No. _____

IN THE
Supreme Court of the United States

OREGON, et al.,

Petitioners,

v.

PAUL MANEY, et al.

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Eighth Amendment requires state corrections leadership to implement an overall "reasonable" statewide response to a public-health emergency in the aggregate, across multiple years and facilities.

2. Whether it was clearly established for purposes of qualified immunity that the State of Oregon's overall response to the COVID-19 pandemic between March 2020 and May 2022 would constitute cruel and unusual punishment, despite a federal judge ruling in June 2020 that the response met constitutional standards.

PARTIES TO THE PROCEEDING

Petitioners were appellants in the court of appeals and defendants in the district court. They are: the State of Oregon, Colette Peters, Heidi Steward, Mike Gower, Mark Nooth, Rob Persson, Joe Bugher, and Garry Russell.

Respondents were appellees in the court of appeals and plaintiffs in the district court. They are: Paul Maney, Gary Clift, Theron Hall, David Hart, Sheryl Lynn Sublet, Felishia Ramirez, Micah Rhodes, and George Nulph.

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

Maney v. State of Oregon, No. 24-2715, United States Court of Appeals for the Ninth Circuit, rehearing denied September 5, 2025.

Maney v. State of Oregon, No. 6:20-cv-00570-SB, United States District Court for the District of Oregon, opinion and order denying summary judgment on the basis of qualified immunity entered April 10, 2024.

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The opinion of the Ninth Circuit (App. 2a–8a) is not published but is available at 2025 WL 1794110. The opinion of the district court denying qualified immunity (App. 9a–195a) is reported at 729 F. Supp. 3d 1087. An earlier opinion of the district court denying injunctive relief (App. 196a–248a) is reported at 464 F. Supp. 3d 1191.

JURISDICTION

The Ninth Circuit issued its decision on June 30, 2025, and denied a timely filed petition for rehearing (App. 249a–250a) on September 5, 2025. On December 4, 2025, Justice Kagan granted the state's application (25A661) to extend the time to file a petition for a writ of certiorari until February 2, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The text of 42 U.S.C. § 1983 provides, in relevant part: "Every person who, under color of any statute … of any State … subjects, or causes to be subjected, any citizen … to the deprivation of any rights … secured by the Constitution and laws, shall be liable to the party injured in an action at law … for redress …."

INTRODUCTION

In the context of qualified immunity, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (per curiam) (quoting *City & Cnty. of S.F. v. Sheehan*, 575 U.S. 600, 613 (2015)). Specifically, to defeat qualified immunity, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). As a result, "it does not suffice for a court simply to state that" an official may not act unreasonably "and then remit the case for a trial on the question of reasonableness." *Kisela*, 584 U.S. at 105. This Court has repeatedly reversed courts, and the Ninth Circuit in particular, for failing to follow those admonitions. *See id.* at 104 (citing cases).

This case presents another such scenario. The Ninth Circuit affirmed the denial of qualified immunity to petitioners, seven leaders of the Oregon Department of Corrections (ODOC), over the state's overall response to the COVID-19 pandemic. Respondents are plaintiffs who represent a class of thousands of adults in custody (AICs) who tested positive for COVID-19 between March 2020 and May 2022 across 14 different prison facilities. Plaintiffs contend that petitioners' overall response to the pandemic was unreasonable and thereby violated the Eighth Amendment. The district court ruled, and the Ninth Circuit affirmed, that the Eighth Amendment required a reasonable pandemic response in the aggregate, and a jury therefore

must adjudge whether the response marshaled by petitioners was, in toto, reasonable.

The Court should summarily reverse or grant plenary review. There is no Eighth Amendment right to a reasonable pandemic response in the aggregate, across multiple years and facilities. More fundamentally, no caselaw put every reasonable state official on notice that the response marshalled by petitioners to the once-in-a-generation pandemic here would be unlawful. Confoundingly, the same district court that denied defendants qualified immunity ruled in June 2020 that petitioners' initial response to the pandemic met constitutional standards.

Moreover, the resulting import of the Ninth Circuit's decision is breathtaking. No response to a public-health emergency can be perfect. Now, these state officials, and future state officials in the Ninth Circuit, will be forced to trial so that a jury can resolve a purported dispute of fact over whether a state's less-than-perfect response was reasonable enough to pass constitutional muster under the Eighth Amendment. That effectively ends qualified immunity for pandemics and other disease outbreaks. Reversal is required.

STATEMENT OF THE CASE

A. Factual Background

As COVID-19 began to circulate around the world, petitioners began preparing for its likely arrival in Oregon. In the words of the district court, "ODOC was focused on the COVID-19 threat even before the virus reached the United States." App. 201a. The agency "put its leading experts in charge of its efforts," and

those experts "work[ed] around the clock to develop, and continuously improve, procedures to fight the spread of COVID-19 in [the] state prisons." App. 201a.

At the time, ODOC operated 14 distinct prison facilities across the state. App. 202a. Each facility was its own ecosystem. State law charged a superintendent with the care and custody of all AICs in a given facility. O.R.S. § 179.360(1). And the facilities themselves varied dramatically in ways that would become pertinent to viral spread, including in population, age, layout, ventilation, and medical services. (9th Cir. E.R., vol. 4, pp. 906–1022 (declarations from each of the 14 facilities)).

As the pandemic unfolded, knowledge about the virus unfolded in real time. ODOC consulted with its infectious disease specialist, Dr. Daniel Dewsnup, to try to stay abreast and even ahead of published corrections health guidance from the CDC and the Oregon Health Authority. App. 198a, 232a, 237a–242a (citing Dr. Dewsnup's declaration). Consistent with that guidance, ODOC focused virus response efforts across six areas: education and tracking; hygiene and personal protective equipment (including providing two masks to each AIC); screening (including quarantining new intakes into the ODOC system); social distancing; testing and medical care (including testing symptomatic persons and asymptomatic close contacts); and isolation and quarantine (including quarantining new entrants to a facility). App. 210a–214a, 231a–243a.

Take masking as just one example. For those who were asymptomatic, ODOC implemented the first of its many mask mandates on May 14, 2020, requiring

masking for all ODOC employees when social distancing could not be maintained. (9th Cir. E.R., vol. 4, pp. 1027–28). Meanwhile, the CDC's published corrections guidance did not mention masking for asymptomatic individuals until July 14, 2020, when it recommended masking "as much as safely possible" if staff could not maintain social distancing. (9th Cir. E.R., vol. 3, pp. 785, 787, 791–92, 795, 797, 808).

On the ground, the state's response also differed over time and across facilities. For example, COVID-19 arrived at each facility at different times; some facilities hosted AICs who tested positive for COVID-19 due to their advanced medical facilities; and some facilities had to evacuate in September 2020 when wildfires burned across the state. (9th Cir. E.R., vol. 4, pp. 906–1022 (facility declarations)). Ultimately, according to the UCLA School of Law's COVID Behind Bars Data Project, the per capita rate of COVID-19 infections among all AICs in Oregon was average for all states between February 2020 and May 2022, and the lowest among states on the west coast during that time. (9th Cir. E.R., vol. 3, p. 655 (summary of data)).

B. Proceedings Below

1. This case began weeks into the pandemic. On April 6, 2020, plaintiffs sued the State of Oregon and central leadership of ODOC, challenging the state's initial efforts to respond to COVID-19 as a violation of the Eighth Amendment. (Dist. Ct. ECF 1). Plaintiffs moved for injunctive relief seeking, among other things, an order "to reduce prisoner populations." (Dist. Ct. ECF 14 at 3).

In June 2020, the district court denied the motion, ruling that plaintiffs had failed to demonstrate a likelihood of success under the Eighth Amendment. App. 196a–248a. The court ruled that COVID-19 posed a sufficiently serious risk of harm. App. 230a. But the court explained that, under the Eighth Amendment, "the question is not whether ODOC can do better," but "whether ODOC has acted with indifference to the risks posed by COVID-19." App. 202a. And the court concluded "that ODOC officials are already doing their best in response to this unprecedented crisis." App. 202a.

Nevertheless, the district court retained jurisdiction over the case. And in April 2022, the court certified a class action for damages on behalf of all AICs who had since March 2020, and who would through May 2022, test positive for COVID-19. (Dist. Ct. ECF 377). The court acknowledged that "[a] significant percentage of the class members have only suffered mild symptoms, or no symptoms at all." (Dist. Ct. ECF 377 at 42, 45). But the court reasoned that liability under 42 U.S.C. § 1983 could be distilled down to whether petitioners had failed "to implement and enforce COVID-19 policies on a statewide basis," which "exposed all class members to a substantial risk of serious harm." (Dist. Ct. ECF 377 at 36–37). The Ninth Circuit then denied petitioners' petition for permission to appeal that class certification order. (Order, No. 22-80033, Dkt. 4 (9th Cir. May 26, 2022)).

After the close of discovery, the district court decided the parties' cross-motions for summary judgment. App. 9a–195a. As pertinent here, the court

denied petitioners' motion for summary judgment on the basis of qualified immunity on plaintiffs' § 1983 claim for damages under the Eighth Amendment. App. 46a–106a. On the merits, the court ruled that plaintiffs alleged a cognizable right under the Eighth Amendment. The court explained that Eighth Amendment claims have objective and subjective requirements. App. 46a. Objectively, the court found that overall policies and practices that heighten the risk of exposure to COVID-19 violate the Eighth Amendment. App. 91a–92a. Subjectively, the court ruled that defendants thus had to take "reasonable measures to abate the COVID-related risk of harm to Plaintiffs," and "it is a question for the jury whether Defendants' COVID mitigation measures in ODOC institutions, viewed as a whole and in the context of other available mitigation measures, were reasonable." App. 82a–83a.

Turning to qualified immunity, the district court ruled that the requisite contours of the right were clearly established by 2020. App. 106a. Specifically, the court reasoned that petitioners were on notice that they had to provide reasonable "protection from *heightened* exposure to a serious communicable disease," based on this Court's caselaw about *actual* "'exposure of inmates to a serious, communicable disease.'" App. 100a, 103a (emphasis added) (quoting *Helling v. McKinney*, 509 U.S. 25, 33 (1993)). The district court further ruled that plaintiffs need not identify which actions (or inactions) by petitioners were unlawful, as plaintiffs had alleged "a mutually reinforcing effect" among the state's pandemic countermeasures, the aggregate reasonableness of which presented a fact question for a jury to resolve. App. 103a–106a & n.42.

2. The Ninth Circuit affirmed the district court's denial of qualified immunity in an unpublished memorandum disposition. App. 2a–8a.

On the merits, the court held that plaintiffs alleged a violation of the Eighth Amendment on their claim that petitioners had "fail[ed] to protect them from heightened exposure to COVID-19" over the course of the pandemic. App. 3a, 8a. Objectively, the court construed plaintiffs' claim as "the same conditions of confinement claim" as *Hampton v. California*, 83 F.4th 754 (9th Cir. 2023), where the Ninth Circuit held that a single AIC's contraction of COVID-19 from a botched prison transfer in May 2020 constituted an objectively, sufficiently serious deprivation. App. 6a (citing *Hampton*, 83 F.4th at 766).

Subjectively, the court summarily stated that deliberate indifference was the pertinent legal standard for assessing the lawfulness of the state's response across the pandemic. App. 6a. The court also concluded that plaintiffs' allegations amounted to deliberate indifference, where plaintiffs had challenged the overall reasonableness of statewide policies on an amalgam of pandemic countermeasures, including masking, mixing groups of AICs, testing symptomatic AICs, testing asymptomatic AICs, quarantining, social distancing, and even MERV-13 filtration in HVAC units. App. 6a–7a. As such, the court concluded that a jury would have to resolve the dispute of fact over the overall reasonableness of the state's pandemic response. App. 7a.

As to qualified immunity, the Ninth Circuit held that the requisite contours of plaintiffs' asserted right were clearly established at the time of the conduct at

issue to put petitioners on notice that the alleged shortcomings in pandemic countermeasures—from masking to social distancing—would violate the Eighth Amendment. App. 7a–8a. The entirety of the court's reasoning was that "'all reasonable prison officials would have been on notice in 2020 that they could be held liable for exposing inmates to a serious disease, including a serious communicable disease,' like COVID-19." App. 8a (quoting *Hampton*, 83 F.4th at 770).

Like the district court, the Ninth Circuit cited this Court's decision in *Helling* as clearly establishing that principle for exposure to a serious disease. App. 7a. But the Ninth Circuit did not otherwise explain how *Helling* clearly established plaintiffs' challenge to the aggregate range of countermeasures used by petitioners to respond to the COVID-19 pandemic between March 2020 and May 2022. Nor did the court reconcile the denial of qualified immunity with the district court's ruling in June 2020 that the state's initial response to the pandemic met constitutional standards under the Eighth Amendment.

The Ninth Circuit then denied defendants' petition for rehearing. App. 249a–250a.

REASONS FOR GRANTING THE PETITION

A. This case is important and presents a clean vehicle.

The Ninth Circuit's decision in this case—affirming the denial of qualified immunity to state corrections leadership for their overall response to the COVID-19 pandemic—undermined foundational principles of

government efficiency, federalism, and the separation of powers. The case also presents a clean vehicle. This Court's review is warranted on those bases alone.

Qualified immunity is a pillar of good government. "The doctrine … shields officials from civil liability so long as their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). That shield "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231.

Put another way, "[t]he nub of qualified immunity is the need to induce officials to show reasonable initiative when the relevant law is not 'clearly established.'" *Will v. Hallock*, 546 U.S. 345, 353 (2006). The doctrine protects against "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 816 (1982)). By giving public servants room to make good-faith judgments as they execute their duties, the doctrine thereby "honor[s] the separation of powers" and "preserv[es] the efficiency of government and the initiative of its officials." *Will*, 546 U.S. at 352.

Federal courts also defer to state officials on the systems-level management of prison systems. Prison

officials have the "unenviable task of keeping dangerous [people] in safe custody under humane conditions." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (citation omitted). As such, "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). Courts therefore must accord prison officials "wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Whitley v. Albers*, 475 U.S. 312, 321–22 (1986) (quoting *Bell*, 441 U.S. at 547). Those considerations are only redoubled when responding to a novel, changing, once-in-a-generation pandemic, as "the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial." *Bell*, 441 U.S. at 548.

The Ninth Circuit's decision contravened those principles and admonitions. The court held that the overall reasonableness and concomitant constitutionality of a state's pandemic response is a fact question. No pandemic response can ever be perfect, so an expert will always be able to opine, with the benefit of hindsight, that more could and should have been done. The Ninth Circuit thereby elevated federal district courts as the arbiters of prison-system administration in a pandemic, deciding whether a dispute of fact exists over whether the less-than-perfect response was good enough to be "reasonable." And in so holding, the court effectively ended qualified immunity for pandemics and other disease outbreaks, leaving to juries to delimit, after the fact and with the benefit of hindsight,

the bounds of constitutionality for the entirety of a state's response.

In affirming the denial of qualified immunity, the Ninth Circuit directly flouted federalism and separation-of-powers principles. Pandemics and disease outbreaks are some of the precise emergencies for which qualified immunity exists: to give public officials the breathing room to make good-faith judgments in real time, even if those decisions ultimately may prove mistaken with the benefit of hindsight. Yet petitioners here, as well as those willing to sign up for such public service in the future, will be forced to trial with all of the attendant risks and second-guessing involved.

Given the above, this case is an ideal vehicle to resolve these important issues. The Ninth Circuit squarely held that a jury must determine the reasonableness and concomitant constitutionality for the entirety of a state's response to a pandemic or other disease outbreak. App. 7a–8a. To be sure, the decision was unpublished, but that is of no moment, because the Ninth Circuit interpreted its own caselaw as having already clearly established such a far-reaching claim. Absent this Court's intervention, petitioners will face a trial, replete with the costs and risks of second-guessing that this Court's qualified-immunity jurisprudence is designed to prevent. And all state officials will expect the same when faced with a future pandemic or disease outbreak.

B. The Ninth Circuit's merits decision was wrong.

The Ninth Circuit recognized an omnibus theory of liability under the Eighth Amendment for the overall

reasonableness of statewide policies and practices over the first two years of a novel pandemic. That is wrong several times over. The court's decision is flatly inconsistent with this Court's Eighth Amendment caselaw, as well as Eleventh Amendment principles.

First, the Ninth Circuit wrongly constitutionalized petitioners' multi-year response to a novel pandemic under the Eighth Amendment. The Eighth Amendment "prohibits the infliction of 'cruel and unusual punishments' on those convicted of crimes." *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). The amendment "'does not mandate comfortable prisons,' but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981)). To assert a valid claim for relief under the Eighth Amendment, a plaintiff must satisfy both objective and subjective prongs. Objectively, "only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson*, 501 U.S. at 298 (internal quotation marks and citations omitted). Subjectively, "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297).

Here, the Ninth Circuit's rule contravened those legal precepts and turned the Eighth Amendment into a font of tort law. Plaintiffs do not allege that any petitioner individually exposed any of them to COVID-19, nor that any petitioner ignored their serious medical needs. Below, plaintiffs also conceded the obvious given the realities of the pandemic: Some of their

COVID-19 infections were inevitable, regardless of what petitioners did. (9th Cir. E.R., vol. 2, p. 310). Yet the Ninth Circuit recognized a singular Eighth Amendment claim against all petitioners, on behalf of all plaintiffs, for thousands of infections that happened at different times, in different places, involving different people, regardless of the actual circumstances of each infection—or what role any petitioner played in them. However, the Eighth Amendment prohibits cruel and unusual *punishments*, and the Court has made clear that public officials cannot be held vicariously liable for the actions of others under § 1983. *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

Indeed, constitutionalizing a statewide, multi-year response to a pandemic is particularly ill-suited here, where public health guidance counseled against a uniform response, and both the guidance and pandemic itself changed over time. As this Court has cautioned, "courts must not confuse professional standards with constitutional requirements," but "expert opinion may be relevant when determining … what is acceptable in corrections philosophy." *Brown v. Plata*, 563 U.S. 493, 539–40 (2011). Every published corrections guidance on COVID-19 from both the CDC and the Oregon Health Authority began with a bolded preamble that the "principles" therein should "be adapted based on individual facilities' physical space, staffing, population, operations, and other resources and conditions." (9th Cir. E.R., vol. 3, pp. 567, 774; vol. 4, pp. 1043, 1071; vol. 5, pp. 1159, 1186). Naturally, the published corrections guidance then changed over time as the science around the virus changed; so too did petitioners' response efforts.

Further counseling against a composite constitutional standard is that some plaintiffs contracted COVID-19 in situations that were indisputably exigent. To challenge decisions made in exigent circumstances, the Eighth Amendment typically requires a showing of maliciousness, as such decisions "are typically made 'in haste, under pressure, and frequently without the luxury of a second chance.'" *Farmer*, 511 U.S. at 835, 837 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). The claim here includes plaintiffs who contracted COVID-19 at the start of the pandemic, when the science was uncertain and supplies of all kinds were scarce. And it includes plaintiffs who contracted COVID-19 in September 2020, when ODOC had to evacuate five facilities due to raging wildfires. Treating all infections the same, including those born from exigent circumstances, violates the precept that "only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 297).

Finally, the Ninth Circuit's rule also contravened Eleventh Amendment principles on sovereign immunity. At bottom, the Ninth Circuit recognized a singular § 1983 claim that challenges the legal sufficiency of Oregon's overall response to the COVID-19 pandemic across all state prisons. When a plaintiff seeks to challenge state policies and practices, such suits are essentially "a suit against the State itself." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Individuals can sue state officials for injunctive relief to change policies, but state sovereign immunity under the Eleventh Amendment bars damage claims for them. *Quern v. Jordan*, 440 U.S. 332, 337 (1979). The Ninth

Circuit's rule, imputing liability to petitioners for the overall sufficiency of state policies and practices, created an impermissible end run around the Eleventh Amendment.

The Ninth Circuit elided the above by disclaiming, in dicta, its own holding. The court stated that plaintiffs' omnibus Eighth Amendment claim was simply for involuntary exposure to COVID-19. App. 6a. But that is not the claim that plaintiffs advanced, nor is that the claim for which the court affirmed the denial of qualified immunity.

As discussed above, plaintiffs have never argued that petitioners themselves exposed any plaintiff to the virus; instead, plaintiffs charge that petitioners did not do enough to prevent *other* people from exposing them. That is why the Ninth Circuit held that plaintiffs had an Eighth Amendment right against "*heightened* exposure to COVID-19," which required a jury to adjudge the aggregate reasonableness of petitioners' countermeasures across the entirety of the pandemic and 14 different facilities. App. 3a, 7a–8a (emphasis added). Or, in the words of the district court, all plaintiffs advanced "a single Eighth Amendment claim," and the singular legal question under the Eighth Amendment is "whether Defendants' COVID mitigation measures in ODOC institutions, viewed as a whole and in the context of other available mitigation measures, were reasonable." App. 83a, 92a. That is the legal rule established by the Ninth Circuit's holding, which has no basis in this Court's constitutional jurisprudence.

C. The Ninth Circuit's qualified immunity decision was wrong.

Most glaringly, there can be little doubt that, under a correct Eighth Amendment analysis, the Ninth Circuit should have reversed the denial of qualified immunity to petitioners on clearly established grounds. It is long established that a court may not simply state that an official must act reasonably "and then remit the case for a trial on the question of reasonableness." *Kisela*, 584 U.S. at 105. That is precisely what the Ninth Circuit did here.

To defeat qualified immunity, "existing precedent must have placed the … constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). That is, the asserted right must be so clear "that every reasonable official would interpret it to establish the particular rule the plaintiff[s] seeks to apply." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). The standard is "demanding" and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). In other words, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640.

As discussed above, the doctrine "gives government officials breathing room to make reasonable but mistaken judgments." *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Ashcroft*, 563 U.S. at 743). Therefore, to defeat qualified immunity, "the unlawfulness must be apparent" "in the light of pre-existing law." *Anderson*, 483 U.S. at 640. This Court has

repeatedly reminded courts, and the Ninth Circuit in particular, "not to define clearly established law at a high level of generality." *Kisela*, 584 U.S. at 104 (quoting *City & Cnty. of S.F.*, 575 U.S. at 613). Rather, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quoting *Anderson*, 483 U.S. at 640). Otherwise, a plaintiff could invert qualified immunity "into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.* (quoting *Anderson*, 483 U.S. at 639).

Here, no caselaw clearly established that the pandemic response marshalled by petitioners would constitute cruel and unusual punishment under the Eighth Amendment. The district court itself did not think so initially: The court agreed with petitioners that the "aggressive and ongoing measures by ODOC officials to prevent the spread of COVID-19 [wa]s the very opposite of indifference—deliberate or otherwise." App. 231a. That alone defeats the notion that every reasonable official in petitioners' shoes would have understood that their oversight over such measures would nevertheless violate the constitution, from March 2020 through May 2022.

Indeed, to this day, plaintiffs have failed to identify with any specificity what any individual petitioner did wrong beyond fail to act more "reasonable." Before the district court, their expert focused on an alleged failure to release AICs en masse, to install MERV-13 filtration, and to mass test asymptomatic AICs. (9th Cir. E.R., vol. 4, 827, 869–74). On appeal, plaintiffs then broadly asserted general shortcomings in a

compendium of countermeasures, which they contend amount to an overall unreasonable pandemic response in the aggregate. Whatever that means at an abstract level, petitioners have no idea what it means as to actual decisions that each individual petitioner made that may or may not have led to individual exposures and infections. And plaintiffs never say. At a minimum, no such amorphous claim was clearly established by caselaw with any specificity to guide decision-making in 2020.

The Ninth Circuit held otherwise, citing this Court's decision in *Helling* and its own decision in *Hampton*. App. 7a–8a. Neither case is apposite. In *Helling*, this Court held that an AIC "state[d] a cause of action under the Eighth Amendment by alleging that" prison officials had, "with deliberate indifference, exposed him to levels of [secondhand smoke] that pose[d] an unreasonable risk of serious damage to his future health." 509 U.S. at 35. But plaintiffs do not charge petitioners with exposing them to COVID-19; rather, they challenge the overall sufficiency of their management of ODOC's multi-year, multi-facility pandemic response—a question on which *Helling* provides no guidance, much less a clear legal rule.

Hampton is similarly inapt. There, the Ninth Circuit held that a single AIC's contraction of COVID-19 from a botched prison transfer in May 2020 violated a clearly established right. *Hampton*, 83 F.4th at 766. Whatever the merits of that decision, it similarly delineates no guidance or legal rule for how to manage a changing pandemic over two-plus years across 14 different facilities. More fundamentally, the Ninth

Circuit decided the case in 2023; as such, as a legal matter, *Hampton* had not clearly established anything as of 2020.

In short, the Ninth Circuit has once again ignored this Court's command that public officials are entitled to qualified immunity "unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 584 U.S. at 104 (quoting *Mullenix*, 577 U.S. at 13). Petitioners worked through the pandemic to stay abreast and ahead of published corrections health guidance, trying to keep AICs and staff safe from COVID-19, while fulfilling their duty and mission to maintain the institutional security of a statewide corrections system. By leaving to a jury to decide the constitutionality of their efforts, the Ninth Circuit impliedly conceded that no caselaw clearly established the actions that petitioners should have taken. Further, potential future state officials will feel that chill when faced with the next pandemic or other disease outbreak. This Court's review is necessary.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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