No. _____

IN THE

Supreme Court of the United States

PATTI STEVENS-RUCKER,
ADMINISTRATOR OF THE ESTATE OF JASON WHITE, DECEASED,

Petitioner,

v.

SERGEANT JOHN FRENZ (#5141) AND
OFFICER DUSTIN MCKEE (#2611),

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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November 21, 2018

QUESTION PRESENTED

Sergeant John Frenz and Officer Dustin McKee shot Jason White—a decorated veteran suffering a mental health crisis—several times. While Mr. White lay bleeding on the ground, another officer handcuffed Mr. White and rolled him onto his stomach. Sergeant Frenz and Officer McKee were both trained as first responders, yet neither tried to help Mr. White even though they could "clearly see he was dying." Instead, they stood over him and watched him bleed to death for the fifteen minutes it took the ambulance to arrive.

The district court held that the officers' failure to assist Mr. White as he lay bleeding to death violated the Fourteenth Amendment, but a divided Sixth Circuit reversed. Relying on a Ninth Circuit decision, the majority held that the officers satisfied their constitutional obligations by "summoning aid" because police have no constitutional duty "to intervene personally." By contrast, the Eighth and Tenth Circuits have held that police officers trained in first aid are constitutionally obliged to assist persons in their custody who need care when it is safe to do so.

The question presented is:

Are there circumstances in which police officers are constitutionally obligated to help a person injured during arrest, as the Eighth and Tenth Circuits have held, or do officers necessarily satisfy their constitutional obligations by radioing for help, as the Sixth and Ninth Circuits have held?

PARTIES TO THE PROCEEDINGS

Petitioner Patti Stevens-Rucker, as Administrator of the Estate of Jason White, was plaintiff-appellee and cross-appellant in the court of appeals.

Respondents Sergeant John Frenz (#5141) and Officer Dustin McKee (#2611) were defendant-appellants and cross-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Counsel for Patti Stevens-Rucker, the NAACP Legal Defense and Educational Fund, Inc., is a non-profit organization that has not issued shares of stock or debt securities to the public and has no parent corporation, subsidiaries, or affiliates that have issued shares of stock or debt securities to the public.

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PETITION FOR WRIT OF CERTIORARI

Patti Stevens-Rucker, as Administrator of the Estate of Jason White, respectfully petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Sixth Circuit denying rehearing en banc is reproduced at App. 86a-87a. The opinion of the United States Court of Appeals for the Sixth Circuit affirming in part and reversing in part the judgment of the district court is reproduced at App. 1a-34a. The opinion of the United States District Court for the Southern District of Ohio granting summary judgment in part and denying summary judgment in part is reproduced at App. 35a-85a.

JURISDICTION

The court of appeals denied Ms. Stevens-Rucker's petition for rehearing en banc on August 24, 2018. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend XIV § 1.

Title 42 U.S.C. § 1983 provides:

> 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 . . . .

42 U.S.C. § 1983.

INTRODUCTION

Police in America arrest over 10 million people each year. Each year, over 55,000 people are injured or die during arrest. And, on average, there are 135 arrest-related deaths each month. This case asks the Court to answer the question it left open 35 years ago in *City of Revere v. Massachusetts General Hospital*, 463 U.S. 239 (1983), and define police officers' "due process obligations" to provide medical care to persons under arrest. Specifically, this case asks whether the Constitution allows for police officers to shoot someone and then stand over him and watch him die for fifteen minutes without trying to render the aid that they were trained to provide.

Jason White, a decorated Iraq War veteran, suffered mental health issues triggered by his military service. One November morning, Mr. White was suffering a mental health crisis and, while holding a knife, mistakenly entered an apartment that he believed was his. Police officers responded to the scene. They recognized Mr. White had a "vacant" look in his eyes and was "out of it." Even so, when Mr. White did not comply with their commands, the officers shot Mr. White several times—in the shoulder, back, and directly in the chest.

After repeatedly shooting Mr. White, Sergeant John Frenz and Officer Dustin McKee stood over Mr. White for fifteen minutes as they waited for an ambulance to arrive. Both officers were trained as first responders, yet neither tried to help Mr. White as he was on the ground gushing blood. The district court held that the officers violated Mr. White's due process right to medical care. A divided Sixth Circuit reversed, holding that the officers satisfied their constitutional obligations by "summoning aid" because they had no duty to "intervene personally."

Although the Court has said the Fourteenth Amendment requires police to provide medical care to persons in their custody, it has twice declined to define what that care looks like. The Court has, however, made clear that the required level of care as a matter of due process for persons in police custody is at least as great as the level of care required by the Eighth Amendment for convicted prisoners. *See Revere*, 463 U.S. at 244.

The courts of appeals disagree about the level of care police must personally provide to arrestees who are injured while in their custody. The Eighth and Tenth Circuits have held there are occasions in which the Fourteenth Amendment obligates officers to personally provide care to an arrestee. On the other hand, the Sixth and Ninth Circuits have held that officers necessarily satisfy their constitutional obligations by summoning aid. That position would mean the level of care required for arrestees is even less than the Eighth Amendment floor, which is plainly inconsistent with this Court's precedent.

Given the momentousness of the question presented, and the fact that the courts of appeals are divided over its answer, the Court should take this chance to define an arrestee's due process right to medical care while in police custody.

STATEMENT OF THE CASE

Decorated veteran Jason White was 31 years old when he was shot and killed by police. App. 2a. He had been honorably discharged from the U.S. Army just three years prior, after being deployed for almost a year in Iraq and receiving many

honors for his service. ECF No. 87-32 at 3-4 (forensic psychologist evaluation).[1]

After leaving the military, Mr. White was hospitalized "numerous times" at Veterans Administration Hospitals and was diagnosed with paranoid schizophrenia and depression, "believing he was under surveillance and fearful for his life." *Id.* at 4. Three days before his death, Mr. White went to the VA to report that he had not been sleeping, that he was experiencing paranoia, and that his medications were not working. *Id.* at 5. The VA doctor who examined Mr. White noted that his rapport was "poor" and that he was "delusional" and generally "deteriorating." *Id.* Yet, because Mr. White was not "deemed as a threat to himself or others," he was "referred for further outpatient care." *Id.*

A. Sergeant Frenz and Officer McKee Encountered Jason White While He Was Suffering a Mental Health Crisis and Shot Him Several Times.

In the early morning hours of November 17, 2013, Ashley Cruz woke up to find a shirtless man holding a kitchen knife inside her apartment. App. 36a; App. 2a. Ms. Cruz asked the man to leave, but he just kept "looking around." App. 36a. The man was Jason White. Ms. Cruz testified that Mr. White "appeared confused and asked [Ms.] Cruz what she was doing in his home." *Id.* "[Mr.] White then began exiting and reentering the apartment, stating that something happened to him and that something was not right." *Id.* Mr. White eventually left the apartment long enough for Ms. Cruz to lock the door. *Id.* She called 911 and told the operator that Mr.

[1] "ECF" citations are to the record as reflected on the district court's public docket.

White "may have been on drugs because [he] was not making any sense." App. 37a.

Officer Don Alderman received the dispatch call of a "man with a knife." App. 4a. The dispatcher warned that the suspect was "out of it. He was talking but it made no sense." App. 37a (quotation marks omitted). Officer Alderman went to the scene. App. 38a. He saw Mr. White in a breezeway and approached him with his gun drawn. *Id.*

From 45-60 feet away, Officer Alderman ordered Mr. White to show him his hands. *Id.* Mr. White's hands were empty. *Id.* Officer Alderman then asked Mr. White to turn around. *Id.* Mr. White did so, dropping his hands. *Id.* Officer Alderman yelled for Mr. White to put his hands back up. *Id.* Instead, Mr. White turned back around. *Id.* As Officer Alderman explained, Mr. White was "looking around and not really even looking at [him], but almost just kind of looking through [him]." App. 4a.

Officer Alderman unholstered his taser and shouted at Mr. White to get down. App. 38a. When Mr. White did not heed the command, Officer Alderman tasered Mr. White to the ground. App. 38a-39a. As Officer Alderman approached, Mr. White "got up swiftly" with a kitchen knife in hand App. 39a. Office Alderman testified that Mr. White then started towards him, so he grabbed his gun and shot at Mr. White but missed. *Id.* Mr. White ran away. *Id.* Officer Alderman did not give chase. *Id.*

Sergeant John Frenz heard a report of what happened and "ordered a '10-3' run," meaning an officer was in trouble and "that every officer able [should] respond." App. 40a. He then went to the scene, where he met Officers Dustin McKee

and Jeffrey Kratch. *Id.* Sergeant Frenz ordered the two officers to set up a perimeter. *Id.*

Sergeant Frenz and Officer Kratch found Mr. White crouched down in a fenced-off area where the air conditioning units were located. App. 5a-6a. There was an exit on each end of the fenced area. App. 41a. Sergeant Frenz approached from one end with his gun drawn and "ordered [Mr.] White to show his hands." *Id.* Mr. White was still holding a knife. *Id.* Officer Kratch approached from the other end and tasered Mr. White, but it was "not effective," instead causing Mr. White to run "toward the opening" Sergeant Frenz was near. App. 41a-43a.

Although Mr. White was still inside the fenced enclosure, Sergeant Frenz fired twice at Mr. White, hitting him once in the shoulder. App. 43a. Officer McKee had arrived by then and "saw the blood spatter from [Mr.] White's back." App. 6a. Mr. White "stumbled back" against the wall and Sergeant Frenz "knew he had made contact." App. 44a. Mr. White then fled, making it out of the enclosure and around the corner of the building. App. 44a-45a.

Sergeant Frenz and Officers McKee and Kratch chased Mr. White through a breezeway. *Id.* Mr. White was limping now. App. 45a. Officer McKee took aim and shot twice at Mr. White, striking him in the back. App. 46a. Mr. White kept moving and Officer McKee again ordered Mr. White to stop. *Id.*

Mr. White stopped at the end of the breezeway and turned around. *Id.* He had a "blank" look on his face. *Id.* Officer McKee then fired two shots at Mr. White's "center mass," hitting his target. App. 47a. Mr. White fell to the ground, first to his knees, then on to his back. *Id.*

According to Officer McKee, Mr. White "was lying on his left side with his right arm underneath his body [and was] using his left arm to push himself off of the ground." *Id.* Officer Kratch did not "recall seeing [Mr.] White trying to get up off of the ground," however. *Id.* Officer McKee then fired two more shots at Mr. White while he was on the ground, hitting him directly in the chest. *Id.*

B. Sergeant Frenz and Officer McKee Did Not Provide Jason White Any Medical Aid While He Bled to Death in Front of Them.

As Mr. White lay bleeding, he tried to put the knife to his own neck. App. 47a. Officer Kratch walked over and took the knife from Mr. White's hands, rolled him onto his stomach, and handcuffed him. App. 48a. Officer Kratch then left the scene. App. 48a n.10.

Mr. White was "gasping for air" and the officers "could see blood pumping out of [his] chest." App. 48a. An unidentified officer told dispatch that Mr. White was going to need a medic, and dispatch responded that "they were going to get a squad" to the scene. *Id.*

Sergeant Frenz and Officer McKee stood over Mr. White as they waited for the ambulance. *See* App. 47a-48a. Both officers testified that they were trained in first aid and CPR. *See* ECF No. 71 at 18 (aff. of Dustin McKee); ECF No. 79 at 24 (aff. of Jason Frenz). Yet neither tried to help Mr. White as he was bleeding on the ground from the gunshots they had fired. App. 48a. As Officer McKee explained, rather than assist Mr. White, who was now unarmed and handcuffed, he "kept [his] firearm aimed at him" even though he "could clearly see he was dying." ECF No. 71 at 15.

The ambulance arrived 15 minutes later. App. 7a. Mr. White was dead by the time it got there. *Id.*

C. The District Court Denied the Officers Summary Judgment.

Ms. Stevens-Rucker sued under 42 U.S.C § 1983 alleging Sergeant Frenz and Officer McKee violated her son's Fourth Amendment right to be free from excessive force and denied him adequate medical care in violation of the Fourteenth Amendment. App. 49a.[2] The officers moved for summary judgment, arguing they were entitled to qualified immunity on all claims.

The district court held Officer McKee was not entitled to qualified immunity on a claim of excessive force for the shots he fired "while [Mr.] White was either on the ground or attempting to stand back up." App. 71a.[3] The court explained that "the law clearly established that officers could not use deadly force unless they had probable cause to believe that an individual posed a serious risk of harm to the officers or others." App. 73a (quotation marks omitted). Here, given that Officer McKee "witnessed [Sergeant] Frenz shoot [Mr.] White and had fired his own gun two times meaning he knew White was injured," the court held that a reasonable officer would not "have felt immediately threatened by a knife wielding suspect on the ground ten to fifteen feet away suffering from at least one gunshot wound." *Id.*

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[2] In addition to filing related state law claims, Ms. Stevens-Rucker alleged that the City of Columbus and its Police Chief failed to "properly train or supervise the officers and [had] customs or policies ratifying constitutional violations." App. 49a-50a.

[3] The court held that Sergeant Frenz and Officer McKee were entitled to summary judgment on excessive force claims based on the first shots they fired at Mr. White. *See* App. 56a-71a.

As for the denial of medical care claim, the officers asserted that they were entitled to summary judgment by arguing that "a police officer discharges his [constitutional] duty to render medical aid by promptly calling for medical help." App. 75a. Ms. Stevens-Rucker maintained the opposite: "that an officer does not [necessarily] discharge his duty to render medical aid solely by calling for aid for a victim of police use of force." *Id.*

The district court agreed with Ms. Stevens-Rucker. It explained that "the Fourteenth Amendment right of pretrial detainees to adequate medical care is, and has long been, clearly established." App. 79a (quotation marks omitted). The district court traced the history of this long-established rule. In *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976), this Court held that "intentionally denying or delaying access to medical care violates the constitutional rights of a prisoner." App. 74a (quotation marks omitted). Then, less than 10 years later, this Court held that, at a minimum, the same applies for "[p]retrial detainees." *Id.* (citing *Revere*, 463 U.S. at 244).

The district court explained that under this decades-old precedent, the officers "could not ignore [Mr.] White's urgent medical needs as he was lying in the grass solely because an officer had called for an ambulance which did not arrive for at least 10 minutes." App. 79a. The officers "knew [Mr.] White was injured and . . . knew they shot him." App. 78a-79a. There was thus "sufficient circumstantial evidence to show that both officers perceived facts allowing them to infer a substantial risk to White, that both drew the inference the risk could cause harm, and then that both disregarded the risk." App. 79a. The court held that the officers were not entitled to

summary judgment because their "decision not to provide medical care" violated clearly established law. *Id.*

D. A Divided Sixth Circuit Reversed the District Court.

A divided Sixth Circuit reversed. In reversing the excessive force claim, the majority held that the district court improperly distinguished the shots Officer McKee fired while Mr. White was still standing from the shots he fired while Mr. White was on the ground. App. 20a. The majority went on to hold that, under its view of the evidence, it was reasonable for Officer McKee, based on his "unrebutted affidavit testimony," to "continue[] to use his firearm to stop what he justifiably perceived as an immediate threat to his safety." App. 22a.

Judge Stranch dissented. She believed that Sixth Circuit precedent required the court to "disaggregate McKee's three spates of gunfire" because his "testimony indicates that he had sufficient time to evaluate White's movements, discern his intent to get back up, and elect to fire again." App. 30a-31a (Stranch, J., dissenting). The facts showed that Mr. White was "15 feet from the officers in an open field, and there were no civilians in the immediate vicinity." App. 31a. Thus, to Judge Stranch, it was "simply not a plausible argument that [Officer] McKee was in immediate danger when he delivered the fatal shots." *Id.*

Regarding the denial of medical care claim, although no party had argued that officers are always required to provide medical aid on the scene, the majority framed the case as if that were the issue. The majority explained it had found "no authority" that "establishes an affirmative duty on the part of police officers to render CPR in any and all circumstances." App. 25a (quotation marks omitted). The majority

acknowledged that "due process requires that police officers seek the necessary medical attention for a detainee when he or she has been injured," but concluded that this constitutional duty of care is satisfied if the officers "either promptly summon[] the necessary medical help or . . . tak[e] the injured detainee to the hospital." *Id.* (quotation marks, brackets, and ellipsis omitted). The majority embraced a categorical rule that the duty of care "does not require the officer to intervene personally," and that "[a]s long as the officer acts promptly in summoning aid, he or she has not deliberately disregarded the serious medical need of the detainee even if he or she has not exhausted every medical option." App. 26a. Thus, the officers did not violate due process and were entitled to qualified immunity. *Id.*

Judge Stranch dissented from this ruling too. In her view, while police do not have a "per se duty to administer CPR, some circumstances create a duty for first responders to render such aid." App. 32a (Stranch, J., dissenting). Here, the officers "[i]n spite of their training as first responders . . . elected to leave [Mr.] White handcuffed, facedown, and dying as opposed to rendering aid." *Id.* And they did so even though they "neither feared for their own safety nor were busy with other tasks." *Id.* Judge Stranch concluded that "the Constitution requires more of officers in these circumstances." *Id.*

REASONS FOR GRANTING THE PETITION

Because the Court has not defined the "due process obligations" police owe "pretrial detainees or other persons in [their] care who require medical attention," *Revere*, 463 U.S. at 244, the courts of appeals are divided.

The Eighth and Tenth circuits have held that police officers sometimes have an affirmative duty to help suspects injured during arrest. *See, e.g.*, *McRaven v. Sanders*, 577 F.3d 974 (8th Cir. 2009); *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014). By contrast, the Sixth Circuit, relying on a case from the Ninth Circuit, rejected such a rule, holding that so long as an officer summons medical aid, she never has a duty to "intervene personally." *See* App. 26a (citing *Maddox v. City of Los Angeles*, 792 F.2d 1408 (9th Cir. 1986)). The Court should grant certiorari to resolve this conflict in authority. *See* Sup. Ct. R. 10(a).

The decision below—and the Ninth Circuit case on which it relies—is contrary to this Court's precedent, which unequivocally states that anyone in police custody is entitled to at least the level of care mandated for convicted prisoners under the Eighth Amendment. *See Revere*, 463 U.S. at 244. The Eighth Amendment would not permit a categorical rule that a state official never has a duty to "intervene personally," even when doing so poses no safety threat and is necessary to save an inmate's life. For this reason, too, the Court should grant certiorari. *See* Sup. Ct. R. 10(c).

The Court should also grant certiorari because this question is important and recurring. Between June 2015 and March 2016, the Bureau of Justice Statistics identified 1,348 potential arrest-related deaths, which averages 135 arrest-

related deaths each month.[4] In 2012, police injured or killed an estimated 55,400 people during arrest.[5] Considering how frequently people are arrested, and the number of people who are injured or die during arrest, the Court should take this chance to answer the question it left open in *Revere*, and "define" what "due process obligations" police officers owe the people who need medical assistance during an arrest. *Revere*, 463 U.S. at 244.

I. THE CIRCUITS ARE DIVIDED ON WHETHER POLICE EVER HAVE A DUTY TO RENDER AID.

The Court in *Revere* was unequivocal that the Fourteenth Amendment requires government officials to provide medical care to arrestees and that the level of care owed to arrestees is at least as great as that owed to convicted prisoners. But that was not the primary issue before the *Revere* Court. Instead, the Court had to decide whether the Constitution obligates

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[4] Bureau of Justice Statistics, *Arrest-Related Deaths Program Redesign Study, 2015-16: Preliminary Findings* (Dec. 2016), https://www.bjs.gov/content/pub/pdf/ardprs1516pf_sum.pdf.
The Washington Post also tracks the number of civilians shot to death by police. Every year since 2015, close to 1000 people have been shot dead by police. *See* Wash. Post, *Fatal Force 2015*, https://www.washingtonpost.com/graphics/national/police-shootings/? (database based on news reports, public records, Internet databases, and original reporting) (last visited Nov. 18, 2018). And guns are not the only way civilians are killed during arrest. Police have killed more than 1000 people using tasers; most of these deaths have occurred since 2000. *See* Reuters, *Reuters Finds 1,005 Deaths in U.S. Involving Tasers, Largest Accounting to Date* (Aug. 22, 2017), https://www.reuters.com/article/us-axon-taser-toll/reuters-finds-1005-deaths-in-u-s-involving-tasers-largest-accounting-to-date-idUSKCN1B21AH.

[5] *See* Ted R. Miller et al., *Perils of Police Action: A Cautionary Tale from US Data Sets*, 23 Injury Prevention 27-32 (July 25, 2016), https://injuryprevention.bmj.com/content/23/1/27.

the government to pay for that medical care. *See Revere*, 463 U.S. at 241.

In *Revere*, the police shot and wounded Patrick Kivlin. *Id.* After catching him, the officers called an ambulance to take Mr. Kivlin to Massachusetts General Hospital for treatment. *Id.* The Hospital later sent the City of Revere's Police Chief a bill for the treatment, and when the City did not pay, the Hospital sued. *Id.* The Massachusetts Supreme Court held that the "Eighth Amendment . . . require[d] that Revere be liable to the hospital for the medical services rendered to Kivlin." *Id.* (quotation marks omitted). This Court reversed, holding that "as long as the governmental entity ensures the medical care is in fact provided," the Constitution does not speak to who must bear the costs. *Id.* at 245.

While deciding the issue, the Court clarified that the Eighth Amendment did not apply because Mr. Kivlin had not been convicted of a crime. Rather, the relevant constitutional provision was the Fourteenth Amendment's Due Process Clause, which "require[s] the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by police." *Id.* at 244. The Court explained that "the due process rights of [an arrestee] . . . are at least as great as the Eighth Amendment protections available to a convicted prisoner." *Id.* That said, the Court did "not define" the government's "due process obligations to pretrial detainees or other persons in its care who require medical attention," because, in that case, the government's obligations were satisfied by ensuring Mr. Kivlin was "taken promptly to a hospital that provided the treatment necessary for his injury." *Id.* at 244-45. There is no suggestion in *Revere* that Mr. Kivilin needed aid at the scene

or that the officers refused to provide Mr. Kivlin care that he needed. Indeed, Mr. Kivlin, the "pretrial detainee," was not a party in the case, and the scope of his rights was not at issue.

Some courts, including the Sixth and Ninth Circuits, have misinterpreted *Revere*'s statement that the officers satisfied due process under the circumstances of that case by taking Mr. Kivlin "promptly to the hospital" as a constitutional rule that police officers *always* satisfy their constitutional obligations by summoning medical care for an injured arrestee. *See Maddox*, 792 F.2d at 1415; App. 25a-26a. But the Court in *Revere* was clear that the Constitution requires a level of care for arrestees that—at a minimum—satisfies the Eighth Amendment standard for convicted prisoners. And the Eighth Amendment would not permit a categorical rule that a state official necessarily provides constitutionally sufficient care by summoning medical aid without taking any steps to assist an inmate personally.

Other courts, including the Eighth and Tenth Circuits, have recognized precisely this point. Those courts have looked to the Court's Eighth Amendment jurisprudence and have asked whether a reasonable juror could find that the officers, despite calling an ambulance, "intentionally den[ied] or delay[ed] access to medical care." *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976). These courts have found that there are circumstances where police are constitutionally obligated to render aid even after calling an ambulance and have denied summary judgment in those circumstances. *See, e.g.*, *McRaven,* 577 F.3d 974; *Estate of Booker*, 745 F.3d 405.

A. The Sixth and Ninth Circuits Have Held Police Officers Necessarily Satisfy Their Constitutional Obligations by Summoning Aid and Have No Duty to Intervene Personally.

In *Maddox v. City of Los Angeles*, police officers arrested Donald Roy Wilson, whom they believed was on drugs, as he was standing naked in traffic. 792 F.2d at 1411. After being handcuffed and placed on the floor of the police car, Mr. Wilson allegedly became "belligerent," so the officers placed him in a "choke hold" to subdue him. *Id.* at 1412. When they reached the hospital, the officers could not find Mr. Wilson's pulse. *Id.* Although they were trained in CPR, the officers did not try to revive him. *Id.* Instead, they took Mr. Wilson to the "jail ward" in the hospital where "the medical staff commenced CPR." *Id.* He was pronounced dead later that day. *Id.*

At trial on a denial of medical care claim, the district court instructed the jury that "the concept of due process of law requires the officers to take reasonable steps to secure medical care which they recognize as necessary for the decedent," but "any failure by the officers themselves to render [CPR] is not a violation of the decedent's constitutional rights." *Id.* at 1414. Ms. Maddox, the administrator of Mr. Wilson's estate, opposed this instruction, asserting that "the fourteenth amendment due process clause requires officers to render CPR when a pretrial detainee in their custody is in need of CPR." *Id.* at 1415.

The Ninth Circuit rejected this argument, holding the instruction correctly "set forth the constitutional obligation of the officers in this case." *Id.* The court, citing *Revere*, noted that "[t]he due process clause requires responsible

governments and their agents to secure medical care for persons who have been injured while in police custody." *Id.* However, it "found no authority suggesting that the due process clause establishes an affirmative duty on the part of police officers to render CPR in any and all circumstances." *Id.* Citing *Revere* again, the court then held that due process only "requires that police officers seek the necessary medical attention for a detainee when he or she has been injured while being apprehended by either promptly summoning the necessary medical help or by taking the injured detainee to a hospital." *Id.* And the court reasoned that, "as in *Revere*, the jury could reasonably have concluded that the defendant police officers fulfilled their obligation under the due process clause when they promptly took the defendant to the hospital to obtain medical care." *Id.*

The Sixth Circuit panel majority relied almost exclusively on *Maddox* and its interpretation of *Revere* when deciding the denial of medical care claim here. The Sixth Circuit concluded that the "logic that underlies" *Maddox* "makes sense: an officer is charged with providing a detainee with prompt medical attention. However, this attention does not require the officer to intervene personally." App. 26a. Applying *Maddox* to this case, the Sixth Circuit concluded that "[a]s long as the officer acts promptly in summoning aid, he or she has not deliberately disregarded the serious medical need of the detainee even if he or she has not exhausted every medical option." *Id.*

Like the Sixth and Ninth Circuits, several district courts have categorically held that when "officers promptly request[] medical assistance . . . the Constitution require[s] them to do no more." *Henriquez v. City of Bell*, No. 14 Civ 196(GW), 2015

WL 13423888, at *3 (C.D. Cal. Sept. 10, 2015); *see, e.g.*, *Adams v. Custer*, No. 14 Civ. 80403(DTH), 2016 WL 155081, at *17 (S.D. Fla. Jan. 12, 2016); *Reyes ex rel. Reyes v. City of Fresno*, No. 13 Civ. 418(LJO), 2013 WL 2147023, at *7 (E.D. Cal. May 15, 2013); *Stogner v. Sturdivant*, No. 10 Civ. 125(JJB), 2010 WL 4056217, at *4 (M.D. La. Oct. 14, 2010); *Tate v. Dunnigan*, No. 06 Civ. 169(RAE), 2007 WL 4353456, at *4 (M.D.N.C. Dec. 7, 2007).

B. The Eighth and Tenth Circuits Have Held There Are Circumstances When Police Officers Have a Constitutional Obligation to Personally Render Aid.

The Eighth and Tenth Circuits have recognized that this Court's precedent does not support a categorical rule that an officer necessarily renders constitutionally adequate medical care simply by summoning aid. Those courts have applied the constitutional floor established by the Eighth Amendment's deliberate indifference standard and held that, under certain circumstances, an officer who fails to render aid to an injured arrestee has acted with deliberate indifference.[6]

In *McRaven*, the Eighth Circuit held that "[a]n officer trained in CPR, who fails to perform it on a [pretrial detainee] manifestly in need of such assistance, is liable under § 1983

[6] The Court has "reserved decision on the question whether something less [with respect to a state actor's culpability] than the Eighth Amendment's 'deliberate indifference' test may be applicable in claims by detainees asserting violations of their due process right to medical care while in custody." *City of Canton v. Harris*, 489 U.S. 378, 389 n.8 (1989). Based on the Court's precedent, there arguably should be no subjective component to a denial of medical care claim in the Fourteenth Amendment context just as there is no requirement to show a subjective intent to harm in the Fourteenth Amendment excessive force context. *See Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2475 (2015).

for deliberate indifference." 577 F.3d at 983. There, police arrested Steven McFarland for driving under the influence. *Id.* at 978. The officers took him to the detention center, where they tested his urine. *Id.* Mr. McFarland tested positive for drugs. *Id.* The officers also noted that Mr. McFarland's condition was "'poor,' his speech [] 'slurred,' his face [] 'flushed,' and his eyelids [] droopy.'" *Id.* Two officers at the center discussed taking Mr. McFarland to the hospital, but they decided to consult with "a practical nurse at the facility, before taking any action." *Id.* The nurse examined Mr. McFarland and determined he did not need to be hospitalized, and they placed him a holding cell. *Id.* at 979.

A few hours later, another detainee notified Sergeant Ashley, who was trained in CPR, that Mr. McFarland "was not breathing." *Id.* The sergeant entered the cell at 5:35 p.m. and stood over Mr. McFarland "shaking him," but never tried to perform CPR. *Id.* He also notified the paramedics, who arrived seven minutes later and transported Mr. McFarland to the hospital. *Id.* Mr. McFarland suffered "severe brain injuries, stemming from airway blockage." *Id.*

Mr. McFarland's guardian brought a § 1983 suit alleging Sergeant Ashley unconstitutionally denied Mr. McFarland medical care. *Id.* The district court held Sergeant Ashley was not entitled to summary judgment on this claim, and the Eighth Circuit affirmed. *Id.* at 980.

Analyzing the "claim under the Due Process Clause of the Fourteenth Amendment," *id.* at 979, the court of appeals explained that "[d]espite being trained in CPR, Ashley made no attempt to resuscitate [Mr.] McFarland" "for seven minutes before the paramedics arrive[d]." *Id.* at 983. The court held that "[a]n officer trained in CPR, who fails to perform it on a

prisoner manifestly in need of such assistance, is liable under § 1983 for deliberate indifference." *Id.* Sergeant Ansley "was aware of [Mr.] McFarland's medical need and was capable of providing assistance," yet "failed to do so." *Id.* Thus, the Eighth Circuit concluded that the "district court did not err by denying him qualified immunity." *Id.* at 983-84.

Citing *McRaven* approvingly, the Tenth Circuit similarly held police officers can be found liable for failing to personally provide aid to a suspect in their custody. 745 F.3d at 431-32. There, police officers arrested Marvin Booker on a failure to appear warrant. *Id.* at 412. Mr. Booker was uncooperative during the booking process, so an officer put him in a "carotid restraint"—a technique "capable of rendering a person unconscious within 10-20 seconds," and which the "Sherriff's training materials warn" can cause "brain damage or death." *Id.* at 413 (quotation marks and emphasis omitted). Close to three minutes passed before the officer released the hold; the deputies then carried Mr. Booker to a cell. *Id.* at 415. None of the officers "check[ed] Mr. Booker's vitals or attempt[ed] to determine whether he needed immediate medical attention." *Id.*

After leaving the cell, one officer went to the nurse's station to "request that Mr. Booker be evaluated." *Id.* Another officer went back to the cell less than thirty seconds later and saw that Mr. Booker "did not appear to be breathing." *Id.* The officer shouted that Mr. Booker "needed medical attention," and then ran to the nurses' station "and told a nurse to hurry." *Id.* A nurse arrived at the cell about one and a half minutes later—less than five minutes after "the use of force incident ended." *Id.* None of the officers sought to intervene personally during this period. *Id.* And "[a]ttempts [by the

nurse] to resuscitate Mr. Booker were unsuccessful." *Id.* at 416.

The district court denied the officers summary judgment on a denial of medical care claim. The Tenth Circuit affirmed. The court noted that the "Defendants actively participated in producing Mr. Booker's serious condition through their use of force against him," and that they had a "front-row seat to Mr. Booker's rapid deterioration." *Id.* at 431. The court pointed to evidence showing that "resuscitation could possibly have saved Mr. Booker's life" and that "[e]ach of the Defendants received regular training in first aid/CPR and training that any inmate involved in a use of force incident needs to be medically evaluated after the incident." *Id.* (quotation marks omitted). The Tenth Circuit concluded that, "[i]n light of this training and Mr. Booker's limp appearance, a reasonable jury could conclude the Defendants inferred that Mr. Booker was unconscious and needed medical attention." *Id.* at 431-32. Thus, held the court, "If a jury concludes the Defendants made this inference, then it could also conclude that they were deliberately indifferent in failing to respond sooner." *Id.* at 432.

Like the Eighth and Tenth Circuits, other district courts across the country have held that "summon[ing] rescue" "is insufficient by itself to defeat [a] deliberate indifference" claim and that there are times when the Fourteenth Amendment obligates an officer to intervene personally. *Petro v. Town of W. Warwick ex rel. Moore*, 889 F. Supp. 2d 292, 333 (D.R.I. 2012); *see, e.g.*, *Wallace v. Jackson*, 667 F. Supp. 2d 1267, 1275 (M.D. Ala. 2009); *Sparks v. Susquehanna County*, No. 05 Civ. 2274(JMM), 2009 WL 922489, at *10 (M.D. Pa. Apr. 3, 2009);

Ashworth v. Round Lake Beach Police Dep't, No. 03 Civ. 7011 (PEP), 2005 WL 1785314, at *7 (N.D. Ill. July 21, 2005).

* * *

These two lines of cases are in conflict. One line of cases, misapplying *Revere*, has held that officers are obligated only to summon aid. The other line, relying on *Estelle*, has held that there are circumstances when an officer's failure to provide aid amounts to the intentional denial or delay of medical care in violation of the Constitution. Because the Sixth Circuit sided with the Ninth Circuit, it held that the officers here were entitled to summary judgment. But had Sergeant Frenz and Officer McKee been in a state in the Eighth or Tenth Circuits, the denial of medical care claim would have gone to a jury. A reasonable juror could have found that the officers were "aware of [Mr. White's] medical needs and [were] capable of providing assistance," yet "failed to do so." *Compare McRaven*, 577 F.3d at 983 (officers not entitled to summary judgment for not providing any assistance for the seven minutes it took the paramedics to arrive). And that reasonable juror could have concluded that the officers "inferred" Mr. White needed "medical attention," and thus "conclude[d]" that the officers "were deliberately indifferent in failing to respond sooner." *Compare Estate of Booker*, 745 F.3d at 431-32 (officers not entitled to summary judgment for not providing any assistance for the five minutes it took the ambulance to arrive).

The Court should grant certiorari to resolve this confusion.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

The Court should also grant certiorari because the question presented is important and recurring. This case involves the due process protections owed to people who police have arrested based on probable cause—a "practical, fluid, flexible, easily applied, and nontechnical" standard. *New Jersey v. T.L.O.*, 469 U.S. 325, 364 (1985) (quotation marks omitted). Indeed, the standard for arrest is so "flexible," that in 2015, over 10 million people were arrested in the United States.[7] And a staggering number of people die or are injured during arrest. According to the available data, there were over 1000 arrest-related deaths in a nine-month span and over 55,000 injuries or deaths during arrest in a one-year period. *See supra* at 13-14. Yet the Court has twice declined to define arrestees' rights to medical care while in police custody. *See Revere*, 463 U.S. at 244; *Harris*, 489 U.S. at 389 n.8. The Court should grant certiorari because the answer to the question presented implicates the constitutional rights of thousands, potentially millions, of citizens each year. And the stakes could not be higher: the level of care police must provide suspects in their custody can be a matter of life or death.

Underscoring the importance of the question presented, as Judge Stranch noted, this case "points to a broader, troubling pattern. After serving his country in the war in Iraq, Jason White returned to the United States as a decorated veteran

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[7] Dep't of Justice, FBI, *2015 Crime in the United States*, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/persons-arrested/persons-arrested (last visited Nov. 18, 2018). Of these 10 million-plus arrests, only roughly 500,000 were for violent crimes. *Id.*

suffering from significant mental health problems. On the day the police shot him, he was suffering an acute mental health incident." App. 32a. (Stranch, J., dissenting). Judge Stranch explained that Mr. White's case is not an anomaly: "it is safe to say that a third to a half of all use-of-force-incidents involve a disabled citizen," and "[p]eople with mental illness are 16 times more likely to be killed by police." *Id.* (brackets and emphasis omitted). Thus, those most likely to be injured or killed by police during arrest are some of the most vulnerable members of society.

Unfortunately, "police are often caught in an unenviable position on the frontlines of mental health emergencies." App. 33a. And despite the statistics showing that a disparate number of use-of-force-incidents involve people suffering from mental illness, officers are still often encouraged to "shoot first and think later." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Granting summary judgment in a case like this does little to encourage police departments to equip officers with the tools needed "to safely address the presenting issue or ongoing needs" of persons they encounter who may be suffering a mental health crisis. App. 33a (Stranch, J., dissenting).

This case does not require the Court to second-guess the difficult, "split-second decisions" police must sometimes make. *Tennessee v. Garner*, 471 U.S. 1, 20 (1985). Instead, it simply, but importantly, asks that the Court define police officers' constitutional obligations after force is used, and decide whether an officer is ever constitutionally obliged to help a person he hurts.

The Court should grant review.

CONCLUSION

For these reasons, certiorari is warranted.

Respectfully submitted,

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