No. 23-722

In the Supreme Court of the United States

RALPH DIAZ, *et al.*,

Petitioners,

v.

PATRICIA POLANCO, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

MICHAEL J. HADDAD
JULIA SHERWIN
TERESA ALLEN
Haddad & Sherwin LLP
505 17th Street
Oakland, CA 94612

Counsel for Patricia Polanco, Vincent Polanco, Selena Polanco, Gilbert Polanco, Michael Hampton, Jacqueline Hampton, Daniel Ruiz, Santos Ruiz, Fernando Vera, Vanessa Robinson, Daniel Ruiz, Jr., Angelina Chavez, Eric Warner, and Henry Warner

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

Counsel for Respondents

Additional Counsel on Inside Cover

FULVIO FRANCISCO CAJINA
Law Office of Fulvio F. Cajina
528 Grand Avenue
Oakland, CA 94610

ANDREW NEILSON
Law Offices of Andrew Neilson
528 Grand Avenue
Oakland, CA 94610

Counsel for Karen Legg and Michelle Legg

NANCY L. HERSH
Hersh & Hersh LLP
Suite 2080
601 Van Ness Avenue
San Francisco, CA 94102

CHARLES C. KELLY, II
Hersh & Hersh
1388 Sutter Street
Suite 1210
San Francisco, CA 94109

MATTHEW CARLSON
Law Office Of Matthew D. Carlson
3959 N Buffalo Road
Suite 29
Orchard Park, NY 14127

BEN ROSENFELD
3163 Mission Street
San Francisco, CA 94110

Counsel for Reginald Thorpe

DAN STORMER
BRIAN OLNEY
DAVID CLAY WASHINGTON
Hadsell Stormer Renick & Dai, LLP
128 N Fair Oaks Ave.
Suite 204
Pasadena, CA 91103

SALOMON ZAVALA
Zavala Law Group
1930 Wilshire Blvd, #817
Los Angeles, CA 90057

DO KIM
Law Offices of Do Kim
Suite 2700
3435 Wilshire Blvd
Los Angeles, CA 90001

Counsel for Joaquin Diaz, Hilda Diaz, Yadira Menchu, and Blanca Diaz Houle

BRIAN A. FORD
Law Offices of Brian A. Ford
3330 Geary Boulevard
3rd Floor East
San Francisco, CA 94118

Counsel for Tyrone Love

STANLEY ROBERT APPS
4424 Bellingham Ave.
Studio City, CA 91604
Counsel for Donte Lee Harris, Kenneth Allan Cooper, and Matthew K. Quale, Jr.

QUESTION PRESENTED

A COVID-19 outbreak at San Quentin State Prison killed twenty-eight inmates and one correctional officer, and infected thousands more. In a public report titled (in part) *California [Officials] Caused a Public Health Disaster at San Quentin State Prison*, California's own Office of the Inspector General, quoting the California Court of Appeal, labeled the San Quentin outbreak "the worst epidemiological disaster in California correctional history." Supp. App. 21a.

The question presented is:

Did the court of appeals properly deny qualified immunity, at the motion-to-dismiss stage, to the California officials who are plausibly alleged to have caused and exacerbated the outbreak?

TABLE OF CONTENTS

Table of Authorities iii
Introduction 1
Statement 4
A. Factual Background 4
B. Proceedings Below 10
Reasons for Denying the Petition 12
A. Factual disputes preclude review. 13
B. The court of appeal correctly denied qualified immunity. 16
1. Deliberate indifference. 16
2. State-created danger 22
3. The Court should not expand the textually and historically unjustified qualified immunity doctrine. 28
C. There is no compelling need for review in this case. 29
Conclusion 33
Appendix A – Report of the California Office of the Inspector General 1a

TABLE OF AUTHORITIES

Cases

Ablordeppey v. *Walsh*,
85 F.4th 27 (1st Cir. 2023) 27

Ashcroft v. *al-Kidd*,
563 U.S. 731 (2011) 18, 24, 25

Baltierra v. *Santoro*,
2023 WL 9119163 (E.D. Cal. Oct. 23, 2023) 31

Board v. *Farnham*,
394 F.3d 469 (7th Cir. 2005) 19

Boyd v. *McNamara*,
74 F.4th 662 (5th Cir. 2023) 26

Butera v. *District of Columbia*,
235 F.3d 637 (D.C. Cir. 2001) 23

City and County of San Francisco v.
Sheehan,
575 U.S. 600 (2015) 20

Collins v. *City of Harker Heights*,
503 U.S. 115 (1992) 27

D.S. v. *E. Porter Cnty. Sch. Corp.*,
799 F.3d 793 (7th Cir. 2015) 22

Davis v. *Allison*,
2023 WL 6796753 (E.D. Cal. Oct. 13, 2023) 31

DeShaney v. *Winnebago Cnty. Dep't of*
Soc. Servs.,
489 U.S. 189 (1989) 22

District of Columbia v. *Wesby*,
583 U.S. 48 (2018) 18, 24, 25

Cases—continued

Doe v. *Jackson Loc. Sch. Dist. Bd. of Educ.*,
141 S. Ct. 895 (2020)....................23

Doe v. *Jackson Loc. Sch. Dist. Bd. of Educ.*,
954 F.3d 925 (6th Cir. 2020)....................22

Doe v. *Rosa*,
795 F.3d 429 (4th Cir. 2015)....................22

Estate of B.I.C. v. *Gillen*,
710 F.3d 1168 (10th Cir. 2013)....................23

Estate of Clark v. *Walker*,
865 F.3d 544 (7th Cir. 2017)....................26

Estelle v. *Gamble*,
429 U.S. 97 (1976)....................17

Farmer v. *Brennan*,
511 U.S. 825 (1994)....................16, 18

Fields v. *Abbott*,
652 F.3d 886 (8th Cir. 2011)....................22

Fowler v. *Irish*,
142 S. Ct. 74 (2021)....................23

Helling v. *McKinney*,
509 U.S. 25, 33 (1993) 11, 17, 18, 20, 21

Hines v. *Youseff*,
914 F.3d 1218 (9th Cir. 2019)....................20

Irish v. *Fowler*,
979 F.3d 65 (1st Cir. 2020) 22

Johnson v. *Epps*,
479 F. App'x 583 (5th Cir. 2012)....................19

Johnson v. *Jones*,
515 U.S. 304 (1995)....................15

Cases—continued

Kennedy v. *City of Ridgefield*,
439 F.3d 1055 (9th Cir. 2006)..............................23

Kisela v. *Hughes*,
584 U.S. 100 (2018)..29

L.W. v. *Grubbs*,
974 F.2d 119 (9th Cir. 1992)....................23, 24, 25

Malley v. *Briggs*,
475 U.S. 335 (1986)..32

Mullenix v. *Luna*,
577 U.S. 7 (2015)..29

Nazario v. *Thibeault*,
2023 WL 7147386 (2d Cir. 2023)...................19, 22

Nelson v. *City of Davis*,
685 F.3d 867 (9th Cir. 2012)................................26

Okin v. *Village of Cornwall-on-Hudson Police Dep't*,
577 F.3d 415 (2d Cir. 2009) 22

Ortiz v. *Jordan*,
562 U.S. 180 (2011)..16

Pauluk v. Savage,
836 F.3d 1117 (9th Cir. 2016) 23, 24, 25, 26, 27

Pearson v. *Callahan*,
555 U.S. 223 (2009)..29

Riggs v. *Madden*,
2024 WL 85894 (S.D. Cal. Jan. 5, 2024) 31

Robinson v. *Webster County*,
141 S. Ct. 1450 (2021)..23

Cases—continued

Sanford v. *Stiles*,
456 F.3d 298 (3d Cir. 2006) 22

Swain v. *Junior*,
958 F.3d 1081 (11th Cir. 2020)............................31

Taylor v. *Riojas*,
592 U.S. 7 (2020)..24

Valentine v. *Collier*,
956 F.3d 797 (5th Cir. 2020)................................31

Vega v. *Semple*,
963 F.3d 259 (2d Cir. 2020) 19

Wilson v. *Williams*,
961 F.3d 829 (6th Cir. 2020)................................30

Ziglar v. *Abbasi*,
582 U.S. 120 (2017)...17

Other Authorities

Betsy McKay, *Coronavirus Symptoms and How to Protect Yourself: What We Know* Wall Street J. (May 24, 2020) 1

Heather Murphy, *Surfaces? Sneezes? Sex? How the Coronavirus Can and Cannot Spread*, N.Y. Times (May 26, 2020) 1

INTRODUCTION

By May 2020, the public knew that the COVID-19 virus was "highly contagious." Heather Murphy, *Surfaces? Sneezes? Sex? How the Coronavirus Can and Cannot Spread*, N.Y. Times (May 26, 2020). They knew that it "spread[] from person to person." *Ibid.* They knew that viral droplets could be expelled when we "cough, sneeze, laugh, sing, breathe and talk." *Ibid.* They knew that "the larger the number of people" around, "the greater the chance that you'll cross paths with an infected person." *Ibid.* They knew that "proper protective equipment" was crucial for preventing the spread of infection. *Ibid.* And they knew that "people without symptoms can also infect others." *Ibid.*; cf. Pet. 4 (bizarrely, citing this same article for the proposition that "[l]ittle was known about how the virus that causes COVID-19 could spread in early 2020"); accord, *e.g.* Betsy McKay, *Coronavirus Symptoms and How to Protect Yourself: What We Know*, Wall Street J. (May 24, 2020) (describing the same dangers and modes of transmission).

But in late May 2020, California officials made a "[c]onscious decision" to transfer 122 medically vulnerable inmates from a prison that had 600 COVID cases to a prison that had none. Pet. App. 123a. Racing to meet a "self-imposed deadline," California officials explicitly rejected suggestions to retest those high-risk inmates before transferring them, even though 121 of the men—out of 122—had not been tested for COVID-19 for two to four weeks. Supp. App. 42-45a, 47-48a, 56-59a.[1]

---

[1] The California OIG report on the incident at the heart of this case is reproduced in the supplemental appendix, *infra*. Multiple decisions below relied on this report as either attached to or incorporated by reference in the relevant complaints in these cases.

California officials also declined to properly screen those high-risk inmates for COVID-19 symptoms prior to boarding the buses—screening nearly half of the 122 transferees more than six hours before departure. Supp. App. 73a. Finally, having failed to properly test and screen the high-risk inmates, California officials packed them onto buses for a ten-hour journey from the California Institution for Men to San Quentin State Prison. *Id.* at 18-19a, 45-46a, 76-77a.

Two of the transferees displayed COVID symptoms upon arrival at San Quentin. Supp. App. 20a. The rest were placed in "a housing unit without solid doors"—that is, in cells that "allow[ed] air to flow in and out"—with shared access to the communal showers and mess hall. *Id.*; Pet. App. 4a.

Tragically—and predictably—an outbreak ensued. Within days, San Quentin reported twenty-five COVID cases among the 122 transferees. Pet. App. 5a. Within three weeks, the virus spread beyond them: 499 people had tested positive. *Id.* at 192a. Yet California officials' decisions after the transfer, in the face of a known, fast-spreading outbreak of communicable disease, created even greater danger to San Quentin staff and inmates. Over the next few months, the officials continued to disregard urgent recommendations from public health authorities and the medical receiver's team of experts.[2]

See Pet. App. 98a, 184a, 217a. In addition to the supplemental appendix, the report is reproduced at *Polanco* C.A. E.R. pages 89-157, and is available online at perma.cc/5W6G-27N3.

[2] A federal district court had "held in 2005 that the medical services in California prisons failed to meet the constitutional minimum," and therefore "appointed a receiver tasked with establishing a constitutionally adequate medical system." Pet. App. 5a (citation omitted).

By early September, just three months after the transfer to San Quentin, at least 2,100 inmates and 270 staff had tested positive. Pet. App. 6a. Twenty-eight of those inmates and one of those staff members—a long-time correctional officer named Gilbert Polanco—died. Supp. App. 21a; Pet. App. 6a.[3]

* * *

As COVID-19 raged through San Quentin, a chorus of California officials condemned the decisions that caused it. California Governor Gavin Newsom said that the prisoners "should not have been transferred." Pet. App. 193a. California state senators called the transfer decision "a 'fiasco,' 'abhorrent,' and 'completely avoidable.'" *Id.* at 40a. One California Assembly member called the outbreak the "worst prison health screw up in state history." *Ibid.* Cal-OSHA cited the California Department of Corrections and Rehabilitation and San Quentin for fourteen violations: five of them "serious" and four "willful-serious." *Ibid*. And the Office of the Inspector General concluded that California officials "caused a public health disaster." *Id.* at 193a.

Several individuals who fell victim to San Quentin's COVID-19 outbreak brought Section 1983 claims against the California officials responsible for it. Pet. App. 35a, 115a, 187-88a, 213a. In each case below, the California officials have moved to dismiss on qualified immunity grounds. *Id.* at 35a, 115a, 187-190a, 213-215a. And in each case below, before three different judges, those motions were denied. *Id.* at 75a, 148a, 210-212a, 236a.

[3] The OIG report cites 29 total COVID deaths at San Quentin (Supp. App. 21a); the court of appeals opinion cites 27 deaths "as of early September [2020]" (Pet. App. 6a).

Petitioners now urge this Court to overturn those denials and to prevent these lawsuits from moving beyond the complaint stage. Pet. 4. But this Court's review is unwarranted, for three reasons:

First, California has injected numerous factual disputes into its presentation of the case. Because this Court does not and cannot review qualified immunity rulings where disputes of fact exist, certiorari is unwarranted.

Second, there is no error to be found in the decisions below. The court of appeals faithfully applied Supreme Court and circuit precedent to articulate the clearly established constitutional rights at issue and deny Petitioners' qualified immunity defenses. Petitioners simply seek error correction—but no error was made.

And *third*, there is no compelling need for review. Contrary to Petitioners' parade of horribles, *Polanco* and its progeny have largely been cited only within the particular—and extreme—factual context of the San Quentin COVID outbreak. These cases present only the opportunity for these particular complaints about an indisputably terrible tragedy, and the "textbook * * * deliberate indifference" that caused it (Pet. App. 15a), to go forward; they do not threaten to reshape the doctrine of qualified immunity.

STATEMENT

A. Factual Background

The early months of the COVID-19 pandemic saw sensible restrictions on the movement of individuals in and out of prisons. In March 2020, California Governor Gavin Newsom issued an executive order "suspending the intake of inmates into all state correctional facilities." Pet. App. 3a. The California Correctional Health Care Services (CCHCS) followed suit by

"adopt[ing] a policy opposing the transfer of inmates between prisons." *Ibid.* CCHCS's reasoning was simple: the "mass movement of high-risk inmates between institutions * * * [was] potentially dangerous," because any transfer would "carr[y] [a] significant risk of spreading transmission of the disease between institutions." *Id.* at 38a.

Under those policies, San Quentin seemed to be "weathering the storm." Pet. App. 3a. Despite its "tight quarters, antiquated design, and poor ventilation," San Quentin had "no known cases of COVID-19" through late May 2020—even as other California state prisons, like the California Institution for Men (CIM) were enduring outbreaks of their own. *Ibid.*

But a long series of "inexplicable" decisions by California officials turned the tide against San Quentin. Pet. App. 161a. On May 27, 2020, with only four days left in the month, California officials told a federal court supervising California prison conditions that high-risk inmates would be transferred out of CIM "around the end of that month." Supp. App. 48a. That same day, California officials ordered CIM officials "to quickly prepare the incarcerated persons for transfer." *Ibid*. Thus, racing to meet a "self-imposed deadline," California officials "pressured staff at the California Institution for Men to take whatever action was needed to identify and prepare incarcerated persons for transfer within the expected time frame." *Ibid.*

As it turns out, meeting that deadline involved jettisoning most available COVID precautions. Even as CIM officials and medical workers expressed concern about the possibility of "infecting another institution" by rushing to transfer inmates (Supp. App. 42a), and even though most of the 122 transferees to San Quentin had not been tested for COVID for at least three weeks, California officials declined to retest any

inmates before transferring them out of CIM (Pet. App. 4a; see Supp. App. 44a). "With such outdated test results, the prison had no way of knowing whether any of those persons were infected with the virus." Supp. App. 43a.

As the OIG further explained, "[t]he decision to transfer the medically vulnerable incarcerated persons despite such outdated test results was not simply an oversight; instead, it was a conscious decision made by prison and CCHCS executives." Supp. App. 43a. Indeed, when subordinates raised concerns that "some of the test dates are at the beginning of [the] May 1st week"—that is, over three weeks old—or that "the risk of transferring patients tested almost one month ago is high for poss[ible] covid spread," those concerns were summarily rejected. *Id.* at 61-62a. To the contrary, "a [prison] health care executive explicitly ordered that the incarcerated persons *not* be retested the day before the transfers began." *Id.* at 4a-5a (emphasis added); see *id.* at 43a-44a.

Thus, as the California OIG concluded, "departmental executives and management were well aware of concerns raised and alarms sounded regarding the outdated testing, but instead chose to focus on their goal to effectuate the transfers during the last week of May 2020." Supp. App. 63a.

In addition to their neglect of testing, California officials also screened the transferees for COVID symptoms "too early * * * to be able to effectively determine whether [the transferred inmates] had symptoms of COVID-19 when they boarded the buses to * * * San Quentin": nearly half of the 122 transferees were screened more than six hours before boarding. Supp. App. 45a. And at least two prisoners *were* symptomatic, but were placed on the buses anyway. *Id.* at 69a.

Finally, facing "pressure[] * * * to carry out the transfers by the end of the month as planned," California officials packed the untested and poorly screened inmates onto buses in numbers that exceeded the bus-capacity limits the California Department of Corrections and Rehabilitation (CDCR) had itself "mandated for inmate safety." Supp. App. 15a; Pet. App. at 4a.

More inexplicable decisions followed at San Quentin. California officials placed all of the transferees—even those who had shared buses with symptomatic inmates—in San Quentin's Badger housing unit, "where tiers of open-air cells open into a shared atrium." Pet. App. 39a. California officials also required that the transferees "use the same showers and eat in the same mess hall as other inmates." *Id*. at 81a. In other words, they were not isolated or quarantined, despite having been transferred from a prison with an active outbreak on buses with symptomatic individuals. Supp. App. 86a-88a ("San Quentin placed many of the persons it suspected had been exposed to COVID-19 in cells without solid doors, jeopardizing the health of both those persons and those already housed in the unit.").

Two days after the transfer, one Marin County Public Health Officer reached out to California officials. He recommended that the transferees be isolated, that officials implement mask mandates in the prison, and that correctional staff not move between San Quentin housing units. Pet. App. 39a. California officials "did not adopt any of these policies." *Ibid.*

Two weeks after the transfer, health experts "toured" and "investigate[d]" San Quentin at the behest of a "court-appointed medical monitor of California prisons." Pet. App. 40a, 82a. The experts then "circulated" an "Urgent Memo" warning that San

Quentin's outbreak was poised to become "a catastrophic super-spreader event." *Id.* at 40a. That memo also criticized San Quentin's failure to provide "readily available" personal protective equipment (PPE) and masks to staff and inmates and San Quentin's "inadequate" testing protocol. Pet. App. 5a. California officials "did not adopt [the memo's] recommendations." *Ibid.* And when two research labs sought to remedy San Quentin's "inadequate" testing protocol—one of them "for free"—California officials "refused the offers." *Ibid.*

* * *

When COVID-19 was brought to San Quentin, long-time and "beloved" correctional officer Sergeant Gilbert Polanco did everything he could to help maintain a sense of normalcy. Pet. App. 69a. When other correctional staff "'call[ed] in sick'" or called out "out of fear," Sergeant Polanco "worked additional hours [and] double shifts." *Id.* at 41a. But unfortunately for Sergeant Polanco, those shifts entailed "transport[ing] sick inmates in need of care, including inmates sick with COVID-19, to local hospitals." *Ibid.* And Sergeant Polanco, despite being "high-risk" for infection,[4] was not given any personal protective equipment to complete them. Pet. App. 35a, 41a. PPE was "readily available" at San Quentin (*id.* at 5a), but it had been "reserved for medical professionals and not front-line correctional officers" (*id.* at 41a)—even officers like Sergeant Polanco whose duties specifically required contact with sick inmates.

Twenty-two days after the transfer, Sergeant Polanco contracted COVID-19. Pet. App. 41a. He was

[4] Sergeant Polanco was fifty-five years old. Pet. App. 41a. He suffered from "obesity, diabetes, hypertension, diabetic nephropathy, hyperlipidemia, [and] thrombocytopenia." *Id.*

taken to the hospital on July 3, 2020, and never left. *Id.* at 42a.

Sergeant Polanco died on August 9. Pet. App. 42a. After his death, Governor Newsom ordered the flag be flown at half-staff, and "San Quentin inmates 'collectively demanded his funeral be live-streamed throughout the prison.'" *Id.* at 69a.

* * *

When COVID-19 was brought to San Quentin, Michael Hampton, a "model inmate," was eligible for release. Pet. App. 127a. Under California's three-strikes law, he had served a twenty-two year sentence for burglary—"a [non-violent] crime with a maximum sentence of 6 years"—and his parole hearing was set for August 2020. *Ibid.*

But Mr. Hampton was never able to attend. Like Sergeant Polanco, Mr. Hampton was at high risk for COVID infection: he was sixty-two years old and suffered from "obesity, hypertension, hyperlipidemia, prediabetes, and sleep apnea." Pet. App. 126a. A few weeks after the transfer, Mr. Hampton fell ill with COVID-19. *Ibid.* He died on September 25, 2020. *Ibid.*

* * *

When COVID-19 arrived at San Quentin, Daniel Ruiz, another "model inmate," had only been incarcerated there for a few short months. *Cooper* C.A. E.R. 425. He was serving a short sentence for non-violent crimes and had been "approved for home release" for "good behavior" in April 2020. *Ibid.*

But Mr. Ruiz never got to go home. Like Sergeant Polanco and Mr. Hampton, Mr. Ruiz was at high risk for COVID-19: he was sixty-one years old and suffered from obesity, asthma, Chronic Obstructive Pulmonary Disease (COPD), lipidemia, and hepatitis C. *Cooper* C.A. E.R. 439. Nineteen days after the transfer, Mr.

Ruiz tested positive for COVID-19. *Ibid.* He was hospitalized four days later, and died on July 11, 2020. *Id.* at 441.

* * *

Three months, 2,000 infections, and twenty-nine deaths after the transfer, Respondent Dr. Robert Tharratt, the CDCR Medical Director, was fired. Pet. App. 36a, 121a. Respondent Ralph Diaz, the "Secretary, and highest policymaking official, of CDCR," abruptly retired. *Id.* at 36a, 40a. And the running count of COVID-19 cases at San Quentin finally plateaued. Supp. App. 102a.

B. Proceedings Below

1. The families of Mr. Hampton, Mr. Ruiz, and others brought Section 1983 claims against the California officials who caused the COVID outbreak at San Quentin. Pet. App. 114-115a, 187-188a, 213a. Their complaints allege that the "botched transfer" and the conditions of confinement it created evince California officials' deliberate indifference to the San Quentin inmates' health and safety, violating the Eighth Amendment. *Id.* at 117a, 123a, 166a, 223-224a. In each case, the California officials moved to dismiss, citing qualified immunity. *Id.* at 35a, 115a, 188-190a, 214-215a.

Three different judges denied those motions. Pet. App. 148a, 210-212a, 236a. The courts held that the incarcerated plaintiffs or their loved ones "plausibly allege that the defendants (affiliated with San Quentin or CIM) knew about the risks related to the transfer and ignored them when they authorized and executed the transfer in an obviously unsafe way." *Id.* at 133a; see also *id.* at 225a. And they concluded that those same defendants were not entitled to qualified immunity because "the unlawfulness of the defendants' conduct was beyond debate." *Id.* at 136a.

2. Sergeant Polanco's surviving wife and children brought a Section 1983 claim against those same officials on Sergeant Polanco's behalf. Pet. App. 6a. They allege violations of the Fourteenth Amendment under the state-created danger doctrine. *Ibid.* California officials again moved to dismiss, citing qualified immunity. *Id.* at 7a.

The district court denied that motion too. Pet. App. 75a. The court held that Sergeant Polanco's family had "plausibly alleged that the CDCR/San Quentin Defendants, both on their own behalf and on a supervisory theory, violated the Due Process Clause by failing to protect Polanco from the state-created danger of a COVID-19 outbreak at San Quentin." *Id.* at 58a. The court further held that the state-created danger doctrine applied "'with obvious clarity' to the [California officials'] decision to transfer 122 inmates from a prison afflicted by a disease outbreak (that had infected 600 and killed nine) in crowded buses to open-air conditions in another prison among thousands of uninfected inmates and guards." *Id.* at 64a. The court thus denied qualified immunity to the California officials at the motion-to-dismiss stage. *Id.* at 75a.

3. The court of appeals affirmed each denial.

As to the Eighth Amendment claims, the court explained that this Court's decision in *Helling* v. *McKinney*—which stated that "deliberate[] indifferen[ce] to the exposure of inmates to a serious, communicable disease" would violate the Eighth Amendment (509 U.S. 25, 33 (1993))—coupled with similar circuit precedent, put prison officials "on notice in 2020 that they could be held liable for exposing inmates to a serious disease, including a serious communicable disease." Pet. App. 103a; see also *id.* at 184a.

And as to the Fourteenth Amendment claim, the court of appeals held that existing circuit precedent put officials "on notice that they could be held liable for affirmatively exposing their employees to workplace conditions that they knew were likely to cause serious illness, including dangers invisible in the air." Pet. App. 19a. As the court of appeals explained, "[t]he fact that the illness here was a newly discovered communicable disease rather than a toxin [as in prior cases] would not have led a reasonable official to conclude that the danger could be ignored." *Id.* at 20a.

Petitioners now urge this Court to overturn those denials of qualified immunity and order the dismissal of these cases at the motion-to-dismiss stage.

REASONS FOR DENYING THE PETITION

The Court should decline Petitioners' invitation to hear this case.

First, Petitioners premise their arguments on a very different factual picture than that painted by the complaints and accepted as true by the courts below. Under this Court's precedents, that is disqualifying: Disputes of fact are outside the bounds of interlocutory appellate review, which is limited to purely legal questions like what law was clearly established.

Second, the courts below faithfully applied this Court's precedents in denying qualified immunity to Petitioners. The decisions below appropriately held that the complaints alleged violations of clearly established Eighth and Fourteenth Amendment rights, precluding dismissal on qualified immunity grounds at this early procedural stage.

Third, there is simply no compelling need for review, and Petitioners merely seek error correction. Contrary to their alarmist predictions, the decisions below have not upset the law of qualified immunity:

Courts in the circuit have consistently extended protection to other state actors in the COVID context, and this case merely presents a set of alleged facts so egregious that qualified immunity is inapplicable. If those allegations turn out to be inaccurate, or if mitigating facts are developed in discovery, Petitioners will of course be free to renew their qualified immunity arguments at a later procedural stage.

A. Factual disputes preclude review.

1. As Petitioners tell it, California "officials took steps to mitigate the risks" of transferring 122 individuals with weeks-old COVID test results from a prison awash with COVID infections to a prison that had none. Pet. 5. Specifically, in Petitioners' selective retelling, California officials "screen[ed] inmates for symptoms, check[ed] temperatures, limit[ed] the number of inmates on transfer buses, isolate[ed] some symptomatic inmates, and test[ed] potentially exposed inmates after the transfer." *Ibid*. But as explained in the OIG Report—which Petitioners themselves requested become part of the record below (Pet. App. 184a n.1)—that account elides crucial details underscoring the patent unreasonableness of the transfer.

For example, California officials *did* screen inmates for symptoms before transporting them to San Quentin—but for nearly half of the 122 individuals transferred, those screenings took place at least six hours before departure from the California Institution for Men. Supp. App. 73a.[5] That is, the screenings were "too early to determine whether [the inmates] had

[5] Thirteen other transferees were not screened until after the buses to San Quentin had already departed. Supp. App. 73a.

symptoms of COVID-19 when they boarded the buses." *Id.* at 5a.

Similarly, California officials *did* decline to fill the transfer buses to their full capacity. Supp. App. 76-77a. But the number of transferees California officials packed onto the buses to San Quentin—up to twenty-five—nevertheless exceeded CCHCS's two-month-old mandated maximum of nineteen prisoners per bus. *Ibid*.

And finally, California officials *did* isolate symptomatic inmates upon arrival at San Quentin—but only after those symptomatic inmates had already shared a "10 to 11 hour" bus ride with the other transferees, who were *not* isolated. Supp. App. 77a. Instead, "San Quentin placed many of the persons it suspected had been exposed to COVID-19 in cells without solid doors, jeopardizing the health of both those persons and those already housed in the unit." *Id.* at 86a. To put it mildly, the California officials' attempts to "mitigate the risks" of this botched transfer (Pet. 5) fell far short of what Petitioners proclaim.[6]

More broadly, Petitioners contend that the California officials "never had a 'fair and clear warning' that their conduct at the outset of an unprecedented pandemic violated the Constitution"—or, put differently, that California officials simply could not have known how to respond constitutionally in the face of such a novel global crisis. Pet. 21. But as Petitioners fail to explain, California officials—and California *prison* officials in particular—received repeated directives about how to manage the COVID-19 crisis in the isolated, high-risk environments they managed.

---

[6] *See also* Pet. App. 25a (Nelson, J., dissenting) ("If Defendants here tried to do their best, it is safe to say that they either failed or need to reassess.").

Two months before the transfer, California Governor Gavin Newsom proclaimed a state of emergency due to COVID-19, and issued an executive order "suspending the intake of inmates into all state correctional facilities." Pet. App. 3a. And around the same time, CCHCS "adopted a policy opposing the transfer of inmates between prisons," reasoning that any transfer of inmates would "carr[y] [a] significant risk of spreading transmission of the disease between institutions." *Ibid.*

The California officials thus *did* have explicit direction about what not to do in the face of a novel pandemic. They simply chose to disregard it. Petitioners' account—which simultaneously overplays officials' supposed mitigation efforts to smooth over their botched inmate transfer and declines to discuss the months-long regulatory buildup to it—knowingly injects these factual disputes into the qualified immunity analysis.

2. These factual disputes strike at the very heart of the qualified immunity inquiry. Respondents urge that the California officials' constitutional violation lies in their deliberate indifference to the San Quentin population's well-being (the California officials "were aware of, yet consciously disregarded, the risks associated with the transfer"), while Petitioners suggest that the California officials did what they could to mitigate those same risks. Compare Pet. 99a with Pet. 98a.

But "a qualified immunity ruling" is "a legal issue that can be decided with reference only to undisputed facts." *Johnson* v. *Jones*, 515 U.S. 304, 313 (1995) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 529 n.10 (1985)). This Court revisits such rulings only when they "involve contests not about what occurred, or why an action was taken or omitted, but disputes

about the substance and clarity of pre-existing law." *Ortiz* v. *Jordan*, 562 U.S. 180, 190 (2011). Such a "neat [presentation of] abstract issues of law" (*id.* at 191) is not available here. As the petition itself indicates, at this motion-to-dismiss stage, disputed facts abound. This Court should not—and typically does not—intervene where "the facts that could render [the Respondents] answerable for crossing a constitutional line" are "controverted." *Ortiz*, 562 U.S. at 191.

Because this Court's review would require the Court to wade into the messy disputes of fact injected by Petitioners, this case does not present a proper vehicle for this Court's review.

B. The court of appeals correctly denied qualified immunity.

The court of appeals' decisions are also correct on the merits. The complaints allege that Petitioners knowingly exposed both inmates and staff to unreasonable risks of deadly harm—and while the factual specifics of "COVID-19 may have been unprecedented, the legal theory that [Respondents] assert[] is not." Pet. App. 103a (quotation marks omitted; alteration incorporated). The law was clearly established as to both claims.

1. Deliberate indifference.

The Eighth Amendment "imposes [affirmative] duties on [prison] officials" to "'ensure that inmates receive adequate * * * medical care[] and [to] 'take reasonable measures to guarantee the[ir] safety.'" *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 526-527 (1984)). As a result, "deliberate indifference to [the] 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) (quotation marks omitted).

Here, as the court of appeals described, Respondents allege (and the California OIG concluded) that "prison executives brushed away repeated warnings that they were proceeding in an unsafe manner," despite the "'societal consensus' * * * that the risk of contracting COVID-19 was 'intolerably grave,'" thus violating the Eighth Amendment. Pet. App. 93a, 96a, 100a.

Petitioners do not contest this conclusion. Instead, they assert that the court of appeals somehow defined the substantive right at the wrong level of generality for immunity purposes when it concluded that "an inmate's right to be free from exposure to a serious disease * * * has been clearly established since at least 1993, when the Supreme Court decided *Helling*." Pet. App. 102a; see *Helling*, 509 U.S. at 33 ("Nor can we hold that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms.").

Contrary to Petitioners' assertions, the court of appeals' analysis is fully consistent with this Court's precedents, and represents a consensus view among the courts of appeals regarding the Eighth Amendment rules applicable to infectious diseases and airborne toxins.

a. Petitioners admonish the court below for "fail[ing] to identify any existing precedent that squarely governs the specific facts at issue here." Pet. 16 (quotation marks omitted; alteration incorporated). But as the Court has repeatedly explained, it "is *not* necessary * * * that 'the very action in question has previously been held unlawful.'" *Ziglar* v. *Abbasi*,

582 U.S. 120, 151 (2017) (emphasis added). The requirement that lower courts not "define clearly established law at a high level of generality" (*Ashcroft* v. *al-Kidd*, 563 U.S. 731, 742 (2011)), does not mean that there "ha[s] to be 'a case directly on point,'" so long as "existing precedent * * * place[s] the lawfulness of the particular [conduct] 'beyond debate'" (*District of Columbia* v. *Wesby*, 583 U.S. 48, 64 (2018) (quoting *al-Kidd*, 563 U.S. at 741)).

Helling does exactly that. While the Court's specific holding in *Helling* was that a prisoner "states a cause of action under the Eighth Amendment by alleging that [jailers] have, with deliberate indifference, exposed him to levels of [second-hand tobacco smoke] that pose an unreasonable risk of serious damage to his future health" (509 U.S. at 35), its reasoning included the clear proposition that "deliberat[e] indifferen[ce] to the exposure of inmates to a serious, communicable disease" would be an obvious constitutional violation (*id.* at 33). See also *id.* (citing *Hutto* v. *Finney*, 437 U.S. 678, 682 (1978), for the proposition that "the Eighth Amendment require[s] a remedy" for "prison conditions" that "expose[]" inmates to "infectious maladies such as hepatitis and venereal disease"); *Farmer*, 511 U.S. at 843 n.8 (explaining that "a prison official * * * would not escape liability" if he "knows that some diseases are communicable and that a single needle is being used to administer flu shots to prisoners but refuses to listen to a subordinate who he strongly suspects will attempt to explain the associated risk of transmitting disease").

The courts of appeals have had no trouble recognizing that *Helling* is not limited to second-hand smoke, and that the Court's discussion of communicable diseases also clearly establishes the law for qualified immunity purposes. As the Fifth Circuit has

explained, for example, "[i]n light of *Helling*, a reasonable official would understand that operating [a prison] barbershop" in a manner that "exposed [inmates] to * * * serious, communicable diseases" "would violate [inmates' Eighth Amendment] rights." *Johnson* v. *Epps*, 479 F. App'x 583, 586, 592 (5th Cir. 2012).

And, in a case dealing with prison COVID-19 measures specifically, the Second Circuit similarly construed *Helling* to clearly establish that "prison officials may not 'be deliberately indifferent to the exposure of inmates to a serious, communicable disease,'" precluding qualified immunity with respect to a prison's COVID response. *Nazario* v. *Thibeault*, 2023 WL 7147386, at *2 (2d Cir. 2023) (quoting *Helling*, 509 U.S. at 33); see also *id.* (collecting circuit cases providing that "correctional officials have an affirmative obligation to protect inmates from infectious disease," and that "failure to adequately screen newly arrived inmates for communicable diseases would violate the Eighth Amendment") (quoting *Jolly* v. *Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996), and citing *Lareau* v. *Manson*, 651 F.2d 96, 109 (2d Cir. 1981)).[7]

---

[7] In the context of environmental toxins, rather than communicable diseases, the courts have similarly explained that *Helling* is not limited to its specific facts. See *Vega* v. *Semple*, 963 F.3d 259, 276-277 (2d Cir. 2020) (concluding that "*Helling*'s clear pronouncement" clearly established the law prohibiting "deliberate indifference to [inmates'] excessive exposure" to *any* "known toxic environmental substance," and explicitly rejecting the argument "that qualified immunity must be granted absent binding precedent that addresses the *very same* carcinogen in this case"); *Board* v. *Farnham*, 394 F.3d 469, 487 (7th Cir. 2005) (holding that *Helling* clearly established that "the right to adequate and healthy ventilation * * * is squarely rooted in Eighth Amendment principles," and rejecting qualified immunity).

By contrast, the case invoked by Petitioners did not hold that *Helling* fails to clearly establish the law; to the contrary, it observes that "*Helling*" *does* "set[] out the constitutional framework for Eighth Amendment claims about involuntary exposure to environmental hazards." *Hines* v. *Youseff*, 914 F.3d 1218, 1228-1229 (9th Cir. 2019); see Pet. 17-18 (relying on *Hines*). Instead, that case upheld qualified immunity because exposure to the particular toxin in question did not "violate[] current standards of decency" on the facts of the case (*Hines*, 914 F.3d at 1232)—an element that Petitioners do not contest with respect to COVID-19. See Pet. App. 95a-96a (concluding that this element is adequately alleged here).

In sum, the court of appeals here applied the law at precisely the same level of generality articulated by this Court and understood by other courts of appeals: "deliberate[] indifferen[ce] to the exposure of inmates to a serious, communicable disease"—no matter what disease it is—violates the Eighth Amendment. *Helling*, 509 U.S. at 33.[8] No reasonable official could think otherwise.

b. Petitioners' real complaint seems to be that no law could possibly put them on notice that their conduct was unlawful, due to the novel features of the COVID-19 pandemic as a factual matter.

---

[8] This case is therefore quite different from *City and County of San Francisco* v. *Sheehan*, 575 U.S. 600, 613 (2015). Cf. Pet. 18 (quoting *Sheehan* to assert that "'[q]ualified immunity is no immunity at all if clearly established law can simply be defined' as a broad and absolute right—divorced from any context—to be free from exposure to a serious disease."). In *Sheehan*, this Court merely rejected the proposition that "'clearly established' law c[ould] simply be defined as the right to be free from unreasonable searches and seizures." *Sheehan*, 575 U.S. at 613. *Helling* establishes a much more specific constitutional rule than that.

That intimation, however, misunderstands the inquiry. If "public health guidance was uncertain, developing, and consistently changing at the time of the alleged conduct" (Pet. 18), that fact goes not to the clearly established nature of the legal principle—that "deliberate[] indifferen[ce] to the exposure of inmates to a serious, communicable disease" is unlawful (*Helling*, 509 U.S. at 33)—but instead to whether Petitioners actually *were* deliberately indifferent to a known hazard. And *that* is not a clearly established law argument at all, but a quibble with the court of appeals' evaluation of the sufficiency of the factual allegations in the complaints. Cf. pages 13-16, *supra*.

That is why the court of appeals in *Hampton* appropriately found *Polanco* to be "controlling" as to "[t]he subjective component" of the Eighth Amendment claim, which asks whether officials were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and "actually dr[ew] the inference." Pet. App. 96a-97a; cf. Pet. 18 (feigning astonishment at this analysis). The court did not cite *Polanco* as clearly established law for qualified immunity purposes, but rather as controlling precedent on the essentially *factual* question whether "the allegations describe deliberate indifference," given the "nearly word-for-word" similarity of the allegations in the two cases. Pet. App. 97a.

In all, the court of appeals correctly explained that "[a]lthough COVID-19 may have been unprecedented, the legal theory that [Respondents] assert[] is not." Pet. App. 103a (quotation marks omitted; alteration incorporated). Petitioners' arguments about the novelty of the pandemic go to what they knew and when they knew it, not to whether the law clearly put them on notice of the relevant legal principle: that ignoring a known risk of communicable disease is unlawful.

Accord *Nazario*, 2023 WL 7147386, at *2 (similarly concluding that *Helling* clearly established the unlawfulness of deliberate indifference to COVID exposure, and finding that arguments about what "a reasonable official in [defendant's] position would [] have understood * * * in the pandemic's early stages" were disputed factual issues inappropriate for summary judgment). Particularly in light of the inherently factbound nature of their arguments, Petitioners present no compelling basis for review.

2. State-created danger.

The court of appeals also faithfully applied this Court's precedents when it denied Petitioners qualified immunity from Sergeant Polanco's state-created danger claims. See Pet. App. 8a.

The Fourteenth Amendment generally does not "impose an affirmative obligation on the State" to protect a person's life, liberty, or property. *DeShaney* v. *Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). However, *DeShaney* implied an exception to this general rule where the State creates or exacerbates the danger that leads to harm. See *id.* at 201 ("While the State may have been aware of the dangers that [the plaintiff] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). Since *DeShaney*, ten circuits have recognized the state-created danger doctrine,[9] and this Court has repeatedly denied

[9] See *Irish* v. *Fowler*, 979 F.3d 65, 67 (1st Cir. 2020); *Okin* v. *Village of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 428 (2d Cir. 2009); *Sanford* v. *Stiles*, 456 F.3d 298, 304 (3d Cir. 2006); *Doe* v. *Rosa*, 795 F.3d 429, 439 (4th Cir. 2015); *Doe* v. *Jackson Loc. Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *D.S.* v. *E. Porter Cnty. Sch. Corp.*, 799 F.3d 793, 798 (7th Cir. 2015); *Fields* v. *Abbott*, 652 F.3d

certiorari petitions seeking to challenge the exception's constitutionality.[10]

The court below applied the state-created danger exception to the facts alleged and found that the California officials, in a "textbook case of deliberate indifference," affirmatively exposed Sergeant Polanco to a danger he otherwise would not have faced. Pet. App. 15a. Petitioners do not dispute here that the alleged misconduct amounted to a constitutional violation. Instead, Petitioners argue that the California officials did not have "fair and clear warning" that affirmatively introducing a deadly virus to San Quentin and then knowingly exposing Sergeant Polanco to infected inmates might run afoul of the law. Pet. 12 (quoting *Sheehan*, 575 U.S. at 614). But, as both the court of appeals and district court correctly held below, the officials' alleged conduct violated clearly established circuit law. See Pet. App. 17a, 66a.

a. The court of appeals identified two circuit cases that clearly established the law in question: *Pauluk v. Savage*, 836 F.3d 1117 (9th Cir. 2016) and *L.W.* v. *Grubbs*, 974 F.2d 119 (9th Cir. 1992). See Pet. App. 16a-20a. *Pauluk* held that the state-created danger doctrine applies where a state employer affirmatively exposes an employee to workplace conditions that the employer knew were likely to cause serious illness (there, "toxic mold exposure"). 836 F.3d at 1125. And *Grubbs* confirms that dangers arising in a prison

886, 891 (8th Cir. 2011); *Kennedy* v. *City of Ridgefield*, 439 F.3d 1055, 1066 (9th Cir. 2006); *Estate of B.I.C.* v. *Gillen*, 710 F.3d 1168, 1173 (10th Cir. 2013); *Butera* v. *District of Columbia*, 235 F.3d 637, 652 (D.C. Cir. 2001).

[10] See, *e.g.*, *Fowler* v. *Irish*, 142 S. Ct. 74 (2021); *Doe* v. *Jackson Loc. Sch. Dist. Bd. of Educ.*, 141 S. Ct. 895 (2020); *Robinson* v. *Webster County*, 141 S. Ct. 1450 (2021).

workplace are no exception to the doctrine. 974 F.2d at 122. While Petitioners complain of a supposed "hodgepodge approach to the qualified immunity inquiry" (Pet. 14), in fact, *Pauluk* does almost all the analytical work.

In *Pauluk*, the plaintiff alleged that his employers knowingly transferred him to an office building infested with toxic mold. 836 F.3d at 1119. Despite knowledge of the health risk, Pauluk's employers failed to take adequate remedial measures and denied Pauluk's requests to transfer to another facility. *Id.* at 1119-1120. Pauluk became seriously ill and died from mixed mold mycotoxicosis. *Id.* at 1120. The court held that these alleged facts were enough to support a finding of liability under Section 1983. *Id.* at 1125.

In both *Pauluk* and *Polanco*, state officials affirmatively exposed their employees to a potentially fatal illness caused by breathing contaminated air. In both cases, the employers responded to the known risks with deliberate indifference and took inadequate measures to protect their employees. Given these similarities, "every reasonable official would understand" after *Pauluk* that the California officials' alleged actions at San Quentin were "unlawful." *Wesby*, 583 U.S. at 63 (quotation marks omitted).

b. Petitioners attempt to distinguish *Pauluk* from *Polanco* on three minor factual points. However, the court of appeals correctly held that these differences were too insubstantial to confuse reasonable officials about their constitutional obligations given binding circuit precedent. As this Court has held, controlling precedent need not be "directly on point." *al-Kidd*, 563 U.S. at 741. And law is clearly established when "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor* v. *Riojas,* 592

U.S. 7, 9 (2020) (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002).

First, Petitioners claim that *Pauluk* is inapplicable because "it did not involve a prison workplace." Pet. 13. But Petitioners fail to provide any rationale for why this distinction is significant, especially when the outcome in *Pauluk* was not dependent on the location of the mold exposure. Reasonable officials would not read *Pauluk* and believe they could expose their employees to toxic mold so long as the exposure work occurred in a public school or prison workplace rather than an office park. Even if the type of facility where the harm occurred was relevant, circuit precedent clearly established at the time of *Polanco's* injury that the state-created danger doctrine applies in the prison context—*that* is where *Grubbs* comes in. See *Grubbs*, 974 F.2d at 119 (holding that the state plausibly created conditions that led an inmate to sexually assault a nurse at a prison). The qualified immunity analysis asks whether the relevant "legal principle * * * ha[s] a sufficiently clear foundation in then-existing precedent." *Wesby*, 583 U.S. at 63. It does not "require" a single "case directly on point" (*al-Kidd.* 563 U.S. at 741), and the court of appeals' analysis of its precedents was perfectly acceptable.

Second, Petitioners argue that *Pauluk* did not sufficiently put the California officials on notice because mold is not sufficiently like an infectious disease. Pet. 13. Again, it is hard to see how a reasonable official could believe he or she could ignore the danger of COVID-19 simply because it is spread through inhalation of viral aerosols rather than inhalation of airborne mold spores. This cannot be a constitutionally relevant distinction, particularly in light of the accepted principle that officials are "not entitled to qualified immunity on the ground that the law is not

clearly established every time a novel method" causes the harm. *Nelson* v. *City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012); accord, *e.g. Boyd* v. *McNamara*, 74 F.4th 662, 669 (5th Cir. 2023) ("[L]awfulness of force does not depend on the precise instrument used to apply it, and qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.") (quotation marks omitted; alterations incorporated); *Estate of Clark* v. *Walker*, 865 F.3d 544, 553 (7th Cir. 2017) ("For purposes of qualified immunity, [prison officials'] legal duty need not be litigated and then established disease by disease or injury by injury.").

And while COVID-19 was a relatively novel disease, May 2020 was not the "early days of a global pandemic." Pet. 12. As evidenced by the repeated admonishments the California officials received from public health experts, the risks and methods of transmission were well established by the time these acts occurred. See pages 1, 14-15, *supra*. Any reasonable official informed by *Pauluk* should have been at least comparably concerned about affirmatively exposing employees to COVID-19 versus exposing them to toxic mold.

Third, Petitioners note that the employee in *Pauluk* asked for a transfer whereas Sergeant Polanco never requested reassignment. Pet. 14. However, Polanco repeatedly asked the California officials for protective equipment—a request which they denied despite ample available resources. Pet. App. 16a, 41a. In both cases, the victim's request for relief from the state-created danger went unaddressed by the employer, and the specific type of relief requested is not sufficient to alter a reasonable official's responsibility. Petitioners cannot rely on Sergeant Polanco's selfless

commitment to public service to immunize their alleged actions.

c. Petitioners' other arguments are equally unavailing. *Collins* v. *City of Harker Heights*, 503 U.S. 115, 126 (1992) held that there is no general constitutional duty to provide employees with a safe working environment. See Pet. 15 (relying on *Collins*). But *Collins* considered only whether the due process clause required state officials to actively mitigate pre-existing hazards in the workplace (503 U.S. at 125-126); the Court did not address the very different issue implicated by the state-created-danger doctrine: affirmatively creating or exposing an employee to a dangerous environment. *Pauluk* even discusses the distinction between *Collins* and state-created-danger claims at length. See *Pauluk*, 836 F.3d at 1123-1124. Any reasonable official familiar with *Pauluk* would know that *Collins*' holding would be inapplicable to the facts at issue here.

Second, Petitioners point to a First Circuit opinion that found *Pauluk* "not sufficiently analogous" to the plaintiff's COVID-related danger creation claim. See *Ablordeppey* v. *Walsh*, 85 F.4th 27, 34 (1st Cir. 2023). But critically, the reason for the mismatch was "the rapidly evolving situation * * * in the face of a global pandemic" in *February and March* of 2020, when the defendants were dealing with some of the first COVID cases in the state without access to adequate safety equipment or staff. *Id.* at 30-34. As Petitioners' own authorities demonstrate, much more was known about appropriate COVID safety precautions by late May and June 2020, when the acts giving rise to this case took place—but Petitioners actively disregarded prison policy and "ignor[ed] concerns from health care staff." Supp. App. 15a; see pages 5-8, *supra*. And, notably, the officials in *Ablordeppey* were responding to

a COVID outbreak that was not of their making, in contrast to the Petitioners here, who are alleged to have affirmatively introduced COVID to San Quentin.

As with the Eighth Amendment claim, therefore, Petitioners are simply seeking error correction—yet there is no error to be corrected. The Court should deny certiorari.

3. The Court should not expand the textually and historically unjustified qualified immunity doctrine.

Finally, in our conditional cross-petition, we have explained at length that qualified immunity is unlawful and unwarranted as a matter of text, history, and policy: The text of Section 1983 does not provide for any immunities, and the original enacted text—lost as an accident of history rather than a considered amendment—expressly abrogated them; qualified immunity was originally adopted based on historical understandings about common-law immunities that are debated at best; and the current doctrine reflects naked judicial policymaking and, in any event, does not even serve the policy values on which it is premised. See generally Conditional Cross-Pet., No. 23-842.

As we explained, that is all reason why, should the Court grant certiorari in this case, it should also grant the conditional cross-petition to overturn or seriously reevaluate qualified immunity as a logically prior matter. But it is also reason to deny this petition: If qualified immunity is fundamentally unjustified as a departure from text, history, and sound policy, the Court certainly should not grant certiorari to *expand* the atextual, ahistorical, and unwarranted immunity currently available under the doctrine.

C. There is no compelling need for review in this case.

Finally, despite the court of appeals' faithful application of precedent, Petitioners claim that allowing discovery about the "worst epidemiological disaster in California correctional history" (Pet. App. 40a), would undermine qualified immunity doctrine. See Pet. 21. But the conduct alleged here is not the type that qualified immunity exists to protect.

Qualified immunity "shield[s] officials from harassment, distraction, and liability when they perform their duties *reasonably*." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (emphasis added). The quintessential case for qualified immunity involves an officer forced to make a split-second decision that ends in tragic results. See, *e.g.*, *Mullenix* v. *Luna*, 577 U.S. 7, 14 (2015) (extending qualified immunity to an officer for shooting a suspect who "had led police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had twice threatened to shoot officers, and was racing towards an officer's location"); *Kisela* v. *Hughes*, 584 U.S. 100 (2018) (extending qualified immunity to an officer for shooting a suspect who was refusing commands to drop a knife while walking towards another civilian).

Here, the California officials faced no exigent circumstances, and their alleged conduct was not remotely reasonable. Months after acknowledging that the "mass movement of high-risk inmates between institutions * * * [was] potentially dangerous," because any transfer would "carr[y] [a] significant risk of spreading transmission of the disease between institutions" (Pet. App. 38a), California officials transferred 122 high-risk inmates from a prison that had 600 COVID cases to a prison that had none (Pet. App. 153a). The only exigent circumstances California

officials faced were ones of their own creation: they "locked themselves into a tight deadline" and then, in order to meet that self-imposed deadline, "explicitly ordered that the incarcerated persons not be retested" for COVID prior to the transfer. Supp. App. 4a, 59a-60a. Then, in yet another "inexplicable decision" (*id.* at 5a), California officials packed the transferees onto overcrowded buses for ten hours and allowed them to intermingle freely with San Quentin prisoners and staff upon arrival. Pet. App. 4a, 39a.

The twenty-nine deaths that resulted were foreseeable and likely preventable had the officials "slow[ed] down a little and d[one] it right," as employees had urged at the time. Supp. App. 45a. Instead, they "ignor[ed] concerns from health care staff" and "risked the health and lives of the [transferees], as well as the thousands of other incarcerated persons and staff at * * * San Quentin." *Id.* at 14a-15a. Petitioners thus created "the worst epidemiological disaster in California correctional history." *Id.* at 21a (quoting *In re Von Staich,* 56 Cal. App. 5th 53, 57 (2020)).

Given the truly exceptional facts at issue, the lower courts' denial of qualified immunity here will not undermine the doctrine's application in appropriate circumstances. Contra Pet. 21. Indeed, other circuits' rejection of Eighth Amendment deliberate indifference claims in the COVID context only serve to highlight the misconduct here. See *Wilson* v. *Williams*, 961 F.3d 829, 841 (6th Cir. 2020) (noting that the defendants "screen[ed] inmates for the virus; isolate[ed] and quarantin[ed] inmates who may have contracted the virus; limit[ed] inmates' movement * * * and group gatherings; conduct[ed] testing in accordance with CDC guidance; educat[ed] staff and inmates about ways to avoid contracting and transmitting the virus; and provid[ed] masks to

inmates and various other personal protective equipment to staff"); *Swain* v. *Junior*, 958 F.3d 1081, 1090 (11th Cir. 2020) (finding that "increasing screening, providing protective equipment, adopting social distancing when possible, quarantining symptomatic inmates, and enhancing cleaning procedures" amounted to the adoption of extensive safety measures, not deliberate indifference); *Valentine* v. *Collier*, 956 F.3d 797, 802 (5th Cir. 2020) ("[T]he evidence show[ed] that [defendants] ha[d] taken and continue[d] to take measures—informed by guidance from the CDC and medical professionals—to abate and control the spread of the virus.").

Petitioners' slippery slope argument is also contradicted by the evidence to date. In the thirty-three instances in which lower courts have cited one of the three decisions consolidated here, none did so in order to define clearly established law at an improperly high level of generality. Rather, courts most often use the facts of the San Quentin outbreak to justify *rejecting* claims that do not allege similarly egregious misconduct.[11]

Finally, denying review here will simply permit this important litigation to move beyond the motion-

---

[11] See, *e.g.*, *Baltierra* v. *Santoro*, 2023 WL 9119163, at *3 (E.D. Cal. Oct. 23, 2023) (rejecting claims arising from COVID exposure at North Kern State Prison in part because the response was more appropriate than that at San Quentin); *Riggs* v. *Madden*, 2024 WL 85894, at *3 (S.D. Cal. Jan. 5, 2024) (rejecting claims because, unlike in *Hampton*, the plaintiff failed to allege that officials conducted a prison transfer without testing, quarantine, or protective equipment); *Davis* v. *Allison*, 2023 WL 6796753, at *3-4 (E.D. Cal. Oct. 13, 2023) (rejecting claims because prison officials did not demonstrate the same deliberate indifference as occurred at San Quentin).

to-dismiss stage. As these cases progress, a factual record is established, and disputes about that record are ventilated, the supervising courts "may well conclude that * * * a constitutional violation was not clearly established." Pet. App. 65a. But in this preliminary posture, Respondents have alleged more than enough to support the courts' rejection of qualified immunity below.

In the end, 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 the courts below correctly concluded, the egregious, knowing conduct of the California officials here amply satisfies that standard. Certiorari should be denied.

CONCLUSION

The Court should deny the petition.

Respectfully submitted.

MICHAEL J. HADDAD
JULIA SHERWIN
TERESA ALLEN
Haddad & Sherwin LLP
505 17th Street
Oakland, CA 94612

Counsel for Patricia Polanco, Vincent Polanco, Selena Polanco, Gilbert Polanco, Michael Hampton, Jacqueline Hampton, Daniel Ruiz, Santos Ruiz, Fernando Vera, Vanessa Robinson, Daniel Ruiz, Jr., Angelina Chavez, Eric Warner, and Henry Warner

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
SARAH P. HOGARTH
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

EUGENE R. FIDELL
Yale Law School Supreme Court Clinic
127 Wall Street
New Haven, CT 06511

Counsel for Respondents

FULVIO FRANCISCO CAJINA
Law Office of Fulvio F. Cajina
528 Grand Avenue
Oakland, CA 94610

ANDREW NEILSON
Law Offices of Andrew Neilson
528 Grand Avenue
Oakland, CA 94610

Counsel for Karen Legg and Michelle Legg

NANCY L. HERSH
Hersh & Hersh LLP
Suite 2080
601 Van Ness Avenue
San Francisco, CA 94102

CHARLES C. KELLY, II
Hersh & Hersh
1388 Sutter Street
Suite 1210
San Francisco, CA 94109

MATTHEW CARLSON
Law Office Of Matthew D. Carlson
3959 N Buffalo Road
Suite 29
Orchard Park, NY 14127

BEN ROSENFELD
3163 Mission Street
San Francisco, CA 94110

Counsel for Reginald Thorpe

DAN STORMER
BRIAN OLNEY
DAVID CLAY WASHINGTON
Hadsell Stormer Renick & Dai, LLP
128 N Fair Oaks Ave.
Suite 204
Pasadena, CA 91103

DO KIM
Law Offices of Do Kim
Suite 2700
3435 Wilshire Blvd
Los Angeles, CA 90001

SALOMON ZAVALA
Zavala Law Group
1930 Wilshire Blvd, #817
Los Angeles, CA 90057

Counsel for Joaquin Diaz, Hilda Diaz, Yadira Menchu, and Blanca Diaz Houle

BRIAN A. FORD
Law Offices of Brian A. Ford
3330 Geary Boulevard
3rd Floor East
San Francisco, CA 94118

Counsel for Tyrone Love

STANLEY ROBERT APPS
4424 Bellingham Ave.
Studio City, CA 91604

Counsel for Donte Lee Harris, Kenneth Allan Cooper, and Matthew K. Quale, Jr.

April 5, 2024