No.

IN THE

Supreme Court of the United States

TRENT MICHAEL TAYLOR,

Petitioner,

v.

ROBERT RIOJAS, Sergeant of Corrections Officer, Individually and in Their Official Capacity; RICARDO CORTEZ, Sergeant of Corrections Officer, Individually and in Their Official Capacity; STEPHEN HUNTER, Correctional Officer, Individually and in Their Official Capacity; LARRY DAVIDSON, Correctional Officer, Individually and in Their Official Capacity; SHANE SWANEY, Sergeant of Corrections Officer, Individually and in Their Official Capacity; JOE MARTINEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are prison officials who deliberately left Petitioner Trent Taylor naked for six days in two filthy cells; the first cell was covered from floor to ceiling in feces from previous residents, and in the second Petitioner had to sleep in a pool of sewage overflowing from a clogged drain. Petitioner brought suit under 42 U.S.C. § 1983 challenging Respondents' conduct as violating the Eighth Amendment. The Fifth Circuit concluded that the substantial risk of harm Respondents imposed on Petitioner was "especially obvious" and therefore unconstitutional. But the court nonetheless granted qualified immunity to Respondents on the theory that, although prior circuit precedent recognized the unconstitutionality of forcing prisoners to live in human waste, those cases involved longer periods of confinement and therefore did not clearly establish a constitutional violation under these precise circumstances. The questions presented are:

1. When the unconstitutionality of government officials' conduct is obvious, does that suffice to render the violation clearly established, as the Sixth, Ninth, and Eleventh Circuits have recognized in analogous cases, or must there also be binding precedent directly on point, as the Fifth Circuit held below?

2. Are government officials entitled to qualified immunity so long as there is no prior precedent recognizing the unconstitutionality of an identical fact pattern, as the Fifth and Eighth Circuits have held, or can prior precedent clearly establish a constitutional violation despite some factual variation, as the Third,

Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have held?

3. Should the judge-made doctrine of qualified immunity, which is not justified by reference to the text of 42 U.S.C. § 1983 or its common law backdrop and which has been demonstrated not to serve its policy goals, be narrowed or abolished?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Trent Taylor; Respondents Robert Riojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, and Joe Martinez; and Defendants-Appellees Robert Stevens, Franco Ortiz, Creastor Henderson, and Stephanie Orr, who are not part of this appeal.

RELATED PROCEEDINGS

Taylor v. McDonald, No. 18-11572 (5th Cir.) (briefing complete)

Taylor v. Olmstead, No. 17-10342 (5th Cir.) (judgment entered June 28, 2018)

Taylor v. Stevens, No. 17-10253 (5th Cir.) (judgment entered Dec. 20, 2019)

Taylor v. Stevens, No. 16-11355 (5th Cir.) (judgment entered Dec. 21, 2017)

Taylor v. Williams, No. 16-10498 (5th Cir.) (judgment entered Nov. 3, 2017)

Taylor v. Stevens, No. 14-CV-0149 (N.D. Tex.) (partial final judgment entered Jan. 5, 2017)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Petitioner Trent Taylor entered a Texas psychiatric prison unit to receive mental health treatment following a suicide attempt. Instead of providing that treatment, prison officials (Respondents here) stripped Taylor of his clothing, including his underwear, and left him naked for nearly a week in filthy cells, forcing him to live and sleep in the urine and feces of the cells' prior occupants. Taylor brought this suit under 42 U.S.C. § 1983 challenging Respondents' conduct as violating the Eighth Amendment.

In its decision below, the Fifth Circuit concluded that Taylor met his summary judgment burden of establishing that Respondents violated the Eighth Amendment, explaining that the substantial health risk they imposed on Taylor was "especially obvious" under these circumstances. The court nonetheless held that Respondents were entitled to qualified immunity because circuit precedent recognizing the unconstitutionality of forcing prisoners to live in human waste involved a longer period of confinement and therefore did not clearly establish a constitutional violation under these precise circumstances.

This Court should review the decision below for three reasons.

First, having determined that the substantial risk posed to Taylor by Respondents' conduct was "especially obvious," the Fifth Circuit strayed from this Court's precedent—and split from decisions of the Sixth, Ninth, and Eleventh Circuits addressing analogous fact patterns—in failing to recognize that the

obviousness of that risk rendered Respondents' conduct a clearly established constitutional violation, regardless of the existence of prior case law addressing similar facts.

Second, the decision below further entrenches a deep and acknowledged circuit split over how factually similar a prior case must be to clearly establish a constitutional violation for qualified immunity purposes. The Fifth and Eighth Circuits stand at one end of the divide, requiring precedent with nearly identical facts to establish a constitutional violation. In contrast, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that a constitutional violation may be clearly established by prior precedent that does not precisely mirror the facts at hand. Absent further guidance from this Court, the lower courts will continue to struggle to apply the "clearly established" prong of the qualified immunity inquiry.

Third, this case presents an opportunity for the Court to abolish or significantly curtail qualified immunity. A growing chorus of critics—including members of this Court, numerous other federal judges, and legal scholars across the ideological spectrum—has demonstrated that qualified immunity is grounded in neither the text of § 1983 nor the common law of official liability that existed when that statute was enacted. What began as an attempt by this Court to apply a narrow good-faith defense to a false arrest claim—because bad faith is an element of that claim at common law—has since been transformed by judicial policy preference into a near-total liability shield across *all* § 1983 claims. And without justification—

the near-universal indemnification of government officials means that qualified immunity is unnecessary to serve its primary purpose of protecting officials from the risk of financial liability when exercising their discretion in the line of duty. Qualified immunity also stagnates the development of constitutional law by encouraging courts to perpetually avoid determining the constitutionality of challenged practices by instead simply finding that any violation is not clearly established. This Court should revisit qualified immunity in light of the myriad weighty arguments favoring its abolition.

This case is an ideal vehicle to consider these important issues. Because the Fifth Circuit found that Respondents' conduct violated Taylor's Eighth Amendment rights, the sole and dispositive question is whether Respondents are entitled to qualified immunity. There are no procedural barriers to this Court's review. And the Fifth Circuit's extraordinary conclusion—that Respondents did not have "fair warning" that it would violate the Eighth Amendment to force an incarcerated psychiatric patient to live and sleep in other people's excrement for six days—illustrates that modern qualified immunity jurisprudence is fundamentally flawed and in need of reconsideration by this Court.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 946 F.3d 211 and is reproduced at Pet. App. 1a-28a. The order of the district court granting partial summary judgment is not officially reported but may be found at 2017 WL 11507190 and is reproduced at Pet.

App. 29a-65a. The unpublished order of the Court of Appeals denying the petition for panel rehearing and rehearing en banc is reproduced at Pet. App. 70a-72a.

JURISDICTION

The Fifth Circuit entered its judgment on December 20, 2019. Pet. App. 1a. A timely petition for panel rehearing and rehearing en banc was denied on January 29, 2020. Pet. App. 72a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the U.S. Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress….

STATEMENT OF THE CASE[1]

Respondents Force Taylor To Live And Sleep In Other Inmates' Excrement For Nearly A Week

At the time of the events giving rise to this suit, Petitioner Trent Taylor was incarcerated in the John T. Montford Unit of the Texas Department of Criminal Justice (Montford). Pet. App. 3a. Respondents Robert Riojas, Ricardo Cortez, Stephen Hunter, Larry Davidson, Shane Swaney, and Joe Martinez were officials at Montford during that period. *Id.*

Taylor was transferred to Montford, a psychiatric prison unit, for mental health treatment following a suicide attempt. Electronic Record on Appeal (R.O.A.) 49. Instead of providing that treatment, Respondents stripped Taylor of his clothing, including his underwear, and placed him in a cell where almost every surface—including the floor, ceiling, windows, and walls—was covered in "massive amounts" of human feces belonging to previous occupants. Pet. App. 7a-8a; R.O.A. 50. The smell was overpowering and could be discerned from the hallway. Pet. App. 8a; R.O.A. 50. Taylor was unable to eat because he feared that any food in the cell would become contaminated. Pet. App. 8a. Feces "packed inside the water faucet" prevented him from drinking water for days. *Id.* Respondents were aware the cell was coated in

[1] These facts are drawn primarily from the decision below and the district court's summary judgment order. Because this case was resolved at summary judgment, the facts and inferences are viewed in the light most favorable to Taylor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

excrement: One Respondent asked several others whether Taylor's cell was the one covered in feces; another answered, "Yes, he's going to have a long weekend," and the officials laughed. *Id.*; R.O.A. 50. Taylor asked numerous prison staff members to clean the cell, but they refused. Pet. App. 8a n.8. When Taylor complained of the conditions, Respondent Swaney responded, "Dude, this is Montford, there is s*** in all these cells from years of psych patients." Pet. App. 8a (brackets omitted).

Four days later, Respondents removed Taylor from the first cell; they then transferred him, still naked, to a different "seclusion cell." Pet. App. 8a, 12a. Montford inmates referred to this cell as "the cold room" because of its frigid temperature; Swaney told Taylor he hoped Taylor would "f***ing freeze" there. Pet. App. 8a n.9. This cell had no toilet, water fountain, or furniture. Pet. App. 8a. It contained only a drain on the floor, which was clogged, leaving a standing pool of raw sewage in the cell. Pet. App. 8a. Because the cell lacked a bunk, Taylor had to sleep on the floor, naked and soaked in sewage, with only a suicide blanket for warmth. Pet. App. 8a-9a, 33a.

Taylor spent three days in the seclusion cell, during which Respondents repeatedly told him that if he needed to urinate, he would not be escorted to the restroom but should urinate into the backed-up drain. Pet. App. 8a. Taylor refused, not wanting to add to the pool of sewage in which he had to sleep naked. Pet. App. 8a-9a. Instead, Taylor avoided urinating for 24 hours until he involuntarily urinated on himself; he attempted to use the clogged drain as instructed, but Taylor's urine "mix[ed] with the raw sewage and r[a]n

all over [his] feet." Pet. App. 9a, 19a (alterations in original). As a result of holding his urine in a bacteria-laden environment for an extended period, Taylor developed a distended bladder requiring catheterization. *Id.*

Taylor Files Suit Challenging The Constitutionality Of Respondents' Conduct, And The District Court Holds That Respondents Are Entitled to Qualified Immunity

Proceeding pro se, Taylor filed suit against Respondents under 42 U.S.C. § 1983, alleging, among other things, that Respondents violated the Eighth Amendment by confining him in such squalid conditions and that certain Respondents had shown deliberate indifference to his serious medical needs by refusing to allow him to use a bathroom for 24 hours, also in violation of the Eighth Amendment. Pet. App. 9a, 30a-34a. The district court denied Respondents' motion to dismiss these claims as insufficiently pleaded, Pet. App. 30a-31a; R.O.A. 513, but later granted summary judgment to Respondents on qualified immunity grounds, Pet. App. 5a, 31a-32a.

Addressing Taylor's cell conditions claim, the court acknowledged that Respondents "provided little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces." Pet. App. 47a. The court nonetheless concluded the cell conditions did not "violate the Eighth Amendment's prohibition against cruel and unusual punishment" because Taylor was "exposed to the alleged conditions for only a matter of days," Respondents "did attempt to clean the [second cell] by

using a towel to wipe the sewage from the floor," and Taylor did not allege any lasting injury from the exposure. Pet. App. 49a-50a. Accordingly, the district court held that Taylor "failed to rebut [Respondents'] assertion of qualified immunity on his conditions-of-confinement claim." Pet. App. 50a-51a.

The district court also granted summary judgment to Respondents on Taylor's claim that they were deliberately indifferent to his serious medical needs when they denied him bathroom access for 24 hours. Pet. App. 51a-53a. Though the court acknowledged that Respondents did not "directly deny [Taylor's] allegations that they refused him the opportunity to use the restroom … or that they advised him to 'pee in the drain like everyone else,'" the court concluded that Taylor had not adequately established his claim or "demonstrated that it was not physically possible for him to relieve himself in the drain as instructed and thus prevent his discomfort and eventual bladder distension." Pet. App. 52a-53a.[2]

The Fifth Circuit Concludes That Respondents' Conduct Violated The Eighth Amendment, But Nonetheless Holds That Respondents Are

[2] Because the district court denied summary judgment with respect to a claim not at issue here—an excessive force claim against a different correctional officer arising from a separate event—the court entered a partial final judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure on Taylor's cell conditions and medical needs claims. The excessive force claim proceeded to trial, where a jury found that the officer "maliciously and sadistically" used excessive force against Taylor but awarded no damages.

Entitled To Qualified Immunity On Taylor's Cell Conditions Claim

On appeal, the Fifth Circuit reversed the grant of summary judgment as to Taylor's deliberate indifference claim against certain Respondents for denying him bathroom access. Pet. App. 18a-24a. The court explained that a reasonable jury could find that Respondents knowingly put Taylor at risk of substantial harm when they refused to take him to the bathroom for 24 hours and instead insisted that he urinate in a drain in his cell that was already overflowing with sewage. Pet. App. 23a & n.21. The court of appeals further held that Respondents were not entitled to qualified immunity because circuit precedent clearly established a constitutional violation under almost identical circumstances. Pet. App. 21a-22a.[3]

The Fifth Circuit affirmed the grant of summary judgment, however, with respect to Taylor's cell conditions claim. Pet. App. 7a, 28a. As with the bathroom claim, the court held that Taylor had established a genuine factual dispute as to whether Respondents violated the Eighth Amendment by confining Taylor in "squalid cells" for nearly a week. Pet. App. 12a-15a. The court explained that the "risk posed by Taylor's exposure to bodily waste was … especially obvious here, as [Respondents] forced Taylor to sleep naked on a urine-soaked floor," and "failed to remedy the

[3] Taylor's live claim of deliberate indifference to serious medical needs involves only Respondents Riojas and Martinez and Defendant-Appellee Franco Ortiz. Respondents Swaney, Cortez, Hunter, and Davidson are not parties to that claim.

paltry conditions." Pet. App. 15a-16a (internal quotation mark omitted).

The Fifth Circuit nonetheless found Respondents entitled to qualified immunity on Taylor's cell conditions claim, holding that the constitutional violation was not "clearly established at the time." Pet. App. 16a-17a. The court observed that while "the law was clear that prisoners couldn't be housed in cells teeming with human waste for months on end," it had not previously held that confinement in human waste for six days violated the Constitution. Pet. App. 17a. Accordingly, the court concluded, Respondents lacked "'fair warning' that their specific acts were unconstitutional." Pet. App. 17a.

Taylor timely filed a petition for rehearing en banc with respect to his cell conditions claim. The Fifth Circuit denied the petition on January 29, 2020. Pet. App. 70a-72a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Precedent That "Obvious" Constitutional Violations Are Clearly Established Even Absent Factually Similar Precedent And Splits From Decisions Of Other Circuits Denying Qualified Immunity In Analogous Circumstances.

Having recognized that the substantial risk of serious harm to Taylor from the squalid cell conditions imposed by Respondents was "especially obvious here," the Fifth Circuit should have followed this

Court's guidance that the unconstitutionality of truly egregious conduct may be clearly established without any case law directly on point. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obviousness of the constitutional violation conflicts not only with this Court's precedent, but also with decisions of the Sixth, Ninth, and Eleventh Circuits involving analogous fact patterns.

A. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obvious unconstitutionality of their conduct conflicts with this Court's precedent.

The animating concern underlying modern qualified immunity jurisprudence is that officers must be "on notice their conduct is unlawful" before being subjected to suit for damages. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). That is, officers must have "fair warning that their conduct violated the Constitution." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Often, this fair warning is provided by prior cases establishing the unlawfulness of the conduct. But an official's conduct may also be so "obvious[ly]" illegal that no "body of relevant case law" is necessary. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citing *Hope*, 536 U.S. at 738); *see also Hope*, 536 U.S. at 753 (Thomas, J., dissenting) ("Certain actions so obviously run afoul of the law that an assertion of qualified immunity may be overcome even though court decisions have yet to address 'materially similar' conduct."); *United States v. Lanier*, 520 U.S. 259, 270-71 (1997) (particularly egregious conduct may be clearly unconstitutional even if "the very action in question

has [not] previously been held unlawful"). Recent decisions of this Court have reaffirmed that obviously illegal conduct can defeat qualified immunity. *See City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam).

The obviousness principle follows directly from the fair warning requirement: For conduct that is "obviously" illegal, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. The principle is also essential to ensure that the most egregiously violative conduct gives rise to liability. Obviously unconstitutional conduct is by its nature less likely to lead to the development of precedent to serve as clearly established law: Because it is obviously unconstitutional, officials are—or should be—less likely to do it. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) ("[O]utrageous conduct obviously will be unconstitutional, this being the reason … that the easiest cases don't even arise." (internal quotation marks and brackets omitted)).

If there is any circumstance that involves obviously illegal conduct, it is deliberately forcing a person to live and sleep naked in squalid cells contaminated by massive amounts of feces and urine left by previous occupants, without access to food or

drinking water.[4] Indeed, the Fifth Circuit acknowledged that the risk of serious bodily harm to Taylor from the cell conditions Respondents imposed on him was "especially obvious here." Pet. App. 15a-16a. The court's holding that Respondents are nonetheless entitled to qualified immunity is inconsistent with this Court's direction that claims describing obviously unconstitutional behavior overcome qualified immunity even absent case law directly on point.

This Court first articulated the principle that obviously illegal conduct defeats qualified immunity in a case involving circumstances similar to Taylor's. In *Hope v. Pelzer*, Hope, an incarcerated plaintiff,

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[4] In affirming the grant of qualified immunity, the Fifth Circuit cited *Davis v. Scott*, 157 F.3d 1003 (5th Cir. 1998), in which the court found no constitutional violation when a prisoner was kept in a filthy cell for three days. *Davis*, however, involved a very different fact pattern and casts no doubt on the obviousness of the constitutional violation here. In *Davis*, the officers had given the plaintiff supplies to clean the cell, "mitigating any intolerable conditions." *Id.* at 1006. In addition, the officers had put the plaintiff in the "crisis management" cell because he was throwing substances at them, *id.* at 1004; he was not placed into squalid conditions simply because he was a psychiatric patient. Moreover, *Davis* preceded this Court's decision in *Hope*, in which this Court declared analogous but less egregious mistreatment to be so obviously unconstitutional that no prior precedent was required to establish the violation. And *Davis* cuts against the great weight of precedent holding that it is impermissible to expose prisoners to their own waste and the waste of others. *See, e.g.*, *Brooks v. Warden*, 800 F.3d 1295, 1303-04 (11th Cir. 2015); *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Gates v. Cook*, 376 F.3d 323, 334 (5th Cir. 2004); *Young v. Quinlan*, 960 F.2d 351, 365 (3d Cir. 1992); *LaReau v. MacDougall*, 473 F.2d 974, 978 (2d Cir. 1972).

brought an Eighth Amendment claim after prison officials handcuffed him to a "hitching post" as punishment for "a wrestling match with a guard." 536 U.S. at 734. Hope was left shirtless in the sun and cuffed to the post for seven hours, given water only once or twice, and provided no bathroom breaks. *Id.* at 734-35. A guard taunted Hope by giving water to some nearby dogs instead of to him. *Id.* at 735.

This Court readily concluded that these conditions were actionable under the Eighth Amendment. *Id.* at 738. It further held that the unconstitutionality of the prison officials' actions was clearly established. *Id.* at 744. After noting that circuit precedent established the unconstitutionality of the defendants' actions, the Court found a second, independent basis for denying qualified immunity:

> The obvious cruelty inherent in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment. Hope was treated in a way antithetical to human dignity—he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous.

Id. at 745.

Hope is squarely on point. Taylor's treatment is evocative of Hope's: the degradation, humiliation, and risk of bodily harm; the lack of drinking water; the

denial of bathroom breaks creating "a risk of particular discomfort and humiliation," *id.* at 738; extreme temperature conditions; nudity; and the taunting of guards. But in its particulars, Taylor's treatment was far worse: Taylor was abused in this manner for 20 times as long as Hope was, and while Hope was subjected to the hitching post as punishment for fighting a guard, Taylor was forced to sleep naked in sewage, unable to eat or drink for days, merely because he required psychiatric treatment for suicidality during his incarceration. *See* R.O.A. 49. Though not amenable to quantification, it is difficult to imagine many more degrading and humiliating affronts to the dignity of an incarcerated person than what Taylor experienced. If *Hope* stands for anything, it must mean that the "especially obvious" risk of harm to Taylor, Pet. App. 15a-16a, clearly established a constitutional violation.

B. The Fifth Circuit's holding that Respondents are entitled to qualified immunity despite the obvious unconstitutionality of their conduct conflicts with decisions of the Sixth, Ninth, and Eleventh Circuits denying qualified immunity on analogous facts.

The Fifth Circuit's holding also directly conflicts with decisions of the Sixth, Ninth and Eleventh Circuits denying qualified immunity under similar circumstances because the constitutional violation was so obvious as to be clearly established even absent a "body of relevant case law." *Brosseau*, 543 U.S. at 199.

In *Brooks v. Warden*, the Eleventh Circuit considered § 1983 claims asserted by a prisoner who had been confined to a hospital bed for two days in a jumpsuit filled with his own waste. 800 F.3d at 1298. Finding the Eighth Amendment violation clearly established, the Eleventh Circuit explained that no factually analogous precedent was necessary because it was a "rare case of obvious clarity." *Id.* at 1307 (internal quotation marks and brackets omitted). The court observed that "[f]orcing a prisoner to soil himself over a two-day period … create[d] an obvious health risk and [wa]s an affront to human dignity," while "[l]aughing at and ridiculing an inmate who [wa]s forced to sit in his own feces for an extended period of time [wa]s not merely unreasonable, but an act of 'obvious cruelty.'" *Id.*

Similarly, the Sixth Circuit has held that a prison official was on "fair warning" that it violated the Eighth Amendment to "le[ave] [a plaintiff] to lay in his own urine and feces for several hours," citing *Hope*'s admonition that certain misconduct is "obvious[ly]" unconstitutional. *Berkshire v. Beauvais*, 928 F.3d 520, 537-38 (6th Cir. 2019); *cf. Barker v. Goodrich*, 649 F.3d 428, 435, 437 (6th Cir. 2011) (noting that the "obvious cruelty" inherent in restraining an inmate in an uncomfortable position, denying access to water, and denying "even the basic dignity of relieving himself" warned defendants "that they were violating the prohibition against cruel and unusual punishment").

Evaluating analogous—though less sustained and egregious—circumstances, the Ninth Circuit reached the same conclusion. In *Weathers v.*

Loumakis, an incarcerated plaintiff alleged that he had twice been made to spend hours cleaning sewage overflow from a malfunctioning toilet with only latex gloves as protection. 742 F. App'x 332, 333 (9th Cir. 2018) (unpublished). Citing *Hope*, the Ninth Circuit held that while it had "never squarely confronted a case with facts precisely like these," "[h]aving to spend hours wading through water filled with human waste" was clearly unconstitutional. *Id.* at 333-34.

The Fifth Circuit disregarded this Court's clear direction in *Hope* and broke with its sister circuits in requiring precedent establishing that the cell conditions here violated the Eighth Amendment despite the obvious unconstitutionality of forcing Taylor to live and sleep naked in human waste. This Court should grant review (or, alternatively, summarily reverse) to restore uniformity among the lower courts on this important aspect of qualified immunity doctrine.

II. The Decision Below Further Entrenches A Deep And Acknowledged Circuit Split On The Degree Of Factual Similarity To Prior Precedent Required For A Constitutional Right To Be Clearly Established.

The decision below also entrenches a second conflict among the circuits that demands this Court's attention. "[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" to find a clearly established constitutional violation. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). The Fifth Circuit stands at

one end of the spectrum in applying a remarkably myopic approach to qualified immunity, which permits government officials to avoid accountability for patently unconstitutional behavior so long as there is no published precedent recognizing that the exact conduct under identical circumstances violates the Constitution.

This case is emblematic of the Fifth Circuit's approach. The federal circuits—including the Fifth Circuit—uniformly agree that dangerously unsanitary prison conditions may violate the Eighth Amendment.[5] Among the conditions that raise constitutional concerns, there is broad consensus that "[e]xposure to human waste, like few other conditions of confinement, evokes … [the] standards of dignity embodied in the Eighth Amendment." *DeSpain*, 264 F.3d at 974; *see, e.g.*, *Gates*, 376 F.3d at 334 ("No one in civilized society should be forced to live under conditions that force exposure to another person's bodily wastes."); *Young*, 960 F.2d at 365 ("It would be an abomination of the Constitution to force a prisoner to live in his own excrement for four days in a stench that not even

[5] *See LaReau*, 473 F.2d at 978; *Hite v. Leeke*, 564 F.2d 670, 672 (4th Cir. 1977); *Hawkins v. Hall*, 644 F.2d 914, 918 (1st Cir. 1981); *Hoptowit v. Spellman*, 753 F.2d 779, 784 (9th Cir. 1985); *Parrish v. Johnson*, 800 F.2d 600, 609 (6th Cir. 1986); *Inmates of Occoquan v. Barry*, 844 F.2d 828, 836 (D.C. Cir. 1988); *Howard v. Adkison*, 887 F.2d 134, 137 (8th Cir. 1989); *McCord v. Maggio*, 927 F.2d 844, 847 (5th Cir. 1991); *Young*, 960 F.2d at 365; *DeSpain v. Uphoff*, 264 F.3d 965, 974 (10th Cir. 2001); *Budd v. Motley*, 711 F.3d 840, 843 (7th Cir. 2013); *Brooks*, 800 F.3d at 1303-04.

a fellow prisoner could stand.").[6] Despite this consensus—including Fifth Circuit precedent that confinement in a sewage-flooded cell violates the Eighth Amendment, *see McCord*, 927 F.2d at 847-48—the Fifth Circuit in this case found no violation of clearly established law because Respondents forced Taylor to live and sleep in cells covered in feces and urine for "only six days" and the court had not previously held that confinement in human waste for that precise time period violated the Eighth Amendment. Pet. App. 17a.

The Fifth Circuit regularly demands this level of "specificity and granularity" in examining whether a constitutional violation is clearly established. *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019). In an opinion issued just weeks after *Taylor*, the Fifth Circuit concluded that a prison guard employed excessive force in violation of the Fourth Amendment when he pepper sprayed an inmate "for no reason at all." *McCoy v. Alamu*, 950 F.3d 226, 231-32 (5th Cir. 2020). The court expressly rejected the guard's argument that a single spray was too insignificant to violate the Constitution, noting that this Court had "rejected that line of reasoning." *Id.* at 232 ("Injury and force ... are only imperfectly correlated, and it is the latter that ultimately counts." (alteration in original) (quoting *Wilkins v. Gaddy*, 559 U.S. 34, 38 (2010))). And while Fifth Circuit precedent recognized that the Constitution prohibits officers from punching or tasing

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[6] *See also, e.g.*, *LaReau*, 473 F.2d at 978; *Johnson v. Pelker*, 891 F.2d 136, 139-40 (7th Cir. 1989); *Fruit v. Norris*, 905 F.2d 1147, 1151 (8th Cir. 1990); *McCord*, 927 F.2d at 847-48; *Brooks*, 800 F.3d at 1303-04.

someone for no reason, *see id.* at 234-35 (Costa, J., dissenting in part), the court concluded that the guard was entitled to qualified immunity because no case law specifically held that "an isolated, single use of pepper spray" qualified as excessive force, *id.* at 233.

The Eighth Circuit has employed a similarly narrow approach. In *Kelsay v. Ernst*, for instance, a woman suspected of a misdemeanor suffered serious injuries after police "placed [her] in a bear hug, threw her to the ground, and placed her in handcuffs." 933 F.3d 975, 978-79 (8th Cir. 2019), *cert. petition pending*, No. 19-682. In finding the officers shielded by qualified immunity, the court acknowledged circuit precedent establishing that "where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." *Id.* at 980 (collecting cases). The court nonetheless found that the law was not clearly established because "[n]one of [these] authorities 'squarely govern[ed] the *specific* facts at issue.'" *Id.* (emphasis added) (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). In particular, "[i]t was not clearly established … that a deputy was forbidden to use a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." *Id.* Like the Fifth Circuit, the Eighth Circuit in *Kelsay* demanded a granular level of factual similarity that is nearly impossible to satisfy and permits even clearly unconstitutional conduct to go unsanctioned.

On the other side of the spectrum, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits hold that a case involving precisely the same facts is not required for law to be clearly established. *See, e.g.*, *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("[T]he qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts.").

The Tenth Circuit, in a case nearly identical to this one, held that to find clearly established law, "[t]here need not be precedent declaring the exact conduct at issue to be unlawful." *DeSpain*, 264 F.3d at 979. Thus, where an inmate was held in a prison unit flooded with water, feces, and urine, the court found a clearly established constitutional violation based on cases condemning "unsanitary, offensive conditions" such as exposure to human waste. *Id*. Unlike the Fifth Circuit here, the court did not split hairs over the precise number of days the inmate was locked in sewage. Rather, the court asked whether "the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id*. at 979 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The court found those contours clear given "the great weight of cases … condemning on constitutional grounds an inmate's exposure to human waste." *Id.*; *see also id*. ("Causing a man to live, eat, and perhaps sleep in close confines with his own human waste is too debasing and degrading to be permitted." (quoting *McBride v. Deer*, 240 F.3d 1287, 1292 (10th Cir. 2001)).

Similarly, in *Brooks*, where guards forced a prisoner to sit in his own waste for two days, the Eleventh

Circuit did not require precedent that "involved the precise circumstances at issue" to find a clear constitutional violation. 800 F.3d at 1306. As discussed, *supra* at 16, the Eleventh Circuit found the violation in *Brooks* so obvious as to be clearly established independent of the case law. *Id.* at 1307. But the court separately held that the guards could not invoke qualified immunity because precedent established that Eighth Amendment violations "can arise from 'conditions lacking basic sanitation.'" *Id.* (quoting *Chandler v. Baird*, 926 F.2d 1057, 1066 (11th Cir. 1991)). The court emphasized that qualified immunity is overcome if existing precedent would lead "a reasonable official [to] understand that what he is doing violates" the law and that this inquiry does not require "[e]xact factual identity with a previously decided case." *Id.* at 1306.

The Third, Fourth, Seventh, and Ninth Circuits agree. *See Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful." (internal quotation marks and brackets omitted)); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) ("In the absence of directly on-point, binding authority, courts may also consider whether the right was clearly established based on general constitutional principles or a consensus of persuasive authority." (internal quotation marks omitted)); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case from the Supreme Court or from this circuit involving

that particular weapon is decided."); *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (holding that the court "need not identify a prior identical action to conclude that the right is clearly established").

The divergent approaches of the courts of appeals demonstrate that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); *see also* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 869 (2010) (discussing "the divergent approaches of the Circuits" in determining whether prior precedent clearly establishes a constitutional violation for qualified immunity purposes).

The practical cost of this confusion—particularly in circuits applying an overly stringent qualified immunity analysis—is that it largely nullifies § 1983. Congress enacted § 1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Congress's purpose is thwarted if state actors can avoid accountability so long as there is no precedent that addresses the precise conduct at issue. This Court's review is warranted to reject the Fifth Circuit's narrow qualified immunity analysis and to restore clarity and uniformity in federal courts' application of the doctrine.

III. This Court Should Grant Review To Abolish Or Substantially Curtail Qualified Immunity.

There is another, more fundamental reason the Court should grant this petition: It presents an ideal vehicle for reexamining modern qualified immunity jurisprudence, which derives neither from the text of § 1983 nor the common law of official immunity and should be abolished or significantly curtailed.

A. Qualified immunity doctrine is inconsistent with § 1983's text and common law backdrop.

Qualified immunity doctrine has evolved dramatically since it was first invoked to bar a § 1983 suit. Modern qualified immunity doctrine bears little resemblance to the common law of official liability when § 1983 was enacted.

When this Court first identified a good-faith defense to a § 1983 false arrest suit, it did so based on the narrow rationale that "the defense of good faith and probable cause" applied to the analogous "common-law action for false arrest and imprisonment." *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). But the Court soon began applying a qualified immunity defense to all § 1983 suits, without investigating whether any corresponding common law claim included such a defense. The Court revised its approach repeatedly, expanding the doctrine to protect an ever broadening array of official misconduct, until it reached its current formulation of the "objective test": that "government officials performing discretionary

functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established … rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). While the Court once required courts to determine whether a constitutional right had been violated before considering whether the right had been clearly established at the time of the violation, *see Saucier*, 533 U.S. at 201, it later reversed course and permitted courts to conduct the qualified immunity inquiry in either order, *see Pearson v. Callahan*, 555 U.S. 223, 234-42 (2009).

None of these doctrinal maneuvers derives from the statutory text. Nothing in the language of § 1983, as originally enacted or as currently codified, requires that a constitutional violation be "clearly established" to support a damages claim. The language of § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980); *see Imbler v. Pachtman*, 424 U.S. 409, 417 (1976) (§ 1983 "admits of no immunities").

Instead, the interpretation of § 1983 to include a broad qualified immunity defense is predicated on the notion that the statute incorporates the common law of 1871, when it was enacted. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). At least in principle, this Court has attempted "to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). The Court has described its approach as seeking to determine whether any common law immunities were "so well established in 1871, when § 1983 was enacted, that 'we presume that Congress

would have specifically so provided had it wished to abolish' them." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55); *see also Filarsky v. Delia*, 566 U.S. 377, 383 (2012).

Yet modern qualified immunity doctrine departs markedly from the common law. *See, e.g.*, 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, 1922-24 (2010). As a growing body of legal scholarship has revealed, "lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55-58 (2018). Rather, early American courts adapted the principle of personal official liability from the English tradition and "applied it with unprecedented vigor." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 14 (1972). Early public officers "bore personal liability for … affirmative acts, willfully done," including both "any positive wrong which was not actually authorized by the state" and even purportedly authorized wrongs. *Id.* at 16-17. The early American rule was thus "extremely harsh to the public official." *Id.* at 18.[7] In short, "good-faith reliance did not create a defense to liability—what mattered was legality." Baude, *supra*, at 56.

[7] This stringent rule of official accountability was mitigated by the possibility that an official held liable for misconduct could petition the legislature for indemnification. *See* Pfander & Hunt,

Strict official accountability for civil rights claims persisted through Reconstruction and after the enactment of § 1983. *See, e.g.*, Joseph Story, *Commentaries on the Constitution of the United States* § 1676 (4th ed. 1873) ("If the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed."). For instance, in 1851, this Court upheld a monetary award against a U.S. colonel for seizing property in Mexico during the Mexican-American War, despite the defendant's presumed "honest judgment" that the seizure was justified by wartime emergency. *See Mitchell v. Harmony*, 54 U.S. 115, 133-35, 137 (1851). Shortly after § 1983's enactment, this Court again affirmed that official liability for wrongful acts "committed from a mistaken notion of power" "cannot be diminished by reason of good motives upon the part of the wrongdoer," because "the law tolerates no such abuse of power, nor excuses such act." *Beckwith v. Bean*, 98 U.S. 266, 276-77 (1878). And in an early case interpreting § 1983, this Court rejected a good-faith defense to a constitutional claim brought under that statute as foreclosed by the statutory text. *See Myers v. Anderson*, 238 U.S. 368, 378-79 (1915). It was not until 1967—nearly a century after § 1983 was enacted—that this Court began to read a qualified immunity defense into the statute; it was many more

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supra, at 1924. But neither the official's subjective good faith nor any objective requirement that the law be "clearly established" categorically shielded the official from liability in the first instance. *See, e.g.*, Baude, *supra*, at 55-58.

years before the present-day, "objective" qualified immunity doctrine took shape.

What's more, there was no "freestanding common-law defense" available in suits against government officials. Baude, *supra*, at 58-59. Instead, where good faith *was* implicated, it was because the particular tort that was the subject of the lawsuit included bad faith or malice as an element. *Id.* at 59-60. In that case, a finding of good faith or the absence thereof fell on "the merits side of the ledger" and determined whether the plaintiff could make out a claim at all. *Id.* But "good faith" was not a generic defense to official liability. And the subjective good-faith defense available for certain common law actions against government officials bears no relationship to the modern objective qualified immunity inquiry. *See* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018).[8] To the extent this Court has attempted to capture the background common law principles regarding official liability and immunity when § 1983 was enacted in 1871, its qualified immunity jurisprudence has not succeeded in that endeavor.

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[8] Indeed, a good-faith inquiry is already built into Eighth Amendment claims such as Taylor's, which require an analysis of the objective risk of harm from the defendants' conduct and the subjective deliberate indifference exhibited by the defendants. The Fifth Circuit expressly resolved the subjective deliberate indifference analysis in Taylor's favor, Pet. App. 15a-16a, exemplifying the divergence between the objective "clearly established" inquiry and the kind of good-faith defense that might be available to certain claims at the common law.

It is not just academics who have recognized that qualified immunity is a modern invention untethered from any common law immunities. Past and current members of this Court have acknowledged that modern qualified immunity doctrine has "diverged to a substantial degree from the historical standards." *Wyatt*, 504 U.S. at 170-72 (Kennedy, J., concurring); *see also, e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (critiquing the doctrine as lacking grounding in the text and history of § 1983, an example of the Court "substitut[ing] [its] own policy preferences for the mandates of Congress"); *cf. Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (describing modern qualified immunity doctrine as an "absolute shield for law enforcement officers").[9]

[9] These concerns are echoed across the judiciary. *See, e.g.*, *Horvath v. City of Leander*, 946 F.3d 787, 795 (5th Cir. 2020), as revised (Jan. 13, 2020) (Ho, J., concurring in the judgment in part and dissenting in part); *McCoy*, 950 F.3d at 237 (5th Cir. 2020) (Costa, J., dissenting in part); *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting); *Zadeh,* 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Irish v. Fowler*, No. 15-CV-0503 (JAW), 2020 WL 535961, at *51 n.157 (D. Me. Feb. 3, 2020); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019); *Russell v. Wayne Cty. Sch. Dist.*, No. 17-CV-154 (CWR) (JCG), 2019 WL 3877741, at *2 (S.D. Miss. Aug. 16, 2019); *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n.10 (D.N.M. 2018); *Thompson v. Clark*, No. 14-CV-7349 (JBW), 2018 WL 3128975, at *9-10 (E.D.N.Y. June 26, 2018).

B. Qualified immunity does not further the policy goals it was designed to achieve.

Despite its lack of statutory or common law roots, qualified immunity is primarily justified by the purported need to protect officials from financial liability and to avoid chilling the exercise of their duties. *See, e.g.*, *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). The theory is that, "[w]hen officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988). In the § 1983 context, this Court has guarded assiduously against "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow*, 457 U.S. at 814 (alteration in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)); *see also, e.g.*, *Pierson*, 386 U.S. at 555 ("A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does.").

By contrast, in cases where these considerations were not implicated, the Court has declined to extend qualified immunity to protect defendants from damages claims. *See Richardson v. McKnight*, 521 U.S. 399, 411 (1997) (comprehensive insurance coverage for private prison guards "reduces the employment-discouraging fear of unwarranted liability"); *Owen*,

445 U.S. at 654 (noting that the "injustice … of subjecting to liability an officer who is required … to exercise discretion" is "simply not implicated when the damages award comes not from the official's pocket, but from the public treasury").

Yet the nearly universal practice of government indemnification of public officials means that government actors are virtually never on the hook financially for actions performed in the course of duty. As Professor Joanna Schwartz found in a recent empirical study tracking litigation payments and indemnifications over a five-year period, in 44 of the country's largest jurisdictions, "officers financially contributed to settlements and judgments in just .41% of … civil rights damages actions resolved in plaintiffs' favor, and their contributions amount to just .02%" of the damages paid out in these cases. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890, 912-13, 936-37 (2014).[10] In 37 smaller jurisdictions tracked in the study, officers "never contributed to settlements or judgments in lawsuits brought against them." *Id.* Officers "did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy" and even when the liable officers "were disciplined, terminated, or prosecuted for their misconduct." *Id.* at 937. Officer indemnification included legal representation as well, as officers

[10] This expansive indemnification extended to punitive damages awards: Only one officer in the study was required to pay anything in punitive damages, for a total of $300. *Id.* at 917-18.

were "almost always provided with defense counsel free of charge" when they were sued. *Id.* at 915.

Thus, for any individual officer, the likelihood of having to contribute to a damages settlement or judgment in the course of a career is "exceedingly remote": In most jurisdictions studied, "officers are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit." *Id.* at 914. The same is true of prison officials: "[F]or individual officers, litigation is mostly a minor inconvenience because … officers do not have to pay for either their defense or any resulting settlement or judgment. Instead, in nearly all inmate litigation, it is the correctional agency that pays both litigation costs and any judgments or settlements, even though individual officers are the nominal defendants." Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1675-76 (2003). That is, publicly employed prison officials are in precisely the same financial situation as the private prison guards who were denied qualified immunity in *Richardson* because they were covered by insurance. 521 U.S. at 411. The principal concern animating the development of a robust qualified immunity defense is empirically invalid.

C. Qualified immunity leaves significant violations of important constitutional rights without remedy.

Modern qualified immunity doctrine stunts the development of constitutional law, preventing individuals from vindicating their constitutional rights. In theory, each case alleging a constitutional violation should help clarify the contours of constitutional

rights and limitations. Even under a qualified immunity regime, where the first plaintiff to raise a valid constitutional claim might be unable to recover unless the violation was "obvious," so long as the court reached the merits of the claim, subsequent plaintiffs could take advantage of the rule established in that suit. *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 Sup. Ct. Rev. 115, 120 (2009) ("When the lack of a clearly established right precludes recovery in one case, adjudication of the merits puts the next case on a different footing.").

Yet since this Court in *Pearson* permitted courts to conduct the two-pronged qualified immunity analysis in any order, courts have frequently granted qualified immunity because of a lack of factually analogous precedent without first determining whether the challenged behavior is unconstitutional. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Calif. L. Rev. 1, 33-51 (2015). Now, "[t]he law is never made clear enough to hold individual officials liable for constitutional violations … as Congress authorized in 42 U.S.C. § 1983." *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting). And the cycle of qualified immunity can perpetuate endlessly, resulting in "[i]mportant constitutional questions go[ing] unanswered precisely because no one's answered them before." *Zadeh*, 928 F.3d at 479-80 (Willett, J., concurring in part, dissenting in part); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017) ("[I]f courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue

will never become clearly established."). Absent an overhaul of qualified immunity, constitutional law will continue to stagnate, and plaintiffs alleging serious constitutional harm will continue to lack a remedy.

IV. This Case Is The Ideal Vehicle To Resolve The Questions Presented.

Several aspects of this case make it an ideal vehicle for addressing these critical questions about the scope and propriety of qualified immunity.

First, the facts are straightforward and essentially uncontested. Taylor was forced to reside for nearly a week in egregiously unsanitary conditions, first in a cell that was coated top to bottom with other prisoners' feces where he could neither eat nor drink water and then in a "cold room" where he was made to sleep in a puddle of raw sewage. He repeatedly brought his horrific cell conditions to the attention of Respondents, who refused to help him and at times mocked or laughed at him. As the district court pointed out in its summary judgment order, Respondents barely disputed Taylor's account, "provid[ing] little in the way of specific summary judgment evidence to support their assertion that the cells were not, in fact, covered with feces." Pet. App. 47a. The clear record and streamlined facts make this a clean vehicle to decide the questions presented as a matter of law.

Second, no ancillary issues would obstruct this Court's consideration of the questions presented. The appeal presents no procedural barriers inhibiting the

Court's review of the merits. The Fifth Circuit unanimously held that the horrific conditions Taylor experienced violated his constitutional rights. The only issue for this Court to resolve is whether qualified immunity bars Taylor's claim. The issue is squarely presented and was the sole basis for the decision below.

Third, this case does not feature split-second decisionmaking, and the officials here were not faced with an urgent decision that they resolved without deliberation. Instead, they intentionally placed Taylor in two separate squalid cells covered in human waste and left him there for nearly a week, despite his repeated pleas to be relocated. Their choice to subject Taylor to these conditions could have been reversed at any time. Moreover, there was no possible penological justification for Respondents' behavior; Respondents did not choose incorrectly between two plausible approaches but instead subjected Taylor to these filthy conditions in "obvious" disregard for his bodily safety. Pet. App. 15a-16a. Official immunity should be at its nadir in the face of a deliberate and long-lasting constitutional violation.

Finally, this case effectively demonstrates several ways in which modern qualified immunity doctrine is untenable. The Fifth Circuit's granular parsing of the number of days Taylor spent naked in a cell covered in others' feces and urine demonstrates the difficulty that courts face in determining the appropriate level of generality at which to define the right at issue. Its refusal to find an "obvious" constitutional violation renders *Hope* a nullity. Even the holding that Respondents' mistreatment of Taylor *was* unconstitutional gives minimal prospective guidance to courts in

evaluating analogous but slightly differentiated circumstances against a qualified immunity defense: What if an inmate is left in a cell like Taylor's for only five days? What if an inmate is placed in a seclusion cell as punishment for misbehavior rather than during treatment for suicidality? What if the next time there is a chair in the second cell? These minor tweaks to the fact pattern could be rightfully recognized as irrelevant to the core constitutional violation or incorrectly found to immunize future illegal conduct, depending on the specificity with which the constitutional right established by Taylor's case is defined. This case thus enables the Court to consider the validity of its qualified immunity jurisprudence in a context in which the flaws of that doctrine are apparent and were dispositive to the outcome below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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