No. 23-1554

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MICHAEL RIVERA,
Plaintiff-Appellant,

v.

REDFERN, et al
Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Pennsylvania, No. 1-21-cv-01118
Before the Hon. Susan E. Schwab, Magistrate Judge

OPENING BRIEF OF APPELLANT MICHAEL RIVERA AND APPENDIX VOL. I

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INTRODUCTION

All defendants—a unit captain, a nurse, and two correctional officers—knew that Michael Rivera had asthma when they ignored his repeated pleas, over the course of nearly ninety minutes, to return him from an open-air cage to his cell before deploying pepper spray in a planned use of force. And they understood the suffering that ignoring him would cause: when Mr. Rivera told Nurse Rogers that leaving him in the cage would trigger an asthma attack, Rogers responded: "I know." Despite that knowledge, they forged ahead, deploying pepper spray against another prisoner—one who posed no urgent threat to prison security—while Mr. Rivera stood defenseless in the cage. When Mr. Rivera's asthma attack arrived, as everyone knew it would, it caused him pain, severe breathing difficulties, dizziness, coughing, sneezing, vomiting, and a drowning-like sensation.

The defendants exhibited deliberate indifference to a substantial risk of serious harm in violation of the Eighth Amendment. The district court never addressed the constitutional merits, deciding instead that an absence of clearly established law shielded the defendants even if they violated the Constitution. That was wrong: it would have been clear to

any reasonable officer in the defendants' shoes that they could not ignore the known risk to Mr. Rivera's health. Defendants are therefore not entitled to qualified immunity.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Michael Rivera filed this action pursuant to 42 U.S.C. § 1983 in the Court of Common Pleas of Centre County, Pennsylvania. AA 48. Defendants removed the case from state to federal court pursuant to 28 U.S.C. § 1441(a). AA 42. The Middle District of Pennsylvania had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. The district court granted defendants summary judgment on February 21, 2023, and Mr. Rivera timely noticed his appeal on March 22, 2023.[1] AA 3; AA 1. This Court has appellate jurisdiction to review the district court's final order under 28 U.S.C. § 1291.

[1] The district court docketed the notice of appeal on March 28, 2023. Under the prison mailbox rule, however, the notice of appeal was "filed" on March 22, 2023, when Mr. Rivera "delivered it to the prison authorities for forwarding to the court clerk." *Houston v. Lack*, 487 U.S. 266, 276 (1988).

ISSUES PRESENTED

I. Whether the defendants violated the Eighth Amendment when, over the course of nearly ninety minutes, they ignored Mr. Rivera's repeated pleas to move twenty-five feet to his cell before they deployed pepper spray in a planned use of force, despite their knowledge that Mr. Rivera would suffer an asthma attack as a result.

II. Whether qualified immunity can shield the defendants from liability for that conduct.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND[2]

Michael Rivera has asthma. AA 11. At approximately 5:40pm on June 20, 2020, Mr. Rivera was in an open-air telephone cage in his prison unit when he noticed prison staff beginning to prepare to extract a fellow prisoner from a cell on the unit. AA 10-11; AA 120. They wished to extract the other prisoner because he was "covering and uncovering" the window in his cell door, behavior that was "slowing down the operations of the RHU." AA 107.

Because cell extractions often involve pepper spray, Mr. Rivera grew concerned: the open-air cage would leave him defenseless to the inevitable pepper spray exposure.[3] AA 10-11. Without the four solid walls

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[2] The facts in this brief come from the district court's recitation of the material facts, the two declarations the district court stated it relied on in setting forth those facts, and uncontested facts from Mr. Rivera's deposition testimony, which defendants attached as an exhibit to their motion for summary judgment. *See* AA 10 ("Brown substantially corroborates Rivera's version of the events, and in setting forth the material facts, we rely on Brown's declaration as well as Rivera's."); AA 84 (Rivera deposition).

[3] The district court used the terms "oleoresin capsicum spray ('OC spray')" and "pepper spray" interchangeably. This brief uses the term "pepper spray" throughout. The terms refer to the same substance.

of his cell and access to the wet rag he normally uses to cover his face, pepper spray would trigger an asthma attack. AA 11, 14; AA 106; AA 112.

So he spoke up. Over the next hour and a half, between 5:40pm and 7:09pm, Mr. Rivera persistently reminded each defendant—all of whom already knew of his asthma, AA 79; AA 93, AA 94—that he had asthma and that, if they deployed pepper spray in the unit without returning him to his cell, he would suffer an asthma attack, AA 11. He "immediately" told defendants Redfern (the unit captain) and Schreck, who both "ignored" him. AA 11. Later, he told defendant Monsell, who confirmed that Redfern was "aware" that pepper spray was "going to mess [Mr. Rivera] up." AA 91; AA 11. He twice more told Redfern and Monsell—conversations that Schreck overheard—and twice more they ignored him. AA 11. He spoke again with Schreck, with the same result. AA 11-12.

Approximately half an hour before officers deployed pepper spray, around 6:45pm, defendant Nurse Rogers entered the unit. AA 12. Mr. Rivera again reiterated his vulnerability, reminding Rogers that he was asthmatic and that pepper spray exposure in the telephone cage would cause him an asthma attack. AA 12. Rogers responded: "I know." AA 12. He reassured Mr. Rivera that the officers "know you're asthmatic." AA

92. When Mr. Rivera asked to be returned to his cell, Rogers said, "I'll let Redfern know." AA 12. Still, Mr. Rivera remained in the cage, defenseless.

As surveillance video confirms, life on the unit was calm between 5:40 and 7:09pm. *See generally* AA 104. Mr. Rivera explained that he was "just sitting in a cage for an hour, . . . talking s*** with the guys on the pod." AA 91. He was "talking to the prisoner that ended up being extracted, . . . talking to Schreck, . . . talking to Monsell"; "just regular everyday prison stuff like how we do it in the RHU." AA 91.

After nearly 90 minutes of inaction—and 90 minutes of Mr. Rivera's pleas to return to his cell—the defendants entered the unit wearing protective gas masks. AA 15. Mr. Rivera asked Rogers one last time to return to his cell; Rogers responded: "What do you want me to do, Rivera? That's up to Redfern." AA 15.

Protected by their gas masks, the defendants deployed pepper spray and completed the cell extraction. AA 15. Within three minutes, Mr. Rivera's asthma attack arrived, as everyone knew it would. AA 16. It caused him "pain and suffering, severe breathing difficulties, dizziness,

coughing, sneezing and vomiting." AA 124. Mr. Rivera later described the sensation as "similar to drowning." AA 93.

Only after they had caused Mr. Rivera's asthma attack did the defendants begin taking steps to address the harm. An officer brought him his asthma pump, which he used in the telephone cage. AA 94. But his severe symptoms continued. Officers escorted Mr. Rivera to his cell, where he continued to vomit. AA 94. His neighbor in the next cell over "could hear [him] coughing and vomiting," AA 128, and could tell that he "wasn't able to communicate," AA 94, so hit the call button to request medical attention, AA 128. Officers returned and brought Mr. Rivera to the triage room, where he received a nebulizer breathing treatment, which finally abated his symptoms. AA 94.

Had Mr. Rivera been in his cell when the pepper spray was deployed, he would have been able to use his normal strategies to minimize its effects. The four solid walls of his cell would have prevented much of the pepper spray from reaching him. AA 92-93. And, given the slow, deliberate nature of cell extractions, he would have "ha[d] time to prepare" by covering up the vent and placing a wet rag over his face. AA 92, AA 94. In that case, he "might [have] start[ed] sneezing, and

sometimes [his] eyes would water." AA 92; AA 106. But, for the most part, "it w[ouldn't have] affect[ed him] at all." AA 94.

II. PROCEDURAL BACKGROUND

After exhausting administrative remedies, *see* AA 60, Mr. Rivera filed suit in the Court of Common Pleas in Centre County, Pennsylvania, *see* AA 47. Proceeding *pro se*, Mr. Rivera alleged that the defendants violated his constitutional rights under the Eighth Amendment when they ignored his repeated pleas to return him to his cell before executing a planned use of force involving pepper spray. *See* AA 53-58. He sought compensatory and punitive damages, declaratory relief, a permanent injunction, and legal costs. AA 58-59.

The defendants removed the case to the United States District Court for the Middle District of Pennsylvania. AA 42. After discovery, the defendants moved for summary judgment, arguing that they had not violated the Eighth Amendment and, if they had, that qualified immunity shields them from liability. AA 67.

The district court awarded the defendants summary judgment. It declined to decide "whether there was, in fact, a constitutional violation." AA 20. It instead skipped to qualified immunity's clearly established

prong, and concluded that the defendants were entitled to qualified immunity because no case on point alerted the defendants that their precise conduct would violate the Eighth Amendment. AA 18-27. It did not consider whether qualified immunity might be inappropriate even absent a case on point. This appeal followed.[4]

STANDARD OF REVIEW

This Court reviews grants of summary judgment, including on qualified immunity grounds, *de novo*. *Halsey v. Pfeiffer*, 750 F.3d 273, 287 (3d Cir. 2014). Summary judgment is appropriate only if there is no "genuine dispute as to any material fact." *Id.* The summary judgment analysis views "the evidence in the light most favorable to the non-moving party"—here, Mr. Rivera—and gives that party "the benefit of all reasonable inferences that can be drawn from the evidence." *Id.*

SUMMARY OF ARGUMENT

I. The Eighth Amendment forbids "fail[ing] to act despite . . . knowledge of a substantial risk of serious harm," *Farmer v. Brennan*, 511

[4] The district court also reached conclusions that this appeal does not challenge: that the Eleventh Amendment bars a claim for damages against the defendants in their official capacities, AA 28-31, and that Mr. Rivera's transfer to a new prison mooted his claims for declaratory and injunctive relief, AA 31-36.

U.S. 825, 842 (1994), where that failure will result in "[t]he infliction of . . . unnecessary suffering," *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) ("undue suffering").

Despite that fundamental constitutional command, the defendants stood by while, over the course of an uneventful hour and a half, Mr. Rivera, who has asthma, pleaded with them to move him to his cell—a mere 25-30 feet away—before deploying pepper spray in a planned use of force against another prisoner on the unit. AA 10-15. When Mr. Rivera reminded them, again and again, that leaving him there would cause him to suffer an asthma attack, the defendants had nothing to say but: "I know." AA 12. And they refused to move him, instead equipping themselves with gas masks while leaving Mr. Rivera—whom they knew was asthmatic—unprotected. AA 15. That conduct violated the Eighth Amendment.

II. The district court skipped this question and instead granted qualified immunity because it concluded (erroneously) that the law was not clearly established. AA 20. But, when it comes to the Eighth Amendment, "a defendant cannot have qualified immunity if she was deliberately indifferent." *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15

(3d Cir. 2001). The district court therefore had an obligation to investigate the constitutional merits—an investigation that would have yielded a plain answer. Mr. Rivera's foreseeable (and foreseen) asthma attack is precisely the sort of "unnecessary suffering" the Eighth Amendment proscribes. Because no reasonable correctional officer could believe that acting with *deliberate* indifference to a *known* substantial risk of serious harm comports with clearly established law, the defendants were not entitled to qualified immunity.

Alternatively, even if qualified immunity could *ever* shield deliberately indifferent defendants under the Eighth Amendment, it would not shield these defendants. Intentional constitutional violations require less factual specificity to become "clearly" proscribed. *See, e.g.*, *Clark v. Coupe*, 55 F.4th 167, 182-83 (3d Cir. 2022). Here, case law made clear that the defendants could not do *nothing* in the face of a known substantial risk that an asthmatic would be exposed to pepper spray—more than enough to clearly establish the law. And regardless, in light of bedrock constitutional principles, the violation would have been "obvious" to any reasonable officer in the defendants' shoes. *See, e.g.*,

Mack v. Yost, 63 F.4th 211, 236 (3d Cir. 2023); *Dennis v. City of Philadelphia*, 19 F.4th 279, 290 (3d Cir. 2021); *Halsey*, 750 F.3d at 296.

In ignoring Mr. Rivera's pleas, the defendants acted with a "culpable state of mind," violating the Eighth Amendment. *Clark*, 55 F.4th at 179. And they acted objectively unreasonably in light of clearly established law, making qualified immunity inappropriate. *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999). This Court should reverse.

ARGUMENT

I. The defendants violated the Eighth Amendment.

The Eighth Amendment forbids "fail[ing] to act despite . . . knowledge of a substantial risk of serious harm," *Farmer v. Brennan*, 511 U.S. 825, 842 (1994), where that failure will result in "[t]he infliction of . . . unnecessary suffering." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976); *see also Spruill v. Gillis*, 372 F.3d 218, 235 (3d Cir. 2004) ("undue suffering"). That's because prison conditions "must not involve the wanton and unnecessary infliction of pain." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981); *see also Hope v. Pelzer*, 536 U.S. 730, 737 (2002) ("The

unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.").

The Eighth Amendment operationalizes this command by reference to a subjective standard: prison officials may not act with "deliberate indifference" to a known "substantial risk of serious harm." *Farmer*, 511 U.S. at 834. The defendants violated this mandate when, over the course of approximately an hour and a half, they ignored Mr. Rivera's repeated pleas to move him prior to exposing him to pepper spray despite "know[ing]" that deploying pepper spray without moving him would cause him to suffer an asthma attack, all while having no penological reason to keep him where he would be exposed. AA 12.

A. Mr. Rivera faced a substantial risk of serious harm.

Claims based on a "failure to prevent harm" to a prisoner must show that the failure posed "a substantial risk of serious harm." *Farmer*, 511 U.S. at 834 (citing *Helling v. McKinney*, 509 U.S. 25, 35 (1993)).

"[P]ain" can be "serious harm" if imposed with deliberate indifference. *Helling*, 509 U.S. at 32, 34 ("unnecessary and wanton infliction of pain") (quoting *Estelle*, 429 U.S. at 103); *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003) ("[n]eedless suffering"). Mr. Rivera's

asthma attack caused him a drowning-like sensation, vomiting, an inability to breathe, and other "pain and suffering." AA 124; AA 93. Those symptoms are worse than ones this Court has held sufficiently serious to trigger Eighth Amendment protection. AA 124; *see Atkinson*, 316 F.3d at 268 ("discomfort somewhere between that of hay fever and the common cold"); *Chavarriaga v. N.J. Dep't of Corr.*, 806 F.3d 210, 228 (3d Cir. 2015) ("migraine headaches and menstrual cramps").[5]

A risk of harm is also constitutionally "serious" if it would give rise to a "medical need . . . [that] is 'so obvious that a lay person would easily recognize the necessity' of medical attention." *Palakovic v. Wetzel*, 854 F.3d 209, 227 n.23 (3d Cir. 2017) (quoting *Monmouth Cnty. Corr. Inst.*

[5] As *Atkinson* and *Chavarriaga* illustrate, that people in the free world sometimes voluntarily or unavoidably experience a type of suffering doesn't mean it falls beyond the Eighth Amendment's concern when the state imposes it, with deliberate indifference, upon those it incarcerates. In *Atkinson*, for instance, the dissent objected that "millions of people not in prison voluntarily tolerate similar" secondhand smoke symptoms—which it described as "discomfort somewhere between that of hay fever and the common cold." *Atkinson*, 316 F.3d at 271 (Ambro, J., dissenting). The majority embraced that description of the symptoms' severity—but explained that, "unlike individuals who voluntarily expose themselves" to a risk, "a prisoner cannot simply walk out of his cell whenever he wishes." *Id.* at 268. The Eighth Amendment, in other words, takes seriously the fact that a prisoner encounters his conditions "unwillingly." *Helling*, 509 U.S. at 36.

Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987)). Not only *would* a lay person recognize that Mr. Rivera required treatment, but a lay person *did* recognize it: his neighbor, hearing his distress and understanding that the asthma attack prevented Mr. Rivera from communicating, summoned medical help. AA 128; AA 94. And when lay prison staff arrived, they recognized the need to transport Mr. Rivera to the triage room for medical attention. AA 16. Mr. Rivera's suffering came as no surprise; Nurse Rodgers said that he "kn[e]w" that the pepper spray would cause an asthma attack, and Monsell confirmed that Redfern was "aware" that pepper spray was "going to mess [Mr. Rivera] up." AA 91; AA 11. In other words, everyone knew *ex ante* that Mr. Rivera would require treatment; and he did in fact require treatment *ex post*. *Cf. Beers-Capitol*, 256 F.3d at 142 (plaintiff must show that defendants "knew of the risk . . . before" it materialized). The harm that the defendants "risked" was therefore "serious."

In this case, treatment was not only medically required; it was constitutionally required. *See, e.g.*, *Iko v. Shreve*, 535 F.3d 225, 241-42 (4th Cir. 2008) (Eighth Amendment requires officials to treat effects of pepper spray); *Danley v. Allen*, 540 F.3d 1298, 1310 (11th Cir. 2008)

(same), *overruled in part on other grounds*, *Randall v. Scott*, 610 F.3d 701 (11th Cir. 2010). If a condition is sufficiently serious that the Constitution requires officials to *treat* it, surely it is also sufficiently serious that the Constitution forbids officials to *cause* it without reason. *Cf. Helling*, 509 U.S. at 33 ("[T]he Eighth Amendment protects against future harm to inmates."); *Montgomery v. Pinchak*, 294 F.3d 492, 499-500 (3d Cir. 2002) (Eighth Amendment prohibits neglecting a condition that would result in serious harm "if not properly treated").

Courts frequently pull this all together to conclude that pepper spray exposure *alone*—even for a non-asthmatic—is sufficiently serious to implicate the Eighth Amendment. *See, e.g.*, *Clement v. Gomez*, 298 F.3d 898, 904 (9th Cir. 2002) (because "a serious medical need is present whenever the 'failure to treat a prisoner's condition could result in . . . the 'unnecessary and wanton infliction of pain,'" the "painful effects of pepper spray" satisfy the objective component); *Iko*, 535 F.3d at 241-43 (pepper spray exposure caused "an objectively serious medical need"); *Snider v. Motter*, No. 4:13-CV-01226, 2016 WL 4154927, at *7 (M.D. Pa. June 2, 2016), *report and recommendation adopted*, No. 4:13-CV-1226, 2016 WL 4140728 (M.D. Pa. Aug. 4, 2016); *Passmore v. Iannello*, No. 12-

90, 2013 WL 625409, at *7 (W.D. Pa. Feb. 20, 2013) ("[T]he Court sees no need to address whether Plaintiff had a serious medical need, as a lay person can readily recognize that an individual exposed to pepper spray is in need of some medical assistance to alleviate the effects of the spray."); *see also Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010) (in excessive force context, noting that pepper spray "has a variety of incapacitating and painful effects," and, as such, "unquestionably . . . constitutes a significant degree of force").

That conclusion is especially obvious when the victim suffers from asthma,[6] and as a result the exposure causes "pain and suffering, severe breathing difficulties, dizziness, coughing, sneezing . . . , vomiting," AA 124, and a drowning-like sensation, AA 93. *See, e.g.*, *Atkinson*, 316 F.3d at 260 ("nausea, an inability to eat, headaches, chest pains, difficulty breathing, numbness in his limbs, teary eyes, itching, burning skin, dizziness, a sore throat, coughing and production of sputum" satisfies Eighth Amendment standard); *Board v. Farnham*, 394 F.3d 469, 475, 484 (7th Cir. 2005) ("nosebleeds, respiratory distress and asthma attacks"

[6] *See Clark*, 55 F.4th at 183 (Constitution "take[s] into consideration" the "particular characteristics of the prisoner raising the challenge").

each independently serious harms); *Weaver v. Clarke*, 45 F.3d 1253, 1254 (8th Cir. 1995) ("severe headaches, dizziness, nausea, vomiting, and breathing difficulties"); *Roberts v. Luther*, No. 1:21-cv-00958, 2021 WL 5233318, at *1 (M.D. Pa. Nov. 10, 2021) ("intense burning sensation in his eyes, nose, mouth[,] and throat, as well as severe guttural coughing, sneezing[,] and respiratory distress").

And there's no question that the defendants' refusal to move Mr. Rivera created a "substantial" risk of this constitutionally serious suffering. The risk materialized—as everyone knew it would. If the gas masks and extraction tools are any indication, the defendants expected to deploy pepper spray. AA 15. And, as everybody agreed, that pepper spray would trigger Mr. Rivera's asthma attack. AA 11-12; *see Mammana v. Fed. Bureau of Prisons*, 934 F.3d 368, 373 (3d Cir. 2019) ("substantial" is a "less demanding" standard than "probable") (quoting *Chavarriaga*, 806 F.3d at 227).

Because pepper spray posed a substantial risk of serious harm, the Eighth Amendment forbade these defendants from acting with deliberate indifference in exposing Mr. Rivera to pepper spray.

B. The defendants acted with deliberate indifference.

The defendants acted with deliberate indifference because they "kn[ew] of and disregard[ed]," *Farmer*, 511 U.S. at 837, the suffering they caused.

The defendants had knowledge of the risk on par with some of this Court's most straightforward "deliberate indifference" holdings. In *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021), for instance, this Court considered a failure-to-protect claim where the victim had "repeatedly told prison officials about the risks she faced," and where "the Defendants explicitly acknowledged [the] risk." *Id* at 374-75. The Court commented that "[i]t is difficult to imagine what more an unrepresented inmate could do to make prison officials aware of [the] risk," and held that the plaintiff had alleged deliberate indifference. *Id.*; *see also Bistrian v. Levi*, 696 F.3d 352, 369 (3d Cir. 2012) (officers were deliberately indifferent if they disregarded a risk of which they had been "repeatedly advised" by the plaintiff), *abrogated on other grounds by Mack v. Yost*, 968 F.3d 311, 319 n.7 (3d Cir. 2020).

Shorter fits this case nearly to a tee. Mr. Rivera "repeatedly told" the defendants of the risk he faced. *See* AA 11-12, AA 15; *Shorter*, 12

F.4th at 374; *Bistrian*, 696 F.3d at 369. The defendants "explicitly acknowledged [the] risk." *See* AA 11-12, AA 15; AA 91; *Shorter*, 12 F.4th at 375. And—unlike in *Shorter*—the defendants were already familiar with Mr. Rivera's medical condition from their daily interaction with him, and their background knowledge provided yet another reason to credit Mr. Rivera's apprehension. *See* AA 79 (per defendants, "it is undisputed that Defendants knew of Rivera's asthma"); AA 93, AA 94; *see also Bistrian*, 696 F.3d at 370 (officers' preexisting "familiarity" with prisoners indicated their knowledge).

The defendants didn't need to take Mr. Rivera's word about the harm exposure to pepper spray would cause him; their own medical professional knew it. When Mr. Rivera told Nurse Rogers that pepper spray would cause him to suffer an asthma attack, Rogers responded: "I know." AA 12. And when Mr. Rivera pleaded with him to move him to his cell, Rogers agreed with that course of action and promised to pass that information on to Redfern, the block captain—who evidently ignored it. AA 12.

This case is thus unlike the sole (and unpublished) appellate authority the district court cited, *Davis v. Thomas*, 558 F. App'x 150 (3d

Cir. 2014). *See* AA 25. *Davis* and its predecessor, *Davis v. Brown*, 556 F. App'x 87 (3d Cir. 2014), held that correctional officers who did nothing "more than . . . defer[] to the judgment of medical personnel" did not act with deliberate indifference when they allowed the plaintiff to be exposed to pepper spray. *Davis*, 558 F. App'x at 154-55 (citing *Spruill*, 372 F.3d at 236); *see also Davis*, 556 F. App'x at 90. There—where the plaintiff's noncompliance with his asthma medication contributed to his suffering and where officers had followed the express assessment of prison doctors in concluding that pepper spray exposure was safe—the defendants had not acted with the requisite mental state to offend the Eighth Amendment. *Davis*, 558 F. App'x at 153.[7]

Unlike in *Davis*, a reasonable jury could easily conclude that the defendants exposed Mr. Rivera to pepper spray against the explicit instruction of their medical professional. *See* AA 12 (Nurse Rogers agreeing with Mr. Rivera about the danger he faced and promising to "let

[7] The (also unpublished) district court opinions the district court cited are similarly irrelevant because in neither of them did the defendants know of the plaintiff's asthma or the potential for pepper spray exposure to cause an asthma attack. *See Stroman v. Wetzel*, No. 1:16-cv-2543, 2020 WL 1531325, at *5 (M.D. Pa. Mar. 31, 2020); *Johnson v. Palockovich*, No. Civ.A.4:04-cv-1804, 2007 WL 431890, at *5 (M.D. Pa. Feb. 5, 2007).

Redfern know"); *cf. Carlson v. Green*, 446 U.S. 14, 16-17 nn.1 & 3 (1980) (Eighth Amendment violation to disregard "advice of doctors" to move plaintiff to a different facility where failure resulted in an asthma attack). At the very least, they certainly did not *seek out* and *obey* the advice of a medical professional, as in *Davis*.

Despite unanimous agreement that Mr. Rivera would suffer an asthma attack if left in the cage, the defendants refused to take even the minimal step, at any point in the ninety uneventful minutes that Mr. Rivera spent pleading with them, of allowing Mr. Rivera to return the 25-30 feet to his cell. AA 10. They refused even though "there was no prison policy or procedure that precluded the defendants from returning him to his cell prior to the use of the OC spray," AA 17 n.12—not that such a policy could override constitutional commands even if it did exist. And they refused even though the pepper spray deployment came not in response to an urgent, unanticipated event but instead pursuant to a planned use of force, executed over the course of nearly ninety minutes, to extract another prisoner from his cell who was "covering and uncovering" the window in his cell door because that behavior was "slowing down the operations of the RHU." AA 107. Mr. Rivera's

"suffering," in other words, was "needless." *Atkinson*, 316 F.3d at 266; *see also Estelle*, 429 U.S. at 103 ("unnecessary and wanton").

In sum, over the course of ninety quiet and uneventful minutes, the defendants ignored Mr. Rivera's repeated pleas to return to his cell as well as the advice of the only medical professional present. They did so despite their knowledge that Mr. Rivera would suffer an asthma attack as a result, and for no serious penological reason. A reasonable jury could conclude that they "dr[e]w the inference" of the danger Mr. Rivera faced and proceeded anyway. *Farmer*, 511 U.S. at 837. Their indifference caused "undue suffering," *Spruill*, 372 F.3d at 235, and violated the Eighth Amendment.

II. Qualified immunity cannot protect the defendants.

"[A] defendant cannot have qualified immunity if she was deliberately indifferent." *Beers-Capitol*, 256 F.3d at 142 n.15. The district court therefore lacked the discretion to "decide the claim based on qualified immunity without deciding whether there was, in fact, a constitutional violation." AA 20. And, even if it is *possible* for deliberately indifferent conduct to be objectively reasonable such that qualified immunity could theoretically attach, it was not appropriate here.

A. Qualified immunity does not shield deliberately indifferent conduct.

Qualified immunity protects officials from liability for "objectively reasonable" conduct. *Carter v. City of Philadelphia*, 181 F.3d 339, 356 (3d Cir. 1999). But "deliberate indifference is simply inconsistent with objectively reasonable conduct." *Kedra v. Schroeter*, 876 F.3d 424, 459 (3d Cir. 2017) (Fisher, J., concurring) (citing *Beers-Capitol*, 256 F.3d at 142 n.15); *see also Kedra*, 876 F.3d at 450. That's because an official is only deliberately indifferent if he has "actual knowledge or awareness" that "there is an excessive risk to the plaintiff[]," *Beers-Capitol*, 256 F.3d at 142 n.15, "yet chooses to disregard it," *Thorpe v. Clarke*, 37 F.4th 926, 933 (4th Cir. 2022); *see also Farmer*, 511 U.S. at 837 ("knows of and disregards"). As this Court "observed in *Beers-Capitol*, 'a reasonable [state actor] could not believe that h[is] actions comported with clearly established law while also believing that there is an excessive risk to the plaintiff[] and failing to adequately respond to that risk.'" *Kedra*, 876 F.3d at 450.

Beers-Capitol involved claims of Eighth Amendment deliberate indifference to a "significant risk" of sexual abuse by a youth detention facility employee. 256 F.3d at 125. The Court emphasized that the "high"

bar of deliberate indifference "requir[es] actual knowledge or awareness on the part of the defendant." *Id.* at 137. Some defendants, the Court concluded, "*should* have recognized the excessive risk and responded to it"—but in the absence of evidence that they *did*, they had not violated the Eighth Amendment. *Id.* at 138. One defendant, however, had "basically admitted that she had knowledge" of the employee's abusive activities and yet "did not investigate . . . or report" her knowledge. *Id.* at 141-42. Rather than comb the Federal Reporter for similar cases, the Court reasoned that no reasonable official could "believe that her actions comported with clearly established law while also believing that there is an excessive risk to the plaintiffs and failing to adequately respond to that risk." *Id.* at 142 n.15. Thus, the very fact of her deliberate indifference "foreclose[d] her claim of qualified immunity." *Id.* at 126 n.1.

This Court held, then, that "a defendant cannot have qualified immunity if she was deliberately indifferent" in violation of the Eighth Amendment. *Id.* at 142 n.15. It is not alone; at least the Fourth, Seventh, and Eighth circuits have similarly held that qualified immunity and deliberate indifference cannot coexist. *See, e.g.*, *Thorpe*, 37 F.4th at 939 ("sid[ing] with the Third, Seventh, and Eighth Circuits" in concluding

that qualified immunity cannot shield deliberate indifference); *Walker v. Benjamin*, 293 F.3d 1030, 1037 (7th Cir. 2002) (in deliberate indifference case, the constitutional merits and qualified immunity inquiries "effectively collapse into one") (citing *Delgado-Brunet v. Clark*, 93 F.3d 339, 344-45 (7th Cir. 1996)); *Miller v. Solem*, 728 F.2d 1020, 1024-25 (8th Cir. 1984) ("If an officer recklessly disregards an inmate's need for safety he certainly cannot maintain an objective good faith immunity defense.").[8]

That makes sense. Qualified immunity is not an empty exercise in fishing for a prior case with "precise factual correspondence." *Peroza-Benitez v. Smith*, 994 F.3d 157, 166 (3d Cir. 2021). Instead, the doctrine

[8] Still others have recognized the same thing with respect to other constitutional violations that share similar features—for instance, Eighth Amendment excessive force, which forbids the use of force in bad faith. *See, e.g.*, *Skrtich v. Thornton*, 280 F.3d 1295, 1301 (11th Cir. 2002) ("In this Circuit, a defense of qualified immunity is not available in cases alleging excessive force in violation of the Eighth Amendment, because the use of force 'maliciously and sadistically to cause harm' is clearly established to be a violation of the Constitution[.]"); *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021) (if "officers . . . acted with a wrongful and punitive motive, then they violated clearly established Eighth Amendment law"); *Brooks v. Johnson*, 924 F.3d 104, 118-19 (4th Cir. 2019) ("Because 'the case law is intent-specific,' clearly establishing that the bad faith and malicious use of force violates the Eighth Amendment rights of prison inmates, a corrections officer who acts with that culpable state of mind reasonably should know that she is violating the law.").

asks whether "a reasonable official would understand that what he is doing violates" the Constitution. *Mack v. Yost*, 63 F.4th 211, 231 (3d Cir. 2023). If "it would have been clear to a reasonable officer that the alleged conduct 'was unlawful in the situation he confronted,'" then the officer is "not entitled to qualified immunity." *Ziglar v. Abbasi*, 582 U.S. 120, 152 (2017) (quoting *Saucier v. Katz*, 533 US. 194, 202 (2001)).

The situation an officer confronted includes "the information [he] possessed." *Kedra*, 876 F.3d at 449 (citing *Anderson v. Creighton*, 483 U.S. 635, 641 (1987) and *Beers-Capitol*, 256 F.3d at 142 n.15). To obtain qualified immunity, the defendants must "show," in light of that information, "that reasonable officers could not have known that their conduct constituted . . . a violation." *Halsey v. Pfeiffer*, 750 F.3d 273, 288 (3d Cir. 2014).

The substantive Eighth Amendment standard, too, incorporates knowledge. To violate the Eighth Amendment, an official "must . . . draw the inference" that a prisoner faces a "substantial risk of serious harm"—but opt to "disregard[]" it. *Farmer*, 511 U.S. at 837; *see also Hamilton v. Leavy*, 117 F.3d 742, 747-48 (3d Cir. 1997) ("consciously disregard"); *Chavarriaga*, 806 F.3d at 227 ("acted or failed to act despite having

knowledge that her actions or inaction . . . would subject the inmate to a substantial risk of serious harm"); *Clark*, 55 F.4th at 183 ("To constitute cruel and unusual punishment, . . . the wanton and unnecessary infliction of pain must be done knowingly."). If the officer fails to draw that inference—even if he "should have" drawn it—he "cannot . . . be condemned as" violating the Eighth Amendment. *Farmer*, 511 U.S. at 838. "[B]ecause an officer necessarily will be familiar with his own mental state," *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021), that "consciousness" is part of the "information [he] possessed," *Kedra*, 876 F.3d at 449, for qualified immunity purposes.

To grant qualified immunity after concluding that a defendant acted with deliberate indifference in violation of the Eighth Amendment, then, a court would need to conclude that an officer could *understand* himself to be ignoring a substantial risk of serious harm, and yet *reasonably believe* that the Constitution condones his behavior. To say it is to disprove it. In such a situation, an officer "can use his own 'state of mind' as 'a reference point' to 'assess conformity to the law.'" *Thorpe*, 37 F.4th at 939 (quoting *Thompson v. Virginia*, 878 F.3d 89, 106 (4th Cir. 2017)).

Sometimes, especially in the Fourth Amendment context, the Supreme Court has required "[p]recedent involving similar facts" to defeat qualified immunity. *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018). But that's because the Fourth Amendment's objective reasonableness standard sketches a "hazy border between excessive and acceptable force" that an officer might struggle to discern. *Mullenix v. Luna*, 577 U.S. 7, 18 (2015). That standard doesn't allow an official to "assess conformity with the law" by reference to his own "state of mind," *Thorpe*, 37 F.4th at 939, because it does not account for an officer's "intent or motivation," *Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004). In the Fourth Amendment context, then, only case law guides officers in determining what the Constitution demands. But when it comes to the Eighth Amendment, "liability turns not on the particular factual circumstances under which the officer acted—which may change from case to case as the precedent develops—but on whether the officer acts with a culpable state of mind." *Dean*, 984 F.3d at 310; *see also Mack*, 63 F.4th at 231 n.17.

So, here, the district court erred when it skipped the constitutional merits to reach qualified immunity. "If [Mr. Rivera] succeeds in

establishing that the . . . defendants acted with deliberate indifference to constitutional rights—as [he] must in order to recover under section 1983—then *a fortiori* their conduct was not objectively reasonable." *Carter*, 181 F.3d at 356; *see also Meyers v. Majkic*, 189 F. App'x 142, 144 (3d Cir. 2006) ("Because there is a genuine issue of fact as to whether [the defendant] was deliberately indifferent, he has not carried his burden to establish that he is entitled to qualified immunity.").

Because an officer cannot be both deliberately indifferent and objectively reasonable, the district court was wrong to grant qualified immunity. The officers here were deliberately indifferent, and that was enough to make clear the unconstitutionality of their conduct.

B. It would have been clear to a reasonable officer that the Constitution forbade ignoring Mr. Rivera's pleas.

Even if qualified immunity *could*, in some circumstances, shield deliberate indifference, it wouldn't here. Defeating qualified immunity doesn't require a "case directly on point." *Thomas v. Tice*, 948 F.3d 133, 141 (3d Cir. 2020) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Instead, this Court "take[s] a 'broad view' of what makes a right clearly established." *Mack*, 63 F.4th at 232 (quoting *Peroza-Benitez*, 994 F.3d at 166). "The ultimate question is whether the state of the law when the

offense occurred gave" officials "fair warning" that their behavior was unconstitutional. *L.R. v. Sch. Dist. of Philadelphia*, 836 F.3d 235, 247-48 (3d Cir. 2016). To obtain qualified immunity, the defendants must "show," in light of that law and the information they possessed, "that reasonable officers could not have known that their conduct constituted . . . a violation." *Halsey*, 750 F.3d at 288.

"Defining the right at issue is critical to this inquiry." *L.R.*, 836 F.3d at 248. When this Court (despite its contrary precedent) does entertain qualified immunity defenses for Eighth Amendment deliberate indifference, it nonetheless recognizes that an officer's knowledge and intent must enter into the definition of the right—and that the "clearly established law" need not mirror the facts at hand as closely in such cases as it must in others. That's because distinctions from precedent bestow immunity only if a reasonable officer could believe they make a constitutional difference; otherwise, the law has achieved the qualified immunity touchstone of "fair warning." *L.R.*, 836 F.3d at 247-48. But where officials acted with a "culpable state of mind," *Clark*, 55 F.4th at 179, they require less factual similarity to be fairly warned.

Consider *Clark v. Coupe*, an Eighth Amendment challenge to a seven-month stay in solitary confinement. 55 F.4th at 180. The district court had defined the right as that of a "mentally ill inmate" not to be placed "in solitary confinement for long periods of time," and held that the right was not clearly established. *Id.* at 182. This Court rejected that definition, and instead incorporated the officers' subjective awareness: the correct definition of the right was that "of a prisoner *known* to be seriously mentally ill to not be placed in solitary confinement for an extended period of time by prison officials *who were aware of, but disregarded*, the risk of lasting harm posed by such conditions." *Id.* (emphasis added).

In light of the defendants' knowledge, this Court emphasized that "state officials can still receive fair warning that their conduct is violative even in 'novel factual circumstances' never previously addressed in caselaw." *Id.* Thus, the Court relied on less particularized statements of the law to provide fair warning: for instance, that "[a]t the time of [the plaintiff's] stay in the SHU, imposing conditions that cause the 'wanton and unnecessary infliction of pain' had long violated the Eighth Amendment prohibitions against cruel and unusual punishment," *id.* at

183 (quoting *Rhodes*, 452 U.S. at 347), and that "unexplained inaction in the face of a known risk has long been held violative of the Eighth Amendment," *id.* at 184 (citing *Farmer*, 511 U.S. at 845)). Those commands made the unlawfulness clear, even in the absence of a more specific statement of the law.

Just so here. Those same bedrock commands would have made clear to reasonable officers in the defendants' shoes that they could not knowingly cause Mr. Rivera to suffer an asthma attack without reason.

This approach accords with a number of other courts, which refuse to demand microscopic similarity to precedent in overcoming qualified immunity for subjectively-defined constitutional violations. *See, e.g.*, *Ashaheed v. Currington*, 7 F.4th 1236, 1247 n.8 (10th Cir. 2021) ("[W]e have accepted general statements of law as clearly established when the unlawfulness of an action 'depends on the actors' unconstitutional motive.'"); *A.N. by and through Ponder v. Syling*, 928 F.3d 1191, 1198-99 (10th Cir. 2019) (the "general rule" that intentional differential treatment without rational basis violates the Equal Protection Clause suffices because, "[i]n contrast" to the "imprecise nature" of the Fourth Amendment, the bar against intentional discrimination is "relatively

straightforward"); *Lipman v. Budish*, 974 F.3d 726, 750 (6th Cir. 2020) (suggesting that higher level of generality is appropriate where violation entails deliberate indifference); *A.D. v. Calif. Hwy. Patrol*, 712 F.3d 446, 459 n.12 (9th Cir. 2013) (that the qualified immunity analysis might reach a different conclusion for an intentional constitutional violation than an objective one "is simply a feature of the differing nature of the constitutional claims—one with a subjective intent element and one without").[9]

[9] *See also Kapinski v. City of Albuquerque*, 964 F.3d 900, 910 (10th Cir. 2020) ("Where *intentional misstatements* are concerned, our precedent clearly establishes that lying in a warrant affidavit is unconstitutional. Because there is 'little ambiguity as to what kind of conduct constitutes lying,' this general principle suffices to place the question beyond constitutional debate and put reasonable law enforcement officers on notice, even in the absence of factually analogous precedent." (citation omitted)); *Poe v. Leonard*, 282 F.3d 123, 139 (2d Cir. 2002) ("[F]or claims based on intentionally tortious harmful conduct employed in the absence of any legitimate government interest, the requisite degree of particularity is lessened."); *Branch v. Tunnell*, 937 F.2d 1382, 1385 (9th Cir. 1991) ("'If an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth and no accurate information sufficient to constitute probable cause attended the false statements, . . . he cannot be said to have acted in an objectively reasonable manner,' and the shield of qualified immunity is lost.") (quoting *Olson v. Tyler*, 771 F.2d 277, 281 (7th Cir. 1985)), *overruled on other grounds by Galbraith v. Cnty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

Even if they needed more specificity than that, case law clearly established that prison officials cannot do *nothing* in the face of a known substantial risk that a vulnerable prisoner will be exposed to pepper spray for no reason. *See, e.g.*, *Thomas v. Bryant*, 614 F.3d 1288, 1311 (11th Cir. 2010) ("[W]here chemical agents are used unnecessarily, without penological justification, . . . that use satisfies the Eighth Amendment's objective harm requirement."); *Iko*, 535 F.3d at 241 (pepper spray exposure caused "an objectively serious medical need"); *Clement*, 298 F.3d at 904 (the "painful effects of pepper spray" satisfy the Eighth Amendment's objective component); *Hope v. Harris*, 861 F. App'x 571, 581 (5th Cir. 2021) ("suffer[ing] physical harm as a result of being exposed to [pepper spray] 'unnecessarily'" constitutes "a sufficiently serious condition"); *Hope*, 861 F. App'x at 585 (pepper spray carries "an obvious risk of harm"); *Reyes v. McGrath*, 444 F. App'x 126, 126-27 (9th Cir. 2011) (deliberate indifference where defendants "were aware of both the potentially harmful effects of pepper spray generally and of the specific symptoms suffered" by the plaintiff).[10] And, in the excessive force

[10] These out-of-circuit cases can clearly establish the law in the Third Circuit. *See, e.g.*, *Williams v. Bitner*, 455 F.3d 186, 192 (3d Cir. 2006) ("[I]f the unlawfulness of the defendant's conduct would have been apparent

context, this Court has endorsed a description of pepper spraying somebody in a locked cell without "legitimate penological reason" as "reprehensible." *Robinson v. Danberg*, 673 F. App'x 205, 212 (3d Cir. 2016).

Case law establishing that pepper spray exposure can be constitutionally serious gave these defendants "fair warning" that they had to take *some* step to protect a known asthmatic from unnecessary exposure. That is, maybe some responses, even if inadequate, would have entitled the defendants to qualified immunity because, in the absence of case law, they could have appeared objectively reasonable. Perhaps providing Mr. Rivera with a wet rag, for instance, without transporting him to his cell would have fallen in a gray area—unconstitutional but not clearly so. But case law made clear that the defendants could not do *nothing* in the face of this known risk and without penological reason.

Consequently, even if qualified immunity were available in deliberate indifference cases, it would not be appropriate here. It was

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to a reasonable official based on the current state of the law, it is not necessary that there be binding precedent from this circuit so advising."). Even "district court cases, from within the Third Circuit or elsewhere" can clearly establish the law. *Peroza-Benitez*, 994 F.3d at 165-66.

clearly established that the Constitution forbade defendants from disregarding the "known risk" of serious harm Mr. Rivera faced. *Farmer*, 511 U.S. at 836. Yet they knowingly engaged in the "wanton and unnecessary infliction of pain," the quintessential form of cruel and unusual punishment. *Rhodes*, 452 U.S. at 347. Even without a binding Third Circuit case addressing these exact facts, the defendants had plenty of notice that refusing to move Mr. Rivera out of harm's way before a planned use of pepper spray that they knew would induce an asthma attack violated his Eighth Amendment rights. The district court therefore erred in granting them qualified immunity.

C. The constitutional violation was "obvious."

A "general constitutional rule . . . may apply with obvious clarity to the specific conduct in question." *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (quoting *Hope*, 536 U.S. at 741). The Supreme Court has applied this principle at least twice in Eighth Amendment deliberate indifference cases. *See Taylor*, 141 S. Ct. at 54; *Hope*, 536 U.S. at 737-38; *see also McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (granting, vacating, and remanding in light of *Taylor* on Eighth Amendment excessive force claim asking whether force was applied "maliciously and sadistically to cause

harm"). Here, because the defendants acted with deliberate indifference—that is, they *actually knew* of the risk and *decided* to disregard it without reason—the "general constitutional rule" against disregarding a substantial risk of serious harm, *Farmer*, 511 U.S. at 834, gave them "fair warning," *Hope*, 536 U.S. at 741, that the Eighth Amendment would forbid their behavior.

As *Taylor*, *Hope*, and *McCoy* demonstrate, the "obviousness" principle operates with special force in cases, like this one, involving knowingly wrongful conduct. Consider this Court's recent decision in *Mack v. Yost*. That case involved interference with a prisoner's prayer in violation of the Religious Freedom and Restoration Act. 63 F.4th at 217. Like in *Clark v. Coupe*, this Court insisted on incorporating the defendants' mental state into the definition of the "clearly established" right: it was the "right to engage in prayer free of substantial, *deliberate*, repeated, and unjustified disruption by prison officials." *Id.* at 230 (emphasis added). It explained that forbidding such behavior "is not to indulge in an abstraction"—and it drew a contrast with "defining the right in an excessive force case by saying simply that 'objective reasonableness' is the touchstone for Fourth Amendment claims," which,

in light of the objective standard, would be unacceptably vague. *Id.* at 230 n.15.

A survey of the case law revealed no "'factually analogous' binding precedent" or "'robust consensus' of persuasive authority." *Id.* at 233. But that absence of case law didn't immunize the defendants. Instead, this Court held that, in view of the "obvious" maxim that "an *intentional* effort 'to suppress . . . religious worship' for that purpose alone is plainly impermissible," the "illegality of such conduct is generally obvious enough to be understood even without judicial guidance." *Id.* at 234, 236 (emphasis added); *see also Dennis*, 19 F.4th at 290 ("We conclude that the constitutional rule that framing criminal defendants through use of fabricated evidence . . . violates their constitutional rights applies with such obvious clarity that it is unreasonable for us to conclude anything other than that the detectives were on sufficient notice that their fabrication of evidence violated clearly established law."); *Halsey*, 750 F.3d at 296 (obvious violation to "knowingly use[] fabricated evidence to bring about [a] prosecution or help secure [a] conviction").

Importantly, the *Mack* Court also explained that, although egregious cases are often obvious ones, "[t]o say that an obvious case is

also an egregious one is not to say that only egregious cases present obvious violations." *Id.* at 236 n.22. That is, prison officials need not leave a prisoner in a sewage-filled cell for six days to commit an obvious violation. *See Taylor*, 141 S. Ct. at 53-54. The obviousness doctrine focuses not on the extremity of the deprivation but on whether an "official should have related . . . established law to the instant situation," even if "established law" comes in the form of "broad rules and general principles." *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011).

Here, having "dr[awn] the inference" that Mr. Rivera faced a substantial risk of serious harm, the "general constitutional rule" established in *Farmer*, 511 U.S. at 834, against disregarding such a risk gave the defendants "fair warning," *Hope*, 536 U.S. at 741, that the Eighth Amendment would forbid their behavior. They didn't need a case book to tell them that.

CONCLUSION

This Court should reverse the district court's grant of qualified immunity.

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Respectfully submitted,

s/ Cal Barnett-Mayotte

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Pursuant to Federal Rule of Appellate Procedure 32(a), I certify that this brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,283 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

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Pursuant to Third Circuit Local Appellate Rule 46.1(e), I certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

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I hereby certify that on June 8, 2022, I electronically filed the foregoing *Opening Brief of Appellant Michael Rivera and Appendix Vol. I* with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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