No. 21-__

IN THE
Supreme Court of the United States

PATSY K. COPE; ALEX ISBELL, as Dependent Administrator of, and on behalf of, Estate of DERREK QUINTON GENE MONROE, and his heirs at law,
Petitioners,

v.

LESLIE W. COGDILL; MARY JO BRIXEY; JESSIE W. LAWS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Upon arriving in jail, pretrial detainee Derrek Monroe informed jail officials that he was suicidal and attempted to hang himself twice in his cell. Jail officials responded by isolating Monroe in a new cell with a wall-mounted telephone and a 30-inch phone cord. When Monroe began to strangle himself with the obvious ligature, the lone jailer on duty stood outside the cell and watched. The jailer did not call 911 and did not attempt to render aid to Monroe as Monroe was dying a few feet away.

A divided panel of the Fifth Circuit concluded that the jailer who watched Monroe's suicide without intervening was entitled to qualified immunity because, even though he "knew he should have" intervened, Fifth Circuit precedent did not clearly establish the unreasonableness of his conduct. The panel further concluded that the jail officials who isolated Monroe in a cell with a 30-inch phone cord could not be held liable because, under Fifth Circuit precedent, a phone cord is "not as obvious" a ligature as bedding.

This case presents recurring and important questions regarding application of the deliberate-indifference standard to claims involving pretrial detainees:

1. Whether jail officials who are subjectively aware of a substantial risk that a pretrial detainee will attempt suicide and respond to the harm unreasonably may be held liable where their violation was obvious—as the First, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits have held—or whether jail officials who respond unreasonably to the obvious risk

should be granted qualified immunity in the absence of a case involving the same facts—as the Fifth Circuit held below.

2. Whether the objective standard this Court announced in *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015), applies to inadequate-care claims brought by pretrial detainees—as the Second, Sixth, Seventh, and Ninth Circuits have held—or whether the subjective standard that applies to convicted prisoners also applies to pretrial detainees—as the Eighth, Tenth, and Eleventh Circuits have held and as the Fifth Circuit held below.
3. Whether the judge-made qualified immunity doctrine requires reform.

PARTIES TO THE PROCEEDING

Patsy K. Cope, individually, and Alex Isbell, on behalf of the estate of Derrek Quinton Gene Monroe, petitioners on review, were the plaintiffs-appellees below.

Leslie W. Cogdill, Mary Jo Brixey, and Jessie W. Laws, respondents on review, were the defendants-appellants below.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit:

Cope v. Cogdill, No. 19-10798 (5th Cir. July 2, 2021) (reported at 3 F.4th 198)

U.S. District Court for the Northern District of Texas:

Cope v. Coleman County, No. 6:18-cv-015-C (N.D. Tex. April 25, 2d019) (unreported, available at 2019 WL 11715574)

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PETITION FOR A WRIT OF CERTIORARI

Patsy K. Cope, individually, and Alex Isbell, on behalf of the estate of Derrek Quinton Gene Monroe (collectively, "Cope") respectfully petition for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 3 F.4th 198. Pet. App. 1a-60a. The District Court's opinion is not reported but is available at 2019 WL 11715574. *Id.* at 61a-72a.

JURISDICTION

The Fifth Circuit entered judgment on July 2, 2021. It denied panel rehearing and en banc review on August 13, 2021. *Id.* at 75a-76a. On October 21, 2021, this Court extended Petitioners' deadline to petition for a writ of certiorari to December 13, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment, U.S. Const. amend XIV, provides in relevant part:

> No State shall * * * deprive any person of life, liberty, or property, without due process of law.

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

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

On a Sunday morning in 2017, Jessie Laws, the jailer on duty at the Coleman County Jail in Texas, watched Derrek Monroe, a pretrial detainee, wrap a 30-inch phone cord around his neck, strangle himself, and become motionless. Laws did not intervene to stop the suicide. Nor did he call 911. Monroe died from his injuries.

Monroe was alone in his cell with a 30-inch ligature because jail officials moved him there after he repeatedly attempted to hang himself in a different cell. Jail policy, jail training, and common sense directed the officials against isolating an inmate known to be suicidal in a cell with an obvious potential ligature. Indeed, a recent statewide memorandum had recommended that phone cords in Texas jail cells "be no more than twelve (12) inches in length" due to the risk that longer phone cords could be used in suicides. Pet. App. 19a-20a n.11. Jail officials isolated Monroe in a cell with a 30-inch phone cord anyway. He hung himself with that cord the next day.

These undisputed facts set out a singularly egregious case of deliberate indifference. But a divided Fifth Circuit panel concluded that the jail officials were entitled to qualified immunity on all counts.

As to Laws, the jailer who watched Monroe hang himself without rendering aid or calling 911, the panel majority acknowledged his deliberate indifference. It noted that "watching an inmate attempt suicide and failing to call for emergency medical assistance is not a reasonable response" and that "[c]alling for emergency assistance was a precaution that Laws knew he should have taken." *Id.* at 16a. The court nonetheless granted Laws qualified immunity because no directly analogous Fifth Circuit case clearly established that watching a detainee commit suicide without intervening was unreasonable.

The panel majority also granted qualified immunity to the jail officials who isolated Monroe in a cell with a 30-inch phone cord. It acknowledged Fifth Circuit precedent holding that officials are deliberately indifferent when they place a detainee known to be suicidal

in a cell with obvious ligatures. But the panel observed that the ligatures at issue in those earlier cases were blankets, and declared that the danger posed by a 30-inch phone cord was "not as obvious" as the danger posed by bedding. *Id.* at 19a-20a. For that reason, the panel held, the jail officials did not violate clearly established law. Judge Dennis dissented.

This Court should grant certiorari for three reasons.

First, the decision below marks yet another example of the Fifth Circuit's refusal to follow this Court's qualified immunity precedent in a case involving egregious misconduct. Despite the obvious deliberate indifference demonstrated by the jail officials in this case, the panel granted them qualified immunity on the theory that no factually identical case established the unlawfulness of their acts. Just last Term, this Court reproached the Fifth Circuit for committing a materially identical error. *See Taylor* v. *Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam). As Judge Dennis explained in his dissent in this case, the panel's decision here "repeats the very same analytical error [the Fifth Circuit] made in *Taylor* and which the Supreme Court found necessary to correct." Pet. App. 41a.

By departing from this Court's precedent, the panel's decision creates a circuit split regarding the standard that should govern qualified immunity in inmate-suicide cases. No fewer than six other courts of appeals have confronted suicide cases similar to (but less egregious than) this case. All six have denied qualified immunity. These courts correctly recognize that prison officials who are subjectively aware of an obvious risk that a detainee will commit suicide and who respond in a manifestly unreasonable manner may be held liable, even in the absence of factually

identical precedent. The Fifth Circuit's contrary holding in this case departs from the consensus and creates a split in a factual scenario that arises all too often in local jails.

Second, the decision below entrenches a widely acknowledged split regarding the application of this Court's decision in *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015). *Kingsley* held in the context of an excessive-force case that the Fourteenth Amendment's objective standard, rather than the Eighth Amendment's subjective standard, governs claims brought by pretrial detainees. The circuits are now intractably split over whether the logic of *Kingsley* extends to cases involving inadequate care. The Fifth Circuit sided with the courts that have erroneously refused to extend *Kingsley* where logic dictates. The split on this important question is now 4-to-4. Only this Court can resolve it.

Third, this case presents an appropriate opportunity to rein in the excesses of the modern qualified immunity doctrine. The Fifth Circuit's conclusion that the jail officials in this case lacked "fair warning" that their misconduct was unlawful illustrates how far modern qualified immunity has deviated from its common law roots as a narrow, good-faith defense to unconstitutional conduct. This Court should restore qualified immunity to its proper form.

STATEMENT

A. Factual Background

1. Suicide is a leading—and growing—cause of death in the United States.[1] Local jails are particularly susceptible to this nationwide scourge: The suicide rate in jails of 100 beds or fewer is nearly ten times the rate in the nation as a whole.[2]

The Coleman County Jail, located in central Texas, is one such local jail. It has a small inmate capacity with just four cells. Pet. App. 23a. The jail maintains a suicide-prevention policy and conducts periodic trainings regarding the handling of suicidal detainees. Three features of the jail's policies and trainings are relevant here.

First, jail policy requires that suicidal detainees "be transferred to a facility better equipped to manage an inmate with mental disabilities" if necessary to protect them. *Id.* at 26a-27a. Second, jail officials are trained to avoid placing suicidal inmates in isolation, where other inmates cannot come to their aid. *See id.* at 24a-25a. Third, if an official witnesses a suicide in progress, jail policy requires them to "notify the nearest officer on duty or on call and call the Emergency Medical Service." Cope CA5 Br. 14 (quotation marks omitted).

Coleman County Jail's suicide-prevention practices are informed by the Texas Commission on Jail Stand-

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[1] Suicide, Nat'l Inst. of Mental Health, https://tinyurl.com/2abm5c6z (last visited Nov. 21, 2021).

[2] Nat'l Inst. of Corrs., *The Role of Corrections Professionals in Preventing Suicide* 3 (rev. 2011), https://tinyurl.com/56f6d5sa.

ards, which issues recommendations to jail administrators. One such recommendation, sent to every sheriff and jail administrator in Texas in 2015, advises that phone cords in jail cells be no more than 12 inches long. Pet. App. 25a-26a. The Commission issued this guidance in response to four suicides involving longer phone cords that occurred in Texas jails in the span of eleven months. *Id.*

2. Derrek Monroe died by suicide after officials in the Coleman County Jail isolated him in a cell with a 30-inch phone cord even though he had twice attempted suicide by hanging the previous day. The jailer on duty watched the suicide without rendering aid or calling 911. The suicide and events leading up to it were captured on the jail's surveillance camera.

Jail Administrator Mary Jo Brixey and Sheriff Leslie Cogdill oversaw the Coleman County Jail during the events at issue. Both previously worked at jails where in-custody suicides occurred, including suicides by hanging. *Id.* at 24a.

Monroe was arrested for a suspected drug offense on Friday, September 29, 2017. *Id.* at 2a; Appellants' Opening CA5 Br. 5. During intake, Monroe informed jail authorities that he "wished [he] had a way to" kill himself and that he had attempted suicide two weeks earlier. Pet. App. 2a. After learning of Monroe's suicidality, Brixey placed Monroe on suicide watch. *Id.* at 2a-3a. Brixey and Cogdill then located Monroe in a cell with multiple inmates, consistent with their training not to isolate suicidal detainees. *Id.* at 24a.

On Saturday, a day after arriving at the jail, Monroe suffered a seizure and was sent to a hospital for medical treatment. *Id.* at 25a. He returned to the jail later that day after being successfully treated. *Id.*

Jailer Jessie Laws was the only jailer on duty upon Monroe's return from the hospital. Approximately 17 minutes after he returned, Monroe attempted suicide twice in rapid succession. *Id.* at 3a, 25a. First, he sat against the wall, wrapped a blanket around his neck, and tried to "choke himself out." *Id.* at 25a. When that failed, Monroe stood up, climbed onto the cell's latrine, and tried to hang himself by tying the cloth to a fixture and diving off, but the knot gave way. *Id.*

Laws called Cogdill upon witnessing Monroe's suicide attempts. After arriving at the jail, Cogdill spoke with Monroe and consulted the intake form, which confirmed Monroe's suicidality. *Id.* at 2a-3a. Cogdill then decided to remove Monroe from his shared cell and isolate him in the jail's only single-occupancy cell. *Id.* at 25a. Brixey ratified this decision. *Id.* Their decision contravened their training, which made clear that isolating a suicidal detainee is dangerous and disfavored. *Id.*

Monroe's new cell contained a wall-mounted phone with a 30-inch cord. Later that afternoon, Monroe told a mental health evaluator, "The first chance I get[,] it's over." *Id.* at 26a.

The jail was staffed by just one jailer on nights and weekends. On Sunday morning, the day after Monroe's unsuccessful suicide attempts, Laws was again the only jailer on duty. A witness in an adjacent cell testified that Monroe was "making all kinds of racket" that morning, and for at least an hour could be heard saying, "I'm going to kill myself. I'm going to kill myself. Please help me." Cope CA5 Br. 15.

Monroe eventually defecated on himself and required a shower and clean clothes. Although jail pol-

icy did not allow jailers to enter an inmate's cell without backup personnel present, when it became necessary to take Monroe to the shower, Laws phoned Brixey and received permission to remove Monroe from the cell without backup. The jail's surveillance video shows Laws—alone and unarmed—escorting Monroe—unrestrained—to and from the shower. Pet. App. 27a.

Almost immediately after returning to his cell, Monroe became agitated and caused his toilet to overflow, after which Laws began to mop the floor outside his cell. At 8:37 a.m., as Laws mopped, Monroe began wrapping the phone cord around his neck. *Id.* The surveillance video shows that Laws momentarily stopped mopping as he observed Monroe wrap the cord around his neck and bring his weight to bear on the cord to strangle himself. *Id.* at 64a.

Laws made no effort to stop Monroe. Instead, he slowly returned the mop to its bucket, wrung it out, and stepped away from the cell. *Id.* Instead of calling 911 as jail policy required, he called his bosses. *Id.* He failed to determine their locations and thus did not know when they would arrive at the jail. *Id.* at 28a. When asked later why he didn't call 911, Laws replied, "Honestly, I don't know." *Id.*

After being informed that Monroe was in the process of hanging himself, neither Brixey nor Cogdill called 911. Cope CA5 Br. 17. Nor did they instruct Laws to call 911 or to render aid to Monroe. *Id.*

At 8:40, more than three minutes after Monroe began asphyxiating himself, Laws returned, stood before Monroe's cell, and placed his hands on the bars of the cell. By this point, Monroe's body was motionless.

Although Laws had opened the cell mere minutes earlier and walked Monroe, unrestrained, to and from the shower, Laws did not enter the cell. Nor did he retrieve a breathing mask to ensure he would be ready to provide life-saving treatment immediately upon entering Monroe's cell. He also failed to seek assistance of the trustee-inmate in an adjacent cell who, pursuant to jail policy, could have been called on for assistance had Laws feared entering the cell alone. Instead, for the next seven minutes, Laws intermittently grasped the door of the cell, looked at his watch, and scratched his head. *Id.* at 18.

At 8:47, ten minutes after Monroe began to asphyxiate himself, Brixey arrived. Only then did Laws unlock the cell. The two entered the cell and unwrapped the phone cord from Monroe's neck. Brixey—not Laws—called 911, then returned to the cell before leaving again two minutes later to retrieve the breathing mask that Laws had failed to have at the ready. Pet. App. 29a.

Emergency services arrived at 8:54, seventeen minutes after Monroe began to hang himself. *Id.* Medical personnel attempted to resuscitate Monroe by performing chest compressions. Their efforts came too late. Monroe died at the hospital. *Id.* at 4a.

B. Procedural Background

1. Monroe's mother, Patsy Cope, sued Cogdill, Brixey, and Laws under 42 U.S.C. § 1983, alleging violations of the Fourteenth Amendment. Cope maintained that Laws acted with deliberate indifference by failing to render aid or call 911 as Monroe committed suicide in Laws's presence. She further alleged that Cogdill and Brixey acted with deliberate indifference

by isolating Monroe in a cell with an obvious ligature even though they knew he was suicidal.

2. The defendants asserted qualified immunity and moved for summary judgment, which the District Court denied. The District Court reasoned that it was undisputed that defendants were subjectively aware that Monroe was suicidal, and that the "law is clearly established that jailers must take measures to prevent inmate suicides once they know of the suicide risk." Pet. App. 71a (quotation marks omitted). The District Court concluded that a reasonable jury could find that Laws acted unreasonably by failing to call 911 or intervene to prevent the suicide occurring in his presence. *Id.* at 69a. The District Court further concluded that Cogdill and Brixey's decision to isolate a suicidal detainee in a cell with a 30-inch phone cord in violation of their training demonstrated "a high and obvious risk of suicide," such that a reasonable jury could find that their conduct was deliberately indifferent. *Id.* at 69a-70a.

3. A divided Fifth Circuit panel reversed. The panel majority first determined that the deliberate indifference standard required showing that the defendants "had subjective knowledge of a substantial risk of serious harm." *Id.* at 11a (quotation marks omitted). It rejected Cope's argument that, under this Court's decision in *Kingsley*, her claims should be governed by the objective standard applicable to pretrial detainees under the Fourteenth Amendment rather than the subjective standard applicable to convicted criminals under the Eighth Amendment. *Id.* at 12a-13a & n.7.

The panel majority then addressed qualified immunity. As to Laws, it recognized "that promptly failing to call for emergency assistance when a detainee"

is committing suicide "constitutes unconstitutional conduct." *Id.* at 16a. It further recognized that "[c]alling for emergency assistance was a precaution that Laws knew he should have taken, and failing to do so was both unreasonable and an effective disregard for the risk to Monroe's life." *Id.* But the panel majority believed that "[e]xisting case law * * * was not so clearly on point" as to put Laws on notice that his conduct was unlawful. *Id.* at 17a. As those two judges saw it, while Fifth Circuit precedent made clear that a jail official acts unlawfully when he does *nothing* to stop a suicide in progress, here "Laws did *something*": He called his bosses and waited for one of them to arrive. The court therefore concluded he was entitled to qualified immunity. *Id.*

The panel majority similarly granted Cogdill and Brixey qualified immunity for isolating Monroe in a cell with a telephone cord even though he had twice attempted to hang himself a day earlier. It acknowledged longstanding Fifth Circuit precedent holding that jail officials are deliberately indifferent when they provide inmates known to be suicidal with obvious ligatures, and further acknowledged that the dangers posed by long phone cords were well known in Texas jails at the time of Monroe's suicide. *See id.* at 19a-21a, n.11 & n.12. Even so, the panel majority granted qualified immunity because the danger posed by the phone cord was "not as obvious" as the danger posed by bedding. *Id.* at 19a-20a.

Judge Dennis dissented. He explained that "an officer violates clearly established law when his conduct so obviously transgresses the Constitution such that the unlawfulness would have been apparent to any

reasonable officer." *Id.* at 40a. Judge Dennis maintained that Laws's "glaring" inaction in the face of Monroe's ongoing suicide was an "obvious" violation, and that "any reasonable officer should have realized" as much. *Id.* at 42a, 46a (quoting *Taylor*, 141 S. Ct. at 54). Similarly, he concluded that any reasonable officer should have understood that isolating a suicidal inmate in a cell with "an obvious potential ligature for suicide"—whether it be bedsheets or a phone cord—violated the Constitution. *Id.* at 25a. By granting qualified immunity on the ground that no factually identical precedent involved phone cords rather than bedding, Judge Dennis believed, the panel "repeat[ed] the very same analytical error [the Fifth Circuit] made in *Taylor* and which the Supreme Court found necessary to correct." *Id.* at 41a.

The Fifth Circuit denied Cope's motion for panel rehearing and rehearing en banc. *Id.* at 75a-76a. This petition follows.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CIRCUIT SPLIT BY DISREGARDING OBVIOUS CONSTITUTIONAL VIOLATIONS FOR WANT OF FACTUALLY IDENTICAL PRECEDENT.

The Fifth Circuit continues to defy this Court's precedent, doubling down on the error this Court corrected in its summary reversal in *Taylor* just last Term. As this Court explained in *Taylor*, qualified immunity is not appropriate where "any reasonable officer should have realized" that their conduct violated the Constitution. 141 S. Ct. at 54. In the decision below, however, the Fifth Circuit required "clearly on point" precedent despite the obvious unconstitutionality of the

defendants' conduct. Pet. App. 17a. The decision below conflicts with decisions of the First, Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits involving facts analogous to—albeit less egregious than—the facts here. This Court's intervention is necessary to restore uniformity among the circuits and to correct, once again, the Fifth Circuit's refusal to apply this Court's qualified immunity precedent.

A. The Decision Below Ignores This Court's Precedent (Again).

The Fifth Circuit's decision misapplies the law of qualified immunity and flouts this Court's precedent.

1. Qualified immunity does not protect officials who "knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986). If officials have "fair warning that their conduct violated the Constitution," they are not entitled to qualified immunity. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). Typically, officials have the requisite "fair warning" because prior case law clearly establishes the unlawfulness of their conduct. *See Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). But as this Court has explained—repeatedly—prior case law directly on point is not required to clearly establish that certain conduct is unconstitutional. *See Hope*, 536 U.S. at 741; *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). Instead, where the unconstitutionality of the challenged conduct is so "obvious" that "any reasonable officer should have [so] realized," qualified immunity does not apply. *Taylor*, 141 S. Ct. at 54. Officials thus can "still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. That conclusion

holds particularly true where novel facts are not "materially distinguishable" from facts in prior cases. *Rivas-Villegas* v. *Cortesluna*, No. 20-1539, 2021 WL 4822662, at *3 (U.S. Oct. 18, 2021) (per curiam).

This Court first articulated the obviousness principle in *Hope*. There, prison officials handcuffed an inmate to a hitching post as punishment. *Hope*, 536 U.S. at 734. The inmate was left shirtless in the sun for seven hours, with minimal water and no bathroom breaks. *Id.* at 734-735. This Court held that the "violation was so obvious" that it did not matter that facts of prior cases "are not identical." *Id.* at 742-743. "The obvious cruelty inherent" in the conduct "should have provided respondents with some notice." *Id.* at 745.

The Fifth Circuit is not at liberty to disregard *Hope*. But it tried in *Taylor*. There, the Fifth Circuit concluded that officers did not have fair warning of the unconstitutionality of their acts because precedent did not clearly establish that "prisoners couldn't be housed in cells teeming with human waste" "for only six days." *Taylor* v. *Stevens*, 946 F.3d 211, 222 (5th Cir. 2019). Because the court had not previously held that confinement for six days in a cell with human feces violated the Eighth Amendment, the Fifth Circuit granted qualified immunity.

This Court summarily reversed. The Court explained that "no reasonable correctional officer could have concluded" the conduct was constitutionally permissible. *Taylor*, 141 S. Ct. at 53. In reaching this conclusion, this Court cited no case law presenting similar facts, because such case law was unnecessary in light of the clear unconstitutionality of the officers' conduct. Instead, citing *Hope*, this Court explained

that obvious constitutional violations provide defendants with "fair warning" that their conduct is unconstitutional. *Id.* at 53.

2. It is difficult to conceive of a clearer case of deliberate indifference than this one.

a. Consider Laws's conduct. Laws was subjectively aware of the substantial risk that Monroe would commit suicide because he watched the suicide unfold. Rather than intervening or calling 911, however, he called his off-site supervisors and waited, watching as Monroe was dying a few feet away from him.

Laws's conduct was manifestly unreasonable. He had no basis for refusing to enter the cell to come to Monroe's aid; he had escorted Monroe to the shower, unarmed and unassisted, minutes earlier. Had he been afraid to enter the cell alone, jail policy permitted him to seek assistance from a trustee-inmate in a neighboring cell. *See* Pet. App. 65a. And he had no basis for refusing to call 911, particularly given the jail's policy requiring jailers who witness a suicide attempt to "notify the nearest officer on duty or on call *and* call the Emergency Medical Service." Cope CA5 Br. 14 (quotation marks omitted) (emphasis added). Laws's actions throughout the suicide—his visible frustration with Monroe, his willingness to open the cell to escort Monroe to the shower unassisted but not to save Monroe's life, his refusal to call 911, his failure to have a breathing mask ready, his utter lack of urgency during the 17 minutes Monroe was dying—at least raise a factual dispute whether Laws failed to intervene because he was frustrated with Monroe and did not care if he died.

The panel recognized that "watching an inmate attempt suicide and failing to call for emergency medical assistance is not a reasonable response." Pet. App. 16a. It further recognized that "[c]alling for emergency assistance was a precaution that Laws *knew he should have taken*." *Id.* (emphasis added). But the panel granted qualified immunity anyway, concluding that existing precedent did not speak "directly on whether failing to call for emergency assistance in response to a serious threat to an inmate's life constitutes deliberate indifference." *Id.* According to the panel majority, existing case law involved jail officials who did *nothing* in response to a suicide, whereas here "Laws did *something*"—albeit something that even the panel understood to be egregiously deficient. *Id.* at 17a.

This is *Taylor* all over again. The "obvious cruelty inherent" in standing by while a detainee commits suicide is enough to give any reasonable officer fair warning. Indeed, it is analytically impossible to conclude—as the panel did—that Laws "knew" he acted with deliberate indifference, but that he nonetheless lacked the requisite "fair warning" that his conduct was unconstitutional. Qualified immunity does not protect officials who "knowingly violate the law." *Malley*, 475 U.S. at 341. Factually identical precedent is not necessary.

b. Consider next the conduct of Brixey and Cogdill. Like Laws, they were subjectively aware of the substantial risk that Monroe would attempt suicide; he told them he was suicidal and had twice attempted suicide a day earlier. But they chose not to follow jail policy to transfer him "to a facility better equipped to manage an inmate with mental disabilities." Pet.

App. 53a. Nor did they keep him in a cell with others, as their training required. *Id.* at 24a-25a. Instead, they isolated him in a cell with a 30-inch phone cord, "an obvious potential ligature for suicide." *Id.* at 25a.

The panel acknowledged Fifth Circuit precedent clearly establishing that jail officials are deliberately indifferent when they place an inmate known to be suicidal in a cell with access to "blankets" and "other potential ligatures." *Id.* at 19a-21a & n.12 (citing *Sanchez* v. *Oliver*, 995 F.3d 461, 473 (5th Cir. 2021); *Converse* v. *City of Kemah*, 961 F.3d 771, 773-774 (5th Cir. 2020); *Jacobs* v. *West Feliciana Sheriff's Dep't*, 228 F.3d 388, 396 (5th Cir. 2000)). The panel further acknowledged that the Texas Commission on Jail Standards had issued a memorandum sent to all jail administrators in Texas "recommending that phone cords in jails" be no more than a foot long due to their suicide risk. *Id.* at 19a-20a n.11. But the panel granted Cogdill and Brixey qualified immunity anyway. The panel believed that the Fifth Circuit's existing precedents were not sufficiently analogous because they involved bedsheets and blankets, and declared—notwithstanding the factual dispute—that Cogdill and Brixey must not have seen the memorandum regarding phone cords. Although the panel evidently recognized the obvious risk posed by the phone cord, the panel concluded that the risk was "not *as* obvious" as the dangers posed by bedding. *Id.* at 19a-20a (emphasis added).

Again, the panel's analysis repeats the *Taylor* error. Just as it did not matter in *Taylor* how many days the inmate sat in human waste, because "any reasonable officer" should have known that those conditions of confinement violated the Constitution, 141 S. Ct. at

54, the distinction between a phone cord and bedding as "obvious ligatures," *Sanchez*, 995 F.3d at 473, is immaterial. "[A]ny reasonable officer" should have recognized the risks inherent in leaving a known suicidal inmate isolated with a 30-inch cord. *Taylor*, 141 S. Ct. at 54. As this Court explained in *Farmer* v. *Brennan*, "a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." 511 U.S. 825, 842 (1994).

3. "Confronted with the particularly egregious facts of this case, any reasonable officer should have realized that [Monroe's care] offended the Constitution." *Taylor*, 141 S. Ct. at 54. The Fifth Circuit's contrary conclusion is plainly wrong and will result in more tragedies like the one in this case. It will allow for the grant of qualified immunity based on technical, immaterial factual differences—for example, based on speculation about whether bedding poses a *more* obvious suicide risk than a phone cord. And it will yield the perverse result of absolving officials for extreme acts of misconduct precisely because such misconduct is unlikely to have been the subject of prior judicial decisions.

B. The Fifth Circuit's Decision Splits From the Decisions of Six Circuits.

Given the unhappy prevalence of jailhouse suicides, it is no surprise that six other courts of appeals have confronted the question whether jail officials may be granted qualified immunity where they were aware of an obvious risk of suicide and responded to that risk unreasonably. All six have rejected the argument that these officials were entitled to qualified immunity in the absence of precedent with identical facts. This

Court's review is needed to restore a uniform answer to this important and recurring question.

1. Six courts of appeals do not require plaintiffs to cite a directly analogous case to defeat qualified immunity in the circumstances here.

First Circuit: The First Circuit has denied qualified immunity in a case involving facts similar to those here. *Penn* v. *Escorsio*, 764 F.3d 102 (1st Cir. 2014), involved a pretrial detainee who informed jail officials that he was suicidal, after which the officials placed him alone in a cell with a bedsheet and checked on him periodically. *Id.* at 107-108. The detainee suffered severe injuries after attempting suicide by hanging. *Id.* at 108. The defendants argued that they were entitled to qualified immunity because they "took 'some action' to prevent" the suicide attempt; the First Circuit rejected that argument, explaining that a reasonable jury could conclude the jail official took "effectively no action" to reduce the risk of suicide. *Id.* at 112-113. Notwithstanding the absence of directly analogous precedent, the court denied qualified immunity because taking "effectively no action" to prevent a suicide attempt was obviously unconstitutional.

Ninth Circuit: The Ninth Circuit has twice rejected the approach embraced below. In *Lemire* v. *California Department of Corrections and Rehabilitation*, 726 F.3d 1062 (9th Cir. 2013), the court considered a claim against officers who discovered an inmate unconscious after a suicide attempt but performed no life-saving actions, instead waiting for medical services to arrive. *Id.* at 1082-83. The Ninth Circuit reversed the grant of qualified immunity at summary judgment. Notwithstanding the absence of a case with identical

facts, the court concluded that "failing to provide * * * life-saving measures to an inmate in obvious need" could violate clearly established law. *Id.* While the failure to render life-saving care is not *per se* deliberate indifference, the court explained that the facts presented precluded summary judgment for the officers because "a trier of fact could conclude" that the officers were not entitled to qualified immunity. *Id.* at 1083.

More recently, in *Sandoval* v. *County of San Diego*, 985 F.3d 657 (9th Cir. 2021), the Ninth Circuit reversed the grant of qualified immunity to a jail nurse who failed to call paramedics in response to an overdosing inmate. The court explained that "every reasonable nurse * * * would have understood that not calling paramedics amounted to an unconstitutional failure to provide life-saving measures to an inmate in obvious need." *Id.* at 678-679 (quotation marks omitted). The court reasoned that it made no difference whether "the very action in question has previously been held unlawful"; the operative question was whether "every reasonable" official in the situation "would have understood" their conduct was unlawful. *Id.* at 680 (alteration and quotation marks omitted). While Judge Collins dissented on other grounds, he agreed that the nurse was not entitled to qualified immunity. Judge Collins explained that "the evidence here amply supports the view that [the nurse] subjectively knew that paramedics needed to be called," and that the nurse's response was "obviously objectively unreasonable." *Id.* at 694 (Collins, J., concurring in the judgment in part and dissenting in part). Thus, "it follows that, 'at the time of [the nurse's] conduct, the law was sufficiently clear that *every reasonable of-*

ficial would understand that what she is doing is unlawful.' " *Id.* (alterations and quotation marks omitted).

Seventh Circuit: The Seventh Circuit has explained in an inmate-suicide case that the deliberate indifference inquiry cannot be defined "in such a specific manner that virtually nothing" other than precedent "specific to the conduct alleged" would clearly establish a violation. *Estate of Miller, ex rel. Bertram* v. *Tobiasz*, 680 F.3d 984, 991 (7th Cir. 2012). *Bertram* involved allegations that jail staff were deliberately indifferent by failing to call for medical attention upon finding an inmate not breathing after a suicide attempt. The Seventh Circuit affirmed the denial of qualified immunity, explaining that a case presenting identical facts was not needed. *Id.* Where defendants are subjectively aware of the risk of suicide and respond unreasonably, plaintiffs need not point to case law speaking to the "precise risk that unfolds." *Id.*

Fourth Circuit: The Fourth Circuit has denied qualified immunity in an inmate-suicide case without inquiry into the existence of factually analogous precedent. In *Short* v. *Smoot*, 436 F.3d 422, 429 (4th Cir. 2006), the record permitted a reasonable inference that a jail official observed the detainee attempting suicide but did not "make any effort to stop the ongoing suicide attempt." In direct contrast to the Fifth Circuit, the court denied qualified immunity because it was clear that "the conscious failure by a jailer to make any attempt to stop an ongoing suicide attempt by one of his detainees would constitute deliberate indifference." *Id.* at 430.

Eighth Circuit: In *Turney* v. *Waterbury*, 375 F.3d 756 (8th Cir. 2004), the court confronted a case similar

to this one and reached the opposite conclusion. *Turney* involved a pretrial detainee who attempted suicide using a bedsheet. *Id.* at 758. Upon transfer to a new jail, the sheriff—who knew of the prior suicide attempt—placed the detainee in a cell alone with a bedsheet. *Id.* at 760. The sheriff then ordered the lone jailer on duty not to enter the cell without backup. *Id.* at 761. When the jailer discovered the detainee suspended from the ceiling, the jailer did not enter the cell; she instead called her supervisor and waited for him to arrive. *Id.* at 759. The Eighth Circuit denied qualified immunity notwithstanding the absence of factually identical precedent. The court reasoned that the detainee had a "clearly established constitutional right to be protected from the risk of suicide," *id.* at 760, and that the sheriff acted with deliberate indifference by placing the inmate in a cell with a ligature and prohibiting the jailer on duty from entering the cell without backup, *id.* at 761.

Eleventh Circuit: The Eleventh Circuit has squarely held that requiring a factually identical case to prove deliberate indifference "add[s] an unwarranted degree of rigidity to the law of qualified immunity." *Greason* v. *Kemp*, 891 F.2d 829, 834 n.10 (11th Cir. 1990). In *Greason*, the court considered a claim on behalf of an inmate whose parents had informed jail officials that he was suicidal and had attempted suicide after being removed from his antidepression medication. *Id.* at 832-833. Jail officials failed to modify his medication or place him on suicide watch, and the inmate later committed suicide using his sweatshirt. *Id.* The court highlighted evidence in the record that would allow a jury to find deliberate indifference and affirmed the district court's denial of qualified immunity at summary judgment. *Id.* at 835. Rejecting the dissent's

reasoning, which was akin to the panel's below, the majority stated: "[O]ne simply cannot say that a prisoner has a clearly established constitutional right to adequate psychiatric care but that that right is not violated by a particular treatment amounting to grossly inadequate care unless some prior court has expressly so held on 'materially similar' facts." *Id.* at 834 n.10.

2. In the decision below, the Fifth Circuit departed from the consensus of these six circuits by granting qualified immunity on the ground that no factually identical case established a constitutional violation. Cope's claims would have survived summary judgment had they been brought in the Second, Fourth, Seventh, Eighth, Ninth, or Eleventh Circuits. But Cope's claims arose in the Fifth Circuit, and that led to a starkly different outcome.

C. This Case Presents a Clean Vehicle.

This is an excellent vehicle for this Court's review. The question presented was pressed below and was outcome determinative. The panel's grant of qualified immunity to all three defendants turned on its conclusion that no precedent governed the same fact pattern. Rather than heed this Court's directive in *Taylor* to find a right clearly established where the violation is obvious, the Fifth Circuit repeated its error. Resolution of the question presented is crucial to ensuring that pretrial detainees in the Fifth Circuit are able to vindicate the same constitutional rights as detainees in other jurisdictions.

II. THE DECISION BELOW DEEPENED A SPLIT ON THE STANDARD GOVERNING A PRETRIAL DETAINEE'S CLAIM OF INADEQUATE CARE.

The panel below held that "Cope must prove subjective knowledge" to prevail. Pet. App. 13a n.7. For the reasons already explained, Cope has more than satisfied that subjective standard. If this Court concludes otherwise, however, it should grant certiorari and hold that Cope's claims are governed by an objective standard rather than the subjective standard applied below.

The panel deepened a circuit split deriving from competing interpretations of this Court's decision in *Kingsley*. *Kingsley* held that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." 576 U.S. at 397. As this Court in *Kingsley* explained, *prisoner* claims arise under the Eighth Amendment's proscription of cruel and unusual punishment, which requires a subjective inquiry. *Id.* at 400. But *pretrial detainees* have not been convicted and therefore cannot be punished. *Id.* Their claims arise under the Fourteenth Amendment, which calls for an objective inquiry. *Id.* at 397-398. *Kingsley* thus held that the subjective standard did not apply to a pretrial detainee's excessive-force claim.

After *Kingsley*, four circuits have held that *Kingsley*'s logic extends to pretrial-detainee claims of inadequate care. But four other circuits confine *Kingsley* to excessive-force claims. The courts of appeals have acknowledged that "the circuits are split on whether *Kingsley* eliminated the subjective component of the deliberate indifference standard" in cases involving pretrial detainees. *Strain* v. *Regalado*, 977 F.3d 984,

990 (10th Cir. 2020). This Court should grant certiorari to resolve the 4-to-4 split.

A. The Circuits Are Split on *Kingsley*'s Application.

The Second, Sixth, Seventh, and Ninth Circuits hold that an objective standard governs pretrial detainees' claims because the Constitution does not allow pretrial detainees to be punished before conviction. The Eighth, Tenth, Eleventh, and Fifth Circuits disagree.

1. Four circuits hold under *Kingsley* that the standard governing a pretrial detainee's claim of inadequate care is an objective one.

Second Circuit: The Second Circuit first confronted *Kingsley* in a conditions-of-confinement case. In *Darnell* v. *Pineiro*, 849 F.3d 17 (2d Cir. 2017), the court reasoned that "punishment has no place in defining the *mens rea* element of a pretrial detainee's claim under the Due Process Clause," regardless of the type of claim under that Clause. *Id.* at 35. As such, "[t]he same objective analysis [as in *Kingsley*] should apply to an officer's appreciation of the risks associated with an unlawful condition of confinement in a claim for deliberate indifference under the Fourteenth Amendment." *Id.* In later cases, the Second Circuit applied this principle to claims of inadequate medical care. Acknowledging that its decision in *Darnell* did not specifically address medical treatment, the court held that "the same principle applies" for inadequate-care claims. *Charles* v. *Orange County*, 925 F.3d 73, 86-87 (2d Cir. 2019).

Ninth Circuit: In *Castro* v. *County of Los Angeles*, 833 F.3d 1060 (9th Cir. 2016) (en banc), which involved a pretrial detainee's failure-to-protect claim,

the en banc Ninth Circuit held that *Kingsley* "expressly rejected * * * the notion that there exists a single 'deliberate indifference' standard applicable to *all* § 1983 claims, whether brought by pretrial detainees or by convicted prisoners." *Id.* at 1069. Then, in *Gordon* v. *County of Orange*, the Ninth Circuit held that "logic dictates" extending *Kingsley* and *Castro* to inadequate medical care cases. 888 F.3d 1118, 1124 & n.2 (9th Cir. 2018) (citing *Darnell*, 849 F.3d at 36). Noting *Kingsley*'s "broad wording," the court evaluated the inadequate-care claim under an objective standard. *Id.* at 1124-25 (quotation marks omitted).

Seventh Circuit: In *Miranda* v. *County of Lake*, 900 F.3d 335 (7th Cir. 2018), the Seventh Circuit followed the lead of *Darnell* and *Gordon*, and held that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject to the objective unreasonableness inquiry identified in *Kingsley*. In doing so, the court emphasized that this Court has signaled that "courts must pay careful attention to the different status of pretrial detainees." *Id.* at 352. Logic does not support "dissecti[ng]" the standard by type of claim. *Id.* Instead, the court reasoned, the proper standard turns on the status of the plaintiff.

Sixth Circuit: In *Brawner* v. *Scott County*, 14 F.4th 585 (6th Cir. 2021), the Sixth Circuit concluded that its precedent applying a subjective standard to a pretrial detainee's deliberate-indifference claim was "no longer tenable" given "*Kingsley*'s clear delineation between claims brought by convicted prisoners under the Eighth Amendment and claims brought by pretrial detainees under the Fourteenth Amendment." *Id.* at 596. Citing *Darnell*, *Gordon*, and *Miranda*, the Sixth Circuit held that *Kingsley*'s objective standard

applies to a pretrial detainee's medical care claims. *Id.* at 593.

2. Four circuits, in contrast, confine *Kingsley* to excessive-force claims.

Tenth Circuit: The Tenth Circuit maintained that "*Kingsley* turned on considerations unique to excessive force claims." *Strain*, 977 F.3d at 991. Notwithstanding *Kingsley*, the court thus requires pretrial detainees alleging inadequate medical care to demonstrate that the defendant subjectively knew of and disregarded the substantial risk of serious harm.

Eighth Circuit: The Eighth Circuit has likewise held that "*Kingsley* does not control because it was an excessive force case, not a deliberate indifference case." *Whitney* v. *City of St. Louis*, 887 F.3d 857, 860 n.4 (8th Cir. 2018); *accord Karsjens* v. *Lourey*, 988 F.3d 1047, 1051-52 (8th Cir. 2021).

Eleventh Circuit: The Eleventh Circuit agrees. In *Nam Dang* v. *Sheriff, Seminole Cnty.*, 871 F.3d 1272 (11th Cir. 2017), the court declined to apply an objective standard in an inadequate-care case because "*Kingsley* involved an excessive-force claim, not a claim of inadequate medical treatment due to deliberate indifference." *Id.* at 1279 n.2.

Fifth Circuit: In the decision below, the Fifth Circuit agreed with these circuits. Cope argued that *Kingsley* "announced an objective standard for pretrial detainees" and not just for excessive-force claims. Pet. App. 13a n.7. But because *Kingsley* "discussed a different type of constitutional claim," the panel concluded that *Kingsley* did not abrogate Fifth Circuit deliberate-indifference precedent requiring subjective knowledge. *Id.*

B. The Decision Below Is Wrong.

There is no principled basis for applying *Kingsley* only to a pretrial detainee's excessive-force claim.

A convicted prisoner's claim arises under the Eighth Amendment's Cruel and Unusual Punishment Clause. *Kingsley*, 576 U.S. at 400. This Court applies a subjective standard for such claims, a standard which "follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' " *Farmer*, 511 U.S. at 834 (quoting *Wilson* v. *Seiter*, 501 U.S. 294, 297 (1991)).

By contrast, a pretrial detainee's claim arises under the Fourteenth Amendment's Due Process Clause. *See Kingsley*, 576 U.S. at 400. A pretrial detainee "cannot be punished at all, much less 'maliciously and sadistically.' " *Id.* The Due Process Clause thus protects a pretrial detainee from acts amounting to punishment. *Id.* at 398. Absent an expressed intent to punish, the question whether "punishment" occurred turns on objective factors such as whether the actions are "rationally related to a legitimate nonpunitive governmental purpose" or whether the actions "appear excessive in relation to that purpose." *Bell* v. *Wolfish*, 441 U.S. 520, 561 (1979).

In *Kingsley*, this Court thus concluded that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." 576 U.S. at 397. This Court's reasoning did not turn on the nature of the claim. It turned on the nature of the claimant. Indeed, *Kingsley* itself relied on this Court's decision in *Bell*, even though *Bell* was a conditions-of-confinement case rather than an excessive-force case. *See id.* at 397-398. *Kingsley* then analyzed cases involving a

wide range of pretrial-detention issues—not just issues related to excessive force—en route to its conclusion that "*Bell* itself shows" that a pretrial detainee can prevail by relying on "objective evidence." *Id.* at 398-399. This Court was not concerned with the "differ[ing] type[s] of constitutional claim[s]," as the Fifth Circuit believed. Pet. App. 13a n.7. This Court was concerned instead with the differing claimants whose rights derive from different Clauses of the Constitution. *Cf. Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009) (applying *Twombly* in a non-antitrust case because there was no principled basis to limit *Twombly*'s holding to the antitrust context).

C. This Case Presents a Good Vehicle.

1. This case is an excellent vehicle to address the entrenched circuit split over the application of *Kingsley*. The decision below starkly implicates the split. The panel identified the issue, made clear that "Cope must prove subjective knowledge" even after *Kingsley*, and concluded that Cope failed to satisfy that standard. Pet. App. 13a n.7. The panel then focused on the subjective standard in evaluating all three defendants' conduct—perhaps because the *objective* unreasonableness of their conduct was so clear.

As to Cogdill and Brixey, the panel's application of a subjective standard was dispositive. The panel found Cope's evidence "insufficient to support the inference that Brixey and Cogdill had subjective knowledge of the risk posed by the lengthy phone cord." *Id.* at 19a-20a n.11. And the Fifth Circuit dismissed the relevance of the Texas Commission memorandum—which warned jail officials about the risks of long phone cords—only by speculating that Cogdill and Brixey lacked subjective knowledge of the memorandum. *Id.*

Only the panel's focus on the subjective standard allowed it to sidestep the objective unreasonableness of Cogdill and Brixey's conduct in violating their training and isolating Monroe in a cell with an obvious ligature.

Application of a subjective standard similarly affected the panel's conclusions related to Laws. The panel determined that a triable fact existed that Laws was subjectively deliberately indifferent, but nonetheless concluded that he was entitled to qualified immunity. But the panel may have concluded that qualified immunity was inappropriate had it applied a less stringent standard for establishing the underlying violation. *See Sandoval*, 985 F.3d at 675 (explaining that applying an objective rather than subjective standard may affect the propriety of qualified immunity).

2. This Court recently denied the petition for a writ of certiorari in *Strain* v. *Regalado*, which presented the *Kingsley* question presented here. No. 20-1562, 2021 WL 4509029 (U.S. Oct. 4, 2021) (*cert denied*). This case presents a more suitable vehicle than *Strain* to address this important question. *Strain* came to the Court in a motion-to-dismiss posture. 977 F.3d at 996. And there, at least arguably, the *Kingsley* circuit split may not have been outcome-determinative because the allegations in the complaint were insufficient to satisfy even an objective standard. *Id.* at 996-997.

Here, by contrast, the Fifth Circuit's application of a subjective standard was outcome-determinative. The objective unreasonableness of the defendants' conduct cannot be disputed. This case is an ideal vehicle to

address *Kingsley*'s application beyond the excessive-force context.

III. THIS CASE HIGHLIGHTS THE NEED FOR QUALIFIED IMMUNITY REFORM.

The decision below epitomizes the excesses of modern qualified immunity. The doctrine has "diverged to a substantial degree from the historical standards." *Wyatt* v. *Cole*, 504 U.S. 158, 170-172 (1992) (Kennedy, J., concurring); *see also Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (critiquing qualified immunity as lacking grounding in the text and history of § 1983, an example of the Court "substitut[ing] [its] own policy preferences for the mandates of Congress"); *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (per curiam) (Sotomayor, J., dissenting) (describing modern qualified immunity doctrine as an "absolute shield for law enforcement officers"). It bears little resemblance to any defense available at common law. *See, e.g.*, James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1922-24 (2010). And it is detached from the text and history of § 1983 given that the Court created the defense nearly 100 years after the statute's enactment. *See Pierson* v. *Ray*, 386 U.S. 547, 556-557 (1967). In the years since, that judge-made doctrine has improperly countenanced significant violations of constitutional rights.

Not only does qualified immunity stray from the common law and statutory text, but in its most recent evolution, the doctrine stunts even its own development. The Court once required courts to determine

whether a constitutional right had been violated before considering whether the right had been clearly established at the time of the violation. *See Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). Since *Pearson*, however, the Court has permitted courts to conduct the two-pronged qualified immunity analysis in any order. 555 U.S. at 236. Courts therefore frequently grant qualified immunity for lack of factually analogous precedent without first determining whether the challenged behavior is unconstitutional. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Calif. L. Rev. 1, 33-51 (2015). *Pearson*'s choose-your-own-adventure ordering allows for circular reasoning and repeated grants of qualified immunity for the same unconstitutional conduct. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 65-66 (2017) ("[I]f courts regularly find that the law is not clearly established without first ruling on the scope of the underlying constitutional right, the constitutional right at issue will never become clearly established.").

This case epitomizes the problems with the *Pearson* regime. Cogdill and Brixey responded to Monroe's known risk of suicide in a decidedly unreasonable manner. Rather than confirming that their conduct was unconstitutional, the panel distinguished between types of obvious ligatures and concluded that holding Monroe in a cell with a 30-inch phone cord "did not violate a clearly established constitutional right." Pet. App. 20a-21a. Accordingly, it arguably remains an open question in the Fifth Circuit whether isolating a suicidal inmate in a cell with a long phone cord is unconstitutional. A future plaintiff bringing an identical claim could still lose.

The Fifth Circuit's application of qualified immunity to immunize officials who gave a suicidal man the tools to kill himself, then watched him do so, highlights the need for the untenable doctrine to be narrowed or abolished.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

This Court's review is urgently needed to restore accountability for obviously unconstitutional care of pretrial detainees. People in jails are far likelier to suffer from mental-health crises than the general population, and jail staff must be held accountable when they respond to such crises in an obviously unreasonable manner.

1. The questions presented are exceptionally important for the health and safety of pretrial detainees, especially those detained in small jails. People in jail are five times more likely than the general population to have serious mental illness.[3] Indeed, jails today often function as mental health institutions—more mentally ill persons are in jails and prisons than in hospitals.[4] Suicides in jail present a national crisis. And nowhere is this crisis more acute than in small

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[3] Henry J. Steadman, et al., *Prevalence of Serious Mental Illness Among Jail Inmates*, 60 Psychiatry Servs. 761, 761 (2009), https://tinyurl.com/34eafhb6; *see also* Alexi Jones, Prison Pol'y Initiative, *New BJS Report Reveals Staggering Number of Preventable Deaths in Local Jails* (Feb. 13, 2020), https://tinyurl.com/3h9vkf6b.

[4] *See* E. Fuller Torrey, et al., Treatment Advoc. Ctr. & Nat'l Sheriff's Ass'n, *More Mentally Ill Persons Are in Jails and Prisons Than Hospitals: A Survey of the States* 1 (May 2010), https://tinyurl.com/ff9nshds.

jails of 100 or fewer beds, where the suicide rate is nearly ten times the rate of the nation as a whole.[5]

The "shock of confinement" in jails is real, and it can lead to tragedies when jail staff respond with deliberate indifference.[6] Because detention isolates detainees, "foreclose[s] their access to outside aid," and prevents their communities from ensuring their well-being, *Farmer*, 511 U.S. at 833, jails must take adequate precautions to ensure that detainees suffering mental-health crises are not given the means to harm themselves. When jail officials fail to meet this basic obligation, they must be held accountable.

As precedent currently stands, however, jail officials in Texas, Louisiana, and Mississippi can abjectly neglect their obligation to prevent inmates from engaging in self-harm without fear that they will be held responsible for their conduct. The Court's review is needed to protect pretrial detainees in the Fifth Circuit from the deliberate indifference of their jailers.

2. The decision below is the latest in a line of Fifth Circuit decisions refusing to heed this Court's directive against granting qualified immunity in cases of obvious misconduct. *See, e.g.*, *Taylor*, 141 S. Ct. at 53; *McCoy* v. *Alamu*, 141 S. Ct. 1364 (2021); *Ramirez* v. *Guadarrama*, 2 F.4th 506 (5th Cir. 2021) (per curiam), *petition for writ of cert. filed* (U.S. Nov. 22, 2021). Just last Term, this Court in *Taylor* took the

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[5] *The Role of Corrections Professionals in Preventing Suicide*, *supra* p. 3.

[6] Martin Kaste, *The 'Shock of Confinement': The Grim Reality of Suicide in Jail*, N.P.R. (July 27, 2015, 5:59 PM ET), https://tinyurl.com/3fa8nvcu.

extraordinary step of summarily reversing a Fifth Circuit decision granting qualified immunity to prison officials who housed an inmate in a cell "teeming with human waste" for six days. 946 F.3d at 222. And that was not even the only such summary action in a Fifth Circuit qualified-immunity case last Term. *See McCoy*, 141 S. Ct. at 1364 (summarily vacating a Fifth Circuit decision granting qualified immunity to a prison guard who pepper-sprayed an inmate in the face for no reason).

The decision below "repeats the very same analytical error [the Fifth Circuit] made in *Taylor*." Pet. App. 41a (Dennis, J., dissenting). The decision contravenes *Taylor*, immunizes egregious misconduct that "any reasonable officer" would have understood to be unlawful, and requires a level of specificity in defining a clearly established right that few plaintiffs could hope to satisfy. This Court should grant the petition and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

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