No. 17-1284 & 17-1289

IN THE

Supreme Court of the United States

JONATHAN APODACA, JOSHUA VIGIL, and DONNIE LOWE,

Petitioners,

v.

RICK RAEMISCH & TRAVIS TRANI,

Respondents.

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

CONSOLIDATED REPLY FOR PETITIONERS

ELISABETH L. OWEN
LEVIN SITCOFF P.C.
1512 Larimer Street,
Suite 650
Denver, CO 80202
(303) 575-9390

DANIEL M. GREENFIELD
Counsel of Record
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

Attorneys for Petitioners

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CONSOLIDATED REPLY FOR PETITIONERS

Respondents do not dispute that the Colorado State Penitentiary ("CSP") denied outdoor exercise to all prisoners in solitary confinement.[1] Respondents do not—even now—offer a justification.

Instead, Respondents argue in opposition that: (1) the vehicles are poor because Petitioners offer arguments in support of certiorari that they did not in opposing qualified immunity, and (2) there is no clearly established right to outdoor exercise while in solitary confinement. Respondents' first argument is a red herring, and its second underscores the Tenth Circuit's divergence from this Court's qualified immunity jurisprudence.

First, Petitioners claimed below and before this Court that CSP's permanent ban violated the Eighth Amendment. Petitioners argued below and before this Court that Tenth Circuit precedent clearly established the illegality of Respondents' conduct. Petitioners also argue before this Court that the Tenth Circuit is an outlier. That thematic variation does not counsel abstention.

Second, Respondents' recounting of Tenth Circuit precedent confirms that the court below disregarded

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[1] The Colorado Department of Corrections ("CDOC") utilizes various terminology to denote isolating prisoners for twenty-three or twenty-four hours a day. Br. in Opp'n ("BIO") 2–3. This practice is often called "solitary confinement," including by Respondent Raemisch. *E.g.*, Rick Raemisch, Opinion, *My Night in Solitary*, N.Y. TIMES, Feb. 21, 2014.

the required qualified immunity analysis. A line of Tenth Circuit precedent, previously unbroken, placed the right to outdoor exercise outside the realm of reasonable debate.

Respondents imposed solitary confinement in an extreme manner that heightened its cruelty. Left unchecked, that practice will proliferate. The petitions should be granted.[2]

I. Respondents' Vehicle Argument Is Baseless.

Respondents argue that these are poor vehicles because Petitioners did not make duplicate arguments in support of certiorari and in opposing qualified immunity. BIO 8–12. This is a smokescreen. Litigants are required to preserve claims, not arguments. Petitioners' claim below and before this Court is identical: the Eighth Amendment does not countenance permanently withholding outdoor exercise from prisoners in solitary confinement. That Petitioners also argue in support of certiorari that the Tenth Circuit is an outlier—contested unpersuasively by Respondents—does not counsel avoidance.

A. Petitioners Squarely Presented The Issue Below.

After denials of outdoor exercise for between eleven and twenty-five months, Petitioners claimed the deprivation violated the Eighth Amendment. BIO 4. Respondents moved to dismiss, arguing they were

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[2] On June 18, 2018, undersigned counsel learned that Petitioner Lowe had died on May 25, 2018. Pursuant to Supreme Court Rule 35, an authorized representative will move for party substitution within the time allowed.

shielded by qualified immunity. BIO 5. Respondents accepted that Tenth Circuit precedent prohibited the prolonged denial of outdoor exercise, but asserted that Petitioners' deprivations were of acceptable duration.[3] MTD at 8–11, *Apodaca*, No. 15-cv-00845 (D. Colo. June 19, 2015); MTD at 8–10, *Lowe*, No. 15-cv-01830 (D. Colo. Nov. 9, 2015). Petitioners countered that the Tenth Circuit had clearly established the illegality of denials exceeding nine months. Resp. to MTD at 19, *Apodaca*, No. 15-cv-00845 (D. Colo. Aug. 5, 2015); Resp. to MTD at 10, *Lowe*, No. 15-cv-01830 (D. Colo. Dec. 18, 2015). The parties maintained these positions on appeal. BIO 7.

Petitioners raise the same claim before this Court: the Eighth Amendment was violated because Respondents denied them outdoor exercise for between eleven and twenty-five months. *Lowe* Pet. 19–22; *Apodaca* Pet. 19–23. And Petitioners argue again that Tenth Circuit precedent clearly prohibited the deprivation. *Id*.

Petitioners also expand upon this theme: solitary confinement is dangerous, solitary confinement without outdoor exercise is doubly dangerous, and the Tenth Circuit is an outlier in disregarding this danger when imposed without an individualized security

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[3] Respondents assert here that they moved to dismiss on the grounds that "no Tenth Circuit precedent clearly established a constitutional violation when inmates were allowed to exercise *out of their cells*—even if they were not granted *outdoor* exercise." BIO 5 (emphasis original). In fact, Respondents conceded the right to outdoor exercise. Motion to Dismiss ("MTD") at 8–11, *Apodaca*, No. 15-cv-00845 (D. Colo. June 19, 2015); MTD at 8–10, *Lowe*, No. 15-cv-01830 (D. Colo. Nov. 9, 2015).

justification. *E.g.*, *Lowe* Pet. 2–3. That does not prescribe avoidance. This Court frequently grants certiorari under these circumstances. *E.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below."); *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992) (same); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010) ("Citizens United's argument that *Austin* should be overruled is not a new claim. Rather, it is—at most—a new argument to support what has been [a] consistent claim....") (internal citations and quotation marks omitted)).

B. The Tenth Circuit Is An Outlier In Considering Outdoor Exercise In A Vacuum.

Respondents concede that other circuits have "address[ed] security concerns" in considering the constitutional dimensions of depriving prisoners of outdoor exercise. BIO 12. Respondents also concede that the Tenth Circuit did not. BIO 7. Respondents dispute, however, that this difference is meaningful, arguing that out-of-circuit precedent reflects only an incidental interest in balancing security and outdoor exercise.[4] BIO 12–17. In fact, Petitioners accurately characterized the Tenth Circuit as an outlier.

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[4] Respondents assert that any balancing was a function of a party introducing a security rationale. BIO 12. There could be no

Respondents urge that *Spain v. Procunier*, 600 F.2d 189 (9th Cir. 1979), did not "hinge[]" on a security justification. BIO 16. Respondents are mistaken. From start to finish, the Ninth Circuit considered whether security justified the restriction. The court notes at the outset: "The case is difficult because it requires us to pass upon measures adopted by prison officials for the safe custody of some of the most dangerous men in the prison population." *Spain*, 600 F.2d at 192. Turning to outdoor exercise, the court writes:

> The state argues that outdoor exercise was withheld to protect prison staff and other inmates from violent attacks by the plaintiffs, and to protect plaintiffs from attacks by other inmates. The state also cites the objective of reducing the risk of escape, a risk which existed with the plaintiffs even under conditions where security was greater than in the prison exercise yard. These concerns justify not permitting plaintiffs to mingle with the general prison population but do not explain why other exercise arrangements were not made.

Id. at 200.

Respondents concede that "security concerns" were at issue in *Walker v. Mintzes,* 771 F.2d 920 (6th Cir. 1985), but maintain they were only "one factor." BIO

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individualized justification here, however—the ban was indiscriminate.

15. The Sixth Circuit, however, appears to have balanced *only* security and outdoor exercise:

> We find it necessary to REMAND the matter of constitutional yard time requirements for consideration and clarification in accordance herewith considering the inmates' constitutional need for time outdoors. The district court should, of course, be mindful of the limitations placed on each class of inmates that might restrict prisoner interaction, as well as prison security requirements, and whether restrictions are totally without penological justification.

Walker, 771 F.2d at 928 (internal quotation marks omitted). That the court instructed the district judge to consider (1) that prisoners in solitary confinement are already severely isolated, and (2) whether the restriction lacked *any* justification, BIO 16, strengthens Petitioners' position—*i.e.*, the question was whether the outdoor exercise limitations passed muster in light of prison rioting.

Respondents argue that *Pearson v. Ramos*, 237 F.3d 881 (7th Cir. 2001), is "inapposite" because the plaintiff may have been denied all out-of-cell exercise. BIO 13–14. While Pearson may have been doubly restricted, the court explicitly considered whether security concerns justified denying outdoor exercise: "the dispositive issue in this case is whether the stacking of such sanctions [for violent misconduct] to the point of depriving a prisoner of an entire year of

yard access is cruel and unusual punishment ...." *Pearson*, 237 F.3d at 884; *see also id.* at 889–90 (Ripple, J., concurring) ("[T]he principles that can be drawn from this circuit's case law manifest a clear aversion to denying prisoners outside exercise time for extended periods absent an acute need to do so."). To answer the dispositive question, the court balanced plaintiff's "violent and incorrigible" nature with the right:

> To allow him to 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 the other prisoners from his violent propensities. Any objection to the punishment based on considerations of proportionality thus dissolves and leaves for consideration only whether the denial of yard privileges for a year does so much harm to a prisoner that it is intolerable to the sensibilities of a civilized society no matter what the circumstances.

Id. at 885.

Respondents also contend that *Bass v. Perin*, 170 F.3d 1312 (11th Cir. 1999), is insignificant because the court considered the security justification for withholding outdoor exercise *and* whether officials were deliberately indifferent in doing so. BIO 14–15. Why Respondents believe a subjective-prong analysis undermines reliance on *Bass* is unclear—deliberate indifference is a component of every conditions claim.

In any event, the Eleventh Circuit explicitly balanced the right and security. As the court explained, "prison officials violate the Eighth Amendment through the unnecessary and wanton infliction of pain." *Bass* 170 F.3d at 1316 (internal quotation marks omitted). Although withholding outdoor exercise "certainly involves the infliction of pain," "[t]he pain inflicted on the plaintiffs … cannot be said to be unnecessary—in other words, totally without penological justification." *Id*. (internal quotation marks omitted). This was so 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*. Standing alone, the security rationale permitted the court to conclude that the Eighth Amendment had not been violated. *Id*. at 1316–17.

Finally, Petitioners asserted that *Hernandez v. Velazquez*, 522 F.3d 556 (5th Cir. 2008), reflects a balancing of security and outdoor exercise. Respondents dispute that, relegating the discussion of security to background. BIO 13. Even if Respondents are correct, the Tenth Circuit remains an outlier.

II. The Tenth Circuit Disregarded This Court's Qualified Immunity Jurisprudence.

Respondents argue that the Tenth Circuit "correctly concluded that there was no 'clearly established' in-jurisdiction law supporting Petitioners' claims." BIO 19. Respondents are mistaken—Tenth Circuit precedent established the right denied.

Respondents contend that *Perkins v. Kansas Dep't of Corr.*, 165 F.3d 803 (10th Cir. 1999), "addressed not the deprivation of 'outdoor exercise' … but the *total* deprivation of exercise" and, accordingly, did not prohibit their conduct. BIO 22. Respondents also argue that *Perkins* "did not address whether and to what extent the law on the subject was 'clearly established.'" BIO 21. Respondents are incorrect.

First, from the get-go, *Perkins* is an outdoor exercise case. By way of introduction, the court explained, Perkins "seek[s] redress for … (2) being denied all outdoor exercise for more than nine months…." *Perkins*, 165 F.3d at 805. Elaborating on the claim, the court noted that Perkins "alleges … injuries from the denial of outdoor exercise." *Id.* at 806. The legal analysis commenced with "the first of plaintiff's Eighth Amendment claims, relating to the deprivation of outdoor exercise." *Id.* at 810. Upon reaching the objective prong, the court explained, "the district court here erred when it held that plaintiff's allegations about the extended deprivation of outdoor exercise show[ed] no excessive risk to his well-being." *Id.* (internal quotation marks omitted). The focal point of the subjective prong does not vary: "[P]laintiff's complaint … also establish[es] that prison officials knew of his continuing deprivation of outdoor exercise." *Id.* Nor does the holding:

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

Id.

Perkins is a published opinion holding that withholding outdoor exercise from a prisoner in solitary confinement for nine months states a claim. That decision alone clearly establishes the right. *E.g.*, *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1114–15 (10th Cir. 2008) (explaining that a single published opinion holding that conduct "could result in a constitutional violation" clearly establishes the law for purposes of qualified immunity); *Woodward v. City of Worland*, 977 F.2d 1392, 1398 (10th Cir. 1992) (same). And subsequent cases demonstrate that the Tenth Circuit had long considered *Perkins* to be an outdoor exercise case. *E.g., Fogle v. Pierson*, 435 F.3d 1252, 1260 (10th Cir. 2006) (emphasizing that *Perkins* is an "outdoor" exercise case); *Silverstein v. Fed. Bureau of Prisons*, 559 F. App'x 739, 756 n. 17 (10th Cir. 2014) (describing *Perkins* as "holding claim related to … denial of any outdoor exercise stated an Eighth Amendment claim"). Even the panels below appeared to concede as much. *E.g.*, *Apodaca* Pet. App. 10a ("We expressed our [*Perkins*] holding in terms of the denial of outdoor exercise." (internal citations and quotation marks omitted)).

Second, *Perkins* does "address whether and to what extent the law … was 'clearly established.'" BIO 21. Its analysis of the claim begins as follows: "As this

and other courts have recognized, 'some form of regular outdoor exercise is extremely important to the psychological and physical well being of inmates.'" *Perkins* 165 F.3d at 810 (quoting *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir.1987) (per curiam) (citing *Spain*, 600 F.2d at 199)). The *Perkins* court then described its decisions in *Housley v. Dodson*, 41 F.3d 597 (10th Cir. 1994), and *Bailey*, observing that "[i]n *Bailey,* we found that even a convicted murderer who had murdered another inmate and represented a major security risk was entitled to outdoor exercise." *Perkins*, 165 F.3d at 810. The *Perkins* panel explicitly described its holding as reached "in light of [these] previous holdings." *Id*.

Respondents also argue that the Tenth Circuit's 2006 decision in *Fogle* is of "limited relevance" because it reversed a screening dismissal, not an order denying a motion to dismiss. BIO 22. That distinction is meaningless. *E.g.*, *Kay v. Bemis*, 500 F.3d 1214, 1217–18 (10th Cir. 2007). And *Fogle* is an outdoor exercise case through and through. As the panel notes, "Fogle contends that he suffered unconstitutionally cruel and unusual punishment by being denied all outdoor exercise for the three years he was in administrative segregation." *Fogle*, 435 F.3d at 1259–60. Reaching the objective prong, the court explained, "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*. at 1260. The court remained laser-focused on outdoor exercise when analyzing the subjective prong: "we think it is clear that a factfinder might conclude that the risk of harm from three years of deprivation of any form of outdoor exercise was

obvious." *Id*. Finally, the *Fogle* court canvassed Tenth Circuit precedent before holding that the deprivation of outdoor exercise stated a claim. *Id*.

Respondents also suggest that two antecedent opinions, *Bailey* and *Housley*, and a subsequent unpublished order, *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008), muddy the waters. BIO 20–23. In fact, they are clarifying.

The *Bailey* court described the "substantial agreement … that some form of regular outdoor exercise is extremely important," but held that the Eighth Amendment was not violated because the plaintiff exercised outdoors for "one hour per week." *Bailey*, 828 F.2d at 653. Petitioners, in contrast, were offered no reprieve. *Housley* is a case about *out-of-cell* exercise. *Housley*, 41 F.3d at 599. Accordingly, a reasonable official would not have relied upon it to conclude that it was permissible to deprive Petitioners of *outdoor* exercise. Even so, the *Housley* panel went out of its way to emphasize the right to outdoor exercise. *Id*. And *Ajaj* may not even stand for the proposition put forth by Respondents—*i.e.*, that a one-year denial of outdoor exercise is constitutional. *See Ajaj*, 293 F. App'x at 591 (Henry, C.J., concurring) ("As the majority correctly observes … Mr. Ajaj was offered, but refused, outdoor exercise...."). Petitioners were not as lucky. More significant, *Ajaj*, an unpublished order, cannot undermine *Perkins* and *Fogle*. *E.g.*, *Townsend v. Lumbermens Mut. Cas. Co.*, 294 F.3d 1232, 1237–39 (10th Cir. 2002) (emphasizing that antecedent published opinions trump subsequent unpublished orders); *see also Knopf v. Williams*, 884

F.3d 939, 947 (10th Cir. 2018) ("unpublished decisions provide little support for the notion that the law is clearly established.").

This Court has repeatedly held that a case with identical facts is unnecessary to overcome qualified immunity. *E.g.*, *Hope v. Pelzer*, 536 U.S. 730, 739–41 (2002); *cf. Sause v. Bauer*, No. 17-742, 2018 WL 3148262, at *2 (U.S. June 28, 2018). Even so, Tenth Circuit precedent left no doubt that it was illegal to deprive prisoners in solitary confinement of outdoor exercise for between eleven and twenty-five months. Respondents were nevertheless granted qualified immunity, suggesting that the doctrine has mutated in the Tenth Circuit.

CONCLUSION

These cases concern an extreme form of solitary confinement, yet Respondents urge the Court to look away. The CDOC has improved its solitary confinement protocol, and there is "no possibility of recurrence," they say. BIO 25. Respondents are mistaken: within the Tenth Circuit, thousands of prisoners languish in solitary confinement. *See* Arthur Liman Pub. Interest Program & Ass'n of St. Corr. Admin., *Time-In-Cell: The ASCA-Liman 2014 National Survey of Administrative Segregation in Prison* 15 (Aug. 2015).[5] If the decisions below stand, all of them could be forced to endure the cruel regime implemented at CSP—for any reason or no reason at all. The petitions should be granted.

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[5] https://law.yale.edu/system/files/documents/pdf/asca-liman_administrative_segregation_report_sep_2_2015.pdf.

Respectfully submitted,

DANIEL M. GREENFIELD*
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 E. Chicago Ave.
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

ELISABETH L. OWEN
LEVIN SITCOFF P.C.
1512 Larimer Street, Suite 650
Denver, CO 80202
(303) 575-9390

Attorneys for Petitioners

* Northwestern Law School student Rosalind Dillon and Harvard Law School students Dalia Deak and Caroline Li contributed to the preparation of this brief.