No. 23-1108

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,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

Cases

Rules

INTRODUCTION

In their opposition brief, the Respondents studiously ignore one of the most notable aspects of the *Thomas* decision – the Court's acknowledgment that as of December 14, 2019 the date of this incident "there has not yet . . . been a recognition by this Court of the right to medical care after the ingestion of drugs." Officers Petition App. 17. Rather than adopt the conclusion that necessarily follows and find that the officers are entitled to qualified immunity the majority instead misapplied an extreme circumstances exception which is applicable only in "exceedingly rare" cases involving egregious conduct or obvious cruelty. The drastic implications of this unwarranted holding for law enforcement officers are starkly presented in the amicus briefs submitted in support of Officer Kinsinger's petition. See e.g. Brief of International Union of Police Associations at 4-8. The Third Circuit's precedential holding poses an equally stark threat to this Court's long-established qualified immunity jurisprudence. In almost every instance where qualified immunity is at issue there must be controlling precedent or a robust consensus of persuasive authority to provide notice to officers that a constitutional right is clearly established. Having determined that no such precedent or persuasive authority existed on December 14, 2019 the majority performed an end run by shoe horning this case into a rarely used exception which, applied properly, has no discernable application to the qualified immunity issues presented in this case.

In what may be a tacit concession that their arguments on the merits of the petitions are lacking, the Respondents pose a number of "vehicle problems" unrelated to the

merits of the petitions or to the considerations governing review on certiorari found in Supreme Court Rule 10. Advancing these red herrings they try to induce the Court to deny certiorari for reasons other than the merits of the petitions. The vehicle problems identified by Respondents are irrelevant and, in some instances, are contradicted by case law and the principles governing this Court's mandated approach to qualified immunity issues.

ARGUMENT

A. The Court of Appeals Adoption of an Extreme Circumstances Standard was Clear Error in Direct Conflict with this Court's Multiple Decisions on the Contours of Qualified Immunity and the Approach Lower Courts must Take in Assessing its Applicability.

As noted in the Officers' Petition, the extreme circumstances exception adopted by the Third Circuit has been sanctioned by this Court only twice in the last twenty-two years. Officers' Petition at 14. Both decisions – *Hope v. Pelzer*, 536 U.S. 730 (2002) and *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam) involved conduct by corrections officers that was variously described by the Court as "antithetical to human dignity" *Hope*, 536 U.S. at 745 and "particularly egregious". *Taylor*, 592 U.S. at 9. The obvious cruelty evidenced by the officers' sadistic conduct in each case supported the conclusion that any reasonable officer would have known those actions violated the constitution even without clearly established precedent proscribing the officers' conduct.

The "exceedingly rare" extreme circumstances exception predicated on egregious misconduct or acts

of obvious cruelty has no application to the facts alleged against these officers. There are no averments that Mr. Thomas requested and was refused medical care or exhibited signs or complaints of medical distress that would convey to any reasonable officer a need to rush him to a hospital. Mr. Thomas denied cocaine ingestion, responded coherently to questions, and repeatedly stated in response to inquiries that he felt "ok". There are no averments that the officers knew how much cocaine Mr. Thomas actually swallowed, knew that the cocaine was laced with fentanyl or knew the degree of toxicity the fentanyl laced cocaine posed. The officers closely observed Mr. Thomas for signs of medical distress and saw none. The trip from the site of the traffic stop to the Dauphin County Prison took six minutes. The Respondents acknowledged in their amended complaint that medical staff at the prison transferred detainees to "nearby UPMC Pinnacle Harrisburg Hospital for treatment." Kinsinger Petition App. 84a

Upon arrival at the prison, Officer Carriere alerted prison officials that Mr. Thomas may have ingested cocaine which prompted them to have Mr. Thomas assessed by medical staff at the prison presumably with the intent of transferring Mr. Thomas to the nearby hospital for treatment if that was deemed necessary. He was assessed by the medical staff and cleared to stay.

The Respondents do not contest any of this. Nor can they because all of these facts are averred in their amended complaint. Their opposition brief is notable more for the arguments they do not make than for the arguments that they do. They do not dispute the Third Circuit's acknowledgment that at the time of this incident

there was no clearly established precedent that deprived the officers of qualified immunity. They do not argue that the actions ascribed to the officers in the amended complaint were egregious or evidenced any form of cruelty much less obvious cruelty. They do not maintain that the City of Harrisburg's policy, so heavily relied upon by the panel majority, set a constitutional standard for the officers' conduct. Their sole argument appears to be that the stand alone fact that officers suspected Mr. Thomas had ingested drugs while evidencing no outward physical manifestation of drug overdose apart from the innocuous complaint of feeling hot while a short distance from the prison supported a clearly established right to be taken immediately to a hospital for treatment rather than to a prison where he could be assessed by medical staff and transferred to a nearby hospital for treatment after being assessed.

The qualified immunity analysis adopted by the majority comes down to this. The Court of Appeals conceded that a constitutional right to be taken to a hospital under these or closely analogous facts was not clearly established by binding precedent or a robust consensus of persuasive authority at the time of this incident. Neither the Respondents nor the *Thomas* majority even attempt to characterize the officer's conduct as egregious or obviously cruel for purposes of placing this case in the extraordinary circumstances exception. The majority instead relied upon a statement made by the Mayor of Harrisburg to a local news outlet that the Harrisburg Police Department had "a policy to take an arrestee to the hospital rather than the booking center if they have consumed illegal narcotics in a way that could jeopardize their health or welfare." Officers Petition App 25. As noted by Judge Phipps, the Majority Opinion relied

upon this press statement not to demonstrate obvious cruelty but to show that the officers were on notice that they should have taken Mr. Thomas to hospital rather than to the Booking Center. Officers Petition App. 25.

There are myriad problems with this analysis. The Harrisburg Police Policy articulated by Mayor Papenfuse is just that – a departmental policy not a constitutional mandate. It does not set a constitutional standard of conduct for Harrisburg Police Officers let alone every police officer in the Third Circuit. As Judge Phipps noted "a municipal policy cannot substitute for controlling precedent or a robust consensus of persuasive authority as a means of providing notice that a constitutional right is clearly established." Officers Petition App 25. The majority opinion's use of a municipal policy in place of precedential authority subverted the entire premise of qualified immunity reducing it to a tort-based inquiry on reasonable notice not one predicated on constitutional principles. More significantly, it evidences an approach designed to limit the scope of qualified immunity by expanding the extraordinary circumstances exception beyond its doctrinal foundation.

B. There are no Vehicle Problems that Counsel against the Court's Review at this Stage of the Proceedings

The Respondents offer several considerations unrelated to the merits of the petitions which they assert should counsel this Court to deny certiorari. None of them warrant extensive discussion. The Respondents first argue that qualified immunity issues lend themselves to motions for summary judgment not motions to dismiss and the court should therefore decline to review the

officers' entitlement to qualified immunity at the motion to dismiss stage. This Court has never held as a general principle that qualified immunity issues should be resolved exclusively or even preferably on motions for summary judgment after the conclusion of discovery. The governing rule is precisely the opposite. Qualified immunity is "*an immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 522 (1985) (emphasis in original). It protects government officials not only from liability but also from the burden of participating in litigation. For that reason, this court has always emphasized that "qualified immunity questions should be resolved at the earliest possible stage of the litigation." *Anderson v. Creighton*, 483 U.S. 635, 646 n. 6 (1987). In appropriate cases such as this the earliest possible stage is a motion to dismiss under Fed. R. Civ. P. 12(b)(6).

The Respondents' second vehicle argument relates to the first. They argue that the amended complaint presents disputed issues of fact which must be addressed in discovery before qualified immunity can be assessed in the context of motions for summary judgment. They do not identify any disputed factual issues and they do not take exception to either petition's rendition of the facts as set out in the amended complaint. The District Court accepted as true all well-pleaded facts in the amended complaint and all reasonable inferences arising from those facts. Officers Petition App. 34 as did the Court of Appeals in its review. Officers Petition App. 9. The issue decided by both Courts was whether on the basis of those facts the individual officers were entitled to qualified immunity under the legal standards governing the application of that doctrine. Disputed issues of fact played no role in

the lower courts' determinations and certainly play no role in this Court's decision as to whether to grant certiorari.

The Respondents' next argue that it is fitting to allow this case's qualified immunity issues to "percolate" further in the Courts of Appeals to allow the issue to be addressed by this Court, if at all, at some indeterminate time in the future if there is a split between the Circuits. Supreme Court Rule 10 does not designate a split among the Circuits as the preferred vehicle for Supreme Court review nor is there case law adopting such a priority. More significantly, this would have the effect of allowing a clearly erroneous precedential decision to govern qualified immunity issues in the Third Circuit for an indeterminate time. This in direct contravention of the Court's oft-stated emphasis on the importance of resolving qualified immunity issues at the earliest possible stage. There is no basis in common sense or the law for this Court to defer addressing the significant issues raised in these certiorari petitions until there is a split in the Circuits, a circumstance that may never arise.

Finally, Respondents argue that this case does not fall within the "heartland" of qualified immunity cases which they perceive to be "fact intensive, fast moving cases." Opposition Brief at 30. While a police officers' need to make split second decisions can be a factor in assessing the officers' conduct, *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), this Court has never restricted qualified immunity to "fast moving cases" whatever that is intended to mean and has applied qualified immunity in cases where the officers acted in a deliberative manner under circumstances that posed no imminent danger. *See*, *e.g. District of Columbia v. Wesby*, 583 U.S. 48 (2018); *Hunter*

v. Bryant, 502 U.S. 244 (1991). There is no justifiable basis to restrict qualified immunity to "fast moving cases". Police officers make multiple decisions and take multiple actions over the course of a shift, a month, a year and a career. Qualified immunity shields them from being sued for reasonable but mistaken judgments in carrying out their duties whether made under duress or not. Adding the meaningless and unworkable qualification that a fluid situation must be "fast moving" in order for the officer to benefit from qualified immunity cuts directly against the societal goals qualified immunity is designed to achieve.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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