No. 17-890

In The Supreme Court of the United States

RICHARD LOPEZ, FRANK SALINSKY, MARGARITA DIAZ-BERG, ALEXANDER C. AYALA, FROILAN SANTIAGO, CRYSTAL JACKS, COREY KROES, RICK BUNGERT, LUKE LEE, JACOB IVY, and KARL ROBBINS,

Petitioners,

v.

ESTATE OF JAMES FRANKLIN PERRY, and JAMES FRANKLIN PERRY, JR.,

Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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January 22, 2018

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Under Rule 37.2 of the Rules of this Court, the International Municipal Lawyers Association moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Written consent of petitioner is being submitted contemporaneously with this brief, but respondents have withheld their consent.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

Established in 1935, IMLA is the oldest and largest association of attorneys representing United States municipalities, counties, and special districts. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the Supreme Court of the United States, the United States Courts of Appeals, and in state supreme and appellate courts.

In this case, the Seventh Circuit held that there was a material factual dispute as to whether the

eleven petitioning City of Milwaukee police officers violated the Fourth Amendment in their responses to James Perry's[1] medical condition for the approximately 23 hours between Perry's traffic-stop arrest and subsequent death at a Milwaukee County facility. While Perry's amended complaint alleged the City of Milwaukee petitioners violated his Eighth Amendment rights by acting with deliberate indifference to his medical needs, both the district court and Seventh Circuit concluded, without adequate analysis and in direct conflict with eight other federal circuit courts, that the Fourth Amendment's objective-reasonableness standard governed his claims. Although Perry had been arrested during a traffic stop, processed at the City of Milwaukee's Prisoner Processing Section, transported to the hospital for medical treatment, returned to the City's Prisoner Processing Section, and then transported to Milwaukee County's Criminal Justice Facility for admittance into the jail, the Seventh Circuit reasoned that the Fourth Amendment applied because Perry had not yet received a probable cause hearing.

Additionally, the Seventh Circuit flatly concluded that qualified immunity did not apply at all in this case, without conducting individual analyses for each of the eleven City of Milwaukee petitioners who were alleged to have had contact with Perry throughout the 23 hours following his arrest. Moreover, despite an existing split in federal appellate authority as to when

[1] IMLA will hereinafter collectively refer to James Perry and the plaintiffs-appellants-respondents as "Perry."

the Fourth Amendment's objective-reasonableness standard gives way to the Fourteenth Amendment's deliberate-indifference standard in cases involving arrestees' medical needs, the Seventh Circuit nonetheless concluded that in September 2010, "it was clearly established that the Fourth Amendment governed claims by detainees who had yet to receive a judicial probable cause determination." *Estate of Perry v. Wenzel*, 872 F.3d 439, 460 (7th Cir. 2017).

IMLA writes separately to stress the necessity for this Court to provide guidance to lower courts, law enforcement, and municipal litigators for determining when the Fourth Amendment gives way to the Fourteenth Amendment in Section 1983 medical-needs cases involving arrestees. IMLA's ability to address this topic is particularly significant here, where the lower courts wholly failed to analyze – let alone acknowledge – the growing confusion and split in authority on this issue. The federal courts of appeals are intractably split on this issue. The remaining circuits that have not addressed the issue continue to avoid the opportunity to decide whether the Fourth or Fourteenth Amendment applies in these cases and some courts have struggled with the question of whether medical-needs claims are even cognizable under the Fourth Amendment. *See, e.g.*, *Esch v. County of Kent*, 699 F. App'x 509, 511-15 n.3 (6th Cir. 2017) ("We express no view as to the broader legal question of whether inadequate medical care claims are ever cognizable under the Fourth Amendment."); *Bailey v. Felmann*, 810 F.3d 589, 593 (8th Cir. 2016) ("[A] right

under the Fourth Amendment against unreasonable delay in medical care for an arrestee was not clearly established in March 2012."). Thus, IMLA sees a readily apparent need for clarity from this Court as to whether and when the Fourth Amendment's objective-reasonableness standard applies to Section 1983 medical-needs claims involving arrestees.

Integral to IMLA's mission, a decision from this Court will guide lower courts in their qualified immunity analyses and inform law enforcement officers involved in medical-needs situations involving arrestees. This case also presents this Court with an opportunity to provide continued direction to lower courts in their qualified immunity analyses, as the Seventh Circuit glossed over the fact-specific questions of whether qualified immunity applied to each of the eleven individual officers, and failed to acknowledge the current circuit split revolving around the proper constitutional standard applicable to this case. Thus, IMLA seeks to offer the Court its point of view as to why the Court's guidance in this case will benefit lower courts and law enforcement by clarifying the constitutional rights of arrestees in need of medical attention.

The International Municipal Lawyers Association should be granted leave to file the attached *amicus* brief.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*[1]

Amicus is the International Municipal Lawyers Association ("IMLA"), a nonprofit, nonpartisan professional organization consisting of more than 2,500 members. The membership is composed of local government entities, including cities, counties, and subdivisions thereof, as represented by their chief legal officers, state municipal leagues, and individual attorneys. IMLA serves as an international clearinghouse of legal information and cooperation on municipal legal matters.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represents that no counsel for a party authored this brief in whole or in part, that no counsel or a party made a monetary contribution intended for the preparation or submission of this brief, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus curiae* represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due. Petitioners consented while Respondents withheld consent.

SUMMARY OF ARGUMENT

I. In this case, the Seventh Circuit applied the Fourth Amendment's objective-reasonableness standard to analyze the Section 1983 claim for inadequate medical care to an arrestee. However, the Seventh Circuit, along with the Ninth Circuit, is in the minority of federal circuits that apply the Fourth Amendment in analyzing such claims. On the other side of this split, the First, Second, Third, Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits apply the Fourteenth Amendment to these claims. This Court should resolve the deep and intractable circuit split and provide guidance to lower courts, law enforcement, and municipal litigators for determining when the Fourth Amendment gives way to the Fourteenth Amendment in Section 1983 medical-needs cases involving arrestees. This Court also has not addressed the question of whether the Fourth Amendment's objective-reasonableness standard or Fourteenth Amendment's deliberate-indifference standard governs medical-needs claims involving arrestees and the Petition presents an ideal vehicle to do so. Accordingly, the Court should grant *certiorari* in this case and resolve the circuit split that has developed on this important and recurring issue of federal law.

II. The Seventh Circuit's discussion of qualified immunity in this case did not contain any of the touchstones indicative of an appropriate qualified immunity analysis as exemplified in this Court's well-established precedent. First, the Seventh Circuit failed to consider the specific circumstances facing each of the eleven

individual petitioners in considering not only whether each individual violated a clearly established constitutional right, but also in considering whether each Petitioner knew or believed what they were doing was lawful. Second, contrary to this Court's many admonitions relating to how lower courts should define "clearly established" rights, the Seventh Circuit broadly defined the law at issue by simply concluding that failing to provide medical care to an arrestee violates the Fourth Amendment. In so doing, the Seventh Circuit also ignored the split among the federal circuits relating to whether the Fourth or Fourteenth Amendment governs an arrestee's right to medical care, effectively holding law enforcement in the Seventh Circuit to a higher standard than those in a majority of other federal circuits. Accordingly, the Court should grant certiorari to once again reiterate the longstanding rules of analyses in qualified immunity cases, particularly those involving multiple individual defendants.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT AS TO WHAT CONSTITUTIONAL STANDARD GOVERNS SECTION 1983 CLAIMS THAT ARRESTEES RECEIVED INADEQUATE MEDICAL CARE.

The federal circuit courts are not in agreement on the appropriate constitutional standard for analyzing Section 1983 claims for inadequate medical treatment

to an arrestee. *See generally* Ivan E. Bodensteiner & Rosalie Berger Levinson, 1 State and Local Government Civil Rights Liability § 1:16.50, n.12-13 (Nov. 2017 update). Two circuits, the Seventh and Ninth, hold that the Fourth Amendment requires objective reasonableness in response to arrestees' medical needs. *Currie v. Chhabra*, 728 F.3d 626, 630 (7th Cir. 2013); *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1099 (9th Cir. 2006). By contrast, eight other circuits look to the Due Process Clause of the Fourteenth Amendment and hold that, in order to be liable for a claim of inadequate medical care of an arrestee, the plaintiff must show that law enforcement officers were deliberately indifferent to an arrestee's serious medical need. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 67-69, 74 (1st Cir. 2016); *Brown v. Middleton*, 362 F. App'x 340, 342-44 (4th Cir. 2010); *Burnette v. Taylor*, 533 F.3d 1325, 1327-31 (11th Cir. 2008); *Barrie v. Grand Cty.*, 119 F.3d 862, 863-64, 867-69 (10th Cir. 1997); *Weyant v. Okst*, 101 F.3d 845, 848-50, 856-57 (2d Cir. 1996); *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472-73 (5th Cir. 1996); *Groman v. Township of Manalapan*, 47 F.3d 628, 632-33, 636-37 (3d Cir. 1995); *Dorman v. District of Columbia*, 888 F.2d 159, 160-61 (D.C. Cir. 1989). Adding further confusion to this split in authority, in the last two years two circuit courts have refrained from deciding between the Fourth or Fourteenth Amendments' application, noting that the law is not settled. *See Esch v. County of Kent*, 699 F. App'x 509, 514-15 (6th Cir. 2017); *Bailey v. Felmann*, 810 F.3d 589, 593 (8th Cir. 2016).

"This is not a purely academic question as the standards of liability vary significantly according to which amendment applies." *Esch*, 699 F. App'x at 513 (quoting *Lanman v. Hinson*, 529 F.3d 673, 679-80 (6th Cir. 2008)). Thus, the Court should use this opportunity to resolve the circuit split by granting the petition for writ of certiorari and ultimately reversing the Seventh Circuit's application of the Fourth Amendment in this case and instead apply the Fourteenth Amendment's deliberate-indifference test to Section 1983 claims for inadequate medical care for an arrestee.

A. Circuit courts are split or undecided as to whether the Fourth Amendment's objective-reasonableness standard or the Fourteenth Amendment's deliberate-indifference standard applies to Section 1983 claims for arrestees' medical needs.

1. The First, Second, Third, Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits have applied the Fourteenth Amendment.

The majority of circuits have concluded that the Fourteenth Amendment applies to failure to provide medical care claims under Section 1983. Most recently, the First Circuit applied the Fourteenth Amendment's deliberate-indifference standard to a Section 1983 medical-needs claim by the estate of an arrestee who died within ninety minutes of his interaction with law enforcement. *See Miranda-Rivera*, 813 F.3d at 67-69,

74 (1st Cir. 2016). Similarly, in 2010, the Fourth Circuit applied the Fourteenth Amendment's deliberate-indifference standard to the estate of an arrestee's Section 1983 medical-needs claim where the arrestee died at a detention center less than four hours after being arrested for drug possession during a traffic stop. *Brown*, 362 F. App'x at 342-44. Likewise, the Eleventh Circuit applied the Fourteenth Amendment's deliberate-indifference standard to a deceased arrestee's father's Section 1983 claim for inadequate medical care, where the arrestee died of a lethal combination of prescription drugs within one day of his arrest and detention in the defendant's jail. *See Burnette*, 533 F.3d at 1327-31; *see also Sanders v. City of Dothan*, 409 F. App'x 285, 287-89 (11th Cir. 2011).

The District of Columbia, Second, Third, Fifth, and Tenth Circuits have been applying the Fourteenth Amendment to Section 1983 medical-needs cases since the late 1980s that remain good law. For example, in *Dorman*, the court applied the Fourteenth Amendment's deliberate-indifference standard to a Section 1983 medical-needs *Monell*[2] claim involving an arrestee's suicide that occurred less than one day after his arrest and detention in the District of Columbia's Police Department. 888 F.2d at 160-61. In *Weyant*, the Second Circuit also applied the Fourteenth Amendment's deliberate-indifference standard in a Section 1983 medical-needs claim immediately following the

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[2] *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658 (1978) (holding that a municipality may be liable under 42 U.S.C. § 1983 based on an unconstitutional policy or practice).

arrest of a diabetic person who went into insulin shock at the scene. 101 F.3d at 848-50, 856-57. In *Groman*, the Third Circuit applied the Fourteenth Amendment's deliberate-indifference standard to a Section 1983 claim that officers failed to provide an arrestee with medical assistance at the arrest scene or at the police station after the arrestee had suffered a minor stroke. 47 F.3d at 632-33, 636-37.

The Fifth Circuit treats arrestees as a "subset of pretrial detainees," and has expressly concluded that, "[a]fter the initial incidents of a seizure have concluded and an individual is being detained by police officials but has yet to be booked, an arrestee's right to medical attention, like that of a pretrial detainee, derives from the Fourteenth Amendment." *Nerren*, 86 F.3d at 472-73; *see also Hill v. Carroll County, Miss.*, 587 F.3d 230, 237-38 (5th Cir. 2009) (holding that the claims for "failure to monitor" or failure to provide medical attention to an arrestee who died in the back of a squad car on the way to jail were governed by the Fourteenth Amendment's deliberate-indifference standard). Lastly, the Tenth Circuit held in *Barrie v. Grand Cty.* that the Fourteenth Amendment's deliberate-indifference standard governed an estate's claim that the decedent's death was the result of inadequate medical attention where the arrestee committed suicide in less than twelve hours after his arrest and initial detention. 119 F.3d at 863-64, 867-69.

Thus, the majority of circuit courts have either expressly held or acknowledged that the Fourteenth Amendment's deliberate-indifference standard governs

a Section 1983 claim that an arrestee was not provided with adequate medical attention.

2. The Seventh and Ninth Circuits inappropriately apply the Fourth Amendment in conflict with the majority of circuit courts to an arrestee's claim for denial of medical care.

Two circuits, the Seventh and Ninth, adhere to the minority view that the Fourth Amendment applies to a Section 1983 failure to provide medical care claims. In *Tatum v. City and County of San Francisco*, the Ninth Circuit held that law enforcement officers are held to the objective-reasonableness standard under the Fourth Amendment for purposes of post-arrest medical care. 441 F.3d at 1099. The Ninth Circuit appears to apply the Fourth Amendment's objective-reasonableness standard at least until the arrestee arrives at the police station. *See, e.g.*, *Estate of Cornejo ex rel. Solis v. City of Los Angeles*, 618 F. App'x 917, 920 (9th Cir. 2015) ("In *Tatum* . . . we found that suspects have a Fourth Amendment right to 'objectively reasonable post-arrest [medical] care' until the end of the seizure," which lasts at least until an arrestee arrives at the police station.).

Although the Seventh Circuit also applies the Fourth Amendment in such cases, its reasoning is different. The Seventh Circuit evaluates whether the Fourth, Fourteenth, or Eighth Amendment applies to a

civil rights claim based on when the alleged constitutional violation occurred during the criminal justice process. *See Collins v. Al-Shami*, 851 F.3d 727, 731 (7th Cir. 2017). Specifically, the Seventh Circuit adheres to the following rubric:

> The Fourth Amendment applies to the period of confinement between a warrantless arrest and the probable-cause determination[;] the Due Process Clause of the Fourteenth Amendment governs after the probable-cause determination has been made[;] and the Eighth Amendment applies after a conviction. . . .

Id. (internal citations omitted). Based on this test, the Seventh Circuit holds that the Fourth Amendment's objective-reasonableness standard applies to "medical care" claims "brought by arrestees who have not yet had" the requisite hearing on probable cause, also known as a *Gerstein* hearing, in reference to this Court's holding in *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Currie v. Chhabra*, 728 F.3d 626, 629 (7th Cir. 2013).

In the present case, the Seventh Circuit analyzed Perry's Section 1983 medical-needs claim under the Fourth Amendment. After acknowledging that Perry's Amended Complaint sought relief under the Eighth Amendment for alleged deliberate indifference to his medical needs, the Seventh Circuit held that, because Perry had been in custody for less than 24 hours when he died and never received a probable cause hearing, the Fourth Amendment's objective-reasonableness standard applied to his medical-needs claim. *Estate of*

Perry v. Wenzel, 872 F.3d 439, 452-53 (7th Cir. 2017). Without any in-depth analysis, the Seventh Circuit cited three of its prior decisions from 2006 and 2007 to support its conclusion that the Fourth Amendment applied to Perry's claims. *See Perry*, 872 F.3d at 453 (citing *Williams v. Rodriguez*, 509 F.3d 392, 403 (7th Cir. 2007); *Lopez v. City of Chicago*, 464 F.3d 711, 719 (7th Cir. 2006); *Sides v. City of Champaign*, 496 F.3d 820, 828 (7th Cir. 2007)).

Thus, in the present case, the Seventh Circuit applied the Fourth Amendment to Perry's Section 1983 medical-needs claim based on prior Seventh Circuit precedent that is at odds with the majority of the other federal appellate courts.

Recent decisions from the Sixth and Eighth Circuits highlight the need for this Court's involvement on the issue. In July of last year, the Sixth Circuit considered, but did not decide, whether the Fourth Amendment's objective-reasonableness standard or the deliberate-indifference standard under the Fourteenth Amendment governed a claim for inadequate medical treatment, where the arrestee experienced a fatal seizure in a county jail approximately 15 hours after his arrest. *Esch*, 699 F. App'x at 511-15. Acknowledging that its precedent "never squarely decided whether the Fourth Amendment's objective reasonableness standard can ever apply to a plaintiff's claims for inadequate medical treatment," the Sixth Circuit noted the split in authority among other circuits. *Id.* at 514-15 (citing *Currie*, 728 F.3d at 630; *Tatum*, 441 F.3d at 1099; *Barrie*, 119 F.3d at 868-69). Ultimately, the

Esch court decided that the plaintiff's claims failed under both the Fourth and Fourteenth Amendment standards, avoiding a determination of which standard applied. *Id.* at 515.

Similarly, in early 2016, without deciding whether the Fourth or Fourteenth Amendment applied, the Eighth Circuit held that qualified immunity barred a claim for unreasonable delay in rendering medical care to an arrestee because the right to an objectively reasonable response to medical needs had not been clearly established in March 2012. *Bailey*, 810 F.3d at 593 (recognizing a "conflict in authority" about how to evaluate a claim alleging denial of medical care to an arrestee and comparing cases from the Seventh and Tenth Circuits), *cert. den'd*, 137 S. Ct. 60. The Eighth Circuit explained: "Neither the Supreme Court nor this circuit had announced such a right, and there is no uniform body of authority that might allow us to conclude that the right was clearly established." *Id.*

This Court's intervention is needed to provide clarity to police officers and local government attorneys around the country to resolve this circuit conflict.

B. This Court's Fourth and Fourteenth Amendment jurisprudence in relation to arrestees' medical needs supports the application of the Fourteenth Amendment's deliberate-indifference test.

The intersection of this Court's Fourth and Fourteenth Amendment jurisprudence as it relates to

pre-trial detainees and arrestees has largely been in the context of excessive-force cases. The Courts' reasoning and analyses in those cases and its choices in applying the objective-reasonableness or deliberate-indifference standards in particular contexts sheds light on how the circuit split involving arrestee's medical needs should be resolved, should this Court decide to grant the petition.

This Court has not explicitly addressed whether a Section 1983 claim for inadequate medical care rendered to an arrestee is cognizable under the Fourth Amendment, nor, if so, whether and when the Fourth Amendment's objective-reasonableness standard or the Fourteenth Amendment's deliberate-indifference standard governs. *See Bailey*, 810 F.3d at 593 ("Neither the Supreme Court nor this circuit ha[s] announced" a "right under the Fourth Amendment against unreasonable delay in medical care for an arrestee. . . ."); Bodensteiner & Levinson, 1 State and Local Government Civil Rights Liability § 1:16.50 (Nov. 2017 update).

The Fourth Amendment's objective-reasonableness standard applied by the Seventh Circuit in this case traces its origin to 1989, where, this Court articulated the constitutional standard applicable to "a *free* citizen's claim that law enforcement officials used excessive force in the course of making an arrest, investigatory stop, or other 'seizure' of his person." *Graham v. Connor*, 490 U.S. 386, 388 (1989) (emphasis added). After rejecting the notion "that all excessive force claims brought under § 1983 are governed by a single generic standard," the Court instructed that the

"analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Id.* at 394. When excessive-force claims arise in the context of an arrest or investigatory stop of a free citizen, the Court reasoned, "it is most properly characterized as one invoking the protections of the Fourth Amendment" because that amendment guarantees citizens the right to be free from unreasonable "seizures." *Id.* (quoting U.S. Const. amend. IV).

The *Graham* Court then explained that, "[a]s in other Fourth Amendment contexts[,] . . . the 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397. In a footnote, the *Graham* Court refrained from resolving whether the Fourth Amendment "continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which arrest ends and pretrial detention begins. . . ." *Id.* at 395 n.10.

Twenty-six years later, in *Kingsley v. Hendrickson*, the Court considered an issue closely related to the one alluded to in the *Graham* footnote: "whether, to prove an excessive force claim [under the Fourteenth Amendment's Due Process Clause], a pretrial detainee must show that the officers were subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was objectively unreasonable." *See* 135 S. Ct. 2466, 2470 (2015). In its analysis,

the *Kingsley* Court explained that excessive-force cases involve two distinct "state-of-mind" inquiries:

> The first concerns the defendant's state of mind with respect to his physical acts – *i.e.*, his state of mind with respect to the bringing about of certain physical consequences in the world. The second question concerns the defendant's state of mind with respect to whether his use of force was "excessive."

Id. at 2472.

To highlight the distinction between these two state-of-mind inquiries, the Court relied on its prior reasoning in a substantive due process high-speed pursuit case, *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). Citing *Lewis*, the Court explained that, in fact, excessive-force claims necessarily require a showing or, as was true in *Kingsley*, a stipulation that the defendant purposefully or knowingly used force, narrowing the state-of-mind inquiries in excessive-force cases down to questioning the "interpretation" of that use of force – *i.e.*, the defendant's state of mind in relation to whether the use of force was excessive. *Kingsley*, 135 S. Ct. at 2472, 2475. Thus, the Court held that the excessiveness of the use of force must be gauged through an objective standard – as opposed to subjectively asking whether the defendant intended to use force excessively – while the initial use of force itself must occur knowingly or on purpose, as discussed in *Lewis*. *Id.* at 2472; *Lewis*, 523 U.S. at 849.

In *Lewis*, the Court held that a police officer did not violate the Fourteenth Amendment's Due Process Clause by causing a death through deliberate or reckless indifference during a high-speed vehicle chase. 523 U.S. at 836. Before reaching its due process analysis, the Court was presented with the question of whether facts involving a high-speed chase could present a cognizable claim under the Fourth Amendment and thus be analyzed under the objective-reasonableness standard because the officer was attempting to make a "seizure." *Id.* at 842-43. Relying on the more-specific-provision rule set out in *Graham*, the Court reasoned that the Fourteenth Amendment's Due Process Clause governed because, during the high-speed pursuit, there was no "search" or "seizure," as those terms are used in the Fourth Amendment. *Id.* at 843-44.

Moving onto the substantive due process analysis, the *Lewis* Court considered a circuit split relating to whether the deliberate-indifference or shocks-the-conscience standards applied in cases involving high-speed pursuits. *Id.* at 839-40. In its analysis, the Court compared different types of cases on a spectrum of culpability ranging from negligence (not culpable enough for Fourteenth Amendment liability) and arbitrary government action that would shock the conscience (culpable enough for Fourteenth Amendment liability). *Id.* at 845-50. The Court reasoned that the deliberate-indifference standard is appropriate in cases where law enforcement has the time for "actual deliberation" before acting, such as in the prison or custodial context,

as opposed to cases involving situations where law enforcement must make split-second decisions. *Id.* at 850-54. In those split-second-decision cases, the Court reasoned that the shocks-the-conscience standard was more appropriate. *Id.*

Pertinent to the present case, by way of contrasting high-speed pursuit situations to examples where law enforcement were afforded more time to deliberate their actions, the *Lewis* Court stated that "[d]eliberately indifferent conduct must . . . be enough to satisfy the fault requirement for due process claims based on the medical needs of someone jailed while awaiting trial. . . ." *Id.* at 850 (citing *Barrie*, 119 F.3d at 867; *Weyant*, 101 F.3d at 856). As previously discussed, *Barrie* and *Weyant* were cases where the Tenth and Second Circuits applied the Fourteenth Amendment's deliberate-indifference standard to determine whether arrestees' medical needs were constitutionally met within one day of their arrests while being held in custody before judicial determinations of probable cause. *See Barrie*, 119 F.3d at 865-68; *Weyant*, 101 F.3d at 848-50, 856.

Thus, taking the *Lewis*, *Kingsley*, and *Graham* decisions together, there exists a clear precedential path for resolving the identified circuit split relating to the constitutional standard applicable to Section 1983 claims for an arrestee's medical care. *Lewis* acknowledges the Fourteenth Amendment's application to arrestees' medical needs both explicitly and implicitly through its citation to *Barrie* and *Weyant*. While *Kingsley* set forth an objective-reasonableness standard for

excessive force claims based on the Due Process Clause, the dual state-of-mind questions unique to use-of-force cases and the Court's reliance on *Lewis* sets *Kingsley* apart from cases involving medical claims, allowing the Court to further delineate when the deliberate-indifference test applies. Lastly, *Graham*'s seminal holding relating to the objective-reasonableness standard is premised on the more-specific-provision rule that lends ready support to applying the Fourteenth Amendment, and not the Fourth, to medical-needs claims by arrestees because those claims do not involve searches or seizures.

Accordingly, this Court should seize the opportunity to resolve the deepening divide among the circuits and tie together its own precedent by considering whether the Seventh Circuit applied the appropriate constitutional standard in this case.

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S OPINION AND PROVIDE FURTHER INSTRUCTION TO LOWER COURTS ON THE PROPER APPLICATION OF QUALIFIED IMMUNITY.

As set forth above, this case is an ideal vehicle for resolving the circuit split that has developed on this recurring and important issue of federal law. Notwithstanding the foregoing, the Court has independent grounds to reverse the Seventh Circuit's opinion on the basis of its failure to properly apply qualified immunity in this case.

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The purpose of the qualified immunity doctrine is to give government officials "breathing room to make reasonable but mistaken judgments," such that " 'all but the plainly incompetent or those who knowingly violate the law' " are shielded from Section 1983 liability. *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Stanton v. Sims*, 134 S. Ct. 3, 4-5 (2013).

In its one-page analysis denying the qualified immunity defense in this case, the Seventh Circuit necessarily concluded that all eleven petitioners were "plainly incompetent" or "knowingly" violated Perry's clearly established constitutional right to objectively reasonable responses to his medical needs under the Fourth Amendment. *See Perry*, 872 F.3d at 460; *Stanton*, 134 S. Ct. at 5-6. However, far from declaring patent incompetence or knowing violations for each of the eleven petitioners, the Seventh Circuit simply relied on its own precedent relating to medical-needs cases and concluded that "[b]ecause Perry has met his burden at summary judgment of establishing that there was a violation of his constitutional rights and that that right was clearly established in 2010, his claims must be submitted to a jury for consideration." *Perry*, 872 F.3d at 460.

The Seventh Circuit's reasoning is so severely lacking that this Court's review is necessary. First, the Court should emphasize the need for fact-specific analyses in cases where, as here, there are several individual defendants claiming qualified immunity. The Seventh Circuit's failure to consider whether each of the eleven petitioners violated Perry's constitutional rights runs in direct contradiction to this Court's qualified immunity jurisprudence and the express holdings of other federal circuits. Second, the Court should use this case as an opportunity to issue what has become a recurrent – but still needed – reminder to lower courts that, in evaluating whether the constitutional law alleged to have been violated was clearly established, courts must consider the law in the context of the particular conduct at issue. Perhaps even more concerning, the Seventh Circuit ignored the split in authority discussed in Part I of this brief and held the petitioners responsible for knowing that a more rigorous constitutional standard applied to their conduct in this case than would have been true in eight other federal circuits.

A. The Seventh Circuit failed to conduct qualified immunity analyses as to each individual defendant.

The established rules governing whether qualified immunity shields a government official from liability inherently require fact-specific, individualized analyses. This is true in part because immunity is not solely based on whether there has been a constitutional

violation, but instead can apply where an officer makes a reasonable mistake. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting) (quoting *Butz v. Economou*, 438 U.S. 478, 507 (1978)))). Thus, a crucial step in the qualified immunity analysis is evaluating what an officer knew or could have reasonably believed based on the specific circumstances facing that officer at the time of the incident. *See id.* at 244 ("The principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law.").

To that end, federal circuits across the country have made clear that the qualified immunity analyses in cases involving more than one defendants' conduct require specificity and individualized analyses as to each defendant. *See, e.g.*, *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015) (holding that the district court's rulings were deficient "in evaluating defendants' claims of qualified immunity, [because] the district court ruled on all defendants as a single group instead of evaluating [the plaintiff]'s claims against each defendant individually"); *Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996) ("Thus, crucial to the resolution of any assertion of qualified immunity is a careful examination of the record (preferably by the district court) to establish, for purposes of summary judgment, a

detailed factual description of the actions of each individual defendant (viewed in a light most favorable to the plaintiff).”); *Longoria v. Texas*, 473 F.3d 586, 593 (5th Cir. 2006) (“When . . . the district court does not explain with sufficient particularity the factual basis justifying a denial of qualified immunity, an appellate court must examine the record, and it becomes [its] task to determine whether, when viewing the facts in the light most favorable to [the plaintiff], each defendant was entitled to qualified immunity.”); *Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 401 (6th Cir. 2015) (“To start, each defendant’s liability must be assessed individually based on his own actions.” (internal quotes and alterations omitted)); *Manning v. Cotton*, 862 F.3d 663 (8th Cir. 2017) (“Thus, the district court erred by failing to conduct individualized analyses as to each officer as required.”); *Tooley v. Young*, 560 F. App’x 797, 801 (10th Cir. 2014) (“[T]he inquiry must be defendant specific except when Defendants actively and jointly participated in the use of force or the facts support a failure-to-intervene theory.” (internal quotations omitted)).

Here, the Seventh Circuit did not even attempt to engage in individual qualified immunity analyses of each of the eleven petitioners in the one page it devoted to qualified immunity. *See Perry*, 872 F.3d at 460. While the court briefly addressed the actions of four of the petitioners in its general analysis under the Fourth Amendment, *see Perry*, 872 F.3d at 456-57, even this analysis is insufficient, as the court failed to discuss or acknowledge whether the specific circumstances

facing each officer could have led them to believe that they were violating any clearly established law. Instead, the Seventh Circuit simply based its denial of qualified immunity on its finding that there had been a Fourth Amendment violation. *Id.* at 460. This is clearly insufficient and this Court should intervene to clarify that courts should engage in an individualized analysis for each individual defendant for the purposes of qualified immunity.

B. Contrary to the Seventh Circuit's holding, the Fourth Amendment's application to Section 1983 claims for inadequate medical care for arrestees was not clearly established in 2010.

In the underdeveloped qualified immunity section of its opinion, the Seventh Circuit concluded that, "in September 2010, it was clearly established that the Fourth Amendment governed claims by detainees who had yet to receive a judicial probable cause determination." *Perry*, 872 F.3d at 460 (citing *Williams*, 509 F.3d at 403). The court reasoned that, "if by 2010, it was clearly established that an officer or prison nurse's actions were judged by the objectively reasonable standard of the Fourth Amendment, the failure to take *any* action in light of a serious medical need would violate that standard." *Id.* (emphasis in original). The court ended its reasoning there.

This Court has "repeatedly told courts . . . not to define clearly established law at a high level of

generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *White v. Pauly*, 137 S. Ct. 548, 552 (2017). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742.

Here, the Seventh Circuit disregarded this Court's admonitions as to avoiding generalizations in defining "clearly established law." Indeed, the Seventh Circuit's general statement of the right that was allegedly violated in this case nearly tracks the linguistic formula this Court set forth as a prime bad example for analyzing whether a right is clearly established. *Compare Perry*, 872 F.3d at 460 (stating that "the failure to take *any* action in light of a serious medical need would violate" the Fourth Amendment), *with al-Kidd*, 563 U.S. at 742 ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help. . . ."). Thus, the very language of the Seventh Circuit's decision is evidence for its woefully deficient analysis related to whether the constitutional law alleged to have been violated was clearly established.

Moreover, while this Court does not require a "case directly on point" to clearly establish law, "existing precedent must have placed the statutory or constitutional question *beyond debate*." *al-Kidd*, 563 U.S. at 741 (emphasis added). To that end, "[i]f judges thus disagree on a constitutional question, it is unfair to

subject police to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999); *see also Pearson v. Callahan*, 555 U.S. 223, 244-45 (2009). In *Wilson*, between the time of the alleged constitutional violation and the Court's decision, "a split among Federal Circuits in fact developed" on the constitutional question at issue in that case. 526 U.S. at 618. In light of that "undeveloped state of the law," the Court thought it unfair to expect police officers to "'predict the future course of constitutional law.'" *Id.* at 617 (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).

In this case, the Seventh Circuit could and should have known that its application of the Fourth Amendment's objective-reasonableness standard to Section 1983 medical-needs claims involving arrestees was on one side of a genuine split among the federal circuits that had existed for years. Indeed, more than one and one-half years before the Seventh Circuit penned its decision in this case, the Eighth Circuit specifically acknowledged that "a right under the Fourth Amendment against unreasonable delay in medical care for an arrestee was *not clearly established* in March 2012. Neither the Supreme Court nor [the Eighth Circuit] had announced such a right, and *there is no uniform body of authority that might allow [the court] to conclude that the right was clearly established*." *Bailey*, 810 F.3d at 593 (emphasis added).

Thus, at the time of Perry's arrest in 2010 and at the time of the Seventh Circuit's decision seven years later, federal circuit judges disagreed not only on the

constitutional question of whether the Fourth Amendment applied to Section 1983 claims for inadequate medical care for an arrestee, but they also disagreed on the question of whether that Fourth Amendment right was clearly established. This presents a constitutional question of law far too unsettled to support denying qualified immunity. *See Wilson*, 526 U.S. at 618. The law enforcement officers in this case – or any case – should not be subjected to Section 1983 liability simply because they reside in a circuit that fails to recognize contrary case law from other circuits.

Accordingly, in resolving the circuit split that the Seventh Circuit ignored in its qualified immunity analysis, this Court should also use this case as yet another opportunity to remind the federal circuits of the factual and legal specificity and attention to detail necessary to sufficiently conduct a qualified immunity analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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