No. 21-783

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondents cannot justify the Fifth Circuit's failure to abide by this Court's qualified-immunity precedent. They cannot justify the panel's decision to grant Laws qualified immunity even though he "knew" his conduct was unreasonable. Pet. App. 16a. And they cannot justify the panel's decision to grant Cogdill and Brixey qualified immunity even though their miscon-

duct was obvious—just "not *as* obvious" as the misconduct addressed by circuit precedent. *Id.* at 19a-20a (emphasis added).

The important facts are undisputed. Respondents do not dispute that Laws watched Derrek Monroe wrap a 30-inch phone cord around his neck and strangle himself in his cell. Nor do Respondents dispute that Laws did not attempt to render aid or even call 911. Instead, Laws telephoned his bosses and tended to his mop as Monroe lay dying a few feet away. Respondents also do not dispute that Cogdill and Brixey moved Monroe to a cell with a 30-inch ligature after he repeatedly attempted to hang himself in a different cell. And Respondents do not dispute that isolating Monroe violated jail policy. Cogdill and Brixey isolated Monroe in a cell with a 30-inch cord anyway. Then Monroe hung himself as Laws watched.

If this conduct does not amount to deliberate indifference, it is hard to see what would. The Fifth Circuit's contrary holding is predicated entirely on the notion that—notwithstanding Respondents' obvious misconduct—its deliberate-indifference precedent was not sufficiently "clearly on point." *Id.* at 17a. This splits from six courts of appeals that have rejected the same reasoning in inmate-suicide cases similar to, albeit *less* egregious than, this one. And it defies this Court's decision last Term in *Taylor* v. *Riojas*, 141 S. Ct. 52 (2020) (per curiam), which rebuked the Fifth Circuit for a materially identical error.

This Court's intervention is also needed to address the split over the standard governing pretrial detainees' deliberate-indifference claims after *Kingsley* v. *Hendrickson*, 576 U.S. 389 (2015). Respondents do

not dispute the split. They instead say more percolation is needed—even though nine circuits have weighed in. And they argue that the *Kingsley* question was not outcome-determinative here—even though the panel expressly refused to apply *Kingsley*.

Finally, this case puts the need for qualified-immunity reform into stark relief. Malleable at best, outcome-driven at worst, the qualified-immunity doctrine prevents recovery for—and deterrence against—egregious constitutional violations like the conduct in this case. The panel's grant of qualified immunity despite Respondents' paradigmatic deliberate indifference confirms that the doctrine requires reform.

The petition should be granted.

I. RESPONDENTS IGNORE THEIR OBVIOUS CONSTITUTIONAL VIOLATIONS.

Respondents' attempts to justify the Fifth Circuit's decision underscore the necessity of this Court's review.

1. As to Laws, Respondents do not dispute the relevant facts, captured on a surveillance video introduced into the record below. Respondents do not dispute that Laws knew Monroe was suicidal. Nor could they: Laws was the jailer on duty a day earlier when Monroe twice attempted suicide and, on the morning of the suicide, Monroe could be heard saying "I'm going to kill myself" and "Please help me." Pet. 8. Respondents also do not dispute that Laws failed to intervene when Monroe wrapped the cord around his neck and strangled himself, even after Monroe became unconscious. And Respondents do not dispute that Laws violated jail policy by failing to call 911. Instead, Laws wrung out his mop, called his bosses, and watched as Monroe was dying.

Respondents' attempts to justify Laws' conduct strain credulity.

First, Respondents speculate that Laws did not render aid because he believed it "unsafe" to enter the cell. BIO 6. But Laws (alone, unarmed) had escorted Monroe (unrestrained) to and from the shower mere minutes earlier without safety concerns. While Respondents imply that Monroe had become more "agitated and violent" in the meantime, *id.* at 1, the surveillance video refutes that characterization—Monroe was "making all kinds of racket" both before and after he showered. Pet. 8. The suggestion that Laws became so suddenly fearful that he could not enter the cell to save Monroe's life—even after Monroe stopped spasming and remained motionless for minute after minute—is entirely implausible, and a quintessential fact issue unfit for summary-judgment resolution.

Respondents' post-hoc fear of a "[f]ake suicide," BIO 6, lacks record support. Laws never suggested he believed Monroe was faking suicide—nor would such a suggestion have been credible given the overwhelming evidence of Monroe' suicidality. Respondents' lone article supporting their fake-suicide theory only underscores its implausibility: It describes an incident in a New York prison, *after* the events here, involving an inmate who had previously threatened the officer—nothing like this case.

Respondents invoke jail policy prohibiting jailers from "enter[ing] a cell without backup." *Id.* But the policy permitted Laws to enter the cell with supervisor approval. Laws simply never *sought* approval—even though he spoke to supervisors during the suicide and had obtained approval minutes earlier to escort Monroe, without backup, to the shower.

Second, Respondents cannot justify Laws' failure to call 911, which jail policy also required. Pet 16. When asked why he never did, Laws declared, "Honestly, I don't know." Pet. App. 28a. Respondents argue that the Constitution does not "compel[] an optimal order of operations in calling for emergency personnel." BIO 18. To be clear: This was not an order-of-operations problem. It was a failure to take a minimal step to save a dying detainee. Respondents insist the delay lasted "just ten minutes." *Id.* at 2. Ten minutes of strangulation is a long time—too long, as Laws knew. *See* Pet App. 28a.

Even the panel below acknowledged that "[c]alling for emergency assistance was a precaution that Laws knew he should have taken" and that failing to do so was "an effective disregard" for Monroe's life. Pet. App. 16a. Respondents, like the panel below, make no effort to explain how Laws could be entitled to qualified immunity given that he "knew" his conduct was unlawful. Qualified immunity does not protect people who "knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986).

Third, Respondents argue Laws is entitled to qualified immunity because he "did not 'do nothing,'" BIO 23, he "did *something*," Pet. App. 17a. Indeed he did. He wrung out his mop. He waited for his bosses to arrive. He failed in the meantime to call 911, or render aid, or retrieve a breathing mask. Respondents' argument—that officials must be granted immunity where they take *any* action in response to an ongoing suicide, no matter how manifestly inadequate—underscores their unsupportable theory of qualified immunity.

2. Respondents' arguments as to Cogdill and Brixey are just as deficient. Respondents do not dispute that Cogdill and Brixey were trained to avoid placing suicidal inmates in solo cells; that they responded to Monroe's attempted suicide by isolating him in a cell with a thirty-inch cord; or that isolating Monroe with only one jailer on duty was "just not safe." Pet. App. 52a.

Respondents instead argue that the risk posed by the phone cord was "not *as* obvious" as bedding. BIO 15 (emphasis added). Repeating the "very same analytical error" the Fifth Circuit made in *Taylor*, Pet. App. 41a, Respondents insist no case with identical facts put them on notice that their conduct was unlawful. BIO 14. But identical facts are not necessary to hold officials liable for obvious constitutional violations. *Taylor*, 141 S. Ct. at 53. After all, "the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder* v. *City of Albuquerque*, 787 F.3d 1076, 1082-83 (10th Cir. 2015) (Gorsuch, J.).

The Fifth Circuit's insistence on factually identical precedent distinguishing phone cords from bedsheets was particularly perverse. Phone cords are a *more obvious* strangling hazard than bedding. Pet. App. 30a-31a. As amici highlight, it is "common knowledge" that lengthy phone cords can be used in inmate suicides. Amicus Br. of Disability Rights Texas, et al. 11-15. The Texas jail memorandum circulated statewide confirmed the risk. Even assuming Cogdill and Brixey did not see this memorandum (which is—again—a factual dispute), the memorandum's existence itself shows that the risk was obvious. *Cf. Lombardo* v. *City of St. Louis*, 141 S. Ct. 2239, 2241 (2021)

(per curiam) (non-compliance with "well-known police guidance" regarding permissible force "may be pertinent" in deciding whether officer's use of force was reasonable).

Respondents suggest that Cogdill and Brixey had no alternative but to isolate Monroe in a cell with an obvious ligature. BIO 1. But that is a fact question not resolvable at summary judgment. Even short of simply staffing one extra jailer for one weekend, jail policy spelled out a clear alternative: It *required* prisoners with mental-health crises "be transferred to a facility better equipped to manage" them if necessary for their "protect[ion]." Pet. App. 26a-27a. Respondents quibble about the policy's details, BIO 7, but never dispute that Cogdill and Brixey could have transferred Monroe. If Respondents are correct—that they had no alternative but to isolate Monroe in a cell with an obvious ligature after he twice tried to hang himself—then there was no way they could house him safely. Respondents were required to transfer him to a facility that could.[1]

3. The panel's decision creates a circuit split. There can be no reasonable dispute that the First, Fourth, Seventh, Eighth, Ninth, or Eleventh Circuits would deny Respondents qualified immunity. Each rejects qualified immunity where—as here—a jailer is aware of the risk that an inmate may commit suicide and responds in a "grossly inadequate" manner. *Greason* v. *Kemp*, 891 F.2d 829, 834 n.10 (11th Cir. 1990). And

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[1] Contrary to Respondents' assertion, BIO 11 n.2, Petitioners preserved the argument that "Brixey ratified" Cogdill's decision to isolate Monroe. Pet. 8. And Petitioners similarly preserved the argument that Respondents' weekend-staffing decision required them to transfer Monroe to another facility. *Id.* at 17-18.

each rejects the theory—embraced below—that qualified immunity protects wrongdoers unless "the very action in question" has "previously been held unlawful." *Sandoval* v. *County of San Diego*, 985 F.3d 657, 680 (9th Cir. 2021) (quotation marks omitted).

Respondents' attempts to distinguish these cases are an exercise in hair-splitting. Respondents concede that *Estate of Miller ex rel. Bertram* v. *Tobiasz*, 680 F.3d 984 (7th Cir. 2012), denied qualified immunity where a jailer "failed to call for medical attention despite finding [an inmate] with no pulse and not breathing on the floor of his cell." BIO 22-23. Respondents say this case is different because the delay here was 10 minutes, not 58, and because Laws did not fail to call 911 "*after* discovering that the inmate was not breathing," *id.* at 23 (emphasis added)—underscoring the unsupportable degree of specificity they demand.

Respondents selectively quote *Penn* v. *Escorsio*, 764 F.3d 102 (1st Cir. 2014), as holding that the jailer there took "no action" to prevent a suicide. BIO 20. The actual quotation is that taking "*effectively* no action" to prevent a suicide is obviously unconstitutional, *Penn*, 764 F.3d at 112-113 (emphasis added). The same goes here. And Respondents concede that *Short* v. *Smoot*, 436 F.3d 422, 429-430 (4th Cir. 2006), held that "the conscious failure by a jailer to make any attempt to stop an ongoing suicide" is deliberate indifference. BIO 23. Respondents attempt to distinguish *Smoot* on the ground that "Laws did not 'do nothing.'" *Id.* But he did *effectively* nothing.

The split continues to deepen. A unanimous Eleventh Circuit panel comprising Judges Jill Pryor, Branch, and Grant, recently confirmed that jailers

who "were aware" that a detainee was suicidal but detained him "where he would have dangerous items at his fingertips" were deliberately indifferent. *Turner* v. *Phillips*, No. 21-12370, 2022 WL 458238, at *4 (11th Cir. Feb. 15, 2022) (per curiam); *id.* at *3 (quoting *Greason*, 891 F.2d at 835-836). The panel rejected the argument that precedent was "too different from this case to clearly establish" the victim's rights, explaining that precedent made clear that jailers cannot "simply le[ave] suicidal detainees in a cell with items that they could—and did—use to harm themselves." *Id.* at *3-4. Precedent "need not be directly on point to clearly establish a right;" it must simply place the question "beyond debate." *Id.* at *4 (quotation marks omitted). That standard was met because the "officers effectively took no action" to protect the victim. *Id.* The same is true here. Indeed, qualified immunity is even less appropriate here. In *Turner*, unlike here, no defendant watched as the suicide unfolded.

4. Contrary to Respondents' assertion, this case is a far cry from "fact-bound." BIO 20. Suicide is "an epidemic in local jails, fed by a jailhouse population boom and a burgeoning population of inmates with mental illness." Disability Rights Amicus Br. 6. Deliberate-indifference cases arising from inmate suicides arise with dismaying frequency. Just last year, seven circuits decided sixteen appeals addressing such claims. *E.g.*, *Crane* v. *Utah Dep't of Corr.*, 15 F.4th 1296, 1307 (10th Cir. 2021); *Leftwich ex rel. Leftwich* v. *County of Dakota*, 9 F.4th 966, 972 (8th Cir. 2021). More doubtless will follow. It is critically important to apply a uniform standard to resolve these recurring claims.

But the Fifth Circuit granted qualified immunity to Respondents notwithstanding their paradigmatic deliberate indifference; doubled down on the same error this Court corrected in *Taylor*; and yet again ignored this Court's qualified-immunity precedents. *See, e.g.*, *Taylor*, 141 S. Ct. at 53; *Ramirez* v. *Guadarrama*, 2 F.4th 506 (5th Cir. 2021) (per curiam), *petition for writ of cert. filed* (U.S. Nov. 22, 2021). This Court's review is urgently needed.

II. RESPONDENTS DISPUTE NEITHER THE EXISTENCE OF THE *KINGSLEY* SPLIT NOR ITS IMPORTANCE.

1. Pretrial detainees' deliberate-indifference claims arise under the Fourteenth Amendment, whereas prisoners' claims arise under the Eighth. Given that distinction, this Court in *Kingsley* held that "the appropriate standard for a pretrial detainee's excessive force claim is solely an objective one." 576 U.S. at 397, 400.

Respondents do not and cannot contest the existence of a split post-*Kingsley*. Four circuits—the Second, Sixth, Seventh, and Ninth—apply *Kingsley*'s logic to pretrial-detainee claims of inadequate care. In these courts, an objective standard applies. Five circuits disagree. The Fifth Circuit joined the Eighth, Tenth, and Eleventh Circuits in confining *Kingsley* to excessive-force claims. The Fourth Circuit now appears to have joined that side of the split. *Moss* v. *Harwood*, 19 F.4th 614, 624 n.4 (4th Cir. 2021). In these courts, a subjective standard applies.

2. Unable to dispute the split, Respondents contend this issue was not outcome-determinative below. BIO 28-29. That is wrong. The panel squarely held that "Cope must prove subjective knowledge" even after

Kingsley. Pet. App. 13a n.7. Respondents insist that the subjective standard did not matter because the panel "effectively assumed" Cogdill and Brixey were subjectively deliberately indifferent. BIO 28. Wrong again. The panel granted qualified immunity because there was assertedly insufficient evidence as to Cogdill and Brixey's "subjective knowledge of the risk posed by the phone cord." Pet. App. 20a n.11. This was not an "alternative rationale," BIO 29—it was the panel's justification for its holding.

As to Laws, the panel recognized he was subjectively aware of the risk to Monroe but granted him qualified immunity anyway. Pet. App. 17a-18a. As the Ninth Circuit has recognized in this exact context, relaxing the substantive standard governing a claim can affect the propriety of qualified immunity. *See Sandoval*, 985 F.3d at 675. The same reasoning governs here.

Respondents miss the point when they assert that the *Kingsley* issue in this case is "hypothetical." BIO 29-30. Their egregious misconduct precludes qualified immunity even if the (improper) subjective standard applies. But if this Court concludes otherwise, qualified immunity is even more plainly unwarranted if the (proper) objective standard applies. In that case, the standard makes all the difference.

3. Respondents defend the panel's decision by relying on Fifth Circuit precedent *preceding Kingsley*, which of course has no bearing on *Kingsley*'s meaning. *Id.* at 30.

Respondents then attempt to differentiate inadequate-care claims from the excessive-force claim at issue in *Kingsley*. *Id.* at 32-33. But *Kingsley*'s reasoning did not turn on the nature of the claim; it turned

on the nature of the claimant. Pet. 29-30. And Respondents' assertion that an objective standard would amount to mere "negligence," BIO 33, has been repeatedly rejected: Even under *Kingsley*'s objective standard, "[a] pretrial detainee must prove more than negligence but less than subjective intent." *Brawner* v. *Scott County*, 14 F.4th 585, 596 (6th Cir. 2021) (quotation marks omitted).

4. Respondents also call for "further percolation." BIO 34. But nine circuits have already weighed in, splitting 5-to-4. These courts have considered conditions-of-confinement, inadequate-care, and failure-to-protect claims. Pet. 26-27. The contrasting approaches are clear; there is no need to wait for the circuit-court equivalent of a full count. Respondents offer a last-ditch argument that this Court denied review in *Strain* v. *Regalado*, 142 S. Ct. 312 (2021), BIO 34; but the allegations there were arguably insufficient even under the *objective* standard. This case is an ideal vehicle to address the split this Court forwent addressing in *Strain*.

III. QUALIFIED IMMUNITY NEEDS REFORM.

The Fifth Circuit in this case invoked qualified immunity to justify the unjustifiable. It granted summary judgment to a jailer caught on video watching a suicide unfold before him without calling 911, and to jail officials who isolated a detainee in a cell with a lengthy cord despite knowing he had twice tried to hang himself. As amici explain, qualified immunity is so far removed from "any plausible legal or historical basis" that the doctrine instead has become a "choose-your-own-adventure" dictated by policy preferences rather than statutory text or historical practice. Amicus Br. of Cato Inst., et al. 8-10. Nowhere is this truer

than in the Fifth Circuit, which is "marginalizing *Taylor* and the principles it reaffirmed into irrelevance." Amicus Br. of Const. Accountability Ctr. 17. The Fifth Circuit's decision confirms that qualified immunity has become untenable. This Court should either reform the doctrine, or abolish it.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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