NO. _____

In the Supreme Court of the United States

P. SWANEY, ET AL.,
Petitioners,
v.
HECTOR LOPEZ,
Respondent.

UNKNOWN SWANEY, ET AL.,
Petitioners,
v.
ENRIQUE MONTIJO,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Ninth Circuit err when a divided panel of that court denied qualified immunity to correctional officers notwithstanding Third and Seventh Circuit authority making clear that the correctional officers' conduct did not violate prisoners' constitutional rights, and absent any contrary authority clearly establishing otherwise?

PARTIES TO THE PROCEEDING

Petitioners, correctional officers Bennett and Swaney, were defendants-appellants in the court of appeals. Respondents Hector Lopez and Enrique Montijo were plaintiffs-appellees below.

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The opinion of the court of appeals in *Lopez* was not published but is available at 741 F. App'x 486. App. 1–6. The court of appeals' order denying the petition for rehearing and rehearing en banc is not published. App. 47–48.

The district court's decision denying summary judgment based on qualified immunity was not published but is available at 2017 WL 4677850. App. 7–35. The district court's decision denying the defendants' new-trial motion was not published but is available at 2017 WL 4677851. App. 85–95.

The opinion of the court of appeals in *Montijo* was not published but is available at 2018 WL 5618111. App. 51–55. The court of appeals' order denying the petition for rehearing and rehearing en banc is not published. App. 96–97.

The district court's decisions denying defendants' summary-judgment (App. 56–84) and new-trial (App. 85–95) motions were not published.

JURISDICTION

The Ninth Circuit denied the petitions for rehearing en banc in both *Lopez* and *Montijo* on December 4, 2018. App. 47–48 (*Lopez*); App. 96–97 (*Montijo*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents allege that Officers Bennett and Swaney violated Respondents' rights under the Eighth Amendment to the United States Constitution, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII.

Respondents sued under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

A divided panel of the Ninth Circuit denied qualified immunity to Sergeant J. Bennett and Lieutenant P. Swaney despite precedent from the Third and Seventh Circuits making clear that the officers' conduct did not violate two inmates' Eighth Amendment rights, and without identifying any contrary authority clearly establishing otherwise.

The panel majority ignored the undisputed facts and failed to cite a single case even suggesting that the officers' specific conduct—relying on and deferring to nurses' medical judgments—was unconstitutional, much less any controlling authority placing the constitutional question beyond debate. That this question was *not* beyond debate could not be clearer: the Ninth Circuit panel itself could not agree on the answer.

"[Q]ualified immunity is important to society as a whole," and "as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (internal quotation marks omitted). That is no less true here, where the panel majority denied qualified immunity in an unpublished memorandum decision. That fact cannot insulate the majority's decision from review. *See City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (summarily reversing Ninth Circuit's unpublished disposition denying police officers qualified immunity). Neither can the majority's "simply … stat[ing] that there are material issues of fact in dispute" insulate the majority's decision where, as here, the resolution of those issues

has no bearing on the defendants' right to qualified immunity. *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1996).

The writ of certiorari should be granted, and the judgment of the Ninth Circuit should be summarily reversed.

STATEMENT

Hector Lopez and Enrique Montijo were cellmates in a maximum custody unit in an Arizona prison. App. 10 (*Lopez*); App. 60 (*Montijo*). Around July 20, 2012, Lopez, Montijo, and two other inmates "shared food" and "began to feel ill over the next few days." App. 11 (*Lopez*); App. 60 (*Montijo*). Each Respondent claims that his symptoms worsened over the next several days, rendering him "unable to walk, eat, open his eyes, chew, talk, or breathe without gasping for air." App. 2 (*Lopez*); App. 52 (*Montijo*). Many of the details in Respondents' account of what occurred during the following days are disputed, but this Petition accepts their version of the facts because it arises from a motion for summary judgment, a context in which this Court has regularly emphasized the importance of qualified immunity. *E.g., City of Escondido*, 139 S. Ct. 500.

Nurses visited Lopez and Montijo repeatedly during their illness. *See* App. 11–12, 21 (*Lopez*); App. 61–64 (*Montijo*); *Montijo* CA9 E.R. 42, ¶ 15. On July 30, Officer "Bennett escorted a nurse to [their] cell, and the nurse checked [each] Plaintiff's vitals, which were normal." App. 21 (*Lopez*); *see also Lopez* CA9 E.R. 43, ¶ 13; *Lopez* CA9 E.R. 52, ¶ 16; App. 64 (*Montijo*).

Lopez "complained of dizziness and shortness of breath," but the nurse "noted he was talking in full sentences and walking with a steady gait" and showed "no signs of stress." *Lopez* CA9 E.R. 52, ¶ 16. Likewise, "[t]he medical record for this cell-front visit documents that [Montijo] was able to answer questions, his lungs were clear, his skin was dry, he walked with a steady gait, and there were no signs of stress." App. 64 (*Montijo*). Lopez and Montijo "told [the] nurse that they had consumed hooch about a week [earlier]." App. 64 (*Montijo*); *see also Lopez* CA9 E.R. 52, ¶ 16. That evening, the same nurse "again saw Lopez [and Montijo] … and directed the control room officer to note 'no issues.'" *Lopez* CA9 E.R. 43–44, ¶ 14; *see Montijo* CA9 E.R. 35–36, ¶ 16.

On July 31, the same nurse who had twice seen Lopez and Montijo the day before "again assessed [them] at [their] cell." *Lopez* CA9 E.R. 52, ¶ 17; *Montijo* CA9 E.R. 43, ¶ 17. The nurse "noted that [Lopez] was awake, he had a steady gait, his lungs were clear, his vitals were normal, and that there were no signs of stress." *Lopez* CA9 E.R. 52, ¶ 17. The same was true for Montijo, except that "he was barely awake." *Montijo* CA9 E.R. 43, ¶ 17. The nurse "indicated that Lopez [and Monitjo] stated that [they were] still sick from drinking hooch" and "would be under continuous monitoring." *Lopez* CA9 E.R. 52, ¶ 17; *Montijo* CA9 E.R. 43, ¶ 17.

According to Lopez, Officer Bennett "came to [Lopez and Monitjo's] cell" the same day. App. 14 (*Lopez*); App. 65 (*Montijo*). Montijo "begged Bennett to get them to a doctor" and "told Bennett that the nurses

refused to help or examine them and they needed to see a doctor to get a diagnosis." App 14 (*Lopez*); *see* App. 65 (*Montijo*). "Bennett promised to get them a doctor; however, he later returned to the cell and told them that no one wanted to help them." App. 14 (*Lopez*); *see* App. 65 (*Montijo*).

On August 1, Montijo "began choking, and inmates in the pod started screaming 'man down!' to get attention." App. 14 (*Lopez*); *see* App. 65 (*Montijo*). According to Lopez, "Swaney and other officers arrived," and Officer Swaney "shouted words to the effect 'I can't do anything for you. Medical doesn't want to help you!'" App. 14 (*Lopez*). Respondents claim that when Montijo "begged to speak to [Swaney's] supervisor or doctor, Officer Swaney yelled 'no,'" threatened them, and shouted obscenities. *Id.*; App. 65, 76 (*Montijo*).

Although some of the foregoing details are disputed, it is undisputed that Swaney "left" and "told medical," and "medical said [they] had already addressed [the prisoners'] issues [that] morning" and that whatever was wrong with them "didn't require any further response." *Lopez* CA9 E.R. 57 at 63:3–8. In uncontroverted testimony, Officer Swaney explained that he "responded to Lopez's [and Montijo's] request[s] for medical attention, alerted medical staff to [their] request[s], and was assured by medical staff that [they were] receiving appropriate treatment." *Lopez* CA9 E.R. 47, ¶ 31; *Montijo* CA9 E.R. 39, ¶ 31. Likewise, concerning Officer Bennett, no one disputes that he "escorted a nurse to [Respondents'] cell" and that "Bennett … observed nursing staff at [the] cell front

twice during the relevant time frame" and "therefore … believed that the sick inmates were being monitored and treated by medical staff." App. 21–22 (*Lopez*).

The next day, August 2, "the nursing staff and security staff advised" a physician's assistant (Nick Salyer) "that several inmates had reported feeling ill after drinking hooch and were not improving." *Lopez* CA9 E.R. 52, ¶ 18; *Montijo* CA9 E.R. 43, ¶ 18. After "evaluat[ing] Lopez [and Montijo]," Salyer "suspected that [they] had botulism poisoning" and decided "to send [them] to the hospital." *Lopez* CA9 E.R. 53, ¶¶ 21–22, 25; *Montijo* CA9 E.R. 44–45, ¶¶ 21–22, 25. "Swaney coordinated the logistics for transport"; Montijo was hospitalized until August 7, and Lopez "was hospitalized for seven days." App. 66 (*Montijo*); App 16 (*Lopez*).

Lopez and Montijo later sued various prison officials, and Officers Bennett and Swaney twice moved for summary judgment based on qualified immunity. The district court denied the motions. *Lopez* Dist. Ct. Dkt. 64; App. 7–35 (*Lopez*); *Montijo* Dist. Ct. Dkt. 53; App 56–84 (*Montijo*). A divided panel of the Ninth Circuit affirmed.

The majority concluded that Bennett and Swaney "violated clearly established law," because "[i]t is 'beyond debate' … that a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease," and here "some evidence suggests that Bennett's response to [each] Plaintiff's needs was unreasonable," and "some evidence" supports the claim of deliberate indifference against Swaney. App. 2–4

(*Lopez*); *accord* App. 52–54 (*Montijo*). The majority rejected the officers' "argument that they did not violate clearly established law because they acted pursuant to the nursing staff's opinions … because that argument depends on the resolution of *disputed* issues of fact, in *Defendants'* favor." App. 4 (*Lopez*); *accord* App. 54 (*Montijo*).

The dissenting judge succinctly summarized the flaws in the majority's analysis: "When correctional officers rely upon medical professionals to diagnose and consider the sickness of a prisoner, they meet their constitutional obligations to the prisoners," and are therefore entitled to qualified immunity. App. 6 (*Lopez*); *accord* App. 55 (*Montijo*) ("Both officers relied upon the medical staff at the institution and did not violate any clearly established constitutional right by taking no further action."). No one has ever disputed that Officers Bennett and Swaney relied on the opinion of the prison's nurses.

Bennett and Swaney petitioned for rehearing or rehearing en banc on November 9, 2018. The petitions were denied on December 4, 2018, and the court of appeals' judgments took effect on December 12.

REASONS FOR GRANTING THE PETITION

To defeat qualified immunity and hold Officers Swaney and Bennett liable under Section 1983, Respondents must establish both the existence of a constitutional violation and that that "existing precedent … placed the … constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Here, Respondents have done neither. The only analogous precedent teaches that the officers' commonsense deference to nurses' medical opinions does *not* amount to a constitutional violation. In reaching the opposite conclusion, the Ninth Circuit panel majority parts ways with its sister circuits and the repeated instruction of this Court. Certiorari and summary reversal are necessary.

I. The Ninth Circuit's Decision Creates A Split With The Third And Seventh Circuits On Whether The Defendants' Conduct Constitutes Deliberate Indifference

The panel majority's decision creates a split in authority with the Third and Seventh Circuits on whether Officers Bennett and Swaney's conduct violates the Eighth Amendment.

The dissenting judge aptly summarized that conduct. "Bennett escorted a nurse to [Montijo and] Lopez's cell and the nurse checked the vital signs of the prisoner." App. 6 (*Lopez*); *see also* App. 55 (*Montijo*). "On the following day, when Bennett came to [their] cell, Bennett went to medical, returned to the cell, and told Montijo that he had talked to the medical staff and a nurse said she had seen Montijo and there was

nothing wrong with him." App. 55 (*Montijo*). "Bennett relied upon the fact that the sick inmates were being monitored and treated by the medical staff." App. 6 (*Lopez*); *see also* App. 22 (*Lopez*).

As for Officer Swaney, "although he saw that Lopez was having problems breathing" and "told Lopez that 'medical doesn't want to help you,'" "Swaney told medical about Lopez's complaint that day and medical indicated that no further medical response was needed." App. 6 (*Lopez*); *see also Lopez* CA9 E.R. 57 at 63:3–8; *Lopez* CA9 E.R. 47, ¶ 31. Officer Swaney also "informed medical staff of Montijo's complaints either before or after he spoke to Montijo, but the medical staff said that they had already addressed the medical issues that morning and that whatever was wrong with Montijo 'didn't require any further response.'" App. 55 (*Montijo*).

Faced with these undisputed facts, the panel majority concluded that Bennett and Swaney may have violated Lopez's and Montijo's constitutional right against cruel and unusual punishment. *See* App. 2–5 (*Lopez*); App 52–54 (*Montijo*).

But on much starker facts, the Seventh Circuit found no constitutional violation. In *King v. Kramer*, 680 F.3d 1013 (7th Cir. 2012), two correctional officers "called for a nurse" when they found a prisoner "convulsing on the floor, screaming and foaming at the mouth." *Id.* at 1016. When the nurse arrived, "she tried to put a pulse oximeter on [the inmate's] toe, but his shaking was too intense to keep it on." *Id.* at 1016–17. One officer told the inmate "to 'quit acting like a child and get up' and accused him of faking the

seizure." *Id.* at 1017. The nurse "was unable to get a blood pressure reading because [the inmate] was shaking too hard"; she "used smelling salts to look for a reaction but there was none." *Id.* The inmate's "face turned blue." *Id.* Yet the nurse and the officers, "convinced that [the inmate] was faking, left [him] lying on the floor. They did not contact the on-call physician … or emergency medical services." *Id.* at 1017.

The Seventh Circuit concluded that the prisoner had not "presented enough evidence of deliberate indifference to survive summary judgment." *Id.* at 1018. "The officers were not responsible for administering medical care to [the inmate]; rather, they were 'entitled to defer to the judgment of jail health professionals as long as [they] did not ignore [the prisoner].'" *Id.* The court rejected the argument that the officers were "aware that [the nurse] was improperly treating [the inmate]. They were not trained to assess whether an inmate is genuinely experiencing seizures, and so they lacked the capacity to judge whether [the nurse] made an inappropriate diagnosis." *Id.*

Applying the same rule in the context of non-medical prison staff, the Third Circuit affirmed the dismissal of a deliberate indifference claim because guards could not be "considered deliberately indifferent simply because they failed to respond directly to the medical complaints of a prisoner who was already being treated by the prison doctor." *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004) (quoting *Durmer v. O'Carroll*, 991 F.2d 64, 69 (3d Cir. 1993) (decided on

summary judgment)). In the Third Circuit, a correctional officer can be liable for deliberate indifference only if he knows that medical personnel are mistreating or not treating an inmate. *Id.* Moreover, "mere disagreement" over the appropriate treatment is not sufficient. *Id.* at 235. Taken together, these principles mark an irreconcilable split with the Ninth Circuit's standard below. Officers Swaney and Bennett knew that Lopez and Montijo were receiving care and had no reason—other than the inmates' stated disagreement with that care—to think that the medical care provided by prison medical staff was inadequate. In the Third Circuit, the claims against the officers would have been dismissed.

If the officers in *King* and *Spruill* were entitled to qualified immunity, then so are Officers Bennett and Swaney. Yet the panel majority avoided that straightforward conclusion in three ways.

First, the panel majority ignored *King* and similar decisions from the Third and Seventh Circuits. *E.g.*, *Pearson v. Prison Health Serv.*, 850 F.3d 526, 543 (3d Cir. 2017) (affirming summary judgment in favor of a prison doctor who evaluated an inmate and decided not to order post-surgery measures that the inmate's surgeon had earlier prescribed); *Berry v. Peterman*, 604 F.3d 435, 440 (7th Cir. 2010) ("As a nonmedical administrator, [defendant] was entitled to defer to the judgment of jail health professionals so long as they did not ignore [plaintiff].").

Second, the panel majority disregarded undisputed evidence regarding Bennett's and Swaney's specific conduct and thus failed to apply the rule that

nonmedical officers enjoy qualified immunity when they rely on the opinion of a trained medical professional like a nurse. Regarding Officer Bennett, the majority concluded that "there was no bona fide medical opinion in this case—or, at least, not one of which Bennett was aware." App. 3 (*Lopez*); App. 53 (*Montijo*). The majority also claimed that Officer Bennett "*did nothing*, in the face of serious symptoms, to verify that [each] Plaintiff was receiving adequate treatment." *Id.* (emphasis added). But these conclusions are impossible to square with the undisputed facts that "Bennett escorted a nurse to [Respondents'] cell," that "the nurse checked [their] vitals, which were normal," and that "Bennett … observed nursing staff at [their] cell front twice during the relevant time frame" and "therefore … believed that the sick inmates were being monitored and treated by medical staff." App. 21–22 (*Lopez*); *see also* App. 6 (*Lopez*); App. 55, 72 (*Montijo*). This is especially so given the majority's "assum[ption] … that Defendants would be entitled to rely on a nurse's opinion." App. 3 n.1 (*Lopez*); App. 53 n.1 (*Montijo*).

The majority also stated that Officer Swaney "did nothing," and denied that "he was relying on the opinions of the prison's medical staff." App. 4 (*Lopez*). The majority found "a question of fact as to whether Swaney acted with deliberate indifference by failing to obtain help for [each] Plaintiff on August 1," *id.*, apparently seizing on one snippet of Officer Swaney's deposition testimony and ignoring everything that followed. That testimony as a whole leaves no doubt that Swaney did not "fail[] to obtain help for [each] Plaintiff on August 1." *Id.* As the dissenting panel

judge pointed out, Officer Swaney "told medical about Lopez's [and Montijo's] complaint[s] that day and medical indicated that no further medical response was needed." App. 6 (*Lopez*); *see also* App. 55 (*Montijo*).

To the extent the majority's conclusion reflects a credibility determination or evidence-weighing, this conflicts with binding precedent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations [and] the weighing of evidence … are jury functions, not those of a judge … ruling on a motion for summary judgment."); *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014) ("By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weigh[ed] the evidence.'"). The undisputed facts show that Officer Swaney, like Officer Bennett, sought medical care for Lopez and Montijo, and then deferred to the medical professionals who provided it.

Third, the panel majority found a possible constitutional violation by ignoring precedent from the Seventh and Ninth Circuits holding that prison officials need not defer to or even credit prisoners' opinions about the sufficiency of the care they receive. The majority concluded that "Bennett denied [each] Plaintiff access to treatment even though he had reason to think that [each] Plaintiff was receiving no care at all." App. 3 (*Lopez*); App. 53 (*Montijo*). The asserted basis for this conclusion is Montijo's telling Officer Bennett that "the nursing staff refused to help or examine him, and Bennett, after being told as much, did nothing … to verify that [Lopez] was receiving adequate treatment." App. 3 (*Lopez*); App. 53

(*Montijo*). But no decision holds that a correctional officer must defer to an inmate's opinion about the adequacy of care he is receiving, or that nonmedical professionals like Officers Bennett and Swaney must credit an inmate's assessment of his care, despite medical staff stating the contrary and their firsthand knowledge that nurses were regularly visiting the inmates in question.

Indeed, in *Hayes v. Snyder*, 546 F.3d 516 (7th Cir. 2008), the Seventh Circuit rejected the same argument that the panel majority accepted here. In *Hayes*, the plaintiff argued that two nonmedical prison staff "did have actual knowledge, or at least reason to believe, that the prison doctors were 'mistreating (or not treating) him,'" because "he told [an assistant warden] about his pain and about the doctors' refusal to respond to his pleas for treatment." *Id.* at 527. Because the nonmedical staff had "investigated [the inmate's] complaints, sought reports from medical officials, and relied on the judgment of the prison physicians," the court held they were entitled to qualified immunity. *Id.* at 527–28.

So too here: Where nothing other than Montijo's say-so even suggested that he and Lopez were receiving inadequate medical care, Officer Bennett was entitled to rely on the judgments of the nurses who were monitoring and treating Respondents. The majority's contrary decision splits with *Hayes* and establishes two different approaches to officers' reliance on medical staff in different parts of the country. That division warrants this Court's review.

II. The Panel Majority Flouted This Court's Decisions By Denying Qualified Immunity Based On The Violation Of An Abstract Right

Qualified immunity shields officials from § 1983 suits if "their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)). "A clearly established right is one that is 'sufficiently clear that *every reasonable official* would have understood that what he is doing violates that right.'" *Id.* (emphasis added) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). And the right at issue cannot be defined in the abstract. The Court "has 'repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality.'" *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015)).

The majority's decision continues a trend in the Ninth Circuit of overlooking the facts of the case based on identification of a generic right that is clearly established. Here is the right identified below: "a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease." App. 4 (*Lopez*) (citing *Hunt v. Dental Dep't*, 865 F.2d 198, 201 (9th Cir. 1989)); *see also id.* at 3 ("The denial of medical care in the face of an obvious emergency constitutes deliberate indifference." [citing *Hoptowit v. Ray*, 682 F.2d 1237,

1259 (9th Cir. 1982), *overruled on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995)]).

This general rule falls far short of the "high 'degree of specificity'" that this Court requires. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Mullenix*, 136 S. Ct. at 309). This is not a generic case of "denial of medical care," and the Ninth Circuit's abstraction "is too general" because "the unlawfulness of the [officers'] conduct 'does not follow immediately from the conclusion that [the denial-of-care rule] was firmly established.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)). By rounding off the facts of this case, including the role of medical professionals, the Ninth Circuit majority fails to ask "[t]he dispositive question … 'whether the violative nature of *particular* conduct is clearly established,'" an "inquiry [that] '"must be undertaken in light of the specific context of the case, not as a broad general proposition."'" *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742; *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

The Court repeatedly has rejected attempts such as this "'to convert the rule of qualified immunity … into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *White*, 137 S. Ct. at 552 (quoting *Anderson*, 483 U.S. at 639). The decision here is yet another example of the Ninth Circuit's denying qualified immunity based on a supposed violation of an abstract right, "repeat[ing] the same error [this] Court has time and again felt compelled to correct." *Hamby v. Hammond*, 821 F.3d 1085, 1095 (9th Cir. 2016).

The majority's decision also conflicts with this Court's and the Ninth Circuit's precedents because it denied Officers Bennett and Swaney qualified immunity without identifying "existing precedent [that] 'placed beyond debate the unconstitutionality of' the officials' actions, as those actions unfolded in the specific context of the case at hand." *Hamby*, 821 F.3d at 1091 (quoting *Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015)). "[S]tate officials are entitled to qualified immunity so long as 'none of our precedents squarely governs the facts'" of the case. *Id.* (quoting *Mullenix*, 136 S. Ct. at 310). And if "it is at least debatable that the prison officials … complied with the Eighth Amendment," then they "are … entitled to qualified immunity." *Id.* at 1096.

That the panel divided over the question whether Officers Bennett and Swaney complied with the Eighth Amendment means that this issue is at least debatable; for this reason alone, the officers are entitled to qualified immunity as a matter of law.

The majority turned this rule on its head, effectively concluding that if it is at least *possible* that Officers Bennett and Swaney violated Respondents' rights, then they must be *denied* qualified immunity. As noted, the majority found the abstract rule "that a prison official acts with deliberate indifference when the official denies medical care to a prisoner exhibiting serious symptoms of pain or disease" to be "'beyond debate.'" App. 4 (*Lopez*) (quoting *Hamby*, 821 F.3d at 1092); *see also* App. 54 (*Montijo*) (quoting *Hamby*, 821 F.3d at 1092). But the majority did not cite "precedent on the books" placing Officers Bennett's and Swaney's actual

conduct beyond debate. *Hamby*, 821 F.3d at 1092 (quoting *Taylor*, 135 S. Ct. at 2045). The reason, of course, is that no such precedent exists. Instead, the majority found that "some evidence *suggests* that Bennett's response to [each] Plaintiff's needs was unreasonable," and likewise that "some evidence *suggests* that Swaney responded to [each] Plaintiff's needs with deliberate indifference." App. 3–4 (*Lopez*) (emphasis added); *see also* App. 52–53 (*Montijo*).

This is not enough. To overcome an officer's qualified-immunity defense, existing precedent cannot merely "suggest[]" that an officer's conduct was unlawful; it must "clearly prohibit the officer's conduct in the particular circumstances before him." *Wesby*, 138 S. Ct. at 590. This Court has thus reversed a denial of qualified immunity on the precise terms that the majority below used. *See*, *e.g.*, App. 3 ("[S]ome evidence suggests that Bennett's response to Plaintiff's needs was unreasonable."); App. 52 (same). This circumstance cries out for summary reversal, lest Officers Swaney and Bennett face an unnecessary trial and the State face unjustified liability.

Indeed, in the absence of a decision from this Court holding an officer liable for an Eighth Amendment violation under similar circumstances, only "a 'robust consensus of cases of persuasive authority' could itself clearly establish the federal right [Lopez] alleges." *Sheehan*, 135 S. Ct. at 1778 (quoting *al-Kidd*, 563 U. S. at 742). That consensus, to the extent it exists, points in the opposite direction. *See infra* Part I; *see also Kisela*, 138 S. Ct. at 1153 (summarily reversing denial

of qualified immunity where "the most analogous Circuit precedent favor[ed]" the defendant).

Even in the Ninth Circuit, existing case law suggests that deference to the prison nursing staff was appropriate. In *Toguchi v. Chung*, 391 F.3d 1051, 1058 (9th Cir. 2004), that court held that "a mere difference of medical opinion" between a prisoner and prison medical officials is "insufficient, as a matter of law, to establish deliberate indifference." Similarly, when two physicians serving on a committee that reviewed prisoners' medical complaints agreed with the examining physician that no surgery was necessary, the Ninth Circuit afforded them qualified immunity. *Hamby*, 821 F.3d at 1093. There, as here, the defendants acted "based on legitimate medical opinions that have often been held reasonable under the Eighth Amendment." *Id.*

Precedent from this Court, other circuits, and even the Ninth Circuit itself confirm that the facts of this case create at least a reasonable debate about whether Officers Swaney and Bennett violated Lopez's or Montijo's constitutional rights. Only by abstracting to a generic rule about the impermissibility of withholding medical care does the panel majority create the appearance of unanimity. That practice has rightly earned summary reversal in recent years, and the Court should not now send a mixed signal by failing to reverse the same error here.

CONCLUSION

The Court should grant a writ of certiorari and summarily reverse the panel majority's decisions denying qualified immunity.

Respectfully submitted

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