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.

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

REPLY BRIEF FOR THE PETITIONER

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Law enforcement officers' jobs are hard enough without the risk that even acting completely reasonably is not enough to shield them from discovery, depositions, trial, and potential liability. Yet that is the consequence of the error below—the obliteration of qualified immunity in the deliberate indifference context in the Third Circuit. The importance of that error is difficult to overstate. Six different law enforcement organizations have filed *amicus* briefs in this case urging reversal. They represent over 360,000 law enforcement officers including 40,000 in Pennsylvania. They urge reversal because the decision below, if allowed to stand, will transform thousands of routine law enforcement encounters in the Third Circuit into potential § 1983 lawsuits threatening devastating personal liability for the officers involved. This Court's review would set an important nationwide precedent. It would clarify the application of the "obviousness" exception to qualified immunity and the application of the deliberate indifference standard to a recurring crucially important law enforcement situation.

The key error below, which prompted Judge Phipps's blistering dissent, was the majority's holding that it is not just deliberate indifference but "*obvious*" deliberate indifference to drive a person who has ingested an unknown quantity of cocaine, who shows no clear signs of medical distress, to a booking center six minutes away for evaluation by the medical staff there. That holding is clearly wrong. It contravenes this Court's precedents governing both qualified immunity and deliberate indifference. And it is utterly unworkable: it makes it impossible for officers to know how to respond in mine-run encounters involving individuals who have consumed an unknown quantity of drugs.

Respondents' arguments against review are meritless. The decision below is not "correct" (*contra* Opp. 2). Nor does petitioner's request for summary reversal turn on any disputed facts (*contra* Opp. 26). Nor is it material that this case reaches this Court on a motion to dismiss rather than summary judgment (*contra* Opp. 24-25). Further percolation would benefit no one (*contra* Opp. 28): not this Court, whose law is already clear; and not law enforcement officers, who face crushing liability every day that the decision below remains the law. This case strikes at the very heart of what qualified immunity exists to protect (*contra* Opp. 29): officers making hard decisions in fluid, uncertain situations. The Court should reverse.

ARGUMENT

I. THE MAJORITY BELOW ERRED ON AN ISSUE OF EXCEPTIONAL NATIONWIDE IMPORTANCE

A. The Majority Below Flouted This Court's Qualified Immunity Precedents

The brief in opposition cements the conclusion that this is an open-and-shut case for summary reversal. As Judge Phipps explained in dissent below, to deny qualified

immunity, a plaintiff must show that "the violation of a federal right has been clearly established." Pet. App. 19a. There are two ways to make that showing. "The mainline method" is identifying either "binding precedent or a robust consensus of persuasive authority." Pet. App. 19a. The other method, reserved for "exceedingly rare cases," is showing "the wrongdoing is so obvious that 'every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.'" Pet. App. 20a. This Court has only ever found the obviousness exception met twice, in two cases involving "obvious cruelty." Pet. App. 20a-21a. But the majority did not "attempt to construe defendants' conduct as obvious cruelty." Pet. App. 22a. There was no other valid basis in this case for concluding that the constitutional violation here was "obvious." *Id.*

This was not an "obvious" constitutional violation. The officers believed Thomas had ingested cocaine, but did not know how much or if it was a toxic amount. Pet. 2-5. "Thomas exhibited no plain symptoms of distress." Pet. App. 21a. "[H]e responded coherently to inquiries by other later-arriving officers." Pet. App. 21a. He repeatedly stated he was okay. Pet. App. 109a. "The only time he expressed physical discomfort was en route to the booking center, which had on-site medical staff." Pet. App. 21a. The drive to the booking center was only six minutes; the entire encounter with Thomas lasted 38 minutes. Pet. App. 112a. "And after Thomas arrived at the detention center, not even the examining nurse realized the urgency of the situation." Pet. App. 21a. "Under these circumstances, the response by law enforcement officers—who interacted with Thomas to varying degrees and who are not medical professionals—falls well short of the obvious cruelty alleged in *Hope* and *Taylor.*" Pet. App. 21a.

Respondents do not dispute any part of Judge Phipps's analysis. Respondents do not dispute that there is no binding precedent or consensus of persuasive authority finding that conduct like the conduct alleged here constitutes deliberate indifference, nor did the majority cite any. Respondents do not argue the officers acted with "obvious cruelty."[1] Respondents do not even defend the majority's obviousness analysis. *See* Opp. 23-24. Respondents do not contend, as the majority below did, that the existence of a Harrisburg Police Department policy made the constitutional violation here "obvious." Pet. App. 17a, n.52, 21a.

Instead, respondents defend the majority below by arguing that "this case evinces no confusion about *Hope* or *Taylor*." Opp. 24. But that is false. As Judge Phipps explained, neither *Hope* nor *Taylor* created "such a broad workaround" from the requirement that a plaintiff must point to binding precedent or a consensus of persuasive authority to show a right is clearly established. Pet. App. 22a; *see also* Pa. Lodge. Br. 19-24.

Respondents also argue that "the Third Circuit used the same standard all courts use for these claims." Opp. 24. Even if that were correct, it only confirms the need for this Court's review. This Court's summary reversal decisions provide critical guidance to the lower

[1] Respondents state the majority below "quoted this Court's opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004)" for the proposition that "a general constitutional rule already identified in the decisional law may apply with obvious clarity." Opp. 23. That quote does not appear in *Brosseau*. *Brosseau* was a summary reversal that is almost an exact twin of this case. *Brosseau* held that the appellate court's decision "to find fair warning in the general tests set out in *Graham* and *Garner*" was "mistaken." *Brosseau*, 543 U.S. at 199 (per curiam). That case, like this one, was "far from the obvious one where . . . [abstract legal standards] alone offer a basis for decision." *Id.*

courts. As the petition explained (Pet. 26-27) lower courts routinely cite this Court's qualified immunity summary reversals, citing them thousands of times for key qualified immunity holdings. A summary reversal here would similarly set an important nationwide precedent about the correct application of the "obviousness" exception.

Respondents also do nothing to rebut petitioner's argument that the standard announced below is entirely unworkable. *See* Pet. 24-25; Nat'l FOP Br. 17; Pa. Lodge Br. 24-26. The announced standard:

> [when an officer is] 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, that officer must take reasonable steps to render medical care.

Pet. App. 16a. The words "reasonable steps" could not be more opaque. Is it deliberate indifference to take a person who has ingested a large quantity of drugs to an overcrowded hospital? To take him by car rather than by ambulance? To call paramedics instead of transporting him to the hospital? To transport him only once officers have secured the scene? To call a doctor to the scene and ask her to determine whether hospital care is needed? What about a nurse? What about taking him to medical staff six minutes away at a booking center to determine whether hospital care is needed?

This is a clear-cut case of a failure to apply blackletter qualified immunity doctrine. Respondents do not even try to explain why this is the rare "obvious" case where qualified immunity can be denied without on-point precedent, nor do they defend the reasoning employed by the majority below. The Court should summarily reverse.

B. The Majority Below Ignored This Court's Deliberate Indifference Precedents

The majority's analysis was at odds with this Court's established deliberate indifference precedents. The parties agree that a claim for deliberate indifference has "an objective component" and "a subjective component." Opp. 10-11. Correctly understood, neither is met here.

1. The objective component of deliberate indifference is not met here. The objective component asks whether there even was indifference, or whether, instead, the plaintiff lacked a medical need or his medical needs were reasonably addressed. Pet. 10-11. Respondent is incorrect that all that is required to establish the objective component is a "serious medical need." Opp. 11. If that were true, detainees could sue every time they were unsatisfied with the medical treatment that they received. *But see Estelle v. Gamble*, 429 U.S. 97, 105 (1976) ("[Not] every claim by a prisoner that he has not received adequate medical treatment states a violation of the Eighth Amendment."). "Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106. And "[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment." *Id.* at 107; *accord Mosley v. Zachery*, 966 F.3d 1265, 1270 (11th Cir. 2020) (explaining that to establish deliberate indifference "a plaintiff must show both that the defendant actually (subjectively) knew that an inmate faced a substantial risk of serious harm and that the defendant disregarded that known risk by failing to respond to it in an (objectively) reasonable manner") (cleaned up).

Respondents do not dispute that an officer drove Thomas the six minutes to the booking center and that he was evaluated by the on-site medical staff. That was objectively reasonable by any conceivable standard. Respondents argue that the booking center "lacked

sufficient medical resources to deal with overdoses." Opp. 1. But that is beside the point. Not every person who ingests drugs needs medical treatment. *See* Nat'l FOP Br. 17. The appropriate question is whether it was reasonable for the officers to take Thomas to be seen by the medical staff at the booking center to determine whether he needed emergency medical care. That was eminently reasonable and respondents do not attempt to argue otherwise.

Respondents argue that the Harrisburg Police Department policy to transport detainees who have "consumed illegal narcotics in a way that could jeopardize their health and welfare" (Opp. 5) to the hospital rather than booking "underscored the risk to people in Thomas's situation" (Opp. 16). Either way, it does not make a decision to transport Thomas a short distance to a booking center for prompt medical evaluation objectively unreasonable. That is especially true for petitioner here, who is not an employee of the Harrisburg Police Department and thus not subject to the policy.[2]

2. The subjective component of deliberate indifference also is not met here. The parties agree on the standard: to establish the subjective component of deliberate indifference an "official must know the relevant facts and actually draw the inference that the medical need is serious" and disregard it. Opp. 11.

The allegations here do not rise to that standard. The complaint itself establishes the opposite: that the officers *did not* draw the inference that petitioner was suffering a

[2] Respondents do not dispute Judge Phipps's point that the "policy does not set a constitutional standard of conduct for the Harrisburg Police Department, much less for every law enforcement agency operating within [the Third] Circuit's geographical bounds." Pet. App. 22a.

medical emergency requiring his immediate transport to a hospital. Pet. 15-17; *see* Pet. App. 76a (Compl. ¶ 32).

Respondents do not point to facts in the record or allegations in the complaint that would support the inference that the officers knew Thomas was suffering a medical emergency and consciously disregarded it. Respondents instead point repeatedly to the fact that the officers believed that Thomas had ingested an unknown quantity of cocaine. But that fact is not equivalent to them concluding that Thomas was suffering a medical emergency that required immediate hospitalization. Opp. 16-17. Individuals regularly ingest cocaine without requiring any medical treatment at all, let alone hospitalization. *See* Nat'l FOP Br. 17. In this very case, Thomas's cause of death was not cocaine alone, but cocaine and *fentanyl* toxicity. And respondents do not allege petitioners had any suspicion Thomas ingested fentanyl, which is far more lethal than cocaine.

Respondents argue that officers' concern for Thomas's welfare—repeatedly asking him about his wellbeing and warning him of the danger of ingesting illegal drugs—shows they knew he was suffering a medical emergency and did nothing. But it establishes the opposite: it shows they wanted to find out if he was undergoing a medical emergency so that they could render appropriate aid.

II. THE COURT'S REVIEW IS IMPERATIVE AND RESPONDENTS' ARGUMENTS AGAINST REVIEW ARE MERITLESS

A. The Third Circuit fundamentally erred in its application of qualified immunity. This Court cannot let such a serious error go uncorrected. The Court's intervention in qualified immunity cases is infrequent enough that courts look to this Court's decisions to grant or deny summary reversal in qualified immunity cases as important guideposts in determining the doctrine's

correct application. The Court should correct the Third Circuit's error, remind the lower courts of the correct test and standard for qualified immunity cases, and reassure law enforcement officers that they have breathing room in situations where no clearly-established law guides their decisions.

Without this Court's intervention, the decision below will cause the very problems that qualified immunity was meant to prevent. As the cases respondents cite (Opp. 13-16) and as the numerous cases cited by *amici* (Nat'l FOP Br. 15-16; Nat'l Sheriffs' Assoc. Br. 5-9; Pa. Lodge Br. 10-11) all confirm, law enforcement officers regularly encounter individuals under the influence of drugs or alcohol. "[D]epartments do not have the resources or capabilities to train all officers to comply with the standard set forth by the Third Circuit." Nat'l FOP Br. 16. The decision below "will have law enforcement officers hesitating, second-guessing, and proceeding uncertainly in scenarios where they are forced to make split-second decisions with limited information," causing a "chilling effect" on officers, "endangering both themselves and the public they have sworn to protect." IUPA Br. 2.

B. Respondents grasp at supposed "vehicle problems." All are meritless.

1. That this case reaches the Court on a motion to dismiss is not a reason to deny review. *Contra* Opp. 25. Respondents argue that even if the officers prevail, respondents can just amend their complaint to evade the decision. Opp. 25. Even if that were possible, respondents misunderstand the significance of the error below and the role of this Court in correcting it. The majority announced a rule of constitutional law for every law enforcement officer in the Third Circuit, barring qualified immunity in any case in which an arrestee who has taken an unknown quantity of drugs is not taken directly to a hospital. That the decision below was founded on the "obviousness"

exception only compounds its consequences. If the alleged deliberate indifference here was "obvious," it is unclear what well-pleaded claim of deliberate indifference would not be—eviscerating qualified immunity in the deliberate indifference context.

This Court has never suggested, as respondents claim, that summary judgment is "the superior time to address qualified immunity." Opp. 24-25. In fact, it has said the opposite. This Court has "repeatedly . . . stressed the importance of resolving [qualified] immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). "[N]owhere [has] the Supreme Court suggest[ed] that it was inappropriate to dismiss a complaint on qualified immunity or that there should be a presumption against it." *Crawford v. Tilley,* 15 F.4th 752, 765 (6th Cir. 2021) (Nalbandian, J.).

2. Respondents argue that this case involves disputed facts (Opp. 26), but that is false. As Judge Phipps explained, the complaint demonstrates that petitioner is entitled to qualified immunity. Pet. App. 22a. The parties do not dispute any critical facts. Respondents do not dispute Thomas exhibited no plain symptoms of distress, repeatedly denied he had ingested cocaine, and repeatedly stated that he was okay. Respondents do not dispute that it took six minutes to drive Thomas to the booking center. Respondents do not dispute that the transporting officer ensured medical staff were informed of the belief that Thomas had ingested cocaine and that he was evaluated by medical staff. The purely legal dispute here is over the application of qualified immunity and the deliberate indifference standard to these undisputed facts.

3. The Court should not await further percolation (*contra* Opp. 28). Additional percolation would not aid the Court's application of its blackletter law to the facts here.

And tens of thousands of law enforcement officers in the Third Circuit would be at risk of devastating liability while this Court waits for a split to develop. *See, e.g.*, IUPA Br. 2-3; NAPO Br. 7. Respondents seem to argue that this Court's decisional process would benefit from further percolation (Opp. 28)—but do not explain why. The decision below is plainly wrong, contravenes the Court's precedents, and denies law enforcement officers an immunity critical to the effective discharge of their daily functions. The time for the Court's intervention is now.

4. Finally, respondents urge the Court to deny review because this case "does not implicate the heartland of qualified immunity" which they argue is reserved for "fact-intensive, fast-moving cases." Opp. 29-30. This Court has never circumscribed qualified immunity in that way, *see, e.g.*, *District of Columbia v. Wesby*, 583 U.S. 48, 62-63 (2018); *Ziglar v. Abbasi*, 582 U.S. 120, 152 (2017). In any event, this *is* a heartland qualified immunity case even under respondents' "fast-moving cases" theory. This was a fast-moving situation involving drugs, multiple criminal suspects, and risks to officer and public safety. Pet. 2-5. The entire encounter lasted 38 minutes. Pet. 5. This is exactly the kind of case for which qualified immunity was made and to which it rightfully applies.

The decision below is utterly "divorced from the real world that police officers face on a regular basis." *Wesby v. District of Columbia*, 816 F.3d 96, 111 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc). Law enforcement officers confront situations just like the one here every day. The Court should reaffirm that they will not be sued into bankruptcy even when they respond completely reasonably to difficult and uncertain circumstances. The Court should reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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