No. 24-73

IN THE
Supreme Court of the United States

SHERRY L. BURT, ET AL.,

Petitioners,

v.

JIMMIE LEON GORDON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Sixth Circuit, in an unpublished memorandum, appropriately applied clearly established law to deny qualified immunity at the motion to dismiss stage to prison officials who exhibited deliberate indifference to the risk posed by COVID-19, when they ignored procedures developed by the Michigan Department of Corrections requiring them to segregate COVID-positive and close-contact prisoners?

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INTRODUCTION

In the spring of 2020, the Michigan Department of Corrections (MDOC) developed procedures aimed at limiting the spread of COVID-19 within its facilities, including segregating COVID-positive prisoners and close contacts of COVID-positive prisoners from the rest of the population. But, contrary to these procedures, Petitioners moved close-contact prisoners into Respondent Jimmie Gordon's unit, without isolating them or social distancing. Then several days later, they moved Respondent and the other "natives" from his unit into the gymnasium, which was converted into dormitory-style housing, with bunk beds placed less than six feet apart, and with improper ventilation. Respondent developed COVID-19 symptoms and tested positive for the virus.

Respondent sued Petitioners under § 1983, alleging that Petitioners acted with deliberate indifference in the face of the risk posed by COVID-19 when they acted in disregard of MDOC's COVID-19 protocols. The district court dismissed the complaint for failure to state an Eighth Amendment claim, and, in an unpublished order, the Sixth Circuit reversed. The district court then dismissed the complaint on qualified immunity grounds, and the Sixth Circuit reversed again, in a second unpublished order, holding that it was clearly established "that prison officials cannot exhibit deliberate indifference to an inmate's exposure to dangerous communicable diseases." Pet. App. 5a (citing *Helling v. McKinney,* 509 U.S. 25, 33 (1993)).

Now, rather than proceed to discovery, Petitioners ask for this Court's review. Yet they don't allege a circuit split—nor could they, as the Sixth Circuit's decision is consistent with the two other circuits to have

reached this question. And the court of appeals' unpublished decision below is correct—as it straightforwardly applied clearly established law. Petitioners' arguments to the contrary boil down to little more than an assertion that qualified immunity is appropriate because COVID-19 was "novel." But this persnickety view of qualified immunity runs headlong into this Court's precedents. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."). The Court should deny certiorari.

STATEMENT OF THE CASE

In March of 2020, in response to the rapid spread of COVID-19 in prisons and jails, Michigan Governor Gretchen Whitmer issued an Executive Order that, among other things, required MDOC to implement policies, consistent with the guidelines set by the Centers for Disease Control and Prevention (CDC), to slow the spread of the virus in Michigan's prisons. Pet. App. 57a. In particular, the CDC had issued lengthy and detailed guidance on managing the coronavirus in correctional facilities, noting the heightened potential for COVID-19 to spread and the need for social distancing. Pet. App. 58a-59a. Based on these guidelines, MDOC developed procedures to "segregate COVID-positive and close-contact prisoners from other prisoners and to sanitize areas occupied by close-contact prisoners." Pet. App. 38a.[1]

[1] Under CDC guidelines, "close contact" means that a person was "less than 6 feet away from someone with confirmed or suspected

On July 27, 2020, Petitioner Sherry Burt, then the warden at Muskegon Correctional Facility (MCF) in Muskegon, Michigan, notified the incarcerated individuals at MCF, including Respondent Jimmie Leon Gordon, that a person in the facility had tested positive for COVID-19. Pet. App. 59a. A few days later, Petitioners Burt and Deputy Warden Darrell Steward began moving all incarcerated individuals from the infected individual's housing unit, Unit 2, into Respondent's housing unit, Unit 1. Pet. App. 59a-60a. Petitioners moved all individuals from Unit 2 to Unit 1, including those who were in close contact with the infected individual. Pet. App. 59a. These close-contact individuals were not isolated within the population; they were "authorized to utilize Restrooms, Showers, [the] T.V. Room, and Day-room" in Respondent's unit. Pet. App. 60a. There were no sanitizing or social distancing policies implemented. *Id*. Respondent and other incarcerated individuals began to grieve to Petitioners out of fear they would contract COVID-19. *Id*.

After another few days—during which the close-contact prisoners continued to be housed alongside people in the previously-uninfected unit—Petitioners moved the Respondent and other Unit 1 "natives" to the gymnasium, which they converted into dormitory-style housing. Pet. App. 60a. The gymnasium contained bunkbeds positioned directly next to each other, less than six feet apart, with improper ventilation. Pet. App. 61a. Again, Respondent grieved, reiterating his fear that he was at risk of contracting COVID-19. *Id*. A prison official replied that Respondent could either stay in the gymnasium or be placed

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COVID-19" for "a cumulative total of 15 minutes or more over a 24-hour period." Pet. App. 32a.

in "the hole." *Id*. The officer stated that he was "just following orders given [by] MCF administration." *Id*. Unable to cope with the isolation of solitary confinement, Respondent had no choice but to remain in the gymnasium. *Id*. After about three or four days, Respondent developed COVID-19 symptoms, and he tested positive on August 4, 2020. *Id*.

Respondent, litigating pro se, filed a § 1983 complaint against Petitioners in the United States District Court for the Western District of Michigan. Pet. App 55a. As relevant here, Respondent claimed Petitioners violated his Eighth Amendment rights by exhibiting deliberate indifference to the risk of him contracting COVID-19. Pet. App. 64a.

In pre-service screening under the Prison Litigation Reform Act, the district court dismissed Respondent's complaint for failure to state an Eighth Amendment claim. Pet. App. 44a. The district court held that while the risk of COVID-19 satisfied the objective prong of the Eighth Amendment deliberate indifference test, Respondent's claim did not satisfy the subjective prong because he could not show that Petitioners acted in reckless disregard of the risk of him contracting COVID-19. Pet. App. 33a.

Respondent, still proceeding pro se, appealed. Pet. App. 30a. In this first appeal, the Sixth Circuit issued an unpublished order holding that the district court erred in dismissing Respondent's claim because his allegations—that Petitioners "disregarded [MDOC] procedures by purposefully housing Respondent with close-contact prisoners and allowing those prisoners to comingle freely with other prisoners"—were sufficient to meet the subjective prong of the deliberate indifference test. Pet. App. 38a.

On remand, after being served, Petitioners moved to dismiss, attempting to relitigate whether Respondent stated an Eighth Amendment claim, despite the Sixth Circuit's ruling that he had. Pet. App. 21a. They also argued they were entitled to qualified immunity, asserting that even if Respondent stated a plausible constitutional violation, the right was not clearly established. Pet. App. 20a.

The magistrate judge noted that Petitioners' merits argument was precluded by the law of the case doctrine because the court of appeals "ha[d] already determined that Plaintiff adequately state[d] an Eighth Amendment deliberate indifference claim." Pet. App. 21a. However, it recommended granting Petitioners' motion on qualified immunity grounds, reasoning that because the "novel coronavirus" created "unprecedented challenges" for prison officials, the law was not clearly established. Pet. App. 24a. Over Respondent's objections, the district court adopted the magistrate's report and recommendation and dismissed the case on qualified immunity grounds, likewise relying on the "unprecedented" and "novel" nature of the virus. Pet. App. 11a-12a.

Again, Respondent appealed pro se to the Sixth Circuit. Pet. App. 3a. And again, in another unpublished decision, the court of appeals reversed the district court's dismissal order. Pet. App. 30a. Because the Sixth Circuit had previously concluded that Respondent stated an Eighth Amendment violation, only the clearly-established prong of qualified immunity was at issue in this second appeal. Pet. App. 5a.

On that question, the court of appeals concluded that, "notwithstanding the novelty of the coronavirus," it was clearly established before the COVID-19 pandemic began that prison officials cannot exhibit deliberate indifference to an incarcerated individual's "exposure to dangerous communicable diseases." Pet. App. 5a. The Sixth Circuit relied on this Court's decision in *Helling v. McKinney,* 509 U.S. 25, 33 (1993), in which the Court held that prison officials may not "be deliberately indifferent to the exposure of inmates to a serious communicable disease on the grounds that the complaining inmate shows no serious current symptoms." Pet. App. 5a. Although the court of appeals acknowledged *Helling* arose outside of the COVID-19 context, it reasoned that *Helling*, as well as *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976), and *Farmer v. Brennan*, 511 U.S. 825, 833 (1994), clearly established that prison officials have a duty to protect incarcerated individuals from involuntary exposure to dangerous prison conditions like COVID-19. Pet. App. 5a. The Sixth Circuit also relied on its own precedent that clearly established that prison officials cannot be deliberately indifferent to the risk of prisoners' future health problems. Pet. App. 5a (citing *Brown v. Bargery*, 207 F.3d 863, 867-68 (6th Cir. 2000)). Finally, the court of appeals noted that the Ninth Circuit's decision in *Hampton v. California*, 83 F.4th 754, 760 (9th Cir. 2023), was consistent with its holding. *See* Pet. App. 5a. Because the right was clearly established, the Sixth Circuit vacated the district court's dismissal order and remanded the case for further

proceedings. Pet. App. 6a. Petitioners now seek certiorari.

REASONS FOR DENYING THE PETITION

I. The courts of appeals are aligned on this issue.

To start, it is worth emphasizing that this case is not about whether Respondent adequately alleged that Petitioners violated his Eighth Amendment right to be protected from a contagious disease like COVID-19. The Sixth Circuit held that he had, and Petitioners never challenged that holding—and do not challenge it now. The only question, then, is whether the law requiring prison officials to act to protect incarcerated individuals from a contagious disease was clearly established before COVID-19.

The only circuits to reach the issue, the Second and the Ninth, agree with the Sixth Circuit below and have held that defendants are not entitled to qualified immunity if they exhibit deliberate indifference to an incarcerated individual's risk of contracting COVID-19. In *Hampton v. California*, 83 F.4th 754, 760 (9th Cir. 2023), the spouse of a deceased incarcerated individual sued corrections officials, alleging they violated her husband's Eighth Amendment rights when, after a COVID-19 outbreak in California's Institution for Men (CIM), they transferred 122 incarcerated individuals from CIM to San Quentin State Prison. This transfer ultimately led to an outbreak at San Quentin with over 2,000 positive COVID-19 cases and 26 deaths, including Mr. Hampton's. *Id.* The Ninth Circuit affirmed the district court's rejection of defendants' motion to dismiss on qualified immunity grounds, holding that an incarcerated person's "right

to be free from exposure to a serious disease" was clearly established. *Id.* at 769. The court of appeals relied on this Court's decision in *Helling*, which held that an incarcerated person had stated a deliberate indifference claim by alleging that prison officials had exposed him to high levels of secondhand tobacco smoke. *Hampton*, 83 F.4th at 769. This Court denied certiorari in *Hampton*. *Diaz v. Polanco*, 144 S. Ct. 2520 (2024).

Similarly, the Second Circuit considered the issue in *Nazario v. Thibeault*, No. 22-1657, 2023 WL 7147386 (2d Cir. Oct. 31, 2023). In *Nazario*, the plaintiff alleged that correctional officers violated his constitutional rights by transferring him to a housing block with COVID-19 positive individuals. *See Nazario v. Thibeault*, No. 3:21-CV-216-VLB, 2022 WL 2358504, at *2 (D. Conn. June 30, 2022). The plaintiff eventually contracted COVID-19 and sued corrections officials, claiming they were deliberately indifferent to his risk of developing COVID-19. *Id.* at *4. The Second Circuit affirmed the district court's denial of a motion to dismiss on qualified immunity grounds, stating that *Helling* clearly established that prison officials may not "be deliberately indifferent to the exposure of inmates to a serious, communicable disease" and concluding that "material issues of fact preclude[d]" qualified immunity "on the present record." *Nazario*, 2023 WL 7147386 at *2. In short, the two circuits to have previously reached the question presented to the Sixth Circuit have likewise held that clearly established law provided sufficient notice to prison officials that they could not act with deliberate indifference to the risk posed by COVID-19.

Petitioners apparently understand this; the word "split" is found nowhere in the petition. Still, to gin up some semblance of a circuit conflict, Petitioners point to "several circuits" that "have rejected claims that prison officials mishandled the COVID-19 pandemic." Pet. 12. But the decisions Petitioners point to arise in the very different circumstances of district court grants of preliminary injunctions relating to enhanced COVID-19 protocols. *Valentine v. Collier*, 956 F.3d 797, 799 (5th Cir. 2020) (staying a preliminary injunction that "regulate[d] in minute detail the cleaning intervals for common areas, the types of bleach-based disinfectants the prison must use, the alcohol content of hand sanitizer inmates must receive," and other requirements that "'[go] beyond' the recommendations of the Centers for Disease Control and Prevention"); *Swain v. Junior*, 958 F.3d 1081, 1085 (11th Cir. 2020) (staying preliminary injunction pending appeal that required Miami-Dade County to "employ numerous safety measures to prevent the spread of COVID-19" in the Metro West Detention Center and "impose[d] extensive reporting requirements"). Indeed, the fact that Petitioners cite a Sixth Circuit opinion in this posture, Pet. 13, should put the lie to any claim of a split on the *actual* issue in this case, *Wilson v. Williams*, 961 F.3d 829, 833 (6th Cir. 2020) (vacating preliminary injunction requiring BOP to evaluate potential transfer and release of incarcerated individuals to stop the spread of COVID-19.).

These cases each turned on the plaintiffs' likelihood of success on the merits—and recall that Petitioners cannot and do not challenge the merits here. *See Valentine*, 956 F.3d at 801 ("TDCJ is likely to prevail on the merits of its appeal" for "two reasons.");

Swain v. Junior, 961 F.3d 1276, 1294 (11th Cir. 2020) (concluding plaintiffs failed to meet requirement "to show a substantial likelihood of success on the merits of their constitutional claim" and vacating preliminary injunction); *Wilson*, 961 F.3d at 840-41 (holding plaintiffs unlikely to prevail on the merits where BOP reasonably responded to the risk posed by COVID-19 by, among other things, screening individuals for the virus, isolating and quarantining infected individuals, and limiting movement and group gatherings). On the actual issue the Sixth Circuit ruled on below, the few circuits to have weighed in are aligned.

II. The decision below is correct and consistent with this Court's precedent.

A. The Sixth Circuit's unpublished decision correctly held the right was clearly established.

In addition to not presenting a circuit split, the decision below is correct and consistent with this Court's precedent. The Sixth Circuit held—in an unpublished order—that "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." Pet. App. 5a. The court based this (nonprecedential) holding on *Helling*, 509 U.S. 25, where this Court held that incarcerated individuals have a constitutional right to be free from exposure to environmental tobacco smoke that poses "an unreasonable risk of serious damage to [their] future health," *id.* at 35, and observed that "prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease," regardless of whether he had yet to manifest symptoms, Pet App. 5a (quoting *Helling*, 509 U.S. at

33). The Sixth Circuit noted that the Ninth Circuit's decision in *Hampton* likewise concluded that "*Helling* sent a clear message to prison officials: The Eighth Amendment requires them to reasonably protect inmates from exposure to serious diseases." Pet. App. 5a.

"Although *Helling* dealt specifically with prison officials' deliberate indifference to the health risks posed by an inmate's exposure to environmental tobacco smoke," the Sixth Circuit went on, the principles of *Helling,* as well as *Estelle*, 429 U.S. at 103-04, and *Farmer*, 511 U.S. at 833, "clearly established the legal principle that, because prisoners have limited or no ability to protect themselves, prison officials have a duty to protect them from involuntary exposure to dangerous prison conditions," Pet. App. 5a. Not only that, but the court of appeals cited its own precedent establishing that prison officials cannot be deliberately indifferent to the risk of prisoners' future health problems. Pet. App. 5a (citing *Brown v. Bargery*, 207 F.3d 863, 867-68 (6th Cir. 2000)). Ultimately, the Sixth Circuit concluded that "a reasonable prison official would have understood that she could not exhibit deliberate indifference" to the risk posed by COVID-19, and that "by purposefully commingling infected prisoners with uninfected prisoners," she was violating the Eighth Amendment. Pet. App. 6a. This straightforward reading of this Court's and the court of appeals' precedent is correct.

B. Petitioners' arguments to the contrary are unpersuasive.

In the face of the Sixth Circuit's commonsense application of clearly established law, consistent with

the other circuits, Petitioners make two principal arguments, neither of which is persuasive.

First, Petitioners suggest that because COVID-19 was "unprecedented" and "novel," the law could not have been clearly established. *See* Pet. i, 2, 11, 19 ("unprecedented"); Pet i, 2, 8, 10, 11, 12 n.1 ("novel"). Rubbish. The principle that prison officials have an obligation to protect incarcerated individuals from communicable diseases is not new. *See* Pet. App. 5a ("[N]otwithstanding 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."). *Helling* is sufficiently clear on this point. It held that the plaintiff "state[d] a cause of action under the Eighth Amendment by alleging that petitioners ha[d], with deliberate indifference, exposed him to levels of [environmental tobacco smoke] that pose[d] an unreasonable risk of serious damage to his future health." 509 U.S. at 35. Substitute one toxic airborne substance for another, and you have this case.

What is more, *Helling* itself calls for this very mode of analysis; it analogized between different types of risks faced by prisoners. *Helling* cited to *Hutto v. Finney*, 437 U.S. 678 (1978), an earlier decision of this Court acknowledging an Eighth Amendment claim where prisoners "were crowded into cells" where "some of them had infectious maladies such as hepatitis and venereal disease." *Helling*, 509 U.S. at 33. *Helling* also reasoned that a prisoner "could successfully complain about demonstrably unsafe drinking water without waiting for an attack of dysentery," and

explained "that prison officials may be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that" symptoms had yet to manifest. *Id.* This all to say that this Court in *Helling* understood exposure to environmental tobacco smoke, "infectious maladies," dysentery through contaminated water, and "communicable diseases" to all be of a piece—conditions of confinement that could lead to Eighth Amendment liability, if imposed with deliberate indifference. *Id.* at 32-33.[2] In short, Petitioners' reading of *Helling*—which would confine *Helling* to its facts—conflicts with *Helling* itself.

Second, and relatedly, Petitioners suggest that the Sixth Circuit drew too broad a rule from *Helling* for qualified immunity purposes, and that in order to defeat qualified immunity, Respondent needed to point to prior caselaw on "placing close-contact COVID-19 prisoners with other non-close contact prisoners" and "housing non-close-contact prisoners in a dormitory-style setting with less than six feet of social distancing between bunks." Pet. 18. In Petitioners' view, without prior caselaw finding constitutional violations on

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[2] Petitioners attempt to characterize the "communicable diseases" line in *Helling* as dicta. Pet. 14. Not so. *Helling*'s reference to "communicable diseases" was crucial to the holding that prison officials cannot exhibit deliberate indifference to prisoners' risk of future health problems, and therefore binding law. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). At any rate, Petitioners do not dispute *Helling*'s mode of analysis, which is that all dangerous environmental conditions can lead to Eighth Amendment claims if sufficiently serious and approached with deliberate indifference. *See supra*.

these specific COVID-19 issues, how were prison officials supposed to have known they could not act with deliberate indifference? This argument would effectively allow prison officials to do *nothing* in the face of any new disease—or, more specifically, a disease for which there hasn't yet been a published case regarding deliberate indifference—and escape liability. And it is just another—equally unpersuasive—way of asserting their "novel = no liability" argument. *See supra* at 12.

Anyway, this is just not how qualified immunity works. Respondent does not need to find a case that presents an identical factual scenario to his situation, but merely find a case that would put any reasonable officer on notice that his or her conduct is unlawful. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of the pre-existing law the unlawfulness must be apparent." (citation omitted)). More than that even, this Court has "ma[d]e clear that officials can still be on notice that their conduct violates established law *even in novel factual circumstances*." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (emphasis added) (citing *United States v. Lanier*, 520 U.S. 259 (1997)). *Helling* provided enough guidance to a reasonable prison official, who "would have understood that, by purposefully commingling infected prisoners with uninfected prisoners, as [Respondent] alleges here, she was violating the Eighth Amendment." Pet. App. 6a.

It's also worth noting that this case arose based on Petitioners' (ill-) considered decisions to "disregard[]" MDOC's own "published COVID-19 social distancing

guidelines by purposefully housing inmates in dormitory-style quarters and failing to isolate infected prisoners," Pet. App. 2a, not a "split-second judgment[ ]" in a "tense, uncertain, and rapidly evolving" situation, where "specificity is especially important," *Kisela v. Hughes*, 584 U.S. 100, 103 (2018). Putting aside the soundness of the doctrine as a whole,[3] qualified immunity makes the *least* sense in a situation like this one—where Petitioners had the luxury of time and deliberation and still chose to ignore MDOC's own COVID-19 guidelines and subject Respondent to a risk of harm. *See Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting denial of certiorari) ("[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting?"); *Villareal v. City of Laredo, Tex.*, 94 F.4th 374, 406 (5th Cir. 2024) (Willett, J., dissenting) (Judge Willett, joined by five of his colleagues, concluding that qualified immunity is not appropriate where no official was compelled to make

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[3] *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Price v. Montgomery County, Kent.*, 144 S. Ct. 2499, 2500 n.2 (2024) (Sotomayor, J., respecting denial of certiorari) (citing "recent scholarship [that] details that the 1871 Civil Rights Act included language abrogating common-law immunities that was, for unknown reasons, omitted from the first compilation of federal law" that "reinforces why, at a minimum, this immunity doctrine should be employed sparingly"); *Green v. Thomas*, __ F. Supp. __, 2024 WL 2269133, *18-26 (S.D. Miss. 2024) (compiling judicial and scholarly critiques of qualified immunity and outlining the textual, democratic, and policy problems with the doctrine).

a "split-second" judgment), *vacated on other grounds by Villareal v. Alaniz*, ___ S. Ct. ___, 2024 WL 4486343 (2024).

III. This issue is not important enough to warrant this Court's review, and at any rate is a poor vehicle.

In addition to being splitless and correct, the issue in this case does not warrant this Court's attention, and this is a poor vehicle.

This case is relatively small ball—it presents no constitutional questions, only a question of the court of appeals' application of qualified immunity. Recall, the Sixth Circuit "previously concluded that Gordon stated an Eighth Amendment violation," Pet. App. 5a, and the (unpublished, nonprecedential) opinion below addressed only whether that violation was clearly established.

What is more, the lower courts will not meaningfully benefit from this Court's wisdom on this question, since the COVID-19 pandemic has ended, and litigation arising therefrom has largely already worked its way through the court system, as evidenced by the court of appeals decisions on this issue. *See supra* at 7-10. And although several have been presented for review, this Court has repeatedly denied petitions for certiorari related to COVID-19 prison policies. *See Hampton v. California*, 83 F.4th 754 (9th Cir. 2023), *cert. denied sub nom. Diaz v. Polanco*, 144 S. Ct. 2520 (2024); *Pinson v. Carvajal*, 69 F.4th 1059 (9th Cir. 2023), *cert. denied sub nom. Sands v. Bradley*, 144 S.

Ct. 1382 (2024); *Mays v. Dart*, 974 F.3d 810 (7th Cir. 2020) *cert. denied* 142 S. Ct. 69 (2021).[4]

This case in particular is not a good vehicle. At the outset, it is unpublished and lacks precedential value. Also, since this case arises in a motion to dismiss posture, it remains to be seen whether liability is even on the table absent qualified immunity. Indeed, Petitioners will be free to present their arguments about the "significant complexity," Pet. 17, that COVID-19 added to the prison context at summary judgment, and potentially at trial (should the case make it that far), since the deliberate indifference standard bakes in the sufficiency of defendants' responses given the circumstances. Simply put, this case would not be worth an extension of this Court's limited resources.

CONCLUSION

The Court should deny certiorari.

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[4] Not only has this Court consistently denied cert in prison conditions COVID-19 cases, it has also recently declined to hear a series of deliberate indifference cases brought by correctional officers who were denied qualified immunity. *See Crittindon v. LeBlanc*, 37 F.4th 177 (5th Cir. 2022), *cert. denied*, 144 S. Ct. 90 (2023); *Welters v. Minnesota Dep't of Corr.*, 982 N.W.2d 457 (Minn. 2022), *cert. denied sub nom. Emily v. Welters*, 144 S. Ct. 74 (2023); *Smith v. Linthicum*, No. 21-20232, 2022 WL 7284285, (5th Cir. Oct. 12, 2022), *cert. denied*, 144 S. Ct. 70 (2023); *Paugh v. Uintah Cnty.*, 47 F.4th 1139 (10th Cir. 2022), *cert. denied sub nom. Anderson v. Calder*, 143 S. Ct. 2658 (2023).

Respectfully submitted,

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