

No. 25-943

In the
Supreme Court of the United States

— ◆ —
ANTONIO M. SMITH,

Petitioner,

v.

JOHN KIND, ET AL.,

Respondents.

— ◆ —
On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

— ◆ —
**BRIEF IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI**

— ◆ —
JOSHUA L. KAUL
Attorney General of Wisconsin

JODY J. SCHMELZER
Assistant Attorney General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 266-7636
jody.schmelzer@wisdoj.gov

QUESTION PRESENTED

Petitioner Antonio Smith is a Wisconsin prisoner. He sued various correctional officers, including Respondents, claiming that 23 hours of cold conditions in his temporary cell assignment violated his Eighth Amendment right to be free from cruel and unusual punishment. The district court granted summary judgment to Respondents and the Seventh Circuit affirmed, relying on qualified immunity principles that this Court has confirmed numerous times. Like this Court and every other circuit, the Seventh Circuit grants qualified immunity to state officials except the plainly incompetent or those who knowingly violate the law. At the time of the underlying incident, no authority held that temporary confinement in a cold cell for 23 hours after a disturbance where chemical agents were used, and where the inmate is offered a protective covering but refuses to cooperate, crossed the Eighth Amendment line.

The question presented is:

Did the Seventh Circuit correctly conclude that it was not unlawful beyond debate that an inmate could be temporarily housed for 23 hours in a cold cell after he created a disturbance and chemical agents were used, and where he was offered a protective covering but refused to cooperate?

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INTRODUCTION

Smith asks the Court to engage in error correction on a fact-intensive inquiry that affects only him. The Seventh Circuit determined that the conditions alleged by Smith would violate the Eighth Amendment, so, at this point, the only issue is whether Smith could collect money damages. In addressing this issue, the Seventh Circuit faithfully applied controlling law. This fact-specific claim for damages does not present an issue of exceptional importance.

Prison staff at Green Bay Correctional Institution (“Green Bay”) had difficult decisions to make on November 28, 2017. One of the inmates in the restrictive housing unit, Antonio Smith, was 50 days into a hunger strike, which they knew was dangerous and could lead to permanent physical impairment. Worse yet, Smith had decided not to cooperate with medical assessments. It was at that point that staff decided to bring him out of his cell, observe his ability to walk, and have him assessed by a medical professional at the unit’s nurse station—something a nurse could not readily do through a cell door. Correctional staff, including Captain Jay Van Lanen, issued 20 direct orders for Smith to cooperate and instructed him a dozen times that chemical agents would be used if his refusal continued. Video of the incident demonstrates just how reluctant Van Lanen was to use the chemical agent. Smith ignored these orders, and a short burst of a chemical agent was deployed into the cell. Smith was removed from his

cell, escorted to the nurse's station, assessed, and placed in a control cell close to the nurse's station.

Because chemical agents had been used in his cell and Smith was asthmatic, his clothes needed to be removed, and he could not immediately return to his contaminated cell. He was placed in the control cell naked and offered a shower, which he refused. Green Bay was a heated facility, and the control cell had adequate lighting, a working toilet, and running water. According to Smith, he was cold in the cell and felt cold air blowing out the vent. Smith was later offered a blanket-type smock if he agreed to cooperate with his health assessment, but he refused it. Green Bay staff checked on Smith every 30 minutes until he was let out of this cell after fewer than 23 hours. Smith did not require any medical care for being cold and did not sustain any injury—he alleges the cold caused him to lose sleep and suffer pain while he was temporarily housed in the control cell.

Recognizing the difficult position Smith had put Green Bay staff in, and that there was no clearly established closely analogous case law that would have put these officers on notice of how to navigate this situation under the Eighth Amendment, the Seventh Circuit affirmed judgement for the correctional officers based on qualified immunity for both his excessive force claim challenging the use of chemical agents and conditions of confinement claim. (Pet. App. 9a–22a.) Before doing so, though, the court found that Smith's allegations did support an Eighth Amendment violation, so the law would be clearly

established going forward. (*Id.*) The Seventh Circuit also affirmed summary judgment on the merits of Smith's excessive force claim challenging his escort from his cell to the nurse's station. (Pet. App. 22a–23a.)

The Seventh Circuit correctly decided all issues. On the conditions-of-confinement claim, which the petition focuses on, the court faithfully applied both its own and this Court's precedent to this issue. While one panel member disagreed with the majority's application of these precedents, there is no authoritative decision on applying the Eighth Amendment to an inmate in Smith's situation, where he was housed naked in a cell for 23-hours after the use of chemical agents was required, he refused medical attention and a shower, and he later refused protective clothing to mitigate the cold. No other controlling precedent has addressed this issue with similar facts, nor is there a robust consensus of authority, which this Court requires to defeat qualified immunity.

Further, this case does not raise an important federal question. Sup. Ct. R. 10(c). While conditions of confinement are important, the Seventh Circuit's holding addressed that interest by holding that Smith could sustain an Eighth Amendment claim—a finding that will defeat the assertion of qualified immunity for any closely analogous Eighth Amendment claims going forward. Its narrow holding that such a claim was not clearly established for these correctional defendants when they made the decisions they did on

November 28, 2017, does not have a substantial impact on any other cases given its fact-specific nature. And given the holding on the merits of the Eighth Amendment issue, no split in the circuits currently exists.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

I. Factual background.

Smith, who had a history of hunger strikes dating back to 2016, put Green Bay on notice that he was engaged in another one at the beginning of October 2017. (Record 34 ¶ 10; 37-1:18.)¹ Hunger strikes are dangerous. (Record 37-3:4.) Refusing to eat can cause dizziness, weakness, and nausea. (Record 37-3:4.) It can also result in permanent health and kidney damage. (Record 37-3:4.) Not eating or drinking anything can lead to death in only a few days. (Record 37-3:4.) Smith’s case was assessed as “emergent” by medical professionals. (Record 34 ¶ 11; 37-1:18.)

Green Bay staff initiated a hunger-strike care plan to monitor and treat Smith as his strike progressed. (Record 37-1:18.) As part of the plan, staff were required to look for significant weight loss as well as

¹ Citations to the “Record” are to docket entries in the district court, *Smith v. Kind*, no. 18-cv-1569-pp (E.D. Wis. 2025), which was the record before the Seventh Circuit. Citation to the docket entry is then followed by the relevant paragraph or page number in the document, or time mark in the video.

signs of dehydration and malnutrition, such as any changes in Smith's mental status or an inability to walk. (Record 50 ¶ 16; 56-1:5.) A nurse was to evaluate Smith daily and an advanced-care provider was to physically examine Smith every 72 hours or more frequently if his condition required doing so. (Record 56-1:6.)

Smith refused all medical monitoring and treatment for 45 days, October 10 through November 24. (Record 37-1:2–17.) Green Bay policy was that Smith needed to report to the nurse's station on the unit, even if he was refusing medical treatment. (Record 39-1:12.) Based on this, Security Director John Kind granted staff permission to remove Smith from his cell and transport him to the nurse's station for assessment. (Record 56-1:61.) Kind also gave staff permission to use force—including a taser, chemical agent, and entry of Smith's cell—to accomplish this task. (Record 56-1:61.) Having Smith leave his cell would facilitate his medical evaluation and give staff a chance to assess his ability to walk, which informs staff of the toll Smith's hunger strike had taken and future treatment needs. (Record 56-1:5, 61.)

From November 25 through 27, Smith refused to cooperate with removal from his cell, engaging only in a "surrender ritual" on his bed. (Record 56-1:65, 94.) Green Bay correctional staff decided on those instances to enter the cell carrying a taser, apply restraints, strap him to a restraint chair, and wheel him to the nurse's station for assessment, which he refused. (Record 56-1:61, 65, 94.) After the November

27 removal, Smith informed staff that he would not be as cooperative for the next cell extraction, which was to occur the following day. (Record 56-1:94, 98, 102 (“I will not be taking a knee tomorrow”).)

The next day, a cell removal team was gathered to transport Smith to the nurse’s station for his appointment. (Record 35-1:2.; *see generally* Record 60.) As the removal team approached Smith’s cell, he pulled up his pants to waist level from below the buttocks, which Van Lanen took as a sign that Smith was readying an attack. (Record 35-1:2.) Van Lanen ordered Smith to walk to the front of his cell so he could be handcuffed and leave his cell voluntarily. (Record 35-1:2; 60 at 3:30–8:50.) Smith was asked approximately 20 times to comply and told of the effects of using the chemical agent about a dozen times before Van Lanen showed Smith the fogger used to administer the agent and gave him another opportunity to comply. (Record 60 at 3:00–8:50.) Smith continued to resist, covering his face with bed linen and assuming the same position he had taken the past three days. (Record 35-1:2; 60 at 8:30–8:50.) Van Lanen then sprayed one short burst of chemical agent into Smith’s cell. (Record 35-1:2; 60 at 8:46.)

After a few minutes, Smith came to the front of his cell, his clothes were removed, and he was restrained and removed from the cell. (Record 35-1:2; 60 at 8:50–17:55.) He was then escorted by the removal team down the hall to the unit’s nurse station, (Record 35-1:3; 60 at 21:55–27:00), where he passed on his appointment by ignoring the medical staff. (Record 34

¶ 49; 60 at 25:45–27:00.) A nurse practitioner was still able to determine that Smith was not in respiratory distress. (Record 34 ¶ 52; 50:18–19; 60 at 27:25–28:00.)

Smith was then escorted to a control cell in controlled-separation status. (Record 34 ¶ 53; 60 at 28:00–30:30.) Inmates can be put on controlled-separation status when, like Smith, they exhibit disruptive behavior. (Record 56-1:159.) Staff removed the towel around Smith’s waist before placing him in the control cell because the towel had chemical agent on it. (Record 51 ¶ 71; 60 at 29:30–30:30.) The control cell had a working toilet, running water, and lighting for up to twelve hours of reading. (Record 34 ¶ 55.) The facility was heated in November 2017, with no maintenance reports that the heating system was inoperable. (*See* Record 34 ¶ 55.) Van Lanen testified that Smith was offered a segregation smock, but demanded regular clothing, and Van Lanen explained Smith could not that have while on control status. (Record 39-3:3; 50:22.) Van Lanen informed Smith that he could have a decontamination shower and soap at any time. (Record 50:20; 60 at 31:36–34:10.)

Smith asserts that he was never offered a security mat, soap, or toilet paper. (Record 50 ¶ 62; 51 ¶¶ 77–81.) He claims that he spoke to Lieutenant Retzlaff about three-and-a-half hours after he was placed in his control cell—around 3:30 p.m. on November 28—and asked for a smock, security mat, soap, toilet paper, and cleaning supplies. (Record 59 ¶¶ 82–84.) Smith was offered the blanket-type

segregation smock at about 3:41 a.m. on November 29 from Lieutenant Wickman. (Record 59 ¶ 92.) Despite his claims that he was in pain from the cold, Smith declined the offer because, he contends, Wickman said it was contingent on Smith obeying orders to leave his cell for his medical assessments. (Record 59 ¶ 93.)

Green Bay staff checked on Smith every 30 minutes while he was in his control cell. (Record 34 ¶ 64; 37-4.) They talked to Smith and observed him sometimes standing, sometimes sitting on the bed. (Record 37-4:2–5.) Staff released Smith from his control cell at 11:00 a.m. on November 19, less than 23 hours after he entered it. (Record 34 ¶ 65.) Smith suffered no medical injuries while in his control cell. (See Record 59:22–30.)

II. Procedural history.

Smith brought Eighth Amendment excessive-force claims challenging the use of chemical agents and his escort out of his cell, along with a conditions-of-confinement claim challenging his temporary placement in a control cell. (Record 10:9–16.) The district court granted the defendants summary judgment on the excessive force claims because “record evidence fully supports” that the use of chemical agent “was a good-faith attempt to get [Smith] to comply with the order to come to the door of his cell, rather than a malicious and sadistic attempt to cause [Smith] harm” (Pet. App. 69a); and no reasonable jury could conclude excessive force was used in Smith’s escort given the video evidence. (Pet. App. 75a.) The district court also granted

the defendants summary judgment on Smith's conditions-of-confinement claim because a reasonable jury "could not conclude that Van Lanen and Retzlaff knew [Smith] was at a substantial risk of serious harm" (Pet. App. 79a), or that the conditions of the control cell caused Smith cognizable harm. (Pet. App. 81a.)

On May 30, 2025, a divided panel of the Seventh Circuit affirmed judgment for the Green Bay defendants. (Pet. App. 23a.) The panel concluded that there was "no violation of the Eighth Amendment" regarding Smith's escort by the removal team. (*Id.*) However, the panel found that viewing the facts in the light most favorable to Smith, a jury could reasonably conclude that the use of chemical agents on him constituted excessive force, and that the temporary conditions of his confinement while in control status subjected him to a substantial risk of serious harm in violation of the Eighth Amendment. (Pet. App. 9a–22a.)

Nonetheless, the panel held that qualified immunity applied to Smith's excessive force claim because it could not "conclude that a reasonable correctional officer would have known that using pepper spray to extract Smith from his cell violated the Eighth Amendment." (Pet. App. 17a.)

The panel majority also held that qualified immunity applied to Smith's conditions of confinement claim because it had never found these conditions to be unconstitutional on closely analogous

facts, and it could not “conclude that this constitutional violation was so ‘obvious’ as to avoid the need to point to a closely analogous case.” (Pet. App. 21a–22a.) Judge Hamilton dissented on this point because he believed controlling precedent did clearly establish such a right to be free from the cold, despite that “[t]hose cases did not draw bright lines based on exactly how cold was too cold or exactly how long the cold conditions lasted.” (Pet. App. 34a.) Judge Hamilton also found that such a violation should have been “obvious” to a reasonable officer, applying the holding in *Hope v. Pelzer*, 536 U.S. 730 (2002). (Pet. App. 36a–37a.)

Smith filed a petition for rehearing and rehearing en banc on July 9, 2025. (Pet. App. 86a.) No active judge requested a vote on his petition, and only Judge Hamilton voted to grant panel rehearing. (Pet. App. 86a–87a.) The petition for rehearing en banc was denied on September 2, 2025. (*Id.*) Smith now seeks certiorari.

REASONS FOR DENYING THE PETITION

The question presented does not warrant review for two reasons.

First, the Seventh Circuit’s decision is correct and consistent with this Court’s precedent. The Seventh Circuit applied settled law on the doctrine of qualified immunity, and Smith’s argument that the law was misapplied does not warrant certiorari review.

Second, Smith's argument that there is a circuit split regarding the application of qualified immunity to his individualized facts is both inaccurate and exaggerated. The cases he cites from the Fifth and Eleventh Circuits were resolved differently from this case because of key factual distinctions. And these nonprecedential circuit decisions now appear aligned with the Seventh Circuit on the merits of the conditions of confinement issue given its holding that the facts here could sustain an Eighth Amendment claim. Certiorari review is not necessary to correct an inconsistency that no longer exists.

I. Certiorari should be denied because the decision below was correct and consistent with this Court's precedent.

Certiorari may be appropriate when "a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). It may also be appropriate when "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Neither of these situations apply here. The Seventh Circuit's decision is correct and was consistent with this Court's qualified immunity precedent.

A. This is not the rare obvious case the Court contemplated in *Hope v. Pelzer*.

First, Smith asserts that the Seventh Circuit’s decision conflicts with established precedent by not finding the conditions of confinement alleged by Smith to be an obvious Eighth Amendment violation (Pet. 8–10.) He is wrong.

Smith argues that the Seventh Circuit’s decision was contrary to this Court’s decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), because it took a “rigid gloss on the qualified immunity standard.” (Pet. 9.) In so arguing, though, Smith ignores how this Court has applied the “clearly established” requirement in the 20 years since *Hope*.

This Court holds that a right is “clearly established” if it is “one that is ‘sufficiently clear that every reasonable official would have understood that what he is doing violates that right.’” *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (citation omitted). Courts must not “define clearly established law at a high level of generality”; instead, their “inquiry ‘must be undertaken in light of the specific context of the case.’” *Id.* at 12 (citations omitted); see also *City of Escondido v. Emmons*, 586 U.S. 38, 42 (2019), (the clearly established right “must be defined with specificity.”) Therefore, unless existing precedent “squarely governs” the conduct at issue, an official will be entitled to qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam); *Mullenix*, 577 U.S. at 12 (emphasizing that

“[t]he dispositive question is ‘whether the violative nature of particular conduct is clearly established’” (emphasis omitted) (citation omitted)).

It is true that this Court has recognized that “there can be the *rare* ‘obvious case,’ where the unlawfulness of the officer’s conduct is sufficiently clear even though existing precedent does not address similar circumstances.” *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018) (emphasis added) (citation omitted). But this Court has also cautioned that “a body of relevant case law’ is usually necessary to ‘clearly establish the answer.’” *Id.* (citation omitted). The exception to this requirement in *Hope* is limited and has been sparingly applied to “permit[] clearly established violations to be found when *extreme though unheard-of actions* violate the Constitution.” *Camreta v. Greene*, 563 U.S. 692, 728 (2011) (Kennedy, J., dissenting) (emphasis added).

Smith seems to argue that things changed with this Court’s decision in *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). But, instead, that decision emphasizes the high standard set by this Court since *Hope*. In *Taylor*, this Court vacated the Fifth Circuit’s grant of qualified immunity to a group of corrections officers for an alleged Eighth Amendment violation. 592 U.S. at 8–10. This Court’s concluded that the misconduct at issue was “particularly egregious” and over the top: the inmate was confined for four days in a cell covered floor to ceiling with feces, followed by two days in a frigid cell with a clogged drain overflowing with bodily waste, forcing the inmate to

sleep naked on the floor in raw sewage. *Id.* at 7–9. This Court noted that a case finding no Eighth Amendment violation when an inmate was held in a dirty cell for three days was “too dissimilar, in terms of both conditions and duration of confinement, to create any doubt about the obviousness of Taylor’s right.” *Id.* at 9 n.2.

Nothing in *Taylor* changed this Court’s requirement of identifying a closely analogous case except in “extreme circumstances” where the constitutional violation is “obvious.” *Id.* at 53–54 (citation omitted). Nor did it change the requirement that only a *rare* case with *extreme unheard-of actions* would fall within the Court’s exceedingly narrow exception to the requirement of identifying closely analogous clearly established law set forth in *Hope*. As demonstrated by the cases analyzed by the Seventh Circuit and referenced below, this is not such a case.²

B. The Seventh Circuit correctly held that the right was not clearly established.

Smith also argues that the Seventh Circuit erred by not finding existing precedent to be sufficiently

² It should also be noted that because *Taylor* came over three years after the conduct at issue in this case, it could not have put these Green Bay correctional officers on notice that they were allegedly violating a clearly-established Eighth Amendment right. See *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (per curiam) (“*existing* precedent must have placed the statutory or constitutional question beyond debate” (emphasis added)).

analogous to defeat qualified immunity. (Pet. 10–11.) Here, the Seventh Circuit held that there was no closely analogous controlling precedent that would have put the Green Bay correctional officers on notice that Smith’s alleged temporary conditions in the control cell violated the Eighth Amendment. (Pet. App. 21a–22a.) It correctly found that none of the cases cited by Smith meet the demanding burden established by this Court to defeat qualified immunity, which requires that “the clearly established law . . . be ‘particularized’ to the facts of the case.” *White v. Pauly*, 580 U.S. 73, 79 (2017) (citation omitted). This is necessary because an Eighth Amendment violation could hinge on such factors as the severity of the cold, the duration of the confinement, and any alternatives presented to the inmate to protect himself from the cold. *Dixon v. Godinez*, 114 F.3d 640, 642 (7th Cir. 1997).

The Seventh Circuit correctly analyzed circuit precedent, holding it did not clearly establish the alleged Eighth Amendment violation here. In *Gillis v. Litscher*, 468 F.3d 488 (7th Cir. 2006), the inmate was kept naked in a cold cell for five days. In *Henderson v. DeRobertis*, 940 F.2d 1055, (7th Cir. 1991), cell temperatures fell below freezing during a four-day cold spell where the outdoor wind chill was recorded at 80 degrees below freezing, the cellblock’s heating system malfunctioned, and broken windows allowed cold air inside. In *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994), temperatures reached 50 degrees below zero during an inmate’s strip search. In *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987), inmates

alleged that their cell temperature was around 53 degrees for two months.

None of these cases were sufficiently analogous to Smith's conditions so that the Green Bay correctional officers had clear notice that they were violating the Eighth Amendment, especially when decisions from the Seventh Circuit have dismissed Eighth Amendment claims where the temperatures were much more severe and where these temperatures lasted far longer. See *Mays v. Springborn*, 575 F.3d 643, 648 (7th Cir. 2009); *Flores v. O'Donnell*, 36 F. App'x 204, 207 (7th Cir. 2002) (holding that there was no Eighth Amendment violation where an inmate was exposed to "extreme cold" for 48 hours during which time he was offered clothing that he refused).

In *Mays*, for instance, an inmate testified that the temperature in his cell caused him to "suffer[] from hurt ears and numb hands, felt frostbite, and caught colds." *Mays*, 575 F.3d at 648. The Seventh Circuit nevertheless affirmed a grant of summary judgment against the inmate's conditions-of-confinement claim because "this evidence does not rise to the level of the objectively serious harm necessary to show an Eighth Amendment violation." *Id.* The court held that the inmate "did not show that he was forced to be in the cold for long periods of time or that he suffered anything more than the usual discomforts of winter." *Id.*

Also, unlike the inmates in *Gillis*, *Henderson*, *Del Raine*, *Lewis* and *Taylor*, Smith was offered

protection from the cold by way of a blanket-like segregation smock—all he had to do was cooperate with his cell removal—but he refused. This distinction was significant in *Gillis*, where the Court noted that “deliberate noncompliance with a valid rule does not convert the consequences that flow automatically from that noncompliance into punishment,” distinguishing *Gillis*’s situation from others where inmates “could [] end [the deprivation] by altering his behavior.” *Johnson v. Prentice*, 29 F.4th 895, 912 (7th Cir. 2022) (Rovner, I., dissenting); *Rodriguez v. Briley*, 403 F.3d 952–53 (7th Cir. 2005).

The Seventh Circuit followed this Court’s precedent in requiring closely analogous case law to overcome the defendant’s qualified immunity and correctly held that Smith had not met this burden. Certiorari is not warranted.

II. Certiorari should be denied because the circuit courts of appeals are aligned on this issue.

Smith contends there is a split of authority between the Seventh Circuit and two other circuits on whether temporarily keeping an inmate in a cold cell violates clearly established Eighth Amendment law. However, there are key differences in the cases Smith relies on, meaning there is no actual split of authority. Given the fact-intensive nature of these claims, there is no split merely because violations have been found in certain cases with particular facts but not in other cases with different facts.

For example, in *Palmer v. Johnson*, prison officials forced 49 inmates to sleep in a field, without shelter, completely subjected to the elements, and they were forced to huddle together and build earthen walls to protect themselves from the wind. 193 F.3d 346, 352 (5th Cir. 1999). The inmates were also all forced to urinate and defecate within a small, confined space. *Id.* And in *Chandler v. Baird*, the inmate was confined for sixteen days in a filthy cell that was freezing cold without running water or hygiene items. 926 F.2d 1057, 1063 (11th Cir. 1991). The inmate was forced to sleep on the floor and on occasion huddled with a roommate. *Id.*

Unlike *Palmer* and *Chandler*, Smith was not subjected to other unsanitary conditions of confinement, and Smith was offered protection from the cold by way of a segregation smock but refused to cooperate. Also, unlike *Palmer*, Smith was housed inside a heated building, protected from the elements, provided the opportunity to shower but refused, and had a private toilet and running water at his disposal. Further, unlike *Chandler*, Smith was only in a control cell for less than a day. Neither of these cases are sufficiently analogous to create the circuit split argued by Smith.

In any event, recognizing a circuit split only affirms the application of qualified immunity. See *Mocek v. Albuquerque*, 813 F.3d 912, 929 n.9 (10th Cir. 2015) (“A circuit split will not satisfy the clearly established prong of qualified immunity”); *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011) (“Where

no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established.") As this Court has stated explicitly, "[i]f judges thus disagree on a constitutional question, it is unfair to subject [government officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Given the circuit split argued by Smith, judges clearly disagreed as to whether the conditions he was allegedly subject to were clearly established in October 2017. The Seventh Circuit was right to afford the officers qualified immunity under these circumstances.

Further, because the Seventh Circuit found in Smith's favor that a jury could find an Eighth Amendment violation on his allegations, any purported split of authority with the Fifth and Eleventh Circuits on the issue is illusory. The Seventh Circuit is now aligned with *Palmer* and *Chandler* in finding a violation based (at least in part) on cold cell conditions, and an Eighth Amendment violation is now clearly established going forward. Indeed, the Seventh Circuit acknowledged in its decision that it intended to "clarify Eighth Amendment law in our circuit and establish future constitutional boundaries." (Pet. App. 9a.) Because there is no split on the issue Smith raises, certiorari should be denied.³

³ It is questionable whether there can even be a split of authority on fact-intensive cases involving cell conditions unless the facts are squarely on point. For example, Smith relies on an

Finally, Smith argues that there is a split of federal authority over whether qualified immunity is even available on Eighth Amendment claims that require a finding of deliberate conduct. (Pet. 13–14.) However, an evaluation of intent is irrelevant to the Eighth Amendment qualified immunity analysis and contrary to this Court’s holding in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

In *Harlow*, the Court eliminated the subjective or good faith element from the qualified immunity analysis, holding, instead, that the official’s entitlement to qualified immunity “focuses on the objective legal reasonableness of an official’s acts.” *Id.* at 819. “Under that standard, a defense of qualified immunity may not be rebutted by evidence that the defendant’s conduct was malicious or otherwise improperly motivated” because “[e]vidence concerning the defendant’s subjective intent is simply irrelevant to that defense.” *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). Clearly, the Fourth Circuit decisions cited by Smith that are contrary to the clear dictates of this Court are erroneous. This case is not the proper vehicle to correct those individual cases, and the petition should be denied.

Eleventh Circuit decision, but that court also affirmed dismissal of an Eighth Amendment claim where the inmate alleged that he remained a cold cell without a blanket, mattress, or bed and with only a “suicide shroud” to wear for over 72 hours, forcing him to sleep on an “extremely cold floor” causing numbness in his feet and legs. *O’Connor v. Kelley*, 644 Fed. App’x 928, 930–32 (11th Cir. 2016). There is no split of authority within the Eleventh Circuit. Instead, it merely holds that certain facts can sustain an Eighth Amendment claim while other facts do not.

III. Certiorari should be denied because this is not the proper vehicle to resolve this issue.

In addition, the issue in this case does not warrant this Court's attention. In his petition, Smith overstates the significance of the questions presented and the practical consequence of a decision in his favor. (Pet. 15–16.) Smith seeks the correction of a perceived error in the Seventh Circuit's application of its precedent to the particularized facts of his case, which is not proper for review in this Court.

The qualified immunity question here turns entirely on an interpretation of the record in one particular case, which “is a quintessential example of the kind that [the Court] almost never review. *Taylor*, 592 U.S. at 11 (Alito, S., concurring). “A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.” Sup. Ct. R. 10. That is precisely the situation here, where Smith is alleging that this Court correct the denial of “a remedy for particularly egregious unconstitutional conduct.” (Pet. 15.)

A decision by this Court on whether Smith is entitled to qualified immunity adds virtually nothing to the law going forward. The Seventh Circuit held that the conditions alleged by Smith, if proved, would violate the Eighth Amendment, and this puts correctional officers in the Seventh Circuit on notice that such conditions are not tolerable. Thus, even without the Court's intervention, qualified immunity would not be available in any similar future case.

The only consequence to a decision from this Court would be to make money damages available to Smith. Even then, money damages may not be awarded if he lost at trial. And at trial, a decision by this Court would not even conclusively resolve the issue of qualified immunity because the Green Bay correctional officers would be free to renew that defense at trial, and if the facts Smith alleges are not ultimately established, the defense could succeed. Indeed, if Smith cannot prove the facts he alleges concerning the temperatures in his cell in October 2017, he may not even be able to show that his constitutional rights were violated.

Smith's request for individual relief, tailored to his case, undermines the importance of the issues he raises. *See Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring) ("The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases . . . whose significance is limited to the parties.").

Smith's petition does not concern an important federal question, and his petition for certiorari should be denied.

IV. Summary reversal is not warranted.

Smith states that "this case is appropriate for summary reversal." (Pet. 16.) His contention is misguided. Summary reversal is an "extraordinary remedy." *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 512–13 (2001) (Stevens, J.,

dissenting); *see Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 422 (1990) (“Summary reversals of courts of appeals are unusual under any circumstances”). It requires this Court to decide a case without the benefit of full briefing and argument. *See Montana v. Hall*, 481 U.S. 400, 407 (1987) (Marshall, J., dissenting). And it departs from this Court’s traditional role in resolving important questions of law and maintaining uniformity in the lower courts, rather than merely correcting alleged errors. *See* S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, *Supreme Court Practice* § 5.12(c)(3) (10th ed. 2013) (“[E]rror correction ... is outside the mainstream of the Court’s functions.”).

The standard for summary reversal is accordingly high. It is a “rare disposition, usually reserved by this Court for situations in which the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error.” *Schweiker v. Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting).

This case falls far short of that high bar. As discussed above, the Seventh Circuit’s decision is not clearly in error. To the contrary, it applied this Court’s precedent on what constitutes clearly established law to novel factual circumstances. This case bears no resemblance to *Taylor*, which involved exceptionally obvious Eighth Amendment violations that were clearly more extreme than cases relied upon by the Fifth Circuit.

Smith's invitation to this Court to summarily reverse the Seventh Circuit's decision should be rejected.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

JODY J. SCHMELZER
Assistant Attorney General
Counsel of Record

Attorneys for Respondents

Wisconsin Department of Justice
17 West Main Street
Madison, WI 53703
(608) 266-7636
jody.schmelzer@wisdoj.gov

March 11, 2026