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

REPLY BRIEF OF PETITIONER

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The circuit split presented by this case is real and significant – Petitioner's municipal liability claim would have gone forward in the Ninth and Tenth Circuits regardless of individual qualified immunity but failed in the Second and Eighth Circuit. The Sixth Circuit, meanwhile, has taken opposite sides on the same question in different cases. This Court should grant certiorari to resolve this division of federal appellate authority.

I. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN INDIVIDUAL DEFENDANT'S QUALIFIED IMMUNITY AUTOMATICALLY DEFEATS MUNICIPAL LIABILITY.

A. The Circuit Split Regarding the Interaction Between Qualified Immunity and Municipal Liability Based on Deliberate Indifference Is No Illusion.

Respondents contend that the split among the circuits on whether the qualified immunity of individual officers automatically defeats municipal liability in a deliberate indifference case is "illusory." Br. 11. On the contrary, this case would have come out differently in the Ninth and Tenth Circuits, and the Sixth Circuit is divided against itself.

Tenth Circuit: Contrary to respondents' argument, the Tenth Circuit holds that the qualified immunity of individual officers does not necessarily defeat municipal liability in a failure-to-train case. In its discussion of the plaintiff's failure-to-train claim, the court stated in *Medina v. City and Cnty. of Denver:*

> "[T]here is no inherent inconsistency in allowing a suit alleging an unconstitutional policy

> or custom to proceed against the city when the individuals charged with executing the challenged policy . . . have been relieved from individual liability. While it would be improper to allow a suit to proceed against the city if it was determined that the officers' action did not amount to a constitutional violation, there is nothing anomalous about allowing such a suit to proceed when immunity shields the individual defendants. The availability of qualified immunity does not depend on whether a constitutional violation has occurred. While a government official who violates the constitution will be protected if his or her actions were reasonable in light of clearly established law and the information the official possessed when he or she acted, municipalities enjoy no such shield."

960 F.2d 1493, 1499-500 (1992) (quoting *Watson v. City of Kansas City*, 857 F.2d 690, 697 (10th Cir. 1988)). This holding is in direct conflict with the decision below, which holds that a plaintiff suing a municipality on a failure-to-train claim "must show that the allegedly violated right was clearly established." Pet. App. 14.

After the Tenth Circuit in *Medina* reached the holding that an individual's qualified immunity does not automatically defeat municipal liability for failure to train, the court went on to hold that the plaintiff's evidence did not establish that the city was deliberately indifferent in its training. *Medina*, 900 F.2d at 1500. Thus, respondents focus on this latter holding, Br. 17-18, but the only reason the Tenth Circuit went on to consider whether the plaintiff presented sufficient evidence of deliberate indifference is that it first

rejected the very rule that the Sixth Circuit applied here – that the qualified immunity of the individual officers *automatically* defeats municipal liability in failure-to-train cases. *Medina*, 900 F.2d at 1499-1500; Pet. App. 14. The rule applied below and the Tenth Circuit's holding are directly in conflict.

Ninth Circuit: In *Fairley v. Luman,* the Ninth Circuit stated: "If a plaintiff establishes he suffered a constitutional injury by the City, the fact that individual officers are exonerated is immaterial to [municipal] liability under § 1983." 281 F.3d 913, 917 (9th Cir. 2002). The court explicitly stated that "[t]his is true [when] the officers are exonerated on the basis of qualified immunity." *Id.* at 917 n.4.

Respondents correctly point out that *Fairely* itself does not involve a deliberate indifference or failure-to-train theory of municipal liability. Br. 16-17. Nevertheless, the Ninth Circuit applies the same rule in cases that do involve municipal liability predicated on deliberate indifference and failure to train. In *Kirkpatrick v. Cnty. of Washoe*, 843 F.3d 784, 792 (9th Cir. 2016) (en banc), the Ninth Circuit held that social workers violated a child's Fourth Amendment rights by removing her from a parent in the absence of imminent danger to the child. Despite the constitutional violation, the en banc court held that the social workers were entitled to qualified immunity. *Id.* at 793.

But the qualified immunity of the individual defendants did not absolve the municipality of liability for its deliberate indifference in failing to train the social workers that they could not remove children when no imminent danger exists. *Id.* at 793-97.

After concluding that "the social workers in this case are entitled to qualified immunity," the court continued, "[o]ur inquiry, however, is not over. Summary judgment on [the child's] Fourth Amendment claim against Washoe County is still inappropriate if we can trace the social workers' unconstitutional removal to a systemic failure to train DSS officers to obtain a warrant before seizing a child to investigate abuse or neglect." *Id.* at 793. After reviewing the evidence of inadequate training, *id.* at 794-96, the court concluded: "Given the work performed by [county] social workers, the need for [the county] to train its employees on the constitutional limitations of separating parents and children is 'so obvious' that its failure to do so is 'properly . . . characterized as "deliberate indifference" to [the] constitutional rights' of Washoe County families." *Id.* at 796-97 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10). Thus, the court concluded that Washoe County was not entitled to summary judgment on the failure-to-train claim, even though qualified immunity shielded all of the individual defendants from liability. *Id*. at 796-97.

In this case, the panel held that the qualified immunity of individual defendants automatically defeats municipal liability in a deliberate indifference case. Pet. App. 11-14. If the en banc Ninth Circuit followed that rule in *Kirkpatrick*, the result would have been different. Thus, the decision below is directly contrary to Ninth Circuit law.[1]

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[1] In the Third Circuit, we concede that subsequent cases have narrowly cabined the reach of *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3rd Cir. 1994), which holds that a municipality may be liable even where no individual municipal defendants committed a constitutional violation. *See* Br. 19-20.

Sixth Circuit: In *Gray v. City of Detroit*, 399 F.3d 612, 617 (6th Cir. 2005), a case in which the plaintiff's theory of municipal liability was predicated on deliberate indifference and failure to train, the Sixth Circuit stated: "When an officer violates a plaintiff's rights that are not 'clearly established,' but a city's policy was the 'moving force' behind the constitutional violation, the municipality may be liable even though the individual officer is immune."

Similarly, the Sixth Circuit stated in *Scott v. Clay Cnty.*, which also involved a failure-to-train theory of municipal liability: "[Q]ualified immunity will not automatically excuse a municipality or county from constitutional liability, even where the municipal or county actors were personally absolved by qualified immunity, if those agents in fact had invaded the plaintiff's constitutional rights." 205 F.3d 867, 879 (6th Cir. 2000) (citation omitted).

In a third failure-to-train case, the Sixth Circuit stated:

> As plaintiff correctly argues, a municipality is not entitled to qualified immunity. While officials may not be liable under section 1983 because their actions (or failure to act) were not constitutional violations according to clearly established law at the time the actions took place, a municipality may nevertheless be liable if the actions complained of rise to the level of constitutional violations in light of present law.

Barber v. City of Salem, 953 F.2d 232, 237 (6th Cir. 1992) (citations omitted).

The same court that decided *Gray*, *Scott*, and *Barber* held in this case – without even mentioning its trilogy

of prior cases to the contrary – that "[t]he violated right in a deliberate-indifference case . . . must be clearly established because a municipality cannot deliberately shirk a constitutional duty unless that duty is clear." Pet. App. 12. The Sixth Circuit itself is split on the same question that has divided the other circuits.

In addition to stating that a municipality may be liable where all of the individual defendants enjoy qualified immunity, *Gray* also "[a]ssum[ed] for the sake of argument" that a municipality may be liable even "[i]f no constitutional violation by the individual defendants is established." *Gray*, 399 F.3d at 617. Respondents point out that a district court criticized (in an unpublished case) this latter, more radical possibility left open in *Gray*. Br. 18 (citing *Modd v. Cnty. of Ottawa*, No. 1:10–CV–337, 2012 WL 5398797, at *19 (W.D. Mich. Aug. 24, 2012)). But that is beside the point. *Gray*, *Scott*, and *Barber* all state that a municipality may be liable for deliberate indifference and failure to train even if the individual defendants enjoy qualified immunity. A district's court comments on a separate question – whether *Gray* leaves open the possibility of municipal liability where no individual has violated the Constitution – is not relevant here.

B. This Court's Decision in *Brown* Is Not Relevant to the Interaction Between Qualified Immunity and Municipal Liability.

Respondents argue that *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397 (1997) provides the solution to the circuit split and establishes that individual officers' qualified immunity automatically defeats municipal liability in a failure-to-train case. Br. 13-15. Not so. *Brown* could hardly have clarified the

relationship between qualified immunity and failure to train because *Brown* involved neither qualified immunity nor failure to train.

The phrases "qualified immunity" and "clearly established" do not appear in *Brown*. In fact, *Brown* repeatedly states that municipal liability requires deliberate indifference to an obvious risk of a violation of law, not an obvious risk of a violation of *clearly established* law. *Brown* omits any reference to violations of clearly established law for a simple reason – violations of clearly established law are not part of a claim against a municipality for deliberate indifference. *See Brown*, 520 U.S. at 400 (stating that municipal liability requires that "deliberate action attributable to the municipality itself is the 'moving force' behind the plaintiff's deprivation of federal rights" – not the plaintiff's deprivation of *clearly established* federal rights); *id.* at 404 (stating that a plaintiff "must demonstrate a direct causal link between the municipal action and the deprivation of federal rights" – not the deprivation of *clearly established* federal rights); *id.* at 411 (stating that "[a] plaintiff must demonstrate that a municipal decision reflects deliberate indifference to the risk that a violation of a particular constitutional or statutory right will follow the decision" – not that a violation of a particular and *clearly established* constitutional or statutory right will follow the decision).

Moreover, *Brown* addresses a claim based on deliberate indifference in a municipality's hiring – not the subject matter of both *City of Canton* and this case, which is deliberate indifference in a municipality's training. *Brown* involved a sheriff's deputy who was hired even though he had a misdemeanor record. *Brown*, 520 U.S. at 414. This Court expressed concern

about extending *Monell* liability to a single decision to hire one individual. *Id*. at 410. The Court drew a sharp line between cases about an isolated hiring decision and cases (like *City of Canton* and this case) that involve a failure to train municipal officers:

> In attempting to import the reasoning of *Canton* into the hiring context, respondent ignores the fact that predicting the consequence of a single hiring decision, even one based on an inadequate assessment of a record, is far more difficult than predicting what might flow from the failure to train a single law enforcement officer as to a specific skill necessary to the discharge of his duties.

Id. The Court then explained that the risks caused by deficiencies in hiring are very different than the risks caused by deficiencies in training: "Unlike the risk from a particular glaring omission in a training regimen, the risk from a single instance of inadequate screening of an applicant's background is not 'obvious' in the abstract." *Id.* In short, deliberate indifference in hiring is different from deliberate indifference in training. If the respondents in *Brown* went astray "[i]n attempting to import the reasoning of *Canton* into the hiring context," *id.*, then the respondents here made the same mistake, only in reverse – attempting to import the reasoning of the hiring context into *Canton*.

At the end of the day, whatever relevance *Brown* has to municipal failure-to-train claims, it undermines neither *Owen*'s holding that qualified immunity is no defense to a *Monell* claim, *see Owen v. City of Independence*, 445 U.S. 622, 638 (1980), nor *City of Canton*'s holding that failure-to-train claims against municipalities are a species of *Monell* claims, *see City*

of Canton, 489 U.S. at 388. The clear implication of *Owen* and *City of Canton* is that qualified immunity is not a municipal defense against a failure-to-train claim.

C. The Argument that an Individual's Qualified Immunity Automatically Defeats *Monell* Liability in Deliberate Indifference Cases Is Illogical and Inconsistent with this Court's Precedent.

Like the decision below, the Brief in Opposition conflates two questions: (1) whether a municipal practice ignores an obvious risk of causing constitutional violations, and (2) whether the violation that the municipal practice happens to cause in a particular case transgresses clearly established law. Br. 13-14.

These are separate issues. Consider, for example, a city police force that does not train its officers that they need reasonable suspicion to conduct *Terry* stops. This constitutes deliberate indifference under *City of Canton* because "the need to train officers" in this area is "so obvious" that "the "failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." *City of Canton*, 489 U.S. at 390 n.10.

In this example, the failure to provide any training on *Terry* stops will obviously lead to constitutional violations. In some of the illegal stops that will occur, the officers will enjoy qualified immunity because – by sheer luck – the objective circumstances of a given stop are close enough to reasonable suspicion for qualified immunity purposes. But the happenstance of their

qualified immunity does not affect the three things that matter for the municipality's *City of Canton* liability: (1) the municipality's failure to train created an obvious risk that constitutional violations would occur, (2) a constitutional violation did occur when an officer performed a *Terry* stop without reasonable suspicion, and (3) the lack of training was the moving force behind the constitutional violation. As *City of Canton* states, municipal liability exists where "a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants" and the lack of training is the "the 'moving force [behind] the constitutional violation.'" 489 U.S. at 389. That is the entire equation, and qualified immunity is not part of it.

Returning to the facts of this case, Arrington-Bey's legal theory is no different than the theory in the *Terry* stop example above. First, it is obvious that if jail staff have no mental health training, deprivations of care that rise to the level of constitutional violations will occur. Second, a constitutional violation in fact occurred – the district court found a genuine issue as to whether such a violation occurred, Pet. App. 50-65, and the Sixth Circuit did not disturb that finding, Pet. App. 7. Third, the constitutional violation – grossly deficient lack of mental health care – would not have occurred if staff had been properly trained; therefore, lack of training was the "moving force," *City of Canton*, 489 U.S. at 389, behind the violation. That is the beginning and the end of *City of Canton* liability, regardless of whether the individual officers are entitled to qualified immunity.

II. THE COURT SHOULD GRANT CERTIORARI ON THE SECOND QUESITON PRESENTED – WHETHER THE POLICE AND JAIL OFFICERS ARE ENTITLED TO QUALIFIED IMMUNITY.

It should be obvious to anyone that refusing mental health evaluation and treatment to a detainee who is ranting, raving, cursing, talking nonsense, eating with his hands and feet, and spilling food all over himself violates the law. Defendants are not entitled to qualified immunity in "an obvious case." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *White v. Pauly*, 137 S. Ct. 548, 552 (2017). The facts of this case make the constitutional violation obvious.

Moreover, it is clearly established that: (1) jail officers are guilty of deliberate indifference when they delay or deny outright a prisoners' access to care for a serious medical need; (2) some medical needs are so serious that delays measured in hours rather than days constitute deliberate indifference; and (3) psychological disorders may constitute serious medical needs. *See* Pet. 23-25. These rules are not bare legal standards – taken together, they clearly establish that the respondents violated the Constitution by refusing all treatment to a floridly psychotic detainee.

The crux of respondents' qualified immunity argument is that the Sixth Circuit correctly held that "'plaintiff must identify a case with a similar fact pattern.'" Br. 21 (quoting Pet. App. 7-8). This Court has said the opposite time and time again, including in *White v. Pauly*: "This Court's case law do[es] not require a case directly on point for a right to be clearly established." *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (per curiam) (quotation omitted). *See also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) ("We do not require a

case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (quotation omitted)); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (stating that a "fundamentally similar" or "materially similar" previous case is not required).

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

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