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

REPLY BRIEF OF APPELLANT MICHAEL RIVERA

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SUMMARY OF ARGUMENT

Defendants argue a case not before this Court. This case has been consistently litigated by both sides as a deliberate indifference case—so that's the case the district court reviewed. Defendants perhaps now wish they had asserted that the malicious and sadistic standard should have applied. But they didn't—until now. That is textbook forfeiture.

At any rate, defendants were right to not raise this argument sooner, because the deliberate indifference standard is the appropriate one to apply in this context. Defendants had ninety minutes of ordinary prison routine in which to move Mr. Rivera the 25-30 feet to his cell, where he could protect himself from the planned use of pepper spray. This is a far cry from situations of prison riots or actual violence where the malicious and sadistic standard applies.

On both the merits of Mr. Rivera's deliberate indifference claim and qualified immunity, defendants do not have a lot to say. They entirely fail to respond to the arguments and cases provided by Mr. Rivera in his opening brief, and the few affirmative arguments they grasp at fail to persuade. For the reasons stated in Mr. Rivera's opening brief—which remain entirely unrebutted—this Court should reverse the district

court's grant of qualified immunity on Mr. Rivera's deliberate indifference claim. Defendants acted with deliberate indifference towards Mr. Rivera and, as a result, are not entitled to qualified immunity.

ARGUMENT

I. The Deliberate Indifference Standard Applies to this Case.

A. The defendants forfeited any argument that the malicious and sadistic standard applies here.

Rather than argue the case that is actually before this Court, defendants present a version of this dispute that they never litigated—one where the malicious and sadistic standard applies, instead of the deliberate indifference standard. But it is too late in the day for this change, and defendants have forfeited the argument they now present.

Defendants—repeatedly and consistently—presented this as a deliberate indifference case to the district court. To start, in their notice of removal, defendants (accurately) explained that Mr. Rivera's complaint asserted that "the Defendants were deliberately indifferent" to his Eighth Amendment rights "when they sprayed OC spray near him, causing him to have an asthma attack." AA 43-44. They did not mention the malicious and sadistic standard.

Next, in their Answer, defendants again embraced the application of the deliberate indifference standard. *See generally*, Dkt. 6. In response to Mr. Rivera's legal claims—which he framed in terms of the deliberate indifference standard—defendants stated only that "[t]hese allegations are a conclusion of law to which no response is required." Dkt. 6 at 4 (answering paragraphs 37 through 40 of the Complaint, found at AA 57-58). They even included a deliberate indifference defense, stating that they "did not act with deliberate, intentional, or reckless indifference toward Plaintiff." Dkt. 6 at 5. Defendants again said not a word about the malicious and sadistic standard applying, rather than the deliberate indifference standard.

And when they moved for summary judgment, defendants *again* argued this as a deliberate indifference case. They noted that "[a] prison official violates the Eighth Amendment when," in the face of an objectively, sufficiently serious risk, "the prison official acts with deliberate indifference to the prisoner's health or safety," AA 77-78, and quoted the Supreme Court's paradigmatic deliberate indifference case, *Farmer v. Brennan*, 511 U.S. 825 (1994). Next, they laid out that, under *Farmer*, "the prison official must: (1) know of and disregard an excessive

risk to inmate health or safety; (2) be aware of facts from which an inference could be drawn that a substantial risk of serious harms exists; and (3) draw the inference." AA 78 (citing *Farmer*, 511 U.S. at 837). They argued there was no "evidence that the Defendants were deliberately indifferent to [Mr. Rivera's] health or safety." AA 77. But they never argued that the deliberate indifference test didn't apply. Far from it—they set out the test, embraced the test, and argued why, in their view, they were entitled to summary judgment based on the facts under the deliberate indifference test. *See* AA 77-79. The last sentence of defendants' summary judgment argument reads in full: "Because Defendants did not act with deliberate indifference to Rivera's health or safety, he cannot maintain an Eighth Amendment claim against the Defendants and his complaint should be dismissed." AA 80.

Given the defendants' decision to consistently argue this case under the deliberate indifference standard, it is no surprise that the district court approached the case this way as well. *See* AA 20-21. When turning to its analysis of Mr. Rivera's claim, the district court set out the *Farmer* test for deliberate indifference. AA 21. It did so because "both Rivera and the defendants frame Rivera's claims as Eighth Amendment conditions

of confinement claims." AA 21 (citing both parties' use of the deliberate indifference standard). The district court observed that "[w]hen the claim is an Eighth Amendment claim about exposure to secondhand OC spray," some courts apply the deliberate indifference standard, but others apply the Eighth Amendment excessive-force framework, where the maliciously and sadistic standard applies. AA 21 n.18. However, since "both . . . the parties frame the claims" as deliberate indifference claims, the court concluded that "this is also how [it] will frame the claims." AA 21.

Because defendants consistently argued the case under the deliberate indifference standard, the district court "ruled on the legal argument the[y] presented." *United States v. Dowdell*, 70 F.4th 134, 144 (3d Cir. 2023). Defendants cannot now change course and argue that—whoops—they should be entitled to qualified immunity under a different standard. That is textbook forfeiture: "an inadvertent failure to raise an argument." *Id.* at 140. The "ordinary rule" is "that an argument not raised in the district court is [not properly presented] on appeal." *United States v. Bradley*, 959 F.3d 551, 556 (3d Cir. 2020). "[T]he argument presented in the Court of Appeals must depend on both the same legal

rule and the same facts as the argument presented in the District Court." *United States v. Joseph*, 730 F.3d 336, 342 (3d Cir. 2013). Moreover, "the degree of particularity required to preserve an argument is exacting." *Id.* at 337. Generally, this Court will refuse to consider the forfeited argument. *See, e.g.*, *Dowdell*, 70 F.4th at 140; *Bradley*, 959 F.3d at 556; *Joseph*, 730 F.3d at 342-43. So, for example, in *Dowdell*, this Court recently held that the government forfeited "a potentially winning argument" when they failed to include the argument in suppression-motion briefing, but "[then] presse[d it] on appeal." 70 F.4th at 137, 141.[1]

This Court explained in *Dowdell* why our judicial system favors the enforcement of forfeiture rules. "The policy supporting . . . forfeiture is the 'party presentation principle,'"—the "bedrock of our adversarial system"—which applies "in both civil and criminal cases, in the first instance and on appeal." *Id.* at 140-41, 145 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). That is, our adversarial legal system "is designed around the premise that the parties know what is best for

[1] As *Dowdell* illustrates, the district court's observation that some courts apply the malicious and sadistic standard does not somehow excuse or revive defendants' forfeiture of an argument along those lines. *See* 70 F.4th at 142-43 (rejecting contention that the government adopted the court's argument on forfeited issue).

them, and are responsible for advancing the facts and arguments entitling them to relief." *Id.* at 141. Forfeiture also "serves several important judicial interests," including "protecting litigants from unfair surprise; promoting the finality of judgments and conserving judicial resources; and preventing district courts from being reversed on grounds that were never urged or argued before them." *Id.* (cleaned up). With no offense to this Court, "[t]rial court proceedings are the 'main event,' and not simply a 'tryout on the road' to appellate review." *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977)). Defendants have forfeited their malicious and sadistic standard argument by not raising it sooner.

Defendants, in their brief, refuse to acknowledge their forfeiture, and so do not argue that their forfeiture should be excused.[2] At any rate, any argument to that effect would be futile. This Court will "resurrect" a forfeited argument only "in 'extraordinary circumstances.'" *Dowdell*, 70 F.4th at 140 (quoting *Wood v. Milyard*, 566 U.S. 463, 471 & n.5 (2012)). Such "resurrections" are rare—generally forfeited arguments stay dead,

[2] Interestingly, then, defendants have forfeited this argument as well. *See, e.g.*, *In re Grand Jury*, 635 F.3d 101, 105 n.4 (3d Cir. 2011) (declining to consider argument first raised at oral argument); *In re Stone & Webster, Inc.*, 558 F.3d 234, 246 n.15 (3d Cir. 2009) (same).

and this Court will consider "arguments asserted for the first time on appeal" only when "the public interest requires that the issues be heard" or when failure to consider them would result in "manifest injustice." *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2001). No such factors are present here. To the contrary, in the few cases where "courts have approved departures from the party presentation principles" it "has usually been to *protect* a *pro se* litigant's rights." *Dowdell*, 70 F.4th at 141 (first emphasis added). Here it would do just the opposite.

Defendants consistently litigated this as a deliberate indifference case in the district court, and cannot now change tack. This Court should enforce the forfeiture.

B. Deliberate indifference is the appropriate standard.

Defendants had good reason to argue this case before the district court as arising under the deliberate indifference standard—that's the appropriate standard to apply.

In arguing now that instead the malicious and sadistic standard applies, defendants rely principally on *Whitley v. Albers*, 475 U.S. 312 (1986). The very first line of *Whitley* reads: "This case requires us to decide what standard governs a prison inmate's claim that prison officials

subjected him to cruel and unusual punishment by shooting him *during the course of their attempt to quell a prison riot*." *Id.* at 314 (emphasis added). And a riot it was. Prison guards attempted to move intoxicated prisoners "to the penitentiary's isolation and segregation facility," and some incarcerated "onlookers became agitated because they thought that the guards were using unnecessary force." *Id.* Officers ordered the prisoners back to their cells, and they refused; "[s]everal inmates confronted the two officers." *Id.* One prisoner jumped from the second tier of a cellblock and assaulted one of the officers, a second officer was taken hostage, and other prisoners "began breaking furniture"; the captain "left the cellblock to organize an assault squad." *Id.* at 314-15. In response, the prisoner who had first assaulted the officer—and "was armed with a homemade knife"—"threatened to kill the [officer] hostage if an attempt was made to lead an assault." *Id.* at 315. He informed the captain "that one inmate had already been killed and other deaths would follow." *Id.* Prison officials determined "that forceful intervention was necessary to protect the life of the hostage and the safety of the inmates who were not rioting." *Id.* at 316. So the captain took "a squad armed with shotguns into [the] cellblock." *Id.* The officers "clambered over the barricade" the

rioters had constructed at the cellblock entrance, several incarcerated people were shot, and the hostage was freed. *Id.*

As defendants are quick to point out, the Court in *Whitley* concluded that the question there was "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.* at 320-21. But *Whitley* does not stand for the proposition that where *any* competing constitutional concerns are at play, the deliberate indifference standard goes out the window. Rather, *Whitley* dealt with the application of force "to resolve a disturbance . . . that indisputably pose[d] significant risks to the safety of inmates and prison staff"—indeed, one officer had already been injured in the riot and another was being held hostage. *Id.* at 320. In quelling the riot, the officers in *Whitley* acted "in haste, under pressure, and . . . without the luxury of a second chance." *Id.* Because, in *Whitley*, the theoretical potential for prison violence had already "ripen[ed] into *actual* unrest and conflict," the deference to prison administration was given "special weight." *Id.* at 321. The "context" of the governmental action is determinative of the applicable standard. *Id.* at 320.

Here, the context is very different from that in *Whitley*. The preplanned cell extraction was the result of someone "covering and uncovering" the window in his cell door, which was "slowing down the operations of the RHU." AA 107. Defendants characterize this as an "emergency," Resp. Br. 21, but just saying that does not make it so, and their claim to any emergent circumstances is undermined by the facts: it took a full hour-and-a-half for the extraction to occur, during which time the unit was calm, *see generally* AA 104, and Mr. Rivera was "talking to the prisoner that ended up being extracted, . . . talking to [defendant] Schrek, . . . talking to [defendant] Monsell"; "just regular everyday prison stuff like how we do it in the RHU." AA 91. During the pendency of the extraction, much of the day-to-day business of the unit continued: defendant Monsell "came around three times" for his normal rounds and wellness checks. AA 91; *see also* AA 11.[3] This is hardly the exigent circumstance presented by the prison riot in *Whitley*, where decisions were "made in haste, under pressure, and . . . without the luxury of a second chance." 475 U.S. at 320.

[3] During this period as multiple of the defendants walked by the telephone cage, Mr. Rivera told them he would suffer from an asthma attack if not moved. AA 11-12, AA 91.

None of the other cases defendants rely on further their case for applying the malicious and sadistic standard. Resp. Br. 20-23. Some involve the very different context of substantive due process claims arising out of high-speed police chases. *See, e.g.*, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998) (applying intent-to-harm standard to substantive due process claim brought by 16-year old killed during a high-speed police chase involving the motorcycle he was riding on); *Terrell v. Larson*, 396 F.3d 975 (8th Cir. 2005) (same, where officers ran a red light responding to a high priority call). Others involve serious prison violence, along the lines of *Whitley*. *See, e.g.*, *Clement v. Gomez*, 298 F.3d 898, 901-02 (9th Cir. 2002) (claim arising out of officers' response to "[a] violent fight," where "a prisoner's face was covered with blood," officers sounded an alarm, and "one of the prisoners threatened to kill the other"). Some actually apply the deliberate indifference standard, even where competing institutional concerns are present. *See, e.g.*, *King v. Cnty. of Gloucester*, 302 F. App'x 92, 97 (3d Cir. 2008); *Stark v. Lee Cnty.*, 993 F.3d 622, 625 (8th Cir. 2021).

Certainly, state actors sometimes face competing institutional concerns in the administration of prisons. But the deliberate indifference

standard already "bakes in" respect for the difficulty of prison administration. As the Supreme Court put it, because officers "may be found free from liability if they responded reasonably to the risk, even if the harm" occurs, the standard "incorporates due regard for prison officials' unenviable task of keeping [prisoners] in safe custody under humane conditions." *Farmer*, 511 U.S. at 844-45 (internal quotation marks omitted).

And, indeed, this Court has applied the deliberate indifference standard in factually similar cases involving claims related to involuntary exposure to high levels of secondhand smoke, *Atkinson v. Taylor*, 316 F.3d 257, 266 (3d Cir. 2003), and exposure to pepper spray when subduing another prisoner, *Davis v. Thomas*, 558 F. App'x 150, 154-55 (3d Cir. 2014), where the defendants presumably failed to protect the plaintiffs because of institutional concerns. *See Atkinson*, 316 F.3d at 259-60 (plaintiff repeatedly asked to be moved to smoke-free area of the prison, and defendants refused); *Davis*, 558 F. App'x at 152 (plaintiff asked to be transferred to a "clean air environment," and defendants refused). In sum, defendants' early and consistent (until now) choice to

argue this case under the deliberate indifference standard, rather than the malicious and sadistic standard, was correct.[4]

II. Defendants Are Not Entitled to Qualified Immunity.

A. The defendants violated the Eighth Amendment

Applying the appropriate deliberate indifference standard—under which they have been litigating this case from the start—defendants violated Mr. Rivera's constitutional rights. Defendants do not dispute, and therefore concede, that Mr. Rivera faced a substantial risk of serious harm. *See* Opening Br. 13-18. And they do not—meaningfully or

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[4] If the Court excuses defendants' forfeiture—despite the fact that they do not even attempt to make the required showing for doing so—and holds that the malicious and sadistic standard should apply, the Court should remand to the district court to restart discovery and apply the standard in the first instance. *See, e.g., Farmer*, 511 U.S. at 849 (remanding for possible additional discovery and application under correct standard, where district court applied incorrect legal standard). Since this case was litigated start-to-finish in the district court as a deliberate indifference case, there has not been fact development relating to the malicious and sadistic standard. (This explains why in defendants' argument sections relating to the actual merits of this standard, they do not cite any record evidence supporting their claimed inability to move Mr. Rivera during the 90 minutes before deploying the tear gas. *See* Response Br. 24-29.) Under that standard, relevant factors that have yet to be litigated include (1) the need for the application of force; (2) the relationship between the need and amount of force used; (3) the extent of the injury sustained; (4) the extent of the threat to the safety of staff and prisoners; and (5) any efforts to temper the severity of the force used. *Brooks v. Kyler*, 204 F.3d 102, 106 (3d Cir. 2000).

otherwise—engage with the cases discussed and cited in Mr. Rivera's opening brief, indicating that defendants acted with deliberate indifference. *See* Opening Br. 19-22 & n.21 (discussing *Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021), *Bistrian v. Levi*, 696 F.3d 352, 369 (3d Cir. 2012), and distinguishing *Davis v. Thomas*, 558 F. App'x 150 (3d Cir. 2014), and a pair of district court cases, none of which are mentioned in defendants' brief).

Their only argument is that they didn't have time to act with deliberate indifference. That is, that because there was no time for "actual deliberation," they couldn't have been deliberately indifferent. *See* Response Br. 29. This is wrong on both the facts and the law.

First, the facts bely the premise of this argument, and show no true "emergency" or lack of time for deliberation. *See supra* 8-11. Recall, the extraction did not occur for 90 minutes, during which time the unit was calm, *see generally* AA 104, Mr. Rivera spoke to multiple defendants—"just regular everyday prison stuff," AA 91, and defendant Monsell "came around three times" for his normal rounds and wellness checks, AA 91; *see also* AA 11. During this period, the defendants had time to—and did—debate Mr. Rivera's requested move with him. AA 11; AA 91 (Monsell

confirmed Redfern was "aware" that pepper spray was "going to mess [Mr. Rivera] up"); AA 12 (Nurse Rogers noting he'll "let Redfern know" about Mr. Rivera's requested move); AA 15 (Rogers: "What do you want me to do, Rivera? That's up to Redfern."). So even *if* deliberate indifference required time to deliberate, defendants here had the time.

Second, defendants cite no relevant caselaw to support their novel theory. In defending themselves against Mr. Rivera's claim of deliberate indifference, defendants rely exclusively on an entirely inapposite body of caselaw—those applying the malicious and sadistic standard. *See Lewis*, 523 U.S. at 851 (substantive due process claim arising from a high-speed chase); *Whitley*, 475 U.S. at 325 (claim arising from prison riot). These cases are not about what it takes to be deliberately indifferent at all, and aren't relevant to that inquiry.

Defendants' only substantive argument as to why they were not deliberately indifferent in unnecessarily exposing Mr. Rivera to pepper spray was that they adequately responded *after* they did so. *See* Response Br. 30. That may explain why Mr. Rivera did not bring claims relating to inadequate post-pepper spray medical care. But this post-spray conduct is irrelevant to the 90 uneventful minutes before defendants deployed the

spray and caused Mr. Rivera to have an avoidable asthma attack, as they knew it would.

In short, defendants' halfhearted arguments as to why they were not deliberately indifferent are legally and factually flawed. For the reasons set out in Mr. Rivera's opening brief, defendants acted with deliberate indifference, *see* Opening Br. 12-18, and nothing in defendants' response brief changes that conclusion.

B. The law was clearly established.

Mr. Rivera explained at length in his opening brief the way that qualified immunity works in a case involving deliberate indifference. *See* Opening Br. 23-30. Specifically, "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). That is because, as this Court "observed in *Beers-Capitol*" and reiterated in *Kedra*, "'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 v. Schroeter*, 876 F.3d 424, 450 (3d Cir. 2017) (alterations in original) (quoting *Beers-Capitol*, 256 F.3d at 142 n.15). In other words, "deliberate

indifference is simply inconsistent with objectively reasonable conduct." *Id.* at 459 (3d Cir. 2017) (Fisher, J., concurring). That is true in not only in this Court; several other circuit courts have likewise held that qualified immunity and deliberate indifference cannot coexist. *See* Op. Br. 25-26 (collecting cases from Fourth, Seventh, and Eighth circuits).[5]

Defendants dispute *none* of this.[6] They cite *Beers-Capitol* a single time for the general deliberate indifference standard they say does not apply, and the word "*Kedra*" does not appear once in their brief. *See* Resp. Br. 19. Nor do they respond to Mr. Rivera's argument that, even if

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[5] *See also Albers v. Whitley*, 743 F.2d 1372, 1376 (9th Cir. 1984) ("[D]eliberate indifference is inconsistent with a finding of good faith or qualified immunity" because "those deliberately indifferent to the plaintiff's right could not show that they had not violated established statutory or constitutional rights of which a reasonable person would have known."); *McKee v. Turner*, No. 96-cv-3446, 1997 WL 525680, at *4 (6th Cir. 1997) ("[I]t would not make any sense to permit a prison official who deliberately ignored the serious medical needs of an inmate to claim that it would not have been apparent to a reasonable person that such actions violated the law.").

[6] Defendants spend two-and-a-half pages of their brief argument on clearly-established law setting out quote after quote from the Supreme Court, the gist of which is: it's hard to point to clearly-established law. *See* Response Br. 30-32. But the vast majority of those cases involve fast-moving police encounters and, as explained in Mr. Rivera's opening brief, the same concerns do not lie in deliberate indifference cases. *See* Op. Br. 29. Defendants fail to respond to that point. And, importantly, none of their cases involve allegations of deliberate indifference.

qualified immunity *could*, in some circumstances, shield deliberate indifference, it wouldn't here based on prior caselaw. *See* Op. Br. 30-37. And defendants likewise do not respond to Mr. Rivera's argument that the constitutional violation here would have been "obvious" to a reasonable officer. *See* Op. Br. 37-40.

Rather, in a clumsy act of misdirection, they ask this Court to "disregard" the entirety of Mr. Rivera's analysis under the deliberate indifference standard, and instead argue qualified immunity under the forfeited and wrong malicious and sadistic standard. *See* Resp. Br. 33-35; *cf.* THE WIZARD OF OZ (Metro Goldwyn Mayer 1939) ("Pay no attention to that man behind the curtain."). Because they have failed to respond to Mr. Rivera's argument as to how deliberate indifference interacts with qualified immunity, they have forfeited any argument on this front. *See, e.g.*, *In re Grand Jury*, 635 F.3d 101, 105 n.4 (3d Cir. 2011) (declining to consider argument first raised at oral argument); *In re Stone & Webster, Inc.*, 558 F.3d 234, 246 n.15 (3d Cir. 2009) (same).

Defendants' only argument as to why they are entitled to qualified immunity for Mr. Rivera's deliberate indifference claim is that any lack of clarity involving what standard applies—the deliberate indifference

standard under which "the parties frame[d] their claims" in the district court, AA 21, or their forfeited and inapt malicious or sadistic standard—counsels in favor of qualified immunity. Response Br. 35-37. But that is wrong.

Even assuming there was some ambiguity in the law as to the appropriate standard—and there is not—none of the cases defendants put forward support the proposition that such ambiguity "must inure to the benefit of the" defendants. Resp. Br. 35. Defendants' principal cases on this point—*Stark v. Lee County*, 993 F.3d at 626, and *Martin v. Seal*, 510 F. App'x 309, 314-16 (5th Cir. 2013)—turn on the absence of a constitutional violation (prong 1), and do not even address the question of whether the law was clearly established (prong 2).[7] And *Reichle v. Howards*, 566 U.S. 658 (2012), and *Sauers v. Borough of Nesquehoning*, 905 F.3d 711 (3d Cir. 2018), both involved an arguably new *theory of liability*, not a question about what standard applied to a particular claim. *Reichle*, 566 U.S. at 664-65; *Sauers*, 905 F.3d at 719.

[7] These cases are also notable because they applied the deliberate indifference standard, not the malicious and sadistic standard, where there were arguably competing institutional concerns at play, and so undermine defendants' argument on the appropriate standard. *See supra* 12-14.

And no wonder defendants cited no law actually supporting this proposition. The argument is directly contrary to the Supreme Court's admonition that an "officer would not be entitled to qualified immunity based simply on the argument that courts had not agreed on" the "formulation of the controlling standard." *Saucier v. Katz*, 533 U.S. 194, 202-03 (2001). And, consistent with *Saucier*, several courts of appeals have explicitly rejected defendants' entitlement to qualified immunity simply by virtue of an unsettled legal standard, because the second prong of qualified immunity focuses "not [on] legal arcana," but on whether "defendant's *conduct* was unlawful in the situation he confronted." *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 671-78 (9th Cir. 2021) (discussing cases from the Sixth and Seventh circuits). Any alleged "confusion" as to the standards does not somehow entitle defendants to qualified immunity.

The question, instead, is whether it would have been clear to a reasonable officer that when they acted with deliberate indifference the Constitution prohibited their conduct. The answer is yes, and defendants make no meaningful argument to the contrary.

CONCLUSION

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

Dated: August 28, 2023

Respectfully submitted,

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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 4,511 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.

s/ Devi M. Rao

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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 August 28, 2023, I electronically filed the foregoing *Reply Brief of Appellant Michael Rivera* 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.

s/ Devi M. Rao