No. _____

In the Supreme Court of the United States

DONALD SPAULDING AND BRAD PURVES, PETITIONERS

v.

WILLIAM WELCH

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

John L. Thurber
Assistant Attorney General
Civil Litigation, Employment,
and Elections Division

Attorneys for Petitioners

QUESTION PRESENTED

1. Does it substantially burden a prisoner's right to freely exercise his religion if he is given a 1,300 calorie per day diet during a month-long religious fast, if the prisoner does not prove or even allege that he suffered any adverse effects from the reduced diet?

2. Is it clearly established, for qualified-immunity purposes, that the above scenario violates the First Amendment?

PARTIES TO THE PROCEEDING

The petitioners in this matter are Don Spaulding and Brad Purves; they are employees of the Michigan Department of Corrections. The respondent, William Welch, is an inmate incarcerated in Michigan.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

OPINIONS BELOW

The opinion of the Sixth Circuit (App. 1a–19a) is reported as *Welch* v. *Spaulding*, *et al.*, at 2015 WL 5729466. The opinion of the United States District Court for the Eastern District of Michigan (App. 20a–29a) is reported as *Welch* v. *Kusey*, *et al.*, 2014 WL 3543270.

JURISDICTION

The Sixth Circuit entered its opinion on September 30, 2015. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the dep-

rivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

"Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco, Calif.* v. *Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (citation omitted) (listing five recent examples). Here, the Sixth Circuit wrongly subjected two prison officials to liability on the theory that they substantially burdened a prisoner's free exercise of religion by giving him (William Welch) fewer calories during his religious fast than non-fasting prisoners received.

The officials did not violate the First Amendment. As Judge McKeague explained in dissent, Welch did not produce any evidence showing that his diet caused any adverse effects—any health problem, any weight loss, or even any discomfort. If he did not suffer any adverse effects, then his free-exercise rights could not have been substantially burdened. Simply put, the First Amendment does not establish a requirement that, even in the absence of allegations of adverse effects, a prisoner must receive a specific number of calories per day during a religious fast. Yet that is what the Sixth Circuit's rule boils down to.

It is not clearly established that giving a prisoner roughly 1,300 calories per day during a religious fast substantially burdens his religious freedom. No decision of this Court or of any circuit has ever mandated that a diet of 1,300 calories per day violates the Constitution. In fact, the Seventh Circuit has rejected a similar claim, and thus the Sixth Circuit has, ironically, created a circuit split as to whether such a right was clearly established under the First Amendment.

Since the law was—and still is—unclear on this issue, the petitioners are entitled to qualified immunity. This case is a textbook example of where government officials should be entitled to qualified immunity. This Court should grant the writ of certiorari because of the importance of qualified immunity to society, as holding prison officials personally liable for good-faith decisions like this one will deter good people from serving in the important public function of operating prisons.

STATEMENT OF THE CASE

William Welch, an inmate under the custody of the Michigan Department of Corrections (MDOC), brought this action under 42 U.S.C. § 1983 against three prison officials who worked in food service—against Don Spaulding, the Food Service Director at the Saginaw Correctional Facility where Welch resided in August 2011, against Brad Purves, MDOC's Food Service Program Manager, and against Glenn Kusey, an acting food service supervisor at the Saginaw Correctional Facility. App. 2a. Welch alleged that the three officials violated his First Amendment right to freely exercise his religion by failing to provide him with a sufficient number of calories during the month of Ramadan in 2011 (August 1 through August 29, 2011). Welch asserted that the two bagged meals a day he received during Ramadan (one before dawn and one after sunset) totaled approximately 1,300 calories per day. App. 8a, 43a. Welch did not allege in his complaint that he suffered any adverse effects as a result of this diet—he has not alleged that he lost any weight, experienced any discomfort, or suffered any health problems as a result of the reduced number of calories.

The prison officials moved for summary judgment based on qualified immunity. The magistrate judge agreed and recommended that the district court dismiss Welch's money-damages claim. App. 61a. He reasoned that the law was not clearly established that a prisoner fasting for religious purposes is entitled to the same number of calories as the general prison population. App. 67a. The magistrate judge also recommended that Welch's claim for injunctive relief proceed. (And the magistrate judge recommended that the claim against Kusey be dismissed because Kusey's only role in the case was denying an administrative grievance. App. 60a. Because the district court dismissed Kusey and Welch did not appeal that determination, Kusey is no longer a part of this case.)

The district court rejected the magistrate judge's conclusion that Spaulding and Purves were entitled to qualified immunity. Noting that Welch "claims that he was entitled to 'nutritionally adequate food,' " the district court concluded that Welch had a clearly established right "to an adequate diet during Ramadan" and that "a reasonable prison official should have known in 2011, that a diet consisting of 1,200 to 1,300 calories per day served for thirty consecutive days was not sufficient to maintain the health of an average inmate and thus [was] constitutionally inadequate." App. 27a. The district court relied solely on generic evidence of the number of calories provided and did not identify any evidence that Welch's health was adversely affected in any way. App. 26a–28a. The two remaining officials (Spaulding and Purves) appealed.

In a divided opinion, the Sixth Circuit affirmed the denial of qualified immunity. App. 10a. The majority concluded that prisoners have a First Amendment right to " 'an adequate diet without violating the inmate's religious dietary restrictions,' " App. 6a (quoting *Colvin* v. *Caruso*, 605 F.3d 282, 290 (6th Cir. 2010)), or, as other circuits have put it, " 'to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion,' " App. 6a (quoting *McElyea* v. *Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987)). Applying this "adequate diet" or "good health" standard, the majority relied solely on data about average caloric requirements. App. 6a–10a. The majority did not cite any record evidence showing that Welch's health suffered in any way or even that Welch had experienced hunger or discomfort, App. 6a–10a; rather, the majority acknowledged that "Welch did not document specific adverse health effects." App. 8a n.2. The majority held that Welch made the "required showing to defeat Petitioners' claim of qualified immunity at this stage, and established a genuine issue of material fact regarding whether the particular restricted diet in his case was so lacking as to violate this established right." App. 10a.

In dissent, Judge McKeague concluded that Welch's claim failed both prongs of sovereign immunity: "Welch has not met his burden of producing evidence that shows a constitutional violation, much less a clearly established one." App. 11a.

Addressing the "constitutional violation" prong, Judge McKeague explained that, under Sixth Circuit precedent, receiving fewer calories rises to the level of

a substantial burden on free-exercise rights only "if the prisoner can show—by sufficient evidence at the summary-judgment stage—that he 'would have been malnourished' (or suffered a substantial burden in some other way) if he didn't give up his fast." App. 13a. Welch did not show a substantial burden, Judge McKeague concluded, because he did not produce any evidence he suffered any adverse effects. App. 14a. For example, "Welch has failed to show that he needed [the extra calories] to remain healthy or to satisfy the dietary requirements of his religion." App. 14a (internal quotation marks omitted; alteration in original). And in the absence of any evidence of adverse effects, the case "boils down to this: The majority holds that the First Amendment requires a specific number of calories during a religious fast." App. 17a. Because Welch "[l]ack[s] even an alleged substantial burden," Judge McKeague would have held that "Welch cannot make out a First Amendment violation." App. 17a.

Judge McKeague also concluded that Welch failed the "clearly established" prong: "There is simply *no way* that '*every* reasonable official would have understood' that administering a 1,300-calorie-per-day diet for thirty days during an inmate's religious fast—with no evident or even alleged adverse effects to the inmate—violates the First Amendment." App. 17a (emphasis added; internal quotation marks omitted) (quoting *Aschcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

REASONS FOR GRANTING THE PETITION

Qualified immunity serves the important societal interest of "shield[ing] officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 231 (2009). Qualified immunity recognizes both "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion" and "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Scheuer* v. *Rhodes*, 416 U.S. 232, 240 (1974), abrogated on other grounds by *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

The Sixth Circuit's decision fails both steps of the qualified-immunity analysis. See *Saucier* v. *Katz*, 533 U.S. 194 (2001). It fails the first step because "the facts that [the] plaintiff has alleged . . . or shown" do not "make out a violation of a constitutional right." *Id.* at 232. A prisoner cannot show that his First Amendment right to an adequate diet while fasting has been substantially burdened when he fails to allege or show any facts suggesting that the diet adversely affected him. And it fails the second step because "the right at issue" was not " 'clearly established' at the time of [the] defendant's alleged misconduct." *Id.* To the contrary, no circuit court had held that similar conduct violated the First Amendment. As a result, the Sixth Circuit's decision allows officials to be subject to personal liability based on the theory that a 1,300-calorie-per-day diet inherently violates the First Amendment, even if the prisoner does not allege that he suffered any adverse effects. Summary reversal is warranted.

I. The First Amendment does not impose a minimum-calorie diet for fasting prisoners.

Neither the First Amendment itself nor this Court's jurisprudence require that prisoners who engage in religious fasts must receive the same number of calories as other prisoners or must receive a certain minimum number of calories. Instead, courts applying the First Amendment in the prison context focus on whether the relevant policy "substantially infringes on an inmate's First Amendment religious practices." *Hayes* v. *Tennessee*, 424 F. App'x 546, 549 (6th Cir. 2011); see, e.g., *Jehovah* v. *Clarke*, 798 F.3d 169, 177 (4th Cir. 2015); *Ford* v. *McGinnis*, 352 F.3d 582, 592 (2d Cir. 2003) (Sotomayor, J.); *Levitan* v. *Ashcroft*, 281 F.3d 1313, 1320 (D.C. Cir. 2002). Even if a prison regulation substantially infringes on religious practices, "the regulation is valid if it is reasonably related to legitimate penological interests." *Turner* v. *Safley*, 482 U.S. 78, 89 (1987); see also *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342 (1987); App. 39a.

When a prisoner fails to provide evidence that he suffered any adverse effects from receiving fewer calories, he has not shown that any question of fact exists as to whether he experienced *any* burden on his religious liberty, let alone a substantial one. Here, Welch provided no evidence, "not even his own testimony," App. 15a (McKeague, J., dissenting), to show that the food he received was insufficient to provide him with an adequate diet or to maintain his health. And absent allegations about adverse effects, all that is left of his claim is the assertion that the First Amendment mandates a certain number of calories during fasts.

It does not. The requirements of the First Amendment are satisfied if a prisoner is given an adequate diet with food sufficient to sustain him in good health. *Colvin*, 605 F.3d at 290; *McElyea*, 833 F.3d at 198. Different prisoners with different body types and different activity levels will naturally have different caloric requirements, which is why the courts have, with the exception of the decision below, looked at whether the prisoner's health was actually effected. E.g., *Hall* v. *Sutton*, No. 11-cv-446-JPG, 2012 WL 407244, *4 (S.D. Ill. Feb. 8, 2012) (inmate alleged he experienced "physical discomfort" because of reduced calories during Ramadan fast); *Kwanzaa* v. *Mee*, No. Civ. 09-5132 SRC, 2011 WL 2580396, at *2 (D.N.J. June 28, 2011) (inmate alleged "weight loss" as a result of reduced calories during Ramadan fast); *Lovelace* v. *Bassett*, No. 7:07cv00506, 2008 WL 4452638, at *1 (W.D. Va. Sept. 27, 2008) (inmate "lost ten pounds, suffered 'hunger headaches' and had trouble sleeping" as a result of reduced calories during Ramadan fast). Without such allegations—and here, at the summary-judgment stage, evidence supporting the allegations—the prisoner necessarily fails to show that his diet was inadequate to maintain his health. He therefore cannot make out a valid First Amendment claim.

II. The law is not clearly established that the First Amendment requires fasting prisoners to receive a particular number of calories per day.

At the very least, Spaulding and Purves are entitled to qualified immunity because existing precedent has not put the constitutional question "beyond debate." *al-Kidd*, 131 S. Ct. at 2083. As this Court has repeatedly explained, government officials acting

within the scope of their authority are entitled to qualified immunity as long as their conduct does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). Indeed, government officials lose the protections of qualified immunity only if, "at the time of the challenged conduct, 'the contours of a right are sufficiently clear' that *every* 'reasonable official would have understood that what he is doing violates that right. *al-Kidd*, 131 S. Ct. at 2083 (emphasis added; brackets omitted) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). A court may answer first the question of whether a right was clearly established. *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009).

The Sixth Circuit's analysis is flawed in this case because it defined clearly established law at too high a level of generality. No reasonable government official would have understood that administering the Ramadan diet in question violated clearly established law, particularly when it did not cause any adverse effects for Welch. Recently, this Court emphasized that it has "repeatedly told courts . . . not to define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2023 (2014) (ellipsis in original); *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015). After all, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established." *Mullenix*, 136 S. Ct. at 308. "This inquiry must be undertaken in light of the specific context of the case, not as a

broad general proposition." *Id.* (internal quotation marks omitted).

No court prior to the decision in this case had held anything approaching the petitioners' conduct to be unconstitutional. Prior to the Sixth Circuit's decision, courts had held only that prisoners had a right to a nutritionally adequate diet, and here there is not even an allegation that the diet was nutritionally inadequate. Courts must define law in a particularized sense by looking at the body of law that "squarely governs" the conduct at issue. *Brosseau* v. *Haugen*, 543 U.S. 194, 201 (2004). The majority's decision fails to point to any case law, in the Sixth Circuit or otherwise, in which a claim such as Welch's was allowed to proceed to a jury.

In contrast to the Sixth Circuit's decision, the Seventh Circuit held that prison officials who provided a Muslim prisoner with "1,000 to 1,500 fewer calories a day during [two] Ramadan seasons" than non-Muslim prisoners were entitled to qualified immunity. *Hall* v. *Sutton*, 581 F. App'x 580 (7th Cir. Nov. 4, 2014). Thus, rather than there being clearly established law, there is actually a conflict between the decision the Sixth Circuit reached in this case and the decision the Seventh Circuit reached in *Hall*.

In *Hall*, the Seventh Circuit analyzed the caselaw and concluded that a broad right to adequate nutrition did not clearly establish that a prisoner observing a religious fast (Ramadan, just as here) had a clearly established right to a supplemental meal. The plaintiff in *Hall* (who at least alleged that he "may have lost weight," 581 F. App'x at 581) relied on a single district court decision to argue that he had a clearly

established right to a supplemental meal. The Seventh Circuit rejected that contention, recognizing that a single district court decision did not reflect a "robust consensus of cases" this Court requires to show that a right is clearly established. *Plumhoff* v. *Rickard*, 134 S. Ct. at 2023. With the Sixth and Seventh Circuits decisions in such stark contrast to one another, it is apparent that government officials in the Seventh Circuit would be entitled to qualified immunity under the same set of facts, while government officials in the Sixth Circuit would be denied qualified immunity. This Court should grant the petition for a writ of certiorari to resolve this conflict.

This Court has repeatedly granted review in qualified-immunity cases. E.g., *Taylor* v. *Barkes*, 135 S. Ct. 2042 (2015) (summarily reversing a denial of qualified immunity); *Carroll* v. *Carman*, 135 S. Ct. 348 (2014) (same); *Stanton* v. *Sims*, 134 S. Ct. 3 (2013) (same); *Ryburn* v. *Huff*, 132 S. Ct. 987 (2012) (same). Indeed, this Court just this year explained that "[b]ecause of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cty. of San Francisco*, *Calif.* v. *Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (citations omitted; citing additional cases). Because of the importance of qualified immunity, because no First Amendment violation occurred, and because at the least the law is not clearly established that this "*particular* conduct," *Mullenix*, 136 S. Ct. at 308, violates the First Amendment, the Court should grant the petition and summarily reverse the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Bill Schuette
Michigan Attorney General

Aaron D. Lindstrom
Solicitor General
Counsel of Record
P.O. Box 30212
Lansing, Michigan 48909
LindstromA@michigan.gov
(517) 373-1124

John L. Thurber
Assistant Attorney General
Civil Litigation, Employment, and Elections Division

Attorneys for Petitioners

Dated: DECEMBER 2015