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 INTERNATIONAL UNION OF POLICE ASSOCIATIONS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GEOFFREY BICHLER
Counsel of Record
MEGAN OLIVA
541 South Orlando Avenue,
Suite 310
Maitland, Florida 32751
(407) 599-3777
geoff@bichlerlaw.com

Counsel for Amicus Curiae

116851

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Cited Authorities

Cited Authorities

Page

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

The International Union of Police Associations ("IUPA") is a union that is comprised of American law enforcement personnel. IUPA was created to improve the lives of law enforcement officers and support personnel through legislative initiatives, political action, fundraisers, and various campaigns to protect wages, benefits, and work conditions. Over the last several decades, IUPA has become one of the most influential voices for law enforcement, working tirelessly to ensure that law enforcement officers maintain their rights and receive benefits that are deserving of the job.

IUPA has a strong interest in this case because the Third Circuit's opinion eliminates fundamental qualified immunity protections upon which IUPA's members, and all law enforcement officers across the United States, rely. Law enforcement officers, who are tasked with protecting our communities, depend on the courts, in turn, to protect them from the burdens of personal-liability lawsuits. Law enforcement officers further rely on the courts to provide guidance as to what type of conduct violates the Constitution. The denial of qualified immunity in this case – where officers took a suspected drug user to a detention center with medical staff rather than a hospital – is troubling. There was no legal precedent upon which the officers could have relied to guide their actions, and it

1. No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members and its counsel, made any monetary contribution toward the preparation or submission of this brief. All parties received notice of *amicus*'s intent to file more than ten days before this filing.

cannot be said that the officers' conduct was so egregious as to be an obvious constitutional violation.

In practice, the Third Circuit's approach to qualified immunity will have law enforcement officers hesitating, second-guessing, and proceeding uncertainly in scenarios where they are forced to make split-second decisions with limited information. The increased uncertainty and threat of personal financial ruin will have a chilling effect, causing law enforcement officers to be fearful to act, endangering both themselves and the public they have sworn to protect. This undercuts the very purpose of qualified immunity. IUPA has a strong interest in maintaining the integrity of the qualified immunity doctrine and thus writes to urge the Court to grant certiorari.

SUMMARY OF THE ARGUMENT

The doctrine of qualified immunity is essential to law enforcement officers being able to perform their duties without fear of liability. While qualified immunity gives officers "breathing room to make reasonable but mistaken judgments," *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011), it also ensures that those officers that are "plainly incompetent or those who knowingly violate the law" are held accountable. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Officers suffer both professionally and personally when they are sued for actions performed in the line of duty. Protracted litigation interferes with their ability to perform their job duties. The threat of financial ruin puts an enormous strain on their mental and emotional wellbeing. Their families suffer the consequences as well.

Worse still, when officers are threatened with personal liability for performing their official duties, "they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988). Put simply, when officers become fearful in the performance of their duties, they put themselves and the people they have sworn to protect in danger.

Over forty years ago, this Court articulated the standard for determining when government officials are entitled to qualified immunity for the performance of discretionary job functions. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The test formulated by this Court asks whether the official's conduct violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." *City of Tahlequah, Oklahoma v. Bond*, 595 U.S. 9, 12 (2021). If it did not, the official is protected from suit. *Ibid.*

An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014). While this Court does not require a case directly on point, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). The Third Circuit, in denying Officer Kinsinger the protections of qualified immunity, acknowledged "the absence of closely analogous precedent," upon which they could rely. Instead, the Third Circuit utilized an extraordinary-circumstances exception

to conclude that Officer Kinsinger's failure to take the arrestee to a hospital was an obvious constitutional violation undeserving of qualified immunity. In doing so, the Third Circuit contravenes decades of emphatic directives from this Court.

Officers are presented with new factual scenarios and unique situations each and every day they present to work. Unless there is existing precedent that squarely addresses the facts or situation before the officer, the officer must be afforded the opportunity to act swiftly, reasonably, and decisively without the fear of civil liability. Officer Kinsinger could not have been on notice of a possible constitutional violation given the absence of on-point precedent. Further, his conduct was not so egregious as to constitute an obvious violation of the arrestee's constitutional rights. There was simply no justification for denying qualified immunity in this circumstance.

ARGUMENT

THE DEGREDATION OF QUALIFIED IMMUNITY PROTECTIONS WILL HAVE SERIOUS PUBLIC POLICY IMPLICATIONS

The qualified immunity doctrine "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). In identifying qualified immunity as the best accommodation of these competing values, this Court has relied on the assumption that "[i]nsubstantial lawsuits [will] be quickly

terminated." *Butz v. Economou*, 438 U.S. 478, 507 (1978). When qualified immunity is erroneously denied, society as a whole pays the price. "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982).

This Court has acknowledged that the threat of personal liability may cause government officials "to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219, 223 (1988). This is especially true for law enforcement officers. The need to make split-second, life-changing decisions is an ever-present, constant reality for law enforcement officers. The fear of personal and financial ruin can cause law enforcement officers to hesitate and act tentatively in times of danger or uncertainty. Absent strong qualified immunity protections, officers will be constantly fearful that any misstep will ruin not only their lives, but the lives of their families as well. This places the safety of both officers and the public at serious risk. When it comes to combating crime and protecting the public, the importance of swift and decisive action cannot be understated. Subjecting law enforcement officers to personal liability for actions taken in the line of duty, "may detract from the rule of law instead of contributing to it." *Id.* In extreme cases, hesitating for even a moment could be deadly.

The Third Circuit's decision in this case could have far-reaching consequences if permitted to stand. Law

enforcement officers are constantly arresting individuals who have consumed drugs or who are suspected of consuming drugs. Although this Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity," *D.C. v. Wesby*, 583 U.S. 48, 66 n.8 (2018), when law enforcement officers across the nation become aware of the Third Circuit's finding that Officer Kinsinger's failure to bring the arrestee to the hospital was a constitutional violation, they will undoubtedly begin hesitating and second guessing how they deal with detained suspected drug users. Even in circumstances where suspected drug users deny having consumed drugs and display no signs of acute distress – as was the case here – officers, fearful of a personal liability lawsuit, will have no choice but to take these individuals straight to a hospital. This will unnecessarily divert valuable time and resources from where the time and resources are truly needed.

Perhaps obviously, the circumstances or situations that lead to the arrest of a suspected drug user can oftentimes be fraught with danger. In such circumstances, officers must act "in the midst and haste of a criminal investigation," *United States v. Ventresca*, 380 U.S. 102, 108 (1965), and make judgment calls over which reasonable officers could differ. Here, Officer Kinsinger exercised reasonable judgment by taking the arrestee to the detention center *with medical staff on hand* rather than the hospital. As this Court stated in *Ryder v. United States*, 515 U.S. 177 (1995), qualified immunity "specially protects public officials from damages liability for judgment calls made in a legally uncertain environment …." 515 U.S. at 178. The Third Circuit, with the benefit of 20/20 hindsight, condemns Officer Kinsinger's "on-the-

spot [decision] in a situation far removed from the serenity and unhurried decision making of an appellate judge's chambers," *Wesby v. D.C.*, 816 F.3d 96, 109 (D.C. Cir. 2016) (Kavanaugh, J., dissenting). The Third Circuit's denial of qualified immunity, if permitted to stand, will prompt hesitation in circumstances where swift and decisive action is necessary for the safety and wellbeing of our officers and the communities they protect.

The consequences of the degradation of qualified immunity protections extend beyond safety concerns. Personal liability lawsuits also deter citizens from applying to or accepting law enforcement positions. Qualified immunity is essential to "ensure that talented candidates [are] not deterred by the threat of damages suits from entering public service." *Wyatt v. Cole*, 504 U.S. 158, 167 (1992). As this Court has acknowledged, the fear of suit can "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950). If the courts continue to erode the doctrine of qualified immunity, current law enforcement officers may conclude that continued employment in this profession is no longer worth the risk. Robust qualified immunity is essential for the recruitment and retention of well-qualified law enforcement officers.

In sum, qualified immunity serves essential public policies. When courts like the Third Circuit erode the qualified immunity protections, society suffers the consequences. This Court regularly stands guard against such encroachments; over the past decade (and beyond), this Court has repeatedly corrected lower courts that have

wrongly found law enforcement officers personally liable for damages. *See City of Tahlequah v. Bond*, 595 U.S. 9 (2021); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021); *Taylor v. Riojas*, 592 U.S. 7 (2020); *City of Escondido v. Emmons*, 586 U.S. 38 (2019); *Kisela v. Hughes*, 584 U.S. 100 (2018); *District of Columbia v. Wesby*, 583 U.S. 48 (2018); *Hernandez v. Mesa*, 582 U.S. 548 (2017); *Ziglar v. Abbasi*, 582 U.S. 120 (2017); *White v. Pauly*, 580 U.S. 73 (2017); *Mullenix v. Luna*, 577 U.S. 7 (2015); *Taylor v. Barkes*, 575 U.S. 822 (2015); *San Francisco v. Sheehan*, 575 U.S. 600 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014); *Lane v. Franks*, 573 U.S. 228 (2014); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); and *Wood v. Moss*, 572 U.S. 744 (2014). The Third Circuit contravenes these emphatic directives by denying Officer Kinsinger the protections of qualified immunity.

THE ALLEGED CONSTITUTIONAL VIOLATION WAS NOT "SO OBVIOUS" AS TO BE CLEARLY ESTABLISHED IN THE ABSENCE OF CONTROLLING PRECEDENT OR A ROBUST CONSENSUS OF PERSUASIVE AUTHORITY

The circumstances in which an officer can be denied qualified immunity are extremely limited. An officer loses the protections of qualified immunity only when they have "violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014) (internal quotation marks omitted). A right is clearly established if it has "a sufficiently clear foundation in then-existing precedent." *D.C. v. Wesby*, 583 U.S. 48, 63 (2018). This standard "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances

before him." *Ibid.* Although a case directly on point is not required, existing precedent must have placed the statutory or constitutional question "beyond debate." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986). It is rare that a case is so "obvious" that there need not be a materially similar case. *Wesby*, 583 U.S. at 64.

Here, Officer Kinsinger transported an arrestee who appeared to have ingested cocaine to a detention center with medical staff on hand rather than a hospital. The Third Circuit concluded that every objectively reasonable government official would have known that failing to take the arrestee to the hospital violated the arrestee's constitutional rights. The constitutional right allegedly violated was the right to medical care while in custody. This Court has found that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney v. Winnebago Cnty. Dept. of Soc. Services*, 489 U.S. 189, 199-200 (1989). In order to state a cognizable claim, a person in custody "must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). It is this indifference that can offend "evolving standards of decency" in violation of the Eighth Amendment. *Ibid.* This Court has held that an official will not be subject to damages liability for denying an inmate humane conditions of confinement "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S.

825, 837 (1994). Significantly, an inadvertent failure to provide adequate medical care alone does not constitute a constitutional violation. *Estelle,* 429 U.S. at 105-106.

This Court has explained time and time again that clearly established law must be "particularized" to the facts of the case. *White v. Pauly*, 580 U.S. 73, 79 (2017) (*citing Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Typically, the fact that a case is unusual is "an important indication ... that [the officer's] conduct did not violate a 'clearly established' right." *Pauly*, 580 U.S. 73, 80 (2017). Here, the Third Circuit readily acknowledged the lack of closely analogous precedent, but found that Officer Kinsinger's failure to take the arrestee to the hospital was "so obvious" and presented such an extreme circumstance that the general constitutional rule (the right to medical care while in custody) applied with obvious clarity. The reasoning of the Third Circuit stands in stark contrast to this Court's qualified immunity analysis in cases where "obvious" constitutional violations have occurred.

For example, in *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court found that the Eleventh Circuit erred in granting qualified immunity where an obvious Eighth Amendment violation had occurred on the facts alleged. In *Hope*, it was alleged that prison guards handcuffed an inmate to a hitching post, knowingly subjecting the inmate "to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs and the restricted position of confinement for a 7–hour period, to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." 536 U.S. at 738. Clearly, an egregious set of facts.

More recently, in *Taylor v. Riojas*, 592 U.S. 7 (2020), this Court found that the Fifth Circuit erred in granting officers qualified immunity where the following facts were alleged:

> Petitioner Trent Taylor is an inmate in the custody of the Texas Department of Criminal Justice. Taylor alleges that, for six full days in September 2013, correctional officers confined him in a pair of shockingly unsanitary cells. The first cell was covered, nearly floor to ceiling, in " 'massive amounts' of feces": all over the floor, the ceiling, the window, the walls, and even " 'packed inside the water faucet.' " *Taylor v. Stevens*, 946 F.3d 211, 218 (CA5 2019). Fearing that his food and water would be contaminated, Taylor did not eat or drink for nearly four days. Correctional officers then moved Taylor to a second, frigidly cold cell, which was equipped with only a clogged drain in the floor to dispose of bodily wastes. Taylor held his bladder for over 24 hours, but he eventually (and involuntarily) relieved himself, causing the drain to overflow and raw sewage to spill across the floor. Because the cell lacked a bunk, and because Taylor was confined without clothing, he was left to sleep naked in sewage.

Id. at 7-8.

The officers' conduct in this case does not come close to the egregiousness demonstrated in *Hope* and *Taylor*. It simply cannot be said that taking a suspected drug user to a detention facility with medical personnel, rather

than a hospital, is akin to handcuffing a prisoner to a post in the hot sun for hours on end or locking a prisoner in a room completely covered in feces. This is not a case where it is obvious that there was a violation of the Eighth Amendment. How can it be said that Officer Kinsinger violated the arrestee's right to medical care when Officer Kinsinger took the arrestee directly to a location where the arrestee was evaluated by medical staff? Even the medical staff did not realize the urgency of the situation. It is unreasonable to expect Officer Kinsinger, who is not a medical professional, to have understood the extent of care the arrestee required.

The Third Circuit, with the benefit of 20/20 hindsight and advanced legal degrees, concluded that Officer Kinsinger's actions were an obvious constitutional violation. Officer Kinsinger, after exercising his reasonable judgment while on the job, now faces financial ruin if the Third Circuit's denial of qualified immunity is permitted to stand. Clearly established federal law does not require law enforcement officers to transport a detained suspect who appears to have ingested drugs to a hospital. Officer Kinsinger's actions do not rise to the level of obvious cruelty that was demonstrated in *Hope* and *Taylor*. The Third Circuit's holding that Officer Kinsinger could be subjected to civil liability for failing to take the arrestee to the hospital is a significant error that merits review and correction.

CONCLUSION

IUPA respectfully requests this Court grant Officer Kinsinger's Petition for Writ of Certiorari to correct the Third Circuit's mistaken qualified immunity analysis.

Respectfully submitted,

GEOFFREY BICHLER
Counsel of Record
MEGAN OLIVA
541 South Orlando Avenue,
Suite 310
Maitland, Florida 32751
(407) 599-3777
geoff@bichlerlaw.com

Counsel for Amicus Curiae