No. 22-735

IN THE

# Supreme Court of the United States

KORI ANDERSON, DAN BUNNELL, KYLE FULLER, TYLER CONLEY, RICHARD GOWEN, and UINTAH COUNTY
*Petitioners,*

v.

TRISTEN CALDER, as personal representative of the estate of Coby Lee Paugh,
*Respondent.*

**On Petition for a Writ of Certiorari To the United States Court of Appeals for the Tenth Circuit**

## REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Frank D. Mylar
*Counsel of Record*
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
office@mylarlaw.com

*Counsel for Petitioners*

## TABLE OF CONTENTS

Table of Contents .....i

Table of Authorities..... iii

Introduction .....1

Reply Argument .....1

I. Respondent misstates the requirement of specificity in the clearly established analysis.....1

II. The facts found by the district court do not show a clearly established constitutional violation.....4

III. Caselaw cited by Petitioners demonstrates the law is not clearly established. .....5

A. Tenth Circuit caselaw demonstrates the law is not clearly established. .....6

B. Caselaw from other circuit courts is too generally defined and does not show the law is clearly established contrary to Petitioners' actions. .....9

IV. Petitioners did not forfeit the argument about whether Circuit Courts can establish law. .....12

V. There is no basis for liability against Uintah County, and this Court should define the parameters of pendent jurisdiction. ..... 12

Conclusion ..... 13

## TABLE OF AUTHORITIES

### Cases

*Al-Turki v. Robinson*,
762 F.3d 1188 (10th Cir. 2014) ..... 7

*Brown v. Montoya*,
662 F.3d 1152 (10th Cir. 2011) ..... 3, 12

*City and County of San Francisco v. Sheehan*,
575 U.S. 600 (2015) ..... 2

*City of Escondido v. Emmons*,
139 S. Ct. 500 (2019) ..... 2

*City of Los Angeles v. Heller*,
475 U.S. 796 (1986) ..... 13

*Estelle v Gamble*,
429 U.S. 97 (1976) ..... 1

*Farmer v. Brennan*,
511 U.S. 825 (1994) ..... 4

*Garcia v. Salt Lake County*,
768 F.2d 303 (10th Cir. 1985) ..... 8

*Harper v. Lawrence County*,
592 F.3d 1227 (11th Cir. 2010) ..... 10

*Kingdomware Techs., Inc. v. United States*,
579 U.S. 162 (2016) ..... 12

*Kisela v. Hughes*,
138 S. Ct. 1148 (2018) ..... 2

*Martinez v. Beggs*,
563 F.3d 1082 (10th Cir. 2009) ..... 9

*Mata v. Saiz*,
427 F.3d 745 (10th Cir. 2005) ..... 7

*Meier v. Cty. of Presque Isle*,
376 F. App'x 524 (6th Cir. 2010) ..... 11

*Mitchell v. Forsyth*,
472 U.S. 511 (1985) ..... 1

*Murray v. Dep't of Corrs.*,
29 F.4th 779 (6th Cir. 2022) ..... 3

*Orlowski v. Milwaukee County*,
872 F.3d 417 (7th Cir. 2017) ..... 10

*Pfaller v. Amonette*,
55 F.4th 436 (4th Cir. 2022) ..... 3

*Phillips v. Roane* County,
534 F.3d 531 (6th Cir. 2008) ..... 10

*Quintana v. Santa Fe County Bd. of Comm'rs*,
973 F.3d 1022 (10th Cir. 2020) ..... 8, 9

*Sealock v. Colorado*,
218 F.3d 1205 (10th Cir. 2000) ..... 6

*Stefan v. Olson*,
497 F. App'x 568 (6th Cir. 2012) ..... 10

*Taylor v. Barkes*,
575 U.S. 822 (2015) ..... 3, 12

*White v. Pauly*,
580 U.S. 73 (2017) ..... 1, 2

*Williams v. City of Yazoo*,
41 F.4th 416 (5th Cir. 2022) ..... 10

*Zentmyer v. Kendall County*,
220 F.3d 805 (7th Cir. 2000) ..... 10

*Ziglar v. Abbasi*,
582 U.S. 120 (2017) ..... 2

## INTRODUCTION

Respondent argues, "ignoring obvious and serious medical needs violates the constitution" (Resp't's Br. at 2) and since a judge determined a jury could reach this conclusion, denial of qualified immunity is proper. These sorts of legal statements serve as the basis for the denial of qualified immunity below. However, determining what a jury might find, based upon a general legal statement, guts the doctrine of qualified immunity.

This case is the sort where qualified immunity should immunize defendants. The lower courts erred by relying upon general legal statements. This Court should grant certiorari or summarily reverse to prevent lower courts from diluting qualified immunity. Without intervention, immunity will be "effectively lost if [the] case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

## REPLY ARGUMENT

### I. Respondent misstates the requirement of specificity in the clearly established analysis.

Respondent selectively quotes caselaw to incorrectly characterize the clearly established analysis as expansive, consistent with statements from *Estelle v Gamble*, 429 U.S. 97 (1976). (Resp't's Br. at 12-13.) However, as this Court clarified, particularity must be read into the analysis. *White v. Pauly*, 580 U.S. 73, 79 (2017). The lower court decisions should be corrected so that the clearly established analysis remains constrained.

Respondent cites *Kisela v. Hughes* for the notion that "this Court's caselaw does not require a case directly on point for a right to be clearly established[.]" (Resp't's Br. at 15 (*quoting* *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018).)) However, Respondent omits the remainder of the sentence that clarifies "existing precedent must have placed the statutory or constitutional question beyond debate." 138 S. Ct. at 1152. This requires comparing facts of similar cases. A lower court's conclusion that a jury could find deliberate indifference is the wrong analysis. The mission is to compare the facts of this case to other similar withdrawal-symptom cases to find an applicable rule of law.

Respondent cites *Ziglar* (Resp't's Br. at 15.) for the proposition that "[i]t is not necessary, of course, that the very action in question has previously been held unlawful." *Ziglar v. Abbasi*, 582 U.S. 120, 151 (2017) (cleaned up). While this is true, *Ziglar* goes on to state that "in the light of pre-existing law, the unlawfulness of the officer's conduct must be apparent." *Id.* (cleaned up).

Read in context, both *Kisela* and *Ziglar* stand in conformity with this Court's repeated admonishments that lower courts are "not to define clearly established law at a high level of generality." *City and County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015) (internal citation omitted). "[T]he clearly established law must be 'particularized' to the facts of the case." *White*, 580 U.S. at 79. That is, "the clearly established right must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019).

Respondent cites *Pfaller v. Amonette*, 55 F.4th 436, 453 (4th Cir. 2022) and *Murray v. Dep't of Corrs.*, 29 F.4th 779, 790 (6th Cir. 2022) – both not controlling because they are not from the Tenth Circuit. (Resp't's Br. at 15.) *See* *Brown v. Montoya*, 662 F.3d 1152, 1164 (10th Cir. 2011) ("In order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains.") (internal citation omitted). Two cases are insufficient weight of authority, especially when there is "disagreement in the courts of appeals" about whether circuit precedent can clearly establish a right. *Taylor v. Barkes*, 575 U.S. 822, 826 (2015).

*Pfaller* and *Murray* do not alter the clearly established analysis. *Pfaller* addresses treatment, and *Murray* addresses how the clearly established analysis does not require finding caselaw about a particular disease or injury. This case is concerned with neither; rather, Petitioners argue that the Court must look at the symptoms Paugh was exhibiting. No caselaw demonstrates that Paugh's symptoms would alert Petitioners to his need for immediate treatment. The fact that the district court found a jury could make this finding is not relevant or conclusive of the clearly established analysis. Paugh exhibited mild symptoms of withdrawal. There is no controlling caselaw that demonstrates the way Petitioners treated these symptoms violates the constitution.

## II. The facts found by the district court do not show a clearly established constitutional violation.

Respondent argues that whether Petitioners had the requisite knowledge "'is a question of fact.'" (Resp't's Br. at 17 (*quoting* *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).)) However, the facts, as found by the district court, do not clearly establish a constitutional violation.

For example, Dr. Bradbury's discharge instructions were that Paugh should be returned to the hospital if his "condition worsened." (App. at 4a.) This was communicated through a generic hospital form, and there is no controlling caselaw holding that they should have perceived a serious medical need from the symptoms. It was not clearly established that Petitioners were constitutionally mandated to perceive these symptoms as a worsening condition.

Respondent cites the district court's finding of the symptoms perceived by Petitioners, arguing that it was clearly established that this was sufficient to put Petitioners on notice of Paugh's alleged worsening condition. (Resp't's Br. at 19.) These symptoms included "tremors, paleness, spitting up mucus, cold chills and other fever symptoms, loss of appetite, restlessness and anxiety, and significant shaking in his hand to the point that it extended through his forearms and the shaking could be seen from a distance." (App. at 25a n.18.) None of these symptoms rise beyond the level of common withdrawal symptoms that were observed by all Petitioners.

There is no caselaw that unequivocally demonstrates that a multitude of common symptoms mandates immediate medical attention. If anything, Tenth Circuit caselaw demonstrates the opposite, as explained in Point III(A).

Likewise, the discharge instructions were unclear when they stated immediate medical care should be obtained if there are symptoms "such as a fever, uncontrolled vomiting, uncontrolled anxiety, or agitation and confusion." (App. at 44a.) The word "uncontrolled" is inherently malleable, particularly as interpreted by non-medical professionals. There are no facts in the record that suggest Paugh's symptoms were "uncontrolled" or fit within the parameters of the hospital discharge instructions without any room for a contrary interpretation.

Finally, Respondent faults Petitioners for failing to contact a medical provider after Paugh answered medical screening questions. (App. at 24a.) However, Paugh had just seen a doctor. Paugh's answers to such questions were not cause for concern. Further, there is no caselaw that holds a phone call to a medical provider must be made in such circumstances.

## III. Caselaw cited by Petitioners demonstrates the law is not clearly established.

Respondent attempts to distinguish cases cited in the Petition. (Resp't's Br. at 17-24.) However, Respondent does not show that the law is clearly established with cases from the Tenth Circuit Court of Appeals or from other circuit courts.

### A. Tenth Circuit caselaw demonstrates the law is not clearly established.

Respondent argues that some Tenth Circuit cases show that the law is clearly established. However, Respondent does not persuasively distinguish these cases.

For example, Respondent points out that *Sealock v. Colorado*, 218 F.3d 1205 (10th Cir. 2000) found liability for one non-medical defendant. (Resp't's Br. at 17.) However, this lone non-medical defendant's actions are not comparable to Petitioners' actions. The *Sealock* defendant observed the plaintiff "at a time when he was very pale, sweating and had been vomiting." 218 F.3d at 1210. This defendant was also told that the plaintiff "was or might be having a heart attack." *Id.* In response, this defendant "refused to transport [the plaintiff] immediately to a doctor or a hospital because it was snowing outside and it would take time to warm up the prison van for transportation." *Id.* He also told the plaintiff "not to die on his shift." *Id.* Moreover, the *Sealock* Court affirmed summary judgment for another non-medical defendant. *Id.* at 1209.

The actions by the non-medical *Sealock* defendant are not comparable to the actions of Petitioners, who all took some positive action. Fuller encouraged Paugh to "drink fluids and stay hydrated" (App. at 7a.), got Paugh's prescription, and gave him his Librium. (*Id.* at 7a-8a.) Fuller called the PA to determine how often to administer Librium. (*Id.* at 8a-9a.) Gowen told Anderson "to 'get up' and check on Paugh 'as often as she [could]' to make sure he was 'breathing and in no distress.'" (*Id.* at 11a.) Bunnell

gave Paugh his missed dose of Librium. (*Id.*) Anderson and Bunnell moved Paugh to a different cell "so that he could be in 'a cell alone while he was sick.'" (*Id.* at 12a.) Bunnell gave Paugh an extra blanket and looked in Paugh's cell before he left the Jail to ensure Paugh was alright. (*Id.*) Conley checked on Paugh, asked if he was "alright," offered him a phone call, and told Fuller that Paugh's prescription needed to be filled during the dayshift. (*Id.* at 67a-68a, 144a-145a.)

The *Sealock* defendant was flippant towards the plaintiff's medical condition, whereas all Petitioners in this case took action to help Paugh. *Sealock* is insufficient to clearly establish Petitioners' conduct as a constitutional violation.

In *Mata v. Saiz*, 427 F.3d 745 (10th Cir. 2005), Respondent likens a nurse defendant's role to the role of Petitioners because she was serving as a "gatekeeper." (Resp't's Br. at 17.) First, a nurse is a medical professional, and it is not clearly established that the law regarding a nurse can establish the law for non-medical defendants. *See Rife v. Jefferson*, 742 F. App'x 377, 388 (10th Cir. 2018) (cases involving medical professionals "don't establish the deliberate-indifference standards that apply to laypeople.") Second, the concept of "gatekeeper" liability is not found in this Court's jurisprudence and does not negate deliberate indifference.

Respondent cites *Al-Turki v. Robinson*, 762 F.3d 1188, 1192 (10th Cir. 2014) for the proposition that "prison officials cannot be deliberately indifferent to prisoners' serious needs." (Resp't's Br. at 17-18.) However, this states the law too broadly, and

Respondent does not grapple with the specificity requirements of the clearly established analysis.

Next, Respondent claims that *Garcia v. Salt Lake County*, 768 F.2d 303 (10th Cir. 1985) "cannot reasonably be read to state a rule that an intoxicated inmate must be unconscious to require medical attention . . . ." (Resp't's Br. at 18.) However, *Garcia* is the only controlling case identified by any party or court that clearly establishes constitutional liability for dealing with an inmate suffering from alcohol withdrawal. As such, conduct that is worse than the conduct in *Garcia* can be said to clearly establish the law, but conduct that is less egregious does not clearly establish the law.

Respondent next claims that *Quintana v. Santa Fe County Bd. of Comm'rs*, 973 F.3d 1022 (10th Cir. 2020) does not clearly establish the law because Paugh experienced more symptoms than just vomiting. (Resp't's Br. at 19.) However, there were more symptoms in *Quintana* than just vomiting. For example, one of the *Quintana* defendants knew the decedent "had vomited in his cell and exhibited other common signs of withdrawal." *Id.* at 1030-31. This was insufficient to establish liabilty against this defendant. *Id.* Likewise, another defendant heard the decedent "'pushing and 'making noises' on the toilet," yet there was no liability for this defendant either. *Id.* at 1031.

The salient point is that none of Paugh's symptoms rose to the level of frequent vomiting, and even frequent vomiting "does not present an obvious risk of severe and dangerous withdrawal." *Id.* at 1029. Even taken together, none of Paugh's symptoms rose to the

level of bloody vomit, which "does present an obvious risk." *Id.* at 1029-1030. Paugh exhibited common signs of withdrawal, which were not a constitutional violation in *Quintana*. *Id.* at 1030-31. Accordingly, the law was not clearly established that Paugh's observed symptoms should have led a reasonable officer to conclude that there was a serious risk to Paugh's health.

Finally, Respondent argues that *Martinez v. Beggs*, 563 F.3d 1082 (10th Cir. 2009) does not assist Petitioners' position because a reasonable jury could find that Paugh needed immediate medical assistance. (Resp't's Br. at 18.) However, this misses the point because in *Martinez* the decedent displayed "characteristics that are common to many intoxicated individuals," which meant that he did not exhibit "symptoms that would predict his imminent heart attack or death." 563 F.3d at 1091. In the same way, Paugh displayed common withdrawal signs, which means that Petitioners were not on notice that Paugh's death was imminent. The law was not clearly established that Petitioners' actions could amount to a constitutional violation.

### B. Caselaw from other circuit courts is too generally defined and does not show the law is clearly established contrary to Petitioners' actions.

Respondent attempts to distinguish caselaw from several other circuits, claiming there is no circuit split on a prisoner's right to medical care. (Resp't's Br. at 20-24.) Respondent argues that "the cases demonstrate widespread agreement on the contours of that right." (*Id.* at 21.) Yet, these cases only stand for

the general notion that there may be liability if a jailor has knowledge of a serious medical condition and fails to take action.[1] This does not clearly establish the law relating to Petitioners' conduct. Just because multiple circuit courts broadly define a right does not mean it has been defined with the required level of specificity.

Petitioner cites *Harper v. Lawrence County*, 592 F.3d 1227 (11th Cir. 2010) and *Stefan v. Olson*, 497 F. App'x 568 (6th Cir. 2012). (Resp't's Br. at 21.) However, these cases are distinguishable.[2] The *Harper* defendants ignored the inmate, which did not happen with Paugh. 592 F.3d at 1234-1235. *Stefan* only denied qualified immunity to a nurse, a medical professional 497 F. App'x at 569-74. No Petitioner was a medical professional in this case.

Respondent also claims *Zentmyer v. Kendall County*, 220 F.3d 805 (7th Cir. 2000) is not helpful to Petitioners' position because in *Zentmyer* most of the medication was administered and there was no evidence that any deputy thought missing the medication would cause serious injury. (Resp't's Br. at 22.) Even if that was the case, it is comparable to Petitioners. There is evidence Paugh was given his medication, and there is no evidence anywhere that any Petitioner thought Paugh was at risk of serious

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[1] Respondent cites *Williams v. City of Yazoo*, 41 F.4th 416, 424, 426 (5th Cir. 2022); *Orlowski v. Milwaukee County*, 872 F.3d 417, 422 (7th Cir. 2017); and *Phillips v. Roane* County, 534 F.3d 531, 545 (6th Cir. 2008).

[2] (*See also* Pet'rs' Br. at 18-19 n.4.)

injury or death. As such, *Zentmyer* demonstrates why qualified immunity should be applied.

Finally, *Meier v. County of Presque Isle*, 376 F. App'x 524 (6th Cir. 2010) demonstrates that "intoxication by itself" and the malaise of typical alcohol withdrawal are insufficient to put a defendant on notice of a serious risk to an inmate's health. 376 F. App'x at 529-530. Respondent attempts to distinguish this case by pointing out that an on-call doctor was called. (Resp't's Br. at 23.) Notwithstanding the fact that a PA was called for Paugh, there was still no liability for two *Meier* defendants who made no call to a doctor. One defendant (Flewelling) observed the plaintiff but did not call the doctor. 376 F. App'x at 529. Nevertheless, there was no liability, even though he violated policy. *Id.* Likewise, another defendant (Berg) observed the plaintiff, did not call the doctor, and attributed the plaintiff's "malaise to typical alcohol withdrawal," and there was no liability for this defendant either. *Id.* at 530. The actions of these two *Meier* defendants are comparable to Petitioners', who also observed typical withdrawals, and demonstrate why the law is not clearly established.

Respondent's inability to distinguish these cases demonstrates the error in the Tenth Circuit's opinion. Respondent does not identify any additional caselaw, controlling or persuasive, that demonstrates constitutional liability for Petitioners' conduct. This lends additional support that the law is not clearly established.

## IV. Petitioners did not forfeit the argument about whether Circuit Courts can establish law.

Respondent incorrectly claims that Petitioners' argument that this Court must define what law is clearly established is forfeit. (Resp't's Br. at 25.) Qualified immunity was raised throughout these proceedings, and Petitioners' argument fits within that framework, demonstrating that the issue has not been forfeited and is part of a general legal argument.

Nevertheless, it is important to note that this Court only "normally" declines to entertain arguments not raised below. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016). Failure to raise an argument below is not an absolute bar to consideration by this Court.

Further, there is "disagreement in the courts of appeals" about whether circuit precedent can clearly establish a right. *Taylor*, 575 U.S. at 826. Only this Court can resolve this issue, and it was not raised below since the Tenth Circuit has already answered the question to allow its caselaw to clearly establish a right. *See Montoya*, 662 F.3d at 1164. To the extent this Court disagrees with the Tenth Circuit, this case would serve as a good vehicle to correct such error.

## V. There is no basis for liability against Uintah County, and this Court should define the parameters of pendent jurisdiction.

If the Court were to find that no Petitioner violated Paugh's constitutional rights, or that all are entitled to qualified immunity, then there should not be liability for Uintah County. *See City of Los Angeles v.*

*Heller*, 475 U.S. 796, 799 (1986) (no caselaw "authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm.") This case provides a good vehicle to further define jurisdiction in such a case and to clarify *Heller*, as some courts are disregarding it.

## CONCLUSION

The Court should grant this petition, or summarily reverse the lower court decision.

Respectfully submitted this 6th day of June, 2023.

Frank D. Mylar
*Counsel of Record*
MYLAR LAW, P.C.
2494 Bengal Blvd.
Salt Lake City, Utah 84121
Phone: (801) 858-0700
office@mylarlaw.com
*Counsel for Petitioner*