No. 23-1204

IN THE

Supreme Court of the United States

DANIEL KINSINGER,

Petitioner,

v.

SHERELLE THOMAS, ADMINISTRATOR OF THE ESTATE OF TERELLE THOMAS, *et al.*,

Respondents.

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

BRIEF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

In this case, a county probation officer was denied qualified immunity in a lawsuit alleging that he and city police officers deprived the decedent of his life without due process of law because, after the decedent had been taken into custody, the officers, having reason to believe that the decedent had ingested cocaine, transported the decedent to a detention facility, rather than a hospital, although the officers informed the prison medical staff that they believed the decedent had ingested cocaine. Although the prison's medical staff cleared the decedent to remain at the detention facility, he later died of a fentanyl and cocaine overdose. The question amicus will address, fairly presented within the questions presented in the petition for certiorari, is:

Whether a law-enforcement official should be denied qualified immunity and subjected to damages liability absent a breach of a rule of constitutional law that has been articulated by binding precedent with sufficient specificity that law enforcement agencies and their employees should be expected to incorporate it into the training and supervision of officers, at least absent conduct so outrageous that it shocks the conscience.

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INTEREST OF THE AMICUS CURIAE

The National Association of Police Organizations (NAPO) is a coalition of police units and associations from across the United States. It was organized for the purpose of advancing the interests of America's law enforcement officers. Founded in 1978, NAPO is the strongest unified voice supporting law enforcement in the country. NAPO represents over 1,000 police units and associations, over 241,000 sworn law enforcement officers, and more than 100,000 citizens who share common dedication to fair and effective law enforcement. NAPO often appears as amicus curiae in cases of special importance.

Amicus has a strong interest in this case because of its members' exposure to unwarranted litigation under 42 U.S.C. § 1983.[1]

STATEMENT OF THE CASE

On December 14, 2019, Harrisburg Police Officer Daril Foose, working with the petitioner, Dauphin County Probation Officer Dan Kinsinger, stopped a vehicle in which Terrelle Thomas ("Thomas") was the back seat passenger, and Officer Foose observed that Thomas

1. Pursuant to this Court's Rule 37.6, counsel for amici curiae certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus, its members, or its counsel made a monetary contribution to its preparation or submission. Pursuant to this Court's Rule 37.2, counsel of record received timely notice of the intent to file this brief on May 24, 2024, more than 10 days before the due date.

"spoke to her as if he had 'cotton mouth' and had a large amount of an unknown item inside his mouth." Pet. App. 4a. Officer Foose also observed "strands in his mouth that were almost like gum and paste," that his lips were "pasty white," and that his "face was covered with a white powdery substance," and therefore concluded that Thomas had "ingested a large amount of cocaine." *Id.* Although Thomas stated that "the only drugs on his person was a small amount of marijuana and that his lips were white because he had consumed a candy cigarette," Officer Foose disbelieved him, since she had "observed cocaine rocks fall out of . . . Thomas's shirt . . . and she failed to find any candy cigarettes." Pet. App. 4a-5a (ellipses in original).

Additional police officers shortly arrived on the scene, and Officers Foose and Kinsinger informed them that they believed that Thomas had ingested cocaine. Pet. App. 5a. The officers decided that Thomas should be taken to Dauphin County Booking Center at the Dauphin County Prison for detention and processing. *Id.* At this facility, Dauphin County provides medical care to detainees through a contractor, PrimeCare Medical Inc., although the facility does not have hospital features such as X-ray or CT machines, and transfers individuals to a nearby hospital when such facilities are necessary for testing and treatment. Pet. App. 5a-6a.

Officer Brian Carriere arrested Thomas and transported him to Dauphin County Booking Center. Pet. App. 6a. Upon arrival, Officer Carriere informed prison officials and medical staff there that Thomas "may have swallowed crack cocaine." *Id*. The prison officials and PrimeCare staff noted that Thomas had white powder covering his lips, and then placed Thomas in a cell without any medical care or observation. *Id*.

Less than two hours after Thomas's arrest, surveillance video showed Thomas falling, hitting his head, and suffering cardiac arrest. Prison officials then transported Thomas to a hospital, where he died three days later of "cocaine and fentanyl toxicity." Pet. App. 6a.

Respondent Sherelle Thomas, the administrator of Thomas's estate, brought suit alleging, among other things, that the officers deprived Thomas of his life without due process of law by failing to provide Thomas with medical care. Pet. App. 7a. The district court denied the officers qualified immunity on the ground that they violated Thomas's clearly established rights. Pet. App. 43a-47a.

On the officers' interlocutory appeal, a divided panel of the Third Circuit affirmed the denial of qualified immunity on the failure-to-provide-medical-care claim. The panel's majority concluded that "[b]ecause there are sufficient allegations here from which to find deliberate indifference, as well as a serious medical need, Sherelle Thomas has plausibly alleged a violation of the right to medical care." Pet. App. 13a. Although the panel's majority acknowledged, "[t]here has not yet, however, been a recognition by this Court of the right to medical care after the ingestion of drugs," Pet. App. 14a, the majority nevertheless denied the officers qualified immunity:

> We may rely on general principles to find that the facts here present a violation that is "so obvious" "that every objectively reasonable government official facing the circumstances would know that the [Officers'] conduct . . . violate[d] federal law when [they] acted." In

> such a case, "general standards can 'clearly establish' the answer, even without a body of relevant case law." In other words, "officials can still be on notice that their conduct violates established law even in novel factual circumstances."

Pet. App. 16a (footnotes omitted) (quoting *Mack v. Yost*, 63 F.4th 211, 232 (3d Cir. 2023); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); and *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

Judge Phipps dissented, observing that "the Majority Opinion offers 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 (footnote omitted). While acknowledging that under extraordinary circumstances, qualified immunity can be denied even absent a breach of a rule laid down by a binding precedent, Judge Phipps reasoned that "because the allegations do not identify obvious cruelty, the officers should receive qualified immunity." Pet. App. 22a.[2]

SUMMARY OF THE ARGUMENT

The doctrine of qualified immunity bars damages awards against public officials unless the defendant "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known."

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2. The Harrisburg police officers that were named as defendants separately petitioned for certiorari on April 8, 2024. That petition is pending as No. 23-1108.

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (internal quotation marks omitted) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

There is considerable methodological disagreement in the lower courts about how to determine whether a right has become sufficiently established to deprive a defendant of qualified immunity. In this case, for example, the court of appeals acknowledged that no precedent had settled whether a law enforcement officer who believes a suspect in his custody has ingested narcotics must immediately transport to a hospital rather than a detention facility, even when, as here, the suspect exhibits no obvious medical distress, and the detention facility provides medical personnel responsible for evaluating the detainee's condition and assessing what care and treatment is required.

In our view, the doctrine of qualified immunity should be applied in light of a realistic assessment of the practicalities faced by law enforcement personnel in the field. Law enforcement personnel should not be expected to parse every precedent potentially governing their conduct, as well as the "general principles," Pet. App. 16a, that animate each area of constitutional law. Instead, officers should be expected to adhere to systems of training and supervision that are attentive to the constitutional constraints on law enforcement, but without need to exercise excessive timidity in order to minimize liability risks.

Accordingly, when constitutional jurisprudence produces concrete rules that can be practicably incorporated into training and supervision, law enforcement personnel

should be held to those rules, and only then denied qualified immunity. When the law is not sufficiently clear that it can be practicably incorporated into police training and supervision, qualified immunity is warranted.

To be sure, in extraordinary cases, qualified immunity should be denied when law enforcement conduct "'shocks the conscience' and violates the 'decencies of civilized conduct.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998) (quoting *Rochin v. California*, 342 U.S. 165, 172-72 (1952)). Nothing like that, however, occurred in this case.

ARGUMENT

The doctrine of qualified immunity offers immunity from liability for damages unless the defendant "violate[s] clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 555 U.S. at 231 (internal quotations omitted) (quoting *Harlow*, 457 U.S. at 818). "To be clearly established, a right must be sufficiently clear that every reasonable official would [have understood] that what he is doing violates that right. In other words, existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (first brackets added) (citations omitted) (internal quotation marks omitted) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

The defense of qualified immunity is justified, this Court has written, because of "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."

Ziglar v. Abbasi, 582 U.S. 120, 150 (2017) (internal quotation marks omitted) (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)).

Indeed, there is ample reason to fear over-deterrence if public officials faced personal liability in the face of unsettled law. Law enforcement officials' compensation is generally not based on their arrests or the local crime rate; accordingly, officers internalize few, if any, of the benefits of effective policing, which are instead externalized to the public at large.[3] If officials were forced to internalize the costs of their activities through damages liability, when they do not internalize its benefits, the likely result would be over-deterrence—effectively incentivizing officers to avoid conduct that exposes them to liability, even if that conduct produces benefits to the public at large. As Professor John Jeffries put it:

> While negative outcomes can readily be translated into adverse legal claims, the benefits

3. For helpful discussions of this point, see, for example, Donald A. Dripps, *The "New" Exclusionary Rule Debate: From "Still Preoccupied with 1985" to "Virtual Deterrence,"* 37 Fordham Urb. L.J. 743, 763-64 (2010) ("Individual officers do not internalize either the benefits or the costs of Fourth Amendment activity. When the police apprehend an offender, they may improve their performance evaluations and gain prestige within the force. They do not, however, pocket what the community is willing to pay to prosecute and punish the offender."); Richard A. Posner, *Excessive Sanctions for Governmental Misconduct in Criminal Cases*, 57 Wash. L. Rev. 635, 640 (1982) ("Police and other law-enforcement personnel are compensated on a salaried rather than piece-rate basis, so that even if they perform their duties with extraordinary zeal and effectiveness they do not receive financial rewards commensurate with their performance.").

> of good performance are hard to capture. These skewed incentives may bias discretionary choices . . . The result is a bias toward inaction, defensiveness, and bureaucratic self-protection.

John C. Jeffries, Jr., *Disaggregating Constitutional Torts*, 110 Yale L.J. 259, 267 (2000).

Accordingly, qualified immunity sensibly offers protection to officers who reasonably believe that their conduct is consistent with extant law. As this Court has written, "the most important special government immunity-producing concern" is "protecting the public from unwarranted timidity on the part of public officials." *Richardson v. McKnight*, 521 U.S. 399, 408 (1997) (citing *Butz v. Economou*, 438 U.S. 478, 506 (1978)).

To be sure, the Civil Rights Act of 1871 provides that "[e]very person" acting under color of state law who "subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Congress, however, has authorized the courts to erect a common law of civil-rights remedies through the Civil Rights Act of 1866, which is currently codified at 42 U.S.C. § 1988 and provides that jurisdiction under section 1983

> shall be exercised and enforced in conformity with the laws of the United States . . . but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and

> changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the disposition of the cause. . . .

42 U.S.C. § 1988(a).

By its terms, section 1988 recognizes that section 1983's text alone does not determine what remedies are appropriate for deprivations of federal rights. Indeed, if section 1983's text were understood to require an award of damages in every case in which a defendant could be found liable under that provision, section 1983 litigation would be utterly transformed; there would be no immunity from damages liability for judges, legislators, witnesses, or public officials, no limitations defenses, and all causes of action would survive the plaintiff's death. Indeed, if the text of section 1983 were not supplemented by section 1988, section 1983 jurisprudence would recognize no defenses of any kind. Section 1983 means that one who has deprived a plaintiff of a constitutional right shall be "liable," but it does not indicate when an award of damages is appropriate. That gap is filled by section 1988.

Section 1988, in turn, authorizes the courts to utilize state law or federal common law, as appropriate, to delineate the circumstances in which damages and other remedies are appropriate under section 1983. Moreover, this Court has concluded that the determination of immunity from damages liability in section 1983 litigation is governed by federal and not state law. *See*, *e.g.*, *Howlett*

v. Rose, 496 U.S. 356, 377-78 (1990) ("To the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law.").[4]

There is, however, disarray in the lower courts when it comes to the methodology for determining whether a right is sufficiently established to justify a denial of qualified immunity. That disarray warrants plenary review, as we explain in Part I below. Moreover, as we explain in Part II, qualified immunity doctrine should be formulated in a manner attentive to the realities that confront police officers in the field, as well as those who train and supervise them. In this fashion, qualified immunity can both protect constitutional rights and minimize the risk that potential liability will over-deter law enforcement.

I. THERE IS METHODOLOGICAL DISARRAY IN THE LOWER COURTS WHEN ASSESSING WHETHER A RIGHT IS CLEARLY ESTABLISHED.

This Court's most comprehensive consideration of the methodology to be employed when assessing whether a plaintiff has claimed a violation of a clearly established right can be found in *Anderson*:

4. For a more elaborate discussion of section 1988 as a statutory basis for a federal common-law defense of qualified immunity, see Lawrence Rosenthal, *Defending Qualified Immunity*, 72 S.C. L. Rev. 547, 560-71 (2020).

> The operation of this standard . . . depends substantially upon the level of generality at which the relevant legal rule is to be identified.. . . . [T]he right the official is alleged to have violated must have been clearly established in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

483 U.S. at 638-39 (internal quotations and citations omitted). There, however, is a degree of imprecision lurking in this formulation. Sometimes, but not always, a binding precedent is required to clearly establish the law.

This duality is reflected in this Court's qualified-immunity jurisprudence. In most of its qualified immunity decisions, the Court has surveyed applicable precedents to determine if an official's conduct violated clearly established law. *See*, *e.g.*, *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam) ("The panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment."); *Mullenix v. Luna*, 577 U.S. 7, 13-14 (2015) (per curiam) ("The relevant inquiry is whether existing precedent placed the conclusion that Mullenix acted unreasonably in these circumstances beyond debate." (internal quotations and citation omitted)); *Al-Kidd*, 563

U.S. at 741 ("At the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional."); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("[A]lthough media ride-alongs of one sort or another had apparently become a common practice, in 1992 there were no judicial opinions holding that this practice became unlawful when it entered a home." (footnote omitted)).

On occasion, however, the Court has denied qualified immunity even absent a precedent on point. In *Hope v. Pelzer*, 536 U.S. 730 (2002), for example, the Court, after explaining that while "earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding," *id.* at 741, held that tying a shirtless prisoner to a hitching post in the Alabama sun for seven hours without bathroom breaks, and with only one or two offers of water, amounted to a violation of the Eighth Amendment's prohibition on cruel and unusual punishment, for which the defendant prison guard was not entitled to qualified immunity, writing that despite the absence of precedent squarely on point, the prisoner's right to be free from this type of abuse was clear in light the "obvious cruelty inherent in th[e] practice." *Id.* at 745.

Similarly, in *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam), Taylor was confined for six days in two cells, one "covered, nearly floor to ceiling in a massive amount of feces," and another "frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes," where "he eventually (and involuntarily) relieved

himself," and "[b]ecause the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage." *Id.* at 7 (internal quotations omitted). The Court concluded that given "the particularly egregious facts of this case, any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." *Id.* at 9.

The methodological imprecision over the extent to which a binding precedent is required to clearly establish applicable law is understandable. If qualified immunity were available as long as there were no binding precedent on point, the most egregious fact patterns would often produce immunity, since these are the types of cases least likely to be litigated, producing a binding precedent, rather than resulting in a prompt settlement of an indefensible case.

While it is difficult to confine qualified immunity to cases in which a binding precedent is precisely on point, absent a binding precedent, it will often be equally difficult to determine when, "in the light of pre-existing law the unlawfulness [is] apparent." *Anderson*, 483 U.S. at 639.

However understandable, this methodological imprecision has produced considerable disarray in the lower courts. As the petitioner points out, in conflict with the holding below, other circuits have held that it is not clearly established that a law enforcement official is required to transport a prisoner directly to a hospital when there is reason to believe that the prisoner has ingested potentially dangerous narcotics. *See* Pet. 22-23. But, the case for plenary review here extends beyond a disagreement in the lower courts concerning any particular fact pattern.

In practice, the Court's admonition in *Anderson* that qualified immunity should be denied whenever "in the light of pre-existing law the unlawfulness [is] apparent," 483 U.S. at 639, has proven difficult to apply. A recent comprehensive review of the law in four circuits not only demonstrated how frequently this methodological issue arises, but also found inconsistent approaches in the four circuits reviewed:

> [L]ower courts—at least in the reviewed circuits—can be placed into two categories with regard to their approach to the clearly established analysis: circuits that default to a search for reasonably similar precedent and treat the possibility of obvious violations as something of an outlier . . . and circuits that have developed multitrack frameworks for identifying clearly established rights, which consider both the "obvious" possibility and the potential for precedent—often precedent involving fairly similar circumstances to the case at bar—to clearly establish the right.

Benjamin S. Levine, "*Obvious Injustice" and the Legacy of* Hope *v.* Pelzer, 68 U.C.L.A. L. Rev. 842, 899 (2021).[5]

Professor Jennifer Laurin has elaborated on the variety of related methodological disagreements in the lower courts for determining whether a right is clearly established:

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5. For the author's discussion of his methodology and the large number of cases in which this question of how to determine whether the law was clearly established in the absence of a binding precedent arose, see *id.* at 872-75.

> [A]lthough the Supreme Court has been assiduous in its attention to how generally or specifically the contours of a right are described for clearly-established-law analysis, it has devoted almost no attention to other details of how the analysis should be conducted—and thereby allowed substantial variation to develop among the circuits. One such detail is the question of what legal sources "count" for purposes of deciding whether a right is clearly established. Lower courts have differed, for example, in their answer to the question of whether the decisions of state courts or federal district courts factor in the clearly established analysis. Also a matter of debate among the circuits is whether non-legal sources, such as departmental training or policies, can properly be consulted as a source of what makes an official's legal obligations "clear." So too are lower courts divided over whether a circuit split on a legal question can *un*clarify otherwise clear in-circuit law on the matter. These open questions have tremendous significance for qualified immunity's effects.

Jennifer E. Laurin, *Reading* Taylor*'s Tea Leaves: The Future of Qualified Immunity*, 17 Duke J. Const. L. & Pub. Pol'y 241, 274-75 (2022) (footnotes omitted).

This case, in which the court of appeals acknowledged that there was no binding precedent on point, accordingly, provides an ideal vehicle for the Court to clarify the methodology for determining when a right is sufficiently established to deny qualified immunity absent a binding precedent on point.

Indeed, the panel's majority offered only the vaguest of formulations for when qualified immunity should be denied absent a precedent on point, invoking "general principles" and "general standards," that can "clearly establish the answer, even without a body of relevant case law." Pet. App. 16a (footnotes and internal quotations omitted). Surely greater methodological clarity in the law of qualified immunity is warranted.

II. QUALIFIED IMMUNITY DOCTRINE SHOULD BE FORMULATED SO THAT IT CAN BE READILY APPLIED TO LAW-ENFORCEMENT TRAINING AND SUPERVISION.

If qualified immunity doctrine is to achieve its intended purpose of protecting constitutional rights without producing overly cautious officers inhibited in the performance of their duties by the threat of liability, the doctrine should be applied in a manner attentive to the realities facing law enforcement.

1. A legalistic focus on what should be clear from a review of applicable or related precedent is unrealistic; officers are not lawyers expected to scour the precedents on an ongoing basis. Rather than requiring each officer to effectively act as his own legal advisor, the sensible regime is one in which public employers develop policies that comport with constitutional norms—policies on which their employees can then rely.

Indeed, this Court has, at least occasionally, acknowledged that qualified immunity is appropriate when public employees reasonably rely on the policies of their employers. *See*, *e.g.*, *Wilson*, 526 U.S. at 617

("[I]mportant to our conclusion [to grant qualified immunity] was the reliance by the United States marshals in this case on a Marshals Service ride-along policy. . . . [T]he state of the law as to third parties accompanying police on home entries was at best undeveloped, and it was not unreasonable for law enforcement officers to look and rely on their formal ride-along policies." (footnote omitted) (citation omitted)).

2. Law enforcement agencies, in turn, have ample incentive to train officers to avoid liability-inducing conduct. Because the threat of liability can inhibit officers in the vigorous performance of their duties, law enforcement agencies have an incentive to train those officers to avoid such behavior. Moreover, when governmental policies governing the training and supervision of officers does not comport with constitutional norms, section 1983 permits a municipal employer to be held liable. *See City of Canton v. Harris*, 489 U.S. 378 (1989) (discussing when a city's failure to adequately train officers to provide medical care can result in municipal liability).

Beyond that, law enforcement agencies typically indemnify officers for their legal costs arising from conduct undertaken within the scope of employment. *See*, *e.g.*, Aaron L. Nielson & Christopher J. Walker, *Qualified Immunity and Federalism*, 109 Geo. L.J. 229, 269-72 (2020) (surveying state and local indemnification laws); Teresa E. Ravenell & Armando Brigandi, *The Blurred Blue Line: Municipal Liability, Police Indemnification, and Financial Accountability in Section 1983 Litigation*, 62 Vill. L. Rev. 839, 865-67 (2017) (describing contractual indemnification obligations); Stephen Rushin, *Police Union Contracts*, 66 Duke L.J. 1191, 1222 (2017) (same);

Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 912 (2014) ("[L]aw enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period.").

By shifting the financial burden of liability to the employer, the obligation to indemnify provides law enforcement agencies with a potent incentive to train and supervise employees to comply with constitutional commands. To the extent that public resources must be devoted to the defense of litigation and the payment of judgments, this will reduce the resources available to fund essential governmental services, often producing hardship for third parties not responsible for police misconduct, but who depend on the ability of state and local governments to adequately fund public services.[6]

At the same time, law enforcement agencies also have powerful incentives not to over-deter officers, thereby compromising the efficacy of law-enforcement services. After all, law enforcement agencies, funded by and accountable to the taxpayers and voters, have ample incentive to provide effective service to the public.

Accordingly, indemnification complements qualified immunity by incentivizing law enforcement agencies to train officers to comply with clearly established law, but not to exercise excessive timidity in the performance of their duties.

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6. For a more extensive discussion of this point, see Rosenthal, *supra* note 4, at 574-85.

3. Training and supervision can only be effective, however, when constitutional law contains sufficiently clear and administrable rules that can be practicably incorporated in the manner by which officers are trained and supervised. When applicable law is stated at a relatively high level of generality, it may be difficult to expect those who train and supervise public employees to provide the kind of concrete guidance that facilitates effective training and supervision. It asks too much to expect law-enforcement agencies and their personnel to develop proficiency in applying what the court of appeals called "general principles" and "general standards," Pet. App. 16a (footnotes and internal quotations omitted), rather than more rule-like commands.

4. Accordingly, the critical inquiry should be whether a public employer could have been reasonably expected to impose a system of training, supervision, and discipline sufficient to direct its employees to avoid a particular liability risk without undue threat of over-deterrence. If not, the imposition of liability is unwarranted, whether the financial burden of liability is imposed on individual officers or, by virtue of indemnification, is shifted to their employers.

Qualified immunity doctrine, in other words, properly functions by permitting damages awards when, but only when, in light of constitutional jurisprudence extant at the time of the events giving rise to section 1983 litigation, public employers should have been expected to train and supervise their employees to avoid the conduct alleged to have violated the constitutional rights of the section 1983 plaintiff.

This inquiry, moreover, should be attentive to the practical realities facing law enforcement. As Professor Joanna Schwartz observed in her study of the manner in which California law-enforcement agencies train officers in the use of force: "There could never be sufficient time to train officers about all the court cases that might clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 672-73 (2021).

To be sure, as the court of appeals observed, Harrisburg Police Department policy provided that officers should take arrestees to a hospital if the arrestees have "consumed illegal narcotics in a way that could jeopardize their health and welfare." Pet. App. 6a. This policy, however, requires officers to make a judgment about the extent of the threat to an arrestee's health and welfare, rather than automatically transport all detainees who have consumed narcotics to a hospital. Its application to Thomas is therefore less than crystal clear. Moreover, the policy had no application to the petitioner in this case, Officer Kinsinger, who was employed by Dauphin County, not Harrisburg.

In any event, this Court has rejected the view that breach of an internal policy rather than a rule of federal constitutional or statutory law can deprive an official of qualified immunity on a constitutional claim: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer*, 468 U.S. 183, 194 (1984). A contrary rule would provide a disincentive to promulgate prophylactic policies designed to provide greater protection than the Constitution might otherwise require.

As we acknowledge above, there are egregious cases in which qualified immunity should be denied even absent a binding precedent that gives rise to an administrable rule of constitutional law. Due process jurisprudence has long recognized a minimum standard of decency to which law enforcement personnel are constitutionally held; due process prohibits deprivations of life, liberty, or property by means that "'shock[ ] the conscience' and violate[ ] the 'decencies of civilized conduct.'" *Lewis*, 523 U.S. at 846 (quoting *Rochin*, 342 U.S. 171-72). Officers require no specific training in the fundamental decencies of civilized behavior. Nothing conscience-shocking, however, is alleged in this case. Nor did the court of appeals claim that the officers' conduct "conscience-shocking, in a constitutional sense." *Collins v. City of Harker Heights*, 503 U.S. 115, 128 (1992).

The officers transported Thomas to a facility in which medical personnel were available to assess the medical needs of newly-arrived detainees. The officers informed the prison and medical personnel at the detention facility that they believed Thomas had ingested cocaine, and both the prison officials and the prison's medical contractor's personnel observed white powder on Thomas's lips.

The court of appeals, for its part, did not claim that the decision to take Thomas to a detention facility rather than a hospital produced any material delay that prevented Thomas from obtaining necessary care in a timely fashion, had the prison's personnel concluded that transfer to a hospital was warranted. Indeed, no such allegation of any material delay attributable to the decision to take Thomas to a detention facility rather than a hospital appears in the complaint. *See* Pet. App. 81a-85a.

This is not a case in which arresting officers abandoned a likely overdose victim in their custody to his fate. Instead, they left Thomas in the hands of prison and medical personnel they had reason to believe were qualified to assess Thomas's medical needs.

Nothing in this case reflects the kind of abusive, conscience-shocking techniques that every officer should know are forbidden even absent appropriate training and supervision.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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