No. 19-1262

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MATEUSZ FIJALKOWSKI,

Plaintiff-Appellant,

v.

M. WHEELER, *ET AL.*,

Defendants-Appellees.

On Appeal From The United States District Court For The Eastern District of Virginia, Alexandria Division (Hon. T. S. Ellis, III, U.S. District Judge)

BRIEF OF THE WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS & URBAN AFFAIRS *ET AL.* AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1262 Caption: Fijalkowski v. Wheeler, et. al

Pursuant to FRAP 26.1 and Local Rule 26.1,

Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLC")
(name of party/amicus)

who is amici curiae makes the following disclosure:
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Signature: s/ Hannah Lieberman Date: May 14, 2019

Counsel for: Washington Lawyers' Committee

CERTIFICATE OF SERVICE

****

I certify that on May 14, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTEREST OF AMICUS CURIAE

The Washington Lawyers' Committee for Civil Rights & Urban Affairs ("WLC") was founded in 1968 to provide *pro bono* legal services to address issues of discrimination and entrenched poverty. Since then, it has successfully handled thousands of civil rights cases on behalf of individuals and groups.

Many of the WLC's clients bring claims that their constitutional rights were violated by government officials. In most of these cases, the WLC's clients face an immediate qualified immunity challenge. As such, the WLC has an interest in having this Court further clarify the qualified immunity doctrine.

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties and filed numerous amicus curiae briefs in the federal Courts of Appeals and Supreme Court. The Rutherford Institute works to preserve the most basic freedoms of our Republic through litigation brought under 42 U.S.C. § 1983, and advocates to assure that the remedies provided by that statute remain effective in protecting individual civil rights.

STATEMENT OF COMPLIANCE WITH RULE 29(a)

The Washington Lawyers' Committee for Civil Rights & Urban Affairs obtained consent from plaintiff-appellant to file this brief. Defendants-Appellees' counsel refused to consent to this filing, but did not explain the reason for doing so. Amici submits their Motion For Leave To File Brief As *Amicus Curiae* In Support Of Plaintiff-Appellant together with this brief.

This brief is submitted pursuant to Rule 29 of the Federal Rules of Appellate Procedure. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This case presents an opportunity for this court to clarify its jurisprudence on a question that has vexed the legal community for decades: When is it appropriate for government officials to be immune from liability for conduct that violates a person's constitutional rights? The U.S. Supreme Court created the common law doctrine of qualified immunity to address this issue in civil litigation brought under 42 U.S.C. § 1983. In determining whether to grant qualified immunity or not, courts normally ask two interrelated, but distinct, questions: (1) was there a violation of a statutory or constitutional right, and (2) was the law clearly established so as to put the government official on notice that he or she was violating the law? *City & Cty. of San Francisco. v. Sheehan*, 135 S. Ct. 1765, 1774 (2015).

While the Supreme Court has recently stated that "clearly established law must be 'particularized' to the facts of the case," it has also noted that "general statements of the law are not inherently incapable of giving fair and clear warning to officers" in the "obvious case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Moreover, the Supreme Court has made clear that "[i]t is not necessary, of course, that the very action in question has previously been held unlawful." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (internal quotation marks omitted). In fact, "an officer might lose qualified immunity even if there is no reported case directly on point," so

long as the "unlawfulness of the officer's conduct [is] apparent." *Id.* (internal quotation marks omitted).

The facts of the present case fit squarely into the "obvious case" category. The police officers' treatment of the appellant should be deeply concerning to anyone. The police officers not only stood by while the appellant, who was clearly suffering a mental health episode, submerged himself under water for almost three minutes, but also actively prevented a lifeguard from jumping in to save the appellant from drowning. By taking this affirmative action, the police officers created the precise danger that threatened appellant's life. Prior case law provides a more than sufficiently clear constitutional rule to provide fair notice to the appellees that their actions were unconstitutional and this constitutional rule applies with "obvious clarity to the specific conduct" at issue here. *United States. v. Lanier*, 520 U.S. 259, 271 (1997). As such, the district court erred in granting the police officer appellees qualified immunity.

ARGUMENT

I. A Brief History of Qualified Immunity

Despite the routine application of the qualified immunity doctrine in cases brought pursuant to 42 U.S.C. § 1983, "[w]ading through the doctrine of qualified immunity is one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location,*

Location": Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. Ann. Surv. Am. L. 445, 447 (2000). Section 1983 was initially crafted as an avenue for citizens to bring cases against public officials for civil rights and constitutional violations.[1] The statute does not contain any reference to immunities or defenses and was not generally understood as providing any at the time of its passage. *See* William Baude, *Is Qualified Immunity Unlawful?* California Law Review, 106 Cal. L. Rev. 45 (2018). However, in 1967, the U.S. Supreme Court, in *Pierson v. Ray*, 386 U.S. 547 (1967), borrowed from common law to articulate for the first time the defense of qualified immunity in Section 1983 actions.[2] The Court justified its holding by analogizing Section 1983 actions to common-law false arrests, *see id.* at 557, and qualified immunity originated in this context as a subjective defense available only to police officers.

Over time, qualified immunity has greatly expanded beyond its common law origins. The U.S. Supreme Court eventually held that in addition to police officers, qualified immunity can apply to prison officials,[3] school board members,[4] mental

[1] Section 1983 was originally part of the Civil Rights Act of 1871, Ch. 22, § 2, 17 Stat. 13.
[2] For a more complete history, see William Baude, *Is Qualified Immunity Unlawful?* California Law Review, 106 Cal. L. Rev. 45 (2018).
[3] *See Procunier v. Navarette*, 434 U.S. 555 (1978).
[4] *See Wood v. Strickland*, 420 U.S. 308 (1975).

hospital officials,[5] state executive officials,[6] public employees, and private individuals acting on behalf of the government.[7] In 1975, the Court modified the test for qualified immunity and indicated that, in addition to a public official's conduct being subjectively unreasonable, it also had to be objectively unreasonable. *Wood v. Strickland*, 420 U.S. 308, 321 (1975).

Six years later, in *Harlow v. Fitzgerald*, the Court erased the subjective standard altogether and introduced the objective inquiry that is used today. 457 U.S. at 818. This new standard evaluated whether a violation of a constitutional right had occurred and whether such right was "clearly established" at the time of the violation. *Id.* In a sharp departure from the common law justification for qualified immunity, the *Harlow* Court found that the previously applied subjective test allowed too many meritless Section 1983 claims to reach trial. *Id.* at 815. The Court noted that questions of fact should not be decided on motions for summary judgment, and that too frequently, courts questioned officials' subjective good faith as grounds to deny such motions. *Id.* at 816. The inquiry created "substantial" litigation costs, which the Court deemed unjustifiable when balanced against the need to consider officials' subjective motives. *Id.* at 816–17. It reasoned that an objective standard,

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[5] *See O'Connor v. Donaldson*, 422 U.S. 563 (1975).
[6] *See Scheuer v. Rhodes*, 416 U.S. 232 (1974) (*abrogated on other grounds by Harlow v. Fitzgerald*, 457 U.S. 800 (1982)).
[7] *See Filarsky v. Delia*, 566 U.S. 377 (2012).

measured by whether an official's conduct violated "clearly established" statutory or constitutional rights, would more quickly dispose of meritless Section 1983 claims. *Id.* at 818. Animating the *Harlow* Court's move towards an objective standard was a fear of "excessive disruption of government . . . ." *Id.* [8]

However, the Court was quick to note that an objective qualified immunity test was not a "license to lawless conduct." *Id.* Instead, "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* The key questions, then, were whether the "public interest" would best be served by granting qualified immunity and whether

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[8] The Court's shift in the application of qualified immunity in *Harlow* has drawn much criticism. Some on the Supreme Court have recently registered their discomfort with the doctrine, either because of its divergence from section 1983's original understanding, *see Ziglar* 137 S. Ct. at 1871 (quoting *Anderson v. Creighton*, 483 U.S. 635, 645 (1987)) (Thomas, J., concurring in part and concurring in the judgment) ("[i]n the decisions following *Pierson [v. Ray*, 386 U.S. 547 (1967)], we have 'completely reformulated qualified immunity along principles not at all embodied in the common law.'"), or its ubiquitous and one-sided application, *see Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that such a "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers.").

Amici agree with scholars and jurists that it is time to "rethink qualified immunity and get constitutional tort law back on track." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 Fla. L. Rev. 851, 869 (2010). While the resolution of *this case* does not require a revision to the doctrine, if the court should so choose, we believe "[t]he moment is [] right for reappraising qualified immunity, and also for careful thinking about what should replace it." Samuel L. Bray, *Foreword: The Future of Qualified Immunity* 93 Notre Dame L. Rev. 1793, 1794 (2018).

the government official was put on notice that his or her conduct violated constitutional rights.

II. This Case Does Not Require A Heightened Specificity Requirement

Following its decision in *Harlow*, the Court attempted to define the scope of the objective standard—that is, how were lower courts to determine whether a reasonable police officer knew that certain conduct would violate a plaintiff's constitutional rights. The Court tried to answer the question in *Anderson v. Creighton* by stating that the objective standard was "fact-specific." 483 U.S. 635, 641 (1987). In other words, "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

However, the level of specificity required for a prior case to be "clearly established" has "proved to be a mare's nest of complexity and confusion." John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* Florida Law Review, 62 Fla. L. Rev. 851, 852 (September 2010). As explained by Professor Jeffries, the "clearly established" law requirement has been interpreted to mean that not only must the conduct of a public official be objectively unreasonable, but there must also be "specific precedent declaring . . . comparable [conduct] objectively unreasonable on similar facts." *Id.* at 863. Under this formulation, "many instances of wholly unjustified [conduct] will be effectively immune from redress" if there is not a prior

decision factually on point. *Id.* This cannot be the correct formulation of the qualified immunity defense, as the Supreme Court has "never required a factually identical case to satisfy the 'clearly established'" standard. *Kisela v. Hughes*, 138 S. Ct. 1148, 1161 (2018) (Sotomayor, J., dissenting).

In fact, the Supreme Court has made clear that the level of specificity for a right to be clearly established is not the same in every case. Rather, "specificity is especially important in the Fourth Amendment context," because it "is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (internal quotation marks omitted); *see also D.C. v. Wesby*, 138 S. Ct. 577 (2018) (applying heightened specificity requirement because of Fourth Amendment claim); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (same); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (same).[9]

In turn, for cases in which the Fourth Amendment is not implicated, the Court has not applied the same specificity requirement. For example, in *U.S. v. Lanier*, which concerned sexual assault of federal employees, the Court noted:

[9] The specificity requirement, however, is not *mandated* in Fourth Amendment cases. *See Clem v. Corbeau*, 284 F.3d 543, 553 (4th Cir. 2002) (stating, in case concerning the Fourth Amendment, that "when the defendants' conduct is so patently violative of the constitutional right that reasonable officials would know without guidance from the courts that the action was unconstitutional, closely analogous pre-existing case law is not required to show that the law is clearly established.").

> [i]n some circumstances, as when an earlier case expressly leaves open whether a general rule applies to the particular type of conduct at issue, a very high degree of prior factual particularity may be necessary. But general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'

520 U.S. 259, 270–71 (1997) (quoting *Anderson*, 483 U.S. at 640). The Court further clarified in *Hope v. Pelzer*, which concerned the Eighth Amendment, that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." 536 U.S. 730, 741 (2002); *see also White*, 137 S. Ct. at 552 ("general statements of the law are not inherently incapable of giving fair and clear warning to officers" in the "obvious case.").

Based on these Supreme Court cases, other Circuit Courts have applied a less strict specificity standard in non-Fourth Amendment cases. *See, e.g.*, *Hart v. Texas Dep't of Criminal Justice*, 106 F. App'x 244, 250 (5th Cir. 2004) (relying on less strict standard outlined in *Hope* to deny qualified immunity under Eighth Amendment claim); *Akins v. Fulton Cty., Ga.*, 420 F.3d 1293 (11th Cir. 2005) (same as to First Amendment claim). In fact, the Fifth Circuit in *Hart* made clear that "*Hope* pushes us toward a more general description of the constitutional right at issue both by describing a level of specificity lower than that we have used in the past, and by undermining the case law that originally established the more rigid standard and thereby eroding the foundations" of the rigid application of the

specificity requirement. 106 F. App'x at 249–50. Therefore, "[a]t its core, then, the clearly established inquiry boils down to whether [an official] had fair notice that he acted unconstitutionally." *Kisela*, 138 S. Ct. at 1161 (Sotomayor, J., dissenting) (internal quotation marks omitted).

As will be described more fully below, the present case is one in which this Court should follow *Hope* and make clear that in the Fourth Circuit "officials can be on notice that their conduct violates established law even in novel factual situations." *Hope*, 536 U.S. at 731.

III. The Police Officers Had Fair Warning That Their Conduct Was Unconstitutional.

Applying the standards set forth in *Lanier* and *Hope* to the instant case demonstrates that the police officers had fair warning that they were engaging in unlawful conduct by ordering the lifeguard not to rescue the appellant, particularly in light of the fact that they knew that he could not swim. To be sure, this case presents "novel factual circumstances"[10], nevertheless, when describing general principles of law for qualified immunity purposes, this Court reviews "cases of controlling authority in [this] jurisdiction as well as the consensus of cases of persuasive authority from other jurisdictions." *Sims v. Labowitz*, 885 F.3d 254, 262 (4th Cir. 2018) (citations omitted).

[10] Amici did not locate any qualified immunity cases in the Fourth Circuit that were similar to the unique facts of this case.

As discussed below, two cases from other Circuits have both held that it is unconstitutional for a government official to prevent a private individual from rescuing a person at substantial risk of death without offering a meaningful alternative. These cases provide the "general statements of the law," *Hope*, 536 U.S. at 741, that give "fair and clear warning" to the police officers and describe a "general constitutional rule" that applies with "obvious clarity to the specific conduct in question," *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640).[11]

The seminal case addressing the legality of police conduct that interferes with the private rescue of drowning victims is *Ross v. United States*, 910 F.2d 1422 (7th Cir. 1990). In *Ross*, a twelve-year old boy fell into Lake Michigan and within ten minutes, lifeguards, firefighters and scuba-diving civilians were on the scene with equipment to commence a rescue. Before the rescue could be undertaken, a County Deputy Sheriff arrived in a patrol boat and ordered all such individuals to cease their rescue efforts, citing his police department's policy of only allowing certain officially authorized divers to effect such a rescue. Such divers did not arrive until 20 minutes later, at which point the boy had already drowned.

The U.S. Court of Appeals for the Seventh Circuit noted that it had rejected Section 1983 claims seeking to impose liability on public officials for a failure to

[11] Appellant argues, and Amici agree, that the law was clearly established in this case under any standard of specificity.

rescue, but that it had previously articulated the principle that a constitutional due process violation occurs when the state officials "greatly increased the risk while constricting access to self-help" and that '"when a state cuts off sources of private aid, it must provide replacement protection.'" *Id.* at 1431 (quoting *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988)). The Seventh Circuit also concluded that this due process right was "clearly established" at the time of the drowning. *Id.* at 1433 ("If officer Taylor, knowing the car was occupied and wanting the occupants to be burned to death, directed traffic away from the scene in order to prevent any passing driver from saving them, he would be liable." (quoting *Jackson v. City of Joliet*, 715 F.2d 1200, 1202 (7th Cir. 1983)).

The Seventh Circuit explained in *Ross* that "[t]here was simply no rational reason for [the Deputy Sheriff] to prefer 'authorized' but equally competent rescuers located away from the scene." *Id.* at 1433. Although the Deputy Sheriff may not have intended for the boy to die, for due process violations, the relevant inquiry is whether the state actor acted recklessly, which may be found if the state actor ignored a "known and significant risk of death." *Id.* (quoting *Archie*, 847 F.2d at 1219). The Seventh Circuit concluded that the Deputy Sheriff was not entitled to qualified immunity because he was aware of the risk of death and "consciously chose a course of action that ignored the risk." *Id.*

Another illuminating case is the Sixth Circuit's decision in *Beck v. Haik*. 234 F.3d 1267 (Table), 2000 WL 1597942 (6th Cir. 2000) (unpublished). In *Beck*, a man plunged into a river and within "two or three minutes" police officers arrived at the scene. *Id.* at *1. Shortly thereafter, members of a private rescue organization of divers arrived with diving equipment and offered to help. The police officers instructed them not to enter the water and to standby. The police officers then waited until a county dive team arrived and entered the water about 35 minutes later, at which point the man had died.

Beck agreed with the court in *Ross* that "official action preventing rescue attempts by a volunteer civilian diver can be arbitrary in a constitutional sense if a state-sponsored alternative is not available when it counts." *Id.* at *4. According to the Sixth Circuit, if the police officers irrationally prohibited private rescue efforts, this would constitute a violation of the victim's constitutional rights and thus satisfy the first prong of the qualified immunity test. *Id.* However, Sixth Circuit law, unlike this Circuit's law, requires binding precedent to exist for the law to be "clearly established." *Id.* at 7. Despite the Seventh Circuit's decision in *Ross*, because the Sixth Circuit "found no direct authority in the form of pre-1995 decisions of the Supreme Court or the Sixth Circuit that could fairly be said to have left no room for doubt in the minds of reasonable public officials that *Ross* would be followed in this jurisdiction," the right was not clearly established. *Id.* As a result, the Sixth Circuit

ultimately granted qualified immunity by holding that the right was not "clearly established" at the time of the constitutional right was violated. *Id.*

This Court's precedent, however, allows for a finding that a constitutional right can be "clearly established" based on the consensus of persuasive authority from other jurisdictions. *See Sims*, 885 F.3d at 262. *Ross* and *Beck* provide that authority.

In the instant case, while the police officers eventually allowed the lifeguard to rescue the appellant, it was not until the appellant had been submerged for nearly three minutes, vomited under water, expelled his last breath, and lost his pulse. The District Court found that the police officers' interference with a private rescue was justified because the appellant was under mental distress and could be a danger to the lifeguard. But distinguishing this case on technical differences from *Ross* and *Beck* misses the forest for the trees. The key issue is whether *Ross* and *Beck* provide clear examples of "general statements of the law," *Hope*, 536 U.S. at 741, that give "fair and clear warning" to the police officers. There is no question that these cases describe the "general constitutional rule" that the government cannot arbitrarily impose its authority in a manner that creates a danger that threatens an individual's life. This general principle applies with "obvious clarity to the specific conduct in question," *Lanier*, 520 U.S. at 271 (quoting *Anderson*, 483 U.S. at 640), and is precisely the type of behavior that due process protections are designed to prevent.

Whether the police officers acted reasonable under the circumstances is a matter that should be decided at trial and not summarily.

CONCLUSION

The WLC respectfully submits that this case presents this Court with an opportunity to clarify its jurisprudence and make clear that where there is a "consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful," the qualified immunity defense is not available. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999). This Court should find that the constitutional right here was clearly established, and follow the specificity standard set forth by the Supreme Court in *Lanier* and *Hope*.

Because the police officer appellees were put on notice that their conduct was unconstitutional, this court should reverse the district court's grant of qualified immunity.

Date: May 14, 2019

Respectfully Submitted,

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CERTIFICATE OF TYPE-VOLUME COMPLIANCE

This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed. R. App. P. 29(a)(4)(G) and 32(g), I certify, based on the word-counting function of Microsoft Word, that this brief complies with the type-volume limitations of Rule 29(a)(5), in that the brief contains 3,498 words, including footnotes but excluding portions of the brief that are not to be counted, which is less than half the allowable length of a party's principal brief.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system on May 14, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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