No. 14-

IN THE

Supreme Court of the United States

STANLEY TAYLOR; RAPHAEL WILLIAMS,

Petitioners,

v.

KAREN BARKES; ALEXANDRA BARKES; BRITTANY BARKES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in holding that 42 U.S.C. § 1983 authorizes the imposition of supervisory liability on state officials for a subordinate's alleged constitutional violation.

2. Whether the Third Circuit erred in holding that there is a clearly established right under the Eighth Amendment to the "proper implementation of adequate suicide prevention protocols."

PARTIES TO THE PROCEEDINGS

Petitioners, Stanley Taylor and Raphael Williams, were the defendants-appellants below.

Respondents, Karen Barkes, personally and as administratrix of the estate of Christopher Barkes, Alexandra Barkes, and Brittany Barkes, were the plaintiffs-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Stanley Taylor and Raphael Williams, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Barkes* v. *First Correctional Medical, Inc.*, 766 F.3d 307 (3d Cir. 2014), and is reproduced at Petition Appendix (Pet. App.) 1a-76a. The district court's unpublished opinions are available at 2008 WL 523216 (D. Del. Feb. 27, 2008), and 2012 WL 2914915 (D. Del. July 17, 2012), and are reproduced at Pet. App. 104a-121a and 77a-103a.

JURISDICTION

The court of appeals entered its judgment on September 5, 2014, and denied a petition for rehearing en banc by order dated October 3, 2014. Pet. App. 1a, 122a-23a. On December 16, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 2, 2015. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

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 ju-

> risdiction 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Eighth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

In the decision below, the court of appeals held that "two of the most senior executives in the Delaware prison system must stand trial" on a 42 U.S.C. § 1983 claim that they violated an inmate's constitutional right not to be subjected to "cruel and unusual punishment." Pet. App. 48a (Hardiman, J., dissenting). The claimed constitutional violation was a prison medical provider's use of a 1997 version of suicide screening protocols, rather than a 2004 version, and the administration of the screening by a licensed practical nurse rather than a mental health professional. *Id.* at 44a. These claims, the court held, stated a violation of the prisoner's "clearly established" right under the Eighth Amendment to the "proper

implementation of adequate suicide prevention protocols," even though the prisoner denied being suicidal and exhibited no signs of mental or emotional distress. *Id.* at 5a, 42a. And the state officials were alleged to be liable for that error based on their "failure to supervise" the medical provider, although neither official had knowledge of the prisoner or involvement with any decisions as to his medical care, and neither directly supervised the medical provider. *Id.* at 44a, 51a-52a.

This decision conflicts with decisions of this Court and other courts of appeals on two important legal questions. *First*, the Third Circuit's decision—that these high-ranking state officials could be liable under section 1983 for failure to supervise the medical provider—conflicts with this Court's holding in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), that "'supervisory liability' is a misnomer" in section 1983 suits, and that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677. Because the officials were not involved with the inmate's treatment (or even with supervising the medical provider) and the plaintiffs did not challenge the State's policies, these officials could only be liable under a theory of *respondeat superior*—a theory this Court has foreclosed in this setting. As the dissent noted, the complaint "targeted" these officials because they "'presided over a system.'" Pet. App. 66a, 72a (quoting Complaint). This is "a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*." *Id.* at 48a (dissent).

The Fifth, Seventh, Eighth, and Tenth Circuits have all held that supervisors cannot be held liable under section 1983 if they were not personally involved in the constitutional violation or in imple-

menting an unconstitutional policy. See *Gates* v. *Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008); *Vance* v. *Rumsfeld*, 701 F.3d 193, 203-05 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013); *Nelson* v. *Corr. Med. Servs.*, 583 F.3d 522, 535-36 (8th Cir. 2009) (en banc); *Porro* v. *Barnes*, 624 F.3d 1322, 1326-27 (10th Cir. 2010). Like the Third Circuit, however, the Ninth Circuit has held that supervisors may be liable for failure to prevent subordinates' violations. See *Starr* v. *Baca*, 652 F.3d 1202, 1205-07 (9th Cir. 2011). The decision below "invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect." Pet. App. 69a (dissent). The Court should grant the petition to resolve this conflict and ensure that high-ranking state government officials in the Third and Ninth Circuits are not exposed to the burdens of litigation under section 1983 when only a subordinate is alleged to have violated the Constitution.

Second, the Third Circuit's holding that there is a clearly established constitutional right to the "proper implementation of adequate suicide prevention protocols," Pet. App. 42a, conflicts with this Court's holdings that the Eighth Amendment does not constitutionalize medical malpractice in prisons or require the adoption of whatever courts determine to be the "best practices" in the medical treatment of inmates. This Court has made clear that inadequate medical care constitutes "cruel and unusual punishment" only when prison officials are deliberately indifferent to a prisoner's known medical needs. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 838 (1994). Accordingly, multiple circuits have held that the Eighth Amendment does not require prisons to examine every inmate for potential suicidal tendencies. See, *e.g.*, *Belcher* v. *Ol-*

iver, 898 F.2d 32, 34-35 (4th Cir. 1990); *Whitt* v. *Stephens Cnty.*, 529 F.3d 278, 284 (5th Cir. 2008); *Tittle* v. *Jefferson Cnty. Comm'n*, 10 F.3d 1535, 1539-40 (11th Cir. 1994) (en banc).

Here, the Third Circuit did not stop at holding that a prisoner has a constitutional right to be examined for possible suicidal tendencies; it further held that all inmates have a right to "proper implementation of adequate suicide prevention protocols," which can be violated if a prison deviates from the most recent recommended screening practices. Pet. App. 42a. As the dissent here explained, this holding is "inconsistent with the weight of authority" from other circuits. *Id.* at 74a. This Court should grant the petition to bring the Third Circuit back in line with *Farmer* and its progeny, and with the decisions of the other courts of appeals.

STATEMENT OF THE CASE

1. Christopher Barkes "was a troubled man with a long history of mental health and substance abuse problems." Pet. App. 2a. He was arrested in 2004 for violating his probation, and taken to the Howard R. Young Correctional Institution ("HRYCI") in Wilmington, Delaware. *Id.* at 4a. A private contractor named First Correctional Medical ("FCM") provided the prison's medical services. *Id.* As part of Barkes's intake at the prison, a licensed practical nurse ("LPN") conducted a standard medical screening, which included a mental health screening designed, among other purposes, to determine whether prisoners are suicidal. *Id.*

The suicide screening form that First Correctional Medical used was modeled on a form created by the National Commission for Correctional Health Care ("NCCHC") in 1997. Pet. App. 7a-8a. Although the

Commission had released an updated protocol in 2003, First Correctional Medical continued using the 1997 form. *Id.* at 8a. If the inmate checked at least eight out of 17 risk factors on the 1997 form, or if certain serious risk factors were present, then the nurse would notify a physician and initiate suicide prevention measures. *Id.* at 5a.

During Barkes's screening, he "did not self-report feelings of suicidal ideation, nor did he exhibit any outward signs of suicidality." Pet. App. 47a. Barkes also did not display an "altered mental status" or "abnormal conduct." *Id.* at 5a. Barkes disclosed that he "had attempted suicide in 2003," but did not disclose three other previous suicide attempts, one in 1997 and two in 2004. *Id.* at 4a-5a. He also disclosed "that he had a psychiatric history," but incorrectly "denied having a history of drug abuse." *Id.* at 5a. Because Barkes checked only two of the 17 risk factors—"his psychiatric history and the 2003 suicide attempt"—the nurse "referred Barkes to mental health services on a 'routine' urgency level," and did not place him on suicide watch. *Id.*

Later that night, in a phone call to his wife, Barkes stated that he "can't live this way anymore" and that he was "going to kill himself." Pet. App. 5a. However, Barkes's wife did not notify anyone at the prison that Barkes was suicidal. And Barkes did not either. *Id.* The next morning, guards observed Barkes "at 10:45, 10:50, and 11:00 a.m., and none recalled anything unusual about him or any indication that he was suicidal." *Id.* at 6a. At 11:35 a.m., a guard discovered that Barkes had hanged himself in his cell. *Id.*

2. In 2006, Barkes's widow, individually and as administratrix of his estate, and his children sued, among others, Stanley Taylor, the Commissioner of

the Delaware Department of Correction, and Raphael Williams, the Warden of the prison, alleging that they "had violated the Eighth Amendment through their deliberate indifference to Christopher Barkes' serious medical needs, and by failing to train and/or maintaining wrongful customs, practices, and policies." Pet. App. 105a.

"The parties agree[d] that neither executive had any personal knowledge of Barkes before his death." Pet. App. 52a (dissent), 117a. Further, Warden Williams "was outside of the chain of supervision over FCM"; the medical staff were contractors for the Department of Corrections, not employees of the prison, and they did not report to the Warden or his subordinates. *Id.* at 51a-52a. The parties also agreed that Commissioner Taylor did not directly supervise FCM. Instead, Joyce Talley, the head of the Department of Corrections' Bureau of Management Services, supervised FCM. *Id.* Commissioner Taylor was Talley's supervisor, but had no direct involvement with FCM; "Delaware law empowered him to designate someone to administer the state's medical services contract, and he appointed Talley to discharge that duty." *Id.* at 52a. Plaintiffs did not name Talley as a defendant in the lawsuit. *Id.* at 51a-52a.

In 2008, the district court granted summary judgment in favor of the defendants. It held that Commissioner Taylor and Warden Williams were entitled to qualified immunity on the claim that they were deliberately indifferent to Barkes's medical needs because "[i]t is undisputed by Plaintiffs that Defendants Taylor and Williams had no personal involvement in the events surrounding Mr. Barkes's suicide, and there is no evidence in the record to suggest that the DOC Commissioner or the HRYCI Warden had any interaction with Barkes, or knowledge of his condi-

tion." Pet. App. 117a. It further held that they were entitled to qualified immunity on the claim that they maintained unconstitutional policies or practices with regard to suicide prevention. While plaintiffs argued that FCM should have used a different intake screening protocol, and should have had a registered nurse rather than a licensed practical nurse administer the protocol, plaintiffs "do not discuss how different intake screening or different medical personnel would have resulted in Mr. Barkes's identification as suicidal, and prevented his suicide." *Id.* at 119a.

The court granted plaintiffs leave "to file a Third Amended Complaint limited to a claim of failure to supervise." Pet. App. 81a. Accordingly, in 2010, plaintiffs filed an amended complaint "solely seeking relief as to Count V, which alleges that Defendants violated Barkes's civil rights *by failing to adequately supervise* the medical treatment provided at HRYCI by FCM." *Id.* (emphasis supplied). Plaintiffs also sought reinstatement of their claim that Commissioner Taylor and Warden Williams were deliberately indifferent to Barkes's medical needs. *Id.* at 81a-82a.

The court denied reconsideration, again holding that "a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide." Pet. App. 87a. The district court then held that Commissioner Taylor and Warden Williams were not entitled to qualified immunity on the "failure to supervise" claim. The court reasoned that "Barkes had a clearly established constitutional right to adequate medical care," and "[i]f Plaintiffs can demonstrate that Defendants failed to supervise and/or monitor FCM in such a manner as to subsequently give rise to Barkes' suicide," they would establish a violation of that right. *Id.* at 94a.

The court rejected defendants' argument "that Plaintiffs' claim of failure to supervise/monitor a medical provider is not a cognizable claim under § 1983." Pet. App. 99a. The court again recognized that "it is undisputed that neither Taylor nor Williams had any personal involvement with Barkes' suicide," *id.* at 101a; rather, "Plaintiffs assert that Defendants presided over a prisoner medical screening process—carried out by FCM—which Defendants knew was deficient, yet they failed to act to prevent the risk of prisoner suicide," *id.* at 96a. This claim was cognizable, the court held, because "Plaintiffs seek to hold Defendants Taylor and Williams liable for their *individual* actions (in failing to supervise) rather than for the actions of their subordinates." *Id.* at 101a.

3. The Third Circuit affirmed the district court's decision that the defendants were not entitled to qualified immunity on plaintiffs' "failure to supervise" claim. It found that "it is necessary first to consider whether and to what extent our precedent on supervisory liability in the Eighth Amendment context was altered by the Supreme Court's decision in *Ashcroft v. Iqbal*." Pet. App. 14a. The court remarked that *Iqbal*'s holding that "'supervisory liability' is a misnomer" under section 1983 "has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." *Id.* at 18a-19a. It then held that "[w]e do not read *Iqbal* to have abolished supervisory liability in its entirety." *Id.* at 22a. Instead, the Third Circuit "agree[d] with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged." *Id.* The court then concluded that *Iqbal* had no impact upon the Third Circuit's previous test for supervisory liability under section

1983 where the plaintiff claims that "a state official, by virtue of his or her own deliberate indifference to known deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur." *Id.* (emphases omitted).

Applying this standard, the Third Circuit held that Commissioner Taylor and Warden Williams were not entitled to qualified immunity. It held that the constitutional "right Appellees assert, properly defined, is this: an incarcerated person's right to the proper implementation of adequate suicide prevention protocols." Pet. App. 38a. This right, the court held, is "clearly established in our case law," because prior cases held that the Eighth Amendment "obliges the States to provide adequate medical care," and "vulnerability to suicide is a serious medical need." *Id.* at 38a-39a. There was a genuine dispute of fact as to whether defendants violated this right, the court held, because there was evidence that "FCM's suicide prevention screening practices were not in compliance with NCCHC standards, as required by their contract with the DOC." *Id.* at 44a-45a.

Specifically, plaintiffs argued that, under the NCCHC protocols, the intake screening should have been administered by a "qualified mental health professional, but instead was administered by an unqualified [licensed practical nurse]." Pet. App. 45a. Plaintiffs also argued that the nurse should have been given "access to Barkes's probation records," which would have revealed that several of Barkes's answers on the suicide screening form were untruthful—although plaintiffs did not argue that either the 1997 or the 2004 NCCHC protocols required such access. *Id.* Further, plaintiffs argued that there was

evidence that "DOC's dilatory manner of supervision allowed FCM's provision of services to degrade." *Id.*

The court held that a reasonable jury could find "by failing to enforce FCM's compliance with NCCHC standards as required by their contract, Appellants were deliberately indifferent to the risk that FCM's flagging quality would result in a violation of an inmate's constitutional rights." Pet. App. 46a. The court pointed to no evidence that either Commissioner Taylor or Warden Williams was involved with supervising FCM, or that they had specific knowledge of problems with FCM's suicide prevention practices.

Judge Hardiman dissented, stating that the court's holding that "two of the most senior executives in the Delaware prison system must stand trial for the suicide of Christopher Barkes" is "a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*." Pet. App. 48a. The dissent would have held that the Third Circuit's previous supervisory liability test "has been abrogated by *Iqbal*," *id.*, because it required plaintiffs "only [to] establish a supervisory practice or procedure that the supervisor failed to employ." *Id.* at 68a (alteration omitted). This holding "departed from the approaches taken by the Fifth, Seventh, Eighth, and Tenth Circuits," which "require[] plaintiffs to establish the supervisor's personal involvement in his subordinates' misfeasance," rather than merely "relying on the supervisor's position of authority." *Id.* at 56a-57a, 64a. However, the Third Circuit's standard was consistent with the Ninth Circuit, which allows supervisors to be held liable under section 1983 where they "knew or should have known about the dangers" complained of and failed to correct them. *Id.* at 64a.

Applying the standard used by the Fifth, Seventh, Eighth, and Tenth Circuits, the dissent would have granted summary judgment to the defendants. "[N]othing in the pleadings alleges that Taylor and Williams personally displayed deliberate indifference"; indeed, "neither Taylor nor Williams supervised FCM." Pet. App. 65a, 72a. "Nor does Barkes challenge any of the policies promulgated by the DOC." *Id.* at 65a. Instead, "Barkes has targeted [Williams and Taylor] merely as top-level DOC executives," bringing claims against them "because—in Barkes's words—[they] 'presided over a system.'" *Id.* at 66a, 72a. Therefore, the dissent warned, "[t]oday's decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect." *Id.* at 69a.

The dissent further disagreed that there is a constitutional right "to the proper implementation of adequate suicide prevention protocols," finding such a right "inconsistent with the weight of authority" from other circuits. Pet. App. 74a. The right "to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies," the dissent concluded, rejecting the majority's "contention that FCM's administration of the NCCHC's 1997 standards by an LPN amounts to cruel and unusual punishment." *Id.* at 74a-75a.

Commissioner Taylor and Warden Williams filed a petition for rehearing en banc, which was denied on October 3, 2014, with three judges voting for rehearing. Pet. App. 122a-23a.

REASONS FOR GRANTING THE PETITION

There are two compelling grounds for this Court's review of the decision below. First, the Third Cir-

cuit's holding that high-ranking prison officials can be held liable under section 1983 solely for "failure to supervise" subordinates alleged to have committed constitutional violations is contrary to this Court's holding in *Iqbal* that section 1983 does not support a claim for supervisory liability. See 556 U.S. at 677; *id.* (under section 1983, "masters do not answer for the torts of their servants"). This holding also deepens a circuit split that has developed among courts of appeals uncertain about the scope of this Court's holding in *Iqbal*: the Fifth, Seventh, Eighth, and Tenth Circuits have all held that, for a supervisor to be held liable under section 1983, he must either have been personally involved in the constitutional violation or be responsible for creating or maintaining an unconstitutional policy. See *Gates*, 537 F.3d at 435; *Vance*, 701 F.3d at 203-05; *Nelson*, 583 F.3d at 535-36; *Porro*, 624 F.3d at 1326-27. On the other hand, the Ninth Circuit—now joined by the Third Circuit—has held that supervisors can be held liable under section 1983 based on a theory that their inadequate supervision failed to prevent constitutional violations by their subordinates. See *Starr*, 652 F.3d at 1205-07. In jurisdictions where this holding is law, it will "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.).

Second, the Third Circuit's holding that there is a constitutional right to the "proper implementation of adequate suicide prevention protocols," Pet. App. 42a, conflicts with this Court's holding that the Eighth Amendment's prohibition of cruel and unusual punishment mandates only that prison staff not be deliberately indifferent to inmates' known medical needs. The Eighth Amendment does not mandate the adop-

tion of "best practices" in prisons or constitutionalize medical malpractice claims, let alone claims based on a prison's failure to update its existing NCCHC protocols for suicide prevention screening. The Third Circuit's holding that the Eighth Amendment requires "proper implementation of adequate suicide prevention protocols" creates a split with the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, which have held that there is no constitutional right to be screened for suicidal tendencies.

I. THE THIRD CIRCUIT'S HOLDING THAT SECTION 1983 CREATES SUPERVISORY LIABILITY CONFLICTS WITH *ASHCROFT* v. *IQBAL* AND DECISIONS OF OTHER CIRCUITS.

A. The Third Circuit's Holding That Section 1983 Creates Supervisory Liability Conflicts With *Ashcroft* v. *Iqbal*.

The Third Circuit's holding that these Delaware officials may be held liable under section 1983 for a "failure to supervise" conflicts directly with *Ashcroft* v. *Iqbal*, which holds that there is no supervisory liability under section 1983. In *Iqbal*, a federal prison inmate sued the Attorney General and the Director of the FBI, alleging that they knew of and condoned a practice of subjecting Arab Muslim detainees to harsh conditions of confinement. Among other allegations, the inmate alleged that he was beaten, kicked, subjected to needless body cavity searches, and denied the opportunity to pray due to his race, religion, and national origin. 556 U.S. at 668.

This Court held that the inmate's "account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors," but not by the Attorney General or the Director of the

FBI. *Id.* at 666. The Court began with the principle that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*," and explained that "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. See also *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976) (rejecting argument that section 1983 provides a right to relief "when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct"). Based on this principle, the Court rejected the argument "that, under a theory of 'supervisory liability,' petitioners can be liable for knowledge and acquiescence in their subordinates'" constitutional violations. *Iqbal*, 556 U.S. at 677.

The plaintiffs' "conception of 'supervisory liability,'" this Court held, "is inconsistent" with the principle that government officials "may not be held accountable for the misdeeds of their agents." *Id.* Indeed, "[i]n a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer." *Id.* There is no special liability "for an official charged with violations arising from his or her superintendent responsibilities." *Id.* Rather, "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* Applying this standard, the Court held that the complaint had to be dismissed because, "[t]hough respondent alleges that various other defendants, who are not before us, may have [subjected him to harsh conditions] for impermissible reasons," there was no factual allegation that the Attorney

General or the Director of the FBI had done so or that the policies they had adopted were unconstitutional. *Id.* at 682-83.

As the dissent remarked, "[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely." *Id.* at 693. The essential "nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects." *Id.*

The Third Circuit's decision here is directly contrary to *Iqbal*'s holding that there is no supervisory liability under section 1983. The Third Circuit affirmed the district court's holding that two high-ranking state government officials could be held liable under section 1983 for "failing to adequately supervise the medical treatment provided" at the prison, even though, as the district court also held, the defendants *were not deliberately indifferent* to the inmate's medical needs and had not adopted or enforced an unconstitutional policy regarding suicide prevention. Pet. App. 81a, 86a-88a. It was "undisputed" that the defendants "had no personal involvement in the events surrounding Mr. Barkes's suicide, and there is no evidence in the record to suggest that the DOC Commissioner or the HRYCI Warden had any interaction with Barkes, or knowledge of his condition." *Id.* at 117a.

The Commissioner and Warden were not even personally involved in supervising the prison medical provider. The Warden had no supervisory authority over the medical provider, and the Commissioner had lawfully delegated responsibility for supervising the medical provider to the head of the Bureau of Management Services. Pet. App. 51a-52a (dissent). Nor,

as the dissent remarked, did Barkes "challenge any of the policies promulgated by the DOC" or prison. *Id.* at 65a. Instead, Barkes challenged only the alleged failure of defendants to ensure that the prison medical provider properly implemented those policies. In short, as the dissent put it, the Warden and Commissioner were sued not based on their own actions, but solely because they "presided over a system." *Id.* at 66a. This is classic supervisory liability, which *Iqbal* forecloses.

The Third Circuit reached its result only by denying that "*Iqbal* . . . abolished supervisory liability in its entirety." Pet. App. 22a. Indeed, the court interpreted *Iqbal* to have no effect whatsoever on its supervisory liability doctrine for Eighth Amendment claims. *Id.* ("[W]e hold that the standard we announced in *Sample* for imposing supervisory liability based on an Eighth Amendment violation is consistent with *Iqbal*."). The court reasoned that this conclusion was consistent with *Iqbal* because *Iqbal* requires only that "the level of intent necessary to establish supervisory liability" be the same as "the underlying constitutional tort alleged," and Third Circuit precedent already required supervisors to display deliberate indifference, the same intent required for an underlying Eighth Amendment violation. *Id.* However, this reasoning ignores *Iqbal*'s instruction that officials may be held liable under section 1983 only when "the official's own individual actions" have "violated the Constitution." *Iqbal*, 556 U.S. at 676. Here, again, the defendants had no personal involvement, either with Barkes or with the medical provider's suicide prevention protocols, and were not even responsible for supervising the medical provider. Holding that officials may be held liable under

these circumstances reduces "deliberate indifference" to nothing more than "*respondeat superior*."

This Court's review of the Third Circuit's holding is critically important because the decision would allow plaintiffs to subject officials at the highest levels of government to litigation simply by alleging that their failure to prevent subordinates from committing violations constitutes "deliberate indifference." The "decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect," which could lead to a flood of litigation against senior officials. Pet. App. 69a (dissent). Exposing high-level state officials to liability based on the alleged constitutional violations of lower-level employees would significantly increase the "substantial social costs" of extending liability to supervisory government officials, which "includ[e] the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). Moreover, as this Court warned in *Iqbal*, "[l]itigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." 556 U.S. at 685. Such unrestrained supervisory liability for "high-level officials" presents grave risks that they will be continually distracted "from the vigorous performance of their duties" by section 1983 suits. *Id.* at 686.

B. The Circuits Are In Conflict As To Whether Supervisory Liability Claims Can Be Brought Under Section 1983.

Review should be granted for the additional reason that the circuits are divided and in need of guidance

as to the availability of supervisory liability under section 1983. As the majority here put it, "[t]his aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." Pet. App. 19a; see *id.* at 15a (remarking that the court must "wade into the muddied waters of post-*Iqbal* 'supervisory liability'"). While several circuits have now considered "this aspect of *Iqbal,* . . . consensus as to its meaning remains elusive." *Dodds* v. *Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010); see *id.* at 1209 (Tymkovich, J., concurring) (*Iqbal* "recently muddied further these already cloudy waters"); see also, *e.g.*, *Reynolds* v. *Barrett*, 685 F.3d 193, 205 n.14 (2d Cir. 2012) ("*Iqbal* has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory liability test"); *Maldonado* v. *Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009) (*Iqbal* "may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability"); *Arnett* v. *Webster*, 658 F.3d 742, 757 (7th Cir. 2011) ("The landscape of [supervisory] claims after *Iqbal* remains murky . . . .").

The Fifth, Seventh, Eighth, and Tenth Circuits have all interpreted *Iqbal* as holding that "[a] supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates*, 537 F.3d at 435; see *Carnaby* v. *City of Houston*, 636 F.3d 183 189 (5th Cir. 2011) (holding that "a government official can be held liable only for his own misconduct" and "the extent of his liability as a supervisor is similar to that of

a municipality that implements an unconstitutional policy").

For instance, in *Nelson* v. *Correctional Medical Services*, the Eighth Circuit rejected a section 1983 claim against the Director of the state Department of Corrections based on an inmate's allegations "that while giving birth to her child, she was forced to go through the final stages of labor with both legs shackled to her hospital bed in violation of the Eighth Amendment," causing serious and permanent damage to her hips. 583 F.3d at 524. The Eighth Circuit allowed the inmate's suit to proceed against the guard who ordered her to be shackled, but *not* against the Director of the Department of Corrections. The inmate presented no evidence that the Director, "who was responsible for managing a large state wide prison system," had "any personal involvement in [the guard's] decision to keep [the inmate] restrained while she was in labor." *Id.* at 535. Further, "[t]he regulations, directives, and orders" of the Department were not themselves unconstitutional, but rather "suggest[ed] administrative concern for the health and safety of pregnant inmates." *Id.* at 536. Because "[i]n a § 1983 case an official 'is only liable for his . . . own misconduct' and is not 'accountable for the misdeeds of [his] agents,'" the Director could not be held liable for "deliberate indifference" to the prisoner's medical needs. *Id.* at 534-35 (quoting *Iqbal*, 556 U.S. at 677) (omission and second alteration in original).

Similarly, the Seventh Circuit held in *Vance* v. *Rumsfeld* that the Secretary of Defense could not be held liable for subordinates' mistreatment of military detainees. The plaintiffs alleged that they were subjected to unconstitutional conditions of confinement including "violence, sleep deprivation and alteration,

extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, [and] denial of needed medical care." 701 F.3d at 196. But even if subordinates subjected the plaintiffs to unconstitutional conditions, the Seventh Circuit held, the Secretary could not be held liable because "[h]e did not arrest plaintiffs, hold them incommunicado, … subject them to loud noises, threaten them while they wore hoods, and so on." *Id.* at 203. Under *Iqbal*, the plaintiffs' allegations that the Secretary "received reports that his subordinates sometimes used these techniques, without authorization," and "he did not do enough to bring interrogators under control," were insufficient. *Id.* "[T]he Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing," absent a showing "that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm." *Id.* at 204-05. Liability premised upon a supervisor's knowledge of violations, combined with inaction, "would be purely vicarious," and is therefore impermissible. *Id.* at 204. Compare *T.E.* v. *Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (allowing section 1983 claim against supervisor to proceed where "plaintiffs are not relying on a theory that 'mere failure of supervisory officials to act' violates the Due Process Clause," but instead allege that the supervisor "is liable for actively concealing reports of abuse").

The Tenth Circuit adopted a similar standard in *Porro* v. *Barnes*, holding that "[s]imply put, there's no special rule of liability for supervisors"; the test for supervisors "is the same as the test for everyone else." 624 F.3d at 1328. Accordingly, "it is evident that in order for liability to arise under § 1983, a defendant's direct personal responsibility for the

claimed deprivation of a constitutional right must be established." *Id.* at 1327 (emphasis and alteration omitted); see also *Dodds*, 614 F.3d at 1199 ("§ 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of [an unconstitutional] policy").

The Ninth Circuit, by contrast, adopted a markedly different interpretation of *Iqbal* in *Starr* v. *Baca*. Like the Third Circuit, the Ninth Circuit holds that *Iqbal* has no impact whatsoever on supervisory liability for deliberate indifference claims, concluding "[w]e see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases." 652 F.3d at 1207. Thus, the Ninth Circuit held that "the supervisor need not be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury." *Id.* at 1205. Nor must the plaintiff demonstrate that the supervisor is responsible for an unconstitutional policy.

Instead, the Ninth Circuit holds, a supervisor may be held liable for deliberate indifference based on a wide range of theories, including "his own culpable action or *inaction in the training, supervision, or control of his subordinates*, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others." *Id.* at 1205-06 (emphasis supplied). Applying this standard, the Ninth Circuit held that the head of the L.A. County Jail system could be held liable for an attack on an inmate by prison guards, even though he had no in-

volvement in the attack and had not implemented an unconstitutional policy, on the theory that his "knowledge of the unconstitutional conditions in the jail, including his knowledge of the culpable actions of his subordinates, coupled with his inaction, amounted to acquiescence in the unconstitutional conduct of his subordinates." *Id.* at 1208.

Judge Trott dissented, remarking that the suit "has all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss." *Id.* at 1217. Eight judges dissented from the denial of rehearing en banc, objecting that the panel "resurrects a theory of supervisory liability for constitutional torts that the Supreme Court has foreclosed." *Starr* v. *Cnty. of L.A.*, 659 F.3d 850, 851 (9th Cir. 2011) (O'Scannlain, J., dissenting). As the dissenters remarked, the standard adopted by the Ninth Circuit in *Starr*, and followed by the Third Circuit here, "has the effect of inserting *respondeat superior* liability into section 1983 despite the Supreme Court's admonition [in *Iqbal*] that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* at 854.

The petition should be granted to resolve the conflict among the circuits, and to bring the Third and Ninth Circuits back into line with this Court's holding in *Iqbal* that supervisors are not liable under section 1983 for the actions of their subordinates.

II. THE THIRD CIRCUIT'S HOLDING THAT THERE IS A CONSTITUTIONAL RIGHT TO "THE PROPER IMPLEMENTATION OF ADEQUATE SUICIDE PREVENTION PROTOCOLS" CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. This Court's Decisions Make Clear That There Is No Constitutional Right To The Proper Implementation Of Adequate Suicide Prevention Protocols.

This Court's review of the Third Circuit's holding that "incarcerated person[s]" have a "clearly established" constitutional "right to the proper implementation of adequate suicide prevention protocols" is also warranted. Pet. App. 38a; see *id.* at 42a ("[W]e hold that the right Appellees assert—an incarcerated person's right to the proper implementation of adequate suicide prevention protocols—was clearly established . . . ."). As the dissent explained, "the 'right to the proper implementation of adequate suicide prevention protocols' is a departure from Eighth Amendment case law that had never been established before today." *Id.* at 76a.

Indeed, the Third Circuit's recognition of this "right" is flatly contrary to this Court's precedents. The Third Circuit reasoned that the Eighth Amendment right to be free from cruel and unusual punishment includes a right to "adequate physical and mental health care," and that this right includes protection against "an inmate's particular vulnerability to suicide." Pet. App. 39a. However, the Eighth Amendment does not create a free-standing right to adequate medical care, much less to "adequate suicide prevention protocols." As this Court explained in *Farmer* v. *Brennan*, 511 U.S. at 837, "[t]he Eighth Amendment does not outlaw cruel and unusual 'con-

ditions'; it outlaws cruel and unusual 'punishments.'" It is only a prison official's deliberate indifference to an inmate's known and serious medical needs that can render inadequate medical care a "punishment" within the meaning of the Eighth Amendment. *Id.* at 838 ("an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment"). See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control . . . .").

Because the Eighth Amendment prohibits only cruel and unusual punishments, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); see *id.* at 105-06 ("[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'"). Nor does the Eighth Amendment "transform courts into boards of inquiry charged with determining 'best practices'" for prisons. *Baze* v. *Rees*, 553 U.S. 35, 51 (2008) (plurality). This "approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures." *Id.*

Under these basic principles, it is clear that the Eighth Amendment does not require prisons to institute preventative screenings of every inmate to proactively identify inmates who may be suicidal or have

other latent medical needs, much less to "proper[ly] implement[]" "adequate" screening protocols. Pet. App. 38a. Instituting such screening protocols may well be a desirable "best practice," but the Constitution does not mandate it. Rather, the Eighth Amendment requires only that prison personnel respond adequately when an inmate requests medical care for a serious need, or when the inmate's need for care is otherwise brought to their attention. See *Estelle*, 429 U.S. at 105-06; *Jenkins* v. *Cnty. of Hennipin*, 557 F.3d 628, 633 (8th Cir. 2009) ("Under the Constitution, however, the range of acceptable medical care is broad. Jailers bear only the responsibility to identify medical needs that are so obvious that even a layperson would easily recognize the necessity for a doctor's attention.").

Here, although not required to do so by the Constitution, the prison medical provider implemented preventative screening programs to attempt to better serve inmates who may have latent medical issues, including mental health issues. Accordingly, the prison medical provider administered a mental health screening to Barkes, during which Barkes denied that he was suicidal and neglected to mention multiple previous suicide attempts. See 6, *supra*. Barkes also exhibited no outward signs of suicidal ideation or emotional distress in front of anyone at the prison. See *id.* While he informed his wife that he was suicidal, his wife also failed to notify anyone at the prison. See *id*. The Third Circuit held that Barkes's Eighth Amendment rights were nonetheless violated because the medical provider used a 1997 rather than a 2004 version of the screening form, had a licensed practical nurse rather than a mental health professional conduct the screening, and did not cross-check Barkes's probation records, which would have

revealed that some of his statements on the screening form were false. Pet. App. 45a.

None of these supposed flaws in Barkes's suicide prevention screening is of constitutional magnitude; the prison was not constitutionally required to provide a screening at all, and the screening provided simply does not constitute "cruel and unusual punishment." Pet. App. 74a (dissent disagreeing with "Barkes's contention that FCM's administration of the NCCHC's 1997 standards by an LPN amounts to cruel and unusual punishment"). Further, even if the majority were correct that the suicide screening represented a breach of the medical provider's contract with the Department of Corrections, a breach of contract does not violate the Eighth Amendment. See *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Luckert* v. *Dodge Cnty.*, 684 F.3d 808, 819 (8th Cir. 2012) ("Failure to follow written procedures does not constitute *per se* deliberate indifference.*"), cert. denied*, 133 S. Ct. 865 (2013). The petition should be granted to correct this manifestly incorrect ruling.

B. The Third Circuit's Holding That There Is A Constitutional Right To The Proper Implementation Of Adequate Suicide Prevention Protocols Creates A Circuit Split.

Unsurprisingly, the Third Circuit's holding that there is a constitutional right to the "proper implementation of adequate suicide prevention protocols" also conflicts with the decisions of several other circuits: The Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have all held that no such right exists.

As the Sixth Circuit has cogently explained, "[i]t is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help." *Danese* v. *Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989). Therefore, the "right to medical care for serious medical needs does not encompass the right to be screened correctly for suicidal tendencies." *Comstock* v *McCrary*, 273 F.3d 693, 702 (6th Cir. 2001); see *id.* at 703 ("to prevent the constitutionalization of medical malpractice claims," a "plaintiff alleging deliberate indifference must show more than . . . the misdiagnosis of an ailment").

The Fourth Circuit has similarly held that "[t]he general right of pretrial detainees to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies." *Belcher*, 898 F.2d at 34-35. "The Eighth and Fourteenth Amendments do not contemplate liability upon the premise that all self-inflicted harm is someone else's fault." *Id.* at 36. Rather, they only "prohibit inhumane methods of punishment and assure appropriate standards of decency in a setting of detention." *Id.* Therefore, "prison officials need not screen a pretrial detainee for suicidal tendencies if they have no knowledge that the prisoner is suicidal." *Gordon* v. *Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992).

Likewise, the Fifth Circuit has concluded that, "[i]n the specific context of prison suicide prevention, . . . a failure to train custodial officials in screening procedures to detect latent suicidal tendencies does not rise to the level of a constitutional violation." *Whitt*, 529 F.3d at 284 (emphasis omitted). Thus, "[i]n the absence of manifest signs of suicidal tendencies, a city may not be held liable for a detainee's suicide in

a § 1983 suit." *Id.*; see *Burns* v. *City of Galveston*, 905 F.2d 100, 104 (5th Cir. 1990) (same).

The Seventh and Eleventh Circuits have both come to similar conclusions. The Eleventh Circuit holds that "a finding of deliberate indifference requires that officials have notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual." *Tittle*, 10 F.3d at 1539. Claims of "weaknesses in the screening process, the training of deputies and the supervision of prisoners" are insufficient to show "deliberate indifference toward the rights of prisoners." *Id.* at 1540; *Cook ex rel. Estate of Tessier* v. *Sherriff of Monroe Cnty.*, 402 F.3d 1092, 1117 (11th Cir. 2005) (same). The Seventh Circuit likewise holds that an Eighth Amendment claim based on a prisoner's suicide cannot prevail in the absence of "evidence showing that the defendants had actual knowledge of [the prisoner's] risk of suicide." *Matos ex rel. Matos* v. *O'Sullivan*, 335 F.3d 553, 557 (7th Cir. 2003). Where the prisoner "never told any of the defendants that he felt suicidal or depressed beyond his control during his incarceration . . . despite having been asked the question numerous times," his estate could not base a claim on the premise that "the defendants should have known not to take 'no' for an answer when [he] told them he was not suicidal." *Id.*

This issue of the Eighth Amendment standard related to suicide prevention protocols is important in and of itself. As the number of cases reveals, it is a recurring issue and now one that places state prison officials in the Third Circuit at risk of trial for violation of the Eighth Amendment's prohibition on cruel and unusual punishment if they fail to follow best practices in this area. In addition, the holding that state prison officials must maintain best practices

with respect to the suicide prevention protocol may be extended to other medical protocols, expanding the decision's harmful consequences. See, *e.g.*, *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1196 (9th Cir. 2002) (considering a section 1983 claim based on the lack of preventative medical screening for combative inmates); *Woodberry* v. *Simmons*, 118 F. App'x 362 (10th Cir. 2004) (considering a section 1983 claim based on the lack of preventative medical screening for inmates who smoked cigarettes).

In sum, as all of these circuits which have addressed the issue have recognized, there is no constitutional right to the "proper implementation of adequate suicide prevention protocols." The Third Circuit has radically departed from the precedents of this Court and its sister circuits in creating such a right and holding that two high-ranking state officials must stand trial for violating it, particularly where, as here, suicide prevention screening occurred and the allegation is only that it had not been updated and thus was inadequate. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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