22-1657

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Christopher Nazario,
Plaintiff-Appellee,
v.
Nicole Thibeault,
Defendant-Appellant.

On appeal from the United States District Court
for the District of Connecticut
Case No. 3:21-cv-216-VLB
Hon. Vanessa L. Bryant

APPELLEE CHRISTOPHER NAZARIO'S ANSWERING BRIEF

Athul K. Acharya
PUBLIC ACCOUNTABILITY
P.O. Box 14672
Portland, Oregon 97293
(503) 383-9492
athul@pubaccountability.org

Counsel for Plaintiff-Appellee
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Statement of Jurisdiction

This Court's jurisdiction over this appeal is limited. It's true, as Appellant Nicole Thibeault says, that the district court had federal-question jurisdiction and that she timely appealed. Opening Brief (Br.) 1. But Thibeault seeks review of a *denial* of summary judgment—an interlocutory order from which appeal is normally prohibited. *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); 28 U.S.C. § 1291. The Supreme Court has allowed a "limited exception" for interlocutory denials of qualified immunity, like the order on appeal here. *Terebesi v. Torreso*, 764 F.3d 217, 229 (2d Cir. 2014) (quotation marks omitted). But in such cases, the Court's jurisdiction extends only to "abstract issues of law," and not to questions about "the existence, or nonexistence, of a triable issue of fact." *Johnson v. Jones*, 515 U.S. 304, 316–17 (1995).

This limit on the Court's jurisdiction is further developed below in Part 1, pp. 13–19.

Issues Presented

A few weeks into Covid-19, Warden Thibeault decided to move her facility's laundry workers, including Christopher Nazario, from H-Block to E-Block. The laundry workers protested that E-Block was undergoing an active Covid outbreak, but she forced them to move there anyway. As a result, Nazario caught Covid, suffered a heart attack, and nearly died.

Nazario sued for damages. At summary judgment, the district court found that he had enough evidence to go to a jury. Thibeault's interlocutory appeal raises four questions:

1. **Jurisdiction.** This Court has interlocutory jurisdiction only over legal issues. Thibeault's subjective knowledge is a factual issue. May she challenge the district court's finding that her subjective knowledge was genuinely disputed?

2. **Merits.** Resolving the dispute in Nazario's favor, Thibeault knew that moving Nazario to E-Block would expose him to Covid. She forced him to move there anyway. Was that reasonable?

3. **Immunity—Test.** The test for qualified immunity has two prongs: (1) whether the official violated a constitutional right and (2) whether that right was clearly established. This Court used to add an extra prong: whether—even if the right were clearly established—a reasonable official might violate it anyway. But the

Supreme Court has since confirmed that there are only two prongs, and this Court's more recent cases use the two-prong test. To provide clarity to litigants and district courts, should this Court formally overrule the spurious third prong?

4. **Immunity—Decision.** The Supreme Court clearly established in 1993 that "mingling" healthy inmates with inmates carrying "serious contagious diseases" violated the Eighth Amendment's prohibition on cruel and unusual punishment. Did Thibeault have fair notice that mingling the healthy laundry workers with the infected inmates in E-Block would violate the laundry workers' constitutional rights?

STATEMENT OF THE CASE

This is a civil-rights case. JA 1. Nazario, a prisoner in Connecticut's Osborn Correctional Institution, alleges that Warden Thibeault violated his constitutional rights. *Id.* Thibeault moved for summary judgment, arguing that Nazario couldn't prove his claim and that she was in any event entitled to qualified immunity. JA 127–28. The district court (Bryant, J.) denied her motion, holding that the qualified-immunity analysis turned on facts the parties genuinely disputed. JA 144–45; *Nazario v. Thibeault*, 2022 WL 2358504, at *8 (D. Conn. 2022). Thibeault appeals.

STATEMENT OF FACTS

1. Thibeault transfers Nazario from H-Block, where the inmates were healthy, to E-Block, where many inmates had Covid-19.

By April 2020, the Covid-19 pandemic was in full swing. States and cities had issued sweeping stay-at-home orders,[1] offices had shut down,[2] and masks were mandatory for those who left their homes.[3] The

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[1] Kwame Opam, *It's Not 'Shelter in Place': What the New Coronavirus Restrictions Mean*, N.Y. Times (Mar. 24, 2020), https://nyti.ms/40PCV6X.

[2] Hallie Golden, *Amazon, Microsoft and Facebook advise employees to work from home*, The Guardian (Mar. 5, 2020), https://bit.ly/3Yo7T4a.

[3] Luis Ferré-Sadurní & Maria Cramer, *New York Orders Residents to Wear Masks in Public*, N.Y. Times (Apr. 15, 2020), https://nyti.ms/3jPiI0g.

CDC had advised correctional facilities to isolate individuals with Covid symptoms and to "minimize mixing of individuals from different housing areas." JA 65, 61. And Warden Thibeault decided to force Osborn's laundry workers to move from H-Block, where they were not infected, to E-Block, where they would become infected. JA 129–30.

H-Block was undisputedly the safer place to live during an airborne pandemic. JA 3 ¶¶ 17, 21–22.[4] The cells there had solid metal doors and windows for fresh air. JA 130; JA 88. The cells in E-Block had neither. Their bar doors were open to the hallway and they had no other ventilation. *Id.* These features increased the "risk of air-borne spread" in E-Block. *See* JA 44 ¶ 12. On top of that, the inmates living there were showing symptoms of Covid. JA 131; JA 89. They were coughing, sneezing, and vomiting—not just in their cells but in shared spaces like the showers and the phone area. JA 131–32. The laundry workers knew all this from their contacts among the kitchen workers, who lived on the bottom floor of E-Block. JA 130; *see, e.g.*, JA 117 ¶ 12; JA 123 ¶ 19.

So when Thibeault told Nazario and the other laundry workers on April 3 that they were moving to E-Block, they protested. JA 3 ¶¶ 20–23. The inmates there were sick with Covid, they told her. JA 130; JA 88–89. And its structural features made it less safe than H-Block, they

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[4] Nazario attested to his complaint under penalty of perjury, so his assertions within it are testimony. *See* JA 8.

added. *Id.* They pleaded to stay in H-Block, where they'd been protected from the virus. JA 3 ¶ 23.

Their entreaties fell on deaf ears. Thibeault told them that if they refused to go, they would suffer the full panoply of prison punishment. JA 4 ¶ 24; JA 130–31. Faced with no other options, the workers reluctantly relocated to E-Block. JA 131. As they expected, they found themselves living alongside inmates showing symptoms of Covid and sharing common spaces with them. JA 131–32. Worse yet, within a week another ten or twenty inmates with Covid arrived. JA 132.

Two other failures of hygiene compounded the laundry workers' risk. First, their new cells were "filthy": the toilets were dirty, the sinks smelled of sewage, the cells' bars were caked with dried food and unidentifiable liquids, and at least one cell had vomit on its walls. JA 132; JA 114 ¶ 22; JA 118 ¶ 19. Second, inmates weren't given masks or free soap until late April or early May, after many had contracted Covid. JA 133 & nn.9–11.

2. Nazario contracts Covid-19 in E-Block and nearly dies.

Within a few weeks of moving to E-Block, Nazario fell ill with Covid. JA 4–5. He was moved to F-Block, a quarantine unit in Osborn, and then to Northern Correctional Institution, a quarantine facility. JA 5. His condition continued to deteriorate and he was transferred to a local hospital. *Id.* He was put on a ventilator. *Id.* He

suffered a heart attack. *Id.* During emergency surgery, his heart stopped twice. *Id.* He will require a pacemaker for the rest of his life. JA 6.

Nearly every laundry worker who was moved to E-Block also developed Covid-19. *Id.* ¶ 49. Like Nazario, many suffer from long-term symptoms as a result. JA 104 ¶ 25; JA 109 ¶ 26; JA 115 ¶ 28; JA 120 ¶ 26; JA 126 ¶ 32.

3. The district court denies summary judgment, finding that Thibeault knew the risk and moved Nazario to E-Block anyway.

Nazario filed suit. He brought an Eighth Amendment claim against Thibeault for transferring him to E-Block despite knowing the substantial risk that he'd catch Covid-19 there. JA 6–7. Thibeault moved for summary judgment, asserting that she had been unaware of any risk and that she was in any event entitled to qualified immunity. JA 127–28.

The district court disagreed on both counts. JA 140, 144. It reasoned, first, that Nazario's evidence showed that Osborn housed infected and healthy individuals together in E-Block, made them use the same phones and showers, housed them in cells that were filthy, and denied them sufficient personal protective equipment. JA 138–39. On those facts, it concluded, a reasonable jury could find that Nazario objectively faced a substantial risk of serious harm. *Id.*

It next found a genuine dispute of material fact as to Thibeault's subjective knowledge. JA 139–40. The laundry workers claimed they had informed Thibeault of the infected inmates in E-Block. JA 139. The court reasoned that if a jury were to accept their account, it could reasonably find that Thibeault had been "aware that there were COVID-19 positive and symptomatic inmates in E-block" when she ordered the laundry workers there. JA 139–40. It also held that a reasonable jury could find that Thibeault had been deliberately indifferent to the laundry workers' need for masks and other PPE. JA 140–41.

Finally, the district court denied Thibeault's request for qualified immunity. It reasoned that if a jury were to resolve the parties' factual disputes in Nazario's favor, Thibeault had violated clearly established law. JA 144–45. "Even at the beginning of the pandemic in March 2020, a reasonable official would have realized that Covid-19 is a serious infectious disease from which prison officials had a duty to protect inmates." *Id.*

Now, Thibeault seeks interlocutory review.

STANDARD OF REVIEW

Summary judgment. In ruling on a motion for summary judgment, courts construe the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Soto v. Gaudett*,

862 F.3d 148, 157 (2d Cir. 2017). Summary judgment lies only when the evidence, so construed, presents "no genuine dispute as to any material fact" and the moving party prevails "as a matter of law." Fed. R. Civ. P. 56(a).

Appellate review. Because this is an interlocutory appeal, the standard of review is mixed. The Court lacks jurisdiction to review whether a factual dispute is *genuine*; instead, resolving such disputes in favor of the nonmoving party, this Court has jurisdiction to review only whether they are *material*. *Infra* Part 1.1, pp. 13–16. Put differently, Thibeault is bound by the district court's factual or evidentiary findings but may seek review of its legal conclusions de novo. *See Johnson*, 515 U.S. at 313–14.

Summary of Argument

The district court correctly denied Thibeault's motion for summary judgment. Its decision should be affirmed.

1. Thibeault seeks interlocutory review. In that posture, she is bound by the district court's factual conclusions.

- **a.** On interlocutory review, this Court has appellate jurisdiction only over issues of law. It lacks jurisdiction to revisit the district court's finding of a genuine dispute of fact. Instead, taking such disputes "as given" and resolving them in favor of Nazario, this Court may review only the "purely legal"

question of whether, under those facts, Thibeault was entitled to qualified immunity. *Johnson*, 515 U.S. at 319; *Terebesi*, 734 F.3d at 228–30.

b. Thibeault asks the Court to reassess the evidence on appeal. This she may not do. The district court held that a reasonable jury might believe the laundry workers' testimony that the inmates in E-Block had Covid, that they told this to Thibeault, that they lacked masks and other PPE, that they told this to Thibeault too, and that their cells in E-Block were filthy. For purposes of this interlocutory appeal, Thibeault must accept that version of events.

2. Under that version of events, transferring Nazario to E-Block violated the Eighth Amendment.

a. Objectively, Nazario faced a substantial risk of serious harm from exposure to Covid-19 in E-Block. Thibeault argues that she mitigated that risk with policies and protocols to limit the spread of Covid, but sending Nazario to E-Block violated those policies—and it violated the CDC guidelines on which she purportedly relied, too.

b. Subjectively, once the laundry workers told Thibeault that inmates in E-Block were sick with Covid, Thibeault knew that transferring healthy inmates there would put them in danger. Thibeault argues that she wasn't obliged to *believe* the laundry

workers, but at summary judgment, the question is not what she believed but whether she had been "exposed to information concerning the risk." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). She was, and a jury may infer knowledge from that exposure.

c. Thibeault argues that even if she had subjective knowledge of the risk, moving Nazario to E-Block was reasonable because of the Covid protocols she had promulgated. As before, sending the laundry workers to E-Block violated those protocols, and in any event, officials cannot "insulate [themselves] from liability" for specific harmful decisions by pointing to general protective measures. *Lewis v. Siwicki*, 944 F.3d 427, 433 (2d Cir. 2019).

3. Thibeault is not entitled to qualified immunity.

a. At the turn of the century, this Court's cases laid out a three-part test for qualified immunity. Since 2001, however, the Supreme Court has consistently enunciated a two-part test. More recent cases from this Court also hew to the two-prong formulation, and the third prong is superfluous to boot. *See Walczyk v. Rio*, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring). To provide clarity to litigants and courts, this Court should formally overrule the spurious third prong.

b. Thibeault argues that she is entitled to qualified immunity because the Covid pandemic was caused by a novel virus. But reasonable officials had known for decades that the Eighth Amendment prohibits "mingling" healthy inmates with inmates carrying serious contagious diseases. *Helling v. McKinney*, 509 U.S. 25, 34 (1993). And this Court has rejected the notion that constitutional rights must be relitigated whenever injury is inflicted through a novel mechanism. *See, e.g.*, *Edrei v. Maguire*, 892 F.3d 525, 542–43 (2d Cir. 2018). Any reasonable official would have understood that she couldn't send healthy inmates to live among sick ones. Because Thibeault did so anyway, she is not entitled to qualified immunity.

ARGUMENT

In this interlocutory appeal, the controlling facts are that Thibeault knew transferring the laundry workers to E-Block would put them in danger and did so anyway. Nazario's right to protection from communicable disease had long been clearly established, so Thibeault is not entitled to qualified immunity.

1. In this interlocutory appeal, Thibeault is bound by the district court's factual findings.

The common thread that runs through all of Thibeault's arguments is a factual premise: She didn't know that transferring Nazario to E-Block would spike his risk of contracting Covid-19. The district court found that a reasonable jury could conclude otherwise—that she did know, and that she consciously disregarded the risk when she ordered the move. This Court should not revisit that finding in this interlocutory appeal.

1.1. This Court has interlocutory jurisdiction only over "purely legal" issues.

The federal courts of appeals have jurisdiction over "final decisions of the district courts." 28 U.S.C. § 1291. Denials of summary judgment, however, are "by their terms interlocutory." *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976). The courts of appeals normally lack jurisdiction to review such decisions. *Ortiz*, 562 U.S. at 188; *Terebesi*, 764 F.3d at 228–29.

The collateral-order doctrine is a limited exception to this general rule. It allows a court to hear an interlocutory appeal of a denial of qualified immunity—but only to the "narrow extent" that it turns on questions of law rather than questions of fact. *Bolmer v. Oliveira*, 594 F.3d 134, 140 (2d Cir. 2010); *Soto*, 862 F.3d at 157. Put differently, the final-judgment rule in qualified-immunity cases is not a jurisdictional

bar but a jurisdictional screen. "[P]urely legal" issues get through; issues of fact do not. *Johnson*, 515 U.S. at 313.

At the pleading stage, this jurisdictional screen reduces to the ordinary Rule 12(b)(6) standard: The court of appeals must assume the plaintiff's allegations are true and determine whether the defendants' conduct, as alleged, violated clearly established law. *Edrei*, 892 F.3d at 532. But at the summary-judgment stage, the jurisdictional screen is less straightforward; what gets through depends on the difference between *genuineness* and *materiality*. *Terebesi*, 764 F.3d at 229.

When a district court denies summary judgment, it necessarily decides that the parties' evidence presents at least one "genuine dispute as to a[] material fact." Fed. R. Civ. P. 56 (a). A dispute is "genuine" if there is enough evidence in the record for a jury to conclude that certain facts that the movant denies are true. *Bolmer*, 594 F.3d at 141. A dispute is "material" if, under the governing law, changing the outcome of the dispute would change the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

So genuineness is an evidentiary question and materiality is a legal question. From that distinction flows the jurisdictional rule: A court hearing an interlocutory appeal from a denial of summary judgment has jurisdiction to review whether the disputes identified by the district court are legally material, but not whether they are evidentiarily genuine. *Bolmer*, 594 F.3d at 140–41; *Johnson*, 515 U.S. at 307, 313.

Put another way, the universe of discourse on interlocutory review includes three sets of facts: "stipulated facts," "facts that the plaintiff alleges are true," and "facts favorable to the plaintiff that the trial judge concluded the jury might find." *Lennox v. Miller*, 968 F.3d 150, 154 (2d Cir. 2020) (quotation marks omitted). Any challenge to those facts is outside the appellate court's jurisdiction. *Id.* n.2.[5]

Like most jurisdictional rules, this one is fairly inflexible. Two examples illustrate. In *Soto v. Gaudett*, the defendant officers had left the plaintiff "incapable of communicating," so the record reflected only their testimony and reports of the incident. 862 F.3d at 154–59. Still, the district court denied summary judgment based on "internal inconsistencies" in their stories. *Id.* at 155, 161. On interlocutory appeal, the officers "relentlessly" argued their version of the facts, but this Court dismissed those portions of the appeal for lack of jurisdiction. *Id.* at 160–63. Even with no countervailing evidence, the Court bound the defendants to the district court's view of the facts. Similarly, in

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[5] Thibeault suggests that despite the interlocutory posture this Court may conduct an "independent review of the record." Br. 26 n.5. That quotation comes from *Lennox*, but Thibeault misstates the point. The appellants' brief in *Lennox* "repeatedly glosse[d] over relevant disputed facts." 968 F.3d at 154 n.2. As a result, this Court had to "disregard" the appellants' assertions about the record and review for itself "the district court's explanation of facts in dispute." *Id.* (quotation marks omitted). In other words: "Any dispute of fact, no jurisdiction." *Belya v. Kapral*, 2023 WL 1807013, at *2 (2d Cir. 2023) (Lohier, J., concurring in denial of reh'g en banc). Just so here.

DiStiso v. Cook, this Court held that even when evidence is of questionable admissibility, defendants are bound by "the record evidence as characterized by the district court." 691 F.3d 226, 230 (2d Cir. 2012).

None of this is to say that district courts may circumvent interlocutory review by "assert[ing] that disputed factual issues exist." *Raspardo v. Carlone*, 770 F.3d 97, 112 (2d Cir. 2014) (cleaned up). Rather, when an appellant raises factual arguments on interlocutory appeal, an appellate court has two options. It can dismiss the appeal outright, as in *Soto*. Or instead, it can proceed with review by "tak[ing], as given, the facts that the district court assumed when it denied summary judgment"—and determining, on those facts, whether the defendants violated clearly established law. *See Johnson*, 515 U.S. at 319; *e.g.*, *Lennox*, 968 F.3d at 154 n.2.

1.2. The district court found genuine disputes about the conditions in E-Block and Thibeault's knowledge of those conditions.

Thibeault insists that her appeal is based on "undisputed facts" and "Plaintiff's version of events." Br. 26 n.5. Yet she "repeatedly glosses over relevant disputed facts, . . . or treats disputed facts . . . as undisputed." *Cf. Lennox*, 968 F.3d at 154 n.2. Because Thibeault is "bound" by the district court's findings, as well as other facts the district court "did not explicitly identify but likely assumed," a review of the

factual basis for this appeal is in order. *Terebesi*, 764 F.3d at 236; *Bolmer*, 594 F.3d at 141 (cleaned up).

Thibeault asserted below that inmates in E-Block who tested positive for Covid-19 were promptly isolated and quarantined. JA 131 n.5. On appeal, she continues to argue that inmates who tested positive in E-Block were "then moved from the unit to quarantine in accordance with facility policies." Br. 27. The district court, however, found that claim genuinely disputed. JA 131 & n.5. It held that a reasonable jury could find, on Nazario's evidence, that "[d]espite Osborn's quarantine protocols, inmates showing symptoms associated with the COVID-19 virus were living in E-Block and using the unit's common areas at the time [Nazario] was transferred there." JA 131 (footnotes omitted); *see also* JA 4 ¶¶ 28–31; JA 102–03 ¶¶ 15, 18–19; JA 107–08 ¶¶ 14–17; JA 113–14 ¶¶ 18–21; JA 118 ¶¶ 16–18; JA 124 ¶¶ 22–23.

So too with "whether [Thibeault] was aware that there were COVID-19 positive and symptomatic inmates in E-block." JA 139. The district court found that issue genuinely disputed based on the laundry workers' testimony about their statements to Thibeault. JA 139–40. Thibeault objected to that evidence below, JA 130 n.3, and she renews that objection on appeal, arguing that the laundry workers' testimony is "inadmissible hearsay." Br. 11; *see also* Br. 26 n.5. As the district court pointed out, it's not: The statements are offered not for their truth but to show what Thibeault knew. JA 130 n.3. At all

events, because "personal knowledge" is a question of fact, *Terebesi*, 764 F.3d at 239, Thibeault may not raise these evidentiary arguments here. *DiStiso*, 691 F.3d at 230, 244 n.25. She must accept the district court's view of the record, *id.*, and on that view, "a reasonable jury could conclude that [Thibeault] had notice of the risk associated with transferring [Nazario] to E-block and disregarded that risk when she effectuated the transfer." JA 140; *see also* JA 3 ¶¶ 20–23; JA 102 ¶ 9; JA 107 ¶ 10; JA 113 ¶ 14; JA 117–18 ¶¶ 12–13; JA 123–24 ¶ 19.

Finally, the district court found that there was sufficient evidence for a jury to conclude: (1) that Thibeault "was at least partially responsible for implementing the policies related to supplying inmates with PPE"; (2) that the inmates told her they lacked sufficient PPE; and (3) that she still failed to provide at least some inmates with cloth or surgical masks until late April or early May 2020. JA 138–39, 140–41, 133 & nn.9–10; *see also* JA 31 ¶ 32; JA 101 ¶ 5; JA 106 ¶¶ 5–6; JA 111–12 ¶¶ 5, 9–10; JA 116 ¶¶ 5–6; JA 122 ¶ 6. Thibeault quarrels with these findings, too. *See, e.g.*, Br. 7, 28–29 & n.7, 50. She argues that Covid-19 protocols existed at Osborn, and that some were even observed. *See id.* Even if that were true, it wouldn't rebut Nazario's specific evidence about masks and PPE. But her arguments were properly addressed to the district court. On interlocutory review, Thibeault is bound by the district court's resolution of them.

Taking these facts "as given," *Johnson*, 515 U.S. at 319, the question for this Court is whether Thibeault's conduct—chiefly, transferring Nazario to E-Block even though she knew it would increase his risk of contracting Covid-19—violated clearly established law. For the reasons below, it did.

2. Thibeault was deliberately indifferent to the risk that transferring Nazario to E-Block would expose him to Covid-19.

The Eighth Amendment "does not mandate comfortable prisons, but neither does it permit inhumane ones." *Farmer*, 511 U.S. at 832 (cleaned up). Prison officials must take "reasonable measures" to guarantee inmates' safety, including protecting them from exposure to "serious, communicable disease." *Id.* (quotation marks omitted); *Helling*, 509 U.S. at 33. Officials may not turn a blind eye to conditions that are "likely to cause serious illness and needless suffering." *Helling*, 509 U.S. at 33.

Prison officials violate this proscription when they act with "deliberate indifference" to an inmate's health or safety. *Hathaway v. Coughlin* (*Hathaway I*), 37 F.3d 63, 64 (2d Cir. 1994). This inquiry has three elements. Objectively, the inmate must face a "substantial risk of serious harm." *Lewis*, 944 F.3d at 431. Subjectively, the official must know of the risk or the risk must be obvious. *Walker v. Schult*, 717 F.3d 119, 125 (2d Cir. 2013). If both conditions obtain, the official must

"take reasonable steps to avoid [the] harm" or face liability under the Eighth Amendment. *Lewis*, 944 F.3d at 433.

These inquiries are "fact-intensive." *See Darnell v. Pineiro*, 849 F.3d 17, 31 (2d Cir. 2017). As the district court correctly found, Nazario has enough evidence to put them to a jury. JA 144. This Court should let him try his case.

2.1. Transferring Nazario to E-Block exposed him to a substantial risk of contracting Covid-19.

To satisfy the objective element, "the inmate must show that the conditions, either alone or in combination, pose an unreasonable risk of serious damage to his health." *Walker*, 717 F.3d at 125. Whether Thibeault seriously contests that exposure to Covid-19 poses an unreasonable risk of serious harm is unclear. At times, she appears to concede that it does: "Thibeault never argued that exposure to COVID-19 did not amount to a serious risk of harm[.]" Br. 12. Elsewhere she questions it. *Cf.* Br. 37–38. In any event, this Court has long held that "correctional officials have an affirmative obligation to protect inmates from infectious disease." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996). Exposure to "communicable disease" is "sufficiently harmful to evidence deliberate indifference to serious medical needs." *Lareau v. Manson*, 651 F.2d 96, 109 (2d Cir. 1981) (quotation marks omitted); *see also Helling*, 509 U.S. at 33.

Transferring Nazario and the other laundry workers from H-Block to E-Block skyrocketed their exposure to Covid. In H-Block, they had managed to avoid Covid; in E-Block, they lived cheek-by-jowl with infected inmates. JA 131–32, 138–39. In H-Block, they could fully shut their cells and open a window to the outside; in E-Block, they were forced to breathe and rebreathe the same air as their infected comrades. JA 129–30. Were that all, it would suffice to concern the Eighth Amendment. *Cf. Helling*, 509 U.S. at 34; *Lareau*, 651 F.2d at 109. But on top of that, their cells in E-Block were filthy and they did not receive masks. JA 132–33, 138–39. Together, these "mutually enforcing conditions" easily created an objectively substantial risk of serious harm. *See Darnell*, 849 F.3d at 30–31.

Thibeault counters that she mitigated any risk to the laundry workers with "policies and protocols to limit the spread of COVID-19." Br. 37–38. But those policies and protocols ostensibly included "reducing population density" and "[q]uarantining" inmates who displayed Covid symptoms. *Cf.* Br. 4–5. In other words, moving the laundry workers to E-Block *violated* the policies Thibeault now vaunts. It also violated CDC recommendations, such as "minimiz[ing] mixing of individuals from different housing areas." JA 61. So even if Thibeault's characterization of the law were correct, the predicate is lacking: Thibeault breached the protective measures that she claims protect her from liability.

But also, she misreads the law. None of her authorities feature a prison administrator sending healthy inmates to live among sick ones. Most of them, both in this section and elsewhere, involve inmates faulting officials for failing to implement strict enough protocols, failing to ensure perfect compliance, or even failing to release prisoners. *See, e.g.*, *Harper v. Cuomo*, No. 9:21-cv-19-LEK-ML, 2021 WL 1821362, at *8 (N.D.N.Y. 2021); *Chunn v. Edge*, 465 F. Supp. 3d 168, 172 (E.D.N.Y. 2020); *Stevens v. Cuomo*, No. 9:21-cv-306-GLS, 2021 WL 3165364, at *4–5 (N.D.N.Y. 2021). The plaintiffs in those cases sought positive rights to heightened protective measures. Nazario, by contrast, asserts a negative right against being forced to participate in a "coronavirus party."[6] Nothing in Thibeault's authorities addresses that fact pattern.

Those authorities do exist. As well as Judge Bryant here, two other district judges have also denied Thibeault qualified immunity for moving the laundry workers to E-Block. *See Browne v. Rodriguez*, No. 3:21-cv-329-VAB, 2023 WL 1069477, at *1 (D. Conn. 2023); Minute Entry, *Lee v. Cook*, No. 3:21-cv-399-KAD (D. Conn. Sept. 23, 2022), Dkt. 40. And decisions from other jurisdictions with similar facts also impose liability. *See, e.g.*, *Jones v. Sherman*, 2022 WL 783452, at *3, *12 (E.D. Cal. 2022) (denying qualified immunity for officials who

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[6] *Cf. Pox party*, Wikipedia, https://en.wikipedia.org/wiki/Pox_party (updated Jan. 9, 2023).

"turned a non-infected facility F into a quarantine," infecting all inmates there).

Thibeault relies on *Gibson v. Rodriguez*, which she claims dismissed a suit brought by "an Osborn laundry worker transferred on the same occasion as the Plaintiff here." Br. 40 (citing *Gibson*, No. 3-20-cv-953-KAD, 2021 WL 4690701 (D. Conn. 2021)). Nothing in *Gibson* reflects those facts; it appears to be a bog-standard claim that the plaintiff caught Covid despite protective measures. *See* 2021 WL 4690701, at *6–8. In any event, the plaintiff there was pro se. When the laundry workers brought claims with the benefit of counsel, the same judge denied Thibeault summary judgment. *Lee*, No. 3:21-cv-399-KAD, Dkt. 40; *see also Browne*, 2023 WL 1069477, at *9 (distinguishing *Gibson*). *Gibson* cannot bear the weight Thibeault places upon it.

As to Thibeault's other authorities, one more point: The plaintiffs' odds of catching Covid there were often *lower* than in the surrounding community. *Harper*, 2021 WL 1821362, at *9; *Chunn*, 465 F. Supp. 3d at 201; *Stevens*, 2021 WL 3165364, at *4. Here, by contrast, not only did Thibeault subject the laundry workers to increased risk, but that risk materialized: Nearly all of them contracted Covid after being forced to move to E-Block. JA 6 ¶ 49. Thibeault's own cases confirm that on facts like these—when inmates face "elevated COVID-19 risks compared to the outside community"—courts "*have*

found a substantial risk of serious harm." *Chunn*, 465 F. Supp. 3d at 200–01 (collecting cases).

2.2. Thibeault knew the risk because the laundry workers told her that inmates in E-Block were sick with Covid-19.

Nazario must show that Thibeault subjectively knew of the danger that awaited him in E-Block. He can do so either through direct evidence of her knowledge or through evidence "that a risk was obvious or otherwise must have been known." *McCray v. Lee*, 963 F.3d 110, 116 (2d Cir. 2020) (quoting *Walker*, 717 F.3d at 125). The district court held that Nazario's evidence "raised a genuine dispute of material fact as to whether [Thibeault] was aware that there were COVID-19 positive and symptomatic inmates in E-block." JA 139–40.[7] On interlocutory review, that finding is dispositive: Thibeault subjectively knew that there were infected and symptomatic inmates in E-Block—because the laundry workers told her so. JA 139–40; JA 130.

Thibeault's primary defense on this point is that she had no duty to *believe* the laundry workers. Br. 26–27. But as the Supreme Court explained in *Farmer*, the question at summary judgment is not whether Thibeault actually "believ[ed]" that harm would befall Nazario; the

[7] The district court also found that Thibeault knew the laundry workers weren't receiving cloth or surgical masks when she transferred them to E-Block. JA 140.

question is whether she had been "exposed to information concerning the risk." 511 U.S. at 842. When an inmate tells an official of a risk, the official has been exposed to information about the risk. *See Walker*, 717 F.3d at 129–30 (inmate's complaints of unconstitutional conditions sufficed to give officials subjective knowledge). A jury may infer knowledge from that exposure. *Farmer*, 511 U.S. at 842–43.[8]

Of course, a jury is also free to conclude otherwise. *Id*. at 844. The standard is actual knowledge, so if Thibeault truly "believed (albeit unsoundly)" that the laundry workers were mistaken about conditions in E-Block, she can tell that to the jury. *Cf. id*. But she may not ask this Court to find so in the jury's stead.

[8] A jury might also find that Thibeault knew of conditions in E-Block because she "was required to tour through [it]" regularly. JA 107; JA 113; JA 117; JA 123. For reasons that are unclear, the district court held that this evidence didn't "support[] Defendant's actual knowledge of the status of the inmates in E-block." JA 140. The district court likely erred here: This Court has held that officials have "actual knowledge of the inhumane conditions" in a prison unit when an inmate asserts without rebuttal that the unit was part of their "daily rounds." *Gaston v. Coughlin*, 249 F.3d 156, 166 (2d Cir. 2001). The Court need not decide whether it has jurisdiction to correct this error on interlocutory review because the district court ultimately found that Nazario's other evidence was enough to raise a jury question.

2.3. Thibeault knew the risk but transferred Nazario to E-Block anyway, so she was deliberately indifferent.

Once an official subjectively knows an inmate is in danger, she has a duty to take "reasonable measures to protect [the inmate] from harm." *Lewis*, 944 F.3d at 433. A reasonable response can take many forms. *See id.* at 433–34. If Thibeault doubted the laundry workers' claims, for instance, she might have visited E-Block to learn the truth of conditions there. But nothing in the record suggests that she "took any steps whatsoever" to assure herself that the laundry workers were mistaken. *Cf. Johnson v. Wright*, 412 F.3d 398, 406 (2d Cir. 2005). She just told the laundry workers that if they didn't comply with the move, they'd be punished. JA 130–31. That's deliberate indifference. *Lewis*, 944 F.3d at 433; *Walker*, 717 F.3d at 129–30.

Thibeault mounts three arguments in defense. Her main response is that "there is [no] dispute that quarantine and isolation policies were in place." *E.g.*, Br. 29–31, 38, 50–51. In other words, because Thibeault "implemented and participated in creating policies and protocols to limit the spread of COVID-19" instead of "simply ignoring the virus and proceeding with business as usual," Nazario can't hold her liable for moving him to E-Block. *See* Br. 38.

As before, this argument stumbles at the outset: In moving Nazario to E-Block, Thibeault ignored the very policies that she now brandishes. *Cf.* Br. 4–5. But even at face value, her argument is

misplaced. It addresses the more common sort of Covid claim—one that seeks redress for mere "lapses in enforcement" of Covid protocols or for officials' "failure to eliminate all risk." *Cf.* Br. 49 (quoting *Swain v. Junior*, 958 F.3d 1081, 1089 (11th Cir. 2020) (per curiam) (alteration omitted)); *id.* at 50 (quoting *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 330 (3d Cir. 2020)). But Nazario's claim is of a different sort. Thibeault forced him to "mingl[e]" with "inmates with serious contagious diseases." *Cf. Helling*, 509 U.S. at 34. Never mind eliminating all risk—Thibeault actively harmed him. That she may have taken other measures that were protective does not "insulate [her] from liability" for her actively harmful decisions. *Lewis*, 944 F.3d at 433; *see, e.g.*, *Browne*, 2023 WL 1069477, at *9; *Martinez-Brooks v. Easter*, 459 F. Supp. 3d 411, 442–43 (D. Conn. 2020).

Thibeault's next line of defense is that she moved the laundry workers to "cohort[]" them, so that if they developed Covid the facility could "pull workers from other units to ensure services for the inmates, like laundry and food services, could continue." Br. 8, 43, 50. But Thibeault offers no reason why she couldn't have "cohorted" the laundry workers in H-Block, where the cells were safer and where they had managed to avoid infection. A jury may consider "[t]he availability of this protective measure" in evaluating the reasonableness of Thibeault's claimed justification. *Lewis*, 944 F.3d at 433–34. And a jury might also find that her justification makes little sense given the

laundry workers' warning—which turned out to be true—that the inmates in E-Block already had Covid.[9]

Thibeault's final argument is that she relied on the advice of medical professionals and CDC recommendations to "limit the spread of COVID-19 in the prison." *E.g.*, Br. 30–31, 45, 51–52. No doubt her general Covid-mitigation policies—quarantining new admissions, suspending visits, screening staff, and so on—were based on medical advice. *Cf.* Br. 4–5. But as for moving the laundry workers to E-Block, Thibeault offers no evidence that medical staff were involved. *Cf.* JA 37–38 ¶¶ 17–23.[10] Nor does her Chief Medical Officer suggest that he had anything to do with the decision. *Cf.* JA 42–48. And the CDC's advice—"minimize mixing of individuals from different housing areas"—is the opposite of what Thibeault did. *Cf.* JA 61.[11] She cannot

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[9] The district court didn't explain explicitly why it rejected this particular rationalization. But given the "internal inconsistencies," the court likely determined that a jury would have to assess its credibility. *Cf. Soto*, 862 F.3d at 161. On interlocutory review, implicit factual determinations of that sort are just as binding as explicit factual findings. *Bolmer*, 594 F.3d at 141 (factual basis for interlocutory appeal includes facts the district court "did not explicitly identify but likely assumed" (cleaned up)); *Johnson*, 515 U.S. at 319.

[10] Thibeault does make this claim a few times in her *brief*, but unadorned by citation to the record. Br. 50, 51, 52. In contrast, where she does cite the record, it is for vague, general propositions—for example, that she consulted medical staff on "housing decisions throughout this time period." Br. 33 n.9; *see also, e.g.*, Br. 9, 31.

[11] The CDC's guidance, issued well before April 3, also means Thibeault cannot use the novelty of the coronavirus as an excuse. *Cf., e.g.*, Br. 30

escape liability because "at some point" she sought the advice of medical staff on other housing matters. *See Hathaway I*, 37 F.3d at 68.

* * *

In sum, once told there were symptomatic inmates in E-Block, Thibeault had a few choices. She might have investigated the claim. She might have reconsidered the move. She might have ensured that her staff in E-Block were faithfully carrying out her quarantine orders. She did none of these things. She ignored the risk and forced Nazario to move to E-Block or face further punishment. The Eighth Amendment no more permits that than it would a "sentence that required [Nazario] to submit to [infection with the coronavirus]." *See Brock v. Wright*, 315 F.3d 158, 163 (2d Cir. 2003). The district court correctly denied Thibeault's request for summary judgment.

3. Thibeault is not entitled to qualified immunity.

Qualified immunity is about "fair notice." *Edrei*, 892 F.3d at 540. It shields government agents from liability for violating constitutional rights if those rights were not "clearly established" at the time of the violation. *Camreta v. Greene*, 563 U.S. 692, 705 (2011). It consists of two prongs: Whether the official violated a right and whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

("these determinations were made very early on into the COVID-19 pandemic").

Courts may address the prongs in any order, but both the Supreme Court and this Court have recognized that addressing the merits first is "often beneficial." *Id.* Even in novel factual circumstances, officials are not entitled to qualified immunity if their conduct "obvious[ly]" or "egregious[ly]" violates the Constitution. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002)).

3.1. The test for qualified immunity has two prongs: Whether a right was violated and whether it was clearly established.

Since its 2001 decision in *Saucier v. Katz*, the Supreme Court has consistently explained that qualified immunity has two prongs. *See* 533 U.S. 194, 201 (2001) (setting out two "sequential" steps); *Pearson*, 555 U.S. at 236 (allowing courts discretion over "which of the *two prongs* of the qualified immunity analysis should be addressed first" (emphasis added)); *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) ("two prongs"). The first prong is whether the defendant violated a constitutional right and the second prong is whether that right was clearly established. *Tolan*, 572 U.S. at 656.

Two years before *Saucier*, however, this Court enunciated a three-part test. *X–Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65–66 (2d Cir. 1999). On top of the Supreme Court's two prongs, this Court tacked on whether "the defendant's action was objectively legally reasonable"

even if the right had been clearly established. *Id.* *Saucier* focused on a different error in the Ninth Circuit's analysis, so it didn't address this Court's three-prong test. *See* 533 U.S. at 202. This Court, for its part, reiterated the three-prong test after *Saucier*. *See Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211–12 (2d Cir. 2003). And so it shows up from time to time in this Court's decisions, *see, e.g.*, *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013), and thus also in litigants' briefs, *see* Br. 16, 47–53.

This Court should lay the errant third prong to rest. Most of the Court's recent cases—whether they grant immunity or deny it—already enunciate the test in two parts. *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 738 (2d Cir. 2022); *Hurd v. Fredenburgh*, 984 F.3d 1075, 1084 n.3 (2d Cir. 2021); *Lennox*, 968 F.3d at 155; *Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020). What remains of the third prong has been subsumed into the second. *See, e.g.*, *Bailey v. Pataki*, 708 F.3d 391, 404 & n.8 (2d Cir. 2013). This only makes sense: As Justice Sotomayor pointed out when she sat on this Court, the third prong is superfluous. *Walczyk*, 496 F.3d at 166 (Sotomayor, J., concurring) ("[W]hether a right is clearly established is the *same question* as whether a reasonable officer would have known that the conduct in question was unlawful.").[12] Enunciating the understanding

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[12] Other judges of this circuit and its sister circuits have made the same point. *See, e.g.*, *Vincent v. Yelich*, 718 F.3d 157, 166 (2d Cir. 2013)

of a reasonable officer as a distinct prong is also "contrary to Supreme Court precedent." *Id.* And this Court "owe[s] fidelity to the [Supreme] Court's articulation of the test as well [as its substance]." *Maldonado*, 568 F.3d at 269.

Ordinarily, one panel of this Court may not overrule another. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). But there is an exception when the prior decision "has been thoroughly undermined" by intervening Supreme Court precedent. *Id.*; *see, e.g.*, *Darnell*, 849 F.3d at 34–35. That condition obtains here. No Supreme Court case has ever enunciated a third prong to qualified immunity. This Court usually ignores the spurious third prong anyway. It should take the opportunity to formally overrule it and provide clarity to litigants, district courts,[13] and future panels of this Court.

("Absent 'extraordinary circumstances,' '[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his conduct.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982))); *Taravella v. Town of Wolcott*, 599 F.3d 129, 138 (2d Cir. 2010) (Straub, J., dissenting); *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009); *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009).

[13] *Cf., e.g.*, *Boyler v. City of Lackawanna*, 287 F. Supp. 3d 308, 317 n.5 (W.D.N.Y. 2018) (treating the third prong as already overruled), *aff'd*, 765 F. App'x 493 (2d Cir. 2019).

3.2. Nazario's right to protection from infectious disease had long been clearly established.

Thibeault forced Nazario to move to E-Block in April 2020. JA 129–30. Nazario's right to protection from infectious disease was clearly established long before that. For just a few examples:

- This Court held in 1981 that prison policies that "threat[ened]" healthy inmates with the "spread of . . . disease[ ]" evinced "deliberate indifference to serious medical needs." *Lareau*, 651 F.2d at 109 (quotation marks omitted).
- The Supreme Court held in 1993 that "prison officials may [not] be deliberately indifferent to the exposure of inmates to a serious, communicable disease." *Helling*, 509 U.S. at 33.
- This Court held again in 1996 that "correctional officials have an affirmative obligation to protect inmates from infectious disease." *Jolly*, 76 F.3d at 477.

Even on a more granular, element-by-element level, Nazario's right was clearly established long before April 2020. On the objective prong, *Helling* established that "the mingling of inmates with serious contagious diseases with other prison inmates" created a substantial risk of serious harm. 509 U.S. at 34. On the subjective prong, *Farmer* told reasonable officials in 1994 that once they were "exposed to information concerning the risk," a jury could conclude that they subjectively knew the risk. 511 U.S. at 842. And on the reasonable

response, *Helling*'s prohibition on "mingling" infected and healthy inmates again sufficed to give Thibeault fair notice that she could be held liable for forcing Nazario to live among Covid-positive inmates. 509 U.S. at 34; *see also Hutto v. Finney*, 437 U.S. 678, 682–83 (1978) (similar).

Thibeault's main argument for qualified immunity, which she reiterates in various permutations throughout her brief, is that Covid-19 was "an unprecedented worldwide pandemic." Br. 21; *see also, e.g.*, Br. 22 ("few cases at all exist with regard to pandemics"); Br. 30–31, 36, 43, 53.[14] But clearly established law can apply with "obvious clarity" to novel circumstances. *Taylor*, 141 S. Ct. at 53–54 (quotation marks omitted). When extant caselaw "clearly foreshadow[s] a particular ruling on the issue," officials have fair notice. *Terebesi*, 764 F.3d at 231 (quotation marks omitted). So as the Seventh Circuit put it, prison officials' legal duty to protect inmates from infection "need not be litigated and then established disease by disease or injury by

[14] Thibeault's other arguments for qualified immunity rely on facts that are legally irrelevant, such as that she implemented "extensive [Covid] policies and protocols" unrelated to moving Nazario to E-Block, Br. 21–22; on facts not present in the record, such as that she "had conferred with medical staff as to the safety of the move," Br. 52; or on facts that only a jury may find, such as that Covid-positive inmates were promptly "moved from [E-Block] to quarantine in accordance with facility policies," Br. 27. *Cf. Sloley v. VanBramer*, 945 F.3d 30, 36 (2d Cir. 2019) (emphasizing that "under either [prong]" of qualified immunity, courts may not resolve genuine disputes of material fact).

injury." *Est. of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017); *see also Vega v. Semple*, 963 F.3d 259, 277 (2d Cir. 2020) (rejecting the argument that "qualified immunity must be granted absent binding precedent that addresses the *very same* carcinogen").

This Court has explained that "novel technology" and "novel method[s]" of "inflict[ing] injury" do not entitle an officer to qualified immunity. *See Edrei*, 892 F.3d at 542; *Terebesi*, 764 F.3d at 237 (quotation marks omitted). Neither does a novel pathogen. Thibeault is not entitled to qualified immunity.

CONCLUSION

For all these reasons, the district court's denial of summary judgment should be affirmed.

Dated: February 13, 2023

Respectfully submitted,

By: /s/Athul K. Acharya
Athul K. Acharya

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellee

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(g) and Local Rule 32.1(a)(4)(A) because it contains 7,893 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count feature of Microsoft Word for Mac 16.65.

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Dated: February 13, 2023

By: *_/s/Athul K. Acharya_*
Athul K. Acharya

PUBLIC ACCOUNTABILITY
Counsel for Plaintiff-Appellee