No. 19-656

In The
Supreme Court of the United States

WILLIAM ANDERSON,
Petitioner,

vs.

CITY OF MINNEAPOLIS, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIROARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael O. Freeman
Hennepin County Attorney

Beth Stack, *Counsel of Record*
Beth.Stack@Hennepin.US
Assistant County Attorney

Jonathan P. Schmidt
Jon.Schmidt@Hennepin.US
Assistant County Attorney
300 South 6th Street, C-2000
Minneapolis, MN 55487
(612) 348-5550

Ann Walther
AWalther@RiceMichels.com
Rice, Michels & Walther, LLP
10 Second Street Northeast,
Suite 206
Minneapolis, MN 55413
(612) 676-2300

Erik Nilsson
Interim City Attorney,
Minneapolis

Ivan Ludmer
Ivan.Ludmer@Minneapolis
MN.Gov
Assistant City Attorney

Tracey Fussy
Tracey.Fussy@Minneapolis
MN.Gov
Litigation Manager
350 South 5th Street, #210
Minneapolis, MN 55414
(612) 673-2478

ATTORNEYS FOR RESPONDENTS

QUESTIONS PRESENTED

1. Whether the arguments related to the burden of persuasion in a qualified immunity case were sufficiently raised below and whether the issue would be dispositive such that this case presents an appropriate vehicle for this Court's review?

2. Whether the "clearly established right" standard was preserved for this Court's review and, if so, whether the circuit courts have a meaningful disagreement regarding the standard?

3. Whether Petitioner preserved the state-created danger standard for this Court's review and whether a different standard would affect the outcome of this case?

LIST OF PARTIES

The parties to this action are Petitioner William Anderson (*as Trustee for the Next-of-Kin of Jacob William Anderson* (deceased)), who appeared as plaintiff in the district court proceedings and appellant at the court of appeals. Respondents City of Minneapolis; County of Hennepin; Hennepin Healthcare System, Inc.; Dr. Brian Mahoney, M.D., as then-Medical Director of HCMC Ambulance Services; Shana D. York, Anthony J. Buda, Raul A. Ramos, and John Doe individuals to be determined, Individual Fire Department Personnel in Their Individual Capacities; Daniel F. Shively and John Doe individuals to be determined, Individual HCMC Ambulance Services Personnel in Their Individual Capacities; Mitchel Morey, M.D., Individual Medical Examiner's Personnel, in His Individual Capacity; Daniel J. Tyra, Shannon L. Miller, Dustin L. Anderson, Scott T. Sutherland, D. Blaurat, Emily Dunphy, Christopher Karakostas, Matthew George, Joseph McGinness, Calvin Pham, Arlene M. Johnson, Matthew T. Ryan, and John Doe individuals to be determined, Individual Police Officers in Their Individual Capacities, all appeared as defendants in the district court and as appellees at the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion from the Eighth Circuit Court of Appeals is reported at 934 F.3d 876 (8th Cir. 2019) and reproduced in Petitioner's Appendix ("Pet. App.") at 1-17. The order from the District Court of Minnesota is available on Westlaw at *Anderson for Anderson v. City of Minneapolis*, No. 16-CV-04114, SRN-FLN, 2018 WL 1582262 (D. Minn. Mar. 30, 2018) and reproduced at Pet. App. 18-78.

JURISDICTION

Petitioner challenges an Eighth Circuit Court of Appeals opinion and judgment issued on August 20, 2019, affirming the judgment of the district court. Pet. App. 1. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1). The petition was timely filed within 90 days of the court of appeals' ruling. *See* Pet.; S. Ct. Rules 13.1, 29.2.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 provides:

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

SUMMARY OF ARGUMENT

Petitioner identifies three purported circuit court conflicts in claiming review is necessary. None of the three arguments were raised in the courts below and, as such, are not appropriately preserved for this Court's review. This case presents a poor vehicle for resolving any circuit split that might exist.

Besides a bad vehicle, the purported splits among the circuit courts do not bear upon the issues in this case. The differences in opinion among the appellate courts are also not in meaningful conflict such that this Court must resolve any split.

The petition should be denied.

STATEMENT OF THE CASE

A. Background

In 2013, Jacob Anderson was a 19-year-old freshman at the University of Minnesota. Pet. App. 3. On December 14, 2013, he attended a party and was seen leaving at 11:15 p.m. *Id.* He did not return to his dormitory that night. *Id.*

Jacob Anderson was discovered the next morning, lying face down in the snow in a remote area of Minneapolis near the Mississippi river. *Id.* at 22. The temperature was zero degrees Fahrenheit, with a reported wind chill temperature of negative fifteen degrees Fahrenheit. *Id.*

After spotting Jacob Anderson face down in the snow, a person passing by called 911 at 8:44 a.m. *Id.* The 911 dispatcher sent the Minneapolis Fire Department, Hennepin County Medical Center Ambulance Services / Emergency Medical Services, and the Minneapolis Police Department to the scene. *Id.* The fire department employees arrived within ten minutes. *Id.* at 3. The firefighters—certified emergency medical technicians—performed a check on Jacob Anderson's pulse by holding his wrist. *Id.* After the assessment, the fire department employees pronounced him dead at 8:57 a.m. *Id.*

The fire department report indicated no life support was provided. *Id.* at 23. The report indicated that Jacob Anderson had no pulse, was not breathing,

and was frozen, indicating obvious death. *Id.* Having declared him dead, the firefighters cancelled the ambulance and called police to the scene. *Id.*

Paramedics had already arrived before the fire department employees cancelled the ambulance. *Id.* at 3. The paramedics spoke to the fire department personnel, but did not separately assess Jacob Anderson or provide medical treatment. *Id.* The paramedics left the scene after about two minutes. *Id.*

Police officers arrived at the scene and shortly thereafter the fire department employees left. *Id.* Officers treated the area as a potential crime scene and notified the Hennepin County Medical Examiner's Office at 10:30 a.m. *Id.*

The Medical Examiner's Office sent two investigators to the scene, who examined Jacob Anderson's body. *Id.* at 4. The investigators called the Assistant Medical Examiner, a medical doctor and board-certified forensic pathologist, who determined that a doctor's visit to the scene was not necessary. *Id.*

The Examiner's Office later performed an autopsy. *Id.* The report indicated that the cause of death was hypothermia. *Id.*

B. The Minnesota Federal District Court dismissed Petitioner's complaint

In December 2016, Jacob Anderson's father and his wife filed a complaint in federal district court against the individual responders and entities that responded to the 911 call. Pet. App. 5. More than three years after Jacob Anderson's death, Jacob's father was appointed as trustee. *Id.*

Petitioner filed a Second Amended Complaint alleging causes of action under federal law and two causes of action under state law. *Id.* The district court dismissed the state law claims—alleging negligence and negligent undertaking—as barred by Minnesota's three-year statute of limitations. *Id.* at 47-56 (citing Minn. Stat. § 573.02). Since a court-appointed trustee had not filed a claim within the three years of Jacob Anderson's death, the district court determined that the claims were time-barred and did not relate back to the filing of the original federal complaint. *Id.*

Petitioner's complaint also raised federal claims under 42 U.S.C. § 1983 alleging violations of Jacob Anderson's substantive due process rights by the first responders and their employing municipalities. *Id.* at 6. The underlying basis of the claims was the alleged failure of Respondents to recognize Jacob Anderson as a severe hypothermia victim and to render medical assistance, which Petitioner alleged might have saved Jacob Anderson's life. *Id.* at 8.

In his brief opposing the motion to dismiss, Petitioner asserted:

> In order to survive these motions with respect to Jake's claims, Plaintiff must have adequately pleaded: (1) a right secured to Jake by the Constitution or laws of the United States; (2) a violation of that right by state actors; and (3) with respect to the City and County, an unconstitutional custom or policy that caused the violation. To defeat a defense of qualified immunity, Plaintiff must also have pleaded that the Individual Responders' conduct was objectively unreasonable in light of clearly established law at the time of the state actions at issue.

Petitioner's Opposition to Motion to Dismiss ("D. Ct. Br.") at 37; *id.* at 61-63 (detailing "clearly established" standard). After articulating that legal framework, Petitioner argued the complaint alleged a violation of a clearly established right. *Id.*

The district court dismissed the federal claims because the complaint had not demonstrated a constitutional right had been violated since Respondents had not created or amplified any danger to Jacob Anderson. Pet. App. 57-63. The court held the state actors neither were involved in the circumstances that led to his exposure to the cold, nor increased his vulnerability to the cold. *Id.*

The court further concluded no constitutional violation had been demonstrated because Petitioner had not alleged Jacob Anderson was in the State's custody so as to trigger a duty to protect. *Id.* at 63-68. Even assuming a duty to aid had attached, the court held the conduct alleged was not "sufficiently 'conscience-shocking' to give rise to a substantive due process violation." *Id.* at 68-74.

The court reasoned that Respondents were entitled to qualified immunity because Petitioner had not plausibly alleged that Respondents violated Jacob Anderson's substantive due process rights. *Id.* at 74-75. The district court declined to address the second prong of the qualified immunity analysis: whether the constitutional right was clearly established. *Id.*

Finally, the court dismissed the claims against the municipalities because liability had not attached to the individual Respondents. *Id.* at 75-77. As a result, the entire complaint was dismissed with prejudice. *Id.* at 77-78.

C. The Eighth Circuit affirmed

Petitioner appealed a single issue to the Eighth Circuit Court of Appeals, arguing the district court erred in finding qualified immunity because, according to Petitioner, Respondents "created or exacerbated the danger to Jacob" Anderson. Pet. App. 6. The remaining arguments advanced at the district court were abandoned. *Id.*

Petitioner argued he had presented "substantial facts" to meet his burden to establish a violation of Jacob Anderson's constitutional rights and also detailed the "clearly established law" prong of the qualified immunity analysis. *See* Petitioner's Opening Brief to the Eighth Circuit Court of Appeals ("8th Cir. Op. Br.") at 11, 13, 20-22, 24, 27, 29, 36-37, 41, 41-52. Petitioner's reply brief again claimed he had met his burden in pleading a constitutional violation yet took no issue with the "clearly established law" standard. *See* Petitioner's Reply Brief to the Eighth Circuit Court of Appeals ("8th Cir. Reply Br.") at 1, 7, 15, 22-25.

Rather than resolve the issue on the first prong of the qualified immunity analysis—whether a constitutional right had been violated—as the district court did, the Eighth Circuit determined that Petitioner had not demonstrated the right was clearly established at the time of the alleged violation. Pet. App. 9. The court concluded the law was not clearly established as to state actors increasing any danger to Jacob Anderson. *Id.* at 10-16. Having resolved the case on the "clearly established right" prong, the Eighth Circuit declined to address the arguments related to whether a constitutional violation had occurred. *Id.* at 16-17.

D. Petitioner raises new issues in the petition for a writ of certiorari

The petition contends this case presents an appropriate vehicle to resolve several circuit splits and to provide clarity in the law. Petitioner first claims there is a circuit split "as to who has the burden of persuasion with regard to qualified immunity." *See* Pet. 4, 9-15. Petitioner next advances a split about the proper criteria for determining whether a right was clearly established. *Id.* at 15-19. Finally, Petitioner asserts the circuits are divided as to how large a role the state must play in creating a danger before it assumes a constitutional duty. *Id.* at 20-27.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

The petition asserts this Court should resolve splits among the federal circuit courts of appeals related to: the burden of persuasion for qualified immunity, the criteria for addressing the "clearly established right" prong of the qualified immunity analysis, and the role the state must play in creating a danger before it assumes a constitutional duty. Pet. 9-27. None of these were raised to the lower courts, represented a determinative issue below, or involve a material difference to constitute a true "split." The petition should be denied.

I. Petitioner purports to identify a circuit split as to qualified immunity that was neither a disputed nor dispositive issue

Petitioner claims there is a circuit split as to whether plaintiff or defendant bears the burden of persuasion on a qualified immunity defense. Pet. 9. He describes this burden as applying to both steps of the qualified immunity analysis: first, whether "a statutory or constitutional right has been violated" and, second, whether "the right was clearly established at the time of the alleged violation." *Id.*

Petitioner, however, failed to raise the allocation of the burden to the district court or challenge the allocation at the circuit court, preventing the issue from being litigated here. Even if the circuits are split as to the first prong, it would

not be relevant because the Eighth Circuit "resolve[d] this case on" the second prong – that Petitioner "has failed to show the violation of a clearly established right." App. 9. The circuits are not meaningfully split as to that second prong.

A. Petitioner never argued below that the burden of persuasion should lie with Respondents

Resolution of any purported split in authority should await a case that appropriately litigated the issues. This Court has consistently held that issues not raised in the lower courts will not be considered. *See, e.g.*, *Nat'l Bank v. Commonwealth*, 76 U.S. 353, 363, 9 Wall. 353, 19 L. Ed. 701 (1869) (Court "cannot consider" issue not raised below); *OBB Personenverkehr AG v. Sachs*, -- U.S. --, 136 S. Ct. 390, 397-98, 193 L. Ed. 2d 269 (2015) ("argument was never presented to any lower court and is therefore forfeited.").

If the Court granted this Petition, the issues would be "reviewable on appeal—if at all—only for plain error." *Musacchio v. United States*, -- U.S. --, 136 S. Ct. 709, 718, 193 L. Ed. 2d 639 (2016). Petitioner does not assert plain error on the part of the courts below, and the failure to preserve the issues demonstrates this case is not the proper vehicle to resolve any purported conflict.

1. Not raised at the district court

Petitioner informed the district court that to defeat the Respondents' motions to dismiss, "Plaintiff must have adequately pleaded: (1) a right secured to Jake by the Constitution or laws of the United States; (2) a violation of that right by state actors; and (3) with respect to the City and County, an unconstitutional custom or policy that caused the violation." D. Ct. Br. at 37. Petitioner also asserted that to defeat the defense of qualified immunity, "Plaintiff must also have pleaded that the Individual Responders conduct was objectively unreasonable in light of clearly established law at the time of the state action at issue." *Id.*; *see also id.* at 61 ("Plaintiff now needs only to show that the Individual Responders' conduct was objectively unreasonable in light of clearly established law at the time of their actions at issue to overcome the … defense of qualified immunity.").

Given the lack of dispute, the district court applied the standard that Petitioner proposed: defendants "are entitled to qualified immunity unless this Court determines that (1) Counts I and II state a plausible claim for a violation of a constitutional right, and (2) that right was 'clearly established at the time of the alleged infraction.'" Pet. App. 58 (quoting *Hager v. Arkansas Dep't of Health*, 735 F.3d 1009, 1013-14 (8th Cir. 2013), & citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.")).

2. Not raised at the Eighth Circuit

Petitioner's Eighth Circuit appeal did not argue that the district court erred in placing the burden on Petitioner. Pet. App. 1-17. Instead, Petitioner consistently argued he had met his burden by alleging facts in the complaint to demonstrate Jacob Anderson's constitutional right was violated. *See* 8th Cir. Op. Br. at 11, 13, 20, 22 ("the Complaint plausibly shows Appellees had a constitutional duty to protect Anderson"), 24, 29, 36 ("Appellant clearly alleges facts sufficient to meet the 'deliberate indifference' standard."), 37, 41 ("Plaintiff-Appellant has sufficiently pleaded that the acts of the Appellee emergency responders were reckless and deliberately indifferent."). Petitioner detailed the exact standard the appellate court used in its opinion, noting the two-step inquiry for analyzing whether qualified immunity applied. *Id.* at 41-44. Petitioner then used that test to argue that the district court erred in dismissing the case because, as Petitioner argued, he had met his burden. *Id.* at 45 (Appellant will "apply the two-pronged qualified immunity test to the present facts."), *id.* at 46-52.

In his reply brief, Petitioner again asserted he had met his burden by adequately pleading his claims. *See* 8th Cir. Reply Br. 1 ("[Petitioner] has adequately pled his claims to standard that the state actor first responders violated statutes, ordinances, and regulations, including the Fourteenth Amendment to the United States Constitution, and thus deprived

Jake of his right to life."); at 2 ("Appellant met its pleading standard and the case should not have been dismissed."), at 7, 15, 22, 25. The reply brief did not take issue with the appropriate standard to apply or who should bear the burden.

Accordingly, the Eighth Circuit did not address the question of the proper standard; instead, it relied on precedent to note that "a plaintiff must show both that a statutory or constitutional right has been violated and that the right was clearly established at the time of the alleged violation." App. 9. And, like the district court below, the court did not rely on the burden to break a tie, but rather decided that Petitioner "lack[ed] an analogous case." App. 14.

B. The procedural posture of this case makes it the wrong vehicle to resolve a burden of persuasion conflict

In describing a purported split regarding who bears the burden of persuasion for qualified immunity, Petitioner ignores the different procedural context of this case compared to those in the alleged split. Pet. 9-15.

The procedural posture of the majority of cases involved in Petitioner's identified split involved a summary judgment ruling. *See, e.g.*, *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) (reversing denial of summary judgment that denied immunity to defendants); *Tindle v. Enochs*, 420 F. App'x 561, 563 (6th Cir. 2011) (same); *Erwin v. Daley*,

92 F.3d 521, 525 (7th Cir. 1996) (summary judgment); *Justus v. Maynard*, 25 F.3d 1057 (Table), 1994 WL 237513, at *1 (10th Cir. 1994) (summary judgment dismissal); *Montoute v. Carr*, 114 F.3d 181, 182 (11th Cir. 1997) (reversing denial of summary judgment motion because defendant entitled to qualified immunity); *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) (noting defendant's burden in summary judgment to demonstrate absence of genuine issue of material fact for qualified immunity); *Bryant v. City of Cayce*, 332 F. App'x 129, 132 (4th Cir. 2009) (analyzing summary judgment).[1] One case involved review after a trial. *See, e.g.*, *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 33 (1st Cir. 2001) (qualified immunity waived in appeal after trial where defendants had not previously asserted qualified immunity arguments).

Unlike Petitioner's cited cases, this case involves a motion to dismiss on the pleadings. Pet. App. 56-57. As a result, the district and appellate courts assumed all the allegations in the complaint were true and construed reasonable inferences in the light most favorable to Petitioner. *Id.*; Pet. App. 7-8. Thus, there was no burden to persuade the courts below that the facts either supported or were against

[1] The Second Circuit decision that Petitioner cites was reviewing an order on a motion to dismiss on the pleadings. *See Jackler v. Byrne*, 658 F.3d 225, 233 (2nd Cir. 2011). The Second Circuit, however, did not address the qualified immunity argument because (1) the issue had not been analyzed by the district court, and (2) defendants had not raised the issue until their reply brief in support of the motion to dismiss. *Id.* at 242-44.

qualified immunity. *Id.* Instead, both courts took the allegations as true and then applied settled law in concluding that Respondents were entitled to qualified immunity. *Id.*

Besides not being properly preserved—given Petitioner assumed he had the burden and consistently claimed he met his burden (*supra*)—the procedural context of this case does not lend itself to reach the burden issue.

C. Petitioner's purported split on the first prong is irrelevant because the Eighth Circuit did not address the issue

Petitioner describes a supposed difference among the circuits related to the first prong of the qualified immunity analysis. Pet. 9-15. But the Eighth Circuit correctly noted that it had "discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." Pet. App. 9 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). "Because Anderson has failed to show the violation of a clearly established right, [the circuit court] resolve[d] this case on that ground." *Id.* With the issue left undecided by the appellate court, this case does not present an appropriate vehicle to resolve any split among the circuits that might exist as to the first prong of the qualified immunity analysis.

D. There is no meaningful circuit split regarding the burden as to the second prong of the qualified immunity analysis

Petitioner erroneously asserts that the First, Second, Fourth, Ninth, and D.C. Circuits place the burden of persuasion as to whether a right was clearly established at the time of the alleged violation on the defendant. Pet. 11-12. First, this Court has already resolved the issue. At the pleading stage, like here, this Court held that "[q]ualified immunity shields federal and state officials from money damages *unless a plaintiff pleads facts showing* (1) that the official violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735, 131 S. Ct. at 2080 (emphasis added); *see also Davis v. Scherer*, 468 U.S. 183, 197 (1984) ("plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct").

Those decisions explain why the First, Third, Ninth, and D.C. Circuits all place the burden to show clearly established law on the plaintiff – not the defendant. *See, e.g.*, *Mitchell v. Miller*, 790 F.3d 73, 77 (1st Cir. 2015) ("The plaintiff bears the burden of demonstrating that the law was clearly established at the time of the alleged violation"); *Sherwood v. Mulvihill*, 113 F.3d 396, 399 (3d Cir. 1997) ("The plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established

statutory or constitutional right."); *Martinez v. City of Clovis*, 943 F.3d 1260, 1275 (9th Cir. 2019) ("The plaintiff bears the burden of proving that the right allegedly violated was clearly established at the time of the alleged misconduct.") (quotations omitted); *Daugherty v. Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018) ("The proponent of a purported right has the burden to show that the particular right in question … was clearly established") (quotations omitted).[2] Because there is no genuine split as to qualified immunity burdens on an issue argued to the courts below, this Court should deny certiorari on that question.

[2] The Second Circuit does not appear to have addressed which party has the burden of showing whether a right was clearly established, but there is no reason to doubt that it would follow this Court. *See, e.g.*, *Abraham v. Servoss*, 1991 WL 73966, at *3 (S.D.N.Y. May 2, 1991) ("The burden is on the plaintiff to demonstrate that the rights asserted were clearly established at the time of the conduct in issue.") (citing *Davis*, 468 U.S. at 193). The Fourth Circuit appears to have an internal split in its own authority related to who bears the burden as to the second prong. *See Henry v. Purnell*, 501 F.3d 374, 378 n.4 (4th Cir. 2007). The Fourth Circuit stands alone and has not yet addressed the issue *en banc*. Any suggestion that it gives rise to a genuine circuit split would be premature, at best.

II. Petitioner never argued below "a clearly established right" standard different from what the courts applied, and the petition does not articulate a meaningful difference among the circuit courts

Petitioner's failure to raise this issue below bars review. Moreover, Petitioner did not identify any meaningful difference between the Eighth Circuit's approach and that of other circuits. All circuits would reject Petitioner's assertion that "clearly established" law can exist in the absence of any controlling or persuasive authorities.

A. Petitioner never challenged the standard for a "clearly established right" prong of qualified immunity

Petitioner claims confusion among lower courts as to the "clearly established right" prong. Pet. 15-19. Petitioner failed to raise this argument below.

1. Not raised at the district court

The district court recited the same standard that Petitioner articulated for the "clearly established" prong. *Compare* Pet. 62, *with* D. Ct. Br. at 62. Petitioner argued that "[a] constitutional right is clearly established if at the time of an official's challenged conduct, the contours of the right in question are sufficiently clear that a reasonable official would understand what he is doing violates that right." D. Ct. Br. at 62 (quotations omitted).

Petitioner did not ask the district court to apply different criteria when determining whether a right was clearly established. *Id.* at 61-70.

2. Not raised at the Eighth Circuit

At the Eighth Circuit, Petitioner again did not assert the appellate court must apply certain criteria to determine whether a constitutional right was "clearly established" at the time of the alleged conduct. *See* 8th Cir. Op. Br. at 44-51. Instead, Petitioner recited the "clearly established law" standard, noting that "in the light of preexisting law, the unlawfulness must be apparent." *Id.* at 43 (quotations omitted). Petitioner informed the Eighth Circuit that the prong is satisfied if the "unlawfulness is apparent when a reasonable official would have known that her actions were unlawful [in that situation]." *Id.* (quotations omitted).

Petitioner's reply brief noted, "The test for qualified immunity is whether the individual defendants violated clearly established law that every reasonable officer should know." *See* 8th Cir. Reply Br. at 22. Petitioner then asserted, "the law in this area is clearly established and every reasonable officer should have known that leaving Jake Anderson in the cold with no effort to warm him would end his life." *Id.*; *id.* at 25 ("The Complaint alleges that the defendants violated clearly established law that every reasonable officer should know.").

The Eighth Circuit used the standard Petitioner proposed:

> "A clearly established right is one that is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Mullenix v. Luna*, -- U.S. --, 136 S. Ct. 305, 308, 193 L.Ed.2d 255 (2015) (per curiam) (quoting *Reichle v. Howards*, 566 U.S. 658, 664, 132 S. Ct. 2088, 182 L.Ed.2d 985 (2012)). "A plaintiff need not always identify a case directly on point, but controlling authority or a robust consensus of cases of persuasive authority must put the statutory or constitutional question beyond debate." *Swearingen v. Judd*, 930 F.3d 983, 987 (8th Cir. 2019) (citation omitted). As the Supreme Court has repeatedly stressed, we are "not to define clearly established law at a high level of generality." *al-Kidd*, 563 U.S. at 742, 131 S. Ct. at 2074.

Pet. App. 9.

Although Petitioner agreed with the Eighth Circuit's recitation of the "clearly established" standard, he now criticizes this Court for failing to articulate criteria for "how this is to be determined." Pet. 16. Yet, Petitioner never advocated that the Eighth Circuit should use particular criteria to resolve the question. *See* 8th Cir. Op. Br. at 43-51; 8th Cir.

Reply Br. at 22, 25. Because the question was never argued to the Eighth Circuit, this Court should deny certiorari. *See supra* I.A.

B. The Petition does not identify a clear split as to clearly established rights or how its resolution could affect the outcome of this matter.

Petitioner takes issue with the Eighth Circuit's "loosely applied loophole that unfairly allows defendants to escape liability when any reasonable person would know what they were doing was wrong, despite the fact that no court has decided the issue and no law was in place to prevent it." Pet. 19. In other words, Petitioner complains that in deciding whether the law was clearly established at the time of the event, the Eighth Circuit actually looks for law that supports the alleged "established right."

Petitioner addresses four circuits in claiming a split of authority: the Second, Fourth, Sixth, and Eighth. Pet. 16-19. None have decided that "clearly established law" may be found in the absence of existing precedent. All cases cited in the Petition treat the sources of law the same – first, look to controlling authority, then to a weight of persuasive authority. *See Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010) (looking to "court of appeals case law" including "other circuit[s]"); *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 566-67 (6th Cir. 2016) (looking to "decisions of other circuits"); *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 280 (4th Cir. 2004) (looking to "a consensus

of cases of persuasive authority");[3] App. 9 (looking to controlling authority or a robust consensus of cases of persuasive authority).

Petitioner claims that language from the Second Circuit—that authority may "clearly foreshadow a particular ruling on the issue"—supports his argument. But that quote is no more than a restatement of this Court's oft-repeated admonition that while qualified immunity does "not require a case directly on point, . . . existing precedent must have placed the statutory or constitutional question beyond debate." *E.g.*, *Mullenix v. Luna*, -- U.S. --, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015).

Petitioner primarily appears to simply disagree with the Eighth Circuit's rejection of his argument that "regulations can place state actors on notice that their actions violate an individual's constitutional right." App. 14. The Petition, however, identified no circuit court that would consider internal municipal-department regulations in finding a "clearly established right." Therefore, any split that Petitioner may have identified is irrelevant, and this case is a poor vehicle to resolve it.

---

[3] Petitioner describes this as a contrast with a previous Fourth Circuit decision, but the previous decision only stated that it does not "ordinarily" need to look beyond Supreme Court and Fourth Circuit precedent. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999).

III. Petitioner never argued below for a different standard on state-created danger and does not identify a standard that would have affected the outcome of this case.

Petitioner's failure to argue that the district court applied the wrong standard is fatal to the petition. The supposed split Petitioner identified is also (a) illusory, and (b) relates to an element of the state-created danger claim that the Eighth Circuit did not rely on when it granted qualified immunity.

A. Petitioner never argued for a different state-created danger standard

Petitioner claims the circuits are divided as to the level of government action required to trigger a constitutional duty under the state-created danger doctrine. Pet. 20-27. Like the other issues presented in the petition, this supposed confusion among the circuit courts was not presented to the courts below.

1. Not raised at the district court

Petitioner argued to the district court that the "state-created danger doctrine was clearly established law in 2013." D. Ct. Br. at 65. Petitioner did not address the level of government action needed in order for the constitutional duty to apply. *Id.* Instead, Petitioner noted "[t]he central theme to cases involving state-created danger is that the state actor left the person in a situation that was more dangerous than the one in which they found him." *Id.* at 49.

The court adopted the same standard that Petitioner advanced: "[t]he state-created danger theory requires that state officials act[] affirmatively to place someone in a position of danger *that he or she would not otherwise have faced* before a constitutional duty to render protective services will arise." Pet. App. 61 (quotations and citation omitted) (emphasis in original).

2. Not raised at the Eighth Circuit

On appeal, Petitioner argued that Respondents acted with deliberate indifference, which "meets the test for plausibly alleging a constitutional claim under the state-created danger theory." *See* 8th Cir. Op. Br. at 27. Rather than argue that the state-created danger doctrine needed clarification as to the level of government action required (Pet. 20), Petitioner provided the Eighth Circuit with the level of action he believed to be necessary: "the government affirmatively places a particular individual in a position of danger the individual would not otherwise have been in." *See* 8th Cir. Op. Br. at 28.

In fact, Petitioner informed the court of appeals that the level of government conduct to meet this test cannot be "precisely defined" and "must necessarily evolve over time from judgments as to the constitutionality of specific government conduct." *Id.* at 28 (citations omitted). Petitioner later agreed "the standard to use" is that the individuals "would not have been in harm's way **but for** the government's

affirmative actions." *Id.* at 32 (quotations omitted) (emphasis in original); *id.* ("Appellant agrees that this is the standard to use, but disagrees with the district court's application of this standard to the facts.").

In the reply brief, Petitioner agreed with Respondents that "an assessment of the deliberate indifference of a state actor depends on an 'exact analysis of circumstances' in a given case." 8th Cir. Reply Br. at 7. Petitioner informed the Eighth Circuit that the state-created danger is "settled law." *Id.* at 17 ("Instead, it simply applies the well-settled law of 'state created danger' to the action of EMT/EMS government officers coming to a person suffering hypothermia."). Petitioner simply never made arguments that the level of government action should be addressed and, instead, applied the settled standard. *Id.*; *see also id.* at 22 ("The test for qualified immunity is whether the individual defendants violated clearly established law that every reasonable officer should know. As explained in Appellant's principal brief, the law in this area is clearly established and every reasonable officer should have known that leaving Jake Anderson in the cold with no effort to warm him would end his life.").

Since Petitioner preserved none of the arguments that he proposes to raise in this Court for the first time, this Court should deny certiorari.

B. Petitioner does not identify authority in another circuit that would have affected the outcome of this case.

Among the elements to assert a state-created danger claim, Petitioner takes issue only with the Eighth Circuit's previously-stated requirement that "the risk of danger be known or obvious to the defendant" at the time of the risk-creating action. Pet. 22. But, as Petitioner recognizes, the Eighth Circuit did not reach the merits of the state-created-danger issue. Pet. 20; *see also* Pet. App. 16.[4] Instead, in deciding that there was no applicable clearly established law, the Eighth Circuit focused on whether the Complaint plausibly asserted that "the government has taken a more active role in placing the victim in harm's way," and decided that it did not. *Id.* at 13-14. Since the Eighth Circuit did not rule on this issue, this Court should not address it in the first instance. *See United States v. Haymond*, -- U.S. --, 139 S. Ct. 2369, 2385, 204 L. Ed. 2d 897 (2019) ("this

[4] Petitioner reads the Eighth Circuit's opinion out of context in claiming the court of appeals "explicitly acknowledged that there is a severe lack of clarity as to the government's duty to protect." Pet. 27. In context, the Eighth Circuit was merely distinguishing Petitioner's cited case related to whether the law was clearly established at the time of the events in this case. Pet. App. 11-12. Indeed, the Eighth Circuit noted its prior decision "left open the possibility that we could recognize such a claim—it did not clearly establish a rule that such a claim is valid." *Id.* In a footnote, the Eighth Circuit further clarified that "[a]t most" the prior case outlined the general proposition of the state's duty to protect, but did not establish "any rule relevant to the specific context of this case." *Id.* at n.5 (quotations and brackets omitted).

Court normally proceeds as a 'court of review, not of first view").[5]

In addition, the cases Petitioner cites prove that the supposedly conflicting standard (not applied here) is consistent among the circuits, as those decisions identified known or obvious danger in denying qualified immunity on state-created danger claims. *See Kneipp v. Tedder*, 95 F.3d 1199, 1210-11 (3d Cir. 1996) (allowing claim to proceed, in part, because the officers "failed to take the appropriate measures, knowing that [plaintiff] was severely intoxicated" when they separated her from her husband and sent her home alone); *Wood v. Ostrander*, 879 F.2d 583, 590 (1989) (allowing claim to go forward where government arrested plaintiff, impounded her car, and stranded her in area with one of the highest violent crime rates in the county because officer who had long served in the area was chargeable with that knowledge).

---

[5] Even if the Eighth Circuit, as Petitioner contends, applied an intent requirement, the Petition does not assert that there is a jurisdiction without that requirement. He instead claims that the Second, Ninth, and D.C. Circuits have not clearly defined the claim to include that element. *See* Pet. 21. As a preliminary matter, he is wrong about the Ninth Circuit. *See Pauluk v. Savage*, 836 F.3d 1117, 1124-25 (9th Cir. 2016) (requiring a state actor to "have acted with deliberate indifference to a known or obvious danger") (internal quotations omitted). And Petitioner has identified no decision in the Second, D.C. Circuits, or any other circuit that has allowed a state-created danger in the absence of a known or obvious danger.

Because Petitioner's cases all require a plausible claim that the risk was known or obvious to the defendant, he has not described a meaningful or relevant split of authority on that point. Even if there was such a split, the Eighth Circuit's lack of reliance on the knowledge requirement here would make this case a poor vehicle to address it.

CONCLUSION

The Court should deny the Petition.

Respectfully submitted,

MICHAEL O. FREEMAN
Hennepin County Attorney

BETH STACK (*Counsel of Record*)
Beth.Stack@Hennepin.US

JONATHAN P. SCHMIDT
Jon.Schmidt@Hennepin.US
300 South Sixth Street, C-2000
Minneapolis, MN 55487
(612) 348-5550

ERIK NILSSON
Interim City Attorney, Minneapolis

IVAN LUDMER
Ivan.Ludmer@MinneapolisMN.Gov
Assistant Minneapolis City Attorney

TRACEY FUSSY
Tracey.Fussy@MinneapolisMN.Gov
Litigation Manager
350 South Fifth Street, #210
Minneapolis, MN 55414
(612) 673-2010

ANN WALTHER
AWalther@RiceMichels.com
Rice, Michels & Walther, LLP
10 Second Street Northeast, Suite 206
Minneapolis, MN 55413
(612) 676-2300