No. 19-899

IN THE
Supreme Court of the United States

SHANIZ WEST,
Petitioner,
v.

DOUG WINFIELD, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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March 20, 2020

COUNTERSTATEMENT OF QUESTION PRESENTED

This Court has repeatedly held for decades, in decisions as recent as last year, that police officers (and other government officials) are entitled to qualified immunity unless their conduct violates a right that was "clearly established" at the time of the violation. For a right to be clearly established, there must be existing precedent placing the illegality of the conduct beyond debate. The test is highly particularized: the facts of the prior case must be closely comparable to those surrounding the conduct at issue. Absent such a precedent, qualified immunity applies, except in the rare case of such egregious conduct that it would be obvious to any police officer that the conduct was illegal.

With that legal framework, the question presented may be stated as follows:

1. Petitioner consented to Respondents entering her house to apprehend a suspect, who was a convicted felon, a gang member, and wanted on several felony warrants for violent crimes, and who reportedly was armed, high on drugs, and possibly suicidal. After demands for the suspect to leave the house voluntarily went unanswered, Respondents used tear gas, causing property damage. There is no prior case with similar facts. Did Respondents violate a "clearly

established" right by allegedly exceeding the scope of consent?

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COUNTERSTATEMENT OF THE CASE

The Petition asserts that "[t]he events at the heart of this case began around 2:20 p.m. on August 11, 2014, when Petitioner arrived at her house with her children to discover her house surrounded by the City of Caldwell police[.]" Pet. at 3. In reality, however, the events surrounding this case began days before.

Fabian Salinas, Petitioner's ex-boyfriend, was a documented gang member and convicted felon who was wanted by several law enforcement agencies on multiple felony charges for violent crimes. App. at 2.[1] Days before the incident at issue, officers from the City of Caldwell Police Department attempted to stop Salinas, who led them on a high-speed car chase. *Id.* During that chase, Salinas sped head-on towards the police vehicle, forcing the officer driving the car to swerve onto a residential sidewalk. *Id.*

During the night and early morning on August 10–11, 2014, Petitioner heard knocking on the back door and windows of her house. App. at 32. Petitioner herself called police on the morning of August 11 to report the incident. *Id.* Petitioner told the police that she believed Salinas was responsible for the knocking. *Id.* Police officers informed Petitioner that Salinas had outstanding felony arrest warrants. *Id.*

Later that day, Salinas entered Petitioner's home. App. at 33. Petitioner told the suspect to leave the residence before she returned. *Id.* Later, Petitioner's grandmother called 911 to request police

[1] Citations to "App. at __" are to Petitioner's Appendix.

assistance. *Id.* The 911 call log shows that Petitioner's grandmother told the police: 1) Salinas was in Petitioner's home and was possibly threatening Petitioner with a BB gun; 2) there were children in the house; 3) Salinas was in fact inside the house even though Petitioner might assert otherwise; and 4) Salinas was high on methamphetamine. App. at 33–34. The police also had information that Salinas owned a .32 caliber pistol. App. at 3.

Officers from the Caldwell Police Department went to Petitioner's home in response to her grandmother's 911 call. App. at 34. After multiple failed attempts to call Petitioner, police officers contacted Petitioner's grandmother, who relayed the same information to the police officers on site that she had previously relayed on her 911 call. *Id.* In addition, Petitioner's grandmother told police officers that Salinas likely broke Petitioner's phone, which explained why the officers were having difficulty contacting her. *Id.* Officers tried knocking on Petitioner's door but received no response. *Id.*

Police officers then contacted Crystal Vasquez, Salinas's sister and Petitioner's friend, who police believed was in the house. *Id.* Vasquez informed the police officers that: 1) Salinas was inside Petitioner's house as of 20–30 minutes prior; 2) Salinas was waiving around a firearm, which Vasquez believed to be a BB gun; 3) Petitioner was not answering Vasquez's phone calls; and 4) Salinas was on drugs. App. at 34–35. The police also were told that Salinas might be suicidal. App. at 5.

Petitioner arrived home as police officers were outside discussing how best to deal with the situation.

App. at 35. She told the police that Salinas was in the house and was armed with what Petitioner believed was a BB gun. App. at 36. Petitioner also told police officers that Salinas had locked the chain lock on the front door. App. at 36–37. After some discussion, Petitioner gave the officers permission to enter the house to apprehend Salinas and handed them the keys to the front door. App. at 38.

Contrary to the assertion in the dissent below that police had no further contact with Petitioner after she gave consent to enter her house to apprehend Salinas, App. at 20, call logs in the summary judgment record document multiple communications between the police and Petitioner. Specifically, throughout the day, a Crisis Negotiator from the Caldwell Police Department remained in contact with the Petitioner, calling her at least eight times:

a. At 5:38 p.m., the Crisis Negotiator contacted Petitioner, who informed the Crisis Negotiator that there was no keypad for the garage door.

b. At 5:50 p.m., the Crisis Negotiator called Petitioner to find out if her key also unlocked the deadbolt on the front door.

c. At 5:58 p.m., the Crisis Negotiator called Petitioner to confirm that there was no telephone in the house that could be used to contact Salinas.

d. At 6:23 p.m., Petitioner called the Crisis Negotiator and asked if contact had been made with Salinas. She also informed the

Crisis Negotiator there was a friendly pit bull in the house.

e. Petitioner and the Crisis Negotiator had four more telephone conversations that night, at 7:33 p.m., 8:20 p.m., 8:28 p.m., and 9:31 p.m.

Decl. of L. Brown in Supp. of Defs.' Mot. for Summ. J., Ex. A, at 41–42; Decl. of M. Sperry in Supp. of Defs.' Mot. for Summ. J., Ex. A.

In light of the obvious high risk of the situation, the officers on the scene requested SWAT assistance. App. at 39. After the SWAT team arrived, they made repeated announcements demanding that Salinas exit the house. App. at 42. When those demands went unanswered, the SWAT team dispersed tear gas into the house to subdue Salinas before they entered. *Id.*

Police officers then entered the house to apprehend Salinas. Petitioner asserts that the police officers "did not use the keys" provided by Petitioner prior to discharging the tear gas. Pet. at 4. Petitioner fails to acknowledge, however, that she had previously told police officers that Salinas had locked the chain on the door from the inside, such that the keys would not allow the officers to gain access to the premises. App. at 36–37. And, in fact, when the officers attempted to enter using the keys, they were stopped by the chain. App. at 42.

Petitioner also asserts that "[a]fter a thorough and destructive search, the police concluded that [Petitioner] had been right, and her ex-boyfriend was not there." Pet. at 5. Petitioner, however, never communicated to police officers that she believed that Salinas was not inside her house. To the contrary, as

noted above, she informed officers that Salinas *was* inside her house and asked the Crisis Negotiator if she had been able to contact Salinas.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit followed the correct test as established by this Court for determining whether a right is "clearly established" and reasonably (and correctly) applied that test to the specific facts of this case.

The Court of Appeals for the Ninth Circuit correctly stated this Court's "clearly established" test for determining whether a government official is entitled to qualified immunity. Applying that test to the specific fact situation before it, the court of appeals reasonably (and correctly) concluded that Respondents are entitled to qualified immunity because they did not violate a "clearly established" right.

A. The "clearly established" test for qualified immunity requires courts to define the right at issue with a high level of specificity.

Qualified immunity protects government officials, including police officers, from liability for civil damages unless the official violates a federal statutory or constitutional right that was "'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). So long as a police officer is not "plainly incompetent" or

does not "knowingly violate the law," the officer is entitled to qualified immunity from civil suit. *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Recent decisions from this Court have stressed that "for a right to be fairly established, existing precedent must have placed the statutory or constitutional question beyond debate," *White v. Pauly,* 137 S. Ct. 548, 552 (2017*)* (internal quotation marks omitted), so that "every reasonable official would have understood that what he is doing violates that right." *Mullenix*, 136 S. Ct. at 308.

This test is intensely fact-specific. "The clearly established law must be 'particularized' to the facts of the case." *White,* 137 S. Ct. at 552. Thus, the question a court must decide when evaluating whether an official is entitled to qualified immunity is whether it is "clearly established" that the officer's *particular conduct* violated the plaintiff's rights. *Id.*

This Court has emphasized that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). It has taken pains to remind lower courts, and in particular the Ninth Circuit, "repeatedly" that they must take care "not to define clearly established law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (quoting *City & Cty. of San Francisco, Cal. v. Sheehan*, 135 S. Ct. 1765, 1775–76 (2015)) (internal quotation marks omitted).

A right is clearly established with the requisite "specificity" only where there is a controlling case that "squarely governs the specific facts at issue." *E.g.*,

City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503–04 (2019). As this Court has said, this specificity is "especially important in the Fourth Amendment context" because it is "sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308. To meet the level of specificity required in this context, the court must "identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." *Emmons*, 139 S. Ct. at 504 (quoting *D.C. v. Wesby*, 138 S. Ct. 577, 581 (2018)).

For example, in *City of Escondido, California v. Emmons*, the plaintiff sued police officers for forcing him to the ground before arresting him, alleging that the officers had used excessive force in completing the arrest. 139 S. Ct. at 502. The Ninth Circuit held that the officers' conduct violated the plaintiff's "right to be free of excessive force" and that they were not entitled to qualified immunity. *Id.* This Court reversed, holding that the Ninth Circuit applied the Court's "clearly established" test too generally. In doing so, this Court explained that the court of appeals "should have asked whether clearly established law prohibited the officers from stopping and taking down a man *in these circumstances*." *Id.* at 503 (emphasis added).

Petitioner contends, Pet. at 15, that this Court's decision in *Hope v. Pelzer*, 536 U.S. 730, 740–41 (2002), conflicts with its later qualified immunity decisions requiring the level of specificity for a right to be "clearly established." Petitioner argues that *Hope* held that qualified immunity requires only that

officials have general notice that their conduct is unlawful. Not so. *Hope* stands only for the unremarkable proposition that, in some "novel factual situations," the unlawfulness of a police officer's conduct is so obvious that it is indisputable that the officer had sufficiently "fair warning." *Id.* at 739–41.

This Court's more recent decisions are consistent with this straight-forward reading of *Hope*. Those decisions have acknowledged that, although qualified immunity ordinarily requires a factually similar case to demonstrate a clearly established right, there can be the "rare, obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Wesby*, 138 S. Ct. at 590 (internal quotation marks omitted).

In short, this Court's long line of qualified immunity cases is clear and consistent. The test for determining whether a police officer (or other government official) is entitled to qualified immunity is itself clearly established.

B. The Ninth Circuit reasonably (and correctly) applied the "clearly established" test in granting qualified immunity to Respondents.

The Ninth Circuit reasonably (and correctly) applied this Court's "clearly established" test in holding that Respondents are entitled to qualified immunity. As an initial matter, the court of appeals correctly stated the applicable test: except in the "rare obvious case," an officer is entitled to qualified immunity, unless a controlling case that "squarely governs the specific facts at issue" clearly establishes

that the officer's actions were unlawful. App. at 8 (quoting *Emmons*, 139 S. Ct. at 503–04).

Applying that test to the specific facts before it, the Ninth Circuit explained that "no Supreme Court or Ninth Circuit case clearly established, as of August 2014, that [Respondents] exceeded the scope of consent." App. at 13. The Ninth Circuit was right. Petitioner still has not identified any case in which officers were held to have exceeded the scope of their authority in remotely similar circumstances.

Citing the dissent below, Petitioner contends that the "most factually similar case" is *United States v. Ibarra*, 965 F.2d 1354 (5th Cir. 1992). Pet. at 11, n.4. However, the facts in *Ibarra* are readily distinguishable from those here.[2] Most notably, *Ibarra* did not involve efforts to arrest a dangerous suspect wanted on multiple felony warrants for violent crimes who police officers believed was both armed and potentially suicidal. To the contrary, the police officers in *Ibarra* were merely searching a house for "money or drugs." 965 F.2d at 1355. Additionally, the officers in *Ibarra* knew that the individual from whom they received consent for the search did not own the house or live there. *Id.*

Moreover, the Ninth Circuit reasonably (and correctly) held that this case is not one of those rare,

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[2] Even if it were factually similar, which it is not, *Ibarra* could not have created "clearly established" law in the Ninth Circuit because it has no precedential weight even in the Fifth Circuit. The *Ibarra* opinion was issued by an equally divided *en banc* court. An opinion and affirmance by an equally divided court is not entitled to precedential weight. *Neil v. Biggers*, 409 U.S. 188, 192 (1972).

"obvious case[s]" in which the unlawfulness of police officers' actions are so clear that a factually-similar precedent need not exist. App. at 19. As outlined by this Court, such "obvious" cases exist only where the facts of a case are so egregious that no police officer could believe that the officer's conduct was lawful. *See, e.g.*, *Hope*, 536 U.S. at 738–41.

The Ninth Circuit rightly held that Respondents could have believed that their conduct was lawful for several reasons: Respondents had received consent from Petitioner to enter the house to apprehend a dangerous suspect; in giving consent, Petitioner did not express any limitations on "time, place within the house, or manner of entry;" Respondents reasonably believed that Salinas was armed and dangerous; Respondents had been told that Salinas was possibly suicidal; and to the extent handing over her keys implied that Petitioner expected Respondents to enter through the front door, Respondents knew that the door was chained from the inside. App. at 36–37. For these reasons, the court of appeals reasonably (and correctly) held that it would not be "obvious" to police officers that their actions were unlawful.[3]

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[3] Comparing this case to *Hope*, for example, makes clear that this type of conduct is not the type that this Court had in mind when outlining the "obvious" case. As the Ninth Circuit pointed out, *Hope* involved prison guards whose acts of "plac[ing] a prisoner in leg irons, forc[ing] him to remove his shirt, and handcuff[ing] him to a hitching post in the hot sun for seven hours with little water and no bathroom breaks" were obviously egregious and unlawful. App. at 9. In contrast, Respondents in this case used tear gas to attempt to incapacitate a suspect who was a convicted felon wanted on felony warrants for violent crimes who they believed was armed, dangerous, and potentially suicidal, after

In short, the Ninth Circuit correctly articulated the test for qualified immunity established by this Court's decisions, and then applied that test reasonably to a specific factual situation. This Court therefore should deny review. Indeed, even if this Court were to disagree with the Ninth Circuit's conclusion, further review of the Ninth Circuit's determination would be unwarranted because the decision is fact-bound. A reversal on that ground would have no meaningful impact on the law and instead would affect only the parties to this case.

II. There is no circuit split regarding what constitutes "clearly established" law in the qualified immunity context.

Petitioner asserts that the Ninth Circuit's decision in this case deepens a split between it and the Second Circuit, on one hand, and the Sixth Circuit and Seventh Circuit, on the other hand, regarding the meaning of the "clearly established" test for qualified immunity. Pet. at 10–14. In fact, however, there is no split.

First, it is not at all clear that either of the Sixth and Seventh Circuit cases Petitioner cites are in fact inconsistent with the Ninth Circuit's decision here. Second, even if there were some inconsistency, the decisions on which Petitioner relies were issued before this Court's decision in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), which clarified the nature of the "clearly established" test. Subsequent decisions of the Sixth and Seventh Circuits show that those courts

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receiving permission from the homeowner to enter the house to detain and remove the suspect.

now follow this Court's qualified immunity doctrine faithfully, applying the test in the same way as do the Ninth Circuit and Second Circuit.

A. There is no conflict among the circuits regarding application of this Court's "clearly established" judicial immunity test.

Petitioner correctly asserts that the Second Circuit, like the Ninth Circuit decision in this case, requires a high level of specificity of the constitutional right for the law to be "clearly established" under a qualified immunity analysis. As Petitioner notes, in *Winfield v. Trottier*, 710 F.3d 49 (2d Cir. 2013), the Second Circuit stated that the constitutional right "must be defined 'in a more particularized, and hence more relevant, sense'" to ensure that "'a reasonable official would understand that what he is doing violates that right.'" *Id.* at 56–57 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

According to Petitioner, *Winfield* and the Ninth Circuit's decision below conflict with the approach taken by the Sixth Circuit in *Shamaeizadeh v. Cunigan*, 338 F.3d 535 (6th Cir. 2003), and the Seventh Circuit's decision in *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008). Petitioner claims that in both of those cases the courts defined the Fourth Amendment right at a higher level of generality than did the Second Circuit in *Winfield* and the Ninth Circuit in this case. Pet. at 13–14.

In *Shamaezadeh,* the Sixth Circuit stated that, in assessing whether a right is clearly established, "[t]he unlawfulness of an action may be apparent . . .

from the general reasoning that a court employs." 338 F.3d at 546 (internal quotation marks omitted). But it is unclear whether the court meant by this statement that general principles always suffice to make a right clearly established, or whether those general principles suffice only when the violation is sufficiently obvious.[4] The unlawful conduct in *Shamaezadeh* involved police officers who conducted a search with consent, then subsequently conducted two more searches without consent. It may well be that the Sixth Circuit concluded that conducting additional searches without consent constituted a rare case in which the violation was obvious. It therefore is not apparent that there is any conflict between that decision and the decision in this case.

Moreover, the Seventh Circuit's decision in *Michael C.* plainly does not conflict with the Ninth Circuit's decision here. There, a social worker conducted a physical search of a child's body, although the social worker had been granted permission only to interview the child. 526 F.3d at 1012. In denying qualified immunity, the Seventh Circuit stated the same rule identified by the Ninth Circuit: a right may be clearly established even without a factually similar precedent if it is obvious from the outrageous nature of the conduct that it is unlawful. *Id.* at 1017. As the court put it, a "general constitutional rule already identified may apply with obvious clarity to the

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[4] In making this statement, *Shamaezadeh* cited *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003), which in turn cited *Hope*. As noted earlier, *Hope* stands simply for the proposition that some novel violations are so obvious as to be clearly established. 536 U.S. at 738–41.

specific conduct in question, even though the very action in question has not previously been held unlawful." *Id.* (citing *Hope*, 536 U.S. at 741). Applying that rule, the Seventh Circuit reasoned that conducting a physical search based on consent to interview constituted a rare case in which the violation was obvious. *Id.*

B. The decisions of the Sixth and Seventh Circuits cited by Petitioners as creating a conflict pre-date this Court's decision in *Ashcroft*; subsequent decisions by those circuits confirm there is no conflict.

Shamaezadeh and *Michael C.* were decided prior to this Court's decision in *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011). In *Ashcroft*, this Court clarified the test for qualified immunity, holding that police officers are protected from civil liability unless they violate a federal statutory or constitutional right that was "'clearly established' at the time of the challenged conduct." 563 U.S. at 735. Following *Ashcroft*, the Sixth and Seventh Circuits have applied the same test for determining whether a right is "clearly established" as do the Second and Ninth Circuits.

1. The Sixth Circuit

In *Hernandez v. Boles*, police stopped a car for speeding and then asked to search the vehicle. 949 F.3d 251, 254 (6th Cir. 2020). The occupants refused. *Id.* A drug-sniffing K-9 unit later alerted the police to the presence of drugs outside, but not inside, the car.

Id. The police searched the vehicle, found incriminating evidence, and arrested the vehicle's occupants. *Id.*

In holding that the officers were entitled to qualified immunity, the Sixth Circuit applied the same test that the Ninth Circuit applied in this case. It stated that, in determining whether a right is clearly established, the "relevant principles should be defined at a 'high degree of specificity,' especially in the Fourth Amendment context." *Id.* at 261. It further explained that "in the Fourth Amendment context, [w]hile there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular [search] beyond debate." *Id.* (internal quotation marks omitted).

Applying that test, the court noted that prior cases had held that "(a) probable cause to search an area is dissipated when a sufficiently thorough prior search has been fruitless; and (b) the failure of a drug-sniffing dog to alert dispels suspicion." *Id.* It held, however, that neither case was "specific enough to clearly establish" that the officers' search of the car after the dog failed to detect drugs in the car was illegal. *Id.*

2. The Seventh Circuit

Likewise, in *Day v. Wooten*, 947 F.3d 453 (7th Cir. 2020), the Seventh Circuit applied the same particularized test for determining whether a right is "clearly established" as the Second and Ninth Circuits.

In *Wooten*, police handcuffed a suspect with his hands behind his back. That action, combined with

the suspect's health conditions, resulted in his death. *Id.* at 455. The Seventh Circuit held that the officers were entitled to qualified immunity from a civil suit alleging that their actions violated the Fourth Amendment.

In doing so, the Seventh Circuit held that in determining whether a right was clearly established, "the right must be defined more specifically than simply the general right to be free from unreasonable seizure." *Id.* at 461. The court added that "[s]pecificity is especially important in the Fourth Amendment context." *Id.* (quoting *Kisela*, 138 S. Ct. at 1152). Applying that test, the court concluded that its prior decisions limiting the use of "excessively tight handcuffs" did not clearly establish that the officers' conduct was unlawful, because those prior decisions involved different factual circumstances. *Id.* at 461–62.

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These recent decisions by the Sixth and Seventh Circuits establish that, contrary to Petitioner's assertion, those circuits apply the same particularized standard for assessing whether a right is clearly established as did the Ninth Circuit here. There is no conflict and no need for review to clarify the law.

III. This case is a poor vehicle for this Court to reevaluate its qualified immunity doctrine.

The Petition asks this Court to determine whether the Ninth Circuit applied the correct test to determine whether a right is clearly established. Pet.

at i. However, the Ninth Circuit never resolved the threshold question of whether Respondents' conduct violated Petitioner's rights.

A much better case for evaluating the standards for applying qualified immunity would be one in which the court below resolved both the threshold issue and the qualified immunity question, either by holding that the defendants violated a right and that it was clearly established, or by holding that the defendants violated a right but that the right was not clearly established. This Court would then have a full analysis of the relevant issues for review.

In *Pearson v. Callahan*, 555 U.S. 223 (2009), this Court held that a court need not decide whether a police officer's conduct was constitutional before deciding whether the officer is entitled to qualified immunity. *Id.* at 236. Rather, the Court explained that, because an officer may be entitled to qualified immunity even when the conduct at issue is unconstitutional, courts may choose not to "expend[] scarce judicial resources" resolving the question of constitutionality first because this question often "has no effect on the outcome of the case." *Id.* at 236–37.

Consistent with that principle, the Ninth Circuit did not address whether Respondents' conduct was constitutional. App. at 12–13. Instead, it "assume[d] without deciding that [Respondents] exceeded the scope of consent," and then based its decision solely on the determination that Respondents were entitled to qualified immunity because the right that Respondents allegedly violated was not clearly established. App. at 12. Because there is no holding from the lower court determining

whether a constitutional violation has even occurred, a decision by this Court regarding the availability of qualified immunity may "have no effect on the outcome of the case." *Pearson*, 555 U.S. at 237.

If this Court is inclined to reevaluate its qualified immunity doctrine, a better vehicle for doing so would be a case in which the lower courts have already determined that the conduct at issue violated plaintiff's rights, and then decided the qualified immunity issue, one way or the other. In that context, the Court would have before it a full analysis of the relevant issues by the court below.

IV. Petitioner's arguments suggesting that this Court should overturn its decisions holding that qualified immunity is available as a defense in this kind of case were not raised below and do not merit review.

Petitioner and Petitioner's amici argue that this Court should grant review either to abandon the qualified immunity doctrine completely, or at least to clarify that qualified immunity does not apply to the sort of Fourth Amendment claims raised by Petitioner. These arguments are without merit and were also not raised below.

A. This Court should not abandon the long-standing doctrine of qualified immunity.

Petitioner's amici argue the Court should grant review to abandon qualified immunity wholesale. *See* Brief of DKT Liberty Project, at 11–19 (Feb. 20, 2020)

(calling for the abrogation of qualified immunity because it "places a nearly insurmountable hurdle in the way of civil rights litigants" and undermines the rule of law); Br. of Legal Scholars, at 5–21 (Feb. 20, 2020) (arguing that qualified immunity conflicts with § 1983 and various policy considerations); Br. of Cato Inst., at 4–16 (Feb. 20, 2020) (arguing that qualified immunity conflicts with section 1983). Petitioner did not raise any of these arguments in her Petition; the closest she comes to doing so is hinting that some scholars and judges have disagreed with qualified immunity. Pet. at 17, n.6. In any event, Petitioner did not make any such argument in the courts below, which therefore never addressed them. This case would therefore be a poor vehicle to consider those arguments.

Nor should this Court abandon qualified immunity. Although some scholars have challenged qualified immunity, *see, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 82 (2018), others have argued convincingly that stare decisis alone warrants maintaining the doctrine, *see* Aaron Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 NOTRE DAME L. REV. 1853, 1857 (2018).

Abandoning qualified immunity at this point would require the Court to overrule multiple decisions issued over the course of decades, doing grave damage to the principle of stare decisis. Moreover, local governments have relied on this Court's qualified immunity decisions in countless ways, including fashioning training for law enforcement and other officials, drafting their employment contracts, and negotiating insurance

policies. Overturning the doctrine would disrupt these arrangements and impose enormous costs on those localities. It would also, of course, expose police officers, who perform important, dangerous and difficult jobs, to unlimited personal liability for doing nothing more making an honest mistake in taking actions that a court later determined violated someone's rights.

B. Qualified immunity is warranted in factual situations such as this one.

According to Petitioner, qualified immunity should not extend to this case because the situation did not call for Respondents to make "split-second" judgments. Pet. at 18. Petitioner also contends that history precludes the application of qualified immunity in this case because there is no common law qualified immunity for physical trespass into one's house. Pet. at 20. Petitioner did not make either of these arguments below and, in any event, they lack merit.

Although several of this Court's decisions upholding qualified immunity involved split-second decisions, this Court has never limited qualified immunity to those situations. Qualified immunity aims to avoid discouraging officials from hesitating in the face of danger. Indeed, ensuring that officers act in the face of danger is the primary reason that this Court has highlighted the importance of qualified immunity when officers must make quick decisions. *See, e.g.*, *Sheehan*, 135 S. Ct. at 1775 (supporting qualified immunity with the need for quick decisions

because "delay could make the situation more dangerous").

Needless to say, situations calling for immediate action decisions are not the only ones in which officers must make difficult decisions. In many slowly evolving dangerous situations, officers must make challenging decisions about how and when to respond to the danger.

The facts of this case illustrate the point. Respondents reasonably believed that Salinas was in Petitioner's house, that he was armed, that he had possibly threatened Petitioner with a weapon, that he was high on methamphetamine, that he was a convicted felon, that he had several outstanding felony warrants for violent crimes, that he had attempted to run a police vehicle off the road, and that he was possibly suicidal. The officers had to decide how and when to enter the house in a way that would minimize the risk of harm to the officers, to Salinas, and to anyone else who might be in the house or in the vicinity.

With the benefit of 20-20 hindsight, knowing Salinas was not in the house, one could argue that the officers made "some mistakes" in choosing their course of action. *Heien v. N.C.*, 135 S. Ct. 530, 536 (2014). But nothing in this Court's qualified immunity cases suggest that police officers forced to make such difficult decisions should be exposed to liability without the benefit of a qualified immunity defense. It would be contrary to the important public policy goals of qualified immunity to put police officers in the position of having to worry that in making such decisions in high stakes situations they could be

exposed to personal liability, even if they acted in good faith taking actions that did not violate any clearly established right.

Nor is there merit to Petitioner's argument that Respondents are not entitled to qualified immunity because there is no qualified immunity analog in the common law for physical trespass into one's house. The common law did recognize various forms of immunity for trespass.[5] For example, in the 1894 case of *State v. Mooring*, 115 N.C. 709 (1894), the North Carolina Supreme Court held that a police officer deserved immunity, even after breaking down the doors of the plaintiff's house to execute an arrest warrant, so long as he "act[ed] in good faith in doing so." *Id.* (cited by this Court in *Filarsky v. Delia*, 566 U.S. 377, 388 (2012)).

Similarly, the Supreme Judicial Court of Massachusetts in 1876 held that a police officer, though acting on an arrest and not search warrant, "[could not] be treated as a trespasser" and possessed

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[5] The Fourth Amendment itself incorporates a good-faith immunity of this sort. It does not outlaw all forms of government trespass. Nor does it confer a right against police officers who enter houses mistakenly if their entry was "reasonable." *See, e.g.*, *Ill. v. Rodriguez*, 497 U.S. 177, 185 (1990) ("It is apparent that in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government . . . is not that they always be correct, but that they always be reasonable."); *Brinegar v. United States*, 338 U.S. 160, 176 (1949) ("Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.").

"a right to enter the outer door of the house by force . . . ." *Commonwealth v. Reynolds*, 120 Mass. 190, 190–91 (1876). This Court continues to affirm that a common law background of the good faith defense underpins qualified immunity today. *See, e.g.*, *Filarsky*, 566 U.S. at 388; *see also Imbler v. Pachtman*, 424 U.S. 409, 418 (1976) ("[Section] 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them.").

CONCLUSION

The Ninth Circuit correctly stated this Court's test for determining whether a police officer or other government official is entitled to qualified immunity. Applying that test to a highly specific factual context, the Ninth Circuit reasonably (and correctly) held that Respondents were entitled to qualified immunity because there was no "clearly established" law holding that their conduct was unconstitutional and that conduct was not "so obviously" unlawful as to defeat qualified immunity.

Petitioner's contention that there is a circuit split regarding the degree of specificity in prior decisions required to render a right "clearly established" is incorrect. The decisions of the Sixth and Seventh Circuits on which Petitioner relies are not clearly inconsistent with the Ninth Circuit's decision here and were decided before *Ashcroft*. Furthermore, subsequent decisions of those courts make clear that they now apply the "clearly established" standard consistently with how the Ninth Circuit applied it here.

Finally, the amici briefs raise the same arguments against the doctrine of qualified immunity that this Court has considered, and rejected, in case after case for decades, as recently as last year. Accepting that argument would require the Court to overrule multiple decisions, decisions on which government officials and state and local governments have reasonably relied. Many of those arguments were not made below or even in the Petition. No brief filed in this case has raised any arguments that would justify review of this Court's long-established qualified immunity jurisprudence.

The Petition should be denied.

Respectfully submitted,

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March 20, 2020