

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Jonathan Apodaca & Joshua Vigil,
Applicants,

v.

Rick Raemisch & Travis Trani,
Respondents.

**APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI**

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December 15, 2017

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To the Honorable Sonia Sotomayor, Associate Justice of the United States and
Circuit Justice for the Tenth Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30.3, Applicants Jonathan Apodaca and Joshua Vigil respectfully request a 60-day extension of time to file a petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Tenth Circuit in this case, to March 9, 2018. As discussed herein, this case involves an important question of federal constitutional law upon which the lower courts are divided: the right of prisoners in solitary confinement to outdoor exercise.

Mr. Apodaca and Mr. Vigil have not previously sought an extension of time from this Court and Respondents do not oppose this request. Mr. Apodaca and Mr. Vigil request this extension because Counsel of Record, Daniel Greenfield, did not represent applicants before the district court or appellate panel and therefore requires additional time to evaluate the record developed below. Furthermore, Mr. Greenfield has a number of other substantial commitments which would prevent him

from providing the sort of comprehensive analysis that would aid this Court in determining whether to grant certiorari. Finally, co-counsel Elisabeth Owen, who represented Mr. Apodaca and Mr. Vigil in the courts below, has recently experienced a family medical emergency that has warranted a temporary withdrawal of her full attention from this case.

The Tenth Circuit issued its opinion on July 25, 2017. *See Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017) (attached hereto as Exhibit A). On October 10, 2017, Mr. Apodaca and Mr. Vigil's timely petition for rehearing en banc was denied by the Tenth Circuit. *See Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017) (en banc denied Oct. 10, 2017) (attached hereto as Exhibit B). As such, the time for filing a petition would expire on January 8, 2018 absent an extension. Consistent with Rule 13.5, this application has been filed at least 10 days before that date. This Court has jurisdiction over this case under 28 U.S.C. § 1254(1).

1. Mr. Apodaca and Mr. Vigil were confined in administrative segregation at the Colorado State Penitentiary ("CSP") for eleven months. Throughout this time, Mr. Apodaca and Mr. Vigil, *like all prisoners housed in administrative segregation at CSP*, were prohibited from exercising outdoors. Exercise was permitted only within the confines of their cell or another small indoor room.

2. The blanket prohibition on outdoor exercise led Mr. Apodaca and Mr. Vigil, on behalf of a putative class, to sue the prison warden, Travis Trani, and the director of the Colorado Department of Corrections, Rick Raemisch, in their individual capacities. Mr. Apodaca and Mr. Vigil invoked 42 U.S.C. § 1983 and

claimed the complete denial of outdoor exercise for eleven months was a violation of the Eighth Amendment. *Apodaca*, 864 F.3d at 1074.

3. The warden and director moved to dismiss on the grounds that the right to outdoor exercise was not clearly established and, accordingly, that they were entitled to qualified immunity. *Id.* The district court determined that Mr. Lowe had adequately alleged a violation of a clearly established right and therefore denied the motion to dismiss. *Apodaca v. Raemisch*, No. 15-CV-00845-REB-MJW, 2015 WL 13215657 (D. Colo. Oct. 30, 2015), *rev'd and remanded*, 864 F.3d 1071 (attached hereto as Exhibit C).

4. Respondents appealed the district court's qualified immunity ruling to the Tenth Circuit. The Tenth Circuit reversed and remanded "with instructions to grant the motion to dismiss the personal-capacity claims based on qualified immunity." *Apodaca*, 864 F.3d at 1080. The court did not reach the question of whether a denial of outdoor exercise violates the Eighth Amendment. *Id.* at 1077. Rather, the court merely held that any right to outdoor exercise was not clearly established within the Tenth Circuit at the time of the violation. *Id.* at 1077–79.

5. This case presents this Court with an opportunity to clarify an important constitutional right, upon which the circuits are in conflict. Exercise is a basic human need that must be provided to prisoners. *See Wilson v. Seiter*, 501 U.S. 294, 304 (1991). Furthermore, "some form of regular outdoor exercise is extremely important to the psychological and physical well being of [prisoners]." *Thomas v. Ponder*, 611 F.3d 1144, 1152 (9th Cir. 2010).

6. Mr. Apodaca and Mr. Vigil intend to file a petition for certiorari asking this Court to clarify that prison officials may not deny prisoners access to outdoor exercise. That question satisfies this Court's criteria for certiorari: It concerns a fundamental question of federal constitutional law upon which the circuits are divided. Some circuits hold that withholding outdoor exercise from a prisoner constitutes a violation of the Eighth Amendment absent a compelling penological interest in its temporary denial. *See, e.g., Thomas*, 611 F.3d at 1154-55. Others hold that the denial of outdoor exercise does not violate the Eight Amendment if sufficient indoor opportunities are provided. *See, e.g., Smith v. Dart*, 803 F.3d 304, 313 (7th Cir. 2015).

7. Mr. Apodaca and Mr. Vigil respectfully request additional time to file their petition for certiorari for three reasons.

8. First, Mr. Greenfield, did not represent the applicants before the district court or the appellate panel and therefore requires additional time to evaluate the record developed below in order to provide the sort of comprehensive analysis that would aid this Court in determining whether to address this fundamental constitutional issue.

9. Second, Mr. Greenfield has a number of other substantial competing commitments, including the following pending Fourth, Seventh, Tenth, and Eleventh Circuit appeals: *Williamson v. Sterling*, No. 17-6922 (4th Cir.); *Wallace v. Baldwin*, No. 17-2427 (7th Cir.); *Grissom v. Roberts*, No. 17-3185 (10th Cir.); *Quintanilla v. Stanton*. No. 17-14141 (11th Cir.).

10. Third, Ms. Owen, who represented applicants in the courts below, has recently experienced a family medical emergency that has warranted a temporary withdrawal of her full attention from this case.

11. For these reasons, Mr. Apodaca and Mr. Vigil respectfully request that the time to file a petition for a writ of certiorari be extended to and including March 9, 2018.

Respectfully submitted,

/s/Daniel Greenfield

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December 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that, on this 15th day of December, 2017, I caused a copy of the foregoing Application for Extension of Time to be served on the following by first-class mail, postage pre-paid, as well as electronically:

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