No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Fourteenth Amendment provides that the government may not 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. In this case, municipal employees responded to a 911 emergency call and found Jacob Anderson, who was suffering from hypothermia. Regulations and protocols command that emergency responders immediately take actions to warm victims of hypothermia. However, the responders summarily declared Jacob dead, in violation of hypothermia treatment protocols, preventing further aid and worsening his condition. Through these actions, the state actor emergency responders increased the danger to Jacob and deprived him of his constitutional right to life.

In its holding in this case, the Eighth Circuit stated, "[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." App. 11. Not knowing that "point" at which the state assumes the duty, districts have increasingly swept state created danger cases into the qualified immunity category. Thus, the Circuits are intractably divided over what level of state action is required to meet the burden of state created danger and when qualified immunity should be granted.

The questions presented in this case are:

1. Whether the burden of persuasion in qualified immunity cases should be, in part or entirely, on the plaintiff as held by the Eighth Circuit in this case

QUESTIONS PRESENTED—Continued

and by the Fourth, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits, or whether it should be placed on the defendant, as held by the First, Second, Third, Ninth, and District of Columbia Circuits.

2. Whether, under the state created danger doctrine, due process is violated when first responders fail to provide any treatment to a person suffering from severe hypothermia, and instead, erroneously declare him dead.

3. Whether the Eighth Circuit erred in dismissing this state created danger case on qualified immunity grounds.

PARTIES TO THE PROCEEDING

Petitioner William Anderson (*As Trustee for the Next-of-Kin of Jacob William Anderson (deceased)*) was the plaintiff in the district court proceedings and appellant in the court of appeals proceedings. Respondents City of Minneapolis; County of Hennepin; Hennepin Healthcare System, Inc.; Dr. Brian Mahoney, M.D., as then-Medical Director of HCMC Ambulance Service; 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, were the defendants in the district court proceedings and appellees in the court of appeals proceedings.

RELATED CASES

- *William Anderson v. City of Minneapolis, et al.*, No. 16-cv-4114 (SRN/FLN) United States District Court for the District of Minnesota.
  Judgment Entered: April 2, 2018
- *William Anderson v. City of Minneapolis, et al.*, No. 18-1941, United States Court of Appeals for the Eighth Circuit.
  Judgment Entered: August 20, 2019

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PETITION FOR A WRIT OF CERTIORARI

William Anderson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

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

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The United States Court of Appeals for the Eighth Circuit entered judgment on August 20, 2019, affirming the judgment of the district court. App. 2. This petition is filed within 90 days of the Eighth Circuit's ruling and is therefore timely under Rule 13.1 and 29.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides that:

> 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 law shall be liable to the party injured in an action at law, suit in equity, or other appropriate proceeding for redress.

U.S. CONST. AMEND. XIV.

> The Fourteenth Amendment to the United States Constitution states in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

INTRODUCTION

The right to life is a fundamental human right enshrined in the United States Constitution. But what happens when the government interferes with that right by causing a person's death by breaching its legal duty of care?

In *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), this Court held that, absent government creation or escalation of a danger, there is no violation of the Fourteenth Amendment's Due Process Clause, and a state actor has no constitutional duty to act to protect when "it played no part" in creating potential danger nor when it did not do anything to render an individual "more vulnerable" to danger. 489 U.S. at 201. However, this Court recognized that the government can be held liable when there is a "state created danger."

In the present case, the state actor defendants did "play[] a "part in creating" and rendering an individual "more vulnerable" to the danger. *Id.* It therefore presents the questions *DeShaney* left open: (1) how large a role the state must play in the creation of a danger and in the creation of vulnerability before it assumes a corresponding constitutional duty to protect; and, (2) when should qualified immunity protect state actors who breach that duty.

Since 1989, the majority of courts of appeals have agreed that under *DeShaney*, a state actor may be liable for action that creates or increases danger to an individual. But they have adopted increasingly divergent tests for "state created danger" claims and are irreconcilably divided on the question presented here: What constitutes an "active role" in placing the victim in harm's way, thus increasing the individual's vulnerability beyond the level it would have been absent state action? As scholars have noted, "Because the U.S. Supreme Court has not addressed the issue, many variations of the state created danger doctrine exist across the

federal circuits. The resulting lack of uniformity has led to inconsistent results, promoting unfairness for litigations throughout the country." *See* Christopher M. Eisenhauer, *Police Action and the State-Created Danger Doctrine: A Proposed Uniform Test*, 120 Penn St. L. Rev. 893 (2016).

Without a clear test for these claims, qualified immunity becomes the default holding, as occurred in this case. But there is a deep, long-standing split among the Circuits as to who has the burden of persuasion with regard to qualified immunity. Every Circuit now has ruled and there is an almost even split, with about half saying it is on the plaintiff and about half putting it on the defendant, with two other Circuits allocating the burden of persuasion in part on each. This question often is decisive, as it likely was in this case.

Moreover, clarity as to the proper application of qualified immunity to state created danger cases is needed now more than ever. Whether the Constitution allows legal remedies against emergency first responders that cause death, or whether emergency responders are categorically excluded from such liability because of qualified immunity, should not depend on where a person lives. This Court should use this case to resolve the conflict over whether qualified immunity should attach when the government arbitrarily ignores the obvious needs of a vulnerable victim and increases his vulnerability to the danger he faces. These are crucial issues left open since *DeShaney* and that have wide-reaching applicability across the nation.

STATEMENT OF THE CASE

A. Factual Background

There has been no adjudication of the facts of this case. Because the case was resolved against the plaintiff on a motion to dismiss for failure to state a claim, the facts must be viewed in the light most favorable to petitioner.

Jacob Anderson was a 19-year-old freshman at the University of Minnesota in Minneapolis. On the night of December 14, 2013, he attended a party with several other classmates. He left the party around 11:15 p.m.

Jacob was discovered the next morning, unconscious and lying face down in the snow in a remote area near the Mississippi River in Minneapolis. The temperature outside was approximately 0º F (zero degrees Fahrenheit). The passerby who found Jacob called 911 at 8:44 a.m. The defendants, the Minneapolis Fire Department, Hennepin County Emergency Medical Services and Minneapolis Police Department, responded to the 911 emergency call and found Jacob Anderson lying outside unconscious. The fire department responders, some of whom were certified emergency technicians, performed a 30-second check on Jacob's pulse by holding his wrist. Failing to find a heartbeat within a mere 30 seconds, the fire department pronounced him dead at 8:57 a.m. It is important to note that it is medically impossible to determine death from hypothermia until a person has been warmed. Because of the pathophysiology of hypothermia, emergency hypothermia victims who appear to be dead can be

successfully resuscitated, even in the most extreme circumstances. All emergency medical protocols mandate that if no pulse is found on a hypothermia victim, the victim is to be immediately taken indoors to be warmed. This is because a victim may still be alive, as Mr. Anderson's expert has opined that Jacob likely was in this case.

The fire department then cancelled the ambulance and called police to the scene. The ambulance emergency responders, who were already on the way, arrived shortly after being cancelled. They accepted the fire department's death declaration and did nothing to treat Jacob. The police department responders and the county medical examiner, who is a medical doctor, also accepted the fire department's premature declaration of death in violation of hypothermia treatment protocols. This premature declaration of death effectively cut off Jacob's only chance to be treated for hypothermia by being rewarmed, worsening his hypothermia condition and leaving him exposed to the extreme cold, facing certain death.

Had the first responders followed the standard operating procedures and guidelines they were trained to follow, namely, to rewarm a hypothermic victim before ever making an arbitrary and medically erroneous declaration of death, Jacob likely would be alive today.

B. Trial Proceedings and Eighth Circuit Appeal

On March 30, 2018, the district court granted the defendants' motions to dismiss, holding that qualified immunity barred the federal claims against the individual defendants. Specifically, the Court held that Mr. Anderson did not show that the state actors created or exacerbated the danger to Jacob, placed Jacob "in custody," or alleged conduct that was sufficiently "conscience-shocking" to give rise to a claim under the Fourteenth Amendment.

Mr. Anderson appealed the district court ruling to the Eighth Circuit Court of Appeals, arguing that the district court was in error when it found that the individual defendants did not create or exacerbate the danger to Jacob. The Court of Appeals affirmed the district court, holding that, "because Jacob has failed to identify a clearly established right, we hold the individual defendants are entitled to qualified immunity." App. 9.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN IRRECONCILABLE CONFLICT OVER THE PROPER APPLICATION OF QUALIFIED IMMUNITY IN STATE CREATED DANGER CLAIMS

The Eighth Circuit in this case decided that Anderson failed to identify a clearly established right, and thus, the defendants were entitled to qualified

immunity. However, the Eighth Circuit admitted that their analysis was hindered by the lack of developed law in the area. They are not alone. Having only a flawed framework with which to analyze the application of qualified immunity to state created danger cases, the federal circuits have developed divergent tests and interpretations that have created irreconcilable conflict in this area of law.

As the Eighth Circuit cited in their opinion, "[t]o overcome a qualified immunity defense, a plaintiff must show both that a statutory or constitutional right has been violated and the right was clearly established at the time of the alleged violation." App. 9, citing *Smith v. City of Minneapolis*, 754 F.3d 541, 546 (8th Cir. 2014). In *Pearson v. Callahan*, this Court recognized that the two-step approach "holds the potential to confuse," and held that courts can choose which of the qualified immunity prongs it tackles first. 555 U.S. 223, 236 (2009) (cited by *Smith*, 754 F.3d at 546).[1] But while *Pearson* settled the timing of when the two prongs of qualified immunity must be analyzed, it left many questions unanswered surrounding the application of qualified immunity in a §1983 claim, including: (1) who bears the burden of persuasion when a claim of qualified immunity is asserted; (2) what criteria should be used to

[1] "[W]hile the sequence of [determining which prong of qualified immunity] . . . is often appropriate, it should no longer be regarded as mandatory," and it gave lower courts "permi[ssion] to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236.

determine when a right is "clearly established"; and, (3) when should qualified immunity be applied in state created danger cases? As explained below, the Circuits have come to their own varied conclusions as to these critical questions regarding the application of qualified immunity to state created danger claims. Only this Court's guidance can provide the necessary resolution to this divergence and to the Circuit splits.

A. The Circuits are split as to who bears the burden of persuasion regarding the application of qualified immunity in constitutional cases.

It is widely commented that "[t]he Supreme Court has never clarified whether the plaintiff or the defendant bears the burden of persuasion on the defense of qualified immunity." Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. Ill. U. L.J. 135, 142-43 (2012). Due to the lack of direction from the Supreme Court, the federal circuits have irreconcilably different approaches in deciding which party must show that qualified immunity applies to a particular case. Given the policy underlying the doctrine of qualified immunity, this Court should use the *Anderson* case to answer this important question.

Five circuits place the burden of persuasion regarding both of the major *Pearson* steps in a qualified immunity inquiry on the plaintiff: the Fifth,[2]

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[2] *Collier v. Montgomery*, 569 F.3d 214, 217 (5th Cir. 2009) ("Although nominally an affirmative defense, the plaintiff has the

Sixth,[3] Seventh,[4] Tenth,[5] and Eleventh[6] Circuits. This approach has resulted in plaintiffs being prematurely barred from discovering the merits of their case. This is at odds with the purpose of §1983, which is to afford citizens a legal remedy when the government deprives them of their due process. It also is at odds with this Court's holding in *Gomez v. Toledo*, 465 U.S. 635 (1980), that qualified immunity is an affirmative defense.

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burden to negate the assertion of qualified immunity once properly raised."); *Calton v. Livingston*, 2011 WL 2118700, at *9 (S.D. Tex. 2011) ("An official need only plead his good faith, which then shifts the burden to the plaintiff, who must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law.").

[3] *Tindle v. Enochs*, 420 F. App'x 561, 563 (6th Cir. 2011). The court held:

> The plaintiff bears the burden of proof in showing that the defendant is not entitled to qualified immunity by proving "both that, viewing the evidence in the light most favorable to [the plaintiff], a constitutional right was violated and that the right was clearly established at the time of the violation."

[4] *Erwin v. Daley*, 92 F.3d 521, 525 (7th Cir. 1996) ("Once a public official raises the defense of qualified immunity, the plaintiff bears the burden of proof on the issue.").

[5] *Justus v. Maynard*, 1994 WL 237513, at *1-2 (10th Cir. 1994) ("Although qualified immunity is a defense which must be pleaded by the defendant, once the defendant raises qualified immunity, the burden of proof is on the plaintiff to show that the right allegedly violated was clearly established at the time of the challenged conduct.") (citations omitted).

[6] *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) ("Once an officer or official has raised the defense of qualified immunity, the burden of persuasion as to that issue is on the plaintiff.").

Conversely, it appears that five circuits place the burden of persuasion as to the *Pearson* steps in a qualified immunity inquiry on the defendant: the First[7], Second[8], Third,[9] Ninth,[10] and D.C.[11] Circuits.

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[7] *DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 35 (1st Cir. 2001) ("Qualified immunity is an affirmative defense, and thus the burden of proof is on defendants-appellants.").

[8] *Jackler v. Byrne*, 658 F.3d 225, 242 (2d Cir. 2011) ("Qualified immunity, an affirmative defense as to which the defendants have the burden of proof. . . .").

[9] *Reiff v. Marks*, 2011 WL 666139, at *5 (E.D. Pa. 2011) ("Qualified immunity is an affirmative defense for which the defendants bear the burden of proof.").

[10] *Moreno v. Baca*, 431 F.3d 633, 638 (9th Cir. 2005) ("Because the moving defendant bears the burden of proof on the issue of qualified immunity, he or she must produce sufficient evidence to require the plaintiff to go beyond his or her pleadings."). On prior occasions, though, the Ninth Circuit split the burden of proof as between the elements. *See*, *e.g.*, *DiRuzza v. Cnty. of Tehama*, 206 F.3d 1304, 1313 (9th Cir. 2000) ("While the plaintiff bears the burden of proof regarding whether the right is clearly established, a defendant must prove that his or her conduct was reasonable."). Fittingly, the district courts in the circuit are at odds. Compare *Jones v. Mattel*, 2011 WL 720066, at *6 (E.D. Cal. 2011) ("Because qualified immunity is an affirmative defense, the burden of proof initially lies with the official asserting the defense."); *Benigni v. City of Hemet*, 879 F.2d 473, 479-80 (9th Cir. 1989); and *Dupris v. McDonald*, 2012 WL 210722, at *3 (D. Ariz. 2012) ("Qualified immunity is an affirmative defense. The defendant asserting qualified immunity bears the burden of both pleading and proving the defense."); with *Bell v. City of Los Angeles*, 835 F. Supp. 2d 836, 844 (C.D. Cal. 2011) ("Although it is defendants who interpose the defense or privilege of qualified immunity, the plaintiff has the burden of proof on these two elements.").

[11] *Reuber v. United States*, 750 F.2d 1039, 1057 n.25 (D.C. Cir. 1984) ("Qualified immunity is an affirmative defense based

Finally, two circuits, the Fourth[12] and the Eighth Circuits[13], appear to split the two major steps between the parties. However, these circuits allocate the two steps differently from each other. The Fourth Circuit places the burden of showing that the law was "clearly established" on the defendant, while placing the burden of showing that the defendant did not "violate a

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on the good faith and reasonableness of the actions taken and the burden of proof is on the defendant officials.").

[12] *Bryant v. City of Cayce*, 332 F. App'x 129, 132 (4th Cir. 2009). The court held:

> When government officials properly assert the defense of qualified immunity, they are entitled to summary judgment if either (1) the facts the plaintiff has alleged or shown do not make out a violation of a constitutional right—a question on which the plaintiff bears the burden of proof; or (2) the right at issue was not "clearly established" at the time of the defendant's alleged misconduct—a question on which the defendant bears the burden of proof. *Id.*; but, see *Henry v. Purnell* 501 F.3d 374, 378 n.4 (4th Cir. 2007) (recognizing intra-circuit conflict as to which party bears the burden in proving or disproving that the law was clearly established); *see also* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 Fed. Cts. L. Rev. 17, 20-22 (2009) (noting that the Fourth Circuit has adopted the "earliest-decided rule," in which the earliest precedent on an intra-circuit split issue controls over the later precedent).

[13] *Wagner v. Jones*, 664 F.3d 259, 273 (8th Cir. 2011) ("Qualified immunity is an affirmative defense for which the defendant carries the burden of proof. The plaintiff, however, must demonstrate that the law is clearly established."); *see also* Mary A. McKenzie, *The Doctrine of Qualified Immunity in Section 1983 Actions: Resolution of the Immunity Issue on Summary Judgment*, 25 Suffolk U. L. Rev. 673, 696-97 (1991).

constitutional right" on the plaintiff. The Eighth Circuit does just the opposite, adding further confusion.

Simply put, splits among the Circuits cannot be deeper or more manifest than this. On an issue that constantly arises and often is decisive, every Circuit has ruled, and they are evenly divided.

Unlike decisions arising in the First, Second, Third, Ninth, and D.C. Circuits, the Eighth Circuit in this case placed the burden of showing that a right was "clearly established" on Mr. Anderson as soon as the defendants asserted qualified immunity through a motion to dismiss under FRCP 12(b)(6). Mr. Anderson effectively bore the burden of persuasion to negate the qualified immunity defense before he could perform any discovery or notice a single deposition by the state actors who had knowledge of the events that transpired on December 15, 2013. Thus, Mr. Anderson was not allowed to discover facts to make a cogent argument for why the state actors reasonably understood that what they did violated Jacob's substantive right to life. In other circuits, Mr. Anderson would have had the opportunity to ask the state actors what medical standards they relied upon to reach a determination of death. With that information, he would have been able to articulate why the standards the state actors used to determine Jacob's death and strip him of his right to life were arbitrary and unreasonable. Similarly, if Mr. Anderson would have been given the opportunity to discover facts regarding the defendants' training on how to make a determination of death, he would have discovered why the defendants failed to follow

the generally accepted medical standards when determining Jacob's death.

Alternatively, if the defendants had the burden of persuasion to show why a right was not "clearly established," after asserting a qualified immunity defense with a motion to dismiss under FRCP 12(b)(6), Mr. Anderson would have at least been afforded an opportunity to negate their reasoning for such a suggestion. But in the Eighth Circuit, Mr. Anderson was required to prove a negative (that the qualified immunity defense did not apply because the defendants understood what they were doing violated Jacob's right to life) without being able to discover the defendants' understanding of what the right to life entails, and whether they understood the consequences of their actions on Jacob's right to life. A person's right to redress for a constitutional deprivation of life should not be dependent upon where they file their complaint.

Moreover, the Eighth Circuit's requirement that plaintiffs bear the burden of persuading the court that an affirmative defense of qualified immunity is not applicable is completely out of step with other bodies of law concerning the burden of persuasion when asserting an affirmative defense.[14] There has been no

[14] In the criminal context, the defendant has the burden of showing they are entitled to assert an affirmative defense "by a preponderance of the evidence." *Patterson v. New York*, 432 U.S. 197, 206 (1977). In the context of a state deprivation of a statutory right, "the burden of persuasion lies where it usually falls, upon the party seeking relief." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57–58 (2005). In the context of an unconstitutional employment discrimination claim, "[t]he general rule [is] that the

rationale articulated by this Court to justify the approach requiring a plaintiff to bear the burden of persuasion with regard to an affirmative defense raised by the defendants. This case provides an opportunity for this Court to decide whether a plaintiff should bear the burden of persuasion for a qualified immunity defense asserted by state actors, to resolve the long-standing and deep Circuit split, and to announce a legal standard that can be applied uniformly throughout the country.

B. The Circuits are split as to the proper criteria for determining if a right was clearly established.

Even if the Circuits were to come to a consensus on the proper burden of persuasion for qualified immunity in constitutional cases, there remains another material split: What are the proper criteria for determining if a constitutional right was clearly established? As the "clearly established" prong of the qualified immunity question is generally easier to answer, courts often answer it first. Thus, *how* to determine "clearly established" becomes an extremely important question regarding the defense of qualified immunity. Yet, once again, the Circuits apply vastly different criteria when analyzing these types of cases.

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application of an exemption under the [FLSA] is a matter of affirmative defense on which the [defendant] has the burden of proof." *Meacham v. Knolls Atomic Power Lab.*, 554 U.S. 84, 92, (2008).

In lieu of specific guidance on when a right is "clearly established" for purposes of asserting a qualified immunity defense, the Court has stated that "existing precedent" should place the constitutional question "beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); see also, e.g., *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (holding that "clearly established" means the law was sufficiently clear that every reasonable official would understand her actions were unlawful). The Court has invoked the possibility that a consensus of persuasive authority may clearly establish a federal right.[15] Importantly, however, the Court has never clarified how this is to be determined.

Accordingly, the Circuits are split on the correct source or breadth of controlling case law for determining the "clearly established" prong of the qualified immunity analysis. The Second Circuit will occasionally treat the law as clearly established without controlling precedent if controlling authority "clearly

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[15] In *Wilson v. Layne*, the Court stated that a plaintiff could identify "a consensus of cases of persuasive authority" such that a reasonable official could not have believed that her actions were lawful. 526 U.S. at 617. *Ashcroft v. al-Kidd* slightly modified the approach by suggesting that "a robust 'consensus of cases of persuasive authority' " is needed to clearly establish a right absent controlling authority. 563 U.S. at 742 (emphasis added) (quoting *Wilson*, 526 U.S. at 617); see also *Plumhoff v. Rickard*, 572 U.S. 765, 767 (2014) ("[R]espondent must meaningfully distinguish [contrary cases] or point to any 'controlling authority' or 'robust "consensus of cases of persuasive authority," ' that emerged between the events there and those here that would alter the qualified immunity analysis." (citation omitted) (quoting *al-Kidd*, 563 U.S. at 742).).

foreshadow[s] a particular ruling on the issue." *Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010). The Sixth Circuit has stated that the inquiry should look beyond Supreme Court and Sixth Circuit precedent only in "extraordinary cases." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993). Yet, the same circuit cited *Walton* in an opinion that found a clearly established right based on persuasive authority from other circuits. See *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 567 (6th Cir. 2016) (finding "clearly established" that the unreasonable killing of a dog constitutes an unconstitutional seizure of personal property under the Fourth Amendment because every "sister circuit" that had confronted the issue so concluded).

Likewise, there is a split within the Fourth Circuit as to the proper authority for determining whether there is clearly established law, reflecting the disagreement among Circuits across the country. Compare *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 280 (4th Cir. 2004) ("When there are no [relevant] decisions from courts of controlling authority, we may look to 'a consensus of cases of persuasive authority' from other jurisdictions, if such exists" (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999)), with *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) ("In determining whether a right was clearly established at the time of the claimed violation, 'courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose. . . .'"

(alteration in original) (quoting *Jean v. Collins*, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)).

In its recent qualified immunity cases, the Supreme Court has concentrated little attention on the relevant sources of law, and instead focused its holdings on the specificity with which the right must be defined. *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (instructing the lower court not to read prior precedent too broadly when deciding whether a new set of facts is governed by clearly established law); *Wesby*, 138 S. Ct. at 590 (stressing the importance of the specificity of the legal principle in the Fourth Amendment context); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) ("While this Court's case law 'do[es] 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.' " (alteration in original) (quoting *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)).

Whether to rely upon certain sources of law or the specificity of the right alleged has led to additional complexity in determining when a right has been clearly established at the circuit court level. Indeed, many commentators have asked, "[w]hen courts face conflicting sources of law, can a right ever be clearly established?" John C. Williams, *Qualifying Qualified Immunity*, 65 Vand. L. Rev. 1295, 1312 (2012). This Court should step in as it did in *Pearson* and provide state actors, as well as the people they serve, with

clarity as to when a right has been clearly established.

The standard for a "clearly established" right that the Eighth Circuit applied to the *Anderson* case is that "[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." App. 9, quoting *Swearingen v. Judd*, 930 F.3d 983, 987 (8th Cir. 2019). This nebulous standard applied by the Eighth Circuit begs the question of what is the proper authority required to recognize a right before it is "clearly established"? Similarly, the question must be asked, how closely do the facts of a controlling case need to align with Mr. Anderson's case? What does it take to make a "robust consensus of cases," showing a "clearly established" right?

Upon inspection, the "clearly established" standard manufactured by the Eighth Circuit in qualified immunity cases appears to be a 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. Therefore, it is imperative that this court step in and finally announce what criteria should be used to decide whether a right was "clearly established," in the context of a qualified immunity claim.

C. The Circuits are split as to how large a role the state must play in the creation of danger and in the creation of vulnerability before the state assumes a corresponding constitutional duty.

As the Eighth Circuit stated in *Anderson*, under the current framework, courts need not reach the merits of state created danger if they find qualified immunity attaches. But in addition to the Circuit splits described above, with regard to qualified immunity, the Circuits are also in conflict as to the level of government action required to even trigger a constitutional duty under the state created danger doctrine. This further muddies the interplay between the doctrines of state created danger and qualified immunity.

In *DeShaney*, this Court stated that a government is not liable for injuries sustained by another, when "it played no part in their creation, nor did it do anything to render him any more vulnerable to them." 489 U.S. at 206. From that statement, most Circuits concluded that liability exists under a state created danger theory when the state places a particular individual in a position of danger the individual would not otherwise have faced. *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993); *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996); *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998); *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998); *Freeman v. Ferguson*, 911 F.2d 52 (8th Cir. 1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992); *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Butera v. D.C.*, 235 F.3d 637, 651 (D.C. Cir. 2001).

However, since this Court's watershed decision in *DeShaney*, the Circuits have developed their own tests on how large a role the state must play in the creation of the danger and in the creation of vulnerability for an individual before the state assumes a corresponding constitutional duty to protect the individual. Judges "have noted, there is considerable variation among the circuits in their application of the state-created danger doctrine." *King ex rel. King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 818 n.3 (7th Cir. 2007) (citing *Pena v. DePrisco*, 432 F.3d 98, 108 (2d Cir. 2005)). Some circuits have articulated multi-part tests for determining whether an individual's constitutional rights have been violated under the state created danger doctrine. *See*, *e.g.*, *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3469 (U.S. Mar. 4, 2007) (No. 06–563) (four-part test); *McQueen v. Beecher Cmty. Sch.*, 433 F.3d 460, 464 (6th Cir. 2006) (three-part test); *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir. 2005) (five-part test); *Christiansen v. City of Tulsa*, 332 F.3d 1270, 1281 (10th Cir. 2003) (six-part test). Other circuits simply ask whether the state created or increased the danger to the individual and whether the failure to protect against the danger shocked the conscience. *See*, *e.g.*, *Lombardi v. Whitman*, 485 F.3d 73, 79 (2d Cir. 2007); *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1063–64 (9th Cir. 2006); *Fraternal Order of Police v. Williams*, 375 F.3d 1141, 1144 (D.C. Cir. 2004).

A minority of jurisdictions have not recognized *DeShaney's* state created danger doctrine, *Frances-Colon v. Ramirez*, 107 F.3d 62 (1st Cir. 1997), or will not

recognize it absent some special relationship between the state and the victim. *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995); *McClendon v. City of Columbia*, 258 F.3d 432 (5th Cir. 2001).

The Eighth Circuit's state created danger test squarely conflicts with the tests utilized in other federal circuits. Specifically, the Eighth Circuit requires that "the risk of danger be known or obvious to the defendant" state actor at the time of the risk-creating act before it will impose a corresponding constitutional duty to protect the individual. *Gladden v. Richbourg*, 759 F.3d 960, 965-66 (8th Cir. 2014). Like the Eighth Circuit's obvious risk requirement, the Tenth Circuit requires that the risk of harm "was obvious or known," by the defendant state actor at the time of the risk-creating act. *Estate of Reat v. Rodriguez*, 824 F.3d 960, 965 (10th Cir. 2016), *as amended on reh'g in part* (Aug. 12, 2016). If the risk of harm to the individual is deemed not to be obvious or known, then the Eighth Circuit will grant summary judgment to the state under the doctrine of qualified immunity based on its view that no clearly established right exists. App. 13.

Not surprisingly, the differences between the standards utilized by the federal circuits to determine whether a state created danger claim exists and whether a qualified immunity defense attaches has led to major discrepancies in the outcomes of cases with factually similar circumstances.

For instance, in *Kneipp v. Tedder*, police officers sent a woman home "unescorted in a visibly intoxicated state in cold weather." 95 F.3d 1199 (3d Cir. 1996). The woman later fell down an embankment and suffered hypothermia. *Id.* The plaintiff's legal guardians "alleged that the City and police officers violated [plaintiff's] right to substantive due process guaranteed by the Fourteenth Amendment." *Id*. at 1204. There, the Third Circuit Court of Appeals agreed that the plaintiff's due process rights had been violated by the action of the police officer. The court applied a four-part test that considered whether:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) the state actor acted in willful disregard for the safety of the plaintiff;
>
> (3) there existed some relationship between the state and the plaintiff [such that the plaintiff was a foreseeable victim of defendant's acts in a tort sense];[16]
>
> (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

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[16] The Court held that "the relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense," as opposed to a "special relationship" that could give rise to a state created danger as delineated in *DeShaney*. *Kniepp*, 95 F.3d at 1209.

Kniepp, 95 F.3d at 1208.[17] Under the Third Circuit's enunciated state created danger test, the Court found that state actors had violated plaintiff's substantive due process right, and that the officers were not entitled to claim qualified immunity. *Id*. It is likely that Mr. Anderson would have prevailed under the Third Circuit's approach.

In *Riordan v. City of Joliet*, 3 F. Supp. 2d 889 (N.D. Ill. 1998), police officers evicted a severely intoxicated man from his hotel and left him on the steps of the police station on a cold night with instructions to go inside the station. The man never entered the station, and he was found several hours later in the alcove of a nearby building, suffering from severe hypothermia and frostbite. *Id.* at 893. The plaintiff "contend[ed] that Officers' failure to protect him from the elements violated the substantive due process guaranty of the Fourteenth Amendment." *Id.* at 894 (citing *DeShaney*,

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[17] The Court held that "a reasonable jury could find that the harm likely to befall [plaintiff] if separated from [her husband] while in a highly intoxicated state in cold weather was indeed foreseeable." *Kniepp*, 95 F.3d at 1208. The Court found that the officer "acted in willful disregard for [plaintiff's] safety" based on her level of intoxication and impairment, the officer's knowledge of her intoxication and impairment, and the officer's decision to send the plaintiff home alone. *Id.* The Court found that the relationship between the officer and plaintiff was such that plaintiff's injuries were foreseeable, when the officer "sent her home unescorted in a visibly intoxicated state in cold weather." *Id.* at 1209. "A jury could find that Samantha was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to Samantha was greatly increased." *Id.*

489 U.S. 189, 195.) The trial court, sitting in the Seventh Circuit, agreed with the plaintiff, because the officers affirmatively placed the individual "in a position of danger the individual would not have otherwise faced." *Id.* The officers claimed they were entitled to qualified immunity, because it was not "clearly established" that the officers were violating plaintiff's substantive due process right when they failed to protect him from the elements. The court rebuffed the officers' claim for immunity, because by the time of the incident, the Seventh Circuit had already decided that "police officers violated substantive due process principles by leaving 'helpless' " people in great physical danger from inclement weather and heavy traffic. *Id.* at 898.

In *Wood v. Ostrander*, the Ninth Circuit held in favor of a woman who was left alone on the side of the road with no means of transportation and was later raped after accepting a ride from a stranger. The Court held that these facts met the exception in *DeShaney* and expressly used the language "deliberate indifference," stating that the police, by leaving her alone on the side of the road with no means of transportation, were "deliberately indifferent" to her safety. *Wood*, 879 F.2d at 588. There the Court took the position that "the qualified immunity regime of clearly established law should not be held to allow section 1983 defendants to interpose lawyerly distinctions that defy common sense in order to distinguish away clearly established law." *Wood*, 879 F.2d 593.

As Justice Higginson stated, concurring in *Doe v. Covington Cnty. Sch. Dist.*, "[d]icta in *DeShaney* has

contributed to twenty-three years of circuit (and intra-circuit) disharmony, and excited legions of law review articles, about whether the Constitution asserts positive or negative liberties, or regulates government action or inaction—all giving uncertain guidance to litigants and courts, as well as public officials, hence necessarily also giving uncertain relief to citizens whom government persons cause to be subjected to injury." 675 F.3d 849, 871 (5th Cir. 2012). The facts in *Anderson* likely would have been decided differently in other jurisdictions. As the Eighth Circuit stated in its order, referencing *Ross v. United States*, "The Seventh Circuit found a constitutional violation because the county, rather than merely failing to provide rescue services, 'had a policy of arbitrarily cutting off private sources of rescue without providing a meaningful alternative.'" 910 F.2d 1422, 1431 (7th Cir. 1990).[18]

Unfortunately, in the years since this Court decided the *DeShaney* case, certiorari has been denied in similar cases involving state created danger. *See*, *e.g.*, *Davis v. Brady*, 143 F.3d 1021 (6th Cir. 1998), *cert. denied*, 525 U.S. 1093 (1999); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990). Indeed, the Eighth Circuit states further, "[i]n the decades since [*Freeman v.*

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[18] The Eighth Circuit found *Ross* inapplicable, stating "[u]nlike in *Ross*, no one intentionally or arbitrarily cut off emergency services to Jacob," shockingly concluding that the declaration of death did not end the emergency response. App. 13.

Ferguson, 1990], no case has settled the state's duty in these circumstances." App. 12. This has led to great confusion and another deep split among the Circuits.

This Court's forbearance to clarify the law with regard to state created danger and qualified immunity claims has left laypersons and lower courts alike to guess the scope of their rights when interacting with public servants, and has left public servants to guess as to their duties when interacting with the public. Only this Court can resolve the Circuit split and provide the necessary clarity and uniformity.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT

The facts and analysis in *Anderson* make it an ideal case for this Court to clarify the proper application of qualified immunity to state created danger claims among the Circuits. In granting qualified immunity in this case, the Eighth Circuit explicitly acknowledged that there is a severe lack of clarity as to the government's duty to protect. Citing its own decision in *Freeman*, the panel in *Anderson* stated, "the law is not entirely established as to the extent to which the government must increase the danger of private violence before it assumes a corresponding duty to protect." *Freeman*, 911 F.2d at 55; App. 12.

Lacking a clearer body of law, the Eighth Circuit analyzed the *Anderson* case by concluding the individual defendants were entitled to qualified immunity

because Mr. Anderson failed to identify a clearly established right that was violated. App. 9. The court then continued by analyzing state created danger cases to reach the conclusion that there was no violation of a clearly established right. App. 10-16. *Anderson* thus provides an appropriate case for the articulation of a rule, as it directly analyzes the interplay between qualified immunity, clearly established rights, and state created danger, all areas of the law that need clarification and uniformity among the Circuits.

Due to the nature of this case, this Court can use *Anderson* to specifically address the level of government action a plaintiff is required to prove to overcome qualified immunity in state created danger cases. It also directly poses the questions of who has the burden of persuasion in qualified immunity cases and what needs to be shown to demonstrate the existence of clearly established law.

This Court's cases granting qualified immunity usually pertain to split-second decisions by police or discretionary decisions by high-ranking government officials. Yet, *Anderson* presents a much different factual framework. The first responders here had the time and opportunity to make the proper decision. Moreover, they were not high-ranking government officials; these were medical personnel who had clear directives regarding the treatment of hypothermia from their protocols. Qualified immunity should not be applied the same way to very different types of state actors and actions. Review of this case can help draw the

distinctions necessary for proper application among the Circuits.

The *Anderson* case includes fire department employees, paramedics, medical examiners, and police officers. It involves the right to life under the Constitution, the state created danger doctrine, the government duty to protect, and the application of qualified immunity. The nature of the actions taken by the different government actors in *Anderson* can be analyzed and ruled on in a way that the resulting body of law will be applicable to almost any state created danger claim that the Circuits may face. Accordingly, this Court should use this case to provide the federal courts with uniformity in the very important legal areas of state created danger and qualified immunity.

CONCLUSION

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

Respectfully submitted,

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