No. 20-31

In the Supreme Court of the United States

PRINCE MCCOY, SR., PETITIONER

v.

TAJUDEEN ALAMU

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This case involves a claim that respondent, a prison guard, used excessive force in violation of the Eighth Amendment when he sprayed an inmate with pepper spray a single time immediately at the tail end of a disturbance in the prisoner's housing unit. The Fifth Circuit held that while the guard violated the Eighth Amendment by unnecessarily spraying the inmate when he could have retreated, the guard was entitled to qualified immunity.

The question presented is whether the Fifth Circuit correctly applied this Court's five-factor test in *Hudson v. McMillian*, 503 U.S. 1, 7 (1992), when it determined that the guard did not violate clearly established federal law given the guard's quick action to ensure that the inmate promptly received appropriate medical treatment, and that the inmate suffered only minor injuries as a result of the incident.

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INTRODUCTION

This Court has cautioned that the "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7 (2015)), where courts must "slosh [their] way through [a] factbound morass," *Scott v. Harris*, 550 U.S. 372, 383 (2007), in ascertaining whether an officer violated the Constitution. Where an officer accused of excessive force invokes qualified immunity, as here, the inquiry becomes doubly fact-intensive. Qualified-immunity analysis can require a reviewing court to enter that "factbound morass" first on the merits, and a second time in determining whether the officer's use of force was so far outside "the hazy border between excessive force and acceptable force" that the illegality of the officer's conduct is "beyond debate." *Mullenix*, 577 U.S. at 18.

Petitioner asks this Court to enter that morass over the factbound application of this Court's Eighth Amendment excessive-force test in *Hudson v. McMillian*, 503 U.S. 1 (1992). This Court should reject that invitation. The gravamen of his petition is that the Fifth Circuit misapplied the five "*Hudson* factors" in granting Officer Alamu qualified immunity, and that other circuits have sometimes denied immunity to other officers in other excessive-force cases. Although petitioner clothes his request for error correction in the language of a "circuit split," all he has shown is that various courts of appeals have obeyed this Court's instruction to apply the same multi-factor test and come to different results in different cases based on different facts.

That is the essence of a factbound dispute that does not give rise to this Court's intervention. Sup. Ct. R. 10.

Indeed, the Fifth Circuit held that petitioner's Eighth Amendment rights were violated, so an officer in a future case like petitioner's would not be entitled to immunity. Petitioner's request is therefore a one-off request for putative error correction in his favor. This Court should follow its typical course in such cases and deny the petition.

STATEMENT

A. December 28, 2016 Incident[1]

In December 2016, Petitioner Prince McCoy was an inmate held in administrative segregation at the Darrington Unit, a facility operated by the Texas Department of Criminal Justice. Pet. App. 1-2, 18. Respondent Tajudeen Alamu was an officer at the Darrington Unit. *Id.* at 1-2. Petitioner has since been transferred out of Darrington. *Id.* at 1-2, 18.

On December 28, 2016, petitioner's neighbor, Marquieth Jackson, assaulted Officer Alamu. *Id.* at 2. Jackson threw water on Alamu unprovoked; Alamu responded by contacting a sergeant, who handled the matter. *Id.* Alamu returned to the administrative-segregation unit an hour and a half later to conduct a routine inmate count, and Jackson assaulted Alamu with water a second time. *Id.* Though Alamu reached for his pepper spray in response to the second assault, Jackson had blocked the entry to his cell with sheets. *Id.* Other prisoners on the administrative-segregation unit shouted that Alamu "can't spray [Jackson]." *Id.*

After a brief period, Officer Alamu re-holstered his pepper spray and approached petitioner's cell. *Id.* Alamu asked petitioner for his name and prisoner number. *Id.*

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[1] As petitioner seeks review of summary judgment granted in Alamu's favor, the following statement takes petitioner's assertions as true. *Tolan v. Cotton*, 572 U.S. 650, 656-67 (2014) (per curiam).

According to a use-of-force report, petitioner then assaulted Alamu, and Alamu responded by pepper-spraying petitioner. *Id.* at 20. Petitioner maintains that Alamu pepper-sprayed him once in the face without provocation. *Id.* at 2. Alamu stopped before exhausting his pepper spray. *Id.* at 5, 29.

Alamu immediately reported the spraying to the Incident Command System, and medical personnel responded. *Id.* at 2-3. Prison personnel recorded petitioner's response on video: while petitioner repeatedly stated that he could not breathe, a nurse contemporaneously addressing the camera indicated that petitioner was "moving around just fine" and could breathe "with no distress." *Id.* at 3. Petitioner was provided with "[c]opious amounts of water and fresh air" to wash off the pepper spray. *Id.* Petitioner reported a host of injuries, ranging from stomach pain to low blood sugar to depression, allegedly due to the spraying. *Id.* at 3, 22. A use-of-force report concluded that petitioner had assaulted Alamu, but that Alamu's use of pepper spray was unnecessary because Alamu could have retreated. *Id.* at 3, 20.

B. Petitioner's Lawsuit

1. Petitioner sued Officer Alamu in the Southern District of Texas under 42 U.S.C. § 1983, alleging that Alamu's pepper spraying violated his Eighth Amendment rights. Pet. App. 1.

Both sides sought summary judgment. *Id.* at 17. Aside from his statement, petitioner included several witness statements from fellow inmates attesting to the spraying, *Id.* at 18, as well as paperwork showing that he sought medical care repeatedly as a result of the incident. *Id.* at 22. These "sick call" slips ran through at least

July 2017, almost seven months after the spraying. *Id.* at 22 & n.5.

Alamu supported his motion for summary judgment with his statement that he had been struck in the face immediately before the spraying, *id.* at 20-21, a report stating that petitioner had assaulted Alamu during the incident, *id.* at 20-21, and video and medical records suggesting that Alamu was able to breathe, move, and speak normally immediately following the spraying. *Id.* at 19.

2. Applying this Court's directions in *Hudson* and *Wilkins v. Gaddy*, 559 U.S. 34 (2010) (per curiam), the district court granted Officer Alamu summary judgment. "*Hudson* . . . identified five factors relevant to the Court's analysis: (1) the extent of the injury suffered by the inmate; (2) the need for application of force; (3) the relationship between that need and the amount of force used; (4) the threat reasonably perceived by the responsible officials; and, (5) any efforts made to temper the severity of a forceful response." Pet. App. 27.

The district court assumed that Alamu's use of pepper spray was unnecessary. *Id.* at 28. Nonetheless, it determined that several other *Hudson* factors favored Alamu, *id.* at 29-32, including: (1) Alamu reasonably perceived a threat from petitioner, *id.* at 29; (2) Alamu fired only a short burst of pepper spray at petitioner, *id.*; and (3) various record sources indicated petitioner was not actually injured by the spray, *id.* at 30. Taken together, the district court concluded that Alamu had acted in self-defense and to restore order in the unit, *id.* at 32, and that petitioner therefore failed to raise a genuine fact dispute that Alamu used excessive force against him. *Id.*

3. Petitioner appealed. *Id.* at 1. Applying this Court's familiar two-step qualified immunity analysis, the Fifth Circuit first addressed the merits of

petitioner's excessive-force claim. *Id.* at 4. It chided the district court for resolving a factual dispute regarding Officer Alamu's reason for pepper spraying petitioner and concluded that petitioner raised a fact question as to whether Alamu's spraying was unnecessary. *Id.* at 5-6. While the Fifth Circuit agreed that petitioner's injuries were minor and that Alamu had tempered his use of force, that court nonetheless concluded that petitioner also raised a fact question as to whether the pepper spraying was unconstitutionally excessive under *Hudson*. *Id.* at 6-7.

The Fifth Circuit then turned to whether Alamu's actions violated clearly established law when taken in the light most favorable to petitioner. Pet. App. 8. That court noted this Court's repeated warnings that whether a violation is clearly established "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 9 (quoting *Mullenix*, 136 S. Ct. at 308). It acknowledged that the fact Alamu used pepper spray—as opposed to some other implement—was irrelevant for Eighth Amendment purposes, *id.*, but reiterated this Court's instructions that clearly established federal law must place an alleged violation "beyond debate." *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)).

The Fifth Circuit concluded Alamu's conduct was not beyond constitutional debate for three reasons. *First*, the Fifth Circuit addressed petitioner's argument that this Court's guidance in *Hudson* itself supplied the "clearly established" law. *Id.* at 10. Consistent with this Court's consistent guidance regarding qualified immunity, the Fifth Circuit declined to hold that this Court's statement in *Hudson* that prison officials cannot "maliciously and sadistically act to cause harm" was sufficient

to place Alamu's alleged violation beyond debate. *Id.* at 10-11. The court explained that "[f]act-intensive balancing tests alone (such as the *Hudson* factors) are usually not 'clear' enough because the illegality of the *particular conduct* at issue must be undebatable." *Id.* at 11 (citing *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)).

Second, looking to the specifics of the incident, the Fifth Circuit noted it was debatable whether Alamu used a constitutionally *de minimis* amount of force. *Id.* at 9. The court noted the incident involved an "isolated, single use of pepper spray." *Id.* at 10. The court noted petitioner did not challenge that Alamu used less than the full can of spray, that Alamu immediately reported the incident, or that medical personnel responded to the incident promptly. *Id.* Given previous Fifth Circuit precedent stating that the partial use of a fire extinguisher on an inmate was a *de minimis* use of force, *id.*, the Fifth Circuit concluded it "wasn't beyond debate that Alamu's single use of spray stepped over the *de minimis* line." *Id.*

Third, the Fifth Circuit agreed with the district court that several of the *Hudson* factors guiding that court's merits analysis favored Alamu, *id.* at 11, so petitioner could not argue that *Hudson* alone rendered Alamu's conduct obviously unconstitutional. *Id.* It affirmed the district court's summary-judgment grant on this alternative ground.

Judge Costa dissented. *Id.* at 13. He began by characterizing petitioner's claim generally as one of an "unprovoked assault." *Id.* He analogized this generally described complaint to a previous Fifth Circuit case regarding a Fourth Amendment challenge to an officer tasing an arrestee during a traffic stop. *Newman v. Guedry*, 703 F.3d 757 (2012). In his view, the majority placed too

much emphasis on the lack of case law regarding pepper spray; *Newman* "put officials on notice . . . that using a unique 'instrument' of force does not allow them to escape liability for constitutional violations." Pet. App. 14. Describing pepper spray as a "chemical agent . . . banned for use in war," Judge Costa would have held that Alamu's actions fell within an "obviousness exception" for qualified immunity. *Id.* at 14-15. He concluded that this obviousness exception meant Alamu's conduct was so obviously unconstitutional that petitioner needed no factually analogous precedent to show clearly established federal law, and that the district court therefore should have been reversed. *Id.* at 15-16.

SUMMARY OF ARGUMENT

I. This Petition raises the same issues this Court has encountered and denied many times, including earlier this year. Parties in excessive-force cases often ask this Court to correct a lower court's determination of whether force was constitutionally excessive, under *Hudson* or otherwise. These fact-bound requests are routinely denied. There is no sound reason to deviate from that practice here.

II. Petitioner alleges that the Fifth Circuit's decision creates two conflicts among the circuits, neither of which bears any scrutiny.

A. First, petitioner claims (at 7-12) that the Fifth Circuit held that every *Hudson* factor must favor an excessive-force plaintiff to overcome qualified immunity. But the decision below refutes that premise. Like every court of appeals, the Fifth Circuit has both granted and denied immunity in cases where the *Hudson* factors point in multiple directions. Here, the Fifth Circuit rejected a categorical rule conferring or denying immunity in excessive-force cases. It instead emphasized

this Court's instructions that such determinations must be made based on the facts and circumstances of each case. Pet. App. 9. When petitioner relied on this Court's broad statement that officals may not treat inmates sadistically, the Fifth Circuit cited several features of Alamu's conduct that this Court has deemed salient to determine whether an officer has violated the Eighth Amendment. *Id.* at 10-11.

B. As a fallback, petitioner claims the Fifth Circuit "implicitly held" that Alamu was entitled to qualified immunity because Alamu used "novel weaponry," pepper spray, on petitioner, which he asserts is inconsistent with how other circuits treat similar claims. Pet. i, 13. This argument uncritically accepts the panel dissent's "alternative explanation" as to the Fifth Circuit's holding. But it ignores that the the panel expressly disclaimed any reliance on the fact that the Fifth Circuit has never "previously found a use of *pepper spray* . . . to violate the Eighth Amendment." Pet. App. 9. There is therefore no circuit conflict for this Court to resolve.

III. Petitioner finally requests summary reversal because, in his view, Officer Alamu's conduct was "obviously unconstitutional." Pet. 16. This is an unadorned request for factbound error correction, as petitioner's extensive reliance on the specific facts of his case makes clear. This Court does not typically indulge requests for one-off error correction.

It particularly should not do so here because there is no error to correct. The Fifth Circuit correctly determined that it could be fairly debated whether Alamu employed more than a constitutionally *de minimis* amount of force, and whether it could be fairly debated that Alamu's conduct was not unconstitutionally sadistic in light of his immediate action to ensure

petitioner received medical attention. In either event, Alamu would be entitled to qualified immunity—as the Fifth Circuit properly held.

ARGUMENT

I. This Court Has Repeatedly Denied Petitions Like Petitioner's.

Petitioner asks this Court to determine whether Alamu was entitled to qualified immunity even though "not every *Hudson* factor" favors him. Pet. i. He also claims that the Fifth Circuit wrongfully relied on the nature of the weapon Alamu used in granting Alamu immunity. Pet. i.

These are familiar requests. Both plaintiffs and governmental officials routinely request this Court's intervention to correct a particular panel's grant or denial of qualified immunity regarding an excessive-force claim, either on the merits or the "clearly established" prong. *E.g.*, Petition for a Writ of Certiorari, *Hunter v. Cole*, 2020 WL 3146695 (U.S. June 15, 2020) (No. 19-753), 2019 WL 6817403 (QP1); Petition for a Writ of Certiorari, *Mason v. Faul*, 2020 WL 3146722 (U.S. June 15, 2020) (No. 19-7790) (QP1); Petition for a Writ of Certiorari, *Baxter v. Bracey*, 140 S. Ct. 1862, (2020) (No. 18-1287), 2019 WL 1569711 (QP1); Petition for a Writ of Certiorari, *Chung v. Silva*, 139 S. Ct. 1172 (2019) (No. 18-695), 2018 WL 6192286 (QP1); Petition for Writ of Certiorari, *Frakes v. Ott*, 137 S. Ct. 835 (2017) (No. 16-696), 2016 WL 6958120 (QP2); Petition for a Writ of Certiorari, *Dickhaus v. Champion*, 125 S. Ct. 1837 (2005) (No. 04-1050), 2005 WL 8161207 (QP3); Brief in Opposition to Petition of Writ of Certiorari, *Jackson v. Morgan*, 122 S. Ct. 1437 (2002) (No. 01-1086), 2001 WL 34117047; Petition for Writ of Certiorari, *Cyr v. City of Dallas*, 522 U.S. 997 (1997) (No. 97-572), 1997 WL 3354997) (QP1, QP2).

These requests often rely on the type of implement involved or statements that the court of appeals misapplied this Court's excessive-force guidance. *E.g.*, *Chung*, 2018 WL 6192286, at *i (pepper spray); *Frakes*, 2016 WL 6958120, at *i (handcuffs); Petition for Writ of Certiorari, *Johnson v. Roberts*, 564 U.S. 1004 (2011) (No. 10-1227), 2011 WL 1356670, at *24-28 (arguing court of appeals failed to recognize genuine fact issue under *Hudson*); Petition for Writ of Certiorari, *Boyett v. Wash. County*, 555 U.S. 1049 (2008) (No. 08-522), 2008 WL 4656896, at *11-12; *Jackson*, 2001 WL 34117047, at *i ("Whether the Court of Appeals correctly applied this Court's decision in *Hudson* . . . in holding that Petitioner had not made out a claim of excessive use of force from his isolated confinement in restraints because Petitioner failed to establish more than *de minimis* injury"); *Dickhaus*, 2005 WL 8161207, at *i (pepper spray); *Jackson*, 2001 WL 34117047, at *i, 1 (pepper spray and *Hudson*).

This Court all but uniformly denies these requests. For good reason. This Court rarely reviews either incorrect factual determinations or the misapplication of its correctly stated guidance. Sup. Ct. R. 10. Petitioner fundamentally complains that the Fifth Circuit improperly granted immunity when it applied *Hudson*. That fact-specific question is not a question worthy of this Court's review.

II. This Case Presents No Circuit Split.

Though petitioner alleges two circuit splits (at 7, 13), neither withstands scrutiny.

A. The Fifth Circuit has not "split" from other courts to require all *Hudson* factors to favor an excessive-force claimant.

Petitioner first proposes that the Fifth Circuit split from "every other circuit to consider the question of whether all *Hudson* factors must favor the plaintiff for a right to be clearly established." Pet. 10.

At the outset, petitioner misses the mark regarding the panel majority's holding. The court gave two bases for holding that then-applicable federal law did not clearly establish that Alamu's conduct violated the Eighth Amendment. First, the majority cited this Court's statement in *Hudson* that a *de minimis* use of physical force did not violate the Eighth Amendment—regardless of the *Hudson* factors. Pet. App. 9. The panel then explained that for petitioner to overcome Alamu's immunity, petitioner had to show it was beyond debate that Alamu's single use of pepper spray exceeded this *de minimis* limit. Pet. App. 10. But surveying Fifth Circuit precedent, the panel noted a previous holding where spraying a prisoner with a fire extinguisher was a *de minimis* use of force. Pet. App. 10 (citing *Jackson v. Culbertson*, 984 F.2d 699, 700 (5th Cir. 1993) (per curiam)). This precedent, the panel held, left it debatable whether Alamu's use of pepper spray was as well. Pet. App. 10.

Second, the court then explained why petitioner could not overcome Alamu's immunity on the basis that Alamu acted "maliciously and sadistically to cause harm." Pet. App. 10. The Fifth Circuit correctly noted that "[f]act-intensive balancing tests alone (such as the *Hudson* factors) are usually not 'clear' enough" to overcome immunity "because the illegality of the *particular conduct* at issue must be undebatable." Pet. App. 11. Agreeing with the dissent, the panel majority acknowledged that these

general standards might be able to overcome immunity for obvious constitutional violations. Pet. App. 11. The majority held, however, that Alamu's violation was not obvious because several of the *Hudson* factors undercut petitioner's arguments, reinforcing that Alamu's conduct was not obviously unconstitutional solely by reference to *Hudson* as clearly established law. Pet. App. 11.

In other words, the Fifth Circuit came to two routine conclusions entirely consistent with this Court's guidance—namely, that a particular pepper spraying was not: (1) clearly above the minimum force required for an Eighth Amendment violation; or (2) an obviously malicious or sadistic act that was intended to cause harm in violation of the Eighth Amendment. Pet. App. 10-11. Contrary to petitioner's assertions (at 10, 14), neither of these conclusions amounts to a sweeping rule that all *Hudson* factors must favor a plaintiff to overcome qualified immunity. Petitioners' argument assumes that the Fifth Circuit collapsed two distinct inquiries—the factors a court must consider in assessing an Eighth Amendment excessive-force claim and whether a violation has been "clearly established" for immunity purposes—into one. It did not. It merely noted that, with several *Hudson* factors supporting *Alamu*, the Eighth Amendment violation was not so obvious that he could overcome sovereign immunity absent a closely analogous case, which petitioner concedes does not exist.

Nor would petitioners' conclusion have been consistent with prior Fifth Circuit decisions. After all, the Fifth Circuit has rejected claims of immunity by officials sued for excessive force without applying all of *Hudson*'s factors. *E.g.*, *Bourne v. Gunnels*, 921 F.3d 484, 491-93 (5th Cir. 2019); *Cowart v. Erwin*, 837 F.3d 444, 454-55 (5th Cir. 2016); *see also Cardona v. Taylor*, No. 17-11533,

2020 WL 5638591, at *3 (5th Cir. Sept. 21, 2020) (per curiam) (holding inmate stated Eighth Amendment excessive-force claim without surveying all *Hudson* factors). It has likewise in some cases allowed claims to go forward where some of the *Hudson* factors favored the officials. *E.g.*, *McGuffey v. Blackwell*, 784 F. App'x 240, 242-43 (5th Cir. 2019) (per curiam); *Preston v. Hicks*, 721 F. App'x 342, 345 (5th Cir. 2018) (per curiam); *see also Rankin v. Klevenhagen*, 5 F.3d 103, 107-08 (5th Cir. 1993) (finding viable claim under *Hudson* even where factors favored both sides).

The rule petitioners claim the panel majority created here is incompatible with these decisions. To accept petitioners' gloss on the Fifth Circuit's holding here, this Court would have to conclude that a panel majority effectively overturned numerous precedents in a single sentence, yet neither the majority nor dissent noticed, nor did any active Fifth Circuit judge seek en banc review. That is implausible.

The other side of petitioners' alleged split similarly cannot withstand scrutiny. None of the cases on which petitioner relies (at 10-12) identifies a circuit split on how many *Hudson* factors a plaintiff must prove to overcome immunity. Instead, as petitioner describes (at 10-12), each is merely a fact-bound application of the *Hudson* factors to a particular Eighth Amendment claim, followed by a review of relevant precedent to determine whether a violation was clearly established.

In *Thompson v. Commonwealth of Virginia*, the Fourth Circuit determined that at least three out of four *Hudson* factors favored a prisoner who had been subjected to a particularly violent experience in detention, and then that court reviewed every other circuit court to determine whether such "rough rides" had been

previously held unconstitutional. 878 F.3d 89, 99-100, 103-06 (4th Cir. 2017). Indeed, though *Thompson* surveyed every other circuit but the D.C. Circuit, it never mentioned the possibility of a circuit split. *Id.* at 103-06. In *Cordell v. McKinney*, 759 F.3d 573 (6th Cir. 2014), the Sixth Circuit performed a painstaking examination of numerous depositions, videos, and reports in evaluating a prisoner's Eighth Amendment claim under *Hudson*, *id.* at 581-85, and then mentioned *Hudson* only in passing when addressing immunity. *Id.* at 587-88. The Ninth Circuit reversed the order of analysis, first surveying its precedent and then its sister circuits for clearly established law, then turning to a fact-specific application of *Hudson*. *Furnace v. Sullivan*, 705 F.3d 1021, 1027-28 (clearly established), 1028-30 (*Hudson*) (9th Cir. 2011). But it followed the same approach as its sister circuits. None of the cases on which petitioners rely asserted a minimum or maximum number of *Hudson* factors necessary to overcome immunity.

That is because no court, including the Fifth Circuit, uses such a rule. The courts of appeals petitioner cites and the Fifth Circuit all follow the same approach. *Hudson* supplies the rule for determining whether a constitutional violation occurred. If one has, immunity can be overcome either by precedent indicating directly that the officer's particular conduct was unconstitutional beyond debate, or by a showing that such unconstitutionality was obvious from constitutional principles. Petitioner tried both tacks; when the first did not work, the Fifth Circuit rebutted the second by stating that Alamu's conduct was not obviously unconstitutional under *Hudson*. Pet. App. 10-11. Far from demonstrating a circuit split, petitioners' authorities highlight how uniformly the circuits follow this Court's guidance in this area.

B. The Fifth Circuit has not "split" from other courts to create a new rule about novel methods of force.

Petitioner proposes a second circuit split regarding whether an officer is entitled to qualified immunity when "past precedent involved different mechanisms of force." Pet. i. This second alleged split rests on no firmer ground than the first.

Petitioner acknowledges at the outset that this purported circuit split comes from his (and the panel dissent's) view of what the Fifth Circuit "implicitly held." Pet. i. The panel majority *explicitly* held the opposite of what petitioner describes as the panel's "implicit" holding: it said in no uncertain terms that "it's irrelevant that we hadn't previously found a use of *pepper spray*—as distinguished from some other instrument—to violate the Eighth Amendment." Pet. App. 9. Petitioner arrives at his misleading characterization only by uncritically repeating the dissent's gloss on the majority opinion. *Compare* Pet. App. 14a, *with* Pet. 12-13. But circuit precedents—and thus circuit splits—arise from what panel majorities hold, not what panel dissents accuse them of holding.

Petitioner's characterization is necessary to gin up a circuit split, as the Fifth Circuit has not created the one petitioner wants. Instead, the Fifth Circuit has expressly held that relevant law can be clearly established despite differences in facts between precedent and an official's challenged conduct. *E.g.*, *Ramirez v. Martinez*, 716 F.3d 369, 378-79 (2013) (finding fact question in excessive-force context regarding whether violation was clearly established despite acknowledgment court "ha[d] not addressed a fact pattern precisely on point"); *Lytle v. Bexar County*, 560 F.3d 404, 417 (2009) (remarking that

federal "law can be clearly established 'despite notable factual distinctions between the precedents relied on and the cases then before the Court'"(quoting *Kinney v. Weaver*, 367 F. 3d 337, 350 (5th Cir. 2004) (en banc)). The panel majority did so once again. Pet. App. 9.

Petitioner cannot identify an opposite side for this second alleged split, either. Each of the cases he cites (at 14-16) merely restates what the Fifth Circuit has held: that whether an Eighth Amendment excessive-force violation is "clearly established" does not depend on whether an officer used a given implement before. No court of appeals, including the Fifth Circuit, holds that immunity is warranted "every time a novel method is used to inflict injury," *Rodriguez v. County of Los Angeles*, 891 F.3d 776, 796 (9th Cir. 2018), or that each "time the police employ a new weapon, officers . . . get a free pass to use it in any manner." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012).

Finally, petitioner suggests (at 16) that "Eighth Amendment excessive force claims should require less specificity" to overcome qualified immunity. But this Court's precedents foreclose that argument, *e.g. Mullenix*, 577 U.S. at 16, and petitioner does not ask for this Court to reexamine them. Pet. i. Nor does petitioner suggest that any court of appeals has taken up that call. Petitioner is therefore left without a clear division of authority on a question of law for this Court to address, and his petition should be denied.

III. Petitioner Seeks Factbound Error Correction With No Error For This Court's Review.

Petitioner waits until the end of his petition (at 16-18, when he adds a cursory request for summary reversal) to acknowledge his true aim: factbound, case-specific error correction for his benefit. But this Court rarely

indulges such requests, and it especially should not do so here, where there is no error to correct. Petitioner's appeal is to his specific situation—and his alone, as the Fifth Circuit's holding means that any future officers employing pepper spray under similar circumstances will have acted in violation of clearly established law.

Petitioner's request is unabashedly factbound. He does not ask this Court to reexamine qualified immunity more broadly, as several recent petitions have. *E.g.*, Petition for a Writ of Certiorari, *Zadeh v. Robinson*, 2020 WL 3146691 (U.S. June 15, 2020) (No. 19-676), 2019 WL 6341146; Petition for a Writ of Certiorari, *Baxter v. Bracey*, 140 S. Ct. 1862 (2020) (No. 18-1287), 2019 WL 1569711. Nor does he identify any particular precedent from this Court or the Fifth Circuit—aside from a passing reference to *Wilkins,* 559 U.S. 34—that covers a category of cases like his. Instead, he says that his is the "rare obvious" case, Pet. 17, where a government official's actions "involv[e] the most blatantly unconstitutional conduct" and therefore the "most egregious constitutional violations." *Id.* (citing Pet. App. 16).

Petitioner's argument that Alamu's conduct was obviously unconstitutional fails at the outset. After all, Alamu's conduct did not appear blatantly unconstitutional to three of the four federal judges to consider it, including the panel majority and the district court. Nor to any Fifth Circuit judge save the panel dissent, as none apparently called for an en banc poll.

This was for good reason: the Fifth Circuit correctly determined it was not obviously unconstitutional. After all, the constitutionality of Alamu's use of force turned on whether that use was in good faith to maintain or restore discipline, or if it was malicious and sadistic. *Hudson*, 503 U.S. at 7. No one disputes that prior to using

pepper spray, Alamu had been assaulted twice by Jackson and had been subjected to screaming by other inmates. Pet. App. 2. Nor that Alamu walked away from the initial situation with Jackson on the administrative-segregation unit. *Id.* Nor that Alamu tempered his use of force when he used only one blast of pepper spray rather than his full supply. *Id.* at 5. Critically, Alamu immediately reported his actions to the prison, and petitioner received prompt medical attention to limit the painful effects of the pepper spray. *Id.* at 2-3. And Alamu suffered only minor injuries from the event. *Id.* at 6 n.3. Taken as true for purposes of summary judgment that Alamu sprayed petitioner without good reason, *id.* at 5-6, Alamu's actions before and after show that at worst, the pepper spraying was a temporary lapse of judgment that arose from a stressful situation that Alamu immediately attempted to mitigate—not an obvious exercise in sadism. And nothing in the record supports petitioner's suggestion that Alamu sought to "gratuitously blind" petitioner. Pet. 17.

This Court summarily reverses the courts of appeals when they "conspicuously disregard" this Court's precedents. *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *2 (Alito, J., concurring in the judgment). In requiring petitioner to provide closely analogous precedent to overcome Alamu's qualified immunity, the Fifth Circuit hewed to this Court's repeated instructions. *E.g.*, *Mullenix*, 577 U.S. at 16-17; *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Petitioner's strenuous disagreement with the panel majority is hardly the ill that the strong medicine of a summary reversal is designed to cure. This Court should refuse petitioner's request.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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