No. 17-___

IN THE

Supreme Court of the United States

CHERYL WENZEL AND NICOLE VIRGO,
Petitioners,

v.

THE ESTATE OF JAMES FRANKLIN PERRY,
BY BETTIE A. RODGERS, SPECIAL ADMINISTRATOR,
AND JAMES FRANKLIN PERRY, JR. (A MINOR),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Seventh Circuit reversed a grant of qualified immunity to two Milwaukee County jail nurses on a claim that they violated the constitutional rights of a City of Milwaukee arrestee. In determining whether the right was "clearly established," the court of appeals thought it sufficient that the Fourth Amendment has been held to require officials to respond reasonably to an arrestee's serious medical needs. This case, one of a series from that court, presents the following question: Whether the court of appeals defined the constitutional right in question at too high a level of generality, directly contrary to this Court's teachings on qualified immunity?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The parties to the appeal before the Seventh Circuit were as follows:

- The Estate of James Franklin Perry and James Franklin Perry, Jr., his minor son, were the appellants;
- Milwaukee County; its insurer, Wisconsin County Mutual Insurance Corporation; then-Milwaukee County Sheriff David A. Clarke, Jr.; and ten current or former employees of the Milwaukee County Sheriff's Office (Richard Schmidt, Fatrena Hale, Kelly Kieckbusch, Abie Douglas, Anthony Arndt, Sheila Jeff, Darius Holmes, Tina Watts, Nicole Virgo, and Cheryl Wenzel) were appellees; and
- The City of Milwaukee; Milwaukee Police Chief Edward Flynn; and sixteen current or former City of Milwaukee police officers (Richard Lopez, Frank Salinsky, Stephon Bell, Margarita Diaz-Berg, Alexander Ayala, Froilan Santiago, Crystal Jacks, Corey Kroes, Rick Bungert, Luke Lee, Jacob Ivy, Richard Menzel, Ramon Galaviz, Victor Beecher, Karl Robbins, and Shannon Jones) were also appellees.

The only corporation that was a party to this proceeding below, Wisconsin County Mutual Insurance Corporation, has no parent corporation, and no publicly held company owns any of its stock.

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The defense of qualified immunity exists to protect public officials from personal liability under section 1983 unless all reasonable officials in their position would know that their actions fell short of applicable constitutional minimums. This Court has repeatedly emphasized that a court must assess the defense against specific constitutional standards that have been clearly established under analogous circumstances. Here—and in two other cases to be presented to this Court—the Seventh Circuit has deviated from this fundamental principle.

Petitioners, Nicole Virgo and Cheryl Wenzel, are registered nurses who tried to assist an arrestee, James Franklin Perry, when City of Milwaukee police officers brought him to the pre-booking room of the Milwaukee County Jail. The nurses had no previous knowledge of Perry or his medical condition. Responding to events rapidly unfolding in the pre-booking room over the course of eleven minutes, the nurses assessed Perry's condition, called for an ambulance to be summoned to transport him to the hospital, monitored his status while waiting for the ambulance, and initiated CPR when he suddenly became nonresponsive. Unfortunately, Perry thereupon died, but not because the nurses had violated some clearly established constitutional right.

Reversing the district court's grant of summary judgment to Virgo and Wenzel, the Seventh Circuit effectively ignored this Court's recent teachings about qualified immunity. The court of appeals denied immunity to the nurses based on its conclusion that it is clearly established that the Fourth Amendment required them to respond to Perry's serious medical needs in an objectively reasonable manner. This

analysis ran directly counter to this Court's qualified-immunity precedent by framing the analysis at too high a level of generality and ignoring the specific facts and circumstances confronting the two nurses. Properly framed, no clearly established legal precept would have informed Virgo and Wenzel that their actions with respect to Perry were unconstitutional, and they are thus entitled to qualified immunity.

Review by this Court is critical to restore qualified immunity to its appropriate place as an important defense in section 1983 cases within the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit (App. 1–40) is reported at 872 F.3d 439 (7th Cir. 2017). The opinion of the district court (App. 41–65) is reported at 185 F. Supp. 3d 1087 (E.D. Wis. 2016).

JURISDICTION

The Seventh Circuit entered judgment on September 18, 2017. *See* App. 1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution, made applicable through the Fourteenth Amendment, provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

Section 1983 of Title 42 of the United States Code provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

This section 1983 case presents the important question whether the Seventh Circuit has departed from this Court's teachings concerning qualified immunity. To put the issues in this petition in context, it is necessary to describe (1) petitioners and the nature of their jobs, (2) petitioners' brief interaction with Perry, (3) the procedural history of this lawsuit, and (4) the court of appeals' decision.

1. The Nurses and Their Jobs. Nicole Virgo and Cheryl Wenzel are registered nurses licensed by the state of Wisconsin. R.85 ¶¶ 3–4.[1] Both were previously employed by the Milwaukee County Sheriff's Office as nurses in the Milwaukee County Jail. *Id.* ¶ 6.

The pre-booking room is where law enforcement agencies throughout Milwaukee County bring prisoners to be booked into the jail. *Id.* ¶ 29. At one end of the pre-booking room is a nurse's station, which is staffed by one or more nurses on duty in the jail. *Id.* ¶ 33. The nurses conduct initial health screenings to assess whether prisoners are medically fit to be booked into the jail. No prisoner can be booked unless he is medically cleared by a nurse. *Id.* ¶ 34. The nurses also have duties elsewhere in the jail, including in the adjacent booking room (which is where prisoners are initially held after being medically cleared but before being assigned to a specific housing area in the jail).

2. The Nurses' Interaction with Perry. Both petitioners were on duty in the jail on the evening of September 13, 2010. At approximately 8:44 p.m., Virgo walked up to the nurse's station in the pre-booking room, having been told by a corrections officer that a City of Milwaukee Police Department (MPD) arrestee had just arrived who needed to be assessed for entry to the jail. *Id.* ¶¶ 59, 64. Wenzel arrived at

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[1] In addition to citing the attached appendix ("App."), this petition refers, where appropriate, to the record ("R.") in the district court, specifying the docket number of the document cited. The overwhelming majority of these references are to the materials filed in connection with a motion for summary judgment. Thus, for example, "R.85" is petitioners' statement of undisputed material facts, which itself contains references to the underlying support for each proposition of fact as found in declarations, depositions, and other portions of the record.

the nurse's station roughly one minute later—i.e., at 8:45 p.m. *Id.* ¶ 65.

This arrestee was James Franklin Perry. Neither Virgo nor Wenzel had had any prior contact with or knowledge of Perry. Thus, for example, neither knew anything about the events that had been unfolding since Perry's arrest by the MPD almost nineteen hours earlier. *Id.* ¶ 15.[2]

Upon their arrival in the pre-booking room, the nurses acted immediately. No more than one minute after she arrived in pre-booking—i.e., ca. 8:45 p.m.—Virgo walked from behind the nurse's station over to Perry to assess his condition. *Id.* ¶ 68. As she assessed him, Virgo stood next to Perry, bending over

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[2] In its opinion, the Seventh Circuit looked backward and recounted the events beginning at approximately 2:00 a.m. that same day, when MPD officers arrested Perry in a stolen car on suspicion of armed robbery. App. 3–10. These events include Perry's having a seizure while in MPD custody, being taken by MPD officers to a hospital, and there suffering additional seizures and being given anti-seizure medications. Perry later arrived at the jail in the custody of the MPD, and he remained in the custody of the MPD until he died. It made sense for the Seventh Circuit to recount various of these facts given that the defendants (appellees below) included individuals involved in these previous events, such as various City of Milwaukee police officers. The events are generally irrelevant, however, to the liability of petitioners and thus are recounted in the text here only to the extent that is not the case (i.e., only insofar as they are relevant). *Compare White v. Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam) (acknowledging that on summary judgment facts are viewed in the light most favorable to the non-movants, but stating that "[b]ecause this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers" and on that basis noting the relevance of the fact that petitioner was "an officer [who] ha[d] arrived late at an ongoing police action").

so that her head was close to his. R.86-28 at 7. During this assessment, two corrections officers stood next to Perry, and Wenzel remained at the nurse's station. R.85 ¶ 71. The nurse's station was no more than seven feet from where Perry was sitting. *Id.* ¶ 35.

Perry was in leg restraints, had his hands cuffed behind his back, and was wearing an expectorant shield (a "spit mask"), all of which had been applied by MPD officers. *Id*. ¶ 44; R.90 ¶ 6, Ex. D. The portion of the spit mask covering Perry's face was made of a porous, mesh material. R.85 ¶ 45.

From the hospital discharge papers that the MPD officers had brought with them, Virgo knew that Perry had been evaluated at a hospital that day for seizure activity. *Id.* ¶ 72. For that reason, the nurse asked Perry some orienting questions. Virgo asked Perry if his name was James Perry and if he had a history of seizures; he nodded "yes" in response to both questions. Virgo asked Perry to state his name, but he did not respond. *Id.* ¶¶ 73–74.

Virgo applied her training and experience as a nurse to conduct a visual observation as part of her initial screening assessment. She saw that Perry had defecated in his pants and that there was blood on his spit mask. *Id.* ¶ 76. She did not believe this to require immediate medical attention. *Id.* ¶ 90. She observed that Perry was not labored in his breathing, did not have an increased respiratory rate, and was otherwise breathing normally. *Id.* ¶ 77. None of the MPD officers told Virgo that Perry had had any trouble breathing that night. *Id.* ¶ 78. Based on her observations from a close proximity, Virgo did not believe the spit mask was obstructing Perry's ability to breathe. *Id.* ¶ 79.

Perry did not complain to Virgo of any chest pain, and she did not perceive him to be having any chest pain. *Id.* ¶ 80. None of the MPD officers told Virgo that Perry had had any chest pain or an unusual pulse that night. *Id.* ¶ 81. Virgo knew that the hospital discharge papers did not indicate that Perry had been having chest pain, difficulty breathing, or an unusual pulse, and they did not reflect any other indication of heart trouble. *Id.* ¶ 84. Virgo's visual assessment occurred over a period of one minute. *Id.* ¶ 69.

Virgo did not think that all was well. Based on her assessment, she believed that Perry was not stable enough to be admitted to the jail and instead needed to be taken to a hospital for further assessment. *Id.* ¶ 87–89. She did not believe that Perry presented a medical *emergency*, but she did believe that Perry needed medical assistance beyond what the jail could provide. *Id.* ¶ 119.

Consequently, at approximately 8:46 p.m., Virgo walked back to the nurse's station, leaving two corrections officers still next to Perry. *Id.* ¶ 91. There, she informed the jail sergeant of her decision to refuse Perry's admission and requested that an ambulance be called to transfer Perry to a hospital. *Id.* ¶ 92. This is what Perry's hospital discharge papers indicated should occur if he experienced a deterioration in his condition. R.120, Ex. R at 31–33.

At approximately 8:47 p.m., Perry slipped off the bench onto the floor immediately in front of the nurse's station. R.85 ¶ 94. The two corrections officers next to him allowed him to slide to the floor because he was swaying back and forth on the bench and appeared to want to go to the floor. *Id.* ¶ 95. Virgo returned from the nurse's station to Perry to assess his condition

again. *Id.* ¶ 98. To do so, Virgo again stood directly over Perry. R.86-28 at 12.

At approximately the same time, the jail sergeant left the pre-booking room to return to her desk to call for an ambulance, as Virgo had requested. R.85 ¶ 97. One corrections officer remained next to Perry, while Virgo, once she had assessed Perry a second time, returned to the nurse's station. *Id.* ¶ 96. Back at the nurse's station, Virgo spoke by telephone with the jail's on-call medical director to inform him of the situation and her decision to refuse Perry's admission. *Id.* ¶ 101.

At approximately 8:48 p.m.—less than two minutes after Virgo finished her initial assessment of Perry and requested that an ambulance be called—the sergeant called Master Control within the jail, requesting that an ambulance be summoned to transfer Perry to a hospital. *Id.* ¶ 99. Master Control immediately called the City of Milwaukee Fire Department to request an ambulance. *Id.* ¶ 100.

Nurse Wenzel wanted to see if something more could be done to help Perry while waiting for the ambulance. *Id.* ¶ 108. At approximately 8:50 p.m., she left the nurse's station to retrieve a towel so that she could wipe Perry's face. *Id.* ¶ 107. Having retrieved the towel, at approximately 8:51 p.m., Wenzel requested that the MPD officers remove Perry's spit mask (as he was still in their custody). *Id.* ¶ 109. The MPD officers and Wenzel approached Perry, and the officers sat Perry up and removed his spit mask. *Id.* ¶ 110.

Upon the removal of the mask, Wenzel observed blood and vomit on Perry's face. *Id.* ¶ 111. The nurse wiped his face with a towel. *Id.* ¶ 113. His head thereupon fell backwards, and Wenzel saw his eyes

roll back into his head. *Id.* ¶ 114. Wenzel saw that Perry was no longer breathing. *Id.* ¶ 115. She checked Perry's carotid pulse, and she felt none. *Id.* ¶ 117. Like Virgo, Wenzel had not believed, up until that point, that Perry presented a medical emergency. *Id.* ¶ 120. Once the spit mask was removed, Virgo observed that the amount of blood present around Perry's mouth was more than what she had understood when she first assessed him (which she noted afterwards on a medical screening form). *Id.* ¶¶ 116, 134.

The nurses immediately called for an emergency response in the jail. *Id.* ¶ 118. Virgo, Wenzel, and other jail staff also immediately began trying to resuscitate Perry. *Id.* ¶¶ 125–26. Within a minute after the call for an emergency response, corrections officers delivered the jail's resuscitation bag and an automated external defibrillator to pre-booking. *Id.* ¶¶ 121, 124. Virgo and Wenzel (among others) began CPR on Perry as soon as the medical emergency was called, and they continued once the officers arrived with the resuscitation bag and the defibrillator. *Id.* ¶¶ 125–26.

Their efforts were unsuccessful. At approximately 8:55 p.m., a fire department unit arrived in pre-booking and took over the efforts to resuscitate Perry. *Id.* ¶ 129. A second fire department unit arrived at approximately 9:00 p.m. *Id.* ¶ 130. Perry was pronounced dead at approximately 9:21 p.m. *Id.* ¶ 131. An autopsy revealed that Perry died of coronary artery thrombosis, secondary to a clot in a blood vessel in his heart. *Id.* ¶ 140.

3. This Lawsuit. Respondents (Perry's estate and his minor son) sued petitioners, Virgo and Wenzel, and numerous other defendants associated with Milwaukee County and the City of Milwaukee. Proceeding in

federal court, respondents asserted claims under 42 U.S.C. § 1983 and Wisconsin law. R.24. For the section 1983 claim, respondents alleged that defendants violated Perry's rights under the Eighth and Fourteenth Amendments by allegedly failing to provide adequate medical care.

Together with the other county defendants, petitioners moved for summary judgment. Respondents then abandoned various claims. R.143 at 21, 23, 25. What remained for resolution on summary judgment with respect to the county defendants consisted of respondents' section 1983 claims against Virgo, Wenzel, and six other defendants and their state-law negligence claims against these individuals, the county, and the county's insurer.

The district court granted summary judgment to the county defendants, including Virgo and Wenzel, as well as the city defendants. App. 41. For the point relevant here, the district court concluded that Virgo and Wenzel possessed qualified immunity: For, at a minimum, a reasonable nurse in their position could have regarded their actions as objectively reasonable. App. 56–58. The court entered judgment dismissing respondents' claims in their entirety. App. 67.

4. The Court of Appeals' Decision. Upon Perry's appeal pursuant to 28 U.S.C. § 1291, the Seventh Circuit affirmed summary judgment for the other county defendants, but not petitioners Virgo and Wenzel. App. 40. Analyzing Perry's section 1983 claim under the Fourth Amendment instead of the Eighth or Fourteenth (because Perry had not received a probable cause hearing at the time of his death), the Seventh Circuit concluded that a reasonable jury could find that Virgo and Wenzel's actions were objectively

unreasonable under the circumstances. App. 26–29.[3] As for Virgo, it held that a jury could find her conduct objectively unreasonable because she did not immediately remove the MPD spit mask, take Perry's vital signs, or place her hands on him when she assessed him, and on the theory that she could have called for an ambulance sooner. App. 28–29. With respect to Wenzel, the Seventh Circuit held that a jury could conclude that her actions were objectively unreasonable because she stood at the nurse's station while Virgo assessed Perry rather than providing care herself and because she did not ask that the MPD spit mask be removed sooner. App. 29.

For the essential point here, the court of appeals concluded that neither Virgo nor Wenzel was entitled to qualified immunity. App. 32–33. It acknowledged that this Court has "warned that we must not define 'clearly established law at a high level of generality.'" App. 33 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)). It further quoted this Court's admonition that, for a particular right to be clearly established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Nonetheless, the Seventh Circuit defined the right in question only at a very high level of generality. Citing circuit precedent, it stated "that in September 2010, it was clearly established that the Fourth Amendment governed claims by detainees who had yet to receive a probable cause determination." *Id.* The

[3] The Seventh Circuit reversed the district court's grant of summary judgment to the individual city defendants on the same grounds, although it upheld the dismissal of Perry's section 1983 claims against the city. App. 20–26, 34–36.

court of appeals further noted that it had previously defined a four-factor general test for addressing such claims. *Id.* Having defined the clearly established right as the "objective reasonableness" standard of the Fourth Amendment, the Seventh Circuit went on to hold that "if by 2010, it was clearly established that an officer or prison nurse's actions were judged by the objectively reasonable standard of the Fourth Amendment, the failure to take *any* action in light of a serious medical need would violate that standard." *Id.* In reaching this conclusion, the Seventh Circuit did not cite a single case, from this Court, its own precedent, or another circuit, that addressed a claim brought against a jail nurse or other personnel under similar circumstances.

REASONS FOR GRANTING THE PETITION

I. THE SEVENTH CIRCUIT FLOUTED THIS COURT'S QUALIFIED-IMMUNITY PRECEDENT BY DEFINING THE CONSTITUTIONAL RIGHT IN QUESTION AT TOO HIGH A LEVEL OF GENERALITY RATHER THAN IN LIGHT OF THE SPECIFIC FACTS AND CIRCUMSTANCES CONFRONTING PETITIONERS.

A. This Court Has Emphasized That Courts Considering Qualified-Immunity Defenses Must Consider Whether a Reasonable Official Would Have Known That Her Conduct Violated the Law.

"Public officials are immune from suit under 42 U.S.C. § 1983 unless they have 'violated a statutory or constitutional right that was clearly established at the time of the challenged conduct.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting

Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014)). Such qualified immunity "gives government officials breathing room to make reasonable but mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law." *Carroll v. Carman*, 135 S. Ct. 348, 350 (2014) (per curiam) (internal quotation marks omitted). "[The] 'clearly established' standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can 'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)) (internal quotation marks omitted).

The doctrine is important. This is certainly so for the defendants entitled to it: As an immunity from suit, qualified immunity "'is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). But it is also important "to society as a whole." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Perhaps for this reason, this Court has not hesitated to set aside judgments of lower courts when they improperly deny immunity to public officials. *See Sheehan*, 135 S. Ct. at 1774 n.3 (citing five examples from 2012, 2013, and 2014 alone); *see also Wesby v. Dist. of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[I]n just the past five years, the Supreme Court has issued 11 decisions reversing federal courts of appeal in qualified immunity cases, including five strongly worded summary reversals"), *cert. granted*, 137 S. Ct. 826 (Jan. 19, 2017), *argued and submitted* (Oct. 4, 2017).

These cases and principles have elaborated upon this Court's caution, thirty years ago, against applying "the test of 'clearly established law' . . . at [a high] level of generality." *Anderson*, 483 U.S. at 639. Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Id.*; *see also Reichle*, 566 U.S. at 665 (observing that, stated as "a broad general proposition," any constitutional right would be clearly established) (internal quotation marks omitted). Accordingly, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *Anderson*, 483 U.S. at 640. This is "so that the 'contours' of the right are clear to a reasonable official." *Reichle*, 566 U.S. at 665 (quoting *Anderson*, 483 U.S. at 640).

The recent cases accordingly have emphasized to the lower courts that overgeneralized statements of constitutional rights will not suffice under the standard enunciated in *Anderson*. Rather, to be clearly established, a right must be "one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308 (internal quotation marks omitted). This does not mean that a prior case exactly on point is required. *al-Kidd*, 563 U.S. at 741. However, "'existing precedent [must have] placed the statutory or constitutional question beyond debate.'" *Sheehan*, 135 S. Ct. at 1774 (quoting *al-Kidd*, 563 U.S. at 741). More precisely or practically, "[a]n officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it.'" *Id.* (quoting

Plumhoff, 134 S. Ct. at 2023); *see also Saucier v. Katz*, 533 U.S. 194, 216 n.6 (2001) (Ginsburg, J., concurring in judgment) ("'[I]n close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently.'") (quoting *Roy v. Inhabitants of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994)).

This Court's recent applications of this principle—reversing four different federal courts of appeals for their failure to examine whether a right was clearly established in a particularized sense, including three times involving the Fourth Amendment—involved different circumstances, but they are highly instructive here. In *Sheehan*, respondent was a mentally disturbed and armed group-home resident who sued police for allegedly violating her Fourth Amendment right to be free from excessive force. Denying qualified immunity, the Ninth Circuit held it to be clearly established that an officer cannot "forcibly enter the home of an armed, mentally ill subject who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." *Sheehan*, 135 S. Ct. at 1772 (internal quotation marks omitted). In reversing, this Court explained that "[t]he Ninth Circuit focused on *Graham v. Connor,* 490 U.S. 386 (1989)," but *Graham*'s holding—"only that the 'objective reasonableness' test applies to excessive-force claims under the Fourth Amendment"—"is far too general a proposition to control this case." *Sheehan*, 135 S. Ct. at 1775. The Court also distinguished two Ninth Circuit precedents involving officers' use of force.

The Court explained that these various precedents had not "placed the statutory or constitutional question beyond debate" and explained the level of particularity required:

> When *Graham* [and the two Ninth Circuit cases] are viewed together, the central error in the Ninth Circuit's reasoning is apparent. The panel majority concluded that these three cases "would have placed any reasonable, competent officer on notice that it is unreasonable to forcibly enter the home of an armed, mentally ill suspect who had been acting irrationally and had threatened anyone who entered when there was no objective need for immediate entry." 743 F.3d at 1229. But even assuming that is true, *no precedent clearly established that there was not "an objective need for immediate entry" here.* No matter how carefully a reasonable officer read *Graham* [and the two Ninth Circuit cases] beforehand, that officer could not know that reopening Sheehan's door to prevent her from escaping or gathering more weapons would violate the Ninth Circuit's test, even if all the disputed facts are viewed in respondent's favor.

Id. at 1777. "Without that 'fair notice,' an officer is entitled to qualified immunity." *Id.*

This Court required similar specificity of precedent in *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam). The Third Circuit had upheld a denial of qualified immunity on a claim that it had characterized as asserting "an incarcerated person's right to the proper implementation of adequate suicide prevention protocols." *Id.* at 2044 (internal quotation marks omitted).

This Court summarily reversed. After surveying decisions of its own, the Third Circuit, and various other courts of appeals, the Court summed up as follows: "[E]ven if the Institution's suicide screening and prevention measures contained the shortcomings that respondents allege, no precedent on the books in November 2004 would have made clear to petitioners that they were overseeing a system that violated the Constitution." *Id*. at 2045. The conclusion followed directly: "Because, at the very least, petitioners were not contravening clearly established law, they are entitled to qualified immunity." *Id*.

More recently yet: In *Mullenix*, this Court confronted a refusal by the Fifth Circuit to afford qualified immunity on an excessive-force claim involving a trooper who responded to a fleeing suspect and a high-speed pursuit because "'the law was clearly established such that a reasonable officer would have known that the use of deadly force, absent a sufficiently substantial and immediate threat, violated the Fourth Amendment.'" 136 S. Ct. at 308 (quoting 773 F.3d 712, 725 (5th Cir. 2014)). As in *Sheehan* and *Taylor*, the Court rejected this formulation: "We have repeatedly told courts . . . not to define clearly established law at a high level of generality." *Id.* (internal quotation marks omitted). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 742). The Court also noted that "specificity is especially important in the Fourth Amendment context," an area in which "'it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts.'" *Id.* (quoting *Saucier*, 533 U.S. at 205).

According to the Court in *Mullenix*, if the legal question at issue "'is one in which the result depends very much on the facts of each case,'" then a public official is entitled to immunity if "'[n]one of [the applicable case law] *squarely governs* the case.'" *Id.* at 309 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)). When circumstances "fall somewhere between . . . two sets of cases," qualified immunity applies, as the doctrine "protects actions at the 'hazy border between [impermissible and permissible conduct].'" *Id.* at 312 (quoting *Brosseau*, 543 U.S. at 201).

And just last Term, in *White*, this Court decided another excessive force case, this one involving an officer who "arrived late at an ongoing police action" and witnessed several shots being fired before shooting and killing an armed individual without first giving a warning. 137 S. Ct. at 549. The lower courts thought qualified immunity inappropriate, the theory being its having been clearly established that the Fourth Amendment's reasonableness principle required the officer to give a warning. *Id.* at 550–51. In reversing, this Court rejected the Tenth Circuit's formulation of the right at issue: "[I]t is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality.'" *Id.* at 552 (quoting *al-Kidd*, 563 U.S. at 742). The court of appeals "failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id.*

B. The Seventh Circuit Ignored This Court's Teachings by Defining the Right in Question at Too High a Level of Generality.

Against this backdrop, it is clear that the court of appeals applied the clearly-established-law component of the qualified-immunity analysis at too high a level of generality. Its approach of defining the relevant law as simply (i.e., generally) the right under the Fourth Amendment to a reasonable response to a serious medical need is exactly analogous to the approach that this Court declared to be categorically improper in *Sheehan*, *Taylor*, *Mullenix*, and *White*.

To be sure, in various words in its opinion, the Seventh Circuit acknowledged this Court's recent admonitions. For instance, the Seventh Circuit noted that this Court has "warned that we must not define 'clearly established law at a high level of generality.'" App. 33 (quoting *Mullenix*, 136 S. Ct. at 308). The Seventh Circuit further observed that, for a particular right to be clearly-established, "existing precedent must have placed the . . . constitutional question beyond debate." *Id*. (quoting *al-Kidd*, 563 U.S. at 741).

Nonetheless, in reversing the district court's grant of immunity to petitioners, the Seventh Circuit failed to put these principles into practice. Rather, the court defined the right in question at a very high level of generality. First, it observed that the Fourth Amendment applies to Perry's claims against these nurses, stating that "in September 2010, it was clearly established that the Fourth Amendment governed claims by detainees who had yet to receive a probable cause determination." *Id*. Then the court noted that it had defined a four-factor general test to address such claims. *Id*. (citing *Williams v. Rodriguez*, 509 F.3d 392

(7th Cir. 2007)). The Seventh Circuit went no further in its exposition of the law. Instead, having defined the clearly established right as the objective reasonableness standard of the Fourth Amendment, the Seventh Circuit held simply as follows: "[I]f by 2010, it was clearly established that an officer or prison nurse's actions were judged by the objectively reasonable standard of the Fourth Amendment, the failure to take *any* action in light of a serious medical need would violate that standard." *Id*.

In so holding, the court of appeals failed to credit that Virgo and Wenzel were medical professionals applying their best professional judgment and, in fact, taking actions consistent with that reasonable judgment in the eleven minutes before the ambulance crews took over the efforts to revive Perry. For example, Virgo went to Perry's side to personally assess his medical condition within one minute of his entering the pre-booking room. Only two minutes after she arrived in pre-booking, Virgo refused to allow Perry to be admitted to the jail and instead directed that security staff call for an ambulance to take him to the hospital for further evaluation. Virgo returned to his side roughly one minute later to again assess his condition. Virgo personally observed that Perry was not having trouble breathing (even with the spit mask on), was not showing any signs of heart trouble, and was not having a seizure during her assessments of his condition. Wenzel, who stood by observing as Virgo initially assessed Perry, took the added step of asking the MPD officers to remove the spit mask so that she could double check his condition no more than three minutes after an ambulance had been called to take him to the hospital. *Neither nurse—the only two medical professionals on the scene—believed that Perry*

presented a medical emergency until he became unresponsive as the MPD officers were removing his spit mask. And both nurses immediately undertook life-saving efforts once Perry became unresponsive. *See supra* pp. 4-9.

The Seventh Circuit did not engage in the type of particularized analysis, based on the facts and circumstances confronting the nurses, required by this Court. Like the court of appeals in *Mullenix*, it did not analyze the qualified-immunity issue in light of the specific context of this case, but rather as a broad, general proposition. Like the court of appeals in *White*, it did not cite a single case—from this Court or any court of appeals—that addressed a Fourth Amendment claim brought in similar circumstances, let alone one that would have made clear to the nurses that their conduct was unconstitutional (or even, to put the point contextually, that it was objectively unreasonable). That is, the Seventh Circuit pointed to nothing that would have given fair warning to Virgo and Wenzel or other nurses or public officials in such a situation that the manner in which petitioners were responding to the rapidly evolving situation confronting them in the few minutes they were in the pre-booking room with Perry violated the Constitution.

If clearly established law can be defined at the general level of a Fourth Amendment requirement of an objectively reasonable response to a serious medical condition, then nurses such as Virgo and Wenzel and other public officials in their position are virtually guaranteed to have their qualified-immunity defenses denied and be required to proceed to trial. This is scarcely different from the point emphasized only two years ago in *Sheehan* that "[q]ualified immunity is no immunity at all if 'clearly established' law can simply

be defined as the right to be free from unreasonable searches and seizures." 135 S. Ct. at 1776.

It is fundamentally inconsistent with the qualified-immunity doctrine's purpose—protecting all public officials but those who are plainly incompetent or knowingly violate the law from personal liability—to second-guess the real-time judgments made by petitioners in the few minutes they were with Perry as to what form of response his medical condition required as it rapidly evolved. It is of course clear now, with 20/20 hindsight, that Perry was about to have a heart attack when Virgo first encountered him, but the undisputed facts reflect that he was not displaying any signs of cardiac or respiratory trouble when she twice assessed his condition. It is also clear now, to one looking back at the events in pre-booking with the benefit of knowing what ultimately transpired, that Perry needed emergency transport to a hospital. But the undisputed facts establish that—while Virgo and Wenzel believed that Perry should be transported to a hospital for further evaluation (and acted on that belief)—the nurses were not aware that his condition was an emergency. Judged from the correct perspective, their belief and actions were objectively reasonable, and, even if they were not, such a conclusion certainly was not beyond debate.

C. The Seventh Circuit's Disregard For Controlling Qualified-Immunity Precedent Extends Beyond This Case.

The problem presented by the Seventh Circuit's approach to qualified immunity is immediate and dramatic for petitioners. The two defendants who did the most to assist Perry in the few minutes he was in the jail have been denied the immunity from suit granted them by law and will be forced to defend themselves

against Perry's claims at a trial. But the problem presented by the Seventh Circuit's improper approach to qualified immunity is not limited to this case or panel.

For example, in two other cases only recently decided (one on the very same day as this and also involving Milwaukee County and the other later the same week and involving another Wisconsin county), the court of appeals approached the qualified-immunity doctrine just as it did here. In *Orlowski v. Milwaukee County*, 872 F.3d 417 (7th Cir. 2017), the Seventh Circuit considered the grant of summary judgment to two officers employed at the Milwaukee County House of Correction in a section 1983 suit brought by the estate of a sentenced inmate who died at the facility of a methadone overdose. In reversing the district court, the appellate court rejected a qualified-immunity defense. There, too, it did so by assessing the right only at an improperly high level of generality. In rejecting the officers' qualified-immunity arguments, the court held it sufficient for it to be clearly established under the Eighth Amendment that an officer cannot be deliberately indifferent to a known serious medical condition. *Id.* at 422. The Seventh Circuit did not identify a single case where an officer responding to circumstances similar to those confronting the two defendant officers was found to have violated a prisoner's rights. *Id.*

Likewise, in *Estate of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017), the Seventh Circuit ruled that summary judgment was not available to a corrections officer in a section 1983 suit brought by the estate of an individual who committed suicide in a county jail. In rejecting the officer's qualified-immunity arguments, the Seventh Circuit thought it enough for it to

have been established that "prisoners have an Eighth Amendment right to treatment for their 'serious medical needs,'" that the risk of suicide is a serious medical need, and that Seventh Circuit precedent proscribed deliberate indifference to the risk of inmate suicide. *Id.* at 551–53 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). For a familiar theme: the Seventh Circuit did not identify a single case where a corrections officer faced with circumstances similar to those confronting the defendant officer was found to have violated a prisoner's constitutional rights. *Id.* at 553.

Petitions for writs of certiorari are being filed with this Court in both the *Orlowski* and *Clark* cases. Absent review by this Court, the flawed approach employed by the Seventh Circuit will uproot the protections properly planted by the qualified-immunity doctrine not only for petitioners here but for other nurses, jail officers, and public officials throughout the circuit.

II. IF THE DEFENSE IS ASSESSED AT THE APPROPRIATE LEVEL OF SPECIFICITY, PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY.

If petitioners' qualified-immunity defense is properly assessed at the level of specificity required by this Court, both nurses are entitled to immunity.

To begin with a note concerning the proper inquiry: As with all claims under section 1983, negligence alone is categorically insufficient to state a cause of action. *See Cty. of Sacramento v. Lewis*, 523 U.S. 833, 848–49 (1998); *Davidson v. Cannon*, 474 U.S. 344,

347–48 (1986). And whatever the source of the constitutional standard,[4] the inquiry must be addressed based on what was *actually* known to the nurses at the time the events in pre-booking were occurring, not what is *now* known to the litigants or the court with the benefit of 20/20 hindsight. *See Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also supra* p. 5 n.2 (citing and quoting *White v. Pauly* on this point).

Thus, framed properly in light of the specific facts and circumstances confronting Virgo and Wenzel in the pre-booking room, the question in this case is whether in September 2010 it was clearly established that the Constitution required Virgo and Wenzel to take action beyond the steps they actually took to help Perry. Stated differently: Was it clearly established that the law (i.e., the Constitution) required the nurses to provide or arrange for emergency medical treatment the moment Perry was brought into pre-booking, instead of first assessing his condition, calling for an

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[4] Because Perry was an arrestee at the time of his death, the Seventh Circuit considered his section 1983 claims under circuit precedent declaring the applicable constitutional provision to be the Fourth Amendment and the standard to be one of objective reasonableness. App. 18, 27. Other courts have applied the Eighth Amendment and the deliberate indifference standard to such claims. *See, e.g.*, *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 602–03 (6th Cir. 2005); *Barrie v. Grand Cty.*, 119 F.3d 862, 868–69 (10th Cir. 1997). Still others have explicitly not decided the question. *See, e.g.*, *Bailey v. Feltmann*, 810 F.3d 589 (8th Cir. 2016); *see also City of Revere v. Massachusetts Gen. Hosp.*, 463 U.S. 239, 244 (1983) (stating that "the due process rights of a person" who was "injured while being apprehended by the police" are "at least as great as the Eighth Amendment protections available to a convicted prisoner," but concluding that "[w]e need not define, in this case, [the city's] due process obligation to pretrial detainees or other persons in its care who require medical attention").

ambulance so that he could be transferred to a hospital for further evaluation, and then calling for an emergency response and initiating life-saving measures once it became clear Perry had become nonresponsive?

Neither Perry nor the court of appeals identified any decisions (let alone controlling case law) holding that a nurse or other medical professional violated an arrestee's constitutional rights under analogous circumstances, thus putting Virgo and Wenzel on clear and unambiguous notice that their actions were constitutionally insufficient. In fact, other than citing cases outlining the general parameters of the reasonableness standard under the Fourth Amendment, the Seventh Circuit cited no decisions at all addressing the standard in the specific context of government actors responding in real time to rapidly evolving circumstances involving an ill arrestee.

In fact, the most directly applicable case law supports the proposition that Virgo and Wenzel did *not* violate the Constitution in their response to the situation confronting them. Under the Seventh Circuit's precedent, the reasonableness test operates on a sliding scale, "'balancing the seriousness of the medical need with . . . the scope of the requested [medical] treatment.'" *Ortiz v. City of Chi.*, 656 F.3d 523, 531 (7th Cir. 2011) (quoting *Williams*, 509 F.3d at 403); *compare Taylor*, 135 S. Ct. at 2045 ("Assuming for the sake of argument that a right can be 'clearly established' by circuit precedent despite disagreement in the courts of appeals, neither of the Third Circuit decisions relied upon clearly established the right at issue" and concluding that the Third Circuit's precedents would not "have put petitioners on notice of any possible constitutional violation"). Here, contrary to the Seventh Circuit panel's effort to characterize

petitioners (and all other defendants) as having "fail[ed] to take *any* action," App. 33, the undisputed facts demonstrate that the nurses adjusted their response to Perry's medical condition as it changed or became clear.

When she first assessed Perry, Virgo believed that he was not fit to be booked into the jail based on the fact that he did not answer some of her questions, the blood she observed on his spit mask, and his general condition. She did not believe that his condition was an emergency, however, as she could see he was breathing without difficulty, was not having a seizure, and displayed no signs of cardiac trouble. In short, she knew that he needed to be taken to the hospital to be further evaluated, but she did not believe he needed emergency transport. *See supra* pp. 5-7.

As a result, within two minutes of first arriving in the pre-booking room, Virgo told the jail sergeant present to call for an ambulance, which the sergeant then did. Virgo assessed Perry again only one minute later, and her conclusions did not change. Wenzel, while waiting for the ambulance to arrive, took the added step of asking the MPD officers to remove the spit mask from Perry's face. She did this within three minutes of the ambulance being summoned. As this took place, Perry became unresponsive. Immediately, petitioners called for an emergency response within the jail and began CPR, which they continued until the ambulance crews arrived and took over the efforts to save Perry. *See supra* pp. 7-9.

At each and every step in their interactions with Perry, Virgo and Wenzel responded to the specific situation presented by Perry's condition in the moment, increasing the urgency and level of their response as his condition or their awareness of it changed. In

other words, they matched their response and the care they provided to the seriousness of Perry's medical condition as it evolved and as they reasonably understood it, all the while operating within the limitations on the care they could provide within the jail.

Virgo and Wenzel's actions are not to be judged against what hindsight reveals might have been more effective care. So while, in retrospect, it might have aided Perry if the initial call for an ambulance had included a request that the transport be on an emergency basis, this does not change the fact that Virgo requested that Perry be taken to a hospital only two minutes after she first came into Perry's presence, based on her professional assessment that he needed further evaluation at a facility that could treat him. Likewise, any argument that Virgo and Wenzel should have realized that Perry was suffering from a life-threatening emergency sooner—i.e., before he became nonresponsive as the mask was being removed at approximately 8:52 p.m.—is based purely on hindsight and improperly equates section 1983 liability with a negligence standard. If not the constitutional standard itself (whether objective reasonableness under the Fourth Amendment or deliberate indifference under the Fourteenth or Eighth, *see supra* p. 25 & n.4), then the qualified-immunity doctrine certainly provides protection to Virgo and Wenzel for any mistakes that they made. *Compare Sheehan*, 135 S. Ct. at 1775 (observing that immunity applies even when, "with the benefit of hindsight, the officers may have made some mistakes").

In short, it cannot be maintained that all nurses in Virgo's and Wenzel's shoes would have known that to proceed as they did was to violate the law. *See id*. at 1774. Even if the facts are viewed most favorably to

respondents, in no sense did Virgo and Wenzel have fair and clear warning that their conduct fell below constitutional expectations. *See id*. Virgo and Wenzel did not save Perry's life, but neither did they behave in a way that was "plainly incompetent," and absolutely nothing suggests that they "knowingly violate[d] the law." *Carroll*, 135 S. Ct. at 350. Qualified immunity thus protects them from suit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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