

No. 19-656

In The
Supreme Court of the United States

—◆—
WILLIAM ANDERSON,

Petitioner,

v.

CITY OF MINNEAPOLIS, ET AL.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
REPLY BRIEF
—◆—

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April 2, 2020

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INTRODUCTION

Jacob Anderson died likely as a result of the failure of officers of the Minneapolis Fire Department, Police Department and HCMC EMS to follow federal, state and local regulations, which command that emergency responders immediately take actions to warm victims of hypothermia, by covering them with a blanket and moving them inside to be warmed. This lawsuit was brought pursuant to the “state created danger doctrine,” developed after *DeShaney v. Winnebago*, 489 U.S. 189 (1989), under which state actors who create or increase danger to an individual can be held liable for violations of the Fourteenth Amendment.

Since *DeShaney*, this Court has had little occasion to clarify the law in this area. Accordingly, the federal courts of appeals are intractably divided over what level of state action is required to meet this burden and when qualified immunity should cause claims against officers to be dismissed. This confusion among the circuits has resulted in inconsistent decisions nationwide.

Respondents cannot deny this confusion or the split among the circuits. Their repeated assertions that the issues were not present below are simply not true. The litigation in the district court and the Eighth Circuit focused entirely on qualified immunity and the state created danger doctrine.

The Petition identifies three splits among the circuits, all of which were substantial factors in the lower courts’ holdings in this case, and all of which require

this Court's review. The splits represent a meaningful and irreconcilable conflict regarding a cornerstone question in constitutional law: when to hold state actors liable who violate constitutional rights by creating or exacerbating a danger. This discord among the circuits affects countless constitutional cases each year and creates a body of federal law that is increasingly unclear.

The lower courts in this case applied standards that likely would have been very different had the case been brought in other circuits. There is strong reason to believe that in a number of other circuits, the motion to dismiss would have been denied and the case would have gone forward to discovery. The rights of a citizen to seek justice for a constitutional deprivation should not change at the circuit border. The need for clear standards to analyze these issues, all of which are central to constitutional cases, is why this Court's review is now required.



REASONS WHY THE PETITION SHOULD BE GRANTED

The Petition for Certiorari is based on three clear circuit splits, all of which are material to the present case, and are implicated in every state created danger case in the country. First, the circuits are split as to who bears the burden of persuasion regarding the application of qualified immunity in constitutional cases. Second, the circuits are split as to the proper criteria

for determining if a right was clearly established for purposes of qualified immunity. And third, the circuits are split as to how large a role the state must play in the creation of danger or in the exacerbation of vulnerability before the state assumes a corresponding constitutional duty. The Petition detailed the circuit split on each of these issues.

Respondents attempt to considerably minimize this discord among the circuits and argue that this Court is somehow barred from review of these important, though currently disparate standards. Nothing in Respondents' arguments suggests a reason why this Court is prohibited from reviewing these three important issues.

Contrary to Respondents' arguments, each of the issues presented here were raised and were crucial to the rulings below. The lower court litigation and decisions were entirely about whether there is liability based on state created danger and qualified immunity, the issues now presented to this Court. What is required is that the issues be raised in the lower courts, even though new arguments obviously can be developed and presented in this Court. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *see also Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Moreover, this case clearly presents each of the legal issues and thus provides the perfect vehicle for

this Court to articulate clear standards that can be relied upon by courts across the country.

I. THERE IS A MEANINGFUL SPLIT AMONG THE CIRCUITS REGARDING THE PROPER STANDARDS FOR QUALIFIED IMMUNITY AND LIABILITY FOR A STATE CREATED DANGER.

The Petition describes circuit splits on three issues: Who bears the burden of persuasion as to the prongs of the qualified immunity analysis? What is the proper standard for determining a “clearly established right”? What is the proper standard for liability under due process for a state created danger? By applying conflicting standards for these issues, the circuits have created the potential for wildly different outcomes to the same interpretation of some of the most important rights our country recognizes. Respondents state that the circuits are not meaningfully split, thus obviating the need for this Court’s review. Brief in Opposition to the Petition for Certiorari [Br. Opp.] at 18. Their argument ignores the clearly contradictory standards, their widespread application, and the outmost gravity of the constitutional rights they protect.

A. The Circuits Are Clearly Split as to the Burden of Persuasion in the Qualified Immunity Analysis.

There is a clear circuit split as to who possesses the burden of persuasion as to the prongs of the qualified

immunity analysis. The First, Second, Third, Ninth and D.C. Circuits place the burden on defendants for both prongs of the analysis. Conversely, the Fifth, Sixth, Seventh, Tenth and Eleventh Circuits place the burden for both prongs on the plaintiff. Even more confusing, the Fourth and Eighth Circuits split the burden as to each prong between the parties, yet allocate them in the opposite way. Petition for a Writ of Certiorari [Pet.] at 9-13. There could not be a clearer or more extensive circuit split on an issue.

As stated in the Petition, which party bears the burden on which prong of the qualified immunity analysis is often enormously important to the outcome of a case. In a circuit where the burden is on the defendant to prove one or both prongs of the test under *Pearson v. Callahan*, 555 U.S. 223 (2009), Petitioner would likely have withstood the motion to dismiss and the matter would have advanced to discovery.

B. The Circuits Are Clearly Split as to the Standard for Determining Whether There Is a “Clearly Established Right.”

The circuits are split and have differing approaches as to what authority is necessary to “clearly establish” a right for purposes of the qualified immunity analysis. Respondents fail to understand the gravity of having differing approaches to this issue currently being applied by the circuits. Under a qualified immunity analysis, defining the proper criteria for determining when

a constitutional right is “clearly established” is as important as defining a right itself.

Respondents also fail to see how resolution of this split could affect the outcome of this case. If a circuit effectively requires a case specifically on point before it will hold that a right is clearly established, new law would never be made. Any number of factual scenarios in constitutional cases will become summarily swept under the heading of governmental immunity. In the alternative, a circuit that focuses more on the state action in question, as well as the knowledge and expertise of the state actors, may reach entirely different legal conclusions.

As with the burden of proof as to the two-pronged qualified immunity test, the standard for determining whether there is a “clearly established right” is yet another significant split among the circuits in need of this Court’s guidance.

C. The Circuits Are Clearly Split as to When There Is Liability for a “State Created Danger.”

There is also a clear circuit split as to the legal standard for “state created danger” liability under the due process clause. As the Eighth Circuit recognized in this case, and as reflected in the split among the circuits, there is great disagreement as to the standard for the level of state action required before a corresponding constitutional duty attaches. As the Eighth Circuit noted: “[i]t is not clear, under *DeShaney*, how

large a role the state must play in the creation of danger and in the creation of vulnerability before it assumes a corresponding duty to protect. It is clear, though, that at some point such actions do create such a duty.” Petitioner’s Appendix [Pet. App.] at 11.

Respondents fail to recognize this disparity across the country. Br. Opp. at 23. Similar to the split regarding how to determine whether there is a “clearly established right,” the differing criteria regarding state created danger has led to irreconcilable variances in the law from one circuit to another, thus now requiring this Court’s review. Also, the lack of clarity as to the legal standard has meant that relief for such claims almost always fails, as occurred in this case, on qualified immunity grounds.

II. ALL ISSUES WERE PROPERLY RAISED AT THE LOWER COURTS.

Respondents erroneously claim that several issues were not properly raised in the lower courts. Yet, each of these issues were not only raised at the district court and appellate levels, they were material to the lower courts’ holdings. Although the existence of circuit splits obviously was not the focus in the lower courts, the substantive issues underlying the splits were central to the proceedings below and indeed, were raised. Thus, these issues are properly presented for this Court’s review.

A. The Two-Pronged Analysis of Qualified Immunity, Including the Burden of Persuasion Under It, Was a Material Part of the Lower Courts' Proceedings in this Case.

Respondents falsely claim that the issue of qualified immunity was not properly raised below. In fact, the two *Pearson* prongs were both briefed and explicitly discussed in the decisions from the courts below. This analysis was a central focus of the district court's order. (See Pet. App. at 14-20 for analysis of *Pearson* two-prong test).

Respondents say that the issue of the burden of persuasion was not raised or ruled on below and thus this issue is not properly before this Court, though Respondents ultimately admit that the issue of qualified immunity was raised below. Br. Opp. at 13. Nevertheless, the placement of the burden of persuasion was crucial in both the appellate and district court decisions. Pet. App. at 9, 58. ("To overcome a qualified immunity defense, 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."; "Qualified immunity is an affirmative defense that a plaintiff need not anticipate to state a claim. However, if the defense is raised on a 12(b)(6) motion, it will be upheld if the immunity is established 'on the face of the complaint.'") (internal citations omitted).

In ruling for Respondents, both the district court and the Eighth Circuit necessarily decided the issue of the burden of persuasion in their holdings, ruling against Petitioner in a manner that clearly put the burden of persuasion on him.

B. The “Clearly Established Right Standard” Was a Material Part of the Lower Courts’ Proceedings in this Case.

As with the qualified immunity test, the question of how to determine what is “clearly established” law also featured prominently in the lower court holdings in this case.

The district court specifically decided not to rule on whether the right Mr. Anderson alleged was “clearly established,” because it determined that no constitutional violation occurred. Pet. App. at 74. (In light of its conclusion that Plaintiff has not plausibly alleged that the Individual Defendants violated Anderson’s substantive due process rights, this Court need not reach the question of whether the rights claimed to have been infringed were clearly established at the time of Anderson’s death.”)

Conversely, however, the appellate court decided not to rule on whether a constitutional violation occurred, which was the basis of the lower court’s ruling on qualified immunity, because it determined Mr. Anderson’s asserted right “was not clearly established.” 934 F.3d 876, 882-884 (“Anderson claims that *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990) and *Ross v.*

United States, 910 F.2d 1422 (7th Cir. 1990) show that the right he identifies is clearly established, but neither case defines a specific right that is applicable here . . . Anderson makes several other arguments directed at the district court’s conclusion that no constitutional violation occurred. Because we do not reach that question, we need not address them.”)

Respondents wrongly assert that the Eighth Circuit did “not reach” the issue of the circuit split on the “clearly established” prong. Br. Opp. at 21-23. Although those courts did not focus on the circuit split, because there is no reason for lower courts to do so, the district court raised the issue and the Eighth Circuit explicitly analyzed and ruled on the question of whether there is clearly established law.

Accordingly, the issue of how to determine what is “clearly established law” was raised in both the district court and the appellate court. The issue is now properly before this Court for review.

C. Confusion Among the Courts as to the State Created Danger Standard Was a Material Part of the Lower Courts’ Proceedings in this Case.

This case is about whether Respondents are liable for a “state created danger” under the due process clause. This is the focus of Petitioner’s Complaint.

Respondents nonetheless argue that this was not properly presented below. Respondents rely on *Nat’l*

Bank v. Commonwealth, 76 U.S. 353 (1869) and *OBB Personenverkehr AG v. Sachs*, ___ U.S. ___, 136 S. Ct. 390 (2015). In *Nat'l Bank*, this Court rightfully refused to hear the bank's argument, reasoning that the "proposition is not raised among the very distinct and separate grounds of defen[s]e set up by the bank in the pleading." *First Nat. Bank*, 76 U.S. 353 (1869). But here, in the *Anderson* case, "state created danger" was *the* focus in the lower courts.

Similarly, Respondents provide no analysis for why *Sachs* precludes review in this Court. There, the Court was asked to consider "the scope of the commercial activity exception, which withdraws sovereign immunity in any case 'in which the action is *based upon* a commercial activity carried on in the United States by [a] foreign state.'" *Sachs*, at 392 (quoting 28 U.S.C. § 1605(a)(2)).

Here, the degree of the state action necessary for liability for a "state create danger" was a major consideration at both the appellate and district court levels. Pet. App. at 13, 72. ("In more factually similar cases, courts have found a constitutional violation only where the government has taken a more active role in placing the victim in harm's way."); ("But as in *DeShaney*, '[t]he most that can be said of the[se] [Defendants] . . . is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.'"). Respondents are simply incorrect in stating this issue was not properly raised, as it was a material focus of the lower courts' holdings.

III. THE OUTCOME OF THIS CASE LIKELY DEPENDS ON THE CIRCUIT WHERE IT WAS LITIGATED.

Respondents assert that Petitioner did not provide authority from other circuits that indicate that the outcome would have changed had it been litigated elsewhere. The Petition specifically describes the differing law in other circuits and why this disparity shows that the case likely would have produced a different result if it had been litigated in other venues.

Most importantly, if *Anderson* had been litigated in other circuits, Petitioner likely would have withstood the motion to dismiss and would have been afforded the opportunity to engage in discovery and pursue his case on the merits. Key issues that were in dispute at the pleading stage, such as the critically dispositive factual issue of whether Jake Anderson was still alive at the time he was declared dead, could have been answered through a robust discovery process and ultimately through presentation of expert testimony.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLITS.

These issues addressed above and in the Petition highlight just why this case is the ideal vehicle to resolve the circuit splits. At issue in this case was a violation of Jake Anderson's undeniable Fourteenth Amendment right to life. Importantly, Respondents have not challenged the crucial fact that leaving a severely hypothermic victim exposed to extreme cold

could put his life at risk. The fact that no case specifically states, “not adhering to hypothermia protocols could violate a person’s constitutional right to life” begs the question of whether such a case is needed and how to decide when government officers are liable for such a state created danger.

Respondents claim the procedural posture of the case somehow makes it a poor vehicle for this Court to resolve the many issues implicated within it. This is simply wrong. The district court and the Eighth Circuit dismissed this case for failure to state a claim. It is thus in the perfect procedural posture to decide the three questions presented.

Contrary to Respondents’ conclusory arguments, this is precisely why this case presents the proper vehicle for resolution of the three highlighted splits. Few qualified immunity cases present a factual scenario involving each type of state actor first responder involved in *Anderson*, and even fewer also involve the interpretation of three different legal standards, all of which could alter countless outcomes in the lower courts. This case thus provides an excellent vehicle for this Court’s review of these issues to create the necessary uniformity for this very important area of law.



CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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