No.

IN THE
Supreme Court of the United States

DONNIE LOWE,
Petitioner,

v.

RICK RAEMISCH & TRAVIS TRANI,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether clearly established Eighth Amendment law permits prison officials to permanently deprive a prisoner in solitary confinement of outdoor exercise without a security rationale.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Donnie Lowe respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's opinion (Pet. App. 2a–14a) is published at 864 F.3d 1212. The opinion of the district court (Pet. App. 15a–22a) is unpublished, but is available at 2016 WL 4091175.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 25, 2017. Petitioner timely filed a petition for rehearing, which the court of appeals denied on October 10, 2017. On December 19, 2017, Justice Sotomayor granted an extension of time to file a petition for a writ of certiorari to March 9, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

INTRODUCTION

One hundred and twenty-eight years ago, this Court expressed grave concerns with solitary confinement. *In re Medley*, 134 U.S. 160, 170–71 (1890). More recently, Justice Kennedy has called for this Court to examine its constitutionality and lamented that "research still confirms what this Court suggested over a century ago: Years on end of near-total isolation exact a terrible price." *Davis v. Ayala*, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). And just last term, Justice Breyer described the "terrible" trauma inflicted by solitary confinement and emphasized the need for "constitutional scrutiny" of the practice. *Ruiz v. Texas*, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting from denial on application for stay of execution).

Here, solitary confinement was imposed in a brutal manner that exacerbated its cruelty. For twenty-three years, prisoners in solitary confinement at the Colorado State Penitentiary ("CSP") were denied all access to outdoor recreation. ECF No. 1 at ¶ 25. Respondents did not assert that the blanket prohibition at CSP was compelled by a security rationale. *See* ECF No. 10. In fact, Respondents did not assert any rationale. *See id*. Yet, Petitioner Donnie Lowe endured that inhumane regime for more than two years. ECF No. 1 at ¶ 99.

When the Tenth Circuit held that prison officials were shielded by qualified immunity, it created a split with five other circuits. In every other circuit to have considered this issue, prison officials may not even temporarily deny those in solitary confinement access to outdoor recreation absent a security justification. There is good reason for the prevailing view: in light

of the isolation and restrictions on out-of-cell movement inherent to solitary confinement, it has long been recognized that the ameliorating effect of "outdoor exercise [is] a necessity." *Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (Kennedy, J.).

This case is an ideal vehicle for considering the question presented because the record is clean and the decisions below reasoned. If, however, the Court does not grant plenary review, it should summarily reverse for two reasons. First, the appellate decision squarely conflicts with this Court's holding that a security rationale must motivate restrictions of the sort imposed upon Petitioner. Second, the court of appeals' qualified immunity analysis cannot be reconciled with the inquiry mandated by this Court.

STATEMENT OF THE CASE

I. Petitioner's Prolonged Solitary Confinement Without Outdoor Exercise.

Petitioner spent more than eleven years of his life in solitary confinement. ECF No. 1 at ¶ 17. For much of that time, he was incarcerated at CSP, where he was also denied any access to outdoor recreation. This case concerns the final two-plus years of that deprivation. ECF No. 1 at ¶ 99.

At CSP, prisoners in solitary confinement are housed alone in a small cell containing a metal bed, desk, and toilet. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1137 (D. Colo. 2012). "The cells [at CSP] were designed in a manner that discourages and largely restricts vocal communication between cells." *Id.* Petitioner was confined to his cell at CSP for twenty-three hours a day, five days out of the week, and twenty-four hours a day the remaining two. ECF No.

1 at ¶ 27. In short, "[t]he inmates' daily existence [at CSP] is one of extreme isolation." *Anderson*, 887 F. Supp. 2d at 1137.

As members of this Court have recognized, prolonged solitary confinement inflicts profound harm. *See*, *e.g.*, *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring). And CSP's solitary confinement regime was uniquely harmful. From 1993 until 2016, prisoners in solitary confinement at CSP were denied access to outdoor recreation. ECF No. 1 at ¶ 25.

Respondents did not assert that the blanket prohibition at CSP was compelled by a security rationale. *See* ECF No. 10. In fact, Respondents did not assert any rationale. *See id*. Notably, "CSP itself was designed with a central open-air courtyard that could be used for outdoor exercise." *Anderson*, 887 F. Supp. 2d at 1141; *see also* ECF No. 1 at ¶ 71.

As a consequence of the outdoor exercise ban, on those days Petitioner was permitted to leave his cell, he was escorted to another cell-like space where he could recreate alone for approximately one hour. *See generally* ECF No. 1 at ¶ 27. As one court has observed of the exercise room available to prisoners in solitary confinement at CSP:

> This room is empty except for a chin-up bar. It has two vertical "windows," approximately five feet by six inches in size, which are not glassed but instead are covered with metal grates. The grates have holes approximately the size of a quarter that open to the outside.

Anderson, 887 F. Supp. 2d at 1137 (quotation marks in original); *see also* ECF No. 1 at ¶ 27; Pet. App. 23a

(reproducing a photograph of that room from another challenge to the outdoor exercise restriction at CSP, Exhibit 9 to Defendants' Motion for Partial Summary Judgment, ECF No. 50-9, *Decoteau v. Raemisch*, No. 1:13-cv-03399 (D. Colo. July 6, 2016)).

Petitioner was released from CSP in March 2015. Pet. App. 15a. On August 25, 2015, Petitioner filed the present action, seeking damages and alleging that the deprivation of outdoor exercise violated the Eighth Amendment. ECF No. 1.

Approximately three months later, in response to another lawsuit, Respondents entered into a settlement agreement obligating them to provide outdoor exercise to prisoners at CSP. *See* Pet. App. 21a (citing Settlement Agreement, ECF No. 162, and Minute Entry for Fairness Hearing, ECF No. 180, *Decoteau v. Raemisch*, No. 1:13-cv-3399 (D. Colo. July 6, 2016)). As a result, the Colorado Department of Corrections ("CDOC") erected exercise areas at CSP where prisoners in segregation now recreate outdoors. *See generally* Motion for Hearing at 2, ECF No. 115, *Decoteau v. Raemisch*, No. 1:13-cv-3399 (D. Colo. July 6, 2016).

II. The District Court's Decision.

On November 9, 2015, Respondents filed a motion to dismiss. ECF No. 10. In relevant part, they argued that they were entitled to qualified immunity. ECF No. 10 at 7–14. Respondents conceded that "the right to engage in outdoor exercise" is "clearly established." ECF No. 10 at 9. They contended, however, that only "continuous and prolonged" deprivations violate the Eighth Amendment, and that no court has defined

that measure to mean a two-plus year deprivation.[1] *Id*.

The district court denied the motion to dismiss. Pet. App. 22a. Nearly two decades ago, the district court explained, the Tenth Circuit decided *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999). Pet. App. 18a–19a. *Perkins* "held that the inmate's complaint that he had been denied all outdoor exercise for more than nine months" stated an Eighth Amendment claim. *Id*. Given the much shorter period at issue in *Perkins*, that case surely put Respondents on notice that they could not lawfully deprive Petitioner of outdoor exercise for more than two years. *See* Pet. App. 22a.

The district court also found that a subsequent Tenth Circuit decision, *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008) (unpublished), further entrenched the rule of *Perkins*. Pet. App. 19a–20a. In *Ajaj*, the Tenth Circuit acknowledged that "'some form of regular outdoor exercise is extremely important to the psychological and physical well-being of inmates.'"[2] Pet. App. 19a (quoting *Ajaj*, 293 F. App'x

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[1] Notably, in connection with a putative class action challenging the outdoor exercise restriction at CSP, *see Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017), Respondents argued that "the 12 month time period discussed in *Ajaj*, is the appropriate measure" of an Eighth Amendment violation. Motion to Dismiss at 8, ECF No. 18, *Apodaca v. Raemisch*, No. 1:15-cv-00845 (D. Colo. Oct. 30, 2015). Petitioners in *Apodaca*, represented by undersigned counsel, also seek this Court's review of the Tenth Circuit's qualified immunity decision. *See Apodaca v. Raemisch*, No. 17A650 (U.S. Dec. 18, 2017).

[2] Ultimately, the *Ajaj* Plaintiff, a prisoner at a federal facility who regularly declined the opportunity to recreate outside, had not come forth, at summary judgment, with sufficient evidence

at 583). The district court also called attention to the opinion of the concurring judge in *Ajaj*, who wrote that the Tenth Circuit's "'cases suggest that the general rule entitling prisoners to outdoor exercise may not be violated, absent a strong justification.'" Pet. App. 19a–20a (quoting *Ajaj*, 293 F. App'x at 589–90 (Henry, C.J., concurring)).

The court also noted that a prior district court opinion, *Anderson v. Colorado*, applied governing Tenth Circuit law to CSP. Pet. App. 20a–21a. In *Anderson*, which issued six months before Petitioner entered CSP, Pet. App. 20a, the district court concluded that prison officials had violated the Eighth Amendment by withholding outdoor exercise for more than a decade from a prisoner in solitary confinement at CSP:

> CDOC officials know that the CSP is out of step with the rest of the nation. They have been told by the experts whom they hired that access to outdoor recreation at the CSP is deficient. However, so far as the evidence in this case shows, nothing has been done to provide any form of outdoor exercise to Mr. Anderson or to other inmates who have been held in administrative segregation at the CSP for long periods.

Pet. App. 21a (quoting *Anderson*, 887 F. Supp. 2d at 1142).

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that his Eighth Amendment right to outdoor exercise had been violated. Pet. App. 19a.

III. The Tenth Circuit's Decision.

Respondents took an interlocutory appeal of the district court's order denying their motion to dismiss. They reiterated that Tenth Circuit law does not clearly establish that the denial of outdoor exercise for a period of two-plus years violates the Eighth Amendment. Appellant Br. at 17.

Without considering the absence of a security rationale, the court of appeals reversed, holding that Respondents were entitled to qualified immunity. Pet. App. 14a.

The court of appeals acknowledged that its precedent eliminated "any 'doubt that total denial of exercise for an extended period of time would constitute cruel and unusual punishment prohibited by the Eighth Amendment.'" Pet. App. 6a (quoting *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir. 1994)). Nonetheless, the court opined that the question in this case—whether denying outdoor exercise for two years and one month to a prisoner in solitary confinement violates the Eighth Amendment—remained open for several reasons. Pet. App. 6a–10a.

First, the court of appeals summarily concluded that "[t]he deprivation of outdoor exercise for two years and one month is not so obviously unlawful that a constitutional violation would be undebatable." Pet. App. 10a. Second, the court of appeals considered its own precedent insufficiently probative of the right at issue. Pet. App. 6a–10a. Finally, the court observed that the district court finding in *Anderson*, that CSP prison officials had violated the Eighth Amendment by denying outdoor exercise to a prisoner in solitary confinement, was irrelevant for purposes of qualified immunity. Pet. App. 12a–14a.

Petitioner timely filed a petition for rehearing *en banc*, which was denied. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

The circuit split created by the court of appeals concerns a fundamental constitutional deprivation and warrants this Court's review.

For more than a century, this Court has expressed grave concerns with solitary confinement, a restriction imposed here in brutal fashion. In this case, the court of appeals concluded that qualified immunity shielded prison officials who permanently denied outdoor recreation to a prisoner consigned to solitary confinement.

This holding creates a split with five other circuits. Every other circuit to consider the issue has concluded that prison officials may not even temporarily deprive those subjected to solitary confinement of outdoor exercise unless the restriction is compelled by a security rationale. As one court recognized decades ago, "[t]here is substantial agreement among the cases in this area that some form of regular outdoor exercise is extremely important to the psychological and physical well being of the inmates." *Spain*, 600 F.2d at 199 (Kennedy, J.). That proposition applies with particular force to prisoners in solitary confinement. *See id*.

While the right at stake is clearly established pursuant to this Court's qualified immunity jurisprudence, this case also presents an excellent opportunity to respond to concerns that the doctrine has "diverged to a substantial degree from the historical standards" that prevailed when Congress enacted Section 1983. *See*, *e.g.*, *Wyatt v. Cole*, 504 U.S.

158, 170 (1992) (Kennedy, J., joined by Scalia, J., concurring); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring).

Because the record is clean and the decisions below reasoned, this case is an ideal vehicle for considering the question presented.

I. The Tenth Circuit's Decision Creates A Split With Five Other Circuits Which Have Concluded That Prison Officials May Not Even Temporarily Deprive Those In Solitary Confinement Of Outdoor Exercise Without A Security Rationale.

The Tenth Circuit stands alone. In five other circuits, prison officials may not inflict even a temporary restriction of this nature without a security rationale. *Spain v. Procunier*, 600 F.2d 189, 192 (9th Cir. 1979) (Kennedy, J.), is the seminal opinion. Subsequent decisions are faithful to its principles.

Ninth Circuit. In *Spain*, several prisoners who were charged with or convicted of rioting and other violent acts were assigned to an "adjustment center" used to segregate and discipline disruptive prisoners. 600 F.2d at 192. The prisoners were then denied all outdoor exercise for periods of up to four-and-a-half years. *Id*. The court affirmed the district court finding that "[t]he denial of fresh air and regular exercise constitutes cruel and unusual punishment," without reaching the question of "whether a denial is a per se violation of the eighth amendment." *Id*. at 199. Although the state argued that the deprivation was a security measure to prevent violent attacks and escape attempts, the court found that the "concerns justif[ied] not permitting plaintiffs to mingle with the

general prison population but [did] not explain why other exercise arrangements were not made," noting that "[t]he cost or inconvenience of providing adequate facilities is not a defense to the imposition of a cruel punishment." *Id*. at 200. "Several factors combined to make outdoor exercise a necessity. [Administrative Confinement] prisoners were in continuous segregation, spending virtually 24 hours every day in their cells with only meager out-of-cell movements and corridor exercise. Their contact with other persons was minimal." *Id.* at 199; *see also Norwood v. Vance*, 591 F.3d 1062, 1068–70 (9th Cir. 2010) (in light of "extraordinary violence gripping the prison [that] threatened staff and inmates alike," qualified immunity shielded prison officials responsible for temporary outdoor exercise restriction); *Allen v. Sakai*, 48 F.3d 1082, 1087–88 (9th Cir. 1994) (prison officials not entitled to qualified immunity because prisoner in solitary confinement was deprived of outdoor exercise without an antecedent "determination by prison officials that he presented a 'grave security risk when outside his cell' and that measures were necessary to deter violent behavior") (citation omitted)).

Fifth Circuit. In *Hernandez v. Velazquez*, a prisoner in solitary confinement was deprived of outdoor exercise for thirteen months after he was identified as a member of the Texas Syndicate, a violent prison gang engaged in "planning a gang war" in retaliation for the murder of one of its members by a rival prison gang. 522 F.3d 556, 558–59 (5th Cir. 2008) (per curiam). Prison officials determined that withholding outdoor exercise was necessary to preserve institutional security in light of threatened

gang violence. *Id.* Moreover, the Eighth Amendment was not violated because Hernandez "presented no evidence at summary judgment" that he "suffered a serious illness or injury" as a result of the deprivation. *Id.* at 561. The court explained that its analysis "follow[ed] from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Id.* at 560–61 (internal quotation marks omitted).

Sixth Circuit. In *Walker v. Mintzes*, prison officials drastically decreased yard time after an outbreak of "rioting . . . burning and looting," with prisoners in solitary confinement receiving virtually no outdoor time for a year. 771 F.2d 920, 924, 926–27 & n.3 (6th Cir. 2016). The district court found the deprivation violated the Eighth Amendment, but, without explanation, ordered different minimum yard times depending on the classification of each prisoner. *Id*. at 926–27. In light of "the inmates' constitutional need for time outdoors," the court remanded for "further explanation or rationale with respect to the bases for these differences . . . taking into account, of course, prison security requirements and conditions." *Id*. at 927–28.

Seventh Circuit. In *Pearson v. Ramos*, a prisoner was consigned to solitary confinement and denied outdoor exercise for one year in response to grave misconduct, including arson and the brutal assault of a guard. 237 F.3d 881, 885 (7th Cir. 2001). Under the circumstances, the court held that the restriction did not violate the Eighth Amendment. *Id.* As the court explained, "[t]o allow [the prisoner] exercise in the yard would have given him additional opportunities to attack prison staff and set fires. Preventing access to

the yard was a reasonable method of protecting the staff and other prisoners from his violent propensities." *Id.* The court also noted that qualified immunity would shield prison officials in light of the security rationale for the restriction. *Id.* at 884.

Eleventh Circuit. In *Bass v. Perin*, two prisoners designated a threat to security—for possession of firearms, the murder of a prison guard, and attempted escape—were assigned to solitary confinement and deprived of all outdoor exercise for more than two years. 170 F.3d 1312, 1315 (11th Cir. 1999). The court recognized the gravity of the restriction, observing that "[a]lthough being in solitary confinement with minimal time outside is only marginally different from being in solitary confinement with no time outside, there is nevertheless a significant difference between some time outside—even a minimal amount—and none at all." *Id.* at 1316. The "pain inflicted on the plaintiffs, however, cannot be said to be unnecessary" because "it would be hard to imagine a situation in which two persons had shown a greater threat to the safety and security of the prison." *Id.* Consequently, the court held that the Eighth Amendment was not violated. *Id.* at 1317.

Petitioner's claim that he was subjected to an extreme form of solitary confinement was thrown out because he was imprisoned in Colorado. Had he been incarcerated in one of the twenty-two states that comprise the Fifth, Sixth, Seventh, Ninth, and Eleventh Circuits, Petitioner's claim would not have been dismissed.

II. This Case Is A Perfect Vehicle To Resolve This Issue.

This case is ideally suited to resolving the question of whether clearly established Eighth Amendment law permits prison officials to permanently deprive a prisoner in solitary confinement of outdoor exercise without a security rationale.

The decision below squarely presents the issue raised by this petition. That prison officials are purportedly entitled to qualified immunity was the court of appeals' sole reason for reversing the district court. Both the district court and the court of appeals examined the question in substantial, reasoned decisions.

The record below is straightforward. Generally speaking, prisoners in solitary confinement can be temporarily denied access to outdoor recreation as a consequence of a variety of dangerous misconduct. *See supra* pp. 10–13. In the typical case, the specific asserted security rationale must be balanced against the right at issue. And the record concerning each is likely to be nuanced given the complexities of prison security. *Id*. This case, by contrast, offers unusual clarity in that prison officials have not asserted an individualized security rationale for withholding outdoor access from Petitioner: the restriction was permanent and applied indiscriminately to all prisoners subjected to solitary confinement.

For each of these reasons, this case squarely raises the question presented.

III. The Issues Presented Are Important.

The split created by the decision below presents a question of fundamental importance.

1. Long-term solitary confinement is devastating to human beings. For greater than a century, this

Court has expressed significant doubts about solitary confinement. In 1890, the Court described it as "an additional punishment of the most important and painful character[.]" *Medley*, 134 U.S. at 171. Already, this Court had come to recognize its destructive effects, noting that after even one month of solitary confinement many prisoners descended into a "semi-fatuous condition," "became violently insane," "committed suicide," and "did not recover sufficient mental activity to be of any subsequent service to the community." *Id*. at 168.

Since that time, more evidence that solitary confinement causes profound harm has accrued. Indeed, "[n]early every scientific inquiry into the effects of solitary confinement over the past 150 years has concluded that subjecting an individual to more than 10 days of involuntary segregation results in a distinct set of emotional, cognitive, social, and physical pathologies." Kenneth L. Appelbaum, *American Psychiatry Should Join the Call to Abolish Solitary Confinement*, 43 J. AM. ACAD. PSYCHIATRY & L. 406, 410 (2015) (quoting David H. Cloud, et al., *Public Health and Solitary Confinement in the United States*, 105(1) AM. J. PUB. HEALTH 18, 21 (2015)) (alteration in original). As another expert observes, "[e]mpirical research on solitary and supermax-like confinement has consistently and unequivocally documented the harmful consequences of living in these kinds of environments." Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME & DELINQUENCY 124, 130 (2003).

Correctional experts like the Executive Director of the Colorado Department of Corrections ("CDOC"), Respondent in this case, have also called attention to

the dangers of solitary confinement. *See* ECF No. 1 at ¶¶ 44–46. In fact, eighteen months before Petitioner filed this lawsuit, Respondent wrote an op-ed in the New York Times, describing the twenty hours he spent in a CDOC solitary confinement cell. *See* Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014, at A25.[3] He noted that "Terry Kupers, a psychiatrist and expert on confinement," has long documented the "many psychological effects of solitary." *Id.* And he wondered, if he had to live in solitary confinement, "[h]ow long it would take before [it] chipped [] away" his "mind." *Id.* Whatever the precise measure, Respondent was "confident that it would be a battle [he] would lose." *Id.*

The consensus among experts that prolonged solitary confinement is uniquely destructive is reflected in calls from members of this Court to examine its constitutionality. *See*, *e.g., Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting). Justice Breyer has observed that "it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms," including hallucination, panic, paranoia, and self-mutilation. *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting) (citing Haney, *supra*, at 130; Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J. L. & POL'Y 325, 331 (2006)). And Justice Kennedy has emphasized "[t]he human toll wrought by extended terms of isolation" and described solitary confinement as a "regime that will bring you

[3] *Available at* https://www.nytimes.com/2014/02/21/opinion/my-night-in-solitary.html.

to the edge of madness, perhaps to madness itself." *Ayala*, 135 S. Ct. at 2209 (Kennedy, J., concurring).

2. This case presents an especially cruel incarnation of solitary confinement—isolation compounded by being denied access to the outdoors for years on end. Petitioner's only respite from his isolation cell was a similarly-sized, even starker room—deemed an "exercise" cell because of the existence of a single pull-up bar. Pet. App. 23a. His "out-of-cell" recreation time consisted of walking around another cell. As Justice Kennedy observed nearly 40 years ago, the isolation and inactivity intrinsic to solitary confinement "combined to make outdoor exercise a necessity." *Spain*, 600 F.2d at 199.

The "dehumanizing effect of solitary confinement," *Glossip*, 135 S. Ct. at 2765 (Breyer, J., dissenting), was amplified here in an extreme manner—a circumstance that could, without this Court's intervention, metastasize. This Court should grant certiorari to ensure that prison officials have a disincentive against implementing a regime that may exceed human capacity to bear and that a humane society cannot tolerate. *See Ayala*, 135 S. Ct. at 2210 (Kennedy, J., concurring) ("The degree of civilization in a society can be judged by entering its prisons." (citing The Yale Book of Quotations 210 (F. Shapiro ed. 2006) quoting Fyodor Dostoyevsky, THE HOUSE OF THE DEAD (Constance Garnett trans. 1961) (1862))).

This Court has granted certiorari in the face of qualified immunity shielding prison officials from liability for disturbing conduct even where relatively few prisoners had been or were likely to be subjected to the challenged policy. *See Hope v. Pelzer*, 536 U.S. 730, 733 (2002). Yet, even were this Court to ignore

the relevance of this case to the solitary confinement regime itself, it did not occur in isolation. For twenty-three years, prison officials applied this restriction to all prisoners languishing in solitary confinement at the State's largest supermax facility. And while the restriction at CSP was mercifully discontinued in 2016, there is nothing to stop officials from reviving it at another prison in the future.

3. If this Court ultimately considers whether the Eighth Amendment imposes limitations on solitary confinement generally, that question will require an intricate balancing of security interests and constitutional rights. But the issue here is narrow, and stark—does solitary confinement with the added cruelty of being denied access to the outside violate the Eighth Amendment when unaccompanied by a security rationale?

Respondents did not claim a security rationale for their categorical ban on outdoor exercise for solitary confinement prisoners at CSP. Nor did they explain why CSP needed to ban outdoor exercise for solitary confinement prisoners while solitary confinement prisoners elsewhere have long been allowed outside. *See supra* pp. 10–13. In a broader case, "the judiciary may be required, within its proper jurisdiction and authority, to determine whether workable alternative systems for long-term [solitary] confinement exist." *Ayala,* 135 S. Ct. at 2210 (Kennedy, J., concurring). At minimum, however, the experience of other states shows that solitary confinement *with outdoor exercise* is a "workable alternative system[ ]" to solitary confinement *without outdoor exercise*. *Id.*; *see also Procunier v. Martinez*, 416 U.S. 396, 414 n. 14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be

relevant to a determination of the need for a particular type of restriction."), *overruled on other grounds*, *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

IV. The Tenth Circuit's Decision Is Wrong.

The decision below is incorrect because it misapplies this Court's qualified immunity jurisprudence. Although "[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), this Court has squarely rejected the theory that prison officials are immune from liability "unless the very action in question has previously been held unlawful." *Hope*, 536 U.S. at 739. In other words, this Court "'do[es] not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *al-Kidd*, 563 U.S. at 741).

In this case, the question is whether it would be clear to a reasonable official that denying outdoor exercise was unlawful "in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194–95, 202 (2001). In accordance with this Court's qualified immunity jurisprudence, it has long been beyond debate that the Eighth Amendment does not countenance Petitioner's mistreatment.

First, "[t]he obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated [Petitioner's] constitutional protection against cruel and unusual punishment." *Hope*, 536 U.S. at 745. Depriving a prisoner of access to the outdoors for more than two years is shocking and, contrary to the court

of appeals' analysis, exactly the sort of deprivation that "obviously crossed a constitutional line." *See* Pet. App. 12a. The compulsion to go outside and feel the wind and sun is universal. Impeding it for years on end ensured that Petitioner "was treated in a way antithetical to human dignity." *Hope*, 536 U.S. at 745.

Worse still is that this obviously cruel regulation was imposed without a corresponding security rationale. This Court has long made clear that, consistent with the Eighth Amendment, restrictions of this nature may not be inflicted without a security rationale. *Hope*, 536 U.S. at 738 (this Court's Eighth Amendment "precedent clearly prohibits" extreme restrictions absent countervailing "safety concerns" or "an emergency situation"). Prison officials have not, however, asserted a security rationale for their policy.

Second, the Tenth Circuit's own precedent further emphasized that outdoor exercise could not be withheld for more than two years without violating the Eighth Amendment. In particular, the Tenth Circuit's decisions in *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999), and *Fogle v. Pierson*, 435 F.3d 1252 (10th Cir. 2006), "placed the . . . constitutional question beyond debate." *See Mullenix*, 136 S. Ct. at 308.

In *Perkins*, the Tenth Circuit held that a Kansas prisoner in solitary confinement adequately stated an Eighth Amendment claim where prison officials denied him outdoor exercise for nine months:

> We conclude that plaintiff's complaint presents facts from which a factfinder could infer both that prison officials knew of a substantial risk of harm to plaintiff's well being resulting from the

> lengthy denial of outdoor exercise and that they disregarded the harm. Therefore, the district court erred in *sua sponte* dismissing plaintiff's Eighth Amendment claim for deprivation of outdoor exercise.

165 F.3d at 810.

Perkins alone was enough to put Respondents on notice that their actions were unlawful. But *Perkins* is not the only Tenth Circuit case that provided notice. In *Fogle*, the court of appeals reviewed a claim concerning the withholding of outdoor exercise for three years from a prisoner in solitary confinement. 435 F.3d at 1260. The Tenth Circuit held that "the district court erred as a matter of law in concluding that a prisoner must allege denial of all exercise, not just outdoor exercise, to present an 'arguable' claim." *Id*. As the *Fogle* court recognized, "the extended deprivation of outdoor exercise" could represent an "excessive risk to [Fogle's] well-being." *Id*. (citation omitted).

Moreover, the *Fogle* decision involves facts nearly identical to those at issue here. The deprivation of outdoor exercise occurred at CSP, the same prison implicated in this case. *See* Order at 3, ECF No. 12, *Fogle v. Slack*, No. 1:05-cv-01211 (D. Colo. July 20, 2010). And, as is the case here, Fogle "acknowledge[d] that he [was] allowed access to a cell with a pull-up bar a few times each week"—*i.e.*, the same indoor recreation room available to Petitioner. *Fogle*, 435 F.3d at 1260 n.4.[4]

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[4] And *Fogle* does not represent the only time prison officials were put on notice that the outdoor exercise ban imposed at CSP

Fogle and *Perkins* provided prison officials with clear notice that a two-plus year deprivation of outdoor exercise is forbidden. Indeed, they are far more illustrative of a clearly established right than the Eleventh Circuit precedent this Court relied upon in *Hope v. Pelzer* for the proposition. *See Hope*, 536 U.S. at 742–43. It is difficult to imagine what more precision the Tenth Circuit would require before concluding that Respondents were on notice that it was unlawful to deprive Petitioner of outdoor exercise for more than two years. Perhaps they would require a Tenth Circuit case with *identical* facts, but this Court has repeatedly stated that is not necessary. *See*, *e.g.*, *Hope*, 536 U.S. at 739-41; *Mullenix*, 136 S. Ct. at 308. To overcome Respondents' qualified immunity defense, Petitioner must demonstrate the officials in question had "fair warning" of what the law required. *See*, *e.g.*, *Hope*, 536 U.S. at 741. That standard has been met here. *See Fogle*, 345 F.3d 1252; *Perkins*, 165 F.3d 803.

In sum, the combined weight of the obvious cruelty inherent in the practice, this Court's precedent, and Tenth Circuit authority permits only two conclusions: prison officials were "incompetent" or they "knowingly violate[d] the law." *Mullenix*, 136 S. Ct. at 308 (quoting *Malley v. Briggs*, 475 U. S. 335, 341 (1986)).

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violated the Eighth Amendment. *See Anderson*, 887 F. Supp. 2d at 1142. Even assuming that the district court order in *Anderson* does not constitute clearly established law, it nevertheless provided Respondents with substantial notice that their conduct was unconstitutional. *See Hope*, 536 U.S. at 744–45 (Department of Justice report decrying the challenged conduct, although not communicated to defendants, nevertheless "buttressed" the "conclusion that a reasonable person would have known of the violation") (internal quotations and citations omitted)).

V. Granting Review Would Allow The Court To Revisit The Law Of Qualified Immunity.

Although the right at issue here is clearly established under the Court's qualified immunity doctrine, this case also offers an opportunity to consider whether the law of qualified immunity comports with the rules that prevailed when Congress enacted 42 U.S.C. § 1983.

Several members of this Court have observed that the qualified immunity doctrine has "diverged from the historical inquiry mandated by the statute." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring); *accord Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., joined by Scalia, J., concurring) ("In the context of qualified immunity for public officials, however, we have diverged to a substantial degree from the historical standards."); *Crawford–El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., joined by Thomas, J., dissenting) ("[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted.").

Indeed, the decision below rested on an immunity that would not have been available to Respondents when § 1983 was enacted. *See*, *e.g.*, William Baude, *Is Qualified Immunity Unlawful*, 106 CAL. L. REV. 45, 55–61 (2018). In 1871, most government officers were held strictly liable for harm resulting from illegal or unconstitutional misconduct, and the burden of such liability was ameliorated by the availability of indemnification. *Id.* at 56–57; *see also*, *e.g.*, *Tracy v. Swartwout*, 35 U.S. 80, 98–99 (1836) ("Some personal

inconvenience may be experienced by an officer who shall be held responsible in damages for illegal acts done under instructions of a superior; but, as the government in such cases is bound to indemnify the officer, there can be no eventual hardship."); *Milligan v. Hovey*, 17 F. Cas. 380, 381 (No. 9605) (C.C.D. Ind. 1871) (finding an officer liable if his actions contravened the Constitution).

At common law, the purpose of subjecting government officials who violated a constitutional right or otherwise engaged in illegal misconduct to strict liability "was to ensure legal accountability for the benefit of the victim of the government wrongdoing and to place Congress in charge of protecting officers from the consequences of potentially ruinous personal liability." James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1914 (2010). Qualified immunity, much like indemnity, relieves the wrongdoer from financial responsibility but, unlike indemnity, leaves the victim of the wrongdoer bearing the ultimate burden. Where there is a violation of a prisoner's constitutional rights, awarding prison officials qualified immunity cannot be squared with common law immunities that existed at the time § 1983 was enacted. Such expansive grants of immunity allow officers to avoid liability for their actions, while victims are left without redress under the statute specifically designed for such violations.

Moreover, qualified immunity is least compelling where the challenged action is deliberative rather than heat-of-the-moment. Most of this Court's recent qualified immunity cases have involved split-second

decision making by police officers in the field, often during potentially life-threatening situations. *See, e.g.*, *Mullenix*, 136 S. Ct. at 308 (observing that qualified immunity is especially compelling in the Fourth Amendment context, as "[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts" (internal quotation omitted)); *see also* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 63 nn.6 & 7 (2016) (collecting recent cases). Such circumstances may not lend themselves to second guessing. This case, in contrast, is the result of a policy implemented in 1993. From that time, until 2016 when the ban was rescinded, prison officials had ample time to consider and re-consider their decision to withhold outdoor exercise without any of the exigencies that typically accompany this Court's qualified immunity cases.[5]

For each of the aforementioned reasons, this Court should grant certiorari, resolve the circuit split created by the Tenth Circuit, and correct the Tenth Circuit's decision.

VI. In The Alternative, The Court Should Summarily Reverse.

If the Court chooses not to grant plenary review, it should summarily reverse the court of appeals for two reasons.

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[5] This Court's guidance on qualified immunity would be particularly helpful in the context of enduring prison conditions that are the result of policies maintained under circumstances conducive to careful deliberation.

First, without examining whether a security rationale compelled the outdoor exercise restriction imposed by prison officials, the court of appeals held that qualified immunity shielded them from liability. This error warrants summary reversal because it so squarely conflicts with this Court's precedent.

As set forth above, it has long been clear that restrictions like those imposed upon Petitioner may not be instituted without a security rationale. *Hope*, 536 U.S. at 738. Prison officials have not, however, asserted a security rationale for their policy.

Second, the court of appeals' qualified immunity analysis diverged radically from the inquiry mandated by this Court. The court of appeals would require an identical case to overcome Respondents' qualified immunity defense. However, this Court has long made it clear that such precision is not required. *Hope*, 536 U.S. at 739–41; *Mullenix*, 136 S. Ct. at 308. Rather, Petitioner must show that the officials in question had "fair warning" of what the law required. *See*, *e.g.*, *Hope*, 536 U.S. at 741. That burden is satisfied here. *See Fogle*, 345 F.3d 1252; *Perkins*, 165 F.3d 803.

Because the decision of the court of appeals conflicts dramatically with this Court's precedent, summary reversal is appropriate.

CONCLUSION

For the foregoing reasons, the Court should grant either the petition for a writ of certiorari or summary reversal.

Respectfully submitted,

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