No. 21-1065

In the Supreme Court of the United States

DENNIS WAYNE HOPE, PETITIONER

v.

TODD HARRIS, ET AL.

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

SUGGESTION OF MOOTNESS AND BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Dennis Wayne Hope is serving an 80-year sentence for a string of violent armed robberies. He has escaped or attempted to escape from Texas prisons often enough to inspire a television episode about his criminal exploits.[1] After a successful escape during which Hope shut down the electricity to an entire maximum-security prison, fled to another State, and committed additional violent crimes—including carjacking an unarmed 83-year-old man at knife point—Hope was placed in restrictive housing. He received periodic reviews to determine whether it would be safe to move him to the general population. Several years ago, it was determined that staff no longer needed a "flight risk" warning on Hope's file, but other safety concerns kept him in restrictive housing.

During Hope's most recent review, the Texas Department of Criminal Justice determined that those additional concerns had been ameliorated, transferred him out of restrictive housing, and began the process of transitioning him to the general population. The questions presented are:

Whether a conditions-of-confinement claim under the Eighth Amendment is moot when the challenged conditions of confinement no longer apply.

Whether a procedural-due-process claim challenging a prison's process for periodic review of solitary confinement is moot when the prisoner is released from solitary confinement.

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[1] *I (Almost) Got Away With It*, Season 3, Episode 10 (first aired June 28, 2011) (hereafter "*Almost Got Away*").

Whether the duration of solitary confinement, considered in a vacuum, can violate the Eighth Amendment.

Whether petitioner plausibly alleged all the respondent prison officials were deliberately indifferent to the Eighth Amendment violations he alleges.

Whether petitioner plausibly alleged he was deprived of due process in connection with periodic reviews of his continued placement in restrictive housing.

RELATED PROCEEDINGS

Hope v. Harris, No. 9:18-cv-27, U.S. District Court for the Eastern District of Texas. Judgment entered May 5, 2020.

Hope v. Harris, No. 20-40379, U.S. Court of Appeals for the Fifth Circuit. Judgment entered June 18, 2021.

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INTRODUCTION

Dennis Wayne Hope asks this Court to grant review to decide a legal question—whether solitary confinement can violate the Eighth Amendment based on its duration alone—that the Fifth Circuit did not resolve, that bears no resemblance to his complaint, and that no longer affects him. This Court should decline that request.

Though Hope's depicts his attack on the Fifth Circuit's decision as a clean-cut challenge to the duration of his stay in restrictive housing (also known as "solitary confinement") his challenge below is anything but. He seeks both prospective and retrospective relief based on all aspects of his detention, from the length of his confinement in restrictive housing to the level of noise in the cellblock and the amount of personal belongings Hope could keep in his cell. Since he filed his petition, Hope has been released from restrictive housing pursuant to respondents' ordinary-course review of his detention there; and the Fifth Circuit remanded his retrospective claims for discovery and trial. This Court does not ordinarily grant cases where the judgment to be reviewed is one part moot and one part interlocutory. It should not do so here.

Hope's conditions-of-confinement claim does not warrant review in part because it is moot. This February, following a regular review, Hope was transferred out of restrictive housing. He is presently completing a four-month educational program to ease his transition to the general population. His claims for prospective relief based on the length of his confinement in restrictive housing as well as the procedure used to periodically reassess that confinement—the only claims that he currently presents to this Court—are moot because he has already received the relief he seeks.

Granting certiorari would be unwarranted even if Hope's primary claims for this Court's intervention were not moot. Apart from his mooted demand for a transfer out of restrictive housing, most of Hope's Eighth Amendment claims are in the very early stages of litigation. The Fifth Circuit reversed and remanded his individual-capacity claims for monetary damages, as well as his official-capacity claims against the prison official alleged to have actual knowledge of the challenged conditions of Hope's confinement sufficient to support deliberate indifference. A case in this interlocutory posture is a poor vehicle for this Court's review.

But this Court's review would be unwarranted even absent mootness and the interlocutory nature of the case. He misapprehends the Fifth Circuit's holding, depicting it as a categorical refusal to consider the duration of a prisoner's detention in restrictive housing when performing the fact-intensive Eighth Amendment analysis this Court requires. The Fifth Circuit did nothing of the sort, instead concluding that Hope stated a claim that one of the respondents "knew of and disregarded the excessive risks to Hope's health and safety" allegedly caused by his confinement in restrictive housing, Pet. App. 20a, and recognizing that the length of that confinement "cannot be ignored," Pet. App. 19a. That is precisely the sort of case-specific, fact-bound holding that this Court frequently refuses to review. *E.g.*, *Strain v. Regalado*, 142 S. Ct. 312 (2021) (Mem.); *Atkins v. Williams*, 141 S. Ct. 2512 (2021) (Mem.).

Nor are any of Hope's other Eighth Amendment claims worthy of this Court's review. Apart from his mooted demand for a transfer out of restrictive housing, most of Hope's Eighth Amendment claims are in the very early stages of litigation: the Fifth Circuit reversed

and remanded his individual-capacity claims for monetary damages, as well as his official-capacity claims against the prison official alleged to have actual knowledge of the challenged conditions of Hope's confinement sufficient to support deliberate indifference. A case in this interlocutory posture is a poor vehicle for this Court's review.

Finally, Hope's Fourteenth Amendment procedural-due-process claim does not call for this Court's review. Even if Hope had identified an error in the Fifth Circuit's conclusion, certiorari is unwarranted because his petition posits a dispute about the application of correctly stated law to the pleadings in this case. That kind of question does not warrant certiorari.

STATEMENT

I. Background Facts

Following his conviction for aggravated robbery that resulted in an 80-year prison sentence, Dennis Wayne Hope made a name for himself as an escape artist.

A. Hope first escaped from custody in 1990. It was during transport from pretrial detention to a court appearance in Dallas. As he later told the story for a documentary about his escape exploits, Hope had robbed numerous Albertsons grocery stores. *Almost Got Away*, *supra* n.1, at 33:31-44; *see United States v. Hope*, 102 F.3d 114, 115 (5th Cir. 1996). During the first few robberies, Hope used a fake ID and uniform to pose as an armored-vehicle guard; disguised, he deceived employees into handing over the store's cash deposits. *Almost Got Away*, at 1:09-5:45. He later switched his *modus operandi* and began robbing Albertsons cashiers and actual armored-vehicle guards at gunpoint. *Id.* at 6:38-8:31.

The Dallas County District Attorney charged Hope with multiple counts of aggravated robbery with a deadly

weapon. To escape pretrial custody, Hope made a handcuff key out of the ink insert from a ballpoint pen. *Id.* at 12:57-13:03. He later bragged about the technique in an exclusive interview with Dallas investigative reporter Robert Riggs: "I could make about six [keys] out of that."[2] During transport to a court appearance, Hope slipped his handcuffs and eluded guards, then stripped down to his boxer shorts and jogged away through downtown Dallas. *Almost Got Away* at 12:57-13:38, 14:00-15:00. Hope bragged that he evaded the suspicions of a police officer who spotted him by saying that he was wearing just light shorts because he was training for a triathlon. *Id.* at 14:00-15:00.

It took Dallas police a week to track Hope down. *Id.* at 16:26-46. When they did, he led them on a high-speed car chase for over an hour, Hope said, before police disabled his car by shooting out the tires. *Id.* at 18:12-40. He was tried for the robberies, convicted, and sentenced by the jury to 80 years. *Hope v. State*, No. 05-91-00245-CR, 1991 WL 290548, at *1 (Tex. App.—Dallas Dec. 19, 1991, pet. ref'd).

B. Hope was three years into the 80-year sentence for the Albertsons robberies when he escaped from a maximum-security Texas prison. *See Hope*, 102 F.3d at 115. Hope spent months training—he ran 10 miles a day around the prison yard—and planning the escape. *Almost Got Away* at 20:00-05, 20:29-57. Hope planned his escape for Thanksgiving weekend, he explained, because only a skeleton crew would be on duty. *Id.* at 21:52-22:16. Hope and two accomplices sabotaged a generator, shut

[2] Robert Riggs Reporting, "Texas Prison Escape Artist Dennis Wayne Hope" at 2:24-30, https://www.youtube.com/watch?v=myxF5myFNhw (originally aired on various dates in 1995 and 1996) (hereafter "*Riggs Reporting*")

down the power to the entire prison, and cut through an interior fence. *Id.* at 22:20-23:18, 23:35-38. They had to climb a second fence, and Hope had prepared for the razor wire by padding his clothing with cardboard and bedding. *Id.* at 23:40-24:19.

The other escapees were quickly apprehended, but Hope made it over the wire and eluded capture. *Id.* at 24:40-25:48, 27:06-37. He ran 14 miles to Pearland, Texas, a town outside Houston, where he stole a truck and drove north to Dallas. *Id.* at 27:37-28:10.

Hope then "stole a[nother] car at knife point from 83-year-old Elvin Mitchell," who he "severely cut" and left bleeding on the side of the road. *Hope*, 102 F.3d at 115. After robbing an Albertsons—one of those he had robbed before—Hope fled the State. *See id.* "I knew I was going to stay in Memphis," Hope said, "so I didn't want to commit any crimes there. I decided I was going back to Dallas to rob [the Albertsons stores I'd robbed before] because I knew it didn't require as much planning, and I wouldn't have to stay there [in Dallas] very long." *Almost Got Away* at 33:31-44. "Between December 1, 1994 and January 16, 1995 Hope robbed four Albertson's grocery stores in the Dallas area." *Hope*, 102 F.3d at 115.

Hope has admitted he was prepared to kill to evade recapture. In his March 1995 interview with reporter Robert Riggs, Hope said he "didn't plan on coming back" to prison: "I planned on it being a shootout, either me killing them or them killing me." *Riggs Reporting*, at 7:08-15. On February 1, 1995, Memphis police pulled Hope over on his way to a casino. *Almost Got Away* at 36:24-40. "As I pulled over, I had the 9mm with me," Hope told interviewers, "and I actually put it to my chest where it was aimed over my left shoulder." *Id.* at 36:43-

54. "If that officer walked up, I was gonna pull the trigger and take off." *Id.* at 37:25-28. But, as Hope described it, the officer instead directed Hope by intercom to step out of the car, asked him about a case of beer sitting on the seat, and sent him on his way. *Id.* at 37:28-38:11.

Texas law enforcement caught up with Hope the next day. *See Hope*, 102 F.3d at 115. That night, along with the FBI and Memphis police, Texas officers apprehended and arrested Hope in a nightclub. *Id.* Memphis police found a handgun and a police scanner in the Jaguar Hope had driven to the club. *Id.* at 115-16.

C. When Hope stood trial for the carjacking, armed robberies, and escape, the federal district judge ordered him shackled in the courtroom. *Id.* at 117. As the Fifth Circuit explained, the court's reasons for doing so were "readily apparent . . . from the record." *Id.* at 118. "Hope not only had been sentenced previously for aggravated robbery, but he was an escapee from prison, thus posing both the threat of injury to individuals in the courtroom and the threat of escape." *Id.*

During the trial, Hope tried another escape; he snatched a handcuff key. *See Riggs Reporting* at 3:23-48. Then he scuffled with guards before the verdict and threatened to stab his lawyer "in the scull" with a pencil. *Id.* at 7:45-50.

And while in detention awaiting his federal sentencing, Hope tried yet again. *See id.* at 9:10-58. He smuggled hacksaw blades into the jail, beat a guard with a heavy metal drain cover, and took over a control center. *Id.* at 9:44-52. "I could have come out of my cell whenever I wanted to come out of that cell," he bragged. *Id.* at 12:20-23.

D. Not long after his arrest in Memphis, Hope told reporter Robert Riggs he was already planning his next

escape. "I'm not gonna stop trying," he bragged. *Id.* at 2:37-38. "They can put me in high security, but I was in high security the last time I left." *Id.* at 10:22-28.

After Hope's federal conviction and sentencing, he was returned to TDCJ custody and placed in restrictive housing (then called "administrative segregation"). As reflected in the public record, each unit's Administrative Segregation Committee is "responsible for the process of reviewing offenders for placement in administrative segregation and routine reviews of those offenders."[3] This process is overseen by "[a] central administrative classification committee," known as the State Classification Committee or SCC, which "makes final decisions with regards to agency-wide issues and unit classification committee recommendations. During the intake process, the SCC makes decisions concerning the initial assignment of an offender to a unit. The SCC also makes final decisions regarding administrative segregation, safekeeping, and requests for protection." *Id.* Hope does not dispute that these regular reviews have occurred and continue to occur.

In July 2016, Hope initiated the grievance procedure that led to this lawsuit. In his initial grievance, he asserted that the SCC process was a "meaningless review" because he had been "repeatedly scheduled for a hearing before someone [presumptively at the SCC] who doesn't have the authority to authorize my release from Ad. Seg." ROA.22. TDCJ staff explained in response that he had been maintained in restrictive housing until December 2016 "on the basis of escape risk, staff assault[] and weapons possession." ROA.23. Hope did not dispute

[3] Tex. Dept. of Crim. Justice, *Offender Orientation Handbook* at 7, https://www.tdcj.texas.gov/documents/Offender_Orientation_Handbook_English.pdf.

these factual statements in his second-stage grievance. ROA.24-25.

II. Procedural History

A. In 2018, Hope sued numerous TDCJ officials in their individual and official capacities, alleging violations of the Eighth and Fourteenth Amendments. *See* ROA.6-25; Pet. App. 59a–61a. His amended complaint names Todd Harris, the Senior Warden of the Polunsky Unit, Chad Rehse, a Major at the Polunsky Unit, members of the SCC, and two other administrative officials he alleges are responsible for his placement in administrative segregation. Pet. App. 59a-61a.[4]

Hope's lawsuit seeks both prospective relief against the defendants in their official capacities and monetary damages from the defendants in their individual capacities. *See* Pet. App. 59a. He alleges the conditions of his confinement at the Polunsky Unit violate the Eighth Amendment because, among other things, he is served meals in his cell on trays, many of which are "dirty and unsanitary," Pet. App. 62a, he is strip-searched before leaving his cell, Pet. App. 62a-63a, he can keep only limited personal property in his cell, Pet. App. 63a, and he is not allowed contact visits, Pet. App. 63a-64a. He alleges that "excessive amounts of noise can be heard 24/7," Pet. App. 65a, that he has been exposed to pepper spray "through no fault of his own," Pet. App. 65a-66a, and cells are not sanitized before he is moved in, Pet. App. 69a. He alleges that in December 2017 he was

[4] Hope also alleges First Amendment retaliation claims against two of the respondents. *See* Pet. App. 68a-69a, 79a-80a. The Fifth Circuit reversed the dismissal of those claims and remanded them for further proceedings, Pet. App. 15a-17a, and—understandably—Hope does not raise them in his petition.

housed for thirteen days in a cell that had "black mold" on one wall. Pet. App. 69a.

As to procedural due process, Hope alleges his file is reviewed monthly by the Administrative Segregation Committee, but he says these reviews are "a sham." Pet. App. 72a. An "'escape risk' designator" was removed from his file in 2005, Hope alleges, but he is still held in restrictive housing. Pet. App. 78a.[5] At least every 180 days, the State Classification Committee holds a hearing at which Hope may appear and submit a statement. Pet. App. 72a-73a. Hope says "he has gone before a number of SCC members who saw no reason not to release him to [general population]," but since 2010 "SCC members have been told not to release" him by the committee chair. Pet. App. 75a; *see also id.* 73a-74a. In one instance, he alleges, the reviewing committee member told him she would recommend he be released to a "transitional program," but that recommendation was not carried out. Pet. App. 72a-73a. So he says these SCC hearings are also "a sham." Pet. App. 76a.

The district court dismissed Hope's claims. Pet. App. 32a-58a.

B. The Fifth Circuit affirmed in part and reversed in part. The court of appeals affirmed the dismissal of Hope's due process claims under *Mathews v. Eldridge*, 424 U.S. 319 (1976). Pet. App. 12a-15a. It also affirmed dismissal of his Eighth Amendment claims against most of the named defendants because the amended complaint failed to plausibly allege they acted with deliberate indifference. Pet. App. 20a. But the Fifth Circuit reversed

[5] TDCJ's records reflect that the "escape risk" designator was changed to "escape history" in 2015—not in 2005. As that is not in the record at this stage, respondents will assume the truth of Hope's allegations.

and remanded on two other grounds relevant here: *first*, the Fifth Circuit remanded Hope's individual-capacity claims seeking money damages, which the district court's decision had not addressed in any respect. Pet. App. 11a-12a, 24a.

Second, the Fifth Circuit remanded Hope's official-capacity Eighth Amendment claims against Major Rehse. Applying the two-part conditions-of-confinement test set out in *Farmer v. Brennan*, 511 U.S. 825 (1994), the court concluded Hope had plausibly alleged "(1) that the prison conditions pose a 'sufficiently serious' threat to his health, including his mental health, and (2) that [Major Rehse] acted with 'deliberate indifference' to such threat." Pet. App. 18a (quoting *Farmer*, 511 U.S at 834); *see* Pet. App. 17a-22a. The court found it "plausible that Hope's decades of solitary confinement alongside such conditions of mold, urine, and feces have caused the physical and psychological deterioration he alleges, and it is clear that such an allegation is sufficiently serious to invoke Eighth Amendment concerns." Pet. App. 22a; *see also id.* 22a-24a. And it concluded Hope had sufficiently alleged that Major Rehse was aware of these conditions as well as incidents of physical injury caused by pepper spray. Pet. App. 23a. The Fifth Circuit explained that "these allegations are made against the backdrop of Hope's allegation that he is no longer an escape risk. Accepting the allegations in Hope's complaint as true, it is at least plausible that Hope's continued confinement in these conditions is not a matter of reasonable policy judgment but is instead deliberate indifference." Pet. App. 23a.

One judge dissented in part. Pet. App. 25a-31a. She would have held that Hope sufficiently alleged Eighth and Fourteenth Amendment violations against all the

defendants, so all of his claims should be permitted to proceed past the pleading stage. *See* Pet. App. 25a.

III. Post-Petition Developments

On February 7, 2022, following one of the reviews that he derides as a "sham," Hope was transferred from restrictive housing in the Polunsky Unit to the Cognitive Intervention Transition Program at the Ellis Unit. *See* App. 1a-2a[6] Through the Cognitive Intervention Transition Program, Hope is completing a four-month educational program aimed at helping inmates successfully make the change from restrictive housing to the general population. App. 1a-2a.[7] Participants attend classes together each day, eat communal meals, and may congregate in the common area during their free time. App. 2a. Mr. Hope is housed with a cellmate. App. 2a. In the cellblock where participants are housed, cell doors are made of bars and the view out each door looks across a hallway and out a window. App. 2a. Participants in the program are eligible for regular visitation and may use the inmate telephone system. App. 2a. They will be returned to restrictive housing only if they commit misconduct serious enough to warrant restrictive housing in the first instance. App. 2a.

Hope has had no disciplinary events since his transfer to the Ellis Unit and is actively participating in the Cognitive Intervention Transition Program. App. 2a. He is scheduled to complete the program on May 26,

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[6] Hope's transfer to the Ellis Unit is a matter of public record and may be viewed at inmate.tdcj.texas.gov/InmateSearch/start.action by searching for "Dennis Hope" or TDCJ number 00579097.

[7] An overview of the program is provided in the public record and is available at https://www.tdcj.texas.gov/divisions/rpd/citp.html.

2022, after which he will be assigned to the general population in minimum custody status with continued good conduct. App. 2a.

REASONS TO DENY THE PETITION

I. The Claims That Form the Basis of Hope's Petition Are Moot.

The primary relief Hope seeks in his lawsuit is transfer out of solitary confinement (at 15-16) or, short of that, "that prison officials actually evaluate whether solitary confinement is still warranted" (at 36). Both have already happened. As a result of the review process Hope calls (at i) a "sham," Hope has been transferred out of restrictive housing at the Polunsky Unit to the Cognitive Intervention Transition Program at the Ellis Unit. Participants in the program, including Hope, have cellmates, attend classes as a group, and eat communal meals. *See supra* 11-12. In short, Hope is already out of solitary confinement, and—absent further misconduct on his part—he is not going to be subject to the challenged review procedure again. Indeed, his complaint alleges he was wrongfully denied the opportunity to participate in such a transition program in 2016, *see* Pet. App. 73a; having received the very relief he seeks, Hope cannot dispute that his claims for prospective relief are moot. *See, e.g.*, *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021).

Because he is no longer housed in solitary confinement, Hope lacks standing to pursue prospective relief. *See id.* at 1780; *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). And prospective relief is the only relief available in an official-capacity suit under *Ex parte Young*, 209 U.S. 123 (1909). *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011). Hope's moot claims will have to be dismissed because federal courts lack jurisdiction to opine on a "dispute solely about the meaning of

a law, abstracted from any concrete actual or threatened harm." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009); *see, e.g.*, *Gilday v. Boone*, 657 F.2d 1, 3 (1st Cir. 1981) (claim for injunctive relief was moot after plaintiff was released from segregated detention).

To be sure, a defendant who voluntarily terminates the challenged conduct bears the burden of showing it "c[annot] reasonably be expected to recur." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam). But courts assume the government acts "in good faith when it changes its policy." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014); *see* 13C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3533.7 n. 16 (3d ed.). That presumption applies here: TDCJ transferred Hope out of restrictive housing and he will—absent serious misconduct on his part—be housed in the general population within a matter of weeks. App. 2a.

To be returned to restrictive housing, Hope would have to commit a disciplinary violation serious enough that it would warrant placement in restrictive housing in the first instance. App. 2a. Even that would not implicate his claims here, which are premised on the allegation that he continued to be held in solitary confinement solely due to his 1994 escape. *See* Pet. App. 76a. A new transfer for different reasons would not implicate his claims. *See Deakins v. Monaghan*, 484 U.S. 193, 201 n.4 (1988) (speculation that defendants could undertake the same action based on "other events" in the future does not avoid mootness).

II. The Interlocutory Nature of this Case Makes It a Poor Vehicle to Address Hope's Remaining Claims.

A. Although Hope's Eighth Amendment claims for monetary damages are not moot, *Collins*, 141 S. Ct. at 1780, this is neither the proper time nor a good vehicle to review them. The Fifth Circuit reversed the dismissal of those claims and remanded them for further proceedings, *see* Pet. App. 11a-12a, 24a, and Hope does not invoke these claims in his petition. Indeed, he concedes (at 24) that "thorny questions about qualified immunity" would complicate this Court's review of his individual-capacity claims. Because no lower court has yet addressed these issues, petitioner's request for monetary damages is not yet ripe for this Court's review.

B. Hope's Eighth Amendment claim against Major Rehse has been remanded for discovery and trial. This Court's "normal practice" is to "den[y] interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting); *see also Va. Mil. Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."). Indeed, lack of finality "alone [can] furnish[] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

There are good reasons why this Court is "generally hesitant to grant review of non-final decisions." *Taylor v. Riojas*, 141 S. Ct. 52, 55 (2020) (per curiam) (Alito, J., concurring). Litigation is inherently unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented. *See* William J. Brennan, Jr., *Some Thoughts on*

the Supreme Court's Workload, 66 JUDICATURE 230, 231-32 (1983). "[A]llowing the case to proceed to its final disposition below might produce a result that makes it unnecessary to address an important and difficult constitutional question." *Id.* at 231.

Review is often premature even after there has been factual development for a preliminary injunction. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 139 S. Ct. 634, 635 (2019) (Alito, J., concurring in the denial of certiorari); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 857 (2022) (Mem.) (granting certiorari after summary judgment). Much more so where (as here) the claims have been remanded at the pleading stage so that factual development can begin in the first place. *See Nat'l Football League v. Ninth Inning, Inc.*, 141 S. Ct. 56, 56 (2020) (Kavanaugh, J., respecting the denial of certiorari).

The Court should adhere to the normal practice in this case because the Fifth Circuit has remanded the bulk of Hope's Eighth Amendment claims for further proceedings. *See* Pet. App. 24a. Denial is the usual result in such a posture. *See Abbott v. Veasey*, 137 S. Ct. 612, 613 (2017) (Roberts, C.J., respecting the denial of certiorari); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J., respecting the denial of certiorari); *Va. Military Inst.*, 508 U.S. at 2432 (Scalia, J., respecting the denial of certiorari*); Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 944 (2012) (Alito, J., respecting the denial of certiorari); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 327-28 (1967) (per curiam).

This is not an "extraordinary case[]" that necessitates departure from this Court's settled practice. Stephen M. Shapiro et al., *Supreme Court Practice* 283 (10th ed. 2013). Those cases involve situations where "the

lower court's decision is patently incorrect *and* the interlocutory decision . . . will have immediate consequences for the petitioner." *Id.* (emphasis added) (collecting cases). That narrow test is met in situations where the circuit court's decision implicates a matter that is "effectively unreviewable" if the Court were to wait until final judgment. *Will v. Hallock*, 546 U.S. 345, 351-52 (2006) (addressing related collateral-order doctrine).

This is not such a case: Hope is seeking retrospective damages for conduct dating back to 2017 along with, against Major Rehse, prospective relief from his conditions of confinement. There is no suggestion that failure to address his claims now will materially prejudice his ability to litigate those claims. As a result, this case is very different from other instances when this Court has deemed interlocutory review appropriate—for example, in cases involving a sovereign's or public official's immunity from suit, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009), class certification, *see, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), or where a burdensome preliminary injunction will cause the petitioner concrete, irreparable harm during the pendency of the litigation, *Mazurek v. Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam). For this reason too, the petition should be denied.

III. On the Merits, Hope's Claims Do Not Warrant Review.

Even if the Court were inclined to look beyond the mootness of Hope's claims for prospective relief and the interlocutory nature of the case, neither of Hope's remaining claims would warrant this Court's review. Hope misstates the Fifth Circuit's ruling regarding his Eighth Amendment claim. And his due-process claim presents a

fact-bound dispute regarding how to apply well-settled law to his allegations.

A. Eighth Amendment.

1. Hope's Eighth Amendment claim is premised on a question not actually presented in the decision below. Hope asks for this Court's review because, he says (at 3), the Fifth Circuit held that "solitary confinement *never* violates the Eighth Amendment." It held no such thing. To the contrary, the Fifth Circuit applied the opposite rule. *See* Pet. App. 17a-24a.

In analyzing Hope's Eighth Amendment claim, the Fifth Circuit acknowledged that "[t]here is a line where solitary confinement conditions become so severe that its use is converted from a viable prisoner disciplinary tool to cruel and unusual punishment." Pet. App. 18a (quoting *Gates v. Collier*, 501 F.2d 1291, 1304 (5th Cir. 1974)). And it concluded Hope *has* plausibly alleged that Major Rehse crossed that line, and thereby stated a claim against Major Rehse that should proceed to discovery. Pet. App. 20a-24a. It affirmed dismissal of Hope's official-capacity claims against the other defendants because it concluded Hope had not plausibly alleged they acted with deliberate indifference, Pet. App. 20a, and not even Hope argues that conclusion is worthy of certiorari.

In short, Fifth Circuit doctrine already embodies the rule Hope urges this Court (at 9) to adopt: "solitary confinement can violate the Eighth Amendment, depending on its length, its impact on a prisoner's mental and physical health, and its necessity." Far from a categorical prohibition on Eighth Amendment violations arising from solitary confinement, Fifth Circuit precedent aligns with the flexible Eighth Amendment standard Hope urges (at 9). *See* Pet. App.17a-24a; *Fussell v. Vannoy*, 584 F. App'x 270, 271-72 (5th Cir. 2014) (per curiam) (reversing

dismissal of a prisoner's complaint because it plausibly alleged that after 25 years the prisoner's "continued lockdown is not a matter of reasonable policy judgment, but is instead deliberate indifference"); *Gates*, 501 F.2d at 1304; *cf. Riojas*, 141 S. Ct. at 53-54 (length of time, necessity, and the possibility of mitigation are all relevant considerations). There is no reason for this Court to grant certiorari.

Hope criticizes (at 23-24) the Fifth Circuit's citation to *Hutto v. Finney*, 437 U.S. 678 (1978), because *Finney* involved *overcrowded* conditions in isolation cells, not solitary confinement. To be sure. But the Fifth Circuit did not cite the case for its facts; it cited *Finney* for the principle it represents. *See* Pet. App. 17a-19a. In *Finney*, this Court observed: "It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual." *Finney*, 437 U.S. at 686; *see* Pet. App. 18a. The case stands for the proposition that the length of time a prisoner spends under the challenged conditions of confinement is relevant but cannot be "considered in a vacuum." *Finney*, 437 U.S. at 685. That is why the Fifth Circuit cited it, explaining that "under the Eighth Amendment, 'the length of confinement *cannot be ignored* in deciding whether the confinement meets constitutional standards.'" Pet. App. 19a (quoting *Finney*, 437 U.S. at 686) (emphasis added). The court also cited *Finney* to explain why "sheer length of . . . confinement" does not state a claim. Pet. App. 17a n.5. Hope's factual distinction likewise does not favor this Court's review.

At bottom, Hope's quarrel with the Fifth Circuit goes to how it applied the flexible Eighth Amendment standard in analyzing his complaint. The Fifth Circuit

concluded Hope has not plausibly alleged most of the defendant prison officials—all but Major Rehse—acted with deliberate indifference to the alleged harmful effects of his conditions of confinement in restrictive housing. Pet. App. 20a. Hope insists (at 12) that he did indeed sufficiently allege deliberate indifference. That kind of fact-bound, case-specific disagreement about the pleadings does not call for this Court's review. *See* Sup. Ct. R. 10.

2. In any event, Hope has not stated a claim under the Eighth Amendment because his conditions of confinement are not "totally without penological justification." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (joint opinion); *see also Farmer v. Brennan*, 511 U.S. 825, 852 (1994); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981). As the Fourth Circuit puts it, "a legitimate penological justification can support prolonged detention of an inmate in segregated or solitary confinement" even if the conditions "create an objective risk of serious emotional and psychological harm." *Porter v. Clarke*, 923 F.3d 348, 362–63 (4th Cir. 2019); *cf. Wilkinson v. Austin*, 545 U.S. 209, 227 (2005) (the State's "first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves.").

The record contradicts Hope's premise (at 25) that "there is no basis for his ongoing solitary confinement." Responding to Hope's administrative grievance, TDCJ officials explained the reasons the State Classification Committee continued his placement in restrictive housing: "escape risk, staff assault[] and weapons possession." ROA.23. In his follow-up grievance, Hope did not deny that he was an escape risk or that concerns about staff assault and weapons possession apply to him. ROA.24. This undisputed evidence forecloses Hope's

Eighth Amendment claim as a matter of law under *Farmer*.

B. Due Process

Hope's due process claim based on alleged defects in TDCJ's process for reviewing his continuance in restrictive housing is moot because he is no longer in restrictive housing and subject to that review. But even if it were not, this Court's review would be unwarranted. The Fifth Circuit applied the balancing test from *Mathews v. Eldridge*, 424 U.S. 319 (1976), *see* Pet. App. 15a, which is what Hope contends (at 32) should apply. So even under Hope's reading, the Fifth Circuit's decision involves, at most, "the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Certiorari is not warranted on that basis. *Id.*

And in any event, Hope's pleadings do not state a claim. He alleges in conclusory fashion that hearings held to review his continued restrictive housing are "a sham and meaningless." *E.g.*, Pet. App. 72a. But these are just the sort of "labels and conclusions" that do not suffice to state a plausible claim under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). *Iqbal*, 556 U.S. at 678.

That Hope was not transferred out of restrictive housing until this year does not mean TDCJ's periodic review processes were "a sham." Hope characterizes the review process as a sham because he had not been transferred even though some individual reviewers opined that he could be. *See* Pet. App. 71a-73a. But his allegations are, at most, "merely consistent with" wrongdoing, and that does not state a claim for relief. *Twombly*, 550 U.S. at 557; *see also Iqbal*, 556 U.S. at 678. It is equally likely, taking his allegations as true, that the State Classification Committee ultimately disagreed with the

individual reviewers' assessment and decided in each instance that Hope could not safely be removed from restrictive housing. And the record reflects that the committee's decision turned on undisputed misconduct by Hope, as TDCJ explained to Hope. *See supra* 7-8.

And in any event, contrary to Hope's suggestion (at 36), this Court has never required prison administrators to develop new evidence every time they reconsider a prisoner's solitary detention. Indeed, this Court has explained that the necessary "review will not necessarily require that prison officials permit the submission of *any* additional evidence or statements." *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (emphasis added), *overruled on other grounds Sandin v. Connor*, 515 U.S. 472, 479-84 (1995). Nor does clearly established law require reviewing officials to ignore past actions in determining whether a prisoner needs to remain in restrictive housing. To the contrary, this Court has explained that prison administrators will review continued solitary confinement based on "facts . . . ascertained when determining to confine the inmate to restrictive segregation," along with "officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner." *Id.*

Hope repeatedly escaped from prison to commit more—and increasingly violent—robberies, then he bragged about his prowess as an escape artist and vowed never to stop trying to escape. *See supra* at 3-7. There is nothing suspect about prison officials determining restrictive housing remained necessary, even years later. In this context, this Court's precedent recognizes that the State's interest is "a dominant consideration," given the State's "obligation . . . ensure the safety of guards

and prison personnel, the public, and the prisoners themselves." *Austin*, 545 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2022

APPENDIX

APPENDIX

DECLARATION OF TIMOTHY R. FITZPATRICK

1. My name is TIMOTHY R. FITZPATRICK. I am over the age of 21 years, of sound mind, capable of making this declaration, and have personal knowledge of the facts stated herein. I am currently employed with the Texas Department of Criminal Justice ("TDCJ") as the Director of Classification and Records and have served in this capacity since November 15, 2021. I have held a series of progressively responsible positions including Correctional Officer, Sergeant, Lieutenant, Captain, Major, Assistant Warden, Warden and this most recent position. I have worked for the agency since 2005 and have over 16 years of experience. As Director of Classification and Records and the Mail System Coordinators Panel, I oversee and am responsible for statewide admissions, intake, time auditing, transfers, Unit Classification, State Classification and Mailroom System Coordinators Panel.

2. On February 4, 2022, the State Classification Committee held a hearing to consider Dennis Wayne Hope's (TDCJ #579097) continued classification in Restrictive Housing. The Committee determined that Mr. Hope would be removed from Restrictive Housing and would be transferred to the Cognitive Intervention Transition Program (CITP) at the Ellis Unit. After successful completion of this program, Mr. Hope will be housed in the general population in G2 (minimum) custody status. The Committee reached this decision after extensive consideration of all prior criminogenic history, institutional adjustment, the recommendations of Polunsky Unit Administration concerning current

behavior, and in consultation with the leadership of TDCJ. Mr. Hope was transferred to the Ellis Unit on February 7, 2022.

3. Participants in the Cognitive Intervention Transition Program at the Ellis Unit attend classes together each day, eat communal meals, and may congregate in the common area during their free time. Most participants, including Mr. Hope, are housed with a cellmate. In the cellblock where participants are housed, cell doors are made of bars and the view out each door looks across a hallway and out a window. Participants are eligible for regular visitation and may use the inmate telephone system.

4. Participants in the Cognitive Intervention Transition Program will be returned to restrictive housing only if they commit misconduct serious enough to warrant restrictive housing in the first instance. In contrast, lesser infractions will affect the participant's security classification level within the general population. The Cognitive Intervention Transition Program lasts four months. At the conclusion of the program, graduates are transferred to housing in the general population. Mr. Hope is scheduled to complete the program on May 26, 2022 and will be assigned to the general population in G2 (minimum) custody status with continued good conduct.

5. Mr. Hope has had no disciplinary events since his transfer to the Ellis Unit and is actively participating in the Cognitive Intervention Transition Program.

Pursuant to 27 U.S.C. section 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 4, 2022, in Huntsville, Texas.

/s/ Timothy R. Fitzpatrick
Timothy R. Fitzpatrick
Director of Classification and Records
Texas Department of Criminal Justice