No. 17-871

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

REPLY BRIEF OF PETITIONERS

ANNE BERLEMAN KEARNEY
JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
P.O. Box 2145
Milwaukee, Wisconsin 53201

ANDREW A. JONES
Counsel of Record
CHARLES H. BOHL
KURT M. SIMATIC
HUSCH BLACKWELL LLP
555 E. Wells St., Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100
Andrew.Jones@huschblackwell.com

Counsel for Petitioners

March 12, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY BRIEF OF PETITIONERS

Respondents misapprehend the law of qualified immunity as developed by this Court. Even to leave aside their mistaken conception that "[p]etitioners ask this Court to cloak them in the protection of the Constitution," Opp. Br. 1 (whereas in fact it is respondents who rely on the Constitution to pursue this section 1983 claim), respondents contend that a generalized four-factor test previously developed by the Seventh Circuit was sufficient to establish clearly the Fourth Amendment right alleged to have been violated here, so that qualified immunity was unavailable. This is incorrect. *See infra* Part I. The erroneous analysis by the Seventh Circuit here is representative of a broader set of cases in this court of appeals and warrants this Court's attention. *See infra* Part II.

I. RESPONDENTS IGNORE CORE QUALIFIED-IMMUNITY PRINCIPLES BY DEFINING THE RIGHT IN QUESTION TOO GENERALLY AND POINTING TO NO PRECEDENT THAT WOULD HAVE PUT THESE NURSES ON NOTICE THAT THEY WERE PROCEEDING UNLAWFULLY.

Without reciting all of the core principles of the qualified-immunity defense, it is important to recall that, for a constitutional right to have been clearly established (as is required to defeat the defense), "'the right's contours'" must have been "'sufficiently definite that any reasonable official in [the defendant's] shoes would have understood that he was violating it.'" *City & Cty. of S.F. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (quoting *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014)); *see* Pet. 12-19 (discussing cases). Just this Term, in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), this Court has reiterated that "[t]his requires

a high 'degree of specificity'" in existing law. *Id*. at 590 (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015)). To put it in practical terms: Qualified immunity is appropriate unless one "of [the] precedents squarely *governs the facts here*," such that "only someone plainly incompetent or who knowingly violate[s] the law" would have proceeded as the defendant did. *Mullenix*, 136 S. Ct. at 310 (emphasis added and internal quotation marks omitted); *accord White v. Pauly*, 137 S. Ct. 548, 551-52 (2017) (and cases cited).*

The "specificity" of the right asserted to have been clearly established is "especially important in the Fourth Amendment context." *Wesby*, 138 S. Ct. at 590 (quoting *Mullenix*, 136 S. Ct. at 308). For, as *Wesby* explained, "[p]robable cause [under the Fourth Amendment] turn[s] on the assessment of probabilities in particular factual contexts and cannot be reduced to a neat set of legal rules." *Id.* (internal quotation marks omitted). The same is true where the Fourth Amendment right involves not probable cause (as in *Wesby*) but a claim of inadequate medical care (as here): "Given its imprecise nature, officers [or nurses] will often find it difficult to know how the general standard of probable cause [or objective reasonableness] applies in the precise situation encountered." *Id.* (internal quotation marks omitted). For this reason, a defendant is entitled to qualified

---

* 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)). This point is worth recalling because, throughout their opposition, respondents lose sight of it. *See*, *e.g.*, Opp. Br. 12-13 (urging the Court to allow "the jury [to] weig[h] the evidence" and stating that "any concerns petitioners have can be ameliorated by . . . jury instructions and appeals").

immunity absent "'a [prior] case where an [official] acting under similar circumstances . . . was held to have violated the Fourth Amendment.'" *Id.* (quoting *White*, 137 S. Ct. at 552).

Against this background, here is one way of putting the question: Can it truly be said in this case that "the panel majority [or respondents] have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances"? *Id.* at 591 (internal quotation marks omitted). The answer is *no*. Respondents, like the court of appeals, rely on two appellate cases in their effort to maintain that the right asserted was so clearly established that the reversal of qualified immunity was proper. Opp. Br. 15-17. The first of these cases, *Williams v. Rodriguez*, 509 F.3d 392 (7th Cir. 2007), in fact *rejected* an arrestee's failure-to-provide-medical-care claim, doing so under the deliberate-indifference standard of the Fourteenth Amendment. *Id.* at 402-03. The other case, *Ortiz v. City of Chicago*, 656 F.3d 523 (7th Cir. 2011), was decided in August 2011—almost a full year *after* the events at issue in this case.

Respondents do not even attempt to argue that either of these cases (or any other case) "squarely governs the [facts] here," *Mullenix*, 136 S. Ct. at 310, or reflects an official "acting under similar circumstances [who] was held to have violated the Fourth Amendment," *Wesby*, 138 S. Ct. at 590 (quoting *White*, 137 S. Ct. at 552). Rather, they—like the court of appeals—think it sufficient that *Williams* (a) clearly established for the Seventh Circuit that the objective-reasonableness standard of the Fourth Amendment applies here (i.e., to denial-of-medical-care claims by prisoners who have not yet had a judicial probable

cause determination) and (b) "identified the four factors later articulated in *Ortiz*." Pet. App. 33; *see* Opp. Br. 1-2, 15-16.

That these precepts, even together (and quite apart from *Ortiz*'s necessarily having no instructional value for the nurses given when it was decided), are too general is demonstrated by this Court's qualified-immunity pronouncements from *Anderson v. Creighton*, 483 U.S. 635 (1987), through *Sheehan*, *Mullenix*, *White*, and, now, *Wesby* (or, if one prefers respondents' phrasing, by "a laundry list of cases," Opp. Br. 14). Consider simply *Sheehan*: This Court held that the objective-reasonableness standard was not specific enough to constitute the clearly established right necessary to sustain an excessive-force claim under the Fourth Amendment. Why so? Nothing about that general standard would have caused "any reasonable official in [the defendant officer's] shoes [to] underst[an]d that he was violating" the constitutional right in the specific circumstances that confronted the defendant. *Sheehan*, 135 S. Ct. at 1774. The same is true here. Nothing about a "four-factor test established by *Williams*" (which really means *Ortiz*)—requiring a court to "loo[k] to . . . '(1) whether the officer has notice of the detainee's medical needs; (2) the seriousness of the medical need; (3) the scope of the requested treatment; and (4) police interests, including administrative, penological, or investigatory concerns'" (Opp. Br. 16 (quoting *Ortiz*, 656 F.3d at 530))—would have caused the nurses here to understand that their approach to the situation rapidly unfolding before them was unlawful. Respondents' catalogue of things that "[a] reasonable jury" could find (Opp. Br. 12 (using that phrase six times)) demonstrates that their resort here is not to analogous precedents but to the general common law of negligence.

In short, that the nurses acted unlawfully "does not follow immediately from the conclusion that [the right to an objectively reasonable response to a prisoner's medical needs] was firmly established." *Compare Wesby*, 138 S. Ct. at 590 (quoting *Anderson*, 483 U.S. at 641). Thus, the right advocated by respondents is "too general" to overcome the nurses' qualified immunity to a claim of their having violated it. *Id.*

II. THIS IS ONE OF A SERIES OF CASES IN WHICH THE COURT OF APPEALS HAS SOUGHT TO SIDESTEP THIS COURT'S QUALIFIED-IMMUNITY TEACHINGS.

Respondents, like the court of appeals, seek to avoid this dispositive point by asserting that the nurses did nothing to respond to Perry's medical needs in the few minutes they were with him in the jail's pre-booking room before he became non-responsive. *See* Opp. Br. 2, 7 ("not . . . *any* reasonable care"); Pet. App. 33 ("failure to take *any* action"). Surely, the thinking behind this assertion goes, it must be clearly established that to do nothing but "watc[h] Perry die" (Opp. Br. 5) is to violate the standard. This will not work.

First, it disregards the facts. One can leave aside respondents' more general approach to the facts, as it does not matter. For the following facts simply cannot be and are not disputed:

- Nurse Virgo and Nurse Wenzel first encountered Perry when they entered the pre-booking room at 8:44 and 8:45 p.m., respectively, which was within two (and three) minutes of his arrival and promptly after their being informed of his presence. R.130 ¶¶ 43, 59, 64, 65.

- Roughly one minute after her arrival—i.e., ca. 8:45 p.m.—Virgo left the nurse's station to assess Perry's condition. *Id.* ¶¶ 68-69. Standing immediately next to Perry, Virgo (a) observed that he was breathing normally (including, more specifically, that the spit mask applied by the City of Milwaukee police officers, though it had blood on it, was not obstructing his breathing), *id.* ¶¶ 76-79, 90, and (b) saw no signs that Perry was having chest pain. *Id.* ¶¶ 80-81, 84.

- Concluding that there was not an *emergency* but that Perry needed to be taken to the hospital for further assessment, Virgo walked back to the nurse's station at approximately 8:46 p.m. *Id.* ¶ 91. Once there, she informed the jail sergeant that she was refusing Perry's admission to the jail and that an ambulance should be called to transport him to the hospital for evaluation. This occurred between two to three minutes after Virgo first walked into the pre-booking room at 8:44 p.m. and immediately following her initial assessment of Perry's condition. *Id.* ¶ 92.

- While Virgo returned to Perry's side to personally assess his condition a second time, the jail sergeant arranged for the jail to call an ambulance, which occurred at 8:48 p.m., only two minutes after the nurse's first assessment of Perry ended. *Id.* ¶¶ 97-100.

- Wenzel left the nurse's station only two minutes later—ca. 8:50 p.m.—to retrieve a towel so that she could wipe Perry's face. At 8:51 p.m., Wenzel had the Milwaukee police officers sit Perry up and remove the spit mask. Wiping his face, Wenzel saw Perry's eyes roll back into his

head and she saw that he had stopped breathing. *Id.* ¶¶ 107-17.

- Whereas up until that point neither nurse believed that Perry presented a medical emergency, *id.* ¶¶ 87-90, 93, 119-20, both Virgo and Wenzel immediately began efforts to resuscitate Perry. *Id.* ¶¶ 118, 121, 124-26.

It is true that the nurses were unable to save Perry's life. However, even to consider the evidence in the light most favorable to respondents, it is demonstrably false to say that the nurses did nothing to respond to the situation as it unfolded before and with them.

Second, the reasoning employed by respondents and the court of appeals cannot be squared with the law. The precedents simply would not suggest, in any particular or specific way, to a nurse in this situation that to respond to Perry's needs as Virgo and Wenzel did would be to violate his constitutional rights. Respondents effectively concede this. As noted above, respondents cite Seventh Circuit cases in their brief in opposition not as reflecting any factual similarity (and thus as providing fair notice to the nurses) but rather only for the general objective-reasonableness standard or, at most, the four-factor test (which, again, was articulated after the events at issue here, *see supra* pp. 3-4). This does not do the job under the well-developed law of qualified immunity. *See supra* Part I.

Significantly, the court of appeals' technique for avoiding the rigorous standards of the qualified-immunity doctrine goes beyond this case, as respondents also do not contest. In a series of cases, the court of appeals has taken to characterizing a defendant officer as having done "nothing" or as not taking "*any* action"—where in fact the complaint really is that the defend-

ant, having acted, did not take *some additional* actions that the plaintiff now wants. The court, thereby, has sought to sidestep the need to engage with the question whether case law has dealt with analogous factual circumstances and thus provided the defendant fair notice. *See Estate of Clark v. Walker*, 865 F.3d 544, 553 (7th Cir. 2017) (upholding denial of qualified immunity on grounds that defendant officer "chose to do nothing" in response to risk that prisoner would commit suicide), *pet. for cert. pending* (No. 17-872, filed Dec. 15, 2017, distributed for March 16, 2018 conference); *Orlowski v. Milwaukee Cty.*, 872 F.3d 417, 422 (7th Cir. 2017) ("If Alexander and Manns chose to do nothing despite this duty, they violated 'clearly established' Eight[h] Amendment law.") (footnote omitted), *pet. for cert. pending* (No. 17-883, filed Dec. 15, 2017, response requested by the Court on Jan. 30, 2018, and now due April 2, 2018). This Court's review is thus important.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANNE BERLEMAN KEARNEY
JOSEPH D. KEARNEY
APPELLATE CONSULTING GROUP
P.O. Box 2145
Milwaukee, Wisconsin 53201

ANDREW A. JONES
Counsel of Record
CHARLES H. BOHL
KURT M. SIMATIC
HUSCH BLACKWELL LLP
555 E. Wells St., Suite 1900
Milwaukee, Wisconsin 53202
(414) 273-2100
Andrew.Jones@huschblackwell.com

Counsel for Petitioners

March 12, 2018