IN THE
SUPREME COURT OF THE UNITED STATES

MIKHAIL MILKOVICH, Petitioner, v. VERONICA FISHER, Warden, Maximum Security Unit, SDC; FIONA PFENDER, Deputy Warden, Maximum Security Unit, SDC; SHEILA JACKSON, Classification Supervisor, Maximum Security Unit, SDC; and TAMI TAMIETTI, Major, Maximum Security Unit, SDC, Respondents.	)	No.: 20-1000

2020 NATIONAL ONLINE MOOT COURT COMPETITION PROBLEM

For the purpose of this problem, you should make the following assumptions:

1. All filings, notices, and appeals were timely made.

2. The issues to be briefed and argued are those set forth in the Order Granting Petition for Writ of Certiorari.

3. Unless the lower courts' opinions indicate a disagreement between the parties as to the facts, the facts are as stated in those opinions. Likewise, any provision of the law of the fictional state of Gallagher is as cited or characterized in the opinions. To the extent either party wishes to argue that facts not stated in the record or factual disagreements not resolved in the opinions below are pertinent to the disposition of the case, that party should be prepared to explain how any such absence in the record or unresolved disagreement would affect proper disposition of this matter.

4. The United States Supreme Court has jurisdiction over all issues set forth in the Order Granting Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF GALLAGHER

MIKHAIL MILKOVICH, Plaintiff, v. VERONICA FISHER, Warden, Maximum Security Unit, SDC; FIONA PFENDER, Deputy Warden, Maximum Security Unit, SDC; SHEILA JACKSON, Classification Supervisor, Maximum Security Unit, SDC; and TAMI TAMIETTI, Major, Maximum Security Unit, SDC, Defendants.	))))))))))))))))	Civil Action No. 1:19-cv-2900-MC

OPINION AND ORDER

CLARK, District Judge.

This matter comes before the Court on Defendants' Motion to Dismiss the Complaint. For the reasons discussed below, Defendants' Motion is **GRANTED**.

Mikhail Milkovich, an inmate at Southside Detention Center ("SDC"), filed this action under 42 U.S.C. § 1983, alleging that Defendants Fisher, Pfender, Jackson, and Tamietti, officials at SDC, violated his Eighth Amendment rights when it placed him in administrative segregation for 360 days, before moving him to a general population unit. Mr. Milkovich claims that the conditions of his confinement and the inadequate medical care he received during those 360 days violate the Eighth Amendment ban on cruel and unusual punishment. He seeks damages and injunctive relief.

Mr. Milkovich alleges that while he was in administrative segregation, he was only allowed one hour outside of his cell on weekdays, but was rarely permitted to spend that one hour in the

outdoor recreation area; he was only permitted to shower three times per week; and he was given cold food. Mr. Milkovich also contends that Defendants ignored his "pleas" for psychological treatment, and deprived him of his prescribed medications. Mr. Milkovich alleges that he suffers from numerous mental health conditions, including anxiety, depression, and borderline personality disorder, which, when untreated, has led him to self-harm in the past. He contends that his condition is managed through "regular therapy sessions" and a combination of prescription medications to be taken daily. Mr. Milkovich further alleges that his condition is exacerbated by prolonged isolation from others. He alleges that "SDC knew that he was seriously mentally ill" and that he "is supposed to take medication daily."

However, Defendants correctly argue that Mr. Milkovich does not state an Eighth Amendment claim because he does not aware that they personally were aware of his specific mental health needs. Furthermore, he fails to allege sufficient facts to suggest that any of the Defendants acted with deliberate indifference. His failure to include these critical allegations is fatal to his Eighth Amendment claims. *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 862 (8th Cir. 2006) ("[t]he subjective inquiry must show a mental state akin to criminal recklessness: disregarding a known risk to the inmate's health"). Accordingly, Defendants' Motion to Dismiss is **GRANTED**.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

No. 19-01111

Non-argument Calendar

D.C. Docket No. 1:19-cv-2900-MC

MIKHAIL MILKOVICH,

Plaintiff-Appellant,

versus

VERONICA FISHER, Warden, Maximum Security Unit, SDC;
FIONA PFENDER, Deputy Warden, Maximum Security Unit, SDC;
SHEILA JACKSON, Classification Supervisor, Maximum Security Unit, SDC; and
TAMI TAMIETTI, Major, Maximum Security Unit, SDC,

Defendants-Appellees.

Appeal from the United States District Court

for the District of Gallagher

Before GARDNER, GUINN, and WHITE, Circuit Judges.

Judge GARDNER wrote the opinion, in which Judge WHITE joined.

GARDNER, Circuit Judge:

Mikhail Milkovich sued Gallagher prison officials seeking damages and injunctive relief under 42 U.S.C. § 1983, alleging deprivations of his constitutional rights while incarcerated. The

district court concluded that Milkovich's complaint failed to state a claim and dismissed the action. Milkovich concedes on appeal that his claim for injunctive relief is now moot, and he proceeds only on his claim for damages. We affirm the ruling of the district court on grounds that the complaint does not adequately allege a violation of Milkovich's clearly established constitutional rights, so the Defendants are entitled to qualified immunity.

I.

Milkovich is an inmate in the custody of the Gallagher Department of Corrections at the Southside Detention Center ("SDC"). He suffers from a number of mental health problems, including borderline personality disorder, post-traumatic stress disorder, antisocial personality disorder, anxiety, and depression. He takes daily medication for his mental health conditions, as prescribed by a physician, and sees a counselor for therapy approximately once per week.

In March 2017, Milkovich alerted prison authorities to a potential attack by another inmate against a prison guard. As a security measure, he was transferred from general population to administrative segregation. Due to ongoing construction at SDC, the only available cells for administrative segregation were in the solitary confinement wing. Milkovich remained in administrative segregation for 360 days, before he was ultimately transferred back to general population. Milkovich alleges that while in administrative segregation, he remained in his cell for twenty-three hours per day, leaving for "one hour a day, five days per week," but only if security concerns or weather did not interfere. Milkovich was allowed three showers per week, three phone calls per week, and was often served cold food. He had no television in his cell, and there were no public televisions in the hallway of the solitary confinement wing. Milkovich was allowed to keep a limited number of books in his cell, but complains that his light bulb was often burned out,

"making it hard to see or read anything for days." He also lost his job and could not receive vocational training. He had no roommate and "rarely any human contact."

Administrative segregation allegedly affected Milkovich's mental health. He describes being "deprived of his prescribed adequate medical treatment and medication" and having his "pleas" for treatment "ignored." These deprivations, combined with the stress of solitary confinement, impacted his mental health: he "often couldn't sleep, had a lack of appetite, hallucinations, nightmares, restlessness, anxiety, and panic attacks," and felt a risk of "irreparable emotional damage" or suicide. Milkovich alleged that he was "skipped randomly at pill call," had no access to therapy sessions, and that officers working in the solitary confinement unit knew about the gaps in his treatment.

In March 2019, Milkovich sued under 42 U.S.C. § 1983, asserting claims under the Eighth Amendment for damages and injunctive relief. The defendants were SDC warden Veronica Fisher, deputy warden Fiona Pfender, classification supervisor Sheila Jackson, and building major Tami Tamietti. The district court dismissed the complaint for failure to state a claim on which relief maybe granted. *See* Fed. R. Civ. P. 12(b)(6). Milkovich appeals the dismissal.

II.

Given that Milkovich's claims are for damages only, an obvious question is whether the prison officials are entitled to qualified immunity. Qualified immunity shields government officials from suits for damages under § 1983 if their "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The immunity is an immunity from suit, not merely from liability. It is designed "to avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching

discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (alteration in original) (quoting *Harlow*, 457 U.S.at 817-18). Especially where a decision on qualified immunity is more straightforward than resolving a novel question of constitutional law, the Supreme Court has counseled that "courts should think hard, and then think hard again, before turning small cases into large ones." *Camreta v. Greene*, 563 U.S. 692, 707 (2011).

Because the parties had not briefed the issue, we requested supplemental filings to address whether the district court's judgment should be affirmed based on qualified immunity. Milkovich responded that because the officials did not raise qualified immunity in their motion to dismiss, the defense was waived or forfeited for purposes of the pleading stage. The officials say not so: they moved to dismiss the complaint for failure to state a claim, without filing an answer, and succeeded in obtaining a dismissal. Thus, they had no occasion to assert a qualified immunity defense.

In *Story v. Foote*, 782 F.3d 968 (8th Cir. 2015), the Eighth Circuit concluded that even where an appellee did not argue qualified immunity as an alternative ground for affirmance, it was appropriate to resolve the appeal on that basis where the defense was established on the face of the complaint. *Id.* at 970. Although not binding, we are persuaded by the reasoning in *Story*. Milkovich contends that *Story* is distinguishable, because the defendant there had no opportunity to raise qualified immunity in the district court; the case was dismissed before service of process under 28 U.S.C. § 1915A. Here, by contrast, the defendants moved to dismiss the amended complaint, and argued successfully that Milkovich failed to allege a constitutional violation. But because the defendants did not argue a fallback position that they are entitled to qualified immunity, Milkovich

says that we must turn a small case into a large one and address only the constitutional questions decided by the district court.

We are satisfied that it is appropriate to consider whether the defendants are entitled to qualified immunity. We may affirm a judgment on any ground supported by the record; where qualified immunity is evident on the face of a complaint, it is an available basis for decision. *Leveto v. Lapina*, 258 F.3d 158, 161 (3d Cir. 2001); *Graves v. City of Coeur d'Alene*, 339 F.3d 828, 845 n.23 (9th Cir. 2003). Although the Defendants here did not raise qualified immunity in their motion to dismiss, the posture of the case has materially changed. The claims for injunctive relief are now concededly moot; all that remain are Milkovich's claims for damages, and qualified immunity could be dispositive as to the only claims left on appeal.

In that circumstance, we see no bar to addressing qualified immunity. Whether the allegations show a violation of a clearly established right is a purely legal issue that is amenable to consideration for the first time on appeal. The parties have been given notice and an opportunity to be heard on the issue in thorough supplemental briefs. The Defendants have made clear that if this court were to reject the district court's decision on any claim, then they would promptly assert a defense of qualified immunity on remand. In that event, after the district court resolved the qualified immunity issue, the case inevitably would return to us for a decision on that point in a second appeal. There is nothing to be profited by that procedural roundabout.

To overcome a claim of qualified immunity, Milkovich must establish that (1) the facts alleged in the complaint make out a constitutional violation and (2) that the right violated was "clearly established." *Pearson*, 555 U.S. at 232. For a right to be "clearly established," the law must have been sufficiently clear, at the time of the official's conduct, to put every reasonable official on notice that what she was doing violated that right. *Ashcroft v. al-Kidd*, 563 U.S. 731,

741 (2011). A plaintiff need not cite "a case directly on point," but "controlling authority" or "a robust 'consensus of cases of persuasive authority'" must have put "the statutory or constitutional question beyond debate" as of the date of the alleged violation. *Id.* at 741-42 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)).

We now consider Milkovich's claim of deliberate indifference to his serious medical needs through the lens of qualified immunity. Milkovich asserts that the deprivation of his medication on numerous occasions, combined with the stresses of his administrative segregation, resulted in anxiety, hallucinations, and even suicidal thoughts. He alleges "that his 'pleas' for psychological treatment were 'ignored,'" and that the Defendants "all knew [he] was a mentally ill inmate," and were "aware" that he was not receiving his medication on a consistent basis, and was not able to attend therapy sessions. He further alleges that he has visible scars from previous self-harm attempts, which should have alerted prison officials to the risks posed by his illness.

Despite the seriousness of Milkovich's alleged medical needs, we conclude that the defendants did not violate his clearly established rights. Mere negligence in diagnosing or treating a medical condition does not rise to the level of an Eighth Amendment violation. *Estelle v. Gamble*, 429 U.S. 97 (1976). A prisoner must allege instead (1) that he suffered objectively serious medical needs and (2) that the prison officials actually knew of but deliberately disregarded those needs. *See Lane v. Philbin*, 835 F.3d 1302, 1308 (11th Cir. 2016); *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998). Prison officials may not deliberately delay or deny prisoners' medical care, *Estelle*, 429 U.S. at 104-05, but a plaintiff "must show more than negligence, more even than gross negligence," to make out a constitutional violation. *Estate of Rosenberg v. Crandell*, 56 F.3d 35, 37 (8th Cir. 1995).

Milkovich alleges that there were gaps in administration of his daily medication and that the defendants were aware of this failure to treat his serious medical needs. But Milkovich's pleadings also include an exhibit showing that prison officials, including Pfender, responded to a grievance regarding the medication gaps and took steps to ensure that Milkovich received his prescribed medication. He describes one nurse as repeatedly failing to distribute his daily medication, but the same exhibit conveys that her superiors determined that the nurse would "be counseled individually on the importance of medication administration and documentation." None of the Defendants were personally responsible for administering Milkovich's medication.

These facts distinguish the alleged deprivation of Milkovich's rights from the violations recognized in other decisions. Milkovich directs the Court's attention to an Eighth Circuit case, *Langford v. Norris*, 614 F.3d 445 (8th Cir. 2010). Milkovich argues that *Langford* clearly established that officials violate the Eighth Amendment when they ignore "complaints about receiving deficient medical care." *Id.* at 462. But the facts in *Langford* were also quite different: the case involved a medical services administrator's failure to address two prisoners' prolonged, serious medical needs. *Id.* at 460-61. One prisoner alleged that he suffered stomach and back pain for years, resulting in at least two hospital visits for emergency care, and the other prisoner endured an irreversible deformity in his foot due to lapses in treatment after surgery. *Id.* Despite knowing about these medical problems, the administrator did little to ameliorate the situation, telling one prisoner to use the internal grievance system and assuring both prisoners that he would refer their matter to another administrator. *Id.* at 461-62.

Milkovich, by contrast, did not languish for years without proper medical care: the exhibit attached to his complaint describes only nine occasions when he did not receive his daily treatment.

Although he alleges that gaps "continue[d] to happen," and were "frequent," the prison officials at least attempted to fix the problem.

In evaluating an officer's claim to qualified immunity, "[t]he dispositive question is whether the violative nature of particular conduct is clearly established." *Mullenix v. Luna*, --- U.S. ---, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). Milkovich does not point to any case showing that the "particular conduct" alleged runs afoul of the Eighth Amendment. A reasonable prison official, aware of the alleged gaps in Milkovich's treatment, could have understood the Eighth Amendment to allow administrators an opportunity to fix problems that arise in a prison's healthcare system by responding to grievances and taking corrective actions.

Milkovich's next Eighth Amendment claim also fails to overcome qualified immunity. He alleges that prison officials were deliberately indifferent to the risk of serious harm arising from the conditions of his administrative segregation in light of his serious mental illness. To establish a conditions of confinement claim, a plaintiff must demonstrate (1) that the alleged deprivation was "objectively, sufficiently serious" to result in the "denial of the minimal civilized measure of life's necessities," and (2) that the prison official whose action or omission caused the deprivation behaved with "deliberate indifference to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) (internal quotation marks omitted). "We may infer the existence of this subjective state of mind from the fact that the risk of harm is obvious." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002). Milkovich alleges that the defendants knew that he was "seriously mentally ill" and that his confinement "risked irreparable emotional damage or a death by suicide." He argues that since *In re Medley*, 134 U.S. 160, 168 (1890), courts have recognized the damaging effects of solitary confinement. He contends that "it is now beyond serious dispute" that administrative segregation

poses serious risks, which are "particularly pronounced for prisoners with mental illness." He points to the Eighth Circuit's decision in *Simmons v. Cook*, 154 F.3d 805 (8th Cir. 1998), which is not binding in this Circuit, as establishing that solitary confinement, together with a prisoner's physical limitations, can deprive him "the minimal civilized measure of life's necessities." *Id.* at 808 (internal quotation omitted).

To defeat qualified immunity, however, "the clearly established law must be particularized to the facts of the case" and not "defined at a high level of generality." *White v. Pauly*, ––– U.S. ––––, 137 S. Ct. 548, 552 (2017) (per curiam) (internal quotation marks omitted). None of the prior decisions involved a mentally ill prisoner in administrative segregation, and they do not demonstrate that the prison officials here violated a clearly established right.

Milkovich maintains that various studies on solitary confinement and decisions of other circuits placed the defendants on notice that subjecting a prisoner with Milkovich's mental illnesses to prolonged administrative segregation violates the Eighth Amendment. Although "a robust consensus of cases of persuasive authority" may suffice to put a "constitutional question beyond debate," *al-Kidd*, 563 U.S. at 741-42 (internal quotation marks omitted), Milkovich fails to demonstrate such authority existed at the time he was placed in administrative segregation. And scholarly literature about negative effects of segregation may influence prison administrators and future court decisions, but it likewise does not establish that the constitutional question raised by Milkovich was beyond debate in 2017.

Milkovich's allegations identify a combination of circumstances that was not present in previous cases. We do not gainsay that lengthy administrative segregation of an inmate with serious medical illness and no access to television or regular reading material requires different analysis than solitary confinement of prisoners with no history of psychiatric difficulties and

milder restrictions. That Milkovich presents a debatable argument for distinguishing prior decisions and breaking new legal ground, however, does not suffice to allege that the officials violated a clearly established right.

Where Milkovich's only remaining claim is for damages, we conclude that the officials are entitled to qualified immunity. The judgment of the district court is AFFIRMED.

GUINN, Circuit Judge (dissenting):

I disagree with the majority's ruling that the complaint was properly dismissed. Instead, I believe the district court erred in finding that Milkovich failed to state a claim for violation of the Eighth Amendment. Additionally, I would not find the prison officials entitled to qualified immunity because they failed to raise the defense in the court below.

The majority *sua sponte* raises qualified immunity, "an affirmative defense that must be pleaded by a defendant official." *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). The majority does not cite, and I have been unable to find, any cases where the Thirteenth Circuit *sua sponte* raised the affirmative defense of qualified immunity after the district court dismissed without mention of qualified immunity. The prison officials chose not to raise a qualified immunity defense in their motion to dismiss the complaint. Generally, a party's failure to raise or discuss an issue in its brief is to be deemed an abandonment of that issue. *Goodman v. Harris County*, 571 F.3d 388, 399 (5th Cir. 2009). While we have discretion to consider issues not raised below this is not the type of case where substantial public interests weigh in favor of reaching an unraised issue. *Consumers Union of U.S., Inc. v. Federal Power Comm'n,* 510 F.2d 656, 662 (D.C. Cir. 1974). Accordingly, I do not believe it is appropriate for this Court to *sua sponte* raise this defense on the correctional officers' behalf.

Even if a qualified immunity defense were properly before this court, I would not find defendants entitled to qualified immunity at this time. Dismissal based on an affirmative defense is appropriate only where "the defense is established on the face of the complaint." *Leveto v. Lapina*, 258 F.3d at 161; *cf. Weaver v. Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995) ("Because qualified immunity is an affirmative defense . . . it will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint."). In my view, the face of the complaint does not support a judgment for the prison officials on either prong of a qualified immunity defense.

First, the face of the complaint does not establish that no constitutional violation occurred. A correctional officer's power to maintain order and security in his or her prison by way of solitary confinement[1] may be broad, but it is not unfettered. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). Second, in my view, a reasonable correctional officer would have known that placing a mentally ill inmate with a history of self-harm in solitary confinement and depriving him of his prescription medications and therapy was unconstitutional. Milkovich's allegations are not negated by the exhibit showing that a prison nurse who failed to provide Milkovich his medication on nine occasions *in a one month period* (a detail the majority fails to mention) was counseled on the "importance" of providing inmates their medication does not negate Milkovich's allegations that the problems persisted and the Defendants took no action. Perhaps after the completion of

[1] As used throughout this Dissent, the term "solitary confinement" covers those forms of in-prison punishment that totally remove a prisoner from inmate society. Whatever other term is used-isolation, punitive segregation, confinement to a strip cell or the "hole"—the essential feature of solitary confinement is isolation from other prisoners and sometimes guards, and often a complete removal from sensory and physical stimuli. Another frequently used term is "administrative segregation." The primary difference between solitary confinement and administrative segregation is the reason for the segregation/confinement. Solitary confinement is punishment for misbehavior, whereas administrative segregation is supposedly for protection.

discovery and briefing by the parties, it will be appropriate to find the prison officials entitled to qualified immunity against Milkovich's claims; however, the time for such a finding is not now.

The majority's error is a result of reviewing the "clearly established" prong, without first considering whether a constitutional violation has been alleged. Of course, this approach is one expressly permitted by the Supreme Court. In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court revisited the procedure for lower courts to evaluate a qualified immunity defense, holding that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand." 555 U.S. at 236. The Court also noted that, while no longer mandatory, the protocol mandated in *Saucier v. Katz*, 555 U.S. 194, 201 (2001)—by which a court first decides if the defendant's actions violated the Constitution, and then the court determines if the right violated was clearly established—will often be beneficial. *See Pearson*, 555 U.S. at 241. In rejecting the mandatory approach, the Supreme Court recognized that "[t]here are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right," and that such an approach burdens district court and courts of appeals with "what may seem to be an essentially academic exercise." *Id.* at 237. The Supreme Court also reasoned that the prior mandatory approach "departs from the general rule of constitutional avoidance and runs counter to the older, wiser judicial counsel not to pass on questions of constitutionality unless such adjudication is unavoidable." *Id.* at 241 (alterations omitted); *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (affirming *Pearson's* procedure and noting that deciding qualified immunity issues on the basis of a right being not "clearly established" by prior case law "comports with our usual reluctance to decide constitutional questions unnecessarily").

Pearson sounds acceptable in theory, but it does not work well in practice. It is extremely difficult to perform a "clearly established" prong review first without looking—closely or superficially—at whether there is a constitutional right and whether there is a violation. One cannot properly review the facts, rights, and alleged violations to the clearly established prong without looking at the facts, rights, and alleged violations on the merits of the constitutional claim. The clearly established prong is a comparison between the case before the Court and previous cases, and *Pearson* suggests that the Court can compare before the Court fully understands what it is comparing. *Saucier* worked better in practice.

Solitary confinement is "perilously close to a penal tomb" and its constitutionality is subject to question. *See Apodaca v. Raemisch*, 139 S. Ct. 5, 10 (2018) (Sotomayor, J., statement respecting denial of certiorari); *see Davis v. Ayala*, 135 S. Ct. 2187, 2209–10 (2015) (Kennedy, J., concurring) (emphasizing "[t]he human toll wrought by extended terms of isolation," describing solitary confinement as a "regime that will bring you to the edge of madness, perhaps to madness itself," and calling for constitutional scrutiny of the practice); *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (Breyer, J., dissenting) (highlighting the "dehumanizing effect of solitary confinement," cataloguing the "numerous deleterious harms" it inflicts, and calling for constitutional scrutiny of the practice). Notwithstanding calls from jurists on the Supreme Court for further constitutional inquiry, lower courts routinely dispose of cases concerning solitary confinement on the "clearly established" prong of the analysis, thereby avoiding the constitutional question altogether. In the last three years, for example, and despite the fact that such claims are hardly novel, *see, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209 (2005), a Westlaw search shows that circuit courts relied on the "clearly established" prong alone to resolve 62.5% percent of Fourteenth Amendment due process challenges to solitary confinement in cases decided on

qualified immunity grounds. *Compare Mathews v. Brown*, 768 F. App'x 537, 539–40 (7th Cir. 2019) (observing that "[w]e cannot say on this record that Mathews had a 'clearly established' right to avoid segregation"); *Grissom v. Roberts*, 902 F.3d 1162, 1170 (10th Cir. 2018) (noting that panel "need not address" merits of procedural due process claim concerning twenty years of solitary confinement because no "clearly established law . . . support[s] his claim"); *Perry v. Spencer*, 751 F. App'x 7, 10–11 (1st Cir. 2018) (noting that procedural due process rights are "not sufficiently defined as to place the constitutional question beyond debate") (internal quotation marks omitted); *Carr v. Higgins*, 700 F. App'x 598, 601 (9th Cir. 2017) (similar) *with J.H. v. Williamson Cty., Tenn.*, 951 F.3d 709, 720 (6th Cir. 2020) (reaching the constitutional prong, but granting qualified immunity); *Smith v. Corcoran*, 716 F. App'x 656, 657 (9th Cir. 2018) (similar); *Almighty Supreme Born Allah v. Milling*, 876 F.3d 48, 59-60 (2d Cir. 2017) (similar).

That is, in nearly two thirds of these cases, our sister courts refused to grapple with whether the constitutional rights had been violated. In accordance with the "Escherian Staircase" that is the contemporary qualified immunity regime, there is no need to bother. *Zadeh v. Robinson*, 902 F.3d 483, 498-99 (5th Cir. 2018) (Willett, J., concurring dubitante). Without intervention by the high court, the majority's decision—and the decisions of several other circuits (*e.g.*, the Second, Eighth, and Ninth Circuits)—will surely be weaponized countless times to shield solitary confinement from constitutional scrutiny. This is not hyperbolic. In the eighteen months following the Supreme Court's denial of certiorari in *Apodaca v. Raemisch*, 864 F.3d 1071 (10th Cir. 2017) and *Lowe v. Raemisch*, 864 F.3d 1205 (10th Cir. 2017), both panel decisions continue to be cited for the proposition that no clearly established law prohibits solitary confinement without any access to outdoor recreation. *See, e.g.*, *Moore v. Little*, 785 F. App'x 609, 613 (10th Cir. 2019) (citing *Apodaca* and *Lowe* for proposition that there is "reasonable debate on the constitutionality" of

withholding outdoor exercise for fourteen months from prisoner in solitary confinement); *Cunningham v. Hall*, No. 19-3115-SAC, 2019 WL 4034467, at *3 (D. Kan. Aug. 27, 2019) (citing *Apodaca* and *Lowe* for the proposition that "the Court does not need to decide the constitutionality of [solitary confinement without outdoor exercise] because the right was not clearly established").

As months turn to years, the "ravages of solitary confinement," *Apodaca,* 139 S. Ct. at 9 (Sotomayor, J., statement respecting denial of certiorari), will continue uninterrupted, especially if courts are permitted to raise qualified immunity on behalf of government actors. I write to strongly encourage Milkovich to seek the Supreme Court's intervention, because the time for it has come.

IN THE
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MIKHAIL MILKOVICH,	)	
	)	
Petitioner,	)	
	)	
v.	)	No.: 20-1000
	)	
VERONICA FISHER, Warden, Maximum Security Unit, SDC; FIONA PFENDER, Deputy Warden, Maximum Security Unit, SDC; SHEILA JACKSON, Classification Supervisor, Maximum Security Unit, SDC; and TAMI TAMIETTI, Major, Maximum Security Unit, SDC,	)	
	)	
Respondents.	)	

ORDER GRANTING PETITION FOR WRIT OF CERTIORARI

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Thirteenth Circuit is hereby granted as to the following questions:

1. (A) Whether federal appellate courts may raise the defense of qualified immunity *sua sponte*, and if so, (B) whether our holding in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009) permitting lower courts to proceed directly to the "clearly established" prong of the qualified immunity analysis should stand.

2. Whether placing a prisoner with serious mental illnesses and a history of self-harm in administrative segregation for 360 days, without consistent access to physician-prescribed treatment, can violate the Eighth Amendment right against cruel and unusual punishment.

IN THE
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	)	
Respondents.	)	

NOTICE

This matter is SET FOR ARGUMENT on January 15, 2021. In light of the COVID-19 pandemic, oral argument will be held virtually. The Clerk will provide detailed information to counsel of record regarding virtual argument.