No. ______

In the Supreme Court of the United States

DARIL FOOSE, BRIAN CARRIERE, SCOTT JOHNSEN, TRAVIS BANNING AND ADRIENNE SALAZAR,

Petitioners,

v.

SHERELLE THOMAS, ADMINISTRATOR OF THE ESTATE OF TERELLE THOMAS; T. T., A MINOR, INDIVIDUALLY, AS CHILD OF DECEDENT TERELLE THOMAS AND AS HIS SOLE SURVIVOR,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Petitioners are police officers who arrested Terelle Thomas after a traffic stop. Mr. Thomas was observed to have a pasty white substance in his mouth which he spit out and a powdery substance on his lips face and shirt. He repeatedly denied having ingested cocaine, coherently responded to questions, assured the officers that he felt "okay" and showed no signs of medical distress or drug toxicity. Mr. Thomas was transported to the nearby County Prison where he was assessed by the prison medical staff and cleared to remain. About one hour later he collapsed in a holding cell and eventually died of cocaine and fentanyl toxicity. The Court of Appeals acknowledged the lack of controlling precedential authority proscribing Petitioners' conduct in the context of these facts yet denied them qualified immunity holding that their actions were an obvious violation of the Fourteenth Amendment right of a person in the custody of law enforcement to receive medical care.

The question presented is:

> Whether the police officers' decision to transport a detainee who they suspected had ingested drugs to a nearby prison where he was evaluated by the prison's medical staff rather than to a hospital is an obvious constitutional violation depriving the officers of qualified immunity despite the lack of controlling precedent proscribing their conduct ?

PARTIES TO THE PROCEEDING

Sherelle Thomas is Administrator of the Estate of Terelle Thomas. T.T. is Terelle Thomas's minor daughter who is a statutory beneficiary under Pennsylvania's Wrongful Death Act. Both are plaintiffs in the District Court action and were appellees in the Court of Appeals. Petitioners, Daril Foose, Brian Carriere, Scott Johnsen, Adrienne Salazar, and Travis Banning are City of Harrisburg Police Officers. They are defendants in the District Court action and were appellants in the Court of Appeals. Adult Probation Officer Dan Kinsinger is a defendant in the District Court action and was an appellant in the Court of Appeals. Dauphin County, Prime Care Medical, Inc., and multiple unidentified John Does are defendants in the District Court action but were not appellants in the Court of Appeals and are not parties to this petition. The City of Harrisburg was dismissed as a defendant by the District Court in its October 15, 2021 order and is not a party to this petition.

On March 28, 2024, Mr. Kinsinger filed an application for an extension of time to and including June 6, 2024 to file a Petition for Writ of Certiorari. The Court may wish to defer acting on this petition until Mr. Kinsinger's petition is ripe for decision so both petitions may be considered together.

CORPORATE DISCLOSURE STATEMENT

A corporate disclosure statement is not required under Supreme Court Rule 29.6 because the Petitioners are individuals not nongovernmental corporations.

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is related to the following proceedings in the United States District Court for the Middle District of Pennsylvania and the United States Court of Appeals for the Third Circuit:

Thomas v. City of Harrisburg et al, No. 20-cv-01178 (District Court) Order entered February 23, 2021 granting motions to dismiss with leave to amend.

Thomas v. City of Harrisburg et al, No. 1-20-cv-01178 (District Court) Order entered October 15, 2021 denying motions to dismiss amended complaint;

Thomas v. City of Harrisburg et al, Nos. 21-2963, 21-2964, 21-3018 (Court of Appeals) Order entered December 6, 2023 affirming in part and reversing in part District Court order;

Thomas v. City of Harrisburg, Nos. 21-2963, 21-2964, 21-3018 (Court of Appeals) Order denying petition for en banc rehearing January 8, 2024;

Thomas v. City of Harrisburg et al, Nos. 21-2963, 21-2964, 21-3018 (Court of Appeals) Judgment issued January 16, 2024.

There are no other proceedings in state or federal trial or appellate courts directly related to this case within the meaning of Supreme Court Rule 14,1(b)(iii).

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This Court has emphasized many times that in order to be "clearly established" for qualified immunity purposes a constitutional right must be defined at a high level of specificity and must clearly prohibit the officer's conduct in the particular factual circumstances he or she confronts. *Mullenix v. Luna*, 577 U.S. 7, 13 (2015) (*per curiam*). The Court of Appeals acknowledged that a right clearly established by controlling precedent and directly applicable to the officers' conduct did not exist when the events underlying this case occurred. The Court's inquiry should have ended there but did not. The panel's majority deprived these officers of qualified immunity on the basis of "extreme circumstances," an argument not made by the appellees. The application of extreme circumstances has been described by this Court as the "rare obvious case" *District of Columbia v. Wesby,* 583 U.S. 48, 64 (2018) and by the Third Circuit as "exceedingly rare." *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011).

As Judge Phipps' noted in his dissent, the extreme or extraordinary circumstances exception, properly applied in accordance with this Court's precedents, has no discernable application to the facts of this case or to the qualified immunity analysis those facts present. Extreme circumstances relate to conduct so obviously violative of the constitution that directly controlling precedent is unnecessary to put officials on notice that their conduct is illegal. *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*per curiam*). In the context of a claim for deliberate indifference to a pretrial detainee's serious medical needs the conduct must be "obviously cruel" or "particularly egregious." In their amended complaint, the Respondents do not allege any obviously cruel or particularly egregious conduct by these officers that is indicative of an obvious constitutional violation.

The Court compounded its error by elevating an elected official's statement describing a Police Department policy to the status of a constitutional imperative despite contradictory authority in the Third Circuit and elsewhere that departmental policies do not establish constitutional rights and are irrelevant to the question of whether a constitutional right is clearly established for qualified immunity purposes. *Bornstein v. Monmouth County Sheriff's Office*, 658 Fed. App'x. 663, 668 (3d Cir. 2016) (not precedential); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1988), *cert. denied*, 504 U.S. 915 (1992). ("Under §1983 the issue is whether [the officer] violated the Constitution not whether he should be disciplined by the local police force"); *Soares v. Connecticut*, 8 F.3d 917, 922 (1993).

There are compelling reasons for the Court to grant this petition. The majority's misapplication of the extraordinary circumstances exception conflicts with this Court's qualified immunity precedent and, in doing so, undermines the societal values qualified immunity promotes. *See, e.g. District of Columbia v. Wesby,* 586 U.S. at 62. More troubling, the decision opens the door to expansive exceptions to this Court's multiple holdings that in most every instance the qualified immunity inquiry must be defined at a high level of specificity and must be particularized to the facts of the case. The decision creates as precedent an almost unfettered ability for lower courts to declare conduct to be within the extraordinary circumstances exception as a basis to deny qualified immunity. This court's plenary review is necessary to again reinforce its oft articulated requirement that clearly established law be defined at a high level of specificity rooted in the precise factual context which the officers confront and that the "exceedingly rare" extreme circumstances exception may not be applied broadly to circumvent that requirement. The Court should grant certiorari, reverse the Court of Appeals and remand with instructions to dismiss all claims against the Petitioners.

OPINIONS BELOW

The District Court's opinion is available at 2021 U.S. Dist. LEXIS 199522, 2021 WL 4819312 (M.D. Pa. October 15, 2021) and is reproduced at App. 27 – 71. The Court of Appeals opinion is reported at 88 F.4th 275 (3rd Cir. 2023) and is reproduced at App. 1 – 26.

JURISDICTION

The Court of Appeals issued its opinion on December 6, 2023 and denied *en banc* rehearing on January 8, 2024. App. 74 – 75. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the Constitution of the United States provides "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the Constitution of the United States provides in material part "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983 provides in material part "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 … ."

STATEMENT OF THE CASE

A. Factual and Procedural Background

This action was instituted against law enforcement officers, medical personnel and municipal entities by complaint filed in the United States District Court for the Middle District of Pennsylvania. The District Court had subject matter jurisdiction under 28 U.S.C. §§1331 and 1343(a)(3). All of the defendants filed motions to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). The District Court granted the motions in their entirety and dismissed the complaint with leave to amend. The District Court did not address the qualified immunity arguments raised by the individual officers. An amended complaint was filed and defendants moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6) or, in the case of Dauphin County, by motion for judgment on the pleadings under Fed. R. Civ. P. 12(c). The law enforcement officers raised the defense of qualified immunity in their 12(b)(6) motions.

The factual allegations, accepted as true by the district court for purposes of deciding the motions, are as follows. At 6:15 pm on December 14, 2019, Harrisburg Police Officer Daril Foose initiated a traffic stop at the intersection of South 17th and Holly Streets in the City of Harrisburg. Officer Foose observed that one of the occupants of the car, Terelle Thomas, "spoke to her as if he had 'cotton mouth' and a large amount of an unknown item inside of his mouth." Further observations by Officer Foose that Mr. Thomas's lips were pasty white, there was a large amount of paste inside of Mr. Thomas's mouth, and his face was covered with a white powdery substance led her to believe that Mr. Thomas had ingested cocaine. Four other Harrisburg Police officers – Corporal Scott Johnsen, Officers Adrienne Salazar, Travis Banning and Brian Carriere - also responded. They were told by either Officer Foose or Adult Probation Officer Kinsinger, who was partnered with Officer Foose, that Mr. Thomas may have swallowed cocaine.

Mr. Thomas was placed under arrest and was transported to the Dauphin County Prison Booking Center by Officer Carriere. Upon arrival, Officer Carriere informed prison officials and medical staff that Mr. Thomas "may have swallowed crack cocaine." Officials at the Booking Center and the prison's medical services contractor, PrimeCare, were not equipped to assess drug-related issues and "ignored" Officer Carriere's suggestion. While the medical staff did not function as a hospital or an emergency room, it had the ability to transfer inmates requiring acute care or testing to a "nearby" hospital. An hour after his arrival at the Booking Center, Mr. Thomas collapsed in his holding cell and "coded" from cardiac arrest on the floor of the holding cell. He died three days later. The cause of death was determined to be cocaine and fentanyl toxicity.

Plaintiffs relied on a number of exhibits attached to the amended complaint. Those documents were considered by the District Court in deciding the motions. *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3d Cir 1997). The exhibits include the initial and supplemental reports prepared by Officers Foose, Johnsen, Salazar, Banning and Carriere and added factual detail not in the text of the amended complaint. *Amended Complaint Exhibit "A."* At the scene, Mr. Thomas was asked multiple times by several officers if he had ingested cocaine and on each occasion he denied that he had done so. He told Officers Johnsen, Foose and Banning that the pasty white substance on his mouth was from eating candy cigarettes. The other two occupants of the vehicle – Theresa Henderson and Jay Wilkerson – denied seeing Mr. Thomas ingest cocaine and denied seeing cocaine in the car. Mr. Thomas was told by Corporal Johnsen that if he swallowed cocaine he needed to tell them "so we could inform medical staff because he could possibly die." Officer Salazar told Mr. Thomas that he needed to tell the officers what he had ingested for his own safety because it would have an ill effect on his health. Despite those admonitions, Mr. Thomas continued to deny that he had swallowed cocaine and in response to inquiries about his condition told both Officer Salazar and Officer Carriere that he was "okay." Officer Salazar "closely observed" Mr. Thomas and noted that he "appeared conscious and was able to speak to me in a coherent manner. I asked him on two separate occasions if he was feeling okay and he stated that he was okay. I closely observed him while on scene and his condition did not appear to worsen." Officer Banning also observed Mr. Thomas and reported that Mr. Thomas "did not act as if he was under the influence of anything or seemed to becoming ill."

Mr. Thomas was transported to Dauphin County Prison by Officer Carriere, a drive that took six minutes. During the transport, Mr. Thomas told Officer Carriere that he felt hot despite an outside temperature of 46 degrees. Officer Carriere told officials in the Booking Center that Mr. Thomas "may have ingested crack cocaine." Officer Carriere's report establishes that medical staff assessed Mr. Thomas for drug ingestion and cleared him to remain at the prison. Medical Staff did not direct that Mr. Thomas be taken from the prison to the nearby hospital emergency room. During the assessment, Mr. Thomas denied several times to medical staff that he had ingested cocaine. Mr. Thomas was placed in a holding cell at about 7:13 pm. He collapsed in the holding cell at 8:05 pm. Following Mr. Thomas' death, Harrisburg Mayor Eric Papenfuse issued a statement published in a local newspaper that it was "[Harrisburg Police] Department policy to take someone to a hospital rather than the Booking Center if they have consumed illegal narcotics in a way that could jeopardize their health or welfare." *Amended Complaint Exhibit "C"*

The District Court denied the law enforcement officers' motions to dismiss the amended complaint. On the issue of qualified immunity, the court determined that there were sufficient factual averments in the amended complaint and accompanying documents to state a claim that the individual officers had committed a constitutional violation – they knew Mr. Thomas had ingested cocaine and demonstrated deliberate indifference to his need for medical intervention by failing to provide access to immediate medical care at a hospital emergency room. The court concluded that Mr. Thomas's constitutional right to receive care for a serious medical condition was clearly established by Third Circuit case law recognizing a general Fourteenth Amendment due process right to emergency medical care by pretrial detainees.

The Law Enforcement Officers appealed the Court's order denying qualified immunity. A panel of the Court of Appeals affirmed with Judge Phipps dissenting. *Thomas v. City of Harrisburg*, 88 F.4th 275 (3d Cir. 2023). The majority acknowledged that as of December 14, 2019 neither the Supreme Court nor the Third Circuit had clearly established that a person in the custody of law enforcement had a constitutional right to be taken immediately to a hospital for treatment of drug consumption in the factual context these officers confronted. The Court then invoked "extreme circumstances" an argument not raised by the Appellees. The court held that it should be obvious to every reasonable police officer that Mr. Thomas was in need of medical care at a hospital and that his right to be taken immediately to a hospital for treatment was clearly established by the Fourteenth Amendment right of a person in custody to be provided emergency medical care as well as by the Harrisburg Police Department policy referenced by Mayor Papenfuse in his statement to the local newspaper.

In his dissent, Judge Phipps noted the acknowledged lack of controlling authority or a robust consensus of prevailing authority that requires a detainee such as Mr. Thomas to be transported immediately to a hospital rather than to a Prison Booking Center where he could be assessed by medical professionals for drug ingestion and sent to a nearby hospital if necessary. Even the medical professionals who cleared Mr. Thomas did not appreciate his condition and they did not transfer him. Judge Phipps noted that "extraordinary circumstances" as applied by this Court in assessing Eighth and Fourteenth Amendment violations means exactly what the term implies – circumstances that involve instances of "cruelty" or other egregious conduct so obviously violative of the Constitution that precedent on point is unnecessary to put officials on notice that the conduct is illegal. He further noted that the existence of a policy that requires transport to a hospital in cases of drug ingestion is a local departmental policy not a constitutional mandate and thus does not provide notice of constitutional requirements.

A petition for *en banc* rehearing was denied. App. 74-75. This petition followed.

B. Legal Framework

Qualified immunity "shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 566 U.S. 658, 664 (2012). To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent in the form of "controlling authority" or a "robust consensus of persuasive authority" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011). The legal principle must clearly prohibit the officer's conduct in the particular circumstances he or she confronts. This requires the principle to be framed with a high degree of specificity. *Mullenix v. Luna*, 577 U.S. at 12. "Ordinarily a constitutional duty is not clearly established simply because of the existence of a broad imperative like the one 'against unreasonable … seizures.'" *Schneyder v. Smith*, 653 F.3d 313, 329 (3d Cir. 2011). Instead, the contours of the right must be so well defined that it clearly prohibits the officer's conduct in the particular situation he or she confronts. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

Described by the Third Circuit itself as "exceedingly rare," *Schneyder*, 653 F.3d at 330, are cases involving "extreme" or "extraordinary" circumstances in which qualified immunity is not appropriate even in the absence of materially similar decisional law. In those cases, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The majority in this case deprived the officers of qualified immunity based on its determination that the claims against them presented an obvious violation of the general principle that "deliberate indifference to a prisoner's illness or injury states a cause of action under §1983" established by this Court in *Estelle v. Gamble*, 429 U.S. 97, 105 (1976), and by the Third Circuit in *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 582 (3d Cir. 2003). In *Estelle,* this Court determined that deliberate indifference to a prisoner's serious medical needs is a violation of the Eighth Amendment's proscription against cruel and unusual punishment. 429 U.S. at 103-04. The same protection was extended under the Fourteenth Amendment to pretrial detainees such as Mr. Thomas. *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244 (1983). The majority therefore applied the Eighth Amendment subjective deliberate indifference standard to the Fourteenth Amendment claims asserted by Mr. Thomas's Estate.

REASONS FOR GRANTING THE PETITION

Plenary review by this Court is essential because the Court of Appeals decision wrongfully subjects these police officers to liability by expanding the extreme circumstances exception beyond its established and intended application. This will open the door to other qualified immunity decisions circumventing the principles established by this Court by depriving officials of qualified immunity even absent precedential authority directly applicable to their conduct. The Court of Appeals created an expansive precedential exception to the longstanding principle that in assessing qualified immunity the right at issue must be specifically defined and rooted in the particular circumstances the officers confronted.

"When what is not clearly established is held to be so" a court "inadvertently undermines the values that qualified immunity seeks to promote." *Ashcroft v. al-Kidd*, 563 U.S. at 735. The doctrine of qualified immunity stems from the tension inherent in holding government officials accountable for the performance of their discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). When government officials abuse their offices an "action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow*, 487 U.S. at 814. Monetary accountability, however, can entail a "substantial social cost including the risk that fear of personal monetary liability and harassing litigation will unduly influence officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

Qualified immunity accommodates these conflicting concerns by shielding officials from liability for civil damages unless the law clearly proscribes their actions. 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. at 664 *quoting Anderson v. Creighton*, 483 U.S. at 639. Clarity of the legal principles against which an official's conduct is measured is thus essential to the correct application of the doctrine. Allowing the legal right at issue to be described in general terms makes it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). The contours of the right must be sufficiently clear that "a reasonable official would understand that what he is doing violates that right … . In the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640.

"Because of the importance of qualified immunity to 'society as a whole,' [citing *Harlow v. Fitzgerald],* the Court often corrects lower courts when they wrongly subject individual officers to liability." *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n. 3 (2015) (citing to five pre-2015 cases); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) *(per curiam); City of Tahlequah v. Bond*, 595 U.S. 9 (2021) (*per curiam*); *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (*per curiam*); *Kisela v. Hughes*, 584 U.S. 100 (2018) *(per curiam); White v. Pauly*, 580 U.S. 73 (2017) *(per curiam).* The Court has found this necessary both because of qualified immunity's importance to society and because, as an immunity to suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial. *White v. Pauly*, 580 U.S. at 79 *quoting Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Most, if not all, of these summary reversals involve cases where the lower court defined the constitutional right at issue too generally. This case falls squarely within that category.

This Court has upheld the application of the extraordinary circumstances exception twice in this century – *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (*per curiam*). Both decisions provide insight into the exceedingly limited types of conduct that support application of the exception. As a purely punitive measure, prison officials in *Hope* tied a shirtless prisoner to a hitching post in the hot sun for seven hours with no bathroom breaks and only one or two offers of water, conduct the Court described as "antithetical to human dignity." 536 U.S. at 745. This Court determined that "the obvious cruelty in this practice should have provided respondents with some notice that their alleged conduct violated Hope's constitutional protection against cruel and unusual punishment." *Id.* In *Taylor,* a prisoner was confined for six days in two different cells, the first of which was covered nearly floor to ceiling with human feces, and the second of which was "frigidly cold." The Court determined that confronted with "the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement violated the constitution." 141 S. Ct. at 54.

The egregious conduct detailed in these decisions is in stark contrast to the allegations against the Petitioners here. There are no averments that Mr. Thomas exhibited signs or made complaints of medical distress or drug toxicity that conveyed a need for immediate medical care at a hospital. He repeatedly denied ingesting drugs and responded coherently to questions. Nor are sufficient facts pled to support that Mr. Thomas swallowed a large amount of cocaine as suggested by the Third Circuit in its decision. The law enforcement officers did not witness Mr. Thomas ingest drugs, did not know how much cocaine, if any, he may have swallowed and did not know the degree of toxicity it posed. This is not a case where a person in custody asked for and was denied medical care. Mr. Thomas never requested medical care. The first arguable symptom of drug ingestion was while Mr. Thomas was in transit to the Booking Center, minutes away from being assessed by the prison's medical staff. Rather than being deliberately indifferent to Mr. Thomas' condition the officers observed him closely and questioned him to ensure that he was not experiencing medical distress. Their decision to transport Mr. Thomas to the County Booking Center rather than directly to a hospital emergency room was based on their interactions with and observations of Mr. Thomas. It does not support a finding of deliberate indifference and is light years from an obvious violation of Mr. Thomas' Fourteenth Amendment right to receive treatment for a serious medical condition a constitutional violation predicated on deliberate indifference.

Appellate decisions in analogous cases predating December 14, 2019, held that facts such as these precluded a finding of deliberate indifference as a matter of law. *Watkins v. City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001) (Watkins "consistently denied swallowing drugs", provided a plausible explanation for what were drug related symptoms, and repeatedly declined medical treatment); *Weaver v. Shadoan*, 340 F.3d 398 (6th Cir. 2003) (detainee denied ingesting drugs and declined medical treatment despite warnings by police of the dangers of drug ingestion). Appellate Courts after these events have reached conflicting conclusions. *Compare J.K.J. v. City of San Diego,* 42 F.4th 990 (9th Cir. 2021)*, vacated petition for en banc rehearing granted,* 59 F.4th 1327 (9th Cir. 2023) with *Gomez v. City of Memphis,* 2023 U.S. App. LEXIS 20180 (6th Cir. 2023)*, rehearing denied,* 2023 U.S. App. LEXIS 25999 (6th Cir. 2023). Irrespective of outcome, these decisions illustrate the fact intensive nature of the qualified immunity analysis in cases such as these and the critical importance of defining the constitutional right at issue with specificity and in the context of the precise facts the officers confronted.

Beyond the immediate damage to these officers caused by the Court of Appeals decision is the damage to the values that qualified immunity is designed to promote. The linchpin of the immunity afforded by the doctrine is to immunize government officials from liability unless through incompetence or volitional conduct they violate clearly established constitutional principles which every reasonable official in their position would know. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1985). As this Court has repeatedly recognized, it is essential to the correct application of qualified immunity that the constitutional principles in question be defined with specificity in the context of the particular facts confronting the official. Otherwise, the official is left to guess as to whether his conduct in a particular factual context is proscribed by the Constitution or not. See e.g. *District of Columbia v. Wesby*, 583 U.S. at 63 ("Courts must not define clearly established law at a high level of generality since doing so avoids the crucial question of whether the official acted reasonably in the particular circumstances that he or she faced.") The Court of Appeals decision turned this principle on its head by applying the extraordinary circumstances exception to conduct that was not egregious and which was not on its face clearly violative of general constitutional principles.

As a precedential opinion, the *Thomas* Court's decision opens the door in the lower courts to future expansions of the extraordinary circumstances doctrine and the erosion of the protections afforded by qualified immunity. This potential is illustrated by another Third Circuit decision filed after this case was argued but before the court's decision in *Thomas* was filed. In *Mack v. Yost*, 63 F.4th 211 (3d Cir. 2023) the Court addressed the issue of whether a Muslim prisoner had a clearly established right to pray and engage in other religious activities without largely verbal harassment by prison guards. As it did here, the Court acknowledged that there was no controlling or persuasive authority clearly establishing such a right under the circumstances presented by the case. As it did here, the Court applied the exceptional circumstances doctrine and held that the plaintiff had a clearly established First Amendment right and statutory right under the Religious Freedom Restoration Act to engage in the free exercise of his religion and that harassment by prison guards that interfered with religious activities such as prayer was an obvious violation of that right. This prompted a dissenting opinion from Judge Hardiman who, like Judge Phipps in this case, pointed out the absence of extreme circumstances or particularly egregious conduct which is indicative of the obvious case and decried the majority's unwarranted expansion of the extreme circumstances exception to circumvent this Court's qualified immunity jurisprudence.

The Court of Appeals decision in *Thomas* is in direct conflict with numerous decisions of this Court establishing the approach courts are to take in addressing qualified immunity. If the decision in *Mack v. Yost* is an indication, *Thomas* is part of a developing pattern of using the extreme circumstances exception to apply general principles of law to the qualified immunity analysis. The Court's decision undermines the societal benefits that are promoted by the correct application of the qualified immunity doctrine. It blurs the distinction between the "exceedingly rare" cases that involve conduct that is particularly egregious and therefore an obvious constitutional violation and the vast majority of cases that require a clear definition of the constitutional right assessed in the factual context the official confronts. For those reasons, the Court is requested to grant Certiorari and reverse the Third Circuit's decision.

CONCLUSION

For all of the foregoing reasons, Certiorari should be granted.

Respectfully submitted,

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