No. _____

IN THE
Supreme Court of the United States

CHARLES HAMNER,

Petitioner,

v.

DANNY BURLS, et al.

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

"Since qualified immunity is a defense, the burden of pleading it rests with the defendant." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Nonetheless, three circuits raise qualified immunity *sua sponte*. By contrast, in nine circuits, defendants must claim entitlement to qualified immunity or lose its shield.

The first question presented is:

Is qualified immunity an affirmative defense that state actors must assert, as nine circuits hold, or may federal appellate courts raise the defense *sua sponte*, as three circuits hold?

In *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), the Court announced discretion to proceed directly to the "clearly established" prong of the qualified immunity analysis. A chorus of federal jurists has criticized this approach, which may "leave standards of official conduct permanently in limbo." *Camreta v. Green*, 563 U.S. 692, 706 (2011).

The second question presented is:

Should the Court reconsider *Pearson* in light of empirical evidence that bypassing the constitutional prong results in a constitutional catch-22, increasingly leaving pressing questions unanswered simply because they have not been answered before?

PARTIES TO THE PROCEEDING

Petitioner Charles Hamner was the Appellant in the Eighth Circuit. Respondents Danny Burls, Connie Jenkins, Maurice Williams, Steve Outlaw, and Marvin Evans were the Appellees in the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Hamner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The Eighth Circuit's opinion (Pet. App. 1a-18a) is published at 937 F.3d 1171. The disposition of the district court (Pet. App. 22a-27a) is unpublished, but is available at 2018 WL 2033406; the order adopting this disposition is available at 2018 WL 2024613.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on November 26, 2019. Petitioner timely filed a petition for rehearing, which the court of appeals denied on December 9, 2019. On February 19, 2020, Justice Gorsuch granted an extension of time to file a petition for a writ of certiorari to April 21, 2020. This Court then issued an order extending the deadline to file any petition for a writ of certiorari to 150 days from the order denying the petition for rehearing. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND 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."

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . 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 . . . .

STATEMENT OF THE CASE

1. Petitioner Charles Hamner, formerly an Arkansas prisoner, "suffers from a number of mental health problems, including borderline personality disorder, posttraumatic stress disorder, antisocial personality disorder, anxiety, and depression," Pet. App. 2a, causing prison officials, Respondents here, to recognize that Petitioner was "seriously mentally ill." Pet. App. 11a.

In March 2015, Petitioner "alerted prison authorities to a potential attack by another inmate against a prison guard." Pet. App. 2a-3a. For reasons that remain murky, Arkansas prison officials then transferred Petitioner to a solitary confinement unit. Pet. App. 3a.

There, Petitioner spent twenty-three hours of each day alone in his cell. *Id.* Before leaving it, Petitioner

was required to submit to a strip search. Pet. App. 3a. Whether inside or outside his cell, Petitioner "rarely [had] any human contact." Pet. App. 3a. His isolation was compounded by the lack of a television, and a routinely-broken light, which left him in darkness, struggling to "see or read anything for days." *Id.*

While in solitary confinement, Petitioner experienced "anxiety, hallucinations, and even suicidal thoughts." Pet. App. 8a; *see also* Pet. App. 3a-4a. He "felt a risk of 'irreparable emotional damage'" from the experience. Pet. App. 4a. The "known negative effects of segregation and isolation," Pet. App. 16a (Erickson, J., concurring), were amplified, Petitioner alleged, because Respondents "ignored" his "'pleas' for psychological treatment." Pet. App. 3a, 8a.

Respondents provided no "meaningful" explanation for imposing or extending Petitioner's solitary confinement, and their "review process" was a "futil[e]" exercise. Pet. App. 2a-3a. After nearly seven months, Respondents returned Petitioner to general population. Pet. App. 3a.

2. In 2017, Petitioner filed a pro se 42 U.S.C. § 1983 civil rights complaint against Respondents, whom he charged with violating the Fourteenth Amendment by subjecting him to solitary confinement without affording him adequate procedural protections. Pet. App. 4a. He also brought a First Amendment retaliation claim. *Id.*

The district court screened Petitioner's complaint under 28 U.S.C. § 1915A. *Id.* It dismissed the Fourteenth Amendment claim after holding that solitary confinement did not "implicate a protected

liberty interest" since "periods of segregation significantly longer than [Petitioner's] are not considered atypical and significant hardships." ECF 4 at 2-3; Pet. App. 4a.[1]

The district court ordered the First Amendment retaliation claim served on Respondents. Pet. App. 4a. Arguing that they were "entitled to qualified immunity in their individual capacities as to plaintiff's retaliation claim," Respondents moved to dismiss that count. ECF 17 at 5. The district court denied the motion, ECF 20 at 5; ECF 22, and Respondents filed an answer to the First Amendment retaliation claim.

Petitioner then filed an amended complaint in which he expanded upon his procedural due process claim under the Fourteenth Amendment. Pet. App. 4a. He also added two Eighth Amendment claims: Respondents denied him constitutionally adequate mental health care, and Respondents subjected him to unconstitutional conditions.[2] *Id.*

Respondents moved to dismiss a second time, arguing that their conduct complied with the Constitution. ECF 38; *see also* Pet. App. 7a. They did not, however, assert qualified immunity as a defense

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[1] "ECF" refers to a numbered entry on the district court docket. By way of example, ECF 4 at 2-3 refers to the fourth entry at pages 2-3.

[2] When amending his complaint, Petitioner also renewed his First Amendment retaliation claim. ECF 36 at 6, 12. That claim was subsequently dismissed for failure to exhaust, which Petitioner did not challenge on appeal. Appellant's Br. 14, n.10.

to Petitioner's Eighth or Fourteenth Amendment claims. ECF 38; Pet. App. 7a.

The district court found no constitutional violation and dismissed Petitioner's case in its entirety. Pet. App. 4a; Pet. App. 22a-27a. It did not consider whether Petitioner's claims could have been dismissed on the un-asserted basis of qualified immunity.

3. Petitioner timely filed a counseled appeal. Pet. App. 4a-5a. The parties briefed the alleged constitutional violations but none addressed—or even mentioned—qualified immunity. Pet. App. 6a. At oral argument, however, the appellate court raised the affirmative defense *sua sponte*. Oral Argument at 8:49, *Hamner v. Burls*, 937 F.3d 1171 (No. 18-2181), *available at* http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/182181.MP3; *see also* Pet. App. 7a. After argument, it ordered supplemental briefs "address[ing] whether any or all of the district court's judgment should be affirmed based on qualified immunity." Pet. App. 6a.

Petitioner argued that, by choosing not to assert qualified immunity from Petitioner's Eighth and Fourteenth Amendment claims, Respondents had either waived or inexcusably forfeited the pleading-stage version of the defense. Appellant's Supplemental Br. 2-5. Respondents conceded that they had not previously sought immunity from Petitioner's Eighth or Fourteenth Amendment claims. Appellees' Supplemental Br. 3-5. Nonetheless, they argued in supplemental briefing that the Eighth Circuit should take the first view of qualified

immunity. *Id.* at 1-3. Even then, however, Respondents did not claim entitlement to qualified immunity from Petitioner's claim of constitutionally inadequate mental health care under the Eight Amendment. *Id.* at 11-14.

The panel majority acknowledged that Respondents had not asserted qualified immunity prior to post-argument supplemental appellate briefing, but proceeded with an immunity analysis on the view that qualified immunity at the pleading stage is a "purely legal issue that is amenable to consideration for the first time on appeal." Pet. App. 6a-7a. As Respondents were sure to raise qualified immunity on remand, the majority explained, there was "nothing to be profited by th[e] procedural roundabout" of deferring its review. Pet. App. 7a. It noted that the Second and Ninth Circuits had addressed qualified immunity under similar circumstances. *Id.*

The majority exercised *Pearson* discretion to begin—and end—the qualified immunity analysis with the "clearly established" inquiry. *Id.* While acknowledging that the "negative effects of [solitary] may influence . . . future court decisions," the majority believed that reaching the constitutional issues risked "turn[ing] a small case into a large one." Pet. App. 6a, 13a

The majority thus affirmed solely on the basis that no prior precedent "clearly established" that Petitioner had endured unconstitutional conditions of confinement or been entitled to procedural due process protections. Pet. App. 2a. Despite the fact that

Respondents never asserted qualified immunity from Petitioner's Eighth Amendment mental health care claim—even in supplemental briefing—the majority granted immunity on that claim, too. *Id.*

4. Judge Erickson "reluctantly" concurred on the basis that no "clearly established" circuit precedent forbade Respondents' conduct, but questioned the majority's decision not to examine whether that conduct was constitutional. Pet. App. 16a-18a (Erickson, J., concurring). In his view, "the Constitution requires, at a minimum, an opportunity for meaningful review when prison administrators impose restrictions on an inmate as significant and as potentially injurious as placement in administrative segregation." Pet. App. 16a (Erickson, J., concurring). Judge Erickson then asserted that "the time has come to consider the literature and reverse the precedent that stands for the proposition that isolation is not a significant hardship with constitutional implications." Pet. App. 18a (Erickson, J., concurring).

5. Petitioner timely sought rehearing en banc. Appellant's Pet. for Reh'g. Judges Erickson, Grasz, and Kelly voted to grant rehearing, but the petition was denied. Pet. App. 29a.

REASONS FOR GRANTING THE PETITION

The decision below entrenches an intractable divide among the circuits: whether qualified immunity is an affirmative defense that defendants bear the burden of asserting, or a barrier that federal appellate judges may erect on their own. Four decades ago, this Court held that qualified immunity is an affirmative defense, and allocated the "burden of

pleading it" to state actors. *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). Nine circuits—the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits—follow *Gomez*. The Second, Eighth, and Ninth Circuits do not. Only this Court can resolve this split and clarify the proper role of the federal judiciary in implementing the qualified immunity doctrine.

The question is exceptionally important because authorizing federal appellate courts to inject qualified immunity *sua sponte* has profound effects. Beyond cultivating a transformative expansion of qualified immunity doctrine, the approach embraced by the Second, Eighth, and Ninth Circuits further disadvantages private citizens hoping to remedy violations of important federal rights, consolidates power in the federal courts at the expense of litigants, and risks undermining the public's perception of an unbiased federal judiciary.

The divided panel decision below also illustrates a second controversy: whether *Pearson v. Callahan*, 555 U.S. 223 (2009), should be reconsidered in light of empirical evidence that courts are increasingly dodging the constitutional prong, with troubling results. The dramatic shift to resolving cases on the "clearly established" prong has meaningful consequences. First, it leads to "constitutional stasis" that unnecessarily prolongs the lifespan of constitutionally dubious practices such as the brutal solitary confinement Petitioner endured. Second, it deprives the bench, private citizens, and government officers of important guidance regarding constitutional minima. Third, it creates a perception that state actors are unaccountable to the

Constitution. Fourth, it lends outsized weight to the precedent of circuits that reach the constitutional question with disproportionate frequency.

The Court should grant certiorari to resolve the circuit split, reconsider *Pearson*, and redress the increasingly stark "diverge[nce]" of qualified immunity jurisprudence "from the historical inquiry mandated by [Section 1983]." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part). This case is an ideal vehicle for considering the questions presented—the record is crisp, the arguments are preserved, the decision below is reasoned, and the challenged conduct is of independent concern to the Court.

If, however, the Court does not grant plenary review, it should summarily reverse for two interdependent reasons. First, the panel's decision squarely conflicts with the Court's holding in *Gomez* that qualified immunity is an affirmative defense that state actors—and no one else—have the burden to champion. Second, the decision below is impossible to reconcile with the Court's cases establishing that circuit courts lack the "authority to resurrect" waived defenses, and can only do so with respect to forfeited defenses under "exceptional" circumstances wholly lacking—and never asserted—here. *Wood v. Milyard*, 566 U.S. 463, 471 n.5, 473 (2012).

I. THE COURT SHOULD GRANT REVIEW TO DECIDE THE QUESTIONS PRESENTED.

A. The Circuits Are Split, 9-3, On Whether Qualified Immunity Is An Affirmative Defense That Defendants Must Assert, Or A Shield That Appellate Judges May Raise Sua Sponte.

1. If this case had been heard before the First, Third, Fourth, Fifth, Sixth, Seventh, Tenth, Eleventh, or D.C. Circuits, the result would have been different. These circuit courts hold that qualified immunity is unavailable on appeal if government officers do not raise and preserve the defense below.

In the **First Circuit**, qualified immunity is waived or forfeited unless it is "raised in a diligent manner" in the district court by the government. *Guzman-Rivera v. Rivera-Cruz*, 98 F.3d 664, 668 (1st Cir. 1996). This approach properly balances the equities, as it shields plaintiffs from gamesmanship without "inhibit[ing] the ability of defendants to raise a defense of qualified immunity and benefit from the protection it offers." *Id.* at 668.

In the **Third Circuit**, a defendant who fails to "assert his qualified-immunity claim below . . . is barred from raising it in th[e] appeal." *Bines v. Kulaylat*, 215 F.3d 381, 386 (3d Cir. 2000). This rule has "no potential for manifest injustice" because, in the usual case, state actors retain a "full opportunity to assert [a] qualified-immunity claim in the District Court" on remand. *Id.* at 385.

The **Fourth Circuit** "refuse[s] to consider" qualified immunity—"*sua sponte*" or otherwise—when it is not properly raised by defendants in the district court. *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 226 (4th Cir. 1997). This position follows from the "well-settled" rule that "qualified immunity is an affirmative defense, and that 'the burden of pleading it rests with the defendant.'" *Sales v. Grant*, 224 F.3d 293, 296 (4th Cir. 2000) (quoting *Crawford–El v. Britton,* 523 U.S. 574, 586-87 (1998)).

The **Fifth Circuit** requires defendants to "press, not merely intimate," qualified immunity in the district court "in order to preserve it for appeal." *Kelly v. Foti*, 77 F.3d 819, 823 (5th Cir. 1996). "[D]eclining" to take the first view of an un-asserted "qualified immunity defense will not result in grave injustice" since defendants may generally assert the defense on remand. *Id.* at 822.

In the **Sixth Circuit**, "[t]he failure to raise qualified immunity results in waiver of the defense" and precludes appellate review. *Summe v. Kenton Cty. Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010). This rule is mandated by the fact that qualified immunity is "an affirmative defense that must by pleaded and proved by the defendant." *Id.* at 269.

In the **Seventh Circuit**, the court of appeals may not review qualified immunity unless defendants asserted it below. *Narducci v. Moore*, 572 F.3d 313, 323-25 (7th Cir. 2009). "The cases holding that an omission of this character constitutes a waiver of the right to present [qualified immunity] on appeal are

legion." *Walsh v. Mellas*, 837 F.2d 789, 799-800 (7th Cir. 1988).

The **Tenth Circuit** "cannot" reach qualified immunity if government officers do not raise it below because "qualified immunity is an affirmative defense that defendants must invoke in district court." *Greer v. Dowling*, 947 F.3d 1297, 1303 (10th Cir. 2020).

Government officers in the **Eleventh Circuit** must raise the defense or lose its protection since "[q]ualified immunity is an affirmative defense to personal liability that the defendant has the burden of pleading." *Moore v. Morgan*, 922 F.2d 1553, 1557 (11th Cir. 1991).

In the **D.C. Circuit**, state actors inexcusably "forfeit[]" qualified immunity when they raise the defense for the first time on appeal. *Robinson v. Pezzat*, 818 F.3d 1, 11 (D.C. Cir. 2016). Because "[t]his argument comes too late" under those circumstances, qualified immunity is not available as "an alternative ground" on which to affirm. *Id.*

2. The Second, Eighth, and Ninth Circuits, by contrast, permit appellate courts to inject qualified immunity *sua sponte* when defendants have not raised or preserved the defense.

The **Second Circuit**'s rule permitting appellate courts to raise qualified immunity *sua sponte* is consistent, the court reasons, with its "discretion" to review "waived arguments" presenting pure "question[s] of law." *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009).

The **Eighth Circuit**, of course, takes the position that appellate courts may raise qualified immunity *sua sponte*. *See* Pet. App. 7a; *Story v. Foote*, 782 F.3d

968, 969-70 (8th Cir. 2015); *Jacobson v. McCormick*, 763 F.3d 914, 916-17 (8th Cir. 2014).

In the **Ninth Circuit**, appellate courts may raise qualified immunity *sua sponte* because it presents a "pure[]" issue of law, *Graves v. City of Coeur D'Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003), and courts have "discretion" to review waived arguments.[3] *Cmty. House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 968 (9th Cir. 2010).

3. Resolving the proper approach is profoundly important. The unconventional procedural mechanism invoked by the Second, Eighth, and Ninth Circuits in civil rights cases amounts to a "freewheeling policy choice," *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring), to render one-sided aid on behalf of government defendants.

Federal courts "do not, or should not, sally forth each day looking for wrongs to right" or a side to champion, but rather "decide only questions presented by the parties." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). The party-presentation system fosters an important value: the public perception that federal judges are "neutral arbiter[s]" engaged in interpreting rules evenhandedly rather than advocates with a dog in the fight. *Id.* at 243. That ideal is undermined when federal appellate courts put a thumb on the scale by invoking qualified immunity *sua sponte*.

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[3] On these points, the Ninth Circuit may be internally conflicted. *See Binkovich v. Barthelemy*, 672 F. App'x 648, 649 (9th Cir. 2016) (refusing to consider qualified immunity when defendants raised it in an answer but did not press the defense in dispositive motions before the district court).

As well, the transfiguration only exacerbates "the kudzu-like creep of the modern [qualified] immunity regime" that has lately engendered so much "disquiet." *Zadeh v. Robinson*, 902 F.3d 483, 498-99 (5th Cir. 2018) (Willett, J., concurring dubitante). That disquiet may be justified. Qualified immunity has no statutory basis. *Malley v. Briggs*, 475 U.S. 335, 342 (1986). It is not grounded in history. William Baude, *Is Qualified Immunity Unlawful?* 106 CAL. L. REV. 45, 55-61 (2018). And it is not required to insulate from the chill of financial ruin. *E.g.*, Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 890 (2014) (indemnification guarantees that law enforcement officers almost never pay out-of-pocket—indeed, only 0.02% of the time).

The Court should not countenance this radical expansion of a judge-made immunity doctrine that already suffers under scrutiny. A mutation amounting to a "get out of jail free card" that may be played by courts on behalf of the government is a far cry from the limited immunity regime that existed at common law. *See* Baude, *supra* at 55-57.

B. The Court Should Reconsider *Pearson v. Callahan*.

The decision below exemplifies an additional ongoing expansion of the qualified immunity regime warranting the Court's intervention.

1. In *Saucier v. Katz*, 533 U.S. 194 (2001), the Court announced a mandatory two-step sequence for resolving assertions of qualified immunity. The test required courts to consider whether a government official's conduct violated a constitutional right before turning to decide whether that right was clearly

established at the time of the alleged conduct. *Id.* at 201. The Court noted that the first prong permits "the law's elaboration from case to case" and is the mechanism by which courts describe and protect constitutional rights. *Id.* It further observed that "[t]he law might be deprived of this explanation were a court to simply skip ahead to the question [of] whether the law clearly established that the officer's conduct was unlawful." *Id.*

Several years later, after examining perceived inefficiencies, the Court abandoned this framework. *Pearson v. Callahan*, 555 U.S. 223, 234 (2009). Instead, *Pearson* granted lower courts the discretion to go directly to the second step and evaluate the "clearly established" prong of the qualified immunity analysis. *Id.* at 236.

2. As it turns out, *Pearson* may not have ushered in a golden age of efficiency. Authorized to "leave [constitutional] issue[s] for another day," courts may dodge the same questions again and again. *Camreta v. Greene*, 563 U.S. 692, 706 (2011); *see also*, *e.g.*, *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting that it was the "fourth time in three years that an appeal has presented the [same] question" only to "resolve the question at the clearly established step").

While *Pearson*'s efficiency is thus debatable, its distortion of the qualified immunity regime is not. First, *Pearson* has unquestionably stymied the development of constitutional guidance by "leav[ing] standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706. Empirical analyses of the

Saucier era show that "courts avoided reaching constitutional questions" in qualified immunity cases at rates calculated to be between 1% and 6%. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 27-29 (2015). In marked contrast, circuit courts now skip the constitutional question *54.5%* of the time. *Id*. at 33-34. This precipitous decline has resulted in a similarly significant decrease in the rate at which circuit courts announce new constitutional rights—*i.e.*, those that were not clearly established prior to the court's decision. *Id*. at 37-38. In the pre-*Pearson* era, that rate ranged from 7%-14%. *Id*. It has plunged to approximately half that since *Pearson*. *Id*.

Second, "there is substantial variation in the rate at which the circuits . . . reach constitutional questions." *Id*. at 39-40. The Fifth Circuit "lead[s] the way," exercising discretion to reach constitutional issues 58% of the time, a "statistically significant" variation from the Ninth Circuit, for example, which reaches the constitutional prong in only 36% of cases. *Id*. at 39. *Pearson* may thus "increase disuniformity between circuits," lending disproportionate weight to the constitutional jurisprudence of some appellate courts. *Id.* at 42.

This turn of events has prompted significant—and justified—handwringing. Judges from all corners of the country have decried "the inexorable result" of *Pearson*: namely, the "constitutional stagnation" resulting from "fewer courts establishing law at all, much less *clearly* doing so." *Zadeh*, 902 F.3d at 498-99 (Willett, J., concurring dubitante); *see also*, *e.g.*, *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en

banc) (Grasz, J., dissenting) (observing that *Pearson* "stunt[s] the development of constitutional law" by encouraging "default[] to the 'not clearly established' mantra").

Likewise, judges have cogently explained how skipping the constitutional question all but gives the government "*carte blanche* to violate constitutionally protected privacy rights" by functioning as "a perpetual shield against the consequences of constitutional violations." *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2011). Through "send[ing] an alarming signal to law enforcement officers and the public . . . that palpably unreasonable conduct will go unpunished," *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), *Pearson* may, in turn, "frustrate . . . the promotion of law-abiding behavior." *Camreta*, 563 U.S. at 706 (internal quotation marks omitted).

In addition, jumping ahead to the "clearly established" prong, without first adjudicating the constitutionality of a challenged practice, "deprive[s] conscientious officers of the guidance necessary to ensure that they execute their responsibilities in a manner compatible with the Constitution." *United States v. Garcia-Hernandez*, 659 F.3d 108, 116 (1st Cir. 2011) (Ripple, J., concurring). Put another way, *Pearson* permits courts to abdicate their "essential function of explaining and securing the protections of the Constitution by failing to inform law officers, among others, which practices are constitutional and which are not." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1249 (2015).

3. "There is a better way." *Kelsay*, 933 F.3d at 987 (en banc) (Grasz, J., dissenting).

First, the Court could overrule *Pearson* and return to the *Saucier* framework. In contrast to the usual case, *stare decisis* does not counsel hesitation in "revisit[ing] an earlier decision where experience with its application reveals that it is unworkable." *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015). After all, *Pearson* is not a long-standing rule, but rather an experimental reaction designed to address perceived shortcomings with the *Saucier* regime. *Pearson*, 555 U.S. at 233-34. In fact, the *Pearson* Court rejected the argument that *stare decisis* was an impediment to reconsideration. *Id.* The *Saucier* sequence, the Court explained, was a "judge-made rule" concerning "an important matter involving internal Judicial Branch operations" that had proved to be unworkable.[4] *Id.*

The same criticism can be leveled at *Pearson*. Not only might the cure be worse than the disease, the cure was not even what the doctor ordered. This Court did not encourage wholesale abdication of the *Saucier* protocol. Instead, it described that sequence as "often beneficial" and noted that "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a

[4] In related contexts, the Court has not hesitated to amend the rules governing Section 1983 claims. *See*, *e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 816-818 (1982) (overruling subjective-good faith element recognized in *Gomez*).

qualified immunity defense is unavailable."[5] *Id.* at 236.

Short of overruling *Pearson*, the Court could invoke one of "several 'mend it, don't end it' options" suggested by jurists and commentators. *Cole v. Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (en banc) (Willett, J., dissenting). For example, the Court could "nudge [lower] courts to address the threshold constitutional merits rather than leave the law undeveloped." *Id.*; *see also Kelsay*, 933 F.3d at 987 (en banc) (Grasz, J., dissenting) (noting that, "at every reasonable opportunity," courts should "address the constitutional violations prong . . . rather than defaulting to the 'not clearly established' mantra"). Or "the Court could require lower courts to explain *why* they are side-stepping the constitutional merits question." *Cole*, 935 F.3d at 472.

Nearly a decade ago, the Court suggested that *Pearson* could end up spelling trouble. *Camreta*, 563 U.S. at 706. It was prescient. This Court should grant certiorari to revisit *Pearson* and ensure that the benefit of *Pearson* discretion is adequately balanced with its high cost.

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[5] Petitioner, for example, endured seven months of solitary confinement. That is more than long enough to inflict permanent damage. *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (noting that "even a short [solitary] confinement" was sufficient to plunge prisoners into "insan[ity]"). Yet, seven months is frequently too short to obtain constitutional review when qualified immunity is not available as an outcome-determinative defense. Here, Petitioner's claims for non-monetary relief were moot more than a year before he even managed to file his initial pro se complaint in the *district court*, ECF 2 at 4, notwithstanding the Eighth Circuit's confusion on that point. Pet. App. 7a.

C. This Case Is An Ideal And Compelling Vehicle To Resolve The Questions Presented.

1. This case offers an uncommonly straightforward opportunity to resolve the questions presented as pure matters of law. The decision below squarely turns on the issues Petitioner raises. The questions are preserved. And the facts are undisputed.

2. This case also presents an especially compelling vehicle for resolving the questions presented: the expansive qualified immunity regime exemplified by the decision below has permitted solitary confinement to evade constitutional scrutiny despite widespread condemnation of the practice.

Members of this Court have decried solitary confinement as "perilously close to a penal tomb" and have urged further inquiry into its constitutionality. *Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., statement respecting denial of certiorari); *see Davis v. Ayala*, 135 S. Ct. 2187, 2209-10 (2015) (Kennedy, J., concurring) (emphasizing "[t]he human toll wrought by extended terms of isolation," describing solitary confinement as a "regime that will bring you to the edge of madness, perhaps to madness itself," and *calling for constitutional scrutiny of the practice*); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (highlighting the "dehumanizing effect of solitary confinement," cataloguing the "numerous deleterious harms" it inflicts, and *calling for constitutional scrutiny of the practice*).

Notwithstanding these calls for further constitutional inquiry, lower courts routinely dispose of cases concerning solitary confinement on the "clearly established" prong of the analysis, thereby avoiding the constitutional question altogether. In the last three years, for example, and despite the fact that such claims are hardly novel, *see*, *e.g.*, *Wilkinson v. Austin*, 545 U.S. 209 (2005), a Westlaw search shows that circuits courts relied on the "clearly established" prong alone to resolve 62.5% percent of Fourteenth Amendment due process challenges to solitary confinement in cases decided on qualified immunity grounds.[6] That is, in nearly two thirds of these cases, appellate courts refused to grapple with whether the Fourteenth Amendment had been violated. In accordance with the "Escherian Staircase" that is the contemporary qualified immunity regime, there is no

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[6] *Compare* Pet. App. 6a (declining to reach constitutional question to avoid "turn[ing] a small case into a large one"); *Mathews v. Brown*, 768 F. App'x 537, 539–40 (7th Cir. 2019) (observing that "[w]e cannot say on this record that Mathews had a 'clearly established' right to avoid segregation"); *Grissom v. Roberts*, 902 F.3d 1162, 1170 (10th Cir. 2018) (noting that panel "need not address" merits of procedural due process claim concerning twenty years of solitary confinement because no "clearly established law . . . support[s] his claim"); *Perry v. Spencer*, 751 F. App'x 7, 10–11 (1st Cir. 2018) (noting that procedural due process rights are "not sufficiently defined as to place the constitutional question beyond debate") (internal quotation marks omitted); *Carr v. Higgin*s, 700 F. App'x 598, 601 (9th Cir. 2017) (similar) *with J.H. v. Williamson Cty., Tenn.*, 951 F.3d 709, 720 (6th Cir. 2020) (reaching the constitutional prong, but granting qualified immunity); *Smith v. Corcoran*, 716 F. App'x 656, 657 (9th Cir. 2018) (similar); *Almighty Supreme Born Allah v. Milling*, 876 F.3d 48, 59-60 (2d Cir. 2017) (similar).

need to bother. *Zadeh*, 902 F.3d at 498-99 (Willett, J., concurring dubitante).

Without this Court's intervention, the decision below will surely be weaponized countless times to shield solitary confinement from constitutional scrutiny. This is not hyperbolic. In fact, in the months since the panel opinion issued, it has already been cited to dispose of unsuccessful civil rights challenges to the imposition of solitary confinement.[7] Likewise, in the 18 months since this Court denied certiorari in *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017) and *Lowe v. Raemisch*, 864 F.3d 1205 (10th Cir. 2017), both panel decisions continue to be cited for the proposition that no clearly established law prohibits solitary confinement without any access to outdoor recreation.[8]

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[7] *See, e.g.*, *O'Neil v. Andrews*, No. 2:19-cv-00159-DPM-JJV, 2020 WL 1042277, at *3 (E.D. Ark. Feb. 11, 2020) (citing to *Hamner* for the proposition that there is "no clearly established right to due process for [a] mentally ill prisoner held in solitary confinement twenty-three hours a day for seven months"); *McClure v. Bivens*, No. 4:20-cv-00147-JM-JJV, 2020 WL 1668992, at *2 (E.D. Ark. Mar. 19, 2020) (citing to *Hamner* for the proposition that "a demotion to segregation, even without cause, is not itself an atypical or significant hardship").

[8] *See*, *e.g.*, *Moore v. Little*, 785 F. App'x 609, 613 (10th Cir. 2019) (citing *Apodaca* and *Lowe* for proposition that there is "reasonable debate on the constitutionality" of withholding outdoor exercise for fourteen months from prisoner in solitary confinement); *Cunningham v. Hall*, No. 19-3115-SAC, 2019 WL 4034467, at *3 (D. Kan. Aug. 27, 2019) (citing *Apodaca* and *Lowe* for the proposition that "the Court does not need to decide the constitutionality of [solitary confinement without outdoor exercise] because the right was not clearly established").

As months turn to years, the "ravages of solitary confinement," *Apodaca*, 139 S. Ct. at 9 (Sotomayor, J., statement respecting denial of certiorari), will continue uninterrupted, especially if courts are permitted to raise qualified immunity on behalf of government actors. The time has come for the Court to intervene.

II. THE COURT SHOULD SUMMARILY REVERSE IN THE ALTERNATIVE.

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

First, the court of appeals raised and decided the case on the basis of qualified immunity even though Respondents had not asserted the defense in the district court. In fact, Respondents first claimed entitlement to immunity when instructed to brief the issue after oral argument, and even then elected not to seek immunity from Petitioner's Eighth Amendment mental health care claim. Undeterred, the majority dismissed *all* of Petitioner's claims on qualified immunity grounds. That decision is irreconcilable with *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), where this Court unequivocally held that qualified immunity is an affirmative defense which defendants bear the burden of raising. The Eighth Circuit blatantly disregarded this Court's "conclusion as to the allocation of the burden," *id.*, when it asserted the defense for Respondents.

Second, Respondents waived—or, at the very least, inexcusably forfeited—the pleading-stage version of qualified immunity from Petitioner's Eighth and

Fourteenth Amendment claims. Early in the litigation, Respondents claimed entitlement to qualified immunity from Petitioner's First Amendment retaliation claim. With respect to Petitioner's Eighth and Fourteenth Amendment claims, however, Respondents charted a different course, choosing to attack them only on the merits. A "knowing[] and intelligent[]" decision to raise a qualified immunity defense as to one claim and "relinquish[]" it as to three others is paradigmatic waiver, which the Eighth Circuit had no "authority" to excuse. *Wood v. Milyard*, 566 U.S. 463, 470-71 nn.4-5 (2012). Put another way, Respondents' tactical decision to wait for summary judgment to assert qualified immunity from Petitioner's Eighth and Fourteenth Amendment claims was not for the circuit court to second-guess.

The appellate court was wrong to revive the defense even if it generously construed Respondents' decision to forego a qualified immunity defense as an unintentional error that amounts to forfeiture. Forfeited defenses "cannot be asserted on appeal" except in "exceptional" circumstances.[9] *Id.* at 470-72. Respondents did not argue that any exceptional circumstances excused their forfeiture, and none do: Petitioner brought a run-of-the-mill civil rights suit.

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[9] Even this limited potential to revive forfeited defenses is controversial. *See e.g.*, *Day v. McDonough*, 547 U.S. 198, 212 (2006) (Scalia, J., dissenting) (refusing to "join this novel presumption *against* applying the Civil Rules" that have long prohibited federal courts from sua sponte considering forfeited defenses).

The only thing exceptional about this case is the manner in which the panel majority resolved it.

The Court has not hesitated to summarily reverse when lower court decisions squarely conflict with precedent. Indeed, "this Court routinely displays an unflinching willingness to 'summarily reverse courts for wrongly denying officers the protection of qualified immunity.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (Sotomayor, J., dissenting). There is then no principled reason to deny summary reversal merely because government officers have been inappropriately *granted* qualified immunity.

Because the decision of the court of appeals cannot be reconciled with the Court's precedent, summary reversal is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari and resolve the questions presented. Alternatively, it should summarily reverse the decision below.

Respectfully submitted,

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