relying on its own decisions in analyzing the state of clearly-established law, the Fifth Circuit was acting consistent with its own longstanding practice, Pet. App. 12a n.5, and that of all the courts of appeals.

2. Petitioners' characterization of *Delaughter* as post-dating the conduct in this case, Pet. 9, is inaccurate. Rather, petitioners here have maintained an ongoing, non-medically-considered, "categorical policy prohibiting any repair or replacement" of an SCS, contrary to respondent's treating physicians' orders, and not subject to change for the next 25 years. Pet. App. 7a. That policy may have *started* before *Delaughter*,

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ket" and "categorical" non-medical policy of prohibiting SCS repair or replacement for the entire 25 years remaining in respondent's sentence could constitute deliberate indifference. Pet. App. 7a.

but petitioners have maintained it since *Delaughter* as well—it is all one course of conduct.[8]

This case has *always* been about the ongoing nature of petitioners' unconstitutional conduct, despite petitioners' suggestion to the contrary. Pet. 15. *See generally* ROA.12-13. Specifically, respondent's complaint alleges that "it is cruel and unusual punishment to deny him the necessary SCS replacement surgery and force him to be in constant chronic pain for the next 30 years until he discharges his sentence and can get the surgery from the VA on his own accord." ROA.12. And respondent seeks not just damages for past harm but also injunctive relief to receive his medically ordered SCS surgery—a claim that qualified immunity will never touch. ROA.14; Pet. App. 17a (Duncan, J., concurring in part and dissenting in part) (noting live injunctive claim irrespective of qualified immunity). On appeal respondent re-asserted his claim for ongoing deliberate indifference;[9] the ongoing nature of the constitutional violation was acknowledged

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[8] Petitioners' argument, Pet. 16-17, that the Fifth Circuit somehow relied on different sets of facts in prongs 1 and 2 of the qualified immunity inquiry rings hollow. The court analyzed the one, single, continuing course of conduct at issue in the case—petitioners' policy that, no matter what and for all time, they would not consider SCS replacement on medical terms. *See* Pet. App. 10a (in constitutional section, noting "Talley's potentially unconstitutional refusals to treat Smith were made in accordance with a policy [Talley's] supervisors enacted to that effect"); Pet. App. 12a (in clearly-established section, holding "that any policy of categorically denying SCS replacement without regard to an inmate's serious medical need constitutes Eighth Amendment deliberate indifference").

[9] Respondent alleged "Defendants' categorical policy to prohibit any care, upkeep, repair, or replacement of his SCS device—*re-*

by everyone—the panel and both sides' counsel—at argument;[10] and the resulting Fifth Circuit opinion properly understood it as such explicitly recognizing "the ongoing nature of the harm." Pet. App. 13a n.6.[11]

There's nothing novel about this. Prisoner Eighth Amendment claims often "challeng[e] both ongoing practices and a specific act of alleged misconduct." *McCarthy v. Bronson*, 500 U.S. 136, 143-44 (1991). That's actually the point of many conditions of confinement claims—to bring to light (and stop) an ongoing constitutional violation. *See, e.g.*, *Brown v. Plata,* 563 U.S. 493, 499 (2011) ("This case arises from serious constitutional violations in California's prison system. The violations have persisted for years. They remain uncorrected."). And this Court recognized in *Estelle* that medical deliberate indifference claims can result from corrections officers "intentionally denying

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gardless of the duration of his sentence, treating physicians' recommendations, his history of success with SCS treatment (before the device malfunctioned), ineffectiveness of pain medication, excruciating pain, or *any other* circumstances—constitutes deliberate indifference to his serious medical needs." App. Resp. Br. 20.

[10] *See, e.g.*, Oral Argument at 15:28 (Judge noting "but in this case the factual scenario, as I understand it, continues and then *Delaughter* comes down and so the circumstances are still in existence"); *id.* at 15:50 (petitioners' counsel acknowledging "I do think [*Delaughter*] could serve to give guidance when there is an ongoing issue"); 22:39 ("with apologies for asking an outside the record question, but . . . where it's ongoing, I have got to ask what is Mr. Smith's current situation with respect to the SCS"), https://www.youtube.com/watch?v=7DJex1UTkoI&ab_channel=U.S.CourtofAppealsfortheFifthCircuit.

[11] So petitioners' statement that "the only live claim in [respondent's] complaint seeks damages based on Dr. Talley's pre-*Delaughter* denials," Pet. 15, is wrong twice over.

or delaying access to medical care or intentionally interfering with the treatment once prescribed"—all of which can be ongoing problems, as this case well indicates. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976) (footnote omitted).[12]

Petitioners are correct that under the clearly-established inquiry, an officer "is not required to foresee judicial decisions that do not yet exist." *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018). And so, when assessing an officer's actions at a particular moment in time—pulling a trigger, using force during a takedown, or searching a home—this Court has rejected the use of precedent that post-dates the date of the shooting, takedown, or search. *See Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004) (shooting), *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (same); *Kisela*, 138 S. Ct. at 1154 (same).

But as the Fifth Circuit understood, the ongoing nature of the constitutional violation here makes the situation "a far cry from the typical § 1983 case (like, say, a shooting, an excessively forceful takedown, an illegal search)." Pet. App 13a n.6. This is not a cop-on-the-beat case, or one involving split-second decisionmaking. Unlike the shooting officers in *Brosseau*, *City of Tahlequah*, or *Kisela*, years ago petitioners "received reasonable warning that their *ongoing* treatment of the plaintiff might be unconstitutional but

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[12] Ongoing wrongs also show up in the continuous violation doctrine, which acknowledges the existence of problems that are more than just a one-off. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 115-18 (2002); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381 (1982). This is just to say: there's nothing jaw-dropping (or sum-revvable) about the notion of suing for an ongoing problem.

never reconsidered the issue." Pet. App 13a n.6. When *Delaughter* came down in 2018, petitioners could have (and should have) reassessed their "blanket and non-medically considered policy" against giving respondent a new SCS, as his treating physicians recommended—but they didn't, and haven't still. Pet. App. 14a.

3. *Delaughter* was close enough on its facts to give petitioners here "fair warning" of the unconstitutionality of their conduct, and the Fifth Circuit defined the right at issue at the appropriate level of generality. *Contra* Pet. 17-19.

Doctors determined that Mr. Delaughter required a hip replacement, but defendants cancelled the scheduled surgery because "they [we]re simply not going to pay for [it]." *Delaughter*, 909 F.3d 130, 135 (5th Cir. 2018). Instead, they treated him with medication and steroid injections. *Id.* The Fifth Circuit denied qualified immunity to the prison medical official who unjustifiably delayed the required surgery. *Id.* at 137-38. If the delay wasn't the result of "medical-judgment decisions," the court held, it could "evince a wanton disregard for [a] serious medical need." *Id.* at 138.

Here, the panel correctly perceived that *Delaughter* would 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. Indeed, Dr. Talley's insistence that "we don't service [or] place . . . any of those stimulators" and that treatment related to an SCS "will not occur while offender" is in petitioners' custody, Pet. App. 3a-4a, sounds an awful lot like the decision in *Delaughter*

that the defendants were "simply not going to pay for it."[13]

Petitioners first attempt to distinguish *Delaughter* on the grounds that, unlike *Delaughter*, this case (they say) is about petitioners' decision that respondent could be treated with pain medications over SCS replacement surgery. Pet. 18.[14] But *Delaughter* posed the same issue—the defendants denied plaintiff the required knee-surgery and instead gave him pain medications and steroid injections. *Delaughter*, 909 F.3d at 135.

Petitioners would also cabin *Delaughter* to its specific facts, arguing that it somehow would only put them on notice that they can't have a blanket policy of refusing to consider medically-necessary treatment for *financial* reasons. Pet. 18. But there's just nothing in *Delaughter*—or common sense—that would allow petitioners to think that although *Delaughter* held a blanket refusal to consider a medical procedure based on *cost* is prohibited, a blanket refusal to consider a medical procedure based on some other non-medical reason—they've never said what—is somehow fine.

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[13] Moreover, the Fifth Circuit observed, petitioners' conduct here was arguably *worse* than in *Delaughter*, because that case was about delay and this is about categorical *denial* for a quarter century. Pet. App. 15a. After all, what's denial if not an infinite delay? *See generally* Samuel Beckett, *Waiting for Godot* (Grove Press 2011) (1953).

[14] As explained above, *supra* at 11-13 & n.5, the decision to provide him with painkillers wasn't a *medical* judgment at all, just a nonmedical policy of refusing SCS surgery and falling back on pain-management, notwithstanding a documented medical need and repeated requests by multiple doctors.

4. What's more, even if *Delaughter* did postdate the events in question here (and it didn't), and even if it was distinguishable (it's not), it *still* would be relevant to the analysis. Although *Delaughter* was a 2018 decision, it analyzed the state of the law in an earlier time period, when the defendants in that case acted, and found the law then was clearly established. 909 F.3d at 137-38. In other words, *Delaughter* itself did not establish the law.

Specifically, the court in *Delaughter* denied qualified immunity to the prison medical official who, in 2011 through 2015, unjustifiably delayed the required surgery. *Id.* at 137-38. The Fifth Circuit concluded in *Delaughter* that, based on prior precedent, "the contours of the right" at issue would have been "sufficiently clear that a reasonable official" acting in 2011 to 2015 "would understand that what he is doing violates that right." *Id.* at 139-40; *see also id.* at 140 n.10 ("The law must be clearly established at the time of the alleged violation."). So, when the Fifth Circuit addressed the clearly-established prong of qualified immunity in *this case*, *Delaughter* was a relevant authority interpreting the state of the law that existed as of 2015, before Dr. Talley issued her 2016 denials.[15]

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[15] Petitioners attempt to relitigate *Delaughter*—attacking its reasoning at some length. Pet. 12-14. This is not the time or place for doing so. *Delaughter* was published precedent that the panel below appropriately considered in addressing the state of the law at the time of Dr. Talley's initial denials, let alone petitioners' ongoing and unmoving nonmedical policy of refusing to consider SCS replacement. *See Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1021 n.4 (9th Cir. 2020) (applying prior precedent stating law was clearly established, noting "we must follow the . . . factually indistinguishable and binding opinion from our court").

In addition to *Delaughter*, pre-*Delaughter* cases put petitioners on notice as to the unconstitutionality of their blanket non-medical refusal to consider SCS replacement. As the Fifth Circuit observed, "*Delaughter* merely reiterated and solidified what ha[d] long been the law in [that] circuit: that a prison medical official's decision to deprive an inmate of a medically needed surgery" must "be the product of a genuine and considered *medical* judgment, not a nonmedical reason." Pet. App. 14a.

In *Easter v. Powell*, 467 F.3d 459 (5th Cir. 2006), for example, the defendant nurse knew that a treating physician had prescribed nitroglycerin for the plaintiff's heart problems. *Id.* at 461. She also knew that the plaintiff was experiencing severe chest pain and was out of his medication. *Id.* at 463. She did *something* to try and assist—sent him to the pharmacy—but when she learned the pharmacy was closed she sent the plaintiff back to his cell without providing any treatment. *Id.* at 464. The Fifth Circuit held the plaintiff had alleged a constitutional violation because the defendant "was aware of a serious risk to [plaintiff's] health, yet turned a deaf ear to his request." *Id.* Similarly here, petitioners knew of respondent's condition, knew he was experiencing pain, and refused, for nonmedical reasons, to follow the judgment of the treating providers.[16] It's no surprise, then, that the

[16] Petitioners' attempt to distinguish *Easter* goes nowhere. They claim that, unlike in *Easter*, respondent "does not allege that Dr. Talley failed to follow a prescribed course of treatment." Pet. 10. But that's *exactly* what the allegations are: that Dr. Talley and her bosses have a blanket policy of refusing to consider SCS surgery for the entirety of respondent's incarceration, notwithstanding that three different treating physicians have ordered the surgery while respondent has been in petitioners' custody. *See* Pet.

Fifth Circuit below relied on *Easter* as a pre-*Delaughter* case setting forth the same constitutional rule. Pet. App. 14a. *Easter* itself was enough to put petitioners on notice that their elevation of non-medical reasons over medical ones was an Eighth Amendment problem.

Because *Delaughter* and *Easter* would have put defendants on notice of the unconstitutionality of their ongoing, nonmedical decision to refuse SCS repair or replacement—no matter how many of respondent's doctors ordered it, no matter how much pain he was in, and no matter how long he was incarcerated—the Fifth Circuit correctly affirmed the district court's denial of qualified immunity.

II. Plenary Review is Unnecessary Because the Circuits are all Following this Court's Precedent.

Petitioners' claim that circuits are running wild applying "authority postdating the defendant's acts" contrary to this Court's precedent is false. Pet. at 21. These cases are not court of appeals-made "exceptions" to this Court's rules regarding qualified immunity—they are sensible applications of those rules.

To understand why, it's useful to quickly distinguish between two types of cases when we're talking about precedent that might be relevant to the clearly-established-law inquiry.

App. 4a ("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.").

First, there are "prong 1" qualified immunity decisions—that is, decisions that articulate a particular constitutional rule, but don't address the second, clearly-established-law step of the qualified immunity inquiry. For prong 1 cases, if they post-date the events in question they cannot be considered as part of the prong 2 clearly-established analysis, because the official's actions are "judged against the backdrop of the law at the time of the conduct." *Brosseau*, 543 U.S. at 198. That's the teaching of *Kisela*. What this Court disapproved of in *Kisela* was the Ninth Circuit using a "prong 1" decision (*Glenn*, from 2011) that post-dated the events in question (2010) in the clearly-established-law inquiry.[17] This is "because a reasonable officer is not required to foresee judicial decisions that do not yet exist" at the time they acted. 138 S. Ct. at 1154.[18]

Second, though, are the "prong 2" cases—those that address whether the law was clearly established at the time the official in that particular case acted. These cases, which ask whether the officer was on notice as to the unconstitutionality of their actions, involve some aspect of time-travel. They look back in time to the events in question—which may be several years before the decision is published—and ask: what

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[17] To the extent petitioners read *Kisela* to more broadly prohibit the consideration of *any* case that post-dates the events in question, that position makes no sense "[a]s a matter of pure logic." *Sampson*, 974 F.3d at 1027 (Hurwitz, J., concurring).

[18] The Court in *Kisela* noted that that rule applies only "where the requirements of the [constitutional provision] are far from obvious." 138 S. Ct. at 1154. The qualified immunity inquiry in such a case is different. *See, e.g.*, *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Hope v. Pelzer*, 536 U.S. 730 (2002).

was the law like then? So, prong 2 cases that post-date the events in question *can*, actually, be relevant for the clearly-established law inquiry, depending on the timeline.

Take, for example, a 2013 prong 2 decision holding that the clearly-established law was settled in 2006. That case would be relevant to an inquiry into the state of the law in *any* subsequent years—for officials that acted in 2007 through 2012, before that decision was issued. *See, e.g.*, *Ballentine v. Tucker*, 28 F.4th 54, 65 (9th Cir. 2022). Likewise, as explained above, even assuming *Delaughter* post-dated the conduct in question, it would be relevant for the clearly-established analysis because it was a precedential opinion that spoke to what the Fifth Circuit law had clearly-established as of 2015—the date of the conduct in that case—which predates Dr. Talley's earliest denial here. *Supra*, at 20 & n.15. [19]

The cases that petitioners cite for alleged examples of courts of appeals running amok are all of this variety. In *Jones v. Treubig*, 963 F.3d 214 (2d Cir. 2020), for example, the Second Circuit held "that it was clearly established before April 2015"—when the defendant in *Jones* acted—that deploying a taser in the

[19] *Brosseau*'s footnote noting several decisions that postdated the conduct there were "of no use in the clearly established inquiry" is not to the contrary. 543 U.S. at 200 n.4. None of those decisions held the law to be clearly established by the time of the shooting in *Brosseau*. Likewise, *City of Tahlequah* noted that a prior case decided after the events in question was "of no use," but that case's prong 2 analysis had just been decimated by the Court—it relied on a case with "dramatically different" facts—so it could only be used as a prong 1 decision. 142 S. Ct. at 11-12.

circumstances was unconstitutional because the Second Circuit had already held as much in cases addressing the state of clearly-established law as to tasers deployed in 2008 and 2013. *Id.* at 227; *see also* Pet. 21 (noting this timeline). The Court of Appeals was not relying on those later-in-time decisions to clearly establish the law; rather, it observed that those decisions had *already held* that the law during the relevant time period was clearly established. *Jones*, 963 F.3d at 227 (recognizing that this "Court's concern [in *Kisela*] specifically related to opinions published after the officer's conduct at issue that establish the right *in the first instance*").

The other decisions petitioners flag do the same thing—they cite to precedent that point back in time to caselaw that existed at the time the defendant acted. *See Ouza v. City of Dearborn Heights*, 969 F.3d 265, 282 (6th Cir. 2020) (citing to case holding proposition "well-settled" based on precedent from 2005 and 2007, in case involving 2014 conduct); *Sampson v. Cnty. of Los Angeles*, 974 F.3d 1012, 1020 (9th Cir. 2020) (citing to case holding law clearly established by August 2015, in case involving November 2015 conduct); *Garcia v. McCann*, 833 F. App'x 69, 71 (9th Cir. 2020) (citing to case holding constitutional rule "beyond debate" in 2008, in case involving 2013 conduct); *Tan Lam v. City of Los Banos*, 976 F.3d 986, 1001-02 (9th Cir. 2020) (citing to case holding law clearly established before late-September 2013, in case involving incident in early-September 2013); *Paugh v. Uintah Cnty.*, 47 F.4th 1139, 1168 n.28 (10th Cir. 2022) (citing to case holding law clearly established based on precedent from 2000 and 2005, in case involving 2015 conduct); *Wilkins v. City of Tulsa*, 33 F.4th 1265,

1276 n.8 (10th Cir. 2022) (relying on cases holding law clearly established in 2013 and 2011, in case involving 2017 incident). And, likewise, the First Circuit—and one judge on the Third Circuit—have merely suggested they would follow this same commonsense approach, they are not joining an "erroneous trend." *See* Pet. 25 (citing *Lachance v. Town of Chartlon*, 990 F.3d 14, 27 (1st Cir. 2021); *Thomas v. Tice*, 948 F.3d 133, 148 (3d Cir. 2020) (Greenaway, J., concurring in part and dissenting in part)). These circuits' citation to precedent that came down after the events in question but looked back to before the relevant time period in assessing the clearly-established law are "simply to show that later panels" of that circuit had interpreted its "earlier case law as clearly establishing" the relevant legal proposition. *Ouza*, 969 F.3d at 282 n.6.

III. This Case Does Not Warrant this Court's Review—Whether Summary or Plenary.

This case does not come close to warranting review from this Court—in any fashion—for a multitude of reasons. First, the Fifth Circuit was correct in applying its own precedent in assessing the state of clearly-established law, *see supra* Section I.B, but even were it *not* this case is a "one-off," both legally and factually. Pet. App. 14a n.7. Legally: the opinion is unpublished and lacks precedential value. Factually: the opinion is the result of petitioners' "puzzling[] (and blunt) failure" to "simply articulate some legitimately considered basis for its" treatment plan or a "non-medically-indifferent policy against a certain procedure." Pet. App. 14a n.7.

Second, petitioners do not allege a split, and as explained above the circuits have been loyally following this Court's precedent. It's no surprise, then, that the

Court denied the one other petition on this "issue." *See* Petition for Writ of Certiorari, *McCann v. Garcia*, 142 S. Ct. 582 (2021) (No. 20-1592), 2021 WL 1988363, at *28-31.

Third, the alleged defect of which petitioners complain is not remotely outcome-determinative in this case. Even if *Delaughter* post-dated the conduct in question here and it was inappropriate for the Fifth Circuit to consider it, *but see supra* Section I.B.2, *Easter* alone was enough to clearly-establish the law, *see supra*, at 21; Pet. App. 14a (relying on *Easter*). What's more, separate and apart from respondent's damages claim, which lives or dies depending on the qualified immunity outcome, respondent has a pending injunctive relief claim that is continuing to trial in the district court regardless. Pet. App. 17a & n1.

And although this Court does, occasionally, summarily reverse denials of qualified immunity, those cases are almost uniformly in the Fourth Amendment excessive-force-in-policing context, where this Court has stated "specificity is especially important" in the clearly established inquiry because of the "hazy border between excessive and acceptable force." *Kisela*, 138 S. Ct. at 1152-53.[20] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 88-90 (2018) (appendix compiling this Court's applications of the qualified immunity standard from 1982 through 2017). In fact, in the context of prisoners' Eighth Amendment cases, this Court tends to summarily reverse *grants*—not denials—of qualified immunity.

[20] All the cases petitioners cite, Pet. 26—*White*, *Plumhoff*, *Kisela*, and *Brosseau*—arise not just in the excessive-force context but in the *deadly* force context.

See, e.g., *Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Hope v. Pelzer*, 536 U.S. 730 (2002); *cf. McCoy v. Alamu*, 141 S. Ct. 1346 (2021) (granting, vacating, and remanding in light of *Taylor*). The only time this Court has, to counsel's knowledge, summarily reversed a denial of qualified immunity in the prison context, this Court's intervention was outcome-determinative; that case did not involve a live injunctive-relief claim, *see Taylor v. Barkes*, 575 U.S. 822 (2015)—unlike this one.

CONCLUSION

The Court should deny certiorari.

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Respectfully submitted,

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