No. 01-309

In the Supreme Court of the United States

LARRY HOPE, PETITIONER

v.

MARK PELZER, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether state officials sued in their individual capacities under 42 U.S.C. 1983 are entitled to qualified immunity unless they have violated statutory or constitutional rights "clearly established" by a case presenting facts "materially similar" to those in plaintiff's case.

2. Whether under the circumstances that must be taken as true at the summary judgment stage of this case, tying a prisoner to a "hitching post" violates "clearly established" constitutional rights for purposes of qualified immunity under 42 U.S.C. 1983.

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INTEREST OF THE UNITED STATES

This case concerns the law of qualified immunity and particularly the standards for determining whether, for purposes of qualified immunity, Eighth Amendment claims in the prison context rest on "clearly established" law. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 (1994 & Supp. V 1999) also apply in civil actions against federal personnel under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 n.30 (1982). The United States has an interest in protecting government employees, including per-

sonnel of the Federal Bureau of Prisons, from meritless and unduly burdensome litigation that may interfere with the exercise of lawful discretion in their official functions and deter qualified individuals from public service. The United States also has an interest in ensuring effective deterrence of unconstitutional conduct by government employees and in ensuring that adequate remedies exist for violations of constitutional rights.

The United States has a further interest in this case because the standard for determining whether the law is "clearly established" when an official asserts qualified immunity in civil litigation is equivalent to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. See *United States* v. *Lanier*, 520 U.S. 259, 270-272 (1997). The Court's decision in this case therefore may affect federal enforcement of 18 U.S.C. 241 and 242.

Finally, the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. 1997 *et seq.*, authorizes the United States Department of Justice to investigate conditions of confinement in correctional facilities when it is alleged that prisoners are being deprived of constitutional rights pursuant to a pattern or practice of resistance to the full enjoyment of those rights. When he has reasonable cause to believe that such deprivations exist, the Attorney General may initiate a civil action in the name of the United States against state or local officials to remedy unconstitutional conditions of confinement. See 42 U.S.C. 1997a(a). Pursuant to CRIPA, the Department of Justice has investigated Alabama's practice of shackling inmates to a restraining bar—like the one involved in this case—at a prison other than the institution at issue in this case. After

that investigation, the Department of Justice advised the State of Alabama that its practice was unconstitutional.

STATEMENT

1. Administrative Regulation Number 429 of the Alabama Department of Corrections provides that inmates who "refuse[] to work or [are] otherwise disruptive to [a prison] work squad" shall be handcuffed to a restraining bar known as a "hitching post." Ala. Dep't of Corrs. Reg. 429, at 1 (Oct. 26, 1993) (Reg. 429); see Pet. App. 4; Br. in Opp. 1. The federal district court in *Austin* v. *Hopper*, 15 F. Supp. 2d 1210 (M.D. Ala. 1998), which found Alabama's shackling of inmates to hitching posts unconstitutional (*id.* at 1265-1266), described the apparatus and its use:

> Regulation 429 describes the hitching post or restraining bar as a horizontal bar, "made of sturdy, nonflexible material," placed at 57 inches and 45 inches from the ground so as to accommodate inmates of varying heights. Inmates are handcuffed to the hitching post in a standing position and remain standing the entire time they are placed on the post. Although corrections officers are instructed to handcuff the inmates to the post at "mid-chest level," the plaintiffs presented evidence that some inmates were handcuffed such that they were forced to stand with their arms above their heads, while others were handcuffed such that they could not stand upright while handcuffed to the post. Most inmates are shackled to the hitching post with their two hands relatively close together, however some inmates were handcuffed so that their arms were spread apart and their hands shackled independently. Some facilities also shackle

> the inmates' ankles together when the inmates are on the post.
>
> Inmates eat their lunches while standing and with both hands shackled to the post. * * * Inmates are not permitted breaks to flex or stretch their muscles while they are on the post. * * * [M]any inmates reported being in mild to severe pain during and after their placement on the hitching post because of the strain on their muscles.
>
> * * * * *
>
> Once an officer has determined that an inmate has refused to work or is disruptive to a work squad, the officer may place the inmate on the hitching post, using force if necessary. No disciplinary hearing or other type of due process procedure is provided to the inmate.

Id. at 1241-1242 (footnotes omitted).[1]

The hitching posts at Alabama's prisons are located outdoors. See Pet. 3. Regulation 429 provides that an inmate shackled to the bar should remain there until he agrees to return to work or, if the inmate does not agree to return to work, until "after the last [work] squad is checked in[to the prison]." Reg. 429, at 1-2. The regulation also requires prison officials to give the inmate medical attention either after he is put on the hitching post (if force has been used against the inmate) or after he is removed from it. *Id.* at 1; see *Austin*, 15 F. Supp. 2d at 1242. Inmates are to be offered fresh water and hourly bathroom breaks. Reg. 429, at 1; 15

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[1] In its decision in this case, the Eleventh Circuit deemed the *Austin* court's Eighth Amendment analysis of Alabama's use of hitching posts "sound and directly applicable to our case." Pet. App. 4 n.6.

F. Supp. 2d at 1242. Inmates who are placed on the hitching post are subject to additional prison discipline for their refusal to work. Reg. 429, at 2; 15 F. Supp. 2d at 1242-1243.

Alabama's prisons are the only prisons in the United States that use the hitching post or a similar device. See *Austin*, 15 F. Supp. 2d at 1250. A regulation of the Federal Bureau of Prisons provides that "[r]estraint equipment or devices (*e.g.*, handcuffs) may not be used * * * [a]s a method of punishing an inmate"; "in any manner which restricts blood circulation"; "[i]n a manner that causes unnecessary physical pain or extreme discomfort"; or "[t]o secure an inmate to a fixed object, such as a cell door or cell grill, except as provided in [28 C.F.R.] 552.24 [addressing use of restraints where necessary to control inmate]." 28 C.F.R. 552.22(h).

The United States Department of Justice investigated Alabama's Easterling Correctional Facility under CRIPA and, based upon that investigation, notified the State of Alabama in March 1995 that its use of a hitching post at that prison did not comply with the requirements of Regulation 429, created medical risks for inmates, served no valid penological purpose, and was unconstitutional. The State of Alabama responded that it had determined to continue using the hitching post at its Easterling prison and that it believed the practice was necessary to preserve prison security and discipline, as well as constitutional. See Pet. App. 6-7; *Austin*, 15 F. Supp. 2d at 1249-1250.

2. In 1995, petitioner was incarcerated at Alabama's Limestone Correctional Facility. He was assigned to the prison's chain gang. Pet. App. 2. Respondents were guards at the prison. *Id.* at 3.

On May 11, 1995, petitioner had a verbal disagreement with another inmate on the chain gang. Pet. App.

2. Guards took petitioner back to the prison and shackled him to the hitching post for disrupting the work squad. While handcuffed to the hitching post, petitioner was offered drinking water and a bathroom break every 15 minutes. Petitioner was released after approximately two hours. A prison nurse examined petitioner that evening and found no signs of injury. *Id.* at 2-3; Pet. Supp. App. 12-13.[2]

On June 7, 1995, petitioner fought with a guard while away from the prison with the chain gang. Guards forcibly subdued petitioner and then drove him back to the prison, where, after being examined by a nurse, petitioner was shackled to the hitching post. Petitioner alleges that he was handcuffed to the restraining bar in a standing position, with his arms raised, for approximately seven hours. Petitioner further alleges that he was not allowed to use a bathroom during the seven hours; that the guards gave him drinking water only once or twice and denied him water for three hours during the hottest part of the day; and that when he asked for water, guards taunted him by giving water to guard dogs and pouring water on the ground.[3] Pet. App. 3-4; Pet. Supp. App. 13-15, 26 n.10. Petitioner asserts that his arms grew tired from being handcuffed in a raised position and that his wrists became swollen and bruised. Pet. Supp. App. 14, 21. A prison nurse examined petitioner after his release from the hitching post but noted no injuries. Pet. App. 3. Petitioner

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[2] Because summary judgment was entered for respondents, the record must be viewed in the light most favorable to petitioner, drawing all inferences most favorable to him. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 n.26 (1982).

[3] The guard who allegedly poured out the drinking water is not a respondent in this case. See Pet. Supp. App. 26 & n.10.

received no other discipline for the June 7 incident. Pet. Supp. App. 15.

3. Petitioner sued respondents and other guards in the United States District Court for the Northern District of Alabama under 42 U.S.C. 1983. See Pet. Supp. App. 6, 9. The district court referred the case to a magistrate judge. *Ibid.*

The magistrate judge determined that petitioner's claims were limited to Eighth Amendment claims arising from respondents' use of the hitching post on May 11 and June 7, 1995. Pet. Supp. App. 7, 15, 27. The magistrate judge further concluded that petitioner could seek only compensatory and punitive damages—not injunctive or declaratory relief—because his claims concerned completed acts and he had been released from prison. *Id.* at 7 n.1, 27.

As to the Eighth Amendment claims that were properly presented, the magistrate relied on petitioner's factual allegations and on "special reports" filed by respondents, and treated respondents' reports as motions for summary judgment. Pet. Supp. App. 7-10; see generally 42 U.S.C. 1997e(c)(1) (1994 & Supp. V 1999) (requiring courts to dismiss prisoner Section 1983 suits "on [their] own motion or on the motion of a party * * * if the court is satisfied that the action * * * seeks monetary relief from a defendant who is immune from such relief."). Looking primarily to decisions of this Court, the United States Court of Appeals for the Eleventh Circuit, and the Alabama Supreme Court, see Pet. Supp. App. 20, 21-25, 31-32, the magistrate judge found that respondents were entitled to summary judgment because their "actions in placing the plaintiff on the restraining bar were [not] so contrary to then

existing law so as to defeat their assertion of qualified immunity," *id.* at 26-27.[4]

The district court adopted the magistrate judge's report and granted summary judgment for respondents. Pet. Supp. App. 3. The district court additionally held in a short memorandum opinion (*id.* at 1-3) that, at the time of the conduct alleged in this case, it was not clearly established that respondents' use of the hitching post to restrain respondent violated either the Eighth Amendment's prohibition on cruel and unusual punishments or the Fourteenth Amendment's Due Process Clause (U.S. Const. Amend. XIV, § 1).

4. The court of appeals affirmed. Pet. App. 14. Whereas the district court failed to determine whether respondents violated petitioner's constitutional rights, the court of appeals held that handcuffing petitioner to the hitching post on May 11 and June 7, 1995, did violate his Eighth Amendment rights. The court of appeals reasoned that petitioner was shackled to the bar "for a period of time extending past that required to address an immediate danger or threat" (*id.* at 9; see *id.* at 10) and respondents "were aware that placing him on the hitching post created a substantial risk of harm" to petitioner, which respondents did nothing to abate (*id.* at 6). The court declared a "bright-line rule for any future case" (*id.* at 11): "The practice of leaving an inmate cuffed to a hitching post when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment right to be protected from cruel and unusual punishment,

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[4] The magistrate judge also found that if petitioner had properly raised a Fourteenth Amendment due process claim, summary judgment for respondents would have been warranted on that claim as well. Pet. Supp. App. 27-31.

particularly when he is denied water and bathroom breaks" (*id.* at 13).[5]

The court of appeals concluded, however, that respondents were entitled to summary judgment in their favor on qualified immunity grounds because in 1995, when the actions took place, there was no "preexisting, obvious, and mandatory" federal law prohibiting use of the hitching post. Pet. App. 12 (quoting *Hill* v. *DeKalb Reg'l Youth Det. Ctr.*, 40 F.3d 1176, 1185 (11th Cir. 1994)). The court "recognize[d] that the inappropriateness of the hitching post could be inferred from" Eleventh Circuit precedent. *Id.* at 12. But the court stated that "[i]t is important to analyze the facts in these cases, and determine if they are 'materially similar' to the facts in the case in front of us." *Id.* at 13 (quoting *Suissa* v. *Fulton County*, 74 F.3d 266, 269-270 (11th Cir. 1996) (per curiam)). The relevant precedential decisions, the court of appeals concluded, did not establish the governing Eighth Amendment rule with sufficient clarity to defeat respondents' assertions of qualified immunity because these decisions involved facts that, although "analogous," were "not 'materially similar' to [petitioner's] situation." *Id.* at 13.

5. This Court granted certiorari on January 4, 2002. On January 29, 2002, the Court limited its grant of the petition to two questions formulated by the Court, which are stated above on page I of this Brief.[6]

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[5] The court of appeals did not address due process issues. See Pet. App. 3 n.3. Petitioner does not challenge that aspect of the court of appeals' decision and appears to rely only on the Eighth Amendment as the basis for his claim under Section 1983. See Pet. 1-2.

[6] This Court has directed lower courts to consider, as "the initial inquiry" in qualified immunity analysis, whether there would be a constitutional violation if the plaintiff's allegations were estab-

SUMMARY OF ARGUMENT

1. The touchstone of qualified immunity analysis is whether the defendant official has violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). A claim of immunity must be upheld unless, at the time of the asserted violation, settled law "clearly proscribed" the officers' alleged actions. *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985). In the case of an especially egregious violation of a clearly stated constitutional provision, a claim to official immunity might fail even though courts have never before had occasion to enforce the relevant constitutional right on materially similar facts. Where a violation of a broadly stated constitutional provision is alleged, however, a legal rule of the requisite clarity and specificity generally must be found, if at all, in judicial decisions. In that situation the facts of the earlier court case(s) need not be exactly the same as the facts of the alleged violation. To overcome a claim of qualified immunity based on judicial precedent, however, the plaintiff must identify authoritative decisions that establish, with obvious clarity, that the defendant's alleged conduct violated constitutional rights.

2. Viewing the record in this case in the light most favorable to petitioner and drawing all inferences most favorable to him, respondents' use of the hitching post

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lished. See *Saucier* v. *Katz*, 121 S. Ct. 2151, 2156 (2001). In this case and others (see, *e.g.*, *id.* at 2155, 2159), however, this Court has granted certiorari on qualified immunity issues but not on the underlying constitutional claim, presumably because only the former satisfies the criteria for this Court's exercise of certiorari jurisdiction. See Sup. Ct. R. 10. This Brief addresses only the qualified immunity issues on which the Court has granted certiorari.

against petitioner violated clearly established Eighth Amendment rights of which a reasonable officer would have known. Controlling Eleventh Circuit precedent clearly stated that disciplining an inmate who is not resisting authority by handcuffing him to a fixed object for a long period of time, or forcing him to stand in an awkward position for a long period of time, violates the Eighth Amendment. This precedent was materially similar to the instant case in that it provided clear notice of the relevant constitutional rule and no reasonable officer could have thought that the prolonged, painful, and punitive use of the hitching post that allegedly occurred on June 7, 1995, was lawful. The court of appeals reached a contrary conclusion by placing undue weight on the factual and procedural contexts of its controlling cases, without giving due significance to their holdings. On the limited record before it, the district court should not have granted summary judgment for all respondents on qualified immunity grounds.

ARGUMENT

I. A QUALIFIED IMMUNITY DEFENSE CAN SOMETIMES BE DEFEATED EVEN IN THE ABSENCE OF CASE LAW PRESENTING MATERIALLY SIMILAR FACTS

A. Official immunity is rooted in the policy consideration that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer* v. *Rhodes*, 416 U.S. 232, 241 (1974). "Implicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at

all." *Id.* at 242; see *Saucier* v. *Katz*, 121 S. Ct. 2151, 2158 (2001) ("The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct.").

Qualified immunity serves to ensure that officials do not "exercise their discretion with undue timidity." *Wood* v. *Strickland*, 420 U.S. 308, 321 (1975); see *Davis* v. *Scherer*, 468 U.S. 183, 195 (1984) (qualified immunity doctrine allows officers to "act without fear of harassing litigation"). It affords "'room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 343, 341 (1986)).

B. Implementing those principles, this Court held in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), that qualified immunity prevents a federal official sued in his personal capacity from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. The same rule applies in a suit against a state or local official under 42 U.S.C. 1983 (1994 & Supp. V 1999). 457 U.S. at 818 n.30; see *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). Thus, even when a state or local official errs and violates the Constitution, immunity shields the officer from liability and suit under Section 1983 unless, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley*, 475 U.S. at 341. "[I]f officers of reasonable competence could disagree on" the lawfulness of the conduct, then "immunity should be recognized." *Ibid.*

In *Anderson* v. *Creighton*, 483 U.S. 635 (1987), this Court addressed the level of generality at which the qualified immunity inquiry must take place. The court of appeals there had held that immunity was unavailable to an officer who allegedly conducted a warrantless search of a home, reasoning that it was clearly established that such searches are unconstitutional absent probable cause and exigent circumstances. *Id.* at 638. This Court reversed, ruling that immunity may not be denied merely because the governing legal principle was clearly established at a high level of generality. *Id.* at 639.

The *Anderson* Court explained that immunity may not be denied in a due process case, for example, simply because "the right to due process of law is quite clearly established by the Due Process Clause." 483 U.S. at 639. Instead, immunity may be denied only if "the right the official is alleged to have violated [was] 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640. "This is not to say," the Court continued, "that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." Rather, "the unlawfulness must be apparent" in light of pre-existing law. *Ibid.* Applying those principles, this Court held in *Anderson* that the court of appeals should have examined the "fact-specific" question of "whether a reasonable officer could have believed [the] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id.* at 641; see *id.* at 638 ("Our cases * * * generally provid[e] government officials * * * with a qualified immunity

* * * as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated.").

In *United States* v. *Lanier*, 520 U.S. 259 (1997), the Court further addressed the level of specificity that must be present in a governing legal rule in order for there to be "clearly established" law. *Lanier* involved a criminal prosecution under 18 U.S.C. 242, which makes it unlawful to act willfully and under color of state law to deprive a person of federal constitutional or statutory rights. See 520 U.S. at 264. The court of appeals had held that criminal liability may not be imposed under Section 242 for deprivation of a constitutional right unless this Court had applied the same right "in 'a factual situation fundamentally similar to the one at bar.'" *Id.* at 263 (quoting *United States* v. *Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1986)).

This Court reversed. It explained that the critical consideration is whether "broad constitutional requirements have been 'made specific' by the [constitutional] text or settled interpretations," such that potential criminal violators of Section 242 had "fair warning" of what was prohibited at the time of the charged conduct. 520 U.S. at 267 (quoting *Screws* v. *United States*, 325 U.S. 91, 104 (1945)). The Court concluded that "[n]either a decision of this Court [n]or the extreme level of factual specificity envisioned by the Court of Appeals is necessary in every instance to give fair warning." *Id.* at 268. Indeed, the Court noted that it had upheld convictions under Section 242 "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 269.

The *Lanier* Court compared the fair-warning standard that applies in criminal prosecutions under Section 242 to the "'clearly established' law" standard that applies to claims of qualified immunity in civil suits under Section 1983 or *Bivens*. 520 U.S. at 270. Both tests "serve the same objective," the Court held, "and in effect the qualified immunity test is simply the adaptation of the fair warning standard to give officials (and, ultimately, governments) the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes." *Id.* at 270-271.

Drawing on qualified immunity cases, the Court held that "general statements of the law are not inherently incapable of giving fair and clear warning" and that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640). The Court concluded that under Section 242, as in qualified immunity cases, "all that can usefully be said * * * is that [liability] may be imposed for deprivation of a constitutional right if, but only if, 'in the light of pre-existing law the unlawfulness under the Constitution is apparent.'" *Id.* at 271-272 (quoting *Anderson*, 483 U.S. at 640) (brackets omitted). Thus, as the Court reiterated last Term in *Saucier* v. *Katz*, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." 121 S. Ct. at 2156; see *id.* at 2156-2157 ("If the law did not put the officer on notice that his conduct would be clearly

unlawful, summary judgment based on qualified immunity is appropriate.").

C. *Harlow*, *Anderson*, and *Lanier* answer the first question posed in this case. Those decisions establish that government officials are not immune from liability for clear constitutional violations simply because courts have never had occasion to enforce the relevant constitutional right on materially similar facts. Some constitutional violations are obvious whether or not they have been addressed in reported cases. For example, the Thirteenth and Fourteenth Amendments would put any reasonable state welfare official on notice that selling foster children into slavery is clearly unconstitutional. There accordingly would be no official immunity from Section 1983 liability for such a constitutional violation—whether or not a case with similar facts had ever before arisen. *Lanier*, 520 U.S. at 271; see U.S. Const. Amend. XIII, § 1, and Amend. XIV, § 2. Likewise, case law addressing materially similar facts would be unnecessary to defeat a claim of immunity if state officials conceived and implemented a plan to disenfranchise female voters on account of their sex, in plain violation of the Nineteenth Amendment.[7]

In the ordinary case, however, the claimed constitutional right is not unequivocally set out in the text of the Constitution itself with a sufficient level of specificity to satisfy the requirement that officers have clear

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[7] In other cases, the Eleventh Circuit has recognized this rule. See *Smith* v. *Mattox*, 127 F.3d 1416, 1419 (1997) (plaintiff can overcome qualified immunity by showing "that the official's conduct lies so obviously at the very core of what the [Constitution] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw."); *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (2000) (same).

notice of the unlawfulness of their conduct. Case law therefore will be necessary to make the constitutional right specific and to establish the contours of the right with sufficient clarity for purposes of qualified immunity analysis. In that situation, "[t]he relevant, dispositive inquiry" is whether the case law would make it "clear to a reasonable officer that his conduct was unlawful in the situation" at issue in the lawsuit. *Saucier*, 121 S. Ct. at 2156.

That question must be answered with regard for both the authoritativeness of any relevant judicial decisions and whether the decisions arose on "facts not distinguishable in a fair way from the facts presented in the case at hand." *Saucier*, 121 S. Ct. at 2157. Decisions that are not controlling in the relevant jurisdiction generally will not suffice to establish a clear legal rule unless they establish "a consensus * * * of persuasive authority." *Wilson*, 526 U.S. at 617; see *id.* at 618 (where courts of appeals differ on a constitutional question, "it is unfair to subject police to money damages for picking the losing side of the controversy"); see also *Lanier*, 520 U.S. at 269 (finding no "need for a categorical rule that decisions of the Courts of Appeals and other courts are inadequate as a matter of law to provide [fair warning of a constitutional rule]"). But when there is a controlling decision on-point or a consensus of persuasive authority establishing the governing legal rule, insignificant factual variations from the case at issue will not allow the defendant officer to obtain immunity. A government official could not establish immunity if such judicial authority stated a constitutional rule that "appl[ied] with obvious clarity to the specific conduct in question, even though the very action in question" had never been addressed by

the courts. *Id.* at 271 (internal quotation marks omitted).

Consistent with those principles, the Eleventh Circuit has required the facts of the judicial authority that is relied upon to defeat a claim of qualified immunity to be "materially similar" to the facts at issue. *Suissa* v. *Fulton County*, 74 F.3d 266, 270 (11th Cir. 1996) (internal quotation marks omitted). Other circuits have developed similar rules. The Tenth Circuit, for example, requires that "there be some, but not necessarily precise, factual correspondence between previous cases and the case at bar." *Calhoun* v. *Gaines*, 982 F.2d 1470, 1475 (1992). The First Circuit requires "fairly analogous precedents." *Horta* v. *Sullivan*, 4 F.3d 2, 13 (1993). The Seventh Circuit demands "case law in a closely analogous area." *Lojuk* v. *Johnson*, 770 F.2d 619, 628 (1985), cert. denied, 474 U.S. 1067 (1986). When properly applied, such tests are fully consistent with this Court's decisions addressing qualified immunity. But proper application of those tests requires the search for "materially similar" cases to remain part of the ultimate inquiry into whether the constitutional right at issue was established with sufficient clarity to put a reasonable officer on notice.

There is a danger—suggested by this case, see Part II, *infra*—that the search for materially similar decisions may take on a life of its own and override the principle that official conduct can be both novel and clearly unconstitutional, see *Lanier*, 520 U.S. at 271. The search for materially similar cases, moreover, must encompass both the facts and the holdings of relevant precedents. If an earlier case establishes a bright-line rule, then factual disparities between that case and a later case will be immaterial unless the differences put the conduct in the later case outside the scope of the

bright-line prohibition. By contrast, if precedent establishes that a constitutional judgment depends on the totality of the circumstances in the particular case, then factual variations between the precedent and the case being litigated likely will have greater importance.

For those reasons, a search for materially similar cases is particularly useful (indeed, necessary) when dealing with constitutional norms that are defined at high levels of generality. For example, the constitutional principles that officers must have probable cause to conduct a search and that exigent circumstances excuse a search warrant are not self-executing. See *Anderson*, 483 U.S. at 641. The rule that officers may not use unreasonable force when making an arrest likewise can only provide concrete guidance when it is made specific in particular cases. See *Saucier*, 121 S. Ct. at 2158. Where, however, the case law provides clear guidance and bright-line rules, factual differences are less relevant. The degree of factual difference that precludes a finding of material similarity therefore depends in part on the extent to which the relevant legal rules—as established by the Constitution and the case law—themselves provide officers clear guidance.

II. THE DISTRICT COURT'S DISMISSAL OF PETITIONER'S LAWSUIT ON QUALIFIED IMMUNITY GROUNDS WAS ERROR

Viewing all disputed facts in the light most favorable to petitioner and drawing inferences in his favor, see *Harlow*, 457 U.S. at 816 n.26, petitioner's claim in this case rests primarily upon the incident on June 7, 1995. On that day, one or more respondents punished petitioner for fighting with a guard by handcuffing petitioner to a hitching post with his wrists at about head-

height, for approximately seven hours in hot weather, while taunting him, denying him any bathroom break, and giving him just one or two drinks of water. That corporal punishment caused petitioner physical pain and made his wrists swollen and bruised. See 11/3/97 Second Aff. of Larry Hope; Pet. App. 2-3, 6, 10; Pet. Supp. App. 12, 13-15.[8]

Under this Court's two-step procedure for considering qualified immunity claims, the "threshold" inquiry when asking whether there was a violation of clearly established rights is whether the alleged facts show a constitutional violation. See *Saucier*, 121 S. Ct. at 2156. The court of appeals held in this case that "[t]he practice of leaving an inmate cuffed to a hitching post when he no longer presents a threat to himself or those around him is a violation of that prisoner's Eighth Amendment rights, particularly when he is denied water and bathroom breaks." Pet. App. 13. For purposes of this case, the correctness of that ruling is unchallenged and may be assumed. See note 6, *supra*.

"[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 121 S. Ct. at 2156. Respondents' ability to obtain summary judgment on qualified immunity grounds therefore depends on whether a rea-

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[8] On June 7, 1995, the high temperature in Huntsville, Alabama (approximately 15 miles from the Limestone prison) was 88 degrees. See <http://www.wunderground.com/history/airport/KHSV/1995/6/7/DailyHistory.html]>. Respondent was without a shirt at least part of the day. See Compl. Exh. 1, at 2 (petitioner's affidavit dated Mar. 26, 1996, alleging that officers made him take off his shirt); but see 11/3/97 Second Aff. of Larry Hope ¶ 15 & Exhs. 3-4 (photographs showing petitioner wearing a shirt while shackled to a hitching post).

sonable officer could have thought that the alleged use of the hitching post was lawful in light of clearly established law and the factual information respondents possessed at the time. See *Anderson*, 483 U.S. at 641.

No reasonable officer could have thought that the alleged prolonged, painful, and punitive use of the hitching post on June 7 was lawful. The court of appeals recognized that at least two of its precedential decisions addressed "analogous" factual situations. Pet. App. 13. The court, however, erroneously dismissed the notice provided by those cases by focusing inordinately on their factual contexts and paying too little attention to the legal principles they established.

In *Gates* v. *Collier*, 501 F.2d 1291 (1974), the Fifth Circuit (before being split into the Fifth and Eleventh Circuits, see Pet. 7, n.2) addressed a record "replete with innumerable instances of physical brutality and abuse in disciplining inmates who were sent to [the Mississippi State Penitentiary]." 501 F.2d at 1306. The court of appeals identified specific practices that, it held, "[u]nquestionably" violated the Eighth Amendment. *Ibid.* Those practices included "handcuffing inmates to the fence and to cells for long periods of time" and "forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods." *Ibid.*

The court of appeals distinguished *Gates* as a case "involv[ing] an effort to make substantial changes" in numerous prison conditions. Pet. App. 13. But the broad scope of the plaintiffs' requested relief in *Gates* does not lessen the force of the Fifth Circuit's *holding* that "handcuffing inmates to the fence and to cells for long periods of time" and forcing them to "maintain awkward positions for prolonged periods" violated the Eighth Amendment. 501 F.2d at 1306. And to the ex-

tent that the court of appeals may have found *Gates* inapplicable because it involved handcuffing inmates to fences and prison cells rather than the use of a hitching post, see Pet. App. 13, the court ignored that a constitutional rule "already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Lanier*, 520 U.S. at 271 (internal citation and quotation marks omitted). No reasonable officer could have concluded that the constitutional holding of *Gates* turned on the fact that inmates were handcuffed to fences or the bars of cells, rather than a specially designed metal bar designated for shackling. If anything, the use of a designated hitching post highlights the constitutional problem. Accordingly, the *Gates* case is materially similar in that it should have put respondents on notice that their conduct was unlawful, even if the facts were not identical.[9]

Ort v. *White*, 813 F.2d 318 (11th Cir. 1987), provided respondents additional notice. The plaintiff inmate in

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[9] The Eleventh Circuit's reliance on fine factual distinctions between this case and *Gates* is at odds with other decisions of the Eleventh Circuit. In *Skrtich* v. *Thonton*, No. 00-15959, 2002 WL 111299 (11th Cir. Jan. 29, 2002), for instance, an unruly prisoner who already had been subdued was beaten by prison guards. Rejecting a claim to immunity, the court of appeals held that the relevant circumstances were "a non-compliant inmate who had been restrained by the guards and no longer posed a threat." *Id.* at *4. Those circumstances, in the court's view, "were enough like the facts in precedent that no reasonable, similarly situated official could believe that the factual differences * * * might make a difference to the conclusion about whether the official's conduct was lawful." *Ibid.* The court of appeals further explained that "[t]he fact that the beating took place in the context of a cell extraction does not materially distinguish this case from our precedent." *Ibid.*

Ort alleged, in relevant part, that Alabama prison officials violated his Eighth Amendment rights by denying him drinking water when he refused to do prison work or to help carry the work squad's water container. *Id.* at 320-321. In addressing the inmate's claims, the Eleventh Circuit approved a district court's holding—based on Fifth Circuit decisions that are themselves precedent in the Eleventh Circuit—that "physical abuse directed at [a] prisoner *after* he terminate[s] his resistance to authority would constitute an actionable eighth amendment violation." *Id.* at 324 (discussing *Smith* v. *Dooley*, 591 F. Supp. 1157 (W.D. La. 1984), aff'd, 778 F.2d 788 (5th Cir. 1985)). Furthermore, the Eleventh Circuit clarified, "[p]rison officials step over the line of constitutionally permissible conduct if they use more force than is reasonably necessary in an existing [disciplinary] situation or if they summarily and maliciously inflict harm in retaliation for past conduct." *Id.* at 325. The court of appeals held (*id.* at 325-326) that the denial of water to Ort at his work site was not an Eighth Amendment violation under the exigent circumstances of that case. But it cautioned that a constitutional violation might have been present "if later, once back at the prison, officials had decided to deny [Ort] water as punishment for his refusal to work." *Id.* at 326.

Like its consideration of *Gates*, the court of appeals' consideration of *Ort* (Pet. App. 13) was inadequate. The significance of *Ort* for purposes of the qualified immunity inquiry in this case is not—as the court of appeals suggested—that both cases involved work squads and drinking water. Rather, *Ort* is significant mainly for its warning against physically abusing a prisoner who is not resisting authority (813 F.2d at 324-325), which reinforced the relevant holdings of *Gates*.

The court of appeals therefore erred in ruling that *Gates* and *Ort* were too dissimilar from this case to provide respondents clear guidance. Despite minor differences in the factual contexts, *Gates*, read together with *Ort*, gave reasonable officers clear notice in 1995 that, when there is no prison disturbance or other ongoing threat, it violates the Eighth Amendment to punish an inmate by handcuffing him to a fixed object with his wrists at about head-height for approximately seven hours while denying him bathroom breaks and severely limiting his access to water. The facts of *Gates* and *Ort* are not identical to those in this case, but together those decisions provided respondents with clear notice of the applicable constitutional rules.

Respondents' alleged use of the hitching post—for a punitive purpose, without giving petitioner an opportunity to return to work, and accompanied by denial of drinking water and bathroom breaks—also violated the requirements of Regulation 429. See pp. 3-5, *supra* (discussing regulation). A violation of Alabama prison regulations could not alone establish an Eighth Amendment violation. See *Davis* v. *Scherer*, 468 U.S. at 193-194 & nn.11, 12. But respondents' alleged failure to follow prison policy does foreclose the argument that, if the state policy itself was arguably constitutional, then respondents' conduct necessarily did not violate clearly established law. This is not a case where the defendants reasonably relied on an administrative policy in carrying out their allegedly illegal acts. Cf. *Wilson*, 526 U.S. at 617 (where relevant law was undeveloped, "it was not unreasonable for law enforcement officers to look and rely on" an administrative policy).

Contrary to respondents' argument (Br. in Opp. 12-15), moreover, reasonable officers in respondents' position could not have relied on the magistrate judge's

Report and Recommendation in *Whitson* v. *Gillikin*, No. CV-93-H-1517-NE (N.D. Ala. Jan. 24, 1994) (*Whitson* Report), to conclude that the alleged treatment of petitioner was lawful.[10] The magistrate judge in *Whitson* found that prison officials who had handcuffed an inmate to a hitching post for eight hours in hot weather without water or bathroom breaks were entitled to qualified immunity because, as of July 1993, "there was no clearly established law identifying this practice as unconstitutional." Br. in Opp. 14 (quoting *Whitson* Report 7). Unlike the alleged facts in this case, however, the defendant officers in *Whitson* "gave [the inmate] the choice of either working or being handcuffed to the security bar." *Whitson* Report 10. As respondents put it, the prisoner in such a situation "in effect, holds the keys to his freedom from the restraint bar." Br. in Opp. 16. The magistrate judge in *Whitson*, moreover, did not evince any awareness of the Fifth Circuit's decision in *Gates*. See *id.* at 7- 11. Given the legally important factual difference between *Whitson* and this case, and given the magistrate judge's failure to consider *Gates*, no reasonable officer would have understood the *Whitson* Report's conclusion that the existence of a constitutional violation in *that* case was "debatable" (*id.* at 11) as indicating that the alleged punishment of petitioner in *this* case might be lawful.[11]

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[10] The magistrate judge's report and recommendation in *Whitson* were accepted by the district court. See Order Granting Summary Judgment and Dismissing the Action, *Whitson* v. *Gillikin*, No. CV-93- H-1517-NE (N.D. Ala. Feb. 15, 1994).

[11] Respondents also cite (Br. in Opp. 12) the 1998 magistrate judge's report in *Hudson* v. *James*, No. CV-96-D-1266-N (M.D. Ala. Oct. 14, 1998). That report was issued after the relevant events in this case and has no significance when assessing the state of the law in 1995. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530

On the limited record before it and absent further discovery, the district court should not have granted summary judgment for all respondents, on qualified immunity grounds, as to petitioner's Eighth Amendment claim. The district court should, at a minimum, have considered the alleged involvement of each respondent officer in events that violated the clearly established rules of *Gates* and *Ort*. See Pet. Supp. App. 12-15 (discussing petitioner's allegations and respondents' factual affidavits); cf. *Saucier*, 121 S. Ct. at 2160, 2161-2162 (Ginsburg, J., concurring in the judgment). Discovery on the qualified immunity issue also may be necessary. See *Anderson*, 483 U.S. at 646-647 n.6. But if such future discovery failed to uncover facts that establish a genuine issue as to whether respondents violated clearly established law, respondents would be entitled to immunity and summary judgment at that time. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985).

CONCLUSION

The court of appeals in this case lost sight of the ultimate question of whether a reasonable officer would have had clear notice that his conduct violated the Constitution. The court of appeals asked a relevant question when it inquired whether the relevant Eleventh Circuit precedents were materially similar to this case. It gave undue weight, however, to the factual and procedural contexts of its precedents and paid too little attention to the guidance provided by their holdings. Viewed in light of their holdings, *Gates*

(1985). The magistrate judge in *Lane* v. *Findley*, No. CV 93-C-1741-S (N.D. Ala. Aug. 4, 1994), found no Eighth Amendment violation where an inmate was shackled to a hitching post for five hours, but "was given food, water, and the opportunity to use toilet facilities." *Id.* at 9.

and *Ort* are "materially similar" to the case at hand. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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