No. _____

In The
Supreme Court of the United States

TRAVIS SCOTT KING by and through his Guardian Ad Litem Breanna Raymundo, and BREANNA RAYMUNDO,

Petitioners,

vs.

DEMICHAEL DEWS, CALVIN NEE, and JOHN TRAN,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises out of the use of force for seven minutes on Petitioner Travis King by three correctional officers that ultimately resulted in King's asphyxiation. While King was handcuffed, in leg irons, and in a prone position officers applied weight to his back and neck. After suffering respiratory and cardiac arrest, King was resuscitated. He is now blind, cannot speak, cannot walk, cannot swallow food, and suffers global brain damage which has rendered him almost totally mentally incapacitated. He requires twenty-four-hour care.

The law has been clearly established since 1992 that the use of force on a handcuffed inmate raises a triable issue of fact as to the question "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Hudson v McMillian*, 503 U.S. 1 (1992) (holding that excessive physical force against a prisoner who was kicked and punched by two prison guards while being escorted in handcuffs and shackles may constitute cruel and unusual punishment even though the prisoner did not suffer serious injury).

This petition raises two issues of exceptional importance:

1. Can the doctrine of qualified immunity ever apply when force is used maliciously and sadistically for the very purpose of causing harm in violation of the Eighth Amendment?

QUESTIONS PRESENTED – Continued

2. Does the use of prolonged prone restraint of bodyweight to the neck and back of an inmate in handcuffs and leg irons that results in asphyxiation raise a triable issue of fact as to whether the force used was malicious and sadistic?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the court whose judgment is sought to be reviewed are:

- Travis Scott King, by and through his Guardian Ad Litem Breanna Raymundo, and Breanna Raymundo
- DeMichael Dews, Calvin Nee, and John Tran

There are no publicly held corporations involved in this proceeding.

RELATED PROCEEDINGS

- There are no related proceedings.

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The district court's unpublished May 12, 2022 order granting summary judgment to defendants is reproduced in the appendix to this petition. *Travis Scott King by and through his Guardian Ad Litem, Breanna Raymundo, et al. v. DeMichael Dews, et al.*, No. 19-cv-07722-VC. (Pet. App., pages 7-13).

The Ninth Circuit's July 31, 2023 memorandum is reproduced in the appendix to this petition. *Travis Scott King by and through his Guardian Ad Litem, Breanna Raymundo, et al. v. DeMichael Dews, et al.*, 22-15743 (9th Cir. 2023). (Pet. App., pages 1-6).

The Ninth Circuit's September 28, 2023 order denying petitioners' Petition for Rehearing En Banc is reproduced in the appendix to this petition. *Travis Scott King by and through his Guardian Ad Litem, Breanna Raymundo, et al. v. DeMichael Dews, et al.*, 22-15743 (9th Cir. 2023). (Pet. App., pages 14-15).

BASIS FOR JURISDICTION IN THIS COURT

The Court has jurisdiction to review the Ninth Circuit's September 28, 2023 order on writ of certiorari under 28 U.S.C. section 1254(1). The petition is timely filed within 90 days of entry of the order denying a petition for rehearing en banc.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners brought the underlying action under 42 U.S.C. Section 1983. The Petitioners allege that the Respondents violated their rights secured by the Eighth and Fourteenth Amendments, which provide:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." USCS Const. Amend. 8

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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." USCS Const. Amend. 14

STATEMENT OF THE CASE

Petitioner Travis King was transferred to San Quentin State Prison on September 18, 2018 from the Sonoma County jail to serve the remaining five and a half months of a sentence for vehicle theft based on the failure to return a U-Haul rental on time.

King was transported to Marin General Hospital for medical care on September 21, 2018 for lower extremity cellulitis. San Quentin Officers Nee and Tran

were assigned to monitor King in his hospital room. Nee abandoned his post and a nurse complained to Nee's supervisor, Sergeant Dews, about the violation of policy. Dews responded to King's room. A series of events occurred in the room and out of view of security cameras that is in dispute, but which is not critical to the ultimate determination of these issues. The description of these events as reported by the officers is disputed by nurses Atkins and Ferrouge, is internally contradictory, and is called into question by the San Quentin armorer and the Internal Affairs investigation into this matter. It is, however, undisputed that at some point King was free of restraints and a physical struggle occurred in his hospital room.

The testimony of nurses Munsell and Bondurant and video evidence shows King exiting the hospital room and being slammed into the hallway wall outside by Dews. King was barefoot and naked except for his boxer shorts. Hospital video surveillance evidence shows Nee in the room for over two minutes before King exited the room with Nee following Dews and Tran out of the room in pursuit of King. Yet, Nee claims that he was not in the room and did not see what occurred.

King was quickly forced into a prone position in the hallway as Officer Nee put King in leg restraints within seconds. Within two minutes Officer Tran had King in handcuffs. Sergeant Dews and Officer Tran applied weight to King's upper body and neck area for another seven minutes until King lay unmoving on the floor. Nurse McFarland testified that based on her

training in airway management she was concerned that the positioning of King's neck was causing King not to get oxygen. Nurse Atkins testified medical staff were unable to evaluate whether King was breathing because officers were on top of him, and she was unable to observe King's ribcage moving. Nurse Bondurant testified that King was moving around trying to get people off of him saying "Get off me. Let me go." Nurse Whelan heard King say, "Help me" and he kept saying that he needed to see a doctor.

At some point during the seven-minute prone restraint, King was injected with Haldol intramuscularly by the medical staff. The drug was not expected to take affect for at least fifteen minutes.

It is undisputed that King lay prone in handcuffs and leg restraints for seven minutes, with weight applied to his upper body by Dews and Tran while officer Nee held his legs until King stopped breathing. It cannot be genuinely disputed that at some point King was struggling to breath because he ultimately succumbed to asphyxiation. Nearly naked, barefoot, handcuffed, in leg irons, in the presence of three large, armed guards with backup arriving in minutes, King posed little risk of harm to others, nor was he capable of escape.

The court ignored evidence that: (1) Dews testified he did not consider King a threat, (2) Dews had a motive to cause harm because a nursing supervisor said she was going to report Dews and his subordinates for violating San Quentin State Prison policy on account of leaving King under the guard of only one officer, and

(3) Dews was recorded laughing when he reported to his supervisor that King had stopped breathing.

WHY CERTIORARI IS WARRANTED

The Ninth Circuit's decision cannot be reconciled with either the language or policies underlying this Court's decision in *Hudson v. McMillian*, 503 U.S. 1 (1972). The Ninth Circuit decided two important federal questions in ways that conflict with a landmark decision of this Court. Rule 10(c).

A. When Prison Officials Maliciously and Sadistically Use Force to Cause Harm the Eighth Amendment is Always Violated for Purposes of Qualified Immunity

The panel addressed the issue of qualified immunity as follows: "Second, we agree with the district court that even if summary judgment was not proper on the issue of whether an Eighth Amendment violation occurred, the correctional officers would be entitled to qualified immunity. Qualified immunity applies in the Eighth Amendment excessive force context. *See Hughes*, 31 F.4th at 1220. Under the doctrine, 'government officials enjoy qualified immunity from civil damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.' *Jeffers v. Gomez*, 267 F.3d 895, 910 (9th Cir. 2001) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). 'The plaintiff bears the

burden of pointing to prior case law that articulates a constitutional rule specific enough to alert those officers in this case their particular conduct was unlawful.' *Hughes*, 31 F.4th at 1223 (cleaned up). We may not define clearly established law at a high level of generality. *See City & County of San Francisco v. Sheehan*, 575 U.S. 600, 613 (2015)."

The panel then went on to hold that "King has identified no Eighth Amendment case with comparable facts." In support of this reasoning the panel concluded that a reasonable officer in that situation could have interpreted his struggling as continued resistance, especially given that none of the observing doctors or nurses raised concerns about King's medical condition until the officers released their bodyweight restraint.

The Eighth Amendment prohibits both "cruel and unusual" punishment. But the panel's reasoning would insulate prison officials from liability so long as they applied force to cause pain and injury in ways not previously applied in reported decisions. This approach eviscerates constitutional protection from all "unusual" punishments, no matter how cruel, on the very basis that the means by which the injury is inflicted had not previously been forbidden with specificity.

The Supreme Court in *Hudson v. McMillian*, 503 U.S. 1 at page 7 addressed the distinction between (1) the use of force in a good-faith effort to maintain and restore discipline as applied to a prison disturbance blessed by the court in *Whitley v. Albers*, 475 U.S. 312 (1986) and (2) the use of force applied to a handcuffed

inmate which raised a triable issue of fact as to whether the force was used maliciously and sadistically to cause harm.

This Court held that the Eighth Amendment's prohibition of cruel and unusual punishment draws its meaning from evolving standards of decency that mark the progress of a maturing society, and so admits of few absolute limitations. *Hudson*, at 8. "**When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency are always violated**." *Hudson*, at 9.

The Ninth Circuit's application of the "clearly established" prong of qualified immunity to an Eighth Amendment purpose to harm analysis is rejected by other circuits. *See, e.g.*, *Tedder v. Johnson*, 527 F. App'x 269, 274 (4th Cir. 2013) (holding that "malicious and sadistic use of force for the very purpose of causing pain is always in violation of clearly established law."); *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002) (finding the law "well established that a malicious and sadistic use of force by a prison office against a prisoner, done with the intent to injure and causing actual injury, is enough to establish a violation of the Eighth Amendment's cruel and unusual punishment clause."); *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) (holding that in the purpose to harm context, "to the extent that the plaintiffs have made a showing sufficient to overcome summary judgment on the merits, they have also made a showing sufficient to overcome any claim to qualified immunity.").

The Eleventh Circuit condensed the paradigm succinctly: "[A] defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution by the Supreme Court decisions in *Hudson* and *Whitley*. There is simply no room for a qualified immunity defense when the plaintiff alleges such a violation. The only question, then, is whether the plaintiff has alleged facts sufficient to survive a motion to dismiss or a motion for summary judgment. If he has done so, that is the end of the inquiry." *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002) (internal citations omitted, emphasis added).

B. The Use of Force on a Handcuffed Inmate Raises a Triable Issue of Fact as to Whether the Force was Applied in a Good Faith Effort to Restore Order or Maliciously and Sadistically to Cause Harm

In *Hudson v. McMillian*, 503 U.S. 1, 7 (1992) this Court addressed the issue of whether the use of force on a handcuffed inmate may constitute cruel and unusual punishment even though that inmate did not suffer serious injury. In reversing the Fifth Circuit's reversal of a judgment in favor of the inmate following a trial before a Magistrate, the court noted that "the core judicial inquiry is that set out in *Whitley*: whether force was applied in a good-faith effort to maintain or

restore discipline, or maliciously and sadistically to cause harm."

This Court noted that in determining whether the use of force was wanton and unnecessary, "it may also be proper to evaluate the need for the application of force, the threat reasonably perceived by the responsible officials, and any efforts made to temper the severity of a forceful response." Id.

Here, the Ninth Circuit drew inferences in favor of the Defendants in concluding that no triable issue of fact existed as to whether King was struggling to resist as opposed to struggling to breathe. There was conflicting testimony from both the nurses and the guards on that very issue. For example, Nurse McFarland testified that based on her training she was concerned that the positioning of King's neck was causing King not to get oxygen. Nurse Atkins testified medical staff were unable to evaluate whether King was breathing because officers were on top of him, and she was unable to observe King's ribcage moving. Nurse Bondurant testified that King was moving around to get people off him saying "Get off me. Let me go." Nurse Whelan heard King say, "Help me" and he kept saying he needed to see a doctor.

All of this testimony was ignored by the Ninth Circuit in holding that: "Even in the light most favorable to King, the testimony of observing witnesses supports the officers' use of force and their reasonable perception of a threat." The Ninth Circuit went on to cite the

testimony of nurses who observed a struggle *before* King was prone in handcuffs and leg irons.

Here, the 1992 landmark decision in *Hudson* was buttressed by a written policy prohibiting the placement of bodyweight restraint on a prone inmate unless the use of deadly force would be justified. 15 Cal. Code of Regs. Section 3268. As further evidenced by the training the officers received, the officers were well aware of the risk of asphyxia to King.

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the petition for writ of certiorari should be granted.

Dated: December 22, 2023

Respectfully submitted,

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