No. _____

In The
Supreme Court of the United States

NEW MEXICO STATE POLICE
OFFICER CHARLES VERNIER,

Petitioner,

v.

DEBRA GALLEGOS,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On May 4, 2013, Respondent Debra Gallegos was stopped at a DWI checkpoint in New Mexico. Petitioner Charles Vernier, a New Mexico State Police Officer, arrested Gallegos after observing that Gallegos performed poorly on standardized field sobriety tests. Vernier also ordered that Gallegos's blood be drawn to test it for drugs. Gallegos alleges that this blood draw violated her clearly established rights under the Fourth Amendment. In his summary judgment motion below, Vernier asserted, as a matter of undisputed material fact, that after the arrest he "read Ms. Gallegos New Mexico's Implied Consent Law, and she agreed to be tested." Gallegos did not specifically controvert this assertion of fact in the District Court—subsequently, the District Court granted Vernier's motion for summary judgment. The New Mexico Court of Appeals reversed the grant of summary judgment on Gallegos's Fourth Amendment unlawful search claim related to the blood draw. In so doing, the state appellate court charged Vernier with the burden of proving—by clear and convincing evidence—that Gallegos did not consent to the blood draw, in contravention of well-established federal case law placing the burden of disproving consent upon the plaintiff. Additionally, relying primarily on one Tenth Circuit case, the appellate court found that Vernier violated a clearly established right when he ordered hospital staff to draw Gallegos's blood. The New Mexico Supreme Court then denied certiorari.

The questions presented are:

1. Did the state appellate court err in failing to apply the standards set forth in federal case

QUESTIONS PRESENTED – Continued

law regarding 42 U.S.C. § 1983 and the qualified immunity defense thereto, particularly as to the questions of:

a) Who bears the burden of showing whether or not a plaintiff consented to an allegedly unlawful search (exacerbating a long-dormant circuit split on this issue); and

b) Whether the constitutional right at issue was "clearly established" where the Tenth Circuit opinion cited by the state court below was not sufficiently particularized to the facts of this case?

2. Did the state appellate court err in reversing the District Court's grant of qualified immunity where, as of May 4, 2013, it was not clearly unlawful for a police officer to order a blood draw under an implied-consent statute?

3. For purposes of qualified immunity, can a federal court of appeals decision constitute clearly established law?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding in the New Mexico Supreme Court, whose judgment is sought to be reviewed, are:

- Debra Gallegos, plaintiff, appellant below, and respondent here.
- Former New Mexico State Police Officer Charles Vernier, defendant, appellee below, and petitioner here.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Charles Vernier respectfully petitions for a writ of certiorari to review the judgment of the New Mexico Supreme Court.

OPINIONS BELOW

The order of the New Mexico Supreme Court denying Petitioner's petition for writ of certiorari to the New Mexico Court of Appeals is reprinted in the Appendix hereto, pp. 1-2.

The opinion of the New Mexico Court of Appeals affirming in part and denying in part the District Court's order granting Petitioner summary judgment and qualified immunity has been designated for publication and is currently available at 2018 WL 6061401. It is reprinted in the Appendix hereto, pp. 3-32.

The order of dismissal issued by the Eighth Judicial District Court for the State of New Mexico granting has not been reported. It is reprinted in the Appendix hereto, pp. 33-34.

The order of the Eighth Judicial District Court for the State of New Mexico granting Petitioner's motion for summary judgment and qualified immunity has not been reported. It is reprinted in the Appendix hereto, pp. 35-39.

JURISDICTION

The New Mexico Court of Appeals reversed in part the District Court's grant of qualified immunity to Petitioner on November 19, 2018. The New Mexico Supreme Court—New Mexico's state court of last resort—issued its decision denying Petitioner's petition for writ of certiorari to the New Mexico Court of Appeals on February 18, 2019. Accordingly, Petitioner filed this timely petition for writ of certiorari on May 20, 2019. *See* Sup. Ct. R. 13(1). This Court has jurisdiction under 28 U.S.C. § 1257(a).

Gallegos filed her 42 U.S.C. § 1983 complaint in New Mexico state district court; Vernier raised qualified immunity as a defense. Vernier did not remove this matter to federal district court based upon federal question jurisdiction, *see* 28 U.S.C. § 1331, and consequently, the appeal of this matter did not lie in any federal circuit court. However, as noted above, this Court has jurisdiction to review the state appellate court's decision under 28 U.S.C. § 1257(a). *See Howlett By and Through Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990) (stating that, under Section 1257(a), this Court has the "ultimate authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution'"); *see also Nevada v. Hicks*, 533 U.S. 353, 385 (2001) (Souter, J., concurring) (Section 1257(a) provides for Supreme Court review of "judgments or decrees rendered by the highest court of a State" where federal law is implicated).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent brought the underlying action under 42 U.S.C. § 1983, which states, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Respondent alleged that Petitioner violated her rights under the United States Constitution's Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On May 4, 2013, at approximately two o'clock in the afternoon, Plaintiff-Respondent Debra Gallegos was stopped at a DWI checkpoint while traveling on

Interstate 25 in Northern New Mexico. App. 4. Upon making contact with Gallegos, Defendant-Petitioner Charles Vernier (then an Officer with the New Mexico State Police) "observed that [Gallegos] was emitting a 'strong odor of alcoholic beverage' and had 'bloodshot[,] watery eyes.'" *Id.* Gallegos denied drinking that day but acknowledged that she had been drinking the previous night. *Id*. She informed Vernier that she "had bad allergies" and "had been diagnosed with dry eyes by [her] doctor[,]" a condition for which she used eye drops. *Id.* Gallegos agreed to submit to standardized field sobriety tests (SFSTs), on which Vernier contended Gallegos "performed . . . poorly." App. 4-5. Specifically, Vernier described Gallegos as being "unable to remain in the starting position and ha[ving] to move her foot and raise her arms for balance" during the walk-and-turn test, failing to have "smooth pursuit in both eyes" during the horizontal gaze nystagmus test, and putting her foot down during the one-leg-stand test. App. 5. Vernier arrested Gallegos for a first-offense DWI, a misdemeanor, and transported her to the local detention center, where Plaintiff agreed to submit to a breathalyzer test. *Id.*

Approximately thirty minutes after the initial stop, Gallegos completed a first breathalyzer test, which recorded a result of .000 breath alcohol content (BrAC). App. 5. Gallegos submitted to a second breathalyzer test, which also recorded a result of .000 BrAC. *Id.* Vernier then transported Gallegos to a nearby medical center where Vernier ordered hospital medical personnel to draw Gallegos's blood to test it for drugs. *Id.*

Vernier did so "[b]ased on [Gallegos's] poor performance on the" SFSTs. *Id.* When the blood test results were not immediately available, Vernier transported Gallegos back to the detention center, where she was booked for DWI. *Id*. The blood test later came back negative for both alcohol and drugs, and the DWI charge was later dismissed for failure to prosecute. *Id.*

Gallegos filed suit against Vernier under 42 U.S.C. § 1983, bringing two claims in her Complaint. App. 6. The first was for "unreasonable seizure" based on Vernier's (1) "seizing her for the crime of DWI and transporting her to a hospital after she blew a .000 [on] two breath tests[,]" (2) "causing her blood to be taken from her person without probable cause to believe that she was under the influence of drugs and without a judicially sanctioned warrant to search[,]" and (3) "transporting her back to the jail and booking her on the crime of DWI without probable cause to believe that Plaintiff was under the influence of liquor or alcohol and without a judicially sanctioned warrant." *Id.* Gallegos's second claim was for "unlawful arrest" based on Vernier "arresting her for DWI after she blew a .000 on a breath test" because he "did not have probable cause to believe that she had been driving while under the influence of alcohol or drugs." *Id.*

On October 7, 2015, Vernier filed a motion for summary judgment on Gallegos's claims, raising the defense of qualified immunity. In his Statement of Undisputed Material Facts, Vernier showed, *inter alia*, that:

> Based on [Gallegos's] poor performance of the Standardized Field Sobriety Tests, [Gallegos's] failure to follow instructions relating to the Standardized Field Sobriety Tests, [Gallegos's] strong odor of alcohol, appearance of blood-shot eyes, and the fact that [Gallegos] was driving a motor vehicle, [Vernier] determined he had probable cause to arrest [Gallegos] for violation of NMSA [1978, §] 66-8-102.

NMCA RP 31.[1] Vernier then "placed [Gallegos] under arrest for driving under the influence of intoxicating Liquor or Drugs." NMCA RP 32. Strikingly, in his summary judgment motion, Vernier affirmatively asserted that he "read Ms. Gallegos New Mexico's Implied Consent Law, *and she agreed to be tested*" (emphasis supplied). *Id.* Subsequently, Vernier transported Gallegos to a nearby medical center, "where she had her blood drawn." *Id.*; *see also* NMCA RP 42 (Affidavit of Charles Vernier setting forth the foregoing facts); NMCA RP 45 (Statement of Probable Cause filed by Charles Vernier against Gallegos). At no point in his summary judgment motion did Vernier argue that the blood draw was justified by "exigent circumstances." *See generally* RP 35-38.

In her summary judgment response, Gallegos focused on the fact that Vernier "did not seek a search warrant for a blood draw." NMCA RP 58-59, *see also*

[1] "NMCA RP" refers to the Record Proper filed in the New Mexico Court of Appeals. Petitioner cites to portions of that record herein pursuant to Sup. Ct. R. 12(7) ("In any document filed with this Court, a party may cite or quote from the record, even if it has not been transmitted to this Court").

NMCA RP 66-68. However, in her response to Vernier's Statement of Undisputed Material Facts, Gallegos did not specifically controvert Vernier's statement that she agreed to be tested after Vernier read her the New Mexico Implied Consent Act. *See generally* NMCA RP 59-60. Indeed, Gallegos admitted that she "consented to performing field sobriety tests" and that she "informed [Vernier] that she had consumed 'a couple of beers the night before' " May 4, 2013. NMCA RP 59. Instead of disputing that she had agreed to be tested, Gallegos conclusorily averred that Vernier "erroneously determined that he had probable cause" to arrest her. *Id.* At no point in either her response to Vernier's assertions of fact, her own statement of "Additional Asserted Facts," or her Affidavit in support of her summary judgment response did Gallegos affirmatively show that she did not consent to having her blood tested on May 4, 2013. *See generally* NMCA RP 58-59, 71-72.

In his summary judgment Reply, Vernier correctly noted that Gallegos had "fail[ed] to controvert virtually all of the facts in" the motion for summary judgment. NMCA RP 74. Vernier also reiterated that Gallegos consented to have a breath and blood test. *Id.*; *see also* NMCA RP 76, 79. Again, Vernier did not rely on "exigent circumstances" in justifying the blood draw. *See* NMCA RP 79. The District Court granted Vernier's motion for summary judgment on all of Gallegos's claims. *See* App. 8; *see also* NMCA RP 94-96.

Gallegos sought review of the District Court's opinion in the New Mexico Court of Appeals. Following

full briefing, on November 19, 2018, the Court of Appeals correctly found that Vernier had probable cause to arrest Gallegos, and that Vernier's failure to release Gallegos following the two breath tests did not violate clearly established law. *See generally* App. 12-18. However, the Court erroneously ruled that Vernier's blood draw of Gallegos following her arrest violated a clearly established right that existed as of May 4, 2013. *See generally* App. 19-31. The state appellate panel below found that the issue of consent to the blood draw was never litigated in the District Court. App. 20-21. Additionally, the state appellate court broadly framed the constitutional right at issue as being the right to be free from a warrantless blood draw, relying primarily on a pair of Tenth Circuit opinions arising out of a single case. *See generally* App. 22-31.

Both Petitioner and Respondent sought review by the New Mexico Supreme Court. However, on February 18, 2019, the Court denied both Vernier's petition for writ of certiorari and Gallegos's cross-petition.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE STATE APPELLATE COURT FAILED TO APPLY THE PROPER STANDARDS, FROM THIS COURT AND BEYOND, TO GALLEGOS'S SECTION 1983 CLAIM AND VERNIER'S QUALIFIED IMMUNITY DEFENSE

Qualified immunity is "the most important doctrine in the law of constitutional torts" because it shields a government official from a civil suit for monetary damages unless said official violates "clearly established" constitutional rights. John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 852 (2010); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "When a plaintiff complains that a public official has violated the Constitution, qualified immunity shields the official from individual liability unless he had fair notice that his alleged conduct would violate 'the supreme Law of the Land.'" *Echols v. Lawton*, 913 F.3d 1313, 1326 (11th Cir. 2019) (quoting U.S. Const. art. VI). "Part of the power of the qualified immunity doctrine arises from the fact that it must simply be raised as a defense by a defendant, and the plaintiffs have the burden of establishing the proof and arguments necessary to overcome it." *Strickland v. City of Crenshaw*, 114 F.Supp.3d 400, 412 (N.D. Miss. 2015) (citing *Pierce v. Smith*, 117 F.3d 866, 871-72 (5th Cir. 1997)). Law enforcement officers such as Charles Vernier are "entitled to a presumption that they are immune from lawsuits seeking damages for conduct they undertook in the course of performing their jobs."

Kerns v. Bader, 663 F.3d 1173, 1180 (10th Cir. 2011), *cert. denied*, 568 U.S. 1026 (2012). Because of the importance of qualified immunity "to society as a whole," *see Harlow*, 457 U.S. at 814, this Court often corrects lower courts when they wrongly subject individual officers to liability. *See City and Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774 n.3 (2015) (collecting cases).

"[B]y asserting the qualified-immunity defense," a Defendant "trigger[s] a well-settled twofold burden that" the plaintiff must shoulder: not only does the plaintiff need to rebut the Defendant's no-constitutional-violation arguments, plaintiff also has to demonstrate that any constitutional violation was grounded in then-extant clearly established law. *Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015) (collecting cases). The burden-shifting context of qualified immunity is unique. *See Estate of Vallina v. Petrescu*, 757 F. App'x 648, 651 n.1 (10th Cir. Dec. 4, 2018) (unpublished). The plaintiff's burden to rebut a showing of qualified immunity is a demanding standard. *See Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2474-75 (2015); *see also Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015). As discussed herein, the state appellate court improperly "ignore[d] . . . the unique briefing burdens of the nonmovant plaintiff in the qualified-immunity context," particularly as to the issue of whether plaintiff consented to the blood draw. *See Cox*, 800 F.3d at 1245; *see also Margheim v. Buljko*, 855 F.3d 1077, 1089 (10th Cir. 2017); *Snider v. Lincoln Cnty. Bd. of Cnty. Comm'rs*, 313 F. App'x 85, 91 (10th Cir. June 5, 2008) (unpublished);

Domingue v. Lafayette City Parish Consol. Gov't, 2008 WL 728654, *10 (W.D. La. Mar. 17, 2008) (unpublished) ("[d]ue to the unique burden-shifting applied in qualified immunity cases, *plaintiff bears the burden to rebut* the defendant officers' allegations that their conduct was reasonable under the circumstances") (emphasis in original).

A. The State Appellate Court Incorrectly Charged Vernier With The Burden Of Showing That Gallegos Consented To The Blood Draw

"It is . . . well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *Fernandez v. California*, 571 U.S. 292, 306 (2014) ("[a] warrantless consent search is reasonable and thus consistent with the Fourth Amendment irrespective of the availability of a warrant"); *see also Amundsen v. Jones*, 533 F.3d 1192, 1194, 1201 (10th Cir. 2008) (explaining that "a blood test conducted pursuant to valid consent does not violate the Fourth Amendment" and reversing denial of summary judgment on qualified immunity where the record established that the plaintiff voluntarily consented to a blood test). As discussed in the Statement of the Case, Officer Vernier showed that plaintiff agreed to be tested, i.e., that she consented to the blood draw. Plaintiff did not dispute this assertion, nor did she specifically state that she did *not* consent to the blood draw.

In its opinion below, the New Mexico Court of Appeals stated that "[t]he party claiming that consent to search was given must establish by clear and convincing evidence that the consent was given voluntarily." App. 19 (citing *State v. Villanueva*, 1990-NMCA-051, ¶ 22, 110 N.M. 359, 364, 796 P.2d 252, 257 ("[t]he state bears the burden of proof to establish that a consent to search was given voluntarily by clear and convincing evidence")). The court thus reasoned that Officer Vernier had the burden to prove—by clear and convincing evidence—that Gallegos consented to the blood draw. *See* App. 19-20. The court purported to analyze Vernier's "argument based on Plaintiff's alleged consent to the blood draw under standard summary judgment rules because a defense based on consent is analytically distinct from a qualified-immunity-based defense." App. 20 n.1. However, under the standards set forth in federal case law for analyzing Section 1983 claims and the qualified immunity defense thereto, the state appellate court's reasoning is wholly improper and erroneous.

Unlike in a criminal case, where the government has the burden of proving that an exception to the warrant requirement applies, the *plaintiff* in a Section 1983 case has the burden of proving that he or she did not consent to a warrantless search. *See*, *e.g.*, *Valance v. Wisel*, 110 F.3d 1269, 1278-79 (7th Cir. 1997) (adopting burden-shifting test that places ultimate burden on plaintiff; specifically, holding that if a defendant police officer produces evidence that a plaintiff consented to a warrantless search, "the plaintiff would be

required to show either that he never consented or that the consent was invalid because it was given under duress or coercion"); *Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991) (as to consent in Section 1983 action, the "ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials"); *Crowder v. Sinyard*, 884 F.2d 804, 825-26 (5th Cir. 1989) (the burden of proof "rests on the plaintiff in a section 1983 action based upon a warrantless search which defendants seek to justify under that exception to the warrant requirement"), *cert. denied*, 496 U.S. 924 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990); *Reid v. Hamby*, 124 F.3d 217 (10th Cir. Sept. 2, 1997) (unpublished table decision) ("in a § 1983 civil rights suit where, as here, the defendant has come forward with evidence that the plaintiff consented to the search, the burden falls upon the plaintiff to prove that no consent was given, or that the consent given was involuntary"); *Fortner v. Young*, 582 F. App'x 776, 782 (10th Cir. Sept. 16, 2014) (unpublished) ("the burden to show consent was involuntary rests on the plaintiff in a civil case"); *Snider*, *supra*, 313 F. App'x at 91-92; *see also Larez v. Holcomb*, 16 F.3d 1513, 1517-18 (9th Cir. 1994); *Amato v. City of Richmond*, 875 F.Supp. 1124, 1134 (E.D.Va. 1994) (plaintiff has "the ultimate burden of non-persuasion. To hold otherwise would alter the fundamental burden of proof in a civil case and would allow civil plaintiffs to prevail by simply *pleading*, rather than *proving*, that the search violated his rights") (emphasis in original), *aff'd*, 78 F.3d 578 (4th

Cir. Mar. 5, 1996) (unpublished table decision), *cert. denied*, 519 U.S. 862 (1996).

A minority of courts place this burden with Defendant, illustrating the existence of a circuit split on this issue. *Tarter v. Raybuck*, 742 F.2d 977, 980 (6th Cir. 1984) (stating without authority, in school-search case, that on consent question, "[t]he burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff"); *Tyree v. Keane*, 400 Mass. 1, 7, 507 N.E.2d 742, 746 (1987); *see also Huotari v. Vanderport*, 380 F.Supp. 645, 648 (D.Minn. 1974). Notably, "[t]he minority of cases placing the burden on the defendant tend to be much older than the majority of cases placing the burden on the plaintiff." *Der v. Connolly*, 2011 WL 31498, *2 (D.Minn. Jan. 5, 2011) (unpublished), *aff'd*, 666 F.3d 1120, 1128-29 (8th Cir. 2012). In the present case, the state appellate court not only resurrected this dormant circuit split, it enhanced the split by putting a heightened burden on Vernier to prove lack of consent by clear and convincing evidence, relying on state criminal case law as authority to do so. *See generally* App. 19-21. Of course, "employing a criminal burden of proof [in a Section 1983 civil action] is contrary to established principles governing civil trials, namely, that the ultimate risk of nonpersuasion must remain squarely on the plaintiff." *Der*, 666 F.3d at 1128 (quoting *Bogan v. City of Chicago*, 644 F.3d 563, 570 (7th Cir. 2011) (quotations and citations omitted)).

Moreover, federal—not state—common law governs a Section 1983 action. *See*, *e.g.*, *Howlett*, *supra*, 496 U.S.

at 375 (noting, in Section 1983 case, that "[t]he elements of, *and the defenses to*, a federal cause of action are defined by federal law") (emphasis supplied); *Busche v. Burkee*, 649 F.2d 509, 518 (7th Cir. 1981); *see also Martin v. Duffie*, 463 F.2d 464, 467-68 (10th Cir. 1972) ("the vindication of federal civil rights guaranteed by the Constitution is peculiarly subject to federal substantive law"). Indeed, the New Mexico Court of Appeals previously recognized as much. *See Doe v. Leach*, 1999-NMCA-117, ¶ 8, 128 N.M. 28, 30-31, 988 P.2d 1252, 1254-55 (citations omitted). More recently, in *Skidgel v. Hatch*, 2013-NMSC-019, ¶¶ 15-16, 301 P.3d 854, 856-57, the New Mexico Supreme Court acknowledged that, "as a matter of federal constitutional law," the Supremacy Clause of the United States Constitution mandates that federal substantive law controls federal questions such as the claims and defenses presented in this Section 1983 case. Quite simply, by placing with Vernier the heightened burden of affirmatively proving consent by clear and convincing evidence, the New Mexico Court of Appeals did not follow the federal common law applicable to Vernier's Section 1983 defenses.[2] At all times, it was *Gallegos*'s burden

[2] That said, even under a basic summary judgment standard, Gallegos did not demonstrate a disputed issue of fact regarding consent. Again, Vernier raised this issue in his motion for summary judgment and affidavit in support thereof, and plaintiff did not specifically controvert Vernier's assertion of fact. A non-movant's failure to respond to the movant's arguments in support of a motion constitutes a waiver and justifies granting the motion. *See*, *e.g.*, *Wojtas v. Capital Guardian Trust Co.*, 477 F.3d 924, 926 (7th Cir. 2007) (citing *Cincinnati Ins. Co. v. E. Atl. Ins. Co.*, 260 F.3d 742, 747 (7th Cir. 2001) (failure to oppose an argument

to demonstrate the violation of her constitutional right, and to demonstrate that this right was clearly established as of May 4, 2013. Gallegos did not meet either burden at any stage of this case, thus reversal is absolutely warranted.

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permits an inference of acquiescence and "acquiescence operates as a waiver")); *cf. Hagelin for President Comm. of Kansas v. Graves*, 25 F.3d 956, 959 (10th Cir. 1994) ("[b]ecause the state failed to submit any materials contradicting plaintiffs' statement of facts in support of their motion for summary judgment, these facts are deemed admitted"), *cert. denied*, 513 U.S. 1126 (1995). "As with any motion, a non-movant who does not respond to a movant's grounds for summary judgment does so at her peril and cannot complain when the district court issues an unfavorable ruling." *Lujan v. Cnty. of Bernalillo*, 2009 WL 10701188, *2 (D.N.M. Apr. 3, 2009) (unpublished) (Kelly, J., sitting by designation) (citing *United States v. Nacchio*, 555 F.3d 1234, 1247 (10th Cir. 2009) (en banc)), *aff'd*, 354 F. App'x 322 (10th Cir. Nov. 27, 2009) (unpublished). New Mexico state law is in accord. *See City of Rio Rancho v. AMREP Sw., Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414, 420 (once the moving party asserts its prima facie case for summary judgment, "the burden shifts to the non-movant to demonstrate the existence of *specific evidentiary facts* which would require trial on the merits") (emphasis supplied). Thus, the state courts below failed to follow both federal law and their own precedents in ruling that Vernier had failed to demonstrate his entitlement to qualified immunity, and as noted above, they have now exacerbated an entrenched circuit split requiring review by this Court.

B. The State Court Incorrectly Found That The Constitutional Right At Issue Was "Clearly Established," As The Tenth Circuit Opinion Cited By The State Court Below Was Not Sufficiently Particularized To The Facts Of This Case.

In its opinion below, the New Mexico Court of Appeals found that Charles Vernier violated a clearly established right when he ordered hospital staff to seize Plaintiff's blood without a warrant. However, the state court's formulation of the constitutional right at issue in this case—"the right to be free from a warrantless blood draw in the absence of exigent circumstances," *see* App. 24—is precisely the type of overbroad generalization of law that is disfavored in the qualified immunity context. In all Section 1983 cases, courts must undertake the qualified immunity analysis "in light of the specific context of the case, not as a broad general proposition." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015) (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)); *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993). Put another way, the court must enunciate "a concrete, particularized description of the right." *Hagans v. Franklin Cnty. Sheriff's Office*, 695 F.3d 505, 508 (6th Cir. 2012); *see also Spady v. Bethlehem Area Sch. Dist.*, 800 F.3d 633, 638 (3d Cir. 2015) (the right at issue must be framed "in a more particularized, and hence more relevant, sense, in light of the case's specific context").

The state court failed to heed numerous admonitions from this Court about defining "clearly established"

constitutional rights too generally. *See Mullenix*, 136 S.Ct. at 311; *see also City & Cnty. of San Francisco v. Sheehan*, *supra*, 135 S.Ct. at 1775-76; *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987). This Court's recent repeated unanimous awards of qualified immunity emphasize the narrow circumstances in which government officials may be held personally liable for their actions in suits for money damages. *See*, *e.g.*, *Taylor v. Barkes*, 135 S.Ct. 2042, 2044 (2015); *Carroll v. Carman*, 574 U.S. 13, 135 S.Ct. 348, 350-52 (2014) (per curiam); *Lane v. Franks*, 573 U.S. 228, 246 (2014); *Wood v. Moss*, 572 U.S. 744, 763-64 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 778-81 (2014); *Stanton v. Sims*, 571 U.S. 3, 9-11 (2013). The state court's formulation of the "clearly established" right at issue in this case lacks the required level of specificity and does not address the question that needs to be answered in this context because it does not describe the specific situation that the officers confronted. *See Estep v. Mackey*, 639 F. App'x 870, 873 (3d Cir. Feb. 12, 2016) (unpublished) (citing *Mullenix*, 136 S.Ct. at 309). By contrast, other courts have been far more precise in their definition of clearly established rights at issue in particular cases. *See*, *e.g.*, *Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 907-08 (4th Cir. 2016) ("[t]he constitutional right in question in the present case, defined with regard for Appellees' particular violative conduct, is Armstrong's right not to be subjected to tasing while offering stationary and non-violent resistance to a lawful seizure") (citing *Hagans*, *supra*, 695 F.3d at 509 ("[d]efined at the appropriate level of generality—a reasonably

particularized one—the question at hand is whether it was clearly established in May 2007 that using a taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force")).

In *White v. Pauly*, 137 S.Ct. 548 (2017) (per curiam), another case involving a New Mexico State Police Officer, this Court reiterated its long-standing rule that, for purposes of qualified immunity, the relevant "clearly established law" must be "particularized" to the facts of the case. *White*, 137 S.Ct. at 552 (quoting *Anderson v. Creighton*, *supra*, 483 U.S. at 640). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 137 S.Ct. at 552 (quoting *Anderson*, 483 U.S. at 639). This Court has repeatedly reaffirmed this "particularity" or "specificity" requirement in recent years. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1866-67 (2017); *D.C. v. Wesby*, 138 S.Ct. 577, 590 (2018) ("[t]he clearly established standard . . . requires a high degree of specificity") (quotations omitted); *Kisela v. Hughes*, 138 S.Ct. 1148, 1153 (2018) (per curiam) ("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue") (quoting *Mullenix*, 136 S.Ct. at 309); *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019). Indeed, this Court "has sent out unwritten signals to the lower courts that [a] factually identical or a highly similar factual case is required for the law to be clearly established." *Manzanares v. Roosevelt Cnty.*

Adult Detention Ctr., 331 F.Supp.3d 1260, 1305-06 (D.N.M. 2018) (citations omitted).

"Qualified immunity protects against novel theories of . . . Constitutional injury," as "any purported harm must stem from rights clearly established under law at the time of the incident, and the contours of that right must be sufficiently clear such that a reasonable officer would understand that his actions were violative of the right at issue." *Mendenhall v. Riser*, 213 F.3d 226, 230 (5th Cir. 2000) (citing *Anderson*, *supra*, 483 U.S. at 638-39). The correct inquiry is "whether the violative nature of *particular conduct* is clearly established" (emphasis supplied). *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). "[E]xisting precedent must have placed the statutory or constitutional question *beyond debate*" (emphasis supplied). *Id.* at 741; *see also Mullenix*, 136 S.Ct. at 308; *Stanton*, *supra*, 571 U.S. at 6. The burden is—and always has been—on Gallegos to identify a case where a police officer acting under similar circumstances as Officer Vernier was held to have violated the Fourth Amendment. *See White*, 137 S.Ct. at 552; *see also Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017); *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013). Neither Gallegos nor the state court below did so.

In *Aldaba v. Pickens*, 777 F.3d 1148 (10th Cir. 2015), the Tenth Circuit affirmed the denial of qualified immunity to police officers in an excessive force case. However, in *Pickens v. Aldaba*, 136 S.Ct. 479 (2015), this Court vacated the Tenth Circuit's opinion and remanded the case for further consideration in

light of *Mullenix v. Luna*. The Tenth Circuit then properly reversed its prior decision denying qualified immunity. *See Aldaba v. Pickens*, 844 F.3d 870 (10th Cir. 2016). Following remand from this Court, the Tenth Circuit held "that the three law-enforcement officers are entitled to qualified immunity because they did not violate clearly established law." *Aldaba*, 844 F.3d at 871. The Tenth Circuit did "not decide whether they acted with excessive force," but still "reverse[d] the district court's judgment and remand[ed] with instructions to grant summary judgment in favor of the three law-enforcement officers." *Id.* The Tenth Circuit had erred in its prior opinion "by relying on excessive-force cases markedly different from this one." *Id.* at 876. "[N]one of those cases remotely involved a situation" as that presented in the *Aldaba* case: "three law-enforcement officers responding to a distress call from medical providers seeking help in controlling a disruptive, disoriented medical patient so they could provide him life-saving medical treatment." *Id.* Similarly, in *Middaugh v. City of Three Rivers*, 629 F. App'x 710 (6th Cir. Oct. 26, 2015) (unpublished), the Sixth Circuit affirmed the denial of qualified immunity to police officers in a due process/wrongful seizure case. Subsequently, this Court vacated the judgment and remanded to the Sixth Circuit for further consideration in light of *Mullenix*. *Piper v. Middaugh*, 136 S.Ct. 2408 (2016). On remand, the Sixth Circuit panel concluded that the law was not clearly established because there was "sufficient daylight between the Officers' conduct . . . and the conduct in [the prior Sixth Circuit cases]" such that they did not "apply with obvious clarity to"

the specific conduct at issue in that case. *Middaugh v. City of Three Rivers*, 684 F. App'x 522, 530 (6th Cir. Mar. 29, 2017) (unpublished). Additionally, in *McKnight v. Petersen*, 137 S.Ct. 2241 (2017), this Court vacated a judgment of the Ninth Circuit, *Petersen v. Lewis Cnty.*, 663 F. App'x 531 (9th Cir. Oct. 3, 2016) (unpublished), and remanded for further consideration in light of *White v. Pauly*. On remand, the Ninth Circuit found that, even if the Defendant Officer had acted unreasonably, the plaintiff "failed to identify any clearly established law putting [Defendant] on notice that, under these facts, his conduct was unlawful." *Petersen v. Lewis Cnty.*, 697 F. App'x 490, 491 (9th Cir. Sept. 22, 2017) (unpublished).

In its opinion below, the state appellate panel relied heavily on the Tenth Circuit's decision in *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157 (10th Cir. 2003) (*Marshall I*)—cited to the court by Gallegos—as the "clearly established" law necessary to deny Vernier qualified immunity on the blood draw claim. *See generally* App. 22-31. The state court purported to outline the various factual similarities between *Marshall* and the present case, *see* App. 29, and further noted that the Tenth Circuit's subsequent opinion, *Marshall v. Columbia Lea Reg'l Hosp.*, 474 F.3d 733 (10th Cir. 2007) (*Marshall II*) "unequivocally established" the "unconstitutionality of a warrantless nonconsensual blood draw in New Mexico in cases where the person was arrested for misdemeanor DWI." App. 29-30. *Marshall* is not sufficiently particularized to the facts of the present case in one key respect: in *Marshall*, the plaintiff

unequivocally and affirmatively stated to hospital staff "you don't have my consent oral or written to take my blood." *Marshall I*, 345 F.3d at 1161, 1176; *see also Marshall II*, 474 F.3d at 737. A jury later "found that Mr. Marshall's actions in no way amounted to consent." *Marshall II*, 474 F.3d at 746. As discussed in the Statement of the Case, *supra*, Vernier showed—and Gallegos did not dispute—that Gallegos consented to the blood draw. As such, *Marshall* is inapposite to the facts of this case. *See United States v. Sawyer*, 441 F.3d 890, 896 (10th Cir. 2006) ("[u]nlike *Marshall*, this case does not involve an 'exigent circumstances' analysis that requires a court to weigh a state's interest against the rights of an individual defendant. . . . Instead, it involves a 'consent' analysis that does not require an examination of state law or state interests").

Similarly, in *Missouri v. McNeely*, 569 U.S. 141, 146 (2013), also cited by the state court, *see* App. 22, 26, the Respondent affirmatively refused to consent to a blood test. As with *Marshall*, *McNeely* cannot serve as the requisite "clearly established" law for this case. At issue in *McNeely* was whether the natural metabolization of alcohol in the bloodstream is necessarily an exigent circumstance justifying a warrantless search. *McNeely*, 569 U.S. at 144. The present case does not involve the exigent circumstances exception to the Fourth Amendment's warrant requirement—as such, *McNeely* is not sufficiently particularized to the facts of this case. *See Gwynn v. City of Philadelphia*, 719 F.3d 295, 302 n.2 (3d Cir. 2013); *Cornelison v. Christensen*, 2019 WL 137574, *7 (D. Idaho Jan. 8, 2019) (unpublished)

("Petitioner's reliance on *McNeely* is misplaced. Regardless of whether there were exigent circumstances in Petitioner's case that justified the warrantless blood test under the particular warrant exception discussed in that case, the blood test was reasonable under a different exception: the *consent* exception") (emphasis in original); *Davis v. Webster*, 2018 WL 1157990, *2 & n.1 (W.D. Penn. Mar. 2, 2018) (unpublished) (finding that, because *McNeely* did not involve issue of consent, it did not "place[] the statutory or constitutional question beyond debate") (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *Gold v. City of Sandusky*, 2018 WL 1468992, *10 (N.D. Ohio. Mar. 26, 2018) (unpublished); *cf. United States v. Muir*, 2015 WL 2165570, *6 (D. Md. May 7, 2015) (unpublished) (quoting *State v. Yong Shik Won*, 134 Hawai'i 59, 332 P.3d 661 (Ct. App. 2014)); *Greene v. Comm'r of Pub. Safety*, 2014 WL 2565733, *2 (Minn. Ct. App. June 9, 2014) (unpublished).

Notably, as Vernier pointed out below, *see* App. 26 n.3, *McNeely* was decided by this Court on April 17, 2013, only seventeen days before the blood draw at issue in this case. *McNeely* cannot serve as "clearly established" law of which a reasonable police officer would have been aware on May 4, 2013. Reasonable government employees are not expected to conduct "an exhaustive study of case law" in connection with their day-to-day operations. *See Meehan v. Thompson*, 763 F.3d 936, 946 (8th Cir. 2014). In *Bryan v. United States*, 913 F.3d 356 (3d Cir. 2019), U.S. Customs and Border Protection (CBP) officers searched the plaintiffs' cruise ship cabins on suspicion of drug-smuggling activity;

those searches yielded no contraband and prompted the plaintiffs to assert claims against the officers for allegedly violating their Fourth Amendment rights. *Bryan*, 913 F.3d at 358. The plaintiffs relied on a published Third Circuit case, *United States v. Whitted*, 541 F.3d 480 (3d Cir. 2008), a (then) first-of-its-kind ruling in any federal circuit involving nearly identical facts (including the exact same cruise ship) as the plaintiffs' case. *See Bryan*, 913 F.3d at 362-63. *Whitted* held that searches of cruise-ship cabins docked in the Virgin Islands after a trip to foreign ports requires reasonable suspicion under the Fourth Amendment. *Whitted*, 541 F.3d at 489-90; *Bryan*, 913 F.3d at 362. However, *Whitted* was issued on September 4, 2008, while the searches in *Bryan* occurred only days later, on September 5 and 6, 2008. *Bryan*, 913 F.3d at 363. The Third Circuit ruled that "the *Whitted* standard was not clearly established . . . on September 5 or 6," and that the CBP officers could not "reasonably be expected to have learned of this development in . . . Fourth Amendment jurisprudence" within one or two days. *Id.* "For purposes of qualified immunity, a legal principle does not become 'clearly established' the day [a Court] announce[s] a decision, or even one or two days later." *Id.* Per the example in *Bryan*, the federal and state courts must allow a reasonable amount of time for an appellate decision or new legal principle to become rooted and disseminated to government employees and officials—that did not occur here.

Additionally, as in *Marshall* and *McNeely*, the petitioner in *Schmerber v. California*, 384 U.S. 757 (1966)

refused to consent to a blood test. *Schmerber*, 384 U.S. at 759. Strikingly, in his briefing below, Vernier showed that *Marshall*, *McNeely*, and *Schmerber* were distinguishable "because those cases involved nonconsensual searches unlike the consensual search he contends occurred here." App. 30-31. However, the state court gave short shrift to this argument based upon its own flawed analysis of the consent issue (discussed in detail above). *See* App. 30-31. Even at that, a reasonable police officer in Vernier's position could have read *Schmerber* as supporting the use of a blood draw to preserve evidence of a DWI. In *Schmerber*, this Court considered the question of whether the State had violated the Fourth Amendment when it compelled an individual suspected of driving while intoxicated to submit to a blood test. This Court held that, under the circumstances, the compelled blood test was reasonable. *See Schmerber*, 384 U.S. at 771; *see also United States v. Husband*, 226 F.3d 626, 630 (7th Cir. 2000); *Ove v. Gwinn*, 264 F.3d 817, 824 (9th Cir. 2001).

This Court's decision in *Schmerber* recognized that, in view of the natural metabolization of alcohol over time and the delays that can occur in obtaining a warrant, the need to timely ascertain an individual's blood-alcohol level may present an exigency that justifies a warrantless examination. *Seiser v. City of Chicago*, 762 F.3d 647, 656 (7th Cir. 2014). In the wake of *Schmerber*, a number of courts "appear[] to have concluded that the natural dissipation of alcohol from the bloodstream, coupled with the delay associated with seeking a warrant, constituted a per se exigency that

routinely justified the warrantless administration" of blood alcohol tests. *See Seiser*, 762 F.3d at 657; *see also State v. Wagoner*, 1998-NMCA-124, ¶ 11, 126 N.M. 9, 12, 966 P.2d 176, 179. While *McNeely* purportedly "resolved the split against a rule of per se exigency in blood-alcohol cases," *see Seiser*, 762 F.3d at 657, as noted above, *McNeely* was issued only seventeen days before the blood draw at issue here, and in any event, did not concern the issue of consent.

In sum, the facts of *Marshall*, *Schmerber*, and *McNeely* do not squarely govern this case. As in *Aldaba*, the cases relied upon by the state appellate panel "differ too much from this one, so reading them would not apprise every objectively reasonable officer" that their actions would amount to excessive force. *Aldaba*, 844 F.3d at 877. As in *Aldaba*, *Middaugh*, and *Petersen*, Respondent and the state court failed to identify the necessarily particularized clearly established law putting Officer Vernier on fair notice that his conduct on May 4, 2013 was unlawful. Neither *Schmerber*, *Marshall*, nor *McNeely* would have advised "every reasonable official" in Vernier's position that his or her actions would amount to an unlawful seizure under the Fourth Amendment. At most, these cases set forth a general statement of law, not a clear and particularized articulation of a federal constitutional right as required by this Court. Without "fair notice," an officer is entitled to qualified immunity. *Sheehan*, *supra*, 135 S.Ct. at 1777. On the "clearly established" prong alone, Officer Vernier is entitled to qualified immunity on

Respondent's Section 1983 unlawful search claim, and the state court erred in deciding otherwise.

II. THE STATE APPELLATE COURT ERRED IN REVERSING THE DISTRICT COURT'S GRANT OF QUALIFIED IMMUNITY BECAUSE IT WAS NOT CLEARLY UNLAWFUL FOR AN OFFICER IN VERNIER'S POSITION TO ORDER A BLOOD DRAW FOR GALLEGOS

If the law does not put a police officer on notice that his or her conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citing *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")), *overruled in part on other grounds*, *Pearson v. Callahan*, 555 U.S. 223, 235-36 (2009); *see also Terrell v. Smith*, 668 F.3d 1244, 1255 (11th Cir. 2012); *Scott v. Baldwin*, 720 F.3d 1034, 1037 (8th Cir. 2013); *Lederman v. United States*, 291 F.3d 36, 46 (D.C. Cir. 2002). In the present case, Officer Vernier arrested Gallegos and ordered her blood to be drawn under the provisions of the New Mexico Implied Consent Act, NMSA 1978, Sections 66-8-105 to -112 (1953, as amended through 2015) ("NMICA"). NMSA 1978, Section 66-8-107(A) (1993) provides in pertinent part that

> [a]ny person who operates a motor vehicle within [New Mexico] shall be deemed to have given consent, subject to the provisions of the

> [NMICA], to chemical tests of his breath or blood *or both* . . . as determined by a law enforcement officer, or for the purpose of determining the drug or alcohol content of his blood if arrested for any offense arising out of the acts alleged to have been committed while the person was driving a motor vehicle while under the influence of an intoxicating liquor or drug.

(emphasis supplied). "A test of blood or breath *or both* . . . shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving a motor vehicle within this state while under the influence of intoxicating liquor or drug" (emphasis supplied). NMSA 1978, § 66-8-107(B) (1993). A driver may refuse to consent to such testing, but the penalty for doing so is the revocation of the driver's license "for a period of one year or until all conditions for license reinstatement are met, whichever is later." NMSA 1978, §§ 66-8-111(A), (B) (2005); *see also Martinez v. Lujan*, 2011 WL 13284668, *2 n.2 (D.N.M. July 11, 2011) (unpublished).

The state appellate panel properly found that Vernier had probable cause to arrest Gallegos. App. 12-13; *see also Martinez*, 2011 WL 13284668 at *6. Again, Vernier established—and Gallegos did not dispute—that Gallegos agreed to be tested. "Conducting a blood test [under the NMICA] to investigate a lawful arrest for DWI is reasonable where the suspect consents to the test." *West v. City of Santa Rosa*, 2008 WL 11451927, *9 (D.N.M. Feb. 8, 2008) (unpublished) (finding that

Defendant Officer was entitled to summary judgment on claim that he used excessive force in compelling plaintiff to submit to blood testing against his will). Officer Vernier's actions on May 4, 2013—taken pursuant to the NMICA—were thus not clearly unlawful, and the state appellate court erred in denying Vernier qualified immunity.

For decades, this Court has confirmed that a State's interest in combatting drunk driving is high. *See*, *e.g.*, *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2178-79 (2016); *Missouri v. McNeely*, *supra*, 569 U.S. at 159-60 (plurality op.); *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990); *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957). States continue to have a paramount interest in preserving the safety of public highways and in creating effective deterrents to drunken driving, which remains "a leading cause of traffic fatalities and injuries." *Birchfield*, 136 S.Ct. at 2178-79 (quoting *Mackey v. Montrym*, 443 U.S. 1, 17, 18 (1979)). In light of this compelling State interest, this Court often upholds "anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances." *Virginia v. Harris*, 558 U.S. 978, 130 S.Ct. 10, 11 (2009) (Roberts, C.J., dissenting from denial of certiorari); *see also Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000) (noting that in the Fourth Amendment context, the Court has upheld government measures "aimed at removing drunk drivers from the road"). Indeed, this Court is presently considering whether a warrantless blood draw of an unconscious driver—pursuant to an implied-consent statute—is an unlawful

search under the Fourth Amendment in *Mitchell v. Wisconsin*, No. 18-6210, argued before this Court on April 23, 2019.

As this Court has recognized, States protect their highways by drawing on "a broad range of legal tools to enforce their [intoxicated]-driving laws and to secure BAC [blood-alcohol content] evidence without undertaking warrantless nonconsensual blood draws." *McNeely*, 569 U.S. at 160-61 (plurality op.). Implied-consent statutes such as the NMICA are chief among these legal tools. *See id.* at 161. Blood tests are the best evidence of a driver's BAC, and it is important to administer them quickly because the level of alcohol in the blood dissipates rapidly after drinking ceases. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 623 (1989) (explaining that blood samples must be obtained "as soon as possible" so as not to "result in the destruction of valuable evidence"); *McNeely*, 569 U.S. at 170 ("the concentration of alcohol can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment") (Roberts, C.J., concurring).

Laws and regulations regularly require consent to various searches as preconditions for undertaking certain activities or enjoying certain privileges. *See*, *e.g.*, *Zap v. United States*, 328 U.S. 624, 626, 630 (1946) (FBI search authorized because contract with the Navy required contractor to open its records for inspection). Because the courts properly presume that drivers know the law that governs their conduct, *see Barlow v. United States*, 32 U.S. 404, 411 (1833), it may "be fairly

inferred from context" that voluntary conduct undertaken against the backdrop of a legal rule is best understood as according with that rule. *Birchfield*, 136 S.Ct. at 2185; *see also Breithaupt*, 352 U.S. at 435 n.2 (observing that "[i]t might be a fair assumption that a driver on the highways in obedience to a policy of the State, would consent to have a blood test made as a part of a sensible and civilized system protecting himself as well as other citizens . . . from the hazards of the road due to drunken driving"). Through the NMICA, New Mexico has presented drivers with a commonsense bargain: by choosing to exercise the privilege of driving on public roads within the State, the driver gives his or her statutory consent to breath and/or blood testing. *See* Robert B. Voas et al., *Implied-Consent Laws: A Review of the Literature and Examination of Current Problems and Related Statutes*, 40 J. Safety Research 77, 78 (2009).

"The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given to widely shared social expectations." *Georgia v. Randolph*, 547 U.S. 103, 111 (2006). Refusing to cooperate with chemical testing under an implied-consent statute can result in administrative license revocation. *See Mackey v. Montrym*, *supra*, 443 U.S. at 11-19. While drivers may withdraw their consent, they typically face civil penalties for doing so. *See Birchfield*, 136 S.Ct. at 2185. Indeed, the NMICA contains such a provision, Section 66-8-111(B), *supra*. Notably, as shown by Vernier in the state district court, Gallegos necessarily consented to the blood draw: had

she not consented, she would have lost her driver's license under Section 66-8-111(B), which did not happen. *See* NMCA RP 79.

Notably, the state court cited this Court's decision in *Birchfield*, but expressly declined to rely upon this decision "in concluding that the right violated, here, was clearly established as of the time of the warrantless blood draw in this case," given that *Birchfield* was decided in 2016. *See* App. 25 n.2. In *Birchfield*, this Court addressed blood draws occurring in the search incident to arrest and implied-consent contexts, not in the context of the exigent circumstances warrant exception so heavily discussed in the state court's opinion below. *See Birchfield*, 136 S.Ct. at 2174, 2185. This Court "was careful to note that a warrantless blood draw is still constitutionally sound where an exception to the warrant requirement applies." *Aponte v. Commonwealth*, 68 Va.App. 146, 158 n.4, 804 S.E.2d 866, 871 n.4 (2017); *see also Birchfield*, 136 S.Ct. at 2185 ("[i]t is well established that a search is reasonable when the subject consents"). As there was no dispute that Gallegos consented to the test—and as her consent was apparent under the surrounding circumstances—Officer Vernier did not engage in any "clearly unlawful" act on May 4, 2013. Consequently, he is entitled to qualified immunity.

III. THIS CASE PRESENTS AN IMPORTANT AND UNDECIDED ISSUE OF WHETHER CIRCUIT PRECEDENT CAN, FOR PURPOSES OF QUALIFIED IMMUNITY, CONSTITUTE CLEARLY ESTABLISHED LAW

In finding the existence of "clearly established law," the court below relied primarily on a pair of Tenth Circuit opinions (*Marshall I* and *Marshall II*) arising out of a single case. As previously discussed, the facts of *Marshall* do not squarely govern the particular facts of the present case. Even assuming otherwise, the state appellate court still erred by relying almost exclusively on this single circuit court case, as opposed to a robust body of case law arising out of this Court. In addition to the questions set forth above, the present case raises the question of whether any court, other than this Court, can for purposes of qualified immunity create clearly established law.

This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *D.C. v. Wesby*, *supra*, 138 S.Ct. at 591 n.8; *see also Sheehan*, *supra*, 135 S.Ct. at 1776 (assuming without deciding that "a controlling circuit precedent could constitute clearly established federal law"); *Carroll v. Carman*, *supra*, 135 S.Ct. at 350; *Reichle v. Howards*, *supra*, 566 U.S. at 665-66; *City of Escondido v. Emmons*, *supra*, 139 S.Ct. at 503. In *Taylor v. Barkes*, *supra*, this Court questioned, without deciding, whether the Third Circuit properly relied solely on its own opinions as clearly establishing a right for qualified immunity purposes

where there was "disagreement in the courts of appeals." *Taylor*, 135 S.Ct. at 2045 (2015). A number of lower courts have noted that this Court has repeatedly reserved this issue. *See*, *e.g.*, *Soto v. City of New York*, 2015 WL 3422155, *3 (S.D.N.Y. May 28, 2015) (unpublished); *Doe v. Rector & Visitors of George Mason Univ.*, 2015 WL 5553855, *19 (E.D. Va. Sept. 16, 2015) (unpublished); *Estate of Burns v. Williamson*, 2015 WL 4465088, *7 (C.D. Ill. July 21, 2015) (unpublished). This Petition gives this Court the opportunity to address this important and recurring qualified immunity issue.

CONCLUSION

Certiorari is appropriate where (as in the present case), "a state court of last resort has decided an important federal question in a way that conflicts with the decision of . . . a United States court of appeals." Sup. Ct. R. 10(b). Certiorari should be granted where, as here, "a state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c); *see also Allapattah Servs., Inc. v. Exxon Corp.*, 362 F.3d 739, 745 (11th Cir. 2004) (Tjoflat, J., dissenting) ("this case presents exactly the type of circuit split on an issue of national importance that warrants the Court's attention"), *cert. granted*, *Exxon Corp. v. Allapattah Servs., Inc.*, 543 U.S. 924 (2004), *reversed and remanded*, 545

U.S. 546 (2005). "A principal purpose for which" this Court uses its certiorari jurisdiction "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991); *see also Sheehan*, *supra*, 135 S.Ct. at 1779 (Scalia, J., concurring in part and dissenting in part) (certiorari is granted "for compelling reasons," which "include the existence of conflicting decisions on issues of law among federal courts of appeals, among state courts of last resort, or between federal courts of appeals and state courts of last resort").

Under any or all of these compelling grounds, certiorari is warranted in this case: the New Mexico Court of Appeals wrongfully denied Charles Vernier qualified immunity, and the New Mexico Supreme Court wrongfully declined to review and reverse that decision. The state court's substantive decision below conflicts with both this Court's precedents and the robust consensus of cases from across the federal circuits. The New Mexico state courts below have now exacerbated a previously-dormant circuit split regarding the proper allocation of the burden of persuasion in Section 1983 wrongful search cases. Moreover, the decision below—if left unchecked—will foster further confusion about the extent to which police officers can lawfully enforce implied-consent statutes such as the NMICA.

This Court should grant the petition for a writ of certiorari and reverse the decision of the New

Mexico Supreme Court and New Mexico Court of Appeals.

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