No. 20-_____

In The

Supreme Court of the United States

KATHY CONTRERAS, on behalf of her minor child A.L.,
Petitioner,

v.

DOÑA ANA COUNTY BOARD OF COUNTY COMMISSIONERS, doing business as DOÑA ANA COUNTY DETENTION CENTER; PACO LUNA; JAIME CASADO; and SHAYLENE PLATERO,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents, Doña Ana County Detention Center and three detention officers, regularly failed to secure access to a control panel that locked the inmates' cell doors. Instead of monitoring an inmate who had loudly threatened Petitioner, the three detention officers watched television while the inmate accessed the unsecured and opened cell doors so that other inmates could brutally attack the 14-year-old Petitioner. This was the fourth such attack in an 18-month period.

In three separate opinions, the Tenth Circuit panel affirmed dismissal of both the individual jailer claims and the *Monell* claims against the jail because the law was not "clearly established." No one circuit judge took the same approach as the others or the district court.

The questions presented are:

1. Whether this Court should resolve the confusion in the circuit courts about what constitutes "clearly established" law with a clear rule and guidance from this Court that allows a legitimate constitutional claim to proceed under Section 1983 whenever the circumstances give government actors ample opportunity to understand how the relevant legal doctrine applies, as the First, Second, Sixth, and Seventh Circuits have decided, rather than requiring factually identical precedent, as the Tenth Circuit required in this case?

2. Whether the Tenth Circuit's decision that the law must be clearly established to support a *Monell* claim for deliberate indifference is inconsistent with the settled law of this Court?

3. Whether Petitioner overcome qualified immunity by showing that the jailers were deliberately indifferent to Petitioner's clearly established rights, because the violation was patently obvious and sufficiently similar prior precedent gave the jailers fair notice their conduct violated Petitioner's constitutional rights?

LIST OF PARTIES

The parties to the proceedings below were Petitioner, Kathy Contreras, on behalf of her minor son, A.L.; and, Respondents Doña Ana County Board of County Commissioners, doing business as Doña Ana County Detention Center, Paco Luna, Jaime Casado, and Shaylene Platero.

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PETITION FOR A WRIT OF CERTIORARI

Kathy Contreras, on behalf of her minor child A.L., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 2a-59a) is reported at 965 F.3d 1114. The district court's order (App. 60a-97a) is unreported.

JURISDICTION

The court of appeals entered judgment on July 7, 2020 (App. 2a-59a) and denied a petition for rehearing on September 4, 2020 (App. 1a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The asserted grounds for jurisdiction in the federal district court were 28 U.S.C. §§ 1331 and 1334.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the rights under the United States Constitution and 42 U.S.C. Section 1983 of a juvenile detained on a probation violation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides in relevant part:

> 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. . . .

STATEMENT OF THE CASE

The Doña Ana County Detention Center (DACDC) uses a control panel to lock and unlock cell doors in the juvenile housing unit. (App. 32a). The control panel is in the day room, a few feet from the commissary kiosk that inmates and detainees use to purchase items. (App. 32a). If detention officers leave the control panel unlocked, unsupervised inmates and detainees can access the panel to unlock and open cell doors, including the doors on the second level of the juvenile area. (App. 32a). On four occasions in the eighteen months preceding the attack on Petitioner, juvenile inmates attempted to access the control panel to operate cell doors, and on two of those occasions, inmates successfully opened doors and attacked other inmates. (App. 35a-36a). One of the Respondent officers reported that no one trained him to lock the panel and customarily, no one locked it. (App. 33a-34a).

Fourteen-year-old Petitioner ("A.L.") arrived at DACDC as a pretrial detainee after a curfew violation. (App. 29a). As detention officers escorted him inside, three inmates loudly threatened to attack him. (App. 30a-31a). DACDC officers knew those detainees had extensive histories of violence, instability, and disciplinary infractions. (App. 29a-30a). Because of the threats, DACDC placed the three violent detainees on "pre-disciplinary" segregation, which restricted the violent inmates to their locked cells, only to be released one at a time, for specific purposes. (App. 31a). DACDC also placed Petitioner in his locked cell. (App. 31a, 69a).

The next day, three detention officers allowed one of the violent detainees to take a shower. (App. 31a). After his shower, he returned to the dayroom. (App. 31a). He requested, and was given, permission to use the commissary kiosk. (App. 32a). While the violent detainee stood at the commissary kiosk, checking over his shoulder to see if the officers were watching him, the three officers sat at a dayroom table, watching television. (App. 31a-33a). The officers paid no attention while the detainee moved from the commissary kiosk to the closely adjacent, highly visible, and unlocked control panel kiosk. (App. 31aa-33a). The detainee quickly manipulated the control panel to open cell doors, including the one in which Petitioner had been secured for his safety. (App. 32a-33a).

That action allowed the two other violent detainees to reach and attack Petitioner. (App. 33a). When the officers made it to the cell to stop the beating (using pepper spray), Petitioner was unconscious, bleeding from his ears. (App. 33a). Respondents sent Petitioner to the hospital, with a broken jaw, lacerations, and bruises. (App. 33a).

Petitioner's mother filed suit under Section 1983 in federal district court against the Doña Ana County Board of County Commissioners and the three detention officers. She claimed the officers were deliberately indifferent to the substantial risk of serious harm to Petitioner and their failure to protect him from that harm violated the due process clause of the 14th Amendment. Petitioner further alleged that the County violated the due process clause of the 14th amendment (1) by deliberate indifference to the risk that failure to properly train the officers to secure

the control panel would cause harm to Petitioner; and, (2) by permitting an unconstitutional custom and practice of failing to secure the control panel.

The district court granted the officers qualified immunity, distinguishing other cell-door-locking cases, reasoning that the law was not clearly established, and ruling that "this case is neither an obvious case of reckless indifference nor has adequate authority previously ruled that materially similar conduct was unconstitutional." (App. 90a). The district court also dismissed Plaintiff's claims against the County. Despite evidence of previous control-panel accessibility incidents, the district court determined that the evidence did not show a pattern of tortious conduct or that the failure to train resulted in a highly predictable constitutional violation. (App. 95a-96a). Alternatively, the district court found that Petitioner's claim against the County also failed: "[b]ecause the right at issue has not been clearly established, Plaintiff cannot show that DACDC was deliberately indifferent" in its failure to train the detention officers. (App. 94a).

Petitioner appealed the district court's ruling to the Tenth Circuit Court of Appeals. Two members of the Tenth Circuit Court of Appeals affirmed the dismissal of Plaintiffs' Section 1983 claims but could not agree on the basis for affirmance. A third panel member dissented.

In his opinion, Chief Judge Tymkovich held that (1) Petitioner failed to provide evidence to establish a constitutional violation; (2) the law was not clearly established or obvious; and, (3) the *Monell* claim was properly dismissed based on the failure of the constitutional claim. (App. 4a, 12a, 16a, 22a). In determining that Petitioner's

rights were not obvious, Chief Judge Tymkovich equated the "obvious" right with the "clearly established" right. (App. 22a). Chief Judge Tymkovich construed the "obvious" analysis as a "functional exception to the presumption against fair notice," and required that for a right to be obvious the Tenth Circuit's precedents must "render the legality of the conduct undebatable." (App. 22a).

Judge Carson's separate opinion recognized the serious failure to protect Petitioner. (App. 23a). Nevertheless, Judge Carson concurred with the result of Chief Judge Tymkovich's opinion but offered different reasons. Judge Carson concluded the law was not clearly established, despite finding the evidence could demonstrate a constitutional violation. (App. 23a). Judge Carson then determined that the failure-to-train claim against the County must also be dismissed, because he agreed with the district court that claims against governmental entities, like those against individuals, must be based on "clearly established" constitutional rights. (App. 25a-27a).

In a third opinion, Judge Baldock dissented in part, concluding first that "after violent threats have been made by a group of particularly violent detainees, any reasonable official cognizant of his duty to protect would know that the failure to secure the control panel while a would-be assailant is outside his cell is objectively unreasonable." (App. 28a). Judge Baldock additionally agreed that evidence was sufficient for a reasonable jury to find that the detention officers violated A.L.'s constitutional rights and that the district court's conclusion that evidence did not support a pattern of tortious conduct was "[n]onsense." (App. 37a, 55a-56a). As for

the analysis that the failure-to-train claim was dependent on clearly established law, Judge Baldock cautioned that requiring "clearly established" law in failure-to-train cases that establish a pattern of tortious conduct would "effectively afford a form of vicarious immunity to municipalities." (App. 58a-59a).

REASONS FOR GRANTING THE WRIT

Summary of Reasons

The Tenth Circuit's fragmented opinion merits this Court's further review for the following reasons:

First, the circuits are in disarray about how to determine whether the law is "clearly established" for the purposes of qualified immunity, specifically in cases that do not require split-second decision making. The fractured Tenth Circuit decision, as well as the Fifth Circuit's decision in *Taylor v. Stevens*, 946 F.3d 211 (5th Cir. 2019), demonstrate the difficulty in differentiating between cases that require specific factual similarity, where it is difficult for officers to determine how to apply relevant legal doctrines, and cases in which general constitutional rules provide clear direction. The First, Second, Sixth, and Seventh Circuits have, in cases that permit time for a deliberative decision, determined the "clearly established" requirement to be met by prior case law with some factual variation from the case before the court. This solution, however is far from uniform, and the conflicting views among the panel members in this case demonstrate the difficulty with determining whether the law was sufficiently clearly established. Only this Court can bring order out of chaos by

providing the much-needed guidance and clarity necessary to achieve a more uniform and justified qualified immunity jurisprudence.

Second, the Tenth Circuit decision is contrary to this Court's holdings rejecting qualified immunity and defining the standard for proving deliberate indifference in governmental-entity liability cases. The two prongs of the qualified immunity analysis, applicable to individuals, require a court to determine whether the constitution was violated and whether the law establishing the violation was clearly established. A requirement that the law must also be clearly established for *Monell* claims contravenes this Court's rejection of qualified immunity for governmental entities and expands this Court's definition of governmental deliberate indifference. In so doing, the Tenth Circuit has fatally undermined the continued development of constitutional law through governmental-entity claims—to which the "clearly established" prong does not apply. *See, e.g., Pearson v. Callahan*, 555 U.S. 223, 242-43 (2009). The Tenth Circuit decision and the decisions in other circuits contradict this Court's authority, confuse the constitutional obligations for governmental entities, and shut the door to the development of constitutional law that the *Pearson* Court purposefully left open.

Third, qualified immunity should not shield the officers in the present case. The jailers were deliberately indifferent to a known risk of harm to Petitioner when they failed to monitor the roaming violent inmate who used an unsecured control panel to access, unlock, and open cell doors. They knew about the threats, knew the control panel was unlocked and vulnerable, and knew the roaming inmate was

violent, but failed to reasonably respond to the threat and watched television instead. The Tenth Circuit's decision acknowledged the law clearly established that "credible threats require reasonable response" (App. 20a), but failed to account for the factual context of this case. Instead, the Tenth Circuit required precise factual similarity in prior cases to find the law was clearly established. In the circumstances of the present case, the law was clearly established because the constitutional violation was obvious and existing precedent gave fair notice of the risk of the violation, given the time for deliberation the jailers enjoyed.

I. This Court Should Resolve the Confusion Among the Circuits About How to Identify Clearly Established Law

The Tenth Circuit's three-way opinion highlights how the federal courts struggle with the level of factual similarity required to demonstrate clearly established law. The struggle arises because Section 1983 applies to many types of factual circumstances. This Court should instruct the circuits that where there is no necessity, exigency, or justification to rationalize a particular action, a different qualified immunity analysis should apply. In those cases, the law is sufficiently clearly established by broad constitutional standards.

Broad constitutional standards can create clearly established law in "obvious cases" where "the unlawfulness of the officer's conduct [will be] sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S.Ct. 577, 589-90 (2018); *see also White v. Pauly*, 137 S.Ct. 548, 552 (2017). This Court has explained that

> general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.

Hope v. Pelzer, 536 U.S. 730, 741 (2002) (internal quotation marks, alterations, and citations omitted). Generally, however, "'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). As this Court has explained, parties must show specific factual similarities between precedent and the case at issue for the law to be clearly established, especially where "'it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Id.* (alteration omitted) (quoting *Saucier v. Katz*, 533 U.S. 194, 205 (2001)); *see also Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (refusing to apply general constitutional principles to clearly establish the law when an officer was confronted by a woman who refused to acknowledge commands to drop a knife); *San Francisco v. Sheehan*, 135 S.Ct. 1765, 1776 (2015) (refusing to apply general constitutional principles when the officers were faced with a dangerous, obviously unstable person making threats).

In the present case, the Tenth Circuit held that prior precedent was not sufficiently similar to the current circumstances, even though two Tenth Circuit cases and a number of other cases from other circuits required jailers to take reasonable steps to protect those in custody from credible threats. (App. 16a-21a). The Tenth Circuit opinion then determined that the constitutional violation was not "obvious"

because the facts did not trigger what the Court termed, the narrow "functional exception against fair notice." (App. 22a). For this is "exception" to apply, the Court stated it would have to "effectively conclude our precedents render the legality of the conduct undebatable." (App. 22a (quoting *Lowe v. Raemisch*, 864 F.3d 1205, 1201-11 (10th Cir. 2017)). The Tenth Circuit did not, as other courts have done, consider whether the officers had time to determine how the relevant legal doctrine would apply in the circumstances Respondents faced.

Four circuits considering qualified immunity in recent years have held the law to be clearly established, even though the case involved a unique set of facts, because the government actor had the opportunity to deliberate before acting or continuing to act. *See Jones v. Treubig*, 963 F.3d 214, 235-36 (2nd Cir. 2020) (citing *Graham v. Connor* to clearly establish the obligation to re-assess in the moment whether additional force is necessary); *Harris v. Klare*, 902 F.3d 630, 643 (6th Cir. 2018) (holding that officers were not entitled to qualified immunity even though the facts of another case "did not precisely match," because the situation was "neither tense, nor uncertain, nor rapidly evolving"); *Becker v. Elfreich*, 821 F.3d 920, 929, n.2 (7th Cir. 2016) (noting that the case did not "involve a split-second delay" to make the relevant decision and declining to require a case directly on point); *Stamps v. Town of Framingham*, 813 F.3d 27, 40-42 (1st Cir. 2016) (determining that despite "unique sets of facts" of cases in that circuit, the law was clearly established for an officer who was "not forced to act based on a split-second judgment about the appropriate level of force to employ"). These cases comport with this Court's recent and long-standing

requirements for overcoming qualified immunity, but these cases also identify particular types of facts that justify the need for less factual identity with prior cases.

This Court recently reversed the Fifth Circuit in *Taylor v. Rojas*. The Fifth Circuit shielded the jailers with qualified immunity, even though the constitutional violation was "obvious," because prior precedent did notify the jailers that leaving an inmate in a feces-covered cell for only six days violated the constitution. *Taylor*, 945 F.3d at 221-22. This Court reversed, in part because the jailers provided no evidence that the prisoner's conditions of confinement "were compelled by necessity or exigency" or that they could not have mitigated those conditions. *Taylor v. Rojas*, 208 L. Ed.2d 164, 165 (2020). In the past, this Court has explained that the "clearly established" component of qualified immunity is necessary because officers face immediate threats against a "hazy legal backdrop." *Mullenix*, 136 S.Ct. at 309, 312; *see Kisela*, 138 S.Ct. at 1152-53. Similarly, in *Sacramento v. Lewis*, the Court considered the intent required for substantive due process violations in the context of excessive force outside a prison setting, as opposed to the intent required in a prison setting. 523 U.S. 833, 836, 851-53 (1998). In that context, this Court explained

> Thus, attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other . . . . As the very term 'deliberate indifference' implies, the standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare.

Id. at 851 (citation omitted). When deliberation is practical and forethought about a citizen's welfare is feasible—and obligatory—less factual specificity among cases should be sufficient to clearly establish the law and overcome qualified immunity.

The opportunity for deliberation allows the government actor to consider his training, consider general constitutional principles, consider personal experience and make a deliberate decision to abide by the law as he knows it or go his own way. In such circumstances, qualified immunity is not justified by the lack of opportunity to consider an uncertain legal backdrop. *See Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (noting the alleged conduct "plainly did not qualify as the type of 'bad guesses in gray areas' that qualified immunity is designed to protect" (quoting *Braun v. Maynard*, 652 F.3d 557, 560 (4th Cir. 2011)); *Irish v. Fowler*, No. 20-1208, at *23, 2020 U.S. App. LEXIS 35054 (1st Cir. Nov. 5, 2020) (noting that, in failure-to-protect case that progressed over the course of about 18 hours, "[t]he test to determine whether a right is clearly established asks whether the precedent is 'clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply' and whether '[t]he rule's contours [were] so well defined that it is clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" (quoting *Wesby*, 138 S.Ct. at 590 (alterations in original)).

No necessity or exigency justified Respondents' failure to lock and monitor the electronic control panel that operates the cell doors in the jail. In the present case, as Judge Baldock noted, the law was clear enough for the detention officers to know "to protect non-violent inmates from violent inmates *by keeping cell doors locked*." (App.

52a, n.5 (emphasis in original) (*quoting Walton v. Dawson*, 752 F.3d 1109, 1121 (8th Cir. 2014)); *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) ("After all, some things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing.").

The qualified immunity doctrine is an issue of national importance and "courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist." *See Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willet, J., concurring in part and dissenting in). Recently, this Court reversed the Fifth Circuit Court of Appeals, which had required nearly identical precedent to deny qualified immunity in a case that the court acknowledged involved an "obvious" constitutional violation. *Taylor*, 208 L.Ed. 2d at 165. Four different analyses about qualified immunity have arisen from the instant case—three from within the Tenth Circuit panel itself.

The circuits vary widely on the level of factual precedent required to "clearly establish" the law. Some circuits require nearly identical facts. *McCoy v. Alamu*, 950 F.3d 226, 233-34 (5th Cir. 2020) (granting qualified immunity because though the single use of pepper spray on an inmate for no reason violated the constitution, the question was not beyond debate); *Kelsey v. Ernst*, 933 F.3d 975, 978-81 (8th Cir. 2019) (distinguishing precedent because the *Kelsey* subject ignored a single command and walked away from the officer and prior case involved two ignored commands or the subject did not walk away); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 536-37 (7th

Cir. 2012) (Tinder, J., dissenting) (finding that because the weapon used was "relatively new" the law did not clearly establish the officers' actions as unlawful). Each of these cases resulted in a panel split on the "clearly established" question. *McCoy* , 950 F.3d at 235 (Costa, J., dissenting) (noting that the majority distinguished cases finding clearly established violations for using a baton or a taser on an inmate for no reason); *Kelsey v. Ernst*, 933 F.3d at 982-88 (Smith, J., dissenting) (construing existing case law to clearly establish that officers could not use a full-body takedown on a small, cooperative, nonviolent misdemeanant); *Phillips*, 678 F.3d at 528-29 (refusing to give officers "a free pass" every time the police use a new weapon). Meanwhile, other circuits have rejected the need for clearly established law to be based on identical factual circumstances. *See Kane v. Barger*, 902 F.3d 185, 195-96 (3rd Cir. 2018); *Brooks v. Powell*, 800 F.3d 1295, 1306-07 (11th Cir. 2015) (finding a constitutional violation clearly established independent of the case law or a case "involv[ing] the precise circumstances at issue here").

The district courts have noted their increasing difficulty with the doctrine. *Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F.Supp.3d 1260, 1293, n.10 (D.N.M. 2018) ("Thus, when the Supreme Court grounds its clearly-established jurisprudence in the language of what a reasonable officer or a 'reasonable official' would know, yet still requires a highly factually analogous case, it has either lost sight of reasonable officer's experience or it is using that language to mask an intent to create 'an absolute shield for law enforcement officers[.]'" (quoting *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J. dissenting) (internal citation omitted); *Jamison v. McClendon*,

No. 3:16-CV-595, 2020 U.S. Dist. LEXIS 139327 (S.D. Miss. 2020) ("Federal judges now spend an inordinate amount of time trying to discern whether the law was clearly established 'beyond debate' at the time an officer broke it. But it is a fool's errand to ask people who love to debate whether something is debatable."); *see also* Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1897-1905 (2018) (detailing the courts' patchy methods for determining whether the law is clearly established).

The case before the Court is a microcosm of the "clearly established" problem. One judge believed that any reasonable officer could apply general constitutional principles to know the failures in this case were unlawful. Two other judges remained unconvinced that the law clearly established that Respondents unconstitutionally failed to protect Petitioner. Only this Court can resolve the disarray and confusion in the circuits about how to resolve the question of "clearly established" law in qualified immunity cases.

II. The *Monell* Analysis Within the Tenth Circuit's Split Opinion Conflicts with this Court's Holdings in *Owen v. Independence*, *City of Canton v. Harris*, *Bd. of County Comm'rs v. Brown*, and *Pearson v. Callahan*

This Court has plainly held that governmental entities are not entitled to the protection of qualified immunity. *Owen v. Independence*, 445 U.S. 622, 651, 655-56 (1980). It has further held that in a failure to train case, the governmental entity is on notice of a potential constitutional violation when there is a pattern of tortious conduct or the violation is highly predictable. *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 407-10 (1997). Judge Carson nevertheless suggested requiring a showing

that the government employee violated "clearly established law" would ensure that the governmental entity's "indifference" was actually "deliberate," otherwise governmental entities would be at risk of being liable for *respondeat superior*, solely for their employees' actions. (App. 26a-27a).

This reasoning fails for two reasons. First, this Court has rejected the qualified immunity shield for governmental entities and placed the burden of foreseeability on the governmental entities. Second, this Court carefully installed safeguards to avoid governmental liability solely for the actions of employees—or *respondeat superior* liability—and an additional "clearly established" standard is not necessary to ensure that a governmental entity's indifference was "deliberate," which the facts of this case demonstrate. Injecting the requirement of "clearly established" into the deliberate indifference analysis into *Monell* claims will stagnate the development of constitutional law, in direct conflict with this Court's reliance on that development.

A. ***Governmental Entities Bear the Risk for Their Own Constitutional Violations***

This Court has carefully ensured that governmental entities are not under the doctrine of *respondeat superior*. In *Monell v. Dep't of Social Servs. of N.Y.*, 436 U.S. 658 (1978), this Court held that Congress intended for governmental entities to be liable under Section 1983 for unconstitutional policies or customs. *Id.* at 690-91. Governmental entities, however, could not be held liable only because an employee violated the constitution. For governmental entities, the "constitutional tort" must be caused by an "action pursuant to official municipal policy of some nature." *Id.* at 691. In the instant case, the evidence also showed that DACDC had a custom of not

securing the control panel, which is a straightforward failure to act by the jail itself. Thus, the Tenth Circuit improperly dismissed the *Monell* claim against the County.

Two years after *Monell*, this Court rejected the proposition that a governmental entity sued under Section 1983 was entitled to qualified immunity. *Owen*, 445 U.S. at 651, 655-56. *Owen* involved liability for a direct governmental decision—the plaintiff claimed the governmental entity discharged him without notice and a hearing and in violation of due process protections. *Id.* at 630. The *Owen* Court explained that:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated.

Id. at 651 (citation omitted). The Court determined no countervailing policies outweighed the need for a remedy for constitutional violations, in part because

> consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Id. at 656 (emphasis in original). The financial loss resulting from constitutional violations is more fairly allocated to the "inevitable costs of government," even "where some constitutional development could not have been foreseen by municipal officials." *Id.* at 655. Contrary to *Owen*'s underpinnings, the Tenth Circuit in the present case

required the law to be "clearly established" to prove the *Monell* claim. And just as the *Owen* Court warned, in the present, the County failed to fulfill its duty to consider whether the policies and training relating to the control panel comported with constitutional mandates, and the Petitioner was left remediless.

B. ***The Deliberate Indifference Standard for Governmental Entities Prevents Respondeat Superior Liability***

In addition to acknowledging *Monell* claims addressing unconstitutional policies and customs, in *City of Canton*, this Court determined that a governmental entity could also be liable under Section 1983 for failure to train its employees. *City of Canton, Ohio v. Harris*, 489 U.S. 378, 380 (1989). This Court continued to reject *respondeat superior* liability and required a showing that "the employee has not been adequately trained and the constitutional wrong has been caused by that failure to train." *Id.* at 387. The Court explained that

> it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymaker of the city can reasonably be said to have been deliberately indifferent to the need.

Id. at 390. The requirement in failure-to-train cases for deliberate indifference and causation ensured that the governmental entity was only liable for its own actions. With this reasoning, this Court allowed failure-to-train claims while still rejecting *respondeat liability*.

This Court gave further instruction in *Bd. of County Comm'rs v. Brown*. Recognizing the difficulty in proving that the governmental entity's actions caused the constitutional violation in failure-to-train cases, the *Brown* Court provided

examples for demonstrating the required governmental deliberate indifference. First, the "continued adherence to an approach that [the governmental entity] know[s] or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." *Brown*, 520 U.S. at 407. Second,

> the existence of a pattern of tortious conduct by inadequately trained employees may tend to show that the lack of proper training, rather than a one-time negligent administration of the program or factors peculiar to the officer involved in a particular incident, is the 'moving force' behind the plaintiff's injury.

Id. at 407-08. A third category of cases arise when the failure-to-train claim stems from single-incident violations. In a narrow range of those cases, "a violation of federal rights may be a highly predictable consequence of a failure to equip law enforcement with specific tools to handle recurring situations." *Id.* at 409 (discussing *City of Canton v. Harris*, 489 U.S. 378 (1989)). In each of these three types of cases, the governmental entity had notice that a constitutional violation could arise from its activities, either because the entity knew or should have known, because there was a pattern of tortious conduct, or because the violation was a highly predictable consequence.

After *City of Canton* and *Brown*, policy-and-practice *Monell* claims and failure-to-train *Monell* claims are on equal footing. Both types of claims—for unconstitutional policies and practices and for failure to train—hold governmental entities accountable for their own conduct and not the conduct of employees. The *Owen*

Court's rejection of qualified immunity for *Monell* claims therefore applies equally to unconstitutional policies and the failure-to-train cases, because both types of *Monell* claims hold government entities liable for their own conduct.

Nevertheless, the Second, Sixth, Eighth, and now, Tenth, Circuits have held that for a governmental entity to be liable for failure to train employees and avoid *respondeat superior* liability, the governmental entity must be deliberately indifferent to "clearly established" rights, as set forth in this Court's qualified immunity precedent. *Arrington-Bey v. City of Bedford Heights*, 858 F.3d 988, 995 (6th Cir. 2017); *Szabla v. City of Brooklyn Park*, 486 F.3d 385, 394 (8th Cir. 2007); *Townes v. City of New York*, 176 F.3d 138, 143 (2nd Cir. 1999. Because failure-to-train cases arise from deliberate indifference, the Sixth Circuit, following the Eighth Circuit, has refused to apply this Court's declaration in *Owen* that governmental entities are not shielded by qualified immunity. *Arrington-Bey*, 858 F.3d at 995. According to those circuits, requiring the law to be clearly established "does not give qualified immunity to governmental entities, it simply follows *City of Canton's* and *Brown's* demand that deliberate indifference be deliberate." *See id.* at 995; *Szabla*, 486 F.3d at 394.

This reasoning permeates the Tenth Circuit's decision, even though the *Brown* Court explained that a pattern of tortious conduct or governmental decisionmakers' "continued adherence to an approach that they know or should know has failed to prevent tortious conduct by employees may establish the conscious disregard for the consequences of their action—the 'deliberate indifference'—necessary to trigger municipal liability." 520 U.S. at 407 (citing *City of Canton*, 489 U.S. at 390, n.10).

Deliberate indifference is "deliberate" if the actor consciously disregards the consequences of actions. The *Owen* Court considered, and rejected, the premise that governmental entities are entitled specific notice of potential constitutional violations:

> [E]ven where some constitutional development could not be foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated.

Owen, 445 U.S. at 655. Any additional notice requirement undermines this Court's analysis in *Brown*, as well as the well-established purpose for governmental liability to "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen*, 445 U.S. at 651-52.

The Sixth Circuit in *Arrington-Bey* equated "clear constitutional duties" with "clearly established" law. *Arrington-Bey*, 858 F.2d at 995; *see also Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505 (6th Cir. 2012); *Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007); *Townes v. City of New York*, 176 F.3d 138 (2nd Cir. 1999). This analysis, however, pre-dated this Court's focus, beginning with *Mullenix v. Luna*, 136 S.Ct. 305 (2015), on specific factual context in order to recognize "clearly established" law that overcomes the qualified immunity bar. *See White*, 137 S.Ct. at 551-52 (noting the increase in qualified immunity reversals by this Court). For qualified immunity, the foreseeability of the constitutional violation must be "clearly established" for a reasonable officer to know what to do. In the context of

governmental liability, the burden of foresight, or the lack thereof, is placed on the government, *see Owen*, 455 U.S. at 655, and the protections put in place by the *Brown* Court ensure that the governmental entity will only be liable for its own actions or failures to act. *See Brown*, 520 U.S. at 406-07.

In the present case, as Judge Baldock determined, the evidence demonstrated a pattern of tortious conduct that supported a failure-to-train claim. (App. 55a-56a). DACDC knew that in the previous 18 months, juvenile inmates had attempted to access the control panel to operate doors four times. Once, the inmate was able to open a cell door, but no attack occurred, and another time, the inmate was stopped before he could reach the unlocked panel. (App. 35a-36a). On two occasions, however, the inmates successfully accessed the panel and attacked other inmates. (App. 35a-36a).

Judge Tymkovich discounted two of the attempts, because only two resulted in attacks sufficiently similar to the present circumstances. (App. 13a). Judge Baldock, however, determined that "[t]hese four occasions considered in the aggregate were sufficient to place DACDC on notice that an unsecured control panel in the juvenile pod may result in problems of constitutional proportions for the DACDC, making the questions of causation and deliberate indifference in this case for the jury." (App. 56a). Judge Carson did not consider whether the prior incidents were a sufficient pattern for the purposes of *Brown*, because he determined that the law must be "clearly established" in order to provide the jail with sufficient notice and to avoid *respondeat superior* liability. (App. 25a-27a).

This Court has carefully developed *Monell* law to avoid the very problem that the Tenth Circuit's decision states is solved by inserting a "clearly established" requirement into the deliberate indifference analysis. A pattern of tortious conduct or demonstration that a constitutional violation was highly predictable avoids *respondeat superior* liability and also avoids shielding governmental entities with qualified immunity—a protection this Court has long rejected.

C. ***Requiring Clearly Established Law for Governmental-Entity Liability Undermines the Development of Constitutional Law***

This Court has emphasized the importance of developing constitutional law through Section 1983 claims against governmental entities. *Pearson*, 555 U.S. at 242-43. If the circuits are allowed to continue to avoid analyzing whether governmental entities have violated the Constitution, the law will stagnate. Unless governmental entities are exposed to novel claims for civil rights violations, this Court's vision for the development of constitutional law will be thwarted. In *Pearson*, the Court determined that district courts could resolve the two prongs of qualified immunity in either order. 555 U.S. at 236. In order to forestall arguments that determining the "clearly established" prong first would stunt the growth of our constitutional common law, this Court explained:

> [T]he development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity. Most of the constitutional issues that are presented in § 1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available, such as criminal cases and *§ 1983 cases against a municipality*[.]

Pearson, 555 U.S. at 242-43 (emphasis added); *see Camreta v. Greene*, 563 U.S. 692, 728 (2011); *see also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1814-20 (2018) (explaining that the "clearly established" prong of qualified immunity has the effect of rendering constitutional protections "hollow" (quoting *Mullenix*, 136 S.Ct. at 316 (Sotomayor, J., dissenting))). The Tenth Circuit's opinion, and the decisions of other Circuits, negate *Pearson*'s assurances.

The Tenth Circuit split opinion, and the decisions of other circuits, will breed a governmental-entity liability analysis under Section 1983 that infringes on and undermines this Court's precedent. This Court should grant certiorari to address the divergence of these courts from well-established precedent on an issue of national importance.

III. Petitioner Satisfied the Burden to Show His Constitutional Rights Were Clearly Established Because Respondents Had Ample Time to Evaluate the Circumstances and Make Reasoned Decisions Based on More General Constitutional Principles

It is a well-established general constitutional principle that prison officials must act when they have knowledge of a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 842 (1994). When they have that knowledge, "the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *District of Columbia v. Wesby*, 138 S.Ct. at 590. The DACDC jailers knew of the risk posed by both the unlocked panel and the particular inmates who specifically threatened Petitioner. Nevertheless, Respondents did not secure the panel or the violent and dangerous inmate who was out of his cell.

No necessity or exigency justified these failures to act to address the known and substantial risk to Petitioner's safety. As Judge Baldock explained, the right established in *Farmer* "is not extremely abstract or imprecise under the facts alleged here, but rather is relatively straightforward and not difficult to apply." (App. 52a (quoting *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1198-99 (10th Cir. 2019). The Tenth Circuit should not have required a fact-to-fact comparison of existing precedent. The violation was obvious, and *Farmer* provided the clearly established law on the that morning Petitioner was beaten in his cell.

The Tenth Circuit's own established on-point precedent and the weight of other circuits also clearly established the law. The Tenth Circuit opinion observed that circuit law clearly established that in jails, "credible threats merit reasonable response," citing *Berry v. Muskogee*, 900 F.2d 1489 (10th Cir. 1990) and *Howard v. Waite*, 534 F.3d 1227 (10th Cir. 2008). (App. 20a). The Tenth Circuit nevertheless distinguished those cases factually, because Respondents separated Petitioner from the three threatening inmates and three guards were present while the inmate accessed the panel and unlocked the doors. (App. 18a-20a). Respondents, however, achieved separation between the violent inmates and Petitioner, by *locking* the cell doors, and the three guards watched television rather than take any action to make sure those doors stayed locked. The present case involved a credible threat and an unreasonable response, which the Tenth Circuit acknowledged is a clearly established constitutional violation.

Four other circuits have established the specific obligation to protect vulnerable inmates from violent inmates by keeping cell doors locked. *Junior v. Anderson*, 724 F.3d 812 (7th Cir. 2013) (holding an inference of deliberate indifference could arise when guard knew the doors were unlocked, left her post, and allowed inmates out of their cells to congregate in an unmonitored area); *Marsh v. Butler Cnty., Ala.*, 268 F.3d 1014, 1228 (11th Cir. 2001) (*en banc*) (permitting a claim against a jail for failure to maintain the jail, because "that the locks on the doors did not work prevented the isolation of prisoners from each other and gave attackers ready access to [the p]laintiffs") (abrogated on other grounds by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561-63, (2007); *Newman v. Holmes*, 122 F.3d 650, 653 (8th Cir. 1997) (affirming the jury's verdict that an officer who opened a cell door without proper precautions, releasing a known-dangerous inmate who attacked other inmates recklessly disregarded a known, excessive risk to inmate safety); *Street v. Corrs. Corp. of Am.*, 102 F.3d 810, 812-13 (6th Cir. 1996) (permitting constitutional claims against an officer who knew of a specific threat to an inmate but nevertheless opened all of the doors in a unit, resulting in an assault on the threatened inmate); *see also Walton*, 752 F.3d at 1114-15, 1123 (allowing a vulnerable inmate to assert a claim against an officer who left the cell doors unlocked, resulting in a known sex offender attacking him); *Erickson v. Holloway*, 77 F.3d 1078, 1079-81 (8th Cir. 1996) (permitting a claim against an officer who knew of a threat, left the control panel accessible to inmates, and did not investigate a violent inmate's movement toward the unlocked area the officer thought was locked).

These cases demonstrate a clear weight of authority from other circuits that jailers have the obligation to protect vulnerable inmates by keeping cell doors locked. *See Irish*, No. 20-1208, at *23, 2020 U.S. App. LEXIS 35054 (explaining that a robust consensus from other circuits does not require agreement of every circuit and that "sister circuit law is sufficient to clearly establish a proposition of law when it would provide notice to every reasonable officer that his conduct was unlawful"). Given the opportunity for Respondents to apply general constitutional principles to the circumstances, the existing precedent would alert a reasonable jailer that the failure to prevent inmates from accessing cell doors would violate Petitioner's clearly established rights. This Court should grant certiorari to resolve whether the Tenth Circuit wrongly disregarded the factual context of this case and whether, in the absence of exigency, necessity, or justification, materially factually similar precedent was necessary to show that the jailers' acts and failures to act were obviously or clearly unconstitutional.

CONCLUSION

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

Respectfully submitted,

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