No. 20-1438

In the
Supreme Court of the United States

TINA CATES,
Petitioner,
v.

BRUCE D. STROUD, *et al.*,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Whether the Ninth Circuit correctly determined that decisions of three other courts of appeals on a fact-specific application of the Fourth Amendment are insufficient to establish a "robust consensus" to clearly establish a constitutional right for purposes of qualified immunity.

2. Whether qualified immunity may be overcome by application of generalized Fourth Amendment principles when a reasonable correctional officer could have believed the challenged search was lawful.

3. Whether this case, which comfortably fits within the scope of the doctrine of qualified immunity, is a proper vehicle to revise or revisit the doctrine's efficacy or scope.

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INTRODUCTION

The Ninth Circuit's opinion affirming the judgment for the Respondents (NDOC Defendants) is a textbook application of established principles governing qualified immunity. The lower court's analysis fits comfortably within the core of qualified immunity. This case is not a case that falls on the doctrine's fringes, making it a poor vehicle for resolving specific questions about the application of qualified immunity, let alone reconsidering the efficacy or scope of the doctrine as a whole.

The dispositive issue here is whether clearly established law put reasonable corrections officials in the Ninth Circuit on notice that a prison visitor must be given the option of foregoing their visit before officers conduct an otherwise lawful strip search. Applying the first step of the qualified immunity analysis to define the constitutional right at issue, the Ninth Circuit concluded that the NDOC Defendants violated Cates' rights under the Fourth Amendment by not giving her the option of canceling her prison visit to avoid undergoing a strip search the court presumed to be lawful. But the panel—led by Judge William Fletcher—affirmed the judgment based on a straightforward, concise, and principled application of the second step of qualified immunity.

The lower court's opinion rejected the proposition that opinions from three other circuits clearly established the right that the Ninth Circuit identified in this case. The Court also rejected the proposition that established Fourth Amendment principles sufficiently notified the NDOC Defendants that

searching Cates without giving her the option of leaving the prison violated the Fourth Amendment.

Neither of those conclusions is controversial. Yet Cates asks this Court to review the particulars of the Ninth Circuit's qualified immunity analysis, while also seeking a wholesale review of the doctrine of qualified immunity. But this case is not worthy of this Court's review.

Cates at best identifies a lopsided split of authority that favors the NDOC Defendants. And this case makes a poor vehicle for resolving the questions presented because (1) the Ninth Circuit's analysis explains that its own precedent left room for reasonable debate on the lawfulness of the challenged conduct, and (2) Cates neither pleaded, nor briefed, the issues the Ninth Circuit decided here.

This Court should deny the petition.

STATEMENT OF THE CASE

I. THE NDOC DEFENDANTS CONDUCT A STRIP SEARCH OF CATES BASED ON CREDIBLE CONFIDENTIAL INFORMATION THAT SHE MAY TRY TO TRANSFER CONTRABAND INTO THE PRISON.

On February 19, 2017, Cates went to visit her boyfriend, Daniel Gonzales, a prisoner at Nevada's High Desert State Prison (HDSP). App. 2a. But unbeknownst to Cates, a non-party correctional officer began investigating Cates based on information he received from two credible, confidential sources that

Cates may try to introduce drugs or contraband into the prison. App. 29a.

Relying on that information, a criminal investigator from the Office of the Inspector General, Arthur Emling, Jr., applied for a warrant, asserting that he had probable cause to believe Cates' person or vehicles likely contained illegal controlled substances. App. 29a. A justice of the peace in Las Vegas agreed that probable cause existed and signed a search warrant authorizing a search of Cates' person and "any vehicles used and registered by Cates to transport herself to" HDSP. App. 39a.

Upon entering the institution, Cates signed a standard "Consent to Search, DOC-1615," stating the following:

> I, the undersigned, being from free from coercion, duress, threats or force of any kind, do *hereby freely and voluntarily consent to the search of my person, vehicle and other property which I have brought onto prison grounds.* I agree that the search maybe conducted by duly authorized Correctional Officers of the Department of Corrections or by other law enforcement officers specifically authorized by the Warden. I understand that if I do not consent to the search of my person, vehicle or other property, I will be denied visitation on this date and may also be denied future visits pursuant to Administrative Regulation 719.

App. 3a-4a.

Then Emling, along with female correctional officer Myra Laurian, approached Cates and asked her to follow them outside the HDSP visitation area. App. 5a. When Emling and Laurian asked Cates to step outside the waiting prison lobby, Emling informed Cates that he had reason to believe Cates was bringing illegal drugs/contraband into HDSP. App. 29a. Then, Laurian took Cates to the women's bathroom to perform a strip search. App. 5a, 29a.

During the search, Laurian asked Cates to remove her tampon for the full body search and did not provide a replacement. App. 5a. Cates alleges that Laurian provided her only with toilet paper and that she (Cates) bled through her clothes while driving home, causing distress and embarrassment. App. 5a-6a.

After the personal search, Emling searched Cates' vehicle in the HDSP parking lot. App. 6a. Emling had Cates wait with Laurian in HDSP administration during the search. App. 6a.

Emling removed Cates' mobile phone from the vehicle and asked to search the phone. App. 6a. Although Cates had signed a form that confirmed her consent to searching her personal property, she refused to permit Emling to search the phone. App. 6a, 30a. Emerling honored Cates' decision to revoke her consent and returned the phone to Cates without searching it. App. 6a, 30a.

Emling then told Cates that her visitation privileges were being terminated and asked her to leave the prison grounds. App. 6a, 30a. Associate Warden Stroud later sent Cates a letter advising her that

NDOC suspended her visiting privileges indefinitely until she obtained written permission from the Warden. App. 30a.

II. THE DISTRICT COURT GRANTS SUMMARY JUDGMENT ON QUALIFIED IMMUNITY.

Cates filed a complaint raising several federal constitutional claims under 42 U.S.C. § 1983 and other state law claims. App. 8a. The federal constitutional claims included a basic challenge to the strip search under the Fourth Amendment but included no allegation that Cates was not given an opportunity to leave. App. 35a-38a; *see also* 2 EOR 034.

The district court granted the NDOC Defendants' motion for summary judgment based on qualified immunity. App. 28a-58a. The district court rejected the Fourth Amendment claim challenging the strip search because the NDOC Defendants "only needed reasonable suspicion that Plaintiff possessed contraband," and Cates did "not dispute that Defendants had reasonable suspicion to perform the strip search." App. 37a-38a. And the district court rejected Cates' reliance on prison regulations governing searches of prison visitors because "violations of prison administrative regulations do not amount to a federal constitutional violation." App. 38(a) (citing cases). Finally, although the NDOC Defendants never executed the search warrant, the district court recognized that a judicial officer determined that the NDOC Defendants had shown probable cause for a search, while they only needed reasonable suspicion to conduct the search. App. 38(a).

III. THE NINTH CIRCUIT DETERMINES THAT THE NDOC DEFENDANTS VIOLATED CATES' FOURTH AMENDMENT RIGHTS.

The Ninth Circuit exercised its discretion to engage in the first step of the analysis and define the scope of the right at issue. App. 9a-24a. The appellate court first determined that not proactively giving Cates the option to leave rather than being subjected to a strip search violated the Fourth Amendment. App. 23a-24a. But after further determining that this right was not yet clearly established in the Ninth Circuit, the court affirmed the district court's judgment based on application of qualified immunity. App. 24a-25a.

In analyzing the claim on the merits, the court recognized general Fourth Amendment principles that prisoners and visitors have diminished constitutional protections, but that they do not shed all of their constitutional rights at the entrance to the prison. App. 11a-12a. It also noted that limitations on constitutional protections must relate to legitimate institutional goals and needs, such as safety. App. 11a-12a. Then the court explained the continuum of searches and the degree of the related justifications needed to conduct those searches, distinguishing the use of pat-downs and metal detectors from a "[v]isual body cavity search, such as the search to which Cates was subjected" and the imposition of such searches on both prisoners and visitors. App. 13a-15a.

The Court ultimately adopted the rationale of the Sixth, Seventh, and Eighth Circuits, recognizing that distinctions between visitors and prisoners affect the justification required to conduct intrusive searches.

App. 15a-24a. The court followed the Sixth Circuit's stated rationale—later adopted by the Seventh Circuit—that a visitor must be given the option of foregoing the visit, rather than undergo an administrative search grounded upon prison safety and security. App. 18a-19a. As a result, because the NDOC Defendants did not give Cates the option of leaving rather than undergoing a strip search, the NDOC Defendants violated Cates' rights under the Fourth Amendment. App. 18a-20a, 23a-24a.

Finally, the Court acknowledged that under other circumstances "legitimate security needs" may justify "a refusal to allow someone to depart rather than submit to a search." App. 20a-23a. Citing its own decision addressing a search of a "would-be airplane passenger" after "he entered the security area, even though he expressed a desire to leave rather than be subjected to a search," the court reconciled its decision in this case with that of the airline passenger. App. 20a-21a. But the court also recognized that the Eleventh Circuit had done the opposite—extending the same rationale the Ninth Circuit expressed with airline security to a vehicle search in a prison parking lot. App. 21a-22a.

IV. THE NINTH CIRCUIT AFFIRMS AFTER CONCLUDING THAT THE RIGHT IT DEFINED HAD NOT YET BEEN CLEARLY ESTABLISHED IN THE NINTH CIRCUIT.

Moving to the second step of qualified immunity, the Ninth Circuit determined that—where a strip search of a prison visitor is conducted pursuant to a reasonable suspicion—a Fourth Amendment right to

leave the prison and avoid the search was not yet established within the Ninth Circuit. App. 24a-25a. Starting with this Court's and its own precedents on strip searches, the court recognized that "when Cates was subject to the strip search at issue in this case, there was no case in this circuit where we had held that prison visitor had the right to leave the prison rather than undergo a strip search conducted on the basis of reasonable suspicion." App. 24a. Further citing authority of this court that a direct factual analog is not required, but that available precedent must put the issue beyond debate, the court (1) acknowledged that it reached its decision here based on "differences," not "similarities" between this case and other "[c]ases allowing strip searches of detainees," and (2) cited prior Ninth Circuit precedent noting that application of this exception to the general need for on point precedent is "'especially problematic in the Fourth-Amendment context' where officers are confronted with 'endless permutations of outcomes and responses.'" App. 24a-25a (quoting *Sharp v. County of Orange*, 871 F.3d 901, 911-12 (9th Cir. 2017)).

Finally, the Court acknowledged that existing case law held that prison officials may not conduct a strip search of a prison visitor without reasonable suspicion. App. 25a. But the Court declined to decisively conclude that reasonable suspicion existed, instead acknowledging that "it was not unreasonable for Laurian to have believed that there was reasonable suspicion, given that a search warrant (though unexecuted) had been issued for a search of Cates's 'person' for drugs." App. 25a. The Court concluded its qualified immunity analysis by noting the absence of

(1) controlling circuit precedent, and (2) "sufficiently robust consensus of persuasive authority in other circuits, holding that prior to a strip search a prison visitor—even a visitor as to whom there is a reasonable suspicion—must be given an opportunity to leave the prison rather than be subjected to the strip search." App. 25a. As a result, the Ninth Circuit "affirm[ed] the district court's award of summary judgment to defendants." App. 27a.

REASONS FOR DENYING THE PETITION

The detailed, specialized inquiry the panel conducted on whether the challenged conduct here violated the Fourth Amendment proves that this case is just the kind of case that falls within the core of qualified immunity. As the Ninth Circuit's decision establishes, without clear, authoritative guidance on the discrete legal issue it decided—whether correctional officers must give a prison visitor the choice to leave the prison before conducting a strip search—the court correctly concluded that reasonable officers presented with the facts here could have believed that their conduct was not proscribed by the law. The law governing their conduct was not "beyond debate."

This is not a good case for addressing the convoluted question of when—if at all—the decisions of sister circuits have clearly established the parameters of a particular constitutional right when applying qualified immunity. Nor is it a good case for revisiting the balance this Court has struck between applying established principles at too high a level of generality and not requiring a precise factual analog when a

general constitutional rule applies with obvious clarity to challenged conduct. As the Ninth Circuit's legal analysis on prong one of qualified immunity analysis shows, before issuance of the opinion in this case, there were legitimate reasons that officers within the Ninth Circuit, presented with the facts here, could have reasonably believed that their conduct was lawful.

For the same reasons, this case is a poor vehicle for revisiting the efficacy and scope of qualified immunity in general. Save for a wholesale abandonment of qualified immunity, the changes Petitioner proposes for qualified immunity would not change the outcome here. This case fits comfortably within the core of qualified immunity—maintaining accountability of public officials but shielding them from suit where they have exercised their authority reasonably.

The Ninth Circuit exercised its discretion to conduct a merits analysis under the first prong of qualified immunity, resolving an open question of constitutional law in that jurisdiction. And without the guidance of the lower court's opinion, which now clearly establishes the relevant Fourth Amendment principle within the Ninth Circuit, the NDOC Defendants' actions were neither unreasonable, nor obviously unlawful.

Finally, this case is a poor vehicle for resolving any of the questions presented. Cates did not actually plead the claim her petition is based upon. And she did not present the issues she asks this Court to review in her appellate briefing.

This Court should deny the petition.

I. AT BEST, CATES PRESENTS A LOPSIDED SPLIT THAT FAVORS THE NDOC DEFENDANTS ON WHETHER SISTER-CIRCUIT PRECEDENT ALONE CLEARLY ESTABLISHES A CONSTITUTIONAL RIGHT.

Nearly all the circuit cases Cates cites in support of her argument that three opinions from sister circuits are enough to establish a "robust consensus" that clearly establishes a constitutional right do not actually support Cates' position. As this Court's opinions recognize, the purpose of the second prong of the qualified immunity analysis is determining whether the law that existed at the time the challenged conduct occurred sufficiently put a reasonable person on notice that the challenged conduct is proscribed by the law. *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020).

This Court has previously hinted that, without any decision of this Court or controlling circuit precedent, a "robust consensus" of persuasive authority from outside the relevant circuit *may* be sufficient to clearly establish a legal principle to undercut a qualified immunity defense. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018). But this Court has not yet drawn specific lines on when such a robust consensus exists. *Wesby*, 138 S. Ct. at 593 n.8. And this is not a good case to decide the issue because, as the Ninth Circuit discussed, there is a competing rationale that could support courts reaching a different conclusion on the Fourth Amendment issue presented here. App. 20a-22a.

Only one of the circuits that Cates identifies for support appears to have actually decided this issue. In

Maldonado v. Fontanes, 568 F.3d 263, 270-71 (1st Cir. 2009), the First Circuit looked to only out-of-circuit precedent in finding a clearly established right under the Fourth Amendment. But that case is easily distinguished.

The First Circuit relied on out-of-circuit precedent to reach two conclusions, neither of which is controversial: (1) a family pet is an "effect" within the scope of the Fourth Amendment, and (2) killing a family pet effects a seizure in applying the Fourth Amendment. *Maldonado*, 568 F.3d at 270-71. The Ninth Circuit's analysis defining the scope of the right at issue shows that the underlying Fourth Amendment issue here is not as clear cut. Giving someone—say an airline passenger or a prison visitor—the opportunity to abandon an attempt to enter a sensitive or secure area upon confrontation by security officials creates opportunities for identifying and exploiting weaknesses in security measures. App. 20a-22a. The complexity of this issue—and the disagreement about it in the other circuits' decisions—means that decisions from three other circuits do not clearly establish the law governing Petitioner's circumstances, unlike the more straightforward issue addressed by the First Circuit in *Maldonado*.[1]

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[1] With no other discussion, Cates also cites *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016). There, relying on *Maldonado*, the First Circuit cited decisions from the Seventh, Ninth, and Tenth circuits for support in concluding "that exerting significant, continued force on a person's back while that person is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force" to be "clearly established in September 2012." *McCue*, 838 F.3d at 64-65. But *McCue* is also

The cases Cates cites from the Third, Seventh, and Eighth circuits do not, as she suggests, hold that decisions from a few other circuits are sufficient—by themselves—to clearly establish a federal right. Rather, each of those cases involves a hybrid analysis with the circuit court analyzing this Court's and its own precedents to identify general governing principles, while also relying on out-of-circuit precedent for persuasive support on what those general principles clearly establish. *Williams v. Bitner*, 455 F.3d 186, 191-94 (3d Cir. 2006); *Kopec v. Tate*, 361 F.3d 772, 776-78 (3d Cir. 2004); *Estate of Escobedo v. Bender*, 600 F.3d 770, 779-86 (7th Cir. 2010); *Nelson v. Correctional Medical Services*, 583 F.3d 522, 531-34 (8th Cir. 2009); *Z.J. ex rel. Jones v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672, 683-86 (8th Cir. 2019). Indeed, not one of the controlling opinions in those cases mentions, let alone makes a specific holding about, precedents of other circuits creating a "consensus" that satisfies the second prong of qualified immunity.

For these reasons, the opinions Cates cites do not support her argument that there is a well-defined split on when out-of-circuit opinions will meet the threshold of establishing a "robust consensus" in applying the "clearly established" prong of qualified immunity. Although the First Circuit authority Cates cites is

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distinguishable. In addition to relying on out-of-circuit precedent, the First Circuit identified statements the officers made about "excited delirium" that "suggest their knowledge of the condition and the associated risks," which contributed to the existence of a material factual dispute on "whether qualified immunity is proper." *Id*. at 65.

distinguishable, Cates at best presents a lopsided split in the NDOC Defendants' favor—with the First Circuit being an outlier. Cates' argument that the outcome of her case would have been different in the Third, Seventh, and Eighth Circuits is unfounded.

The first question presented does not warrant this Court's review.

II. CATES FAILS TO ESTABLISH AN APPRECIABLE SPLIT ON WHEN GENERAL PRINCIPLES SUFFICIENTLY DEFINE A CLEARLY ESTABLISHED RIGHT TO A PARTICULAR SET OF FACTS.

Cates' discussion of the second question presented fares no better. Although the court did not decide whether reasonable suspicion existed, it assumed that such suspicion existed in conducting its Fourth Amendment analysis. App. 23a. The sole question the Ninth Circuit decided is whether Cates had a clearly established right under the Fourth Amendment to be given the choice of leaving the prison after Emling and Laurian confronted her and to thus avoid being subjected to a strip search. App. 23a-24a. This Court has said that existing precedent must put the "question beyond debate" when there is not controlling authority on point. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

The Ninth Circuit held that the right it defined here had not been clearly established in the Ninth Circuit. In reaching that conclusion, the court noted that "differences" (not "similarities") between this case and existing cases *allowing* strip-searches led it to the conclusion that the search here violated Cates' rights

under the Fourth Amendment. App. 24a. The court also noted its prior recognition that the fact-specific application of the Fourth Amendment makes it hard to apply the exception to the requirement for on point controlling precedent to claims like this one. App. 24a-25a.

Cates challenges that conclusion. After noting the Ninth Circuit's suggestion that its conclusion naturally flowed from its "precedent on prison searches and screening measures in sensitive facilities more generally," Cates discusses Ninth Circuit precedent on the invasive nature of strip searches and the need for a link to the administrative goal of prison safety. Pet. at 22-23. But the Ninth Circuit's analysis—particularly its discussion of (1) the rationale from its own precedent on searches at airport terminals, and (2) the Eleventh Circuit's decision in *United States v. Prevo*, 435 F.3d 1343 (11th Cir. 2006), which extends the airport terminal rationale to the prison-visitor context—shows that reasonable officers in the Ninth Circuit could have believed that the Fourth Amendment did not require them to proactively offer Cates the option of leaving to avoid being searched. App. 20a-23a.

Cates also turns to prison regulations to suggest that the NDOC Defendants should have known their conduct was unlawful, citing *Hope* to support the relevance of prison regulations in deciding whether the law was clearly established. Pet. at 23. But *Hope* is unavailing. There, this Court assessed whether the law had clearly established that handcuffing a prisoner to a hitching post for disruptive behavior constituted

cruel and unusual punishment. *Hope v. Pelzer*, 536 U.S. 730, 733 (2002).

This Court did consider the existence of a relevant prison regulation in deciding whether a prison regulation supported its conclusion on prong two of qualified immunity. *Id.* at 741, 743-44. But it combined this together with several other factors that supported the Court's conclusion. This Court considered the prison regulation in context with controlling circuit precedent juxtaposing (1) coercive measures used to obtain compliance with prison rules, and (2) punishment that goes beyond a mere coercive measure and puts the prisoner's health at risk. *Id.* And the Court also noted repeated instances of officers "ignoring [the regulation] with impunity," which "tends to prove that the requirement was merely a sham" or "that they were fully aware of the wrongful character of their conduct." *Id.* at 744.

Cates cites no relevant Ninth Circuit holding that reinforces the prison regulation. Nor does she identify a pattern of prison officials flouting the relevant regulation. Instead, she cites only the regulation as a basis to clearly establish her right to withdraw her consent to the search and leave. As the district court noted below, the violation of prison regulations alone cannot be the basis for clearly establishing a novel constitutional right. App. 38a. A constitutional mandate does not follow from the requirements of a prison regulation. Otherwise, every prison regulation would be transformed into a constitutionally protected liberty interest.

Finally, Cates turns to a discussion of the Sixth Circuit's decision in *Spear v. Sowders*, 71 F.3d 626 (6th Cir. 1995) (en banc), and the Eighth Circuit's decision in *Marriott By and Through Marriott v. Smith*, 931 F.2d 517 (8th Cir. 1991), to support her argument. Pet. at 24-26. Her reliance on those cases is a retread of her argument that out-of-circuit precedent should be enough to satisfy the clearly established standard.

Her reliance on *Spear* and *Marriott* to establish a split of authority is unavailing. First, *Marriott* is easily distinguished because it involved a search that occurred *after* the prison visit was over. It therefore says nothing on the issue decided here: whether the Fourth Amendment requires that a prison visitor be given the option of leaving *before* the visit occurs to avoid a strip search. *Mariott*, 931 F.2d at 520.

Second, both cases pre-date this Court's statement in *al-Kidd* that existing precedent must put the issue "beyond debate" absent controlling authority that is on point. 563 U.S. at 741. This is particularly important to understanding the Sixth Circuit's analysis in *Spear*. There, the circuit court recognized that the clearly established right at issue was the right to be free from detention without probable cause. *Spear*, 71 F.3d at 632. And then the Court *extended* that right to find a *new* right: that the defendant had to be given the option of leaving the prison rather than facing—in that case—an even more invasive digital cavity search. *Id.* at 629, 632.

But the Ninth Circuit's analysis of its own precedent on searches of "would-be" airline passengers shows that—at least prior to the new opinion in this

case—reasonable officers could believe that the Fourth Amendment did not require them to give a prison visitor the opportunity to leave the prison before a scheduled visit—if the officers had reasonable suspicion to believe the visitor intended to introduce contraband into the prison. In other words, under this Court's decision in *al-Kidd*, before the Ninth Circuit's opinion here, the existence of Cates' right to decline consent to search and leave was an open and reasonably debatable question in the Ninth Circuit. And the Ninth Circuit must follow this Court's opinions, not the Sixth Circuit's.

For these reasons, Cates fails to establish a viable split of authority on when general principles sufficiently define a clearly established right to a specific set of facts that warrants this Court's review. This Court should deny review on the second question presented.

III. THE NINTH CIRCUIT'S OPINION FITS COMFORTABLY WITHIN THE SCOPE OF QUALIFIED IMMUNITY, MAKING THIS CASE A POOR VEHICLE FOR DECIDING ALL THREE QUESTIONS PRESENTED.

The Ninth Circuit addressed whether the Fourth Amendment independently requires corrections officials to give a visitor the option of leaving, rather than being subject to a strip search for safety and security reasons. App. 11a-24a. But as Judge Watford acknowledged in questioning Cates' counsel at oral argument, Cates did not plead facts asserting a violation of the Fourth Amendment based on the failure to give Cates the option of leaving to avoid the

search. Recording of Oral Argument, *Cates v. Stroud*, No. 18-17026, at 2:00 (May 29, 2020), https://www.ca9.uscourts.gov/media/video/?20200529/18-17026/ (last visited July 27, 2021); *see also* 2 EOR 034. And Cates never presented any of the questions presented in her briefing before this Court to the Ninth Circuit. Appellant's Opening Brief, *Cates v. Stroud*, No. 18-17026 (9th Cir., Dec. 17, 2018) (Dkt. 8). Because Cates did not plead the claim her petition is based on or present the appellate court with the issues she asks this Court to review, the NDOC Defendants were deprived of fair notice of, and an opportunity to defend against, the claim the Ninth Circuit decided.[2]

For these reasons, this case is a particularly poor vehicle for addressing the questions presented. Each of those questions is dependent upon a claim Cates never pleaded in the district court and arguments she never made in her appellate briefing. Those arguments and issues were instead developed for her by the Ninth Circuit.

The Ninth Circuit's textbook application of relevant governing principles of qualified immunity likewise makes this case a poor vehicle for addressing the questions presented, including Cates' plea for a wholesale abandonment or modification of the doctrine of qualified immunity. The Ninth Circuit's analysis fits comfortably within the core of the doctrine's purpose

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[2] Additionally, even though the Ninth Circuit ultimately affirmed in the NDOC Defendants' favor, it was improper for the Ninth Circuit to conjure up a claim that Cates failed to even plead. *See*, *e.g.*, *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020) (reversing on violation of the principle of party presentation).

and the guideposts this Court has established for applying the relevant principles of qualified immunity.

The aim of qualified immunity is to make sure that public officials remain accountable but retain the necessary ability to make reasonable decisions based on existing law without fear that they will be haled into court every time they make a mistake. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-29 (1982). This point is particularly important in the management of prisons. This Court has instructed that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions," and "[p]rison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

The Ninth Circuit achieved the twin aims of qualified immunity in this case. It exercised its discretion to conduct a merits analysis under the first prong of the qualified immunity analysis, while finding that the right it defined had not yet been clearly established within the Ninth Circuit. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). This allowed the court to resolve an open question of federal constitutional law, clearly establishing that not giving a prison visitor the option of foregoing their visit to avoid an invasive strip search violates the Fourth Amendment in the Ninth Circuit.

Cates has identified some legitimate challenges to the viability of qualified immunity. But this is not the

case in which to decide those issues. This is not the case in which to undertake review of qualified immunity as a whole. This is not a case on the fringes of the doctrine that exposes obvious abuse of qualified immunity to avoid blatant constitutional violations. The Ninth Circuit correctly recognized that, while its conclusion on the underlying Fourth Amendment question "follows naturally from our precedent on prison searches and on screening measures in sensitive facilities more generally," existing authority did not make that outcome so clear that reasonable officers would have known that their conduct was unlawful. App. 18a, 24a-25a.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

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