UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-3176-pr

Caption [use short title]

Vega, et al. v. Semple, et al.

Motion for: Leave to File Amicus Brief

Set forth below precise, complete statement of relief sought:

Movant Human Rights Defense Center seeks leave to file the attached amicus brief beyond the time contemplated by FRAP 29(a)(6).

MOVING PARTY: Human Rights Defense Center **OPPOSING PARTY:** Scott Semple, et al., Defendants-Appellees

☐ Plaintiff ☐ Defendant X Amicus Curiae

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Alexander A. Reinert **OPPOSING ATTORNEY:** Stephen R. Finucane

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Court- Judge/ Agency appealed from: District Court for the District of Connecticut, Judge Arterton

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No

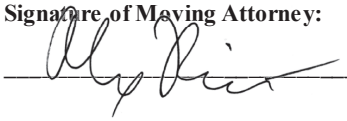
Has this relief been previously sought in this court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:



Date: July 2, 2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

CERTIFICATION OF SERVICE

I certify that on July 2, 2019, I electronically filed the attached *Motion for Leave to File Amicus Curiae Brief* with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to counsel for all Parties in this matter.

s:/Alexander A. Reinert
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New York, New York 10007

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT OF APPEALS
----------X

HARRY VEGA, ET AL.,

Plaintiffs-Appellees,

-against-

SCOTT SEMPLE, ET AL.,

Defendants-Appellants.
----------X

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Docket No. 18-3176-pr

ALEXANDER A. REINERT, an attorney duly admitted to the practice of law in this Court, affirms under penalty of perjury as follows:

1. I am an attorney for amicus curiae Human Rights Defense Center (HRDC). I submit this affidavit in support of amicus curiae's motion, pursuant to Federal Rule of Appellate Procedure 29(a)(6) and Local Rule 29.1, seeking leave to file an amicus brief in the within case outside of the time limits contemplated by FRAP 29(a)(6). A true and correct copy of the proposed amicus brief is attached hereto at Exhibit A.

2. The proposed amicus brief is in support of Plaintiffs-Appellees. Pursuant to this Court's scheduling order (ECF No. 27), Plaintiffs-Appellees' brief was due on May 22, 2019 and was filed on that date. Accordingly, the proposed

amicus brief is untimely.

3. HRDC advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. Included within that advocacy is HRDC's Prison Ecology Project, which investigates, documents, and addresses the ways in which mass incarceration degrades the natural environment and the human health of those inside or nearby prisons and jails.

4. Amicus HRDC only recently became aware of the pending appeal in this matter during the course of its research efforts on topics very closely related to the core issue in the underlying case. The fruits of that research, as well as HRDC's longstanding advocacy, give amicus HRDC a unique perspective to share with the Court and an interest in the disposition of this appeal.

5. Oral argument has not yet been scheduled in this case, reducing any prejudice to the parties by granting the instant request.

6. Counsel for Plaintiffs-Appellees consent to this request; counsel for Defendants-Appellants oppose this request and have indicated that they will seek the opportunity to file a response should the Court grant the motion for leave to file the attached amicus curiae brief.

7. Accordingly, counsel for amicus curiae respectfully request leave to

file the proposed amicus curiae brief despite the fact that it is presented beyond the time limits contemplated by FRAP 29(a)(6).

s:/Alexander A. Reinert
Alexander A. Reinert

Dated: July 2, 2019
New York, New York

EXHIBIT A

18-3176-pr

United States Court of Appeals

for the

Second Circuit

HARRY VEGA,

Plaintiff-Appellee,

MICHAEL CRUZ, On behalf of themselves and all others similarly situated, KENYA BROWN, On behalf of themselves and all others similarly situated, JEFFREY PERRY, On behalf of themselves and all others similarly situated, LEE GRENIER, On behalf of themselves and all others similarly situated, TAVORUS FLUKER, On behalf of themselves and all others similarly situated, ANTHONY ROGERS, On behalf of themselves and all others similarly situated, THOMAS MARRA, On behalf of themselves and all others similarly situated, TERRENCE EASTON, On behalf of themselves and all others similarly situated, LAMONT SAMUEL, On behalf of themselves and all others similarly situated, IAN COOKE, On behalf of themselves and all others similarly situated, J. MICHAEL FARREN, LAWRENCE TOWNSEND, On behalf of themselves and all others similarly situated, JOHN BOSSE, On behalf of themselves and all others similarly situated,

Consolidated-Plaintiffs-Appellees

– v. –

SCOTT SEMPLE, Commissioner of Correction, In their individual and official capacities, (continued on next page)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT
(Arterton, J.)

BRIEF AMICUS CURIAE OF THE HUMAN RIGHTS DEFENSE CENTER IN SUPPORT OF PLANTIFFS-APPELLEES

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Attorney for Amicus Curiae

JAMES DZURENDA, former Commissioner of Corrections, In their individual and official capacities, LEE ARNONE, former Commissioner of Correction, In their individual and official capacities, THERESA LANTZ, former Commissioner of Corrections, In their individual and official capacities, JAMES ARMSTRONG, former Commissioner of Corrections, In their individual and official capacities, LAWRENCE MEACHUM, former Commissioner of Correction, In their individual and official capacities, HENRY FALCONE, Warden, Garner Correctional Institution, In their individual and official capacities, STEVEN LINK, Director, Department of Correction Engineering and Facilities Management, In their individual and official capacities, DAVID BATTEN, former Director, Department of Correction Engineering and Facilities Management, In their individual and official capacities,

Defendants-Appellants

JOHN DOES, 1-3,

Defendants.

DISCLOSURE STATEMENTS PURSUANT TO RULES 26.1 AND 29 OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, counsel for *amicus curiae* hereby disclose that the Human Rights Defense Center is a non-profit corporation. It has no parent corporations.

Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, amicus states that no party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person – other than amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF *AMICUS CURIAE*

The **Human Rights Defense Center** (HRDC) is a non-profit charitable corporation headquartered in Florida that advocates on behalf of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, *Prison Legal News* (PLN), which covers national and international news and litigation concerning prisons and jails, as well as *Criminal Legal News* (CLN), which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners and engages in state and federal court litigation on issues relating to the rights of people held in prisons and jails, including wrongful death, public records, class actions, and Section 1983 civil rights litigation. Additionally, HRDC founded the Prison Ecology Project (PEP) to investigate, document, and address the ways in which mass incarceration degrades the natural environment and the human health of those inside or nearby prisons and jails.

INTRODUCTION AND SUMMARY OFARGUMENT

In this case, the District Court correctly held, pursuant to *Helling v. McKinney*, 509 U.S. 25 (1993), and *LaBounty v. Coughlin*, 137 F.3d 68 (2d Cir. 1998), that the defendants were not entitled to qualified immunity because "reasonable prison officials were on notice that they could not knowingly or recklessly subject prisoners in their custody to toxic substances that posed a serious risk of harm." *Vega v. Semple*, No. 3:17-CV-107 (JBA), 2018 U.S. Dist. LEXIS 167362, at *18 (D. Conn. Sep. 27, 2018).

The Court should take this opportunity to affirm the District Court's understanding of well-established Eighth Amendment jurisprudence which prohibits exposing people in prison to known toxic substances with deliberate indifference to the consequences. As early as 1998, this Court made clear, in the context of asbestos exposure, that prison officials violate the Constitution when, with deliberate indifference, they expose people in prison to known toxic substances. *LaBounty*, 137 F.3d at 74. At that time, this Court understood the right to be free of reckless exposure to toxins was easily encompassed by "the right to be free from deliberate indifference to serious medical needs." 137 F.3d at 74 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Defendants' improperly narrow definition of the right would foreclose any Eighth Amendment conditions of confinement cases based on exposure to a given toxin without a prior United

States Supreme Court opinion dealing specifically with that toxin.

Exposure to radon is just as obviously harmful to people as exposure to asbestos. Therefore, when analyzing the deliberate indifference claim herein, the District Court properly considered the longstanding, unequivocal recognition of radon gas as a carcinogen by federal and state governments. Contrary to Defendants' arguments, the Supreme Court's holding in *Davis v. Scherer*, 468 U.S. 183 (1984), does not foreclose all references to state and federal statutes and regulations in the adjudication of constitutional claims under § 1983. Indeed, well after *Davis*, the Supreme Court itself relied in part on a state regulation to conclude that qualified immunity was improper for prison officials sued under the Eighth Amendment. *See Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002); *see also Tellier v. Fields*, 280 F.3d 69, 86 (2d Cir. 2000) ("[W]e simply cannot accept that [qualified immunity] would ever confer protections on egregious violations of a federal regulation.").

I. *Davis* Does Not Foreclose the Consideration of Statutes, Regulations, and Guidelines for the Purposes of Determining Whether Prison Officials Knew of and Disregarded a Risk of Harm to People in Prison

In *Davis*, the Supreme Court rejected the broad assertion that, regardless of the "clearly established" analysis, officials forfeit any claim to qualified immunity when their conduct violates a state regulation, holding that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their

conduct violates some statutory or administrative provision." 468 U.S. at 194. Defendants would have this Court interpret that holding to afford qualified immunity to officials in any case in which the plaintiffs make any reference to any statute, regulation, or guideline when making out a constitutional claim. But *Davis* rightly says nothing about reference to other, non-constitutional sources of law for the purposes of proving elements of constitutional claims. Defendants' reading betrays the letter of *Davis* and conflicts with the post-*Davis* precedent of this Court.

Plaintiffs indeed reference ubiquitous and publicly-known safety standards from the Environmental Protection Agency (EPA), the World Health Organization (WHO), and the Connecticut Department of Public Health (DPH) in their complaint. Unlike in *Davis*, however, plaintiffs here did not argue that *violation* of those standards deprived officials of their right to qualified immunity. Rather, plaintiffs point to standards *describing* "safe" radon levels for indoor air and the dangers posed by exposure to various levels of radon in order to demonstrate not only that a risk exists and that society is unwilling to tolerate that risk, but that the risk is so obvious that the defendants in this case would have general knowledge of that risk. Ample precedent from the Supreme Court and this Court endorses such a reliance on state and federal policies pertaining to risk assessment and tolerance. *See, e.g., Hope v. Pelzer*, 536 U.S. 730, 743-44 (2002) (relying on existence of Albama

Department of Corrections regulation to reject qualified immunity); *Helling v. McKinney*, 509 U.S. 25, 36, 113 (1993) ("determining whether . . . conditions of confinement violate the Eighth Amendment requires more than a scientific and statistical inquiry into the seriousness of the potential harm[;] . . . [i]t also requires a court to assess whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk"); *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013) ("Evidence that a risk was "obvious or otherwise must have been known to a defendant" may be sufficient for a fact finder to conclude that the defendant was actually aware of the risk."); *Cash v. County of Erie*, 654 F.3d 324, 335 (2d Cir. 2011) (in municipal liability case, concluding that reasonably jury could have concluded that risk of sexual exploitation of female deteinees by mail deputies was obvious to municipality and sheriff because state law prohibited all sexual activity between people in custody and prison and jail guards); *LaBounty v. Coughlin*, 137 F.3d 68, 74 n.5 (2d Cir. 1998) (concluding that exposure to friable asbestos was a known risk that could form the basis of Eighth Amendment claim based in part on Congress's recognition of friable asbestos as a dangerous toxic chemical in the early 1970s and EPA's "hazardous air pollutant" Clean Air Act regulation at 36 Fed. Reg. 5931 (1971)).

Most tellingly, this Court's decision in *LaBounty* came over a decade after the

Supreme Court decided *Davis*. If *Davis* operated as defendants contend, it would have foreclosed the decision in *LaBounty* denying qualified immunity to prison officials for allegedly exposing prisoners to friable asbestos. Instead, this Court had no trouble concluding that qualified immunity was inappropriate, relying on citation to federal statutory and regulatory treatment of asbestos in doing so. *See LaBounty*, 137 F.3d at 74 & n.5. Similarly, the Eleventh Circuit rejected a qualified immunity defense to a claim regarding exposure to asbestos in a federal correctional facility despite explicit references to the Clean Air Act in plaintiff's complaint. *See Powell v. Lennon,* 914 F.2d 1459, 1462 (11th Cir. 1990) (noting that plaintiff separately pled Clean Air Act and constitutional claims). Indeed, courts should welcome the helpful citation to scientific expertise that has been enshrined in law and policy when deciding cases predicated on assessments of environmental and human health risks.

Accordingly, plaintiffs in the case at bench appropriately pointed to the Toxic Substances Control Act (15 U.S.C. § 2601 *et seq.* (1976)), as well as EPA, WHO, and Connecticut DPH safety standards in alleging that Garner officials knowingly disregarded the unreasonable risk presented by radon exposure. To the extent that the District Court relied on those aforementioned citations to establish the obvious risk of radon exposure, it did not err in concluding that the defendants were not entitled to qualified immunity. The District Court accurately noted that "[i]f anything, knowing or reckless exposure of prisoners to radon, given the facts alleged

by Plaintiffs, is more obviously unconstitutional than exposure of prisoners to ETS was [when the Supreme Court decided *Helling*] in 1993." *Vega*, 2018 U.S. Dist. LEXIS 167362, at *17. That some of the facts alleged by plaintiffs also happen to be recognized by federal and state standards only bolsters, rather than detracts from, the strength of their constitutional claim.

II. This Court has Already Determined the Scope of the Right in Question, and it Clearly Encompasses Plaintiffs' Allegations.

In *LaBounty*, this Court confronted "[t]he chronic difficulty with [qualified immunity] analysis" and proceeded to "accurately defin[e] the right at issue" in the context of Eighth Amendment conditions of confinement claims based on alleged exposure to toxic substances. 137 F.3d at 73. The Court found that "the right to be free from deliberate indifference to serious medical needs best encompasses the alleged conduct." *Id.* at 74. Adhering to that definition, plaintiffs' allegations of exposure to high levels of radon gas fit squarely within the clearly established right.

Defendants cite a curated selection of recent decisions from the Supreme Court and the Second Circuit reversing denials of qualified immunity to suggest, not so subtly, that this Court got it wrong in *LaBounty*. Defendants contend that the right in question is substance-specific; according to their reading, the right to be free from exposure to environmental tobacco smoke (ETS) is distinct from the right to be free from exposure to asbestos, which is distinct from the right to be

from exposure to radon, and so on. Nothing in Eighth Amendment jurisprudence supports this prohibitively narrow construction of constitutional rights. Indeed, this Court rejected that very same argument in *LaBounty*, finding that "the district court erred in describing the right at issue as 'the right to be free from crumbling asbestos.'" 137 F.3d at 74. Furthermore, both the Supreme Court and this Court have been careful to state a different conception of the requisite specificity for defining rights. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point."); *Hope*, 536 U.S. at 739 (rejecting argument that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) ("This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful."); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 129 (2d Cir. 2004) ("In order to prevent the margin of immunity from overshadowing our interests in recovery, however, the right in question must not be restricted to the factual circumstances under which it has been established."); *Williams v. Greifinger*, 97 F.3d 699, 703 (2d Cir. 1996) ("A court need not have passed on the identical course of conduct in order for its illegality to be 'clearly established.'"); *see also State Emp. Bargaining Agent Coal. v. Rowland*, 718 F.3d 126, 132 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1002 (2014) (denying qualified immunity even

though the Court had "never articulated a standard for determining whether, and under what circumstances" the particular right would be violated); *Nagle v. Marron*, 663 F.3d 100, 115-16 (2d Cir. 2011) (denying qualified immunity even though case law was not precisely on point).

Two very recent cases make clear the error in Defendants' argument. First, in *Terebesi v. Torreso*, 764 F.3d 217 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1842 (2015), this Court held that officers were not entitled to qualified immunity for the use of stun grenades in a routine search. The officers in *Terebesi* argued that qualified immunity was appropriate because there was no specific Circuit precedent addressing the use of a stun grenade in a search. This Court rejected that argument, citing *Hope* for the proposition that qualified immunity is not appropriate "every time a novel method is used to inflict injury." 764 F.3d at 237 (internal quotation marks omitted); *see also Mendoza v. Block*, 27 F.3d 1357, 1362 (9th Cir. 1994) (cited in *Terebesi* and holding that officers do not need a "particularized expression of the law" for each kind of force used).

Second, in *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018), *cert. denied*, 2019 WL 2166409 (U.S. May 20, 2019), the defendants argued that they were entited to qualified immunity because no decision from this Court or the Supreme Court had held that it was unconstitutional to use a particular technology -- Long Range Acoustic Devices -- to disperse protesters. *Edrei*, 892 F.3d at 542. This court

properly rejected the argument – identical to the Defendants' here – that one needs to have a case regarding the particular instrument of harm in order to reject qualified immunity. *Id.* at 542-44 ("[N]ovel technology, without more, does not entitle an officer to qualified immunity.") In so doing, this Court relied explcicitly on *Hope* and *Terebesi*.

Taken out of the environmental hazards context, the narrow, harm-causing-agent-specific conception of the right is even more pernicious – the rights to be free from each specific type of physical harm (e.g., bludgeoning, strangling, rape, etc.) surely have not been conceived as separate rights. *See, e.g., Farmer v. Brennan*, 511 U.S. 825, 833, 114 S. Ct. 1970, 1976 (1994) (in a case involving alleged failure of officials to protect a prisoner from rape, construing the "particular" constitutionally imposed duty in question as a duty "to protect prisoners from violence at the hands of other prisoners" (internal quotation marks omitted)).

What defendants conveniently fail to state explicitly is that if the Court adopts their position, it would not only overrule its decision in *LaBounty*, but it would also essentially foreclose relief to prisoners exposed to toxic substances other than ETS. That result would condone cruel and unusual punishment. The definition of a constitutional right poses a simultaneously vexing and important task, particularly in the context of qualified immunity. In *LaBounty*, this Court contemplated the risks associated with both ends of the breadth spectrum when considering conduct almost

identical to the case now before it, ultimately deciding to carefully thread the needle in reliance on the Supreme Court's decision in *Estelle v. Gamble*. 429 U.S. 97 (1976).

Finally, even if the Court were convinced that *LaBounty* erred in its framing of the scope of the right in question in 1998, it would not change the outcome of this case. For in this case, the relevant question is what *LaBounty* established as a matter of Eighth Amendment jurisprudence moving forward, not how it resolved the specific issue of qualified immunity in 1998, which addressed when it became obvious that exposure to asbestos posed an obvious risk of harm to people in prison. And even putting aside this Court's resolution of qualified immunity, *LaBounty* makes clear that as of 1998, recklessly exposing people in prison to toxic substances like asbestos is a violation of the Eighth Amendment. No reasonable officer could believe that it was unconstitutional to recklessly expose prisoners to asbestos but constitutional to recklessly expose the same individuals to radon, a powerful carcinogen.

III. The Denial of Qualified Immunity to Defendant Officials will Not Open the Door to Conditions of Confinement Claims for Commonplace Exposures.

The Supreme Court's Eighth Amendment conditions of confinement jurisprudence has already established a demanding framework for plaintiffs seeking

relief under *Bivens* or Section 1983. To succeed, a prisoner-plaintiff must prove that a prison official actually knew of, and disregarded, an objectively unreasonable risk to health or safety. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (rejecting a purely objective formulation of the test for deliberate indifference and explaining that plaintiff must show that "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and *he must also draw the inference*") (emphasis added). Proving both the objective unreasonableness of the risk and the subjective knowledge of that risk on the part of the official defendant presents a daunting task for plaintiffs. This test will foreclose relief for exposure to toxic substances in the majority of cases, regardless of the application of qualified immunity.[1]

In a case such as the one at bench, prisoner-plaintiffs must show that: 1) exposure to the substance presents a substantial risk of future harm (e.g., the substance is a carcinogen); 2) the level of exposure is objectively unreasonable; 3) prison officials either have actual knowledge of the exposure and the danger it presents or have awareness of facts that cause them to draw the inference of that dangerous condition; and 4) prison officials failed to take reasonable measures to mitigate the dangerous condition. *See generally Helling v. McKinney*, 509 U.S. 25

[1] The Prison Litigation Reform Act places additional burdens on prisoner-plaintiffs in bringing conditions of confinement cases by, *inter alia*, requiring exhaustion of administrative remedies and a showing of physical injury. See 42 U.S.C. § 1997e(a), (e).

(1993) and *Farmer*, 511 U.S. at 837. Affirming the District Court's denial of qualified immunity merely provides the plaintiffs with the opportunity to present evidence on these elements; meeting their burden of proof remains a significant hurdle on the path towards relief. Defendants argue as if, absent qualified immunity, not only this case, but countless fanciful others, will be lost and drown the state in liability. Defendants suggest that allowing prisoners to work with garden pesticides, laundry detergent, and manufacturing process chemicals would all somehow subject the state to liability if this case proceeds to the next phase of trial. (Reply Br. at 6-7, ECF No. 50). The history in this Circuit belies defendants alarm ringing; *LaBounty* has been good law for over twenty years, and the parade of horribles posited by defendants has not materialized.

CONCLUSION

For the reasons set forth above, and those outlined in Plaintiffs' brief (ECF No. 45), *amicus curiae* respectfully maintain that the Court should affirm the District Court's denial of qualified immunity in this case.[2]

[2] Should this Court decide to reverse the District Court, *amici* urge the Court to heed the oft-repeated advice of the Supreme Court in *Pearson v. Callahan* and perform both steps of the qualified immunity analysis. As the Supreme Court advised in that important decision, "[a]lthough we now hold that the *Saucier* protocol should not be regarded as mandatory in all cases, we continue to recognize that it is often beneficial." *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818 (2009). The exposure of inmates to toxic substances is areas an area where a full consideration of the constitutional question and the contours of the Eighth

Respectfully submitted,

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Amendment right would be beneficial. As the briefs in this case evidence, very few courts have yet considered similar cases; the law requires further explanation and development.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g)(1) of the Federal Rules of Appellate Procedure, I certify that, according to the word-count feature of the word processing program, this brief contains 3170 words and therefore is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) and Local Rule 29.1(c).

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