No.

In the Supreme Court of the United States

DANIEL KINSINGER, PETITIONER,

v.

SHERELLE THOMAS, ADMINISTRATOR OF THE ESTATE OF TERELLE THOMAS, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In this extraordinary case, a sharply divided Third Circuit panel denied petitioner and other law enforcement officers qualified immunity over a forceful dissent by Judge Phipps. Plaintiffs below (Respondents here) allege that officers believed decedent Terelle Thomas ingested crack cocaine. Thomas showed no signs of distress and repeatedly assured officers that he was okay. Officers transported him to the county booking center six minutes away, where they informed booking center medical staff of their belief that Thomas had eaten crack cocaine. The medical staff evaluated Thomas and cleared him to stay at the booking center. He later collapsed in his cell and was transported to a hospital where he died three days later. His cause of death was fentanyl and cocaine toxicity.

The Third Circuit majority held that transporting Thomas to the booking center with medical staff on site, rather than directly to the hospital, constituted deliberate indifference and that the officers' misconduct was so extreme and so obvious that they could not claim qualified immunity, despite the absence of any on-point precedent. In dissent, Judge Phipps explained that the officers are entitled to qualified immunity because this case "falls well short" of the obviousness exception.

The questions presented are:

1. Whether the Third Circuit erred in holding that law enforcement officers' decision to transport an arrestee they believed had ingested drugs, but did not believe required emergency medical care, to a nearby prison with medical staff rather than directly to a hospital constituted deliberate indifference.

2. Whether the Third Circuit erred—warranting summary reversal—in refusing qualified immunity in the absence of any precedent finding a constitutional violation based on similar facts.

PARTIES TO THE PROCEEDING

Petitioner is Daniel Kinsinger.

Respondents who were Plaintiffs-Appellees below are Sherelle Thomas, administrator of the estate of Terelle Thomas; and T.T., a minor, individually, as child of decedent Terelle Thomas and as his sole survivor.

Respondents who were Defendants-Appellants below are Officer Daril Foose; Corporal Scott Johnsen; Officer Adrienne Salazar; Officer Travis Banning; and Officer Brian Carriere.

RELATED PROCEEDINGS

United States District Court (M.D. Pa.):

Thomas v. Harrisburg City Police Dep't,
No. 1:20-cv-01178, 2021 WL 4819312 (M.D. Pa. Oct. 15, 2021) (order denying motion to dismiss)

United States Court of Appeals (3d Cir.):

Thomas v. City of Harrisburg,
88 F.4th 275 (3d Cir. 2023) (affirming in part and reversing in part denial of motion to dismiss)

United States Supreme Court:

Foose, et al., v. Thomas, et al.,
No. 23-1108 (petition for a writ of certiorari)

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The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a-22a) is published at 88 F.4th 275. The decision of the United States District Court for the Middle District of Pennsylvania (Pet. App. 23a-62a) is unpublished but available at 2021 WL 4819312.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 6, 2023. Pet. App. 1a. The Third Circuit denied rehearing on January 8, 2024. Pet. App. 63a-64a. Justice Alito then extended the time to file a petition for certiorari to May 7, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions, U.S. Const. amend. XIV, § 1 and 42 U.S.C. § 1983, are reproduced in the petition appendix, Pet. App. 65a-67a.

STATEMENT OF THE CASE

Six years ago, this Court summarily reversed the Ninth Circuit in *Kisela v. Hughes*, 584 U.S. 100 (2018) (per curiam), after the Ninth Circuit erroneously refused qualified immunity to a law enforcement officer where the constitutional violation was "far from … obvious" and the "most analogous [] precedent" favored the officer. *Kisela*, 584 U.S. at 105-06.

This case is the mirror image of *Kisela* and warrants the same result. This case would be an appropriate vehicle to clarify the standards governing deliberate indifference, a question the Court has not revisited since *Farmer v.*

Brennan, 511 U.S. 825 (1994). But the Court need not even reach that question in this case because, as in *Kisela*, the majority below egregiously erred in refusing qualified immunity to the officers where the unconstitutionality of the officers' conduct was not remotely obvious and where the most analogous precedent favors the officers. Qualified immunity is supposed to "protect[] all but the plainly incompetent or those who knowingly violate the law." *Kisela*, 584 U.S. at 104. This case is not even close to meeting that standard. "Because of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). The Court should grant certiorari and set this case for plenary review or, alternatively, summarily reverse the Third Circuit to ensure the proper application of qualified immunity.

1. On December 14, 2019, Harrisburg City Police Department (HPD) officer Daril Foose and Dauphin County probation officer Daniel Kinsinger were on patrol in Harrisburg, Pennsylvania. Pet. App. 76a-77a (Compl. ¶¶ 37-39). At about 6:15 PM, they saw a Jeep roll through a stop sign without making a complete stop. Pet. App. 77a (Compl. ¶¶ 39-40); 103a (Foose Rep. 1). They pulled the Jeep over and approached the vehicle. It was then that Officer Foose and Officer Kinsinger encountered decedent Terelle Thomas and the other occupants of the Jeep, Theresea Henderson and Jay Wilkerson. Upon meeting, Officer Foose noted that Thomas spoke to the officers as if he had something in his mouth. Pet. App. 77a (Compl. ¶ 41). Officer Foose saw white, gum-like strands in Thomas's mouth and told Officer Kinsinger that she believed Thomas had something in his mouth. Pet. App. 77a (Compl. ¶¶ 42, 44). She then ordered Officer

Kinsinger to detain Thomas. Pet. App. 77a (Compl. ¶ 44). At that time, Thomas's face and lips were covered in a white substance and he spit out a white liquid. Pet. App. 77a-78a (Compl. ¶¶ 45, 47). Officer Foose believed Thomas had ingested cocaine, but Thomas insisted that he had simply consumed a candy cigarette. Pet. App. 77a-78a (Compl. ¶¶ 46, 48). Thomas's companions Henderson and Wilkerson both assured Officer Foose that there were no drugs in the car. Pet. App. 103a (Foose Rep. 2).

About seven minutes after Officers Foose and Kinsinger first spotted the Jeep, three other HPD officers, Corporal Scott Johnsen, Officer Adrienne Salazar, and Officer Travis Banning, arrived to provide backup. Pet. App. 78a-79a (Compl. ¶¶ 50, 53, 58). Officer Foose informed them that she believed Thomas had ingested cocaine.

The responding officers' police reports—all attached to the complaint and "part of the pleading for all purposes," Fed. R. Civ. P. 10(c)—show that several of the officers independently attempted to discover what Thomas had ingested and whether he was okay. Upon arrival at the scene, Corporal Johnsen "asked Thomas multiple times if he ingested anything and [Thomas] insisted that he did not," still claiming the white substance was residue from candy cigarettes. Pet. App. 107a (Johnsen Supp. Rep. 1); 78a (Compl. ¶ 52). Corporal Johnsen even advised Thomas that it was important to tell officers what he had swallowed so they could "inform medical staff because he could possibly die." Pet. App. 107a (Johnsen Supp. Rep. 1). Both of Thomas's companions, Henderson and Wilkerson, assured Johnsen "that they did not see Thomas ingest anything and did not know that he had crack." Pet. App. 107a (Johnsen Supp. Rep. 1).

Officer Salazar echoed these same concerns, asking Thomas to tell police what he had ingested for his own safety in case it had any negative health effects. Pet. App. 109a (Salazar Supp. Rep. 1); 79a (Compl. ¶¶ 56-57). Thomas again declined to state what he had ingested. Pet. App. 109a (Salazar Supp. Rep. 1). Officer Salazar still "closely observed" Thomas's condition, noting that "he was conscious and was able to speak with [her] in a coherent manner." Pet. App. 109a (Salazar Supp. Rep. 1). She even "asked [Thomas] on two separate occasions if he was feeling okay and he stated that he was okay." Pet. App. 109a (Salazar Supp. Rep. 1). During Officer Salazar's interactions with Thomas, "his condition did not appear to worsen." Pet. App. 109a (Salazar Supp. Rep. 1).

Officer Banning also asked Thomas about the substance on his lips; Thomas again insisted that it was candy cigarettes. Pet. App. 111a (Banning Supp. Rep. 1). Like Officer Salazar, Officer Banning monitored Thomas's condition and noted that Thomas "did not act as if he was under the influence of anything, or seem[] to [be] becoming ill." Pet. App. 111a (Banning Supp. Rep. 1).

Officer Brian Carriere was the last to arrive on the scene. Upon his arrival, other officers conveyed their concerns that Thomas "may have ingested crack-cocaine, but had been denying doing so." Pet. App. 112a (Carriere Transp. Rep. 1). Thomas never asked any of the responding officers at the scene for medical attention.

The officers arrested Thomas after finding crack cocaine, marijuana, and drug paraphernalia in his car. CA App 99; Pet. App. 104a-105a (Foose Rep. 2); CA App 114-15. The traffic stop and arrest happened a mere six-minute drive from Dauphin County Booking Center, a facility with medical staff on site. Pet. App. 112a (Carriere Transp. Rep. 1).

About thirty minutes after the officers first saw the Jeep (at 6:47PM), Officer Carriere drove Thomas the two

miles to the booking center. Pet. App. 112a (Carriere Transp. Rep. 1); Pet. App. 109a (Salazar Supp. Rep. 1). Petitioner's—and most other responding officers'—interaction with Thomas ended at that time; only Officer Carriere transported Thomas to the booking center. During transport, Officer Carriere yet again asked Thomas if he had ingested crack cocaine, and Thomas—for at least the *sixth* time—denied having done so. Pet. App. 112a (Carriere Transp. Rep. 1). When asked about his well-being during transport, Thomas continued to maintain that he "was okay." Pet. App. 112a (Carriere Transp. Rep. 1).

Thomas's only alleged outward sign of distress, per the complaint, is that during the six-minute drive to the booking center, Thomas asked Officer Carriere to lower a window because he was feeling warm. Pet. App. 112a (Carriere Transp. Rep. 1). Nothing in the record indicates the temperature inside the police cruiser.

Six minutes later—thirty-eight minutes after the officers first saw the Jeep—Officer Carriere and Thomas arrived at Dauphin County Booking Center (at 6:53PM). Pet. App. 112a (Carriere Transp. Rep. 1). Upon arrival, Officer Carriere informed medical staff that officers suspected Thomas had swallowed crack cocaine. Pet. App. 112a (Carriere Transp. Rep. 1). Medical staff at the booking center examined Thomas and cleared him to stay at the facility. Pet. App. 112a (Carriere Transp. Rep. 1). "The booking staff asked him several times if he ingested crack-cocaine. Again, he denied doing so." Pet. App. 112a (Carriere Transp. Rep. 1). There is no indication Thomas requested medical care at any time.

About an hour later, Thomas collapsed in his holding cell and became unresponsive. Pet. App. 85a-86a (Compl. ¶¶ 98-99). He was transported to a local hospital for treatment, where he died three days later. Pet. App. 86a (Compl. ¶¶ 101-03). An autopsy revealed the cause of

death to be fentanyl and cocaine toxicity. Pet. App. 86a (Compl. ¶ 103). There is no indication in the record that any officer knew how much cocaine Thomas ingested or that any officer suspected Thomas had ingested fentanyl.

2. In July 2020, Sherelle Thomas, on behalf of Thomas's estate, and Thomas's minor child sued the City of Harrisburg; PrimeCare Medical, Inc.; and the individual officers. Pet. App. 68a-102a. Among the claims in the complaint, Plaintiffs sued the officers under 42 U.S.C. § 1983, alleging "failure to intervene" to provide medical care and a claim of "deliberate indifference" to Thomas's serious medical needs. Pet. App. 88a-102a.

The individual officer defendants, including Officer Kinsinger, moved to dismiss the § 1983 claims, asserting failure to state a claim and, that even if Thomas's estate did state a claim for relief, that they were entitled to qualified immunity. Pet. App. 41a. The district denied the motion to dismiss and denied the officers qualified immunity. Pet. App. 37a, 38a, 47a.

The officers, including Petitioner, took an interlocutory appeal of the denial of their motion to dismiss on qualified immunity grounds. Pet. App. 3a.

3.a. A divided Third Circuit panel affirmed the denial of qualified immunity on the Plaintiffs' deliberate indifference claim over a dissent by Judge Phipps.[1]

The majority acknowledged that as of the time of the arrest in this case—December 14, 2019—neither the Supreme Court nor the Third Circuit had clearly established that an arrestee whom officers believe to have ingested drugs, but does not appear to require emergency medical care, must be taken to a hospital instead of a nearby prison with onsite medical staff. Pet. App. 14a

[1] The Third Circuit panel unanimously reversed the district court's denial of qualified immunity on the "failure to intervene" claim. Pet. App. 18a.

(explaining that "[t]here has not yet … been a recognition by this Court of the right to medical care after the ingestion of drugs").

The majority nonetheless denied the officers qualified immunity because the unconstitutionality of their conduct was "so obvious" as to place it beyond debate. Pet. App. 16a-17a. Specifically, the majority held that it would have been obvious to every reasonable police officer that "oral ingestion of narcotics by an arrestee under circumstances suggesting the amount consumed was sufficiently large that it posed a substantial risk to health or a risk of death," requires the officer "take reasonable steps to render medical care." Pet. App. 16a. Applying that rule to the facts here, the majority held that the officers knew Thomas needed medical care and that the "reasonable steps to render medical care" in these circumstances would have been immediate transportation to a nearby hospital. Pet. App. 16a-17a. In reaching its conclusion that medical care at a *hospital*, rather than medical care at a *prison*, is the only appropriate response, the panel relied on an (alleged) HPD policy providing that individuals who ingest drugs should be taken to a hospital. Pet. App. 16a-17a. As a result, the majority concluded that the complaint stated a claim for "obvious" deliberate indifference to medical needs. Pet. App. 15a.

b. Judge Phipps dissented from the denial of qualified immunity. As Judge Phipps explained: "I do not believe that it is clearly established that the Due Process Clause of the Fourteenth Amendment imposes a duty on law enforcement officers to transport a detained suspect who ingested drugs to a *hospital*." Pet. App. 19a (emphasis in original).

Judge Phipps explained that "[t]he mainline method of proving that a right is clearly established … relies on the notice provided to government officials from the articulation of the constitutional right in question at an

appropriate level of specificity by either binding precedent or a robust consensus of persuasive authority." Pet. App. 19a. But, as he noted, "here" there is "no precedent for the proposition that as of December 14, 2019, the Due Process Clause required that officers transport to a hospital a detained suspect who appears to have ingested drugs." Pet. App. 19a-20a.

Judge Phipps then explained that this case does not come within the narrow exception for "obvious" cases. Pet. App. 20a. That exception "is available only in exceedingly rare cases," where "the wrongdoing is so obvious that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted." Pet. App. 19a (quotation marks omitted).

After comparing the facts of this case to the only two cases in which this Court has applied the narrow "obviousness" exception—*Hope v. Pelzer*, 536 U.S. 730 (2002) and *Taylor v. Riojas*, 592 U.S. 7 (2020)—Judge Phipps concluded "the defendant law enforcement officers did not act with such obvious cruelty." Pet. App. 21a. "Thomas exhibited no plain symptoms of distress. And he responded coherently to inquiries by other later-arriving officers." Pet. App. 21a. "The only time he expressed physical discomfort was en route to the booking center, which had on-site medical staff. During that ride, Thomas communicated to the officer that he felt hot and requested the officer to roll down the window despite an outside temperature of forty-six degrees." Pet. App. 21a. "And after Thomas arrived at the detention center, not even the examining nurse realized the urgency of the situation. Under these circumstances, the response by law enforcement officers—who interacted with Thomas to varying degrees and who are not medical professionals—falls well short of the obvious cruelty alleged in *Hope* and *Taylor*." Pet. App. 21a.

Judge Phipps faulted the majority for not even "attempt[ing] to construe defendants' conduct as obvious cruelty." Pet. App. 21a. Rather than seek to determine whether this case meets the standard for an obvious constitutional violation set out in *Hope* and *Taylor*, the majority instead "conclude[d] that a due process violation was obvious based on allegations that the HPD 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 and welfare.'" Pet. App. 21a. But as Judge Phipps noted, the alleged policy does not "demonstrate [the officer's] obvious cruelty," and "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." Pet. App. 22a. Nor does that policy "set a constitutional standard of conduct for the HPD, much less for every law enforcement agency operating within this Circuit's geographical bounds." Pet. App. 22a. "Such an approach inverts the role of the Constitution as the highest law of the land: constitutional protections should inform police policies; the policy of one police department does not define the constitutional standard of conduct for an entire circuit." Pet. App. 22a.

Judge Phipps concluded, "because the allegations do not identify obvious cruelty, the officers should receive qualified immunity." Pet. App. 22a.

4. The Third Circuit denied a timely petition for rehearing en banc. Pet. App. 64a. Officers Foose, Carriere, Johnsen, Banning, and Salazar petitioned for certiorari on April 8, 2024. That petition is pending as docket number 23-1108.[2]

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[2] The petition in No. 23-1108 should be considered together with this petition.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari to clarify the standard for establishing that a government official has exhibited deliberate indifference to an individual's serious medical needs and to clarify the "obvious cruelty" exception to qualified immunity. Alternatively, it should grant certiorari and summarily reverse the Third Circuit to ensure the proper application of qualified immunity.

I. THE DECISION BELOW IS EGREGIOUSLY WRONG

A. The Third Circuit's Deliberate Indifference Holding Directly Contravenes Controlling Precedent from this Court.

The Third Circuit erred from the outset in holding that the defendant officers acted with deliberate indifference to a serious medical need. The standard for deliberate indifference is well settled, and allegations that the responding officers erred by transporting Thomas to medical staff at the booking center rather than medical staff at a hospital do not come close to meeting it.

To prove deliberate indifference a plaintiff must show a violation of both an objective standard and a subjective standard. Objectively the underlying act or omission must amount to a denial to the inmate (or arrestee) of humane conditions of confinement. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). Put another way, "to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (Alito, J.) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). Mere allegations that a response to a medical need was inadequate, when that response was objectively reasonable, do not rise to the standard of deliberate indifference. *Estelle*, 429 U.S. at 105-06. "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment,

federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Palakovic v. Wetzel*, 854 F.3d 209, 228 (3d Cir. 2017).

Subjectively, "the official [must] know[] of and disregard[] 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 (emphasis added). "[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." *Id.* at 838. And "[i]t is well-settled that claims of negligence or medical malpractice, without some more culpable state of mind, do not constitute 'deliberate indifference.'" *Rouse*, 182 F.3d at 197 (Alito, J.). The conduct must rise to the level of "obduracy and wantonness." *Id.* (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986)). And in "situations, where the decisions of prison officials are typically made 'in haste, under pressure, and frequently without the luxury of a second chance,'" a deliberate indifference claimant must show that officials acted "maliciously and sadistically for the very purpose of causing harm." *Farmer*, 511 U.S. at 835 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6 (1992)). This case obviously fails to meet either the objective or the subjective components of the deliberate indifference standard.

1. The complaint does not surmount the objective test for deliberate indifference because the officers ensured Thomas received prompt medical attention. The complaint does not allege, nor could it, that it is objectively unreasonable to transport an arrestee believed to have ingested an unknown quantity of drugs for evaluation by medical professionals at a prison. To the contrary, the

complaint alleges that "it is considered to be best practice to seek immediate medical treatment when an individual is suspected of ingesting illegal drugs." Pet. App. 82a (Compl. ¶ 76). Which is exactly what happened at the booking center.

The complaint nonetheless alleges that treatment at a hospital is the only reasonable form of medical care in these circumstances because the "Harrisburg Police Department has 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 and welfare." Pet. App. 81a-82a (Compl. ¶ 73).[3] But that "policy does not set a constitutional standard of conduct for the Harrisburg Police Department, much less for every law enforcement agency operating within [the Third] Circuit's geographical bounds." Pet. App. 22a (Phipps, J., dissenting). Whatever the content of HPD's policy, it does not change the fact that it is objectively reasonable to take an arrestee who does not appear to be suffering an immediate medical emergency for treatment by medical staff at a prison.

To be sure, the complaint alleges that the officers did not take Thomas to the booking center for the purpose of getting him medical treatment. Pet. App. 81a (Compl. ¶ 69). But that is not the relevant question under the objective prong. The relevant question is whether, objectively, their act of getting Thomas medical attention only minutes after encountering him "represent[s] cruel and unusual" treatment. *Estelle*, 429 U.S. at 107. No allegations in the complaint support a finding that it was cruel or unusual, because it was neither. Ensuring an individual who is merely believed to have ingested some

[3] The complaint does not, and cannot, allege that Petitioner, a Dauphin County employee, is subject to the alleged policy of the Harrisburg Police Department.

unknown quantity of drugs receives prompt medical attention meets any conceivable objective standard for humane treatment. This is especially true because not every individual who ingests drugs needs medical care. Individuals ingest drugs every day without adverse effect, and law enforcement cannot feasibly transport every individual who ingested drugs to a hospital. *See infra* II. Thomas's health and welfare did not appear in jeopardy after he ingested an unknown quantity of drugs, but the officers ensured he was evaluated by medical staff anyway. This was objectively reasonable behavior.

The majority below held that the objective test was met because the complaint alleges that the officers knew "Thomas had ingested cocaine" and that fact "established objective evidence of a serious medical need." Pet. App. 11a-12a. But the objective test requires more: Thomas's need for medical care must have been "ignored" or "delayed for non-medical reasons." Pet. App. 10a; *see Rouse*, 182 F.3d at 197 (Alito, J.). That did not happen here. The officers transported Thomas to the booking center where medical staff examined Thomas and cleared him to stay at the facility. Pet. App. 112a (Carriere Transp. Rep. 1).

The complaint asserts that Thomas was in a "health crisis" and "need[ed] … emergency medical treatment." Pet. App. 86a-87a (Compl. ¶ 106). But no objective facts—none—would have led a reasonable law enforcement officer to reach that conclusion. A reasonable officer might have known that Thomas had ingested some unknown amount of crack cocaine, but he would *not* know—or even suspect—Thomas had ingested fentanyl. Nor would a reasonable officer have concluded that this was a medical crisis: Thomas showed no outward signs of distress and never stated he was feeling ill at all, let alone that he needed medical aid. In fact, when asked on three separate occasions if he was feeling okay he stated that he

was okay. *See* Pet. App. 109a (Salazar Supp. Rep. 1) (asking twice); Pet. App. 112a (Carriere Transp. Rep. 1) (asking once). A reasonable officer, responding to the circumstances here, would have promptly had Thomas evaluated by medical personnel. And that is exactly what happened. Upon his arrival at the booking center, Officer Carriere informed the medical staff that Thomas had likely ingested an unknown amount of cocaine. Any argument that the responding officers should have made a different medical decision is the sort of post hoc quibbling over a judgment call that cannot amount to deliberate indifference. *Estelle*, 429 U.S. at 107.

The hollowed-out version of the objective prong of the deliberate indifference standard announced by the Third Circuit in this case is revolutionary. It means that every law enforcement officer who arrests a person who seems like he has taken some amount of drugs is now required to take that person to the emergency room even if the arrestee is conscious and coherent, shows no obvious signs of overdose or toxicity, insists he has not taken any drugs, and insists he is okay. Presumably, under this rule, if paramedics are called and evaluate an arrestee, check his vitals, and find no cause for concern but do not transport him to the hospital, the police officers (and possibly the paramedics they called) will now be liable for deliberate indifference.

And that is just the tip of the iceberg. What happens to the officer in a rural location who transports an arrestee to a local urgent care center instead of a more distant hospital? Or to the officer who encounters an arrestee who refuses any medical care? Is the officer required to force medical care upon him in order to avoid liability? What happens to the officer who encounters an arrestee who requests not to be taken to a hospital? Or the officer who takes an arrestee to a hospital but does not insist that he receive an X-ray or CT scan? Lawsuits in all

of these situations are a foreseeable consequence of the Third Circuit's rule. This Court should intervene now to prevent this rule from wreaking havoc on law enforcement across the Third Circuit—and potentially across the country.

2. The complaint does not surmount the subjective test for deliberate indifference either because there is no basis to conclude that the officers subjectively realized Thomas needed urgent emergency medical treatment at a hospital.[4] In fact, the complaint establishes the opposite: that the officers were unaware that Thomas was experiencing a medical emergency. Conscious disregard of a known risk is a prerequisite to establishing the subjective prong: "Deliberate indifference," requires "'obduracy and wantonness,' which has been likened to conduct that includes recklessness or a conscious disregard of a serious risk." *Rouse*, 182 F.3d at 197.

In this case, there is no support for the allegation that the officers consciously disregarded a substantial risk to Thomas's health. The complaint alleges that the officers knew that Thomas had ingested cocaine (and thus needed medical evaluation) but does not allege that any officer thought that his condition required on-the-spot emergency medical care or transportation to a hospital. And the complaint does not allege that any officer even suspected Thomas ingested fentanyl, as there was no

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[4] There is some "confusion" in the lower courts as to the requisite *mens rea* for deliberate indifference after *Farmer*. *Wade v. McDade*, 67 F.4th 1363, 1371 (11th Cir.), *reh'g en banc granted, opinion vacated sub nom. Wade v. Georgia Corr. Health, LLC*, 83 F.4th 1332 (11th Cir. 2023) (Newsom, J.) ("Our post-*Farmer* decisions are a jumble, with different panels adopting one of two different *mens rea* standards at different times."). This would be an appropriate case in which to clarify that standard, though Respondents' claim does not meet *any* of the standards suggested in the lower courts.

indication he had. Indeed, the allegations in the complaint affirmatively point away from the conclusion that the officers believed he needed emergency medical care. The complaint even concedes that every defendant "fail[ed] to recognize and identify that decedent Terrelle Thomas had serious medical problems." Pet. App. 76a (Compl. ¶ 32).

The officers made numerous inquiries and took numerous actions to try to determine if this was a medical emergency. Pet. App. 78a, 79a (Compl. ¶¶ 47, 49, 55). Officers asked Thomas repeatedly if he had ingested cocaine. Pet. App. 78a, 79a (Compl. ¶¶ 52, 57). Officers Johnsen and Salazar informed Thomas that they needed to know if he ingested dangerous substances so that they could determine the care to provide him. Pet. App. 107a (Johnsen Rep. 1); 109a (Salazar Supp. Rep. 1). Officer Salazar asked Thomas how he was feeling, "closely observed" Thomas's condition, and noted that it "did not appear to worsen." Pet. App. 109a (Salazar Supp. Rep. 1). Officer Banning assessed Thomas's condition, as well, noting that he did not appear to be "under the influence of anything, or seem[] to [be] becoming ill." Pet. App. 111a (Banning Supp. Rep. 1). Officer Carriere similarly checked on Thomas during transport and monitored for any medical emergency. Pet. App. 112a (Carriere Transp. Rep. 1). Thomas twice assured Officer Carriere that he was "okay." Pet. App. 112a (Carriere Transp. Rep. 1).

The complaint's bare allegations that the officers were subjectively deliberately indifferent do not withstand scrutiny. The complaint alleges that "Thomas was not taken to the Dauphin County Booking Center to receive medical attention," Pet. App. 81a (Compl. ¶ 69) and that no defendant "sought to provide Decedent Thomas with medical attention," Pet. App. 81a (Compl. ¶ 70). That is flatly contradicted by the record. As the exhibits attached to the complaint show, Corporal Johnsen told Thomas that the officers needed to know "if

he did ingest something … so that [they] could inform medical staff because he could possibly die," Pet. App. 107a (Johnsen Rep. 1). The allegation that no decision was made "to seek medical treatment for [Thomas]," Pet. App. 81a (Compl. ¶ 71), is directly contradicted by the fact that Officer Carriere transported Thomas to a booking facility that had PrimeCare medical staff on site, and, at the facility, Officer Carriere advised PrimeCare staff that Thomas had ingested cocaine, despite Thomas's insistence to the contrary. Pet. App. 112a (Carriere Transp. Rep. 1). Respondents cannot label the officers' actions as a "failure to seek medical treatment," Pet. App. 81a (Compl. ¶ 72), just because they do not like the medical treatment that the officers sought out.

Even if the lay law enforcement officers in this case "should have perceived" that Thomas was experiencing a medical emergency—a contestable proposition given that the *medical professionals* at the prison did not even perceive that Thomas was experiencing a medical emergency—that is insufficient to establish liability under *Farmer*'s subjective prong.

The panel's failure to correctly analyze whether the complaint states a claim for deliberate indifference compounds its extraordinary error in denying the officers qualified immunity. This case offers an ideal vehicle for this Court to clarify the standard for analyzing deliberate indifference claims for the first time since *Farmer*. Doing so would provide much-needed guidance about the correct application of the deliberate indifference standard, and it would do so in the context of a recurrent and important situation that first responders, including law enforcement officers, encounter on a daily basis.

B. The Panel Manifestly Erred by Denying Qualified Immunity, and Summary Reversal Is Appropriate.

The panel's most glaring error lies in its conclusion that any constitutional violation was so clearly established that qualified immunity does not apply. As demonstrated above, it is hard to fathom how the Third Circuit majority concluded there was a constitutional violation at all in this case in light of this Court's precedent. But in refusing qualified immunity, the panel multiplied its error several times over. It merged the standard for denying qualified immunity with the standard for establishing deliberate indifference. It failed to grapple with the guidance this Court has set forth for determining when a constitutional violation is "obvious." And it substituted an (alleged) city police department policy for a constitutional standard, as if the policy were constitutional law.

The manifest nature of the error below, coupled with its extraordinary impact on law enforcement officers (both in this case and elsewhere), warrants summary reversal. "Whatever the merits of the [Third Circuit's] new rule … it is still a new rule." *Wesby v. District of Columbia*, 816 F.3d 96, 111 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc). "And as the Supreme Court has shouted from its First Street rooftop for several years now, qualified immunity protects officers from personal liability for violating rules that did not exist at the time of the officers' actions." *Id.*

1. Not even the panel majority disputes that there is no controlling precedent placing every reasonable official on notice that the officers' conduct in this case constituted deliberate indifference. Pet. App. 16a. This case thus may proceed only if the constitutional violation constituted such "obvious cruelty" that every reasonable official would have been on notice that the conduct here violated Thomas's constitutional right to medical care. *See* Pet. App. 21a-22a.

This case does not come close to clearing that high threshold. The Court has made clear that a denial of qualified immunity is appropriate only when government officials knew or should have known that their conduct was unconstitutional. *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). The constitutional question must be "beyond debate," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), and it cannot be said that the question here was "beyond debate," as the majority and dissent below did debate the question, *see Wilson v. Layne*, 526 U.S. 603, 618 (1999) ("If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy."); *accord Stanton v. Sims*, 571 U.S. 3, 10-11 (2013) (summarily reversing a denial of qualified immunity where courts were split on whether the actions at issue were unconstitutional). Qualified immunity must apply where reasonable minds differ because the doctrine "protects all but the plainly incompetent or those who knowingly violate the law." *Wesby*, 583 U.S. at 63; *see Wesby*, 816 F.3d at 112 (Kavanaugh, J., dissenting from denial of rehearing en banc) (same).

As Judge Phipps explained below, this Court has only applied the "obvious cruelty" exception twice, both times in situations "very different[]" from that at issue here. Pet. App. 20a. In *Hope v. Pelzer*, prison guards handcuffed a prisoner to a hitching post in the Alabama sun for seven hours, offering him water only once or twice, allowing no bathroom breaks, and taunting him. 536 U.S. at 734-35. The Court noted that the "obvious cruelty inherent" in the officers' actions provided the officers with "some notice" that their actions were unconstitutional. *Id.* at 745. After *Hope*, it took nearly two decades for the Court to encounter another extraordinary, obvious case, and then only when the case presented "particularly egregious facts": officers forced an inmate to spend six

days in two prison cells, one "frigidly cold" and sewage-covered, where he had to sleep naked in the sewage, and the other "covered, nearly floor to ceiling in massive amount of feces." *Taylor v. Riojas*, 592 U.S. 7, 7-9 (2020).

This case is not akin to torturing a prisoner on a hitching post in the hot sun or confining a prisoner in inhumane, waste-covered cells for days. The officers' conduct here cannot conceivably be described as "obvious[ly] cruel" or "particularly egregious." From the moment the officers first realized Thomas likely swallowed cocaine, they reacted exactly as any reasonable officer would have. The officers immediately, and consistently throughout the thirty-eight minute encounter, tried to figure out what Thomas had ingested. Pet. App. 78a (Compl. ¶ 48). Officer Foose asked Thomas about what he had ingested less than seven minutes into their interaction, before the backup officers arrived. Pet. App. 78a (Compl. ¶¶ 48, 50). Upon their arrival, Corporal Johnsen and Officers Salazar and Banning also asked Thomas what he had ingested. Pet. App. 107a-111a (Johnsen Supp. Rep. 1, Salazar Supp. Rep. 1, Banning Supp. Rep. 1). Officer Carriere continued this questioning when transporting Thomas to booking. Pet. App. 112a (Carriere Transp. Rep. 1).

The officers also did not blindly rely on Thomas's reassurances that he had not ingested cocaine. During the thirty-eight minute interaction, they were monitoring him for signs of distress. *See* Pet. App. 109a (Officer Salazar noting she closely observed Thomas, and he was conscious and coherent throughout the stop); 111a (Officer Banning writing Thomas did not seem under the influence or ill). Officers on the scene and in the car on their way to the booking center asked Thomas if he was okay, and he answered affirmatively both times. Pet. App. 109a (Salazar Supp. Rep. 1); 112a (Carriere Transp. Rep. 1).

Most tellingly, Corporal Johnsen specifically told Thomas that the officers needed to know "if he did ingest something … so that [they] could inform medical staff because he could possibly die." Pet. App. 107a (Johnsen Supp. Rep. 1). Officer Salazar similarly told Thomas "it was important for [the officers] to know what he ingested for his safety in the event that it would have any ill [e]ffect on his health." Pet. App. 109a (Salazar Supp. Rep. 1). These statements in the police reports attached to the complaint demonstrate that the officers acted with Thomas's health in mind. They intended to seek medical care and inform "medical staff" about his suspected condition. And they did, indeed, deliver him to medical staff a mere six minutes after leaving the scene. Pet. App. 112a (Carriere Transp. Rep. 1). Thomas arrived at the booking center, where medical staff were present, thirty-eight minutes after the Jeep first aroused officers' suspicions.

The officers' behavior was neither cruel nor egregious, and certainly not obviously so. They did not know with certainty what substance Thomas swallowed, how much of that substance he swallowed, or whether he was already under the influence of any other substance. They repeatedly asked him what he swallowed and told him they needed an honest answer for his own safety. And they repeatedly asked about his wellbeing, to which he always said he was okay. Thomas showed no signs of distress beyond asking Officer Carriere to lower a car window—a common request from *any* individual—and the officers brought him to medical personnel minutes away from the scene of the arrest. In short, the officers did what any reasonable officers in such an uncertain situation would have done.

Qualified immunity turns on "the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was

taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (quotation marks and citation omitted); *Rouse*, 182 F.3d at 200 (Alito, J.) ("[W]hen a defendant asserts the defense of qualified immunity, it is necessary to determine whether a reasonable official in the position of that defendant would have known that his or her actions were unconstitutional in light of the clearly established law and the information the official possessed."). *Hope*'s obviousness exception did not displace that objective standard. "Qualified immunity is no immunity at all" if it can be readily evaded by defining the right at issue at a high level of generality or too-readily concluding that a constitutional rule is obvious. *Wesby*, 816 F.3d at 110 (Kavanaugh, J., dissenting from denial of rehearing en banc). Because the officers here acted in an objectively reasonable manner rather than an obviously cruel one, it cannot be said they violated clearly established law. *See Wesby*, 583 U.S. at 63.

2. Caselaw from other circuits further supports the conclusion that the officers' actions were not obviously unlawful. As of December 2019, every other circuit to have considered the issue had held that officers are not liable for deliberate indifference to medical needs where they respond reasonably. *See Brown v. Middleton*, 362 F. App'x 340, 346 (4th Cir. 2010) (no violation of clearly established right where officers did not seek medical care for arrestee who swallowed cocaine and repeatedly denied it to officers, despite warnings from officers that he needed medical attention if he had ingested drugs); *Watkins v. City of Battle Creek*, 273 F.3d 682, 686 (6th Cir. 2001) (no deliberate indifference where detainee "repeatedly denied swallowing drugs, provided rational explanations for his behavior, and did not want medical treatment"); *Weaver v. Shadoan*, 340 F.3d 398, 412 (6th Cir. 2003) (same when officer "did not know and disregard a substantial risk of serious harm" to detainee when he

responded reasonably); *Spears v. Ruth*, 589 F.3d 249, 255 (6th Cir. 2009) (symptoms of cocaine overdose were not obvious to officer); *Martinez v. Beggs*, 563 F.3d 1082, 1091 (10th Cir. 2009) (detainee "was not unconscious and showed no obvious symptoms indicating a risk of serious harm" despite detainee being severely intoxicated); *Johnson v. City of Bessemer*, 741 F. App'x 694, 701 (11th Cir. 2018) (officer suspected prisoner consumed Xanax but did not know prisoner overdosed). And no circuit, before 2019 or since, recognized that a detainee has a right to *hospital* care, as opposed to non-hospital medical care, after ingesting drugs. Just like *Kisela*, this is a case in which the "most analogous [] precedent" favors the officers. 584 U.S. at 104-06.

3. In lieu of summary reversal, the Court may wish to use this case as a vehicle to clarify the scope of the obviousness exception on plenary review. The exception has vexed the lower courts since its inception.[5] *Hope* held that defendants can only be held liable if they had "fair notice" that their actions were unconstitutional and acted with "obvious cruelty." 536 U.S. at 739, 745. But, as Justice Thomas noted in his dissent, it is unclear how a public official can have "fair notice"—and, consequently, how a case can meet the "obvious" standard—if

[5] *Compare Dawes v. City of Dallas*, No. 22-10876, 2024 WL 1434454, at *3 n.2 (5th Cir. Apr. 3, 2024) (per curiam) (stating the obviousness exception only applies "on extraordinarily egregious facts where the defendant officer faced a complete absence of exigency") *with id.* at *8 n.3 (Dennis, J., concurring in part and dissenting in part) (noting "nowhere did [*Taylor v. Riojas*] purport to make a lack of necessity or exigency a requirement under the obviousness case doctrine"). *See also*, *e.g.*, *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir. 2019) (en banc) (finding use of deadly force without warning and without immediate threat an "obvious case" over five dissenting opinions joined by, collectively, seven judges); *Aldaba v. Pickens*, 844 F.3d 870, 874 n.1 (10th Cir. 2016) (discussing confusion about how to apply the obviousness exception).

reasonable jurists disagree about whether the conduct at issue is unconstitutional in the first instance. *Id.* at 759 (Thomas, J., dissenting); *see also Ramirez v. Guadarrama*, 2 F.4th 506, 514-15 (5th Cir. 2021) (Oldham, J., concurring in the denial of rehearing en banc) ("It's unclear how [the Fifth Circuit] should apply [the obviousness exception]" in cases factually different from those in which this Court has applied the doctrine.).

Some jurists have commented that "*Hope* was short-lived" and "the Court began to backtrack" from its standard shortly after the decision came down. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 Mich. L. Rev. 1219, 1247-48 (2015). Yet, as the decision below makes painfully clear, courts still routinely—and inconsistently—apply *Hope*. This case would be a suitable vehicle to clarify the obviousness exception on plenary review.

II. THIS EXTRAORDINARY CASE WARRANTS THE EXERCISE OF THE COURT'S SUPERVISORY POWER

This is an extraordinary case in which "a United States court of appeals … has so far departed from the accepted and usual course of judicial proceedings … as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). "[S]ummary correction is particularly necessary where, as here, a lower court clearly and directly contravenes this Court's settled precedent." *Andrus v. Texas*, 142 S. Ct. 1866, 1879 (2022) (Sotomayor, J., dissenting from the denial of certiorari). The deeply divided decision below is not only directly contrary to this Court's precedents, it "is divorced from the real world that police officers face on a regular basis." *Wesby*, 816 F.3d at 111 (Kavanaugh, J., dissenting from denial of rehearing en banc). The majority ignored that officers are "required to make … on-the-spot … determination[s] in … situation[s] far removed from the serenity and unhurried decision making of an appellate

judge's chambers," *id.* at 109, and instead substituted its own view of how the officers should have acted based on hindsight.

The Third Circuit created a lose-lose situation for law enforcement that contravenes this Court's directives regarding qualified immunity and directly threatens the purpose of the doctrine. Under the Third Circuit's rule, every time law enforcement detains an individual who may possibly need medical attention—and every decision regarding where to send them for medical attention—could impose liability, brand the responder a constitutional violator, and subject him to a huge monetary judgment. Especially in light of the ongoing opioid crisis, the frequency with which public officers encounter these situations means this Court's review is of vital importance.

The decision below will unduly inhibit officials in the discharge of their duties. The officers here did everything right—they asked Thomas whether he had ingested drugs, repeatedly asked if he was okay, and transported him to medical care mere minutes away. If those actions show a deliberate indifference to medical needs and subject the officers to personal monetary liability, first responders will hesitate before stopping individuals who may be in distress. The Third Circuit's rule would require first responders to transport every individual they suspect may have consumed any quantity of drugs to a hospital. But public officials find themselves in these scenarios every single day, often many times in a day. The decision below would drastically disrupt public safety, and it puts these officers in an untenable situation; it effectively removes all "breathing room to make reasonable but mistaken judgements" in the field. *al-Kidd*, 563 U.S. at 743.

Beyond the future ramifications of this decision, this case has substantial consequences for the officers

involved. The Third Circuit's decision exposes these officers to the prospect of lengthy discovery and a drawn out trial, to potentially bankrupting liability, and to irreparable harm to their reputations and careers. For what? For promptly taking an arrestee who did not appear to be in medical distress for medical evaluation at a prison rather than immediately to a hospital. The officers reasonably thought that Thomas's medical needs could be fully addressed by medical staff at the prison. Certainly, the officers were not "plainly incompetent" and did not "knowingly violate" clearly established law when they made that decision.

Correcting the Third Circuit's error and reiterating the narrow scope of *Hope*'s obviousness exception will also "have immediate importance far beyond the particular facts and parties involved" in this case. *Boag v. MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (quoting Address of Chief Justice Vinson before the American Bar Association, Sept. 7, 1949 (quoted in R. Stern & E. Gressman, Supreme Court Practice 258 (5th ed. 1978))). In the past ten years, this Court has summarily reversed courts of appeals in qualified immunity cases at least ten times. *See Tolan v. Cotton*, 572 U.S. 650 (2014); *Carroll v. Carman*, 574 U.S. 13 (2014); *Taylor v. Barkes*, 575 U.S. 822 (2015); *Mullenix v. Luna*, 577 U.S. 7 (2015); *White v. Pauly*, 580 U.S. 73 (2017); *Kisela*, 584 U.S. 100; *City of Escondido v. Emmons*, 586 U.S. 38 (2019); *Taylor*, 592 U.S. 7; *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021); *City of Tahlequah v. Bond*, 595 U.S. 9 (2021). These cases provide lower courts with important guideposts in qualified immunity cases and are regularly cited in the lower courts. More than 6,000 opinions of the lower courts have cited to this Court's explanation of how the summary judgment standard is applied to claims of qualified immunity. *Tolan*, 572 U.S. 650. More than 3,500 opinions

have cited to this Court's summary reversal in *White v. Pauly*, explaining what it means for law to be "clearly established." 580 U.S. at 78-81. And over 4,700 opinions have cited to this Court's admonishing of the Fifth Circuit for defining a "clearly established law at a high level of generality." *Mullenix*, 577 U.S. at 16.

The Court should use this case to provide another such guidepost. This Court should make clear that *Hope*'s obviousness exception is a narrow one and that the only thing obvious about this case is that the Third Circuit's judgment must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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