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 FOR THE PENNSYLVANIA LODGE OF THE FRATERNAL ORDER OF POLICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE* [1]

The Pennsylvania Lodge of the Fraternal Order of Police ("PAFOP") was founded in 1934 and currently represents approximately 40,000 law enforcement officers throughout the Commonwealth of Pennsylvania. PAFOP represents law enforcement officers from agencies of all shapes and sizes. PAFOP strives to advocate for its members to advance policies that enhance the safety of law enforcement officers and the general public. PAFOP also works tirelessly in its efforts to provide member support, educational programs, and public service throughout the Commonwealth of Pennsylvania.

Consistent with its mission, PAFOP has an interest in cases, like this one, that present issues of systematic importance for the individual livelihoods of law enforcement officers. This appeal involves important questions about the scope of 42 U.S.C. § 1983 and qualified immunity that will continue to harm law enforcement officers until corrected by this Court.

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[1] No persons or entities other than *amicus*, its members, or its counsel authored this brief, in whole or in part, or made a monetary contribution to this brief's preparation or submission. Under Supreme Court Rule 37.2, *amicus* provided timely notice to the parties of its intent to file its brief, and no party has objected.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Establishing a state actor's deliberate indifference under the Fourteenth Amendment is a high bar. Higher still is finding that a state actor acted with obvious cruelty. Yet, the Third Circuit found both for a probation officer that did not adhere to a police department's "best practice" of transporting a drug-consuming arrestee to a hospital. More generally, the Third Circuit ruled that *any* law enforcement officer in the circuit acts deliberately indifferent and obviously cruel if the officer does not "take reasonable steps to render medical care" to arrestees after becoming "aware" they had consumed a "sufficiently large" amount of drugs. Pet.App.16a. In so ruling, the Third Circuit neither heeded this Court's high bars for deliberate indifference and obvious cruelty nor examined the established body of drug-ingestion case law.

Among many, the problem with these conclusions is that they ignore the absence of allegations in the complaint showing that Petitioner Dan Kinsinger observed *any* signs that the decedent, Terelle Thomas, was experiencing a significant risk of harm or death. Indeed, the complaint nowhere alleges that Thomas alerted Officer Kinsinger and others that he was experiencing *any* symptoms of a drug overdose. Nor did Thomas request medical help, even though several officers repeatedly asked if he had consumed cocaine and if he needed medical attention. Nor did Thomas ever acknowledge that he had, in fact, ingested a drug. Nor did the Third Circuit seriously

examine the import of the officers' decision to transport Thomas to a booking center *with medical facilities*.

The Third Circuit's conclusions also skirt clear mandates from this Court on how to interpret deliberate indifference and qualified immunity for inadequate-medical-care claims. This Court has stressed that negligence alone cannot serve as the floor for deliberate indifference. *E.g.*, *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976) ("[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'"); *Farmer v. Brennan*, 511 U.S. 825, 838 (1994) ("[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."). And, even though the Third Circuit recognized that no law had previously established its newfound rule, it ignored that "existing law must have placed the constitutionality of the officer's conduct *beyond debate*" and that qualified immunity "protects all but *the plainly incompetent* or those who knowingly violate the law." *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (emphases added) (cleaned up); *see also City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015) ("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."

(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982))). In failing to heed these principles—and despite this Court's holding otherwise—the Third Circuit's new rule "transform[s] every" inadequate-medical-care tort under the Fourteenth Amendment "into a constitutional violation." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1989) (collecting cases).

Indeed, Judge Phipps dissented, echoing these points and more. In particular, he noted that "the Majority Opinion offers no precedent for the proposition that as of [the date of alleged constitutional violation], the Due Process Clause required that officers transport to a hospital a detained suspect who appears to have ingested drugs." Pet.App.19a–20a. That was particularly troubling because, as Judge Phipps rightfully observed, "Thomas exhibited no plain symptoms of distress" and "responded coherently to inquiries by other later-arriving officers." *Id.* at 21a. "And after Thomas arrived at the detention center," urged the dissent, "not even the examining nurse realized the urgency of the situation." *Id.* In fact, the only way the Third Circuit found unconstitutional conduct was by relying on the "best practice" in a Harrisburg Police Department policy—which, as Judge Phipps noted, "does not set a constitutional standard of conduct for the Harrisburg Police Department, much less for every law enforcement agency operating within this Circuit's geographical bounds." *Id.* at 22a.

It is for these many reasons that the Third Circuit's decision is wrong. Accordingly, this Court should grant certiorari to resolve the Third Circuit's grave errors on deliberate indifference and qualified immunity.

1. In finding that Thomas's complaint sufficiently alleged a constitutional violation against Officer Kinsinger, the Third Circuit adopted a concerning view of deliberate indifference for Fourteenth Amendment inadequate-medical-care claims. Under the Third Circuit's rule, so long as law enforcement officers are aware that an arrestee *likely* ingested drugs, they must render medical care—and particularly by transporting the arrestee to the nearest hospital. That approach is deeply flawed for a few reasons.

*First*, the Third Circuit's rule ignores the longstanding deliberate-indifference rules that an arrestee must exhibit a serious medical need and that an officer must "know[] of and disregard[] an excessive risk to [arrestee] health or safety" by being "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and by "draw[ing] the inference." *Farmer*, 511 U.S. at 837. Officer Kinsinger could never have drawn this inference because not all drug ingestions are life-threatening—and thus cannot rise to the level of reckless disregard for a serious medical need. Rather, only when law enforcement officers observe and ignore physical and psychological symptoms of distress can courts hold them liable under § 1983. To be sure, drug *overdoses* often present with visible

life-threatening symptoms. But officers cannot be responsible for transporting myriad suspects to hospitals on suspicion of drug *ingestion* alone.

*Second*, the Third Circuit's prophylactic rule amounts to no more than a negligence standard for deliberate indifference, a standard which this Court has repeatedly warned against. *See Estelle*, 429 U.S. at 105–06; *Wilson v. Seiter*, 501 U.S. 294, 305 (1991) ("Mere negligence would [not] satisfy . . . [the] deliberate indifference standard . . . ." (cleaned up)). At bottom, the Third Circuit charges law enforcement officers with § 1983 liability if they do no more than misdiagnose the amount of drugs a suspect has taken or breach a municipal policy. Deliberate indifference requires more: at a minimum, a conscious disregard of known facts, not judgments rendered erroneous with the benefit of hindsight.

2. Compounding this error, the Third Circuit further denied Officer Kinsinger qualified immunity because it found his conduct to be obviously cruel. This was error for at least three reasons.

*First*, the Third Circuit circumvented any analysis of precedent that would have shown that law enforcement officers do not have a duty to render medical care in drug-ingestion cases. Indeed, the Third Circuit conceded that no law clearly established this duty. But it also ignored entirely an overwhelming body of law that suggests Officer Kinsinger's conduct is neither deliberately indifferent nor obviously cruel. *See, e.g.*, *Spears v.*

*Ruth*, 589 F.3d 249, 254–55 (6th Cir. 2009); *Burnette v. Taylor*, 533 F.3d 1325, 1331–32 (11th Cir. 2008).

*Second*, the Third Circuit misapplied this Court's "obvious cruelty" exception to clearly established law, which applies to extraordinary and egregious facts patterns. The facts here are not extraordinary because, as stated, numerous cases have dealt with strikingly similar fact patterns and granted qualified immunity. Nor are the facts here egregious. Thomas never exhibited symptoms of duress and he refused medical care. Those facts diverge from the ones on which this Court found obvious cruelty: one involving prison guards' intentionally tying an inmate to a hitching post under the hot sun; another involving guards' purposefully placing an inmate in feces-infested cells for six days.

*Finally*, the Third Circuit's qualified-immunity analysis is unworkable. For one, it based its rationale on a Harrisburg Police Department policy—which Officer Kinsinger is not even bound by—thereby elevating municipal policy to a constitutional dimension. As Judge Phipps dissented, "Such an approach inverts the role of the Constitution as the highest law of the land[.]" Pet.App.22a. For another, the Third Circuit's rule now requires law enforcement officers to exercise unqualified on-the-spot medical judgments as to *how much* drugs a suspect may have taken. In other words, instead of investigating drug crimes, officers may now have to focus on taking suspects who have possibly ingested *any* drug (or combination of drugs)

of *any* quantity to nearby hospitals to stave off § 1983 liability.

## ARGUMENT

### I. The Third Circuit's Concerning Contravention of Deliberate-Indifference Precedent

The Third Circuit erred in holding that the officers' decision to take Thomas to a booking center with medical facilities was deliberately indifferent. It incorrectly reasoned that the complaint sufficiently alleged that Officer Kinsinger and others "actually drew the inference of a substantial risk to Thomas's health." Pet.App.12a. That's because, according to the Third Circuit, the complaint alleged that Officer Kinsinger and others knew of the "ill effect" of cocaine ingestion but decided to take Thomas to a booking center that was "ill-equipped to handle emergencies." *Id.* Put simply, the Third Circuit reasoned that, because the officers knew that Thomas had ingested cocaine, they recklessly ignored that Thomas was likely experiencing a medical emergency.

The Third Circuit misapplied the standard for deliberate indifference. That two-prong standard first requires that the officer's conduct result in a denial of humane conditions of confinement—here, a serious medical need. *See Farmer*, 511 U.S. at 834; *Rouse v. Plantier*, 182 F.3d 192, 197 (3d Cir. 1999) (Alito, J.) (quoting *Estelle*, 429 U.S. at 106). Second, an officer must "know[] of and disregard[] an excessive risk to [arrestee] health or safety" by being

"aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and by "draw[ing] the inference." *Farmer*, 511 U.S. at 837. Though the Court crafted this standard in the Eighth Amendment context, the Third Circuit and others have applied it to inadequate-medical-care claims brought by arrestees under the Fourteenth Amendment. *E.g.*, *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 581–82 (3d Cir. 2003); *see also City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244 (1983) ("The Due Process Clause, however, does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police.").

The core error with the Third Circuit's reasoning is that the complaint does not allege sufficient facts showing that Thomas was suffering a "serious medical need" or that Officer Kinsinger was "aware of facts" arising to a "substantial risk of serious harm" or actually drew that inference. For instance, the complaint never alleges that Officer Kinsinger observed symptoms of a cocaine overdose. Start with the obvious: cocaine overdoses often present with highly visible symptoms. *See* 1 ERIC CAMERON STRAIN, WILKINS KAPLAN & SADOCK'S COMPREHENSIVE TEXTBOOK ON PSYCHIATRY 1285 (Benjamin J. Sadock, Virginia A. Sadock & Pedro Ruiz eds., 10th ed. 2017) (noting that severe cocaine intoxication "is marked by evidence of toxicity, which may include grand mal seizures, cardiac arrhythmia, hyperpyrexia [abnormally high

temperatures], and death"). That's a critical fact because deliberate indifference often arises from law enforcement officers' ignoring obvious physical symptoms of distress. But here, the complaint does not allege any physical or psychological symptoms of cocaine overdose. To the contrary, it alleges that Thomas responded cogently to several law enforcement officers' questions and repeatedly denied medical attention. *See Brown v. Middleton*, 362 F. App'x 340, 345 (4th Cir. 2010) (finding no deliberate indifference because the arrestee "acted normally throughout his interactions with officers without showing any of the behavioral symptoms associated with cocaine ingestion"). In other words, the complaint alleges zero facts from which Officer Kinsinger could have known or consciously disregarded the serious medical need, a cocaine overdose.

This requirement for pleading outward symptoms of a serious medical need is nothing new. Many drug-ingestion cases have demanded, at a minimum, allegations or evidence that law enforcement officers ignored an arrestee's outward physical symptoms. *E.g.*, *Burnette*, 533 F.3d at 1331–32 (finding no deliberate indifference for officers who were told that an arrestee ingested drugs but were never made aware of the quantity of drugs or that the arrestee needed medical attention); *Hutto v. Davis*, 972 F. Supp. 1372, 1376 (W.D. Okla. 1997) (finding no deliberate indifference, even though "Hutto said he had ingested a controlled substance (how much and what kind was unclear)

and he exhibited some symptoms of drug influence while being booked into the jail"); *Sanders ex rel. Est. of Sanders v. City of Dothan*, 671 F. Supp. 2d 1263, 1271 (M.D. Ala. 2009) ("[T]he Constitution does not require an officer to provide medical assistance to every arrestee who appears to be affected by drugs."). The rationale of these cases is straightforward—law enforcement officers cannot be deliberately indifferent to overdoses they cannot readily identify. How could they? They would have no known facts of serious harm to consciously ignore. *See Trozzi v. Lake County*, 29 F.4th 745, 756 (6th Cir. 2022) (reasoning that the touchstone of the deliberate-indifference inquiry in the inadequate-medical-care context is "whether a reasonable officer at the scene would have known the detainee's medical needs posed an excessive risk" based on "what the [officer] knew about the detainee's condition" (citing *Greene v. Crawford County*, 22 F.4th 593, 609 (6th Cir. 2022))).

Nor is it sufficient, as the Third Circuit now says, for a complaint to simply allege that officers were deliberately indifferent because they knew that an arrestee ingested drugs. To say so would morph Fourteenth Amendment § 1983 claims into mere claims for negligence. By relying on allegations or evidence of drug ingestion only, a court could find deliberate indifference—at the pleadings stage, no less—solely based on a law enforcement officer's on-the-spot misdiagnosing the amount of drugs an arrestee ingested. In other words, courts will base deliberate indifference on whether law enforcement

officers should have known that an arrestee had taken too much of a drug, not whether officers disregarded serious medical needs. As this Court has repeatedly explained, state actors cannot be held liable for mistakes in judgment or falling below a medical standard of care absent life-threatening symptoms. *E.g.*, *Estelle*, 429 U.S. at 106 ("[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner."); *Seiter*, 501 U.S. at 305 ("[M]ere negligence would [not] satisfy . . . [the] 'deliberate indifference' standard . . . ."); *Farmer*, 511 U.S. at 835 (reasoning that the Cruel and Unusual Punishment Clause "requires 'more than ordinary lack of due care for the prisoner's interests or safety'" (quoting *Whitley v. Albers*, 475 U.S. 312, 319 (1986))). Saying so would, under the Fourteenth Amendment, "transform every tort committed by a state actor into a constitutional violation." *DeShaney*, 489 U.S. at 202 (collecting cases).

Indeed, the scope of the Third Circuit's newly minted broad drug-ingestion standard knows few bounds. Without doubt, law enforcement officers routinely encounter suspects that have ingested *something*. Take DUIs: officers may encounter drivers with BACs just below, just over, or well over the legal limit—each exhibiting different symptoms of impairment, or none at all. Add to the mix that each driver will likely have different rates of alcohol

absorption and different alcohol tolerance levels. And consider that officers at the scene will likely not know if a driver has taken drugs other than alcohol. Normally, officers would be deliberately indifferent *only if* they ignored drivers' known preexisting conditions or outward signs of severe physical or psychological distress. *Compare Est. of Simpson v. Gorbett*, 863 F.3d 740, 747 (7th Cir. 2017) (finding no deliberate indifference because, while officers knew that an inmate was intoxicated, they did not know that he "was addicted to alcohol and thus was likely to suffer from serious withdrawal symptoms"), *and Meier v. County of Presque Isle*, 376 F. App'x 524, 529 (6th Cir. 2010) (finding no deliberate indifference for corrections officer that knew of an inmate's 0.31 BAC but decided to "monitor [him] rather than transfer him to a medical facility"; "[i]n hindsight, it would have been preferable for [the officer] to take different action, but the law does not require the best, or even the better, course"), *with Harper v. Lawrence County*, 592 F.3d 1227, 1234 (11th Cir. 2010) (finding deliberate indifference because the complaint alleged that two officers saw that an inmate "was hallucinating, slurring his words, physically weak, and incoherent" and yet did nothing). But the practical reality of the Third Circuit's prophylactic negligence rule is that officers now have a duty to render medical care to *any* driver they suspect ingested drugs or alcohol to ward off § 1983 liability. This rule, as one court put it, "is ridiculous" because "officers pull over and arrest countless suspects every day who either appear or are confirmed to be intoxicated." *Sanders*, 671 F.

Supp. 2d at 1271.

Even the Third Circuit realized that the complaint needed to allege some fact that Officer Kinsinger could observe. But that singular allegation comes nowhere close to distinguishing between routine cocaine ingestion and potentially lethal cocaine intoxication. The complaint's only allegation about Thomas's physical condition is a circumstantial one: while in the patrol car, he told officers he was "hot" and asked to "lower the window." Pet.App.82a. But that allegation is hardly dispositive that Officer Kinsinger ignored a substantial risk to Thomas's health. Even taking that allegation as true, Thomas's feeling "hot" is consistent with ingesting cocaine, not overdosing on it. *See* STRAIN, *supra*, at 1285 (noting that "changes in . . . thermoregulation" are symptoms of ingesting cocaine). To be sure, the complaint makes no allegation, for example, that the officers ignored a high fever, delirium, or tremors. And, in all events, a court could readily infer that Thomas was feeling "hot" because the temperature in the patrol car was, in fact, too warm.

The Third Circuit compounded its deliberate-indifference error by skirting the allegations in the complaint that Officer Kinsinger and others reasonably rendered medical care to Thomas. *See* *Farmer*, 511 U.S. at 844 ("[P]rison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm

ultimately was not averted."). The complaint alleges that the officers took Thomas to a booking center, where he was seen by medical staff. The Third Circuit ignored that allegation, holding police officers to the standard of recognizing a medical emergency without any outward physical symptoms and ensuring hospital-based emergency treatment. *But see, e.g.*, *Meier*, 376 F. App'x at 529.

Further, the Third Circuit never seriously answered the question of why transporting an arrestee to a booking center with medical services is unreasonable. Rather, the Third Circuit relied on a Harrisburg Police Department policy—which is neither quoted nor attached to the complaint—that says it is "best practice" to bring an arrestee suspected of ingesting drugs to a hospital. Pet.App.82a. The Third Circuit thus found a plausible § 1983 claim because officers failed to follow best practices. *But see Farmer*, 511 U.S. at 838 ("[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."); *DeShaney*, 489 U.S. at 202 ("[T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation." (collecting cases)).[2]

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[2] As noted in the Petitioner's Brief, Pet.Br.17, this case is a good vehicle to clarify the deliberate-indifference standard for the first time since *Farmer*.

At a minimum, this Court should grant certiorari to clarify that mere allegations of drug ingestion are insufficient to plead deliberate indifference. Any other rule would open the floodgates of litigation for every officer who stops a suspect that may have ingested a drug.

## II. The Third Circuit's Incorrect Application of Qualified-Immunity Principles

Another even more alarming error infests the Third Circuit's opinion. Not only did the Third Circuit find that Officer Kinsinger acted with deliberate indifference, but it also found that he acted with obvious cruelty. It reached that conclusion by dodging this Court's command to examine "clearly established" law to evaluate qualified immunity. Rather, it found that Officer Kinsinger's conduct bore resemblance to two cases from this Court—both of which dealt with egregious fact patterns tantamount to torture—to deny him qualified immunity. That error warrants summary reversal by this Court.

### A. Existing Law Does Not Put Officer Kinsinger's Conduct Beyond Constitutional Debate.

To start, this Court has repeatedly stressed that "at the time of the officer's conduct, the law [must be] sufficiently clear that *every* reasonable official would understand that what he is doing is

unlawful." *Wesby*, 583 U.S. at 63 (emphasis added) (cleaned up). A sufficiently clear rule "must be so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted"; "[i]t is not enough that the rule is suggested by then-existing precedent." *Id.* A rule is not sufficiently clear "if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that the rule was firmly established." *Id.* at 64 (cleaned up).

Thus, to satisfy this demanding standard, the Third Circuit had to look for controlling law that predated December 14, 2019, that, at a minimum, clearly established a police officer's duty to render medical care to a suspect he thought had ingested drugs. But it readily conceded that no controlling precedent existed. Pet.App.14a ("There has not yet, however, been a recognition by this Court of the right to medical care after the ingestion of drugs."); *id.* at 16a (relying on "general standards" to clearly establish a constitutional standard).

Moreover, the constitutional violation must be "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). But the Third Circuit could not satisfy such an exacting standard even within its own panel. As evidenced by Judge Phipps's dissent and the myriad cases cited above, the issue of whether a constitutional violation occurred is squarely a matter of debate. *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."). The inquiry should have ended there.

To be sure, had the Third Circuit looked to whether such a right was clearly established, it would have found, at best, a split in authorities on the question. *See Spears*, 589 F.3d at 254–55 (finding qualified immunity for police officer where EMTs and a jail nurse determined that an inmate who ingested drugs did not need to be transported to a hospital); *Burnette*, 533 F.3d at 1331–32 (finding no deliberate indifference for officers who were told that an arrestee ingested drugs but were never made aware of the quantity of drugs or that the arrestee needed medical attention); *Hutto*, 972 F. Supp. at 1376 (finding no deliberate indifference, even though "Hutto said he had ingested a controlled substance (how much and what kind was unclear) and he exhibited some symptoms of drug influence while being booked into the jail"); *Sanders*, 671 F. Supp. 2d at 1271 ("[T]he Constitution does not require an officer to provide medical assistance to every arrestee who appears to be affected by drugs.").

All to say, Officer Kinsinger was never on notice that his conduct would be deemed by a court to be unconstitutional. To the contrary, the balance of authorities suggests otherwise.

### B. The Third Circuit Incorrectly Applied the "Obvious Cruelty" Exception.

Without clearly established law, the Third Circuit ruled that transporting Thomas to a booking center with medical facilities instead of a hospital was an obvious violation of the right to medical care. Pet.App.16a. It did so by relying on the "obvious cruelty" exception announced in *Hope v. Pelzer*, 536 U.S. 730 (2002), and applied again in *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). That conclusion is deeply flawed.

To start, as the facts of *Hope* and *Taylor* show, the "obvious cruelty" exception applies only in extraordinary and egregious factual circumstances. In *Hope*, the Court ruled that it was an obvious violation of the Eighth Amendment's Cruel and Unusual Punishment Clause to tie a shirtless prisoner to a hitching post for seven hours while the sun scorched his back. 536 U.S. at 738. In *Taylor*, the Court again ruled that it was obvious cruelty to house an inmate (Taylor) in two "shockingly unsanitary" cells for six days. 592 U.S. at 7. The first cell "was covered, nearly floor to ceiling, in massive amounts of feces," causing Taylor to neither eat nor drink for nearly four days. *Id.* (cleaned up). The second was "frigidly cold" and "equipped with only a clogged drain in the floor to dispose of bodily wastes," eventually causing Taylor to "sleep naked in sewage." *Id.*

As *Hope* and *Taylor* make clear, the "obvious cruelty" exception applies only when *no* reasonable government official "could have concluded that, under the extreme circumstances of th[e] case" that the conduct was constitutionally permissible. *Id.* at 8 (citing *Hope*, 536 U.S. at 741); *see also Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018) ("[P]laintiffs can demonstrate clearly established law by proving the defendant's conduct was so egregious and unreasonable that no reasonable official could have thought he was acting lawfully." (cleaned up)).

Indeed, that makes sense. The *Hope* Court did not need a factually similar case to know that that the Cruel and Unusual Punishment Clause prohibited tying an inmate to a hitching post for seven hours. Application of the plain text of the Eighth Amendment, as well as this Court's Eighth Amendment decisional law—*see, e.g.*, *Whitley*, 475 U.S. at 319 ("The unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment." (cleaned up))—warned any correctional officer of the constitutional violation. Similarly, the *Taylor* Court did not need a case plainly forbidding a six-day stay in feces-filled cells: the violation was self-evidently cruel and unusual.

The facts here are neither extraordinary nor egregious. For one, as the dozens of cases cited above show, drug-ingestion medical care cases are no

strangers to the federal courts, and many courts have found no liability for officers in the same situation as Officer Kinsinger. *See, e.g.*, *Spears*, 589 F.3d at 254–55; *Burnette*, 533 F.3d at 1331–32. This fact alone calls into question the Third Circuit's use of the "obvious cruelty" exception.

For another, nothing in this record compares to the egregious cruelty displayed by the correctional guards in *Hope* and *Taylor*. The record here shows the officers were concerned with Thomas's well-being by continuously monitoring him and repeatedly asking him if he required medical attention. Nor did Thomas ever claim duress. These facts stand in stark contrast to the behavior of the correctional officers in *Hope* and *Taylor*. *See Hope*, 536 U.S. at 738 (noting that the correctional officers "knowingly subjected [Hope] 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"); *Taylor*, 592 U.S. at 9 (noting that one officer "remarked to another that Taylor was, 'going to have a long weekend'" and that another officer "told Taylor he hoped Taylor would 'f***ing freeze'"). Simply put, nothing in the record shows Officer Kinsinger acted cruelly—much less obviously so.

In attempting to justify its sweeping interpretation of *Hope* and *Taylor*, the Third Circuit identified several cases purporting to show that Officer Kinsinger obviously should have known to transport Thomas to a hospital. Pet.App.16a n.51. Three of those authorities are non-precedential unpublished decisions—two are unpublished district-court decisions—and cannot constitute a body of clearly established law, much less obviously established constitutional principles. *See, e.g.*, *Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 170 n.2 (3d Cir. 2016) (reasoning that an unpublished decision "is not by itself an indication of a clearly established constitutional right"); *Bell v. City of Southfield*, 37 F.4th 362, 367 (6th Cir. 2022) (reasoning that "[b]asic logic" dictates that "a plaintiff cannot point to unpublished decisions" to determine whether a right has been clearly established).

Nor does the one published decision relied on by the Third Circuit, *Sandoval v. County of San Diego*, 985 F.3d 657 (9th Cir. 2021), carry this lofty burden. Preliminarily, that case was decided *more than a year* after the events of this case and could not serve to put Officer Kinsinger on any notice of constitutional law. *See Kisela v. Hughes*, 584 U.S. 100, 107 (2018) (reversing circuit court that relied on circuit precedent as clearly established law because "a reasonable officer is not required to foresee judicial decisions that do not yet exist in instances

where the [constitutional] requirements . . . are far from obvious").

And, in all events, the case is factually dissimilar. There, the Ninth Circuit decided that a trio of jailhouse nurses were not entitled to qualified immunity because they delayed life-saving medical treatment to "an inmate in obvious need." *Sandoval*, 985 F.3d at 678–79. One nurse was told that the inmate was "sweating, tired, and disoriented" and "needed to be looked at more thoroughly" and yet "merely perform[ed] a 10-second blood sugar test." *Id.* at 679 (cleaned up). Two other nurses observed the inmate seize and become unconscious and yet never called paramedics. *Id.* By contrast, Thomas displayed no similar obvious need. The complaint contains no allegations that he was sweating, fatigued, disoriented, or exhibiting any signs of drug overdose. To the contrary, the complaint's allegations show that Thomas was cogent and responsive to the officers' questions. Pet.App.80a (alleging that Thomas told officers that he possessed marijuana, that he denied ingesting cocaine, and that he ate candy cigarettes).

Moreover, as Judge Phipps noted in his dissent, *Id.* at 20a n.56, the logic of *Sandoval* stands on uneasy footing. *See J.K.J. v. City of San Diego*, 42 F.4th 990, 1000–01 (9th Cir. 2021) (granting qualified immunity to officers in denial-of-medical-care case because "general rules . . . do not by themselves create clearly established law outside an

obvious case" and the suspect "said nothing to indicate she might require medical aid" (first quoting *Kisela*, 584 U.S. at 105)), *reh'g en banc granted and vacated by* 59 F.4th 1327 (2023).

By equating the decision to take Thomas to a booking center for medical care with intentional infliction of suffering, the Third Circuit permits the rare "obvious cruelty" exception to swallow qualified immunity. Summary reversal is therefore warranted.

### C. The Third Circuit's Reading of the "Obvious Cruelty" Exception Is Unworkable.

In addition, the Third Circuit's decision is unworkable for at least two reasons.

*First*, as Judge Phipps noted in his dissent, Pet.App.21a–22a, crafting new federal rights out of a Harrisburg Police Department policy risks elevating state laws and local ordinances to a constitutional dimension. This creates several problems. For one, § 1983 claims are premised on violations of *federal* constitutional law and nothing less. A critical point because § 1983 reflects Congress's measured judgment that a private right of action lies for state officers who have violated federal rights only. To engraft violations of state and municipal codes—many of which likely carry no attendant private right of action—into the § 1983 framework risks turning the federal statute into a general federal tort regime.

Relatedly, relying on state and municipal policies for clearly established or obvious constitutional violations upsets basic notions of federalism and state sovereignty. By crafting a new federal right to hospital-based medical care from a local Harrisburg policy *in a published decision*, the Third Circuit's decision requires officers across the circuit to heed Harrisburg policy. Again, as Judge Phipps notes, "Such an approach inverts the role of the Constitution as the highest law of the land[.]" *Id.* at 22a.

Indeed, under the Third Circuit's approach, there is virtually no limit to what can qualify to put a police officer on notice or what a plaintiff can allege to defeat qualified immunity at the pleading stage. An internal employment policy could suffice to clearly establish circuit-wide unconstitutional conduct, even though those policies have no independent force of law. Internal guidance from municipal agencies or departments might also suffice—even though neither likely underwent the rigors of the legislative process, much less have the force of law. *Cf. Kisor v. Wilkie*, 588 U.S. 558, 584 (2019) ("[I]nterpretive rules . . . do *not* have the force of law." (citation omitted)).

*Second*, the Third Circuit's decision forces police officers to make on-the-spot medical judgments about a suspect's present health condition, even though police officers have no formal medical training. Moreover, as here, officers may not know whether a suspect did, in fact ingest a narcotic, how much was ingested, and whether the amount

consumed "was sufficiently large that it posed a substantial risk to health or a risk of death." Pet.App.16a. Nor does the Third Circuit explain what steps are reasonable to render medical care. *Id.* at 16a.

For all these reasons, the Third Circuit's decision creates an unworkable standard, loses sight of practical and operational realities, and leaves police officers without clear guidance.

## CONCLUSION

For the foregoing reasons and the reasons in Petitioner's brief, this Court should grant the writ of certiorari.

Respectfully submitted,

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