No. 17-1204

In The
Supreme Court of the United States

RICHARD SCHROETER,

Petitioner,

v.

JOAN KEDRA, in her own right and as Personal Representative of the Estate of David Kedra,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GERALD J. WILLIAMS, ESQUIRE
Counsel of Record
CHRISTOPHER MARKOS, ESQUIRE
WILLIAMS CEDAR, LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102-1929
Phone: 215.557.0099
Facsimile: 215.557.0673
Email: gwilliams@williamscedar.com
cmarkos@williamscedar.com

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Is a state actor entitled to qualified immunity from a 42 U.S.C. §1983 claim under the Fourteenth Amendment when he acts in criminally conscious disregard of a known, unjustifiable risk of death to another person, and his action results in the death of another?

2. Was Respondent's decedent's right "not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all safety protocols" clearly established at the time of his death?

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RESPONDENT'S STATEMENT OF THE CASE

On September 30, 2014, while conducting a mandatory firearms training attended by Respondent's decedent, Pennsylvania State Trooper David Kedra, Petitioner Schroeter, then a corporal with the State Police, knowingly violated multiple, written rules regarding the use and demonstration of a firearm. He did so, notwithstanding his previous acknowledgment, also in writing, that violating the rules would place others at a substantial risk of bodily harm or death (App. 86-87, ¶¶12-14); *see also*, Opinion below, App. 2-3; 7 n.2; and Concurring Opinion below (Fisher, C.J.), App. 53-54.

Despite Corporal Schroeter's actual knowledge of this risk, and despite his ample opportunity to exercise the "unhurried judgment" needed to avoid it (App. 14-15), he pointed an unchecked pistol at Trooper Kedra *and* pulled the trigger, discharging a round from the chamber, killing Kedra.

Subsequently, Schroeter pleaded guilty to the crime of "reckless endangerment of another person." App. 88, ¶21. Under Pennsylvania law, the *mens rea* for that crime is "*conscious* disregard of a known risk of death or great bodily harm to another person." Concurring Opinion, App. 53 (emphasis added, citations omitted). The statutory definition of the crime provides that "a person acts recklessly when he consciously disregards a substantial and unjustifiable risk." *Id*. (quoting 18 Pa. Cons. Stat. §302(b)(3)).

Respondent brought this action under 42 U.S.C. §1983, alleging that Schroeter had violated her

decedent son's constitutional rights under the Fourteenth Amendment to the U.S. Constitution. Upon appeal from the District Court's dismissal of the complaint on grounds of qualified immunity (App. 71-83), the Third Circuit Court of Appeals reversed and remanded (App. 1-70).

The Court of Appeals found that the complaint "adequately pleads a state-created danger claim under a then-clearly established theory of liability." App. 3-4. In a thorough analysis, the majority opinion found that the complaint clearly stated a claim that Schroeter had violated Kedra's clearly established right "not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols." App. 40-46.[1]

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[1] In his concurrence, Judge Fisher would define Kedra's right as "a police officer's right not to be subjected to a firearms training in which the instructor acts with deliberate indifference, that is, consciously disregards a known risk of death or great bodily harm." App. 58-59. Regardless of whether this definition is considered broader or more narrow than that stated by the majority, App. 40-41, n.2, Judge Fisher concurred that it was clearly established, as "in light of existing case law, a reasonable person could not have believed that it was consistent with Kedra's substantive due process rights to subject him to a firearms training at which the instructor was deliberately indifferent to his safety." App. 60-61.

ARGUMENT

1. The allegations *sub judice* do not purport to hold respondent to a negligence standard, or seek to make him liable for a "horrible accident"; rather, the allegations and the factual assertions on which they rest plausibly claim that he affirmatively acted in conscious disregard of a substantial, unjustifiable risk of harm to David Kedra.

Schroeter's Petition is bereft of any discussions of the Court of Appeals' analysis of the issues presented herein. Review of that analysis, however, reveals that the complaint "clearly and unmistakably alleges facts that support an inference of *actual, subjective knowledge of a substantial risk of lethal harm*, and neither the Supreme Court nor we have wavered from a the well-established principle that a plaintiff may plead and prove deliberate indifference in the substantive due process context using this subjective test." App. 22 (emphasis supplied). Thus, although Schroeter's conduct was undoubtedly "objectively unreasonable" under current Constitutional standards,[2] the complaint does not rely on that test to establish Schroeter's deliberate indifference in the Fourteenth Amendment context. Rather, its factual allegations, if proved, would establish deliberate indifference under

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[2] *See*, *e.g.*, App. 18-20 (discussing *Kingsley v. Hendrickson*, 135 S.Ct. 2466 (2015), and *L.R. v. School District of Philadelphia*, 836 F.3d 235 (3d Cir. 2016)).

the older, "subjective" test, one well-established for decades.

As Petitioner points out, in *Farmer v. Brennan*, 511 U.S. 825 (1994), this Court clarified the subjective test for the establishment of deliberate indifference. There must be a showing that "the official know of and disregard an excessive risk," being "aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference." *Id.* at 837. Petitioner's assertion that he is entitled to qualified immunity under this test is based on a misapprehension of the risk of which he has admitted he was (criminally) aware.

Contrary to Petitioner's position, the allegation that he was deliberately indifferent to a known risk does not rise or fall on the factual question of whether he had actual knowledge that a bullet was in the chamber of the gun he fired at Kedra. As the Court of Appeals observed, requiring such knowledge would improperly elevate the culpability standard from "knowledge of a 'substantial risk' of harm to knowledge of a certainty of harm." App. 33.

The proper focus in this case must remain on Schroeter's knowledge that the affirmative act of pointing *and* firing a gun directly at Kedra, in contravention of all required precautions, carried with it the inherent, fatal risk of the harm that Kedra suffered.[3]

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[3] The Court of Appeals recited the complaint's allegations that Schroeter "directly contravened each and every one" of at

Further, the complaint does not rely on conclusory assertions that Schroeter had the requisite knowledge of risk. The Court of Appeals delineates three areas of circumstantial evidence alleged by plaintiff, and one allegation – admitted by Schroeter – of direct evidence that is virtually dispositive of the issue.

The facts alleged in the complaint and comprising circumstantial evidence of Schroeter's deliberate indifference are (1) the "glaringly obvious" nature of the risk arising when "a firearm instructor skips over each of several safety checks designed to ascertain if the gun is unloaded, points the gun at a trainee's chest, and pulls the trigger;"[4] (2) the actual knowledge of the risk Schroeter possessed by virtue of his long experience and specialized training as a firearms instructor; and (3) the "express advice" he had received regarding the risk through the explicit rules he had acknowledged in writing. *See* App. 23-27.

In addition to these circumstantial facts which overwhelmingly support Respondent's claim, there is also significant direct evidence alleged in the complaint. Schroeter's guilty plea required, and indeed comprised a straightforward admission that he had "recklessly engage[d] in conduct which place[d] . . . another person in danger of death or serious bodily injury," with the mental state of "conscious disregard [of]

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least six "clear and detailed" safety requirements, the importance of which he had previously acknowledged in writing. App. 27.

[4] "Our Sister Circuits, with near unanimity, also have recognized the relevance of obviousness of risk to proving actual knowledge." App. 24, n.12 (citations omitted).

a substantial and unjustifiable risk" of serious harm. App. 27. *See also* Concurring Opinion, App. 53. As Judge Fisher states in his concurrence, "no reasonable person" could believe that conduct like Schroeter's, committed in such a state of mind, was "consistent with Kedra's substantive due process rights. . . ." *Id.* For these reasons, Schroeter is not entitled to qualified immunity.

2. David Kedra's Constitutional right, as delineated by the Court below, was clearly established at the time of his death.

The Court of Appeals provides an extensive analysis of the "clearly established" nature of the right asserted by plaintiff. App. 40-46. In conformity with well-established precedent, the Court of Appeals looked to determine whether the contours of the right were, as of September 2014, "'sufficiently clear that a reasonable officer would understand that what he is doing violates that right.'"[5] App. 41 (quoting *Rivas v. City of Passaic*, 365 F.3d 181, 200 (3d Cir. 2004)). In conducting its analysis, it relied on this Court's precedent establishing that sufficient clarity of the "contours" of a right does not depend on a finding that a defendant's exact conduct has been found previously to be unconstitutional:

> "Officials can still be on notice that their conduct violates established law even in novel

[5] Here, that right was "not to be subjected, defenseless, to a police officer's demonstration of the use of deadly force in a manner contrary to all applicable safety protocols." App. 40.

> factual circumstances," because the relevant question is whether the state of the law at the time of the events gave the officer "fair warning."

App. 42 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

The Court found the appropriate "fair warning" in the holdings of multiple federal cases, including a long line of precedential Third Circuit cases on the state-created-danger theory and decisions from other Circuits finding due process violations in state actors' dangerous conduct in "conscious disregard of substantial risk of harm to innocent parties." App. 42-44 (citations omitted). The many legal precedents established by these cases served to amplify the "fair warning" already bestowed on Respondent by virtue of his training and experience, the obviousness of the relevant risk, and his self-professed, actual knowledge of it. *Id*. at 46. These factors preclude the grant of qualified immunity.

3. The facts plausibly alleged in this case satisfy the element of each test of liability employed by the various Circuits for the state-created-danger theory and none of the variations supports granting the petition.

Petitioner argues that "the precise framework for liability under the state-created danger theory varies among the circuits."[6] However, even a cursory review

[6] Petitioner describes tests from the Third, Fifth, Ninth, Tenth and Eleventh Circuits.

of the cases cited by Petitioner shows that the purported variations are slight, and that the allegations in this case would satisfy each Circuit's test. The hallmark of liability under each test is "conscience-shocking" conduct carried out in conscious disregard of an obvious or known risk of serious harm that is at least "foreseeable," "fairly direct," or "immediate and proximate." *See*, e.g., *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995).

Petitioner characterizes the Eleventh Circuit's decision in *White v. Lemacks*, 183 F.3d 1253 (11th Cir. 1999) as holding that "deliberate indifference is insufficient to constitute a due process violation in a non-custodial setting." But Petitioner's characterization of the *White* holding is misleading. In rejecting a claim that state officials could be held liable for failing to exercise supervision and allocate resources sufficient to prevent inmates' assaults on prison nursing staff, the Eleventh Circuit simply held that deliberate indifference "in the context of routine decisions about employee or workplace safety" would not meet the "conscience-shocking" prong of a "special danger" test. *Id*. at 1258. However, it explicitly recognized that, in other circumstances, a state actor's deliberate indifference might result in conduct that is "conscience-shocking in the Constitutional sense." *Id*. at 1258-59. The circumstances alleged here are a far cry from those involved in *White*. Here, the Petitioner has admitted that he committed a crime against Respondent's decedent – a crime that can only be committed by one who knowingly disregards the grave risk in which

he places the victim, and one that resulted here in the death of the victim. As the Court of Appeals held in both majority and concurring opinions, such conduct is of a nature "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." App. 14 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)).

The Circuits' tests for substantive due process liability are consistent with each other, and their uniform applicability to his conduct undercuts Schroeter's position and compels denial of his Petition.

CONCLUSION

For all the foregoing reasons, this Honorable Court should deny the petition.

Respectfully submitted,

GERALD J. WILLIAMS
Counsel of Record
CHRISTOPHER MARKOS
WILLIAMS CEDAR, LLC
1515 Market Street, Suite 1300
Philadelphia, PA 19102-1929
Phone: 215.557.0099
Facsimile: 215.557.0673
Email: gwilliams@williamscedar.com
cmarkos@williamscedar.com

Counsel for Respondent