No. _____

In the Supreme Court of the United States

SHERRY L. BURT, RETIRED MDOC WARDEN, AND DARRELL M. STEWARD, RETIRED MDOC DEPUTY WARDEN, PETITIONERS

v.

JIMMIE LEON GORDON

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Sixth Circuit improperly deny qualified immunity to prison officials based on their response to the unprecedented COVID-19 global pandemic by defining the relevant law at too high level of generality and identifying no precedent recognizing a constitutional right under similar circumstances that would have put reasonable officials on notice that their conduct may violate the Constitution given the novel challenge of the pandemic?

PARTIES TO THE PROCEEDING

The Petitioners are Sherry L. Burt, a retired Michigan Department of Corrections (MDOC) warden, and Darrell M. Steward, a retired MDOC deputy warden. The respondent is Jimmie Lee Gordon, a prisoner in the custody of MDOC.

RELATED CASES

- United States Court of Appeals for the Sixth Circuit, *Gordon* v. *Burt*, No. 23-1775, Order issued April 24, 2024 (reversing district court decision).

- United States District Court for the Western District of Michigan, *Gordon* v. *Burt*, No. 1:21-cv-415, Opinion and Order issued June 9, 2023 (overruling objections, accepting and adopting the magistrate judge's May 3, 2023 report and recommendation, and granting Defendants' motion to dismiss).

- United States District Court for the Western District of Michigan, *Gordon* v. *Burt*, No. 1:21-cv-415, Report and Recommendation on Defendants' motion to dismiss issued May 3, 2023 (recommending granting Defendants' motion to dismiss).

- United States Court of Appeals for the Sixth Circuit, *Gordon* v. *Burt*, No. 21-1832, Order issued August 17, 2022 (reversing the district court decision).

- United States District Court for the Western District of Michigan, *Gordon* v. *Burt*, No. 1:21-cv-415, Opinion issued October 20, 2021 (dismissing complaint for failure to state a claim).

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JURISDICTION

The district court had jurisdiction over Gordon's claims under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The district court entered judgment for Burt and Steward on June 9, 2023. Gordon moved to alter or amend the judgment on June 22, 2023, which the district court denied on August 10, 2024. Gordon filed a timely notice of appeal by right on August 24, 2023. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Eighth Amendment to the United States Constitution, U.S. Const. amend. VIII, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

COVID-19 presented a once-in-a-century pandemic, disrupting people's lives and stretching public resources throughout the world. It also posed distinctive challenges for officials charged with managing prisons: space is limited, prisoners live in close quarters, there are significant security concerns, and all activities are done in congregate settings for a correctional system with more than 30,000 prisoners in 26 facilities. Despite these challenges, Burt and Steward did their best to protect prisoners, including Gordon, from the coronavirus that, by its nature, spreads easily and widely. For this unique public health challenge, the Sixth Circuit overlooked this Court's qualified immunity and Eighth Amendment precedent, finding a clearly established right to be free from exposure to COVID-19. This ruling would seemingly make it virtually impossible to avoid suit where a prisoner complains about contagion. And while this case rises from a Sixth Circuit order—not an opinion—its effect in reversing a dismissal for the corrections officials is the same.

In contrast to the order here, courts throughout the nation have held that the COVID-19 pandemic created an unprecedented challenge that prison officials could not have contemplated. Under such novel circumstances, the right answer is that there is no clearly established precedent to provide specific guidance to prison officials in their protection of prisoners. Courts of appeal, although inconsistent in their treatment of COVID-19, have similarly held that prison officials have fulfilled their duties so long as they established reasonable protocols—as here—to combat the spread of the virus in prisons.

Other courts have recognized that, although it may be clearly established that prison officials have a duty to protect inmates from COVID-19, the actual right at issue should be analyzed in light of the allegations made in the complaint. This analysis reflects this Court's repeated admonition that the clearly established prong of the qualified immunity test must not be analyzed at too high a level of generality.

Here, Gordon alleged that Burt and Steward violated the Eighth Amendment by placing close-contact COVID-19 prisoners in his housing unit and then moving the residents of his housing unit to a dormitory-style setting with less than six feet of distancing between bunks and only floor fans for ventilation. No clearly established law put Burt and Steward on notice that their conduct may run afoul of the Eighth Amendment. Instead, the Sixth Circuit stated the right so broadly that *any* alleged exposure to *any* "dangerous communicable disease" potentially violates the Eighth Amendment. Case law does not support the Sixth Circuit's order and instead holds that the right asserted by a prisoner must be analyzed in the context of the allegations contained in his complaint.

Under the ruling here, qualified immunity is effectively swallowed by its exceptions, raising the specter of subjecting prison officials to the burdens of discovery and trial whenever a prisoner sues after contracting COVID-19 by second-guessing the actions of officials who did not have all the information then that they do now. Such a rule is contrary to this Court's qualified immunity precedent, contrary to its Eighth Amendment case law, and contrary to common sense. This Court should grant the petition.

STATEMENT OF THE CASE

A. Initial District Court Proceedings

Gordon filed suit on May 18, 2021, alleging two sets of claims against three Michigan Department of Corrections (MDOC) employees in their individual capacities. App. 55a–56a. In his first set of claims, Gordon alleged that on August 2, 2020, Burt, a retired warden, and Steward, a retired deputy warden, violated the Eighth Amendment by moving prisoners who had been exposed to prisoners who had COVID-19 into his housing unit, and later moving the residents of his housing unit into a dormitory-style housing unit without adequate bunk spacing or ventilation. *Id*. at 59a–61a, 63a–64a. Gordon also alleged state-law claims for gross negligence against Burt and Steward. *Id*. at 64a. Gordon's second set of claims were against Defendant Elisia Hardiman, a prison librarian, alleging that she violated the First Amendment, the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132 *et seq*., and the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*., by failing to provide sufficient assistance in preparing his complaint. App. 62a–63a. The allegations leading to his claims occurred at Michigan's Muskegon Correctional Facility (MCF). *Id*. at 56a.

Gordon alleges that he lived in Unit-1 of MCF and that, on July 31, 2020, Burt and Steward moved prisoners who had come into close contact with COVID-19 positive prisoners into Unit-1. *Id*. at 59a–60a. Gordon never asserts that a close-contact prisoner was placed in his cell. Instead, he alleges that, on or around August 2, 2020, Burt and Steward moved Unit-1 prisoners, including those identified as close contacts, into a

gymnasium. *Id*. Gordon claims that the gymnasium was converted into a "dormitory-style congregate space . . . with bunk-bed's [sic] positioned directly next to one another, less than six-feet, [with] 'little or no ventilation' " other than two industrial fans on the floor. *Id*. at 60–61a.

On August 2, 2020, Gordon complained verbally to two correctional officers, stating that " 'this housing arrangement [sic] the required six-feet distancing or proper ventilation per [United States Centers for Disease Control and Prevention (CDC)] guidelines,' " putting him at higher risk for contracting COVID-19. *Id*. at 61a. One of the correctional officers told Gordon that he could either be housed there or in the segregation unit. *Id*. Gordon chose to remain in the gymnasium. *Id*. He claims that he tested positive for COVID-19 on August 4, 2020, just two days after Unit-1 prisoners were placed in the gymnasium. *Id*. The following day, Gordon was moved to the isolation housing unit. *Id*.

Gordon premises his Eighth Amendment claim on grounds that Burt and Steward placed prisoners who had been in close contact with COVID-19 into Gordon's housing unit without complete isolation from COVID-19 negative prisoners, such as Gordon. *Id*. at 63a–64a. Gordon alleges that this violated the Interim Guidance of the CDC and, thus, the Eighth Amendment. *Id*. He also claims that converting the prison gymnasium into a "dormitory-style congregate living space [with] poor ventilation" was "inimical to physical distancing . . . contrary to [the] CDC['s] Interim Guidelines" and in violation of the Eighth Amendment. *Id*. Again, Gordon does not allege that he was

housed in the same cell as, or even came into contact with, a COVID-19 positive prisoner.

The district court dismissed Gordon's claims for failure to state a claim under the Prison Litigation Reform Act (PLRA), 28 U.S.C. §§ 1915(e)(2) and 1915(b), and 42 U.S.C. § 1997e(c). App. 40a–54a.

B. Gordon's First Appeal to the Sixth Circuit

The Sixth Circuit reversed the dismissal of his Eighth Amendment claims, finding that Gordon "sufficiently stated a deliberate-indifference claim against defendants Burt and Steward." App. 38a. At the same time, however, the Court affirmed the dismissal of Gordon's other claims, and remanded the case for further proceedings. *Id*. at 39a. Accordingly, on remand, only Gordon's Eighth Amendment claims against Burt and Steward remained.

C. District Court Proceedings on Remand

Burt and Steward moved to dismiss Gordon's complaint on grounds of qualified immunity under Fed. R. Civ. P. 12(b)(6). (Mot. to Dismiss, R. 38, Page ID # 176–78.) The magistrate judge recommended dismisal. App. 29a. The magistrate judge determined that, because Gordon had failed to cite to any " 'existing precedent [placing] the statutory or constitutional question beyond debate,' " Burt and Steward were entitled to qualified immunity. *Id*. at 23a, 27a (quoting *White* v. *Pauly*, 580 U.S. 73, 79 (2017)).

Gordon filed objections, claiming that he had found case law showing that his claims were clearly

established as of August 2020. (Pl. Objs., R. 58, Page ID # 656–70.) The district court overruled Gordon's objections and framed the questions before it as:

> [W]hether it was clearly established in the Summer of 2020 that Defendants' decisions (1) to place close-contact COVID-19 prisoners with other non-close-contact prisoners in the same housing unit and (2) to house non-close-contact prisoners in a dormitory-style setting with less than six feet of social distancing between bunks and only floor fans for ventilation violated the Eighth Amendment.

App. 10a. The district court later clarified that the operative date was August 2020. *Id*. at 12a.

The district court noted that Gordon relied on the CDC guidelines but held that "the CDC's Interim Guidelines cannot make the law clearly established." *Id*. at. 10a (citing *Mays* v. *Dart*, 974 F.3d 810, 823 (7th Cir. 2020)). The district court also found Gordon's case law unconvincing and easily distinguishable. For instance, Gordon relied on *Helling* v. *McKinney*, 509 U.S. 25 (1993), which dealt with a prisoner who claimed his cellmate smoked five packs of cigarettes a day. App. 11a–12a. But the district court noted that Gordon did not allege that he was placed in a cell with a COVID-19 positive prisoner, or even a prisoner who was a close contact of someone who was COVID-19 positive. *Id*. at 12a. Thus, even if *Helling* had been factually on point, Gordon's allegations were clearly distinguishable. *Id*.

Gordon appealed. (Order, R. 72, Page ID # 678; Notice, R. 73, Page ID # 680.)

D. Gordon's Second Appeal to the Sixth Circuit

The Sixth Circuit vacated the dismissal below on grounds that, "notwithstanding the novelty of the coronavirus, it was clearly established before the onset of the COVID-19 pandemic that prison officials cannot exhibit deliberate indifference to an inmate's exposure to dangerous communicable diseases." App. 5a. It cited to *Helling*, 509 U.S. at 33; *Hampton* v. *California*, 83 F.4th 754, 770 (9th Cir. 2023). App. at 5a.

Applying this reasoning to Gordon's allegations, the Sixth Circuit held that "a reasonable prison official would have understood that, by purposefully commingling infected prisoners with uninfected prisoners, as Gordon alleged here, she was violating the Eighth Amendment." *Id.* at 6a. Based on this, the Sixth Circuit held "that the district court erred in ruling that the defendants were entitled to qualified immunity at the pleading stage." *Id.* Although Gordon had not briefed this issue, the Sixth Circuit took "into consideration Gordon's pro se status [to] conclude that he has not forfeited this issue." *Id.*

Contrary to the Sixth Circuit's order, however, Gordon does not allege Burt and Steward intentionally comingled COVID-19 negative with COVID-19 positive prisoners. Nor does he allege that he came into contact with a COVID-19 positive prisoner or that Burt or Steward placed him in a cell with a COVID-19 positive prisoner. Gordon does not even allege that he was not classified as a close-contact prisoner.

Then, Burt and Steward moved to stay the mandate, which the court granted. (R. 82, Page ID # 738.)

REASONS FOR GRANTING THE PETITION

I. Because COVID-19 presented a once-in-a-century global pandemic, there was no clearly established law regarding the protocol that prison officials should have followed to protect prisoners from contracting COVID-19.

The prime flaw in the Sixth Circuit's order is its fundamental misunderstanding of qualified immunity. The Sixth Circuit treated the reality of COVID-19 like an abstract concept, expecting perfection from prison officials. But COVID-19 was a global pandemic without precedent that created new challenges for prison officials charged with ensuring the safety of both prisoners and the public. As of August 2020, effective suppression of the virus remained elusive, particularly in the setting of a prison.

Prison officials here and elsewhere were required to act when there were no existing protocols, compelling them to attempt creative ways to protect the health and safety of a large population of prisoners, all concentrated in a relatively small number of facilities. It was an impossible situation.

Reflecting this fact, several district courts applying qualified immunity to prison officials' implementation of COVID-19 protocols have recognized that precedent did not provide fair notice to prison officials. A couple circuits have rejected claims against prison officials for allegedly mishandling COVID-19, while the circuits that sustained similar claims relied on an overly expansive view of *Helling*. In sum, the claims against the officials should have been dismissed.

A. COVID-19 was not merely a new communicable disease; rather, it spawned a global pandemic the likes of which neither the legal system nor prison officials had experienced and for which there was no prior precedent.

Federal and state officials are shielded from money damages unless a plaintiff "pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). Courts can take these two prongs of the qualified immunity analysis in any order. *Id.* (citing *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009)).

Only the second prong is at issue here, and the time of the alleged violation was August 2, 2020. Because the COVID-19 pandemic presented prison officials with a novel challenge, existing law could not have given reasonable officials "fair warning" that their responses to the pandemic may violate the Constitution. *United States* v. *Lanier*, 520 U.S. 259, 270–71 (1997).

Contrary to the Sixth Circuit's decision, COVID-19 was not like any other communicable disease. Instead, as numerous district courts have recognized in its wake, "[t]he COVID-19 pandemic was unprecedented" such that "no reasonable person would have anticipated [it]." *Ryan* v. *Nagy*, No. 2:20-cv-11528, 2021 WL 6750962, at *9 (E.D. Mich. Oct. 25, 2021). Particularly in the early months of the pandemic, "the issues and challenges posed by COVID-19 [were]

unlike any other in the modern era" because "COVID-19 is, by definition, a '*novel*' coronavirus." *Tate* v. *Ark. Dep't of Corr.*, No. 4:20-cv-558-BSM-BD, 2020 WL 7378805, at *11 (E.D. Ark. Nov. 9, 2020) (emphasis added). Because of the "unquestionably novel circumstances created by the COVID-19 pandemic in prison settings," "there simply was no clearly established precedent in 2020 and early 2021" on COVID-19. *Fennell* v. *Wetzel*, No. 4:21-cv-01717, 2023 WL 1456288, at *6 (M.D. Pa. Feb. 1, 2023). As such, "a reasonable official could not have known whether their COVID-19 response would have violated Plaintiff's Eighth Amendment rights." *Ryan*, 2021 WL 6750962, at *9.

In the very early months, "[t]he severity of the pandemic was not yet clear" to prison officials. *Lawson* v. *Clark*, No. 22-1193, 2023 WL 2051149, at *4 (E.D. Pa. Feb. 15, 2023). And as the pandemic lingered over the next several months, the situation remained unclear. By July 23, 2020, COVID-19 was still presenting "unique and unprecedented challenges [to] prison officials." *Jones* v. *Burt*, No. 1:21-cv-41, 2024 WL 1250986, at *1, *10 (W.D. Mich. Feb. 14, 2024). As the pandemic continued, the situation remained in flux. In 2022, COVID-19 remained "a novel virus that continue[d] to require evolving standards and practices in order to mitigate its effects." *Brewer* v. *Dauphin Cnty. Prison*, No. 1:21-cv-1291, 2022 WL 16855566, at *4 (M.D. Pa. Nov. 10, 2022). Under these circumstances, a consensus emerged that "there was no clearly established constitutional right to be housed in a Covid-free environment." *Harmon* v. *Harris*, No. 4:22-cv-00716, 2023 WL 1767578, at *4 (E.D. Ark. Jan. 10, 2023) (citations omitted).

Moreover, because "[t]he COVID-19 pandemic was a new and unusual issue," the recommendations of public health officials continually changed during the pandemic. *Ross* v. *Russell*, No. 7:20-cv-000774, 2022 WL 767093, at *14 (W.D. Va. Mar. 14, 2022). Because of the constantly evolving nature of the COVID-19 pandemic, there was "no precedent that would have made it clear to a reasonable official" what conduct constituted a reasonable response under the Eighth Amendment. *Brewer* v. *Dauphin Cnty. Prison*, No. 1:21-cv-1291, 2022 WL 16858014, at *10 (M.D. Pa. June 29, 2022) (internal quotations omitted). Circuit courts have reached inconsistent conclusions regarding COVID-19.[1]

1. Several circuits have rejected claims that prison officials mishandled the COVID-19 pandemic.

The Fifth and Eleventh Circuits have rejected challenges to prison officials' responses to the pandemic in the context of claims for injunctive relief. In April 2020, the Fifth Circuit decided *Valentine* v. *Collier*, 956 F.3d 797, 801 (5th Cir. 2020). Although COVID-19 "can pose a risk of serious or fatal harm to prison inmates," *id.*, the fact that communicable diseases exist and spread in a prison setting " 'do[es] not imply unconstitutional confinement conditions,' " *id.* (citation omitted). Because prison officials had established protocols to protect prisoners from COVID-19, they were likely to prevail on the merits, injunctive

[1] The vast majority of case law addressing COVID-19, particularly the application of qualified immunity, is at the district court level, reflecting the novel nature of the COVID-19 virus and evolving protocols to address it in a correctional setting.

relief was inappropriate, and the Fifth Circuit stayed the district court's injunction. *Id*. at 801–02.

The Eleventh Circuit reached much the same conclusion in *Swain* v. *Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020), adding that a lack of uniform enforcement of COVID-19 safety protocols "do[es] little to establish that the defendants were deliberately indifferent." The Sixth Circuit relied on similar reasoning in *Wilson* v. *Williams*, 961 F.3d 829, 845 (6th Cir. 2020), when it vacated a district court's injunction. The Sixth Circuit observed that prison officials' failure to make "full use of the tools available[,]"—"such as temporary release, furlough, or home confinement"—was irrelevant because prison officials are not required to "take every possible step to address a serious risk of harm." *Id*. at 844.

Taken together, these decisions show an underlying deference to prison officials' response to the COVID-19 pandemic. In particular, where officials have taken action to protect prisoners from COVID-19, it is unlikely that those same officials' conduct violates the Eighth Amendment, even where those officials could have, with hindsight, taken additional steps to address COVID-19.

2. Other circuits have erroneously held that there was a clearly established right for prisoners to live in an environment free of COVID-19.

Other circuits, in the context of claims for monetary damages, have found that prisoners had a clearly established right to be free from exposure to COVID-

19. The only published circuit decision discussing COVID-19 in the context of qualified immunity is the Ninth Circuit's opinion in *Hampton* v. *California*, 83 F.4th 754, 769 (9th Cir. 2023), which held that the right at issue was "an inmate's right to be free from exposure to a serious disease." The Sixth Circuit's unpublished decision in the present case and the Second Circuit's decision in *Nazario* v. *Thibeault*, No. 22-1657, 2023 WL 7147386, at *2 (2d Cir. Oct. 31, 2023), reached similarly flawed conclusions.

In reaching this conclusion, *Hampton*, *Nazario*, and the decision below relied on dicta from this Court's decision in *Helling*. But *Helling* had nothing to do with communicable diseases—it concerned whether a single prisoner's exposure to excessive environmental tobacco smoke (ETS) could violate the Eighth Amendment. *Id*. at 27–28. The plaintiff claimed his cellmate smoked five packs of cigarettes a day, exposing him to an unreasonable risk of harm. *Id*. at 28–29. This Court held that exposure to ETS violated the Eighth Amendment. *Id*. at 35.

In its discussion, this Court commented that prison officials cannot be deliberately indifferent to "the exposure of inmates to a serious, communicable disease." *Id*. at 33. But this comment was not central to the holding in *Helling*. Accordingly, it is dicta and thus not binding. *Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 645 (2022) ("[T]he Court's dicta, even if repeated, does not constitute precedent."). Viewing the COVID-19 pandemic through the lens of the facts at issue in *Helling*, the latter "does not give clear guidance" to prison officials regarding how they should

handle COVID-19. *Shepard* v. *Artis*, No. 1:22-cv-326, 2023 WL 6394064, at *6 (W.D. Mich. Aug. 29, 2023).

Moreover, *Helling* concerned a single prisoner who was assigned a single cellmate who smoked five packs a day of cigarettes. 509 U.S. at 28. In contrast, COVID-19 does not present prison officials with such an isolated issue. It is an easily communicable disease that spreads among people by the mere act of breathing. Thus, the officials running the prison system in *Helling* were in a vastly different position to protect Helling than the public officials sued here, who were charged with mounting a facility-wide policy to protect all inmates.

B. To the extent *Helling* established a right, the Sixth Circuit analyzed the issue at too high a level.

Even if *Helling* had established a constitutional right to be free from serious communicable diseases, such that prisoners have a clearly established right in the context of COVID-19, the Sixth Circuit erred by analyzing the issue at too high a level, contrary to this Court's "longstanding principle that 'clearly established law' should not be defined at a high level of generality." *White*, 580 U.S. at 79.

By drawing out a principle of generality and imposing such a broad duty on prison officials, prison officials will be held to an unreasonable and impossible standard, having their decisions scrutinized with the benefit of hindsight. In reality, the prison officials were doing their level best to combat COVID-19 in a prison setting. Qualified immunity does not

countenance such intrusions into prison officials' decision-making.

1. The right at issue must be analyzed in the context of a plaintiff's actual allegations.

Helling does not stand for the vague and generic proposition that prison officials must prevent prisoners from becoming infected with a communicable disease. It merely establishes a general proposition that must be analyzed in the specific context of the plaintiff's allegations and the circumstances faced by governmental officials.

This principle is supported by *Gasaway* v. *Vigo County Sheriff's Department*, 672 F. Supp. 3d 651, 658–59 (S.D. Ind. 2023), where the court found that, "[a]lthough COVID-19 was a new virus," prison officials nonetheless have "the duty to protect inmates from needless exposure to a serious illness," relying on *Helling*. Notably, however, this holding was rightly not the end of the court's analysis. Instead of merely concluding, as did the Sixth Circuit here, that the general right to protect from exposure was at issue, the court analyzed the matter in the context of the plaintiff's specific allegations. The plaintiff alleged that the sheriff did not provide adequate cleaning supplies, did not implement a universal mask rule prior to December 2020, and failed to provide sufficient COVID-19 tests. *Id.* at 659. Because neither the plaintiff nor the court found any case law even suggesting that such rights were clearly established, the sheriff was entitled to qualified immunity. *Id.* See also *Housely* v. *Plasse*, 688 F. Supp. 3d 830, 837 (S.D. Ind. 2023).

2. Analyzing the right at issue at the appropriate level of specificity, the right at issue was not clearly established.

The Sixth Circuit found that, based on *Helling* and *Hampton*, "it was clearly established before the onset of the COVID-19 pandemic that prison officials cannot exhibit deliberate indifference to an inmate's exposure to dangerous communicable diseases." App. 5a. From that precept, the Sixth Circuit held that "a reasonable prison official would have understood that, by purposefully commingling infected prisoners with uninfected prisoners, as Gordon alleged here, she was violating the Eighth Amendment." App. 6a. But this generic analysis does not account for the exceptional challenges confronted by prison officials in their efforts to combat the pandemic. And, as stated above, it also bears little relationship to Gordon's actual allegations against Burt and Steward.

The prison context added significant complexity to the already difficult challenges presented by Covid-19. Prisons, by their very nature, are congregate settings, housing a population whom the legal system has determined to be too dangerous to freely mingle with outside society due to their violation of society's most fundamental rules. At the same time, prison walls encompass very limited space, making social distancing all but impossible and narrowing the options for completely isolating infected prisoners, close contacts, and non-infected prisoners. These challenges were enhanced by security concerns not faced by other institutions.

In addition, the right asserted by Gordon must be analyzed in the context of the allegations contained in his complaint. Gordon did not allege that Burt and Steward intentionally commingled "infected prisoners with uninfected prisoners." App. 6a. Rather, he alleged that, on August 2, 2024, Burt and Steward moved prisoners who had come into close contact with COVID-19-positive prisoners into his housing unit, which had only two industrial fans for ventilation, and that he was housed in a "dormitory-style congregate living space" that compromised his ability to follow social distancing protocols. *Id.* at 60a–61a. According to Gordon, he caught COVID-19 as a result. *Id.* at 61a.

The right at issue, properly reflecting Gordon's allegations, is whether it was clearly established, as of August 2, 2020, that (1) placing close-contact COVID-19 prisoners with other non-close-contact prisoners in the same housing unit violated the Eighth Amendment, and (2) housing non-close-contact prisoners in a dormitory-style setting with less than six feet of social distancing between bunks and only floor fans for ventilation violated the Eighth Amendment.

There is no case law establishing that prisoners who are negative for COVID-19 have a clearly established right to be housed separately from prisoners who have come into close contact with prisoners who have tested positive for COVID-19. Nor is there any clearly established case law holding that housing prisoners in a dormitory-style unit with less than six feet of distance between bunks and only floor fans for ventilation violates the Eighth Amendment. Gordon found no case law on point. Neither did the district court. And neither did the Sixth Circuit.

The Sixth Circuit overlooked the unprecedented circumstances presented by the COVID-19 pandemic within correctional facilities, including an inherently congregate setting, a dangerous population, and security concerns. In so doing, the exceptions to qualified immunity swallow the protections it offers, subjecting prison officials to the burdens of discovery and trial when a prisoner contracts COVID-19 or any other communicable disease. This establishes a rule of law contrary to this Court's qualified immunity precedent, contrary to its Eighth Amendment case law, and contrary to common sense. Accordingly, this Court should grant Burt and Steward's petition or otherwise provide peremptory relief.

CONCLUSION

For these reasons, this Court should grant this petition or otherwise provide relief.

Respectfully submitted,

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