No. 17-___

IN THE

Supreme Court of the United States

IRBY ALEXANDER AND ANTHONY MANNS,

Petitioners,

v.

GARY ORLOWSKI, INDIVIDUALLY, AND ESTATE OF ALEXANDER L. ORLOWSKI, BY SPECIAL ADMINISTRATOR GARY ORLOWSKI,

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 denied qualified immunity to two county jail officers on a claim that they failed to seek immediate medical attention for an inmate who displayed signs of sleep apnea but, as a matter of fact (unknown to them), had overdosed on illicitly obtained drugs. In determining whether the constitutional right in question was "clearly established," the court of appeals thought it sufficient that the Eighth Amendment has been held to proscribe deliberate indifference to a serious medical need. 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

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

- The Estate of Alexander Orlowski and Orlowski's father, Gary, were the appellants; and
- Milwaukee County, Irby Alexander, and Anthony Manns were the appellees.

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PETITION FOR A WRIT OF CERTIORARI

Irby Alexander and Anthony Manns respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1–16) is reported at 872 F.3d 417 (7th Cir. 2017). The opinion of the district court (App. 17–61) is unpublished but available at 2016 WL 1611471 (E.D. Wis. Apr. 21, 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 Eighth Amendment to the U.S. Constitution, made applicable through the Fourteenth Amendment, provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

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 case presents the important question whether the Seventh Circuit has failed to apply this Court's teachings regarding qualified immunity. To place the issues in this petition in context, it is necessary to describe (1) the events underlying this lawsuit and (2) the proceedings below.

1. The Underlying Events. The Milwaukee County House of Correction ("HOC"), located in Franklin, Wisconsin, houses both convicted prisoners and pretrial detainees. R.46 ¶ 8.[1] Inmates at the HOC are housed in dormitories. One of these dormitories is known as the "Z-2" dorm. *Id.* ¶ 9. This dorm has two

[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 petitioners' motion for summary judgment. Thus, for example, "R.46" is petitioner's statement of undisputed material facts, which itself contains references to the underlying support for each statement of fact as found in declarations, depositions, etc.

sleeping areas, each containing two rows of bunk beds. *Id.* ¶ 10. The dorm has beds for 58 inmates. *Id.* ¶ 11.

The corrections officer assigned to supervise the Z-2 dorm has a desk located at the end of one of the two sleeping areas. *Id.* ¶ 12. During the overnight shift at the HOC, the dorm supervisor patrols the entire dorm by himself. *Id.* ¶ 15. During the night and early morning of November 22, 2007, petitioner Irby Alexander was the supervisor for the Z-2 dorm. *Id.* ¶ 45.

When Alexander began his shift at approximately 12:05 a.m. that night, the inmates in the Z-2 dorm, which was at full capacity, were already in their beds. *Id.* ¶¶ 45–46. One of those inmates was Alexander Orlowski. *Id.* ¶ 44. Petitioner Irby Alexander had never previously met or interacted with Orlowski. *Id.* ¶ 47. He was unaware of any drug abuse by Orlowski before or during his incarceration. *Id.* ¶ 103.

Alexander's shift began in an ordinary way. At approximately 12:25 a.m., he conducted a count of the inmates in the dorm. *Id.* ¶ 48. Alexander next conducted a security check of the dorm. *Id.* ¶ 49. As part of this check, the dorm supervisor walks through the dormitory and observes the space and the inmates to make sure that everything is in order. *Id.* ¶ 50. Alexander did not observe anything unusual in the dorm during his initial security check. *Id.* ¶ 51.

At approximately 1:36 a.m., Alexander conducted another security check of the dorm. *Id.* ¶ 52. Again, he observed nothing unusual. *Id.* ¶ 53. At approximately the same time, petitioner Anthony Manns, the HOC sergeant on duty from 12 midnight to 8:00 a.m., toured the dorm. *Id.* ¶¶ 54, 69. Manns also did not note anything unusual during his tour. *Id.* ¶ 55.

At approximately 3:45 a.m., the HOC kitchen staff called the dorm and informed Alexander that sixteen inmate workers were needed to help prepare breakfast for the facility that morning. *Id.* ¶ 56. The HOC kitchen determines how many inmates are needed to work a particular shift. *Id.* ¶ 57. If more inmates are scheduled for kitchen duty than are needed, the dorm supervisor has discretion to excuse an inmate from working his shift. *Id.* ¶ 58.

While waking inmates for work following the call from the kitchen, Alexander observed that Orlowski was snoring loudly. *Id.* ¶ 59. To Alexander, Orlowski appeared to be "intermittent[ly] . . . breathing" because of his snoring; it "seemed like he stopped breathing" and then "a loud [snore] would come out" of him. *Id.* ¶ 61. Alexander could see Orlowski's chest and stomach going up and down with his breathing. *Id.* On this basis, at approximately 4:00 a.m., Alexander noted the following in the dorm logbook:

> [Orlowski] appears to have a severe sleeping disorder. Inmate appears not to be breathing at times. Inmate makes a lot of noise while trying to breath[e] and[/]or when he is breathing. Inmate appears to have a lot of difficulties sleeping.

Id. ¶ 60.

Alexander was concerned that Orlowski might have a sleep disorder such as sleep apnea. R.48-2 at 237. Alexander was aware of other inmates with sleep apnea who displayed such symptoms. App. 21. When he first observed Orlowski as he awakened inmates following the 3:45 a.m. call from the kitchen, Alexander attempted to rouse him by calling his name and banging on his bunk. R.46 ¶ 66. In response,

Orlowski stopped snoring and changed position but did not awaken from his sleep. *Id.* ¶ 67.

Some discussion within the dorm ensued. An inmate in the vicinity told Alexander that Orlowski slept like that "all the time." *Id.* ¶ 62. Another inmate told Alexander that "[i]f Orlowski rolls over he would stop [snoring]." *Id.* ¶ 63. On summary judgment before the district court, respondents introduced evidence—disputed by petitioners—that a third inmate, Larry Green, expressed concern to an unidentified HOC officer that "something was wrong" with Orlowski after he did not get up for kitchen duty and that, in response, an HOC officer disciplined Green by putting him in the "hole." R.59 ¶¶ 18–19; App. 23.

Orlowski was among the inmates originally assigned to work in the kitchen to help make breakfast that morning. Alexander did not further attempt to wake Orlowski to go to work in the kitchen because there were more inmates who were assigned or had volunteered than were needed. R.46 ¶ 68.

Inmates snoring is a common phenomenon. At the same time, it presents a disruption to other sleeping inmates and, under certain circumstances, can present a security concern because of the risk that one inmate might confront another over his snoring. *Id.* ¶¶ 64–65. So, based on what he had observed and believing it to be important information about an inmate under his supervision, Alexander notified Manns, his supervisor, by radio about Orlowski's loud snoring. *Id.* ¶ 70. Like Alexander, Manns had not previously met Orlowski and knew nothing about him apart from his being an inmate that night. *Id.* ¶ 71.

Manns suggested that Alexander continue to monitor Orlowski and that he talk to Orlowski when

he arose to eat breakfast (or that Alexander wake Orlowski up later that morning to discuss his snoring). *Id.* ¶ 72. From approximately 4:00 a.m. until 6:12 a.m., Manns was stationed in the HOC's dining hall, as he was the only sergeant on duty. *Id.* ¶¶ 73–74.

Inmate attendance at breakfast in the HOC was not mandatory. *Id.* ¶ 77. At approximately 4:20 a.m., seventeen inmates from the dorm left to go eat breakfast, leaving twenty-five inmates still in the dorm, Orlowski among them. *Id.* ¶¶ 75–76.

At approximately 4:35 a.m., Corrections Manager Virginia Ertman toured the dorm. *Id.* ¶ 78. Ertman was the highest-ranking officer on duty at the HOC during the overnight shift. *Id.* ¶ 79. Ertman noted Alexander's entry in the log book regarding Orlowski, and she and Alexander discussed the entry. *Id.* ¶ 80. Alexander related to Ertman that he had notified Manns of his observations regarding Orlowski. *Id.* ¶ 81. Alexander accompanied Ertman to Orlowski's bunk, and she, too, observed Orlowski breathing and sleeping. Ertman could see Alexander's chest rise and fall as he breathed in his sleep. App. 23. Ertman does not recall Orlowski snoring or otherwise making noise at that time. R.46 ¶ 83.

After Ertman left the dorm, Alexander continued his duties. At approximately 4:55 a.m., he conducted another security check of the dorm. *Id.* ¶ 85. Orlowski was still asleep, snoring loudly, and Alexander did not observe any change in Orlowski's condition. *Id.* ¶ 86. At approximately 5:48 a.m., Alexander conducted yet another security check of the dorm. *Id.* ¶ 88. Orlowski was still breathing and sleeping and, again, Alexander did not notice any change in his condition. *Id.* ¶ 89. Alexander did not observe anything during these two

security checks that led him to believe that Orlowski was in any physical distress. App. 23–24.

At approximately 6:10 a.m., several inmates returned to the dorm from working in the kitchen. R.46 ¶ 90. As they were returning to their bunks, one or more inmates called out "man down" in the vicinity of Orlowski's bunk. *Id.* ¶ 91. At that moment, Alexander was at or near the dorm supervisor's desk. *Id.* ¶ 92. Alexander immediately went over to Orlowski's bunk, some thirty feet away, and he saw that Orlowski was lying stiff and still in his bed. *Id.* ¶ 94.

At approximately 6:12 a.m., Alexander radioed that he had a medical emergency in the dorm. *Id.* ¶ 95. Manns and other HOC security staff arrived in the dorm shortly thereafter, together with a registered nurse. *Id.* ¶ 96. The nurse began resuscitation efforts on Orlowski. *Id.* ¶ 97. At approximately 6:25 a.m., a medical unit from the local fire department arrived, followed by a second unit approximately two minutes later. *Id.* ¶ 98. The medical units took over the efforts to revive Orlowski. *Id.* They were unsuccessful, and Orlowski was pronounced dead at approximately 6:54 a.m. *Id.* ¶ 99.

A subsequent investigation revealed that Orlowski died as a result of a drug overdose. *Id.* ¶ 102. According to the investigation, Orlowski illicitly purchased methadone and Seroquel from another inmate at the HOC and consumed the drugs before Alexander and Manns came on duty. *Id.* ¶ 101.

2. This Lawsuit. On November 21, 2013, respondents—Orlowski's estate and his father, Gary Orlowski—brought suit under 42 U.S.C. § 1983 against Milwaukee County; the former superintendent of the HOC, Ronald Malone; petitioners

Manns and Alexander; and the County's insurer, Wisconsin County Mutual Insurance Corporation. R.1. Asserting conditions-of-confinement and denial-of-medical-care claims, respondents alleged that defendants' failure to prevent Orlowski from overdosing on drugs constituted a violation of the Eighth and Fourteenth Amendments. *Id.* As is relevant to this petition, respondents claimed that Alexander and Manns violated the Eighth Amendment by acting with deliberate indifference to a serious medical need on Orlowski's part. *Id.* Respondents also brought a section 1983 claim against Milwaukee County under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and an indemnification claim against the county under Wisconsin law. *Id.* In addition, Orlowski's father asserted that defendants violated the Fourteenth Amendment by interfering with the familial relationship between him and his son. *Id.*

The case proceeded. The district court dismissed Milwaukee County's insurer as a party, R.19, and respondents abandoned their claims against Malone. For the important point here, the district court granted summary judgment to the remaining defendants, including Alexander and Manns. App. 62–63. The court concluded that petitioners did not act with deliberate indifference toward a known serious medical need on Orlowski's part. Without doubting that Orlowski was suffering from a serious medical condition on the morning of his death, the court ruled that neither Alexander nor Manns was aware of the seriousness of the condition and, in any event, that neither had recklessly disregarded Orlowski's condition. App. 30–40. The district court reasoned as follows:

> From the moment Alexander noticed that Mr. Orlowski was breathing oddly, he took action. He noted the fact in the log book. He consulted with his supervisor, Manns, and they discussed a plan of action (monitoring Mr. Orlowski until breakfast, and then discussing with Mr. Orlowski whether he was aware of the symptoms he was exhibiting). He both shook Mr. Orlowski and called his name; the fact that Mr. Orlowski moved and changed his breathing patterns in response gave Alexander no reason to believe that Mr. Orlowski was suffering from a serious medical need at that time. Every time Alexander checked in on Mr. Orlowski—including the occasion on which he took Ertman with him—Mr. Orlowski was breathing, and appeared to be sleeping.

App. 35–36. Finding no constitutional violation, the court did not address the qualified-immunity defense asserted by both Alexander and Manns.

Respondents appealed pursuant to 28 U.S.C. § 1291, and the Seventh Circuit affirmed in part and reversed in part.[2] As is relevant here, the court of appeals concluded that the district court had erred by granting summary judgment to petitioners on Orlowski's Eighth Amendment claim. App. 2, 9–15. The court stated that there were disputed issues of fact as to whether Orlowski had a serious medical condition and

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[2] On appeal, Orlowski's estate did not pursue its *Monell* claims against Milwaukee County or the Fourteenth Amendment conditions-of-confinement claim against Alexander and Manns, and the court of appeals upheld the dismissal of the father's Fourteenth Amendment claim. App. 15–16. The latter ruling was the extent of the court's affirmance.

whether petitioners were deliberately indifferent to that condition. *Id*.

In addition, on a point contested by the parties on appeal, the Seventh Circuit ruled that neither Alexander nor Manns was entitled to qualified immunity. App. 6–9. The court defined the right in question at a very high level of generality. It stated that "[c]orrectional officials have long been warned that they cannot ignore an inmate's known serious medical condition" under the Eighth Amendment. App. 8 (citing *Bd. v. Farnham*, 394 F.3d 469, 485 (7th Cir. 2005)). Having so defined the right, and concluding that "the Estate's evidence indicates that Orlowski presented obvious symptoms of a serious medical condition," the court of appeals held as follows: "[I]f we accept those facts as true, any reasonable officer would know he had a duty to seek medical attention. If Alexander and Manns chose to do nothing despite this duty, they violated 'clearly established' Eighth Amendment law." App. 8 (footnote omitted). In reaching this conclusion, the Seventh Circuit did not cite any case, from this Court, its own jurisprudence, or another circuit, that addressed an Eighth Amendment claim brought against corrections officers 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 Reasonable Officials Would Have Known That Their 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) (emphasis added, 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 is 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).

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 v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted). This does not mean that a prior case exactly on point is required. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). 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—involved various different circumstances but are all 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 described 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.*

The 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 to afford qualified immunity on an excessive-force claim involving a trooper who responded to a fleeing suspect and a high-speed pursuit because (in the Fifth Circuit's estimation) "'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).

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 v. Pauly*, 137 S. Ct. 548 (2017) (per curiam), 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. *Id*. at 549. The lower courts thought qualified immunity inappropriate, on the theory that it was 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 in this case 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 Eighth Amendment to be free from deliberate indifference to a serious medical need is exactly analogous to the approach that this Court declared to be improper in *Sheehan*, *Taylor*, *Mullenix,* and *White*.

The Seventh Circuit defined the right in question only at a high level of generality. First, the court noted that deliberate indifference to a known serious medical need of a convicted prisoner is proscribed by the Eighth Amendment. App. 30–31 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). With respect to whether the right was clearly established, the Seventh Circuit stated that "[c]orrectional officials have long been warned that they cannot ignore an inmate's known serious medical condition." App. 8 (citing *Bd. v. Farnham*, 394 F.3d 469, 485 (7th Cir. 2005)). Contrary to this Court's precedent as discussed above, the Seventh Circuit went no further in its analysis. Instead, having defined the clearly established right as the deliberate-indifference standard of the Eighth Amendment, the Seventh Circuit held simply:

> Here, the Estate's evidence indicates that Orlowski presented obvious symptoms of a serious medical condition. So, if we accept

> these facts as true, any reasonable officer would know that he had a duty to seek medical attention. If Alexander and Manns chose to do nothing despite this duty, they violated "clearly established" Eighth Amendment law.

App. 8 (footnote omitted). In so proceeding, the Seventh Circuit extrapolated far too much from the mere existence of a serious medical need. Can it really be said that, by permitting Orlowski to continue to sleep, repeatedly monitoring his condition, and not summoning medical personnel before the call of "man down," petitioners acted not just "mistaken[ly]" but that they were "plainly incompetent or . . . knowingly violate[d] the law"?

The answer is *no*. Under any view of the facts, Alexander and Manns knew very little about Orlowski's situation. To begin, neither was a medical professional or acquainted with Orlowski. Nor did they know anything of Orlowski's apparent consumption of methadone and Seroquel before they came on duty. So they had their observations, gathered in the course of performing their duties that night and as recounted above. Based on these, Alexander concluded that Orlowski might have some sort of sleep disorder such as sleep apnea.

The court of appeals discussed no case law—from this Court, the Seventh Circuit, or anywhere else—that would have placed *beyond all debate* the question whether these observations should instead have alerted petitioners to a serious and urgent medical condition. *Compare Sheehan*, 135 S. Ct. at 1774; *al-Kidd*, 563 U.S. at 741. The situation is directly analogous to *White*. "The panel . . . misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances to

[petitioner] was held to have violated the Fourth Amendment." 137 S. Ct. at 552.

To be sure, applicable case law would have put Alexander and Manns on notice *generally* that they could not act with "reckless disregard" to a known serious medical need on Orlowski's part. *See, e.g.*, *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). Further, based on Seventh Circuit precedent, Alexander and Manns would have been on notice that something approaching a total lack of concern on their part for a known serious medical need was not permissible. *See*, *e.g., Rosario v. Brawn*, 670 F.3d 816, 821 (7th Cir. 2012). But nothing about those general standards addressed the specific facts and circumstances confronting petitioners such that they would have been on notice that the Eighth Amendment required that they seek immediate medical help because an inmate was snoring loudly and breathing irregularly as he slept.

The court of appeals' approach is even more problematic given that available case law does not support the proposition that loud snoring during sleep or an unusual sleep pattern is indicative of a medical need that is objectively so obvious that a lay person such as Alexander or Manns would necessarily have known of the need for immediate medical attention.[3]

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[3] *See, e.g.*, *Laganiere v. Cty. of Olmsted*, 772 F.3d 1114, 1117 (8th Cir. 2014) (where "[jailer] repeatedly checked on [inmate] prior to his death and observed 'nothing unusual'" and in the absence of "any evidence that [jailer] 'actually knew' [inmate] experienced serious side effects from methadone or that she deliberately disregarded such a risk, she did not violate his Eighth Amendment rights"); *Burnette v. Taylor*, 533 F.3d 1325, 1332 (11th Cir. 2008) (jailer found not to have been deliberately indifferent to serious medical needs of prisoner who died of polypharmacy in his sleep and whom jailer observed to show

Compare Taylor, 135 S. Ct. at 2044 ("'[T]o the extent that a robust consensus of cases of persuasive authority' in the Courts of Appeals 'could itself clearly establish the federal right respondent alleges,' the weight of that authority at the time of Barkes's death suggested that such a right did *not* exist.") (quoting *Sheehan*, 135 S. Ct. at 1778) (citation and internal quotation marks omitted). Nor would those cases actually discussing deliberate indifference in the context of sleep apnea have put Alexander and Manns on notice that an immediate or emergency medical response was required under the Constitution.[4]

Moreover, it is undisputed that, far from ignoring or showing a total lack of concern toward what Alexander observed about Orlowski's sleep pattern, petitioners *did* in fact respond to the observations. Alexander specifically logged his observations of Orlowski and discussed them with two different supervisors. Alexander and the first supervisor, Manns, affirmatively developed a plan that Alexander would continue to monitor Orlowski and that he would talk to Orlowski about his sleep pattern when he woke later that morning. Alexander walked with the second supervisor, Virginia Ertman, over to Orlowski's bunk so that they

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signs of intoxication before going to sleep and then saw asleep and snoring during a cell check); *Grotz v. City of Grapevine*, No. 4:08-CV-344-Y, 2009 WL 3398890, at *9–10 (N.D. Tex. Oct. 22, 2009) (officers did not act with deliberate indifference to serious medical needs of arrestee who was known to be intoxicated and who was observed asleep and snoring during cell checks before he was found dead of mixed-drug intoxication).

[4] *See, e.g.*, *Dortch v. Davis*, No. 11-CV-0841-MJR-SCW, 2014 WL 1125588, at *2–3, 7, & 9 (S.D. Ill. Mar. 21, 2014) (delays of roughly *three months* in obtaining CPAP equipment needed by inmate medically diagnosed with sleep apnea did not constitute deliberate indifference).

could both check on Orlowski in person. Ertman observed nothing at all problematic during that check. And Alexander personally checked on Orlowski to monitor his condition at least two other times between 4:00 a.m. and when he found him unresponsive at 6:10 a.m., and during neither check did Alexander observe any change in his Orlowski's status or condition that raised any additional concerns or led him to believe Orlowski was in physical distress. Of course, once he actually knew that Orlowski was no longer breathing, Alexander immediately called for an emergency response. *See supra* pp. 4–7. Given these affirmative steps taken by petitioners to respond to what they knew, the Seventh Circuit's failure to cite any precedent establishing that such steps were insufficient under the Eighth Amendment to respond to the situation that confronted them only serves to bring the court's misapplication of the qualified-immunity doctrine into greater focus.

The Seventh Circuit dismissed petitioners' argument that it was incorrect to address qualified immunity at such a high level of generality as a construction of the doctrine that was "narrow to the point of meaninglessness." App. 9. But, in fact, by addressing the issue at such a high level of generality, it is the Seventh Circuit that is rendering the doctrine meaningless—creating a rule of potentially unqualified liability rather than one of qualified immunity, contrary to the point made by this Court in *Anderson* and underscored in its more-recent decisions. Indeed, if clearly established law can be defined simply at the level of the Eighth Amendment's proscription against deliberate indifference to a serious medical condition, then officers such as Alexander and Manns and other jail officers 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 stated purpose—protecting from personal liability all public officials but those who are plainly incompetent or knowingly violate the law—to second-guess the real-time judgments made by petitioners with the limited information available to them.

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 Alexander and Manns: They have been denied the immunity from suit granted them by law and will be forced to trial on Orlowski's claim against them. But the problem presented by the Seventh Circuit's approach to qualified immunity is not limited to this case or the court of appeals panel that decided it.

In two other recent cases (one decided the same day as this case and also involving Milwaukee County and the other involving a denial of rehearing two days after this decision), the court of appeals approached the qualified-immunity doctrine just as it did here. In *Estate of Perry v. Wenzel*, 872 F.3d 439 (7th Cir. 2017), the Seventh Circuit rejected qualified immunity for two nurses employed at the Milwaukee County Jail in a section 1983 suit brought by the estate of an arrestee who died at the facility of a heart attack. Likewise, in *Estate of Clark v. Walker*, 865 F.3d 544 (7th Cir. 2017),

the court ruled that qualified immunity 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. For a familiar theme: In each opinion, the Seventh Circuit did not identify a single case where a medical or corrections official faced with circumstances similar to those confronting the defendants was found to have violated a prisoner's constitutional rights.

Petitions for certiorari are also being filed with this Court in both the *Perry* and *Clark* cases. It is plain that, absent review by this Court, the flawed approach employed by the Seventh Circuit will undercut—indeed, eliminate—the protections of the qualified-immunity doctrine for jail officers and other 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, both are entitled to immunity.

To begin with the standard: Orlowski having been a convicted prisoner serving a sentence at the time of his death, the Eighth Amendment governs the estate's claim for denial of medical care (as all agree). *See, e.g.*, *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977). An officer may be held individually liable under the Eighth Amendment if he exhibits "deliberate indifference" to a need for medical care. *Farmer*, 511 U.S. at 828, 832. Mere negligence does not amount to deliberate indifference. *Estelle*, 429 U.S. at 106; *see also Whitley v. Albers*, 475 U.S. 312, 319 (1986) (concluding that the Eighth Amendment demands

proof of "more than ordinary lack of due care for the prisoner's interests or safety"). Rather, "a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer*, 511 U.S. at 837.

The deliberate-indifference standard thus consists of both objective and subjective elements. The former requires that the illness or injury must amount to a serious medical need. *See Estelle*, 429 U.S. at 104. Under existing Seventh Circuit precedent, the medical need must objectively be "sufficiently serious or painful to make the refusal of assistance uncivilized." *Cooper v. Casey*, 97 F.3d 914, 916 (7th Cir. 1996). More specifically, an objectively serious medical condition "is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a layperson would perceive the need for a doctor's attention." *Greeno v. Daley*, 414 F.3d 645, 653 (7th Cir. 2005).

To satisfy the latter (the subjective element), a plaintiff must establish that an official knew of, and disregarded, an excessive risk to inmate health. In other words, as noted above, the official "both [must] be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and "must also draw the inference." *Farmer*, 511 U.S. at 837; *see also id.* at 838 ("[A]n official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the

infliction of punishment."). Once a defendant official is subjectively aware of an objectively serious medical need, the official must show reckless disregard or something approaching a total lack of concern for the medical need before he can be found deliberately indifferent to the need. *See, e.g.*, *Farmer*, 511 U.S. at 836 (requiring a showing of "reckles[s] disregar[d]" for the medical need); *Rosario*, 670 F.3d at 821–22.

Neither respondents nor the court of appeals identified any case law (let alone controlling precedent) holding that officers in a situation remotely analogous to that of petitioners violated these precepts of Eighth Amendment law. This is no surprise: Logging observations about an inmate with an abnormal sleep pattern, conferring with two supervisors about the inmate, developing a plan with one supervisor to address the inmate's sleep pattern with him once he awoke, checking on the inmate with the second supervisor, and then checking on the inmate two more times over the course of two short hours can hardly be characterized as the type of "reckless disregard" or "total lack of concern" sufficient to show deliberate indifference. *See Farmer*, 511 U.S. at 836; *Rosario*, 620 F.3d at 821.

It simply cannot be seriously argued that Alexander and Manns were on clear and unambiguous notice that their actions were constitutionally insufficient. If not the Eighth Amendment's deliberate-indifference standard itself, then the qualified-immunity doctrine certainly provides protection to Alexander and Manns for any mistakes that they may have made here. *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").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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