No. 17-543

IN THE

Supreme Court of the United States

ANITA ARRINGTON-BEY, ADMINISTRATRIX OF THE ESTATE OF OMAR K. ARRINGTON-BEY,

Petitioner,

v.

CITY OF BEDFORD HEIGHTS, OHIO, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

This Petition raises the following questions that were fully considered and correctly decided below:

Whether the unanimous Sixth Circuit panel acted in accord with settled law in *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 406 (1997) and *City of Canton v. Harris*, 489 U.S. 378, 388 (1989) that provide when a plaintiff claims that the municipality had not directly inflicted an injury – like here – but nonetheless had caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employees.

Whether this Court should reconsider its *White v. Pauly*, 137 S.Ct. 548 (2017) decision that emphasized the necessity of particularized case law to avoid the individual defendants' qualified immunity, or re-apply the facts of this case to the established law when the unanimous Sixth Circuit panel could find no sufficiently particularized case law that would have required the arresting officers to drive Omar to the hospital rather than the jail under these circumstances, or the jailers to do more then what they did.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

I. STATEMENT OF THE FACTS

The Court of Appeals for the Sixth Circuit adequately stated the pertinent facts relevant the Petitioner's claims. (Pet. at App. 2-6.) For this Court's convenience, the Respondents provide the following.

A. Introduction

This matter arises from the unforeseeable death of Petitioner's decedent, Omar Arrington-Bey, while he was in custody at the Bedford Heights jail. Omar was arrested for destroying property at a Lowe's store and that he was alternately agitated and rambling, then calm and cooperative with the arresting officers and the jail personnel. At the jail, Omar was placed in a segregation room and booking was delayed until he calmed down. His on again-off again behavior continued in the jail but he was eventually booked. He told the officer during his screening that he had not seen a doctor for any psychiatric issue and was not taking any psychiatric medications. During and after his booking Omar was calm and compliant so Omar was let out of the segregation room without handcuffs so he could make a phone call. Without warning, Omar physically attacked two officers. Omar was eventually subdued but he passed out and despite immediate efforts to resuscitate him, Omar later died. The coroner attributed the death to "sudden cardiac event during a physical altercation in association with bipolar disease."

B. Background regarding Bedford Heights Jail

Bedford Heights Jail is a full service jail facility that provides on-site nurses for medical care of inmates.

The nurses evaluate inmate medical complaints, provide inmate medical information to the jail doctor, and assist in providing inmates with medical care. As part of the medical care provided, nurses verify and confirm a prescription for a jail detainee's unmarked medication. Moreover, nurses would provide detainees entering the jail with further medical evaluation.

Bedford Heights Jail also has in place appropriate policies and procedures with respect to offender intake, inmate healthcare, and the handling of inmate pharmaceuticals. The policies state that the jail is to identify offenders requiring special management "at the time of intake, or as soon thereafter as possible." The policies describe severely disturbed or mentally ill offenders in need of special management as those "who present a danger to themselves or others or are incapable of attending to basic physiological needs because of a mental or emotional problem."

In accord with its policies, the Bedford Heights Jail provides an intake booking process for offenders entering the jail, which includes a medical and mental health screening. The initial screening form expressly inquires as to whether the inmate has seen a medical provider for a psychiatric condition or is taking prescribed psychiatric medications.

The Bedford Heights Jail policies also address the safe, secure use of prescription medications. Offenders entering the jail in possession of medication are permitted to continue taking the medications only after verification by the nurse of need, ownership, and content of the prescription. If an inmate enters the jail with loose pills

of an unsubstantiated nature, a nurse would attempt to verify the nature and reason for the pills and then proceed with the aforementioned verification process.

C. Incident at Lowe's and Omar Arrington-Bey's arrest.

On June 21, 2013, Petitioner drove Omar Arrington-Bey ("Bey") to the Bedford Heights Lowe's store – his former place of employment – to pick up his paycheck. Petitioner parked in the Lowe's parking lot and Bey continued by himself into the store. Russell Nelson was the Assistant Store Manager on duty when Bey entered Lowe's. Bey had recently been fired from his employment with Lowe's due to attendance issues. Nelson approached Bey and asked if he could help him with anything, and Bey responded no. According to Nelson, Bey then began to talk disjointedly about selling gloves to Lowe's. Nelson testified that Bey was calm and Nelson attempted to lead Bey out of the store.

Once outside of the store, Bey told Nelson that he wanted his $200 paycheck. When Nelson told Bey that he would have another employee contact him about the paycheck, Bey yelled he wanted his money and proceeded back into the store. Inside the store, Bey jabbed at Nelson to get him away and then began kicking and throwing cans of stain as he walked down a store aisle. Nelson called 911 and followed Bey down the aisles toward a commercial lumber entrance/exit area.

The initial 911 call from Lowe's was received by Bedford Heights Police Department dispatchers at 9:27 a.m. Bedford Heights Police Officers Honsaker and

Ellis responded to the dispatch call. Dispatch informed the Officers that Bey was out of control and damaging property at the Lowe's. As Officer Honsaker entered the Lowe's parking lot, he received different descriptions of the clothing worn by Bey. The various descriptions were the result of Bey changing his clothing in an attempt to avoid identification.

Officer Honsaker spoke with a Lowe's employee in the parking lot who informed him that Bey had left in a blue or black Mercury. Officer Honsaker saw a dark colored Mercury matching the employee's description leaving the parking lot and followed it. Officer Honsaker stopped the suspect vehicle. Officer Ellis was also on scene to assist Officer Honsaker. Officer Chow was also present at the scene of the arrest, but did not actively participate in the arrest.

Officers Ellis and Honsaker approached Petitioner's vehicle from the passenger side. Officer Honsaker observed Bey in the front passenger seat and his clothing matched the last description received. Bey was slouched down in the passenger seat and Petitioner was in the driver's seat.

Initially, Bey was evasive and told Officer Honsaker that he should be looking for a male in a red shirt. Officer Honsaker explained to Bey that he was informed the male suspect from Lowe's removed a red shirt and was now wearing a white tank top matching what Bey was wearing. Officer Ellis then asked Bey to step out of the vehicle and Bey complied.

Bey was patted down, handcuffed, and detained. During the pat-down, Officers Honsaker and Ellis discovered miscellaneous pills in a container. Bey told Officer Ellis that the pills were to help him sleep. The pills were then placed back in Bey's pocket. Officer Ellis then approached Plaintiff and asked for Bey's address and social security number. Plaintiff provided the requested information and told Officer Ellis that Bey was bipolar. Officer Ellis asked Plaintiff what kind of medication Bey was on. According to Plaintiff she informed Officer Ellis that Bey was on Seroquel. Plaintiff also informed Officer Ellis that Bey had not been taking his medication. Plaintiff then returned to the Lowe's parking lot while the Officers continued their investigation.

While Plaintiff waited in her car in the Lowe's parking lot, Bey was detained in the back of Officer Honsaker's cruiser. Officer Honsaker testified that, while waiting in the Lowe's parking lot, Bey was talking nervously and non-stop. At one point, an unknown individual approached the cruiser and asked if the individual the Officers were looking for had a gun. Bey swore at the individual and told him to leave.

Bey indicated to Officer Honsaker that he was agitated by Plaintiff's presence in the parking lot. As a result, Officer Honsaker approached Plaintiff's vehicle and asked that she leave the parking lot. According to Plaintiff, she informed Officer Honsaker that Bey was bipolar and had not been taking his medication. Plaintiff then left the parking lot.

After the investigation was concluded, Officer Honsaker transported Bey to the Bedford Heights jail.

Officer Honsaker testified that, while in the cruiser, Bey would ramble and talk about random topics such as inventing a kind of marijuana, his father being a son of the devil, being famous on the internet, black people fooling white people by placing the number 1 in front of everything, and being a millionaire. The actions of Bey did not indicate to Officer Honsaker that Bey was suffering from a psychiatric issue and Bey's rambling did not indicate to Officer Honsaker that he posed a danger to himself or others.

Rather, Bey's agitation and rambling were common occurrences due to the anxiety caused by the arrest and did not demonstrate to any Officer that Bey was suffering from a medical emergency. Moreover, Bey swearing at an individual who asked an Officer whether Bey had a firearm was not surprising under the circumstances and did not suggest that Bey was suffering from a mental health emergency. Indeed, Bey's attempts to disguise himself and evade police prior to his arrest further indicated that Bey acting coherently and was not suffering from a psychotic break.

D. Bey's detention at Bedford Heights Jail.

Correctional Officers Lee and Hill received Bey at the jail. Officer Hill described Bey as agitated with Officer Honsaker due to his arrest. Officer Honsaker told Officer Chow – who had overheard Bey talking disjointedly while walking into the jail – that Bey had been rambling in the cruiser. Officer Honsaker also told Officer Hill that Bey had been rambling and talking nonsense in the back of the cruiser.

Officer Hill decided to delay Bey's booking and screening due to his agitated state and because only two female correctional officers were available to book Bey. As a result, Bey was placed in a holding cell until he calmed down. The miscellaneous pills were brought to the booking area and held with Bey's property until a nurse was available to identify the pills and verify a prescription for the pills per jail protocol.

There were two nurses that worked at the Bedford Heights Jail. On the day Bey was arrested, a nurse was scheduled to start her shift at the jail at approximately 6:30 p.m. In addition to identifying the pills and verifying a prescription for the pills, the nurse would provide Bey with further medical evaluation.

Once in the holding cell, Bey's cuffs were removed and so was his belt. Officer Hill stated that when asked to take off his belt and shoes, Bey acted like he was performing a striptease. Officer Hill asked Bey to stop and he complied. Officer Hill did not find Bey's behavior abnormal or unusual in a jail setting. While in the holding cell, Bey sat and talked to himself; flirted with the female correctional officers; talked about a $1 million song or contract he was involved in; was singing and rapping, and kicked the cell door a few times. Officer Hill did not consider Bey's conduct to be a behavioral problem which was indicative of a mental health problem.

Officer Lee did not witness Bey talking incoherently or rambling. Officer Lee did hear Bey kick his cell door. When asked to stop kicking the door, Bey would comply. Officer Lee was aware that Bey had miscellaneous pills on his person when he came into the jail. Officer Lee did

not ask Bey about the pills as the nurse would identify the pills were and would verify a prescription.

At one point, Bey began kicking his cell door and banging a cup on the wall because he wanted to use the restroom. Because there were two female correctional officers on duty, Officer Honsaker was contacted to assist by bringing Bey to the restroom. Assistant Chief Leonardi, Officer Honsaker, and Officer Chow brought Bey to the restroom. Bey explained that he was upset because he had requested to use the restroom thirty minutes before, but did not receive a response. Bey was also agitated because Officer Honsaker was watching him while using the bathroom. In response, Bey used his hand to shake his penis and asked Officer Honsaker if he would like to hold it for him. Bey then finished using the restroom and was escorted back to the holding cell. Bey at this point was no longer agitated and thanked the Officers for allowing him to use the restroom.

At approximately 3:00 p.m., Correctional Officers Sindone and Mudra began their shift and relieved Officers Lee and Hill. From her station in the control room, Officer Sindone could hear Bey rambling and talking about wanting to eat, using the bathroom, and wanting to go home. However, Officer Sindone observed that after a period of time Bey calmed down and was quiet in his cell. Bey was then served food. Officer Sindone recalls that Bey used his hands to eat the food, but believes this was because they did not provide him with utensils. Officer Sindone did not consider Bey's actions as unusual or a sign that he was suffering from a medical emergency.

Officer Mudra recalls hearing Bey sing while in the holding cell and saw him doing push-ups. Officer Mudra did not find Bey's behavior to be unusual. Officer Mudra informed Bey that they would be getting him booked and processed shortly. Bey was quiet and calm in the holding cell.

At around 3:30 p.m., Officer Mudra removed Bey from the holding cell and proceeded to book and process Bey. The booking process included the completion of Bey's initial medical screening. Bey responded "no" to inquiries regarding whether he had seen a doctor for any psychiatric issues or was taking medication for a psychiatric condition. Throughout the booking process, Bey was compliant and cooperative. After booking was complete, Officer Mudra returned Bey to the holding cell.

E. Bey's assault of Officers.

At around 6:30 p.m., Officer Mudra asked Bey if he would like to make a phone call because Officer Mudra wanted to see Bey bonded out. Bey replied that he would like to make the phone call. Officer Mudra took Bey out of the holding cell and walked with him approximately 20 to 25 feet to the booking desk where a phone was available. Bey was not handcuffed as Officer Mudra did not perceive him as a threat. Bey asked where his cellphone was and Officer Mudra told him he did not know. According to Officer Mudra, Bey became agitated and decided that he wanted to go back to his cell rather than make a phone call. As they walked back to the holding cell, Bey stopped, looked at Officer Mudra and told him he could break a man's neck seventeen different ways. Officer Mudra told Bey that he didn't need to make that statement and he was

going to try to find the cellphone. They stopped walking and Bey without warning suddenly grabbed Officer Mudra by the neck and slammed him to the floor. Bey began choking Officer Mudra while on the ground.

Officer Sindone jumped on Bey's back in an attempt to assist Officer Mudra. Bey proceeded to pin Officer Sindone on the ground and began choking her in addition to choking Officer Mudra.

Assistant Chief Leonardi as well as other police officers responded and entered the jail area. Assistant Chief Leonardi and the other officers forcibly removed Bey from Officers Mudra and Sindone. Bey continued to resist the Officers' attempts to gain control and subdue him. Ultimately, Bey was handcuffed with his hands in front of his body and placed in a restraint chair.

Bey did not stop resisting until he was placed in the restraint chair. When placed in the restraint chair, Bey's body remained in an upright position and the handcuffs were removed. Assistant Chief Leonardi detected a problem and asked an Officer to check Bey's pulse. The Officer reported a weak pulse. Assistant Chief Leonardi then immediately ordered that the Officers take Bey out of the restraint chair and he was placed on the floor in a prone position. Assistant Chief Leonardi had an emergency squad called for medical assistance. An Officer immediately began attempts to resuscitate Bey and an AED device was used. Emergency responders arrived and continued providing resuscitation efforts. Bey was taken to the hospital and later pronounced dead.

An autopsy of Bey was performed. The coroner's opinion was that Bey died as a result of a sudden cardiac event during a physical altercation in association with bipolar disease. The coroner found that Bey's weight and coronary artery anatomy placed him at increased risk of such a cardiac event during the assault.

II. REASONS FOR DENYING THIS PETITION

A. Arrington-Bey has not articulated a "compelling" reason for this Court's discretionary review as to Respondent City of Bedford Heights.

Petitioner's claims of "deep conflict" and "doctrinal chaos" are illusory. This case involves a narrow failure to train claim against a municipality in which the Sixth Circuit concluded there is no clearly established law that required the officers to take a bipolar inmate immediately to the hospital. The present case did not involve a direct municipal act by the City, but rather the Petitioner is trying to impose liability on the City for the acts of its employees. See Sixth Cir. Op. at Pet. App. 11-12 (explaining the difference between types of *Monell* claims when an injury arises directly from a municipal act, and those that arise from an *employee's* unconstitutional act).

A municipality cannot be held liable under § 1983 on a respondeat superior theory. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978). This Court has expressly held that when a municipality's alleged responsibility for a constitutional violation stems from an *employee's* unconstitutional act, the city's failure to prevent the harm must be shown to be deliberate under

"rigorous requirements of culpability and causation." *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 415 (1997); *City of Canton v. Harris*, 489 U.S. 378, 388. The natural result is that the violated right in deliberate-indifference/failure to train cases thus must be clearly established because a municipality cannot be deliberately indifferent to a constitutional duty unless that duty is clear. The Sixth Circuit merely followed established law.

The circuits that have touched on this issue routinely observe – and have done so for decades – that if there is not some clear notice to the city of a constitutional violation that a failure to train theory would simply impose impermissible respondeat superior liability on a city. See *Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 94 n.10 (1st Cir. 1994); *Townes v. City of New York*, 176 F.3d 138, 143–44 (2d Cir. 1999); *Hagans v. Franklin Cty. Sheriff's Office*, 695 F.3d 505, 511 (6th Cir. 2012); *Robles v. City of Fort Wayne*, 113 F.3d 732, 735 (7th Cir. 1997); *Young v. City of Augusta*, 59 F.3d 1160, 1172 (11th Cir. 1995).

1. The Sixth Circuit's unanimous opinion is consistent with Supreme Court precedent.

Petitioner suggests that the Sixth Circuit's decision is in conflict with the established law that qualified immunity does not apply to a municipality, citing to *Owen v. City of Indep.*, 445 U.S. 622, 629, 638 (1980). (Pet. at 17-22.) The Sixth Circuit did not hold that a municipality could raise qualified immunity as a defense to a *Monell* claim. There simply is no controversy that this Court and all circuits have long held that qualified immunity is not available to municipalities. See, e.g., *Leatherman v. Tarrant Co.*

Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 166 (1993) ("Municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983."). Petitioner tries to create conflict with this Court's prior precedent where no legitimate conflict exists.

There is no conflict with this Court's decisions in *Owen* or *Canton*. Petitioner does not cite to *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 406 (1997) that largely corrects Petitioner's mistaken position and that reaffirms *Canton's* requirement that a municipality's deliberate indifference must in fact be deliberate.

As the Sixth Circuit recognized, this Court held in *Brown* where a plaintiff claims that the municipality has not directly inflicted an injury – like here – but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee. Sixth Cir. Op at Pet. App. 12, citing *Bd. of Cty. Comm'rs of Bryan Cty. v. Brown*, 520 U.S. 397, 406 (1997). In a deliberate-indifference case, the claimant must show not only that an employee's act caused a constitutional tort, but also that the city's failure to train its employees caused the employee's violation and that the city culpably declined to train its "employees to handle recurring situations presenting an obvious potential for such a violation." *Brown*, 520 U.S. at 409; see *Szabla*, 486 F.3d at 393.

"[O]bvious potential for such a violation" has two elements: It must be obvious that the failure to train will lead to certain conduct, and it must be obvious (i.e., clearly established) that the conduct will violate constitutional

rights. As Judge Colloton pointed out in his opinion for the en banc Eighth Circuit in *Szabla*, requiring that the right be clearly established does not give qualified immunity to municipalities; it simply follows *City of Canton's* and *Brown's* demand that deliberate indifference in fact be deliberate. *Szabla*, 486 F.3d at 394.

The Sixth Circuit simply relied on this Court's *Brown* and *City of Canton* precedent to conclude that a "municipality cannot deliberately shirk a constitutional duty unless that duty is clear." (Sixth Cir. Op. at Pet. App. 12.) Here, the Sixth Circuit determined that the law was not clearly established that officers must take delusional arrestees like Bey to a hospital rather than a jail, or to do anything more than they did: keep him in seclusion for everyone's safety, waited until he was calm to feed him and book him, ask him about any psychiatric diagnoses during the medial screening, and after eight hours of detention uncuffed him and released him from his cell to make a call to be released on bail.

Again, in a deliberate indifference claim such as this, established law requires that it must be obvious to the municipality that the failure to train will lead to certain conduct, and it must be obvious (i.e., clearly established) that the conduct will violate constitutional rights.

The Petitioner obscures the distinction between *Monell* cases that "present no difficult questions of fault and those that do." *Brown*, 520 U.S. 397, 406 (1997) (Examples of those are *Pembaur* involving the decision of the county prosecutor; *Owen*, where there was formal decision by a legislative body (discharged an employee without a hearing). Because fault and causation

were obvious in these types of cases, "proof that the municipality's decision was unconstitutional would suffice to establish that the municipality itself was liable for the plaintiff's constitutional injury." *Brown*, 520 U.S. 397, 406 (1997).

But, Municipalities are not vicariously liable in § 1983 actions merely because they employ someone who has committed a constitutional violation. *Monell*, 436 U.S. at 694. They must pay for violations only if the injury is caused by a municipal custom or policy, or if the city's failure to train employees amounts to deliberate indifference to constitutional rights. See *City of Canton*, 489 U.S. at 388. This is well established law. The City could not be deliberately indifferent in this case because a constitutional duty was not clear, thereby precluding knowledge or notice of any alleged inadequate training.

Petitioner asserts that qualified immunity is not a defense to a *Monell* claim and deliberate indifference is a *Monell* claim. Therefore, the Sixth Circuit erred. But, Petitioner obscures the vital difference between *Monell* claims.

> Where the municipality has not directly inflicted an injury, however, "rigorous standards of culpability and causation must be applied," [*Bd. of Cty. Comm'rs of Bryan Cty. V. Brown*, 520 U.S. 397, 405], and a showing of deliberate indifference is required. The absence of clearly established constitutional rights-what Justice O'Connor called "clear constitutional guideposts," [*City of Canton v. Harris*, 489 U.S. 378, 397 (1989)] – undermines the assertion that

> a municipality deliberately ignored an obvious need for additional safeguards to augment its facially constitutional policy. **This is not an application of qualified immunity for liability flowing from an unconstitutional policy. Rather, the lack of clarity in the law precludes a finding that the municipality had an unconstitutional policy at all, because its policymakers cannot properly be said to have exhibited a policy of deliberate indifference to constitutional rights that were not clearly established.**

Szabla v. City of Brooklyn Park, Minnesota, 486 F.3d 385, 394 (8th Cir. 2007), emphasis added.

There is no conflict with this Court's jurisprudence. The Sixth Circuit merely applied the deliberate indifference standard in this particular context. Despite Petitioner's claim, the Sixth Circuit did not create a novel exception to *Canton v. Harris*, rather the Sixth Circuit merely applied the established law of *Brown* and *Harris*.

2. Petitioner's circuit conflict is illusory.

Petitioner relies on *Fairley v. Luman*, 281 F.3d 913, 917 (9th Cir. 2002) for the claim of conflict. In *Fairley,* the city's liability was predicated upon its own custom that allowed individuals to be detained on the wrong warrant; in other words, it was a direct act of the city. This 15-year-old case does not demonstrate a legitimate or significant conflict. Petitioner's parenthetical citation states "If a plaintiff establishes he suffered a constitutional injury by the City, the fact that individual officers are exonerated

is immaterial to liability under § 1983." (Pet. at 15, citing *Fairley* at 917.) Petitioner takes this passage out of context. In *Fairley*, the plaintiff was arrested and held for 12 days on outstanding warrants issued for the arrest of his twin brother. The plaintiff sued the detaining and booking officers for use of excessive force and arrest without probable cause. The plaintiff alleged a claim pursuant to *Monell* against the city for violation of civil rights **based upon a policy, practice or custom of the police department allowing him to be detained for 12 days**. A jury exonerated the police officers, but found the City liable. In affirming, the Ninth Circuit explained that the plaintiff's loss of liberty was "not suffered as a result of actions of the individual officers, but as a result of the collective inaction of the Long Beach Police Department." (*Id.* at p. 917.) Unlike *Fairley*, the present case does not involve direct injury by a municipal act. Rather, this case involves a claim of deliberate municipal indifference. Similarly, *Chew v. Gates*, 27 F.3d 1432, 1438 (9th Cir.) is distinguishable because the claim of liability against the city was another direct act of the city, predicated on its own policy that authorized the seizure of all concealed suspects—resistant or nonresistant, armed or unarmed, violent or nonviolent—by dogs trained to bite hard and hold. There is no real conflict.

Likewise, the 15-year-old case of *Medina v. County of Denver*, 960 F.2d 1493, 1499-1500 (10th Cir. 1992) held simply that the "appellant failed to produce any evidence that Denver maintained a policy or course of conduct authorizing or condoning reckless, high speed chases that was deliberately indifferent to the rights of innocent bystanders." *Id.* at 1494. The *Medina* court found that the city could not be held liable because it had no evidence

to establish a failure to train claim, it did not rely on the officer's qualified immunity to determine the city was not liable. *Id*. at 1500-01. Petitioner's reliance on dicta does not create a conflict.

The Petitioner also claims that there is an intra-circuit conflict in the Sixth Circuit. The Sixth Circuit expressly disagreed. The Petitioner's request for en banc review in the Sixth Circuit was circulated to the full court and "no judge [had] requested a vote on the suggestion for rehearing en banc." (6th Cir. Order of July 5, 2017.) The court determined that this case was not of "exceptional importance" or that there was "necessity to … maintain uniformity of the court's decisions" under FRAP 35(a) (1-2). *Id*.

Nevertheless, the Petitioner attempts to cobble together dicta to support an argument the Sixth Circuit soundly rejected in its denial of the en banc petition. She claims that cases like *Gray v. City of Detroit*, 399 F.3d 612, 617 (6th Cir. 2005) support her position, but courts throughout the Sixth Circuit recognize these non-essential incidental statements found in *Gray* do not create a conflict. See e.g., *Modd v. Cnty. of Ottawa*, No. 1:10–CV–337, 2012 WL 5398797, at *19 (W.D.Mich. Aug. 24, 2012) (noting that the "statements about municipal liability" in *Gray* are "clearly dictum " and that the Sixth Circuit absolves municipal employers of liability in failure-to-train cases, where its officers have been granted qualified immunity). Similarly, Petitioner's citation to *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000) only demonstrates that when the court found no constitutional violation that a claim against the county could not be maintained under *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)(per curiam). There is nothing controversial about this holding.

Finally, to try to suggest "doctrinal chaos," the Petitioner also relies on the 23-year-old case of *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3rd Cir. 1994) for the proposition that even when an individual does not commit a constitutional violation, the entity may still be liable. The Third Circuit itself subsequently limited this outlier case to insignificance:

> In *Fagan*, we observed that a municipality could remain liable, even though its employees are not, where the City's action itself is independently alleged as a violation and the officer is merely the conduit for causing constitutional harm. We were concerned in *Fagan* that, where the standard for liability is whether state action "shocks the conscience," a city could escape liability for deliberately malicious conduct by carrying out its misdeeds through officers who do not recognize that their orders are unconstitutional and whose actions therefore do not shock the conscience. Here, however, like *Heller* and unlike *Fagan*, the question is whether the City is liable for causing its officers to commit constitutional violations, albeit no one contends that the City directly ordered the constitutional violations. Therefore, once the jury found that [the officers] did not cause any constitutional harm, it no longer makes sense to ask whether the City caused them to do it. **Additionally, recognizing that *Heller* had addressed a closely related issue, we carefully confined *Fagan* to its facts: a substantive due process claim resulting from a police pursuit. By contrast, both this case and *Heller* involve**

primarily a Fourth Amendment excessive force claim.

Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120, 124 (3d Cir.2003), emphasis added (internal citations omitted); see also *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n. 13 (3d Cir.1995). *Fagan* hardly constitutes a conflict and certainly not a substantial conflict. See also *Thomas v. City of Philadelphia*, 804 A.2d 97, 111 (Pa. Comm.Ct.2002) (noting that *Fagan* "has not stood the test of time even in the Third Circuit."). *Fagan* is an outlier and at best (and not even that) an internal circuit issue that is distinguishable on the facts.

B. Petitioner has not articulated a "compelling" reason for this Court's review and merely seeks purported error correction as to the individual officers.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. This case poses no "compelling reason" for review. Petitioner merely asks this Court to reapply the long-standing qualified immunity analysis that this Court recently reaffirmed in *White v. Pauly*, 137 S.Ct. 548, 552 (2017). This Court is not an error correcting court. That is all that Petitioner seeks. Further, the unanimous Sixth Circuit did not commit error.

Petitioner is naturally unhappy with the unfavorable ruling below. But that displeasure does not transform this case into a compelling case for review. See *N.L.R.B v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951)(explaining that the Supreme Court "is not the place to review a conflict of evidence nor to reverse a Court of Appeals

because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way."). The unanimous panel of the Sixth Circuit properly authorized summary judgment in favor of the individual Respondents based on qualified immunity. (Sixth Cir. Op. at Pet. App. 7-11.) Failing to demonstrate a convincing legal reason for this Court to grant certiorari, Petitioner argues that the three Sixth Circuit panel members simply misapplied the law to the facts. This claim is insufficient to warrant this Court's review.

In § 1983 constitutional torts, qualified immunity prevents government officials from being held liable if (1) the officers did not violate any constitutional guarantees or (2) the guarantee, even if violated, was not "clearly established" at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). The Sixth Circuit held that the second prong of qualified immunity resolves this case. (Sixth Cir. Op. at Pet. App. 7.) Because no case clearly established the unlawfulness of the decisions made during Omar's arrest and detention, the officers involved were entitled to qualified immunity.

The Petitioner all but ignores this Court's decision in *White v. Pauly*, 137 S.Ct. 548 (2017). The Sixth Circuit noted that the district court did not have the benefit of *Pauly*, but recognized that it must follow the lead of the *Pauly* decision. The Sixth Circuit recognized this Court's dictate that a "plaintiff must identify a case with a similar fact pattern that would have given 'fair and clear warning to officers' about what the law requires." (Sixth Cir. Op. at Pet. App. 8.) Nevertheless, *Pauly* merely re-affirmed established law. See e.g., *Ashcroft v. al-Kidd*, 563 U.S.

731, 742 (2011); see further e.g., *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Sixth Circuit explained that Petitioner had "not pointed to, and we have not found, any case like this one – a case showing that the officers at the scene immediately needed to seek medical treatment or that the jailers had to do the same once he arrived at the prison." *Id.* The Sixth Circuit analyzed each of Petitioner's cases at that level and concluded that "we begin with, and could end with, the reality that [Petitioner] points to no Supreme Court or Sixth Circuit case that requires officers to take a delusional arrestee like Omar to a hospital rather than a jail. Each of Arrington-Bey's cases fails to address this point and not one involves remotely comparable facts." *Id.*

In her Petition before this Court, Petitioner abandons all of the cases that she previously said demonstrated clearly established law, which were soundly rejected by the Sixth Circuit. Petitioner digs into a new batch of cases that all suffer from the same general lack of specificity that *Pauly* warned against. Petitioner wants this Court to reapply the facts to the established[1] (and recently re-affirmed) law governing the specificity required under the clearly established prong of qualified immunity. Again, as the law is established in *Pauly*, and Petitioner merely seeks reconsideration in this Court. This Court recently reminded lower courts that a plaintiff must identify a case with a similar fact pattern that would have given "fair and

1. Supreme Court law on the point of specificity is long established. "[C]learly established law" may not be defined at such "a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). It must be more "particularized" than that. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

clear warning to officers" about what the law requires. *Id.* (quotation omitted). Immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* at 551 (quotation omitted).

Petitioner's cases are inapposite and – unlike the present case – represent blatant examples where physicians/nurses or jailers disregard heart attacks, gunshot wounds, severely broken bones, profound heatstroke, and similar situations. (See generally Pet. at 23-24.) Petitioner's cases are not adequately particularized and, candidly, are wholly inapplicable. See Pet. at 24, citing: *Terrance v. Northville Reg'l Psychiatric Hosp.*, 286 F.3d 834, 844-45 (6th Cir. 2002)(*physician* – not an officer – who acutely understood the health risks posed to a diabetic prisoner who died due to heat stroke); *Dominguez v. Correctional Medical Services*, 555 F.3d 543, 551 (6th Cir. 2009)(*nurse* – not an officer – specifically disregarded the guard's report that the prisoner was suffering from heat exhaustion); *Cain v. Irvin*, 286 Fed. Appx. 920, 926, 2008 WL 2776863 (6th Cir. 2008)(minor nature of the plaintiff's injury required that the court find that the plaintiff could not satisfy the objective prong of deliberate indifference); *Darrah v. Krisher*, 865 F.3d 361, 368-69 (6th Cir. 2017)(aside from being decided years after the present incident making it of no use in a qualified immunity analysis, physician and nurses failed to provide treatment over a three-month period); *Cooper v. Dyke*, 814 F.2d 941, 945-46 (4th Cir. 1987)(jailers ignored an inmate's repeated pleas to go to the hospital after he had been shot in the chest and had a collapsed lung, a perforated stomach, a lacerated liver and diaphragm); *Aldridge v. Montgomery*, 753 F.2d 970, 972-73 (11th Cir. 1985)(officers inflicted a cut above eye that profusely bled

yet they left him in the cell for hours while blood pooled in his cell floor and even after he received stiches at the ER officers refused to provide follow up treatment); *Brown v. Hughes*, 894 F.2d 1533, 1538-39 (11th Cir. 1990)(officers disregarded a severely broken foot and one officer refused to honor promise made to inmate that he would receive treatment); *McElligott v. Foley*, 182 F.3d 1248 (11th Cir. 1999)(inmate suffered and complained of excruciating pain over months as a result of cancer, physical deterioration, weight loss over a period of months that the risk of harm was obvious).

Setting aside that Petitioner merely wants this Court to re-review the facts and apply the *Pauly* decision to reach a result they desire, there simply is no clearly established law, in the words of the Sixth Circuit, "here or anywhere else" that requires an arresting officer to drive Omar to the hospital rather than the jail under these circumstances. With regard to the jailers, "no case alerted the officers that mental instability of this sort required immediate medical attention." Significantly, as the Sixth Circuit recognized "there was nothing to suggest he was at risk of the heart attack that ended up killing him. And indeed Arrington-Bey does not identify anything that suggests such a risk." The Sixth Circuit ultimately held that "these distinctions add up to an insurmountable barrier. Even if the jail officers knew that Omar was bi-polar and delusional, no clearly established law required them to do more then what they did: they kept him in seclusion for everybody's safety, waited until he was calm to feed him and book him, asked him about any psychiatric diagnosis during the medical screening, and after eight hours of detention uncuffed him and released him from his cell to make a call to be released on bail."

III. CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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