No. 24-73

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

REPLY BRIEF

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INTRODUCTION

Respondent Jimmie Leon Gordon asks this Court to pay no attention to the upheaval caused by the COVID-19 pandemic and to sweep under the rug the unprecedented challenges faced by prison officials. After all, he says, "the COVID-19 pandemic has ended," and cases involving other infectious diseases are close enough to have put Burt and Steward on notice. Br. in Opp. 12, 16. But the COVID-19 pandemic was a unique public health crisis that created unprecedented challenges—especially given the evolving guidance and the limitations of the correctional setting. Gordon makes no attempt to analogize to a similar event. And sufficiently similar factual scenarios matter for the clearly established prong of qualified immunity.

The novel nature of the COVID-19 pandemic renders inapplicable the pre-COVID prison cases on which Gordon relies—tobacco smoke from a cellmate and dungeonlike conditions including shared mattresses and dangerously low caloric offerings. The handful of COVID-19 circuit cases on which Richards relies are likewise distinguishable from the housing decisions challenged here.

This Court should decline Gordon's entreaty that close enough—Gordon asserts that the case law "provided enough guidance"—is good enough to have put Burt and Steward on notice. Precedent need not be identical, but Richards' case law does not make everything clear. Qualified immunity shields officials against claims of mistakes (in hindsight) made when responding to a health crisis like no other.

ARGUMENT

I. The unprecedented nature of the COVID-19 pandemic rendered case law discussing communicable diseases in prisons insufficient to put reasonable government officials on notice regarding what conduct might violate the Eighth Amendment.

The gravamen of the clearly established prong of the qualified immunity test is whether reasonable government officials have been given sufficient notice as to what conduct violates the Constitution. But the law cannot be "clearly established" in a way that meaningfully provides guidance to prison officials in light of an unprecedented worldwide pandemic. After all, qualified immunity "protects government officials . . . insofar as their conduct does not violate clearly established . . . rights *of which a reasonable person would have known*." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009) (cleaned up; emphasis added). This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

"Clearly established" means that, at the time of the officer's conduct, the law was sufficiently clear that *every* reasonable official would understand that her conduct is unlawful. *D.C.* v. *Wesby*, 583 U.S. 48, 63 (2018). In other words, "existing law must have placed the constitutionality of the officer's conduct '*beyond debate*.' " *Id*. (emphasis added). "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341.

In determining whether a right is clearly established, courts must consider the existence of binding precedent in "the specific context of the case, not as a broad general proposition." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (internal quotations omitted). This requires a court to define the right at issue "at the appropriate level of specificity." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999). Although Gordon need not show that "the very action in question has previously been held unlawful" in order to overcome qualified immunity, *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987), he must show that "[its] contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating [a clearly established right]." *Plumhoff* v. *Rickard*, 572 U.S. 765, 778–79 (2014).

This Court has repeatedly emphasized "the longstanding principle that 'clearly established law' should not be defined at a high level of generality." *White* v. *Pauly*, 580 U.S. 73, 79 (2017) (vacating and remanding Tenth Circuit decision for failure to conduct appropriate "clearly established" analysis) (internal quotations and citation omitted); *Kisela* v. *Hughes*, 584 U.S. 100, 104 (2018) (reversing Ninth Circuit for same reason); *City of Escondido*, *Cal.*, v. *Emmons*, 586 U.S. 38, 42–43 (2019) (same); *Rivas-Villegas* v. *Cortesluna*, 595 U.S. 1, 5–6 (2021) (same).

The court below held 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)). We know that under the Eighth Amendment correctional facilities

must " 'take reasonable measures to guarantee the safety of the inmates.' " *Farmer* v. *Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson* v. *Palmer*, 468 U.S. 517, 526–27 (1984)). But the Sixth Circuit's holding on the clearly established prong leads to the question of what types of actions would constitute deliberate indifference to an inmate's exposure to dangerous communicable diseases, and whether, in the face of a formerly unknown disease where the information was rapidly evolving and the breadth of the exposure overwhelming, these prison officials were on notice that they could not put a close-contact prisoner in a unit with a non-close-contact prisoner (such as Gordon) or house close-contact and non-close-contact prisoners in a gymnasium converted into a dormitory.

Gordon relies on Burt and Steward's alleged violation of MDOC's COVID-19 protocols, which were largely based on guidelines from the United States Centers for Disease Control and Prevention. App. 57a–61a. But failing to follow state law or administrative policies does not abrogate Burt and Steward's qualified immunity because, in a 42 U.S.C. § 1983 case, "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some [state] statutory or administrative provision." *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984). As such, MDOC policies could not have put Burt and Steward on notice for purposes of qualified immunity.

A. Because of the novel nature of the COVID-19 pandemic, the pre-COVID-19 case law on which Gordon relies is distinguishable.

Gordon cites to several pre-COVID-19 cases, all of which are facially distinguishable. In the context of the pandemic, they have no application at all to Gordon's allegations. As discussed in the petition, see page 14, *Helling* v. *McKinney*, 509 U.S. 25 (1993), considered environmental tobacco smoke; its discussion of communicable diseases was dicta.

Even if *Helling*'s statements about communicable diseases were not dicta, *Helling* remains inapplicable. In reaching its conclusion regarding environmental tobacco smoke, this Court stated, "Nor can we hold that prison officials may not be deliberately indifferent to the exposure of inmates to a serious, communicable disease on the ground that the complaining inmate shows no serious current symptoms." *Id*. at 33. But context matters. In *Helling*, the plaintiff claimed his cellmate exposed him "to levels of [environmental tobacco smoke] that posed an unreasonable risk of harm to his future health." 509 U.S. at 29. In contrast here, Gordon never alleged that he was placed in a cell with a COVID-19-positive prisoner, or even that he was placed in a cell with a prisoner who was in close contact with someone who was COVID-19 positive. App. 12a, 27a. And it cannot be denied that the circumstance of protecting a *single* inmate from being trapped in a cell with a five-pack-a-day smoker, *Helling*, 509 U.S. at 28, is miles from protecting *the entire prison population* from an infectious disease easily spread via respiration. The fix for the prisoner in *Helling* was to move him elsewhere; given the

ubiquitous nature of COVID-19 during that time, such a straightforward solution was not available.

Gordon attempts to bolster *Helling*, arguing that by citing *Hutto* v. *Finney*, 437 U.S. 678 (1978), *Helling* applies to the COVID-19 context. Not so. In *Hutto*, this Court confronted two issues: (1) the constitutionality of punitive isolation as practiced in the Arkansas prison system; and (2) the availability of attorney fees to a prevailing plaintiff in a case brought under § 1983. *Hutto*, 437 U.S. at 681–82, 689–90. Neither issue has any bearing on the present case. This Court mentioned that some of the 10 to 11 prisoners also "suffered from infectious diseases" as one of many conditions in Arkansas' punitive isolation, which included sharing an 8' by 10' cell, consuming under 1,000 calories a day, and sharing mattresses. *Id.* at 682. That portion of *Hutto* constitutes dicta. See *Oklahoma* v. *Castro-Huerta*, 597 U.S. 629, 645 (2022). In any case, Gordon's allegations are hardly on point with the dungeon-like conditions discussed in *Hutto*. And more to the point, *Hutto*, like *Helling*, speaks only to the intimacy of the cell or shared surfaces—not to what would constitute deliberate indifference in a larger setting.

Nor does *Hope* v. *Pelzer*, 536 U.S. 730 (2002), offer relief to Gordon. In *Hope*, this Court reaffirmed that pre-existing law must provide governmental officials with "fair warning that their alleged [conduct] was unconstitutional." *Id.* at 740–41. At the same time, however, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.* at 741. But as this Court's opinion made abundantly clear, those "novel factual

circumstances" must be grossly outside the bounds of reasonable conduct. Indeed, the facts in *Hope* were so extreme as to put any governmental official on notice that the conduct offended the Eighth Amendment. Prison officials handcuffed a prison inmate to a hitching post for seven hours, with his shirt removed and exposed to the sun, without bathroom breaks and with only one or two water breaks while a prison guard taunted the plaintiff about his thirst, including kicking a cooler of water over in front of him. *Id.* at 730, 734–35. The heinous conduct at issue in *Hope* is not in the least analogous to Burt's and Steward's actions to combat a once-in-a-century pandemic.

None of the analysis from the cases that Gordon cites provides any real guidance to the officials here, who were facing widespread contagion within the facility and limited options for placement with adequate distancing. If it turned out that concentrating those prisoners who were symptomatic with COVID only exacerbated their condition, another set of claims might have been advanced against these same officials. Gordon's arguments have all the feel of Monday morning quarterbacking, as any new contagion or worsening of a condition would, he asserts, bypass immunity if the difficult decisions turned out to be wrong generally, or perhaps just wrong for a specific prisoner (but not others). The overbroad principle Gordon draws from *Helling*—that a corrections official cannot allow a prisoner to be exposed to a communicable disease—does not begin to answer what was required of Burt and Steward in the summer of 2020 as they attempted their level best to respond to a pandemic that was raging through their prison facility.

B. The COVID-19 cases on which Gordon relies are also distinguishable.

Gordon relies on four COVID-19 cases, either for the proposition that this Court's denial of certiorari indicates that this Court had foreclosed review of pandemic-era Eighth Amendment cases, or because they supposedly reached the correct decision. Br. in Opp. 6–8, 16–17 (citing *Hampton* v. *California*, 83 F.4th 754 (9th Cir. 2023), *Nazario* v. *Thibeault*, No. 22-1657, 2023 WL 7147386 (2d Cir. Oct. 31, 2023), *Pinson* v. *Carvajal*, 69 F.4th 1059 (9th Cir. 2023), and *Mays* v. *Dart*, 974 F.3d 810 (7th Cir. 2020), cert. denied 142 S. Ct. 69 (2021)). Denial of certiorari in *Pinson*, *Mays*, and *Hampton* (even where wrongly decided), however, has no bearing on whether certiorari or peremptory relief should be granted in this case.

Pinson did not involve prison conditions under the Eighth Amendment; it was a habeas case in which the prisoner also asked the district court to convert his habeas case into a civil rights action. 69 F.4th at 1064, 1076. The Ninth Circuit affirmed the district court's dismissal, and this Court rightly denied certiorari.

Mays was not even an Eighth Amendment case, but rather a Fourteenth Amendment case brought by pretrial detainees. 974 F.3d at 813. As *Mays* recognized, this Court's decision in *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015), held that pretrial detainees claims are subject to the objective reasonableness test rather than the deliberate indifference test applicable to Eighth Amendment claims. 974 F.3d at 819.

The Second Circuit's decision in *Nazario* likewise offers Gordon no support. The Court did not find

clearly established case law with regard to COVID-19; it merely determined that "open material issues of fact preclude this conclusion on the present record." 2023 WL 7147386 at *2. In other words, it held "only that Thibeault is not entitled to qualified immunity *at this time*." *Id*. (emphasis added).

That leaves *Hampton*. The Ninth Circuit considered an Eighth Amendment claim arising from a series of decisions regarding the transfer of 122 prisoners from the California Institute for Men to San Quentin State Prison in May 2020, which ultimately led to the infection of several hundred prisoners at San Quentin. *Hampton*, 83 F.4th at 758–59. Like the decision below, the court drew from *Helling* too general a principle: "the right at issue here is an inmate's right to be free from exposure to a serious disease." *Id*. at 769. The court ultimately affirmed the denial of qualified immunity, finding that "all reasonable officials" in the defendants' positions would have been on notice that the alleged conduct violated the law. *Id*. at 770.

Hampton mirrors the problem of the decision below. While there are some distinguishing facts—including, unlike here, that the California prisoner transfer involved grossly exceeding COVID-capacity limits on the buses from one facility to the other, *id*. at 759, 770–71—the overarching error in the decision remains. The Sixth and Ninth Circuits both create a Hobson's choice for prison officials with limited options. With a prison population that must be housed in a congregate setting and the rapid spread of a contagious disease, there were no good answers. This Court should grant certiorari or reverse.

II. Although there is no circuit split on this issue, courts have not been uniform in their treatment of COVID-19 in the prison setting.

Gordon correctly points out that this case does not present a circuit split. Br. in Opp. 9. Nevertheless, the case law is, at best, unsettled, as shown in both circuit and trial court decisions.

Several circuits have rejected COVID-19 Eighth Amendment claims for habeas and injunctive relief. See *Valentine* v. *Collier*, 956 F.3d 797, 801 (5th Cir. 2020) (holding that, although COVID-19 "can pose a risk of serious or fatal harm to prison inmates," the fact that communicable diseases exist and spread in a prison setting "do[es] not imply unconstitutional confinement conditions"); *Wilson* v. *Williams*, 961 F.3d 829, 844–45 (6th Cir. 2020) (holding that prison officials are not required to "take every possible step to address a serious risk of harm"); *Pinson*, 69 F.4th at 1064, 1076 (denying habeas relief and refusing to convert the case into a civil action); *Swain* v. *Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (holding that a lack of uniform enforcement of COVID-19 safety protocols "do[es] little to establish that the defendants were deliberately indifferent").

Although two circuit courts have declined to apply qualified immunity to prison officials, as noted above, those decisions came under very different circumstances than those present here. In *Nazario*, the Second Circuit determined that issues of fact precluded qualified immunity at that particular time. 2023 WL 7147386 at *2. And, in *Hampton*, the Ninth Circuit found that California officials had engaged in a series of actions that led to a massive outbreak of COVID-19

at a prison that was, at that point, largely untouched by the pandemic. 83 F.4th at 758–70.

Moreover, as argued in Burt's and Steward's petition, district courts have applied qualified immunity to protect the conduct of prison officials. Pet. at 10–12. For cases like this one arising from the early months of the pandemic, *Lawson* v. *Clark*, No. 22-1193, 2023 WL 2051149, at *4 (E.D. Pa. Feb. 15, 2023), the unprecedented nature of the pandemic, *Ryan* v. *Nagy*, No. 2:20-CV-11528, 2021 WL 6750962, at *9 (E.D. Mich. Oct. 25, 2021), amidst uncertainty and changing guidelines, *Ross* v. *Russell*, No. 7:20-CV-774, 2022 WL 767093, at *14 (W.D. Va. Mar. 14, 2022), created a situation without clear precedent to guide prison officials, *Tate* v. *Arkansas Dep't of Corr.*, No. 4:20-CV-558, 2020 WL 7378805, at *11 (E.D. Ark. Nov. 9, 2020); *Fennell* v. *Wetzel*, No. 4:21-CV-01717, 2023 WL 1456288, at *6 (M.D. Pa. Feb. 1, 2023). Contrary to Gordon's arguments, the case law remains unsettled, requiring guidance from this Court.

CONCLUSION

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

Respectfully submitted,

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