No. 20-1438

In The
Supreme Court of the United States

TINA CATES, PETITIONER,

v.

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

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' opposition is most notable for what it concedes. Respondents do not dispute that the questions presented are important. They do not meaningfully contest that the courts of appeals have divided over both (1) the significance of out-of-circuit precedent to qualified immunity's "clearly established law" requirement and (2) the level of factual specificity necessary to satisfy that requirement. And they admit that Cates has identified "legitimate challenges to the viability of qualified immunity." Opp. 20. Even on Respondents' account, then, the petition raises issues worthy of this Court's review.

Respondents hope to persuade the Court that "this is not the case" to resolve these issues. Opp. 20-21. But Respondents' mantra that this case reflects a "textbook application" (Opp. 1, 19) of existing qualified-immunity doctrine only confirms its viability as a vehicle to reexamine that doctrine. And contrary to Respondents' contentions, the fate of qualified immunity and the conflicts over its application are all properly presented here. If this Court wishes to resolve any of these important questions—and it should—this is the case to do so.

ARGUMENT

I. THE CIRCUITS ARE DIVIDED ON THE SIGNIFICANCE OF OUT-OF-CIRCUIT PRECEDENT

Respondents provide no reason for this Court to refuse to clarify when out-of-circuit precedent may constitute "clearly established law." Respondents do not contest that this is a significant open question: rather, they admit that while "[t]his Court has previously hinted that" a "'robust consensus' of persuasive authority from outside the relevant circuit may be sufficient," it "has not yet drawn specific lines on when such a robust consensus exists." Opp. 11 (emphasis omitted).

Nor do Respondents dispute that the courts of appeals are divided over what constitutes a "robust consensus" of persuasive authority. *See* Pet. 13-19. Respondents acknowledge the First Circuit has "looked to only out-of-circuit precedent in finding a clearly established right under the Fourth Amendment." Opp. 12 & n.1; *see McCue v. City of Bangor*, 838 F.3d 55, 64-65 (1st Cir. 2016); *Maldonado v. Fontanes*, 568 F.3d 263, 266-67 (1st Cir. 2009). Respondents suggest that *Maldonado*—which held that three out-of-circuit decisions clearly established a constitutional right, 568 F.3d at 271—is consistent with the decision below because the Fourth Amendment issue there was "clear cut." Opp. 12. But of course, the underlying Fourth Amendment question here is not a close one. Pet. 22-24; *infra* pp. 7-10. Regardless, the First Circuit's analysis did not rest on the supposedly

"clear cut" nature of the constitutional violation. Instead, the court held "the law was sufficiently recognized by courts"—*i.e.*, in the decisions of three other courts of appeals—"to be clearly established." *Maldonado*, 568 F.3d at 271. Applying that same rule here would produce the opposite result. *See* Pet. App. 17a, 25a.

Similarly, Respondents claim the First Circuit's *McCue* decision is "distinguishable" because it highlighted facts about the defendants' knowledge. Opp. 12 n.1. But in determining whether these facts could reflect a violation of clearly established law, the First Circuit held it was enough that other "circuits had announced th[e] constitutional rule" that the defendants had allegedly violated. *McCue*, 838 F.3d at 64. That is the holding relevant here.

Respondents also cannot dismiss the First Circuit as an "outlier." *Contra* Opp. 13-14. Indeed, Respondents do not even attempt to address the Second, Fourth, and Sixth Circuit decisions that similarly hold that multiple out-of-circuit decisions constitute a "robust consensus of persuasive authority" for qualified immunity purposes—creating intra- and inter-circuit conflicts in the process. *See* Pet. 17-19.

While Respondents do (briefly) address the relevant Third, Seventh, and Eighth Circuit cases, Respondents cannot reconcile them with the Ninth Circuit's holding. Respondents assert that none of these cases "mentions" that "precedents of other circuits" can create a "'consensus' that satisfies" qualified immunity's

requirements. Opp. 13. That is factually wrong. *See Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672, 684 n.5 (8th Cir. 2019) (holding "a consensus of cases of persuasive authority" "can show a right is clearly established"). It is also superficial: courts need not invoke the words "consensus of persuasive authority" to apply the principle. And unlike the Ninth Circuit—and the Fifth, Tenth, Eleventh, and D.C. Circuits—these circuits all "routinely consider decisions by other Courts of Appeals as part of [their] 'clearly established' analysis," applying a far less stringent standard in doing so. *Williams v. Bitner*, 455 F.3d 186, 192-93 (3d Cir. 2006); *see* Pet. 15-17.

Respondents contend these circuits use a "hybrid analysis," considering both factually analogous "out-of-circuit precedent" and "general principles." Opp. 13. That is no distinction. *All* decisions finding a constitutional violation necessarily rely on general constitutional principles. Here, the Ninth Circuit determined its Fourth Amendment holding "naturally follow[ed] from [its] precedent on prison searches and on screening measures in sensitive facilities more generally." Pet. App. 17a-18a. In the Third, Seventh, and Eighth Circuits, those "general principles," coupled with three on-point out-of-circuit decisions, would render the law clearly established. Thus, in *Bitner*, for example, while the Third Circuit had "examined First Amendment claims based on the failure of prison officials to accommodate inmates' religion-based dietary restrictions," it had not "ruled on the specific right asserted" by the prisoner—a First Amendment right not to handle pork.

455 F.3d at 192. The Third Circuit concluded that this right was clearly established because the "three Courts of Appeals to have considered the right * * * had held that prison officials violate Muslim inmates' First Amendment rights when they force the inmates to handle pork." *Id.* at 193. The same is true of Cates's Fourth Amendment right not to be strip searched—but the Ninth Circuit granted qualified immunity. Pet. App. 17a, 25a.

Finally, Respondents suggest this case does not implicate the circuit split because there is "disagreement" in "other circuits' decisions" about the constitutionality of the type of strip search challenged here. Opp. 11-12; *but cf. Bitner*, 455 F.3d at 193 (holding law clearly established notwithstanding contrary unpublished decision). But there is no "disagreement." Respondents allude to the Eleventh Circuit's decision in *United States v. Prevo*, 435 F.3d 1343 (11th Cir. 2006). Yet that case did not involve a strip search, but rather the search of an automobile in the prison parking lot. *Id.* at 1348. Every court to have addressed the right at issue here—a prison visitor's right to be free of a strip search if she might simply leave—has concluded that such a search violates the Fourth Amendment. *Spear v. Sowders*, 71 F.3d 626, 632 (6th Cir. 1995) (en banc) (distinguishing automobile searches); *Burgess v. Lowery*, 201 F.3d 942, 945 (7th Cir. 2000); *Marriott ex rel. Marriott v. Smith*, 931 F.2d 517, 518, 520 (8th Cir. 1991). While that would be enough to defeat qualified immunity in other courts of appeals, the Ninth Circuit denied Cates any remedy.

II. THE CIRCUITS ARE DIVIDED ON THE FACTUAL SPECIFICITY REQUIRED TO CLEARLY ESTABLISH THE LAW

Respondents' efforts to diminish the significance of the second question presented are equally unavailing. As Cates detailed (Pet. 20-26), lower courts are "intractably" divided over the "degree of factual similarity" necessary for existing decisions to clearly establish a right. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part). Some courts demand "close congruence of the facts in the precedent." *Id.* at 468 (majority opinion). These courts would agree with the Ninth Circuit here given the lack of governing precedent specifically addressing this sort of strip search. Pet. App. 24a-25a. Other courts, however, recognize that general legal principles can make the unconstitutionality of such conduct clear "even in the absence of a case addressing the particular violation." *Z.J.*, 931 F.3d at 685. In fact, both the Sixth and Eighth Circuits reached that conclusion with respect to the very Fourth Amendment violation at issue here. *Spear*, 71 F.3d at 632; *Marriott*, 931 F.2d at 518, 521.

Respondents do not attempt to address the general circuit split on the factual specificity necessary to clearly establish a right. Opp. 14-18. They focus entirely on the Sixth and Eighth Circuit decisions denying qualified immunity for prison-visitor strip searches—the most obvious manifestations of that more general divide. Opp. 17-18. But Respondents

cannot distinguish those decisions from the Ninth Circuit's contrary decision here.

Indeed, Respondents all but concede that the Sixth Circuit's decision in *Spear* is indistinguishable. They assert only that *Spear* "pre-date[d] this Court's statement" in *Ashcroft v. al-Kidd* that "existing precedent must put the issue 'beyond debate.'" Opp. 17 (quoting *al-Kidd*, 563 U.S. 731, 741 (2011)). Yet *al-Kidd* did not invent an entirely new qualified immunity standard. Rather, *al-Kidd* relied on prior decisions that articulated similarly expansive versions of the doctrine—decisions predating *Spear*. *al-Kidd*, 563 U.S. at 741-42. And decisions like *al-Kidd* have long stood in tension with a second line of this Court's cases holding that "general constitutional rule[s]" may clearly apply to new factual contexts. *Hope v. Peltzer*, 536 U.S. 730, 740-41 (2002); *e.g., Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020) (per curiam). That tension generated the courts of appeals' confusion on this question. Pet. 21-22. While Respondents may believe the Sixth Circuit was wrong to adhere to the line of precedent recognizing the obviousness of constitutional violations in novel factual settings (Opp. 17-18), they cannot wish away this conflict.

Respondents likewise cannot distinguish the Eighth Circuit's decision in *Marriott* on the ground that the defendants there searched the prison visitor when she was leaving the prison. *Contra* Opp. 17. Respondents identify no constitutionally relevant difference between strip searches of prison visitors already leaving and strip searches of visitors who

would leave if given the option. There is none: because strip searching a visitor who no longer seeks entry has no relationship to any "threat to prison security," it is patently unreasonable. *Marriott*, 931 F.2d at 520; *see* Pet. App. 17a-18a. In any event, this purported factual distinction has no relationship to the qualified immunity question that divides the courts of appeals. Respondents do not suggest that the Eighth Circuit had prior precedent on strip searches of departing prison visitors. It nevertheless held qualified immunity unavailable. *Marriott*, 931 F.2d at 521. By contrast, because the Ninth Circuit demanded on-point precedent, it reached the opposite result. Pet App. 24a-25a.

Aside from this cursory attempt to distinguish *Spear* and *Marriott*, Respondents focus on the merits of the Ninth Circuit's decision. Opp. 14-16. But even if the decision were correct, this Court's review would still be needed to resolve the circuit conflict. Regardless, Respondents' merits arguments also fail.

Respondents insist they could have reasonably believed their conduct consistent with the Fourth Amendment, citing decisions involving airport security and automobile searches. Opp. 15. Tellingly, Respondents never explain exactly what reasoning could lead prison officers to think it permissible to strip search visitors like Cates. Neither of Respondents' cited decisions even involved strip searches, which are "dehumanizing and humiliating" and thus demand particular justification. *Kennedy v. Los Angeles Police Dep't*, 901 F.2d 702, 711 (9th Cir. 1989); *see United States v. Aukai*, 497 F.3d 955, 962 (9th Cir. 2007) (en

banc) (considering non-invasive airport security screening search); *Prevo*, 435 F.3d at 1348 (emphasizing "diminished expectation of privacy in an automobile"). And neither of the rationales on which the cited decisions relied—stopping terrorists from probing multiple airport security screening areas for weaknesses (*Aukai*, 497 F.3d at 960-61), and deterring smugglers from bringing onto prison grounds vehicles accessible to prisoners (*Prevo*, 435 F.3d at 1348-49)—are applicable to a surprise strip search of a prison visitor who might opt not to visit her boyfriend. *See* Pet. App. 20a-24a (explaining these differences).

Nor can Respondents excuse their defiance of prison regulations requiring them to give prison visitors the "option to refuse" strip searches. Pet. App. 8a. Respondents assert that not every violation of prison regulations will contravene clearly established constitutional law, and that such regulations are simply a "factor[]." Opp. 16. True enough; Cates never contended otherwise. But the presence of these regulations confirms Respondents had "fair warning" their conduct was unconstitutional, removing all doubt that they should have known not to conduct a warrantless strip search of a visitor who posed no threat to prison security. *Hope*, 536 U.S. at 741.

Finally, Respondents hint that Cates somehow agreed to the strip search by signing the generic consent form she signed in prior visits. *See* Opp. 3. Respondents wisely do not press this argument. As the district court concluded, that form said nothing about strip searches, appearing to "extend[] only to a pat

down of [Cates's] outer clothing." Pet. App. 37a. Particularly at summary judgment, this form cannot be construed to authorize the far more invasive search to which Respondents subjected her. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

III. THE COURT SHOULD GRANT THIS PETITION TO ELIMINATE OR CURTAIL QUALIFIED IMMUNITY

Respondents also do not dispute that whether qualified immunity should be abrogated is an important question warranting this Court's review. Indeed, they acknowledge the "legitimate challenges to the viability of qualified immunity." Opp. 20. They could hardly argue otherwise. Even in the short time since this petition's filing, jurists again recognized that this Court's "qualified immunity jurisprudence stands on shaky ground." *Hoggard v. Rhodes,* 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting denial of certiorari); *see Ramirez v. Guadarrama*, 2 F.4th 506, 524 (5th Cir. 2021) (Willet, J., dissenting from denial of rehearing en banc) ("[T]he atextual, judge-created doctrine of qualified immunity shields lawbreaking officials from accountability, even for patently unconstitutional abuses.").

Respondents insist, however, that "[t]his is not the case in which to undertake review of qualified immunity as a whole." Opp. 21. Their arguments prove the opposite. Respondents' refrain that this case presents a "textbook application of established principles governing qualified immunity" (Opp. 1) is not a

reason to deny review. It is *because* immunizing prison guards for needlessly strip searching visitors might be deemed a "textbook" application of qualified immunity that the doctrine must be reexamined. What sense would it make to reconsider qualified immunity in a case lying at its "fringes" when the problems with the doctrine lie at its "core"? Opp. 1.

This case is an ideal vehicle because it illustrates what is wrong with qualified immunity. As it confirms, the doctrine has no foundation in the text or history of Section 1983: Respondents cannot contest that prison guards lacked any such immunity at common law. *See* Pet. 28-30. The doctrine also has no coherent policy justification, which likely explains why Respondents see no inconsistency between their contention that qualified immunity is justified by the "deference" owed to "prison administrators" "in the adoption and execution of [prison] policies and practices" (Opp. 20), and their simultaneous argument that Respondents' *violation* of those prison policies should not strip them of such immunity (Opp. 15-16). And the doctrine is a "'mare's nest of complexity and confusion'" (Pet. 22), as demonstrated by the two entrenched circuit splits this case implicates. *Supra* pp. 2-10. This Court should act now to prevent the doctrine from continuing to generate the sort of inconsistent and unjust results it produced here.

IV. THE QUESTIONS PRESENTED ARE PROPERLY BEFORE THIS COURT

Unable to dispute the importance of the questions presented, Respondents make a last-ditch attempt to argue that these questions are not properly before the Court. Opp. 18-19. That effort fails.

The record refutes Respondents' contention that "Cates did not plead the claim her petition is based on." Opp. 19. Cates has consistently asserted that Respondents violated her Fourth Amendment rights, including by not giving her the option of refusing the strip search and leaving. Thus, in her complaint, Cates alleged that Laurian "ordered" Cates "to remove her clothing" and "bend over and spread her buttocks," leaving Cates "no choice but to follow Defendant Laurian's orders." Amend. Compl. ¶¶ 20-23, 59, 2:17-cv-1080 (D. Nev. Oct. 26, 2017), Dkt. 18. In defending against Respondents' summary judgment motion, Cates contended she "was given no choice in the matter of being strip searched" and "was never told that she could refuse." Pltf's Resp. 8, 2:17-cv-1080 (D. Nev. Mar. 2, 2018), Dkt. 27. On appeal, citing the Sixth Circuit's *Spear* decision, Cates reiterated that "[e]ven if Defendants had reasonable suspicion of [her], they were still required *** to give her the option of refusing the strip search and leaving the institution." Appellant's Br. 10, No. 18-17026 (9th Cir. Dec. 17, 2018), Dkt. 8. The Ninth Circuit agreed with Cates that the strip search violated her Fourth Amendment rights for that reason. Pet. App. 11a-24a. Respondents' assertion that the Ninth Circuit's Fourth

Amendment ruling took them by surprise (Opp. 19) could be true only if Respondents had never read Cates's complaint or briefs.

Respondents' parallel argument that Cates did not "present the appellate court with the issues she asks this Court to review" (Opp. 19) misunderstands the case's procedural posture. The district court granted Respondents summary judgment on the ground that they did not violate the Fourth Amendment. Pet. App. 35a-39a. Cates thus had no cause to challenge a hypothetical qualified immunity ruling on appeal. But because the Ninth Circuit affirmed the district court's judgment on that alternative ground (Pet. App. 24-25), qualified immunity's application is now properly presented for this Court's review. *See, e.g.*, *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our practice 'permits review of an issue not pressed so long as it has been passed upon.'" (alterations omitted)). Cates was not required to ask the Ninth Circuit to overrule the doctrine before requesting that this Court do so. Having raised her Fourth Amendment claim at every stage, Cates is entitled to "make any argument in support of that claim"; she is "not limited to the precise arguments [she] made below." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (so holding with respect to request to overrule *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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