No. 20-872

In The
Supreme Court of the United States

SHANE DAVIS,

Petitioner,

vs.

MIKE CARROLL, WILEEN R. WEAVER,
and PAULINE RILEY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED
(as restated by Respondents)

The Court of Appeals and District Court below, in properly applying the clear standard for disposition of qualified immunity cases, and in drawing all reasonable inferences in favor of Petitioner, appropriately determined that the actions of the Respondents did not amount to "deliberate indifference," and, therefore, they did not violate any Constitutional right allowing them qualified immunity.

The Court of Appeals and District Court below had properly analyzed whether the law was "clearly established" to a reasonable social worker as of the time of the incident in question, and such courts did not improperly inject an element of factual reasonableness in allowing the Respondents qualified immunity.

There is not a genuine split amongst the lower courts on the application and disposition of the standards and law in qualified immunity cases.

As all of Petitioner's inquiries and justifications go to the second prong of the analysis, a ruling in his favor finding that the law was clearly established would not change the outcome of the Court of Appeals and District Court decisions. Since a non-movant must prove *both* that the Respondents violated Plaintiff's constitutional rights, and that they violated "clearly established law," the Petition as presented fails and should be denied. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

LIST OF PARTIES

The Respondents, Mike Carroll, Wileen R. Weaver and Pauline Riley, were former employees of the Florida Department of Children and Families ("DCF"), an agency of the State of Florida. In the United States District Court for the Middle District of Florida, all three Respondents were sued in their official capacity. However, Respondents Weaver and Riley were also sued in their individual capacity, for which summary judgment was granted in their favor in the district court and circuit court.

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STATEMENT OF THE CASE

This case stems from the tragic events following the birth of J.D.D. in June 2000. J.D.D. was born to a mother who was reportedly addicted to crack-cocaine, and cocaine was found in his system at birth. *App*. B at 18. He was immediately removed from his mother's custody and spent one week in the hospital at Bayfront Medical Center prior to entering the care of DCF. *App*. B 18. Once in DCF custody, J.D.D. was taken for regular doctor visits with Dr. Richard Gonzalez. *App*. B at 22. According to the Cliffords, Dr. Gonzalez was aware that J.D.D. was born with cocaine in his system and that his mother was a crack addict and had little to no prenatal care. *App*. B at 23.

Approximately fourteen years later, J.D.D. was experiencing symptoms of thrush and was seen by Dr. Carina Rodriguez. *App*. B at 23. Dr. Rodriguez ultimately diagnosed J.D.D. with HIV that had progressed to AIDS. *App*. B at 23. Dr. Tureen, an expert for Petitioner, reviewed J.D.D.'s medical records and opined that nothing in the records would have suggested ordering an HIV test during J.D.D.'s first fourteen years of life, and therefore during the time in which DCF had custody. *App*. B at 43. Moreover, Dr. Tureen testified that roughly between twenty and twenty-five percent of children contract HIV perinatally. *App*. B at 42. Significantly, no direct evidence was ever presented that J.D.D.'s mother ever had HIV and/or AIDS.

In this proceeding, Petitioner presents issues that are out of context with the issues raised on appeal

before the Eleventh Circuit, and therefore those issues should be considered waived and this Petition should be denied. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). For instance, the point raised by Petitioner before the Eleventh Circuit was:

> "The district court reversibly erred in granting summary judgment for the defendants and denying summary judgment for Plaintiff on the ground of qualified immunity as the record contains circumstantial evidence of the defendants' subjective awareness of Plaintiff's serious medical need, creating a genuine issue of material fact from which a reasonable jury could find the defendants acted with a deliberate indifference."
>
> *Resp. App*. C at 5.

As demonstrated by the above point to the Eleventh Circuit, the clearly established prong was not challenged. Any issues with "circumstantial evidence" are not even referenced in the present Petition. "Ordinarily, this Court does not decide questions not raised or resolved in the lower courts." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). For all of the above stated reasons, this Petition should be denied.

Respondents' Objections to Petitioner's Statement of Case and Facts

Petitioner repeatedly relies upon the 2018 opinion of Dr. Jay Tureen, opining that there is a six-week period following the birth of a perinatally predisposed

HIV child wherein the transmission could potentially be stopped (*App*. B at 10), as if Dr. Tureen's 2018 opinion is somehow a standard that would have been applied to Weaver and Riley in the year 2000. Petitioner mistakenly summarizes and misapplies Dr. Tureen's professional medical opinion. *Pet*. at 6.

Petitioner suggests that the "six-week period" opinion set forth by Dr. Tureen is a well-established principle and norm, and that the Respondents should have been aware of that opinion 18 years earlier in June of 2000 – despite the fact that the opinion was not offered until 2018. *App*. B at 10. Any reference to the "six-week period" is immaterial to any issues on summary judgment and irrelevant for this Court's determination. But even accepting Dr. Tureen's opinion, so long as "a reasonable officer could have believed that his conduct was justified," a plaintiff cannot "avoi[d] summary judgment by simply producing an expert's report . . . " *City and County of San Francisco, California v. Sheehan*, 575 U.S. 600, 135 S.Ct. 1765, 1778, 191 L. Ed. 2d 856 (2015).

Petitioner further claims that Weaver was "aware" that the law required laboratory testing, and implies that she also knew and understood that the law had applied to her. *Pet*. at 6. That characterization is misstated. Weaver acknowledged only that she was aware of a state requirement for laboratory testing – but she never admitted that the law had actually applied to her and/or other DCF social workers. In fact, her testimony that "she doesn't do that" demonstrates her

complete misunderstanding of the law.[1] Government officials are still entitled to qualified immunity, despite a mistake of law, a mistake of fact, and/or a mistake based upon both. *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S.Ct. 808 (2009).

A more in-depth look at Weaver's testimony can clarify her understanding at the time. For example, Weaver testified:

> Q. Were you aware of the fact between April 1 of 2000 and January 1 of 2001, that such medical screening shall be performed by a licensed health care professional and shall be to examine the child for injury, illness, and communicable disease?
>
> A. Yes.
>
> *Pet*. at 6 FN 1.

However, that testimony is presently being taken out of context by Petitioner. According to Petitioner, Ms. Weaver is essentially admitting she was aware of the law and the law's application to her. That's inaccurate. Rather, a reading of Ms. Weaver's testimony as a whole clearly shows that while she understood that a "*medical* screening shall be performed by a *licensed*

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[1] Weaver's testimony that "she doesn't do that" illustrates that she was not aware that the law directly applied to her, instead believing that it was the responsibility of others. Additionally, Petitioner has not shown, or otherwise contradicted the lower courts, in that a state law doesn't necessarily apply to each and every social worker. Because the state must comply, doesn't mean every agent of the state is therefore subject to that law.

health care professional . . .," she did not understand that the law could possibly apply to her. In fact, her later testimony, which is included below, confirms same.

> Q. Okay. And once again – I believe that I had read you the administrative code – it was your belief that at the time, throughout the year of 2000, you did not have the authority to order any type of health screening?
>
> A. No.
>
> Q. And we can then assume that based upon that, even though specifically you don't know in this case, as a general rule you would not have authorized any type of health screening on any child under your care?
>
> A. I don't have authorization.
>
> Q. Based upon that, you would not have ordered any health screening on behalf of any child in the year 2000?
>
> A. No.
>
> *Resp. App*. A at 2.
>
> Q. But you don't believe you had the authority that if you thought, based upon the circumstances of the child's birth, to ask for an HIV test?
>
> A. No.
>
> Q. All right. No, as in you did not have the authority.
>
> A. No.
>
> *Resp. App*. A at 3.

Thus, Weaver's testimony, taken in full context, demonstrates a fundamental confusion on what was or was not required of a social worker during the relevant time frame.

REASONS FOR DENYING THE PETITION

I. The Supreme Court has a clear standard for resolving qualified immunity cases.

In the past ten years, this Court has heard thirty-one cases involving various issues with qualified immunity for state officials, including *Tanzin v. Tanvir*, 141 S.Ct. 486 (2020); *Taylor v. Riojas*, 141 S.Ct. 52 (2020); *Baxter v. Bracey*, 140 S.Ct. 1862 (2020); *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500 (2019); *Sause v. Bauer*, 138 S.Ct. 2561 (2018); *Kisela v. Hughes*, 138 S.Ct. 1148 (2018); *D.C. v. Wesby*, 138 S.Ct. 577 (2018); *Ziglar v. Abbasi*, 137 S.Ct. 1843 (2017); *Cty. of Los Angeles, Calif. v. Mendez*, 137 S.Ct. 1539 (2017); *White v. Pauly*, 137 S.Ct. 548 (2017); *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153 (2016); *Mullenix v. Luna*, 577 U.S. 7 (2015); *Taylor v. Barkes*, 575 U.S. 822 (2015); *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014); *Johnson v. City of Shelby, Miss.*, 574 U.S. 10 (2014); *Lane v. Franks*, 573 U.S. 228 (2014); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Tolan v. Cotton*, 572 U.S. 650 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013); *Lefemine v. Wideman*, 568 U.S. 1 (2012); *Reichle v. Howards*, 566 U.S. 658 (2012); *Filarsky v. Delia*, 566 U.S. 377 (2012); *Rehberg v. Paulk*, 566 U.S. 356

(2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012); *Davis v. United States*, 564 U.S. 229 (2011); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011); *Camreta v. Greene*, 563 U.S. 692 (2011); *Ortiz v. Jordan*, 562 U.S. 180 (2011). A review of all of those cases shows that there is no inconsistencies or discrepancies with the Court's disposition analysis for qualified immunity cases. Instead, this Court has been consistent throughout its holdings and should not jeopardize its long standing history by granting certiorari here.

This Court has reiterated time and time again the *two-prong test* for whether a state agent is entitled to qualified immunity: (1) "whether the plaintiff's allegations, if true, establish a constitutional violation" *Hope v. Pelzer*, 536 U.S. 730, 736 (2002), and (2) whether the constitutional violation was clearly established to reasonable official at the time. *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The standard for medical deliberate indifference cases brought by prisoners under the Eighth Amendment applies as well to non-prisoner claims brought under the Fourteenth Amendment. *Yeomans v. Gagnon*, 626 F.3d 557, 566 (11th Cir. 2010). Foster children fall into the latter category as they have a fundamental right to physical safety and to be free from unnecessary pain. *Taylor v. Ledbetter*, 818 F.2d 791, 794-795 (11th Cir. 1987). However, liability upon a state official will only be imposed upon a proof and a showing that the official acted with a deliberate indifference to the welfare of the child. *Id.* at 797. Those clear standards, set out over the years by this Court

and its lower courts, has not been disturbed and remains in place today. The lower courts in this matter properly analyzed the facts and circumstances of this case and correctly affirmed a finding of qualified immunity for the Respondents. There is no compelling need for this Court to re-assert its position on qualified immunity.

II. In Petitioner's Questions Presented, he Mischaracterizes and Demonstrates a Fundamental Misapprehension of the Analysis and Decisions of the Lower Courts, Which Correctly Analyzed and Ruled Finding Qualified Immunity for the Respondents.

Petitioner asks "whether qualified immunity absolves a defendant of § 1983 liability, despite knowledge of clearly established law, unless the plaintiff shows the violation factually unreasonable." *Pet*. at i. While the question presented appears limited to the second prong of the qualified immunity analysis, this response will, in an abundance of caution, address both prongs, including the concept of factual unreasonableness.

To defeat qualified immunity in an instance like this, the Plaintiff must show that the Respondents acted deliberately indifferent to the serious medical needs of J.D.D. *Estelle v. Gamble*, 429 U.S. 97, 104 (1976). A serious medical need is one that has been diagnosed by a physician or one that "is so obvious that even a lay person would easily recognize the necessity

for a doctor's attention." *Farrow v. West*, 320 F.3d 1235, 1243 (11th Cir. 2003). This Court has made it clear that an official only acts with a deliberate indifference when he or she disregards a risk of harm of which he or she is actually *aware*. *Maldonado v. Snead*, 168 F.App'x 373, 379 (11th Cir. 2006), *citing Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970 (1994).

Here, there is no dispute that J.D.D.'s serious medical condition was not diagnosed by a physician at or near the time of his birth. *App*. B at 18-19. Therefore, to defeat qualified immunity, and show a deliberate indifference, Petitioner was required to show that the risk of harm to J.D.D. was *so obvious* that even a "lay person would easily recognize" the necessity for a doctor's attention. *Farrow*, 320 F.3d at 1243. However, none of the people involved here were actually aware of the risk, nor did they infer or otherwise recognize the risk; neither the doctors, hospital staff, defendant social workers, nor J.D.D.'s adoptive family. Even mistakes of law of fact are protected under qualified immunity. *See*, *e.g.*, *Pearson*, 555 U.S. at 231; and *Butz v. Economou*, 438 U.S. 478, 507, 98 S.Ct. 2894 (1978).

The Petitioner further argues that there is a split between the Courts regarding whether there is a reasonableness standard that should be applied to the second prong of the two-step qualified immunity analysis. In support of that theory, Petitioner cites to various cases, seven of which were decided either before, or during the same year, as this Court's vital decision in *Pearson*, 555 U.S. 223 (2009). Petitioner's charge that the Eleventh Circuit improperly implemented a

reasonableness standard to the second prong of the qualified immunity analysis is seemingly misplaced when considering the language of *Pearson*:

> "Turning to the conduct of the officers here, we hold that petitioners are entitled to qualified immunity because the entry did not violate clearly established law. An officer conducting a search is entitled to qualified immunity where clearly established law does not show that the search violated the Fourth Amendment. *See Anderson*, 483 U.S., at 641, 107 S.Ct. 3034. *This inquiry turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." Pearson v. Callahan*, 555 U.S. 223, 243–44, 129 S.Ct. 808, 822, 172 L. Ed. 2d 565 (2009) (emphasis added), *citing Wilson v. Layne*, 526 U.S. 603, 614, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (internal quotation marks omitted); *see Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d. 666 (2002) ("[Q]ualified immunity operates to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful" (internal quotation marks omitted))."

Pearson, 555 U.S. at 243. This Court's decision in *Pearson* makes it clear that there is an element of reasonableness applied in the second prong of the qualified immunity analysis. Accordingly, the Eleventh Circuit held:

> We can assume for argument's sake that J.D.D. 'should' have been considered at risk.

> But 'should' indicates a recommendation, not a requirement. Again, hospital staff and doctors – those who, as the regulation indicates, are often best positioned to detect the need for testing – also did not see a need for HIV screening. Simply put, none of the statutes or regulations command Weaver and Riley to detect the HIV risks and request screening.
>
> At bottom, no federal law mandated HIV screening here – much less 'clearly established' such a requirement. Weaver and Riley are therefore immune from suit. We AFFIRM the judgment of the district court.

App. A at 14. Accordingly, *Pearson* makes it clear that the premise of the Petition in this case is unfounded and should be denied.

In addition, Petitioner perceives a "dispute" amongst the lower courts where one does not exist regarding the qualified immunity analysis. However, as this Court's precedent makes clear, the legal analysis is well defined, as stated above. In *Pearson*, this Court reiterated the first and second prongs, one of which includes an analysis of whether the conduct violated one's constitutional rights, and the other whether the law was clearly established at the time of the events. *See Pearson supra*. Under Petitioner's theory, social workers would be required to not only request, but to mandate that medical professionals conduct a plethora of testing for all possible diseases, perhaps hundreds or thousands, regardless of whether or not the medical professional agreed on the need for testing.

Florida law, as the Eleventh Circuit correctly pointed out, simply authorizes a test and explains who is permitted to perform that test. This is far from creating a mandate, let alone making it a violation of a minor's Constitutional rights for the social worker not to request a certain test. Simply put, Petitioner argues that the risk was "obvious" to any reasonable person. Yet Petitioner cannot explain and does not even attempt to offer a justification as to why none of the medical professionals at the hospital, or Dr. Gonzalez, were aware of the so called "obvious" risk. In fact, the risk was not even obvious to the Davises who were also aware of all the facts, and never sought any kind of HIV testing. Even in Dr. Tureen's experience, when a child was born drug dependent the hospital would perform an HIV test – not the social workers. *Resp. App*. B at 4.

Additionally, and despite Petitioner's contention otherwise, the district court had resolved the factual disputes for Petitioner. *App*. B at 18; *see, also, App*. B at 21; *App*. B at 25 FN5; *App*. B at 27; *App*. B at 41-42; *App*. B at 43.

It is undisputed that J.D.D. remained in the hospital for seven days following his birth. *App*. B at 18. It is further undisputed that hospital staff were aware of the fact that J.D.D. was exposed to cocaine at birth through his mother, had low oxygen and low birthweight, that A. Davis had little to no prenatal care, and that prior children had been removed from her custody. *App*. B at 44. It is further undisputed that J.D.D. didn't have any physical symptoms of HIV. *App*. B at 43.

Lastly, Dr. Tureen testified that the probability of transmission from an HIV infected mother to a newborn infant is roughly twenty to twenty-five percent. *App*. B at 42.

Critically, as Petitioner's expert, Dr. Tureen had reviewed the available medical records for J.D.D., including a blood test with an abnormal platelet count, and testified that nothing in those records would have caused him to order an HIV test. *App*. B at 43. Based on this information, the Eleventh Circuit correctly determined that the risk was not obvious, nor did the Respondents actually draw the inference, and therefore there was no violation of J.D.D.'s Constitutional rights.

> "Weaver testified at her deposition that she would not have requested an HIV test because she did not believe that she had the ability to authorize a medical screening or order an HIV test for a child without a court order. The Court finds that any mistaken belief Weaver may have had regarding the extent of her authority under the law was just that – a *mistake*. This does not amount to deliberate indifference. Further, since the evidence does not establish that Weaver had subjective knowledge of J.D.D.'s need to be tested for HIV, any mistake regarding whether she was authorized to do so is irrelevant."

App. B at 40 FN4. Since qualified immunity protects all but the plainly incompetent or those who knowingly violate the law, it cannot be said that Weaver, or let alone Riley, ever were deliberately indifferent to the

serious medical needs of J.D.D. or that they violated clearly established law. *Kisela*, 138 S.Ct. at 1152.

Petitioner further argues that the Eleventh Circuit had "ignored" Weaver's testimony. *Pet.* at 8. While the Eleventh Circuit may not have specifically mentioned the cited portion Weaver's testimony, it did specifically address the statutory provision relied upon by Petitioner and found that it was not obligatory to social workers. Rather, the Eleventh Circuit explained who can perform the medical screening.

> "Davis argues that the statute 'clearly and unequivocally states DCF 'shall' have the child examined for illness and 'communicable diseases." We do not read the statute to authorize screening in one sentence only to mandate screening in the next. The 'shall be' language does not obligate social workers to initiate any screening; rather, that language explains who can perform medical screening and what kind of screening the department is authorized to request. Far from creating a clear requirement to initiate screening, the language becomes relevant only after a social worker decides to pursue screening."
>
> *App*. A at 13.

The Eleventh Circuit's interpretation of that law is absolutely correct and consistent with Weaver's testimony. Looking back to the second prong of the relevant analysis, "[c]learly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand

that what he is doing'" is unlawful. *D.C.*, 138 S.Ct. at 589 (2018). Weaver's testimony certainly does not arguably establish or demonstrate that she "understood" what she was doing was unlawful, as required by *D.C. v. Wesby*. *Id.*

In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *Id*. As stated above, Weaver testified that she was aware that a screening shall be performed by a health care professional – which she is not. Weaver was never asked, nor did she ever admit, that the statute applied to her or Riley. Even if Weaver had admitted it applied to her, the law would not have mandated she act, and therefore that law cannot be used to prove the "clearly established" prong. But even considering her testimony, it doesn't show "beyond debate" that Weaver understood that the law applied to her – especially considering that none of the court decisions to date opined that it did.

III. Petitioner's Reasons for Granting the Petition Mischaracterize the Analysis of the Courts Below and are Otherwise Insufficient.

a. The Circuit Court and District Court did not improperly inject a consideration of 'factual reasonableness' into their decision that the law was not clearly established.

Petitioner's interpretation of the current status of the law regarding the second prong of the qualified

immunity analysis is misplaced. Neither the circuit court nor the district court below incorrectly injected a consideration of factual reasonableness into the second prong and a review of those Orders clearly confirms same. *App*. A & B. In addition to the clear language of the decisions of the lower Courts, there is not a split amongst the circuits in this regard. In fact, as recently as 2018, this Court reiterated its position as to the clearly established prong, stating:

> "We have repeatedly stressed that courts must not 'define clearly established law at a high level of generality, *since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced*.'"

D.C., 138 S.Ct. at 590 (emphasis added).

Contrary to Petitioner's assertions, the question of whether a defendant acted reasonably has been, and remains, part of this Court's qualified immunity analysis. *Id*. Petitioner relies on the Fifth Circuit's decision in *Hare v. City of Corinth*, 135 F.3d 320 (5th Cir. 1998), for the position that the Fifth Circuit incorrectly added a second question of reasonableness to the second prong of the qualified immunity analysis. *Pet.* at 13. However, a detailed review of *Hare* does not support that oversimplified contention.

While the general holding of *Hare* does imply a second step to the second prong, a closer read is required. In *Hare*, the court held, in part, that a pretrial detainee's right, under due process clause, to "at

least be free from law enforcement officials deliberate indifference to detainee's serious medical needs was clearly established at time of detainee committed suicide. . . ." *Hare*, 135 F.3d at 326-328. But that holding enunciated that the bare minimum standard of deliberate indifference to serious medical needs was clearly established – a point that is not disputed. But this Court has already addressed that issue since holding that such a level of generality was not proper. *D.C.*, 138 S.Ct. at 590.

It is not uncommon for the court to narrow the scope of their holdings over the years. But that does not disrupt the notion that an element of factual reasonableness is considered in deciding the second prong of the qualified immunity analysis. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982); *see also Pearson*, 555 U.S. 223 (2009). "Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Id.* The *Hare* Court went further and explained the concept of the reasonableness analysis, and in doing so, even differentiated the reasonableness aspect of the first and second prong of the analysis, stating:

> "Obviously, the analysis for objective reasonableness is different from that for deliberate indifference (the subjective test for addressing the merits). Otherwise, a successful claim of qualified immunity in this context would

> require defendants to demonstrate that they prevail on the merits, thus rendering qualified immunity an *empty doctrine.*"

Hare, 135 F.3d at 328. The *Hare* Court further identified the purpose of the underlying objective test, stating:

> "The stated purpose underlying adoption of an *objective* test was to 'permit the resolution of many insubstantial claims on summary judgment' and to avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases in which the legal norms the officials are alleged to have violated were not clearly established at the time the events occurred."

Hare, 135 F.3d at 327, *citing Harlow*, 457 U.S. at 817-818.

What were the factual considerations of the Eleventh Circuit in the case below? According to the Petitioner, the Eleventh Circuit described what happened, "considering whether the defendants could reasonably have decided not to test the infant J.D.D." *Pet*. at 13-14. But the Eleventh Circuit clearly and unambiguously stated that "[n]one of the provisions Davis cites, as the district court put it, '*mandate* HIV testing specifically, nor do they unmistakably instruct that the failure to refer a child for such a test is illegal.'" *App*. A at 12 (emphasis added). While Petitioner attempts to insert a factual consideration, that is not the case. Each of the courts below had found no basis for any of the laws or precedent cited by Petitioner. Interestingly, Petitioner

fails to cite to the Eleventh Circuit language upon which he relies. *Pet*. at 14.

Accordingly, there is no clarification or guidance necessary to establish this Court's standard for determining qualified immunity cases, nor to resolve any perceived dispute amongst the lower courts.

b. Any Perceived Split Amongst the Circuits is not Relevant to the Lower Courts' Decision in this Case.

Petitioner also argues that the lower courts are "split" on whether factual reasonableness is a separate third element that must be proven to overcome qualified immunity. In coming to this ill-perceived conclusion, Petitioner misconstrues the Eleventh Circuit's holdings believing that the court found the law was "*not* clearly established" because it was not shown that "defendants acted upon it unreasonably." *Pet*. at 15. But the Eleventh Circuit did not appear to have considered the reasonableness of the defendants' actions in deciding the clearly established prong, instead holding: "[s]till, we cannot say that this language puts social workers on notice that they must diagnose an HIV risk and pursue screening, or else face personal financial liability." *App*. A at 12. At no point in the Eleventh Circuit's opinion regarding the second prong of the qualified immunity analysis are the actions of the Respondents considered. In conclusion, the Eleventh Circuit stated: "At bottom, no federal law mandated HIV

screening here – much less 'clearly established' such a requirement." *App*. A at 14.

As pointed out by Petitioner, the Second, Sixth, and Ninth Circuits have, at times, utilized an additional step in the clearly-established prong, looking to the objective reasonableness of the officer's actions. The standard for judging the objective reasonableness of an officer's actions has long been and remains today the "totality of the circumstances." *Torres v. City of Madera*, 648 F.3d 1119, 1129 (9th Cir. 2011).

Below, however, the Eleventh Circuit did not utilize the third step analysis in the present case. There was no analysis of the reasonableness of Respondents' conduct in deciding the second prong of the qualified immunity analysis, as it never came to that level or near it. The Eleventh Circuit looked at any relevant or similar precedent, including *Doe 1-13 ex rel. Doe, Sr. 1-13 v. Chiles*, 136 F.3d 709, 719 (11th Cir. 1998), federal statutes such as 42 U.S.C. § 1396a, as well as state law including Fla. Stat. § 39.407(1), in coming to their conclusion. The circuit court did not, however, look to the reasonableness of their conduct to decide whether the law was clearly established.

The only example provided by Petitioner is when the Eleventh Circuit purportedly asked, "in effect, '[w]as it reasonable for Weaver to disregard the EPSDT statutes' clear requirement that she not withhold 'laboratory tests?' " *Pet*. at 18. Although written in quotations in the Petition, this question is nowhere to be found anywhere in the Eleventh Circuit's opinion

regarding whether the law was clearly-established. Moreover, it's difficult to ascertain the source of such position in the record below. In this regard, the Eleventh Circuit reviewed the EPSDT statutes and even discussed the decision in *Doe 1-13* – and in that effect differentiated between a duty of the state versus the duty of an individual social worker. *App*. A at 12-13. A mandate on the state is not a mandate on individual social workers. As demonstrated herein, any perceived split amongst the lower courts, is not applicable to the decision of the Eleventh Circuit.

c. The Eleventh Circuit Below Properly Analyzed the Potential Factors of Notice.

Petitioner next asserts that according to *Hope v. Pelzer*, in determining whether the law was clearly-established, courts should perform a "totality-of-notice" analysis. *Pet*. at 24. However, there is no such "totality-of-notice" standard set forth in *Hope*. In *Hope*, similar to in the present case, the Court looked at multiple elements of potential notice, including Eleventh Circuit precedent, Alabama Department of Corrections (ADOC) regulations, and a Department of Justice report specifically informing the ADOC of the constitutional infirmity in its use of hitching posts. *Hope*, 122 S.Ct. at 2516.

As in *Hope*, the Eleventh Circuit here looked to federal and state statutes, as well as a repealed administrative code provision. *App*. A at 12-14. But in *Hope*,

the Department of Justice had previously and *specifically* informed the ADOC that their actions in using hitching posts were unconstitutional. *Hope*, 122 S.Ct. at 2518. In fact, the DOJ had *specifically* told the ADOC to cease its use of hitching posts. *Id.*

Petitioner even goes as far as to interpret the *Hope* holding as requiring a collective view of the potential factors of notice, stating: "*Hope* held broad case precedent, an Alabama Department of Corrections rule, and a Department of Justice report *together* showed officials were on fair notice the right at issue was clearly established, prohibiting qualified immunity. 536 U.S. at 741-744." *Pet*. at 26. But a review of the plain text in *Hope* shows that the decision never used the word "together" and it cannot be read to have applied the analysis any differently than the Eleventh Circuit had in the present case. The primary difference is that in *Hope*, the Court found that all three of the factors of notice would have put the defendants in that case on notice. *Hope*, 536 U.S. at 741-742. On the contrary, in the present case, the Eleventh Circuit declined to find that any of the precedent, statutes, or administrative provisions would have provided notice to the defendants. App. A.

> Even if there might once have been a question regarding the constitutionality of this practice, the Eleventh Circuit precedent of *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under

> the circumstances alleged by Hope was unlawful.
>
> *Hope*, 122 S.Ct. at 2518.

While "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Kisela*, 138 S.Ct. at 1152. "In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law." *Id.* "This Court has 'repeatedly told courts – and the Ninth Circuit in particular – not to define clearly established law at a high level of generality.'" *City and County of San Francisco*, 575 U.S. 600 (2015) (*quoting Ashcroft*, 563 U.S. at 742).

The Eleventh Circuit conducted a full and complete analysis looking to all potential aspects of notice, and in turn, discounting each for specific reasons. But Petitioner continues to assert that the Eleventh Circuit wrongfully cited to *Davis v. Scherer*, 468 U.S. 183, 194 (1984), for the position that an officer does not lose their qualified immunity merely because they violate a statute or administrative provision. *Pet*. at FN6. However, Petitioner voices this contention despite the *Davis v. Scherer* opinion holding: "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." *Davis v. Scherer, supra*.

Petitioner further relies on *Taylor v. Ledbetter* as precedent for the clearly-established prong of the

qualified immunity analysis. *Taylor*, 818 F.2d 791 (1987). In *Taylor*, a foster child brought suit against Georgia state and county officials to recover for injuries the child received while in custody of abusive foster parents. *Id.* The claim in *Taylor* was that the state and county officials had failed to properly investigate the foster family before placing the child there, that they knew, or should have known, that the foster parents were unfit to be trusted with the child's care, and that they failed to maintain proper supervision of the foster home.

In this regard, Petitioner asserts that *Taylor* stands for the position that "defendants had fair warning that their conduct" (in doing nothing to protect the children, given the circumstances) violated clear federal law. *Pet*. at 25. *Taylor*, however, is substantially different and easily distinguishable from the present case. First, the presupposition of the Taylor case is that the state agents did "nothing" to protect the child. In the present case, it is undisputed that Respondents had ensured that the child was taken to regular and frequent medical appointments, including those with Dr. Richard Gonzalez. *App*. B. Also, Taylor was decided on a motion to dismiss, whereas the present case was decided following a full evidentiary analysis followed by summary judgment. *Id.* Lastly, Taylor involved the decision of where to place children in foster care, and the proper maintenance of the child's care. *Id.*

In contrast, the present case involves a complex situation on whether or not social workers with no medical training should have known require medical

professionals to conduct an HIV test on a child born to a drug-dependent mother.

Yet, as mandated in *Hope*, "[f]or a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 536 U.S. at 739. In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." *Reichle*, 566 U.S. at 664, *citing Ashcroft*, 563 U.S. 731 (2011). This "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can "'reasonably . . . anticipate when their conduct may give rise to liability for damages.'" *Id.*, *citing Anderson*, 483 U.S. at 639, *quoting Davis*, 468 U.S. at 195. Given this standard, and based on the various factors of potential notice, how could Respondents in the present case read *Taylor* as requiring them to medically diagnose and test J.D.D. based upon the limited information they knew, including what the medical professionals knew, or face personal exposure and financial liability?

Petitioner next argues that the totality of notice, including the federal statutes, state statutes, administrative rules, and agency report, all together arguably gave Respondents notice of J.D.D.'s right to laboratory testing, including HIV, under EPSDT statutes and the Fourteenth Amendment. *Pet*. at 28. However, to that effect, only one of those includes a potential right to laboratory testing – yet Petitioner would present it as

though they all collectively do. And even so, the Eleventh Circuit has addressed the federal statute providing a right to laboratory testing, stating:

> That level of clarity is not present here. None of the provisions Davis cites, as the district court put it, '*mandate* HIV testing specifically, nor do they unmistakably instruct that the failure to refer a child for such a test is illegal.' We do not doubt that a state plan's required coverage of 'laboratory tests' includes screen for HIV. Still, we cannot say that this language puts social workers on notice that they *must* diagnose an HIV risk and pursue screening, or else face personal financial liability. *App*. A at 12.

The District Court further referenced that state officials "are subject to a plethora of rules, often so voluminous, ambiguous, and contradictory, and in such flux that officials can only comply with or enforce them selectively. *App*. B at 54, *citing Davis v. Sherer*, 468 U.S. 183, 194 (1984). Nor do courts expect state officials to be aware of *every* regulation that indirectly may give rise to a constitutional claim. *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1302-1303 (11th Cir. 1998). After discussing J.D.D.'s adoptive father's testimony that he recalled taking J.D.D. to various doctor appointments with Dr. Gonzalez from 2000 to 2003, together with the language of the EPSDT statute, the District Court held**:**

> Nowhere in the Medicaid Act does it clearly establish that a DCF worker who fails to specifically refer a foster child for HIV screening,

> despite knowledge that the child's birth mother (and, by extension the child), has certain risk factors for HIV has violated the child's statutory rights. *App*. B at 55.

Therefore, and based upon the foregoing, the lower Courts properly analyzed the elements of notice and as such this petition should be denied.

d. The opinion below clearly misapprehends standards set by the court's precedents for disposing of qualified immunity cases.

Petitioner next alleges that the lower court misapprehended this Court's standard for deciding qualified immunity cases on summary judgment. In support of this position, Petitioner relies primarily upon this Court' decision in *Tolan v. Cotton*, 572 U.S. 650 (2014), for the position that the lower court decides contested facts in favor of the Respondents, instead of for the Plaintiff. However, Petitioner's interpretation of the lower court's decisions is flawed. A review of the district court's decisions shows that the court in fact resolved all genuine factual disputes in favor of the Plaintiffs. It cannot reasonably be questioned that the district court had resolved factual disputes in favor of Petitioner. *App*. B at 18. The following are all examples of where the lower courts in this case had resolved any *reasonable* dispute in favor of the Petitioner.

> "At her deposition, Weaver insisted that if J.D.D. was born in the hospital, he would have had a health screening, and that DCF would

not have taken a child who had not had a screening. (Dkt. 87-2 at 22:14-18, 23:8-10). However, crediting Plaintiff's version of the facts for purposes of this Order, the Court does not accept this to be true with respect to J.D.D."

App. B at 5.

"Defendants do not admit that Weaver had knowledge of these circumstances . . . However, Plaintiff argues that Weaver was present at the April 27, 2000 staffing, signed documents that contained this information, and that she had access to J.D.D.'s file which contained this information; thus, the evidence indicates that she would have had knowledge of those circumstances. (Dkt. 87 at 4-6). For purposes of this Order, the Court finds that Weaver possessed this knowledge."

App. B at 21.

"Thus, upon this level of uncertainty and with the absence of admittedly crucial information, causation of J.D.D.'s illness remains unclear. Nevertheless, for purposes of this Order, the Court credits Plaintiff's contention that J.D.D. contracted the disease at birth from A. Davis."

App. B at 25 FN5.

"Again, crediting Plaintiff's version of the facts, for purposes of this Order, the Court assumes this to be true."

App. B at 27.

"Despite Weaver's testimony that she would not have known the totality of the information in a child's file, taking the evidence in the light most favorable to Plaintiff, the Court assumes that both Weaver and Riley were aware of these circumstances. Further, although it was not included in any document summarizing J.D.D.'s case or on any document containing Weaver and Riley's signature, for purposes of this Order, the Court assumes that both Weaver and Riley had knowledge of A. Davis's prior treatment for heroin and 1983 arrest for prostitution, both of which were embedded within abuse reports from previous children removed from her care."

App. B at 41-42.

"It is undisputed that J.D.D. remained in the hospital for seven days following his birth. It is further undisputed that hospital staff were aware of the fact that J.D.D. was exposed to cocaine at birth through his mother, had low oxygen and low birthweight, that A. Davis had little to no prenatal care, and that prior children had been removed from her custody. *App*. B at 44. It is further undisputed that J.D.D. didn't have any physical symptoms of HIV. *App*. B at 43. Lastly, Dr. Tureen testified that the probability of transmission from an HIV infected mother to a newborn infant is roughly twenty to twenty-five percent. *App*. B at 42. In fact, Dr. Tureen reviewed the available medical records for J.D.D., including a blood test with an abnormal platelet count,

> and testified that nothing in those records would have cause to order an HIV test."
>
> *App*. B at 43.

All of the above are examples of disputes resolved in favor of Plaintiff. That being said, Petitioner asserts that the lower courts erred by speculating about "non-record 'facts,' including the thought processes of unknown hospital staff, or doctors (seen only after the six-week window in which J.D.D. could have received effective treatment with antibodies), who the lower court, on its own and without evidence, conjectured, 'did not see a need' for HIV testing, *App*. A at 14, or had not 'thought to have him tested,' *Id*. at 9, 'improperly weigh[ed] the evidence' and resolved disputed issues in favor of the moving party." *Pet*. at 30. Despite Petitioner's assertions, even the Eleventh Circuit reiterated its approach to disputed facts, stating "[t]he parties dispute many of the relevant facts. Because this case comes to us after the district court granted the Respondents' motion for summary judgment, we draw all inferences in favor of Davis." *App*. A at FN1.

By stating that neither Dr. Richard Gonzalez, nor any of the hospital medical staff that treated and oversaw J.D.D. for one week following birth, had seen any reason to pursue HIV testing is not drawing inferences in favor of the Respondents. Rather, these are undisputed facts and therefore not required to be construed in favor of the non-moving party. *Scott v. Harris*, 550 U.S. 372, 380 (2007). (At the summary judgment stage, facts must be viewed in the light most favorable to

the nonmoving party only if there is a "genuine" dispute as to those facts). Furthermore, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be *no genuine* issue of *material* fact." *Id.* at 380. When the facts alleged by a party are blatantly contradicted by the record, a court should not adopt that version in deciding on summary judgment. *Id.* at 380. Here, J.D.D.'s adopted mother testified that she informed Dr. Richard Gonzalez of the circumstances of J.D.D.'s birth and that he did not pursue HIV testing. *App*. B at 23. Additionally, it cannot be disputed, and in fact Petitioner does not dispute, that J.D.D. was in the hospital monitored by staff for the first week of his young life, and that during that time no hospital staff, doctors or otherwise, pursued HIV testing. *App*. B 18-19. Therefore, it was proper for the lower courts to rely on those *undisputed facts* in determining summary judgment for the Respondents.

In *Tolan v. Cotton*, 572 U.S. 650 (2014), this Court determined four factual scenarios in favor of the moving party. First, the *Tolan* Court found that the front-porch was dimly lit at the time of a shooting, this was despite testimony by Tolan's father to the contrary. The *Tolan* Court next found Tolan's mother refused orders to remain quiet, however, there was testimony that she was neither aggravated nor agitated. This Court then found that Tolan *was verbally* threating the officer. However, the testimony did not show any direct threat. Lastly, this Court further found that Tolan was moving

to intervene at the Sergeant's interaction with his mother at the time of his shooting. That being said, the testimony instead showed that Tolan was on his knees and that was corroborated by his mother. In the end, this Court vacated and remanded the Fifth Circuit's decision with instructions to acknowledge and credit evidence in favor of the moving party.

The present case is, however, distinguishable from the *Tolan* decision. As stated above, Petitioner here alleges that the lower courts had determined facts in favor of the non-moving party by speculating about "non-record 'acts, including the thought processes of unknown hospital staff, or doctors . . . " The courts below in this case came to those conclusions based on record evidence and the absence of any evidence to the contrary, which is substantially different to the *Tolan* decision. Accordingly, as the courts below in this case properly resolved disputed facts in favor of the non-moving Petitioner, and the Petition should be denied.

CONCLUSION

Based upon the foregoing arguments and authorities, Respondents respectfully suggest that the Eleventh Circuit and Middle District decisions rendered below have properly applied the principles of qualified

immunity and summary judgment standards. Hence, the Petition should be denied.

Respectfully submitted,

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