No. _____

In the Supreme Court of the United States

TAMMY KORTHALS, *Petitioner*

v.

BRADLEY STROZESKI, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether non-decisional evidence must be considered when determining the protections of qualified immunity for a police officer as originally held in *Hope v. Pelzer*, 536 U.S. 730 (2002).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tammy Korthals respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit as to the denial for rehearing is available at 2020 U.S. App. LEXIS 3466. The United States Court of Appeals Sixth Circuit's prior opinion, which reversed the denial of qualified immunity to Respondent Bradley Strozeski is reported at 2020 U.S. App. LEXIS 1373. The district court's decision denying the motion for summary judgment as to qualified immunity is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on January 13, 2020. Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Sixth Circuit on February 4, 2020. This Court extended time to file this Petition to July 3, 2020 based upon its Order dated March 19, 2020 in light of public health concerns relating to COVID-19. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983 reads, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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…

STATEMENT

A. Factual Background

Petitioner Ms. Tammy Korthals sustained a horrific fall, causing among other injuries a closed head injury, while in the custody of respondent Strozeski, a police officer with the Huron County Sheriff's Department. (A16). At the time of her fall, Ms. Korthals, who was handcuffed behind her back with obvious stability issues and medically deemed to be in an intoxicated condition with a known blood alcohol concentration (BAC) of .41, was ordered by respondent Strozeski to climb steps within the Huron County Sheriff's Department without any assistance. (A15-A16).

Prior to Ms. Korthals' fall, respondent Strozeski, who was the arresting officer, was initially made aware of her highly intoxicated condition at the arrest scene. (A14-A16). In fact, respondent Strozeski ordered a second preliminary breath test (PBT) after the first PBT read .346 as he believed something was wrong with his PBT reader given such a high reading. (A14). The second PBT was even higher as it read .357, which left respondent Strozeski, along with the other officers present on the scene, shocked by these extremely high readings. (A14). In response to the .357 PBT reading, respondent Strozeski admitted that Ms. Korthals was highly intoxicated and that a .357 PBT would result in stability problems. (A16, A20).

After the completion of the PBT tests, respondent Strozeski ordered Ms. Korthals to undergo field sobriety tests which further evidenced that she was highly intoxicated with stability issues. (A14). Specifically, Ms.

Korthals, who was not handcuffed at the time, could not keep her balance during instructions, used her arms to balance, lost balance while turning, and could not even complete some of the tests. (A14). Ms. Korthals was subsequently arrested for operating under the influence, handcuffed behind her back, and placed into the backseat of respondent Strozeski's patrol vehicle. (A15). The last thing that Ms. Korthals recalls is being handcuffed, but she does not recall anything further as "she started to blackout." (A15).

Respondent Strozeski subsequently transported Ms. Korthals to Schuerer Hospital where he was informed that her BAC was a .41. (A15). After the BAC was identified, Ms. Korthals was medically cleared to be released into the custody of respondent Strozeski, but it was noted that she was in an "intoxicated condition." (A15). With regard to Ms. Korthals' obvious intoxicated condition, respondent Strozeski testified that a person with this high of blood alcohol level, referring to the .41, could possibly hurt themselves and might not be able to care for themselves. (A16).

Moreover, the testimony of respondent Strozeski's fellow officers supports their knowledge of a substantial risk of serious harm to Ms. Korthals as they would have walked behind her and/or physically escorted her in the Jail due to the possibility of her falling and injuring herself. (A35, A38-A40, A43-A44). Specifically, Sergeant Neuman, one of respondent Strozeski's supervisors, testified that someone who is handcuffed is not capable of taking care of themselves because they are not able to catch themselves if they were to fall and, therefore, they would need to be stabilized. (A38). Sergeant Neuman further testified that

it could be hard for anyone, intoxicated or not, to walk upstairs while handcuffed behind their back. (A39). Because of this, Sergeant Neuman would keep the person in front of him as he or she ascended stairs for both his safety and the safety of the person whom he is escorting. (A39).

Huron County Corrections Officer Kanaby's testimony agreed with Sergeant Neuman's testimony as he explained that someone who is handcuffed is not capable of taking care of themselves because they are not able to catch themselves if they were to fall. (A43-A44). Therefore, the escorting officer needs to stabilize the handcuffed person. (A44). Similarly, Corrections Officer Kanaby agreed that the officer should be behind this handcuffed person while they ascend the stairs. (A44).

Retired Huron County Corrections Officer Folk echoed the testimony of his peers. He, too, would never walk in front of a handcuffed inmate when he or she were ascending stairs due to safety reasons. (A50). Specifically and in reference to an intoxicated, handcuffed inmate, he would not allow the individual to ascend stairs on their own. (A50). Instead, just as Sergeant Neuman and Corrections Officer Kanaby testified, Officer Folk would have his arm on the person to escort them. (A50). Sheriff Hanson also appreciated the fact that Ms. Korthals' BAC of .41 would have placed him on heightened alert as she posed a potential problem to herself and may have had problems walking and taking care of herself. (A18, A22).

B. Proceedings Below

Ms. Korthals filed the instant 42 U.S.C. § 1983 case where she alleged, in relevant part, that respondent Strozeski's actions violated her Fourteenth Amendment right to be free from a substantial risk of serious harm while incarcerated at the Huron County Sheriff's Department. (A13, A17). Respondent Strozeski filed a motion for summary judgment where he argued that Ms. Korthal's Fourteenth Amendment claim should be dismissed based upon qualified immunity. (A17, A21).

1. The United States District Court for the Eastern District of Michigan denied qualified immunity to respondent Strozeski and held that Ms. Korthals raised a genuine issue of material fact regarding whether respondent Strozeski apprehended a substantial risk of serious harm and failed to reasonably respond to it pursuant to the two-prong test set forth in *Farmer v. Brennan*, 511 U.S. 825 (1994). (A19-A20). In its Opinion, the district court found, by respondent Strozeski's own admission, that someone with a .41 blood alcohol level "could possibly hurt themselves" and "might not be able to care for themselves" in which it held that respondent Strozeski had the requisite knowledge of a substantial risk of serious harm. (A20). The district court further found that "[b]ecause there is a question of fact regarding whether respondent Strozeski was aware of the risk to Plaintiff and disregarded it, he is not entitled to qualified immunity…'because a reasonable officer could not believe that his actions comported with clearly established law if he also understood that there was an excessive risk to the plaintiff to which he did not adequately respond. Conduct that is deliberately indifferent to an excessive risk to [the

plaintiff] cannot be objectively reasonable conduct.'" (A24)(quoting *Carroll v. City of Quincy*, 441 F. Supp. 2d 215, 223 (D. Mass. 2006). Moreover, the district court in reaching its decision that the right was clearly established at the time of respondent Strozeski's constitutional violation against Ms. Korthals, relied upon Sixth Circuit precedent holding that in order to determine whether the right was clearly established at the time, "a reasonable official would have understood that his conduct violated the right." *Comstock v. McCrary,* 273 F.3d 693, 711 (6th Cir. 2001). (A21). The district court further relied upon the *Comstock* court's reliance upon the longstanding holding by this Court as it noted that "[a]s the Supreme Court has instructed, we need not find a case in which 'the very action in question has previously been held unlawful,' but, 'in the light of pre-existing law[,] the unlawfulness must be apparent.'" (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). (A21).

2. On February 4, 2020, the United States Court of Appeals for the Sixth Circuit issued an Opinion which reversed the Eastern District of Michigan and held that respondent Strozeski was entitled to qualified immunity. (A9). In its Opinion and without expressly deciding whether forcing Ms. Korthals, who was obviously severely intoxicated, to ascend stairs while handcuffed behind her back was in violation of her Fourteenth Amendment right to be free from a substantial risk of serious harm while incarcerated, the Sixth Circuit primarily focused its attention to whether the right was clearly established at the time in which it ultimately held that it was not. (A4, A9). In reaching its decision, the Sixth Circuit relied upon cases such as *Perez v. Oakland*, 466 F.3d 416, 427 (6th Cir. 2006) and *Coley v. Lucas Cty.*, 799 F.3d 530, 540 (6th Cir.

2015) in standing for the proposition that the Sixth Circuit looks primarily to the prior decisions of the Supreme Court and that particular circuit court in order to determine if the law is clearly established at the time the constitutional violation was committed by the officer. (A4). The Sixth Circuit also criticized the district court for relying "on a single case from the District of Massachusetts," even though the district court's denial of qualified immunity was not based solely upon *Carroll v. City of Quincy*, 441 F.Supp.2d 215 (D. Mass. 2006). (A4, A21-22). In distinguishing *Carroll* from the instant case, the Sixth Circuit reasoned that *Carroll* was likely "simply wrong" because the District of Massachusetts relied on its finding of deliberate indifference to support its conclusion that a reasonable officer could not have believed that his actions would not violate clearly established law. (A6). The Sixth Circuit further held that even if *Carroll* could be used to support a finding of a clearly established right, the right in *Carroll* is too distinct from the right at issue in the instant case. (A6-A7). Specifically, the Sixth Circuit defined the right in *Carroll* as the "right to be uncuffed when placed in a holding cell, drunk and unattended." (A7). Notably, *Carroll* held that an intoxicated inmate who clearly had trouble standing should not be left unattended and handcuffed behind his back because he is placed in a situation where there was a substantial risk of harm. *Carroll*, 441 F. Supp.2d at 221. In contrast, the Sixth Circuit narrowly defined the right at issue in the instant case as "the right to be closely guided, intently watched, and physically supported when walked from the car to booking, drunk and physically wobbly." (A7). Accordingly, the Sixth Circuit held that this right was not clearly established and reasoned that there was no case directly on point which required respondent Strozeski to take those

"particular" precautions noting that "Korthals has pointed us to no clearly established precedent from the Supreme Court or this Circuit to support that contention, and the cited out-of-circuit district court case (*Carroll)* does not qualify as clearly established law. (A9). The Sixth Circuit made no reference or reliance upon any of the non-decisional evidence in this case prior to reaching its decision that respondent Strozeski was entitled to qualified immunity.

3. On January 27, 2020, Ms. Korthals submitted her Petition for Rehearing where she argued the Opinion favoring qualified immunity for Strozeski was erroneous because of the following: (1) the Panel incorrectly applied Ms. Korthals' burden of proof as to the right being clearly established and mischaracterized the actual clearly established right at issue in this case; (2) the Panel failed to consider other evidence, that being the testimony of respondent Strozeski's supervisors and fellow officers, in support of Ms. Korthals' right being clearly established at the time of the subject incident; and (3) the Panel overlooked material facts in support of respondent Strozeski's actions being deliberately indifferent to Ms. Korthals' Fourteenth Amendment rights. On February 4, 2020, the Sixth Circuit denied Ms. Korthals' Petition for Rehearing. (A29).

REASONS FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT'S DECISION TO GRANT QUALIFIED IMMUNITY TO RESPONDENT STROZESKI BY FAILING TO CONSIDER ANY OF THE NON-DECISIONAL EVIDENCE IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S HOLDING IN *HOPE V. PELZER*, 536 U.S. 730 (2002), AND THIS COURT'S GUIDANCE IS NECESSARY ON THIS ISSUE IN ORDER TO ENSURE UNIFORMITY WITHIN THE LOWER COURTS AS TO THE APPLICATION OF NON-DECISIONAL EVIDENCE WHEN THESE COURTS DECIDE WHETHER A POLICE OFFICER IS PROTECTED BY QUALIFIED IMMUNITY.

A. The Qualified Immunity Doctrine and the Importance of *Hope*'s Reliance Upon Non-Decisional Evidence in Support of a Denial of Qualified Immunity

Qualified immunity is a doctrine created by the judicial branch to balance the necessity of damage remedies to protect the rights of citizens with the interest of protecting officials in discretionary positions from burdensome litigation. *Harlow v. Fitzgerald*, 457 U.S. 800, 808 (1982); *see also* Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach,* 68 *AM. U.L. REV.* 379, 406 (2018). Accordingly, qualified immunity distinguishes between the irresponsible officer, who should be held accountable, and the reasonably mistaken officer, who should be shielded from "harassment, distraction, and liability." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *see also Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). In reaching a balance

between the competing interests of accountability and protection from litigation, this Court adopted a doctrine of qualified immunity rather than absolute immunity with regard to police officers. *Wood v. Strickland*, 420 U.S. 308, 320 (1975); see also John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1300 (2012); Diana Hassel, *Living a Lie: The Cost of Qualified Immunity*, 64 MO. L. REV. 123, 130 (1999).

Specifically, qualified immunity is a privilege granting immunity to government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* at 818. To determine whether a police officer is entitled to qualified immunity at the summary judgment stage, the courts are required to engage in a two-pronged inquiry. *Tolan v. Cotton*, 134 S. Ct. 1861, 1865 (2014). The inquiry as to the first prong asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury . . . show the officer's conduct violated a [federal right[.]" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The inquiry as to the second prong asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). As decided in *Pearson*, these inquiries may be analyzed in any order. *Pearson*, 555 U.S. at 236.

However, the "clearly established" prong has generated notable confusion for the lower courts and has been the topic of much legal scholarship, to the point where one expert described qualified immunity as existing "in a perpetual state of crisis." Chaim Saiman, *Interpreting Immunity*, 7 U. PA. J. CONST. L. 1155 (2005). Specifically,

the lower courts have faced confusion regarding the generality at which to define the clearly established right as well as what sources can provide notice to an officer to establish the right. *See* Kit Kinports, *The Supreme Court's Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62 (2016). This confusion becomes particularly troublesome in light of the fact that qualified immunity has not been proven to meet its specific goals even though it has become more stringent in the past decade. Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 *NOTRE DAME L. REV.* 1797 (2018). For instance, law enforcement officers are almost never required to shoulder the financial burden of a lawsuit against them because of indemnification (in a study of 9225 cases resolved with payments to plaintiffs, individual officers contributed to settlements in just 0.41% of those cases), and nor does qualified immunity achieve its goal of resolving claims before discovery as a review of 1183 cases in five federal district found that just 7 of those cases (0.6%) were dismissed based on qualified immunity prior to discovery. *Id.* at 1797, 1805-06, 1810. In exchange for these very limited benefits, however, an overly stringent application of qualified immunity risks "render[ing] the protections of the [Constitution] hollow." *Id.* at 799 (citing *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting)).

Legal scholars have responded to these issues by presenting solutions which range from eliminating qualified immunity altogether to adopting a "clearly unconstitutional" doctrinal formula as opposed to the existing "clearly established right" analysis. John C. Jeffries, Jr., *What's Wrong With Qualified Immunity?,* 62 *FLA. L. REV.* 851, 867 (2010). The instant case, however,

presents an opportunity for this Court to address this issue by not taking the drastic measure such as eliminating the qualified immunity doctrine, but rather, this case is a chance for the Court to clarify existing precedent as held in *Hope*, which allows a plaintiff to rely upon non-decisional evidence in order to defeat qualified immunity as opposed to the plaintiff being defeated by such immunity because their constitutional rights were violated arising from a novel factual situation.

Hope involved an inmate plaintiff, who alleged that his Eighth Amendment right as to cruel and unusual punishment were violated after being twice handcuffed to a hitching post with the second instance being for a significant duration of time with little water, no bathroom breaks, and unnecessary exposure to the heat of the sun. *Id.* at 734-35. The Court disagreed with the Eleventh Circuit's decision granting qualified immunity to the officers based up the circuit court's requirement that the "facts of previous cases be 'materially similar' to Hope's situation" as the Court noted that "this rigid gloss on the qualified immunity standard, though supported by Circuit precedent, is not consistent with our cases." *Id.* at 678. In reaching its decision that the right was clearly established at the time, the Court reiterated its position in prior holdings which have held that the relevant question as to whether the right was clearly established is whether the officer had "fair warning," at the time, that their action against a citizen was unconstitutional. *Id.* at 741 relying upon *Anderson v. Creighton,* 483 U.S. 635, 640 (1987); *United States v. Lanier,* 520 U.S. 259 (1997). The Court further stressed its prior holding in *Lanier* as to an officer's "fair warning" by stating that "officials can still be on notice that their conduct violates established law even in novel

factual circumstances," and, in doing so, the Court made clear that it "expressly rejected a requirement that previous cases be 'fundamentally similar.'" *Id.*

Notably, the factual circumstances surrounding the constitutional violations in *Hope* were not materially similar to prior case law; however, this Court nevertheless held that the defendant officers violated the plaintiff's Eighth Amendment right to be free from cruel and unusual punishment as the law was clearly established at the time. *Id.* at 741. In reaching its holding, the Court relied, in part, upon non-decisional evidence of a prior advisement report from the Department of Justice ("DOJ") to the Alabama Department of Corrections ("ADOC") to stop the use of hitching posts in order to meet constitutional standards. *Id.* at 744-45. While not case law, this non-decisional evidence supported that "reasonable officials . . . should have realized that the use of the hitching post under the circumstances alleged by [the plaintiff] violated the *Eighth* Amendment prohibition against cruel and unusual punishment." *Id.* at 745.

As this Court held in *Hope* that the determination of whether an officer had "fair warning" can be established by allowing the plaintiff to rely upon non-decisional evidence even in a novel situation, the instant case presents a similar instance where the Sixth Circuit failed to consider the non-decisional evidence—that being the testimony of respondent Strozeski as well as his fellow superiors and officers—which supported that respondent Strozeski had fair warning, at the time, that his actions against Ms. Korthals violated her Fourteenth Amendment rights. Even though this non-decisional evidence is not the only support for the right being clearly established in the

instant case as Ms. Korthals relied upon prior case law, including *Farmer v. Brennan,* 511 U.S. 825 (1994); *Boswell v. Eoon*, 452 Fed. App'x 107 (3d Cir. 2011); *St. Cin v. Purkett*, 1995 U.S. App. LEXIS 28749 (8th Cir.); and *Carroll v. City of Quincy*, 441 F. Supp. 2d 215 (D. Mass. 2006), the combination of both this decisional and non-decisional evidence should have been considered by the Sixth Circuit as it would have resulted in an outcome favorable to Ms. Korthals. Accordingly, granting certiorari in this case will allow the Court to reiterate its longstanding principle in *Hope*, along with other prior precedential cases, that a plaintiff is not required to rely upon prior cases that are "fundamentally similar" to show that an officer had fair warning that his action, at the time, was in violation of constitutional right but, instead, notice can be provided by other sources which the Sixth Circuit failed to consider in this case thus committing reversible error.

B. Post-*Hope* Decisions Relying Upon Non-Decisional Evidence

Notably, *Hope* is not the last time this Court relied, in part, upon non-decisional evidence to support a finding that a constitutional right was clearly established for the purpose of denying qualified immunity. *Groh v. Ramirez*, 540 U.S. 551 (2004). The *Groh* case involved a Fourth Amendment violation based upon an unlawful search of a home resulting from an insufficient warrant that failed to describe the place to be searched and the particular items to be seized. *Id.* at 555. The district court subsequently granted qualified immunity; however, the Ninth Circuit reversed as to the Fourth Amendment claim whereby denying qualified immunity in which this Court affirmed

said reversal. *Id.* at 555-556. In reaching its decision, this Court not only relied upon the language of the United States Constitution as well as existing case law precedent, but also upon the non-decisional evidence of the guidelines within the defendant officer's own department that provided notice that liability may arise when executing a manifestly invalid warrant. *Id.* at 564.

Moreover, the Sixth Circuit, prior to its holding in the instant case, has relied upon non-decisional evidence in the form of officer training and testimony in order to support that a constitutional right has been clearly established in favor of the denial of qualified immunity where it recognized that "other sources can also demonstrate the existence of a clearly established constitutional right…." *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 902 (6th Cir. 2004). In *Champion*, the plaintiffs filed a §1983 action against the defendant police officers arising out of the death of the decedent where they claimed that the officers' use of pepper spray and application of asphyxiating pressure after the decedent's incapacitation was unlawful and in violation of the Fourth Amendment, excessive use of force. *Id.* at 897. The defendant officers appealed the jury verdict in favor of the plaintiffs where the defendant officers argued that they are entitled to qualified immunity in which the Sixth Circuit affirmed the denial of qualified immunity. *Id.* at 899, 905.

In reaching its decision that the right was clearly established at the time, the Sixth Circuit, in part, relied upon the defendant officers' prior training as to the use of force as well as the testimony of fellow officers and, in particular, the admission by three officers that "they were aware of the potential danger of putting pressure on an

individual's back or diaphragm." *Id.* at 904. The Sixth Court also considered the testimony of the defendant officers' supervisor "that he taught his officers that lying across an individual's back when that person is on his or her stomach increases the possibility of asphyxia. *Id.* The Sixth Circuit supported its reliance upon this non-decisional evidence with this Court's decision in *Hope*, noting, "[j]ust as the Supreme Court determined that the Alabama Department of Corrections Regulations and the communications between the U.S. Department of Justice and the State of Alabama put the state on notice about what constituted cruel and unusual punishment, so too here the training these Officers received alerted them to the potential danger of this particular type of excessive force." *Id.*, citing *Hope*, 536 U.S. at 744-45.

The Eighth Circuit has also relied upon non-decisional evidence, including the testimony of the defendant officer, in finding that a constitutional right was clearly established at the time the right was violated in support of a denial of qualified immunity. *Nelson v. Corr. Med. Servs.*, 583 F.3d 522 (8th Cir. 2009). In *Nelson*, the plaintiff, an inmate whose ankles were shackled to a hospital bed during the final stages of labor, alleged that this action by the defendant officer violated her Eighth Amendment right to be free from cruel and unusual punishment. *Id.* at 525-27. The Eighth Circuit ultimately held, after granting the plaintiff's petition for rehearing en banc and vacating the panel opinion, that the defendant officer acted with deliberate indifference to a substantial risk of serious harm and that the right was clearly established at the time. *Id.* at 534. In reaching its holding that the right was clearly established, the Eighth Circuit, in part, relied upon the defendant officer's own testimony.

Id. In particular, the defendant officer's own testimony indicated that "she was aware that shackling a woman in labor was hazardous and contrary to medical needs." *Id.* Indeed, the Eighth Circuit did not rely solely upon this non-decisional evidence to reach its decision that the right was clearly established at the time, but this evidence provided support for the argument that the defendant officer had ample notice that her actions violated the plaintiff's constitutional rights. *Id.* at 533-34.

Likewise, the Third Circuit has also relied upon non-decisional evidence to support the existence of a clearly established right. *Kedra v. Schroeter*, 876 F.3d 424 (3rd Cir. 2017). In *Kedra*, the plaintiff's decedent, a state trooper, was required to attend a routine firearm safety training lead by the defendant officer. *Id.* at 432. While demonstrating a firearm, the defendant officer disregarded all safety steps and pointed the gun at the plaintiff's decedent's chest and subsequently killed the plaintiff's decedent. *Id.* The plaintiff alleged that the defendant officer subjected the plaintiff's decedent to a state-created danger in violation of his Fourteenth Amendment substantive due process rights. *Id.* The defendant officer argued that "there was no precedent sufficiently '*factually similar to the plaintiff's allegations* [] to put [him] on notice that his … conduct [was] constitutionally prohibited.'" *Id.* at 449. However, the Third Circuit disagreed as it noted "it need not be the case that the exact conduct has previously been held unlawful so long as the 'contours of the right' are sufficiently clear, such that a 'general constitutional rule already identified in the decisional law' applies with 'obvious clarity.'" *Id.* at 450 quoting *Anderson,* 483 U.S. at 640 and *Hope,* 536 U.S. at 741. The Third Circuit further relied upon the principle in *Hope* highlighting that

"[o]fficials can still be on notice that their conduct violates established law even in novel factual circumstances,' because the relevant question is whether the state of the law at the time of the events gave the officer 'fair warning.'" *Id.* quoting *Hope,* 536 U.S. at 741. In reaching its decision, the Third Circuit not only relied upon existing case law but also the non-decisional evidence of the defendant officer's "expertise and professional training" as it noted that said training gave the defendant officer fair warning under *Hope* such that no reasonable officer would have acted so contrarily to known safety protocols. *Id.* at 450.

The Second Circuit has also relied upon non-decisional evidence when finding that a right was clearly established. *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415 (2d Cir. 2009). In *Okin*, the plaintiff, who was a domestic violence victim, filed a federal suit where she alleged, among other claims, a Fourteenth Amendment due process violation against defendant officers for their failure to adequately respond to her calls for police assistance against her abusive boyfriend. *Id.* at 419-20. The Second Circuit reversed the district court's grant of qualified immunity to the officers with regard to this claim *Id.* at 419.

In reaching its holding, the Second Circuit relied upon precedent which generally established that police officers cannot engage in conduct that encourages intentional violence against a victim. *Id.* at 434. While the facts in *Okin* did not exactly match those of previous Second Circuit cases, the Second Circuit nevertheless found that these cases gave sufficient notice to the defendant officers that their conduct violates established law as noted in *Hope* that "[o]fficials can still be on notice

that their conduct violates established law even in novel factual circumstances.'" *Id.* at 435 quoting *Hope,* 536 U.S. at 741. The Second Circuit further relied, in part, upon the defendant officers' training reasoning that this non-decisional evidence "provides strong support for the conclusion that the officers should have been aware of the wrongful character of their conduct." *Id.* at 437. Accordingly, this non-decisional evidence aided the Second Circuit in finding that the right was clearly established at the time in support of the denial of qualified immunity.

Therefore, the Sixth Circuit, the Eighth Circuit, the Third Circuit, and the Second Circuit have all followed *Hope* in that these Circuits rely on non-decisional evidence in finding a clearly established right.

C. Courts' Failure to Follow *Hope* and the Resulting Necessity of Re-Addressing Non-Decisional Evidence and its Role in Supporting a Denial of Qualified Immunity

In contrast to the above decisions relying upon non-decisional evidence in support of a denial of qualified immunity, other circuit courts have failed to give such evidence any weight in reaching their opinions as to the applicability of qualified immunity—the Fourth Circuit being one of those courts. The Fourth Circuit has rejected the use of non-decisional evidence to support a finding of a clearly established right. *Fields v. Prater*, 566 F.3d 381 (4th Cir. 2009). In *Fields*, the plaintiff alleged a First Amendment violation resulting from the defendants' refusal to hire her as a local director based on her political affiliation. *Id.* at 383. The Fourth Circuit overturned the district court's denial of qualified immunity and held that

while the defendants violated the plaintiff's First Amendment right, the right at issue was not clearly established at the time of the subject incident. *Id.* at 389. The plaintiff in *Fields* introduced evidence including regulations passed by the State Board prohibiting consideration of political affiliation in hiring; the job application completed by the plaintiff which reiterated that political affiliation should not be considered; and an affidavit from a state official which stated that political affiliation was not an appropriate consideration in the hiring process. *Id.* at 388, 390. Despite this non-decisional evidence, the Fourth Circuit held that relevant cases were factually distinguishable and therefore it could not "unequivocally say that defendants knew or should have known they were violating [the plaintiff's] constitutional rights when they refused to hire her." *Id.* at 390. Therefore, despite non-decisional evidence showing that a reasonable official would have known that political affiliation should not be considered in the hiring process, the Fourth Circuit nevertheless held that the violation of the plaintiff's First Amendment right was not clearly established. *Id.* at 388-90.

Likewise, the Eleventh Circuit has refused to consider non-decisional evidence in finding a clearly established right. *Coffin v. Brandau*, 642 F.3d 999 (11th Cir. 2011). In *Coffin*, the defendant deputies entered the plaintiffs' garage without a warrant in order to serve one of the plaintiffs with a court order, and the plaintiffs alleged that this warrantless entry violated their Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* at 1003. The district court held that a constitutional violation had occurred but held that the right at issue was not clearly established at the time of the

subject incident, which was subsequently affirmed by the Eleventh Circuit. *Id.* at 1003-04. The Eleventh Circuit emphasized that it "looks only to binding precedent—cases from the United States Supreme Court, the Eleventh Circuit, and the highest court of the state under which the claim arose—to determine whether the right in question was clearly established at the time of the violation." *Id.* at 1013. Moreover, the Eleventh Circuit continues to rely upon *Coffin* for its holding that only binding precedent can support a finding of a clearly established right. *See, e.g., Gaines v. Wardynski*, 871 F.3d 1203 (11th Cir. 2017); *Moore v. Pederson*, 806 F.3d 1036 (11th Cir. 2015).

In *Rachel v. City of Mobile*, 112 F. Supp. 3d 1263 (S.D. Ala. 2015), the Alabama Southern District Court relied upon *Coffin* to the extent that it explicitly rejected *Hope*'s reliance upon non-decisional evidence. *Id.* at 1282. In *Rachel*, the defendant officers responded to a domestic violence call which resulted in the death of the plaintiff's decedent after one of the defendant officers left the decedent in a hog-tied position and sat on him for several minutes. *Id.* at 1277. The plaintiff brought several claims on behalf of the decedent, including a claim of excessive force under the Fourth Amendment. *Id.* 1281. With regard to this claim, the plaintiff relied, in part, upon non-decisional authority—specifically, the defendant officers' training and internal department policy—in support of her argument that the defendant officers' conduct violated clearly established law. *Id.* at 1281. The Alabama Southern District Court explicitly rejected the plaintiff's position that "fair warning could come from . . . non-decisional authority." *Id.* Specifically, the Alabama Southern District Court held, "the Supreme Court [in *Hope*] did not say or suggest that a plaintiff can meet her burden of

demonstrating the existence of a clearly established constitutional right by relying on 'non-decisional authority.'" *Id.* The Alabama Southern District Court further held that "nothing in *Hope* can be construed as overriding the Eleventh Circuit rule that constitutional rights can be clearly established only by binding precedent . . . or by the very words of a statute or constitutional provision." *Id*. at 1282 (internal citations omitted). The Alabama Southern District Court therefore held that the defendant officers were entitled to qualified immunity with regard to the plaintiff's claim of excessive force based on provocation. *Id*. at 1283.

Clearly, the Circuits are split as to how they should apply *Hope* as it relates to relying upon non-decisional evidence to support a finding that a right was clearly established. Furthermore, if the Court does not grant certiorari in order to reaffirm the importance of considering non-decisional evidence in the qualified immunity analysis in light of *Hope*, the instant case will set dangerous precedent in which the courts below will continue to ignore non-decisional evidence relevant to a finding that a constitutional right was clearly established at the time the right was violated.

D. While the Sixth Circuit did not Expressly Hold that there was No Constitutional Violation, the Court Should Address the Applicability of Non-Decisional Evidence to the "Constitutional Violation" Prong

In its Opinion, the Sixth Circuit did not expressly hold whether respondent Strozeski violated Ms. Korthals' Fourteenth Amendment right pursuant to the second prong of the qualified immunity analysis. Instead, the Sixth Circuit's Opinion as to this issue ultimately concluded with an ambiguous hypothetical which reads as follows:

> "[w]hile Korthals has clearly stated a strong negligence case, it is less clear that Deputy Strozeski's failure to use caution was not merely careless, inattentive, or sloppy, but was, instead, a conscious disregard of a recognized risk. Regardless, let us assume, arguendo, that Deputy Strozeski *was* deliberately indifferent to the risk and that he violated Korthals's constitutional right to be free from that risk." (A4).

While the court below did not explain its reasoning in hypothetically rejecting that Ms. Korthals demonstrated the violation of a constitutional right, the circumstances of this case as well as the broader implications for constitutional law justify review of this question. *Youakim v. Miller*, 425 U.S. 231 (1976).

Notably, the Eastern District of Michigan reached a decision as to whether a constitutional right was violated and respondent Strozeski violated Ms. Korthals'

Fourteenth Amendment right to be free from a substantial risk of serious harm while in respondent Strozeski's custody. (A20). Even though the Sixth Circuit did not reach a definite conclusion as to the existence of a constitutional right being violated, the Parties have already substantially briefed this issue – it is therefore not raised for the first time in this Petition for a Writ of Certiorari. *See Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985). Furthermore, the issue of whether non-decisional evidence should be considered in analyzing whether a constitutional right was violated is so closely related to the issue of whether non-decisional evidence should be considered in analyzing whether that right was clearly established that it would not cause significant expenditure of judicial resources to address this issue.

In the instant case, Ms. Korthals' deliberate indifference claim is properly alleged under the Fourteenth Amendment—however, in the Sixth Circuit, the deliberate indifference standard pursuant to either the Eighth or Fourteenth Amendment is the same. *Phillips v. Roane County*, 534 F.3d 531 (6th Cir. 2008). Deliberate indifference which violates a constitutional right is analyzed under a two-prong test. *Farmer v. Brennan*, 511 U.S. 825 (1994). With regard to the first prong, "the deprivation alleged must be, objectively, 'sufficiently serious.'" *Id.* at 834. Moreover, this objective component can be satisfied by demonstrating that an inmate has been exposed to a "substantial risk of serious harm." *Id.* With regard to the second prong, the plaintiff must demonstrate that the defendant officer knew of and disregarded a risk to health or safety. *Id.* at 837. In the instant case, the Eastern District of Michigan analyzed both prongs and found that respondent Strozeski violated Ms. Korthals'

constitutional right to be free from deliberate indifference to a substantial risk of serious harm. (A18-A20). In support of its finding that respondent Strozeski violated Ms. Korthals' constitutional right, the Eastern District of Michigan relied on the video evidence, respondent Strozeski's own testimony in which he admitted that someone with a .41 blood alcohol content "could possibly hurt themselves" and "might not be able to care for themselves," and the obviousness of the risk that someone with a .41 blood alcohol content might be harmed. (A20). The Eastern District of Michigan considered this evidence in support of its holding that a reasonable jury could find that respondent Strozeski had the requisite knowledge of a substantial risk and deliberately ignored that risk. (A20-A21). This evidence is highly relevant to the question of whether respondent Strozeski violated the Fourteenth Amendment of the Constitution, making this case an appropriate vehicle to address the applicability of considering *all* evidence to determining whether a constitutional violation occurred.

Circumstantial evidence, such as professional training and safety protocols or the testimony of other officers in the instant case, is, of course, highly relevant and necessary to a plaintiff's case. As the Seventh Circuit has stated, "[t]he difficulty is that except in the most egregious cases, plaintiffs generally lack direct evidence of actual knowledge. Rarely if ever will an official declare, 'I knew this would probably harm you, and I did it anyway!'" *Petties v. Carter*, 836 F.3d 722, 728 (7th Cir. 2016). In *Petties*, the defendant prison medical doctor failed to follow proper protocol in treating the plaintiff inmate's ruptured Achilles tendon, and as a result, the plaintiff alleged that the defendant prison medical doctor acted with deliberate

indifference towards a serious medical need in violation of the Eighth Amendment. *Id*. at 726. The district court held that the plaintiff's constitutional right had not been violated because the defendant doctor was not deliberately indifferent to a serious medical need, and the Seventh Circuit reversed on appeal. *Id.* The Seventh Circuit noted that medical malpractice is not enough to establish deliberate indifference, so mere failure to follow protocol alone may not be sufficient for a deliberate indifference claim. *Id.* at 728. However, the Seventh Circuit held that the defendant doctor's failure to follow protocol, the testimony of other specialists who stated that immobilization is necessary in treating this type of injury, the delay in treatment, and the statement that surgery would be "too expensive" were all pieces of circumstantial evidence which could support a jury's finding of deliberate indifference. *Id.* at 731-33. The Seventh Circuit therefore accepts that while circumstantial evidence including the testimony of other professionals may not always be sufficient to show deliberate indifference, it is certainly relevant to the inquiry and must be weighed in deciding whether a plaintiff has shown the violation of a constitutional right. *Id.*

A Sixth Circuit case prior to the instant case, *Comstock v. McCrary*, 273 F.3d 693 (6th Cir. 2001), further illustrates the importance of considering *all* evidence in a deliberate indifference analysis. In *Comstock*, the plaintiff's decedent committed suicide following the defendant prison psychologist's decision to remove the plaintiff's decedent from suicide watch despite evidence that the plaintiff's decedent remained at risk for suicide. *Id.* at 698-99. As a result, the plaintiff brought suit alleging that the defendant prison psychologist acted with

deliberate indifference to the plaintiff's decedent's serious medical need. *Id.* at 698. The district court denied summary judgment, and the Sixth Circuit affirmed as to the defendant prison psychologist. *Id.* In reaching its holding that a jury could find that the defendant psychologist acted with deliberate indifference, Sixth Circuit analyzed the defendant psychologist's own testimony; the defendant psychologist's evaluation notes; the defendant psychologist's disregard of prison policy; testimony from two former prison psychologists; and testimony from the plaintiff's decedent's psychology expert. *Id.* In light of all of this evidence, the Sixth Circuit held that a jury could conclude that the defendant psychologist knew of the risk and failed to respond reasonably to that risk. *Id.* at 711.

While this point may seem obvious in light of the above case law and the Court's reminder in *Farmer* that circumstantial evidence may be used to prove knowledge, the concurrence in *Kedra v. Schroeter*, 876 F.3d 424 (3rd Cir. 2017) illustrates why this issue is worth addressing. In addition to relying on an officer's training in support of a finding of a clearly established right, the Third Circuit majority also relied on that training in finding that the defendant had committed a constitutional violation. *Id.* at 444. Notably, however, Third Circuit Judge Fisher penned his concurrence specifically to address the Third Circuit majority's reliance on non-decisional evidence. *Id.* at 452. Specifically, Judge Fisher disagreed with the majority's reliance on "circumstantial evidence of conscience-shocking behavior" and further disputed that this evidence "adequately allege[s] conduct that shocks the conscience." *Id.* at 456. Judge Fisher disagreed that the defendant officer's professional training and violation of safety

protocols were sufficient to show a constitutional violation, reasoning that an officer could forget his training in the moment he failed to follow it. *Id.* at 456. Judge Fisher further opined that violating an established rule or acknowledging said rule is not sufficient to show deliberate indifference. *Id.* at 457. In response to the argument that the defendant officer may have forgotten relevant safety protocols, the majority opinion states that "the Concurrence rejects the unavoidable inference that [the defendant officer] therefore knew the risk of harm those protocols were intended to prevent" and instead did not remember his training and did not know that he failed to follow the rules. *Id.* at 445.

Therefore, the Court must address the issue of what evidence can be used to support a finding of a constitutional violation. Without a reminder that the same non-decisional evidence which can be used to show that a right was clearly established can also be used to demonstrate that the right was violated, the Circuits are likely to make the same error as the concurrence in *Kedra*, thus rejecting unavoidable inferences in favor of an erroneous finding of qualified immunity.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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