Nos. 23-1108 and 23-1204

IN THE

Supreme Court of the United States

DARIL FOOSE, *et al.*,

Petitioners,

v.

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

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners Officers Daril Foose, Daniel Kinsinger, and several others arrested Terrelle Thomas after a car stop in which all the officers 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." Officer Kinsinger watched Thomas "spit out a white liquid." All officers concluded, and documented, that Thomas had "ingested a large amount of cocaine," and even warned him that his life could be in danger. But instead of transporting Thomas to a hospital, all Petitioner officers made the decision to take him to a jail that they knew lacked capacity to deal with such acute medical problems. Within an hour of arriving there, Thomas died of a cocaine overdose.

The District Court and the Third Circuit held that Petitioners were not entitled to qualified immunity because the likelihood of such an overdose presented a serious medical need, and all officers subjectively knew of the risk and brought Thomas to jail instead of a hospital anyway.

The question presented is:

Whether the Third Circuit correctly held that a complaint alleging that officers concluded that an arrestee ingested a large quantity of cocaine, actually drew the inference that he faced a substantial risk of serious harm, and failed to get him medical care, plausibly states a claim for failure to render medical care.

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INTRODUCTION

When Officers Foose, Kinsinger, and several others arrested Terrelle Thomas, they all concluded that he had swallowed a large quantity of crack cocaine. While Thomas denied having done so, officers observed telltale signs around his lips and in his mouth, one watched several cocaine rocks fall out of his shirt pocket, and another watched him spit out a white liquid that resembled cocaine. All present officers wrote in their reports that he had ingested a large quantity of cocaine. In such situations, their department maintained a policy to transport such an arrestee immediately to a hospital rather than to booking, because the jail lacked sufficient medical resources to deal with overdoses. Yet the officers took Thomas to booking instead, anyway. There, within an hour, Thomas overdosed and was later pronounced dead.

This is textbook deliberate indifference to a serious medical need: The defendants were deliberately indifferent to the likelihood that Thomas would overdose on a dangerous drug that they knew he had ingested in large quantity, as any layperson would have known. Of course, the officers were not mere laypeople—their department's policy existed specifically because of the serious medical need, as they well knew. The District Court and the Third Circuit correctly recognized that allegations in the complaint from Thomas's Estate could make out a violation of clearly established law, citing Supreme Court cases that predate the events of this case by more than twenty years. In doing so, the Court used the legal standard that every Circuit applies to assess deliberate indifference to serious medical needs for arrestees and pretrial detainees—including specifically overdose deaths by

arrestees brought to jail after ingesting large quantities of dangerous drugs in misguided attempts to hide or destroy evidence. So far, a district court judge, the panel majority, and the eleven additional Third Circuit judges who denied a rehearing petition with no listed dissenters have all agreed.

Unhappy with the Third Circuit's ruling, the officers argue to this Court that they should get qualified immunity. Recognizing the lack of a Circuit split, they even ask for summary reversal. But they seek it primarily based upon their own version of their state of mind—evidence simply outside the record at the motion to dismiss stage. Based on what *is* in the record, no matter how wrong they believe all those judges were, officers "aware of the oral ingestion of narcotics by an arrestee under circumstances suggesting the amount consumed was sufficiently large that it posed a substantial risk to health or a risk of death" who do not "take reasonable steps to render medical care" cannot get qualified immunity. 16a. At bottom, they come here pressing for splitless error correction in the absence of error. None of the questions presented by either petition warrants certiorari.

First, the decision is correct. The Third Circuit applied the standard for claims involving medical care of pretrial detainees applied by every other Circuit. And while the officers cite a small handful of decisions to suggest that the Third Circuit is out of step, most Circuits have case law involving in-custody deaths of arrested pretrial detainees who overdosed on drugs they consumed prior to booking. The allegations here match cases from other Circuits that denied qualified immunity, and cases that applied it—including those cited by Petitioners—often cite

facts alleged here as hypotheticals in which officers could face liability. And no court has adopted a contrary rule or applied qualified immunity to the alleged facts here.

Petitioners' argument of error has several fatal problems. First, their suggestion that the Third Circuit used or applied an incorrect legal standard is wrong—and belied by their own briefing to that Court. Second, they object to the level of generality in defining the right at issue, without acknowledging precedential case law from across the Circuits that frames the right identically. And third, relatedly, they attempt to manufacture confusion about deliberate indifference where none exists. Petitioners attack this Court's recent decision in *Taylor* v. *Riojas*, and *Hope* v. *Pelzer*. But *Taylor* has no bearing on this case, and the decision has nothing to do with Petitioners' stated quarrel with *Hope*, either.

Second, even if this Court thought the petition presented a worthy legal question, this case would be the wrong vehicle to address it. Any resolution of this case by the Court would not be outcome-determinative—on the motion to dismiss posture, Respondents would get an opportunity to amend their complaint to address any identified deficiencies. Worse, because of that posture, Petitioners' arguments for qualified immunity depend upon assertions about their own knowledge of Thomas's consumption, the risk he faced, the quality of available medical care at the jail, and their knowledge of that care—none of which is in the record. Beyond that, Petitioners' simultaneous arguments that the Third Circuit lacked sufficient Circuit precedent to deny qualified immunity, but that this Court should grant certiorari because of how commonly this issue arises for police officers, would

strongly counsel in favor of letting this issue percolate among the Courts of Appeals prior to taking it up here. And regardless, this case involving considered, intentional conduct by the Petitioners does not implicate the heartland of the judge-made doctrine of qualified immunity.

Ultimately, this case is simply not worthy of this Court's attention. This is not a court of error correction and there is no error to correct. The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Harrisburg Police Officer Daril Foose and Adult Probation Officer Dan Kinsinger watched Terrelle Thomas and a friend leave a bar and get into a waiting car. 77a.[1] When Foose and Kinsinger pulled the vehicle over, Thomas ingested a large quantity of crack cocaine, attempting to hide or destroy evidence of it. 77a.

That attempt failed immediately, for many reasons. First, Foose noted that Thomas "spoke to her as if he had 'cotton mouth' and had a large amount of an unknown item inside of his mouth." 77a. Second, Foose observed that Thomas had "strands in his mouth that were almost like gum and paste." 77a. Third, Foose saw that Thomas's lips were "pasty white," and that his "[f]ace was covered with a white powdery substance." 78a. Fourth, when the officers detained Thomas because of their understandable suspicions, Officer Kinsinger watched Thomas "spit out a

1. All record references are to the Kinsinger Petition Appendix.

white liquid." 77a. Fifth, although Thomas attributed the white substance on his lips and face to "a candy cigarette," 78a, Officer Foose "observed cocaine rocks fall out of . . . Thomas's shirt," and correspondingly found no candy cigarettes on Thomas or in the vehicle. 78a. At that point, Officers Foose and Kinsinger drew the obvious—perhaps only—conclusion: that Thomas had "ingested a large amount of cocaine." 77a; *see also* 78a.

While Officers Foose and Thomas detained Thomas and his friend, Corporal Scott Johnsen and Officers Adrienne Salazar, Travis Banning, and Brian Carriere joined them at the scene. When they did, Officers Foose and Kinsinger each shared their conclusion that Thomas had ingested cocaine. 78a. Officers Salazar and Banning similarly saw the white powdery substance and white residue on Thomas's lips. 79a. Ultimately, all the Officers ended up filing police reports memorializing their conclusion that Thomas had ingested cocaine. 79-80a. Officer Foose also swore out an Affidavit of Probable Cause saying that she had seen Thomas swallow "crack cocaine in order to conceal it from police." 77a; 80a.

All the Officers recognized the danger to Thomas that swallowing a large quantity of cocaine might pose, and the possible consequences if he did not receive medical care. Officer Salazar and Corporal Johnsen specifically warned Thomas that he could die from ingesting drugs. 78a; 79a. The Officers' warning of the danger reflected their knowledge of department policy—the Harrisburg Police Department maintains a policy directing that officers should transport suspects who have "consumed illegal narcotics in a way that could jeopardize their health and welfare" first to a hospital, not to booking. 81-82a. The policy exists because Dauphin County Prison

lacks the ability or resources to provide anything more than limited medical care. 83a. Instead, the PrimeCare contractors at the Prison transfer individuals to a nearby hospital for testing and treatment. 83-84a. The Prison "is not equipped" to treat arrestees "with ailments like ingesting cocaine." 84a.

Despite their collective recognition that Thomas had swallowed a dangerous quantity of cocaine, the officers together decided to bring Thomas to Dauphin County Booking Center at the Dauphin County Prison rather than to a hospital. 82a. The Officers knew of the danger—besides their warnings to Thomas, Officer Carriere told staff at booking that the officers at the scene thought Thomas had swallowed crack cocaine, and all officers noted the same in their reports. 85a. Upon arrival, Thomas still had the white powder covering his lips. 85a. And if anything, Thomas's condition had begun to deteriorate; en route, Thomas complained of feeling hot even though the temperature at the time was 46 degrees. 83a.

Befitting the capabilities of the facility, Thomas received no medical care at Dauphin County. 85a. Within an hour of arrival, and within two hours of his arrest, Thomas suffered a cardiac arrest in a holding cell. 85a. At that point, staff sent him to the nearby hospital, where he died three days later. 86a. His cause of death was "cocaine and fentanyl toxicity." 86a.

II. Proceedings Below

Terrelle's twin sister Sherelle Thomas, as the Administrator of Terrelle's estate, and Terrelle's minor daughter, asserted several state and federal claims against a series of defendants. 70a. As relevant here, in

the operative, amended complaint, Respondents asserted a Fourteenth Amendment claim for failure to render medical care against all the individual officers—Foose, Kinsinger, Carriere, Banning, Salazar, and Corporal Johnsen. 95a. All officers moved to dismiss the complaint. The District Court denied those motions, because Thomas's complaint had plausibly alleged a violation of clearly established law. 7a. They all took interlocutory appeals from that denial, with Foose and Carriere filing one brief, Johnsen, Salazar, and Banning filing another, and Kinsinger filing a third. 7a.

On appeal, the officers attacked virtually every aspect of the District Court denial of qualified immunity. Officer Kinsinger argued that no serious medical need exited; that he had not acted with deliberate indifference; and that even if he had, the right at issue was not clearly established. CA3 Doc. 27 at 18, 21, 27. In explaining why he had not acted with deliberate indifference, Kinsginer at bottom disputed the allegations, explaining that "[w]hile he may have 'believed' Decedent might have ingested some cocaine," he thought that Thomas's "allegations fail to provide any evidence that Probation Officer Kinsinger knew Decedent ingested cocaine." CA3 Doc. 27 at 19. For his qualified immunity argument Kinsinger incorporated that fact dispute, and defined the right at issue as "the duty to render medical care to a detainee who may have ingested crack cocaine even though the detainee denies doing so and demonstrates no signs of medical crisis or injury." CA3 Doc. 27 at 30.

Similarly, Officers Foose and Carriere argued that no serious medical need existed; that they did not act with deliberate indifference; and that in the absence of a violation should have gotten qualified immunity. CA3

Doc. 37 at 14. Corporal Johnsen and Officers Salazar and Banning argued that they had not been deliberately indifferent and explained that although they had all seen Thomas's lips and face and were aware he had ingested cocaine, they could not have known of his deterioration en route to booking. CA3 Doc. 32 at 14. In arguing that they had not violated Thomas's clearly established right, like Officer Kinsinger, they incorporated factual disputes into their highly specific definition of the right at issue, defining it as the right "to be taken to a hospital emergency room for treatment when none of the officers witnessed him ingest drugs" and continuing through a list of eight total clauses describing their view of the facts. *Id*. at 25.

A divided panel of the Third Circuit affirmed the denial of qualified immunity to all the appealing officers. In so doing, the Court explained that the complaint alleged "numerous facts demonstrating a serious medical need," 10a, including those from which even a layperson would have known of the danger to Thomas. The Court recognized that the complaint alleged that the officers had knowledge of his dangerous ingestion of cocaine and had drawn the inference as to the danger that it caused—as reflected by their observations, their contemporaneous warnings to him, and their own police reports. 11-12a. And the Court acknowledged that the complaint's allegations that they took him to booking instead of a hospital plausibly stated deliberate indifference. 12-13a.

In discussing qualified immunity, the Court observed that many of the cases the officers cited in their favor involved other officers who "demonstrated no actual belief of narcotic ingestion" or had "failed to draw an inference of substantial risk." 13a. It cited four cases from this Court

and the Third Circuit that had long since established "the right to medical care for persons in custody of law enforcement," 14a, rejecting the 95-word definition of the right suggested by Johnsen, Salazar, and Banning as too specific, 15a. Judge Phipps dissented.

Before seeking certiorari, Petitioners sought rehearing en banc. The full Third Circuit denied rehearing without calling for a response from the Thomas Estate, *see* Third Circuit Internal Operating Procedures 9.5.2 & 9.5.6, and without any noted dissents from the denial. 63a; Third Circuit Internal Operating Procedures 9.5.8 (providing for judges to note votes to grant denied petitions even without filing an opinion dissenting from the denial).

REASONS FOR DENYING THE PETITION

I. Petitioners seek error correction, and there is no error in the Third Circuit's legal standard, application of that standard, or result.

Petitioners portray the Third Circuit's decision as a notable outlier among the Courts of Appeals, and they cite a small handful of Circuit opinions in support. But their argument fails for several reasons. First, the Third Circuit used the same legal standard that every Circuit uses when assessing in-custody deaths of arrestees and pretrial detainees—a standard that Petitioners themselves urged in their briefs to the Third Circuit. That standard is clear, grounded in this Court's own precedent, and the Courts of Appeals have successfully applied it for decades. The Third Circuit did so here. Second, Petitioners' few citations demonstrate that the decision correctly held that Thomas plausibly alleged a violation

of clearly established law. Some qualified immunity cases Petitioners cite posit the facts of this case as hypotheticals in which the courts would have denied defendants' request for qualified immunity. Several come from Circuits with other, more closely analogous precedent that denied qualified immunity. And Petitioners do not mention several other Circuits' opinions that align with the Third Circuit, too. Third, Petitioners' attempt to manufacture confusion about deliberate indifference fails.

1. In assessing the Thomas Estate's claim that the officers failed to provide medical care, the Third Circuit used the framework that courts across this country have used for decades. Courts use the standard for such claims brought by convicted prisoners, taken from this Court's decision in *Estelle* v. *Gamble*, 429 U.S. 97, 103-04 (1976), and applied to claims by pretrial detainees because they get at least as much constitutional protection as convicted prisoners. *See, e.g.*, *Burke* v. *Regalado*, 935 F.3d 960, 992 (10th Cir. 2019).[2] The claim has an objective component,

2. In *Kingsley* v. *Hendrickson*, this Court held that for excessive force claims, pretrial detainees need show only objective unreasonableness, where convicted prisoners must show objective unreasonableness and a subjective intent to cause harm on the part of an official. 576 U.S. 389 (2015). Since *Kingsley*, some Circuits have applied its reasoning to other categories of claims, including denial of medical care—eliminating or modifying the subjective component of that claim for pretrial detainees. *E.g. Gordon* v. *Cnty. of Orange*, 888 F.3d 1118, 1124-25 (9th Cir. 2018); *Darnell* v. *Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017); *see also Brawner* v. *Scott Cnty.*, 14 F.4th 585, 592-93 (6th Cir. 2021) (discussing post-*Kingsley* landscape). Because the Third Circuit used the most demanding standard and correctly held that the Thomas complaint had plausibly alleged subjective deliberate indifference on the part of the officers, that distinction has no bearing on this case.

for which the plaintiff must allege a "serious medical need," and a subjective component, for which the plaintiff must allege that defendants knew of the need and were deliberately indifferent to it. *Estelle*, 429 U.S. at 103-04. A "serious medical need" may be identified by a medical professional—for example, someone arriving at pretrial detention with preexisting prescriptions to treat diabetes, *see Ortiz* v. *City of Chicago*, 656 F.3d 523, 529, 533 (7th Cir. 2011)—but may also be one that would be obvious to a layperson. *E.g. Blackmore* v. *Kalamazoo Cnty.*, 390 F.3d 890, 899-900 (6th Cir. 2004). Saying that a defendant official should have known of the serious medical need does not suffice; the official must know the relevant facts and actually draw the inference that the medical need is serious. *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994). But officials who know of a serious medical need and the substantial risk of harm posed by inaction and then do nothing may face liability.

That standard comes from this Court's cases. *Estelle* is seminal. But numerous cases address officials' responsibilities to people in prison and pretrial detention and flesh out the deliberate indifference component of medical care claims. In 1983, the Court held that the due process clause "requires the responsible government or governmental agency to provide medical care to persons who have been injured while being apprehended by the police." *City of Revere* v. *Massachusetts General Hospital*, 463 U.S. 239, 239 (1983). In 1989, the Court explained 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. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989)

(citing *Youngberg* v. *Romeo*, 457 U.S. 308, 317 (1982)). Not long after, the Court held that if officials knew of a risk of substantial harm to a person in custody, they could not disregard it. *Farmer*, 511 U.S. at 842-43. As to that knowledge of the risk, Plaintiffs must prove through either direct or circumstantial evidence that the official had knowledge "of the facts from which the inference could be drawn that a substantial risk of harm exists" and that the official "dr[e]w the inference." *Id*. at 837, 842.

Courts of Appeals have recognized these claims for decades, both before and since *Estelle*, *City of Revere*, *DeShaney*, and *Farmer*. As early as 1972, the Sixth Circuit held that "where the circumstances are clearly sufficient to indicate the need of medical attention for injury or illness, the denial of such aid constitutes the deprivation of constitutional due process." *Fitzke* v. *Shappell*, 468 F.2d 1072, 1076 (6th Cir. 1972). In 1985, the Eleventh Circuit observed that "[d]eliberate indifference to serious medical needs is a tort of constitutional dimension," *Anderson* v. *City of Atlanta*, 778 F.2d 678, 687 n.12 (11th Cir. 1985) (citing *Estelle*, 429 U.S. at 97), on the way to allowing possible liability where a jail had no medical staff overnight and inadequate non-medical staffing, *id.* at 683, "such that the [pretrial detainee] is effectively denied access to adequate medical care." *Id.* at 686 n.12. In 1990, the Tenth Circuit located the "clearly established constitutional standard by which [detainees'] inadequate medical attention claim must be judged in the familiar 'deliberate indifference to serious medical needs' test of *Estelle* v. *Gamble*." *Martin* v. *Bd. of Cnty. Comm'rs of Pueblo Cnty.*, 909 F.2d 402, 406 (10th Cir. 1990); *see also Marquez* v. *Bd. of Cnty. Comm'rs of Eddy Cnty.*, 543 F. App'x 803 (10th Cir. 2013) (calling the right to medical care

for serious medical needs of which officials have knowledge "long established"). And in 1987, the Third Circuit itself held that *Estelle*'s protections for convicted prisoners extended to pretrial detainees. *Boring* v. *Kozakiewicz*, 833 F.2d 468, 471 (3d Cir. 1987).

The age and durability of those precedents belie Petitioners' demand for qualified immunity here. So does Petitioners' own prior briefing. Notwithstanding their complaints here, the Third Circuit applied exactly the standards Petitioners articulated in their briefs there. *See* CA3 Doc. 37 at 13-14 (citing *Estelle* and *Farmer* for medical care claim elements and deliberate indifference standard); CA3 Doc. 32 at 11 (citing *City of Revere* and *Farmer* for medical care claim elements and deliberate indifference standard); CA3 Doc. 27 at 17-19 (citing exclusively Third Circuit authority for medical care claim elements and *Farmer* for deliberate indifference standard).

Also belying Petitioners' arguments, the Circuits have applied this framework in cases involving numerous serious medical needs, including in ones where arrestees overdosed and died in booking or pretrial detention. Like other medical care cases, those cases date to the immediate aftermath of *Estelle* itself. As early as 1985, the Tenth Circuit denied summary judgment to jail defendants who had enacted a policy of "admitting to jail unconscious persons suspected of being intoxicated, carried out with . . . [deliberate] indifference." *Garcia* v. *Salt Lake Cnty.*, 768 F.2d 303, 308 (10th Cir. 1985). In Garcia, a man died of an overdose of barbiturates, after officers brought him to jail after he had escaped from a hospital. *Id.* at 305.

As the years have passed since *Estelle*, courts have had little problem articulating or applying the standard in overdose and withdrawal death cases. For one, "the objective prong is usually met in overdose cases where death results from a failure to provide medical services." *Burwell* v. *City of Lansing*, 7 F.4th 456, 464 (6th Cir. 2021). And while the serious medical need must be obvious to a layperson in the officer's situation, numerous courts have already held that someone's substantial drug consumption or alcohol intoxication are just such "obvious" medical needs where "conscious disregard of that need alone may suffice." *Quintana* v. *Santa Fe Cnty. Bd. of Comm'rs*, 973 F.3d 1022, 1032 (10th Cir. 2020); *id.* at 1029 n.2 (collecting cases involving heroin and alcohol withdrawal); *see also Grote* v. *Kenton Cnty.*, 85 F.4th 397, 406 (6th Cir. 2023) ("On numerous occasions we have held that drug or alcohol-related symptoms, like those associated with withdrawal or overdose, are sufficiently serious and obvious to laymen."). And contrary to Petitioners' harping upon Thomas having denied ingesting cocaine, when officers believe an arrestee has ingested drugs, a person's denial to police officers "is irrelevant when assessing whether [someone] had a serious medical need." *Id.* at 407.

For another, Circuits have consistently applied deliberate indifference case law when assessing the subjective prong in these cases. In a 2008 overdose case, the Sixth Circuit first set out the "objective and subjective components," including the need to show a "sufficiently serious medical need" as either identified by a doctor or obvious enough "that even a layperson would easily recognize the necessity" to take action. *Phillips* v. *Roane Cnty.*, 534 F.3d 531, 539-40 (6th Cir. 2008). For deliberate indifference, it discussed *Farmer*, and explained that

plaintiffs could show an official's knowledge through circumstantial evidence. *Id.* at 540. And it treated a jail's policies and protocols not as the basis for a constitutional claim, but as evidence that officials had knowledge of the substantial risk of harm posed by failing to act in the face of serious medical needs. *Id.* at 541. Indeed, other Circuits agree with the Third that policies can help establish defendants' knowledge of serious medical needs and the substantial risk of inaction. The Tenth Circuit has affirmed that "disregard of prison protocols, which required . . . transport to a hospital" in the face of a serious medical need, could be "persuasive" as to officials' state of mind on the subjective prong. *Paugh* v. *Uintah Cnty.*, 47 F.4th 1139, 1162 (10th Cir. 2022). And the Fourth Circuit has explained that "protocol violations" can "demonstrate the Individual Medical Defendants knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious need for medical care." *Stevens* v. *Holler*, 68 F.4th 921, 932 (4th Cir. 2023) (internal citation omitted).

Given Circuits' consistent resolution of these cases, Petitioners' warnings about unfairly unbounded liability for police officers who make the wrong call about medical care in the moment ring hollow. Courts recognize that officers are not doctors, and do not hold them to that standard. But officers who act as "gatekeepers" and "prevent an inmate from receiving treatment or deny him access to medical personnel," when they know of the serious medical need and the risk of inaction, can face liability. *Paugh*, 47 F.4th at 1158. So, at the subjective prong, courts routinely distinguish overdose death cases where officers lack knowledge (or fail to draw the inference about risk) with those where they have

knowledge and draw the inference. The Tenth Circuit applies this consistently. *Compare Quintana*, 973 F.3d at 1027 (holding possible liability where jailer knew of heroin withdrawal prior to detainee death), *with Boyett* v. *Cnty. of Washington*, 282 F. App'x 667, 678 (10th Cir. 2008) (affirming qualified immunity where officials had no knowledge of the person's serious medical need). Recently, the Sixth Circuit cited *Farmer*'s discussion of deliberate indifference when discussing situations where "prison officials are aware that a prisoner has access to dangerous substances." *Estate of Zakora* v. *Chrisman*, 44 F.4th 452, 474 (6th Cir. 2022). There, in a case involving an overdose of someone in prison rather than pretrial detention, the court correctly applied the *Estelle* and *Farmer* cases to reject the claim, because "neither [defendant was] made aware at any time before Zakora's death that he had, or was planning to, ingest drugs." *Id*. at 478.

Against this backdrop, Respondents' complaint plausibly alleges a violation of clearly established law. A cocaine overdose resulting in death is a serious medical need. And Petitioners here had and meticulously documented their belief that Thomas had ingested a large quantity of cocaine. They saw Thomas with strands of gum and paste in his mouth and a white powdery substance on his lips, and watched him spit out a white liquid. 77-78a. They watched cocaine rocks fall out of his pocket. 78a. And they shared their conclusions with each other, wrote them in their police reports, and Officer Foose swore out probable cause based on that conclusion. 78a, 80a. They knew of the risk—specifically warning Thomas that he might die. 78a; 79a. Their department policy underscored the risk to people in Thomas's situation. 81-82a. And still, they sent him to booking instead of a hospital, despite

knowing it lacked adequate medical care for overdoses or drug consumption. 82a; 84a. At this stage, the complaint has plausibly alleged every element of the claim, with sadly familiar facts, under the standard established by numerous prior cases.

2. Petitioners' cited cases only underscore that courts straightforwardly apply this well-settled standard, and that the Third Circuit decision was correct. Petitioners offer those cases as purported support for their argument that the Third Circuit erred, but that argument has several problems. For one, several of them describe key facts of Thomas's case as hypothetical alterations to their own facts that would support liability. Far from conflicting with the Third Circuit's reasoning or outcome, the rules in those cases would have reached the same result here, too. For another, Petitioners cherry-pick a small number of cases they say support them, describing them as a federal appellate landscape uniformly reaching a different outcome and so necessarily requiring qualified immunity here. But they do not mention other cases—both cases from the same Circuits from which they picked their cases, and from Circuits they did not discuss at all—that straightforwardly accord with the Third Circuit. Finally, no Court has adopted or discussed a contrary rule to that applied by the Third Circuit here.

Fourth Circuit: *Brown* v. *Middleton*, 362 F. App'x 340 (4th Cir. 2010). Petitioners point to *Brown* as an example of a case where a court granted qualified immunity to officers on similar facts, creating an irreconcilable conflict and requiring qualified immunity here. But while the *Brown* Court did grant qualified immunity, it did so specifically because of factual circumstances that differ starkly from

this case. In *Brown*, the plaintiffs had argued that officers *should have known*, but did not—which is insufficient under the law for deliberate indifference, where officers must know of the risk and disregard it. *Id.* at 344. The officers in *Brown* "did not have any tell-tale signs in or around his mouth of cocaine ingestion," and in the entire record "there [was] no evidence from which a fact finder could infer that they in fact knew that Bell had consumed cocaine." *Id.* at 345. The *Brown* Court found no violation and granted qualified immunity specifically on the basis of that lack of knowledge. That basis is unavailable here because of the allegations that officers knew of Thomas's cocaine ingestion. Petitioners here observed Thomas with white powder on his lips and spitting out a white liquid, and all inferred that he had ingested a substantial amount of cocaine. Notably, *Brown* also resolved at summary judgment rather than a motion to dismiss, and so the record could contain necessary state of mind evidence to grant summary judgment on that basis.

Worse for Petitioners, they do not cite more recent Fourth Circuit opinions with greater factual similarities to this case, where the Court denied qualified immunity.

Mays v. *Sprinkle*, 992 F.3d 295 (4th Cir. 2021). Here, the court allowed a pretrial detainee's claim to proceed over officers' demand for qualified immunity, because "even without external injuries," the complaint plausibly alleged that officers had actual knowledge of a serious medical need and drew the inference about the involved risk, before the person involved died of a drug overdose. *Id.* at 304. The complaint alleged that officers knew that Mays "was extremely intoxicated, had taken large amounts of prescription medication and possibly mixed that medication with alcohol." *Id.* at 305. Indeed,

at the motion to dismiss stage, the court even treated the officers' knowledge that he was at serious risk based upon that consumption as "a logical inference based on the pleaded facts." *Id.*

Stevens, 68 F.4th at 921. Like *Mays*, on a more analogous motion to dismiss posture, *Stevens* allowed a detainee medical care claim to proceed by applying the same standard: plaintiff had adequately alleged "that the defendants actually knew of and disregarded a substantial risk of serious injury to the detainee or that they actually knew of and ignored a detainee's serious medical care." *Id.* at 931-32. Like the Third Circuit here, and contrary to Petitioners' complaints, the *Stevens* Court also treated allegations of policy violations on the part of the defendants not as a basis for liability in itself, but as a basis to infer that the defendants "knew of and disregarded a substantial risk" that the policy had intended to manage or prevent. *Id.* at 932.

Sixth Circuit: *Watkins* v. *City of Battle Creek*, 273 F.3d 682 (6th Cir. 2001), *Weaver* v. *Shadoan*, 340 F.3d 398 (6th Cir. 2003), and *Spears* v. *Ruth*, 589 F.3d 249 (6th Cir. 2009). Petitioners cite a series of Sixth Circuit cases, but like *Brown*, they provide Petitioners little help here. The Courts resolved each of those on a different procedural posture, based upon substantially different facts from the allegations here that were available only in the summary judgment record. In *Watkins*, for example, the Court held that the record lacked evidence to show that the officers had actually drawn the inference required for the subjective prong—which also perhaps explained why the plaintiff had argued negligence, rather than deliberate indifference. *Watkins*, 273 F.3d at 686. In *Weaver*, as in *Brown* and *Watkins*, "the Officers did not see, or

otherwise have knowledge, that Weaver ingested cocaine." *Weaver*, 340 F.3d at 411. As in all cases where plaintiffs argue that officers "should have known" rather than, as here, pointing to facts showing that officers had in fact drawn the inference, summary judgment was appropriate.

But the full set of case law from the Sixth Circuit, including several cases that Petitioners did not mention, demonstrates how well-settled and amenable to application this doctrine is. Several cases denied qualified immunity with facts that look more like the allegations in the complaint here. One is *Roane*. There, the policy that called for the officers to transport someone who had ingested drugs to a hospital instead of booking does not establish liability for a constitutional violation, but, as here, went to the state of mind of the officers. *Roane*, 534 F.3d at 541. Where a policy directs officers to transport people who have ingested drugs to a hospital precisely because of the risk of doing so, officers are aware of the substantial risk of harm to people who ingest drugs and do not get medical care. Another is *Border* v. *Trumbull Cnty. Bd. of Comm'rs*, 414 F. App'x 831 (6th Cir. 2011). There, the court denied qualified immunity to an officer when an arrestee died of an overdose after booking, even though—as here—he had denied ingesting drugs or alcohol and the officer pointed to medical resources at the jail, because of fact questions about the officer's knowledge. *Id.* at 833, 835. Indeed, it specifically distinguished *Watkins* and *Weaver* because, unlike those cases but exactly like this one, the officer had noted the decedent's drug use in a form report. *Id.* at 838. And in *Burwell*, the court observed that it had "routinely assigned liability to officers who witnessed a detainee in obvious distress" and failed to seek or provide medical care. 7 F.4th at 475 (collecting and discussing cases).

Tenth Circuit: *Martinez* v. *Beggs*, 563 F.3d 1082 (10th Cir. 2009). Petitioners' citation to *Martinez* makes especially little sense here. In that case, the problem for the plaintiff was specific liability. *Id.* at 1090. While a pretrial detainee who arrived at jail while intoxicated from drinking did die in custody, he died of a *heart attack*, not anything related to drinking, which of course officers could not have predicted. And *Martinez* is another case decided on the summary judgment posture rather than at the motion to dismiss, so the court could observe that "[n]othing in the record indicates that [the decedent] exhibited symptoms that would predict his imminent heart attack or death." *Id.* at 1091.

By contrast, more analogous Tenth Circuit cases unmentioned by Petitioners allow for liability on more similar facts to this case. *Paugh*, cited above, is one example. *Quintana*, also cited above, is another.

Eleventh Circuit: *Johnson* v. *City of Bessemer*, 741 F. App'x 694 (11th Cir. 2018). Unlike the facts of this case, the *Johnson* Court granted qualified immunity because the officers simply did not know of the risk at issue. There, other than an admission of having consumed some marijuana, officers had no sign of drug use on the part of the decedent at all. *Id.* at 705. And without that knowledge, officers not only did not draw an inference about a risk of substantial harm but could not have done so. *Id.*

Other Circuits' reported cases unmentioned by Petitioners accord with the Third Circuit decision here—including cases with closer factual analogues and/or cases on the same motion to dismiss posture.

Fifth Circuit: *Sims* v. *Griffin*, 35 F.4th 945 (5th Cir. 2022). Like every other Circuit, the Fifth Circuit applies the standard discussed here, looking at whether there was "a serious medical need," i.e., "one for which treatment has been recommended or for which the need is so apparent that even laymen would recognize that care is required," and then whether the officers were "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and [] actually drew the inference." *Id.* at 949-50. *See also Stevenson* v. *Toce*, __ F.4th __, No. 23-30486 (5th Cir. Aug. 22, 2024) (applying the same standard, just last week). The decedent in *Sims*, much like Mr. Thomas, had "swallowed a bag full of drugs" and exhibited other external indicia of having done so. *Sims*, 35 F.4th at 951. And the court rejected qualified immunity and summary judgment because of disputes over whether the plaintiff's "need for treatment was so apparent that even laymen would have recognized that care was required," and the inescapable related dispute over, therefore, whether officers knew of the substantial risk of serious harm. *Id.* at 950. Indeed, the question of obviousness of the substantial medical need is quintessentially one of fact, and so the court "lack[ed] jurisdiction to review" it at that stage. *Id.* at 951.

Eight Circuit: *Barton* v. *Taber*, 820 F.3d 958 (8th Cir. 2016). In *Barton*, the Eighth Circuit rejected qualified immunity for an officer who sought no treatment or care when a man who had been picked up for drunk driving with obvious signs of a serious medical need died in his holding cell. *Id.* at 964. There, where the officer had seen the man's symptoms of alcohol consumption both at the scene of a car accident and at the detention center, *id.*, the "failure to seek medical care" claim could proceed. *Id.* at 967. The

Barton Court emphasized the procedural posture—it, like this case, went to the Circuit on an interlocutory appeal of a motion to dismiss—and noted that it simply could not credit officers' out-of-record assertions about their own state of mind.

All told, most Circuits have precedent that, as here, denies qualified immunity on similar facts involving overdose or intoxication deaths of arrestees and pretrial detainees. And all apply the same rule the Third Circuit applied here.

3. Petitioners also mischaracterize the Third Circuit's opinion as an extension of *Hope* v. *Pelzer*, 536 U.S. 730 (2002) and *Taylor* v. *Riojas*, 141 S.Ct. 52 (2020), and mischaracterize those precedents on their own terms. But the Third Circuit opinion does not depend on, much less extend, those cases. The Court should reject Petitioners' attempts to manufacture confusion over their meaning to entice the Court to plenary review. *E.g.* Kinsinger Petition at 23 ("the Court may wish to use this case as a vehicle to clarify the scope of the obviousness exception").

For one thing, the Third Circuit opinion did not rely on *Hope* or *Taylor*. The opinion quoted this Court's opinion in *Brosseau* v. *Haugen*, 543 U.S. 194 (2004), which post-dates *Hope*, for the much narrower (and uncontroversial) proposition that "a general constitutional rule already identified in the decisional law may apply with obvious clarity." 15a. It cited *Hope* only to emphasize that qualified immunity does not require an exact factual match, or, as the Third Circuit's own precedent—which the Court also cited—explains, "[a] public official, after all, does not get the benefit of one liability-free violation simply because

the circumstance of his case is not identical to that of a prior case." *Mack* v. *Yost*, 63 F.4th 211, 233 (3d Cir. 2023). The opinion does not cite *Taylor* v. *Riojas* at all.

For another, this case evinces no confusion about *Hope* or *Taylor*. Whether or not—as Petitioner Kinsinger suggests—*Hope* addresses only obvious "cruelty" rather than obvious applications of law to facts, Kinsinger Petition at 8, 9, 10, the Third Circuit used the same standard all courts use for these claims, and cited the same cases Petitioners' own appellate briefs did. Neither the Third Circuit, nor any other Circuit that cited the same decisions in the cases described above, are confused about that. This Court should reject Petitioners' attempts to manufacture confusion where none exists.

* * *

For these reasons, the Court should deny certiorari.

II. Besides seeking certiorari from a correct decision in the absence of a Circuit split, the Petitioners ignore numerous vehicle problems counseling against review.

This case has at least four glaring problems that independently warrant rejecting Petitioners' request for plenary review.

1. The questions that Petitioners have presented are not case dispositive. At bottom, Petitioners demand qualified immunity based upon the allegations in the Thomas Estate's operative complaint. But that request only underscores why many courts have held that

summary judgment, not the motion to dismiss, is often the superior time to address qualified immunity.

Motions to dismiss, unlike summary judgment, often do not resolve a case. While plaintiffs do not get a second bite at fact discovery and briefing when they lose at summary judgment, district courts granting dismissal generally do so without prejudice—and most plaintiffs amend based upon identified pleading deficiencies. In a different pretrial detainee medical care case involving qualified immunity, the Eleventh Circuit long ago rejected a district court that had dismissed without leave to amend because of qualified immunity. In doing so, it observed that dismissal without leave to amend would not be proper, because "[m]ore specific allegations (e.g. why [the decedent's] need for medical attention was obvious, why the defendants should have known that [he] needed medical attention) would have remedied the pleading problems found by the district court." *Thomas* v. *Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988). Unless a plaintiff could "beyond doubt" not "prove a set of facts which would entitle him to relief," amendment is not futile. *Id*. (collecting cases).

Here, if the Third Circuit had identified deficiencies in the allegations, Respondents would have gotten allowance to amend their complaint to address those deficiencies. Even worse for Petitioners' request for certiorari, Respondents might well have an opportunity to do so even later. Petitioners are not the only defendants in the case. *See* 7a; 24a. Defendant PrimeCare is in the case regardless, and when Respondents take discovery they might learn new-to-them or additional facts showing that Petitioners violated clearly established law. Respondents could then

reassert their claims based upon new evidence. *See* Fed. R. Civ. P. 15(a). Or, in the Third Circuit, based upon Fed. R. Civ. P. 54(b). *See In re Pharmacy Benefit Mgrs. Antitrust Litig.*, 582 F.3d 432, 439 (3d Cir. 2009) (treating new evidence as an extraordinary circumstance under that Rule). But regardless, this Court's consideration at this stage and on this posture would not resolve the case against Petitioners, much less the case overall.

2. Petitioners' certiorari petitions, like their Third Circuit briefs, depend upon improperly disputing factual allegations. When a trial court has identified a version of the facts that would amount to a violation of clearly established law, disputing those facts divests appellate courts of jurisdiction to hear interlocutory appeals of denials of qualified immunity. *Johnson* v. *Jones*, 515 U.S. 304, 319-20 (1995) (limiting the allowance for interlocutory appeals set out in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1989)). And the factual allegations that they explicitly or impliedly dispute here underscore the problems with addressing qualified immunity on a motion to dismiss, including especially in cases where the claim involves deliberate indifference and turns on the subjective state of mind of the defendants.

Deliberate indifference claims that turn on subjective state of mind evidence are particularly inapt for dismissal based upon qualified immunity. This is because a plaintiff's allegations can differ from an officer's own testimony or other evidence about the officer's state of mind. Every case cited by the Petitioners as out-of-step with the Third Circuit decision here pointed to the lack of knowledge on the part of officers and/or to officers having failed to draw the inference about the substantial risk of serious

harm in failing to act. *See* Reason I, *supra* at 18-22. Those cases did so on the summary judgment posture, with the benefit of evidence in the record about officers' knowledge or inference-drawing. By contrast, courts must credit allegations in a complaint that officers drew those inferences, "as opposed to [] at the summary judgment stage, at which the parties must support their factual assertions with citations to an established record." *Barton*, 820 F.3d at 967. The *Barton* Court, for example, explicitly noted that "our holding should be read in light of the fact that it is based on the district court's denial of a Fed. R. Civ. P. 12(b)(6) motion." *Id*. The *Mays* Court also emphasized the procedural posture, specifically distinguishing other pretrial detainee medical care cases that had "both granted *summary judgment* to defendants." *Mays*, 992 F.3d at 304 (emphasis in original). There, officers had sought "to question their knowledge about Mays's use of pills and discount the inferences to be drawn from the 911 call and Mays's appearance," but the court recognized that officers could not do so until discovery because the complaint had "plausibly alleged that his need for medical care was obvious enough to make it easily recognizable." *Id*. at 305. "There may well be factual disputes," and officers "may dispute their knowledge" of the seriousness of the medical need and the risk it involved, but not at the motion to dismiss stage. *Id*.

This case is just like *Barton* and *Mays* in this regard. Petitioners' request for qualified immunity depends on their own refusal to accept the complaint's allegations. For one, like the officers in *Mays*, Petitioners repeatedly dispute their own knowledge of Thomas's cocaine consumption—despite the allegations in the complaint that they witnessed a white powdery substance around

his lips, his white liquid spit, and cocaine rocks falling out of his shirt. *See* CA3 Doc. 32 at 14 (saying Thomas's drug ingestion was "not witnessed or known"); CA3 Doc. 37 at 20 (insisting Thomas showed no sign of a serious medical need); CA3 Doc. 27 at 19 (arguing that Kinsinger "may have believed" Thomas ingested cocaine but that complaint "fail[ed] to provide any evidence" of the same). For another, they demand inferences in their favor about the medical capabilities at the Dauphin County Prison and their own knowledge of the scope of that care, contrary to explicit allegations in the complaint. *See* Kinsinger Petition at 7 (describing Kinsinger's belief that the difference was merely between "medical care at a *hospital*" and "medical care at a *prison*") (emphasis in original). The complaint alleges that the Prison had only limited care available, specifically not comparable to care at a hospital. 83a.

3. Petitioners' simultaneous arguments that the Third Circuit stepped out on a jurisprudential limb and that certiorari is important because of the frequency of this fact pattern undermine their request for review. Those positions sit in considerable tension, but if both were true, they would only suggest that this Court should allow further percolation in the Courts of Appeals.

The first assertion is wrong, *see* Reason I, *supra* at 18-23, but even if the both were true, this Court should let the Courts of Appeals deal with these cases as they arise to see if a split develops. Respondents agree that "[o]verdose fatalities in prisons have climbed dramatically in recent years." *Zakora*, 44 F.4th at 470 (explaining Bureau of Justice Statistics data suggest that in-custody overdose deaths increased by "more than 600%" from 2001 to 2018). And indeed, this brief discusses seven cases

since 2020 where officers transported a person who had consumed excessive amounts of drugs to a jail instead of a hospital, and they died as a result. *See* Reason I, *supra* at 14-23. For now, courts reach consistent results granting or rejecting qualified immunity based upon allegations or evidence as to officers' knowledge of that consumption and the risk involved—the Court may well never find this worthy of review. If anything, this case does not present the one issue here that might eventually warrant review, the Circuits' evolving treatment of the subjective prong in detainee medical care cases post-*Kingsley*. *See* n.1, *supra*; *see also Sandoval* v. *City of San Diego*, 985 F.3d 657, 671 (9th Cir. 2021) (applying objective-only standard and denying qualified immunity). But to consider that, the Court would want a case—like *Sandoval*, and unlike this one—where the standard might be dispositive. One where the summary judgment record (not the complaint) lacks evidence of officers' knowledge of the serious medical need or of their having drawn the inference, where a plaintiff could only win under an objective-only standard. Unlike the many cases discussed here that granted or affirmed qualified immunity on the subjective prong, because of Petitioners' knowledge, this is not such a case.

4. This case also does not implicate the heartland of qualified immunity, and to the contrary, Petitioners ask for an extension of a dubious judge-made doctrine outside of its core purpose.

The Court has explained that the purpose of qualified immunity is to shield officers who do difficult work and must make split-second decisions in situations that challenge their safety or the safety of others. A proper analysis must "allow for the fact that police officers

are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving[.]" *Plumhoff* v. *Rickard*, 572 U.S. 765, 777 (2014). The Court has repeatedly addressed this point in fact-intensive, fast-moving cases involving excessive force. *E.g. id.*; *Saucier* v. *Katz*, 553 U.S. 194, 206 (2001) (cleaned up) (discussing qualified immunity's purpose "to protect officers from the sometimes hazy border between excessive and acceptable force"); *Kisela* v. *Hughes*, 138 S.Ct. 1148, 1152-53 (2018) (involving excessive force). Justice Thomas has specifically contrasted "officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies" with those who lack such time; the former should not "receive the same protection as a police officer who makes a split-second decision to use force in a dangerous setting[.]" *Hoggard* v. *Rhodes*, 141 S.Ct. 2421, 2422 (2021) (Thomas, J., dissenting from denial of certiorari). Appellate courts across the country routinely consider officers having time to make other choices, including when applying the obviousness standard to deny qualified immunity in the absence of on-point precedent. *E.g. Cole* v. *Carson*, 935 F.3d 444 (5th Cir. 2019).

Worse, Petitioners come to the Court asking for the extension of a judge-made doctrine that courts increasingly recognize has little basis in law. Justices of this Court have lately written opinions urging reform to qualified immunity. *Kisela*, 138 S.Ct. at 1162 (Sotomayor, J., dissenting); *Ziglar* v. *Abassi*, 137 S.Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."). In Circuit cases, "[a] strange-bedfellows alliance of leading scholars and advocacy groups of every ideological stripe"

along with "a growing, cross-ideological chorus of jurists and scholars" have urged reform to qualified immunity jurisprudence. *Zadeh* v. *Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willet, J., concurring in part and dissenting in part). Appellate judges have decried the "ill-conceived" and "judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983." *Sampson* v. *Cnty. of Los Angeles*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part). Particularly implicating Petitioners' arguments, "[n]othing in the text of § 1983—either as originally enacted in 1871 or as it is codified today—supports the imposition of a 'clearly established' requirement." *Horvath* v. *City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring the judgment and dissenting in part).

And qualified immunity's very foundation rests on an error. The Ku Klux Klan Act of 1871, though which Congress enacted § 1983, contained "additional significant text" that did not make it into the U.S. Code. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 235 (2023). In the original text, the law said that government officials "shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable" for damages under § 1983. Ku Klux Klan Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (emphasis added); *see also* Reinert, 111 Cal. L. Rev. at 235. And since "notwithstanding" retains the same meaning today that it had in ordinary public usage in 1871, the meaning is clear: people acting under color of law could not rely upon any then-existing common law immunity. Against this backdrop, Petitioners seek an expansion of the doctrine.

* * *

While the Court should reject Petitioners' primary request for error correction in the absence of error, it should also reject their dubious request for plenary review because of the manifest vehicle problems of the case as they've presented it.

CONCLUSION

The Court should deny the petition for a writ for certiorari.

Respectfully submitted,

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