No. 17-1397

In the Supreme Court of the United States

STEVE SPENCER, PETITIONER

v.

CHRIS ABBOTT, CRAIG JENSEN,
AND RODGER MACFARLANE

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

REPLY SUPPORTING PETITION FOR A WRIT OF CERTIORARI

BEN HATHAWAY, JR.
ALEXANDER DUSHKU
R. SHAWN GUNNARSON
ELI W. MCCANN
KIRTON MCCONKIE
50 E South Temple
Suite 400
Salt Lake City UT 84111

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com

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REPLY SUPPORTING PETITION FOR A WRIT OF CERTIORARI

The Opposition denies reality in three ways. First, it claims there is no circuit split even though Judge Easterbrook has acknowledged a conflict on the first question presented. Second, the Opposition denies it is time reconsider the qualified immunity doctrine even though several sitting and former Justices have called for such reconsideration. Third, the Opposition manufactures "vehicle problems" that do not exist. Accordingly, after obtaining the views of the Solicitor General, the Court should grant certiorari.

A. Respondents do not undermine the petition's—and Judge Easterbrook's—showing that the circuits are split on the Eighth Amendment question.

Remarkably, even though Judge Easterbook has acknowledged the circuit split over the standard for evaluating a deliberate indifference claim, the Opposition denies a split even exists. As explained in opening (at i,10), Judge Easterbrook has stated that the approach used by the Tenth, Third, and D.C. Circuits is "incompatible with" the approach of the Seventh and Ninth Circuits. *Petties* v. *Carter*, 836 F.3d 722, 736 (7th Cir.2016) (Easterbrook, J., dissenting). Five other circuits have also joined this split on whether prison officials comply with the Eighth Amendment so long as they provide some care. See Pet. i, 10-15. Despite this clear split, the Opposition does not even *cite* Judge Easterbrook's explanation, or Judge Bybee's similar comments about the disagreements among the circuits. See *Colwell* v. *Bannister*, 763 F.3d 1060, 1071 (9th Cir.2014) (Bybee, J., dissenting).

The Opposition instead misdescribes the decisions that most clearly demonstrate the conflict. For example, the Opposition claims (at 18) that *Heyer* v. *United States Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017), is distinguishable from this case. Not so. While much of the Fourth Circuit's decision concerns the treatment of the inmate's hearing disability, in a passage ignored by the Opposition, *Heyer* explained that the inmate there "suffered multiple seizures during his confinement." 849 F.3d at 210. *Heyer* concluded "that seizures are sufficiently serious to require medical treatment." *Id.*

Here, not only was Maguire misdiagnosed as having a seizure rather than a stroke, but Respondents Jensen and McFarlane, who misdiagnosed him, did not even give him medical treatment for a seizure; all they did was place his mattress on a cell floor. See Pet. 5a. There is no doubt that, under the Fourth Circuit's holding—that "the mere fact that prison officials provide some treatment does not mean they have provided 'constitutionally adequate treatment,'" *Heyer* 849 F.3d at 211—Maguire would have prevailed. Maguire would similarly have prevailed in four other circuits. See Pet. 12–15.

2. Instead of acknowledging the split, the Opposition argues that the Tenth Circuit really aligns with the Seventh Circuit and its allies. The Opposition thus claims (at 15) that the Tenth Circuit's standard actually requires that more than "some medical care" be given. However, as Judge Easterbrook has summarized, the Tenth Circuit's law is exactly as the Petition describes—that is, that "some care" is enough. See Pet. i.

The Opposition relies principally on *Oxendine* v. *Kaplan*, 241 F.3d 1272 (10th Cir.2001). It claims (at

16) that, because the doctor there provided a surgery, "some medical care" was provided, and yet the Eighth Amendment claim still survived. But *Oxendine* was not about whether the doctor had provided sufficient care via the surgery. Rather, *Oxendine* concerned the complete absence of medical care for a blackening finger that arose *after* the surgery. The inmate there received no treatment for the finger for weeks, which caused him to lose it. 241 F.3d at 1279 ("Dr. Kaplan did not seek specialized medical assistance to deal with Oxendine's decaying finger until at least March 29, 1999 ...") The inmate thus did not receive "some care" for the blackening finger, but no care at all. *Id.* (holding it is unlawful to deny a prisoner "access to medical personnel capable of *evaluating the need for treatment.*") (emphasis in original). *Oxendine* thus does not support the Opposition's argument that an Eighth Amendment claim can survive in the Tenth Circuit even when some medical care is given, because *Oxendine* turned on the fact that, with respect to the *disputed* injury, *no* medical care was provided.

The Opposition's claim that *Sealock* v. *Colorado*, 218 F.3d 1205, 1211–1212 (10th Cir. 2000), defeats the "some care" rule is likewise mistaken. There, a prisoner received *no* care for his complaint of chest pain, only care appropriate for other symptoms. *Id.* The Tenth Circuit thus reversed, as there was a factual dispute regarding whether the doctor was deliberately indifferent to the chest pain by providing no care for it. Respondents have pointed to no Tenth Circuit case, or case from the Tenth Circuit's allies, where an Eighth

Amendment claim survived after some care—however deficient—was provided for the symptoms at issue.[1]

Like *Oxendine* and *Sealock*, this case confirms Judge Easterbrook's statement that the standard for dismissal in the Tenth Circuit is "some care" rather than the higher standard required elsewhere. Here, Abbot merely massaged Maguire, which sustained him only until he reached his cell. See Pet. 5, 5a. Then Maguire was merely observed—*observations* that the decision below ruled were "actual medical *treatment*." Pet. 36a (emphasis removed). This too would not be sufficient in other circuits. See, *e.g.*, *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" (cited at Pet. 11 n.1)). Yet this was all the attention Maguire received—despite being a recovering opioid addict[2] and presenting obvious symptoms of a stroke.

In short, contrary to the Opposition (at 15), such observations and brief relief from the symptoms of a stroke would not have been sufficient in five other circuits. See Pet. 9–17. By contrast, four other circuits have joined the Tenth in applying the "some medical

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[1] The Opposition's quotation (at 15–16) of *Self* v. *Crum*, 439 F.3d 1227, 1232 (10th Cir. 2006), relies only on *Oxendine* and *Sealock*, where no treatment was provided for the relevant condition. *Self*'s reference to patently unreasonable treatment refers to cases where there was no treatment at all.

[2] The Opposition's statement (at 7) that Maguire's opioid addiction is irrelevant to the claim presented by the petition is thus incorrect; Maguire's past medical history—including his opioid addiction—is relevant in determining respondents' subjective state of mind and the adequacy of the care they supposedly provided.

care" standard, or a similar standard. See Pet. 13–15. The Opposition does not even cite the Tenth Circuit's allies or try to harmonize them with the circuits that reject the "some medical care" standard.

3. The Opposition also tries to dodge the issue by claiming that the circuits have been unanimous in holding that negligent behavior alone does not constitute deliberate indifference. Opp, 17 & n.2. While correct, that ignores both points already explained: When faced with similar facts, the circuits on both sides of the split reach different results, under contradictory standards. 1–2, *supra*. And the Tenth Circuit plainly applies the "some care" standard that five circuits have rejected. 2–4, *supra*. The unanimous rejection of the negligence standard is thus irrelevant to the first question presented.[3]

4. The Opposition also tries (at 10–13) to shield this case from review by claiming the decision below is consistent with this Court's decisions in *Estelle* v. *Gamble*, 429 U.S. 97, 104 (1976), and *Farmer* v. *Brennan*, 511 U.S. 825, 837 (1994). But, of course, if two sides of a circuit split are both consistent with this Court's precedent, that is a reason to *grant* review, not deny it.

Moreover, as previously noted, the Opposition relies (at 13) on a misstatement of the Tenth Circuit's

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[3] Apparently concerned that the Seventh Circuit may further be conflict with the Tenth Circuit, the Opposition spends three pages (at 20–22) arguing that "there is no split on whether a plaintiff may use circumstantial evidence to" establish deliberate indifference. Opp. 20. While the Opposition is mistaken, the issue of circumstantial evidence is not the principal focus of Question 1, which is directed mainly to the legal standard for assessing such Eighth Amendment claims.

standard. When that standard is articulated accurately—that is, that "some care" is enough—it becomes apparent that the Tenth Circuit's rule substantially narrows *Estelle* and *Farmer*. See Pet. 17–20.

5. At a minimum, the Solicitor General should be given an opportunity to express the United States' views on the circuit split on the Eighth Amendment standard governing prisoner medical claims. That issue affects not only state prisons and inmates, but federal inmates and personnel in virtually every corner of the Nation.

B. Respondents do not rebut the showing by the Petition and several Justices that this Court should revisit its qualified immunity doctrine.

The Opposition does no better at undermining the need for review of the qualified immunity question. As the Opposition concedes (at 25) the doctrine of qualified immunity—especially its role in short-circuiting the normal rules of appellate review—is highly contested in the academic world. Pet. 22–27. The Opposition's main response is that *stare decisis* and this Court's repeated application of the qualified immunity doctrine foreclose its reconsideration. The Opposition is mistaken.

1. The Opposition does not acknowledge that three Justices have already suggested that this Court consider limiting or overruling the doctrine of qualified immunity. Justice Sotomayor, joined by Justice Ginsburg, recently criticized the present scope of qualified immunity, and the one-sided character of this Court's qualified immunity doctrine. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Jus-

tice Thomas has similarly said that "[i]n an appropriate case, [this Court] should reconsider [its] qualified immunity jurisprudence." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring). Justices Scalia and Kennedy both held similar views when they served on the Court. *Crawford-El* v. *Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting);*Wyatt* v. *Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring).

These opinions show that qualified immunity merits reconsideration. And those opinions—by Justices who are obviously familiar with *stare* decisis—destroy the Opposition's claim (at 25) that *stare decisis* "*require[s]* declining to reconsider qualified immunity."

The Opposition also completely ignores that qualified immunity was crucial to this case: Absent qualified immunity, the Tenth Circuit would have lacked jurisdiction to reverse the district court's denial of summary judgment. See CATO Institute Amicus at 13–15. It is only their assertion of qualified immunity that has allowed Respondents to avoid a trial on petitioner's claims.

2. The Opposition's *stare decisis* argument centers on the standard factors of workability and reliance. But its argument only demonstrates that those factors favor reconsideration of the doctrine.

In support of its workability argument, the Opposition cites *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017), a unanimous decision applying qualified immunity. But no party in that case asked for the doctrine's reconsideration. See Petition at i, Opposition at i, *White* v. *Pauly*, No, 16-67 137 S.Ct. 548 (2017). Likewise, in *District of Columbia* v. *Wesby*, 138 S.Ct. 577 (2018). Justice Thomas wrote an opinion that vindicated Judge Kavanaugh's dissent from a denial of rehearing

en banc in that case, see *Wesby* v. *District of Columbia*, 816 F.3d 96, 102 (D.C. Cir. 2016). But Justice Thomas did not repudiate his earlier view that qualified immunity should be eliminated. Rather, in *Wesby*, as in *White*, no party requested that qualified immunity be reconsidered, See Petition at i, Opposition at i–ii, No. 15-1485, *District of Columbia* v. *Wesby*, 138 S. Ct. 577 (2018). *Wesby*'s application of qualified immunity thus cannot be read to eliminate concerns about the doctrine's continued vitality. See, *e.g.*, *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring) ("The Court correctly applies our precedents, *which no party has asked us to reconsider*.") (emphasis added).

The Opposition's reliance on *stare decisis* is likewise misdirected. This Court's recent decision in *South Dakota* v. *Wayfair*, 138 S. Ct. 2080 (2018), makes clear that *stare decisis* is no barrier to correcting an error. In *Wayfair* this Court unanimously concluded that its prior decision in *Bellas Hess* was "flawed on its own terms."138 S.Ct. at 2092; *id.* at 2102 (Roberts, J., dissenting) ("I agree that *Bellas Hess* was wrongly decided[.]"). Based on this premise, the majority concluded that, while "reliance interests are a legitimate consideration when the Court weighs adherence to an earlier but flawed precedent," that rule does not control when there is "no longer a clear or easily applicable standard." *Id.* at 2099. In other words, this Court examines whether a challenged precedent is workable or not.

Contrary to the Opposition, the doctrine of qualified immunity is not workable. The Opposition's principal argument (at 24–25) focuses on this Court's consistent need to correct lower court decisions on

qualified immunity—eleven in a recent five-year period. But this Court's constant need to correct lower courts is evidence of the doctrine's *un*workability.

Indeed, the Opposition collects (at 24) examples of cases in which this Court has had to intervene, painting the lower courts' repeated confusion over this doctrine as an example of workability. But a doctrine is not workable if this Court has to intervene multiple times a term to correct the lower courts' application of it.

The circuit reporters are also filled with cases in which judges disagree on whether qualified immunity applies. See, *e.g.*, *A.M. ex rel. F.M.* v. *Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016) (Gorsuch, J., dissenting). Revisiting qualified immunity is needed to bring clarity to the doctrine.

3. At a minimum, this issue likewise warrants a call for the views of the Solicitor General. The United States has an obvious interest in the development of the law of qualified immunity, as that doctrine currently applies to federal officials as much as state officials. See, *e.g.*, *Ziglar*, 137 S. Ct. at 1854. Moreover, given multiple Justices who criticize the present doctrine of qualified immunity, and the doctrine's nationwide impact, the Solicitor's insight into the doctrine would aid the Court in addressing the petition.

C. Respondents' attempts to manufacture vehicle problems are meritless.

Perhaps recognizing the importance of both questions presented, the Opposition claims this is a poor vehicle. The Opposition is wrong about that as well.

1. The Opposition falsely claims that the petition contains material factual inaccuracies. See Opp. 6, 25–

27. For example, the Opposition repeatedly notes (at, *e.g.*, i, 1, 8) that Maguire received "immediate relief" following his first visit to Abbott because Abbott applied pressure to trigger points in a muscle, which reduced the pain. The Opposition faults the petition for not mentioning the relief Maguire received. But the Opposition never acknowledges how short-lived that relief was: As the Petition explains—and Respondents do not dispute—"[s]hortly after returning to his cell, Maguire's left arm began seizing, his left leg became numb, and he began convulsing …'" Pet. 5. The relief Maguire felt at first is irrelevant in light of the undisputed subsequent events, clearly evince deliberate indifference by Respondents.

In another attempt to manufacture a factual inaccuracy, the Opposition claims (at 6–7) that "the petition is misleading to the extent it creates the impression that Maguire died due to" his stroke. But the Petition's Statement repeatedly mentions (at 4-5) that the stroke occurred in 2008, and notes (at 4) that Maguire died in 2015. The seven-year gap between the stroke and Maguire's death—and the obvious point that other health events occurred in that gap—is clear.[4]

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[4] The Opposition also attempts to reframe this sentence from page 5 of the petition: "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." The Opposition claims (at 7–8) that this sentence asserts that Maguire's *form* stated he was losing control over his body. But the sentence asserts only what Maguire "noticed," not what was written on the form. And the petition's description matches both the Tenth Circuit's language, which notes that Maguire had "problems controlling the left side of his body (including his left arm and hand)," Pet. 25a, and the Opposition's own explanation, See Opp. 2.

2. The Opposition also claims that, because Petitioner relied solely on Maguire's testimony, Utah's Code 78B-3-107(2) prohibits his estate from receiving relief. See Pet. 26 (citing Utah Code 78B-3-107(2) ("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.") For two reasons, this is flatly wrong.

First, this suit was filed before Section 78B-3-107 was enacted, and another provision of that section (78B-3-107(3)) prohibits the statute's retroactive application. So the statute simply would not apply in a subsequent trial.

Second, the Opposition misstates the record below. If Petitioner prevails and the case proceeds to trial, he will be able to establish his entire case even without Maguire's testimony. For example, the Martinez Reports of Abbott, Miller, Jensen, and MacFarlane show how Maguire was misdiagnosed by Abbott, Jensen, and McFarlane, and their reckless disregard for his condition. See Pet. 40a n.1; District Ct. Docket Nos. 71, 74, 171.

3. The Opposition also tries (at 9, 25, 26) to use Justice Gorsuch's potential recusal and the *possibility* of a 4-4 tie as a reason to deny certiorari. But there is no reason to think this case would be a close one on the merits. Moreover, numerous important cases have been decided with an even number of Justices. See, *e.g.*, *United States* v. *Virginia*, 518 U.S. 515 (1996). This case can easily follow in that tradition.

CONCLUSION

Respondents' various dodges provide no reason to deny the petition, which the Court should grant after obtaining the views of the Solicitor General.

Respectfully Submitted,

BENSON L. HATHAWAY, JR.
ALEXANDER DUSHKU
R. SHAWN GUNNARSON
ELI W. MCCANN
KIRTON MCCONKIE
50 E South Temple
Suite 400
Salt Lake City UT 84111

GENE C. SCHAERR
Counsel of Record
MICHAEL T. WORLEY
SCHAERR | DUNCAN LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-duncan.com