NO. 19-10798

United States Court of Appeals
For The Fifth Circuit

PATSY K. COPE, ALEX ISBELL, ***as Dependent Administrator of and on behalf of the*** **ESTATE OF DERREK QUINTON GENE MONROE, AND HIS HEIRS AT LAW,**

Plaintiffs—Appellees,

versus

LESLIE W. COGDILL; MARY JO BRIXEY; JESSIE W. LAWS,

Defendants—Appellants.

On Appeal from the United States District Court for the Northern District of Texas, San Angelo Division
No. 6:18-CV-0015

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF PLAINTIFFS—APPELLEES

Alexa L. Gervasi (DC Bar No. 1500433)
Patrick Jaicomo (MI Bar No. P75705)
Anya Bidwell (TX Bar No. 24101516)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
agervasi@ij.org
pjaicomo@ij.org
abidwell@ij.org

August 6, 2021

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

Amicus Curiae
Institute for Justice

Counsel for *Amicus Curiae*
Alexa L. Gervasi (Institute for Justice)
Anya Bidwell (Institute for Justice)
Patrick Jaicomo (Institute for Justice)

Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that *amicus curiae* is not a publicly held corporation and does not have any parent corporation, and that no publicly held corporation owns 10 percent or more of its stock.

Date: August 6, 2021

/s/ Alexa L. Gervasi
Counsel for Amicus Curiae
Institute for Justice

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page(s)**

INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit legal center dedicated to defending the foundations of free society. Because qualified immunity and related doctrines limit access to federal courts and drastically hinder enforcement of these rights, IJ litigates government immunity and accountability cases nationwide, including in this court.

SUMMARY OF ARGUMENT

In addition to the reasons presented in Appellees' Petition, en banc review is necessary to reconcile the court's internally inconsistent approach to clearly established law with the Supreme Court's decisions in *Hope v. Pelzer, Taylor v. Riojas*, and *McCoy v. Alamu*.

As outlined in Part I, the *Hope* Court explained that qualified immunity entitles an official to "fair warning" that his conduct is unconstitutional and explained that warning can be supplied by various sources, including

[1] No party's counsel authored any portion of this brief. No party or person—other than amicus—contributed money intended to fund preparing or submitting this brief. Appellees have consented to the filing of this brief, but Appellants have not. *See* Mot. for Leave to File.

obviousness. In the past year, the Supreme Court formally adopted an "obviousness test" for finding clearly established law in a pair of cases summarily reversing this court: *Taylor v. Riojas* and *McCoy v. Alamu*. Despite those reversals, as discussed in Part II, the majority here demanded factual symmetry for a law to be clearly established, demonstrating this court's inconsistent application of the Supreme Court's guidance in *Hope* and *Taylor*. This is an issue of exceptional importance that necessitates en banc consideration.

ARGUMENT

It is often argued that for a law to be "clearly established," courts "must be able to point to controlling authority—or a 'robust consensus of persuasive authority'—that defines the contours of the right in question with a high degree of particularity."[2] As the syllogism goes: no on-point precedent, no clearly established law, no liability.[3] While pithy, this statement of the clearly established test is incomplete. The Supreme Court

[2] *Morgan v. Swanson*, 659 F.3d 359, 371–72 (5th Cir. 2011) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

[3] *See id.* at 372; *see also Morrow v. Meachum*, 917 F.3d 870, 875 (5th Cir. 2019).

has clarified, repeatedly, that "[a]lthough earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding."[4] There is another avenue for clearly established law: obviousness.

As the divided opinions in this case reflect, this court does not yet have a uniform understanding of the obviousness test and, as a result, struggles to apply it in a predictable manner.[5] In the wake of the Supreme Court's summary reversals in *Taylor* and *McCoy*, and faced with the egregious facts of this case, en banc review is necessary to fully incorporate the Court's holding in *Hope* and its reaffirmation in *Taylor*.

---

[4] *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("[I]n an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law."); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("The unconstitutionality of outrageous conduct obviously will be unconstitutional."); *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020) (per curiam); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.).

[5] *Compare* Maj. Op. at 14 (finding *Taylor* inapplicable), *with* Dissenting Op. at 33–35 (Dennis, J., dissenting) (finding officers' violations "obvious").

I. Obviousness is an Equal Source of Clearly Established Law.

Nearly twenty years ago, the Supreme Court sought to remove the "rigid gloss" that tainted the qualified immunity standard.[6] In *Hope*, the Court acknowledged that courts often require a previous case with "materially similar" facts to find a law clearly established.[7] And then it rejected this requirement.[8] The question, the Court explained, is not whether the "very action in question has previously been held unlawful," it's whether the official had "fair warning that their alleged [behavior] was unconstitutional."[9] And in some situations, the constitutional law in question applies "with obvious clarity."[10] For the *Hope* Court, it was obviously clear—if not just from the nature of the violation itself, then from the reasoning in analogous cases, state regulations, and a government

[6] *Hope*, 536 U.S. at 739.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 739–41.

[10] *Id.* at 741 (cleaned up).

report—that the Constitution forbids fixing a prisoner to a hitching post for hours without reprieve.[11]

In the past year, two cases from this court captured the Supreme Court's attention and garnered summary reversals for their failure to heed *Hope*'s instructions. First, in *Taylor*, the Court reaffirmed that precedent wasn't necessary to fairly notify officials that forcing a prisoner to sleep in a cell teeming with excrement is unconstitutional; it was obvious that the "conditions of confinement offended the Constitution."[12] Then, in *McCoy v. Alamu*, the Court instructed this court to reconsider its grant of qualified immunity to an official who pepper-sprayed a prisoner in the face "for no reason at all."[13] Together, these reversals reaffirm that qualified immunity will not shield government officials who engage in obviously unconstitutional conduct.

---

[11] *Id.* at 741–44 (explaining the violation was so obvious that general Eighth Amendment principles arguably gave fair warning, and then providing additional reasons for why the law was clearly established).

[12] 141 S. Ct. at 53–54.

[13] *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020), *rev'd*, 141 S. Ct. at 1354.

Hope, *Taylor*, and *McCoy* present three different factual scenarios with one thing in common—unquestionable unconstitutionality.[14] Although "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional,"[15] as shown through these cases, the obviousness test is not synonymous with an outrage test. "[E]ven as to action less than an outrage," the Supreme Court has explained, "officials can still be on notice that their conduct violates established law."[16]

Hope and its progeny clarify that it's not enough to ask whether analogous precedent put an official on notice. Courts must also provide a careful, principled analysis of whether a constitutional right is so obvious that any reasonable officer would have fair warning that his behavior offended the Constitution. And they must do so in every case. Anything less risks "the danger of a rigid, overreliance on factual similarity."[17]

---

[14] Although each case concerns prison officials' conduct, obviousness isn't limited to this context. The unfortunate reality is that courts are most likely to encounter obvious cases in the prison context because this is where "government power," and therefore the potential for abuse, "is at its apex." *Johnson v. California*, 543 U.S. 499, 511 (2005).

[15] *Safford*, 557 U.S. at 377.

[16] *Id.* at 377–78 (internal quotation omitted).

[17] *Hope*, 536 U.S. at 742.

II. En Banc Review is Necessary to Align this Court's Application of the Clearly Established Test with Supreme Court Precedent.

Although the majority cited to *Taylor*, "rigid, overreliance on factual similarity" still dominated the court's reasoning and determined its result, revealing this court's inconsistent application of the obviousness test.

A. The majority's analysis regarding Officer Laws's failure to call EMS demonstrates this court's misunderstanding of how to apply the obviousness test.

In its sole application of *Taylor*, the majority explained that Laws did not have fair notice that his failure to call for emergency services violated the Constitution because:

> Unlike the officers in *Taylor*, Laws did nothing so extreme or even close as forcing an inmate to sleep naked in raw sewage. The failings of Laws are in a time of minutes and lack of complete action, not days and affirmative misconduct.[18]

The majority then provided a footnote explaining that because the court "adhered to the analogous-case requirement in *Converse* [*v. City of Kemah*]," where it denied qualified immunity to officers who provided a suicidal detainee bedding because of the known risk of strangulation,[19] "[it would]

[18] Maj. Op. at 14.

[19] 961 F.3d 771, 775–80 (5th Cir. 2020).

do so here as well."[20] Notably, the majority did not acknowledge that *Taylor* and *McCoy* were decided after *Converse* and, therefore, provided intervening Supreme Court precedent on the issue of a so-called "analogous-case requirement."

First, the majority's application of *Taylor* is facially inadequate. In *Taylor*, relying on *Hope*, the Court explained the impropriety of focusing only on factually analogous precedent instead of asking whether the official otherwise had fair notice that his behavior was unconstitutional, especially when "[c]onfronted with the particularly egregious facts of [the] case."[21] Yet, the majority here makes the same error.

At no point does the majority engage with whether any reasonable officer, irrespective of factually analogous cases, would have fair warning that failing to call for emergency assistance, while watching a detainee strangle himself, violates the Constitution's demands. *Hope* and *Taylor*

[20] Maj. Op. at 14–15 n.10. The majority inexplicably found *Converse* sufficiently analogous precedent to establish an "analogous-case requirement," but not sufficiently analogous precedent to establish a suicidal detainee's right to not be housed in a cell with an obvious ligature.

[21] 141 S. Ct. at 53–54.

require more. In every case, courts must critically engage with the specific facts at hand and individually assess whether on those facts—novel or familiar—a reasonable officer would have had fair notice that his behavior was improper.[22]

Second, the majority's discussion of *Taylor* suggests that the obviousness test requires factual symmetry with a prior case before it applies. This suggestion is diametrically opposed to the Supreme Court's analysis in *Hope* and *Taylor*.

In the majority's view, the constitutional violation here was not obvious because the facts were not as "extreme . . . as forcing an inmate to sleep naked in raw sewage" and the officer's actions occurred over minutes, not days.[23] There are two ways to interpret this holding: (1) the facts are dissimilar from an earlier case, so the harm is not obvious; or (2) the level of outrage is dissimilar from an earlier case, so the harm is not obvious. Either

[22] *See Hope*, 536 U.S. at 742; *Taylor*, 141 S. Ct. at 53–54.

[23] Maj. Op. at 14.

meaning is a misapplication of Supreme Court precedent that demands remedy.

The Supreme Court has expressly rejected the notion that constitutional violations are obvious only if they are similar to previously recognized violations: *Hope* and *Taylor*'s central point is that factually analogous precedent is not always necessary to clearly establish the law.[24] Likewise, the Court has never suggested that obviousness turns on a specific gradation of outrageousness. To the contrary, the Court has expressly stated that, even absent outrage, a constitutional violation can be obvious in a new factual scenario.[25] Requiring courts to parse through whether a specific violation is more or less obvious or outrageous than a previously recognized violation is merely a reiteration of the fact-specific analysis that *Hope* and *Taylor* rejected.

[24] Indeed, in *Hope* the Court relied on an earlier circuit decision because its "reasoning, though not the holding . . . sent the same message to reasonable officers." 536 U.S. at 743. And *Taylor* did not even cite existing caselaw. Instead, it rested on the observation that "no reasonable . . . officer could have concluded that" their actions were "constitutionally permissible." 141 S. Ct. at 53.

[25] *Safford*, 557 U.S. at 377.

Here, although outrage is not required to find obviousness, both are present. Every reasonable officer knows that he must take steps to abate substantial risks of serious harm to a detainee.[26] And the jail's explicit policy required Laws to call EMS to respond to the situation.[27] Yet, Officer Laws watched Monroe wrap the cord around his neck, briefly returned his attention to mopping, and then called only his supervisors, waiting ten minutes for them to arrive before taking any additional action. In other words, Laws knowingly declined to take the required step to abate Monroe's death, an obvious and outrageous constitutional violation.

The majority's application of the obviousness test creates the untenable risk that apparent constitutional violations will go unchecked based on factors that the Supreme Court itself has rejected.[28] Following *Taylor* and

---

[26] *Farmer v. Brennan*, 511 U.S. 825, 847 (1994).

[27] *See also infra* note 34 (noting that local policies and government guidance can be sufficient to put an officer on fair notice).

[28] The majority's application of the obviousness test is also in contention with the opinions this court issued in *Ramirez v. Guadarrama*, 2 F.4th 506 (5th Cir.) (mem.) (denying petition for en banc rehearing). This court agreed the High Court was sending a "sharp rebuke[]" with its "invocations of the obvious-case exception to the clearly established law requirement" in *Taylor* and *McCoy*. *Guadarrama*, 2 F.4th at 514 (Oldham, J., concurring). And so the various opinions provided a careful analysis of whether the violation was obvious, reaching different conclusions. *Compare id.* at 514–15, *with id.* at 522–23 (Willett,

McCoy, it is essential that this court clarify, once and for all, that: (1) the obviousness test must be applied in every case; and (2) the test requires an engaged analysis of whether there are reasons, apart from factually analogous precedent, why reasonable officers would have fair notice that their actions are unconstitutional.[29]

B. The majority's failure to apply the obviousness test to Officers Brixey and Cogdill's violations highlights this court's inconsistent application of *Taylor*'s demands.

In considering whether Officers Brixey and Cogdill are entitled to qualified immunity for placing Monroe in a cell with a 30-inch phone cord, the majority overlooked *Hope* and *Taylor* altogether. Instead, it focused exclusively on whether fundamentally similar precedent exists, contradicting the Supreme Court's demands.

Here, the obviousness of the violation is overwhelming. The majority agrees that every reasonable officer would know that he cannot give a

---

J., dissenting). Five members of this court found the violation unobvious because, in their view, obviousness requires "particularly egregious facts where there is no evidence of necessity or exigency." *Id.* at 514–15 (Oldham, J., concurring) (internal quotation omitted). While this view is not entirely correct under *Hope* and *Taylor*, *see supra* Part I, even this stringent test would be satisfied by the facts here.

[29] *See generally Hope*, 536 U.S. at 741–44 (exploring various indicia of fair notice).

suicidal inmate bedding,[30] but it concludes that the same reasonable officer would not know that a 30-inch phone cord poses a similar risk.[31] This distinction between bedding and a phone cord is precisely the type of distinction that the *Hope* Court forbade.[32] Just as a prohibition against handcuffing a person to a fence puts an officer on notice that he cannot handcuff a person to a hitching post,[33] a known prohibition against placing a suicidal detainee in a cell with bedding obviously notifies a reasonable officer that he may not confine a suicidal detainee in a cell with a 2.5-foot cord.[34]

The majority's conclusion otherwise demonstrates the need for en banc review. Only the full court can establish a cohesive rule for this court's post-*Taylor* application of clearly established law, clarifying that the obviousness

---

[30] Maj. Op. at 15–16.

[31] Maj. Op. at 16–17.

[32] 536 U.S. at 741.

[33] *Id.* at 742–43.

[34] Guidance from the Texas Commission on Jail Standards, which recommended that phone cords be no more than twelve inches, further demonstrates the obviousness. *See Hope*, 536 U.S. at 744–45 (noting that the obviousness of the violation was "buttressed by the fact that the DOJ specifically advised the ADOC of the unconstitutionality of its practices").

test should be applied in all cases, with careful consideration of whether, apart from analogous precedent, an official had fair notice that his conduct was unconstitutional.

CONCLUSION

En banc intervention is necessary to align this court's jurisprudence with the dictates of *Hope, Taylor*, and *McCoy*.

Dated: August 6, 2021

Respectfully submitted,

/s/ Alexa L. Gervasi
Alexa L. Gervasi (DC Bar No. 1500433)
Patrick Jaicomo (MI Bar No. P75705)
Anya Bidwell (TX Bar No. 24101516)
INSTITUTE FOR JUSTICE
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
agervasi@ij.org
pjaicomo@ij.org
abidwell@ij.org

Counsel for Amicus Curiae
Institute for Justice

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I caused the foregoing Brief of *Amicus Curiae* Institute for Justice in Support of Plaintiffs-Appellees to be filed electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: August 6, 2021

/s/ Alexa L. Gervasi
Counsel for Amicus Curiae
Institute for Justice

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,598 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. of App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Palatino Linotype font.

Dated: August 6, 2021

/s/ Alexa L. Gervasi
Counsel for Amicus Curiae
Institute for Justice