No. 16-2444

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JWAINUS PERRY,
PLAINTIFF - APPELLANT,

v.

LUIS S. SPENCER, THOMAS DICKAUT, ANTHONY MENDOSA, JAMES SABA, ABBE NELLIGAN, PATRICK TOOLIN, KRISTIE LADOUCER, CAROL MICI, THOMAS NEVILLE
DEFENDANT – APPELLEES,

JENS SWANSON,
DEFENDANT.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

EN BANC BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF MASSACHUSETTS, INC., AMERICAN CIVIL LIBERTIES UNION OF MAINE, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, AND AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND, IN SUPPORT OF PLAINTIFF-APPELLANT SEEKING REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amici curiae are nonprofit entities operating under § 501(c)(3) of the Internal Revenue Code. *Amici* are not subsidiaries or affiliates of any publicly owned corporations and do not issue shares of stock. No publicly held corporation has a direct financial interest in the outcome of this litigation due to *amici*'s participation.

INTRODUCTION

Text is paramount in statutory interpretation, except when it isn't. Although the text of 42 U.S.C. § 1983 expressly imposes liability on "[e]very person" acting under color of law who deprives someone of a federal right, the U.S. Supreme Court has construed § 1983 to contain a qualified immunity defense. That defense is grounded in the Court's understanding of Congressional purpose. In the Court's view, Congress sought to impose § 1983 liability only on people who had "fair notice," primarily through case law, that their actions were unlawful. *Kisela v. Hughes,* 138 S. Ct. 1148, 1152, 200 L. Ed. 2d 449 (2018). The Court has thus held that government actors are entitled to qualified immunity when case law at the time of an alleged deprivation of rights did not "clearly establish" the right in question. *See id.*

Because qualified immunity owes its entire existence to this rationale—that government actors should be judged against the cases on the books when they acted—its application must be limited to instances that fit that rationale. The text of § 1983 prescribes no other applications of qualified immunity because, in fact, it does not prescribe qualified immunity at all.

This brief addresses a discrete but important way in which that rationale relates to this case. For 468 days between December 2010 and March 2012, and for 143 days between September 2012 and February 2013, the Massachusetts Department of Correction (DOC) forced Jwainus Perry to spend at least 23 hours a day alone in a tiny, windowless cell. As Mr. Perry has shown, federal decisions issued before Mr.

Perry's confinement confirmed that he was entitled to procedural due process before and while being trapped in such conditions. *See* Pltf. Br. 7-16, 18-26; *see, e.g., Wilkinson v. Austin,* 545 U.S. 209 (2005); *Greenholz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979); *Hewitt v. Helms*, 459 U.S. 460 (1983); *Colon v. Howard*, 215 F.3d 227, 231-32 (2d Cir. 2000); *Rodriguez v. Phillips*, 66 F.3d 470, 480 (2d Cir. 1995); *Black v. Parke*, 4 F.3d 442, 447 (6th Cir. 1993); *Westefer v. Snyder*, 422 F.3d 570, 589-90 (7th Cir. 2005).

Yet the district court and a panel of this Court concluded that DOC officers were entitled to qualified immunity for failing to provide Mr. Perry with the procedural protections that the constitution requires. The courts reached their conclusions after citing *LaChance v. Commissioner of Correction*, 463 Mass. 767 (2012), a case decided by the Massachusetts Supreme Judicial Court in November 2012, nearly two years after the start of Mr. Perry's solitary confinement. *See Perry v. Spencer*, 2016 WL 5746346, at *15-16 (D. Mass. 2016); *Perry v. Spencer*, 751 Fed. Appx. 7, 10-12 (1st Cir. 2018). *LaChance* recognized that incarcerated individuals accrue due process protections after 90 days of solitary confinement—the very right Mr. Perry advances here—but held that this right had not been clearly established before the November 2012 decision in *LaChance* itself. *See* 463 Mass. at 776-778.

When viewed against the rationale that has been articulated for a qualified immunity defense—notice based on case law at the time of the challenged conduct—the *LaChance* decision cannot support the application of immunity here. *LaChance* was decided well into the deprivation of Mr. Perry's rights. On the merits, its holding

supports Mr. Perry's claim that he had a procedural due process right against the arbitrary imposition of lengthy solitary confinement. The only aspect of *LaChance* that is arguably consistent with the defendants' position in this case is its pronouncement that the right was not clearly established before November 2012. But *LaChance* itself did not exist before November 2012, so state officials could not have relied on any confusion created by that decision when they began subjecting Mr. Perry to solitary confinement in December 2010. In the interim, those officials were on notice of the case law that *did* exist, which clearly established the right he seeks to vindicate. *See* Pltf. Br. 7-16, 18-26; *Wilkinson,* 545 U.S. 209; *Greenholz*, 442 U.S. 1; *Hewitt*, 459 U.S. 460; *Colon*, 215 F.3d at 231-32; *Rodriguez*, 66 F.3d at 480; *Black*, 4 F.3d at 447; *Westefer*, 422 F.3d at 589-90. Mr. Perry's solitary confinement then became less justifiable, not more, when it continued after *LaChance* was decided.

Even if the laws of time and space did not relegate *LaChance* to irrelevance here, its relevance would be negligible for the additional reason that state courts have no particular expertise in deciding when rights are clearly established for § 1983 purposes. To be sure, if a federal court is persuaded by *the reasoning* of a state court's conclusion that a right was not clearly established at a particular time, the federal court can note its agreement with that reasoning. But *the fact* that a post-conduct state court case held that a right had not been clearly established—especially where, as in *LaChance*, that same court also held that case law favored a recognition of the right—should not contribute to an application of qualified immunity by a federal court.

For the reasons stated below, and those stated by Mr. Perry, this Court should reverse the district court's grant of summary judgment.

INTEREST OF AMICI CURIAE[1]

Amici the American Civil Liberties Union (ACLU), the ACLU of Massachusetts, Inc., the ACLU of Maine, the ACLU of New Hampshire, and the ACLU of Rhode Island are nonpartisan organizations dedicated to the principles of liberty and equality embodied in the constitution and the nation's civil-rights laws. *Amici* have a longstanding interest in ensuring that civil rights and civil liberties meaningfully protect people, which cannot happen if government actors are needlessly immunized for violating the law and the constitution. Accordingly, *amici* frequently participate directly or as amicus in cases involving qualified immunity. *See Taylor v. Riojas*, 141 S. Ct. 52, 208 L. Ed. 2d 164 (2020) (amicus); *D.C. v. Wesby*, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (amicus); *Richardson v. McKnight*, 521 U.S. 399 (1997) (amicus); *Saucier v. Katz*, 533 U.S. 194 (2001) (amicus); *Gray v. Cummings*, 917 F.3d 1 (1st Cir. 2019) (direct representation); *Stamps v. Framingham*, 813 F.3d 27 (1st Cir. 2016) (amicus). The ACLU and ACLU of Massachusetts also filed an amicus brief in *LaChance*.

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. Only *amici*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. (29)(c)(5).

ARGUMENT

I. The touchstone of qualified immunity is notice.

Qualified immunity's protection for unlawful behavior applies only where government actors could have reasonably believed their actions were lawful at the time of the challenged conduct. *Cf. Davis v. Scherer*, 468 U.S. 183, 195 (1984). The doctrine is designed "to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Qualified immunity therefore turns on "fair notice." *Kisela,* 138 S. Ct. at 1152; *see also Justiano v. Walker*, 986 F.3d 11, 27 (1st Cir. 2021) (confirming officials can only be liable where there is the "requisite notice"). The doctrine protects officers who lack "fair warning" that their conduct was unlawful, *Mlodzinski v. Lewis*, 648 F.3d 24, 37 (1st Cir. 2011), but those who had advance notice cannot evade liability, *see, e.g., Marrero-Mendez v. Calixto-Rodriguez,* 830 F.3d 38, 47 (1st Cir. 2016). Government actors are deemed to lack the requisite notice when "their conduct does not violate clearly established statutory or constitutional rights." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

In applying qualified immunity, courts have presumed that government actors are informed primarily by case law. Thus, a constitutional right is clearly established where there is either controlling authority or a consensus of persuasive authority sufficient to send a clear signal to a reasonable official that the challenged conduct is unlawful. *See, e.g., Alfano v. Lynch*, 847 F.3d 71, 75 (1st Cir. 2017). And because government actors can be guided only by the case law in existence at the time of their

conduct, the inquiry into what officials reasonably believed when they acted necessarily depends on the case law as it existed *when*, and *not after*, the challenged action occurred. As this Court has explained, "the salient question is whether the state of the law *at the time of the alleged violation* gave the defendant fair warning that his particular conduct was unconstitutional." *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009) (emphasis added); *see also McKenney v. Mangino*, 873 F.3d 75, 83 (1st Cir. 2017) ("What counts is whether *precedents existing at the time of the incident* establish the applicable legal rule with sufficient clarity and specificity to put the official on notice that his contemplated course of conduct will violate that rule.") (emphasis added) (internal quotation marks omitted).

Reflecting that logic, this Court has made clear that government actors are presumed to be on notice when the "right was clear at the time defendants acted," "[e]ven if in the future this circuit or the Supreme Court rejects" the existence of that right. *Newman v. Com. of Mass.*, 884 F.2d 19, 25 (1st Cir. 1989). In *Newman*, this Court noted that, for qualified immunity purposes, it did not matter that the contours of the right at issue might change in the future, given that the Supreme Court had thus far avoided ruling on the matter and other circuits were not yet unanimous in their approach, because "at the time defendants acted" that right "was clearly established in our circuit." 84 F.2d at 25.

II. A state court decision regarding whether a right was clearly established that post-dates the challenged conduct cannot be relevant to a qualified immunity analysis.

Qualified immunity rests on the notion that government officials are on notice of a federal right, and thus can avoid violating it, if case law at the time of their conduct clearly established the contours of the right. Applying the core principles of notice described above, a decision that post-dates the challenged conduct cannot disrupt that clarity, and it especially cannot do so when it is a state court decision regarding whether a right was clearly established.

A. State court decisions post-dating the events in question should have little to no relevance to a federal court's qualified immunity inquiry.

To determine whether a right has been clearly established at the time of a violation, this Court has looked to Supreme Court precedent, federal cases within and outside of this Circuit, and state court decisions of the state where the government actors operated. *See Wilson v. City of Boston*, 421 F.3d 45, 56 – 57 (1st Cir. 2005). As part of that approach, this Court has looked to state court decisions on the merits that were issued *before* the challenged conduct to help *confirm* federal courts' recognition of a clearly established right. *See, e.g., id.* at 57 (officers had notice that their conduct was unlawful where "it was well established in other federal courts and in Massachusetts state court, if not in this circuit"); *Alfano*, 847 F.3d at 78 (holding federal decisions demonstrated that the right was clearly established and noting "a decision of the

state's highest court, the Massachusetts Supreme Judicial Court (SJC), confirms the result to which the federal cases unambiguously point").

That analysis is dispositively different, however, from attempting to immunize a government actor based on a state court decision that *followed* the challenged conduct and is *contradicted* by federal law. Because cases that post-date the challenged conduct are incapable of retroactively notifying government actors, they cannot trigger the notification rationale underlying qualified immunity. Indeed, the Supreme Court has made clear that such decisions are "of no use in the clearly established analysis." *Brosseau v. Haugen*, 543 U.S. 194, 200 n.4 (2004). The defendants in this case concur; they emphasize that the "pertinent inquiry" is whether the officers' "belief was reasonable based on then-existing case law." Def. Br. 15, 19–20.

Courts routinely rely on this reasoning to grant qualified immunity despite the existence of post-conduct case law confirming or clarifying the existence of the right in question. *See, e.g., Brousseau*, 543 U.S. at 200 n.4 (granting defendants' motion for summary judgment and refusing to consider cases regarding the lawfulness of using deadly force against a fleeing suspect that post-dated the conduct in question in its qualified immunity analysis); *Belcher v. City of Foley Ala.*, 30 F.3d 1390, 1400 n.9 (11th Cir. 1994) (granting defendants' motion for summary judgment and refusing to consider a case plaintiffs argued established deliberate indifference because "it was decided after the conduct in this case occurred and, therefore, could not have clearly

established the law at the time of the conduct of this case."). [2] Just last year, this Court declined to revisit a decision granting qualified immunity to three police officers for their 2013 warrantless entry into an apartment under the community caretaking exception, even though the Supreme Court had subsequently held in *Caniglia v. Strom*, 141 S. Ct. 1596 (2021), "that police officers may not always enter a home without a warrant to engage in community caretaking functions." *Castagna v. Jean*, 2 F.4th 9, 10 (1st Cir. 2021). Since the relevant inquiry was whether "the officers' conduct was clearly established as unlawful in 2013," even U.S. Supreme Court precedent was irrelevant to this Court's qualified immunity analysis when it postdated the rights violation. *Id.*

This same reasoning dictates that courts cannot, consistent with the notice and reliance concerns animating the doctrine, grant qualified immunity based on post-conduct case law that makes a right less clear. Such post-conduct decisions cannot have formed any part of the body of case law to which government actors might have referred when they acted. Fairness to government actors does not require the immunization of unconstitutional conduct where a government actor did not, and could not have, mistakenly relied on a decision.

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[2] In the analogous context of the good faith exception to the exclusionary rule, courts have similarly determined, "the exclusionary rule should not be applied if the evidence was gathered at a time when the Courts of Appeals approved the practice," even if that practice is subsequently found unlawful. *United States v. Baez*, 878 F. Supp. 2d 288, 292 (D. Mass. 2012).

The irrelevance of post-conduct state court cases with respect to this Court's qualified immunity analysis extends not just to decisions on the merits, but also to decisions regarding whether a right was clearly established. This is particularly so because while state courts can, and routinely do, independently interpret the scope of federal rights, *see, e.g., Hall v. Pennsylvania Bd. Of Probation and Parole*, 578 Pa. 245, 252–253 (2004) (collecting cases), they have no such expertise in surveying the national legal landscape. At the most, a federal court could consider a state court decision issued after the challenged conduct if its reasoning persuasively suggests that the federal right was not clearly established at the time of the events at issue. But, when there was pre-conduct federal case law establishing the existence of the right, granting immunity based even in part on the mere fact of a post-conduct state court decision regarding whether the right was clearly established would extend immunity to circumstances that have no conceivable support in the notice principles on which the entire defense rests.

B. This Court's *Starlight Sugar* decision does not warrant a contrary result.

Declining to consider a state court's post-conduct decision regarding whether a right was clearly established, when there is sufficient federal case law to establish that right, does not conflict with *Starlight Sugar Inc. v. Soto*, 253 F.3d 137 (1st Cir. 2001). There, this Court held that a right under the dormant commerce clause had not been clearly established because, while this Court had previously held that the dormant

commerce clause applied to Puerto Rico, *see Trailer Marine Transport Corp. v. Rivera Vazquez*, 977 F.2d 1 (1st Cir. 1992), decades earlier the Supreme Court of Puerto Rico had held that the dormant commerce clause had different "contours" when applied to Puerto Rico as opposed to the states, *R.C.A. v. Government of the Capital*, 91 PRR 404, 419 (P.R. 1964).

In short, *Starlight Sugar* declared an absence of clearly established law because of a conflict *on the merits* between federal case law and Puerto Rico case law that long *preceded* the challenged conduct. *See Starlight Sugar,* 253 F.3d at 145. There, it was at least factually plausible that, notwithstanding this Court's case law, the defendants could have acted, unlawfully and mistakenly, in reliance on the contrary case law of the Supreme Court of Puerto Rico. *Starlight Sugar* nowhere suggests that government actors could be confused, and that an absence of clearly established law could therefore arise, when those government actors initiated their conduct *before* the issuance of a state court decision questioning whether a right was clearly established.

In addition to being distinguishable, *Starlight Sugar*'s holding—that an absence of clearly established law can arise when there is a pre-conduct conflict between this Court's case law and the case law of a state or territory—is wrong and should be overruled. State and territorial decisions do not and cannot undo the notice provided by federal decisions. Once federal appellate courts have clearly held that a right exists, government actors are on notice that violating that right will risk § 1983 liability, and they cannot be surprised if they are held accountable for any such violation. *Cf. United*

States v. Baez, 878 F.Supp.2d 288, 295 (D. Mass. 2012) (explaining within the analogous context of the good faith exception to the exclusionary rule, "the decisions of state courts on federal Fourth Amendment law are not binding in the federal courts").

Starlight Sugar's contrary approach risks several perverse consequences. To begin, all government actors would get two bites at the qualified immunity apple: one from the federal courts, and one from the state and territorial courts. Although a recognition of a federal right from *either* court would suffice to put government actors on notice—which is all that should matter for qualified immunity purposes—*Starlight Sugar* implies that government actors will remain free to violate a right so long as they can find *any* decision that says the law was not clearly established. There is no notice-related reason to immunize those violations.

Starlight Sugar also risks allowing state courts to dilute federal constitutional protections. "Federal law [] sets certain minimum requirements that States must meet but may exceed in providing appropriate relief." *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008) (internal quotation marks omitted). State courts are not prohibited from providing greater protections to their residents than the federal constitution has required, but they cannot provide less. *Cf. United States v. Baez*, 878 F. Supp. 2d at 295. Given that limitation on the reach of state court decisions, this Court's qualified immunity cases should not allow weaker constitutional protections to prevail based a state court decision, where federal courts have already recognized the existence of a

right. Yet that is exactly what occurred when *Starlight Sugar* erased liability for actions that this Court had already determined were unconstitutional based on a less protective decision by a territorial court.

Finally, *Starlight Sugar* would seem to authorize inconsistent application of this Court's precedent, in contravention of the "law of the circuit" rule. *Cf. San Juan Cable LLC v. Puerto Rico Tel. Co.,* 612 F.3d 25, 33 (1st Cir. 2010). Under this approach, if the New Hampshire Supreme Court and the Supreme Judicial Court of Massachusetts take different views of whether or when a right was clearly established, this Court would provide different protections to individuals who had their rights violated in each state notwithstanding the weight of federal authority. This Court should take this opportunity to reverse a decision that can lead to such bizarre outcomes.

III. The Supreme Judicial Court's *LaChance* decision does not supply a reason to grant qualified immunity here.

Like the district court and the panel decisions in this case, the defendants' supplemental brief points to the *LaChance* decision as a reason to apply qualified immunity. *See* Def. Br. 13-14, 22-23. But, under the principles articulated above, *LaChance* does not support the application of the doctrine here. If, as Mr. Perry has demonstrated, federal case law at the time of the conduct clearly established his legal rights, and therefore put government actors on notice that they were violating Mr. Perry's rights beginning in 2010, *see supra*, the Supreme Judicial Court's subsequent

November 2012 decision in *LaChance* could not have retroactively extinguished that notice.

First, *LaChance* agreed with Mr. Perry that a due process right existed for individuals being held in solitary confinement. It therefore did not present a conflicting interpretation of the federal constitutional right that government actors could have erroneously relied upon. Second, *LaChance* was not decided until *after* the majority of Mr. Perry's confinement had occurred. The DOC officials who placed Mr. Perry in solitary confinement for 611 days without a hearing did not act in reliance upon *LaChance*. Even under *Starlight Sugar*, deference to a state court decision cannot be justified where, as here, government officials have not, and could not have, relied upon that decision. *Cf.* Def. Br. 19 (asking this Court not to consider cases cited by Mr. Perry which issued after the underlying events). Third, DOC officials continued to hold Mr. Perry without adequate process for months *after* the *LaChance* held that such a practice was unconstitutional.

LaChance was decided on November 27, 2012. By then, Mr. Perry had already been held in solitary confinement for 60 continuous days and a total of 528 days without any meaningful review. "Confronted with the particularly egregious facts of this case, any reasonable officer should have realized" that Mr. Perry's confinement "offended the Constitution." *Taylor v. Riojas*, 141 S. Ct. at 54; *see also Hope*, 536 U.S. at 745(noting that "obvious cruelty" is sufficient to establish notice for the purposes of

qualified immunity). And if that was not enough, the case law that existed during that time gave the defendants ample notice that their conduct was unlawful.

Indeed, if the absence of notice had been the issue, then Mr. Perry's solitary confinement would have been immediately halted after the *LaChance* decision. But that is not what happened. Instead, the defendants continued to hold Mr. Perry under these conditions for another 83 days *after* the Supreme Judicial Court decided *LaChance*. As a result, by the time Mr. Perry was finally released, he had been held for 143 continuous days, and 611 days in total, without the constitutionally required review. Under the notice rationale for the qualified immunity defense—which, again, is the only rationale for the doctrine's existence—there is no reason why the defendants in this case should be shielded from liability for their illegal conduct.

CONCLUSION

This Court should reverse the district court's summary judgment order.

Dated: March 11, 2022

Respectfully submitted,

/s/ Matthew R. Segal

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Dated: March 11, 2022

/s/ Matthew R. Segal
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I certify that on March 11, 2022, the foregoing Amici Curiae Brief was filed electronically through the Court's CM/ECF system. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: March 11, 2022

/s/ Matthew R. Segal
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