No. _____

In The
Supreme Court of the United States

CAITLIN MCCANN AND
GLORIA ESCAMILLA-HUIDOR,

Petitioners,

v.

SHEILA GARCIA, ET AL.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a plaintiff satisfies the "clearly established law" prong of qualified immunity by identifying prior authority that articulates general legal principles, or whether a prior case must be so closely analogous on the facts that the unlawfulness of the conduct in question "follows immediately" from the prior case.

2. Whether the doctrine of qualified immunity provides less protection to social workers' child welfare decisions than it does to police officers' law enforcement decisions.

3. Whether courts, in determining whether a right is "clearly established," may consider cases that postdate the alleged constitutional violation.

PARTIES TO THE PROCEEDING

Sheila Garcia and her three children, Cassandra Garcia, C.N.G. and C.J.G (minors, by and through their Guardian ad litem, Donald Walker) were plaintiffs in the district court and are respondents here.

Caitlin McCann and Gloria Escamilla-Huidor were defendants in the district court and are petitioners here. There were additional defendants in the district court—the County of San Diego, Jesus Salcido, Martha Palafox, Laura Quintanilla, and Srisuda Walsh—but the claims against them are not relevant here.

RELATED PROCEEDINGS

- *Garcia et al. v. County of San Diego, et al.*, United States Court of Appeals for the Ninth Circuit, Case No. 19-55022.
- *Garcia et al. v. County of San Diego, et al.*, United States District Court for the Southern District of California, Case No. 3:15-cv-00189-JLS-NLS.

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PETITION FOR A WRIT OF CERTIORARI

The County of San Diego respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's Opinion of October 26, 2020 is reported at 833 F. App'x 69 (9th Cir. 2020), and is reproduced in the Appendix ("App.") at 1–15. The County of San Diego timely petitioned the Ninth Circuit for rehearing and rehearing en banc on January 20, 2021, as did respondents. The Ninth Circuit's order of February 12, 2021 denying both petitions is reproduced at App. 109–111.

The order of the United States District Court for the Southern District of California granting in part and denying in part defendants' motion for summary judgment, and denying plaintiffs' motion for summary judgment, dated June 18, 2018, is not officially reported. It is reproduced at App. 16–87. The district court's order denying defendants' motion for reconsideration of the summary judgment order, dated December 5, 2018, is not officially reported. It is reproduced at App. 88–108.

STATEMENT OF JURISDICTION

Petitioners seek review of the decision of the United States Court of Appeals for the Ninth Circuit entered on October 26, 2020. The Ninth Circuit, on February 12, 2021, denied the County's timely petition for rehearing and rehearing en banc. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 provides, in relevant part: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

A. Factual Background

Judge Collins, in his dissent below, summarized a number of the undisputed facts:

> [A] 16-year-old girl [Cassandra Garcia] had reported to an initial social worker that her father [Rodolfo Garcia] had inappropriately

> fondled her while drunk and that her parents would regularly drink until vomiting, leaving her to care for her two- and ten-year-old sisters; that the initial social worker reported that the 16-year-old was tearful and unable to say if the inappropriate touching had happened previously or to her sisters; that the ten-year-old sister denied that sexual abuse had happened to her but confirmed that the parents would drink to the point of vomiting, although "not so much lately"; that, even though the 16-year-old later claimed that the incident with her father was an isolated accident, the initial social worker had found the 16-year-old's emotional earlier account (which professed uncertainty about other incidents) to be credible; and that a warrant would have taken at least 24 to 72 hours to obtain.

App. 11–12.

Judge Collins's summary, while highlighting some of the troubling facts, actually understates the gravity of the situation facing the social workers.

Cassandra was admitted at a psychiatric hospital when she reported the incident. She also told a social worker "I wanted to kill myself yesterday," and that she was able to improve only after burning herself. When asked whether her father also abused her younger sisters—then two and ten years old—Cassandra did not respond, and became tearful.

When Rodolfo Garcia fondled Cassandra, his younger daughters were asleep in the same bed as

Cassandra. And both parents, rather than accepting that the incident was serious, minimized it and disparaged Cassandra. When San Diego County social worker Caitlin McCann told the mother, Sheila Garcia, that Cassandra had been suicidal, Mrs. Garcia said it was just an effort to get attention.

Rodolfo Garcia, the father, accused Cassandra of using the touching incident as "manipulation." He claimed the incident was a mistake, but it later became clear that his story made little sense. He said that because it was "pitch black" in the room—so dark that he couldn't see his hand—he mistakenly thought Cassandra was his wife. He also claimed, however, that he took a picture of Cassandra because he could see that she was sleeping in an "odd position." The district court noted the inconsistency: "It is unclear to the Court how Rodolfo believed the person in the bed was in an 'odd position' when he also testified the room was dark." App. 18 n.2.

McCann was concerned about the children's safety. She was particularly troubled by the parents' continued drinking, despite their acknowledgment that alcohol played a role in the fondling incident. As a result, McCann attempted to form a "safety plan" to keep the children safe in the home. Specifically, she tried to determine if Mr. Garcia could be separated from the children temporarily while McCann completed her investigation. The Garcias informed McCann, however, that Mr. Garcia picked up their youngest daughter from daycare every day, and was at home with the children, alone, until Mrs. Garcia

returned from work. And there were no friends or relatives in the area who could help.

McCann had to make a decision, and it needed to be made on the spot. She could leave the children in what she believed was an unsafe environment until she could obtain a protective custody warrant—which would have taken at least 24–72 hours—or she could remove the children pending an alternative placement. McCann called her supervisor, Gloria Escamilla-Huidor, and they agreed they could not ignore the red flags. McCann removed the two-year-old and ten-year-old girls, and brought them to an emergency shelter. The next day, when Cassandra was released from her psychiatric inpatient placement at the hospital, McCann brought her to the shelter.

B. Proceedings Below

On January 28, 2015, the Garcias filed suit under 42 U.S.C. section 1983 in the U.S. District Court for the Southern District of California, alleging violation of their Fourth and Fourteenth Amendment rights. They brought additional state-law claims and named additional defendants, but neither are relevant to the issues in this petition.

McCann and Escamilla-Huidor moved for summary judgment based on qualified immunity, but the district court declined to address the issue and denied the motion. It acknowledged that "society has a compelling interest in protecting its most vulnerable members from abuse within their home" and that this right

must be balanced against parents' interest in directing the upbringing of their children. App. 40 (*quoting Greene v. Camreta*, 588 F.3d 1011, 1015–16 (9th Cir. 2009), *vacated in part on other grounds*, 563 U.S. 692 (2011)). The district court further acknowledged that "case law has not clearly established how these competing rights should be balanced." App. 40.

Still, the district court declined to grant qualified immunity, and denied summary judgment. It sidestepped the issue. "Because the Court has determined the issue of whether the social workers' beliefs and actions were reasonable involves disputed issues of material fact, the Court does not make a qualified immunity determination here." App. 38 n.9.

Defendants moved for reconsideration of the denial of qualified immunity. The court declined to hear oral argument, and by Order of December 5, 2019, denied the motion in its entirety. App. 108. Specifically, it held that ruling on qualified immunity would be improper given the existence of disputed issues of fact. App. 91–92. It further opined that "[e]ven if the Court were to reconsider its prior Order, however, the Court would conclude on the current record and the state of the law as of January 28, 2013, that the Moving Defendants are not entitled to qualified immunity. . . ." App. 92.

McCann and Escamilla-Huidor appealed. In a divided opinion, the majority held, *inter alia*, that the social workers were not entitled to qualified immunity. The majority acknowledged that "there is no case with

this precise set of facts." App. 4. Instead, it denied qualified immunity based on a general principle of Ninth Circuit law—that social workers "may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and the scope of the intrusion is reasonably necessary to avert that specific injury." App. 4–5 (*quoting Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)). The majority further relied on *Demaree v. Pederson*, 887 F.3d 870, 883 (9th Cir. 2018)—a case decided more than five years *after* the Garcias' removal—for the proposition that warrantless removals are permissible only to prevent "imminent physical injury or molestation." App. 2–3.

Judge Collins dissented on three grounds relevant here. First, he found that the majority "violate[d] the clear instruction of the Supreme Court" by defining clearly established law at a high level of generality. The majority failed to identify a factually comparable case under which social workers were found liable for similar conduct. Instead, it cited only *Wallis* for a general articulation of the legal standard. App. 9–10.

Second, Judge Collins disagreed with the majority's suggestion that the prohibition on defining clearly established law at a high level of generality is a creature of excessive force cases, and that cases brought against social workers face a less demanding standard. App. 10–11.

Third, Judge Collins found that the majority's reliance on *Demaree*, 887 F.3d 870, was "plainly improper, because that decision postdates the events in the case." App. 14.

McCann and Escamilla-Huidor petitioned for rehearing and rehearing en banc. On February 12, 2021, the panel denied the petition for rehearing and the Ninth Circuit denied the petition for rehearing en banc. App. 109–111.

REASONS FOR GRANTING THE PETITION

Social workers are responsible for protecting children at a time when there is an epidemic of mistreatment of children in this country. In 2019 alone, approximately 3.5 million children in the United States were reportedly subject to abuse or neglect, with over 250,000 reports of sexual abuse. U.S. DEP'T HEALTH & HUMAN SERVS., CHILD MALTREATMENT (2019) pp. 18, 22.

The County of San Diego, like cities and counties across the country, employs social workers to protect children from abuse and neglect. Social workers do not have the luxury of shying away from difficult situations. If they err on the side of inaction, children may be abused or even killed. Rather, social workers have professional, ethical, and legal duties to protect children from abuse. This results in social workers being

placed in challenging (and sometimes dangerous) situations. They must make difficult decisions, and they must act, quickly and decisively, to protect children from abuse and neglect.

Although social workers are trained on constitutional and statutory limitations, decisional law addressing social workers is sparse. It is not possible to distill the governing legal principles into a tidy set of rules. Instead, social workers must make numerous judgment calls, and they rarely have much time to deliberate. They understand that leaving children with potential abusers, even temporarily, can have life and death consequences. Over half of children referred to child welfare agencies who are left with their parents are later referred again based on recurring abuse, and over 1,600 children are killed in the United States each year due to abuse or neglect. J. BERRICK, THE IMPOSSIBLE IMPERATIVE: NAVIGATING THE COMPETING PRINCIPLES OF CHILD PROTECTION, OXFORD UNIVERSITY PRESS (2018), pp. 1, 65.

Under such circumstances, social workers need breathing room to make difficult decisions without continually risking individual liability, and vulnerable children need social workers who are not afraid to protect them. This is precisely what the doctrine of qualified immunity is for. If anything, a social worker taking action to protect the safety and best interests of a child deserves heightened protection under the law.

The panel majority, however, denied qualified immunity based on three erroneous readings of the doctrine, each of which conflicts with this Court's jurisprudence and the law of other Circuits.

First, the panel majority found that the law was "clearly established," without identifying any factually analogous case. Instead, they relied on abstract statements of a legal rule. The majority did not find that the alleged unlawfulness of the social workers' actions "followed immediately" from any prior case, as required by *D.C. v. Wesby*, 138 S. Ct. 577, 590 (2018). They instead held that the bare recitation of the legal rule in *Wallis* was enough. This is the same error that has drawn repeated admonitions by this Court, but it continues to resurface in the Ninth, Fourth, and Sixth Circuits.

Second, the panel suggested that a robust doctrine of qualified immunity is appropriate in cases of excessive force by police, but less so for child removals by social workers. That is not the law. Although the Fifth Circuit has made similar observations, this Court has applied the doctrine with equal force in a variety of contexts, and three circuits have recognized that social workers should receive the same protections as police officers.

Third, the panel relied on a decision that postdated the events in question by five years. This was plainly improper, as the dissent recognized. Most circuits recognize that a case is irrelevant to the "clearly established" analysis unless it was decided prior to the

events in question, but the Ninth Circuit and the First Circuit have reached decisions to the contrary.

Certiorari is warranted to harmonize these conflicts, and to provide guidance in an area that has not received the attention it deserves. Social workers are entitled to the full protection of qualified immunity, so they have the breathing room to take action to protect children from abuse and neglect. The law should not incentivize hesitation, second-guessing, and inaction. While social workers should be trained on clearly established constitutional law, they should not be forced to extrapolate from general principles or to predict future cases. It is only if a social worker violates law that is clearly established *with specificity*, and *beyond debate*, that she should lose the protection of qualified immunity.

I. THE NINTH CIRCUIT, ALONG WITH TWO OTHER CIRCUITS, HAS STRAYED FROM THIS COURT'S SPECIFICATION REQUIREMENT

A. The Majority's Decision Below Conflicts with This Court's Precedent.

A plaintiff can show that a right is clearly established for purposes of qualified immunity only if "existing precedent . . . placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). A constitutional right is clearly established only if "every reasonable official would have understood that what he is doing violated that right." *Id.*

The lower courts regularly note that the relevant law may not be defined "at a high level of generality" (*al–Kidd*, 563 U.S. at 742), but they have struggled to pinpoint exactly how much specificity is required. Those favoring application of qualified immunity cite this Court's calls for specificity and particularization. *See id.*; *see also White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam). Those opposing qualified immunity respond that this Court does not require them to identify a prior identical case. They cite the rule that a plaintiff need not identify a case "directly on point" (*Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (*quoting al-Kidd*, 563 U.S. at 742)), and then conclude that more generalized principles can suffice. *See*, *e.g.*, *Rico v. Ducart*, 980 F.3d 1292, 1306 (9th Cir. 2020) (Silver, J., dissenting) (by requiring a high level of specification, the majority's "approach is functionally equivalent to requiring a 'case directly on point,' something the Supreme Court has rejected.").

But this Court has provided an analytical tool, too often overlooked,[1] for navigating the space between the rule requiring specification and the clarification that there is no need for a case directly on point:

> The Supreme Court has also told us how to decide if a plaintiff has identified a

[1] Of the 598 published circuit court decisions addressing qualified immunity since *Wesby*, 190 have cited the rule from *al-Kidd* and *White* (that rules cannot be stated at "too high a level of generality") or the limitation from *al-Kidd* and *Mullenix* (that there is no need for "a case directly on point"). But only 19 decisions have cited *Wesby's* "follow immediately" test.

> sufficiently specific legal rule: The Plaintiff has identified a rule at too high a level of generality if the unlawfulness of the officer's conduct does not follow immediately from the conclusion that [the rule] was firmly established.

Beck v. Hamblen County, 969 F.3d 592, 599 (6th Cir. 2020) (*quoting Wesby*, 138 S. Ct. at 590).

In order to deny qualified immunity to the social workers, then, the panel needed to identify a case (from prior to January 2013) from which it "followed immediately" that the social workers' actions were unlawful. That would require a prior case addressing factual circumstances so similar that it would provide fair notice to every reasonable social worker—*i.e.*, where there was a risk of child abuse, and getting a warrant would result in leaving the children in the home overnight or longer. The panel acknowledged there is no such case. Instead, it cited two factually distinguishable decisions,[2] and opined that general principles of law were enough:

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[2] As the dissent noted and as the majority conceded, *Mabe v. San Bernardino County*, 237 F.3d 1101 (9th Cir. 2001), is distinguishable in two respects (among others). First, in *Mabe* the social worker waited *days* after completing her investigation to remove the children. Here, the social workers acted immediately. Second, in *Mabe*, the social workers could have obtained a warrant in a "few hours." Here, it would have taken 24–72 hours. In *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007), the social worker was concerned with malnutrition and a filthy home. Here, the social workers were concerned about sexual abuse. The majority's only other case, *Demaree*, 887 F.3d at 883 postdated the events in question, and thus could not have provided fair notice. *See* Section III, *infra*, pp. 28–29.

> Although there is no case with this precise set of facts, it has been well established since at least 2000 that social workers "may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and the scope of the intrusion is reasonably necessary to avert that specific injury."

App. 4–5 (*quoting Wallis*, 202 F.3d at 1138).

As Judge Collins recognized in his dissent, this is the exact error the Supreme Court has repeatedly cautioned against. App. 9–10. Reliance on general legal principles is not enough. Rather, courts must grapple with the particular circumstances the government officials faced, and assess whether a factually similar case placed them on fair notice that their actions, *beyond debate*, would violate the Constitution. Here, there was no such case.

Stated differently, does it "follow immediately" (*D.C. v. Wesby*) from *Wallis* that the social workers' actions violated the Constitution? It does not. *Wallis* says only that a warrantless search must be supported by exigency. It says nothing about whether the exigency requirement was satisfied in the specific circumstances facing the social workers—that absent removal, the children would have been left overnight (or longer) with a father who had drunkenly fondled his daughter, who had started drinking again, and who did not appreciate the seriousness of his conduct.

Indeed, prior Ninth Circuit case law expressly acknowledges that the law of exigency remains undefined. *See Kirkpatrick v. County of Washoe*, 843 F.3d 784, 793 (9th Cir. 2016) ("No Supreme Court precedent defines when a warrant is required to seize a child under exigent circumstances."). *See also Mueller v. Auker*, 700 F.3d 1180, 1189 (9th Cir. 2012) ("[T]he term 'imminent danger' has not been given any detailed definition. . . ."). Two other circuits agree. *See Doe v. D.C.*, 796 F.3d 96, 104 (D.C. Cir. 2015) ("[T]he precise contours of when an exigency exists to justify removal without a warrant or pre-deprivation hearing are not settled. . . ."); *Parker v. Henry & William Evans Home for Children, Inc.*, 762 F. App'x 147, 155 (4th Cir. 2019) (same).

It does not "follow immediately" from the exigency requirement that the social workers violated the Constitution. Rather, they faced unique factual circumstances that no prior case addressed. The panel majority's decision, by relying on general principles of law rather than factually analogous authority, ran afoul of this Court's specification requirement.

B. Six Circuits Have Followed the Specification Requirement, But the Ninth Circuit, Fourth Circuit, and Sixth Circuit Have Strayed From It.

Most circuits have heeded this Court's admonition and require plaintiffs to identify clearly established law that is particularized to the facts of the case. They

use slightly different language to describe the test. But the majority of circuits recognize and faithfully apply the requirement. *See*, *e.g.*, *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015) (requiring "analogous or near-analogous facts"); *Reed v. Palmer*, 906 F.3d 540, 547 (7th Cir. 2018) ("[P]laintiffs must point to a 'closely analogous case' finding the alleged violation unlawful."); *Thurmond v. Andrews*, 972 F.3d 1007, 1012 (8th Cir. 2020) (inquiry is "specific and particularized"); *Kapinski v. City of Albuquerque*, 964 F.3d 900, 910 (10th Cir. 2020) ("the context-dependent nature of [plaintiff's claim] necessitates a factually analogous precedent"); *King v. Pridmore*, 961 F.3d 1135, 1146 (11th Cir. 2020) (requiring "materially similar case on point").

The panel majority, however, acknowledged that there is no case on point, and instead relied on general principles of law. This is a recurring error in the Ninth Circuit. Although its qualified immunity decisions have been marked by inconsistency and division, multiple panel decisions have disregarded this Court's specification requirement. *See Ioane v. Hodges*, 939 F.3d 945, 957 (9th Cir. 2019) ("Closely analogous preexisting case law is not required to show that a right was clearly established.") (*quoting White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000)). *See also Perez v. Cox*, 788 F. App'x 438, 448 (9th Cir. 2019) (Ikuta, J., dissenting) ("[W]ithout bothering to point to any authority . . . the majority denies qualified immunity to the supervisors. How many times must we be told how to conduct such an analysis?").

Moreover, this Court's direction from *D.C. v. Wesby*—that a rule is only clearly established if it "follows immediately" from prior authority—has gone all but unnoticed in the Ninth Circuit. Of its 41 qualified immunity decisions published since *Wesby*, ***just one case*** cited the "follow immediately" test. *See O'Doan v. Sanford*, 991 F.3d 1027, 1041 (9th Cir. 2021). Notably, in *O'Doan*, the majority cited the "follow immediately" test, and granted qualified immunity. The dissent, which did not acknowledge the test, would have denied qualified immunity.

As the Ninth Circuit drifts away from this Court's authority, its qualified immunity jurisprudence is increasingly falling into disarray. Divided panels are commonplace—since this Court last addressed qualified immunity in *Emmons v. City of Escondido*, 139 S. Ct. 500 (2019), the Ninth Circuit has issued over twenty divided panel opinions in qualified immunity appeals,[3] including several opinions addressing

[3] *See Tobias v. Arteaga*, 2021 WL 1621323 (9th Cir. April 27, 2021) (Collins, J., dissenting); *Benavidez v. County of San Diego*, 2021 WL 1343530 (9th Cir. April 21, 2021) (Collins, J., concurring in judgment, but disagreeing with qualified immunity analysis); *O'Doan v. Sanford*, 991 F.3d 1027 (9th Cir. 2021) (Block, D.J., dissenting); *Gonzalez v. City of Huntington Beach*, 843 F. App'x 859 (9th Cir. 2021) (Kennelly, D.J., dissenting); *Sandoval v. County of San Diego*, 985 F.3d 657 (9th Cir. 2021) (Collins, J., dissenting); *Rico v. Ducart*, 980 F.3d 1292 (9th Cir. 2020) (Silver, J., dissenting); *Cortesluna v. Leon*, 979 F.3d 645 (9th Cir. 2020) (Gilman, J. and Collins, J., separately dissenting); *Lam v. City of Los Banos*, 976 F.3d 986 (9th Cir. 2020) (Bennett, J., dissenting); *Sampson v. County of Los Angeles*, 974 F.3d 1012 (9th Cir. 2020) (Hurwitz, J., dissenting); *Porter v. City and County of San Francisco*, 824 F. App'x 515 (9th Cir. 2020) (Dawson, D.J., dissenting); *Hardesty v.*

qualified immunity for social workers.[4] There have been votes for en banc review, and a dissental sharply criticizing the Circuit's departure from this Court's precedents. *See Slater v. Deasey*, 943 F.3d 898, 899 (9th Cir. 2019) (Collins, J., dissenting, with Bea, Ikuta, and Bress, joining) ("By repeating—if not outdoing—the same patent errors that have drawn such repeated rebukes from the high Court, the panel here once again invites summary reversal."). Other circuits, too, have criticized decisions of the Ninth Circuit for their inattentiveness to the specification requirement. *See Ashford v. Raby*, 951 F.3d 798, 804 (6th Cir. 2020) ("[The Ninth Circuit] arguably made the all-too-common

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Sacramento County, 824 F. App'x 474 (9th Cir. 2020) (R. Nelson, J., dissenting); *Adame v. Gruver*, 819 F. App'x 526 (9th Cir. 2020) (Schroeder, J., dissenting); *Finkelstein v. Jangla*, 816 F. App'x 98 (9th Cir. 2020) (Bennett, J., dissenting); *Liberti v. City of Scottsdale*, 816 F. App'x 89 (9th Cir. 2020) (Bennett, J., dissenting); *Doe v. Pasadena Unified Sch. Dist.*, 810 F. App'x 500 (9th Cir. 2020) (Marbley, J., dissenting); *Bennett-Martin v. Plascencia*, 2020 WL 1027948 (9th Cir. March 3, 2020) (Marbley, J., dissenting); *Tobias v. Easy*, 2020 WL 901404 (9th Cir. Feb. 25, 2020) (Wardlaw, J., dissenting); *J.P. v. County of Alameda*, 2020 WL 995203 (9th Cir. March 2, 2020) (Paez, J., dissenting); *Perez v. Cox*, 2019 WL 4413261 (9th Cir. Sept. 17, 2019) (Ikuta, J., dissenting); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019) (Berzon, J., dissenting); *Chandler v. Guitterrez*, 773 F. App'x 921 (9th Cir. 2019) (Bennett, J., dissenting); *Ortiz v. Vizcarra*, 773 F. App'x 450 (9th Cir. 2019) (Fernandez, J., dissenting); *Perez v. City of Roseville*, 926 F.3d 511 (9th Cir. 2019) (Molloy, J., dissenting*); Davis v. Washington State Dep't of Soc. & Health Servs.*, 773 F. App'x 367 (9th Cir. 2019) (Callahan, J., dissenting).

[4] In addition to the case below, *Sampson* and *J.P.* resulted in divided panels.

error of defining clearly established law at a high level of generality.").

While most circuits have taken notice of this Court's precedents, the Ninth Circuit is not alone in straying from them. The Sixth Circuit, too, has permitted general principles to creep back into their qualified immunity analyses, and have relaxed the requirement of identifying analogous case law. *See Ouza v. City of Dearborn Heights*, 969 F.3d 265, 290 (6th Cir. 2020) (Griffin, J., dissenting) ("Time and again . . . the Supreme Court has admonished lower courts that broad statements of clearly established law do not provide the specificity required. . . . Because no such similar case clearly established [defendant] unconstitutionally arrested plaintiff . . . the majority opinion errs in denying him qualified immunity. . . ."); *Jones v. Clark County, Kentucky*, 959 F.3d 748, 769 (6th Cir. 2020) (Murphy, J., dissenting) (right "to be free from a malicious prosecution" defined at too high a level of generality"). The Fourth Circuit, as well, has relied on general principles rather than factually analogous cases. *See Dean v. McKinney*, 976 F.3d 407, 424 (4th Cir. 2020) (Richardson, J., dissenting) ("The majority, regrettably, forgets that qualified immunity doctrine is a demanding standard requiring specificity.").

Judges in multiple circuits have acknowledged the split. *See Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part) ("But courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist."); *Cox v. Wilson*, 971 F.3d 1159,

1164 (10th Cir. 2020) (same). Indeed, even judges arguing for application of qualified immunity acknowledge that it is time for this Court to revisit the doctrine:

> What, then, to make of today's decision? With no clearly established law, perhaps it has less to do with the Supreme Court's qualified immunity doctrine and more to do with misgivings about the wisdom of that doctrine . . . [The doctrine] remains controversial, and there are thoughtful reasons for reconsidering or reforming it. But those are decisions for the Supreme Court (or Congress). Not us.

Dean, 976 F.3d at 433–34 (Richardson, J., dissenting).

This Court's attention is warranted. From 2014 through 2019, this Court reversed denials of qualified immunity more than once per year, and the circuit courts took notice. Specifically, over those six years, it reversed denials of qualified immunity in eight cases, including four from the Ninth Circuit—three of which were summary reversals. *See Emmons*, 139 S. Ct. 500 (2019) (summarily reversing Ninth Circuit); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (same); *Wesby*, 138 S. Ct. 577 (2018) (reversing D.C. Circuit); *White*, 137 S. Ct. 548 (2017) (summarily reversing Tenth Circuit); *City & County of San Francisco v. Sheehan*, 575 U.S. 600 (2015) (reversing Ninth Circuit); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (summarily reversing Fifth Circuit); *Carroll v. Carman*, 574 U.S. 13 (2014) (summarily reversing Third Circuit); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (reversing Sixth Circuit).

This Court has not addressed qualified immunity since 2019, and several circuits, most notably the Ninth, have lost sight of this Court's guidance. Certiorari is warranted to provide redirection, and to bring the circuits back into alignment.

C. The Ninth Circuit's Unpublished Decisions Have Been Particularly Inattentive to this Court's Directives.

The decision below is unpublished. This might ordinarily counsel against certiorari. But here, the lack of publication makes this case an ideal vehicle for addressing a recurring problem in the Ninth Circuit.

In their published decisions, some Ninth Circuit panels have taken pains to display adherence to this Court's admonitions. *See*, *e.g.*, *S.B. v. County of San Diego*, 864 F.3d 1010, 1015 (9th Cir. 2017) ("We hear the Supreme Court loud and clear."). Indeed, it has not been uncommon for Ninth Circuit panels to amend their Opinions to fortify their language addressing the specificity requirement (even as they leave the ultimate dispositions denying qualified immunity intact).[5]

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[5] In *Slater v. Deasey*, 789 F. App'x 17, 19 (9th Cir. 2019), the Court amended its opinion by adding a statement that "[w]e take seriously the Supreme Court's warning that 'clearly established law' should not be defined at a high level of generality," but left its denial of qualified immunity intact. In another recent decision, the panel initially held that general principles of law were sufficient to satisfy the clearly established prong. *See Capp v. County of San Diego*, 936 F.3d 899 (2019) (superseded and withdrawn) ("Plaintiff contends that the law clearly establishes a right to be

In unpublished opinions, however, Ninth Circuit panels have been less attentive to the specification requirement. The majority's decision, below, is just one example, and others abound. *See Perez*, 788 F. App'x at 448 (Ikuta, J., dissenting) ("How many times must we be told how to conduct such an analysis?"); *see Easley v. City of Riverside*, 765 F. App'x 282, 291 (9th Cir. 2019) (Bennett, J., dissenting) ("No case identified by [plaintiff] comes close here."); *Chandler v. Guttierrez*, 773 F. App'x 921, 926 (9th Cir. 2019) (Bennett, J., dissenting) ("The majority's holding . . . defines whatever right we clearly established in [prior case law] at far too high a level of generality.").

Certiorari is warranted to address this recurring error, and to prevent similar errors in future cases. The fact that the opinion below was unpublished is not a reason to deny certiorari. In this context—where there is a gulf between a circuit's published explanations of a doctrine and its unpublished applications of that doctrine—the lack of publication is a reason for this Court to exercise its supervisory powers. *Consider*

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free of 'intentional and calculated acts of retaliation [by a government actor], with the precise details of the retaliatory acts being of secondary importance.' We agree that this is the appropriate level of generality for defining the relevant legal rule."). The panel later amended the opinion to eliminate its suggestion that the facts were less important than the general legal principles. *Capp v. County of San Diego*, 940 F.3d 1046, 1059 (9th Cir. 2019) ("[I]t was clear at the time [defendant] acted that a government actor could not take action that would be expected to chill protected speech out of retaliatory animus for that speech."). Despite the shift in language, the panel left the denial of qualified immunity undisturbed.

S. SHAPIRO, K. GELLER, T. BISHOP, E. HARTNETT & D. HIMMELFARB, SUPREME COURT PRACTICE § 4.11, p. 4-33 (11th ed. 2019) (Justice Stevens—"[I] tend to vote to grant more on unpublished opinions, on the theory that occasionally judges will use the unpublished opinion as a device to reach a decision that might be a little hard to justify.").

II. A GROWING CURRENT IN SEVERAL CIRCUITS SUGGESTS THAT SOCIAL WORKERS ARE LESS DESERVING OF PROTECTION THAN OTHER OFFICIALS. IF ANYTHING, CHILD WELFARE DECISIONS DESERVE MORE PROTECTION, NOT LESS

In finding that the prior cases were sufficient, the panel majority suggested that the Supreme Court's specificity requirement is a creature of excessive force cases, and that it need not apply with equal rigor in other contexts. App. 4 ("Defendants invoke on appeal only the Supreme Court's warning, *given in the context of excessive force cases*, that we not define the law at too high a level of generality.") (emphasis supplied).

Such distinctions are increasingly common in the district courts, and they have found support in the Ninth Circuit and beyond. Most notable is *Romero v. Brown*, 937 F.3d 514 (5th Cir. 2019), in which the Fifth Circuit affirmed the denial of a social worker's motion to dismiss, but reversed the denial of police officers' motions to dismiss based on the same child removal. There, the plaintiffs alleged that a social worker and

two police officers removed their children into protective custody, without a warrant. The next day, a state court judge found the removal unjustified, and ordered the immediate return of the children to the home. *Id.* at 518–19.

The Fifth Circuit held that, given that there was no court order and there was no exigency (at least not on the pleadings), the plaintiffs had adequately alleged violation of clearly established law by the social worker. For the police officers, however, the court was more forgiving. It held that they *were* entitled to qualified immunity for the same removal. Although the plaintiffs alleged that the social worker had informed the officers that there was no emergency, the court dismissed that allegation as "conclusory, uncertain, and likely implausible," and found that the officers had not violated clearly established law. *Id.* at 524.

Additional cases, too, suggest that police officers' decisions are entitled to a higher level of deference than those of social workers. *Morrow v. Meachum*, 917 F.3d 870, 876 (5th Cir. 2019) ("[O]vercoming qualified immunity is especially difficult in excessive-force cases."); *Sampson v. County of Los Angeles*, 974 F.3d 1012, 1029 (9th Cir. 2020) (Zouhary, D.J., dissenting) (arguing against qualified immunity in a social worker case—"[M]uch of the Court's recent precedent cautioning against broadly defining constitutional rights dealt with excessive force."); *West v. City of Caldwell*, 931 F.3d 978, 991 (9th Cir. 2019) (Berzon, J., dissenting) ("the dynamic in a [search and seizure] case is entirely different from that in usual excessive force cases, in

which the Court has insisted on closely analogous case law for qualified immunity purposes").

Such arguments are groundless. The specification requirement is not limited to excessive force cases. As Judge Collins recognized in dissent, the Supreme Court has invoked the requirement in a wide range of contexts. *See* App. 10–11 (*citing Wesby*, 138 S. Ct. at 590 (false arrest); *Ziglar v. Abassi*, 137 S. Ct. 1843, 1866–67 (2017) (conspiracy); *Sheehan*, 575 U.S. at 613 (warrantless entry); *Reichle v. Howards*, 566 U.S. 658 (2012) (First Amendment retaliation); *Wilson v. Layne*, 526 U.S. 603 (1999) (scope of search); *Anderson v. Creighton*, 483 U.S. 635 (1987) (warrantless search)).

There is good reason to hold social workers to the same standards as police officers. Both are charged with protecting public safety while respecting private rights and liberties. Three other circuits have recognized the similarities. *See Brent v. Wayne County Dep't of Hum. Servs.*, 901 F.3d 656, 685 (6th Cir. 2018) (social workers, in removing children from home, were "acting in a police capacity"); *Millspaugh v. County Dep't of Public Welfare*, 937 F.2d 1172, 1176 (7th Cir. 1991) (removing children is analogous to "seizing evidence on the authority of a warrant"); *N.E.L. v. Douglas County*, 740 F. App'x 920, 929–31 (10th Cir. 2018) (applying same analysis to social worker and police officer in child removal case).

The challenges facing social workers are particularly acute, because the safety of children is at stake,

and the risks of inaction cannot be overstated. *See Bom v. Superior Court*, 44 Cal. App. 5th 1, 11 (social workers faced charges for inaction after parents beat their seven-year-old boy to death). Moreover, social workers face a Catch-22 situation any time they make an exigency removal. "If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing the child, they risk injury to the child and may be accused of infringing the child's rights." *Van Emrik v. Chemung County Dep't of Soc. Servs.*, 911 F.2d 863, 866 (2d Cir. 1990).[6] Indeed, the California Supreme Court recognizes that children have independent "compelling rights to be protected from abuse and neglect." *In re Marilyn H.*, 5 Cal.4th 295, 306 (1993). The law should not impose liability when social workers make reasonable decisions while erring on the side of protecting children's rights.

Given the challenging judgments that social workers must make—often based on uncertain, conflicting information; often with victims who are reluctant to reveal the truth; and often under pressure to make an

[6] Lawsuits against social workers for "failure to protect" children are common. Indeed, counsel for respondents has recently initiated several such actions against the County of San Diego's social workers, contending that they should be held liable for inaction. *See Y.I. v. County of San Diego, et al.*, United States District Court, Southern District of California, Case No. 20CV0588 LAB LL (filed March 27, 2020); *Tanner v. County of San Diego*, Superior Court of California, County of San Diego, Case No. 37-2019-00045369-CU-NP-CT (filed Aug. 28, 2019); *A.G. v. County of San Diego, et al.*, United States District Court, Southern District of California, Case No. 16CV229 AJB KSC (filed Sept. 9, 2016).

immediate decision—most circuits apply qualified immunity precedent from the police context to social workers, without limitation. The Fourth Circuit explains that child protection judgments are "precisely the sort" of decisions that qualified immunity is designed to protect, because these decisions involve "weighing professional opinions of child abuse against the obvious interests in maintaining the integrity of a household." *White v. Chambliss*, 112 F.3d 731, 736 (4th Cir. 1997), *cert. denied*, 522 U.S. 913 (1997). *See also Andrews v. Hickman County, Tenn.*, 700 F.3d 845, 865 (6th Cir. 2012) (Sutton, J., concurring) (in warrantless entry case, "[t]here is no reason social workers should be treated differently" than police officers).

If anything, broader immunity for social workers is warranted. Courts routinely make exceptions to constitutional doctrines when the welfare of a child is at stake—including in regulations of vulgar speech (*Cohen v. California*, 403 U.S. 15 (1971)); carrying of firearms near schools (*D.C. v. Heller*, 554 U.S. 570 (2008)); searches of students by teachers (*New Jersey v. T.L.O.*, 469 U.S. 325, 353 (1985) (Blackmun, J., concurring)); and in excusing children from testifying at criminal trials (*Maryland v. Craig*, 497 U.S. 836 (1990)). Social workers reasonably expect the law to protect children, and they should not be held liable for honest efforts to prevent abuse.

Absent this Court's attention, a purported "social worker exception" will continue to surface, steering additional courts into erroneous denials of qualified immunity. This would provide social workers less

breathing room to make difficult, on-the-spot decisions about how to protect vulnerable children from abuse and neglect. This is the antithesis of what qualified immunity is meant to do.

III. THE DECISION BELOW DEEPENS A CIRCUIT SPLIT OVER THE EFFECT OF AUTHORITY THAT POSTDATES THE CHALLENGED CONDUCT

A decision that does not yet exist cannot give a government official "fair notice," and is "of no use in the clearly established inquiry." *Kisela*, 138 S. Ct. at 1154. Accordingly, this Court has consistently held, for over three decades, that the "clearly established" law analysis must be based on authority that was in effect at the time of the challenged action. *See Wesby*, 138 S. Ct. at 589 (jail employees entitled to qualified immunity unless the unlawfulness of their conduct was "clearly established at the time") (*quoting Reichle*, 566 U.S. at 664); *Ziglar*, 137 S. Ct. at 1866 (action "must be assessed in light of the legal rules that were clearly established at the time [the action] was taken") (*quoting Anderson*, 483 U.S. at 638); *Kisela*, 138 S. Ct. at 1154 ("[A] reasonable officer is not required to foresee judicial decisions that do not yet exist.").

Here, the events in question all happened in 2013. The majority, however, cited a 2018 decision to support its finding that the rights at issue were "clearly established" in 2013. *See* App. 2–3 (*citing Demaree*, 887 F.3d at 883).

As Judge Collins stated in his dissent, reliance on *Demaree* "is plainly improper, because that decision postdates the events in this case." App. 14. Indeed, after the decision, another panel of the Ninth Circuit held, unanimously, that *Demaree* "cannot be considered" because it "was decided after the removal." *Reyna v. County of Los Angeles*, 840 F. App'x 955, 959 (9th Cir. 2021). It is rare to see an intracircuit conflict that is so specific and so direct. The *Garcia* majority relied on *Demaree* to deny qualified immunity, and the *Reyna* panel, in affirming qualified immunity, held that *Demaree* is irrelevant to the inquiry. *See CNH Industrial N.V. v. Reese*, 138 S. Ct. 761 (2018) (certiorari granted to resolve intracircuit split; decision below summarily reversed). *See also* S. SHAPIRO, K. GELLER, T. BISHOP, E. HARTNETT & D. HIMMELFARB, SUPREME COURT PRACTICE § 4.6, pp. 4-24–4-25 (11th ed. 2019).

The error is not isolated. Panels in the Ninth Circuit continue to rely on cases that postdate the events at issue. *See Sampson*, 974 F.3d at 1021 (majority held that 2019 *Capp* decision showed that law was "clearly established" as of 2015); *id.* at 1028 (Hurwitz, J., dissenting) (inquiry must be into "opinions extant at the time of the conduct at issue, not on how subsequent cases characterize pre-existing law"); *Sandoval v. County of San Diego*, 985 F.3d 657, 674–75 (applying test from case that postdated the events at issue); *id.* at 686 (Collins, J., dissenting) ("[A] nurse who did not violate then-existing law cannot possibly be said to have violated clearly established law. . . .").

Although the Ninth Circuit is squarely in the minority, there is an acknowledged circuit split regarding the effect of subsequent authority on the clearly established analysis. *See Sandoval*, 985 F.3d at 678 n.15 ("We recognize that three circuits appear to have concluded . . . that they were required to apply a subjective framework for purposes of qualified immunity, even though it had since been replaced by an objective standard. . . . We are . . . not persuaded by their analyses."); *id.* at 685 (Collins, J., dissenting) ("The majority errs—and expressly creates a circuit split. . . .").

At least three other circuits disagree with the Ninth Circuit and hold that even if controlling law changes after the incident in question, qualified immunity turns on the law in effect at the time of the incident. *See Quintana v. Santa Fe County Bd. of Comm'rs*, 973 F.3d 1022, 1023 n.1 (10th Cir. 2020); *Zion v. Nassan*, 556 F. App'x 103, 107 (3d Cir. 2014); *Kedra v. Schroeter*, 876 F.3d 424, 440 (3d Cir. 2017); *Hall v. Ramsey County*, 801 F.3d 912 (8th Cir. 2015). The same is true if the law is uncertain at the time of the incident, and is later clarified or made more specific. The later authority does not convert a law that was uncertain at the time into one that was clearly established. *See Bishop v. Szuba*, 739 F. App'x 941, 945 (10th Cir. 2018); *McKee v. Hart*, 436 F.3d 165, 173 (3d Cir. 2006).

The First Circuit, however, is arguably aligned with the Ninth Circuit. In *Miranda-Rivera v. Toledo-Davila* it found that the law of excessive force was clearly established for purposes of qualified immunity in 2007, even though the relevant case was not decided until 2015. *See* 813 F.3d 64 (1st Cir. 2016).

Certiorari is warranted to resolve both the intercircuit and intracircuit splits. Litigants and courts alike would benefit from this Court's reiteration of the rule that subsequent authority can play no role in the qualified immunity analysis.

CONCLUSION

The majority's decision below conflicts with the law of this Court, conflicts with the decisions of other circuits, and further fractures the Ninth Circuit's qualified immunity jurisprudence. So too does it undervalue the contributions of social workers and underestimate the challenges they face. The law should not incentivize hesitation and inaction. Rather, it should respect the judgments that social workers must make in their efforts to protect children from abuse and neglect. Certiorari should be granted.

Respectfully submitted,

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