**No.**

IN THE

*Supreme Court of the United States*

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PRINCE MCCOY, SR.,

*Petitioner*,

*v.*

TAJUDEEN ALAMU,

*Respondent.*

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

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# PETITION FOR A WRIT OF CERTIORARI

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Samuel Weiss
*Counsel of Record*
RIGHTS BEHIND BARS
416 Florida Avenue, NW
#26152
Washington, DC 20001
(202) 455-4399
sam@rightsbehindbars.org

Daniel Greenfield
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER
SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

*Counsel for Petitioner*

## QUESTIONS PRESENTED

Respondent is a prison guard who attacked an asthmatic prisoner in the face with a can of mace "for no reason at all." The Fifth Circuit held that Respondent's unprovoked assault violated the Eighth Amendment but also that he was entitled to qualified immunity. This Court has held, and reiterated via summary reversal, that it violates the Eighth Amendment to use force against prisoners maliciously and sadistically for the purpose of causing harm.

1. Is a prison official entitled to qualified immunity if he gratuitously assaults a prisoner but not every *Hudson* factor favors the plaintiff, as the Fifth Circuit held here, or can the plaintiff nonetheless defeat qualified immunity, as the Fourth, Sixth, Ninth, and Eleventh Circuits have held?

The Fifth Circuit held that the unconstitutionality of Respondent's unprovoked assault was not clearly established despite circuit precedent holding that unprovoked attacks with a fist or taser violate the Eighth Amendment.

2. Is a prison official who assaults a prisoner without justification entitled to qualified immunity if past precedent involved different mechanisms of force, as the Fifth Circuit implicitly held here, or can precedent concerning unprovoked assaults by one weapon clearly establish the unconstitutionality of unprovoked assaults by other weapons, as the Fourth and Ninth Circuits have held?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Prince McCoy and Respondent Tajudeen Alamu.

## RELATED PROCEEDINGS

There are no related proceedings.

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## INTRODUCTION

In 2010, this Court unanimously summarily reversed a grant of qualified immunity to a guard who assaulted a prisoner without justification. *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam). While this Court's precedent required that a defendant use excessive force "maliciously and sadistically to cause harm" to state an Eighth Amendment excessive force claim, *Hudson v. McMillian*, 503 U.S. 1, 6-7 (1992), it had rejected any requirement that the injury resulting from such force be significant because "[w]hen prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9. Accordingly, this Court in *Wilkins* summarily reversed a lower court opinion requiring that an Eighth Amendment claim plead a significant injury, which this Court did not consider a "defensible" holding because it ignored this Court's "aim[] to shift the core judicial inquiry from the extent of the injury to the nature of the force—specifically, whether it was nontrivial and was applied ... maliciously and sadistically to cause harm." 559 U.S. at 39 (quoting *Hudson*, 503 U.S. at 7).

Prince McCoy similarly was assaulted for no legitimate reason when a guard maced him in the face because the guard was angry at a different prisoner. Like that of the plaintiff in *Wilkins*, McCoy's case was dismissed, this time on qualified immunity grounds. The Fifth Circuit held that this Court's repeated holdings that a prison guard may not use force without justification were not specific enough to clearly establish that *this* use of force without justification was unconstitutional. In doing so, the

court invented a barrier to relief as indefensible as that in *Wilkins*.

The decision below created two circuit splits, which the Court should grant certiorari to resolve. This case is an ideal vehicle for considering the questions presented—the record is crisp, the arguments are preserved, and the decisions below are reasoned.

If, however, the Court does not grant plenary review, it should summarily reverse for two reasons. First, the majority holding squarely conflicts with the Court's holding in *Wilkins*. Second, the decision below disregards the Court's long-standing rule that the lack of identical precedent does not immunize government officials who engage in obviously unlawful conduct.

## OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 950 F.3d 226 and is reproduced at Pet. App. 1a-16a. The order of the district court granting summary judgment is not officially reported but may be found at 2018 WL 4006001 and is reproduced at Pet. App. 17a-34a. The unpublished letter of the Court of Appeals stating that the time for an extension or petition for rehearing has expired is reproduced at Pet. App. 35a-37a.

## JURISDICTION

The Fifth Circuit entered its judgment on February 11, 2020. Pet. App. 1a. 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]

1. At the time of the events giving rise to this suit, Petitioner Prince McCoy was an asthmatic prisoner in the Darrington Unit of the Texas Department of Criminal Justice. Pet. App. 18a; Pet. App. 21a. Respondent Tajudeen Alamu was a correctional officer at Darrington. *Id.*

On December 28, 2016, McCoy was incarcerated in an administrative segregation unit, which uses solitary confinement for non-punitive reasons. Pet. App. 2a. As Alamu approached the cell of Marquieth Jackson, a prisoner in a cell neighboring McCoy's, Jackson threw water on Alamu. *Id.* Later in the day, Alamu returned to the unit and again Jackson threw water on him. *Id.* Angered, Alamu grabbed his chemical spray and threatened to spray Jackson while the other inmates on the unit protested. *Id.* Jackson blocked the front of his segregation cell with sheets so Alamu could not spray him. *Id.* Two minutes passed. *Id.* Alamu walked toward McCoy, who was locked in his segregation cell, and asked him for his name and identification number. *Id.* When McCoy approached the front of the cell to respond to him, Alamu sprayed McCoy directly in the face with mace for no reason. *Id.* A video taken after the use of force showed McCoy pacing around his cell stating that he could not breathe. Pet. App. 3a. McCoy alleged in the prison's internal investigation that as a result of the

[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 McCoy. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

assault he had "burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, anxiety, nightmares, depression, and other emotional distress." *Id.* The investigation concluded that Alamu had unnecessarily used force and Darrington placed him on three months' probation. *Id.*

2. McCoy filed a *pro se* complaint in the Southern District of Texas on July 25, 2017, alleging an Eighth Amendment violation for excessive force. Pet. App. 17a. He attached medical request forms he had submitted to the prison for months after the incident requesting medical attention for consequences from the attack and statements from two other prisoners who corroborated his story, including one from Jackson confirming that Jackson was the instigator of the incident. Pet. App. 18a; Pet. App. 22a.

The Southern District of Texas held that McCoy had not raised a genuine question of material fact on whether Alamu's use of force was excessive and granted Alamu summary judgment. Pet. App. 32a. It credited Alamu's statement that he had reacted "involuntarily" after he "reasonably perceived" a threat from McCoy after having water thrown on him by Jackson. Pet. App. 28a. It held that Alamu had "tempered the use of force" by spraying McCoy with mace only once instead of multiple times. Pet. App. 29a. The court considered McCoy's injuries to be minor. Pet. App. 30a. The court therefore held that McCoy had not raised a genuine question of material fact as to whether Alamu's force was used maliciously or sadistically to inflict pain rather than in a good faith attempt to maintain discipline. Pet. App. 32a.

3. Still proceeding *pro se*, McCoy appealed to the Fifth Circuit. Pet. App. 3a. The court held that the district court erred in resolving factual disputes in Alamu's favor on summary judgment instead of doing so for McCoy, as was required. Pet. App. 5a. Reconsidering the evidence and drawing the appropriate inferences, the court found that McCoy's version of events stated a constitutional violation, as there was no need for force, the force used was disproportionate to the perceived threat, and Alamu did not perceive any threat whatsoever from McCoy, because he had done nothing and was locked in a cell. Pet. App. 6a-7a.

The court nonetheless affirmed on qualified immunity grounds. Pet. App. 10a-11a. The court held that the principle that prison officials cannot act "maliciously and sadistically to cause harm" defines the right too vaguely to clearly establish the unconstitutionality of macing a prisoner once in the face for no reason. Pet. App. 10a-11a. The court did not describe any analogous cases but declared that no case was sufficiently on-point to clearly establish the unconstitutionality of Alamu's conduct. Finally, it noted that even if general standards can defeat qualified immunity when the violation is "obvious," this was not such an "obvious" case because two of the factors this Court articulated in *Hudson* to evaluate alleged Eighth Amendment violations favored Alamu. Pet. App. 11a.

4. Judge Costa dissented in part. Pet. App. 13a. He pointed to Fifth Circuit precedent clearly establishing that an unprovoked attack with a fist or a taser violated the Eighth Amendment, which could

be distinguished only because Alamu used a different weapon. *Id.* He also identified precedent, ignored by the majority, establishing that defendants in excessive force cases cannot escape liability simply by using a novel instrument of violence. *Id.* Finally, he noted that in addition to the specific precedent that provided adequate notice of the unconstitutionality of Alamu's conduct, this was the rare "obvious" case where the general principle that defendants could not use force maliciously and sadistically to cause harm put Alamu on notice that spraying McCoy with mace for no reason was excessive force. Pet. App. 15a.

5. On February 24, 2020, still *pro se*, McCoy filed a letter seeking an extension to file a petition for rehearing en banc until he could obtain a lawyer. Pet. App. 35a. The court informed him on March 6, 2020 that the time had expired to file either the petition for rehearing en banc or an extension to file a petition for rehearing en banc. Pet. App. 37a.

## REASONS FOR GRANTING THE PETITION

### I. The Decision Below Conflicts With Circuit Court Decisions That Have Found That Clearly Established Constitutional Violations Can Be Deduced Even When Not Every *Hudson* Factor Is Met Or The Instrument Of Force Is Different.

McCoy alleges that he was sprayed directly in the face with mace for no legitimate reason in quantities sufficient to ruin his shoes and his radio and despite the fact that he suffered from asthma. The panel majority and dissent below each articulated one

conceivable way of distinguishing these facts from *Wilkins*. According to the panel majority, this case is distinguishable because not every *Hudson* factor favors McCoy. Pet. App. 11. According to the dissent, the primary difference is that the instrument of force was different from past cases from this Court and the Fifth Circuit. Pet. App. 13a. Neither of these distinctions is sufficient to entitle Alamu to qualified immunity, and granting qualified immunity based on either would constitute a break from this Court's precedent and a split from multiple circuit courts that have held the opposite in analogous circumstances.

### A. The use of significant force without justification is clearly established as unconstitutional, even if not every *Hudson* factor favors the plaintiff.

In *Hudson v. McMillian*, this Court considered "whether the use of excessive physical force against a prisoner may constitute cruel and unusual punishment when the inmate does not suffer serious injury." 503 U.S. 1, 4. Hudson was punched and kicked without provocation by officers, but it resulted in only minor injuries that did not require medical attention. *Id.* at 5. This Court held that "[w]hen prison officials maliciously and sadistically use force to cause harm," the Eighth Amendment is always violated, "whether or not significant injury is evident." *Id.* at 9. This Court listed five factors that "may" aid courts in determining whether force was used in good faith or maliciously and sadistically: "the extent of injury suffered," "the need for application of force, the relationship between that need and the

amount of force used, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." *Id.* at 7 (internal quotation marks omitted).

The Fifth Circuit here held that *Hudson*'s first factor, the extent of the injury suffered, favored Alamu because he sprayed McCoy directly in the face with mace only once, and the court determined the resulting injuries minor. Pet. App. 4a; Pet. App. 11a. It held that *Hudson*'s fifth factor, whether any efforts were made to temper the severity of response, also favored Alamu because his decision to not spray McCoy with mace additional times demonstrated an effort to "temper the severity of a forceful response." *Id.* The other factors obviously supported a constitutional violation—the need for application of force was none; the relationship between the nonexistent need for force and a spray of mace to the face was gratuitous and cruel; and the threat perceived by Defendant was nonexistent. The court found decisive, however, that the mixed direction of the *Hudson* factors meant that the right could not be clearly established. Pet. App. 11a. The court held that even if a broad principle can supply adequate notice to a defendant, this could not be such a case because two of the five factors this Court articulated in *Hudson* supported Respondent.[2]

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[2] The panel majority's conclusion that any of the *Hudson* factors favored Alamu was also in error. Viewed in the light most favorable to McCoy, "burning skin and eyes, congested lungs, difficulty breathing, stomach pain, vision impairment, and various forms of emotional distress" do not constitute a minor injury. Pet. App. 6a. n.3. And Alamu's decision to spray McCoy

The panel majority's conclusion splits from every other circuit to consider the question of whether all *Hudson* factors must favor the plaintiff for a right to be clearly established. In *Thompson v. Commonwealth of Virginia*, for instance, a prisoner brought an Eighth Amendment excessive force claim against guards who intentionally drove in such a manner as to throw him around the back of a van during a prison transport. 878 F.3d 89 (4th Cir. 2017). The court evaluated the *Hudson* factors, noting that the medical attention the guards gave the plaintiff could arguably qualify as "efforts to temper the use of force." *Id.* at 100. But "[e]ven assuming this factor weighs in the government's favor," the court held, "it alone cannot preclude the conclusion that Mr. Thompson has alleged a constitutional violation. To hold otherwise would allow prison officials to escape liability in excessive force cases simply by rendering medical assistance after the fact." *Id.* Though this *Hudson* factor supported the defendants, the court found this violation clearly established, writing that "[a]lthough *McMillian* and *Wilkins* did not reach the qualified immunity question, their holdings provide officers with fair notice that malicious, unprovoked, unjustified force inflicted on inmates who are compliant and restrained, … violates the Eighth Amendment." *Id.* at 102-03; *see also Iko v. Shreve*, 535 F.3d 225, 239-40 (4th Cir. 2008) (determining that the

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with mace for no reason, even if followed by a choice not to deploy further amounts of mace, cannot be characterized as an effort "made to temper the severity of a forceful response." Every unconstitutional assault at some point comes to an end; characterizing any decision to stop assaulting a prisoner as a tempering of severity renders this element of the *Hudson* test meaningless.

first *Hudson* factor supported defendants but still denying them qualified immunity).

The Sixth Circuit came to a similar conclusion in *Cordell v. McKinney*, where a prisoner alleged that after an argument and a brief physical dispute, an officer rammed the prisoner's head into a wall. 759 F.3d 573, 577-78 (6th Cir. 2014). The Sixth Circuit found "no genuine dispute as to whether [defendant] had a reasonable basis for using *some* force against" the plaintiff, in line with *Hudson*'s second factor. *Id.* at 582. While the court found this factor favored the defendant, it nonetheless denied qualified immunity, concluding that "any reasonable official would know that ramming a handcuffed and controlled prisoner headfirst into a concrete wall is an unreasonable method of regaining control of a prisoner in a hallway occupied only by other jail officials." *Id.* at 588; *see also Roberson v. Torres*, 770 F.3d 398, 407 (6th Cir. 2014) (concluding that spraying an inmate with pepper spray without provocation violates clearly established law without even analyzing the *Hudson* factors).

In a materially similar case, *Furnace v. Sullivan*, a prisoner alleged that he was pepper sprayed in the face after a disagreement with a guard over a meal tray. 705 F.3d 1021, 1025 (9th Cir. 2013). Just as the court did here, the Ninth Circuit found that *Hudson* factors one and five favored the defendants, as the injuries were merely "moderate" and the defendants "made an effort to temper the severity of their forceful response by allowing [plaintiff] to decontaminate, and giving him medical treatment." *Id.* at 1029-30. *Furnace* nonetheless denied qualified immunity to

the officers because "a significant amount of force was employed without significant provocation from [plaintiff] or warning from the officers." *Id.* at 1030.

The Eleventh Circuit likewise considered the issue in *Skrtich v. Thornton*, where an intransigent prisoner was removed from his cell through a forced cell extraction. 280 F.3d 1295, 1301-02 (11th Cir. 2002). The plaintiff conceded that some amount of force was lawful, *Hudson*'s second factor, but nonetheless alleged an Eighth Amendment violation for the additional assaults he received after being incapacitated. *Id.* The Eleventh Circuit agreed, holding that the continued beating of the prisoner after he had ceased resisting violated the Eighth Amendment and that defendants were not entitled to qualified immunity because it was "clearly established that government officials may not use gratuitous force against a prisoner." *Id.* at 1303.

Alamu's unprovoked assault of McCoy was clearly malicious, sadistic, and contrary to established law. The Fifth Circuit split from several of its sister circuits by suggesting that all of the *Hudson* factors must favor the plaintiff to overcome qualified immunity.

### B. Qualified immunity does not require courts to establish the unconstitutionality of unprovoked and significant force weapon by weapon.

Had McCoy been punched in the face for no reason, or tased for no reason, rather than maced in

the face for no reason, on-point circuit precedent would have clearly established the constitutional violation. As Judge Costa explained in dissent, an alternative explanation for the panel majority's break from this Court's precedent is that Alamu's unprovoked assault simply involved the wrong weapon. Pet. App. 13a-14a. But there is no requirement that a constitutional violation be weapon-specific, and defining Eighth Amendment violations weapon by weapon and granting qualified immunity to defendants using novel weaponry would also break from the other circuits that have considered the question.[3]

The Fourth Circuit squarely rejected that proposition in *Thompson*. 878 F.3d at 102. The Fourth

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[3] The panel majority suggested that pepper spraying an asthmatic directly in the face with enough spray to break his radio and ruin his shoes might constitute *de minimis* force, but this would be the most aberrant of any of the potential bases for its decision. The Eighth Amendment's mens rea standard is already very difficult to meet, and its *de minimis* exception is meant to exclude trivial uses of force such as a simple push, even when done sadistically, from constitutional regulation. *Wilkins*, 559 U.S. at 38. There is no support for a holding that the level of force alleged here is *de minimis*, and such a suggestion clashes with decisions from numerous other circuits. *See, e.g.*, *Roberson v. Torres*, 770 F.3d 398, 407 (6th Cir. 2014) (concluding that spraying an inmate with pepper spray without provocation violates clearly established law); *Furnace*, 705 F.3d at 1028-30 (same); *Iko*, 535 F.3d at 239 (holding that the excessive use of pepper spray violated a clearly established Eighth Amendment right, noting that the defendants' medical examiner stated that it "may have contributed to [plaintiff's] asphyxia and death"); *Lawrence v. Bowersox*, 297 F.3d 727, 733 (8th Cir. 2002) (holding that ordering another guard to unnecessarily pepper spray an inmate was a clearly established constitutional violation).

Circuit relied on this Court's Eighth Amendment cases involving punches and kicks to hold clearly established the unconstitutionality of a "rough ride," where a prisoner was intentionally thrown around the back of a van. *Id.* "[I]t makes no difference to the constitutional analysis," the court wrote," whether the plaintiff:

> was slammed against the side of the van by the officer's hands or by the momentum maliciously created by the officer's driving. The intentionally erratic driving was simply a different means of effectuating the same constitutional violation. To draw a line between these acts would encourage bad actors to invent creative and novel means of using unjustified force on prisoners. … Although few circuits have addressed specifically an officer's use of a vehicle to injure an inmate, there is a clear consensus among the circuits, including the Fourth, that infliction of pain and suffering without penological justification violates the Eighth Amendment in an array of contexts. Simply put, there are many ways of physically and maliciously assaulting a helpless prisoner, and all of them violate the Eighth Amendment.

*Id.* at 102-03 (internal citation omitted).

The Fourth Circuit is not alone. In *Rodriguez v. County of Los Angeles*, prison officials argued that they were entitled to qualified immunity for the unprovoked use of tasers because the

unconstitutionality of such attacks was not clearly established. 891 F.3d 776, 796 (9th Cir. 2018). The Ninth Circuit rejected this distinction:

> An officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury. This statement applies with particular strength in the context of the Eighth Amendment [because a] plaintiff cannot prove an Eighth Amendment violation without showing that force was employed maliciously and sadistically for the purpose of causing harm.

*Id.* (citation and internal quotation marks omitted).

Several circuits courts have reached the same conclusion in the analogous context of excessive force by police officers. *See, e.g.*, *Terebesi v. Torreso*, 764 F.3d 217, 237 n.20 (2d Cir. 2014) (rejecting the "commonplace" trend "for defendants in excessive force cases to support their claims to qualified immunity by pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police"); *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) ("[a]n officer is not entitled to qualified immunity on the ground[] that the law is not clearly established every time a novel method is used to inflict injury") (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."). If anything, precedent on Eighth Amendment excessive force claims should require less specificity around the instrument of force used because its mens rea standard of "malicious or sadistic" is both far more difficult to meet than the Fourth Amendment test and provides greater notice to defendants.

The Fifth Circuit has again broken from its sister circuits by ignoring controlling precedent involving mechanisms of force other than the precise one used by Alamu in his unprovoked attack.

## II. In the Alternative, This Court Should Summarily Reverse Because Respondent's Conduct Was Obviously Unconstitutional.

If the Court chooses not to grant plenary review, it should summarily reverse the court of appeals for two reasons. First, as detailed above, the majority holding is plainly contrary to *Wilkins*.

Second, the decision below sharply deviates from the Court's qualified immunity doctrine. For decades, the Court has warned government officials that the absence of analogous precedent does not guarantee immunity for egregious constitutional violations. *See*, *e.g.*, *Malley v. Briggs*, 475 U.S. 335, 341 (1986); *Hope v. Pelzer*, 536 U.S. 730, 741, 745-46 (2002); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009); *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *City of Escondido v. Emmons*, 139 S. Ct. 500, 504 (2019). As these cases establish, for conduct sufficiently beyond

the pale, the notice necessary to defeat a claim of qualified immunity is inseparable from the violation itself. In such a "rare obvious" case, in other words, "the unlawfulness of the officer's conduct is sufficiently clear" to defeat qualified immunity "even though existing precedent does not address similar circumstances." *City of Escondido,* 139 S. Ct. at 504 (quoting *Wesby*, 138 S. Ct. at 581).

This longstanding rule "plays an important role in qualified immunity doctrine" by "ensur[ing] vindication of the most egregious constitutional violations." Pet. App. 16a. After all, "cases involving the most blatantly unconstitutional conduct will not often end up in the courts of appeals" or before this Court because they are less likely to arise. *Id.* Courts faced with an "obvious case[]," unlikely as they are to manufacture precedent, would ensure "perverse results" should they demand "on-point precedent" to defeat immunity. *Id.*

This is one such case. For "no reason at all," Alamu attacked McCoy with pepper spray, Pet. App. 2a., a "dangerous weapon" that is not only "capable of inflicting death or serious bodily injury" but is also "banned for use in war," Pet. App. 14a. (internal quotation marks omitted). No "reasonable" government official—indeed, no reasonable person—would require access to a case book to know that the law forbids unprovoked violence that might "gratuitously blind an inmate." Pet. App. 15a-16a.

Blatantly disregarding both the inescapable conclusion that Alamu's conduct is obviously unlawful and this Court's numerous cases instructing lower

courts that obviously unlawful conduct provides adequate notice, the panel majority held that Alamu was entitled to qualified immunity merely because identical precedent purportedly could not be identified. That error calls for summary reversal.

The Court has not hesitated to summarily reverse when lower court decisions squarely conflict with precedent, including in almost identical circumstances. *See Wilkins*, 559 U.S. at 38; *see also, e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (summarily reversing a lower court for advancing a proposition when "this Court ha[d] previously considered—and rejected—almost that exact formulation of the qualified immunity question"). As Judge Costa aptly noted, "with so many voices critiquing current law [on the qualified immunity doctrine], the last thing [courts] should be doing is recognizing an immunity defense when existing law rejects it." Pet. App. 16a.

Because the panel majority's decision cannot be reconciled with this Court's precedent, summary reversal is warranted.

## CONCLUSION

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

Respectfully submitted,

Samuel Weiss
*Counsel of Record*
RIGHTS BEHIND BARS
416 Florida Avenue, NW
#26152
Washington, DC 20001
(202) 455-4399
sam@rightsbehindbars.org

Daniel Greenfield
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue Chicago, IL 60611
(312) 503-8538
daniel-greenfield@law.northwestern.edu

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