No. 17-_____

In The

Supreme Court of the United States

STEVE SPENCER,

Petitioner,

v.

CHRIS ABBOTT, CRAIG JENSEN,
AND RODGER MACFARLANE

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eighth Amendment guarantees that "cruel and unusual punishments [shall not be] inflicted." U.S. Const. amend. VIII. And this Court has long held that prison officials violate this guarantee when they manifest "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976). Under this standard, a prisoner states an Eighth Amendment claim by demonstrating a "sufficiently serious" medical need to which a prison official responded with a "sufficiently culpable state of mind." *Farmer* v. *Brennan*, 511 U.S. 825, 834 (1994). Yet federal circuits are split 5-5 on the correct standard to determine when a prison official's state of mind is culpable, which division and confusion has been acknowledged by Judges Easterbrook and Bybee. See *Petties* v. *Carter*, 836 F.3d 722, 736 (7th Cir. 2016) (Easterbrook, J., dissenting); *Colwell* v. *Bannister*, 763 F.3d 1060, 1071 (9th Cir. 2014) (Bybee, J., dissenting). The two questions presented are:

1. Do those working in a state prison comply with the Eighth Amendment simply by responding to a prisoner's serious medical needs with *some* medical care, even if inadequate, as five circuits have held, or must the prison meet a higher standard of providing *adequate* medical care, as five other circuits have held?

2. Should this Court's precedent that creates out of whole cloth the doctrine of qualified immunity for state officials be reconsidered?

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INTRODUCTION

Brian Maguire, an inmate held at the Utah State Prison, had a stroke. Respondents misdiagnosed his stroke symptoms as muscle spasms or seizures. Indeed, after the stroke started, two of the Respondents merely took his pulse and left him to suffer overnight.

The Tenth Circuit below ruled that because Respondents had provided *some* medical care to Maguire his estate (represented by Petitioner) was not entitled to relief. This holding is in direct conflict with at least five circuits, which interpret *Estelle* v. *Gamble*, 429 U.S. 97 (1976), to mean that the provision of only *some* care does not necessarily meet the basic requirements of the Eighth Amendment. Meanwhile, four other circuits apparently follow the Tenth Circuit's rule. This Court's review is urgently needed to resolve this conflict, clarifying that providing only a *de minimis* amount of medical care can constitute cruel and unusual punishment.

The Tenth Circuit's decision also highlights the ongoing problems with this Court's doctrine of qualified immunity. Because it was not clearly established law that more medical care was required than taking a pulse, the prison officials in this case could avoid liability despite the egregious harm Maguire experienced. As Justices Kennedy and Thomas have indicated, the present doctrine of qualified immunity is not based in the text or history of 42 U.S.C. 1983, but 29is instead judge-made law. *See Ziglar* v. *Abbasi*, 137 S. Ct. 1842, 1870-1871 (2017) (Thomas, J., concurring); *Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J.,

concurring). This case presents an ideal vehicle for re-examining qualified immunity, and narrowing or overturning it.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the district court's decision to deny summary judgment to Petitioner is unreported but reproduced in the appendix at Pet. 1a. The combined memorandum decision and order of the U.S. District Court for the District of Utah is likewise unreported but reproduced in the appendix at Pet. 71a.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on December 5, 2017. Justice Sotomayor granted an extension of time to file this petition until April 4, 2018. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment states, in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

42 U.S.C. 1983 states in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

STATEMENT

A proper understanding of the questions presented requires a brief overview of (a) the legal framework underlying the Eighth Amendment and qualified immunity, (b) the factual background of this case, and (c) its procedural history.

A. Legal Background

The Eighth Amendment prohibits states from inflicting "cruel and unusual punishments." U.S. Const. amend. VIII. This Amendment applies not only to the sentencing of criminals, but to how the "punishment" is administered. *Wilson* v. *Seiter*, 501 U.S. 294, 296 (1991). For example, a prisoner who is not provided

sanitary facilities would have an Eighth Amendment claim, even though his sentence did not order that deprivation. Cf., *e.g.*, *id.* (allegation of deprivation). Likewise, the Eighth Amendment forbids "deliberate indifference to serious medical needs of prisoners." *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976).

Prison officials are currently protected from liability by the doctrine of qualified immunity. See, *e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1842, 1870-1871 (2017) (Thomas, J., concurring). This doctrine narrows the text of 42 U.S.C. 1983, allowing relief against a government official only if: (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time of the challenged conduct. *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). Beginning with a group of white and African-American pastors arrested for praying for integration in segregated bus terminals, *Pierson* v. *Ray*, 386 U.S. 547 (1967), qualified immunity has protected governmental officials from liability under Section 1983 for the past fifty years.

B. Factual Background

One prisoner whose interests were affected by both doctrines was Brian Maguire. Prior to his death in February 2015, Maguire was a fifty-nine-year-old inmate in the Utah State Prison. Pet. 4a. Immediately before entering the prison, on July 3, 2008, Maguire had been under the care of a physician for opiate addiction, and his treatment involved methadone. Pet. 4a. The Prison's physician's assistant, Chris Abbott,

informed Maguire during his intake examination that the Prison did not prescribe methadone to inmates, and that Maguire's request to be placed on a methadone-tapering program would be denied. Pet. 4a. Abbott informed Maguire that the immediate methadone withdrawal would not kill him, but may make him "wish he were dead." Pet. 42a. Over the next week, Maguire was in and out of the Prison's infirmary, suffering physically and psychologically while experiencing the effects of methadone withdrawal, including hallucinations. Pet. 42a.

On July 15, 2008, Maguire submitted an inmate health request form after noticing that he was losing control over the left side of his body, including at least his left arm and hand. Pet. 4a. Maguire was seen that afternoon by Abbott, who learned of these symptoms and was told by a prison guard that Maguire had been dragging his left leg as he walked. Pet. 4a-5a. Abbott applied pressure on Maguire's shoulder for a moment, and Maguire told Abbott that this provided some relief. Pet. 5a. Abbott diagnosed Maguire with a simple muscle spasm located in his left shoulder and sent Maguire back to his cell with some instructions for physical therapy exercises. Pet. 5a. Abbott also prescribed muscle relaxants. Pet. 5a.

Shortly after returning to his cell, Maguire's left arm began seizing, his left leg became numb, and he began convulsing, prompting other inmates to call "man down." Pet. 5a. Medical technicians Craig Jensen and Rodger MacFarlane accompanied a prison guard, Jerry Miller, to Maguire's cell. Pet. 5a. The three

witnessed Maguire convulsing. Pet. 5a. Jensen and MacFarlane took Maguire's vitals and told him that he had suffered a seizure. Pet. 5a. Maguire contested the diagnosis, informing Jensen and MacFarlane that he had remained lucid throughout the episode, that this foreclosed the possibility of a seizure, and that he believed something was seriously wrong. Pet. 5a, 43a.

Jensen and MacFarlane then told Maguire that there was nothing they could do for him that night. Pet. 5a, 43a. Rather than responding to Maguire's medical needs, they placed his mattress on the floor and told him that he should inform the guards if he had any problems during the night. Pet. 5a, 43a. Then they left and didn't return. Pet. 5a-6a.

Throughout the night, Maguire attempted to summon help from the guards as they made their hourly counts. Pet. 5a-6a. Each of Maguire's pleas went unanswered. Pet. 6a. By morning, still unable to stand on his own, Maguire had urinated in his jumpsuit. Pet. 6a. A few hours later, he was taken to a hospital, where it was determined that he had suffered a massive stroke the day before, around the time he was being ignored by the guards. Pet. 6a.

C. Procedural Background

Maguire filed a pro se civil rights complaint under 42 U.S.C. 1983, asserting claims against (among others) Abbott, Jensen, MacFarlane, and Miller. Pet. 6a. In 2014, the district court appointed counsel for Maguire, but Maguire passed away the following year.

After some limited discovery, Respondents moved for summary judgment in 2015 on the grounds of qualified immunity. Pet. 3a, 6a. The district court denied the motion. Pet. 6a. The court concluded that a reasonable jury could find that Maguire's symptoms rendered Abbott's diagnosis of a simple shoulder muscle spasm patently unreasonable, and therefore that Abbott's actions were evidence of deliberate indifference to Maguire's serious medical needs. Pet. 7a. Similarly, the court found that Jensen and MacFarlane's decision to deny Maguire's request for emergency medical help in light of his convulsions and pleas could reasonably be labeled deliberate indifference by a jury. Pet. 7a. Finally, the Court found that Maguire's testimony that Miller had failed to respond to his requests for help during the night following his stroke stated a proper deliberate indifference claim, sufficient to overcome the barrier of qualified immunity. Pet. 7a-8a.

Respondents appealed the district court's order, arguing that Maguire's allegations did not demonstrate deliberate indifference by Abbott, Jensen, and MacFarlane. Pet. 3a.

A panel of the Tenth Circuit, including then-Judge Neil Gorsuch, Judge Paul Kelly, and Judge Jerome Holmes, heard argument. Pet. 3a. Given now-Justice Gorsuch's appointment to this Court, Judge Kelly and Judge Holmes issued a two-judge opinion on December 5, 2017. Pet. 3a.

The Tenth Circuit reviewed the district court's decision under the first prong of the qualified immunity

standard, namely, whether Abbott, Jensen, and MacFarlane violated Maguire's Eighth Amendment rights by responding to his serious medical need with deliberate indifference. Interpreting the deliberate indifference standard articulated in *Estelle*, the Tenth Circuit concluded that medical personnel met their burden under the Eighth Amendment when they provided *some* level of medical care that was not "patently unreasonable." Pet. 25a-26a. The court held that Abbott's treatment of Maguire's symptoms did not amount to deliberate indifference because Abbott had provided some basic palliative care and prescribed muscle relaxants with physical therapy. Pet. 25a-34a. The court further concluded that Abbott's actions did not meet the "patently unreasonable" standard because Maguire was not completely denied care, but was merely given ineffective care. Pet. 25a-34a. The court reasoned that Abbott's diagnosis and prescribed treatment, which addressed at least one of Maguire's symptoms, demonstrated that Abbott was not deliberately indifferent to Maguire's medical needs. Pet. 25a-34a.

The court further concluded that, since Jensen and MacFarlane had taken Maguire's vitals and placed his mattress on the floor, Maguire could not argue that he had been denied medical treatment. *Id.* at 34-38. Additionally, the court concluded that Jensen and MacFarlane were reasonable in their diagnosis of Maguire having suffered a seizure, foreclosing any argument that the basic care they provided was patently unreasonable. Pet. 25a-34a.

REASONS FOR GRANTING THE PETITION

This petition should be granted for two reasons. First, review is needed to resolve the circuit split on the level of care the Eighth Amendment requires for prisoners. Second, this petition provides a needed opportunity for this Court to reconsider and overrule or limit the doctrine of qualified immunity, a judge-made limitation on Section 1983. This case is a good vehicle for addressing both issues.

I. The circuits are divided on the level of inmate medical care required by the Eighth Amendment.

The circuits are divided over the first question presented, namely, the level of care that inmates must receive under the Eighth Amendment. The rule articulated by the Tenth Circuit and its allies not only contradicts *Estelle* and decisions in other circuits, but also puts tens of thousands of prisoners at risk.

A. The Tenth Circuit's decision conflicts with decisions in several other federal circuits.

Estelle v. *Gamble*, 429 U.S. 97 (1976), established a prisoner's right to pursue an Eighth Amendment claim against medical professionals who act with "deliberate indifference to serious medical needs." *Id.* at 104. In *Estelle*, this Court held that a deliberately indifferent response to a serious medical need "constitutes the 'unnecessary and wanton infliction of pain,'

proscribed by the Eighth Amendment." *Id.* (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976)). In the four decades since it was issued, *Estelle*'s "deliberate indifference" standard has led to conflicting approaches to the application of its "unnecessary and wanton infliction of pain" standard.

1. One of these conflicts is at the center of this case. As Judge Easterbrook lamented in a dissenting opinion, the circuits are split in applying *Estelle* to claims against medical professionals. See *Petties* v. *Carter*, 836 F.3d 722 (7th Cir. 2016) (en banc) (Easterbrook, J., dissenting). As he cataloged, three circuits have held that medical professionals meet their constitutional burden under the Eighth Amendment merely by providing *some* basic treatment for a known condition, while others require a more searching review of that treatment to determine whether it is so poor that it may amount to cruel and unusual punishment. See *id.* at 735-736 (Easterbrook, J., dissenting).

The Seventh Circuit majority opined on this split in the same opinion, noting that it has "repeatedly . . . rejected the notion that the provision of *some* care means the doctor provided medical treatment which meets the basic requirements of the Eighth Amendment." *Id.* at 731 (emphasis added). Under this standard, the *Petties* court concluded that an inmate who suffered an Achilles tendon rupture had stated a claim under the Eighth Amendment when prison medical professionals prescribed rest and palliative care rather than surgery to fix the rupture. See *id.* at 730-731.

The Second, Fourth, Ninth, and Eleventh Circuits agree with the Seventh. For example, the Ninth Circuit has adopted a standard very similar to that used in the Seventh Circuit, holding that "[a] prisoner need not prove that he was completely denied medical care" in order to prevail on his Eighth Amendment medical neglect claim. *Lopez* v. *Smith*, 203 F.3d 1122, 1132 (9th Cir. 2000) (en banc).[1] Likewise, in *Heyer* v. *U.S. Bureau of Prisons*, 849 F.3d 202, 211 (4th Cir. 2017), the Fourth Circuit held that "the mere fact that prison officials provide some treatment does not mean they have provided '*constitutionally adequate* treatment.'" *Id.* (quoting *De'lonta* v. *Johnson*, 708 F.3d 520, 526 (4th Cir. 2013)). The court further noted that, "[w]hile a prisoner does not enjoy a constitutional right to the treatment of his or her choice, the treatment a prison facility does provide must nevertheless be adequate to address the prisoner's serious medical need." *Id.* (internal quotation marks omitted). The Second Circuit likewise has held that "a physician may be deliberately indifferent if he or she consciously chooses 'an easier

[1] See *Snow* v. *McDaniel*, 681 F.3d 978 (9th Cir. 2012) (holding that an inmate with severe hip problems stated a medical neglect claim when prison officials denied the inmate's request for surgery, even though the prison provided palliative care); *Hamilton* v. *Endell*, 981 F.2d 1062, 1067 (9th Cir. 1992) (holding that an inmate stated a medical neglect claim when prison officials required the inmate to fly in an airplane despite medical recommendations that the inmate not fly immediately after surgery, even though prison officials obtained a contrary medical opinion from a second doctor); *Hutchinson* v. *United States*, 838 F.2d 390, 394 (9th Cir. 1988) (holding that a deliberate indifference to a serious medical need "may be shown by the way in which prison physicians *provide* medical care" (emphasis added)).

and less efficacious' treatment plan." *Chance* v. *Armstrong*, 143 F.3d 698, 703 (2d Cir. 1998) (quoting *Williams* v. *Vincent*, 508 F.2d 541, 544 (2d Cir. 1974)).[2]

The Eleventh Circuit has adopted a similar standard, explaining that deliberate indifference to serious medical needs includes: "(1) grossly inadequate care; (2) a decision to take an easier but less efficacious course of treatment; and (3) medical care that is so cursory as to amount to no treatment at all." *Melton* v. *Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016).

2. The approaches of the Second, Fourth, Seventh, Ninth, and Eleventh Circuits conflict with the Tenth Circuit's interpretation of *Estelle*. In *Sealock* v. *Colorado*, 218 F.3d 1205, 1211 (10th Cir. 2000), that court held that a medical professional's deliberate indifference to a serious medical need arises only when the medical professional fails to provide any care for a serious condition or when she prevents access to medical personnel capable of dealing with a serious condition. In either instance, the standard requires that literally *no* care has been provided.

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[2] See *Hemmings* v. *Gorczyk*, 134 F.3d 104, 108-109 (2d Cir. 1998) (holding that an inmate who injured his ankle had sufficiently stated a deliberate indifference claim when he was provided little follow-up care, even though he had "received some medical attention, including two x-rays" to evaluate the injury); *Hart* v. *Blanchette*, 149 F. App'x 45, 47 (2d Cir. 2005) (allowing a claim for deliberate indifference to go forward with respect to one prison doctor even though that doctor had been "treating" the plaintiff).

To be sure, the Tenth Circuit has since clarified that "patently unreasonable" care is equivalent to no care at all and is therefore actionable as a Section 1983 claim. See *Self* v. *Crum*, 439 F.3d 1227 (10th Cir. 2006) ("So long as a medical professional provides a level of care consistent with the symptoms presented by the inmate, absent evidence of actual knowledge or recklessness, the requisite state of mind cannot be met."). However, according to the Tenth Circuit, even exceptionally poor care is constitutionally adequate as long as it reasonably *attempts* to address at least some symptoms.

For example, the Tenth Circuit has held that:

- An inmate who was treated for a spider bite after reporting chest pains for which he needed a pacemaker did *not* state an Eighth Amendment claim because his "symptoms . . . were consistent with a variety of conditions," *id.*;
- A nurse who misdiagnosed an inmate's chest pains as influenza when he was actually having a heart attack "[a]t worst . . . misdiagnosed" the inmate's condition, *Sealock*, 218 F.3d at 1211; and
- In this case, an inmate who had a stroke supposedly received constitutionally adequate care because prison attendants checked his vitals and placed his mattress on the floor. Pet. 36a.

The First, Third, Fifth, and D.C. Circuits follow the Tenth. The First Circuit employs a rule similar to the

Tenth Circuit's "patently unreasonable" standard, explaining that "[w]here the dispute concerns not the absence of help, but the choice of a certain course of treatment, deliberate indifference may be found where the attention received is so clearly inadequate as to amount to a refusal to provide essential care."[3] Similarly, the Third Circuit interprets *Estelle* as providing an avenue for Eighth Amendment claims against medical professionals only when the professional has "knowledge of the need for medical care," but exercises an "intentional refusal to provide that care."[4]

Similarly, the Fifth Circuit has called deliberate indifference "an extremely high standard to meet," holding that it is established only if the medical

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[3] *Feeney* v. *Correctional Medical Services, Inc.*, 464 F.3d 158, 163 (1st Cir. 2006) (internal quotation marks and alterations omitted); see *Torraco* v. *Maloney*, 923 F.2d 231, 235 (1st Cir. 1991) (holding that when some level of care is provided, an inmate may only state an Eighth Amendment claim when that care is "so inadequate as to shock the conscience" (internal quotation marks omitted)).

[4] *Durmer* v. *O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993) (outlining several examples of deliberate indifference, each of which includes circumstances where no care was provided); see *Inmates of Allegheny Cnty. Jail* v. *Pierce*, 612 F.2d 754, 762 (3d Cir. 1979) ("When . . . prison authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to a physician capable of evaluating the need for such treatment, the constitutional standard of *Estelle* has been violated."); *Ruiz* v. *United States*, 664 F. App'x 130, 134-135 (3d Cir. 2016) (holding that "because record evidence demonstrates that 'basic medical treatment' was provided" to an inmate who suffered ankle and wrist lacerations, accompanied by chest pains due to tight restraints, the inmate had "not adduced evidence to support a claim of deliberate indifference").

professional "refused to treat [the plaintiff], ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino* v. *Texas Dep't of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001) (internal quotation marks omitted). In the same spirit, the D.C. Circuit rejects *Estelle* claims so long as prison personnel provided *some* medical response or treatment. See *Farmer* v. *Moritsugu*, 163 F.3d 610, 614-615 (D.C. Cir. 1998).

This conflict over the subjective component of the "deliberate indifference" standard has thus ripened into a 5-5 circuit split, with the Sixth and Eighth Circuits mired in intra-circuit conflict.[5] Except for the possibility that these circuits will join one camp or the other, further percolation is impossible because every federal court of appeals with authority to address the question presented has done so.

3. This split means that whether similarly situated inmates are able to obtain – or be denied – relief is an accident of geography. This case is exemplary: The Fourth Circuit recently *condemned* the lack of follow-up care after an inmate experienced seizures, and

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[5] The Sixth and the Eighth Circuits appear to have precedent on both sides of the split. Compare, *e.g.*, *Rouster* v. *Cnty. of Saginaw*, 749 F.3d 437, 448 (6th Cir. 2014) (appearing to use a rule similar to the Tenth Circuit), and *McRaven* v. *Sanders*, 577 F.3d 974, 983 (8th Cir. 2009) (same), with *LeMarbe* v. *Wisneski*, 266 F.3d 429, 438-439 (6th Cir. 2001) (requiring more than the Tenth Circuit requires), and *Smith* v. *Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (same).

reversed a summary judgment in favor of the prison. See *Heyer* v. *U.S. Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017). That same year, the decision below in this case excused prison officials from Eighth Amendment liability on the ground that Maguire's supposed seizure "presented no obvious risk of immediate danger" and "required no additional treatment," foreclosing a deliberate indifference claim. Pet. 38a.

Given the Fourth Circuit's standard, and its rationale in *Heyer*, it is therefore likely that had Maguire's case been heard in the Fourth Circuit, the court would have found that the facts alleged amounted to deliberate indifference. At the very least, the Fourth Circuit would have considered the inadequate treatment of the supposed seizures as *potentially* amounting to deliberate indifference. In either event, the conflicting standards would lead to a vastly different result, as is evidenced by the divergence between *Heyer* and this case.[6]

The conflicting standards have also resulted in an inmate in one part of the country having his day in court when denied corrective surgery for an Achilles heel rupture, despite receiving substantial palliative care, see *Petties* v. *Carter*, 836 F.3d 722, 731 (7th Cir.

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[6] As another example of the effect of this split, the Seventh and Tenth Circuits have diverged as to the level of aid required when an inmate complains of chest pain and has an undiagnosed heart attack. The Tenth Circuit held that giving pain killers is enough, *Sealock*, 218 F.3d at 1211, while the Seventh Circuit concludes it is deliberate indifference, *Mathison* v. *Moats*, 812 F.3d 594, 598-599 (7th Cir. 2016).

2016) – while in Utah, an elderly inmate who suffered a massive stroke and was left on his cell floor by medical personnel was denied the same protection. Pet. 38a. And he was denied that protection simply because those personnel checked his vital signs as he was convulsing and pleading for help, before abandoning him on the cell floor for the night. This case thus involves a genuine conflict, and not merely a conflict in principle. See Robert L. Stern et al., Supreme Court Practice 242 (10th ed. 2013) ("A genuine conflict . . . arises when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts."). The vastly different responses and interpretations of *Estelle* demand clarification from this Court.

B. The Tenth Circuit's standard for medical neglect claims under the Eighth Amendment intolerably narrows this Court's standard in *Estelle* and *Farmer*.

The Tenth Circuit's rule narrows *Estelle* so far as to make it inapplicable in all but the most extreme cases, that is, those in which a prison denies medical care completely. *Estelle* explained that the Eighth Amendment "embodies broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which [courts] must evaluate penal measures." 429 U.S. at 102 (internal quotation marks omitted). *Estelle* also emphasized "the government's obligation to provide medical care for those whom it is punishing by incarceration" because "[a]n inmate must rely on

prison authorities to treat his medical needs." *Id.* at 103. In determining that "deliberate indifference to serious medical needs constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment," this Court thus sought to embody the concepts of the Eighth Amendment in a workable rule governing medical treatment of prisoners. *Id.* at 104 (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976)).

Moreover, *Estelle* did *not* define "deliberate indifference" to encompass only those instances where prison officials fail to provide care, or access to care, altogether. Rather, the Court developed the concept of "deliberate indifference" consistently with the Eighth Amendment's mandate that prisoners be free from government action that is cruel and unusual, in any form. Specifically, this Court condemned deliberate indifference that "is manifested by prison doctors in their response to the prisoner's needs." *Id.* at 104-105. *Estelle* thus contemplates that a medical professional's "response to the prisoner's needs" could amount to deliberate indifference, even if that response is something more proactive than denying any care whatsoever. *Id.*

This Court reaffirmed the deliberate indifference standard in *Farmer*, explaining that the constitutional responsibility to provide care that is not deliberately indifferent exists because, "having stripped [inmates] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer* v. *Brennan*, 511 U.S. 825, 833 (1994).

In explaining what constitutes deliberate indifference, the Court stated that "it is enough that the official acted *or failed to act* despite his knowledge of a substantial risk of serious harm." *Id.* at 842 (emphasis added). *Farmer* thus reestablished the parameters of the deliberate indifference standard first described by *Estelle*: that a medical professional may be deliberately indifferent to a serious medical need in violation of the Eighth Amendment whether he fails to act *or* acts in a deliberately indifferent manner. See *id.*

The Tenth Circuit's view that any medical care that is not patently unreasonable meets the constitutional standard presupposes that prisoners suffer no cruel and unusual punishment through medical treatment, no matter how poor, as long as that treatment is somehow responsive to some actual symptom. As explained above, in the Tenth Circuit, a medical professional can meet her constitutional responsibilities by diagnosing an inmate who complains of severe chest pains with the flu, and doing no follow-up care, simply because the flu can also cause chest pains. See *Sealock*, 218 F.3d at 1211. And in this case, the Tenth Circuit held that medical professionals can meet their constitutional standard simply by checking the vital signs of a stroke victim who is convulsing on his cell floor, only to leave him there to suffer for the night without any follow-up. Such a holding contradicts the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency" embraced by *Estelle* and embodied in the deliberate indifference rule. *Estelle*, 429 U.S. at 102 (internal quotation marks omitted).

Estelle requires instead that a factfinder have the opportunity to review the assertions by medical professionals about the care they have provided to address a serious need, and to determine for itself whether that care is so poor as to be contrary to "civilized standards [of] humanity, and decency." *Id.* And, "[i]f a risk from a particular course of medical treatment (or lack thereof) is obvious enough, a factfinder can infer that a prison official knew about it and disregarded it." *Petties* v. *Carter*, 836 F.3d 722, 729 (7th Cir. 2016).

In short, *Estelle* sought to provide an avenue for recourse against deliberate indifference to a serious medical need in any form, not to insulate prison doctors who make minimal efforts to respond to medical emergencies. For that reason too, this Court's review is urgently needed.

C. With the ever-growing and aging prison population, courts are seeing a substantial increase in medical neglect claims, rendering this issue one of significant national importance.

The present conflict is national, entrenched, recurring, and of immense practical importance. Judge Bybee has justifiably lamented how "courts around the United States have struggled" in their efforts to decide what medical care the Eighth Amendment requires. *Colwell* v. *Bannister*, 763 F.3d 1060, 1071 (9th Cir. 2014) (Bybee, J., dissenting). "We have a growing – and,

more importantly, an aging – prison population, and we are going to face these kinds of problems more and more frequently." *Id.* (Bybee, J., dissenting).

Judge Bybee's concern is supported by the reality that approximately 2.2 million people currently find themselves confined in jails and prisons across the United States.[7] Studies have shown that, among the tens of thousands of inmate-initiated civil filings each year, between 10% and 25% are directly related to prison medical care.[8]

As a result, there are increasing numbers of cases involving serious medical needs and, with those, pressing questions about the constitutional responsibility to address those needs. A unified standard for determining what is required of our society's correctional institutions is a matter of national importance.

II. The doctrine of qualified immunity should be revisited.

Review is also appropriate to revisit the doctrine of qualified immunity. Not only does the doctrine lack any legal basis, but in its current form it does not serve the policy interests it was designed to serve.

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[7] See Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. Irvine L. Rev. 153, 157 (2015).

[8] See *id.*; Margo Schlanger, *Inmate Litigation*, 116 Harv. L. Rev. 1555, 1570-1571 nn. 47-48 (2003).

A. There is no legal basis for qualified immunity.

Although the Court has offered various legal rationales to support qualified immunity, each of these rationales fails under scrutiny.

1. The most prominent theory used to justify qualified immunity is that it existed as a common law rule when Section 1983 was adopted. *E.g.*, *Filarsky* v. *Delia*, 566 U.S. 377, 383 (2012) ("reasoning that common law protections well grounded in history and reason had not been abrogated by covert inclusion in the general language of § 1983"). This was the justification the court used in *Pierson* v. *Ray*, 386 U.S. 547, 556-557 (1967). That decision and theory opened the floodgates to today's expansive qualified immunity doctrine.

But the historical justification suffers from a fundamental flaw: When Section 1983 was enacted, "there was no well-established, good-faith defense in suits about constitutional violations." William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 55 (2018) [hereinafter Baude]. Thus, Congress could not have implicitly expected such an exception to exist.

To the contrary, as Professor Baude has noted, "to the limited extent a good-faith defense did exist in some common-law suits, it was part of the elements of a common-law tort, not a general immunity." *Id.* And the Court acknowledged this reality well before creating the doctrine of qualified immunity. Indeed, in *Myers* v. *Anderson*, 238 U.S. 368, 378 (1915), the Court rejected an argument very similar to what would

become the doctrine of qualified immunity. In *Myers*, election officials argued that, under Section 1983, they could not be liable for any official conduct. *Id.*; see Baude at 57-58. The Court rightly rejected this argument, concluding that Section 1983 does not afford a good-faith defense.

2. The Court has elsewhere suggested that, even though the doctrine of qualified immunity is inconsistent with the original scope of Section 1983, "it is a judicially invented immunity for a judicially 'invented' statute." Baude at 63. As Justice Scalia acknowledged, "[The Court's] treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume." *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). Believing that applying 1871 common law-rules to the Court's Section 1983 precedent would carry the Court further away from "what any sane Congress would have enacted," Justice Scalia advocated for the application of compensating immunity rules. *Id.* at 611-612. Because, in his view, the Court's decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), essentially rewrote Section 1983, it is appropriate for the Court to fashion remedies that function as a "sensible scheme" for administering the reinvented statute. *Id.*

Aside from acknowledging that qualified immunity cannot be justified within the original scope of Section 1983, this justification, like the first mentioned in supra Part II.A.1, is flawed. "Justice Scalia's premise –

that *Monroe* v. *Pape* was wrongly decided – appears to be wrong." Baude at 63. But even if that premise were accepted, it is difficult to justify today's qualified immunity regime. In no other area does the Court essentially make up a limiting doctrine applicable to a statutory regime, simply because some members of the Court believe the Court has erred elsewhere in its interpretation of the statute's scope. Two interpretive wrongs do not make a right – especially where, as here, Congress can simply amend the statute to resolve any perceived problems.

3. Finally, the Court has rationalized qualified immunity as a rule of lenity, necessary to provide fair warning to public officials. See, *e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 270-271 (1997) ("[T]he qualified immunity test is simply the adaptation of the fair warning standard to give officials . . . the same protection from civil liability and its consequences that individuals have traditionally possessed in the face of vague criminal statutes."); *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) ("Officers sued in a civil action for damages under 42 U.S.C. § 1983 have the same right to fair notice as do defendants charged with the criminal offense defined in 18 U.S.C. § 242."). But that is also misguided.

For one, principles of lenity have generally been limited to criminal prosecutions. See *Winters* v. *New York*, 333 U.S. 507, 515 (1948) ("The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement."). But even assuming it is appropriate to

extend the lenity doctrine to *civil* statutes, "[q]ualified immunity doctrine has come to bear little resemblance to the rules applicable to criminal defendants." Baude at 74. Judges empathize with public officials much more regularly and liberally than with criminal defendants. *Id.* at 74-77. If the lenity theory is going to justify qualified immunity at all, it can only justify a much more modest immunity.

B. Qualified immunity does not serve its purported policy justifications.

The qualified immunity doctrine also fails to serve the policy interests that underlie it. The Court has stated that the doctrine balances "two important interests": (1) "the need to hold public officials accountable when they exercise power irresponsibly"; and (2) "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson* v. *Callahan*, 555 U.S. 223, 331 (2009); see *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982). But in reality, neither of these policy interests is being served.

1. To the contrary, today, qualified immunity functions as a powerful tool against people whose rights are violated, sometimes in the most egregious of ways. Qualified immunity is implicated in thousands of cases each year. See *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (noting that "tens of thousands" of Section 1983 suits are filed each year); Aaron Nielson & Chris Walker, *The New Qualified Immunity*, 89 So. Cal. L. Rev. 1, 6 (2015). And in

many of these cases, such as in this case, public officials are not being held accountable for abuses of power.

Indeed, rather than being protected by a merely "qualified" immunity, many of today's public officials enjoy nearly *absolute* immunity for their wrongful actions. See Alan K. Chen, *The Facts About Qualified Immunity*, 55 Emory L.J. 299, 232 (2006). In fact, only twice in thirty opportunities at the merits stage (to say nothing of denied petitions) has this Court found a public official to have violated clearly established law. See *Groh* v. *Ramirez*, 540 U.S. 551, 564 (2004); *Hope* v. *Pelzer*, 536 U.S. 730, 741-742 (2002); Baude at 82; see also *Kisela* v. *Hughes*, No. 17-467 (U.S. Apr. 2, 2018) (Sotomayor, J., joined by Ginsburg, J., dissenting) (noting asymmetrical application of doctrine).

In short, qualified immunity today serves only to insulate public officials from accountability, not to make them more accountable.

2. Empirical data also reveal that the shield of immunity either fails or is unnecessary when it comes to protecting public officials from harassment, distraction, and liability. Contrary to popular perception, the doctrine of qualified immunity does not protect government officials from the possible distractions of discovery and trial. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11 (2017) [hereinafter Schwartz, *How Qualified*]. In a review of Section 1983 actions, Professor Joanna Schwartz found that qualified immunity led to the dismissal of just 0.6% of cases

before discovery and 3.2% of cases before trial. *Id.* at 60.

Given these findings, it is difficult to argue that qualified immunity is preserving government time and resources.

Public officials also rarely pay out-of-pocket in successfully litigated civil suits. Instead, they are almost always indemnified. See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014). Such near-certain indemnification "drastically reduces the value of qualified immunity as a protection against the burden of financial liability." Schwartz, *How Qualified*, at 9.

In short, like the legal basis for qualified immunity, the purported policy rationales crumble under scrutiny. If qualified immunity has no sound legal basis, and fails to satisfy its underlying policy justifications, it merely functions as a sword against people whose constitutional rights are violated. Such a weapon should have no place in the Court's jurisprudence.

At a minimum, the doctrine should be subject to appropriate limitations so that it does not shield public officials from egregious recklessness or other wrongdoing, such as what occurred in this case.

III. This case is a good vehicle for addressing the questions presented.

Finally, this case offers a clean and straightforward path to resolving both questions presented. As to the first question presented, the lower court's decision to grant Respondents qualified immunity turned on whether Maguire's Eighth Amendment rights were violated. Pet. 4a. And that issue necessarily concerns the proper scope of *Estelle* and how the circuit courts have interpreted that precedent – a pure legal question that is squarely presented by the facts here. As to the second question presented, the Tenth Circuit's ultimate decision was based squarely on the doctrine of qualified immunity. In short, but for that doctrine – and, relatedly, the Tenth Circuit's interpretation of the *Estelle* standard – Maguire would likely be entitled to relief.

This case is also free of procedural and jurisdictional tangles. The Tenth Circuit's ruling on Respondents' summary judgment motion represents a final decision. By granting Respondents qualified immunity, the Tenth Circuit left Maguire without a path to recovery. And because this suit is brought under Section 1983, the federal courts unquestionably have jurisdiction. See 28 U.S.C. 1331.

Not only does this case present a clean vehicle for addressing the questions presented, but timely review is necessary given the importance of these issues.

CONCLUSION

The court below – and several other circuits – have eroded *Estelle* to provide only a *de minimis* level of medical care for prisoners. When combined with the doctrine of qualified immunity, these holdings leave prisoners effectively unable to seek redress when prison officials ignore their medical needs. Certiorari should be granted, both to resolve the circuit conflict over the proper interpretation of *Estelle*, and to reconsider the entire qualified immunity doctrine.

Respectfully submitted,

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