

**NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 25-1041

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KAREN BROOKINS, Individually and  
as Administratrix of the Estate of Marcus Richard Boone,  
Appellant

v.

THE CITY OF PHILADELPHIA; DET. WALSH;  
CAPT. LUCA; P/O CHRISTOPHER CULVER

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On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
(D.C. No. 2:24-cv-00470)  
District Judge: Honorable Mark A. Kearney

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Argued on February 4, 2026

Before: HARDIMAN, MONTGOMERY-REEVES, and ROTH, *Circuit Judges*.

(Filed: May 29, 2026)

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OPINION\*

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\* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

HARDIMAN, *Circuit Judge*.

Karen Brookins appeals a summary judgment for Philadelphia Police Officer Christopher Culver. We will affirm.

I

In March 2022, Brookins’s adult son Marcus Boone tragically died after he jumped from an overpass. Officer Culver, who was on scene to keep onlookers back, used his personal cell phone to photograph Boone lying on the road below. He did so contrary to the Philadelphia Police Department’s prohibition on officers photographing crime scenes with their personal phones absent exigent circumstances. In a poor attempt at “humor,” App. 379, Culver later sent the photograph to several members of his unit. Someone later posted it to social media, which resulted in at least two people seeing the image and sending it to Brookins.

As relevant here, Brookins sued Culver under 42 U.S.C. § 1983 for a violation of her substantive due process rights and under Pennsylvania law for intentional infliction of emotional distress (IIED). The District Court granted summary judgment for Culver on both claims.

The Court first held that Culver had violated Brookins’s right to substantive due process by depriving her of a protected liberty interest in “non-interference with a family’s remembrance of a decedent.” *Brookins v. City of Philadelphia*, 2024 WL 5057606, at \*8 (E.D. Pa. Dec. 10, 2024). But it held that Culver was entitled to qualified immunity because it was “the first court in this Circuit to reach this conclusion.” *Id.* at \*7. As for the IIED claim, the Court granted judgment to Culver because “Brookins offer[ed]

no cite to her alleged distress caused by Officer Culver’s taking and circulating the photograph,” *id.* at \*18, “as opposed to the grief from her child’s self-harm,” *id.* at \*20.

This timely appeal followed.

## II<sup>1</sup>

Qualified immunity shields Officer Culver from liability on Brookins’s § 1983 claim if his conduct did not “violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Clark v. Coupe*, 55 F.4th 167, 178 (3d Cir. 2022) (internal quotation marks omitted). Brookins contends that Culver deprived her of her liberty interest in “control[ling] dissemination and exploitation of [her] close relatives’ death scene images.” Brookins Br. 12.<sup>2</sup> We assume she has defined her asserted interest “at the appropriate level of specificity.” *Rivera v. Redfern*, 98 F.4th 419, 422 (3d Cir. 2024) (internal quotation marks omitted). But even so, we agree with the District Court that the interest is not clearly established.

### A

First, there is no controlling authority from the Supreme Court or this Court that

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<sup>1</sup> The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343, and 1367(a). We have jurisdiction under 28 U.S.C. § 1291. We review the summary judgment *de novo*, viewing the facts in the light most favorable to Brookins. *Jean-Paul Weg LLC v. Dir. of New Jersey Div. of Alcoholic Beverage Control*, 133 F.4th 227, 232 (3d Cir. 2025) (citation omitted). We will affirm if there are no genuine issues of material fact and Culver is entitled to judgment as a matter of law. *Id.*

<sup>2</sup> We discuss only the asserted Fourteenth Amendment interest because Culver (sensibly) does not dispute that his conduct was conscience-shocking. *See Vargas v. City of Philadelphia*, 783 F.3d 962, 973 (3d Cir. 2015) (substantive due process violation by non-legislative action requires deprivation of protected interest in conscience-shocking manner).

places the existence of Brookins’s asserted right beyond debate. Brookins relies heavily on the Supreme Court’s decision in *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), which held that the phrase “personal privacy” as used in a disclosure exemption under the Freedom of Information Act (FOIA) included “the right of family members to . . . limit attempts to exploit pictures of [a] deceased family member’s remains for public purposes.” *Id.* at 167. *Favish* is unavailing because it established a statutory right while Brookins asserts a constitutional right. *See Elder v. Holloway*, 510 U.S. 510, 515 (1994) (“[T]he clearly established right [must] be the federal right on which the claim for relief is based.”).

Brookins also notes that *Favish* recognized a “well-established cultural tradition” of, and longstanding common law protection for, “a family’s control over the body and death images of the deceased.” *Favish*, 541 U.S. at 168. Because that right was protected at common law, Brookins says, it must also be protected by Fourteenth Amendment substantive due process.<sup>3</sup> But even if we assume that *Favish*’s historical discussion is sufficient to show that a right to control family members’ death-scene images is “deeply rooted in our history and tradition” and “essential to our Nation’s scheme of ordered

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<sup>3</sup> Brookins also suggests that qualified immunity is inapplicable to rights with a common-law heritage. She seems to contend that because qualified immunity comes from the common law, an officer’s violation of a right that also comes from the common law can never be shielded by qualified immunity. That argument disregards the fact that many of our constitutional rights existed at common law. *See e.g., Chiaverini v. City of Napoleon, Ohio*, 602 U.S. 556, 562 (2024) (reciting overlap between Fourth Amendment prohibition on unreasonable seizures and common-law tort of malicious prosecution). Yet the Supreme Court has directed us to apply the qualified immunity doctrine to violations of constitutional rights. *See, e.g., Thompson v. Clark*, 596 U.S. 36, 49 (2022).

liberty,” *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 237 (2022) (citation modified), the right would still not be clearly established. Qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law,” *Egolf v. Witmer*, 526 F.3d 104, 111 (3d Cir. 2008) (internal quotation marks omitted), so officers do not risk liability by failing to anticipate legal rulings as a lawyer might. Culver was not bound to infer from a statutory-interpretation case the existence of a substantive due process right that neither we nor the Supreme Court have ever recognized.

Brookins next cites *Wilson v. Layne*, 526 U.S. 603 (1999), where the Court held that officers violated the Fourth Amendment’s prohibition against unreasonable searches when they permitted news reporters to accompany them as they executed a search warrant. *Id.* at 614. Brookins contends that a reasonable officer should understand *Wilson* to say that officers cannot take and circulate photographs for non-law-enforcement reasons. That argument reads the case at too high a level of generality. *See District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (“[The] legal principle [must] clearly prohibit the officer’s conduct in the particular circumstances before him”). *Wilson* establishes a Fourth Amendment right against the presence of news reporters during a home search—a right far afield of the substantive due process right Brookins asserts.

*Kane v. Barger*, 902 F.3d 185 (3d Cir. 2018) is inapt for the same reason. “[A]n individual’s right not to be sexually fondled and illicitly photographed by a police officer investigating his or her case, for the officer’s own gratification,” *id.* at 195, differs markedly from the right Brookins asserts, even though both involve “invasive photographs,” Brookins Br. 23.

## B

Second, there is no “robust consensus of persuasive authority” that places Brookins’s asserted right beyond debate. *See Clark*, 55 F.4th at 181. Brookins cites many cases, but most are off base. She refers us to substantive due process cases that involve, as she puts it, “compromising or invasive photographs taken and circulated by police officers separate from any legitimate law enforcement basis.” Brookins Br. 27. But each case she cites involved photographs or nonconsensual viewing of the plaintiff’s nude body, not photographs of the plaintiff’s family member’s death scene. *See Donohue v. Hoey*, 109 F. App’x 340, 359 (10th Cir. 2004); *York v. Story*, 324 F.2d 450, 452 (9th Cir. 1963); *Ioane v. Hodges*, 939 F.3d 945, 953 (9th Cir. 2018); *Poe v. Leonard*, 282 F.3d 123, 137 (2d Cir. 2002). Like *Kane*, these cases are not sufficiently analogous.

She also points to several FOIA cases from our sister courts. *See Sikes v. U.S. Dep’t of Navy*, 896 F.3d 1227, 1238 (11th Cir. 2018); *Accuracy in Media, Inc. v. Nat’l Park Serv.*, 194 F.3d 120, 123 (D.C. Cir. 1999); *Prison Legal News v. Exec. Off. for U.S. Att’ys*, 628 F.3d 1243, 1248–49 (10th Cir. 2011). Those cases are inapt for the same reason as *Favish*.<sup>4</sup>

That leaves Brookins with three cases in which federal courts have held that the

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<sup>4</sup> Brookins also cites several state cases holding that individuals had privacy-based rights under state law to control dissemination of their family members’ death images. *See Sellers v. Henry*, 329 S.W.2d 214, 216 (Ky. 1959); *Catsouras v. Dep’t of California Highway Patrol*, 104 Cal. 3d 352, 358 (Cal. Ct. App. 2010); *Reid v. Pierce Cnty.*, 961 P.2d 333, 334 (Wash. 1998) (en banc); *Lawson v. Meconi*, 897 A.2d 740, 747 (Del. 2006). But state-law decisions do not clearly establish federal constitutional rights for qualified-immunity purposes.

interests protected by substantive due process include control over close family members' death-scene images: *Marsh v. Cnty. of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012); *Melton v. Bd. of Cnty. Comm'rs of Hamilton Cnty., Ohio*, 267 F. Supp. 2d 859, 861, 865 (S.D. Ohio 2003); and *Chesher v. Neyer*, 2004 WL 7401873, at \*5 (S.D. Ohio July 29, 2004).<sup>5</sup> One appellate decision and two decisions from district courts are not a “robust consensus.” See *Starnes v. Butler Cnty. Ct. of Common Pleas, 50th Jud. Dist.*, 971 F.3d 416, 432 (3d Cir. 2020) (citing cases holding that unanimity among six circuits is a robust consensus but unanimity among three is not).

Brookins contends that we should add to the mix a Philadelphia Police Department policy that generally prohibits officers from using their personal cell phones at crime scenes. A general prohibition of cell-phone use, however, does not put an officer on notice that taking and circulating a photograph of someone near death is a substantive due process violation, see *Hope v. Pelzer*, 536 U.S. 730, 743–44 (2002) (considering policy on use of hitching posts in case about whether officers' use of hitching post was cruel and unusual).

## C

Third, Culver's conduct was not an obvious constitutional violation that would deprive an officer of qualified immunity without precedent. Those “rare circumstances,” *Urda v. Sokso*, 146 F.4th 311, 314 (3d Cir. 2025), are not present here. A constitutional

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<sup>5</sup> Brookins also cites *Roberts v. Bell*, 281 F. Supp. 3d 1074 (D. Mont. 2018) and *Solares v. Burns*, 2024 WL 1332501 (E.D. Cal. Mar. 28, 2024). But the court in *Roberts* only assumed that the plaintiff had such a right, 281 F. Supp. 3d at 1078, and *Solares* was decided after the conduct underlying this case occurred.

violation is sufficiently obvious only when a “general constitutional rule already identified in the decisional law” is enough to clearly place certain egregious conduct beyond the pale. *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (per curiam) (internal quotation marks omitted). It is not enough that Culver’s conduct was reprehensible; it must have clearly been proscribed by the Constitution’s guarantee of substantive due process. *See, e.g., id.* at 8–9 (housing an inmate in “cells teeming with human waste” for six days without any reason obviously violates the well-established prohibition on cruel and unusual conditions of confinement).

As our discussion of the caselaw demonstrates, no constitutional rule clearly proscribes Culver’s conduct, deplorable as it was. The generally established rule is that officers may not deprive individuals of protected liberty interests in a conscience-shocking manner. *See Vargas v. City of Philadelphia*, 783 F.3d 962, 973 (3d Cir. 2015). Nothing about that general rule makes obvious that control over a loved ones’ death-scene images is a protected liberty interest.<sup>6</sup>

#### IV

Brookins also argues that her failure to cite record evidence showing emotional distress caused by the photograph did not warrant summary judgment on her IIED claim. But Rule 56(c)(1)(A) of the Federal Rules of Civil Procedure required her to support her

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<sup>6</sup> Brookins tacks on a final argument: she says Culver should not get qualified immunity because he was under no time pressure when he took and disseminated the image. Although “qualified immunity exists, in part, to protect police officers in situations where they are forced to make difficult, split-second decisions,” *Reedy v. Evanson*, 615 F.3d 197, 224 & n.37 (3d Cir. 2010), we have never limited the doctrine to cases involving time pressure.

assertions of fact with citations. And if she did not, Rule 56(e) permitted the District Court to disregard them. While it is *permissible* to consider record materials the parties fail to cite, Fed. R. Civ. P. 56(c)(3), we agree with District Court that it was “not *required* to sift through 1,500 pages of medical records.” *Brookins*, 2024 WL 5057606 at \*20 (emphasis added).

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For the reasons stated, we will affirm the District Court’s summary judgment.

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ALL RISE TRIAL & APPELLATE

*Counsel for Appellant*

Joshua Brownlie [**Argued**]  
MARSHALL DENNEHEY

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Jane L. Istvan  
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*Counsel for Appellees City of Philadelphia, Det. Walsh, and Capt. Luca*

ROTH, *Circuit Judge*, concurring in part, dissenting in part.

My position differs from the Majority's holding in two respects.<sup>1</sup> *First*, the Majority does not explicitly hold that Brookins has a constitutional privacy interest in her son's death image, it merely assumes so for purposes of the qualified immunity analysis. I, however, would hold precedentially that Brookins does have such a constitutional privacy interest. Our society has long recognized the right of families to mourn their loved ones in peace without fear of public exploitation, and this privacy interest is so deep-rooted in the history and traditions of our nation that I believe it rises to the level of a constitutional right.

*Second*, the Majority holds that even if the privacy interest asserted by Brookins does exist, Culver is entitled to qualified immunity because the right was not clearly established at the time he took the photo. I agree with the Majority that neither Supreme Court nor our Court precedent has clearly established that the privacy interest Brookins asserts has been protected by the Constitution; nevertheless, I do not believe Culver is entitled to qualified immunity because his conduct was so obviously wrongful that he should have been on notice that his actions were impermissible.<sup>2</sup> As I conclude below, when an officer, in his personal capacity, takes a photo of a death scene and disseminates the image, he violates the constitutional privacy rights of the decedent's family members.

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<sup>1</sup> I dissent in part because I agree with the Majority that Brookins cannot succeed on her IIED claim.

<sup>2</sup> See *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) ("In extraordinary cases, a broad principle of law can clearly establish the rules governing a new set of circumstances if the wrongfulness of an official's action is so obvious that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law when the official acted.") (internal quotation marks and citation omitted).

Consequently, I would hold that Culver violated Brookins’s constitutional privacy rights when he photographed Boone, as he lay on the ground dying, and then shared the photo with others.

## I.

The Supreme Court has long held that the Due Process Clause of the Fourteenth Amendment guarantees “certain areas or zones of privacy.”<sup>3</sup> Specifically, the Court has recognized two zones of privacy: (1) “the individual interest in avoiding disclosure of personal matters;” and (2) “the interest in independence in making certain kinds of important decisions.”<sup>4</sup> Brookins’s asserted privacy right would fall within the first zone because it involves the disclosure of her son’s death images.<sup>5</sup>

Although neither the Supreme Court nor our Court has yet to set forth binding precedent establishing a constitutional right to privacy in a family member’s death images, the Supreme Court in *National Archives and Records Administration v. Favish* provides a pathway for us to find that such a constitutional right exists.<sup>6</sup> There, the Supreme Court

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<sup>3</sup> *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684 (1977).

<sup>4</sup> *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977). The Supreme Court’s ruling in *Dobbs v. Jackson Women’s Health Organization* complicates the privacy jurisprudence because it eliminated the right to abortion, which the Court originally held to fall within the constitutional right to privacy. 597 U.S. 215, 302 (2022); *see also Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy . . . is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”). That said, *Dobbs* did not overturn the numerous Supreme Court cases discussing constitutional zones of privacy, and we can continue to rely on that case law to analyze the privacy right asserted in the instant case.

<sup>5</sup> *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 179 (3d Cir. 2005) (noting that the “right not to have intimate facts concerning one’s life disclosed without one’s consent” is a “venerable” constitutional right).

<sup>6</sup> 541 U.S. 157 (2004).

held in a FOIA case that the term “personal privacy” encompasses a family’s right to privacy in their relative’s death images.<sup>7</sup> The Court’s interpretation of the term was based on its understanding that Congress legislated against the background of common law, which recognized a “well-established cultural tradition acknowledging a family’s control over the body and death images of the deceased.”<sup>8</sup>

A common law right can rise to the level of a Fourteenth Amendment substantive due process right if it is “deeply rooted in this Nation’s history and tradition” and is “implicit in the concept of ordered liberty.”<sup>9</sup> A right can meet this standard when it is grounded in longstanding historical traditions, including practices that predate the founding of the United States.<sup>10</sup> While the Court in *Favish* did not discuss constitutional rights, it noted that families’ statutory privacy interest in the death images of their loved ones had “*deep[]* roots in the common law,” and can be traced back to the ancient principle that families have a personal stake in ensuring that their period of mourning is not degraded by “unwarranted public exploitation.”<sup>11</sup> The Court emphasized the depth of this principle by noting that “[b]urial rites or their counterparts have been respected in almost all

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<sup>7</sup> *Id.* at 168–70.

<sup>8</sup> *Id.* at 168.

<sup>9</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>10</sup> *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989) (plurality opinion) (providing examples from 16th century English law in support of the holding that the “institution of the family is deeply rooted in this Nation’s history and tradition”).

<sup>11</sup> *Favish*, 541 U.S. at 168 (emphasis added).

civilizations from time immemorial.”<sup>12</sup> It pointed to the example of the heroine of the ancient Greek play *Antigone* “insist[ing] on respect for the body of her brother.”<sup>13</sup>

Death rituals, customs, and laws from our country’s colonial period provide ample support for my view that dignified treatment of the dead and respect for families’ right to mourn in peace are firmly ingrained in our nation’s history and traditions. Colonial settlers from Europe, enslaved Africans, and Native Americans alike treated a loved one’s remains with respect and regarded family mourning rituals as sacrosanct.<sup>14</sup> In addition, founding-era laws strictly regulated the treatment of corpses by prohibiting their desecration and banning exhumation.<sup>15</sup> These practices and laws demonstrate that our forebears understood that the dead are sacred. This historical background compels my conclusion that family members have a constitutional privacy interest in the death images of their loved ones. The unwarranted circulation of such images, which could lead to public exploitation as happened with Boone’s death image, treats the deceased with disrespect and inflicts harm on surviving family members.

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<sup>12</sup> *Id.* at 167.

<sup>13</sup> *Id.* at 168.

<sup>14</sup> Erik R. Seeman, *DEATH IN THE NEW WORLD: CROSS-CULTURAL ENCOUNTERS, 1492-1800*, 5–6 (2010). Many of the communities present in the Americas during the colonial period maintained ritualized burial traditions as an expression of respect for the dead. For example, New England Native Americans sewed up corpses in mats made from grasses and reeds, enslaved West Africans washed and clothed corpses before burial, and English colonists shrouded the bodies of their deceased. *See id.* at 15, 96–98, 189–90. These communities also observed mourning periods that gave families the space to grieve their loved ones’ passing. *See id.* at 16, 21–24.

<sup>15</sup> *See* S. Ryan Gregory & Thomas R. Cole, *The Changing Role of Dissection in Medical Education*, 287 *JAMA* 1180, 1180 (2002); 1824 Conn. Pub. Acts ch. 16 (prohibiting disinterment of corpses); 1831 Mass. Acts 574 (banning the exhuming of bodies without proper authority).

My view that family members have a constitutional privacy interest in the death images of their loved ones is underscored by precedent. The United States Court of Appeals for the Ninth Circuit held precisely that in *Marsh v. County of San Diego*, where it invoked the Supreme Court’s reasoning in *Favish* to conclude that “family members’ privacy right in a decedent’s death images” is protected by substantive due process.<sup>16</sup> The plaintiff in *Marsh* sued the San Diego district attorney for sharing photos from her deceased son’s autopsy with news media, claiming that the disclosure of the photos violated her substantive due process right to privacy.<sup>17</sup> The *Marsh* court agreed, holding that the right fell squarely within the constitutional zone of privacy that protects an individual’s interest in “avoiding disclosure of personal matters.”<sup>18</sup> The court stated that “[f]ew things are more personal” than the death images of a family member because they reveal intimate and graphic details of the decedent’s manner of death and the way in which they suffered during their final moments.<sup>19</sup>

Much like the families in *Favish* and *Marsh*, Brookins has a privacy interest in the photo that Culver took of her son. The image captures the immediate aftermath of Boone’s fall, a profoundly disturbing scene that a decedent’s family would reasonably not want disseminated, let alone publicized. Brookins alleges that she has suffered emotional distress when strangers have shown her the image. In addition, she has stated that she continues to worry that other family members may encounter the photo on the internet.

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<sup>16</sup> 680 F.3d 1148, 1153 (9th Cir. 2012).

<sup>17</sup> *Id.* at 1152–53.

<sup>18</sup> *Marsh*, 680 F.3d at 1154 (quoting *Whalen*, 429 U.S. at 599).

<sup>19</sup> *Marsh*, 680 F.3d at 1154.

Both *Favish* and *Marsh* state that the right to privacy in a family member’s death images exists to protect against sensationalized disclosure that “degrade the rites and respect [families] seek to accord to the deceased person who was once their own.”<sup>20</sup> Culver’s dissemination of Boone’s death image to others, which directly led to the image’s publication on social media, “degrade[d] the rites and respect [Brookins sought] to accord to” Boone because it intruded upon her grief and caused her emotional distress during a time when she was entitled to mourn her son in peace.<sup>21</sup>

I would therefore hold precedentially that Culver’s actions violated Brookins’s constitutional privacy rights.

## II.

I join the Majority in finding that case law does not clearly establish the privacy interest asserted by Brookins. Nevertheless, because Culver’s conduct is so obviously wrong, I do not believe he is entitled to qualified immunity. While mindful that it is “exceedingly rare”<sup>22</sup> for an official’s wrongful conduct to be obvious despite the lack of established case law, I believe Culver’s conduct falls within one of those rare cases because of the longstanding tradition of respecting families’ ability to mourn their loved ones in peace.<sup>23</sup> Culver is not entitled to the “benefit of one liability-free violation simply because the circumstance of his case is not identical to that of a prior case.”<sup>24</sup>

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<sup>20</sup> *Marsh*, 680 F.3d at 1153 (quoting *Favish*, 541 U.S. 157 at 168).

<sup>21</sup> *Id.* (citation omitted).

<sup>22</sup> *Schneyder*, 653 F.3d at 330.

<sup>23</sup> *See Favish*, 541 U.S. at 168.

<sup>24</sup> *Thomas v. City of Harrisburg*, 88 F.4th 275, 284 (3d Cir. 2023) (internal quotation marks omitted).

When determining the obviousness of an official’s wrongful conduct, courts look to “broad rules and general principles” that would have given a reasonable official fair warning that his conduct violated the Constitution.<sup>25</sup> For example, in *Taylor v. Riojas*, the Supreme Court held that holding an inmate in a cell “teeming with human waste” was an obvious violation of the Eighth Amendment because of the principle that there is a “cruelty inherent in putting inmates in certain wantonly degrading and dangerous situations.”<sup>26</sup>

Our Court has also relied on such general principles when holding that wrongful conduct is obvious despite the lack of clearly established case law. In *Thomas*, we held that it is obvious that an officer violates an arrestee’s Fourteenth Amendment right to medical care by failing to provide treatment after the arrestee ingests a quantity of narcotics which pose a substantial health risk.<sup>27</sup> There, we relied on the general principle and well-established constitutional obligation that law enforcement must provide medical care to individuals in their custody, as recognized by both the Supreme Court and our Court.<sup>28</sup> We also relied on the local police department’s policy requiring hospital transport for arrestees who ingested dangerous quantities of narcotics as further evidence that the officers were

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<sup>25</sup> *Schneyder*, 653 F.3d at 330.

<sup>26</sup> 592 U.S. 7, 9 (2020) (internal quotation marks omitted).

<sup>27</sup> *Thomas*, 88 F.4th at 283–84.

<sup>28</sup> *Id.* at 284. See also *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989) (“[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being.”); *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 583 (3d Cir. 2003) (holding that there exists a “Fourteenth Amendment right to adequate health care while detained”).

aware of their constitutional obligations.<sup>29</sup> Thus, we held that they had sufficient notice and that their conduct violated the Constitution.<sup>30</sup>

In our case, the general principle which would have given Culver fair notice that taking the photo of Boone was obviously wrongful is the longstanding tradition of respecting families' ability to mourn in peace. As the Supreme Court noted in *Favish*, "almost all civilizations from time immemorial" have recognized the sanctity of the mourning process and the dignity owed to the dead.<sup>31</sup> We all know how difficult the death of a loved one can be, and we also know that families generally prefer to mourn without public exploitation. A reasonable official in Culver's circumstances, that is, a police officer responding to the scene of an emergency, would understand that photographing a man who had just jumped off a bridge and lay dying on the ground, and then disseminating that photo to others, is profoundly disturbing and would foreseeably cause significant distress to the man's family.

In addition, the Philadelphia police department's crime scene directive, on which all officers receive training, explicitly prohibits the use of personal cell phones at crime scenes absent exigent circumstances. The crime scene directive, like the medical care policy in *Thomas*, further supports the conclusion that Culver had fair notice of the wrongfulness of his conduct.

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<sup>29</sup> *Thomas*, 88 F.4th at 285.

<sup>30</sup> *Id.*

<sup>31</sup> *Favish*, 541 U.S. at 167–68.

A common thread in cases finding official conduct to be obviously wrongful is that the officials were not required to make split-second decisions but instead had time to reflect and deliberate before engaging in unconstitutional conduct. In *Hope*, a seminal Supreme Court case which held that tying a shirtless inmate to an outdoor hitching post without bathroom breaks was an obvious violation of the Eighth Amendment, the prison officials who engaged in the wrongful conduct had ample opportunity—nearly seven hours—to reflect on their actions and change course.<sup>32</sup> Similarly, in our case, Culver had numerous opportunities to deliberate before taking the photo. In fact, capturing the image with his camera required Culver to take a series of intentional steps. Culver then chose to send the photos to members of his unit, a deliberate decision he was not compelled to make under any time constraints. That Culver’s wrongful conduct unfolded through multiple steps, affording ample opportunity for reflection, underscores how obviously wrongful his actions were.

For these reasons, I would hold that Culver is not entitled to qualified immunity and can be held liable for violating Brookins’s constitutional privacy rights.

### III.

While I agree with the Majority that case law does not clearly establish the right to privacy in a family member’s death images, our society’s longstanding mourning traditions lead me to believe that the obvious wrongfulness of Culver’s conduct precludes his qualified immunity defense. Accordingly, I respectfully dissent in part.

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<sup>32</sup> *Hope v. Pelzer*, 536 U.S. 730, 734–35 (2002).