No. 22-756

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

REPLY BRIEF FOR THE PETITIONERS

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In qualified-immunity cases, this Court has "repeatedly" warned lower courts "not to define clearly established law at a high level of generality"—or they will face summary reversal. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam). Nevertheless, Smith asserts that a clearly established right preventing prisons from ignoring inmates' serious medical needs also puts prison doctors on notice that they cannot follow general policies regarding extraordinary types of care. The Fifth Circuit previously rejected that premise, and this Court denied review even after the Fifth Circuit decided *Delaughter*—the case on which Smith's attempt to defeat the Petitioners' assertion of qualified immunity depends. *Compare Gibson v. Collier*, 140 S. Ct. 653 (2019), *with Delaughter v. Woodall*, 909 F.3d 130 (5th Cir. 2018). Smith also insists that because he sought injunctive relief, ordinary qualified-immunity rules don't apply to his damages claim. Again, that premise has been squarely rejected. *Behrens v. Pelletier*, 516 U.S. 299, 311-12 (1996). Because these premises form the entire basis for Smith's response, that response makes clear that summary reversal is appropriate.

Putting aside these errors, Smith cannot overcome the Fifth Circuit's improper reliance on *Delaughter*, which post-dated the challenged conduct, and did not give Petitioners notice that their conduct was unlawful. Although this Court does not typically order plenary review to correct such errors, it has repeatedly granted summary reversal when lower courts so blatantly ignore qualified-immunity doctrine.[1] It should do so again.

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[1] Scott Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 NOTRE DAME L. REV. 1999, 2015 & n.103 (2018) (collecting scholarship regarding the practice).

ARGUMENT

I. The Fifth Circuit Ignored This Court's Precedent by Rejecting Qualified Immunity Based on a Case Post-Dating the Challenged Conduct.

A. Pre-existing caselaw did not put Petitioners on notice that their conduct violated the Eighth Amendment.

In defiance of this Court's repeated instructions in the qualified-immunity context to define the constitutional question with precision and to look for analogous facts, *e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153-54 (2018) (per curiam), the Fifth Circuit relied on "one particular decision," *Delaughter*, to hold that Petitioners violated Smith's Eighth Amendment rights. Pet. App. 12a. Among other problems, that case did not provide Petitioners notice that their *specific conduct* violated Smith's constitutional rights.

1. Smith relies (at 13) on broad, general statements about the Eighth Amendment to assert that "the sole constitutional question" is "whether a categorical policy prohibiting" a kind of treatment constitutes deliberate indifference. Even assuming the policy violates the Eighth Amendment, the clearly-established inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quotation marks omitted).

No case establishes that prisons cannot adopt standard-of-care policies that exclude certain forms of surgery. Even if the court below could consider the facts in *Delaughter*, *but see infra* Part I.B., that case can reasonably be read to prohibit only a categorical refusal to provide treatment based on cost, as that case arose out of a

factual context in which doctors "would not pay for [the plaintiff's] surgery," *see Delaughter*, 909 F.3d at 139.

That *Delaughter* cannot be read as broadly as Smith insists (at 18) can be seen from the fact that the very next year, the Fifth Circuit held that prisons *may* make a "categorical policy judgment" that certain forms of surgery are not appropriate in a prison environment. *Gibson v. Collier*, 920 F.3d 212, 224 (5th Cir. 2019). This Court declined to disturb *Gibson*—notwithstanding an acknowledged circuit split, *see* Brief in Opposition, at 10-11, *Gibson v. Collier*, 140 S. Ct. 653 (2019) (No. 18-1586), 2019 WL 5566383, at *10-11 (acknowledging the split), regarding "[w]hether an Eighth Amendment claim for deliberate indifference . . . can be disposed of without any individualized medical evaluation," Petition for Writ of Certiorari, at i, *Gibson v. Collier*, 140 S. Ct. 653 (2019) (No. 18-1586), 2019 WL 2711440, at *i.

Under the Fifth Circuit's strict rule of orderliness, *Gibson* could not have permitted categorical medical policies had *Delaughter* required individualized medical assessments. *See Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 400 n.28 (5th Cir. 2022) ("The rule of orderliness applies as equally to a panel's implicit reasoning as it does to its express holdings."). Although *Gibson*, like *Delaughter*, was decided after the relevant conduct, because "a reasonable officer is not required to foresee judicial decisions," *Kisela*, 138 S. Ct. at 1154, courts may consider later-decided cases to determine what is *not* clearly established at the time of the alleged constitutional violation.

Thus, not a single decision of this Court or the Fifth Circuit told Petitioners that a categorical policy against replacing SCS devices was unconstitutional. If anything, this Court has indicated that *departing* from medical

protocol would be deliberate indifference. *See Erickson v. Pardus*, 551 U.S. 89, 91 (2007) (per curiam) (finding a plausible claim for deliberate indifference when prison officials denied treatment required by protocol). And it has held that a general duty to prevent harm to inmates does not put officers on notice of the type of policy they must implement to prevent the harm. *See Taylor v. Barkes*, 575 U.S. 822, 826 (2015) (per curiam) ("No decision of this Court even discusses suicide screening or prevention protocols.").

2. Smith makes three related counterarguments, none of which has merit. *First*, Smith asserts (at 11-13) that this caselaw is irrelevant because this is *not* a difference-of-medical-opinion case. But that assumes there are only two options: a difference-of-medical-opinion case or a policy-based-refusal-to-treat case. There is a third option: some cases, like this one, arise from a policy of refusing to provide certain forms of care *based* on a difference of medical opinions. *See Gibson*, 920 F.3d at 224.

Second, Smith argues (at 19) that the Fifth Circuit examined the question at the correct level of generality because there is no reason to think that "a blanket refusal to consider a medical procedure" based on something other than cost is constitutionally acceptable. But *Gibson* expressly held otherwise. *See* 920 F.3d at 224. The district court found that Dr. Talley may have been acting based on such a policy. Pet. App. 3a ("We don't even have a specialist on contract . . . . He'll be treated for his chronic pain the same way all of our patients are treated."). Because Smith has not cited a case with specific factual context clarifying that a policy against SCS replacement was unconstitutional, Petitioners are entitled to qualified immunity.

Third, Smith (at 21 & n.16) raises the level of generality even higher by citing *Easter v. Powell*, 467 F.3d 459 (5th Cir. 2006). But as Petitioners have already explained (at 10), in *Easter*, a nurse went against a doctor's order in an emergency. Dr. Talley is a doctor, and *Easter* says nothing about whether she can overrule a different doctor's treatment recommendations based on a medical policy—which must also be adopted with consultation from doctors. Tex. Gov't Code §§ 501.133, .147 (providing how to set prison medical policies). Indeed, the court below relied on *Easter* for the general proposition that tending physicians cannot fail to follow a prescribed course of treatment. Pet. App. 14a. Elsewhere, the Fifth Circuit held that courses of treatment may be prescribed based on the application of a categorical medical policy. *See Gibson*, 920 F.3d at 224.

B. The Fifth Circuit could not rely on caselaw post-dating the challenged conduct.

Finding no case with analogous facts holding Petitioners' conduct unconstitutional, Smith contends (at 20) that it was proper to rely on *Delaughter*'s discussion of previously established law. But this Court has already rejected that approach multiple times. For example, in *Bond v. City of Tahlequah*, 981 F.3d 808 (10th Cir. 2020), the Tenth Circuit relied on a case post-dating the challenged conduct, *Estate of Ceballos v. Husk*, 919 F.3d 1204, 1219 (10th Cir. 2019), for its discussion of *Allen v. Muskogee*, 119 F.3d 837, 839 (10th Cir. 1997), which predated the challenged conduct. This Court expressly disapproved of the practice concluding that "*Estate of Ceballos* . . . is of no use in the clearly established inquiry." *City of Tahlequah v. Bond*, 142 S. Ct. 9, 12 (2021) (per curiam). Smith's attempt to brush aside *Bond* (at 24 n.19) does not account for the actual analysis conducted by the

Tenth Circuit and rejected by this Court. *Accord Kisela*, 138 S. Ct. at 1154 (summarily reversing for citing a post-conduct case merely as an "illustrat[ion]" of law the court considered clearly established).

Smith insists (at 23-26) that the decision below is consistent with some courts of appeals' continued reliance on post-conduct summaries of pre-conduct cases. Petitioners agree the practice exists—over sharp dissents from judges finding it inconsistent with this Court's precedent. *See, e.g.*, *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1027 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part); *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 291 n.3 (6th Cir. 2020) (Griffin, J., concurring in part and dissenting in part). That is *why* the Court should grant review to correct the decision below.

C. Smith cannot rely on post-conduct caselaw by declaring the conduct an "ongoing" condition of confinement.

Finally, Smith is wrong to assert (at 14-18) that the rule against relying on post-conduct precedent simply does not apply in cases alleging ongoing constitutional violations or conditions-of-confinement cases.

1. Petitioners have already explained (at 15-17) that this Court's precedent does not impose an ongoing duty for prison doctors to follow up with every patient with whom they come in contact. Deliberate indifference is a standard "more than mere negligence." *Farmer v. Brennan*, 511 U.S. 825, 835 (1994). It requires both a showing that (1) officers were aware of facts from which they could infer an excessive risk to an inmate and (2) the officers actually drew that inference. *Id.* at 837. By definition, that requires the Court to look at particular decisions made by particular people at specific times—

especially when plaintiffs seek damages against officers in their individual capacities.

Smith acknowledges (at 8) that "the *Delaughter* opinion was issued after Dr. Talley's latest rejection of respondent's requests." Smith argues (at 18), and the Fifth Circuit agreed (at Pet. App. 13a) that Petitioners nonetheless "could have (and should have) reassessed" their decision post-*Delaughter*. While Smith's live pleading for injunctive relief may survive due to a fact question regarding ongoing harm, Pet. App. 17a n.1, it contains no facts implying Dr. Talley is the individual causing that harm—as opposed to some other medical professional. Absent such facts, a duty to "reassess" is irreconcilable with this Court's deliberate-indifference precedent that imposes liability only if an officer is already aware of facts and actually infers a significant risk of harm. *See Farmer*, 511 U.S. at 835. Put simply, this Court has never imposed a limitless duty to affirmatively seek out such facts.

Even if this Court's Eighth Amendment jurisprudence did not foreclose Smith's theory, it is inconsistent with how a court typically "analyze[s] one, single, continuing course of conduct." Br. in Opp. 15 n.8. For example, the continuing-violations doctrine allows a plaintiff to collect money damages for a single injury that manifested over a period of time, but *not* for discrete injuries that occurred before the statute of limitations period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110-15 (2002). But the Court explained that a "continuing violation," perhaps more appropriately called a "cumulative violation," by its very nature involves repeated conduct. *See id.* at 114-15; *Heath v. Bd. of Supervisors for S. Univ. & Agric. & Mech. Coll.*, 850 F.3d 731, 737 (5th Cir. 2017) (describing the violation itself as "based on the

cumulative effect of a thousand cuts"). That doctrine does *not* allow a plaintiff to recover for a discrete act (or omission) that occurred before the limitations period—even if the failure to correct that unlawful act results in an ongoing injury. *E.g.*, *Del. State Coll. v. Ricks,* 449 U.S. 250, 257 (1980); *Gorelik v. Costin*, 605 F.3d 118, 123 (1st Cir. 2010).

Smith is trying to recover for the ongoing *effect* of discrete acts—not an ongoing *violation*. Smith agrees (at 17) that Petitioners cannot be held liable for conduct that occurred before they had notice of Smith's clearly established rights. As explained above, *supra* Part I.A., that notice was lacking *at least* until *Delaughter*. And Smith admits (at 8) that Dr. Talley has not taken any action since *Delaughter*. Nonetheless, he wants to use an Eighth Amendment equivalent of the continuing-violation doctrine to impose liability on pre-notice conduct because the results continued post-notice. But the defense of qualified immunity shields the "*liability of the individual officers*." *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015). Such a rule cannot be squared with Smith's theory that Petitioners can be individually liable for Smith's ongoing care—or lack thereof—even if he is transferred to the care of different physicians or they leave the employment of the Texas prison system entirely. That is not how individual-capacity damages under section 1983 work. "Government officials may not be held liable for the unconstitutional conduct of their subordinates"—let alone their coworkers—"under a theory of *respondeat superior*," *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009), or vicarious liability, *Monell v. Dep't of Soc. Servs. of City of N.Y.*, 436 U.S. 658, 691 (1978).

2. Smith's attempt (at 16-17) to redefine this as a conditions-of-confinement case does not alter the analysis because such claims are also subject to the deliberate-indifference standard. *Wilson v. Seiter*, 501 U.S. 294, 303 (1991). He cannot meet that standard because he has not alleged pre-*Delaughter* conduct for which he may claim a retrospective monetary remedy. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (explaining that qualified immunity protects officers from claims for money damages). The Fifth Circuit grossly misapplied this Court's well-established law in concluding otherwise.

II. The Fifth Circuit's Gross Misapplication of Qualified-Immunity Doctrine Merits Review.

Although this Court does not typically grant plenary review to correct fact-bound errors, it does reverse federal courts in qualified immunity cases when a lower court has transparently refused to follow its doctrines. *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam). For good reason: correcting errant denials of qualified immunity "is important to 'society as a whole,'" *id.* (quoting *Sheehan*, 575 U.S. at 611 n.3), because it protects individual officers from constant litigation that is both a distraction and a disincentive to enter public service, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Smith does not deny that error correction in the qualified-immunity context is an appropriate use of this Court's supervisory power. Instead, he advances two reasons why this Court should not exercise that power here. Neither is availing.

First, Smith attempts (at 27) to argue that summary reversal is proper only in the Fourth Amendment excessive-force context. A review of this Court's summary reversals shows otherwise. *See, e.g.*, *Taylor*, 575 U.S. at 825 (summarily reversing in the Eighth Amendment context). While errors requiring correction may be more

common in the Fourth Amendment context due to the "hazy border" around Fourth Amendment rights, *see Kisela*, 138 S. Ct. at 1152-53, nothing in those cases suggests that this Court corrected the errors because of the nature of the right alleged by the plaintiff. Instead, summary reversal is proper because of the nature of the remedy asserted against the officers. *See, e.g.*, *White*, 580 U.S. at 79 (discussing the right of officers to claim qualified immunity from standing trial); *Kisela*, 138 S. Ct. at 1152 (refusing to consider whether the plaintiff's right was violated and granting officers qualified immunity from suit).

Indeed, this Court has granted summary reversal in the Eighth Amendment context for the very error the Fifth Circuit made below. In *Taylor*, this Court granted summary reversal in a deliberate indifference case because, although it was clearly established that officers could not be indifferent to serious threats to inmates, "[n]o decision of this Court even discusse[d]" what type of policy was required to prevent those threats. 575 U.S. at 826.

Second, Smith insists (at 27) that granting summary reversal is not outcome-determinative here because his claim for injunctive relief will remain. That too ignores this Court's rule that a defense of qualified immunity for some claims "cannot be foreclosed by the mere addition of other claims to the suit." *Behrens*, 516 U.S. at 312. That is, granting qualified immunity at this stage *is* outcome-determinative as to the individual Petitioners' personal liability. The immunity is "'an immunity from suit rather than a mere defense to liability'" and is "'lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Thus, a wrongful

interlocutory denial of qualified immunity is fundamentally different from a wrongful interlocutory grant. *See Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (Alito, J., concurring in judgment).

Moreover, this Court has held that "officers have a personal interest" not just in avoiding the distraction of litigation but in vindicating the reputational harm arising from an alleged constitutional violation. *See Sheehan*, 575 U.S. at 611 n.3. These concerns are amplified here by (1) "a claim seeking money damages," *Ziglar v. Abbasi*, 582 U.S. 120, 142 (2017), and (2) the fact that Smith is accusing (at 6) a physician of failing to observe the appropriate standard of care—an accusation that if correct could implicate her license to practice medicine, Tex. Occ. Code § 164.051(a)(6). Summary reversal is warranted here to protect those interests as well as those of the general public in the proper application of the qualified-immunity doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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