NO. 20-_____

In the Supreme Court of the United States

J.H.,
BY AND THE THROUGH CONSERVATOR, BETTY HARRIS,

Petitioner,

v.

WILLIAMSON COUNTY, JUAN CRUZ,
STEVE MCMAHAN, AND BETSY ADGENT,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

CONNIE REGULI
LAWCARE FAMILY LAW CENTER P.C.
1646 WESTGATE CIR. STE. 101
BRENTWOOD, TN 37027
(615) 661-0122
CONNIE.REGULI@LCFLC.COM

LARRY L. CRAIN
COUNSEL OF RECORD
CRAIN LAW GROUP, PLLC
5214 MARYLAND WAY, STE 402
BRENTWOOD, TN 37027
(615) 376-2600
LARRY@CRAINLAW.LEGAL

SEPTEMBER 11, 2020 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED FOR REVIEW

1. Is *Hope v. Pelzer* dead in the Court's analysis of qualified immunity? If *Hope v. Pelzer* is dead, the lower courts, the federal court bar, and the legislative bodies must know so that they can further define the parameters of immunity judicially and legislatively.

2. If *Hope v. Pelzer* is not dead, this Court must define when other authorities, such as statutes, policies, administrative orders, and published professional opinions establish that a reasonable state actor defendant had "fair warning" that his conduct was unconstitutional.

PARTIES TO THE PROCEEDINGS

Petitioner

- Plaintiff, J.H., was a minor at the time of the events occurring in the Complaint. He was a pre-trial detainee in the Williamson County Juvenile Detention Center who was identified as a child with mental deficiencies.

Respondents

- Defendant Williamson County is a government entity that operates and controls the Williamson County juvenile detention center.
- Defendant Juan Cruz was an employee of the Williamson County juvenile detention center. Plaintiff J.H. alleged that Cruz sexually assaulted him while he was detained.
- Defendant Steve McMahan was an employee of the Williamson County juvenile detention center who served in the role of detention supervisor. There is no dispute that he was responsible and involved in the day to day care of Plaintiff J.H. including the housing and placement of J.H. while incarcerated.
- Defendant Betsy Adgent was an employee of Williamson County juvenile court in a supervisory position.

The conduct of defendant McMahan is at issue in this appeal.

LIST OF PROCEEDINGS

United States Court of Appeals for the Sixth Circuit

No. 18-5874

J.H., by Conservator Betty Harris, Plaintiff-Appellant, v. Williamson County, Tennessee; Steve McMahan; Betsy Adgent, Defendants-Appellees.

Date of Final Opinion: February 27, 2020

Date of Rehearing Denial: April 20, 2020

United States District Court
for the Middle District of Tennessee

No. 3-14-2356

J.H., by Conservator Betty Harris, Plaintiff, v. Williamson County, Tennessee; Betsy Adgent, Steve McMahan and Juan Cruz, Defendants.

Date of Order: July 5, 2018

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INTRODUCTION

This Court has recently rejected review of the rigid "fundamentally similar" (particularized facts) standard for overcoming qualified immunity raised by a state actor in a § 1983 case. However, two justices have encouraged this Court to review the qualified immunity defense. Justice Thomas opined that this Court needed to shift the focus of the inquiry to whether the immunity existed at common law, and Justice Sotomayor's concerns over penal isolation lead her to opine how this rigid standard applied by the Courts can systematically deprive injured individuals of a constitutional remedy and shield officials from liability for their misconduct.

This case presents a classic example of the dangers inherent in the fundamentally similar standard in the context of juvenile pretrial detainees who are subjected to prolonged solitary confinement, and then deprived of a constitutional remedy because of the qualified immunity defense.

Here Plaintiff, J.H., admits that there was no "controlling authority" that stated his Fourteenth Amendment rights were violated when he was placed in solitary confinement as a juvenile with mental health disturbances. However, the realm of professional publications, state policies, federal laws, and local policies made it clear that this treatment was prohibited and damaging.

This case presents an opportunity to review both the quest for inquiry by Justice Thomas on common

law tort defenses, and Justice Sotomayor's concerns over penal isolation.

J.H. asks this Court to review qualified immunity in the context of *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) which relied on a "reasonable person" standard. Then this Court can provide guidance to state actors who serve in the professional context of overseeing incarcerated children. This "reasonable person" standard is derived from tort law wherein the "fictional reasonable person's" conduct sets the standard below which behavior constitutes negligence. *ACLU of Ky. v. Mercer Cty.*, 432 F.3d 624, 626 (6th Cir. 2005) Under the context of the Fourteenth Amendment, and particularly solitary confinement for juveniles, the Court should consider the corpus of knowledge available to the state actors responsible for his care before granting qualified immunity.

The status of the law essentially provides that one plaintiff must be "thrown under the bus" by the judicial system while other plaintiffs in similar conditions continue to suffer, and before any plaintiff can obtain relief. Here, the adverse effect of solitary confinement for juveniles was well published in 2013 and provided ample fair warning to state actors for purposes of the qualified immunity standard enunciated in *Hope v. Pelzer.*

This Court should also differentiate the qualified immunity analysis where the acts and omissions of the defendant are immediate and life-threatening versus the contemplated and enduring conduct of state actors with ample time to consider the liberty interests of the plaintiff. The Court's have opined such a difference when considering excessive force claims

compared to claims brought under conditions of confinement.

Plaintiff seeks an acceptance of this application for substantial briefing by the vast social community interested in the care of incarcerated children.

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Sixth Circuit published on February 27, 2020 is included at App.1a, along with the Concurring Opinion at App.26a and Judgment at App. 35a. The Memorandum and Order of the United States District Court for the Middle District of Tennessee dated July 5, 2018 is added at App.37a. The District Court's July 5, 2018 Opinion is included at App.62a.

JURISDICTION

This Court has jurisdiction under 28 U.S. Code § 1254(1). This matter arises out of an opinion in the Sixth Circuit Court entered on February 27, 2020. App.1a-25a. The Plaintiff filed a timely petition for en banc hearing which was denied on April 20, 2020. App.64a. This Court entered an administrative order that extended the filing period to 150 days due to the COVID-19 pandemic. Order List 599 U.S.___ March 19, 2020. Therefore, the filing deadline for this application is September 17, 2020.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person or life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

28 C.F.R. § 115.342—
Prison Rape Elimination Act (P.R.E.A.)

> Placement of residents in housing, bed, program, education, and work assignments. (a) The agency shall use all information obtained pursuant to § 115.341 and subsequently to make housing, bed,

> program, education, and work assignments for residents with the goal of keeping all residents safe and free from sexual abuse. (b) Residents may be isolated from others only as a last resort when less restrictive measures are inadequate to keep them and other residents safe, and then only until an alternative means of keeping all residents safe can be arranged. During any period of isolation, agencies shall not deny residents daily large-muscle exercise and any legally required educational programming or special education services. Residents in isolation shall receive daily visits from a medical or mental health care clinician. Residents shall also have access to other programs and work opportunities to the extent possible. (h) If a resident is isolated pursuant to paragraph (b) of this section, the facility shall clearly document: (1) The basis for the facility's concern for the resident's safety; and (2) The reason why no alternative means of separation can be arranged.

STATEMENT OF THE CASE

A. Proceedings in the District Court

Plaintiff, J.H., as a minor child, filed a civil rights action under 42 U.S.C. § 1983 for violations of his Fourteenth Amendment rights while he was a pre-trial detainee in the Williamson County Juvenile Detention Center in the fall of 2013. App.37a-61a.

J.H. claimed that the treatment and conditions imposed on him in juvenile detention as a pre-trial detainee were intolerable and resulted in severe psy-

chological damage. J.H. was placed in solitary confinement and denied mental health services. Although the Defendant McMahan claimed that J.H. was moved into solitary confinement because he posed a safety risk for the detention center, there was no dispute that the other housed-juveniles involved in the alleged conflict with J.H. were released the following day. J.H. was not provided a hearing nor was he ever charged with the alleged assault. While J.H. was housed in solitary confinement, he was sexually assaulted by detention employee, Juan Cruz. In spite of observable manifestations of mental health deterioration, J.H. was refused medical and mental health attention. Detention supervisor Steve McMahan was responsible for the housing and care of J.H. App.38a, 43a, 44a, 53a, 57a, 58a.

The issue before the District Court was whether a constitutional violation had occurred and whether the contours of the rights of J.H. were clearly established at the time of his incarceration. The District Court dismissed the case on summary judgment finding no constitutional violation for failure to provide mental health services and finding that there was no clearly established right to be free of solitary confinement in 2013 (without addressing whether a constitutional right was violated). App.46a-48a; 57a.

The District Court opinion considered whether the right of J.H. to be free of solitary confinement as a pre-trial detainee was clearly established in 2013. The court relied on *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) stating that the doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional

rights of which a reasonable person would have known; and *Hayden v. Green*, 640 F.3d 150, 153 (6th Cir. 2011) (the determination of qualified immunity requires the court to answer two questions: (1) whether the officer violated a constitutional right, and (2) whether that right was clearly established in light of the specific context of the case). App.46a-48a.

The Court discounted Plaintiff's reliance on *Graham v. Florida*, 560 U.S. 48 (2010) stating that detention standard of care for juveniles is different than adults; *Roper v. Simmons*, 543 U.S. 551 (2005) finding that the death penalty is improper for juveniles; *Davis v. Ayala*, 135 S.Ct. 2187 (2015) *i.e.*, Justice Kennedy's concurring opinion on solitary confinement; and *Doe v. Hommrich*, 2017 WL 1091864 at *2 (M.D. Tenn. March 22, 2017) Tennessee Court's injunction against solitary confinement of juveniles as punishment. The Court disregarded Plaintiff's arguments that the Prison Rape Elimination Act provided the Plaintiff rights against solitary confinement (enacted in 2003); and that the memorandum issued in the *Doe* decision finding that solitary was cruel and unusual for disabled juveniles was based on the very same, pre-2013, authority that Plaintiff brought to the attention of the District Court. App.46a-48a.

The District Court opined that Plaintiff's numerous publications, studies and expert scholarship to support his claim that in 2013 it was clearly established that solitary confinement for juveniles was unconstitutional, failed because "law review articles and United Nations Resolutions are not clearly established legal authority for purposes of qualified immunity." The Court granted qualified immunity to Steve McMahan finding that

there was no clearly established right in 2013. App. 46a-48a.

B. Proceedings in the Sixth Circuit Court of Appeals

The Sixth Circuit Court entered an opinion on February 27, 2020. The Court acknowledged that J.H. was a minor with known mental health issues and was uniquely vulnerable to the harmful effects of solitary confinement. 36-2, 10. The Court considered, as well, the nature and duration of the confinement, in that J.H. was placed in an eleven by seven-foot cell where he was not allowed any interaction with other juveniles for 21-days. The opinion references *Davis v. Ayala*, 135 S.Ct. 2187, 2209 (2015) which specifically cited other published authorities on the harmful effects of solitary confinement. In *Davis*, Justice Kennedy concluded that it has long been understood that there is a human toll wrought by extended terms of isolation. *Davis*, 135 S.Ct., at 2209. App.1a-5a; 10a-16a.

The opinion also cited *Williams v. Sec'y Pa. Dep't of Corrs*, 848 F.3d 549, 566 (3rd Cir. 2017) (quoting Craig Haney & Mona Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermaxx and Solitary Confinement*, 23 N.Y.U. Rev. L. & Soc. Change, 477, 531 (1997) (there is not a single study of solitary confinement wherein non-voluntary confinement that lasted for longer than 10 days failed to result in negative psychological effects.); and Stuart Grassain, Psychiatric Effects of Solitary Confinement, 22 Wash. U. J.L. & Pol'y 325, 331 (2006) (even a few days of solitary confinement will predictably shift the electroencephalogram (EEG) pattern toward an abnormal pattern characteristic of stupor and delirium.) App.15a-16a.

The Sixth Circuit also stated that "a growing chorus of courts have recognized the unique harms that are inflicted on juveniles when they are placed in solitary confinement." *See e.g.*, *Doe by and through Frazier v. Hommrich*, No. 3-16-0799, 2017 WL 1091864, at *2 (M.D. Tenn. Mar. 22, 2017)(granting preliminary injunction preventing a detention facility from placing juveniles in solitary confinement as punishment and describing how courts across the country have found increased protections for juveniles and persons with diminished capacities); *V.W. by and through Williams v. Conway*, 236 F.Supp.3d 554, 583 (N.D.N.Y. 2017) (issuing a preliminary injunction to enjoin a county and its officials from imposing 23-hour disciplinary isolation on juveniles and recognizing that there is a broad consensus among the scientific and professional community that juveniles are psychologically more vulnerable than adults); and *Turner v. Palmer*, 84 F.Supp.3d 880, 884 (S.D. Iowa 2015) (denying qualified immunity to officials who placed a juvenile with psychiatric issues in solitary confinement and noting that traditionally, juvenile detainees are afforded greater constitutional protections). App.12a-13a.

The Sixth Circuit made an affirmative finding that the punishment of J.H. was not reasonably related to a legitimate government purpose and was excessive, but dismissed the claim against Steven McMahan because the then-existing precedent did not place the constitutional question "beyond debate." Citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Dist. of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). Because "many of the cases recognizing what a punishing experience placement in solitary confinement can be —

especially for juveniles and those with mental health issues — have been issued after 2013" the Sixth Circuit found that the "right at issue" was not established with sufficient specificity as to hold it clearly established as of 2013. McMahan was granted qualified immunity. App.16a.

C. Other Relevant Facts

J.H. was known to suffer from PANDAS (Pediatric Autoimmune Neuropsychiatric Disorder Associated with Streptococcal Infections). PANDAS often manifest itself in multiple psychiatric symptoms, such as an abrupt onset of Obsessive-Compulsive Disorder, impulsivity, eating disorders, depression, dysgraphia, and problems with sleep. After his exposure to strep in April 2013, J.H. began exhibiting some extreme behaviors which lead to his incarceration in the Williamson County Juvenile Detention Center. App.2a. In October 2013, J.H. and his Mother traveled to Maryland to see Dr. Latimer, who specialized in treating children with PANDAS, and receiving intravenous immunoglobulin therapy (IVIG) to reboot his immune system. It takes four to six months for this therapy to improve the neuropsychic symptoms of the patient. It is recommended that patients remain in a center that specializes in treating children with neuropsychiatric illnesses and behavioral challenges during this recovery. App.3a.

Two days after his treatment, J.H. took his Mother's car without her permission and crashed it. He ended up in detention for this incident. Then Mother was able to have J.H. furloughed for an intake in a neurological treatment facility, but an insurance dispute prevented his admission. When the Juvenile Court judge found out that J.H. had not

been admitted, she demanded that J.H. be returned to juvenile detention in November 2013. Two days later, three juveniles in the dorm alleged that J.H. became angry, destroyed property, punched a window, and threatened an assault against them. One of the juveniles recanted his story and said that it was made up to get J.H. out of the dorm. J.H. was removed from the dormitory cell and placed in solitary confinement. App.3a.

J.H. was entitled to a hearing under detention policy but he never received one. He was placed in an eleven-by-seven-foot cell with limited contact from his parents and limited access to other activities where he remained until December 19, 2013. App.4a.

REASONS FOR GRANTING THE PETITION

I. IS *HOPE V. PELZER* DEAD IN THE COURT'S ANALYSIS OF QUALIFIED IMMUNITY? IF *HOPE V. PELZER* IS DEAD, THE LOWER COURTS, THE FEDERAL COURT BAR, AND THE LEGISLATIVE BODIES MUST KNOW SO THAT THEY CAN FURTHER DEFINE THE PARAMETERS OF IMMUNITY JUDICIALLY AND LEGISLATIVELY.

In 2002, this Court published an opinion in *Hope v. Pelzer*, 536 U.S. 730 (2002) which stated that a state actor can be liable where the contours of right were sufficiently clear that the reasonable official had "fair notice" that what he was doing violated that right. However, the recent trend of qualified immunity cases has narrowed the analysis in that the "particularized" conduct must held as unlawful in the particular jurisdiction of the underlying events.

The Court's opportunity to review the qualified immunity analysis and clarify the application of *Hope v. Pelzer* is ripe especially where the state actor has the opportunity for deliberation and repeated reflection largely uncomplicated by the pulls of competing obligations. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). Such a review also serves to satisfy the request for inquiry by Justice Thomas who has recently written that the Court should shift its focus to common law tort defenses. The common law "reasonable man" standard is fundamental in *Hope v. Pelzer*, however, its legal influence has been diluted in recent opinions.

In any action under § 1983, the first step is to identify the underlying right said to have been violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989) In this process, the Plaintiff carries the burden to show that (1) a constitutional right has been violated; and (2) that a reasonable state actor would have known at the time of his conduct was unlawful. *Lewis*, 523 U.S. at 541.

It is well settled that the Court may consider the defendant's opportunity to deliberate and reflect on his actions in determining whether his conduct "shocks the conscience" and amounts to an abuse of executive power clearly unjustified by any legitimate government objective, therein amounting to a substantive due process violation. *Lewis*, 523 U.S. at 853.

When shifting to the "clearly established" or "fair warning" prong of qualified immunity, *Hope v. Pelzer* largely relied on a similar analysis. *Hope*, 536 U.S. at 743-744. The defendants should have known, based on other laws and policies, that their conduct was prohibited.

Recent applications to this court seeking a review of qualified immunity have been rejected.

On June 15, 2020, this Court denied an application for Writ of Certiorari in the case of *Alexander L. Baxter v. Brad Bracey, et al.*, 140 S.Ct. 1862 (Case No. 18-1287) (2020). The petitioner sought review of the application of the doctrine of qualified immunity for civil rights violations brought against state actors under 42 U.S.C. § 1983. The *Baxter* application asked this Court to "reconsider" qualified immunity in that it no longer served its purported policy objectives and that it impaired the enforcement of constitutional norms.

Justice Thomas dissented from the denial for a writ of certiorari. Thomas described that there is no mention of defenses and immunities in § 1983. The concept of qualified immunity had morphed out of the application of legislative immunity which was "well grounded in history and reason" (citing *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)) to a "qualified defense of good faith and probable cause" for police officers (citing *Pierson v. Ray*, 386 U.S. 547, 557 (1967)) and then extended broadly to state actors dispensing with a context-specific analysis when it extended qualified immunity to hospital supervisors and prison officials. (citing *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975), *Procunier v. Navarette*, 434 U.S. 555, 561 (1978)).

Following the extension of the application of qualified immunity to all state actors, this Court then eliminated from the qualified immunity inquiry any subjective analysis of good faith to facilitate summary judgment and avoid the substantial costs [that] attend the litigation of subjective intent in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Courts have subse-

quently applied the objective test. *See Ziglar v. Abbasi*, 137 S.Ct. 1843 (2020). In *Ziglar*, Justice Thomas wrote that "our analysis [of qualified immunity] is no longer grounded in the common law backdrop against which Congress enacted the 1871 Act."

Justice Thomas wrote in *Ziglar v. Abassi*, 137 S.Ct. 1843, 1871 (June 19, 2020) that in the decisions following *Pierson*, the Court has completely reformulated qualified immunity along principles not at all embodied in the common law. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987) Instead of asking whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983, the Court instead granted immunity to any officer whose conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *See Mullenix v. Luna*, 136 S.Ct. 305 (2015).

Justice Thomas opined that the Court is no longer interpreting the intent of Congress in enacting § 1983. The now long history of qualified immunity precedents instead represents precisely the sort of "freewheeling policy choice[s]" that we have previously disclaimed the power to make. *Ziglar*, 137 S.Ct. at 1871. Citing *Rehburg v. Paulk*, 566 U.S. 356, 363 (2012). The Court does not have a license to establish immunities from suits brought under the Act "in the interests of what we judge to be sound public policy." *Id.*

The Court acknowledged that the "clearly established" standard is designed to protect the balance between vindication of constitutional rights and government officials' effective performance of duties, that is a balancing of competing values. *Ziglar*, 137 S.Ct. at

1872. Citing *Reichle v. Howards*, 566 U.S. 658, 664 (2012), *Harlow*, 457 U.S. at 807. The Constitution assigns this kind of balancing to Congress, not the Courts. *Id.*

Finally, Justice Thomas opined that "until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress." He challenged the Court that, in the appropriate case, the United States Supreme Court should reconsider qualified immunity jurisprudence. *Id.*

In *Mullenix*, the police officer was denied qualified immunity in an excessive force claim involving a high-speed chase in the Fifth Circuit Court. This Court granted certiorari and reversed the lower court decision granting qualified immunity stating, the Fifth Circuit had made the qualified immunity inquiry at a high level of generality—whether any governmental interest justified choosing one tactic over another—and then fails to consider that question in the specific context of the case. *Mullenix*, 136 S.Ct. at 311. The Court stated, "we have repeatedly told courts . . . not to define clearly established law at a high level of generality. *Id.* at 308. Citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). In a dissenting opinion, Justice Sotomayor, contrasted this position with that stated in *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), in that after considering whether the state actor had violated a constitutional right, the correct inquiry is whether the contours of the right were sufficiently clear that a reasonable official would [have understood] that what he is doing violates that right. Justice Sotomayor stated that the crux of the qualified immunity test is whether officers have 'fair notice' that they are

acting unconstitutionally, citing *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). *Id.*

After *Mullenix* (2015), this Court increasingly narrowed the qualified immunity analysis now suggesting that the Plaintiff must produce decisional law within its district (or from this Court) with precisely the same particularized facts as a deprivation standard. In *White v. Pauly*, 137 S.Ct. 548, 549 (2017) the Court stated the clearly established law must be particularized of the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. In *Kisela v. Hughes*, 138 S.Ct. 1148, 1150 (2018) the Court stated that where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. The right's contours are not clearly established unless they are sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it. In *District of Columbia v. Wesby*, 138 S.Ct. 577, 580 (2018) the Court stated that the clearly established standard requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted. This requires a high degree of specificity.

Notably, these recent decisions that have narrowed the clearly established analysis are excessive force claims brought under the Fourth Amendment. The

Court appreciates that contextual nuances where immediate life-and-death decisions must be made by an officer, stating it is sometimes difficult for an officer to determine how the relevant legal doctrine will apply to the factual situation the officer confronts. The use of excessive force is an area of law in which the result depends very much on the facts of each case. *Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019) It is arguably acceptable to put this tight cinch on claims where the state actor is forced to make a split-second judgment in circumstances that are tense, uncertain, and rapidly evolving. *See Lewis*, 532 U.S. at 853. (finding that a substantive due process violation did not occur in a high-speed chase where the officer was pursuing an offender).

However, this narrowing analysis of the clearly established prong of qualified immunity has carried over to circumstances where the defendant has the opportunity for deliberation and reflection.

In 2018, this Court denied an application for writ of certiorari where qualified immunity was granted to prison officials for a prolonged period where a prisoner was denied outdoor exercise. *Apodaca v. Raemisch*, 138 S.Ct. 5 (Oct. 9, 2018) The Tenth Circuit incorporated this same strict standard to Eighth Amendment conditions of confinement by granting qualified immunity where a prisoner was denied outdoor exercise for eleven months, even though the Tenth Circuit had already found that the denial of exercise outside of one's cell for nine months was a deprivation of a clearly established right. *Apodaca v. Raemisch*, 864 F.3d 1071, 1074 (10th 2017), citing *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999) The *Apodaca* Court stated that liability extends not only to the plainly

incompetent but to those who knowingly violate the law. The actual knowledge of the offending state actor was irrelevant because there had to be a "single standard" which was whether it would be clear to a reasonable officer that the alleged conduct was unlawful. Ten years earlier, the Tenth Circuit Court had held in 1987 that outdoor exercise was important for prisoners. *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987) The *Apodaca* Court stated that *Perkins* had been ambiguous as to whether the denial of exercise outside of one's cell and denial of exercise outdoors were equally protected. This Court denied certiorari with a statement published by Justice Sotomayor which acknowledged the adverse effects of solitary confinement described in *In re Medley*, 134 U.S. 160, 168 (1890) (A considerable number of prisoners fell, even after a short confinement into a semi-fatuous condition from which it was next to impossible to arouse them and others became violently insane, others, still, committed suicide, while those who withstood the ordeal better were not generally reformed and in most cases did not recover sufficient mental activity to be of any subsequent service to the community.) And she stated that punishment need not leave physical scars to be cruel and unusual. *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

Justice Sotomayor recalled the *Ayala*[1] concurring opinion of Justice Kennedy where he called for closer scrutiny of the use of solitary confinement calling it a penal tomb. She quoted the same professional publications from 2006 cited in Plaintiff J.H.'s arguments including the Washington Univ. Law Journal and the Alabama Law Rev. acknowledging a wide

[1] *Davis v. Ayala*, 135 S.Ct. 2187 (2015)

range of psychological scars from isolation. *Apodaca v. Raemisch*, 139 S.Ct. 5, 6 (2018).

It appears that the "fair notice", "fair warning", and "reasonable person" standards prescribed in *Hope v. Pelze*r have all but disappeared.

The qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid*. "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.*, at 741.

Hope v. Pelzer is not the only case in this Court's history to incorporate a broader perspective of the status of the law when considering qualified immunity.

In *Lanier*, the defendant was prosecuted under 18 U.S.C. § 242 for sexually assaulting five women while he served as a state judge. The Sixth Circuit dismissed the case in reliance on *Screws v. United States*, 325 U.S. 91 (1991) which held that to be convicted under § 242, the constitutional right is said to have been violated only when the right has been held to apply in a factual decision of this Court, and only when the right has been held to apply in a factual situation "fundamentally similar" to the one at bar. In *Screws*, the court regarded these combined requirements as substantially higher than the "clearly established" standard use to analyze qualified immunity in civil cases under 42 U.S.C. 1983 because of its criminal

nature. However, this Court reversed the Sixth Circuit stating, this is not to say, of course, that the single warning standard points to a single level of specificity sufficient in every instance. In some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful," Citing *Anderson v. Creighton*, 483 U.S. at 640. As Judge Daughtrey noted in her dissenting opinion, "'[t]he easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997).

In *Hope v. Pelzer,* 536 U.S. 730 (2002), the Court stated, the Eighth Amendment violation here is obvious on the facts alleged. Any safety concerns had long since abated by the time Hope was handcuffed to the hitching post, because he had already been subdued, handcuffed, placed in leg irons, and transported back to prison. Despite the clear lack of emergency, respondents knowingly subjected him to a substantial risk of physical harm, unnecessary pain, unnecessary exposure to the sun, prolonged thirst and taunting, and a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation. The *Hope*

Court turned to *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982) stating that qualified immunity operates to ensure that before they are subjected to suit, officers are on notice that their conduct is unlawful. Officers sued in a § 1983 civil action have the same fair notice right as do defendants charged under 18 U.S.C. § 242, which makes it a crime for a state official to act willfully and under color of law to deprive a person of constitutional rights. In *Hope*, the Court also looked to published, non-judicial authorities such as (1) a "relevant" shackling regulation promulgated by the Alabama Department of Corrections ("ADOC"), and (2) a United States Department of Justice report warning the ADOC of the unconstitutionality of the disputed practice.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court expressly rejected a requirement that previous cases be "fundamentally similar." The salient question when analyzing qualified immunity is whether the state of the law at the time of the offense gave respondents fair warning that their treatment of the Plaintiff was unconstitutional. *Hope*, 536 U.S., at 739-741.

In January 2017, the Ninth Circuit denied qualified immunity in *Hardwick v. City of Orange*, 844 F.3d 1112, (9th Cir. 2017) where a social worker made false statements under oath in order to obtain an ex parte removal order of a child. The Court relied on *Hope* and a state law that social workers were not granted civil immunity in their investigations if they made false statements under oath. The Court said that it was implausible that social workers were not aware of change in the law in 1999 when the events charged in the complaint occurred (2000). The Court stated

"no official with an IQ greater than room temperature in Alaska could claim that he or she did not know that the conduct at the center of this case violated both state and federal law."

The Ninth Circuit opinion in *Hardwick* (2017) bears stark contrast to the Sixth Circuit opinion in *Brent v. Wayne Cnty. Dep't Human Services*, 901 F.3d 656, 685 (2018) where the court found that in 2017 it was not clearly established that a social worker could not make false statements to obtain a child removal order in Ohio. The result is that the plaintiff in *Hardwick* can prosecute her claim for damages and the plaintiff in *Brent*, although suffering the same injury, cannot even take their claim before a jury.

There can be no dispute that there is a constant tension between these standards for determining clearly established, *i.e.*, "fair warning" versus "controlling authority of particularized facts", and even when the Plaintiff can point to statutes and policies that show that the conduct is prohibited, as here, his right to relief is stonewalled by the lack of prior court precedent.

The liberty costs of qualified immunity without *Hope v. Pelzer* are real and significant. Because qualified immunity relies centrally on the question of when the unlawfulness of particular conduct has been clearly established — an inquiry for which a consistent standard has eluded federal courts for more than a generation and a near complete replacement of this Court jurisprudence — as it continues to be beset with inconsistencies. Because courts are allowed to resolve the qualified immunity inquiry without saying what the law is, "the qualified immunity situation threatens to leave standards of official conduct permanently in

limbo." *Camreta v. Greene*, 563 U.S. 692, 706 (2011) In *Camreta*, this Court dismissed the case on mootness and never resolved the constitutional right determined in the Ninth Circuit as to whether or not a social worker violated the Fourth Amendment by going to a school and interviewing a child without the parent's knowledge or consent in 2003.

The Ninth Circuit had not narrowed its analysis to prior precedent establishing the conduct as unconstitutional in *Camreta*. It said that if the defendants' actions were "clearly unconstitutional" under the Fourth Amendment, qualified immunity should be denied. They looked to a two-step approach, first, considering whether the action was justified at its inception; and second, whether the conduct (continuing seizure of the child) was reasonably related in scope to the circumstances which justified the interference in the first place. *Greene v. Camreta*, 588 F.3d 1011, 1031 (9th. Cir. 2009). The Ninth Circuit denied qualified immunity finding that the actions of the defendants, that is a seizure of the child for over two hours, was not justified even though no precedent existed.

The Ninth Circuit also denied qualified immunity in *Gravelet-Blondin v. Shelton*, 728 F.3d 1086 1093 (9th Cir. 2013) in an excessive force claim regarding the use of tasers. The Court said it does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.

Short of a total remodeling of qualified immunity, this Court must make the contextual circumstances relevant in the clearly established prong of qualified

immunity as it has done in the constitutional violation prong.

The failure to recognize statutory rights established by the legislative branch also creates a constant tension between the two branches of government. In this case, Congress had already enacted laws to protect Plaintiff J.H. from isolation while incarcerated.

While the clash between the federal circuits persists over how strictly to apply qualified immunity, unless this Court provides some clear guidance expounding on the *Hope* doctrine, one thing is certain: for each right guaranteed by the Constitution, the legal community will need to throw a sacrificial lamb/Plaintiff to the wolves/state actors before the next victim's rights will be protected decades later.

II. IF *HOPE V. PELZER* IS NOT DEAD, THIS COURT MUST DEFINE WHEN OTHER AUTHORITIES, SUCH AS STATUTES, POLICIES, ADMINISTRATIVE ORDERS, AND PUBLISHED PROFESSIONAL OPINIONS ESTABLISH THAT A REASONABLE STATE ACTOR DEFENDANT HAD "FAIR WARNING" THAT HIS CONDUCT WAS UNCONSTITUTIONAL AND J.H. IS ENTITLED TO HIS DAY IN COURT AS INTENDED BY 42 U.S.C. § 1983.

Where there is no controlling precedent, the courts should be able to look at the status of the law at the time the events occurred, including policies, administrative orders, and statutes that prohibited the alleged conduct.

There can be no dispute that in 2013 when Plaintiff was incarcerated as a pre-trial detainee, he was known to have brain issues when he was put in solitary confinement by Steve McMahan. The danger

of putting children, who are still developing physically, psychologically, and neurologically, in solitary confinement was well documented for several years prior to 2013.[2] There is also no dispute that the field of psychology and psychiatry and prison management was abound with professional resources that put Defendant McMahan on notice of the cruel and excessive punishment of solitary. Without consideration of the torturous effect of isolation, Defendant McMahan subjected Plaintiff to solitary for 21 days. There is no dispute that the alleged threat of assault which caused J.H.'s removal from the community cell was never adjudicated and the alleged victim left the detention center the following day.

Even though the staff had documented that J.H. had brain issues, even though McMahan knew that J.H. was on psychotropic medication, even after there was a change in the juvenile detention population the following day, and even though McMahan was aware

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[2] *See Solitary Confinement (Isolation)*, Nat'l Comm'n on Corr. Health Care (Apr. 10, 2016), http://www.ncchc.org/solitary-confinement (noting the harms of solitary confinement and concluding that "juveniles . . . should be excluded from solitary confinement for any duration"); *see also* Juvenile Justice Reform Committee, *Solitary Confinement of Juvenile Offenders*, Am. Acad. of Child & Adolescent Psychiatry (Apr. 2012), http://www.aacap.org/aacap/Policy_Statements/2012/Solitary_Confinement_of_Juvenile_Offenders.aspx (noting the "developmental vulnerability" of juveniles and noting that most suicides in juvenile correctional facilities occur when the juvenile is in isolation); *Solitary Confinement as a Public Health Issue*, Am. Public Health Assoc. (Nov. 5, 2013), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-data-base/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue (asserting that juveniles should be categorically excluded from solitary confinement).

of the dilatory effects on J.H., he left J.H. in isolation for up to 23 hours a day.

Although there is no § 1983 liability for negligently inflicted harm (*see Davidson v. Cannon*, 474 U.S. 344, 348 (1986)), the Court has recognized a heightened duty of state actors where the State takes a person into custody or subjects a person with mental illness to involuntary committal. *DeShaney v. Winnebago Court Dept. of Social Servs.*, 489 U.S. 189, 199-200 (1989); *Youngberg v. Romeo*, 457 U.S. 307 (1982).

When this Court analyzed the constitutional rights of mentally deficient institutionalized persons, it said that liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible for the acts or omissions against the Plaintiff actually did not base the decision on such a judgment. *Youngberg*, 457 U.S. at 323.

Therein, the appellant would show that the context of decision making is relevant to the "fair warning" requirement to overcome qualified immunity as well.

The standard upon which the Court is required to review the conditions of confinement for a pretrial detainee was established in *Bell v. Wolfish*, 441 U.S. 520, 523 (1979) which stated that a pre-trial detainee may not be punished prior to an adjudication of guilt. These are Fourteenth Amendment substantive due process claims. Here, Defendant McMahan argued that there was no difference between prisoners and pre-trial detainees, therefore requiring the Court to use the "atypical and significant hardship" test described in *Sandlin v. Conner*, 515 U.S. 472, 484 (1995). This is

incorrect, in that the Court has made it clear that claims based on excessive force (such as jail disturbance) and claims based on conditions of confinement (such as solitary) are different in kind. *Whitley v. Albers*, 475 U.S. 312 (1986), *Fuentes v. Wagner*, 206 F.3d 335 (3rd. Cir. 2000) (use of restraint chair), and followed in the Sixth Circuit stating, [I]f a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to "punishment." Conversely, if a restriction or condition is not reasonably related to a legitimate goal-if it is arbitrary or purposeless-a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees. *Bell v. Wolfish*, 441 U.S. at 538-39.

The Sixth Circuit Court determined that the use of isolation for J.H. for 21 days was excessive and not reasonably related to a legitimate government purpose.

In the case at bar, the Plaintiff provided the panel with ample authority demonstrating that the Defendants were, or should have been on notice, that extended periods of solitary confinement of a child, especially where there are mental health conditions, is severe and excessive. *In Re Medley*, 134 U.S. 160 (1890)

The Plaintiff pointed to several pre-2013 authorities impugning the use of solitary confinement for juveniles.

In 1990, the United Nations *Rules for the Protection of Juveniles Deprived of their Liberty* prohibits

the use of solitary confinement. This resolution was supported by the United States[3].

In 2003, Congress enacted the Prison Rape Elimination Act (P.R.E.A.) (28 C.F.R. 115.342) denouncing solitary confinement except under extremely rare circumstances. Tennessee agreed to be bound by its terms. In December 2010, the Tennessee Department of Children's Services (DCS) adopted and recognized the standards set forth in PREA in Administrative Policies and Procedures 18.8. The juvenile detention center operated under the oversight of DCS in 2013. PREA prohibited isolation except as a last resort when less restrictive measures are inadequate to keep them and other residents safe. Plaintiff's expert opined that PREA did apply in 2013 and the inability of the federal government to impose sanctions is irrelevant to the application of the known standards of care for incarcerated children.

In 2004, DCS also enacted Administrative Policy and Procedure 25.10 which prohibits violations of children's civil rights in behavioral management. This policy provides that seclusion as a punishment, consequence, or sanction is prohibited.

In 2006, the Washington Univ. J. of Law and Policy published an article on the psychiatric effects of solitary confinement. It referenced the decision of *In Re Medley*, 134 U.S. 160 (1890) and the developing body of information documenting the adverse effects of solitary confinement including the deleterious effects.

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3 https://juvenilejusticecentre.org/resources/united-nations-rules-for-the-protection-of-juveniles-deprived-of-their-liberty/

In 2010, the Journal of American Academy Psychiatry and Law, published an article on *Solitary Confinement and Mental Illness in U.S. Prisons* describing the psychological stressors of solitary as clinically distressing as physical torture.

In 2012, the American Civil Liberties Union (ACLU) published *Growing Up Locked Down* stating that the prolonged physical and social isolation of young people raises serious human rights concerns. This report cited several cases which recognized that solitary confinement for "certain vulnerable populations" was cruel and unusual punishment. Citing, *Ruiz v. Johnson*, 37 F.Supp.2d 855 (S.D. Tex. 1999); *Coleman v. Wilson*, 912 F.Supp. 1282 (E.D. D. Cal. 1995); *Madrid v. Gomez*, 889 R.Supp. 11476 (N.D. Cal. 1995); *Casey v. Lewis*, 834 F.Supp. 1477 (D. Ariz. 1993); and *Langley v. Coughlin*, 715 F.Supp. 522 (S.D.N.Y. 1988). The report also referenced *Roper v. Simmons*, 543 U.S. 551 (2005) in which the Supreme Court stated that punishment of children must consider their age and special developmental needs.

In 2012, the American Academy of Child and Adolescent Psychiatry (AACAP) published a policy statement defining solitary confinement as the placement of an incarcerated individual in a locked cell with minimal or no contact with people other than staff as a form of discipline or punishment. AACAP recognized that the psychiatric effects of prolonged solitary included depression, anxiety and psychosis. Seclusion is specifically prohibited for coercion, discipline, convenience, or staff retaliation.

In 2017, the Middle District Court of Tennessee issued an injunction against the use of solitary confinement in a neighboring county. The District Court

relied on these same authorities stating that there were "numerous prior scientific findings and international authorities that opined that punitive solitary confinement or isolation of a juvenile is cruel, inhuman, and degrading." RE 13, Pg. 34. *Doe v. Hommrich*, Case 3:16-799 (M.D. Tenn. April 25, 2016)

Tennessee Corrections Institute (T.C.I.) Minimum Standards for Juveniles was the controlling authority of JDC in 2013. These rules directed the facility to hold a disciplinary hearing within seventy-two hours of placement in segregation. This requirement was also memorialized in JDC's own policies. This hearing never occurred and yet J.H. was held in solitary confinement for weeks.

Plaintiff would show that the abundance of authority on this issue exempts *J.H.* from the "fundamentally similar case" rule for qualified immunity.

Accompanying Plaintiff's arguments in the Sixth Circuit was the Amici Curiae Brief filed on behalf of Professors and Practitioners of Psychiatry and Psychology who cited numerous journals and professional publications as early as 1989 on the dilatory effects of solitary confinement. These included (a) insights on the adolescent brain[4] (2008); (b) position statement on segregating inmates with mental illness[5] (2012); (c)

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[4] B. J. Casey, Rebecca M. Jones, & Todd A. Hare, *The Adolescent Brain,* 1124 Ann. N.Y. Acad. Sci. 111, 111-126 (Mar. 2008); Monique Ernst & Sven C. Mueller, *The Adolescent Brain; Insight from Functional Neuroimaging Research*, 68 Neurobiol. 729-743 (May 2008).

[5] *Position Statement on Segregation of Prisoners with Mental Illness*, Am. Psychiatric Ass'n (Dec. 2012).

human rights and solitary confinement[6] (2012); (d) the effects of solitary confinement on juvenile offenders[7] (2012); (e) acute psychosocial stress on the brain[8] (2012); (f) United Nations report on torture including the use of solitary confinement[9] (2011); (g) prison offenders with mental illness[10] (2003); (h) psychiatric and psychological pathological effects of solitary confinement[11] (2006). Repeated references were made to the 2006 study of the psychiatric effects of solitary confinement and subsequent references to this research that concluded that meaningful social interaction and positive environment stimulation (such as exposure to varying surroundings and participation in productive activities) are no less essential to human health than shelter, nutrition, and medical care. And

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6 *Reassessing Solitary Confinement: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Subcomm. on Constitution, Civil Rights & Human Rights of the S. Comm on the Judiciary*, 112th Cong. 72, 80-81 (2012).

7 Juvenile Justice Reform Committee, Am. Acad. Child Adolescent Psychiatry, *Solitary Confinement of Juvenile Offenders* (Apr. 2012)

8 Franziska Plessow, et. al, *The Stressed Prefrontal Cortex and Goal-Directed Behavior; Acute Psychosocial Stress Impairs the Flexible Implementation of Task Goals*, 216 Exp. Brain Res. 397-408 (2012)

9 Juan E. Mendez, *Interim Report of the Special Rapporteur of the Human Rights Council on Torture and Other cruel, Inhuman or Degrading Treatment of Punishment*, U.N. Doc. A/66/268, 23 (Aug. 5, 2011)

10 Sasha Abramsky, *Ill-Equipped: U.S. Prisons and Offenders with Mental Illness*, Human Rights Watch, 147-49 (2003)

11 Stuart Grassain, *Psychopathological Effects of Solitary Confinement*, 140 Am. J. Psychiatry 1450, 1453 (2006)

the research is clear that any alleged deviation from complete and absolute isolation do not alleviate the toxic stress of isolation so long as meaningful social interaction and positive environmental stimuli are restricted.

Grassain's 2006 published research identified the common psychological injuries resulting from solitary confinement to include depression, hallucination, cognitive dysfunction, memory loss, anxiety, paranoia, insomnia, withdrawal, lethargy, stimuli hypersensitivity, and panic. Mental health professionals recognized that life threatening behaviors such as self-mutilation and suicidal ideation were common among prisoners in solitary confinement. As early as 1998[12], professionals opined on the physiological injuries of solitary confinement, including hypertension, heart palpitations, decline in neural activity, gastrointestinal disorders, severe insomnia, and weight loss. And brain research as early as 2003[13] articulated the physical injury at the subclinical level, including adverse effects on the neural pathways and neurochemistry in the brain. The United Nations report on torture published in early 2012 declared that solitary confinement should never be used on juveniles and people with mental illness[14].

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[12] Elizabeth Bennion, *Impact of Solitary Confinement on Hospitalization Among Danish Prisoners in Custody*, 21 Int'l J. L. & Psychiatry 99, 103 (1998).

[13] Ajai Vyas et al., *Effect of Chronic Stress on Dendritic Arborization in the Central and Extended Amygdala*, 965 Brain Research 290 (2003); Craig Haney, *Mental Health Issues in Long-Term Solitary and Supermax Confinement*, 49 Crime & Delinquency 124 (2003)

[14] *Joint Report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and*

Miller v. Alabama, 567 U.S. 460 (2012) expressed this Court's recognition that recent adolescent brain-development research demonstrated juveniles' psychological immaturity and vulnerability.

If *Hope v. Peltzer* is not dead the lower courts must be directed to review the contextual landscape including other laws, policies, and published professionals. Then, Sixth Circuit must be reversed and *J.H.* deserves to have his day in Court.

CONCLUSION AND PRAYER FOR RELIEF

The decision in *Hope v. Pelzer* came in 2002, twenty years after the Court eliminated the subjective good faith analysis in *Harlow v. Fitzgerald* in 1982. The decision in *Hope* permitted the Court to consider the contextual landscape including the consideration of other authoritative publications. Therefore, the state actor was not subject to the emotional whims of a jury, but could still be accountable if, within the realm of his duties, other authority gave him fair warning that his actions were unlawful.

The status of qualified immunity necessitates this Court's review regarding the analyses of "clearly established" to include a consideration of the status of the law, policies, professional reports, standards established under law and by professional associations.

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the Special Representative of the Secretary-General on Violence Against Children on Prevention of and Responses to Violence Against Children Within the Juvenile Justice System https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-25_en.pdf

This Court cannot expect each plaintiff to pursue his rights only where the identical facts have been laid before the Court and been held as unconstitutional. This requirement dilutes the intent of the Civil Rights Act of 1964 in that any intended accountability articulated in 42 U.S.C. § 1983 is self-abolished.

The lag in justice in this case due to Court schedules, briefing, arguments, and opinions demonstrates just how long it takes before relief is even considered by a jury. J.H.'s assault and isolation occurred in 2013. Only now in 2020, some seven years after the fact, does the Sixth Circuit hold that his solitary confinement was excessive and punitive even though policies, professionals, and other laws were well in place at the time to put a reasonable state actor on notice.

J.H. asks this court to accept the application for full briefing and invite scholarly review such that this Court can bring *Hope v. Pelzer* back to life and define the guidelines for state actors for which they are put "on notice" that their conduct is unlawful.

Respectfully submitted,

LARRY L. CRAIN
COUNSEL OF RECORD
CRAIN LAW GROUP, PLLC
5214 MARYLAND WAY, STE 402
BRENTWOOD, TN 37027
(615) 376-2600
LARRY@CRAINLAW.LEGAL

CONNIE REGULI
LAWCARE FAMILY LAW CENTER P.C.
1646 WESTGATE CIR. STE. 101
BRENTWOOD, TN 37027
(615) 661-0122
CONNIE.REGULI@LCFLC.COM

COUNSEL FOR PETITIONER

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