No. _____

In The
Supreme Court of the United States

TINA CATES, PETITIONER,

v.

BRUCE D. STROUD; BRIAN WILLIAMS, SR.;
JAMES DZURENDA; ARTHUR EMLING, JR.;
MYRA LAURIAN.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether the unanimous conclusion of multiple other courts of appeals suffices to clearly establish the law for purposes of qualified immunity.

2. Whether general Fourth Amendment principles may render an unjustified search obviously unconstitutional and thus defeat qualified immunity.

3. Whether this Court should eliminate or revise the doctrine of qualified immunity.

PARTIES TO THE PROCEEDING

Pursuant to Rules 14.1 and 29.6, petitioner states the following:

> Petitioner, plaintiff-appellant below, is Tina Cates.
>
> Respondents, defendants-appellees below, are:

Bruce D. Stroud, Associate Warden at High Desert State Prison, in his individual capacity;

Brian Williams, Sr., Warden at High Desert State Prison, in his individual capacity;

James Dzurenda, Director of the Nevada Department of Corrections, in his individual capacity;

Arthur Emling, Jr., investigator for the Nevada Inspector General's Office, in his individual capacity;

Myra Laurian, investigator for the Nevada Department of Corrections and/or Nevada Inspector General's Office, in her individual capacity.

STATEMENT OF RELATED PROCEEDINGS

Cates v. Stroud et al., No. 2:17-cv-01080-GMN-PAL, U.S. District Court for the District of Nevada. Judgment entered September 25, 2018.

Cates v. Stroud et al., No. 18-17026, U.S. Court of Appeals for the Ninth Circuit. Judgment entered September 25, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Tina Cates respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-27a) is reported and available at 976 F.3d 972. The district court's order granting respondents' motion for summary judgment (Pet. App. 28a-58a) is unpublished, but available at 2018 WL 9619428.

JURISDICTION

The court of appeals entered judgment on September 25, 2020. A timely petition for rehearing was denied on November 13, 2020. Pet. App. 59a-60a. By order dated March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari to 150 days from an order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the

> place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Section 1983 of Title 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

INTRODUCTION

This case presents another opportunity for this Court to revisit the doctrine of qualified immunity. Nearly forty years ago, this Court declared that government officials who violate the Constitution are

immune from liability if the rights they violate are not "clearly established." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The chorus of jurists and commentators criticizing this unfounded, unworkable, and unjust standard has grown ever louder in the ensuing decades.

The decision below provides yet another illustration of qualified immunity's fundamental defects. Tina Cates was attempting to visit her boyfriend in Nevada state prison when a prison official ordered her to submit to a humiliating strip search. As the Ninth Circuit correctly held, this search violated the Fourth Amendment: There could be no possible justification for strip searching a prison visitor who might prefer to simply leave the prison. Three other circuits had previously recognized this straightforward logic, which was also reflected in the prison's governing regulations. Nevertheless, the Ninth Circuit held the prison official was entitled to qualified immunity due to the purported absence of "clearly established law" at the time of this constitutional violation.

This Court should grant review for three reasons.

First, the Ninth Circuit's decision further entrenches a conflict on the relevance of out-of-circuit authority. This Court has never directly addressed what sources are relevant to determining whether a constitutional right was "clearly established." While some courts of appeals would likely agree with the Ninth Circuit that the decisions of three other circuits cannot defeat qualified immunity, others have reached

the opposite conclusion. Absent this Court's intervention, the courts of appeals will remain at sea on the critical question of when and how persuasive authority can render the law clearly established.

Second, the Ninth Circuit's decision also deepens a division of authority on the degree of factual specificity required for the law to be "clearly established." Here, the court of appeals took the view that general Fourth Amendment principles cannot make a constitutional violation "obvious" unless the plaintiff locates prior precedent directly on point. That standard is inconsistent with the test other circuits apply. Indeed, two courts of appeals have reached directly conflicting conclusions in indistinguishable circumstances, holding that strip searches just like the one here violated clearly established law. This Court's review is necessary to clarify that no prior decision need address precisely the same factual scenario where, as here, a search's lack of justification is patent.

Third, the Ninth Circuit's decision confirms the need for this Court to reconsider its qualified immunity jurisprudence. That the opinion below implicates two separate circuit splits is little surprise: Courts have found it impossible to apply the "clearly established law" standard in any consistent manner. This inconsistency might be forgivable were the doctrine compelled by statutory text or background common-law principles. But it is not. Qualified immunity is a purely judicial invention—and a modern one at that. Still worse, the doctrine is deeply unjust, shielding government officials from liability for all but the most

egregious constitutional violations, while denying individuals any remedy for deprivations of their basic rights.

This Court considered a number of petitions challenging its qualified immunity jurisprudence last Term. It ultimately declined to take up that broad issue, instead resolving only one of these cases on narrower grounds. *See Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam).

Yet the fundamental problems with qualified immunity have not gone away. This case presents the Court with an ideal vehicle to either abrogate or curtail the doctrine. If the Court does not abolish qualified immunity entirely, it should at least restore the more limited version it initially created, which provided immunity only to those officers whose conduct was expressly authorized by a statute, judicial decision, or other authority. *See Pierson v. Ray*, 386 U.S. 547, 556 (1967). Either way, the time has come for this Court to finally put an end to this failed experiment.

STATEMENT

A. Factual Background

Cates's boyfriend of almost three years, Daniel Gonzalez, was incarcerated in Nevada's High Desert State Prison. Pet. App. 3a.[1] Cates visited Gonzalez weekly. Pet. App. 3a. In these visits, Cates consented

[1] Because this case was resolved at summary judgment, the evidence is viewed in the light most favorable to Cates. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

to the prison's standard search of visitors, which involved removing her shoes and jacket, passing through a metal detector, and receiving a brief pat-down. ER192-93.

Cates has a clean record, having never even been arrested. ER115. But—acting on some still unknown tip—Arthur Emling Jr., a state investigator, suspected that Cates might attempt to smuggle drugs to Gonzalez. Pet. App. 4a.[2]

On February 19, 2017, Cates again went to visit Gonzalez. Pet. App. 3a. As she had many times before, she signed a consent form authorizing a search of her "person" and "vehicle." Pet. App. 3a-4a. Cates understood the form to authorize only the noninvasive pat-down search to which she had previously submitted. Pet. App. 5a.

Yet prison officials had other ideas. Emling and Myra Laurian, another investigator, ordered Cates to follow them. Pet. App. 4a-5a. Cates understood that she was not free to leave, and neither Emling nor Laurian told her otherwise. Pet. App. 5a. Complying with their orders, Cates went to the prison administration building, where Laurian led her into the bathroom. Pet. App. 5a.

The Nevada Department of Corrections has promulgated strict guidelines governing when and

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[2] While Emling sought and obtained a search warrant, it was never executed. Pet. App. 4a. Even if executed, the warrant would not authorize a strip search. Pet. App. 4a; *see* ER220.

how officials may conduct strip searches of prison visitors like Cates. Pet. App. 7a. These guidelines provide:

> Prior to the search, the visitor will be informed of the type of search to be performed and of the visitor's option to refuse to be searched. If the planned search is to be a strip search, the visitor must give consent in writing to be strip searched, unless a search warrant has been obtained and a peace officer is present.

ER322; *see* Pet. App. 8a.

Laurian did not inform Cates of her option to refuse a strip search, as these guidelines require. Pet. App. 5a. Nor did she seek Cates's written consent. Instead, Laurian simply ordered Cates to take off all of her clothes, including her bra and underwear. Pet. App. 5a. Laurian also directed Cates to remove her tampon. Pet. App. 5a. Laurian then commanded the naked Cates to bend over and spread her cheeks. Pet. App. 5a. Cates, believing that she had no choice, complied with each of these orders. Pet. App. 5a.

Finding no drugs or other contraband, Laurian permitted Cates to dress herself. Pet. App. 5a. Laurian did not, however, provide a replacement tampon as she had promised, instead giving Cates toilet paper. Pet. App.5a.

Laurian continued to detain Cates while Emling searched Cates's car. Pet. App. 6a. Having found

nothing illegal, Emling returned with Cates's cellphone. Pet. App. 6a. At that point, Emling told Cates that he needed her permission to search the phone. Pet. App. 6a. When Cates refused to provide her password, Emling told her she could not visit Gonzalez. Pet. App. 6a. Emling's later sworn statement indicated Cates was never going to be allowed visitation regardless, as the purported "conspiracy" was "alone" reason enough to refuse her access. ER230; *see* ER246-47.

On her drive back home, Cates—who had been left without a tampon—bled through her clothes. Pet. App. 6a. She rushed to shower off "[t]he blood, and the violation that I felt from the—having to take my clothes off and spread my cheeks open and all that for the lady." Pet. App. 7a. As she later testified, the experience "traumatized" her. Pet. App. 7a. She refused to leave her house for nine days, taking time off of work, because she was "emotionally messed up in the head from the situation that [she] had gone through." Pet. App. 7a; *see* ER147-48.

B. Procedural Background

1. District court proceedings

Invoking 42 U.S.C. § 1983, Cates sued Emling, Laurian, and a number of other prison officials. ER28-29. She alleged, among other things, that the strip search conducted by Laurian violated the Fourth Amendment. Pet. App. 8a; ER34.

The district court granted summary judgment to the defendants. On Cates's Fourth Amendment claim, the district court acknowledged there was a triable issue of fact whether Cates consented to the strip search. ER7. But the court—citing an unpublished California district court decision concluding a plaintiff pleaded a viable Fourth Amendment claim—asserted it sufficed that the defendants had a "reasonable suspicion" that Cates possessed contraband. ER8 (citing *O'Con v. Katavich*, No. 13-cv-1321, 2012 WL 6185212, *5 (E.D. Cal. Nov. 26, 2013)).

2. The Ninth Circuit's opinion

The Ninth Circuit affirmed, holding that while the strip search violated Cates's constitutional rights, qualified immunity precluded her from obtaining any relief.

The court of appeals first held the strip search contravened the Fourth Amendment. It explained that prison visitors' "privacy interests, and their threats to prison security, are distinct from those of inmates and detainees." Pet. App. 12a. Even for inmates, "[v]isual body cavity searches" are permissible "only in limited circumstances"—namely, where "justified by institutional security concerns." Pet. App. 13a-14a. Accordingly, for prison visitors, "a strip search is permissible only if it can be justified by a legitimate security concern." Pet. App. 15a. That security justification, the court continued, exists only when the visitor could "introduce contraband into the prison." Pet. App. 15a. Thus, the court held, "the prison's security needs would

justify a strip search only if the visitor insists on access," and not where "the visitor would prefer to leave the prison without such access." Pet. App. 19a. And because Cates had not been given any opportunity to simply leave, the search "violated her rights under the Fourth Amendment." Pet. App. 23a.

In outlining this straightforward reasoning, the Ninth Circuit expressly "agree[d] with the Sixth, Seventh and Eighth Circuits," all of which had reached the same conclusion. Pet. App. 14a-17a (citing *Spears v. Sowders*, 71 F.3d 626, 632 (6th Cir. 1995) (en banc), *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000), and *Marriott ex rel. Marriott v. Smith*, 931 F.2d 517, 518, 520 (8th Cir. 1991)). The court also cited two state-court decisions applying similar reasoning. Pet. App. 17a (citing *Stephen v. MacKinnon*, No. CIV.A. 94-3651-B, 1997 WL 426972, at *6 (Mass. Sup. Ct. July 25, 1997), and *Shields v. State*, 16 So. 85, 86 (Ala. 1894)).

The court of appeals also explained that its "agreement with [its] sister circuits follow[ed] naturally from [its] precedent," which had previously recognized that detention facilities' justifications for strip searches are premised on "security interests *within*" those facilities. Pet. App. 17a-18a. And, the court observed, the Nevada Department of Corrections' own guidelines buttressed that conclusion, expressly requiring that visitors be given the opportunity to refuse a strip search. Pet. App. 19a-20a.

Nevertheless, the court of appeals held Cates could not overcome qualified immunity. While the court had "concluded, in agreement with three of [its] sister circuits, that Laurian violated Cates's rights under the Fourth Amendment," the court held that the "contours of the right in this circuit" were insufficiently clear. Pet. App. 24a. The court reasoned that because "there was no case in this circuit [holding] that a prison visitor has a right to leave the prison rather than undergo a strip search," the "'existing precedent'" had not "'placed the * * * question beyond debate.'" Pet. App. 24a (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Although the court acknowledged that "sufficiently obvious" constitutional violations may preclude qualified immunity even without a "precise factual analogue," the court dismissed that "'exception'" as "'especially problematic in the Fourth-Amendment context.'" Pet. App. 25a (quoting *Sharp v. Cnty. of Orange*, 871 F.3d 901, 911-12 (9th Cir. 2017)). In a final, concluding sentence, the court also held there was no "sufficiently robust consensus of persuasive authority in other circuits" establishing the Fourth Amendment right that Laurian had violated. Pet. App. 25a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW SPLITS WITH OTHER CIRCUITS ON THE SIGNIFICANCE OF OUT-OF-CIRCUIT PRECEDENT

This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority" that "clearly establishe[s]" the law for purposes of qualified immunity. *Dist. of Columbia v. Wesby*,

138 S. Ct. 577, 591 & n.8 (2018). While this Court has suggested a "robust 'consensus of cases of persuasive authority' " would suffice, it has never explained what a "robust consensus" entails. *al-Kidd*, 563 U.S. at 742; *see Wesby*, 138 S. Ct. at 591. As a result, lower courts are in disarray about whether and how a "robust consensus" of out-of-circuit authority may clearly establish a constitutional violation. The courts of appeals are not even certain whether that vague test is binding law. *Compare McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (en banc) (binding), *with Marsh v. Butler Cnty.*, 268 F.3d 1014, 1032 (11th Cir. 2001) (en banc) (dicta).

This case lays bare the conflict. The Ninth Circuit recognized that three other circuits had previously agreed that the strip search here would violate the Fourth Amendment, and that no circuit had reached the contrary conclusion. Pet. App. 17a, 21a-22a. The court nevertheless held that no "sufficiently robust consensus of persuasive authority" clearly established that constitutional principle. Pet. App. 25a. While the Fifth, Tenth, Eleventh, and D.C. Circuits would have likely reached the same result, the First, Third, Seventh, and Eighth Circuits would have come down the other way. And in the Second, Fourth, and Sixth Circuits, the outcome would have hinged on which line of contradictory circuit precedent the court followed. The courts of appeals are thus deeply divided on this critical—and here, dispositive—legal question.

A. The Courts Of Appeals Are Divided On When Out-Of-Circuit Precedent Constitutes Clearly Established Law

1. The Eleventh Circuit categorically refuses to consider out-of-circuit precedent

In the Eleventh Circuit, the only precedents that qualify as "clearly established law" are "'decisions of the Supreme Court, this court, or the highest court of the state in which the case arose.'" *Knight ex rel. Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 815 (11th Cir. 2017). The court applies this categorical rule rigorously. In *Loftus v. Clark-Moore*, for example, the plaintiff argued that three on-point out-of-circuit cases clearly established the right at issue. 690 F.3d 1200 (11th Cir. 2012). The Eleventh Circuit refused to consider the argument, declaring: "[D]ecisions outside our circuit cannot guide our interpretation of what is 'clearly established' federal law in this Circuit." *Id.* at 1207.

2. Four circuits apply a stringent standard for considering out-of-circuit precedent

The Fifth, Tenth, and D.C. Circuits all at least nominally consider out-of-circuit precedent. But they—like the Ninth Circuit below—take a restrictive approach, refusing to recognize any "robust consensus" of persuasive authority unless a high number of other circuits have all reached the same conclusion.

The Fifth Circuit's decisions illustrate this stringent standard. No Fifth Circuit case has recognized

clearly established law from out-of-circuit precedent alone. On multiple occasions, the court has held a constitutional right not clearly established notwithstanding numerous appellate courts' recognition of that right. In *Vincent v. City of Sulphur*, for example, the Fifth Circuit declared that "two out-of-circuit cases and a state-court intermediate appellate decision hardly constitute persuasive authority adequate to qualify as clearly established law." 805 F.3d 543, 549 (5th Cir. 2015). In *Lincoln v. Turner*, the court held that two on-point court of appeals decisions established "an emerging trend," but did "not provide sufficient authority to find that the law was clearly established." 874 F.3d 833, 850 (5th Cir. 2017). And in *McClendon v. City of Columbia*, the court held the decisions of six other circuits recognizing a constitutional right insufficient given variations in those courts' descriptions of the "contours" of that right. 305 F.3d at 330-31.

The Tenth Circuit has adopted a similar approach. In *Panagoulakos v. Yazzie*, the court held that the decisions of two other circuits and at least two district courts did not constitute clearly established law. 741 F.3d 1126 (10th Cir. 2013). The court indicated that out-of-circuit precedent could suffice only if "[t]he majority of courts * * * imposed such a duty." *Id.* at 1131.

Likewise, the D.C. Circuit has never relied on out-of-circuit precedent to find clearly established law, despite opportunities to do so. In *Jones v. Kirchner*, for example, the court concluded the law was not clearly

established even though two other circuits had already declared the conduct at issue unconstitutional. 835 F.3d 74, 86 (D.C. Cir. 2016).

3. Four circuits apply a relaxed standard for considering out-of-circuit precedent

The First, Third, Seventh, and Eighth Circuits, by contrast, are far less reticent to conclude that out-of-circuit precedent clearly establishes the law.

The First Circuit has repeatedly held that on-point decisions from other circuits suffice. In *Maldonado v. Fontanes*, for example, the court denied qualified immunity to a mayor who oversaw town employees' seizure and killing of public housing residents' pets. 568 F.3d 263, 266-67 (1st Cir. 2009). Although the First Circuit had not yet held that the Fourth Amendment applied to the seizure of pets, the court deemed the law clearly established because "[t]hree other circuits had announced this conclusion well before the violations alleged " and "no circuit court ha[d] held otherwise." *Id.* at 271; *see also*, *e.g.*, *McCue v. City of Bangor*, 838 F.3d 55, 64-65 (1st Cir. 2016) (relying on four out-of-circuit decisions). The same is true here—yet the Ninth Circuit reached the opposite result. Pet. App. 25a.

Similarly, the Third Circuit has consistently recognized clearly established law based on a handful of out-of-circuit cases. In *Williams v. Bitner*, for instance, a Muslim inmate alleged a First Amendment violation after prison officials ordered him to prepare

pork in the prison kitchen. 455 F.3d 186, 187-89 (3d Cir. 2006). The Third Circuit denied qualified immunity, holding that decisions by the Fifth, Seventh, and Eighth Circuits "gave the [defendants] 'fair warning'" and thus clearly established the inmate's First Amendment right. *Id*. at 194; *see also*, *e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777-78 (3d Cir. 2004) (holding the law clearly established based primarily on three out-of-circuit cases).

The Seventh Circuit has also affirmed the relevance of out-of-circuit precedent. In *Estate of Escobedo v. Bender*, the Seventh Circuit held the defendant's use of a flashbang grenade violated clearly established law, relying on cases from the Third and Ninth Circuits, along with "dicta" from a prior Seventh Circuit decision. 600 F.3d 770, 784-86 (7th Cir. 2010).

And the Eighth Circuit "'subscribe[s] to a broad view of the concept of clearly established law,'" looking to "'all available decisional law'" in making that determination. *Turner v. Ark. Ins. Dep't*, 297 F.3d 751, 755 (8th Cir. 2002). Thus, in *Nelson v. Correctional Medical Services*, the Eighth Circuit held that one "widely reported" out-of-circuit district court decision, supported by general principles set down in two Supreme Court cases, "clearly established" a pregnant woman's right not to be shackled during labor. 583 F.3d 522, 531-34 (8th Cir. 2009) (en banc); *see also*, *e.g.*, *Z.J. ex rel. Jones v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672, 684 (8th Cir. 2019) (relying on decisions by the Seventh and Ninth Circuits).

Thus, many circuits have held that three or fewer decisions from other courts of appeals constitute clearly established law. *E.g.*, *Maldonado*, 568 F.3d at 271; *Williams*, 455 F.3d at 194; *Bender*, 600 F.3d at 784-86; *Nelson*, 583 F.3d at 531-34. These cases directly conflict with the Ninth Circuit's decision below. Had Cates been strip searched in Massachusetts, her suit could go forward. Because her rights were violated in Nevada, she has no remedy.

4. Three circuits are internally split on this question

Finally, three circuits are internally divided, with competing lines of cases offering contradictory answers.

In the Second Circuit, one line of authority holds the law is clearly established where decisions from "other circuits clearly foreshadow a particular ruling on the issue." *Terebesi v. Torreso*, 764 F.3d 217, 231 (2d Cir. 2014) (quotation marks omitted); *accord Jones v. Treubig*, 963 F.3d 214, 236 n.13 (2d Cir. 2020). The Second Circuit has specifically held that three out-of-circuit cases suffice. *Weber v. Dell*, 804 F.2d 796, 803 (2d Cir. 1986).

But another line of Second Circuit precedent forbids the use out-of-circuit decisions: "When neither the Supreme Court nor this court has recognized a right, the law of our sister circuits * * * cannot act to render that right clearly established within the Second Circuit." *Pabon v. Wright*, 459 F.3d 241, 255 (2d Cir. 2006); *accord*, *e.g.*, *Moore v. Vega*, 371 F.3d 110, 114 (2d Cir. 2004).

While the court has recognized the conflict between these two rules, *see Terebisi*, 764 F.3d at 231 n.12, both approaches continue to be cited. *E.g.*, *Mudge v. Zugalla*, 939 F.3d 72, 79 (2d Cir. 2019).

The internal split in the Fourth Circuit is equally stark. Some Fourth Circuit decisions allow courts to "consider whether the right was clearly established based on * * * a consensus of persuasive authority." *Ray v. Roane*, 948 F.3d 222, 229 (4th Cir. 2020) (quotation marks omitted). The court has held that two Tenth Circuit cases, a Third Circuit case, and a suggestion in a Supreme Court decision clearly establish the law. *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 418-19 (4th Cir. 2020). Yet other cases take the opposite approach, holding that "'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.'" *Doe v. S.C. Dep't of Soc. Servs.*, 597 F.3d 163, 176 (4th Cir. 2010); *accord Wilson v. Prince George's Cnty.*, 893 F.3d 213, 221 (4th Cir. 2018).

The Sixth Circuit is also of two minds on this question. On the one hand, it held in *Moldowan v. City of Warren* that a right was clearly established because "at least three circuits [had] recognized" it, even though the Sixth Circuit had "not yet directly addressed the issue." 578 F.3d 351, 378, 382 (6th Cir. 2009); *accord Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 566-67 (6th Cir. 2016) (same). But a different line of cases holds that "sister circuits' precedents are usually irrelevant," and that "[t]he only exception is for

'extraordinary' cases where out-of-circuit decisions 'both point *unmistakably* to' a holding and are 'so clearly foreshadowed by applicable direct authority as to leave *no doubt*' regarding that holding." *Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) (quotation marks omitted).

In all three of these circuits, then, some decisions directly conflict with the decision below, *e.g.*, *Dean*, 976 F.3d at 418-19; *Moldowan*, 578 F.3d at 382, while others support it, *e.g.*, *Pabon*, 459 F.3d at 255; *Ashford*, 951 F.3d at 804. This internal confusion only confirms the need for this Court's guidance.

B. The Restrictive Approach Applied Below Conflicts With This Court's Qualified Immunity Jurisprudence

This Court should grant review to clarify that the approach applied by the First, Third, Seventh, and Eighth Circuits is the correct one. That conclusion follows from the basic principle underlying this Court's current qualified immunity jurisprudence. As this Court has held, the ultimate question is "'whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged conduct was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quotation marks and alteration omitted).

When multiple courts of appeals have all concluded that particular conduct is unconstitutional, officials have the requisite "fair warning." *Ibid*. No reasonable officer would disregard the unanimous

conclusion of the courts charged with interpreting and applying the Constitution on the off chance that some future court might disagree (or the mistaken belief that the officer's personal view of the Constitution's requirements is better reasoned). Nor should qualified immunity—and the ability of individuals to seek a remedy for violations of their constitutional rights—turn unnecessarily on the happenstance of the circuit in which the violation occurs or whether some magic number of circuits have seen a similar case.

Thus, where, as here, the courts of appeals are in agreement that particular conduct violates the Constitution, the result should be clear: qualified immunity is unavailable.

II. THE DECISION BELOW ENTRENCHES A SPLIT ON THE FACTUAL SPECIFICITY REQUIRED FOR THE LAW TO BE CLEARLY ESTABLISHED

The Ninth Circuit's decision also further entrenches a conflict on the factual specificity with which prior precedent must clearly establish a right. Even if the three out-of-circuit decisions the Ninth Circuit cited were ignored, other courts of appeals would have held—indeed, *have* held—that more general Fourth Amendment principles made the unconstitutionality of the strip search here sufficiently obvious to preclude qualified immunity. *See Spears*, 71 F.3d at 632; *Marriott*, 931 F.2d at 520-21. But the Ninth Circuit held otherwise. Pet. App. 24a. "[C]ourts of appeals are divided—intractably—over precisely

what degree of factual similarity must exist" to overcome qualified immunity. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). The decision below is yet another example of that persistent divide.

This conflict stems from tension within this Court's decisions. On one hand, this Court has warned lower courts "not to define clearly established law at a high level of generality," emphasizing that "existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741-42; *see also*, *e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (same). On the other hand, this Court has also held that "general statements of the law are not inherently incapable of giving fair and clear warning," and thus "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." *Hope v. Peltzer*, 536 U.S. 730, 741 (2002) (quotation marks and alterations omitted); *see Taylor*, 141 S. Ct. at 53-54 (similar). "There is an obvious tension between" those cases "declaring that there need not be a case on point" and the cases "finding qualified immunity based on the lack of a case on point." Erwin Chemerinsky, *Federal Jurisdiction* 595 (7th ed. 2016).

Some courts of appeals, such as the Fifth Circuit, adhere rigidly to this Court's first line of decisions, demanding that existing precedent address the precise "constitutional question with specificity and

granularity." *Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019) (officer who killed fleeing motorcyclist with his car was entitled to qualified immunity because existing precedent did not "*foreclose*" that conduct); *see also*, *e.g.*, *Zadeh*, 928 F.3d at 468-69 (unconstitutional warrantless search contravened no clearly established law because there was no "close congruence of the facts in the precedent"). Other circuits have hewed to this Court's second line of cases, holding the law can be clearly established without a precise factual analog. *See*, *e.g.*, *Z.J.*, 931 F.3d at 685 (officers' use of flashbang grenades clearly violated the Fourth Amendment "even in the absence of a case addressing the particular violation"); *Kane v. Barger*, 902 F.3d 185, 192, 194-96 (3d Cir. 2018) (officer's photographing and touching sexual assault victim violated her clearly established "due process right to bodily integrity," explaining, "[w]e do not require a case directly on point").

The Ninth Circuit's decision here is emblematic of the first approach. As the court of appeals itself acknowledged, the conclusion that Laurian's strip search of Cates violated the Fourth Amendment "follow[ed] naturally from [Ninth Circuit] precedent." Pet. App. 17a-18a. Indeed, it is hard to see how any prison official could have believed otherwise. Existing precedent had long made clear that strip searches are especially "dehumanizing and humiliating," and thus require some sort of individualized justification. *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1989). Existing precedent also made clear

that warrantless strip searches in detention facilities are permissible "only where such searches are necessary to protect the overriding security needs of the institution"—namely, "to protect prisons and jails from smuggled weapons, drugs or other contraband." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1447 (9th Cir. 1991). Together, these principles lead inexorably to the conclusion that strip searching a prison visitor who might simply leave—and therefore pose no threat to prison security—necessarily violates the Fourth Amendment. Here, that violation becomes all the more obvious if the prison officials never even intended to allow Cates to visit—thus removing any possible justification for the strip search. *See* ER230; ER246-47.

If there were any doubt that Laurian had fair notice her conduct was unlawful, the applicable Nevada Department of Corrections guidelines removed it. They expressly required that any prison visitor be given the "option to refuse" a strip search. ER322; *see Hope*, 536 U.S. at 743-44 (prison regulation prohibiting officers' conduct helped provide "fair warning" that "their conduct violated the Constitution"). Laurian simply disregarded that requirement.

Yet the Ninth Circuit held that all of the foregoing created no "clearly established law." Pet. App. 24a. That conclusion was inconsistent with this Court's decisions holding that general constitutional rules suffice when they clearly apply to a novel situation. *E.g.*, *Hope*, 536 U.S. at 741. It was, however, consistent with prior Ninth Circuit precedent, which demands a high degree of factual similarity in existing precedent

before an officer can be held responsible for any constitutional violation. *E.g.*, *Mattos v. Agarano*, 661 F.3d 433, 446-48 (9th Cir. 2011) (en banc) (granting qualified immunity to police officers who violated Fourth Amendment by repeatedly tasing seven-months-pregnant woman who refused to sign a speeding ticket). It also followed from the Ninth Circuit's apparently now-categorical rule that Fourth Amendment violations are *never* "obvious" without a prior decision confronting directly analogous facts. *See Sharp*, 871 F.3d at 911-12; Pet. App. 24a-25a.

The courts of appeals that apply a more common-sense test would have reached the opposite result. Indeed, other circuits *have* reached the opposite result: In two of the out-of-circuit strip search decisions on which the Ninth Circuit relied, the courts denied qualified immunity notwithstanding the absence of any on-point precedent. *See Spears*, 71 F.3d at 632; *Marriott*, 931 F.2d at 520.

Thus, in *Spears*, the Sixth Circuit confronted circumstances almost exactly the same as those here. Prison officials strip searched the plaintiff prison visitor, believing she might be smuggling drugs and giving her the impression she would be detained if she refused. *Spears*, 71 F.3d at 629. The Sixth Circuit concluded the search was supported by "reasonable suspicion." *Id.* at 631. But the court also held the plaintiff's allegations would establish the defendants violated her "clearly established" right "not to be searched for administrative reasons without having a chance to refuse the search and depart." *Id.* at 632. As

the source for that right, the court did not cite any precedent analyzing prison visitor strip searches (as the Ninth Circuit demanded). Rather, the Sixth Circuit invoked more general constitutional principles, concluding that "the same logic that dictates that such a search may be conducted only when there is reasonable suspicion also demands that the person to be subjected to such an invasive search be given the opportunity to depart." *Ibid.* On that basis, the court held qualified immunity unavailable. *Ibid.*

Similarly, in *Marriott*, prison officials strip searched a prison visitor who had completed her visit. 931 F.2d at 518-19. Like the Ninth Circuit, the Eighth Circuit held this search violated the Fourth Amendment, as the "State's ability to conduct warrantless strip searches of prison visitors" depends "on the State's interest in keeping contraband out of the prisons." *Id.* at 520. But unlike the Ninth Circuit, the Eighth Circuit also held this same reasoning compelled the conclusion that qualified immunity was unavailable: no reasonable officer could think a strip search permissible where the visitor was leaving the prison, thus eliminating any "danger of smuggling." *Id.* at 521.

The Ninth Circuit's contrary conclusion cannot be reconciled with these decisions. This Court should intervene to confirm that "general statements of the law"—whether in the Fourth Amendment search context or any other—"are not inherently incapable of giving fair and clear warning." *Hope*, 536 U.S. at 741. Even without directly on-point authority, a prison

official's belief that she could strip search a prison visitor who might simply leave would rest on a "grievous misreading of existing case law." *Marriott*, 931 F.3d at 521. That the Ninth Circuit had not previously addressed the specific application of the Fourth Amendment to these circumstances does not mean there was confusion on the issue; "[t]he easiest cases don't even arise." *Safford United Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (quotation marks omitted). This Court's review is needed to make clear that state officials cannot escape liability simply because their obviously unconstitutional conduct has no direct antecedent.

III. THIS COURT SHOULD ELIMINATE OR CURTAIL QUALIFIED IMMUNITY

The conflicts of authority detailed above are symptoms of a more basic problem. This case presents the Court with a vehicle to reexamine its qualified immunity doctrine. This Court should take that opportunity: It should either abolish the doctrine entirely or restore the more limited version of immunity this Court originally recognized in *Pierson v. Ray*, 386 U.S. 547 (1967).

A. Qualified Immunity Is Atextual And Ahistorical

The doctrine of qualified immunity is a judicial invention. The text of § 1983 itself provides no support for such immunity. Enacted in 1871, § 1983 creates liability for "[e]very person" who, under color of state law or custom, "subjects, or causes to be subjected, any

citizen of the United States * * * to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Its language "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep.*, 445 U.S. 622, 635 (1980).

Nevertheless, in *Pierson*, this Court recognized a narrow defense for an officer's good faith reliance on a state statute not yet ruled unconstitutional. 386 U.S. at 555. The Court theorized that Congress could not have intended to abrogate well-established common-law immunities. *Id.* at 554-55.

From there, this Court's qualified immunity doctrine grew increasingly detached from any common-law foundation (let alone the text of the statute). Most significantly, in *Harlow v. Fitzgerald*, the Court "revise[d] the immunity defense for policy reasons." *Crawford-El v. Britton*, 523 U.S. 574, 594 n.15 (1998). *Harlow* emphasized that "substantial costs attend the litigation of the subjective good faith of government officials," which "can be peculiarly disruptive of effective government." 457 U.S. at 817. The Court further warned of the "danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties." *Id.* at 814 (quotation marks and brackets omitted). On that basis, *Harlow* adopted the standard of qualified immunity that governs today: officers are immune from liability so long as "their conduct does not violate clearly established statutory

or constitutional rights of which a reasonable person would have known." *Id.* at 818.

Since then, this Court has repeatedly invoked policy objectives to resolve disputes over qualified immunity. *See*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 645-46 (1987) (declining to consider the "arcane rules of the common law" because it would not give officials the "security" of knowing "that they will not be held personally liable as long as their actions are reasonable in light of current American law"). The doctrine is now wholly divorced from any basis in either the text or history of § 1983.

Indeed, it was from the start. This Court hypothesized that Congress could not have intended to "abolish wholesale" any "well established" common-law immunities. *Pierson*, 386 U.S. at 554-55. Yet there is no evidence that qualified immunity existed at common law, let alone that it was so well-established that Congress must have intended to silently incorporate it.

To the contrary, "[l]awsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic." William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018). Rather, "[u]nder principles of agency law well-accepted by the late 1860's and early 1870's, governmental agents were held responsible in damage suits for their negligent acts, misfeasances in office, and intentional wrongs." Richard A. Matasar, *Personal Immunities Under*

Section 1983: The Limits of the Court's Historical Analysis, 40 ARK. L. REV. 741, 760 (1987).

Historically, liability thus did not depend on the officer's belief, reasonable or otherwise, that his conduct was lawful. Liability arose for "any positive wrong which was not actually authorized by the state." David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 17 (1972). Liability also followed "for acts [an officer] was authorized-in-fact to do if, because of constitutional provisions or provisions of ordinary law, his authority to do those acts was legally insufficient." *Id.* at 47. It was understood that "[i]f the oppression be in the exercise of unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed." Joseph B. Story, *Commentaries on the Constitution* § 1676 (3d ed. 1858).

This Court consistently applied these principles both before and after § 1983's enactment. In 1804, for instance, this Court upheld a monetary award against a naval captain who seized a ship at the President's direction. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 176-78 (1804). The Court explained that the President's "instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass," and so the captain "must be answerable in damages to the owner of this neutral vessel." *Id.* at 179; *see also*, *e.g.*, *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 64-65 (1804) (similar). Likewise, shortly before

§ 1983's enactment, this Court sustained a damages award against a colonel who wrongfully seized a merchant's property during the Mexican-American War—notwithstanding the colonel's "honest judgment" that an emergency justified the seizure and his reliance on a superior's orders. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1851). And in an early case interpreting § 1983, this Court rejected the defendants' argument that they could not be liable for depriving the plaintiffs of their right to vote unless their conduct was "corrupt or malicious." *Myers v. Anderson*, 238 U.S. 368, 371, 378-79 (1915).

In short, no recognized mode of statutory interpretation supports qualified immunity for § 1983 actions. This Court regularly advises that its "role" is "to apply [a] statute as it is written—even if [it] think[s] some other approach might accord with good policy." *Burrage v. United States*, 571 U.S. 204, 218 (2014) (quotation marks and alterations omitted). Qualified immunity is a stark departure from that rule.

B. Qualified Immunity Improperly Denies Individuals Any Remedy For Constitutional Violations

Qualified immunity is also inconsistent with the basic purpose of § 1983. Congress, responding to "the lawless conditions existing in the South in 1871," intended the statute to remedy state actors' constitutional violations. *Monroe v. Pape*, 365 U.S. 167, 174 (1961). The Ku Klux Klan had launched "a wave of

murders and assaults" against "both blacks and Union sympathizers," but the state governments were unwilling or unable "to enforce their own laws against those violating the civil rights of others." *District of Columbia v. Carter*, 409 U.S. 418, 425-26 (1973). "[G]iven the ineffectiveness of state law enforcement and the individual's federal right to 'equal protection of the laws,' an independent federal remedy was necessary." *Briscoe v. LaHue*, 460 U.S. 325, 338 (1983). Congress thus sought "to provide compensation to victims of past abuses" and "deter[] against future constitutional deprivations." *Owen*, 445 U.S. at 651.

Qualified immunity drains the statute of these defining purposes. More often than not, qualified immunity serves as "an absolute shield for law enforcement officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); *see Zadeh*, 928 F.3d at 478-81 (Willett, J., concurring in part, dissenting in part). The result is that officers escape liability even for palpably unreasonable conduct. Here, the doctrine shielded officers who needlessly subjected a woman to the degradation of a fully nude strip search. Pet. App. 24a. Elsewhere, the doctrine protects the district attorney who "defame[s] a former prisoner in retaliation for seeking legislative compensation for his wrongful convictions." *Echols v. Lawton*, 913 F.3d 1313, 1317 (11th Cir.), *cert. denied*, 139 S. Ct. 2678 (2019). And the "officer" who "maliciously or sadistically impose[s] harm on a custodial, handcuffed, and completely non-resistant inmate." *Hill v. Crum*, 727 F.3d 312, 325 (4th Cir.

2013) (Thacker, J., dissenting). The officer who arrests a protestor for "wearing a Guy Fawkes mask during an admittedly peaceful protest." *Gates v. Khokhar*, 884 F.3d 1290, 1305 (11th Cir. 2018) (Williams, J., dissenting). And the officer "who knowingly and maliciously or wantonly fire[s] his .357 magnum at a family suburban automobile containing two helpless and innocent bystander children, ages 3 and 7." *Petta v. Rivera*, 133 F.3d 330, 346 (5th Cir. 1998) (Dennis, J., dissenting).

What is more, the current doctrine does not even further the purpose for which this Court created it. *Harlow*'s invention of the "clearly established law" standard was intended to prevent the threat of liability from "dampen[ing] the ardor" of officers in "the unflinching discharge of their duties." 457 U.S. at 814. But state and local governments' broad practice of indemnifying officers removes any such threat. In most jurisdictions, police officers "are more likely to be struck by lightning than they are to contribute to a settlement or judgment in a police misconduct suit." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 914 (2014); *see* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1675-76 (2003) (similar for prison officials).

The two main effects of qualified immunity, then, are to diminish the incentives of state and local governments to prevent constitutional violations by their agents, and to deny the individuals who suffer such violations any remedy. Neither provides any justification for retaining the doctrine.

C. Qualified Immunity Is Unadministrable

The Court's qualified immunity doctrine is also uniquely difficult for courts to apply consistently. The question whether an officer's conduct violates clearly established law is "a mare's nest of complexity and confusion." John C. Jeffries Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010). This Court has clarified the qualified immunity doctrine dozens of times. *See* Baude, *supra*, at 82 (counting 30 cases between 1982 and 2018 in which the Court applied the "clearly established" test). Not one year in the last ten has gone by without this Court addressing the issue.

But profound disagreements remain. This case alone implicates at least two different circuit splits over qualified immunity. *Supra* pp. 11-26. Many more await this Court's resolution.[3]

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[3] These include whether qualified immunity is a pleading requirement, *compare Kulkay v. Roy*, 847 F.3d 637, 641-42 (8th Cir. 2017), *with Thomas v. Indep. Twp.*, 463 F.3d 285, 293 (3d Cir. 2006); who bears the burden of persuasion, Kenneth Duvall, *Burdens of Proof and Qualified Immunity*, 37 S. ILL. U. L.J. 135, 142-43 (2012); "the proper apportionment of responsibility between juries and judges," *Littrell v. Franklin*, 388 F.3d 578, 587 (8th Cir. 2004); whether the law on use of weaponry can be clearly established when courts have not previously considered a specific weapon, *compare Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018), *with Mattos v. Agarano*, 661 F.3d 433, 448 (9th Cir. 2011) (en banc); "whether the violation of an injunction issued on federal grounds, standing alone, constitutes a violation of clearly established law," Steven H. Steinglass, *1 Section 1983 Litigation in State Courts* § 15:7 (Nov. 2018 update); "whether and how to weigh lawyers' advice in qualified immunity analysis," Edward C.

This Court should abandon this "failed enterprise." *Johnson v. United States*, 576 U.S. 591, 601-02, 605 (2015) (overruling precedent where law remained a "'judicial morass that defies systemic solution'"). This Court may revisit its precedent "where experience with its application reveals that it is unworkable." *Id.* at 605. Qualified immunity is just that: Despite this Court's years of effort, it continues to defy consistent application.

D. Numerous Jurists Have Called For Reconsideration Of Qualified Immunity

Given the doctrine's many deficiencies, it is little wonder that the "cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence" continues to swell. *Zadeh*, 928 F.3d at 480-81 (Willett, J., concurring in part, dissenting in part). Members of this Court have voiced their concerns. Justice Thomas has warned that "[u]ntil [the Court] shift[s] the focus of [its] inquiry to whether immunity existed at common law, [it] will continue to substitute [its] own policy preferences for the mandates of Congress." *Ziglar v. Abassi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring). And Justice Sotomayor has observed that the existing doctrine "sends an alarming signal to law enforcement

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Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice*, 110 NW. U. L. REV. 525, 528 (2016); and "whether privately employed doctors who provide services at prisons or public hospitals pursuant to state contracts are entitled to assert qualified immunity," *Perniciaro v. Lea*, 901 F.3d 241, 251 (5th Cir. 2018).

officers and the public" about the lack of consequences for misconduct. *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

Many other judges have echoed these concerns, offering myriad reasons for this Court to reexamine qualified immunity. They have warned that "the profound issues with qualified immunity are recurring and worsening," *Cox v. Wilson*, 971 F.3d 1159, 1165 (10th Cir. 2020) (Lucero, J., dissenting from denial of rehearing en banc); that the doctrine is "'corrosive to public confidence in our criminal justice system,'" *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020), as revised (Jan. 13, 2020) (Ho, J., concurring in part); and that "this entrenched, judge-created doctrine" continues to "excuse[] constitutional violations by limiting the statute Congress passed to redress constitutional violations." *Zadeh*, 928 F.3d at 480-81 (Willett, J., concurring in part, dissenting in part).[4]

This Court should heed these calls. It is past time for the Court to reexamine its departure from the text, history, and purpose of § 1983.

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[4] *See also*, *e.g.*, *McCoy v. Alamu*, 950 F.3d 226, 237 (5th Cir. 2020) (Costa, J., dissenting in part); *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (Grasz, J., dissenting); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018); *Irish v. Fowler*, 436 F. Supp. 3d 362, 428 n.157 (D. Me. 2020); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019); *Russell v. Wayne Cnty. Sch. Dist.*, No. 17-CV-154, 2019 WL 3877741, at *2 (S.D. Miss. Aug. 16, 2019); *Manzanares v. Roosevelt Cnty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *9-10 (E.D.N.Y. June 26, 2018).

E. This Court Should At Least Overrule *Harlow*

If this Court does not abolish qualified immunity, it should at least return to *Pierson*'s limited recognition of that defense. In *Pierson*, the defendant police officers arrested the plaintiffs under a Mississippi anti-loitering statute that this Court ruled unconstitutional four years later. *Pierson*, 386 U.S. at 549-51. The *Pierson* Court held the common law supported "excusing [an officer] from liability for acting under a statute that he reasonably believed to be valid but that was later held unconstitutional on its face or as applied." *Id.* at 555. *Pierson* thus established, at most, a limited defense: Defendants may avoid liability for unconstitutional actions when their conduct was expressly authorized by a statute or other affirmative statement of the law that had not yet been overturned.

Pierson's more restricted immunity fully serves any fair notice concerns. When a statute or court decision expressly authorizes the officer's conduct, one may reasonably doubt whether the officer should be "mulcted in damages" for not second-guessing that authorization. *Pierson*, 386 U.S. at 555. But when officers act without such authorization, they deserve no shield. After all, such officers must necessarily have violated the Constitution or a federal statute to be held liable. Much officer misconduct simply does not rise to the level of constitutional or federal statutory violations. When it does, the officer's ignorance of the

law—just like any other citizen's—should be no defense.[5]

A return to *Pierson* would also rid this Court's precedent of its greatest departures from ordinary methods of statutory interpretation. *See*, *e.g.*, David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 38 (1989) ("Although *Pierson* showed fidelity to common law principles, the Court soon abandoned the common law as the controlling source of immunity."). It was after *Pierson* that this Court in *Harlow* reformulated qualified immunity "for policy reasons." *Crawford-El*, 523 U.S. at 594 n.15. Much can be said about the historical inaccuracies of *Pierson*. *See supra* pp. 28-30. But its recognition of a defense for an officer's good-faith reliance on authorizing law was at least not entirely unprecedented. *See*, *e.g.*, *Dwight v. Rice*, 5 La. Ann. 580, 580-81 (La. 1850); *Rodman v. Harcourt*, 43 Ky. 224, 231-35 (Ky. 1843).

The *Pierson* rule would also be far more administrable than the broad immunity this Court has since extended to all officers whose "conduct does not

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[5] *See* Barbara E. Armacost, *Qualified Immunity: Ignorance Excused*, 51 VAND. L. REV. 583, 585 (1998) (while a "criminal defendant very rarely succeeds" in arguing "she should be excused because she could reasonably have believed that the law did not prohibit her behavior," that "argument frequently succeeds in constitutional damages actions"); Baude, *supra*, at 74 ("[T]he Court treats qualified immunity and the ordinary criminal defendant in almost the opposite fashion.").

violate clearly established statutory or constitutional rights." *Harlow*, 457 U.S. at 818. Under *Pierson*, courts would not need to decide how many out-of-circuit decisions serve to clearly establish the law. *Supra* pp. 11-20. Nor would they have to identify the precise level of factual similarity necessary for prior precedent to defeat immunity. *Supra* pp. 20-26. In fact, courts would not need to decide any of the complex questions plaguing the "clearly established" test. *See*, *e.g.*, *supra* p. 33 n.3. Instead, a court would need only ask whether a statute, regulation, or controlling judicial precedent that had since been overturned had specifically authorized the defendant's conduct.

Application of the *Pierson* rule to this case demonstrates its simplicity. No statute or judicial precedent affirmatively authorized Laurian to strip search Cates. In fact, the only existing authority prohibited the search. Pet. App. 7a-8a. So, under *Pierson*, qualified immunity is unavailable—full stop. The defense will be just as easy to apply in the vast majority of cases. Only where the defendant can point to authority that has been overturned or overruled that expressly authorized his or her conduct could the defense apply.

Thus, at a minimum, this Court should pare back qualified immunity to the more limited version of the doctrine this Court originally recognized. Nearly four decades of experience with *Harlow*'s departure from that precedent has demonstrated the many failings of the "clearly established law" standard. This Court should not permit that amorphous test to continue generating unpredictable and unjust results.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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