No. 18-1162

IN THE

Supreme Court of the United States

P. SWANEY, ET AL.,

Petitioners,

v.

HECTOR LOPEZ, ET AL.

Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction over an interlocutory appeal by officers claiming qualified immunity where the district court held that disputed issues of material fact precluded summary judgment.

2. Whether this Court should review the holding below that disputed factual issues as to whether petitioners acted with deliberate indifference precluded summary judgment, where the courts of appeals agree on the clearly established legal standard.

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for writ of certiorari.

The following proceedings are directly related to this case:

- *Lopez v. Bollweg, et al.*, No. CV 13-00691-TUC-DCB, U.S. District Court for the District of Arizona. No judgment entered (case pending).
- *Lopez v. Swaney; Bennett,* No. 17-16516, U.S. Court of Appeal for the Ninth Circuit. Judgment entered Oct. 30, 2018.
- *Monitjo v. Ryan, et al.*, No. CV 13-01439-TUC-DCB, U.S. District Court for the District of Arizona. No judgment entered (case pending).
- *Montijo v. Swaney; Bennett*, No. 17-16465, U.S. Court of Appeal for the Ninth Circuit. Judgment entered Oct. 30, 2018.

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INTRODUCTION

This case involves application of established legal principles to an unusual set of facts. Respondents Hector Lopez and Enrique Montijo are inmates who were left to suffer in their cells for days with severe botulism poisoning, despite obvious symptoms and repeated pleas for medical assistance. In the two cases addressed in the petition, the district court held that disputed factual issues precluded summary judgment for two correctional officers sued for acting with deliberate indifference to these two inmates' serious medical needs. The court of appeals, agreeing that there are disputed factual issues, affirmed. The officers' petition for certiorari should be denied for three reasons.

First, the court of appeals lacked appellate jurisdiction over the officers' interlocutory appeals. The district court's "determination that the summary judgment record in this case raised a genuine issue of fact concerning petitioners' [conduct with respect to respondents] was not a 'final decision' within the meaning of" 28 U.S.C. § 1291. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Because the court of appeals lacked jurisdiction to consider the merits of petitioners' appeals, this court does as well.

Second, contrary to petitioners' contention, there is no conflict among the lower courts as to whether conduct such as petitioners constitutes deliberate indifference. The Third and Seventh Circuit cases on which petitioners rely, Pet. 10–12, 15, state the same legal standard relied on by the courts below—a standard that, in the district court, petitioners agreed the court had correctly stated. Differences in outcome under different facts do not reflect a conflict among the courts.

Finally, the statement of the clearly established right at issue cannot reasonably be characterized as "abstract." Pet. 16. The district court, citing cases from several circuits, explained that prison officials act with deliberate indifference when "they fail to provide medical assistance to an individual who has a serious medical need that is either obvious or reported to the officers." Pet. App. 33, 82; *see also* Pet. App. 4, 54 (court of appeals' opinions). As the court noted, petitioners agreed with this statement of the law. *See id.* 91. The district court also agreed with petitioners' legal argument that officers who rely in good faith on the judgment of medical personnel who are treating a prisoner are qualifiedly immune from liability for deliberative indifference, but the court found factual disputes as to whether petitioners' conduct fell within the protection of that principle. Notably, the petition offers no alternative formulation of the governing legal standard, instead arguing essentially that, on the facts here, they did not act with deliberate indifference. That factual dispute is one to be resolved in subsequent district court proceedings, not in this Court.

STATEMENT

Factual background

In July 2012, Arizona Department of Corrections inmates Hector Lopez and Enrique Montijo were housed in the Special Management Unit (SMU), a maximum-custody unit where inmates cannot move about freely. When an inmate in the SMU requires medical care, a correctional officer can put him in restraints and escort him to the medical unit for treatment. A correctional officer can also summon medical assistance for an inmate by initiating an Incident Command System (ICS). Accompanied by correctional officers, nursing staff visit the SMU cells to deliver medication to inmates and in

response to Health Needs Requests submitted by prisoners. Nurses are not permitted to assess or diagnose prisoners.

On or about Friday, July 20, 2012, Lopez, Montijo, and two other inmates—Thomas Granillo and Robert Aceves—shared food. Over the next few days, all began to feel ill. Granillo was taken to the hospital on July 25.

From that day through August 2, cellmates Lopez and Montijo repeatedly complained about their symptoms to the correctional officers that passed by their cell, and their symptoms became increasingly severe: blurry vision, dizziness, extreme fatigue, drowsiness, throat tightness, a numb tongue, constant headache, stomach/neck/back pain, and a general feeling of being "drugged." As their conditions deteriorated, they became unable to walk, eat, or drink.

Nonetheless, Lopez and Montijo were not seen by a doctor until August 2. When they finally saw a doctor, he immediately diagnosed botulism—"a rare but serious illness caused by a toxin that attacks the body's nerves, causing weakness of muscles that control the face and throat, and this weakness may spread to the rest of the body, including to muscles that control breathing, which can lead to difficulty breathing and death." Pet. App. 8 n.1 (citing Centers for Disease Control's definition). The doctor promptly sent them to the hospital.

Lopez and Montijo separately filed suit to challenge numerous correctional officers' indifference to their medical conditions.

Lopez: In a detailed opinion on the defendants' first motion for summary judgment, the district court carefully reviewed the facts, dismissed thirteen defendants from the case based on qualified immunity, and denied summary judgment as to four defendants. The parties

later voluntarily dismissed one of those four. In a later summary judgment motion, filed after discovery, the court dismissed one of the three remaining defendants, but denied summary judgment to Lieutenant Swaney and Sergeant Bennett. The facts relevant to those two defendants, petitioners here, are as follows.

On July 31, petitioner Bennett came to the cell. Lopez was "in constant, visible agony," and "Montijo begged Bennett to get them to a doctor." Pet. App. 14. Montijo told Bennett that the nurses refused to help them and that they needed to see a doctor to get a diagnosis. Lopez tried to tell Bennett that he was dying, but it was hard for Bennett to understand him because of his difficulty speaking. Bennett promised to get them to a doctor, but then returned and said that no one wanted to help them. He refused to activate an ICS. *Id.*

On August 1, Montijo began choking, and inmates started screaming "man down!" to get attention. Petitioner Swaney looked at Lopez and Montijo and shouted words to the effect "I can't do anything for you. Medical doesn't want to help you!" *Id.* When Montijo begged to speak to Swaney's supervisor or a doctor, Swaney yelled "no," and he threatened to pepper spray Lopez and Montijo if they kept asking for medical help. *Id.* As Swaney left, other inmates in the pod pleaded for Swaney to help Lopez, Montijo, and Aceves, and Swaney responded by yelling "suck my dick," "shut the fuck up," and "they don't have shit coming." *Id.* 15. (Swaney admits to yelling "shut the fuck up" but denies yelling "they don't have shit coming.") Swaney did not activate an ICS. *Id.*

According to Lopez, Swaney came to the cell on August 2 and told Lopez and Montijo that, unless one of them confessed to using "hooch," they could not see a doctor. Lopez then indicated that he used hooch. Swaney

said that he would write Lopez a disciplinary ticket. He then arranged for Lopez, Montijo, and Aceves to be taken to the medical unit. *Id.*

Swaney describes the facts differently. He states that, on August 2, the deputy warden directed him to bring the three sick inmates to the medical unit, where they were placed in separate rooms. He avers that he interviewed each inmate either before or after the doctor evaluated them, and that Lopez admitted to consuming hooch during the interview. Swaney denies that he coerced Lopez into saying that he had consumed hooch as a condition of receiving treatment or going to the hospital. *Id.* 15–16.

It is undisputed that, when Lopez was finally taken to the medical unit and seen by a doctor, the doctor immediately diagnosed botulism and sent Lopez to the hospital. Lopez was hospitalized for seven days. *Id.* 15, 16.

Montijo: Montijo sued five correctional officers. In a detailed opinion on the defendants' first motion for summary judgment, the district court carefully reviewed the facts, dismissed three defendants from the case based on qualified immunity, and denied summary judgment to petitioners Swaney and Bennett. In a later motion, filed after discovery, the court again denied summary judgment to petitioners. The facts relevant to them are as follows.

By July 27, Montijo was barely able to open his eyelids, he was unable to walk straight, he had to take gasping breaths to get air, and he could not eat. In fact, his meals were collected uneaten. Shortly after midnight, he told correctional officers that he had shared a tamale with Granillo and believed he had food poisoning, and an officer escorted him to the medical unit. *Id.* 61–62.

Montijo told the nurse at the medical unit that he had not taken drugs or alcohol, and he volunteered a urine sample, which came back negative. A note in his file documents that he reported symptoms, that his eyes were droopy, that he appeared to be under the influence of drugs or alcohol, that he had no throat or tongue swelling, and that his respiration was clear. Reflecting that nurses were prohibited from making any assessment or diagnosis, the nurse's note states that the assessment/diagnosis was "[d]eferred." *Id.* 62. Montijo was returned to his cell without any treatment. *Id.*

Botulism symptoms do not spontaneously resolve. Thus, like Lopez, Montijo continued to complain to officers that he was seriously ill and that medical had advised him to let them know if he got worse. Although nurses came through the housing area to pass out medication, and he told them that his condition was deteriorating, the nurses accused him of lying or faking. *Id.*

Around this time, more than a week after the inmates' symptoms started, officers began telling Montijo and Lopez that they would not receive treatment unless they said what they took to make them "drugged." One officer told them that they should admit to drinking "hooch" or other contraband if they wanted treatment. *Id.* 64.

On July 30, Montijo choked on some water and was incapacitated on the floor of his cell. Other inmates started shouting for help by yelling "man down!" A correctional officer arrived and called over a nurse who was nearby passing out medications. Montijo and Lopez told the nurse that they had consumed hooch about a week ago and had whatever Granillo had. Although the medical record for this cell-front visit reflects that Montijo was able to answer questions, his lungs were clear, his skin was dry, he walked with a steady gait, and showed no signs of

stress, Montijo avers that the nurse did not physically examine him; rather, the nurse said: "man up, it's all in your head." *Id.*

Later that day, Bennett conducted a "med pass escort" of a nurse to Montijo's cell. A service log entry for this escort notes "vitals normal" as to both men. *Id.*

On July 31, Montijo begged Bennett to take him and Lopez to a doctor and explained that the nurses refused to help or examine them. Although Bennett said that he would get them (and inmate Aceves) to a doctor, he later returned and said that no one wanted to help. Bennett did not activate an ICS. *Id.* 65.

According to Montijo, and as also described by Lopez, on August 1, when Montijo collapsed, choking, Swaney refused to contact the medical unit and threatened to pepper spray him and Lopez if they continued to ask for help. Swaney denies that he threatened to pepper spray the two men. *Id.*

Swaney did not activate an ICS, and when inmates continued to plead for help, Swaney yelled "suck my dick" and "shut the fuck up." *Id.*

As in the *Lopez* case, the parties disagree on the events of August 2. Like Lopez, Montijo testified that Swaney came to the cell on August 2 and told Lopez and Montijo that, unless one of them confessed to using hooch, they could not see a doctor. Lopez then indicated that he used hooch. Swaney said that he would write Lopez a disciplinary ticket. He then arranged for Lopez, Montijo, and Aceves to be taken to the medical unit, where a doctor immediately diagnosed botulism. The men were then sent to the hospital, where Montijo remained and was treated for five days. *Id.* 66.

Swaney, however, stated that on August 2, the deputy warden directed him to bring the three sick inmates to the medical unit, and that he (Swaney) interviewed each inmate while transportation to the hospital was being arranged. He stated that the purpose of the interview was to ascertain whether the inmates had consumed hooch and, if so, to issue disciplinary tickets. *Id.*

The district court's determinations that issues of fact precluded summary judgment

In its summary judgment rulings, the district court found that, on the facts described above, triable issues of fact existed as to both qualified immunity and the merits of Lopez's and Montijo's claims that Bennett and Swaney were deliberately indifferent to their medical needs.

***Lopez*:** Petitioners moved to dismiss on qualified immunity grounds. Treating the motion as one for summary judgment, the district court held that, in 2012, an inmate's right to adequate medical care for serious medical needs was clearly established and that prison officials violate this right when they intentionally deny or delay access to medical care. The court concluded that the undisputed factual record was insufficient to show whether Bennett and Swaney acted with deliberate indifference to Lopez's serious medical needs. The court therefore denied the motion as to those two officers. D. Ct. Dkt. 53 (granting summary judgment to other defendants).

Petitioners later moved a second time for summary judgment, conceding that Lopez "was suffering from a serious medical condition," Pet. App. 18, but arguing that they did not act with deliberate indifference and for qualified immunity. Considering first the argument that the undisputed facts showed that petitioners did not act with deliberate indifference to Lopez's serious medical

needs, the district court separately reviewed the facts pertinent to each petitioner.

1. Turning first to defendant-petitioner Bennett, the court considered whether Bennett was aware of Lopez's serious medical condition. Bennett argued that he did not know that Lopez had a serious medical condition because he did not know that Lopez had botulism. The court concluded, however, that knowledge of the specific diagnosis is not required for a prison official to be aware of a serious medical need. Moreover, the record showed that nurses were prohibited from making diagnoses, and Lopez stated that Bennett prevented him from seeing a doctor. Pet. App. 19.

Bennett also argued that Lopez's symptoms were not readily observable. Yet Lopez testified that Bennett observed him when he was unable to walk or eat, could not chew or speak clearly, and was having difficulty breathing. In addition, at his deposition, Lopez testified that when he asked Bennett for help, Bennett stated "you guys look really sick. You guys need help." *Id.* 20. Lopez also stated that, on one occasion when officers visited his cell, they videotaped the interaction, and that the videotape would show that his need for emergency medical treatment was readily observable. Because the defendants did not submit the videotape, the court accepted as true Lopez's statements regarding his observable symptoms. *Id.* The court also noted other cases in which courts have recognized that difficulty breathing constitutes a life-threatening emergency. *Id.* The court thus concluded that "there is a question of fact" whether Bennett knew of Lopez's serious medical condition because it was obvious. *Id.* 21.

The district court then considered whether Bennett's response to Lopez's serious medical needs showed

deliberate indifference. Bennett relied on the fact that he had seen nursing staff at Lopez's cell. Quoting Bennett's acknowledgement that "non-medical personnel may rely on the medical opinions of healthcare professionals *unless* they have actual knowledge that prison doctors or staff are *not* treating a prisoner," *id.* 22 (quoting defendants' motion; first emphasis added), the court noted that Lopez stated that his cellmate Montijo had told Bennett that the nurses refused to help them and that they needed to see a doctor for diagnosis. Bennett also acknowledged that the nurses refused to see the men. *Id.* 14. And the court found that Bennett could have initiated an ICS, escorted Lopez to the medical unit, or called a superior officer. The court stated that "[w]hether it was reasonable for Bennett not to take any of these actions on July 31, 2012, despite actual knowledge that nurses had refused to treat Plaintiff, turns on Plaintiff's observable symptoms." *Id.* 23.

Because the outcome depended on the resolution of disputed facts, the district court denied the motion: "If a jury believes Plaintiff's allegations that, by this time, his condition had progressed to the point that he was struggling and gasping for breath, unable to walk, unable to talk clearly or open his eyes, in agony, and barely able to move, it could reasonably conclude that Bennett's failure to take any further action exhibited deliberate indifference." *Id.*

2. As to petitioner Swaney, the parties agreed that Swaney observed and spoke to Lopez on July 26, August 1, and August 2. Lopez stated that he had observable serious symptoms on those occasions. The court therefore recognized that "there is a question of fact whether Swaney knew or should have known that [Lopez] suffered a serious medical need." *Id.* 26.

Concerning whether Swaney's response was adequate, the court described Swaney's own inconsistent statements as to whether he knew of and could have relied on any medical determination when he interacted with Lopez before August 2. *Id.* 27. The court also noted that Lopez described Swaney refusing to get medical help and threatening him with pepper spray *before* Swaney—according to his own deposition testimony—spoke to medical staff. The court concluded: "When viewing the facts in Plaintiff's favor, a reasonable jury could conclude that Swaney's August 1, 2012 response to Plaintiff's serious medical need—his refusal to get medical care, yelling obscenities, and threats to pepper spray Plaintiff if he asked for care again—was not reasonable and exhibited deliberate indifference." *Id.* 28.

Similarly, looking to Swaney's conduct on August 2, the court found "a question of fact whether Swaney's intentional conduct—threatening to withhold medical treatment absent a confession to a disciplinary violation, despite knowing that Plaintiff suffered a serious medical need—resulted in unnecessary and gratuitous suffering." *Id.* 29.

Having found material factual disputes as to whether Bennett and Swaney acted with deliberate indifference, the court denied the motion for summary judgment on the merits as to those two defendants. Turning to their argument with respect to qualified immunity, the court's holding on the constitutional claim determined the first prong of the qualified immunity analysis: whether the officials' conduct violated a constitutional right. Because factual disputes precluded summary judgment on this prong, the court considered the second prong of the qualified immunity analysis: whether Lopez's rights were

so clearly established that a reasonable official would have known that his conduct was unlawful. *Id.* 32.[1]

Petitioners argued that Lopez was asserting a right to have the officers "override the medical directives of prison medical personnel—or more precisely, to require non-medical prison staff to make specific clinical decisions such as demanding that a doctor see an inmate who has already been seen and treated by medical staff." *Id.* 32 (quoting petitioners' motion). As the district court stated, however, "[t]his is not the right at issue in this case." *Id.*

Rather, the right at issue is the "right to officials who are not 'deliberately indifferent to serious medical needs.'" *Id.* 33 (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)). Citing cases from three circuits, the court explained that it is clearly established that "officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers." *Id.* Accordingly, as the court had held in resolving petitioners' first motions for summary judgment, the court held that the right at issue was clearly established at the time of petitioners' conduct. *Id.* 33–34 ("In mischaracterizing the right at issue, Defendants fail to show that the Court's prior determination on this prong was in error.").

The court summed up:

> Construing the facts in Plaintiff's favor, Defendants [Bennett and Swaney] refused to ensure medical attention for Plaintiff despite his serious

[1] In this same opinion, the district court held that the undisputed facts showed that the third defendant remaining in the *Lopez* case had not acted with deliberate indifference and dismissed him from the case.

> symptoms and desperate pleas for medical care. Before 2012, it was clearly established that officers could not intentionally deny or delay access to medical care, and that failing to respond to a prisoner's pain or possible medical need exhibited deliberate indifference.

Id. 34.

Bennett and Swaney moved for reconsideration, offering neither new evidence nor new law, and "present[ing] the same arguments that were raised in their" summary judgment motion. *Id.* 39. The court denied the motion. *Id.* 36. They then filed a motion titled "Rule 59(e) motion for a new trial," which the court denied, finding it improper under Rule 59(e) and, in any event, "meritless." D. Ct. Dkt. 137 at 6.

Montijo: In the *Montijo* case, ruling on Bennett's and Swaney's first summary judgment motion, the district court had held that Montijo suffered a serious medical need. In the second motion, petitioners did not challenge that holding. Pet. App. 69. The court thus turned to considering whether petitioners acted with deliberate indifference.

Bennett and Swaney argued that they had no reason to know of Montijo's serious medical need because Montijo had not yet been diagnosed, Montijo's symptoms were subjective or not readily observable, and the nurses had not identified anything wrong. The court explained, however, that a diagnosis is not required for a prison official to be aware of a risk of serious harm. Moreover, the evidence showed that Montijo could not get a diagnosis from a nurse, but only from a doctor, and that Montijo stated that Bennett prevented him from seeing a doctor. In addition, because Montijo stated that his inability to walk, control his body, eat or drink, and

breathe properly were all observable, the court concluded that whether Bennett and Swaney were aware of his serious medical need was a disputed factual issue. *Id.* 70–71, 74–75.

Bennett also argued that he was not deliberately indifferent because he had no reason to believe that the medical staff was not treating Montijo. Montijo, however, averred that he told Bennett that the nurses had refused to examine him or help him, and Bennett conceded that he could not rely on medical personnel's opinion if he had "actual knowledge" that the medical staff was *not* treating Montijo. *Id.* 73. Agreeing with Bennett's statement of the law, the court found that the parties' testimony created a disputed factual issue as to whether he had such knowledge. After noting several possible courses of action (initiating an ICS, escorting Montijo to the medical unit, calling a superior), the court concluded: "If a jury believes Plaintiff's allegations that, by this time, his condition had progressed to the point that he was struggling and gasping for breath, unable to walk, unable to talk clearly or open his eyes, in agony, and barely able to move, it could reasonably conclude that Bennett's failure to take further action exhibited deliberate indifference." *Id.* 74.

Turning to Swaney, the court noted that Swaney gave inconsistent testimony as to whether he knew, prior to August 2, that Montijo had seen medical staff. The inconsistency created a factual question as to whether he could have relied on a medical determination when he interacted with Montijo prior to August 2. Moreover, Montijo testified that Swaney refused to get him medical help, instead yelling profanities and threatening to pepper spray him, and that, because he had not seen a doctor or been given a diagnosis or medical assessment, no medical determination existed on which Swaney could have relied.

Id. 76. Accordingly, "[o]n this record," the court held that factual questions precluded summary judgment with respect to Montijo's claim against Swaney for his conduct prior to August 2. *Id.*

As to August 2, Montijo testified in deposition that he no longer recalls Swaney's coercive statement to Lopez on that date and no longer recalls making a specific complaint that Swaney conditioned medical treatment on his confessing to drinking hooch. Based on this testimony, the court held that Montijo could *not* establish that Swaney acted with deliberate indifference to his need for medical treatment on August 2. *Id.* 78.

Having found factual disputes as to whether the two officers had acted with deliberate indifference, the district court turned to the question whether petitioners' conduct violated clearly established rights. As petitioners had done in *Lopez*, here too they "mischaracterize[d] the right at issue." *Id.* 82. Properly characterizing the right as a right to medical assistance for a "serious medical need that was either obvious or reported to the officers," *id.* 82 (citing cases), the court held that the right was clearly established prior to 2012, *id.* 83 (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006)).

Petitioners filed a motion for reconsideration, which was denied. *See* D. Ct. Dkt. 114. They then filed a motion styled as a Rule 59(e) motion for a new trial, which was denied both as improper under Rule 59(e) and on the merits. *See* Pet. App. 91, 92.

Appellate proceedings

In both cases, Bennett and Swaney appealed from the denial of summary judgment on the issue of qualified immunity and the denial of their Rule 59(e) motion. In separate but similar unpublished opinions issued on the

same day, the court affirmed the district court. The court of appeals held that "[v]iewing the evidence in the light most favorable to Plaintiff, there exist questions of fact" regarding the conduct of each defendant. *Id.* 2, 52. In addition, with respect to defendants' argument that they did not violate clearly established law because they acted pursuant to the nursing staff's opinions, the court held that the argument also "depends on the resolution of *disputed* issues of fact." *Id.* 4, 54.

In a brief opinion based on a few of the disputed material facts, Judge Siler dissented. *Id.* 6, 55.

The defendants petitioned for rehearing or rehearing en banc. The petitions were denied, with no judge voting for panel rehearing and no judge calling for a vote on rehearing en banc. *Id.* 47–48, 96–97.

REASONS FOR DENYING THE WRIT

I. The court of appeals lacked jurisdiction over the interlocutory appeals in these cases.

Petitioners appealed non-final district court decisions finding that disputed factual issues precluded summary judgment on qualified immunity. Because the court of appeals lacked jurisdiction over the interlocutory appeals, the petition should be denied.

Congress has strictly limited appeals as of right within the federal courts to appeals from "final decisions of the district court." 28 U.S.C. § 1291. The general rule is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted). A decision is ordinarily considered final and appealable under section 1291 only if it "ends the litigation on the merits and leaves

nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945).

Nonetheless, the Court has interpreted section 1291 to authorize appeals in a "small category" of trial court orders that do not end the litigation. *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995). Under the collateral order doctrine first articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546–47 (1949), that small category "includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action." *Swint*, 514 U.S. at 42 (citing *Cohen*, 337 U.S. at 546).

Applying *Cohen*, this Court has held that a district court's order denying a defendant's motion for summary judgment based on qualified immunity was immediately appealable where the issue appealed concerned whether the undisputed facts showed a violation of clearly established law. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). In contrast, a defendant may *not* appeal a district court's order denying a motion for summary judgment based on qualified immunity where the order determined that the record sets forth a genuine fact issue for trial. *Johnson*, 515 U.S. at 313.

This case falls into the latter category, as evidenced by both the district court and appellate court decisions. In the district court's summary judgment decisions, following detailed factual discussions, the court concluded that "there exist material factual disputes whether Bennett and Swaney acted with deliberate indifference to Plaintiff's serious medical need." Pet. App. 32, 81. Importantly, petitioners conceded that they could not rely on medical staff opinions if they had "actual knowledge that prison doctors or staff [were] *not* treating a

prisoner." *Id.* 22, 73. And the court found a factual dispute on petitioners' own view of the law. *Id.* 22, 72–73.

In subsequent motions styled as motions for a new trial under Federal Rule of Civil Procedure 59(e), petitioners tried to frame their argument as a challenge on a point of law. The court explained, however, that petitioners' framing did not accord with their argument because petitioners "agree[d] with the Summary Judgment Order's finding that the law at the relevant time provided that 'officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers.' (Doc. 115 at 3, citing Doc. 110 at 19–20.)" Pet. App. 91 (citing petitioners' motion and court's order); *see Lopez*, Order, Dkt. 137.

The district court further explained that petitioners' claim that "reasonable officials in their positions would not have been on clear notice that they were violating Plaintiff's rights" was not based on insufficiently established law—as they agreed with the court's statement of the clearly established law. "[R]ather, it is based on Defendants' version of the facts." Pet. App. 91 (citing motion); *Lopez*, Order, Dkt. 137. The court thus denied the motions: "Because Defendants' Rule 59(e) Motion challenges the Court's determination of contested facts, and not the determination of the state of the law, they do not raise a purely legal issue that supports the filing of a Rule 59(e) Motion." Pet. App. 91; *Lopez*, Order, Dkt. 137.

Petitioners pressed similar arguments on appeal. But their qualified immunity claims again did not present legal issues capable of resolution with reference only to undisputed facts. "Cases fitting that bill typically involve contests not about what occurred, or why an action was taken or omitted, but disputes about the substance and

clarity of pre-existing law." *Ortiz v. Jordan*, 562 U.S. 180, 190 (2011). Here, however, petitioners' appellate briefing directly contested what occurred and why.

For example, Bennett argued that he had relied on and "was entitled to rely on the judgments of the nurses who were monitoring and treating" the men. *Lopez*, Aplt. Br. 23; *Montijo*, Aplt. Br. 28. But whether nurses were monitoring and treating Lopez was a *disputed* factual issue. Pet. App. 3. Likewise, Swaney argued that he "did not 'refuse[]' to get Lopez medical help in any meaningful way; he simply deferred to the medical staff's judgment that Lopez was already being cared for." *Lopez*, Aplt. Br. 33; *see Montijo*, Aplt. Br. 32. Again, this argument is at bottom a disagreement with the district court's finding of factual disputes about what occurred and why—including whether Swaney knew or believed that nurses were monitoring or treating Lopez. *See Ortiz*, 562 U.S. at 190–91 (holding that a district court decision denying qualified immunity was not appealable where "the pre-existing law was not in controversy. … What was controverted, instead, were the facts that could render [the defendants] answerable for crossing a constitutional line.").

The court of appeals in both cases, although it did not note the jurisdictional flaw, recognized that the issue on appeal was about disputed factual issues. The court held that, "[v]iewing the evidence in the light most favorable to Plaintiff, there exist questions of fact" regarding each defendant's conduct. Pet. App. 2, 52. And regarding petitioners' argument that they did not violate clearly established law because they relied on the nursing staff's opinions, the court specifically held that the argument "depends on the resolution of *disputed* issues of fact." *Id.* 4, 54 (emphasis in original).

"[O]rdinarily an immunity defense provides special procedural treatment only for a defendant's legal claim that the facts *taken as the plaintiff asserts them (or taken as the assertions have survived a motion for summary judgment*) fall within the scope of the immunity. It does not provide special treatment for disputes about the facts." *Osborn v. Haley*, 549 U.S. 225, 259 (2007). Because the court below was without jurisdiction to hear the appeals in these cases, this Court likewise lacks jurisdiction over the merits at this time. Accordingly, the petition must be denied.[2]

II. There is no conflict among the circuits as to the clearly established law at issue here.

The courts below looked to clearly established law holding that "a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease." Pet. App. 4, 54. Indeed, petitioners "agree[d] with the Summary Judgment Order's finding that the law at the relevant time provided that 'officers are not entitled to qualified immunity when they fail to provide medical assistance to an individual who has a serious medical need that was either obvious or reported to the officers.'" *Id.* 91 (quoting petitioners' Rule 59(e) motion citing district court's opinion); *Lopez*, Order, Dkt. 137 at 5; *see also Farmer v. Brennan*, 511 U.S. 825, 842 (1994) (holding that "a factfinder may conclude that a prison official knew of a

[2] In the alternative, the Court could grant, vacate the court of appeals' decisions, and remand with instructions to dismiss the appeals for lack of jurisdiction. *See Will v. Hallock*, 546 U.S. 345, 355 (2006). Although the Court has jurisdiction to take that action, the effect on these cases would be the same as denial of the petition under the circumstances.

substantial risk from the very fact that the risk was obvious").

Nonetheless, while primarily contesting factual issues, Pet. 12–14, petitioners assert that the Ninth Circuit's decision creates a split with Third and Seventh Circuit decisions holding that a non-medical officer is not deliberately indifferent to a prisoner's serious medical needs when the officer relies on the judgment of a medical official. In fact, the Third and Seventh Circuits' holdings are fully in line with the decisions below, which expressly rely on Seventh Circuit precedent, along with precedent from the Sixth, Eighth, and Ninth Circuits, when stating the legal standard on this point. Pet. App. 22, 26, 33 (*Lopez*); *id.* 73, 74, 82 (*Montijo*).[3]

With respect to the Third Circuit, petitioners cite *Spruill v. Gillis*, 372 F.3d 218 (3d Cir. 2004), and *Pearson v. Prison Health Service*, 850 F.3d 526 (3d Cir. 2017). Those cases hold that "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official … will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference." *Spruill*, 372 F.3d at 236; *accord Pearson*, 850 F.3d at 543. That statement of the law is consistent with the appellate and district court decisions here. It also fully supports the outcome here, because the obvious

[3] The court of appeals assumed, without deciding, that petitioners would be entitled under this standard to rely on a nurse's opinion, as well as a doctor's opinion. Pet. App. 3 n.1, 53 n.1. Here, however, evidence suggested that petitioners had *not* relied on nurses' medical opinions because the nurses had not formed any opinions and lacked authority to do so. *See id.* 3–4, 53–54. Petitioners cite no cases in which a court has permitted non-medical officials to rely on a nurse's diagnosis where, as here, the "[n]urses were prohibited from assessing or diagnosing inmates." Pet. App. 12.

symptoms (inmates collapsed on the floor, gasping for breath, appearing "drugged," and unable to eat or speak properly), Lopez's and Montijo's pleas for help, and the lack of any medical diagnosis gave petitioners strong "reason to think that [each respondent] was receiving no care at all." Pet. App. 3, 53; *see id.* 14 (stating that Bennett acknowledged that "no one wanted to help them"); *see also id.* 22, 73 (district court opinions stating that "non-medical personnel may rely on the medical opinions of healthcare professionals *unless* they have actual knowledge that prison doctors or staff are not treating a prisoner" (emphasis added)).

That the Third Circuit in *Spruill* and *Pearson* held that the defendant officers there were entitled to qualified immunity does not reflect a difference of opinion on the law, but the different facts in the cases. In *Spruill*, the plaintiff was "under a physician's care," 372 F.3d at 236, and he did not "allege that his condition was so dire and obvious that [the officer's] failure to summon immediate medical attention … amounted to deliberate indifference," *id.* at 237. He also pleaded no "facts supporting the defendant's mental state." *Id.* at 236. And in *Pearson*, the non-medical officer defendant never saw the plaintiff; his only contacts were with medical staff and his subordinate officers, and the plaintiff "identified no reason for [the officer] to believe that he was being mistreated." 850 F.3d at 543. Moreover, the officer relied on medical officials who had examined the prisoner each time officers sent him to medical, ordered antibiotics, and scheduled a follow-up appointment. *Id.* at 532.

In contrast, here, although Lopez and Montijo informed Bennett that the nurse did not examine them, and although Bennett stated "you guys look really sick. You guys need help," Pet. App. 20, Bennett "did nothing

… to verify that [they were] receiving adequate treatment." *Id.* 3, 53. To the contrary, he acknowledged that he knew they were not being treated. *Id.* 14. And Swaney testified that he was not aware whether medical staff had seen either Lopez or Montijo. *Id.* 4, 54.

The Seventh Circuit likewise applies the same rule applied below and in the Third Circuit decisions: Nonmedical officers may be found deliberately indifferent "where they have 'a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner.'" *Hayes v. Snyder*, 546 F.3d 516, 527 (7th Cir. 2008) (quoting *Spruill*, 372 F.3d at 236); *accord King v. Kramer*, 680 F.3d 1013, 1018 (7th Cir. 2012). Thus, "[i]f a prisoner is writhing in agony, the guard cannot ignore him on the ground of not being a doctor; he has to make an effort to find a doctor … [or] *some* medical professional." *Dobbey v. Mitchell-Lawshea*, 806 F.3d 938, 941 (7th Cir. 2015).

Again, that the non-medical officers in *Hayes* and *King* received qualified immunity does not reflect different views of the law, but different facts. In *King*, on which petitioners chiefly rely, the non-medical officials immediately notified the nurse when the inmate exhibited symptoms, monitored him while waiting for the nurse to arrive, and witnessed the nurse attempt to conduct medical tests; the inmate presented no evidence that the officers were aware that the nurse was treating him improperly. 680 F.3d at 1016, 1018.

In *Hayes*, also cited by petitioners, the non-medical officials "responded readily and promptly to each of Hayes's letters and grievances," including by contacting the medical director and the administrator, and "requesting reports and summaries about the care that [the inmate] had received in order to ensure themselves that

his complaints did not require further action." 546 F.3d at 527. And "nothing in [the] reports made it obvious that Hayes might not be receiving adequate care." *Id.* at 528; *see also Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) (finding no deliberate indifference where prison administrator met with the medical staff about the inmate, forwarded the inmate's complaints to the state department of corrections, and timely responded to the inmate's complaints), *cited in* Pet. 12.

Thus, unlike here, in each case cited by petitioners, the officers reasonably believed that the medical staff was treating the inmate. *See also* Pet. App. 22, 26 (district court decisions below citing *King* and other Seventh Circuit precedent as supportive authority). On the other hand, in cases where, as here, non-medical officials did not reasonably rely on medical staff, the Seventh Circuit has denied summary judgment. *See Diggs v. Ghosh*, 850 F.3d 905, 911 (7th Cir. 2017) (denying summary judgment where "the warden could rely on the medical staff's expertise as long as he did not ignore Diggs or his mistreatment," but he "took no action in response to Diggs's repeated complaints"); *Dobbey*, 806 F.3d at 941 (reversing summary judgment where the defendant argued "that he had no responsibility in the matter because Dobbey was under the care of a physician, but Dobbey was under no one's care"); *see also Perez v. Fenoglio*, 792 F.3d 768, 782 (7th Cir. 2015) (stating that "prisoner requests for relief that fall on deaf ears may evidence deliberate indifference") (internal quotation marks omitted).

Other circuits state functionally the same rule: Officers are entitled to rely on medical officials "if such reliance is reasonable." *McRaven v. Sanders*, 577 F.3d 974, 981 (8th Cir. 2009); *see Cuoco v. Poritsugu*, 222 F.3d 99, 111 (2d Cir. 2000) (reliance reasonable where officers

have "no basis on which to conclude that [the officers] should have challenged the responsible doctors' diagnosis"). However, "unreasonable reliance on the advice of a medical professional will not excuse deliberate indifference to a prisoner's serious medical needs." *Weatherford ex rel. Thompson v. Taylor*, 347 F. App'x 400, 404 (10th Cir. 2009); *see also*, *e.g.*, *Smith v. County of Lenawee*, 505 F. App'x 526, 535 (6th Cir. 2012) (qualified immunity properly denied where officer "was on notice that [the inmate] was very ill and yet did nothing" when he found her "unresponsive and sweating profusely"); *Iko v. Shreve*, 535 F.3d 225, 242–43 (4th Cir. 2008) (denying summary judgment to a non-medical official who claimed reliance on a nurse, where there was "*no* medical opinion to which the officers could have deferred" and where "the facts show that Iko was nonresponsive to the nurse's inquiries, then collapsed in plain sight, but never received medical treatment"); *Gordon ex rel. Gordon v. Frank*, 454 F.3d 858, 865 (8th Cir. 2006) (denying qualified immunity where it was "unreasonable" for officers to ignore the inmate's shortness of breath and chest pain in reliance on nurse's assessment ordering medications the next morning).

The lack of any disagreement among the circuits on the pertinent legal standard reinforces that petitioners are, at heart, challenging the district court's holdings that the cases turn on disputed factual issues. For this reason as well, the petition should be denied.

III. The courts below stated the relevant clearly established law at the proper degree of specificity.

Petitioners argue that the courts below defined the relevant right at too high a level of generality. Pet. 16. Notably, in making this argument, they do not state what they believe the correct legal standard to be—and for

good reason, because in the district court they agreed with the court's statement of the law. *See* Pet. App. 91. Moreover, the Third and Seventh Circuit cases on which petitioners rely in arguing (incorrectly) that that there is a conflict among the courts of appeals where the officers claim to rely on medical professionals state the established right in the same way. *See supra* pp. 21–24.

Although petitioners' point is not entirely clear, they appear to be arguing that they cannot be liable for deliberate indifference to serious medical needs that were obvious and untreated because the facts "create at least a reasonable debate" about their conduct. Pet. 20; *see also* Pet. 18 (arguing that qualified immunity necessarily applies because one judge dissented below based on consideration of the facts). That argument, however, ignores that the reason for the debate is *not* that, on the undisputed facts, it is unclear whether petitioners' conduct amounts to deliberate indifference. Rather, the facts themselves are the subject of the debate. As the court below stated, petitioners' argument that they did not violate clearly established law "depends on the resolution of *disputed* facts." Pet. App. 4, 54.

This Court has reiterated that a clearly established right does not mean "a case directly on point," but instead that, "at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Here, the statement of the clearly established right—consistent with the statement of the same right by numerous other federal courts of appeals—easily meets that standard.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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