No. 23-7

IN THE
Supreme Court of the United States

LYNN HAMLET,

Petitioner,

v.

OFFICER HOXIE, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

"Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress. In an appropriate case, we should reconsider our qualified immunity jurisprudence." *Ziglar v. Abbasi*, 582 U.S. 120, 160 (2017) (Thomas, J., concurring).

Officer Hoxie offers no persuasive reason to decline Justice Thomas's invitation. He instead proffers a manufactured "vehicle" problem that mischaracterizes both the record and the Eleventh Circuit's decision. Beyond that failed effort at distraction, Hoxie articulates no basis in statutory text for current qualified immunity doctrine, no serious argument that immunity for prison officials was well-grounded in common law precedents by 1871, and no meaningful defense of the Court's usurpation of Congress's policy-making power to decide whether and when state officials should be immune from liability for violating constitutional limitations on the exercise of state power.

The Eleventh Circuit's misapplication of the current "clearly established law" standard by itself warrants review. But it more fundamentally illustrates the flawed subjectivity at the core of modern qualified immunity analysis. The Court should grant review and restore qualified immunity to its roots in the

objective common-law standards that prevailed when 42 U.S.C. § 1983 was enacted.

A. The Eleventh Circuit Did Not Reject Hamlet's Underlying Eighth Amendment Claim On Its Merits

Hoxie's principal basis for opposing review is that the qualified-immunity questions raised in the petition are not properly presented here. According to Hoxie, the Eleventh Circuit held that Hamlet did not allege facts establishing an Eighth Amendment violation *at all*, thereby vitiating the need to consider whether Hoxie is *immune* from liability for the alleged violation. BIO 6-7. Hoxie is incorrect.

In the passage Hoxie cites, the Eleventh Circuit addressed only the allegation that Hoxie knew Hamlet had feces *in his wounds* for days *after* the shower. Pet. App.12a-13a. According to the court, "the record does not support an inference that Hoxie was subjectively aware of feces in Hamlet's wounds after the shower," and so Hamlet's allegations failed the "subjective" prong of the Eighth Amendment *as to that later period*. *Id.* at 13a. But the court explicitly distinguished that period from the shower incident itself, which presented the distinct question of whether his willful "30-to-40-minute exposure" to feces was "objectively extreme under clearly established law." Pet. App.12a-13a.

As to the distinct shower incident, the court expressed no doubt that Hoxie was fully aware he was trapping a diabetes-stricken elderly man in feces-contaminated water. Pet. App.4a. Neither did the court express doubt that those facts, taken as true,

established the violation of Hamlet's Eighth Amendment rights. Rather, the court repeatedly described its "narrow task" as deciding only whether the facts established a violation of "clearly established" Eighth Amendment rights. Pet. App.1a-2a; *see id.* at 8a. ("[W]e consider the narrow question of whether Hamlet alleged conduct that violated clearly established Eighth Amendment law.").

This case thus squarely raises the two questions presented in the petition about the current "clearly established right" test: (1) whether the Eleventh Circuit misconstrued that test as requiring a precise factual comparison to prior cases, and (2) whether Hoxie's immunity should be determined by an altogether different test based on common-law doctrine as it existed when § 1983 was enacted in 1871. Hoxie's arguments against review of those questions are unpersuasive, as the next sections show.

B. The Decision Below Misconstrues The "Clearly Established Right" Test

Under current doctrine, a corrections officer may be subject to liability for violating a constitutional right only if the right is "clearly established," meaning either (1) there is a precedent with "materially similar" or "fundamentally similar" facts; or (2) the specific conduct in question is obviously unlawful. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (cleaned up). Nobody should dispute—and Hoxie himself does *not* dispute—that the Eighth Amendment requires the state to establish sanitary conditions of confinement that do not include "purposeful, pronounced, and prolonged" contact with human feces. BIO 13. It should be equally clear that the right to be free from such

inhumane conditions is clearly established, and that Hoxie's conduct here violated that clearly established right.

Viewed in the light most favorable to Hamlet, the summary judgment record squarely establishes the following facts: knowing that Hamlet was an elderly man who suffered from diabetes, Hoxie intentionally forced Hamlet to endure prolonged contact with human feces in a flooded shower and then directed that Hamlet be denied access to cleaning materials for a week thereafter. Pet. App.4a. Just as in *Taylor v. Riojas*, 141 S. Ct. 52 (2020), there is "no evidence that the conditions of . . . confinement were compelled by necessity or exigency" or that the deplorable conditions "could not have been mitigated, either in degree or duration," *id.* at 53-54. There was simply no plausible justification for not promptly removing Hamlet from the shower and ensuring fecal material was thoroughly rinsed from his body.[1]

Notably, Hoxie's brief *does not even disagree*: nowhere does he suggest any penological justification for his conduct. In fact, Hoxie admits that his treatment of Hamlet was not an "exemplary disciplinary practice." BIO 10. But what matters more is what he omits: no authority of any kind—no judicial precedent, no prison regulations, no incarceration manual, nothing—suggests that intentionally forcing a person

[1] Hoxie repeatedly refers to the "potato chip bag" filled with excrement as if it were safely sealed, but obviously it was not. Nowhere does he show that the bag made any difference in minimizing the waterborne presence of dangerous bacteria from the feces floating in and—inevitably—out of and around the bag.

to endure prolonged direct exposure to waterborne human excrement, then denying him access to cleaning materials, is *ever* justified in *any* circumstances for *any* reason.[2] It is thus impossible to conclude that any reasonable corrections officer would believe that the conduct was constitutionally authorized.[3]

Hoxie's effort to explain why his conduct did not violate a "clearly established" right merely reiterates and confirms the Eleventh Circuit's error in applying the "clearly established" test. Rather than try to explain or justify the shower incident on its own terms, Hoxie simply compares the incident to other cases finding Eighth Amendment violations from intentional feces exposure and suggests specific ways those cases were arguably more severe. BIO 7. But his discussion illustrates why this Court eschews "a rigid,

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[2] The punitive use of shower stalls—in violation of Florida's prison regulations—is apparently pervasive in the Florida Department of Corrections. *See* Nicole Einbinder, *Fla. prisons may violate policy by locking people in unsanitary shower stalls for hours on end*, INSIDER, Nov. 8, 2023, https://www.insider.com/florida-prisons-violate-policy-locking-people-in-shower-stalls-2023-11.

[3] Other contexts, such as excessive force claims under the Fourth Amendment, may involve split-section decisionmaking, where especially precise clarity in the legal standards may be necessary to give officers adequate guidance. *See*, *e.g.*, *City of Tahlequah, Okla. v. Bond*, 142 S. Ct. 9, 11-12 (2021). But as this case shows, confinement-conditions cases under the Eighth Amendment typically involve more time for deliberation and mitigative action, making it less likely a reasonable officer would fail to recognize and address an obvious violation such as needless and prolonged direct contact with human excrement.

overreliance on factual similarity." *Hope*, 536 U.S. at 742.

As Hoxie admits, other cases involving fecal contamination apply a clear principle: the Eighth Amendment forbids the state from subjecting persons in custody to "purposeful, pronounced, and prolonged" exposure to fecal contamination. BIO 10, 13. There is no need to assay the factual details of other cases to see why the facts here satisfy that standard. The exposure was "purposeful": Hoxie pushed Hamlet back into the contaminated shower when Hamlet informed him of the excrement, confiscated Hamlet's clean linens, and did not allow Hamlet to shower after contacting feces-contaminated water. Pet. App.4a. The exposure was "pronounced": soaking in feces-infested water would be dangerous to anyone, but especially to Hamlet, given his advanced age and diabetic condition, both known to Hoxie. Pet. App.2a-4a. And the exposure was "prolonged": Hoxie forced Hamlet to soak in the flooded and contaminated shower for 30-40 minutes and then prohibited Hamlet from cleaning himself until a week later. *Id*. Those facts are fully supported by the evidence and thus controlling in the qualified immunity analysis. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (summarily reversing appellate court for granting qualified immunity without viewing facts in light most favorable to non-movant).

Because the foregoing facts themselves set forth the violation of a clearly established right, the Court need not wade into *additional* facts concerning Hoxie's subjective knowledge of whether feces remained in Hamlet's wounds for days later. It is enough that Hoxie knowingly forced Hamlet to bathe

in excrement-contaminated water and knowingly denied him access to cleaning materials. The Eighth Amendment requires only that Hoxie had "knowledge of a substantial risk," which "is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence," including "the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

It is obvious, to say the least, that soaking at length in water contaminated with excrement creates a substantial risk of harm, whether one has open wounds or not. Even if Hoxie did not subjectively know the feces had infected Hamlet's open wounds, he indisputably knew there was a *serious risk* that Hamlet would be harmed by the prolonged contact with excrement. Hoxie's subsequent instruction that Hamlet be denied access to cleaning materials afterward provides additional context, amply justifying the further inference that Hoxie subjectively knew Hamlet had been contaminated with feces and cruelly sought to ensure he could not clean it off. Although that further inference is unnecessary to establish a viable Eighth Amendment claim based on the shower incident alone, both Hoxie and the Eleventh Circuit err in denying the existence of any evidence supporting that inference. BIO 8.

C. The Court Should Overrule *Procunier v. Navarette* And Restore Qualified Immunity To Its Common-Law Roots

This Court should overrule *Procunier v. Navarette*, 434 U.S. 555 (1978), which cannot be reconciled with the original, common-law foundations of qualified immunity. Pet. 25-26.

Hoxie says *stare decisis* has "enhanced force" in the statutory context, BIO 19, but that principle has little significance for a judicially-created doctrine. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Court overruled a "judge made" rule interpreting § 1983 without applying a superspecial *stare decisis* presumption. *Id.* at 233 (overruling *Saucier v. Katz*, 533 U.S. 194 (2001)). Similarly, in *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Court overruled a nearly 100-year-old precedent under the Sherman Act, recognizing that *stare decisis* was "not as significant" in that context because the Court had long "treated the Sherman Act as a common-law statute," *id.* at 899; *see State Oil v. Khan*, 522 U.S. 3, 20 (1997) (The "general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act.").

A similar principle applies here, but with even greater force. At least in *Leegin*, the overruled precedent purported to interpret specific statutory language, i.e., "restraint of trade." By contrast, *Procunier* did not interpret any specific statutory term at all, but instead applied an immunity the Court *read into* § 1983 precisely because the statute's text *lacked* any such immunity. *See Pierson v. Ray*, 386 U.S. 547, 554-55 (1967); *see also Malley v. Briggs*, 475 U.S. 335,

339-40 (1986) (§ 1983 "on its face admits of no immunities"). A doctrine that is judicially created from the outset should be readily susceptible to judicial modification in its application.

Even if a superspecial justification is required to overrule *Procunier*, it exists here. Qualified immunity exists specifically to protect state officers from liability for conduct that *violates constitutional rights*, which should make the Court extra vigilant in policing the boundaries of the doctrine and overruling precedents that contravene its history and logic. Enforcing the Constitution is always a superspecial justification for judicial action.

Further, the traditional factors that justify overruling precedent apply here. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 362-63 (2010) (summarizing factors).

First, *Procunier* is not "well reasoned." *Id.* at 363; *see* Pet. 21-29. To defend the decision's departure from the common law, Hoxie dredges up two nineteenth century cases that purportedly recognize immunity for prison officials. BIO 20 (citing *Williams v. Adams*, 85 Mass. 171 (1861), and *Alamango v. Board of Supervisors of Albany Cnty.*, 32 N.Y. Sup. Ct. 551 (1881)). But two stray cases hardly show that immunity for prison officials was "*well settled* at the time of [§ 1983']s enactment." *Nieves v. Bartlett*, 139 S. Ct. 1715, 1726 (2019) (emphasis added). In fact, when § 1983 was enacted, there was widespread judicial agreement that prison officials were liable for unlawful acts that caused injury to persons in their custody. Pet. 24-25 (collecting cases). Hoxie does not and cannot distinguish those cases.

And even on their own terms, *Williams* and *Alamango* provide no support for *Procunier*. Before discussing those cases, Justice Scalia acknowledged that state prison officials were "sued at common law, often with no mention of possible immunity." *Richardson v. McKnight*, 521 U.S. 399, 415 (1997). He then observed *Williams* was a "novel" case that conferred "immunity upon an independent contractor." *Id.* A "novel" case is the opposite of "well-settled" precedent. And even *Williams* would preclude immunity for willful conduct like Hoxie's. 85 Mass. at 171-72. *Alamango* was an intermediate appellate court decision holding that an incarcerated person could not sue a *municipality* for the harms caused by an independent contractor. 32 N.Y. Sup.Ct. at 553. *Alamango* does nothing to demonstrate the existence of a settled common-law rule of immunity for *individual prison officers* who violate the rights of those in their custody.

Second, there are no meaningful "reliance interests at stake." *Citizens United*, 558 U.S. at 363. Hoxie's only theory of reliance on *Procunier* is that prison employment decisions have depended on expectations of immunity from personal liability for abusive conduct. BIO 20-21. The suggestion is chilling, but also false: states indemnify employees from virtually all personal liability for § 1983 violations.[4] There is no reason the costs of liability for

[4] In fact, governments—not individual officers—pay approximately 99.98% of damages awards. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 885 (2014). Even in the rare cases when prison officials are denied indemnification, plaintiffs and their attorneys typically have little reason to

prison abuses should be borne by uncompensated victims rather than by the perpetrators and those who employ them.

What is more, this Court recently clarified that reliance interests relevant to *stare decisis* "arise where *advance planning of great precision* is most obviously a necessity." *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022) (emphasis added; quotation omitted). Prison officials need no advance planning—precise or otherwise—to ensure that prison conditions do not involve purposeful, pronounced, and prolonged exposure to human feces.

This Court also has recognized that only minimal reliance interests can form around a procedural rule that is not a "guide to lawful behavior." *United States v. Gaudin,* 515 U.S. 506, 521 (1995). Qualified immunity is not a guide to lawful behavior—to the contrary, it explicitly exists to bar liability even for *unlawful* behavior. For that reason, as noted above, the Court should not give meaningful weight to claimed reliance interests. *See supra* at 9.

Statutory developments like the Prison Litigation Reform Act ("PLRA")—which created a prescreening regime for lawsuits filed by incarcerated persons—create *far* greater reliance interests in protecting prison officials from civil actions. Pub. L. No. 104-134, tit. viii, 110 Stat.1321-66 (1996) (codified in 42 U.S.C. § 1997e); *see* Pet. 29-30. The study Hoxie cites about prison litigation only proves the point. BIO 21.

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proceed against officials with inadequate personal resources. *See* Joanna Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605 (2021).

The first year such litigation declined post-1970 was not after the Court decided *Procunier* in 1978, but after Congress enacted the PLRA in 1996. *See* Margo Schlanger, Prison and Jail Civil Rights/Conditions Cases: Longitudinal Statistics, 1970-2021, Cases Terminated FY 2021, 2 (Apr. 16, 2022), https://ssrn.com/abstract=4085142. Since the PLRA's enactment, the number of prison lawsuits filed has never crossed the 1995 high, despite rising prison populations. *Id.* at 2-3. Congress' deliberate and considered action in this field is both more appropriate and more effective than *Procunier*'s judicial policymaking.[5]

Third, experience has proved *Procunier* is unworkable. *See Citizens United*, 558 U.S. at 362. The cruelty Hoxie inflicted on Hamlet, like the prison officials in *Taylor*, 141 S. Ct. 52; in *Hope*, 536 U.S. 730; and in all the cases Hamlet cites (Pet. 10-15), demonstrate *Procunier*'s shortcomings. The decision effectively allows corrections officers to strip persons in their custody of their basic humanity without repercussion, so long as their conduct was not closely analogous to some already decided precedent. As Hoxie admits, the Eighth Amendment requires that corrections officers adhere to "evolving standards of decency," BIO 21 (quoting *Farmer*, 511 U.S. at 833), but *Procunier* effectively relieves them of that obligation by barring

[5] The Eighth Amendment standard alone protects corrections officers from unfair liability—it requires both objective harm and *subjective disregard* for such harm, creating liability for only the most egregious actions.

liability unless their conduct violates standards that are *already* "clearly established."

The Court should restore immunity principles to their original roots: the immunity historically afforded to state prison officials for the specific conduct at question. And applying that standard, the Court should reject immunity for Hoxie, who could not possibly have claimed immunity from liability at common law for the indefensible conduct at issue here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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