No. 20-1392

In The
Supreme Court of the United States

JASON FOWLER and MICAH PERKINS,

Petitioners,

v.

BRITTANY IRISH, Individually and as Personal Representative of the Estate of Kyle Hewitt, and KIMBERLY IRISH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

State-created danger cases almost always involve a gruesome set of facts and allegations that the government and its officials (typically law enforcement officers) could have acted or done something differently to prevent a terrible tragedy. This matter is no different. However, the importance of this case to *amicus* centers not so much on the state-created danger doctrine—which *amicus* will nevertheless address in detail—but rather on qualified immunity. The doctrine of qualified immunity protects state actors such as firefighters, teachers, school administrators, city officials, and police officers from personal civil liability when they are sued in their individual capacities. Although the doctrine has come under intense scrutiny in recent years, often overlooked is the fact that qualified immunity does *not* protect the "plainly incompetent or those who knowingly violate the law." *See Malley v. Briggs*, 475 U.S. 335, 341 (1986).

This case presents this Court with an opportunity to clarify the doctrine of qualified immunity by directing the lower courts, as it has done before, to refrain from defining "clearly established law"—one of the two

[1] In accordance with Rule 37.6, the NFOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. All parties have been timely notified of the submission of this brief.

prongs in every qualified immunity analysis—at a high level of generality. *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018). The First Circuit's decision contravenes this Court's qualified immunity directives.

Should the First Circuit's decision stand, law enforcement officers will once again find themselves in a legal paradox. For example, officers can opt to do little investigation and arrest a suspect, even without probable cause, and thereby risk violating the Fourth Amendment and potentially forfeit their qualified immunity. Conversely, officers can choose to investigate using legitimate, trained law enforcement tools and techniques, but again risk being held liable in a § 1983 action should anything happen to an individual at the hands of a third party in the interim. Moreover, absent performance of certain discretionary and investigation-type actions discharged routinely by law enforcement officers, criminal offenders may avoid punishment altogether thereby endangering the public at-large.

The National Fraternal Order of Police (NFOP) offers its service as *amicus curiae* when important police and public safety interests are at stake, as in this case. It is with this backdrop in mind that the NFOP, the world's largest organization of sworn law enforcement officers with more than 356,000 members in over 2,100 lodges across the United States, respectfully seeks to be heard.

SUMMARY OF ARGUMENT

"Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). Indeed, the relevant inquiry in qualified immunity cases is, in part, whether existing precedent placed the conclusion that the officer acted unreasonably in these circumstances beyond debate. *See Mullenix v. Luna*, 577 U.S. 7, 13 (2015). In this case, the First Circuit held that Officers Perkins and Fowler were not entitled to qualified immunity for their conduct on July 15, 2015 because the record established a substantive due process violation under the state-created danger doctrine which was clearly established in July 2015. *Irish v. Fowler*, 979 F.3d 65, 79 (1st Cir. 2020). However, the lower court stated this holding mere paragraphs after establishing—*as a matter of first impression*—the elements of a state-created danger claim in the First Circuit. *Id.* at 75. This Court should summarily reverse the First Circuit based on its failure to follow established precedent and this Court's repeated admonishments that lower courts should not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *District of Columbia v. Wesby*, 138 S.Ct. 577, 590 (2018). In support of its position, the NFOP requests this Court consider its Brief as follows.

1. The NFOP, similar to Petitioners (albeit with an emphasis on the broader impact to law enforcement), calls attention to the First Circuit's faulty analysis of what constitutes a "clearly established" right. Indeed, this case, like *City of Escondido v. Emmons*, is an appropriate occasion for the Court to remind lower courts that no matter the constitutional violation alleged—this time in the context of due process and the state-created danger doctrine—to not define the law at a high level of generality. Otherwise, the fair notice required to separate reasonable from unreasonable actions of state actors performing discretionary duties will disappear entirely. At the time Officers Perkins and Fowler began their investigation into Respondent's alleged sexual assault, the state-created danger doctrine had not yet been established in the First Circuit. The lower court mistakenly found the contours of Respondent's due process claims for state-created danger were clearly established.

2. Even if the lower court properly found the law to be clearly established on July 15, 2015, Officers Perkins and Fowler's investigation was reasonable. None of their actions "shock the conscience." If we are to accept the First Circuit's formulation of the state-created danger doctrine, this matter is not the occasion to find it applies.

3. In closing, the NFOP underscores the legal paradox law enforcement find themselves in should the lower court's decision stand and why qualified immunity is an appropriate (and important) defense. In support of the Petitioners, the NFOP respectfully requests this Court grant Petitioners' Petition for Writ of Certiorari in order to correct the First Circuit's mistaken qualified immunity analysis.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY.

"Qualified immunity attaches when an official's conduct does not violate *clearly established* statutory or constitutional rights of which a reasonable person would have known." *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500, 503 (2019) (emphasis added) (citing *Kisela v. Hughes*, 138 S.Ct. 1148, 1152 (2018)). The clearly established inquiry focuses "on whether the offic[ial] had fair notice that her conduct was unlawful," and the reasonableness of the official's actions "is judged against the backdrop of the law at the time of the conduct." *Kisela*, 138 S.Ct. at 1152 (quotation omitted). While "this Court's caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *White v. Pauly*, 137 S.Ct. 548, 551 (2017)). To

that end, the Supreme Court has repeatedly admonished lower courts "not to define clearly established law at a high level of generality." *Id*. (quoting *City & Cnty. of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1775–76 (2015)). In other words, a court cannot deny an official qualified immunity based on "constitutional guidelines [that] seem inapplicable or too remote." *Id*. at 1153.

In denying qualified immunity to Officers Perkins and Fowler, the First Circuit ignored this Court's clear precedent and erroneously found that the Petitioners' conduct on July 15, 2015 violated a clearly established constitutional right. The lower court's decision is not only directly at odds with settled principles of qualified immunity, but it also creates a Catch-22 for law enforcement officers. Under the First Circuit's reasoning, an officer forfeits qualified immunity and risks civil liability if—while the officer is performing their discretionary law enforcement duties and investigating a complaint of criminal activity—something happens to the individual at the hands of a third party in the interim. But an officer will also forfeit qualified immunity if they investigate a complaint *too* quickly and arrest someone accused of criminal conduct without probable cause in violation of the Fourth Amendment. Either way, under the First Circuit's decision, an officer's discretion in the performance of criminal investigations will be significantly restrained, making it easier for criminal offenders to avoid punishment and jeopardizing public safety.

A. The constitutional violation alleged was not clearly established at the time of Officers Fowler and Perkins' actions.

To determine whether a government official is entitled to qualified immunity, courts conduct the two-prong analysis promulgated by this Court in *Saucier v. Katz*, 533 U.S. 194, 201 (2001): (1) whether the facts alleged (or shown) establish a violation of a constitutional right; and (2) whether the right was clearly established at the time of the government official's conduct. As this Court stated in *Pearson v. Callahan*, 555 U.S. 223, 236 (2009), lower courts are permitted to exercise their sound discretion in deciding which of the *Saucier* prongs should be addressed first in light of the circumstances in the particular case at hand. In abandoning the "rigid *Saucier* procedure," this Court noted there are cases "in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right." *Id.* The Court further noted that undertaking the inquiry in the first prong "sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Id.* That is the case here. Had the First Circuit Court of Appeals followed this Court's precedents and conducted a proper qualified immunity analysis, this matter may have been properly disposed of at an earlier stage because the law in question was not clearly established at the time of Petitioners' actions.

i. This Court's precedents make clear that law enforcement officers must be on notice that their actions violate clearly established law.

"An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite [such] that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, 138 S.Ct. at 1153. In other words, the dispositive question is "whether the state of the law [at the time of the officials' conduct] gave [them] fair warning that their alleged [conduct] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002); *see also Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (internal citations omitted). Several of this Court's recent decisions are instructive as to what constitutes a "fair warning."

In *Ashcroft v. al-Kidd*, the plaintiff filed a *Bivens* action against former Attorney General Ashcroft, alleging that Ashcroft violated his Fourth Amendment rights by authorizing federal prosecutors to use the federal material-witness statute as a pretext to investigate and preventatively detain terrorism suspects. *Ashcroft*, 563 U.S. at syllabus. Ashcroft moved to dismiss on the basis of absolute and qualified immunity. *Id.* at 734. The district court denied the motion and the Ninth Circuit affirmed, citing a district court's footnoted dictum, irrelevant cases from this Court, and the Fourth Amendment's broad purposes and history. *Id.* This Court reversed the Ninth Circuit, and restated the standard for the second prong of the qualified

immunity analysis: "[A] [g]overnment official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Id.* at 741 (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Applying this standard, the Court held that al-Kidd's complaint fell "far short" of alleging a violation of a clearly established right. *Id.* In particular, the Court noted that "[a]t the time of al-Kidd's arrest, not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional." *Id.* Accordingly, the dicta, irrelevant case law, and broad legal principles that the Ninth Circuit had relied on in denying Ashcroft qualified immunity were insufficient as a matter of law to demonstrate a clearly established right. *Id.*

In *District of Columbia v. Wesby*, 138 S.Ct. 577 (2018), several partygoers sued District of Columbia police officers for false arrest and unlawful entry after the officers responded to a complaint about loud music and illegal activities occurring in a vacant house. It was undisputed that the partygoers were using the house against the owner's will, but nevertheless, they argued that the officers lacked probable cause to arrest them because the officers had no reason to believe that they "knew or should have known" their "entry was unwanted." *Id.* at 586. In rejecting this argument, this Court held that, even assuming that the officers lacked probable cause to arrest the partygoers, they were

entitled to qualified immunity "because, given 'the circumstances with which [they] w[ere] confronted,' they 'reasonably but mistakenly conclude[d] that probable cause [wa]s present.'" *Id.* at 580 (quoting *Anderson*, 483 U.S. at 640). As the Court further explained:

> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be settled law, which means it is dictated by controlling authority or a robust consensus of cases of persuasive authority. It is not enough that the rule is suggested by then-existing precedent.

Id. at 589–90 (internal citations omitted) (internal quotation marks omitted).

More recently, in *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500 (2019), an arrestee sued a police officer and sergeant for excessive force after the officers forcibly apprehended him at the scene of a reported domestic violence incident. Reversing the Ninth Circuit's decision denying qualified immunity to the officers, this Court stated disapprovingly that the "Ninth Circuit's entire relevant analysis of the qualified immunity question consisted of the following: '[t]he right to be free of excessive force was clearly established at the time of the events in question.'" *Id.* at 502. The Court further elaborated as to why the Ninth Circuit's "formulation of the clearly established right was far too general" as follows:

> The Court of Appeals should have asked whether clearly established law prohibited

> the officers from stopping and taking down a man *in these circumstances*. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the right to be free of excessive force was clearly established.

Id. at 503 (emphasis added) (internal quotation marks omitted). Consequently, this Court remanded *Emmons* for the Ninth Circuit Court of Appeals to conduct the analysis required by this Court's qualified immunity precedents. *Id.* at 504.

A similar act is warranted here, because much like the D.C. Circuit in *Wesby* and the Ninth Circuit in *Ashcroft* and *Emmons*, the First Circuit failed to conduct the analysis required by this Court's precedents with respect to whether Officers Perkins and Fowler are entitled to qualified immunity.

ii. The First Circuit's analysis regarding the clearly established law at the time of Petitioners' actions is erroneous.

To overcome a government official's claim for qualified immunity, a plaintiff is not required to point to a case with the exact factual scenario previously addressed in their jurisdiction. Rather, as this Court has explained, a plaintiff may demonstrate that the constitutional right at issue was clearly established by citing either: (1) cases of controlling authority in their jurisdiction at the time of the incident; or (2) a consensus of

cases of persuasive authority. *Ashcroft v. al-Kidd*, 563 U.S. 731, 746 (2011) (Kennedy, J., concurring) (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)). Here, however, Respondents can show neither.

There were no cases of controlling authority in Petitioners' jurisdiction at the time of the incident.

For one, there was no First Circuit case law on point for Officers Perkins and Fowler to rely upon such that any reasonable officer operating in their jurisdiction at the time of the incident would have known his or her actions were unconstitutional. In fact, in the decision immediately below, the First Circuit held, *as a matter of first impression*, that state actors can be held liable for a substantive due process violation based on the state-created danger doctrine. *See Irish v. Fowler*, 979 F.3d 65 (1st Cir. 2020). Thus, *in this very case*, the lower court established the law of the circuit with respect to a substantive due process violation based on the state-created danger doctrine; it also stated, *for the first time*, the necessary components for the viability of such a claim. *Id.* at 75. Therefore, the only logical conclusion is that there were no cases of controlling authority in the First Circuit on July 15, 2015 to give Petitioners fair notice that their actions may violate the law.

In denying qualified immunity to Officers Perkins and Fowler, the First Circuit claimed that its previous opinion in *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir.

2005) served as a "critical warning bell that officers could be held liable under the state-created danger doctrine when their affirmative acts enhanced a danger to a witness." *Irish*, 979 F.3d at 78. However, a review of *Rivera* illuminates its deficiencies as a "critical warning bell." Indeed, the First Circuit specifically stated in *Rivera* that, while it had "discussed the state-created danger theory," previously, the court "never found it actionable on the facts alleged." *Rivera*, 402 F.3d at 35. The court went on to "discuss" the state-created danger theory as follows:

> Even if there exists a special relationship between the state and the individual or the state plays a role in the creation or enhancement of the danger, under a supposed state created danger theory, there is a further and onerous requirement that the plaintiff must meet in order to prove a constitutional violation: the state actions must shock the conscience of the court.

Id.

In *Rivera*, fifteen-year-old Jennifer Rivera was shot and killed to prevent her from testifying at Charles Pona's murder trial. *Id.* at 30. Before her murder, Rivera had received numerous death threats from Pona and his associates; she reported these threats to the police, and they promised to protect her. *Id.* at 31. Relying upon this Court's holding in *DeShaney*, the First Circuit held that "the state's promises, whether false or merely unkept, did not deprive [Rivera] of the liberty to act on her own behalf nor did the state force

[Rivera], against her will, to become dependent on it," and therefore could not support a state-created danger claim. *Rivera*, 402 F.3d at 38. The court went even further to state:

> We add a few words about the separate shock the conscience test which plaintiff would also have to meet if she established a duty. In part, the test is meant to give incentives to prevent such gross government abuses of power as are truly outrageous. The facts here do not match the need for such incentives. . . . *Of course, there may be an extreme set of facts involving such deliberate and malevolent actions by police against witnesses as to shock the conscience and implicate a constitutional violation. Those await another day.*

Id. at 38 (emphasis added) (internal citations omitted). This language is completely at odds with the First Circuit's declaration here, that *Rivera* was a "critical warning bell" for Officers Perkins and Fowler in terms of the state-created danger doctrine. As the trial court in this matter aptly stated, "any reasonable state police officer reading *Rivera* would determine that contacting and interviewing a person accused of sexual assault would not violate the accuser's substantive due process rights, even if doing so could increase the risk to the accuser." *Irish v. Maine*, 1:15-CV-00503-JAW, 2016 WL 4742233, at *12 (D. Me. Sept. 12, 2016).

In short, *Rivera* is not the "case[ ] of controlling authority" in the First Circuit at the time of the incident—July 15, 2015—that the lower court prescribed.

Ashcroft, 563 U.S. at 746. As such, Respondents needed to point to a consensus of persuasive authority to establish that the constitutional right at issue was clearly established.

A consensus of cases of persuasive authority does not exist.

Second, in the absence of cases of controlling authority in the jurisdiction where the incident occurred, this Court requires a robust consensus of cases of persuasive authority in order to show that the law was clearly established. *Wesby*, 138 S.Ct. at 589–90. Again, the First Circuit's decision below falls short of this Court's precedents, citing only two cases from its sister circuits, *Kennedy v. City of Ridgefield*, 439 F.3d 1055 (9th Cir. 2006) and *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998). Indeed, two cases from different circuits hardly represents a "robust consensus of cases of persuasive authority"—especially given that both cases are factually dissimilar from this matter.

Because Petitioners have already conducted a rigorous analysis in their Petition for a Writ of Certiorari, in which they distinguish the facts of this matter from *Kennedy* and *Monfils* (*see* Petition at 31–33), this Brief will not attempt to distinguish those cases in-depth. It is worth noting, however, that both the Ninth Circuit in *Kennedy* and Seventh Circuit in *Monfils* relied on cases from their respective jurisdictions to find that the state-created danger doctrine was clearly established law, unlike the First Circuit here. In *Kennedy*,

the Ninth Circuit began its analysis on the clearly established prong of the qualified immunity test by considering three cases from its own circuit before holding "it was clearly established that state officials could be held liable where they affirmatively and with deliberate indifference placed an individual in danger she would not otherwise have faced." *Kennedy*, 439 F.3d at 1066. Meanwhile, in *Monfils*, the Seventh Circuit noted that its recognition of the state-created doctrine "precede[d] *DeShaney*, which was decided in 1989." *Monfils*, 165 F.3d at 518. Accordingly, the Seventh Circuit—citing its own long-standing precedent—concluded that a government official could, if the circumstances were right, be held responsible for creating a danger in a noncustodial setting. *Id.* at 519.

Again, the dispositive question is whether the violative nature of *particular* conduct is clearly established. *Mullenix*, 577 U.S. at 12. It is a fact-intensive inquiry. Given the unfolding nature of state-created danger cases, it is even more critical, from the boots-on-the-ground officer perspective, for a robust consensus of cases to clearly establish which actions (or inactions) can expose the officer to liability under the Constitution. Because each circuit has developed its own standard in applying (or rejecting) the doctrine, it becomes even more vital—until this Court provides a national, uniform set of rules—that the fair notice to the officer come from the officer's jurisdiction.

Lastly, the NFOP would be remiss not to emphasize the importance of the clearly-established prong of the qualified immunity defense, particularly for its

rank-and-file members. Law enforcement officers simply want to know the rules. In other words, a "fair and clear warning of what the Constitution requires." *Ashcroft*, 563 U.S. at 746 (Kennedy, J., concurring) (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Officers need protection in order to perform discretionary, investigatory functions. Every single factual scenario an officer encounters is different and unknown. Similar to a scenario implicating the Fourth Amendment like those discussed in *Ashcroft*, *Wesby*, and *Emmons*, it is extremely difficult for an officer (and unfair to ask him or her to do so) to determine how a legal principle such as the state-created danger doctrine will apply to an evolving factual scenario that the officer confronts. Thus, unless there is existing precedent that squarely governs the facts before the officer—which we can expect the officer to follow—the reasonable officer needs to be afforded a certain degree of discretion to make legitimate investigatory and law enforcement-related decisions in situations that could put lives, including their own, at risk. In these scenarios, officers must rely on training and experience and should not be punished for doing so absent a clear ruling otherwise.

Accordingly, Petitioners deserve qualified immunity even assuming—contra-factually—that their alleged actions violated Respondents' substantive due process rights.

B. Even if the alleged constitutional violation was clearly established, Officers Fowler and Perkins did not violate Respondents' substantive due process rights under the state-created danger doctrine.

As a "general matter" a state does not violate an individual's due process rights for failing to protect against a privately inflicted harm. *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 197 (1989) (The "purpose" of the Due Process Clause of the Constitution "was to protect people from the State, not to ensure that the State protected them from each other."). While the core holding from *DeShaney* has remained largely unchanged in the decades since this Court issued its opinion, there are two generally recognized exceptions to the rule. Under the first exception, the government has a duty to protect a person if he or she is physically in government custody. *Youngberg v. Romeo*, 457 U.S. 307 (1982). Because Respondents were not in government custody at the time of the injuries, this exception does not apply. Under the second exception, the government has a duty to protect "where the government affirmatively acts to increase the threat to an individual of third-party harm." *Coyne v. Cronin*, 386 F.3d 280, 287 (1st Cir. 2004). This second exception is drawn implicitly from the *DeShaney* opinion, wherein this Court stated, "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201.

Furthermore, despite its holding in *DeShaney*, this Court has not expressly recognized the existence of a state-created danger doctrine. As a result, there is no uniform standard for the doctrine amongst the Courts of Appeals. In this case, the trial court reviewed the various circuits' approaches to the state-created danger doctrine before ruling on Petitioners' motion for summary judgment. *See Irish v. Fowler*, 436 F. Supp. 3d 362, 413 n.148 (D. Me. 2020), *aff'd in part, vacated in part, remanded*, 979 F.3d 65 (1st Cir. 2020). Some circuits have created a test, *see, e.g.*, *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006); *Doe v. Jackson Local Sch. Dist. Bd. of Educ.*, 954 F.3d 925, 932 (6th Cir. 2020); *Estate of Her v. Hoeppner*, 939 F.3d 872, 876 (7th Cir. 2019), while others have rejected the doctrine altogether. *See, e.g.*, *Turner v. Thomas*, 930 F.3d 640, 646 (4th Cir. 2019) ("Following *Pinder*'s narrow reading of the state-created danger doctrine, we have never issued a published opinion recognizing a successful state-created danger claim."); *Keller v. Fleming*, 952 F.3d 216, 227 (5th Cir. 2020). Although this Brief will not attempt to reexamine each circuit's standard (or lack thereof) for the state-created danger doctrine, "it is striking here that circuits really do have quite different tests." Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 Touro L. Rev. 1, 26 (2007). Suffice to say there is certainly no "clearly established law" with regard to the state-created danger doctrine.

Arguably acknowledging that the state-created danger doctrine was not clearly established in the First Circuit, the lower court—in the opinion immediately

below—set forth the necessary components to make out a state-created danger claim in the First Circuit for the very first time:

> The plaintiff must establish that:
>
> 1) that a state actor affirmatively acted to create or enhance a danger to the plaintiff;
>
> 2) that the act or acts created or enhanced a danger specific to the plaintiff and distinct from the danger to the general public;
>
> 3) that the act or acts caused the plaintiff's harm; and
>
> 4) that the state actor's conduct, when viewed in total, shocks the conscience:
>
> > (i) where officials have the opportunity to make unhurried judgments, deliberate indifference may shock the conscience, particularly where the state official performs multiple acts of indifference to a rising risk of acute and severe danger. To show deliberate indifference, the plaintiff must, at a bare minimum, demonstrate that the defendant actually knew of a substantial risk of serious harm and disregarded that risk.
> >
> > (ii) where state actors must act in a matter of seconds or minutes, a higher level of culpability is required.

Irish, 979 F.3d at 75. If we are to accept this formulation of the state-created danger doctrine as the law of

the First Circuit moving forward, then Officers Fowler and Perkins' actions do not reach the level of a state-created danger.

For one, the officers did not commit any conventional tort or constitutional violation which would have been sufficient to rise to the level of an affirmative action under the first step of the First Circuit's test. Rather, the officers performed discretionary, investigatory functions necessary to investigate allegations of sexual assault. These functions included, in part, the following steps:

- Meeting with the Respondent two separate times at the hospital on July 15, 2015.
- Asking the Respondent to complete a written statement and provide the clothes she was wearing at the time of the alleged assault.
- Locating the two camps in which the Respondent claimed she had been sexually assaulted. The officers requested that the evidence response team process the camps for evidence and took interior and exterior photographs of the one camp that they were able to locate the night of July 15, 2015.
- Interviewing the Respondent's best friends.
- Conducting a third, recorded interview with the Respondent.

- Leaving a voicemail requesting a meeting with the alleged suspect. The voicemail did not identify the victim or even suggest what the officer wanted to talk about.
- Interviewing the Respondent's boyfriend.

While Respondents assert that the officers' voicemail was an affirmative act that created or enhanced a danger to them, Officer Perkins and Fowler's actions amount to a reasonable investigation under the circumstances. As the trial court acknowledged, there will always be alternative options to an investigation. *Irish v. Fowler*, 436 F.Supp.3d 362, 383 (D. Me. 2020). Furthermore, officers are entitled to use their discretion and rely on training and experience when investigating allegations of criminal conduct. Petitioners' investigation—viewed in the totality of the circumstances—does not shock the conscience. Per the First Circuit's decision in *Rivera*, the "shock the conscience" standard is a high bar that should be reserved for only "deliberate and malevolent actions by police" officers. *Rivera*, 402 F.3d at 38. Otherwise, the state-created danger doctrine will become a vehicle for criticizing legitimate investigatory practices with hindsight bias.

In short, should this Court accept this case and use it as an occasion to set uniform parameters for the state-created danger doctrine, the NFOP respectfully requests it do so with the above principles in mind.

C. If left to stand, the First Circuit's decision will have significant, adverse consequences for rank-and-file police officers.

Today's law enforcement officer is subject to intense scrutiny and second-guessing for their every action (or inaction). In scenarios involving use of deadly force, for example, every second leading up to the use of force is subject to review by the department, and then further analysis by the general public, the media, and in some cases, a judge and/or jury. In those cases, an officer's every action is parsed to determine if the officer acted appropriately given the totality of the circumstances, which often involve a complex, fact-intensive, and constantly evolving setting.

Similarly, officers' investigatory techniques are scrutinized—often after a tragic set of events—in order to determine if their actions, or inactions, may be a contributing cause. Should the decision below stand, the implication moving forward is perilous for law enforcement. Personal, civil liability may attach to a police officer while performing discretionary, investigatory law enforcement functions any time something happens to an individual at the hands of a third party in the interim. Thus, once again, officers find their hands tied. Law enforcement can opt for a quick arrest and risk liability for a Fourth Amendment violation, or investigate a complaint but risk liability for a due process violation should something unforeseen happen to the complainant during the investigation. To be sure, this Court in *DeShaney* recognized the uncertain position

of the state in cases involving an alleged state-created danger:

> In defense of [the state] it must also be said that had they moved too soon to take custody of the son away from the father, they would likely have been met with charges of improperly intruding into the parent-child relationship, charges based on the same Due Process Clause that forms the basis for the present charge of failure to provide adequate protection.

DeShaney, 489 U.S. at 203. Law enforcement options are dwindling in carrying out their sworn duty to protect and serve the public.

Qualified immunity does not protect police officers that knowingly violate the law. Qualified immunity does not prohibit suits against the city, municipality, or any other governmental entity. Qualified immunity does not protect police officers from criminal charges, internal investigations, or employer discipline. Qualified immunity does not apply to the ministerial acts or duties of law enforcement. The defense applies *only* when the officer's conduct does not violate clearly established rights of which a reasonable officer would have known. It is not absolute, and it is not unlimited. Officers Perkins and Fowler's investigatory actions in this case fall in this limited category and thus, qualified immunity can be appropriately applied.

Officers take solace in that the doctrine protects all but "the plainly incompetent." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Consider this Court's recent

decisions in *Taylor v. Riojas* and *McCoy v. Alamu*. In *Taylor*, this Court held that the Fifth Circuit erred in granting the correctional officers qualified immunity where "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, it was constitutionally permissible to house Taylor in such deplorably unsanitary conditions for an extended period of time." *Taylor v. Riojas*, 141 S.Ct. 52, 54 (2020) (Taylor alleged that, for six full days, correctional officers confined him in a pair of shockingly unsanitary cells, covered nearly floor to ceiling in massive amounts of feces). In *McCoy*, this Court again vacated a grant of qualified immunity by the Fifth Circuit in light of its decision in *Taylor*. In *McCoy*, a Texas prisoner alleged that a correctional officer sprayed him in the face with a chemical agent without provocation. *McCoy v. Alamu*, 950 F.3d 226, 228 (5th Cir. 2020). Indeed, law enforcement officers know that in instances where an officer acts so outside the bounds of reasonableness and decency, qualified immunity will not be available as a defense. In the case of Officers Perkins and Fowler, that is simply not the case.

Finally, qualified immunity promotes not only competent policing, but competent governing. It is a defense available to mayors, city officials, firefighters, school administrators, and teachers, to name a few. Its further erosion will have consequences reaching far beyond law enforcement. The First Circuit's decision is an inaccurate formulation of how qualified immunity is to be applied and must be corrected.

CONCLUSION

Officers Perkins and Fowler acted reasonably. Qualified immunity exists to give "government officials breathing room to make reasonable but mistaken judgments about open legal questions." *Ashcroft*, 563 U.S. at 743. The nature of policing often demands split-second decision-making and sometimes involves a tragic series of events. Where there is no reason for a law enforcement officer to know his or her actions run afoul of the Constitution, in order to protect and serve the public, it is essential the officer be afforded the ability to rely on training and experience. Officers know, in those instances where he or she *knowingly* violates the law or is *plainly incompetent*, qualified immunity is not available. It is only in circumstances where law enforcement is upholding their duty, in a reasonable manner, that they ask for this protection.

For the foregoing reasons, the NFOP respectfully requests this Court grant Petitioners' Petition for Writ of Certiorari to correct the First Circuit's mistaken qualified immunity analysis.

Respectfully submitted,

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