No. 17-1397

In the Supreme Court of the United States

STEVE SPENCER,
Petitioner,
v.
CHRIS ABBOTT, CRAIG JENSEN, AND RODGER MACFARLANE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Medical professionals at the Utah State Prison timely responded twice in one day to inmate Brian Maguire's requests for medical care. First, a physician assistant treated Maguire's complaint that his left arm and hand were "losing their use"; Maguire told the physician assistant that the treatment provided "immediate relief." Later, two emergency medical technicians responded to Maguire's "man-down" call. They identified Maguire's convulsions as a seizure and treated him in accordance with prison policy. The next morning, after Maguire manifested new symptoms, the prison transferred Maguire to a hospital where doctors determined he had a stroke.

The questions presented are:

(1) Did the Court of Appeals' unpublished opinion correctly hold that Respondents did not show deliberate indifference to Maguire's serious medical needs because they exercised considered medical judgment when examining and evaluating Maguire, diagnosing his conditions, and treating his symptoms—even if later events could suggest they misdiagnosed his condition?

(2) Should this Court abandon decades of precedent and reconsider the doctrine of qualified immunity in a case holding that defendants did not violate the plaintiff's constitutional rights?

PARTIES TO THE PROCEEDING

Petitioner is Steve Spencer, the personal representative of the estate of Brian Maguire, a former Utah State Prison inmate. Maguire was the original plaintiff in district court. Maguire sued after suffering a stroke in July 2008. He died in February 2015 from a medical condition unrelated to this case. After that, the district court substituted Spencer as plaintiff. Spencer was the appellee in the Tenth Circuit.

Respondents are medical professionals at the Utah State Prison: physician assistant Chris Abbott and emergency medical technicians Craig Jensen and Rodger MacFarlane. Respondents were defendants in the district court and appellants in the Tenth Circuit.

Maguire also sued other prison officials who are not respondents here. Those other defendants are corrections officer Sergeant Jerry Miller, prison medical director Dr. Richard Garden, and nurse Steve Mecham. Sgt. Miller was an appellant in the Tenth Circuit, but his interlocutory appeal was dismissed for lack of appellate jurisdiction. The district court granted qualified immunity to Dr. Garden and Mecham on summary judgment. Petitioner did not appeal from that order.

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INTRODUCTION

Respondents are prison medical professionals who examined and treated Maguire after he sought medical care. Maguire stated that his treatment from Respondent Abbott, a physician assistant, provided him "immediate relief." Respondents Jensen and MacFarlane, two emergency medical technicians, identified Maguire's later convulsions as a seizure and treated him in accordance with prison policy. Based on later-appearing symptoms—which Respondents did not see when they examined Maguire—doctors at a hospital determined the next day that Maguire had a stroke.

The Tenth Circuit rejected Maguire's claims that Respondents had violated his Eighth Amendment rights by showing deliberate indifference to his serious medical needs. Instead, in an unpublished order, the panel unanimously concluded that Respondents had exercised considered medical judgment, and that their diagnoses and treatments were commensurate with the facts and symptoms presented to them.

In asking this Court to review the Tenth Circuit's conclusion that Respondents did not violate the Eighth Amendment, the petition mischaracterizes the factual record. To put the petition's misstatements in context, *see* S. Ct. R. 15.2, Respondents first recite the facts in the light most favorable to Maguire, as they were presented to the Tenth Circuit, and then summarize this case's procedural history.

COUNTERSTATEMENT OF THE CASE

A. Factual Background.

1. Physician Assistant Abbott Treats Maguire, Giving Maguire "Immediate Relief."

While incarcerated in July 2008, Maguire submitted an Inmate Health Request Form that stated, "my left arm and hand are losing their use and I [am] very worried and suffering mentally and physically." Pet. App. 43; *see also id.* at 4. That same afternoon, Abbott examined Maguire. *Id.* at 4, 43. The corrections officer who took Maguire to the appointment told Abbott that Maguire appeared to be dragging his left leg. *Id.* Maguire also told Abbott that he was having difficulty controlling the left side of his body, including his left arm and extremities. *Id.* at 4-5, 43.

During this medical visit, Abbott saw a prominent spasm in Maguire's left trapezius. *Id.* at 5, 43. Abbott applied pressure to the trigger points on that muscle and provided targeted massage treatment. *Id.* at 5, 33 n.8, 43. Maguire felt "immediate relief" after this treatment. *Id.* at 5, 43. Abbott diagnosed Maguire with muscle spasms and prescribed muscle relaxants and physical therapy. *Id.*

2. EMTs Jensen and MacFarlane Respond to a "Man-Down" Call, Determine that Maguire Had a Seizure, and Provide Treatment Consistent with Prison Protocol.

That evening, Maguire's left arm began seizing, and his left leg became numb. Pet. App. 5, 43. He called for

the other inmates to yell "man-down" so prison guards and medical personnel would come to his cell. *Id.* Sgt. Miller and EMTs Jensen and MacFarlane quickly responded. *Id.*

When Jensen and MacFarlane arrived, Maguire was lucid, coherent, and able to communicate and answer questions. *Id.* at 5, 35, 36, 43, 44. Jensen and MacFarlane witnessed Maguire's convulsions. *Id.* at 5, 43. They assessed Maguire's condition and checked his vital signs. *Id.* at 5, 35, 43. Based on Maguire's condition, and on the symptoms Maguire reported and they observed, Jensen and MacFarlane determined that Maguire had experienced a seizure. *Id.* at 5, 35, 36, 43-44. In accordance with prison policy, they placed Maguire's mattress on the cell floor for his safety to keep him from falling off his bed if he had another seizure. *Id.* at 5, 43.

Maguire disputed Jensen and MacFarlane's finding that he had a seizure for two reasons. First, he claimed that he had not previously had a seizure. *Id.* at 5, 44. Second, he stated that he had been around people who had seizures, and saw that those persons had blacked out; yet he had not blacked out but remained lucid throughout the entire episode. *Id.*

According to Maguire, Jensen and MacFarlane told him that there was nothing else they could do at that time. They told Maguire that if he experienced additional issues, he should tell the on-duty officers, who would alert medical personnel. *Id.*

3. Maguire Is Taken to the Hospital and Diagnosed with a Stroke.

During the night, officers performed hourly inmate counts of Maguire's prison section. Pet. App. 5-6, 44. The officers did not respond to his pleas for help. *Id.* at 6, 44. Abbott, Jensen, and MacFarlane—who are medical professionals, not corrections officers—did not participate in those counts and thus never heard Maguire's requests for help.

The next morning, corrections officials found Maguire sitting in his cell. *Id.* He was unable to stand and had urinated in his jumpsuit. *Id.* Prison officials transferred Maguire to the University of Utah Medical Center, where doctors determined that he had suffered a severe stroke. *Id.*

B. Procedural History.

Two years later, Maguire filed a pro se civil rights complaint under 42 U.S.C. § 1983 against various medical and non-medical prison staff, including Abbott, Jensen, MacFarlane, and Sgt. Miller. Pet. App. 2. Maguire asserted, among other causes of action, claims for deliberate indifference to his serious medical needs in violation of the Eighth Amendment. *Id.* at 3.

In February 2014, the district court appointed counsel for Maguire. In February 2015, Maguire died of terminal liver cancer, a medical condition unrelated to the events in this case.[1] The district court then substituted Spencer, the personal representative of Maguire's estate, as plaintiff. *Id.* at 2 n.1.

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[1] *See* Aplts' App. – Vol. IV, at 381 (10th Cir.); *id.*, Vol. II, at 216.

The next month, all defendants jointly moved for summary judgment on qualified-immunity grounds. *Id.* at 3. The district court eventually entered an unpublished order granting in part and denying in part defendants' motion for summary judgment. *Id.* at 40-71.

The district court denied qualified immunity to Abbott, Jensen, MacFarlane, and Sgt. Miller. It reasoned that their request for qualified immunity could not be granted until a jury resolved disputed facts. *Id.* at 3, 68. Abbott, Jensen, MacFarlane, and Sgt. Miller timely appealed.

The Tenth Circuit panel that heard oral argument consisted of then-Judge Gorsuch and Judges Kelly and Holmes. *Id.* at 2. After Justice Gorsuch's appointment to this Court, Judges Kelly and Holmes resolved the appeal in an unpublished order and judgment.

Writing for the two-judge panel, Judge Holmes dismissed Sgt. Miller's appeal for lack of subject-matter jurisdiction because the record did not blatantly contradict the district court's factual determinations. *Id.* at 13-19. But as to Abbott, Jensen, and MacFarlane, the panel reversed the district court and directed it to enter summary judgment granting those defendants qualified immunity from Maguire's Eighth Amendment claims. *Id.* at 39.

The panel "elect[ed] to focus solely on the first prong of the qualified-immunity standard—that is, on whether Mr. Maguire has demonstrated that Mr. Abbott and EMTs Jensen and MacFarlane violated his . . . Eighth Amendment rights." *Id.* at 21-22. The court concluded that Maguire "has not carried his

summary-judgment burden as to any of these officials." *Id.* at 22.

Maguire failed to do so, the court reasoned, because he did not establish the subjective component of deliberate indifference. Construing the facts most favorably to Maguire, the panel concluded that Abbott, Jensen, and MacFarlane exercised reasonable and considered medical judgment in diagnosing and treating Maguire based on their examinations and the symptoms he presented. *Id.* at 25-26, 29-37. The court also reasoned that even if Respondents had ultimately misdiagnosed Maguire's condition, that would constitute at most a complaint that prison medical officials negligently diagnosed and treated a medical condition. And complaints of that sort—which in effect allege medical malpractice—do not state an Eighth Amendment violation. *Id.* at 24, 30, 34, 37.

C. The Petition Mischaracterizes Facts, and Includes Other Facts Irrelevant to the Claims Against Respondents.

Respondents identify the petition's factual misstatements and omissions "that bear[] on what issues properly would be before the Court if certiorari were granted." S. Ct. R. 15.2. The petition (1) could create the false impression that Maguire died from the events giving rise to this case, (2) discusses facts relevant only to claims not presented to the Tenth Circuit or against other defendants who are not respondents, and (3) omits or misstates critical facts underlying the claims against Respondents.

First, the petition is misleading to the extent it creates the impression that Maguire died due to the

events giving rise to this case. Maguire had a stroke in July 2008; he died in February 2015, nearly seven years later, from terminal liver cancer—a condition unrelated to his § 1983 claims. Aplts' App. – Vol. IV, at 381 (10th Cir.); *id.*, Vol. II, at 216.

Second, the petition includes facts relevant only to claims not presented to the Tenth Circuit or against other defendants who are not also respondents. Petitioner's statements about Maguire's opiate addiction, methadone treatment, prison-intake examination, request for a methadone-tapering program, and infirmary stays, *see* Pet. 4-5, formed the basis for claims against Abbott, Dr. Garden, and nurse Mecham that were not presented to the Tenth Circuit. The district court found no evidence of deliberate indifference by Abbott, Dr. Garden, or Mecham for those acts and granted them qualified immunity on summary judgment. *See* Pet. App. 48-49, 49 n.7, 52-54. Petitioner has not appealed that ruling.

Petitioner's statements about overnight hourly inmate counts by corrections officers and Maguire's requests for help are similarly irrelevant. *See* Pet. 6. Those facts formed the basis for the claim against Sgt. Miller, who is not a respondent because the Tenth Circuit declined to exercise jurisdiction over his appeal. *See* Pet. App. 13-19, 63-66.

Third, Petitioner omits or misstates facts relevant to his claims against Respondents. He incorrectly describes Maguire's July 15 inmate health request form. *See* Pet. 5. That form did not state that Maguire "was losing control over the left side of his body," as Petitioner now alleges. *Id.* Rather, Maguire said that

"he was 'losing the[] use' of his 'left arm and hand.'" Pet. App. 4; *see also id.* at 43.

Next, Petitioner omits critical facts from his description of Maguire's July 15 medical visit with Abbott. *See* Pet. 5. Petitioner fails to mention that (1) while examining Maguire, Abbott observed a prominent spasm in Maguire's left trapezius muscle and applied pressure on the associated trigger points; and (2) following the treatment, Maguire reported "immediate relief." Pet. App. 5, 43.

Petitioner also omits critical facts from his description of Jensen's and MacFarlane's response to the "man-down" call and their medical evaluation of Maguire. *See* Pet. 5-6. Petitioner fails to mention or discounts that, in addition to taking Maguire's vital signs, Jensen and MacFarlane assessed Maguire's overall condition, witnessed his convulsions, and interacted with him because he remained communicative throughout the episode, the examination, and the assessment. Pet. App. 35.

Finally, Petitioner cites no record evidence to support his statement that, when Maguire was taken to the hospital on July 16, "it was determined that he had suffered a massive stroke the day before, around the time he was being ignored by the guards," Pet. 6, or that "after the stroke started, two of the Respondents merely took his pulse and left him to suffer overnight," *id.* at 1. To be sure, doctors later determined that Maguire had suffered a "severe stroke." But Maguire cites no evidence—and the district court did not find—that the stroke had occurred before, during, or immediately after Respondents examined and treated him. *See* Pet. App. 44 (district court's finding that

"[p]rison officials transferred [Maguire] to the University of Utah Medical Center, where doctors determined that he had suffered a severe stroke").

REASONS FOR DENYING THE PETITION

The Tenth Circuit's decision does not warrant plenary review. The first question presented is not certworthy because the Tenth Circuit's unpublished order follows this Court's deliberate-indifference precedents and is correct on the merits. And the split Petitioner alleges between the Tenth Circuit and other circuits is illusory; it is based on misstatements of Tenth Circuit law and of other circuits' decisions.

The second question presented also is not certworthy. The Tenth Circuit directed the district court to enter judgment for Respondents because Respondents did not violate Maguire's Eighth Amendment rights—not because those rights weren't clearly established. And Petitioner fails to address the *stare decisis* factors that any decision to revisit and overrule the doctrine of qualified immunity would implicate. That doctrine is so well established that just last Term this Court summarily reversed a lower-court decision departing from it. That hardly constitutes the sort of unworkable, reliance-free doctrine ripe for reconsideration.

In any event, this case is a poor vehicle to review these questions. Justice Gorsuch was a member of the Tenth Circuit panel that heard argument in this case. If he recuses here, it would raise the theoretical possibility of an equally divided Court. And even if this Court remanded for a trial, the outcome would not

change. Because Maguire has since died from a medical condition unrelated to his § 1983 claims, an evidentiary limitation in a Utah-specific survivorship statute effectively forecloses a jury verdict in his favor. The petition should be denied.

I. THE TENTH CIRCUIT CORRECTLY APPLIED THIS COURT'S PRECEDENTS, AND ITS DECISION DOES NOT CONFLICT WITH DECISIONS FROM ANY OTHER CIRCUIT.

The Tenth Circuit faithfully followed this Court's precedents when resolving Maguire's Eighth Amendment deliberate-indifference claim. And its decision does not conflict with decisions in other circuits.

A. The Tenth Circuit's Deliberate-Indifference Test Adheres to This Court's Precedents.

1. Prison officials violate inmates' Eighth Amendment rights by showing "deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). To state a cognizable Eighth Amendment claim, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id.* at 106.

The deliberate-indifference test has both an objective and a subjective component: "a prison official cannot be held liable under the Eighth Amendment" for deliberate indifference to an inmate's serious medical needs "unless the official knows of and disregards an excessive risk to inmate health and safety." *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). In other words, "the official must both be aware of facts from which the

inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.*

This Court also has repeatedly emphasized that an inmate's "complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Estelle*, 429 U.S. at 106. Negligence or the misdiagnosis of a medical condition does not establish a claim because "deliberate indifference describes a state of mind more blameworthy than negligence." *Farmer*, 511 U.S. at 835. Hence "an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under [this Court's] cases be condemned as the infliction of punishment." *Id.* at 838. In short, "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

2. The Tenth Circuit correctly recited those standards. The two-judge panel reiterated that "the subjective component" of a deliberate-indifference claim "requires proof that a defendant official was both 'aware of facts from which the inference could be drawn that a substantial risk of serious harm exists' *and* that the official actually 'dr[ew] the inference.'" Pet. App. 23 (quoting *Farmer*, 511 U.S. at 837). And it acknowledged that an inmate's "'allegations of "inadvertent failure to provide adequate medical care" or of a "negligent . . . diagnos[is]" simply fail to establish the requisite culpable state of mind.'" *Id.* at 23-24 (quoting *Wilson v. Seiter*, 501 U.S. 294, 299 (1991)). The panel then faithfully applied those

standards to hold that Abbott, Jensen, and MacFarlane did not violate the Eighth Amendment.

As to Abbott, the panel concluded that "Maguire's version of events demonstrates, *at most*, that Mr. Abbott exercised reasonable medical judgment, but ultimately misdiagnosed Mr. Maguire's condition." App. 25. "[T]he facts from which Mr. Abbott could have inferred the existence of" the possibility that Maguire had a stroke "were not obvious." *Id.* at 29. "Notably, Mr. Maguire visually presented to Mr. Abbott in part with a prominent spasm in his left trapezius muscle." *Id.* Maguire's condition did not "decline before Mr. Abbott's eyes"; instead, "Maguire experienced immediate relief from Mr. Abbott's physical application of pressure to the associated trigger point." *Id.* "Given this positive clinical response, Mr. Abbott reasoned that muscle spasms were the root cause of Mr. Maguire's concerns regarding mobility on the left side of his body." *Id.* Abbott thus "did not ignore the medical need that he perceived; rather, he affirmatively acted to address it by prescribing a muscle relaxant and physical therapy." *Id.* at 30. And though the later diagnosis that Maguire had a stroke could support "a plausible argument that" Abbott's diagnosis "was off-base," "the fact that Mr. Abbott's reasoning may have amounted to negligence is immaterial for purposes of the subjective component of the deliberate-indifference standard." *Id.* (citation omitted).

The panel held that Jensen and MacFarlane did not violate the Eighth Amendment for the same reasons. They "exercised considered medical judgment in determining that Mr. Maguire had experienced a minor seizure, and, relatedly," the Court of Appeals could not

"discern any significant ground for the contrary view that they consciously disregarded a substantial risk of harm to Mr. Maguire." *Id.* at 35 (internal quotation marks omitted). When Jensen and MacFarlane responded to the "man-down" call, they "witnessed Mr. Maguire convulsing, checked his vital signs, and assessed his overall condition." *Id.* "Considering his symptoms, and the fact that he remained lucid and communicative throughout their assessment, they determined that Mr. Maguire had experienced a seizure." *Id.* "Accordingly, they provided *actual* medical treatment to a conscious and lucid individual who displayed symptoms they recognized as reflective of a seizure." *Id.* at 36-37. And if their diagnosis "under the circumstances then before them (rather than as later developed) was wrong, it is beyond peradventure that a misdiagnosis, even if rising to the level of medical malpractice, is simply insufficient under [Tenth Circuit] case law to satisfy the subjective component of a deliberate indifference claim." *Id.* at 37 (internal quotation marks omitted).

In sum, the panel faithfully applied this Court's well-established precedent to hold that Respondents did not violate the Eighth Amendment. Respondents exercised reasoned and considered medical judgment in diagnosing and treating Maguire. And even if they ultimately misdiagnosed Maguire's condition—and would have thereby been negligent or committed malpractice—their conduct still was insufficiently blameworthy to satisfy the subjective component of a deliberate indifference claim. Pet. App. 25-26, 29-37. No error is apparent in those holdings.

B. The Tenth Circuit's Deliberate-Indifference Standard Does Not Conflict with This Court's or Other Circuits' Precedents.

Though the decision below follows this Court's cases, Petitioner nevertheless contends that the circuits apply conflicting standards to the subjective component of an Eighth Amendment deliberate-indifference claim. Pet. i, 1, 9, 15. According to Petitioner, in the Tenth Circuit and four others (the First, Third, Fifth and D.C. Circuits), prison medical professionals never violate an inmate's Eighth Amendment rights if they provide *some* medical care—even if that care is "inadequate." Pet. i. That conflicts, Petitioner contends, with the standard in the Seventh Circuit (and the Second, Fourth, Ninth, and Eleventh Circuits), which Petitioner argues requires prison medical professionals to provide *adequate* medical care. *Id.* Petitioner's arguments are wrong for two reasons.

1. The Subjective Component of Deliberate Indifference Is a Fact-Specific Inquiry That Turns on How Medical Providers Respond to What They Know or Reasonably Should Know.

The first problem with Petitioner's claimed split is that it misstates the circuits' legal standards. The Tenth Circuit did not hold here (and has never held) that a prisoner's receipt of merely *some* medical care necessarily forecloses his ability to bring an Eighth Amendment deliberate-indifference claim. Relatedly, no circuit holds, as Petitioner suggests, that inmates

who receive inadequate medical care *necessarily* have a deliberate-indifference claim.

a. To begin, "*some* medical care" is not the Tenth Circuit's standard for the subjective component of deliberate indifference. Instead, as the panel decision explained, the Tenth Circuit directs its "subjective inquiry 'to consideration of the [medical professional's] knowledge at the time he prescribed treatment for the symptoms presented, *not to the ultimate treatment necessary*.'" Pet. App. 32 (quoting *Self v. Crum*, 439 F.3d 1227, 1233 (10th Cir. 2006)). And "where the 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.'" *Id.* (quoting *Self*, 439 F.3d at 1233).

Maguire's claims failed under that standard not because Abbott, Jensen, and MacFarlane provided merely *some* care. His claims failed because Respondents provided care and treatment commensurate with the facts and symptoms presented to them. And "the fact that Mr. Maguire's symptoms could have *also* pointed to other, more serious conditions fails 'to create an inference of deliberate indifference'" by Respondents. *Id.* (quoting *Self*, 439 F.3d at 1235).

The panel's decision accords with earlier Tenth Circuit decisions stating that a prisoner may show deliberate indifference *even if* he receives *some* medical treatment. For example, a prisoner may satisfy the subjective component of deliberate indifference by showing that a medical professional "fail[s] to treat a serious medical condition *properly*." *Sealock v.*

Colorado, 218 F.3d 1205, 1211 (10th Cir. 2000) (emphasis added). And "[i]f a prison doctor . . . responds to an obvious risk with treatment that is patently unreasonable, a jury may infer conscious disregard." *Self*, 439 F.3d at 1232. Medical treatment that is improper or patently unreasonable is still *some* treatment. Yet under *Sealock* and *Self*, Tenth Circuit inmates who receive that kind of treatment might have a viable deliberate-indifference claim.

Other Tenth Circuit cases—that the petition does not cite, even though the panel relied on them, *see* Pet. App. 25-28—show how the circuit applies that rule. To take just one example, in *Oxendine v. Kaplan*, 241 F.3d 1272 (10th Cir. 2001), an inmate received "some" care but still stated a deliberate-indifference claim. A prison doctor performed surgery to re-attach a portion of the inmate's finger severed by his cell door. The doctor then prescribed pain medication for the inmate, instructed the inmate to return to the infirmary for follow-up visits the next day and each successive day for two weeks, and re-examined the inmate's finger multiple times after the surgery. *See id.* at 1277-79.

By any objective measure, the inmate in *Oxendine* received *some* care. But the Court of Appeals still held that the inmate had alleged sufficient facts to satisfy the subjective component of deliberate indifference—facts supporting an inference that the prison doctor knowingly disregarded a substantial risk of harm. Those facts included the ineffectiveness of the re-attachment surgery and later care of the inmate's finger, the lack of proper response to the inmate's repeated complaints of pain and that his finger was not

healing, and the doctor's delay in seeking medical assistance from a qualified specialist. *Id.* at 1278.

Petitioner thus misstates Tenth Circuit law by contending that it forecloses an inference of deliberate indifference whenever an inmate receives *some* medical care. Not so. That alone justifies denying the petition. S. Ct. R. 14.4.

b. Relatedly, no circuit, including the circuits whose decisions Petitioner claims conflict with the Tenth Circuit's, holds that deliberate-indifference claims necessarily arise whenever prison medical care is inadequate. Nor could they. That rule plainly would conflict with *Estelle* and *Farmer*'s teachings that mere negligence or medical malpractice—by definition, "inadequate care"—do not violate the Eighth Amendment. All five circuits on the other side of Petitioner's purported split recognize as much.[2]

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[2] *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016) ("But showing mere negligence is not enough."); *id.* ("'Deliberate indifference is not medical malpractice.'" (quoting *McGee v. Adams*, 721 F.3d 474, 481 (7th Cir. 2013)); *Chance v. Armstrong*, 143 F.3d 698, 703 (2d Cir. 1988) ("Moreover, negligence, even if it constitutes medical malpractice, does not, without more, engender a constitutional claim." (citing *Estelle*, 429 U.S. at 105-06)); *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 211 (4th Cir. 2017) ("Deliberate indifference is more than mere negligence[.]" (quotation omitted)); *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) ("Mere negligence in diagnosing or treating a medical condition, without more, does not violate a prisoner's Eighth Amendment rights." (quotation omitted)); *Melton v. Abston*, 841 F.3d 1207, 1223 (11th Cir. 2016) ("A plaintiff claiming deliberate indifference must prove . . . conduct that is more than mere negligence.").

Petitioner's contrary argument turns principally on his misreading of *Heyer v. United States Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017). Petitioner contends that *Heyer* makes it "likely" that the Fourth Circuit "would have found that the facts alleged [here] amounted to deliberate indifference." Pet. 16. But *Heyer* in fact comports with and supports the Tenth Circuit's conclusion.

The inmate in *Heyer* did *not*, as Petitioner suggests, establish deliberate indifference by showing "the lack of follow-up care after an inmate experienced seizures." *Id.* at 15. Instead, *Heyer* involved a deaf inmate who for more than four years asked for an American Sign Language interpreter to attend his medical appointments and group treatment for sex offenders, and to otherwise communicate for him in prison. In response, the Bureau of Prisons failed to provide an interpreter for two years and then assigned for more than two years only an "inmate companion person" who did not know American Sign Language. *See id.* at 205-07.

The Bureau of Prisons argued that its "decision to provide Heyer with the inmate companion" insulated it "from a finding of deliberate indifference." *Id.* at 211. The Fourth Circuit disagreed. It was undisputed that the "inmate companion assigned to Heyer did not know ASL," and the "inappropriateness of using an interpreter who did not speak Heyer's language is obvious." *Id.* at 211-12. "[T]hat very obviousness could support a factfinder's conclusion that BOP knew the inmate companion was inadequate." *Id.* at 212. Beyond that, the inmate introduced evidence "that BOP officials *did in fact know* that the communication

through the inmate companion was inadequate." *Id.* (emphasis added).

Heyer thus does not remotely resemble this case. There, the evidence showed that "BOP *knew* that Heyer was deaf and needed ASL interpreters to communicate; BOP *knew* that 'accurate' and 'reliable' communication was necessary for Heyer's treatment to be effective; and BOP *knew* that the inmate companion was 'inadequate' to ensure understanding." *Id.* (emphasis added). Here, in contrast, "Maguire has presented no evidence of actual knowledge or recklessness." Pet. App. 32. The cases' outcomes differ not because they applied conflicting legal rules; they differ because they applied the same rule, and the defendants in each case responded differently to their knowledge of the respective plaintiffs' serious medical needs. Those are factbound differences unworthy of plenary review.

In short, Maguire presented no evidence that Respondents "displayed a conscious disregard of a substantial risk of harm arising from his symptoms." *Id.* at 33 (internal quotation marks and brackets omitted); *see also id.* at 33 n.8. The Seventh, Second, Fourth, Ninth, and Eleventh Circuits would have reached that same result given the cases cited *supra* in note 2; Petitioner's claims would not have survived summary judgment in any of those circuits since each prohibits deliberate-indifference claims against prison medical professionals for what, at most, can be called negligence.

2. Petitioner Identifies No Circuit Split on What Types of Circumstantial Evidence Can Establish the Subjective Component of Deliberate Indifference.

Petitioner also tries to establish a split based principally on the Seventh Circuit's opinion in *Petties v. Carter*, 836 F.3d 722 (7th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 1578 (2017). *See* Pet. i, 10. But he misreads that case, too.

In *Petties* the Seventh Circuit summarized different "kind[s] of [circumstantial] evidence" from which "a jury [could] draw a reasonable inference that a prison official acted with deliberate indifference." 836 F.3d at 728. *Petties*'s premise—that a plaintiff may establish the subjective component of deliberate indifference through circumstantial evidence—is unremarkable. This Court has said as much: "[w]hether a prison official had the requisite knowledge of a substantial risk" is "subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer*, 511 U.S. at 842. The Tenth Circuit is in accord. *Mata v. Saiz*, 427 F.2d 745, 752 (10th Cir. 2005) (deliberate indifference "can be demonstrated through circumstantial evidence"). So there is no split on whether a plaintiff may use circumstantial evidence to establish this element.

And there is no split between the Tenth and Seventh Circuits about the types of circumstantial evidence that may be relevant. In *Petties*, the Seventh Circuit identified these kinds of evidence as relevant to that inquiry:

(1) "a prison official's decision to ignore a request for medical assistance," *Petties*, 836 F.3d at 729;

(2) "a risk from a particular course of treatment (or lack thereof)" that "is obvious enough" to permit a factfinder to "infer that the prison official knew about it and disregarded it," *id.*;

(3) "a medical professional's treatment decision" that is "such a substantial departure from accepted professional judgment, practice or standards" that it "demonstrate[s] that the person responsible did not base the decision on such judgment," *id.*;

(4) a prison doctor's "refus[al] to take instruction from a specialist," *id.*;

(5) a prison doctor's "fail[ure] to follow an existing protocol," *id.*;

(6) a prison doctor's "persist[ence] in a course of treatment know[n] to be ineffective," *id.* at 730; or

(7) "inexplicable delay in treatment that serves no penological purpose." *Id.* at 730.

Compare *Petties*'s list to Tenth Circuit precedent. No meaningful daylight exists between them. In fact, *Petties* even cites and relies on Tenth Circuit case law. *See* 836 F.3d at 729 (quoting *Mata*, 427 F.3d at 757). Beyond that, the types of evidence both circuits consider are effectively identical; the necessary inferences can arise:

(1) when "a medical professional completely denies care although presented with recognizable symptoms which potentially create a medical emergency," *Self*, 439 F.3d at 1232;

(2) "from the very fact that the risk was obvious," *Estate of Booker v. Gomez*, 745 F.3d 405, 430 (10th Cir. 2014) (quotation omitted);

(3) when a prison doctor "responds to an obvious risk with a treatment that is patently unreasonable," *Self*, 439 F.3d at 1232;

(4) when "an official's training . . . undermine[s] his or her claim that he or she was unaware of such a risk," *Estate of Booker*, 745 F.3d at 405 (citation omitted);

(5) when "a medical professional recognizes an inability to treat the patient due to the seriousness of the condition and his corresponding lack of expertise but nevertheless declines or unnecessarily delays referral [to a specialist]," *Self*, 439 F.3d at 1232;

(6) when a medical professional fails to follow established protocols, *see Mata*, 427 F.3d at 757 ("While published requirements for health care do not create constitutional rights, such protocols certainly provide circumstantial evidence that a prison health care gatekeeper knew of a substantial risk of serious harm."); or

(7) when a prison official's "delay in providing medical treatment caused either unnecessary pain or worsening of [the inmate's] condition," *id.* at 755.

Those formulations may vary slightly, but those are semantic distinctions that do not create any substantive difference or conflict.

II. THIS COURT SHOULD REJECT PETITIONER'S INVITATION TO RECONSIDER THE QUALIFIED IMMUNITY DOCTRINE.

Petitioner also invites this Court to reconsider decades of settled qualified-immunity precedent. That question is not certworthy.

The Tenth Circuit "elect[ed] to focus solely on the first prong of the qualified-immunity standard" and held that Maguire had not "demonstrated" that Respondents violated his Eighth Amendment rights. Pet. App. 21-22. So even if this Court were inclined to modify or completely reject the doctrine of qualified immunity, doing so in this case would not change the outcome; Maguire has no Eighth Amendment claim in the first place. And further review of that predicate question—whether Respondents violated the Eighth Amendment—epitomizes the type of request for factbound error correction hardly worth this Court's time.

In any event, the petition does not mention, much less seriously address, the *stare decisis* considerations inherent in this request. "Overruling precedent is never a small matter." *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2409 (2015). *Stare decisis* "is a foundation stone of the rule of law," *id*. (internal quotation marks omitted), and "the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process," *id.* (internal quotation marks omitted). *Stare decisis* considerations bear such significant weight that a

request to overrule a decades-long line of precedent cannot fairly wait for the merits stage to address them.

This Court's cases identify "factors that should be taken into account" before deciding whether to revisit and overrule prior decisions. *Janus v. Am. Fed. of State, Cty., & Mun. Employees*, 138 S. Ct. 2448, 2478 (2018). Respondents discuss just two of those factors—whether the rule is "workab[le]," and what kind of "reliance on the decision[s]" exists, *id.* at 2478-79—because those two alone require declining to revisit qualified immunity.

The Court's own docket confirms that the doctrine of qualified immunity is eminently workable and has engendered overpowering reliance interests. "In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (*per curiam*) (citing *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases)). Just last Term the Court added two more opinions to that list. *Kisela v. Hughes,* 138 S. Ct. 1148, 1152 (2018) (*per curiam*) (summarily reversing denial of qualified immunity); *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 582 (2018).

The number of cases summarily reversing the courts of appeals on this doctrine is noteworthy. One court of appeals judge writing in 2016 noted that "[i]n just the past five years, [this] Court has issued 11 decisions reversing federal courts of appeals in qualified immunity cases, *including five strongly worded summary reversals*." *Wesby v. Dist. of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) (emphasis added)

(collecting cases). That number has only grown since then.

The large number of this Court's recent cases applying this doctrine—even without plenary briefing and argument—fatally undermines any suggestion that qualified immunity is either unworkable or free from significant reliance interests. A decision that the doctrine needs revisiting would come as a particular surprise to the respondents in those summary reversals and to the lower-court judges who decided them.

Petitioner tries to stave off that conclusion by citing principally academic and policy-driven criticisms of qualified immunity. *See* Pet. 22-27. Whatever weight those types of criticisms may bear in other contexts, they provide no warrant for revisiting a doctrine so well settled that this Court has applied it repeatedly for decades—and continues to apply it, even just months ago, to summarily reverse lower-court decisions that fail to follow it.

III. PRONOUNCED VEHICLE PROBLEMS DISQUALIFY THIS CASE FROM PLENARY REVIEW.

Even if the questions presented were otherwise certworthy, this case presents a poor vehicle to decide them for two reasons.

First, before the Senate confirmed him as a Member of this Court, Justice Gorsuch sat on the Tenth Circuit panel that heard argument in this case. Pet. App. 2. Justice Gorsuch has recused himself from participating in this Court's cases that were pending in the Tenth Circuit while he was a judge there. *See, e.g.*, *City of Hays v. Vogt*, 138 S. Ct. 1683 (2018); *Dahda v. United States*, 138 S. Ct. 1491 (2018). If he also recuses here,

this Court would be short-handed, and an equally divided Court becomes theoretically possible.

Short-handed decisionmaking on these questions would ill serve the Court and the country. And this case does not require this Court to proceed less than fully constituted. For if, as Petitioner contends, the "ever-growing and aging prison population" really has led to "a substantial increase in medical neglect claims" in federal court, Pet. 20, another case that presents these same questions—but that all nine Members of the Court can hear—should arrive in no time.

Second, should this Court reverse and remand for trial, this case bears a unique Utah-specific wrinkle that would effectively preclude a jury from reaching a verdict for Petitioner. That wrinkle exists because while this case was pending Maguire died from a medical condition unrelated to his claims. And this Court held that § 1983 actions are subject to abatement under a state's survivorship statute when—as here—the plaintiff's cause of death is unrelated to his § 1983 claims. *Robertson v. Wegmann*, 436 U.S. 584, 592 (1978).

Under the version of Utah's survivorship statute in effect when Maguire died, his § 1983 claim might survive his death. But any surviving claim is subject to a critical state-law limit: "neither the injured person nor the personal representatives or heirs of the person who dies may recover judgment except upon competent satisfactory evidence *other than* the testimony of the injured person." Utah Code § 78B-3-107(2) (2014) (emphasis added).

That limitation would doom Petitioner's claims at trial. Virtually all the evidence supporting Maguire's version of the facts came from Maguire's deposition testimony. Yet the applicable Utah law prohibits Petitioner from recovering judgment based on that testimony. The resulting evidentiary vacuum effectively precludes a jury verdict in Petitioner's favor, meaning any decision reversing and remanding the Tenth Circuit's decision would lack real-world effect and might even be an advisory opinion.

CONCLUSION

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

Respectfully submitted.

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