No. 19-1416

In the
Supreme Court of the United States

MATEUSZ FIJALKOWSKI,
Petitioner,
v.
M. WHEELER, *et al.*,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

Whether the Court should revisit its qualified immunity doctrine, which stands in derogation of over three hundred years of Western political theory and contributes to a culture of American law enforcement that tolerates and facilitates police misconduct.

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INTRODUCTION

The underlying case involved in this Petition arose from the actions of several law enforcement officers employed by the Police Department for Fairfax County, Virginia (FCPD) who responded to a call for service involving the Petitioner, Mateusz Fijalkowski. The Petitioner was working at a local pool for the summer, and during an apparent psychotic episode caused by an undiagnosed mental health condition, assaulted a patron of the pool and ignored responding police officers' attempts to investigate and address his bizarre and dangerous behavior. Ultimately, the Petitioner submerged himself in the pool in an attempt to commit suicide. While the Petitioner was submerged, an on-site lifeguard, Sean Brooks (Brooks), asked the Respondent officers for permission to jump into the water. After having observed the Petitioner's dangerous and erratic behavior, the officers instructed Brooks not to jump in at that time. Ultimately, the officers permitted Brooks to jump in and commence the rescue and several of the Respondents worked together with Brooks to pull the Petitioner from the water and resuscitate him, saving his life.

The Petitioner brought suit against the Respondents pursuant to 42 U.S.C. § 1983, claiming that the delay in his rescue constituted a Fourteenth Amendment due process violation. The Fourth Circuit Court of Appeals affirmed the dismissal of the Petitioner's Complaint at the Rule 12(b) stage, holding that the Respondents were entitled to qualified immunity on the Petitioner's claim. The Petitioner does not assign error herein to the Fourth Circuit's

holding, he instead petitions this Court to abrogate its long-standing qualified immunity precedent and do away with the doctrine altogether. For the numerous reasons stated below, the Court should deny the Petition and affirm the holding of the Fourth Circuit Court of Appeals.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Because this case was resolved at the pleadings stage, the allegations in the Petitioner's Complaint, which was attached to his Petition as Appendix C, will be taken as true.[1] In Spring 2016, the Petitioner participated in a program that enabled him to travel from his home country, Poland, to the United States to work for the summer. Appx. C, ¶ 6. Upon his arrival in the United States, the Petitioner accepted a job with American Pools, a company based in Alexandria, Virginia, as an assistant pool manager at a swimming pool in Fairfax County. Appx. C, ¶ 9. On May 30, 2016, the Petitioner was working at the swimming pool. Appx. C, ¶ 11. That afternoon, he experienced a mental health crisis as a result of suffering from bipolar disorder. Appx. C, ¶ 11, 53. The Petitioner began acting irrationally, at one point grabbing a pool patron by the arm and ripping off her armband. Appx. C, ¶ 11. Brooks, who was working as a lifeguard at the pool that day, summoned police to the pool. Appx. C, ¶ 12.

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[1] References to the Complaint will be cited herein as "Appx. C, ¶ __."

On scene, the Respondents, all of whom had been trained to deal with mentally ill persons, understood that the Petitioner was experiencing a mental health crisis and that he had grabbed a pool patron by the arm. Appx. C, ¶ 15, 21. According to the Petitioner, Brooks told the Respondents that the Petitioner could not swim. Appx. C, ¶ 16. The Respondents were unable to effectively communicate with the Petitioner because he did not speak English. Appx. C, ¶ 21-24. The Petitioner also ignored and physically avoided the officers when they approached. Appx. C, ¶ 21-24. At times while the Respondents attempted to engage the Petitioner, he inexplicably blew his lifeguard whistle. Appx. C, ¶ 24. The Respondents arranged for a Polish-speaking police officer to respond to the pool, and that officer attempted to communicate with the Petitioner in his native language, but the Petitioner refused to communicate. Appx. C, ¶ 21. One of the Respondent officers, who was a trained crisis intervention specialist, attempted to communicate with the Petitioner through the use of the Polish-speaking officer as translator, also to no avail. Appx. C, ¶ 22.

The Petitioner continued for some period of time pacing the pool deck talking to himself and praying in Polish. Appx. C, ¶ 24. While the Respondents were present, the Petitioner threw his cell phone into the pool, submerged himself in the deep end of the pool, and emerged from the pool, without assistance, with his cell phone. Appx. C, ¶ 24. On a second occasion, the Petitioner threw his cell phone into the deep end of the pool and recovered it, again submerging himself in the deep end of the pool in the process and exiting the pool without assistance. Appx. C, ¶ 24. After the

Petitioner's second submersion, a bystander began to video-record the scene on a cell phone.[2] Appx. C, ¶ 26.

After entering the pool for a third time and standing for some period in the shallow end of the pool, the Petitioner walked into the deep end of the pool and submerged himself. Appx. C, ¶ 28. The Respondents remained on the side of the pool monitoring the Petitioner. Appx. C, ¶ 30. After initially instructing Brooks not to enter the pool, the Respondents gave him permission to enter the water after the Petitioner had been submerged for two and a half minutes.[3] Appx. C, ¶ 40, 43. Brooks and two of the Respondents entered the pool and, working with several other Respondents, pulled the Petitioner out of the water. Appx. C, ¶ 46-47. The Respondents immediately began cardio-pulmonary resuscitation (CPR) and were eventually assisted by County emergency medical technicians (EMT) who arrived on scene. Appx. C, ¶ 47. The Petitioner survived and was transported to Fairfax Hospital, where he was treated for his injuries and his mental health was stabilized. Appx. C, ¶ 53-54.

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[2] The Petitioner incorporated the video into his Complaint by reference. A link to the video was also included in his Petition.

[3] The Petitioner does not allege how long he was in the water before Brooks asked to enter to attempt his rescue, nor does he allege how long after the Respondents initially told Brooks not to enter the water that he jumped in. The only available timeline is that the Petitioner was submerged for a total of two and a half minutes.

PETITION MISSTATEMENTS OF FACT

Pursuant to their Rule 15 obligation, the Respondents identify the following misstatements of fact that appear in the Petition.

1. The Petition characterizes the Petitioner's behavior with regard to the pool patron as "grabbing at the colored bracelet assigned to a swimmer at the pool." (Petition, p. 2.) However, the Petitioner's Complaint established that the Petitioner, "[i]nsist[ed] that one young woman not enter the pool, [] grabbed her by the arm and ripped off her wristband." Appx. C, ¶ 11.

Because the Fourth Circuit's justification for granting qualified immunity was based in part on the Petitioner's dangerousness to others, the Petitioner's newly censored version of events should not be accepted.

2. The Petitioner mischaracterizes his behavior with regard to entering the pool as standing quietly by the shallow end of the pool, then entering the pool once and submerging himself. (Petition, p. 2.) The Petitioner actually entered the pool on a total of three occasions, with the pool entry referenced in the Petition constituting the third such submersion. Appx. C, ¶ 24, 28.

Again, the Petitioner cannot posture himself more favorably before this Court than he did in his Complaint, wherein he admitted that prior to entering the pool and submerging himself in a way that allegedly necessitated an immediate water rescue, he had twice previously, in full view of the Respondents, submerged himself in the deep end of the pool, and

successfully resurfaced to exit the pool on his own accord.

3. The Petitioner's most significant factual omission is his failure to supply the Court with the backdrop relevant to the Petitioner's state of mind and his dangerousness to both officers and bystanders, specifically Brooks. The Petitioner admitted in his Complaint that during the incident he was "experiencing a serious mental health breakdown." Appx. C, ¶ 19. He affirmatively admitted that he was a "potential risk of harm to himself and others at the pool." Appx. C, ¶ 19. The Petitioner referred in his Complaint to the situation prior to entering the water as "the ongoing crisis posed by [his] instability." Appx. C, ¶ 22. According to the Petitioner, any reasonable person would have known that he was drowning himself. Appx. C, ¶ 34. Because the Petitioner's dangerousness was a significant factor in the Fourth Circuit's determination of qualified immunity, the Petitioner cannot simply ignore that critical information herein.

REASONS FOR DENYING THE PETITION

I. The Petition Fails to Show Any Conflict Among the Circuits on Qualified Immunity.

The Petition discusses two federal circuit cases that have considered Fourteenth Amendment Due Process claims related to law enforcement officers' actions during a water rescue, and then makes offhand reference to the circuits' "split" as to whether the defendant officers were entitled to qualified immunity. Petition, p. 4; *citing Beck v. Haik*, 234 F.3d 1267 (6th Cir. 2000) (unpublished) and *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). The Petition is unclear as to whether this is an assertion of a "circuit split" that could satisfy Rule 10 by establishing a conflict among circuits sufficient to garner this Court's review, but regardless, a review of *Beck* and *Ross* clarifies that no such conflict exists.

As an initial matter, the Petition's assertion that *Beck* and *Ross* were the only federal circuit cases that "had considered state-enhanced danger liability in the context of law enforcement officers barring qualified private rescuers from making timely water rescue attempts" is a misstatement of law. *See* Petition, p. 3. In so asserting, the Petitioner relegates the third such federal circuit case, *Andrews v. Wilkins*, 934 F.2d 1267 (D.C. Cir. 1991)[4], to a footnote and brushes it aside as factually inapposite to the Petitioner's case, asserting that it related to the officers' use of authority to *solicit a rescue* and not to *interfere in a rescue*. Petition, p. 4,

[4] *Andrews* was abrogated by *Atchinson v. Dist. of Columbia*, 73 F.3d 418 (D.C. Cir. 1996), on grounds inapplicable to the Petition.

n.1. The Petitioner's argument ignores that the officers in *Andrews* were not only alleged to have solicited the water rescue, they were alleged to have directed a would-be rescuer "not to go in the water, stating that, '[h]e's an escaped prisoner, and could be dangerous.'"[5] *Id.* at 1269.

Not only are all three cases instructive on the issue of whether it is clearly established that the Respondent officers committed a constitutional violation, they establish that the circuits are consistent in the application of qualified immunity, and there is no conflict among circuits sufficient to necessitate this Court's review.

In all three cases, the courts correctly applied the qualified immunity doctrine. The distinction among the cases with regard to qualified immunity does not

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[5] Indeed, immediately after the portion of the *Andrews* opinion quoted in the Petition, that "rather than using their authority to interfere in a private rescue, the police officers used their authority to solicit it," *Andrews* at 1271, the D.C. Circuit Court of Appeals stated, "[g]iven that they were responsible for [the citizen's] involvement, the police were entitled, if not obliged, to prevent [her] from endangering her life in the course of a police rescue effort." The Court's point is much more nuanced than the Petitioner's simple restatement. The Respondents recognize that the facts of *Andrews* are not squarely on point with the facts as alleged by the Petitioner, because the Respondents did not solicit Brooks' assistance in their rescue, as he was already on the pool deck. That said, the facts of *Andrews* are certainly more similar to the instant case than either *Beck* or *Ross*, both of which involved the water rescue of an individual that did not pose a threat to others. That the Fourth Circuit specifically highlighted similarities between this case and *Andrews* when compared to *Beck* and *Ross* makes the Petitioner's cursory treatment of *Andrews* even more disingenuous.

arise, as the Petitioner suggests, from a misapplication of the standard. Rather, the distinction lies in the courts' application of the specific facts of the case to that proper agreed-upon standard, which led to disparate conclusions.

In *Ross*, the Seventh Circuit Court of Appeals denied qualified immunity to a law enforcement officer who was alleged to have both verbally and physically prevented the private rescue of a drowning 12-year old boy, resulting in his death. *Ross*, 910 F.2d at 1425. In so holding, the court properly applied this Court's qualified immunity doctrine, and identified two Seventh Circuit cases that clearly established in that circuit that the officer had committed a constitutional violation.[6] *Id.* at 1432. Thus, according to the Seventh

[6] Of significance, twenty-five years after its *Ross* decision, and prior to the events that led to this case, the Seventh Circuit clarified in *Doe v. Vill. of Arlington Heights*, 782 F.3d 911 (7th Cir. 2015), that the violation found in *Ross* was based upon two key facts: that the officer had not simply verbally instructed the private rescuers not to get into the water, but had (1) threatened to arrest the individuals who attempted a private rescue, and (2) physically blocked the private rescuers when they attempted to launch their rescue over his objections by placing his boat in their way. *Id.* at 918. According to the court, these two operative facts constituted the affirmative action sufficient to trigger the Due Process Clause. *Id.* Of note, in *Doe* the Seventh Circuit ruled that a law enforcement defendant was entitled to qualified immunity after allegedly leaving a highly intoxicated juvenile female in the company of three males seen dragging her to a secluded area of an apartment complex, lying to dispatch that no subjects were on scene, and preventing a second officer from responding. *Id.* at 913. The girl was subsequently sexually assaulted. *Id.* Immunity was granted even considering *Ross* as prior controlling authority in the circuit. *Id.* ("This is not a case in which Doe was safe, or even considerably safer, before [the officer] acted. His alleged conduct

Circuit, it was clearly established that a law enforcement officer who "cut[] off private avenues of lifesaving rescue without providing an alternative" committed a due process violation. *Id.* at 1432.

In *Beck*, 234 F.3d 1267, the Sixth Circuit granted qualified immunity to an officer alleged to have delayed a water rescue for over an hour, when a private rescue would have been able to assist within 20 minutes of the individual's entry into the water.[7] *Id.* at *1. In so holding, the court found that no Sixth Circuit precedent established the law with regard to government officials' obligations during a water rescue. *Id.* at *7. The court then considered the prior Seventh Circuit *Ross* decision in an effort to determine clearly established law, but the court found that *Ross* was insufficient to negate the officers' entitlement to immunity. *Id.*

In another misstatement of law, the Petitioner asserts that the *Beck* court found "that such conduct constituted a violation of the victim's substantive due process rights." Petition, p. 3-4. This is patently untrue. In *Beck*, the Sixth Circuit granted qualified immunity to the individual officers without deciding whether their actions constituted a due process violation. *Beck*, 234 F.3d at *6 ("The district court held

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did not turn a potential danger into an actual one; Doe was in actual danger already.").

[7] Irrelevant herein, the court denied the municipality defendants' motions for summary judgment, holding that the jury could find that the government had committed a due process violation through its allegedly arbitrary policy prohibiting private water rescue efforts, which ultimately caused the man's death. *Id.* at *4.

that even if the actions of these defendants violated the decedent's constitutional rights, the two individuals are protected from suit under the doctrine of qualified immunity. We agree.").[8]

In *Andrews*, 934 F.2d 1267, the court held that a law enforcement officer who prevented a trained private rescuer from assisting a man drowning in the Washington Channel, resulting in the man's death, did not commit a due process violation. The court further opined that the officer would be entitled to qualified immunity even if a constitutional violation had been sufficiently alleged. *Id.* at 1271. In considering whether the law was clearly established for purposes of its qualified immunity analysis, the court distinguished the facts of the case from those of *Ross*, stating:

> [S]everal factors distinguish *Ross* from the case at hand. First, in *Ross*, well-equipped, would-be rescuers had already arrived at the scene and were preparing to begin rescue efforts when the Deputy Sheriff arrived and ordered them to desist. The Deputy Sheriff in *Ross* directly and physically prevented these rescue efforts, ordering all persons on the scene to cease such efforts, threatening to arrest scuba divers who said they would attempt the rescue at their own risk, and positioning his boat so that scuba divers were unable to enter the water. *Ross*, 910

[8] The Fourth Circuit below also articulated this distinction. *Fijalkowski v. Wheeler, et al.*, 801 Fed. App'x 906, 913 (4th Cir. 2020) (recognizing that in *Beck* the Sixth Circuit stated that *Ross* "pointed to" the conclusion that a due process violation had occurred without determining that it had actually happened).

> F.2d at 1424. Thus, the Deputy used his authority as a state actor to intrude into a purely private rescue effort.

Id. at 1271.

An additional distinction exists between *Andrews* on the one hand, and *Ross* and *Beck* on the other hand; the drowning man in *Andrews* was a fleeing criminal suspect, which the court considered in determining whether the defendant officers should have been concerned about his irrational behavior in determining how to best effectuate his rescue. *Id.* at 1271.

Consideration of these three opinions reveals that they do not create a conflict among circuits with regard to this Court's qualified immunity doctrine for officers engaged in a water rescue. Quite the opposite, they reveal that the circuit courts deciding the cases properly applied the qualified immunity analysis to the specific facts of each case and made a ruling based upon that reasoned analysis. As such, no conflict exists among the circuits with regard to qualified immunity such that the Petition should be granted.

II. Because the Fourth Circuit Properly Applied This Court's Qualified Immunity Doctrine, the Petition Fails to Establish A Conflict Between the Fourth Circuit's Decision and This Court's Precedent.

The Fourth Circuit properly affirmed the District Court's dismissal of the Complaint on qualified immunity grounds without evaluating whether the Petitioner had sufficiently alleged a due process violation, in accordance with *Pearson v. Callahan*, 555

U.S. 223 (2009). In holding that the Respondents were entitled to qualified immunity for their actions in addressing the Petitioner's attempted suicide by drowning, the Fourth Circuit decided the issue in conformity with this Court's framework for determining the existence of clearly established law, and there is no conflict between the decision below and this Court's prior decisions.

This Court recently reiterated the standard for determining whether a law is "clearly established" such that a government official is not entitled to qualified immunity, stating that "existing law must have placed the constitutionality of the officer's conduct 'beyond debate.'" *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) *quoting Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). For a law to be "clearly established," it must be "dictated by 'controlling authority' or 'a robust consensus of cases of persuasive authority.'" *Id.* at 589-90 *quoting al-Kidd*, 563 U.S. at 741-42.[9]

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[9] This Court has at times viewed the "robust consensus" avenue to clearly established law with disfavor. *See, e.g., City of Escondido, Cal. v. Emmons*, 139 S. Ct. 500 (2019) ("Assuming without deciding that a court of appeals decision may constitute clearly established law for purposes of qualified immunity . . . ."); *Taylor v. Barkes*, 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015) ("to the extent that a 'robust consensus of cases of persuasive authority' " in the Courts of Appeals "could itself clearly establish the federal right respondent alleges . . ."); *Reichle v. Howards*, 566 U.S. 658 (2012) ("Assuming arguendo that controlling Court of Appeals' authority could be a dispositive source of clearly established law in the circumstances of this case . . . ."). The Fourth Circuit utilized the *Wesby* standard, which favors the Petitioner by providing the possibility of clearly established law outside of U.S. Supreme Court precedent.

The Fourth Circuit delineated the various bases outlined above upon which qualified immunity is unavailable to government officials, including (1) the existence of controlling authority, (2) a "robust consensus of persuasive authority,"[10] or (3) patently violative conduct negating the necessity for prior authority.[11] *Fijalkowski*, 801 Fed. App'x at 910.

As to the first basis, the court found that no controlling authority exists that would have "plac[ed] the constitutionality of the officers' conduct beyond debate." *Id.* at 911. With regard to the second basis, the Fourth Circuit considered the three main cases across the federal circuits addressing law enforcement officers actions during water rescues, *Beck*, *Ross*, and *Andrews*, and concluded that they did not establish a "robust consensus" of authority.[12] *Id.* ("The officers

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[10] C*iting Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 544 (4th Cir. 2017).

[11] Worthy of mention here, the Petitioner conflates the above qualified immunity doctrine with the "split-second decision" language in *Graham v. Connor*, 490 U.S. 386 (1989), that is part of the standard for judging the reasonableness of an officer's use of force, arguing that the Respondents are not entitled to qualified immunity because they were not engaged in split-second decision-making in addressing the Petitioner's suicide attempt. (Petition, p. 2.) While it is true that often law enforcement officers who use force in rapidly evolving circumstances by taking "split-second" action are entitled to qualified immunity, entitlement to qualified immunity does not require split-second decision-making. *See Graham*, 490 U.S. at 399, n. 12 ("no claim of qualified immunity has been raised in this case").

[12] The Petitioner's allusion to *Beck* and *Ross* creating a "split" between the circuits on the issue of qualified immunity cuts against any argument that the Fourth Circuit incorrectly decided

contend that together, these cases fail to provide a consensus, let alone a robust consensus, that would have given them fair warning that their conduct violated [Petitioner's] substantive due process rights. We agree.").[13]

The Fourth Circuit found that the most factually similar case of the three water rescue cases was *Andrews*, which as in this case involved an individual exhibiting bizarre behavior that officers believed posed a danger to the would-be private rescuer. *Id.* at 913. This, according to the court, created a markedly different factual scenario when compared to *Beck* and *Ross*, both of which involved water rescues of non-dangerous individuals who had accidentally fallen into the water.

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the "robust consensus of authority" question, as by its very terms the alleged "split" asserted by the Petition would fail to support any alleged "consensus." *See Taylor*, 135 S. Ct. at 2045 (calling into question the theory that a right could be "clearly established" by circuit precedent despite disagreement in the courts of appeals).

[13] In both the District Court and the Fourth Circuit, the Respondents also relied on several cases across the circuits that have addressed due process liability in the context of government response to suicidal individuals. *See, e.g.*, *Haberle v. Troxell*, 885 F.3d 170 (3d Cir. 2018) (finding no due process violation as a matter of law); *Cutlip v. City of Toledo*, 488 F. App'x 107, 116 (6th Cir. 2012) (finding no due process duty to intervene in a suicide attempt); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003) (finding no due process violation in police standoff that resulted in decedent's suicide.). The Fourth Circuit reached its decision without need for these cases, however, the Respondents assert herein that they remain relevant to the qualified immunity inquiry, as they establish that the consensus among the circuits is that officers generally have no due process obligations to suicidal persons who are not in law enforcement custody.

Finally, the Fourth Circuit addressed, and rejected, the Petitioner's assertion that the Respondents "so patently violated" the Petitioner's due process rights that "closely analogous caselaw" was not required. *Id.* The court stated, "the officers were aware that [Petitioner's] inability to swim and his mental state made him a risk of danger to others. And, they had seen him enter and exit the pool twice before on his own." *Id.* Combined with the fact that here the Respondents delayed the Petitioner's rescue for no more than two and a half minutes, "far less than the amount of time that had elapsed in *Ross*, *Beck*, and *Andrews*," the court held that no "patently arbitrary assertion of power" had been exerted by the Respondents. *Id.*

Thus, in determining that the Respondents were entitled to qualified immunity, the Fourth Circuit followed this Court's precedent for qualified immunity analysis to the letter, and properly concluded that the Respondents were entitled to immunity. By affirmatively admitting that the Respondents were not dealing with an individual who was accidentally drowning, as in *Beck* and *Ross*, but a suicidal individual in the midst of a psychotic episode, who had already proven dangerous to others at the pool, the Petitioner himself established that the Respondents were required to take into account not only the danger to the Petitioner, but also the Petitioner's danger to Brooks. According to the Fourth Circuit, these competing safety concerns placed this case squarely within the *Andrews* analysis, to the exclusion of both *Beck* and *Ross*, and justified the Respondents' instruction that Brooks delay rescue for a short time

until it was safest for him to enter the water. *Id.* at 913.[14]

In other words, the Petitioner placed on the face of his Complaint the facts necessary to establish the Respondents' entitlement to qualified immunity, and the Fourth Circuit's well-reasoned affirmance of the dismissal of the Complaint does not form the basis for this Court's review.

III. The Petition's Attack on Qualified Immunity Should Be Rejected.

The Petitioner's Question Presented highlights that, at base, he does not contend that the Fourth Circuit Court of Appeals committed error in determining that the Respondents were immune from his constitutional claim, but instead seeks to be a vehicle through which the Petitioner hopes to abolish this Court's long-standing qualified immunity precedent.

A. This Court has recently and decisively refused to reconsider or abrogate qualified immunity.

As mentioned by the Petitioner, this Court has recently rejected a number of Petitions for a Writ of Certiorari that include pleas for this Court to revisit, or abrogate, the doctrine of qualified immunity.[15] In so

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[14] While not necessarily relevant to the Fourth Circuit's analysis, it bears mentioning here that the Respondents made the right decision. Brooks was unharmed during the rescue and the Petitioner was revived and survived his attempted suicide.

[15] As listed in the Petition, recently this Court denied certiorari in the following cases challenging qualified immunity on principle:

deciding, this Court has communicated a clear lack of interest in abolishing, or even reviewing, qualified immunity, the abolishment of which is precisely what the Petitioner herein seeks. *But see Baxter v. Bracey*, __ S. Ct. __; 2020 WL 3146701 (2020) (J. Thomas, dissenting).

The Petition seeks support through invocation of Congress' current legislative proposals with regard to qualified immunity, however, this argument is unavailing. (Petition, p. 7.) A recent law review article addresses this Court's treatment of the qualified immunity defense, referring to it as "emphatic, frequent, longstanding, and nonideological." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1858 (2018). Therein, the authors highlight that Congress has amended Section 1983 in the modern era of qualified immunity without altering government actors' entitlement to qualified immunity therein. *Id.* In fact, Congress has repeatedly enacted legislation

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Zadeh v. Robinson, 928 F.3d 457 (5th Cir. 2019), *cert. denied*, 2020 WL 3146691 (2020); *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), *cert. denied*, 2020 WL 3146693 (2020); *West v. City of Caldwell*, 931 F. 3d 978 (9th Cir. 2019), *cert. denied*, 2020 WL 3146698 (2020); *Mason v. Faul*, 929 F.3d 762 (5th Cir. 2019), *cert. denied*, 2020 WL 3146722 (2020); *Anderson v. City of Minneapolis*, 934 F.3d 876 (8th Cir. 2019), *cert. denied*, 2020 WL 3146690 (2020); *Jessop v. City of Fresno*, 918 F.3d 1031 (9th Cir. 2019), *cert. denied*, 2020 WL 2515813 (2020); *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019), *cert. denied*, 2020 WL 2515455 (2020); *Clarkston v. White*, 943 F.3d 988 (5th Cir. 2019) (per curiam), *cert. denied*, 2020 WL 2515530 (2020); *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, 2020 WL 3146690 (2020); *Brennan v. Dawson*, 752 F. App'x 276 (6th Cir. 2018), *cert. denied*, 2020 WL 3146681 (2020).

that expands the availability of immunity to additional individuals. *Id. citing* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, §309(c), 110 Stat. 3847, 3853; 6 U.S.C. § 1104(b)(1) (providing qualified immunity to officials who report suspected terrorist activity); 14 U.S.C. § 645 (providing qualified immunity in the context of medical quality assurance records). Thus, the article concludes, "if the United States as a society does not want qualified immunity, Congress should enact new legislation."[16] *Id.* at 1859. This is precisely the proper vehicle by which any abrogation of qualified immunity should occur.

B. Qualified immunity is strongly supported by *stare decisis* and is necessary for the reasons set forth in the Court's ample jurisprudence on this issue.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

The availability of qualified immunity to government actors accused of committing constitutional violations in Section 1983 cases has been widely and recently affirmed by this Court. In addition to this Court's recent denials of *certiorari* in qualified

[16] Indeed, if Congress intends to abolish qualified immunity, they will accomplish that objective through passage of the current legislative proposals.

immunity cases, referenced *supra*, recent jurisprudence from this Court substantively addressing qualified immunity evidences a strong precedent supporting government officials' protection through qualified immunity. *See, e.g., Emmons*, 139 S. Ct. 500; *Kisela v. Hughes*, 138 S. Ct. 1148 (2018); *Wesby*, 138 S. Ct. 577; *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *Cty. of Los Angeles, Cal. v. Mendez*, 137 S. Ct. 1539 (2017); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullinex v. Luna*, 136 S. Ct. 305 (2015); *Taylor*, 575 U.S. 822; *City and Cnty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015).

Indeed, on multiple occasions in the past several years, this Court has seen fit to overturn circuit courts that deny qualified immunity to government officials based upon a flawed application of this Court's qualified immunity framework. *See Emmons*, 139 S. Ct. 500; *Kisela*, 138 S. Ct. 1148; *Wesby*, 138 S. Ct. 577; *Mendez*, 137 S. Ct. 1539; *White*, 137 S. Ct. 548; *Mullinex*, 136 S. Ct. 305.

The Petition also flatly ignores that qualified immunity is available and appropriate for government actors other than law enforcement officers, inexplicably asserting that the Court should do away with the doctrine altogether because of current events related to law enforcement officers' use of force. *See, e.g.*, *O'Connor v. Donaldson*, 422 U.S. 563, 577 (1975) (recognizing qualified immunity for the superintendent of a state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (discussing qualified immunity for school officials), *abrogated by Harlow v. Fitzgerald*, 457 U.S.

800 (1982)(granting qualified immunity to presidential aides).

The Petitioner's argument against qualified immunity simply fails to overcome this Court's strong support for the doctrine and offers no basis upon which this Court should reconsider or abolish it.

CONCLUSION

The Fourth Circuit's decision, which constituted a proper qualified immunity review and does not conflict with other circuits, or with this Court's ample qualified immunity precedent, does not warrant a review of this case. Accordingly, the Respondents respectfully request that this Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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