No. 14-939

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

REPLY BRIEF OF PETITIONERS

MICHAEL F. MCTAGGART
DEPUTY ATT'Y GENERAL
DELAWARE DEPARTMENT OF JUSTICE
820 N. French Street
6th Floor
Wilmington, DE 19801
(302) 577-8993

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
ERIKA L. MALEY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Petitioners

*Counsel of Record

April 7, 2015

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
I. THE THIRD CIRCUIT'S HOLDING THAT SECTION 1983 CREATES SUPERVISORY LIABILITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	3
II. THE THIRD CIRCUIT'S HOLDING THAT THERE IS A CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT TO "THE PROPER IMPLEMENTATION OF ADEQUATE SUICIDE PREVENTION PROTOCOLS" CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS	7
CONCLUSION	12

TABLE OF AUTHORITIES

CASES Page

Ashcroft v. *Iqbal*, 556 U.S. 662 (2009) 1, 3
Comstock v. *McCrary*, 273 F.3d 693 (6th Cir. 2001) 9
Danese v. *Asman*, 875 F.2d 1239 (6th Cir. 1989) 10
Gates v. *Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404 (5th Cir. 2008) .. 3
Gordon v. *Kidd*, 971 F.2d 1087 (4th Cir. 1992) 9
Hobart v. *Estrada*, 582 F. App'x 348 (5th Cir. 2014) 6
Johnson v. *Jones*, 515 U.S. 304 (1995) 10
Matos ex rel. Matos v. *O'Sullivan*, 335 F.3d 553 (7th Cir. 2003) 9, 10
Nelson v. *Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009) 5
Plumhoff v. *Rickard*, 134 S. Ct. 2012 (2014) ... 11
Porter v. *Epps*, 659 F.3d 440 (5th Cir. 2011) ... 5, 6
Starr v. *Cnty. of L.A.*, 659 F.3d 850 (9th Cir. 2011) 7
Vance v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 2796 (2013) 4, 5, 6, 7
Whitt v. *Stephens Cnty.*, 529 F.3d 278 (5th Cir. 2008) 10

STATUTE

42 U.S.C. § 1983 1

INTRODUCTION

In denying that the Third Circuit's ruling conflicts with decisions of this Court and other circuits, the Brief in Opposition ("Opposition" or "Opp.") mischaracterizes both the decision below and this Court's precedents. It claims that the Third Circuit's holding that "two of the most senior executives in the Delaware prison system must stand trial" on a 42 U.S.C. § 1983 claim, Pet. App. 48a, creates no conflict because the court of appeals did not apply "*respondeat superior*" liability. Opp. 1. But *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), does not merely reject *respondeat superior* liability; it holds that courts cannot impose "supervisory liability" under section 1983. *Id*. at 677. Rather, "each Government official, his or her title notwithstanding, *is only liable for his or her own misconduct*," not the misconduct of subordinates. *Id.* (emphasis added). Four other circuits have interpreted *Iqbal* to prohibit holding supervisory officials liable unless the officials were personally involved in violating the plaintiff's constitutional rights, or personally maintained an unconstitutional policy. Pet. 18-23.

By contrast, the Third Circuit did not require that Delaware's officials have any personal involvement with the inmate's treatment, with supervising the prison medical provider, or with the allegedly unconstitutional suicide prevention screening policy. Indeed, it is undisputed that neither Delaware official had knowledge of the prisoner, nor involvement with decisions about his medical care; and neither directly supervised the medical provider. Pet. App. 44a, 51a-52a. But the Third Circuit nonetheless held that a showing that the officials were generally aware of some problems with the medical provider, combined

with the officials' inaction, defeated their claims of qualified immunity here. On this theory, high-ranking officials could be held personally liable for *every* failure in a prison system, because they did not "do enough" to prevent violations by their subordinates. Only the Third and Ninth Circuits have adopted such an expansive interpretation of supervisory liability under section 1983; the Fifth, Seventh, Eighth, and Tenth Circuits have refused to do so, as wholly inconsistent with *Iqbal*.

On the second question presented, the Opposition makes no attempt to defend 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. Instead, it argues that the question is "not presented by this case," because the "prison medical officials did administer such a screen, and had actual knowledge that the decedent presented such a risk" of suicide. Opp. 2. But plaintiffs did not argue and the Third Circuit did not find that prison officials had "actual knowledge" that the inmate was suicidal. Rather, it held that the case could proceed to trial on the theory that the Eighth Amendment required the prison to conduct *further screening* to determine more accurately whether the inmate might be suicidal, including questioning by a better qualified mental health professional, and a cross-check of the inmate's answers against his probation records. Pet. App. 46a, 42a, 72a. This holding is flatly contrary to decisions in at least five other circuits, holding that there is no constitutional right to suicide prevention screening. Pet. 27-30. The petition should be granted.

I. THE THIRD CIRCUIT'S HOLDING THAT SECTION 1983 CREATES SUPERVISORY LIABILITY CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Opposition argues that the Third Circuit's decision does not conflict with *Iqbal* because it does not adopt "automatic vicarious liability on supervisors" under the principle of *respondeat superior*. Opp. 23. *Iqbal* cannot be so narrowly construed. The plaintiff there conceded "that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*," but nonetheless argued that they could be held liable under a theory of "supervisory liability." 556 U.S. at 667. This Court *rejected* that argument, holding that "Respondent's conception of 'supervisory liability' is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents." *Id*. at 677. As the dissent explained, *Iqbal* thus "eliminat[ed] *Bivens* supervisory liability entirely," by rejecting the "very principle" that "the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates." *Id.* at 693 (Souter, J., dissenting).

Several circuits have accordingly recognized that *Iqbal* establishes that "[a] supervisory official may be held liable under § 1983 only if" the official himself "affirmatively participates in the acts that cause the constitutional deprivation," or "implements unconstitutional policies that causally result in the constitutional injury." *Gates* v. *Tex. Dep't of Protective & Regulatory Servs*., 537 F.3d 404, 435 (5th Cir. 2008); see Pet. 18-24. The Third Circuit's expansive view of supervisory liability also conflicts with these decisions.

The Opposition contends that the circuits "agree that in Eighth Amendment medical care cases supervisors can be liable for policies constituting deliberate indifference." Opp. 28. But the petition did not contend that a different *mens rea* is required; the split concerns the *conduct* that must be proven. Unlike other circuits, the Third and Ninth Circuits do not require that the supervisory official be personally involved with either the specific incident or the policy at issue. The Opposition also argues that the officials' deliberate indifference *itself* is an unconstitutional "policy." *Id.* at 25 ("'failure to supervise'" is a "policy"); *id.* ("deliberate and indifferent inaction" is a "polic[y]"). But only the Third and Ninth Circuits have adopted such a broad view of "policy" liability for supervisors – a view which would gut *Iqbal*'s holding. The Fifth, Seventh, Eighth, and Tenth Circuits have rejected that reading of this Court's decision. Pet. 18-24.

For instance, *Vance* v. *Rumsfeld*, 701 F.3d 193 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013), held that in deliberate indifference cases "a plaintiff must demonstrate that the public official knew of risks *with sufficient specificity* to allow an inference that inaction is designed to produce or allow" the particular constitutional violation at issue. *Id.* at 204 (emphasis added). Supervisors cannot be held liable on claims that they should "do more to prevent [constitutional violations] on an institution-wide basis"; to the contrary, "heads of organizations have never been held liable on the theory that they did not do enough to combat subordinates' misconduct, and

the Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing." *Id.* at 205.[1]

Nelson v. *Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009) (en banc), similarly holds that supervisory officials cannot be held liable on a deliberate indifference theory absent personal involvement in either the alleged deprivation of rights or a specific unconstitutional policy. Operating at the highest level of generality, the Opposition insists that *Nelson* is consistent with the Third Circuit's decision because it holds that "in an Eighth Amendment case a supervisor can be liable for deliberate indifference." Opp. 31. But the Opposition ignores the tightly cabined nature of such liability in the Eighth Circuit's test; *Nelson* holds that the supervisor could be "liable only if he personally displayed deliberate indifference to the hazards and pain resulting from shackling an inmate such as Nelson during the final stages of labor." 583 F.3d at 535. Because there was no evidence that the supervisor either was involved with the shackling decision or implemented unconstitutional policies regarding shackling inmates during childbirth, the claim against the supervisor failed. *Id.*

Similarly, the Opposition contends that "the Fifth Circuit has repeatedly held that a supervisor can be held liable for a deliberately indifferent failure to supervise or train subordinates," Opp. 34, but the cases it cites confirm that the Fifth Circuit's standard is far narrower than the Third's. For instance, *Porter* v.

---

[1] The Opposition attempts to distinguish *Vance* as not involving constitutional claims. Opp. 29. However, *Vance* assumed that constitutional as well as statutory rights were at stake. *See* 701 F.3d at 198 ("[a]lthough the Constitution's application to interrogation outside the United States is not settled, Rumsfeld concedes (for current purposes at least) that it governs") (citation omitted).

Epps, 659 F.3d 440 (5th Cir. 2011), held that "a pattern of similar constitutional violations . . . is ordinarily necessary to demonstrate deliberate indifference," and remarked that "stringent" limits were necessary to prevent deliberate indifference claims from "result[ing] in *de facto respondeat superior* liability." *Id.* at 447. Likewise, *Hobart* v. *Estrada*, 582 F. App'x 348 (5th Cir. 2014), held that "to establish deliberate indifference, a plaintiff must usually show a pattern of similar violations," or "that the highly predictable consequence of a failure to train would result in the specific injury suffered," criticizing the district court's broader test as "far too expansive an application of what is supposed to be an extremely narrow rule." *Id.* at 357-58 (emphasis omitted).

Here, the Third Circuit imposed no such limitations. It was "undisputed" that the state officials "had no personal involvement in the events surrounding Mr. Barkes's suicide," Pet. App. 117a, and did not directly supervise the prison medical provider, *id.* at 44a. Further, the operative complaint did not "challenge any of the policies promulgated by the DOC" as unconstitutional. *Id.* at 65a. The only supposedly unconstitutional "policy" was the purported failure of these high-ranking officials to supervise the prison medical provider and thereby prevent the provider from violating inmates' constitutional rights. The court required no evidence that either state official had any specific involvement with the provider's suicide prevention protocols, see *Vance*, 701 F.3d at 204, or that there was a pattern of constitutional violations in the implementation of those protocols, see *Porter*, 659 F.3d at 447. Rather, the Third Circuit held that the officials were not entitled to qualified immunity because of evidence that they knew *generally* of deficiencies with the medical provider; they

"knew that the quality of FCM's provision of medical services was degrading," and were aware of instances of "intentional short-staffing" by FCM. Pet. App. 46a. Under the Third Circuit's reasoning, the same high-ranking officials could be held liable, not only for every inmate suicide, but also for every instance of inadequate medical care, based "on the theory that they did not do enough to combat [FCM's] misconduct." *Vance,* 701 F.3d at 205.

Critically, this broad misinterpretation of *Iqbal* "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.'" *Starr* v. *Cnty. of L.A.*, 659 F.3d 850, 854 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing en banc). The petition should be granted to bring the Third and Ninth Circuits into line with *Iqbal*, and to bring clarity to this issue, which "has bedeviled the Courts of Appeals," Pet. App. 19a.

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

The Opposition does not defend the merits 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." Pet. App. 38a. Instead, it contends that review of this question is unwarranted for two reasons: first, the case is "not an appropriate ve-

hicle" because it did not hold that there is a constitutional right to suicide prevention *screening*; and, second, the Third Circuit's purported holding that there is "sufficient evidence to find a constitutional violation" is "not subject to review in this interlocutory appeal." Opp. 35. Neither argument has merit.

First, the Opposition contends that "the Third Circuit does not hold that screening of all inmates (or any other specific medical practice) is constitutionally required; the purpose of the passage to which petitioners object was only to make clear that a state cannot meet constitutional requirements by merely adopting, but not implementing, a policy." Opp. 38. This contention is flatly inconsistent with the Third Circuit's own language: "we hold that the right Appellees assert—an incarcerated person's right to the proper implementation of adequate suicide prevention protocols—was clearly established." Pet. App. 42a; see *id.* at 38a (same). The Third Circuit held in so many words that the Eighth Amendment requires "adequate suicide prevention protocols."

The Third Circuit also clearly holds that these "adequate suicide prevention protocols" must include screening to determine whether inmates are suicidal. The Opposition claims that prison officials "had actual knowledge that the decedent presented" a risk of suicide, Opp. 2, because the screening revealed that he "had attempted suicide, had been seen by a psychiatrist, and was on powerful psychoactive medications," *id.* at 38. That claim mischaracterizes the decision below. The Third Circuit found that "Barkes did not self-report feelings of suicidal ideation, nor did he exhibit any outward signs of suicidality." Pet. App. 47a. Nor did the court hold that plaintiffs could proceed to trial on a theory that prison officials *should have known* Barkes was suicidal, based on his

answers. Instead, the court held that plaintiffs were entitled to trial on a theory that Barkes's Eighth Amendment rights were violated by a failure to conduct a more thorough screening, which allegedly would have resulted in the discovery that Barkes was suicidal. *Id.* at 44a-46a. The claim defeated qualified immunity, the court held, because there was evidence that the "suicide prevention screening practices were not in compliance with NCCHC standards," that the medical provider did not "requir[e] mental health screenings to have been conducted by a qualified mental health professional rather than an unqualified LPN," and that the provider lacked "access to Barkes's probation records," which would have revealed "his lengthy history of mental health problems and suicide attempts," *id.* at 44a-45a.

This holding conflicts with decisions of the numerous circuits that have held the Eighth Amendment does not create a right to suicide prevention screening. Pet. 27-31; see *Comstock* v. *McCrary*, 273 F.3d 693, 702 (6th Cir. 2001) (The "right to medical care for serious medical needs does not encompass the right to be screened correctly for suicidal tendencies."); *Gordon* v. *Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992) ("[P]rison officials need not screen a pretrial detainee for suicidal tendencies if they have no knowledge that the prisoner is suicidal.").

The Opposition argues that the cases the petition cites are distinguishable because "there was screening for suicidal tendencies" here. Opp. 38. But this is no distinction at all; the prisons conducted screening in several of the cases holding that no such screening is constitutionally required. For instance, in *Matos ex rel. Matos* v. *O'Sullivan*, 335 F.3d 553 (7th Cir. 2003), as in this case, the prisoner was screened and denied being suicidal. Plaintiffs argued that prison officials

should have nonetheless realized the prisoner was suicidal due to "his history of suffering from manic depression, his attempted suicide in 1995, his history of substance abuse, and his frequent complaints of depression." *Id.* at 557. The Seventh Circuit held that the officials were entitled to qualified immunity, because the argument "that the defendants should have known not to take 'no' for an answer when Matos told them he was not suicidal" did not state a violation of clearly established constitutional rights. *Id.*

Similarly, in *Whitt* v. *Stephens County*, 529 F.3d 278 (5th Cir. 2008), the prisoner was screened and denied being suicidal. The court held that the absence of adequate "screening procedures to detect latent suicidal tendencies does not rise to the level of a constitutional violation." *Id.* at 284 (emphasis omitted). And *Danese* v. *Asman*, 875 F.2d 1239 (6th Cir. 1989), rejected an Eighth Amendment claim where a prisoner "told [officers] that he was going to kill himself and talked about methods of killing himself, but the officers did nothing" because they did not believe he was actually suicidal, *id.* at 1243, explaining that there is no clearly established "right of a detainee to be screened correctly for suicidal tendencies," *id.* at 1244. The Third Circuit's holding here clearly conflicts with all these decisions.

Finally, the Opposition argues that the Third Circuit's "holding that there is sufficient evidence to prove a denial of adequate care is not subject to review in this interlocutory appeal," under *Johnson* v. *Jones*, 515 U.S. 304 (1995). Opp. 39. But petitioners are not seeking review of whether there is sufficient evidence here; they seek review of the *holding* that there is a "clearly established" constitutional "right to the proper implementation of adequate suicide prevention protocols." Pet. App. 38a.

As this Court recently explained, appellate review of "whether a constitutional right would have been violated on the facts alleged" is entirely appropriate when summary judgment on qualified immunity is denied. *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014). Questions regarding whether alleged conduct violates clearly established constitutional rights are "legal issues; these issues are quite different from any purely factual issues that the trial court might confront if the case were tried." *Id.* at 2019. Here, just as in *Plumhoff*, petitioners contend that they are entitled to qualified immunity because their alleged conduct "did not violate the [Eighth] Amendment and, in any event, did not violate clearly established law." *Id*.

The Third Circuit's holding that there is a clearly established constitutional right to the "proper implementation of adequate suicide prevention protocols" radically departs from the precedents of this Court and other circuits. The decision below should be reversed.

CONCLUSION

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

Respectfully submitted,

MICHAEL F. MCTAGGART
DEPUTY ATT'Y GENERAL
DELAWARE DEPARTMENT OF JUSTICE
820 N. French Street, 6th Floor
Wilmington, DE 19801
(302) 577-8993

CARTER G. PHILLIPS
VIRGINIA A. SEITZ*
ERIKA L. MALEY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
vseitz@sidley.com

Counsel for Petitioners

*Counsel of Record

April 7, 2015