No. 16-20650

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOEL T. DEAN,
Plaintiff-Appellee,
v.
DARSHAN R. PHATAK.
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

BRIEF OF AMERICAN MEDICAL ASSOCIATION, NATIONAL ASSOCIATION OF MEDICAL EXAMINERS, COLLEGE OF AMERICAN PATHOLOGISTS, TEXAS MEDICAL ASSOCIATION, AND TEXAS SOCIETY OF PATHOLOGISTS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT, SEEKING REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

In accordance with 5th Cir. R. 29.2, the undersigned counsel of record certifies that, in addition to the persons and entities described in the parties' certificates of interested parties, the following listed persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae:
American Medical Association
National Association of Medical Examiners
College of American Pathologists
Texas Medical Association
Texas Society of Pathologists

Counsel of Record for Amici Curiae:
Donald P. Wilcox
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/s/ Donald P. Wilcox
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RULE 26.1 DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, *amicus* the American Medical Association (AMA) is a nonprofit corporation organized and operating under the laws of the State of Illinois. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus the National Association of Medical Examiners is a Missouri-chartered nonprofit corporation incorporated in 2010. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus the College of American Pathologists is a nonprofit corporation organized and operating under the laws of the State of Illinois. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus the Texas Medical Association (TMA) is a nonprofit corporation operating under the laws of the State of Texas. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

Amicus the Texas Society of Pathologists is a nonprofit corporation operating under the laws of the State of Texas. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICI CURIAE* [1]

Amici curiae the American Medical Association, the Texas Medical Association, the National Association of Medical Examiners, the College of American Pathologists, and the Texas Society of Pathologists respectfully submit this brief in support of Defendant-Appellant Darshan Phatak, MD, encouraging the reversal of the district court's decision denying Dr. Phatak of qualified immunity, because the district court's decision is inconsistent with well-established United States Supreme Court precedent and with public policy favoring qualified immunity to preserve independent medical judgment. *Amici* are associations of physicians and are greatly concerned that the district court's decision will have a significant chilling effect on not only forensic pathologists but also on any government-employed physician. Specifically, the holding encourages defensive medicine and provides back channels and lower standards for medical professional liability lawsuits.

Amicus curiae American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all U.S. physicians, residents, and medical students are represented in the AMA's policy-making process. The AMA was founded

[1] *Amici* seek for leave to file this brief by motion to this Court, and the source of authority for its filing is in Fed. R. App. P. 29(a). No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area, include forensic pathology, and in every state, including Texas.

Amicus curiae Texas Medical Association (TMA) is a private voluntary, nonprofit association of over 50,000 Texas physicians and medical students, in all fields of medical specialization, including in forensic pathology. TMA was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its mission is to "[i]mprove the health of all Texans." [2]

Amicus curiae National Association of Medical Examiners (NAME) is the national professional organization of physician medical examiners, medical death investigators, and death investigation system administrators who perform medicolegal investigation of deaths of public interest in the United States. NAME members provide expertise to medicolegal death investigation that is essential to the effective functioning of the civil and criminal justice systems.

Amicus curiae College of American Pathologists (CAP) is the world's largest medical society composed exclusively of pathologists, with nearly 18,000 members. Pathologists are physicians who examine tissues, blood, and other body fluids for the

[2] AMA and TMA submit this brief on their own behalves and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

purpose of medical diagnosis and patient care. Through its accreditation and proficiency testing programs, the CAP is also a leader in assuring the quality of laboratory testing: More than 7,000 laboratories are accredited by the CAP, and approximately 23,000 laboratories are enrolled in CAP's testing programs.

Amicus curiae Texas Society of Pathologists (TSP) is the oldest and largest state pathology society in the nation. Founded in 1921, the society serves over 700 practicing pathologists and trainees across the state of Texas.

The Defendant-Appellant in this case is a member of the AMA, TMA, NAME, and CAP.

SUMMARY OF ARGUMENT

Throughout the country, medical examiners carry out statutory duties that are important to the medical profession and the justice system, not the least of which is the official act of certifying the cause and manner of death after completing a death investigation. While medical examination systems vary throughout the nation, one thing is held in common: the forensic pathologist exercises medical judgment and discretion in the death investigation that leads to a professional medical opinion and determination of a cause and manner of death.

The nature of a medical opinion is just that: it is an opinion, albeit one informed by years of experience and rigorous education. Physicians may disagree with another's medical assessment, and sometimes medical opinions may change. But medical

examiners and even other publically employed physicians are able to fearlessly render medical opinions because of the protections of qualified immunity.

The district court failed to afford qualified immunity to Dr. Phatak, because it misapplied Supreme Court precedent. Under established standards, the district court should have considered whether Dr. Phatak violated a clearly established law, which was particularized to the circumstances of his case. Instead, the district court found that Dr. Phatak transgressed a broad, abstract right, thereby restricting Dr. Phatak's legal protection. Furthermore, although the district court should have examined Dr. Phatak's actions for objective reasonableness, it instead measured those actions based on the plaintiff's unsupported conclusions taken from the complaint.

The district court analogized this case to others in which the record indicated that a medical examiner had intentionally fabricated evidence. Here, though, there was no such fabrication. This case arose from a difference of opinion.

The result of the court's failures reaches further than just subjecting Dr. Phatak to unwarranted personal liability; the court's holding hinders the practice of medicine more globally. Specifically, the district court's holding will have a chilling effect on medical examiners and other physicians who will, unable to reasonably anticipate what actions will subject them to liability, act to avert liability rather than act according to medical science and their patients' best interests. The district court's failure to consider objective legal reasonableness in its qualified immunity determination, if left unchecked,

will open the door to suits for civil rights violations, which would not meet the standards of even a negligence cause of action.

The *amici curiae* accordingly respectfully request this court to reverse the district court's holding and afford Dr. Phatak qualified immunity.

ARGUMENT

I. A Physician Should not be Subject to Liability for Alleged Civil Rights Violations if the Physician Acted According to the Standard of Care.

Dr. Phatak's autopsy of Shannon Dean undisputedly came within national and local protocols and procedures. Dr. Phatak reviewed investigator reports, scene photographs, and toxicology reports, reviewed gunshot residue testing of both Shannon and Noel Dean's hands, requested and reviewed psychiatric history information on Shannon Dean, and reviewed documents that may have manifest her mental state. (Aff. of Luis A. Sanchez ¶47; R. at 16-20650.4355.) Dr. Phatak also weighed statements made by the plaintiff, noted the gunshot wound, and was confident it was a patterned injury. (Aff. of Dwayne A. Wolf ¶56, R. at 16-20650.4251.) He properly documented the gunshot wound according to NAME standards and Harris County Institute of Forensic Sciences protocols. (Sanchez Aff. ¶53; R. at 16-20650.4357.) Dr. Phatak discussed the case with law enforcement. (Aff. Of Vincent J.M. Di Maio ¶25; R. at 16-20650.3917-18.) He also discussed and reviewed his findings with the Chief Medical Examiner, Luis Sanchez, MD, and with the Deputy Chief Medical Examiner, Dwayne Wolf, MD. (Wolf Aff. ¶¶49-53; R. at 16-20650.4249-50.) Considering all these and other steps he took,

"Dr. Phatak followed the proper steps" in determining Shannon Dean's cause and manner of death, and "the actions of Dr. Phatak were proper."[3] (Di Maio Aff. ¶25; R. at 16-20650.3917-18.)

Dr. Phatak's actions reflected careful consideration of observations to form a medical opinion, and not cunning and calculation to pin a murder on the plaintiff. As with any other differential diagnosis, Dr. Phatak weighed factors and followed protocols to arrive at an informed medical opinion. One may disagree with a physician's medical opinion by arguing that the physician should have weighed some factors differently. One may also content that the physician erred and was, perhaps, negligent. But it is something else entirely to conclude that the physician acted in bad faith and arrived at an opinion through baseless or falsified premises.

In the instant case, the plaintiff essentially disagrees with Dr. Phatak's medical opinion, alleging that he did not properly weigh the likelihood of suicide (even though the record shows that he did consider that possibility (Sanchez Aff. ¶47; R. at 16-20650.4355)), relied on law enforcement (even though doing so is not only proper, but encouraged (see Wolf Affidavit, ¶39; R. at 16-20650.4246-47)), and failed to perform a side-by-side, gun-to-wound examination (even though there is no national or local

[3] Inasmuch as the duties of a physician are defined by the "standard of care"—the actions which a reasonable and prudent member of the medical profession would take under the same or similar circumstances—a conclusion that a physician's actions were "proper" is significant, suggesting that the physician indeed satisfied the physician's duty and met the standard of care. *See Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex.1977).

standard, requirement, or recommendation for doing so (see Sanchez Affidavit, ¶¶39-44; R. at 16-20650.4353-55)). But a disagreement with Dr. Phatak's medical opinion is no reason to conclude that he falsified his autopsy report. Yet, this is the very conclusion which the district court somehow reached. At best, if there were *any* misstep by Dr. Phatak in his diagnosis and formulation of his medical opinion, it would rise to no more than ordinary negligence, which cannot be the basis for a civil rights cause of action. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998).

As explained below, the district court's improper and unjustified conclusion affects not only Dr. Phatak but also undermines the practice of forensic pathology and medicine more globally.

II. Medical Examiners Rely on Qualified Immunity in Performing Important and Statutorily Required Functions.

A. Medical Examiners Render a Medical Opinion after Performing Comprehensive Testing and Investigation.

Medical examiner practice is the practice of medicine. (Wolf Aff. ¶41; R. at 16-20650.4247.) The modern forensic pathologist is a physician specially trained and experienced in performing official death investigations leading to the preparation of a report, certification of the cause and manner of death, and the provision of testimony in court. The shorthand term "autopsy" is a colloquialism for the comprehensive panoply of activities in which the forensic pathologist engages in performance of official public duties. By its very nature, this includes the formulation of opinions on the cause

and manner of a death. (Wolf Aff. ¶¶28-29; R. at 16-20650.4244-45.) The examination of the body includes not only gross dissection, but frequently also includes toxicologic analysis of fluids and often microscopic examination of tissues. "Forensic Autopsy Performance Standards," National Association of Medical Examiners (2016), p.10; R. at 16-20650.4384.

In order to fulfill statutory duties imposed upon the forensic pathologist in accordance with the National Standards of Practice, as reflected in Forensic Autopsy Performance Standards, a comprehensive approach is expected. The forensic pathologist routinely communicates with professionals of various types including law enforcement investigators, fire marshals, clinical physicians, forensic scientists, and others. ("Forensic Autopsy Performance Standards," p.7; R. at 16-20650.4381 (medical examiners "must investigate cooperatively with, but independent from, law enforcement and prosecutors."); *see also* Wolf Aff. ¶39; R. at 16-20650.4246-47.) In addition, investigative communications may include family, friends, witnesses, experts, technicians, and others. The death scene may be viewed or reenactments may be performed. Postmortem examinations and ancillary studies are performed. These range from external examination to extensive internal examination and may require gathering of trace evidence, biological samples for further testing, specialized examinations, photography, or recovery of projectiles or other objects of death. (Wolf Aff. ¶¶28-29; R. at 16-20650.4244-45.) The information is reviewed and analyzed and an opinion is formulated based upon all pertinent facts. Ultimately, a report is generated and the death

is certified as to cause and manner of death in an official certificate. *Id.* at ¶¶31-37; R. at 16-20650.4245-46.

B. Medical Examiners Play a Critical Role in Society.

There are many societal benefits of a professionally determined cause and manner of death. From a public health perspective, the medical examiner system has historically provided critical information on health trends, epidemics, institutional quality control and iatrogenic problems. *See e.g.*, Sanchez Aff. ¶¶8-10; R. at 16-20650.4347. It is critical to the criminal justice system, providing essential evidence and expert opinion necessary to the fair and equal dispensation of justice. *Id.* at ¶7; R. at 16-20650.4346; *see also* "Necessity and effect, in homicide prosecution, of expert medical testimony as to cause of death," 65 A.L.R.3d 283 §2[a] (Originally published in 1975).

C. Failure to Properly Afford Qualified Immunity Undermines the Public and Societal Benefit Medical Professionals Offer.

Because of the possibility of external pressures that forensic pathologists may face in the performance of their official duties, the pathologist must possess principled and fearless decision-making. Forensic pathologists must at times investigate and testify in cases where a public entity has been involved in the death of a person, or they may have to certify a cause or manner of death that will cause emotional discomfort or financial difficulties for a family. *See* Judy Melinek, MD ET AL., "National Association of Medical Examiners Position Paper: Medical Examiner, Coroner, and Forensic Pathologist Independence," 3 Acad. Forensic. Pathol. 93, 95 (2013), *available at*

https://netforum.avectra.com/public/temp/ClientImages/NAME/00df032d-ccab-48f8-9415-5c27f173cda6.pdf. A recent episode involving a Pennsylvania forensic pathologist—played by actor Will Smith in the Hollywood adaptation[4]—who faced pressure from even the National Football League to suppress autopsy findings further demonstrates the considerable pressure that medical examiners can face in relation to the performance of their official duties. Jeanne Marie Laskas, *Bennet Omalu, Concussions, and the NFL: How One Doctor Change Football Forever*, GQ, Sept. 14, 2009, *available at*: http://www.gq.com/story/nfl-players-brain-dementia-study-memory-concussions.

Medical examiners are able to withstand the public pressures of their position in part because of the protection offered by qualified immunity. The Fifth Circuit recognizes that removing qualified immunity entails "substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Wyatt v. Fletcher*, 718 F.3d 496, 503 (5th Cir. 2013), *citing Anderson v. Creighton*, 483 U.S. 635, 638, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). Because of the protection of qualified immunity, medical examiners have "breathing room to make reasonable but mistaken judgments about open legal questions." *Wyatt*, 718 F.3d at 503, *citing Ashcroft v. al–Kidd*, 563 U.S. 731, 743, 131 S.Ct. 2074, 2085, 179 L.Ed.2d 1149 (2011).

[4] CONCUSSION (The Cantillon Company 2015)

Medical examiners are not the only medical professionals who rely on qualified immunity to perform publically valuable duties. Thousands of other Texas physicians work in public settings like teaching hospitals, residency programs, publically owned health care facilities, prisons, and armed forces bases. These physicians, like medical examiners, further medical education. They also treat vulnerable populations. They also rely on the protections of qualified immunity in the performance of their official duties, ensuring that those who use their medical training for public service are not subjected to harassing litigation.

The district court's ruling puts all of this in jeopardy. As explained below, the misapplication of Supreme Court precedent will interfere with the medical judgment of medical examiners and other publically employed physicians and will also subject these providers to increased risk of litigation for the performance of their official duties.

III. The District Court's Holding Would Establish a Precedent that Could Harm Medicine and Patients by Interfering with Professional Medical Judgments and Providing Plaintiffs an Avenue into Court with Baseless Claims.

The United States Supreme Court has articulated pertinent considerations for determining whether a person protected by qualified immunity may be held personally liable for an allegedly unlawful official action. This determination turns on the objective reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken. *Anderson*, 483 U.S. at 639, 107 S. Ct. at 3038. Thus, "qualified immunity attaches when an official's conduct 'does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known.'" *White v. Pauly*, 137 S. Ct. 548, 551, 196 L. Ed. 2d 463 (2017), *citing Mullenix v. Luna*, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015).

The Fifth Circuit follows this precedent by performing a two-step analysis:

> In assessing qualified immunity, we engage in a two-step analysis. First, we determine whether a plaintiff has alleged the violation of a clearly established constitutional right under the current state of the law. Second, if the plaintiff has alleged such a constitutional violation, we decide whether this defendant's conduct was "objectively reasonable," measured by reference to the law as clearly established at the time of the challenged conduct. (internal citations omitted).

Pierce v. Smith, 117 F.3d 866, 872 (5th Cir. 1997), *citing Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 530 (5th Cir. 1996).

The district court did not extend qualified immunity to Dr. Phatak because it concluded that a "reasonable medical examiner would have understood that intentional fabrication of evidence violated a defendant's right to be free of a wrongful prosecution that caused his pretrial arrest and other deprivations of liberty." (R. at 16-20650.8852.)

Legally, the district court's conclusion has significant problems: it fails to follow well-established Supreme Court and Fifth Circuit precedent that requires granting qualified immunity to an official whose actions were objectively reasonable; it improperly relies for its summary judgment decision on the plaintiff's *alleged* version of the facts rather than on actual *evidence*; and it articulates an improperly broad rationale that renders the qualified immunity doctrine meaningless.

Moreover, the district court's holding raises a significant obstacle to proper medical practice. The court's inability to articulate a clearly defined right pertinent to Dr. Phatak's case created a rule that will interfere with professional medical judgment and consequently harm both physicians and patient care. The holding's disregard of Dr. Phatak's objective reasonableness also paves the way for plaintiffs to have another avenue for recourse against a physician who nevertheless acts reasonably and meets the standard of care, opening a lawsuit door that would be shut for even a simple negligence claim. Simply put, the district court's erroneous holding harms the practice of medicine, harms patients, and must be overturned.

A. The District Court's Unduly Broad and Abstract Articulation of the Applicable Clearly Established Right Test Interferes with Professional Medical Judgment because Physicians Will be Unable to Anticipate When Conduct May Give Rise to Liability.

The first prong[5] in assessing qualified immunity is to determine whether a plaintiff has alleged the violation of a clearly established constitutional right under current law. The U.S. Supreme Court has clarified that "the right the official is alleged to have violated must have been 'clearly established' in a more *particularized*, and hence more relevant, sense: The contours of the right must be sufficiently clear that a

[5] The U.S. Supreme Court has held that "judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 818, 172 L. Ed. 2d 565 (2009). While this court does not have to analyze the "clearly established right" prong first, it is "first" here only in the sense of the order of its discussion.

reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S. Ct. at 3039 (emphasis added).

The Supreme Court warns of the consequences of ignoring this requirement:

> [I]f the test of "clearly established law" were to be applied at this level of generality [applying the test only to, generally, violations of the right to due process of law], it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow* [*v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982)]. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Anderson, 483 U.S. at 639–40, 107 S. Ct. at 3039. By reasoning that the applicable "clearly established law" that Dr. Phatak is alleged to have violated was, generally, the "right to be free of a wrongful prosecution that caused [a] pretrial arrest and other deprivations of liberty," the district court committed the very error of which the Supreme Court warned, and the error will have the very result that the Supreme Court forecasted.

More specifically, the district court failed to apply the clearly established law test in a manner that was *particularized* to the facts of this case. There is no connection between Dr. Phatak's "proper" examination and the alleged violation of the right to be free from a wrongful prosecution. The *only* nexus between Dr. Phatak and this broadly stated right is the simple fact that Dr. Phatak produced an autopsy report that was later

revised. It simply does not follow from a defendant's right to be free from a wrongful prosecution that Dr. Phatak's actions were objectively unreasonable. *See Anderson,* 483 U.S. at 641, 107 S. Ct. at 3039 (where the Supreme Court held that a court of appeals misapplied the principles of clearly established laws, reasoning that the unreasonableness of the official actions in question did not immediately follow from the "clearly established law" that the appellate court articulated).

To be sure, while Supreme Court case law "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White*, 137 S. Ct. at 551, *citing Mullenix*, 136 S. Ct. at 308. No case connects Dr. Phatak's actions with the plaintiff's right to be free from a wrongful prosecution. The case which the district court cited as the supposed precedent that placed the "constitutional question beyond debate" is *Brown v. Miller*, 519 F.3d 231, 237 (5th Cir. 2008). In that case, the plaintiff alleged that he was wrongfully convicted because a laboratory technician's report "had no scientific basis and grossly overstated laboratory results, and violated standard procedures for analyzing blood-semen stains," and the lab technician "concealed, suppressed, or destroyed lab results that were conclusively exculpatory." *Id.* at 237-38. In other words, the lab technician *significantly departed from practice standards or protocols*. That is not the case here. The plaintiff here does not, as in *Brown*, demonstrate specific departures from the standard of care. In fact, quite the opposite: there is substantial evidence, outlined

above, demonstrating that Dr. Phatak abided by the standard of care. (Di Maio Aff. ¶25; R. at 16-20650.3917-18.)

i. Because of the Strained Connection between the District Court's Application of the Clearly Established Right Test and Dr. Phatak's Actions, Medical Professionals Would be Unable to Anticipate Liability

Without a reasonable connection between Dr. Phatak's actions and a violation of the clearly established law identified by the district court, medical examiners and even other physicians truly will not be able "reasonably to anticipate" exactly the actions that will subject them to personal liability. In the medical context, an inability to reasonably anticipate liability can compromise a medical examiner's judgment in two ways: (1) an examiner may practice defensive medicine and perform needless tests before classifying a death as a homicide; or (2) an examiner may avoid classifying anything as a homicide at all. Both ways hurt medicine and thus harm the public, medical professionals, and the integrity of the justice system.

In the first way, the fear and unpredictability of being sued may cause a physician to act protectively: that is, rather than basing actions on medical science and proven protocols, a medical examiner or other physician would chart a course of action that would minimize the chance of litigation. This could induce a medical examiner to undertake unnecessary tests or analyses before coming to a final determination, especially if that determination is a homicide.

Consider the instant case. Here, the court noted that Dr. Phatak failed to perform a gun-to-wound examination, even though multiple experts testified that such an

examination is not typically done, because it does not generally yield useful insights. (Di Maio Aff. ¶26; R. at 16-20650.3918; *see also* Wolf Aff. ¶56; R. at 16-20650.4251); Sanchez Aff. ¶¶39-40; R. at 16-20650.4353.) Even though a scientifically based protocol does not require a gun-to-wound examination, fear of being sued could drive medical examiners to perform such an examination before they classify any death as a homicide. Essentially, because the application of a clearly established law was not particularized to Dr. Phatak's circumstances, the connection between the violation of the court's unduly broad standard and the gun-to-wound examination is unclear. Consequently, a fear of being found in violation of that standard would induce all medical examiners to perform a superfluous test. In effect, this would mean that the district court—rather than medical science—is establishing standards of medical practice.

In the second way, the district court's holding would chill a medical examiner's classifying a death as a homicide. Even without realizing it, the examiner might err on the side of avoiding a homicide determination entirely. When other medical professionals and the justice system depend on reliable cause of death determinations performed by competent medical examiners, this result could exact undue social costs.

ii. The Particularized Clearly Established Right Test Protects the Medical Judgment of Other Physicians beyond Medical Examiners.

In another case involving civil rights actions against physicians claiming qualified immunity, this court properly articulated a clearly established right that was particular to the facts in the case, which also preserved the medical judgment of the physicians

involved. In *Sama v. Hannigan*, 669 F.3d 585 (5th Cir. 2012), a prison inmate diagnosed with cervical cancer brought an action under 42 U.S.C. §1983 alleging that a resident surgeon and the attending physician violated her Eighth and Fourteenth Amendment rights after the physicians removed her ovary and lymph nodes without her consent during a radical hysterectomy. *Sama*, 669 F.3d at 588. Though the inmate had expressly stated that she did not want her ovary removed, her health care providers had also advised her that removal of the ovary might be necessary depending on how the physicians found its condition upon beginning surgery. *Id.* In fact, the surgery did reveal that the ovary was "grossly abnormal"; the surgeons thus determined that its removal was medically necessary and in the inmate's best, long-term interest. *Id.*

When the physicians claimed qualified immunity, this court resolved the pertinent issues under the "clearly established" prong of the qualified immunity test. *Id.* at 592. Rather than analyzing the physicians' actions under a broadly articulated "liberty interest in refusing unwanted medical treatment," this court properly looked to the particularized facts of the case, holding that the plaintiff

> has not cited, and we have not located, a Supreme Court or circuit court decision holding that a violation occurred under similar circumstances, in which an inmate had consented to at least part of the treatment provided, the additional treatment was deemed medically necessary as well as necessary to complete the consented-to procedure that was underway, and the attending physicians determined that it would be potentially life-threatening to end the surgery without removing the ovary and completing the radical hysterectomy.

Id. at 594. *Sama* did not, as the district court in Dr. Phatak's case did, assume that the physicians were acting maliciously or in violation of protected rights in removing the inmate's ovary. Rather, the court recognized the role that the physicians' professional medical judgment played in their decision, reasoning that because the physicians relied on their professional judgment, they did not frustrate the inmate's prior consent to the hysterectomy. *Id.* at 593-594.

The Supreme Court has stated that if the test of clearly established law were to be applied at an abstract or high level of generality, "it would bear no relationship to the objective legal reasonableness that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3039 (internal citations omitted). This is the second problem with the district court's holding: the "clearly established law" articulated by the court bears no relationship to objective reasonableness. The consequences of the district court's failure are discussed in the next section.

B. Neglecting to Consider the Objective Legal Reasonableness of an Official's Actions Lowers the Threshold for a Civil Rights Case Below that of a Simple Negligence Action.

Even if a plaintiff alleges the violation of a clearly established law, the official "is entitled to qualified immunity if the conduct was objectively reasonable." *Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993), *citing Salas v. Carpenter*, 980 F.2d 299, 305-06 (5th Cir. 1992). "The reasonableness ... is assessed in light of the legal rules clearly established at the time of the incident in issue." *Spann*, 987 F.2d at 1114, *citing Salas* 980 F.2d at 310.

The district court did not observe any legal rules clearly established at the time of the incident, other than the broad (and factually irrelevant) principle that autopsy reports should not be falsified. Further, the court did not examine the objective reasonableness of Dr. Phatak's conduct, but merely looked at his actions with the imputed intent that the plaintiff had alleged.

In fact, the district court's reasoning hinged on its statements that "Dean *claims*" Dr. Phatak was impermissibly influenced by detectives (R. at 16-20650.8851), that "Dean *claims*" Phatak's examination was not independent because he expressed an "undetermined" cause of death was not likely (R. at 16-20650.8852), and that "Dean *further claims*" that Dr. Phatak's failure to perform a gun-to-wound comparison was substantial. *Id.*

This is the only indication of the court's analysis of Dr. Phatak's actions, even though the court itself acknowledged that it should not take the plaintiff's allegations at face value.[6] Nowhere did the court compare Dr. Phatak's actions to established protocols. And nowhere did the court take into account the testimony of other forensic scientists, who all indicated, as discussed above, that Dr. Phatak's actions met the prevailing standards of care. Also, as discussed above, if Dr. Phatak had any mistake or

[6] The court noted in its order (p. 12 n.5; R. at 16-20650.8851) Supreme Court precedent that should require the court to look at evidence. "At that earlier stage [on a motion to dismiss], it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Behrens v. Pelletier*, 516 U.S. 299, 309, 116 S. Ct. 834, 840, 133 L. Ed. 2d 773 (1996). (emphasis in original). "On summary judgment, however, the plaintiff can no longer rest on the pleadings, *see* Fed. Rule Civ. P. 56, and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the [qualified immunity] inquiry." *Id.*

misstep at all, his liability would not rise above that resulting from ordinary negligence.

As a result of the court's failure to look at objective reasonableness, the district court would subject Dr. Phatak to personal liability *notwithstanding* the reasonableness of his actions. This holding would undermine medical practice.

It is by reasonableness that physicians define their standards of patient care. The general "standard of care for a physician is to undertake a mode or form of treatment which a reasonable and prudent member of the medical professional would undertake under the same or similar circumstances." *LeNotre v. Cohen*, 979 S.W.2d 723, 727 (Tex. App. 1998), *citing Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex.1977).

Failure to meet a standard of care can subject a physician to liability under a negligence claim. Failure to meet a standard of care cannot, however, subject a physician to personal liability under a civil rights claim. *Cnty. of Sacramento*, 523 U.S. at 849, 118 S.Ct. at 1722 ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). By overlooking the objective reasonableness of an official's actions, then, the district court effectively created for plaintiffs an additional option for recourse. It would mean that the physician who cannot be sued under a traditional negligence theory (because the physician met the standard of care) may *still be* subject to civil rights liability.

Furthermore, this holding would undermine important tort reform laws that Texas enacted to minimize frivolous medical malpractice claims. These laws impose certain procedural and administrative steps to weed out baseless claims, and include,

among other protections, requirements for expert reports and certain notices and limitations on noneconomic damages. *See e.g.*, TEX. CIV. PRACT. & REM. CODE §§74.051, 74.301, and 74.351. While these requirements may discourage a plaintiff from filing a questionable professional liability claim against a physician, the district court's holding would actually *encourage* the same plaintiff to avert such onerous requirements by alleging a civil rights violation.

If not reversed, physicians will be troubled by the district court's holding, which unravels important tort reform protections that allow physicians to care for patients without dread of being subjected to dubious professional liability claims.

CONCLUSION

Dr. Phatak followed local and national protocols. He met the standard of care needed to form a medical opinion regarding the death of Shannon Dean. Notwithstanding the reasonableness of that opinion, the district court's erroneous ruling will subject him to protracted litigation and the possibility of personal liability. This court should overturn the district court's decision and afford Dr. Phatak qualified immunity for his sake and for the sake of all physicians' independent medical judgments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 5,685 words according to Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is in Garamond 14-point font.

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Date: May 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2017, I caused the foregoing Brief of American Medical Association, National Association of Medical Examiners, College of American Pathologists, Texas Medical Association, and Texas Society of Pathologists as *Amici Curiae* in Support of Defendant-Appellant to be electronically filed with the Clerk of Court using the CM/ECF filing system, which will send notice of such filing to all registered CM/ECF users.

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Date: May 2, 2017