No. 18-1173

IN THE

Supreme Court of the United States

I.B. AND JANE DOE,

Petitioners,

v.

APRIL WOODARD, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY FOR PETITIONERS

Respondents' brief in opposition ignores the broad array of jurists, leading treatises, and commentators recognizing widespread confusion over the clearly-established-law test. See Pet. 16-19; see also Cato Br. 17-19 n.16 (collecting additional diverging opinions from six circuits in just the last two years). That confusion alone warrants this Court's review, and the petition's second question presents an ideal vehicle for providing much-needed guidance.

In fact, a wide range of amici—groups from across the ideological spectrum who rarely agree on anything—agree that this petition offers a valuable opportunity to refine this Court's qualified-immunity jurisprudence. See, *e.g.*, Cross-Ideological Grps. Br. 1-6.

The bulk of respondents' brief in opposition addresses the merits. The present choice, though, is not *how* but *whether* to resolve the certiorari-worthy questions raised

here: (1a) the acknowledged 4-2 circuit split on whether the warrant requirement or its special-needs exception applies to caseworker strip searches of children on suspicion of abuse; (1b) whether there are some limits on a lower court's *Pearson* discretion to skip constitutional issues; (2a) the entrenched confusion on how to apply the clearly-established-law test; (2b) clarifying what law *Safford* clearly established; and (3) reconsidering qualified-immunity jurisprudence.

Respondents' merits analysis of those questions is—at best—premature. Nothing respondents say negates the need for the Court to resolve them one way or the other. Individually or collectively, these qualified-immunity issues warrant this Court's review.

I. THERE IS AN ACKNOWLEDGED 4-2 CIRCUIT SPLIT ON WHETHER THE WARRANT REQUIREMENT VERSUS ITS SPECIAL-NEEDS EXCEPTION APPLIES TO STRIP SEARCHES UPON SUSPICION OF CHILD ABUSE

An entrenched 4-2 circuit split burdens the first question presented: do caseworkers generally need a warrant to strip-search a child on suspicion of abuse, or does the special-needs exception to the warrant requirement apply? Pet. 8-9. After multiple circuits acknowledged the division, see *ibid.*, this Court granted certiorari to resolve that split *eight years ago* in *Camreta* v. *Greene*, 563 U.S. 692 (2011). Yet as the court below recognized, because *Camreta* was unable to resolve the question for justiciability reasons that are absent here, the circuit split remains unresolved even now. *Id.* at 698; Pet. App. 18a-21a.

Despite that widespread recognition, respondents assert that the split is "more apparent than real." BIO 11. But respondents conceded the existence of this circuit split before the court of appeals. See Resp. CA Br. 20 ("The District Court correctly noted * * * a split in other circuits' application of the special needs doctrine."). Respondents

now focus on factual distinctions that were immaterial to these cases' holdings and actual legal reasoning. BIO 11, 13-15. For example, the Fifth Circuit acknowledged that the 4-2 split was over whether "the traditional Fourth Amendment standard" applied to caseworker "*juvenile strip searches*." *Roe* v. *Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 403 (5th Cir. 2002) (emphasis added). If all of these cases turned on factbound determinations of "the *degree of invasiveness* of the search," BIO 19 (emphasis added), the circuits would not acknowledge an entrenched split. Indeed, Fourth Amendment law in general would have few legal standards under respondents' approach; all cases could be reframed as factual application of the Constitution's promise.

Respondents also urge the Court to deny certiorari because the Tenth Circuit chose not to reach the merits of this first question presented. BIO 13. Ironically enough, the Tenth Circuit chose this approach *because* it recognized that this case implicates the very circuit split that respondents now deny. Pet. App. 73a-74a. If anything, the Tenth Circuit's refusal to address the merits of the squarely presented issue makes this case a *better* vehicle, because it would allow this Court to simultaneously clarify when the circuits should exercise their discretion under *Pearson* v. *Callahan*, 555 U.S. 223 (2009), to reach constitutional questions. See Pet. 13-15.

Nor would petitioners' position interfere with legitimate child-abuse investigations. Contrary to respondents' assertion, BIO 18, the exigent-circumstances warrant exception applies whenever a child is in imminent danger. See, *e.g.*, *Roe*, 299 F.3d at 407; *Tenenbaum* v. *Williams*, 193 F.3d 581, 604-605 (2d Cir. 1999). And where a child is not in imminent danger, a strip search's highly intrusive nature justifies the modest step of requiring a caseworker to obtain a judicial warrant. Government will still have

ample room to investigate the serious problem of child abuse. But at the same time, strip searches cause psychological harm to children—a serious danger that respondents cannot and do not contest, that is well-documented, and which I.B. herself has suffered. Pet. App 121a; see Pet. 11-12; Home Sch. Legal Def. Ass'n Br. 6-8, 11-12; Pacific Justice Found. Br. 9. When about 80% of the more than 4 million child-abuse investigations that occur annually "end with a finding that the children were not victims," the modest step of requiring a warrant will help ensure that the investigations do not needlessly inflict the very harm they seek to prevent. Home Sch. Legal Def. Ass'n Br. 5, 13.

Remarkably, respondents accuse petitioners of having "ungrounded fears that investigators *might* perform unnecessarily invasive searches." BIO 17. There is no "might" about it—that is exactly what happened here, and the Tenth Circuit majority below never blessed Woodard's strip search of I.B. Although respondents characterize the search as "non-invasive," BIO 15, it is striking how much about I.B.'s experience respondents do not dispute. They do not dispute that a caseworker examined and photographed the intimate parts of a four-year-old girl at preschool, without her mother's knowledge or consent. They do not dispute that the abuse allegations—and all previous allegations—were unfounded. They do not dispute that Woodard lied about the search for weeks to I.B.'s mother. And they do not dispute that most of the allegations could have been readily disproven through a much narrower search.[1]

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[1] Respondents miss the point in asserting that only a search below outer clothes could have verified whether there were "marks on I.B.'s stomach." BIO 25. The abuse allegations also referred to I.B.'s face, back, neck, and knees, Pet. App. 117a, and a narrower search disproving those allegations would have similarly undermined the veracity of allegations about I.B.'s stomach.

Petitioners pleaded that Woodard removed "*all* [of] I.B.'s clothes." Pet. App. 117a (emphasis added); see also Pet. App. 182a. But even if I.B. had remained "partially clothed," BIO 8, 12, 25, 29, a "strip search is a fair way to speak of it." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 374 (2009). As *Safford* explained, anything "going beyond a search of outer clothing and belongings" is "categorically distinct." *Ibid.* (emphasizing that "the exact label" for this intrusion "is not important"). Even according to respondents, "Woodard instructed I.B. to show her bottom" and she "took color photographs of what she observed." BIO 3 (citing Pet. App. 117a, 136a).

Lastly, petitioners try to inject a justiciability argument—that this case, like *Camreta*, might become "moot." BIO 15. This contention, based on the odd suggestion that "I.B. lacks a continuing interest in the controversy," *ibid.*, is meritless. Petitioners seek money damages and challenge the judgment against them that precludes their recovery based on qualified immunity. See Pet. App. 149a-150a. In *Camreta*, the plaintiff "declined to cross-petition for review of the decision that the officials have immunity." 563 U.S. at 700; see *id.* at 714 n.11. In that "peculiar" posture, the plaintiff no longer had a live controversy once she "ha[d] grown up and moved across the country," as she would be highly unlikely to need prospective injunctive relief or ever again face the practices that allegedly caused the constitutional violation. *Id.* at 698. I.B.'s claim for damages turns on what happened to her in Colorado in the past. It is not now and will never become moot, regardless of wherever she currently lives, wherever she might move in the future, and whether she ever steps foot in a Colorado school again. See, *e.g.*, *Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177, 182 n.1 (2007); *Bd. of Pardons* v. *Allen*, 482 U.S. 369, 370 n.1 (1987).

II. RESPONDENTS IGNORE WIDESPREAD CONFUSION OVER THE CLEARLY-ESTABLISHED-LAW TEST

Respondents ignore the many authorities cited in the petition (at 16-19) recognizing widespread confusion over the clearly-established-law test. Their response likewise contains no mention of the Fifth and Eleventh Circuit cases cited in the petition recognizing that *Safford* clearly established the law on school strip searches beyond the precise fact pattern there. See Pet. 23-24. Respondents therefore apparently do not dispute that the Tenth Circuit created a separate circuit split with these decisions on *Safford*'s scope. See Pet. 23.

Rather than engage directly, respondents argue that no confusion exists because both opinions below quoted this Court's "fair warning" standard. BIO 22. But as one amicus correctly observes, the majority below quoted no fewer than *seven different formulations* of the clearly-established-law test from this Court's opinions. See Gun Owners Found. Br. 8-9; see also Pet. App. 11a-13a. In addition to reciting the "fair warning" standard, the majority included formulations demanding close factual similarities between cases. *E.g.*, Pet. App. 24a ("[C]learly established law must be particularized to the facts of the case." (quoting *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam))). The majority and dissent quoted the same formulations of this Court's clearly-established-law test, without noting that some are inconsistent with one another, and then reached *opposite* conclusions—thus illustrating rather than negating the confusion over this test.

Respondents also do not even defend the level of factual granularity at which the Tenth Circuit majority analyzed *Safford*. Respondents acknowledge (BIO 23) the Tenth Circuit's description that *Safford* was "different" because the search in that case addressed "drug

distribution" rather than "abuse." Pet. App. 28a. Respondents cannot justify the Tenth Circuit's conclusion that this factual distinction mattered in *Safford*'s analysis. Moreover, they insist—without citation—that the Tenth Circuit "did not limit the applicability of *Safford* to searches for illicit drugs," and instead held that *Safford* applied only to "searches in aid of school policies." BIO 24. But the Tenth Circuit never used that phrase; it specifically referred to "drug distribution" and "medications." Pet. App. 28a, 29a.

The end result of respondents' (and the Tenth Circuit's) position is that there is currently no established law—whatsoever—in the Tenth Circuit protecting children from school strip searches if government officials suspect "intrafamilial abuse." BIO 24. Yet even respondents concede, as they must, that there are some "minimal standards of reasonableness applicable to any search, including one protected by the special needs doctrine." BIO 25. Indeed, even the circuits that *reject* the warrant requirement in this context still recognize *some* clearly established baseline Fourth Amendment protection that must apply to school strip searches: the "special needs" test's reasonableness requirement. Pet. 9. This special-needs exception is precisely what *Safford* applied when it sought to "make it clear" that a warrantless school strip search is only "reasonable" if "specific suspicions" justify a search so "intrusive" that it is "in a category of its own." 557 U.S. at 377; see also *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 653 (1995) (noting that *Safford*'s foundation, *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), was a "special needs" case). Tellingly, respondents do not mention the words "specific suspicions" or acknowledge that *Safford* meant to clearly establish the law in this area.

The Fourth Amendment standard for warrantless school strip searches cannot possibly be lower for *case-workers*, as opposed to *school* officials who are actually enforcing "school policies." BIO 24; see Pet. 11. School searches enforcing school policies are already subject to a "lesser standard." *Safford*, 557 U.S. at 371. Petitioners are aware of no authority that would support an even lower standard for caseworkers. Respondents certainly do not cite any such authority. To the contrary, in the pre-*Safford* case respondents chiefly rely on, BIO 9, 10, 12, 22, the Tenth Circuit recognized that "[t]here is no 'social worker' exception to the Fourth Amendment." *Dubbs* v. *Head Start, Inc.*, 336 F.3d 1194, 1205 (10th Cir. 2003).

III. THIS IS THE IDEAL VEHICLE TO CLARIFY THE CLEARLY-ESTABLISHED-LAW TEST AND REFINE QUALIFIED-IMMUNITY JURISPRUDENCE

Respondents identify no vehicle problems that would impede the Court's consideration of the questions presented. Moreover, the wide array of amici supporting this petition only adds to the "growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring *dubitante*) (footnotes omitted). Thorough scholarly analysis undergirds the ample support for reconsidering qualified-immunity principles. See, *e.g.*, Cross-Ideological Grps. Br. 8-9; Cato Br. 14; Scholars Br. 14. Petitioners and amici have identified multiple bases on which this Court can consider refinements. See Pet. 27-29; Scholars Br. 14-18; Cato Br. 13-22; First Liberty Br. 16-18.

This Court at a minimum should clarify the clearly-established-law test, and it should recognize that granular factual distinctions between a particular case and an established precedent only matter when those distinctions would alter the constitutional analysis under the relevant

doctrinal test. This, in turn, would explain why granular factual distinctions are largely irrelevant outside the context of challenges to split-second decisions. See Pet. 19, 27; see, *e.g.*, *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). This clarification would continue to protect law-enforcement officers making quick life-or-death decisions, while at the same time confirming Section 1983's applicability to government officers who had ample time to consider their decisions that violated constitutional rights. See First Liberty Br. 8-9.

Plainly, the facts relevant for one constitutional doctrinal test may not be important for another. Even commentators that respondents rely upon (BIO 31-32) recognize that "[to] be clearly established, an earlier case does not need to be factually identical to the subsequent case—indeed, that is impossible." Aaron Nielson & Christopher Walker, *Strategic Immunity*, 66 Emory L.J. 55, 94 (2016); see, *e.g.*, *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011) ("We do not require a case directly on point[.]").

Granular factual distinctions should matter much more in cases involving split-second decisions because of the underlying Fourth Amendment doctrine. See, *e.g.*, *Graham* v. *Connor*, 490 U.S. 386, 396-397 (1989) (Fourth Amendment reasonableness inquiry already treats leniently "split-second judgments" made "in circumstances that are tense, uncertain, and rapidly evolving"). For example, in cases involving sudden decisions by police, the reasonableness of an officer's actions may well turn on granular facts assessed in hot pursuit. See, *e.g.*, *Mullenix* v. *Luna*, 136 S. Ct. 305, 309-310, 312 (2015) (per curiam) (in a car chase, the suspect's speed, the information available to the officer, and the presence or absence of bystanders are all relevant to the reasonableness inquiry). This distinction between split-second versus considered decisions explains the bulk of this Court's cases granting qualified immunity. See, *e.g.*, *Morrow* v. *Meachum*, 917 F.3d 870, 876 (5th Cir.

2019) ("[O]vercoming qualified immunity is especially difficult in excessive-force cases * * * [which] often turn on 'split-second decisions[.]'"). But other government actions might also require essentially instantaneous judgments to avoid considerable harm: If a caseworker faced a situation where she needed to make a sudden decision based on a reasonable belief that a child was imminently in danger, for example, these same split-second-judgment considerations would apply.

But many cases do not involve split-second decisions, and the granularity of the facts in such cases will have far less importance in assessing the reasonableness of the official's actions. This case is a prime example. Ms. Woodard waited until the day after the report was received to seek permission from her supervisor for the search and visit I.B.'s school. See Pet. App. 117a. The strip search was planned in advance—not a split-second decision. Moreover, *Safford* made clear that the most important factor in its Fourth Amendment analysis was whether there were "specific suspicions" of "danger" or "wrongdoing" justifying a highly invasive school strip search. 557 U.S. at 377. The precise "danger" or "wrongdoing" was not relevant, and *Safford*'s application of the special-needs doctrine did not turn on the *purpose* or *object* of the strip search. *Ibid.* Instead, *Safford* turned on whether there were heightened "specific suspicions" of *any kind* of "danger" or "wrongdoing" that justified the massively intrusive nature—the "quantum leap"—of strip searching a child at school. *Ibid.*

Respondents make it seem as if clarifying the clearly-established-law test would leave government officials with absolutely no protection from damages lawsuits. See BIO 26-29. This purported worry is overwrought in part because it ignores that the Fourth Amendment's underlying constitutional test is *already* designed to give officials leeway. In fact, many cases granting qualified immunity

could have been decided on the constitutional merits in favor of the officers. See, *e.g.*, *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018) (finding police officers had probable cause); *Plumhoff* v. *Rickard*, 572 U.S. 765, 778 (2014) (finding no Fourth Amendment violation). If officials make reasonable "mistakes" of law, the Fourth Amendment itself already provides "fair leeway" and a shield. *Heien* v. *North Carolina*, 135 S. Ct. 530, 536 (2014); see also Aaron Nielson & Christopher Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1864 (2018).

Finally, qualified-immunity doctrine since *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), was, in significant part, expanded to protect high-ranking officials from repeated lawsuits. See *Wyatt* v. *Cole*, 504 U.S. 158, 170-171 (1992) (Kennedy, J., concurring). In particular, many of these cases—including *Harlow*—were against *federal* officials; they were not Section 1983 suits against state officials. So the Court's qualified-immunity rulings in this area were indirectly limiting *Bivens* claims, but the Court has subsequently limited *Bivens* claims directly. See, *e.g.*, *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017) ("[T]he Court has refused to [extend *Bivens*] for the past 30 years."). This development calls into question whether (or at least to what degree) these extensions of qualified-immunity—made in *Bivens* cases against high-ranking federal officials—are still necessary. Cf. BIO 27.

In sum, the Court should seize this valuable opportunity to clarify and refine its qualified-immunity jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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