No. 20-1592

In The Supreme Court of the United States

CAITLIN MCCANN AND
GLORIA ESCAMILLA-HUIDOR,

Petitioners,

v.

SHEILA GARCIA, et al.,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

RULES

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents Sheila Garcia, Cassandra Garcia, and CNG, and CJG, Minors, by and through their Guardian ad litem, Donald Walker, respectfully submit the following response to the petition for a writ of *certiorari* filed by Petitioners Caitlin McCann and Gloria Escamilla-Huidor.

STATEMENT OF THE CASE

INTRODUCTION

This case is not ripe for review, and the Petition must be denied on this ground alone. There are unresolved factual disputes that must be determined before any decision can be made on qualified immunity. Qualified immunity was denied on Petitioners' motion for summary judgment, motion for reconsideration, and appeal because of these unresolved factual disputes.

Included among the key factual disputes which prevent any discussion or finding on qualified immunity is whether the "evidence" which Petitioners rely upon to justify their decisions was fabricated by Petitioner Caitlin McCann. Respondents contend, and there is more than ample evidence to support, that Caitlin McCann, and her supervisor, Gloria Escamilla-Huidor, fabricated "evidence" to support their non-exigent removal of the Garcia children from the care and custody of their parents. This evidence supports

that McCann created from whole cloth false allegations of abuse, claiming she gleaned these allegations from her interview with Cassandra Garcia, a troubled young woman in a mental institution.[1] McCann and her supervisor, Petitioner Gloria Escamilla-Huidor, relied upon this demonstrably false "evidence" to support their removal of Cassandra and her two younger sisters from the care and custody of their parents; and now claim they are entitled to qualified immunity for their actions.

This is not the first time McCann has been accused of misrepresenting facts in a juvenile court case. Southern District of California Judge Roger T. Benitez found her demonstrably false statements made to a family court judge in another matter that occurred almost simultaneously "alarming."[2]

The evidence, taken in the light most favorable to Plaintiffs, as required on motions for summary judgment, demonstrates that McCann and her supervisor,

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[1] This is just one of many disputed issues – whether McCann's claimed "solo" interview with Cassandra Garcia even occurred, as the evidence from Cassandra Garcia, the police officer who interviewed Cassandra with McCann and the hospital records do not support McCann's claim this interview even took place.

[2] In his Order on the parties' cross-motions for summary judgment, Judge Benitez stated that Caitlin McCann's conduct in preparing a letter that contained information which she knew to be false to submit to aid a child's father in family court was "alarming." (*Dees v. County of San Diego*, No. 3:14-cv-00189-BEN-DHB, 2016 WL 9488706, *7 (S.D.Cal. May 13, 2016).

Escamilla-Huidor, collaborated and agreed to take the Garcia children from their home without cause.

The very foundation of Plaintiffs' wrongful removal claims is based on disputed issues of material fact – disputed due largely to McCann's false statements and Escamilla-Huidor's unwavering support of her subordinate. Both the District Court and the Ninth Circuit Court of Appeals agree these factual disputes must be resolved before it can determine whether Petitioners are entitled to qualified immunity. This petition must be denied.

FACTUAL BACKGROUND

Petitioners' recitation of the "facts" upon which their writ petition is based is inaccurate and, in some cases, false. Petitioners' purpose was clearly to present this Court with a situation where the social workers were forced to make a "split-second" decision that would warrant the application of qualified immunity. That is not, however, what actually occurred.

The Garcia family is and was a stable nuclear family composed of a mother (Sheila Garcia), father (Rudy Garcia) and three daughters (Cassandra Garcia and minors CNG and CJG). Unfortunately, Cassandra struggled with mental health problems throughout her pre-teens and teens. Her parents were deeply concerned about Cassandra's mental health, and had her in treatment from when she was in sixth grade.

Despite her mental health challenges, Cassandra was an excellent student and participated in band.

Cassandra's mental health became more concerning to her parents after the family's move to San Diego County in early 2012. The move had left her with few friends in the neighborhood and she began to show signs of suicidal ideation. On the suggestion of Cassandra's psychologist, Sheila and Rudy Garcia had Cassandra hospitalized in a psychiatric ward in October 2012. This was upsetting to Cassandra, and a few days after she returned home after her hospitalization, she and her parents had an emotional discussion about Cassandra's mental health and the ways that she was acting out.

After the discussion, Cassandra went upstairs and lay down on her parents' bed, where her sisters were sleeping. When Rudy went to bed later in the evening, he believed it was Sheila on the bed with the girls. He jostled the sleeping figure to wake her up, and discovered in the process it was Cassandra.[3] Rudy apologized to Cassandra, who told him it was "OK."

Later the next evening, when Cassandra told Sheila what happened, Sheila told Rudy he needed to leave the home until she could investigate further.

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[3] Rudy testified that he moved the shoulder or arm of who he believed to be the sleeping Sheila, and didn't touch her in any other way. Cassandra has given varying accounts of where she was touched, with the most consistent account being that Rudy touched her stomach and leg (there is no dispute that she was wearing a T-shirt and shorts).

When Sheila and Rudy talked several days later, Rudy explained the mistaken identity. Cassandra also confirmed her belief and understanding that it was a case of mistaken identity. *It is undisputed there were never any similar incidents before or after this isolated event.*

After October 2012, Cassandra continued to receive psychiatric and therapeutic care, but still struggled with anxiety and depression. In January 2013, Cassandra and her parents agreed that she would be hospitalized again in an inpatient setting. During the admission process, Cassandra met with a hospital social worker "who was poking and prodding and using my feelings against me," in Cassandra's words. This social worker claimed that during this discussion, Cassandra told her that in the October 2012 incident, her mother became ill after drinking and fell asleep in Cassandra's bed; that Cassandra was in her mother's bed, and that her father came in and began to "fondle her and take nude pictures of her." The social worker filed a report with CPS on January 22, 2013.

Although the case was assigned to Petitioners Caitlin McCann and Gloria Escamilla-Huidor on the following day, Petitioners did not even begin to investigate the report until **five days later** (although in their petition to this Court, they claim this was an urgent situation which required prompt action). McCann testified the delay was because there was no "immediate risk" to Cassandra – or, by implication, to her sisters. Thus, On January 23, 24, 25, 26, 27 and

most of January 28, Cassandra was being treated in an impatient setting, and CNG and CJG were happy and healthy in their parents' care.

Prior to Petitioners' involvement, the medical professionals at Sharp Mesa Vista in conjunction with Cassandra's parents, were making arrangements for Cassandra to be transferred to another inpatient mental health facility where she would receive specialized treatment for another two weeks. On January 25, 2013, McCann notified Sharp Mesa Vista they were not to discharge Cassandra to another facility until further notice. McCann had not even spoken with Cassandra when she gave these instructions.

Three days later (five days after McCann was assigned to investigate the referral), on January 28, 2013, McCann finally went to Sharp Mesa Vista to interview Cassandra. McCann first spoke with the hospital social worker (Benaderet). McCann claims Ms. Benaderet told her a "nurse" divulged that Cassandra's father had ejaculated during the incident and that he put his hand in her underwear. Ms. Benaderet denies she said this, there is no evidence of any such "disclosure" in the Sharp Mesa Vista records, and Cassandra categorically denies she ever said *any such thing* to anyone. Moreover, McCann admits she never bothered to ask to speak with the nurse or even find out who the nurse was, and never told the investigating senior Chula Police Department child abuse detective Rebecca Hinzman of this information. It is almost certain McCann made this detail up to support her decision to remove the children.

In addition, McCann's report of her interview with Cassandra and the report by the detective *who performed the interview with McCann* are diametrically opposed to each other. The detective's report, which is consistent with Cassandra's testimony about the interview, indicates that Cassandra said the incident with her father was isolated, that Cassandra knew it to be an accident, and that Cassandra felt safe around her father. Later, after being confronted at her deposition about these glaring inconsistencies, McCann claimed Cassandra provided additional details in a private interview – an interview which Cassandra, the detective, and the hospital notes deny happened. McCann's own notes indicate that there was only one interview, *and it took place in the presence of Det. Hinzman*.

It is the details McCann claimed were divulged by Cassandra during this contested interview that Petitioners rely upon, almost exclusively, in their petition. The overwhelming evidence in this case indicates that all of these details were made up by McCann. Det. Hinzman, a seasoned child abuse investigator with more than 25 years' experience interviewing children and adults related to allegations of child abuse, stated if Cassandra had made any of the statements attributed to her by McCann, she would have immediately arrested her father on suspicion of child abuse. In addition, none of the other details noted by McCann, including purported alcohol abuse, or Cassandra having to care for her sisters, were in Det. Hinzman's report. Even in her dubious claim that a second

interview did take place, McCann admits Cassandra never said her father inappropriately touched her at any time other than the October incident *or that her sisters had ever been inappropriately touched.*

Following the joint interview between McCann, Det. Hinzman and Cassandra, McCann interviewed CNG, who was then 10 years old, at her school. CNG told McCann that her father had never inappropriately touched her, that her parents did not have any problem with alcohol, and that she felt safe at home. McCann did not seize CNG at that time.

McCann then went to the home of CJG's daycare provider. There, McCann spoke with Maria Trinidad, CJG's day care provider, who told McCann that Sheila and Rudy were "very nice and cooperative" and she had no concerns. Although McCann could have spoken further with Trinidad, she did not do so, claiming it was because of a "language barrier." This is itself in dispute, since Trinidad speaks English and *it is undisputed* that McCann's supervisor, Escamilla-Huidor, with whom McCann had been communicating throughout her "investigation," spoke fluent Spanish and could have interpreted for her. Trinidad also told McCann she was a *licensed daycare operator* who had been fingerprinted and trained in first aid and CPR.

After her interviews with Cassandra and CNG, and observation of CJG, McCann interviewed Sheila and Rudy. Following her interviews, McCann advised Rudy and Sheila she had concerns due to Cassandra's claimed statements about the incident and asked if

they would agree to Rudy moving out of the home while she continued her investigation. *Rudy and Sheila agreed*. Sheila also agreed not to use alcohol, agreed to a screening treatment program recommended by McCann, and agreed to cooperate with the investigation (including allowing her children to speak with McCann and other social workers). McCann also knew and understood both parents were supportive of and facilitated Cassandra's mental health treatment, including having her stay as long as necessary in the inpatient facility recommended by the doctors for her treatment. *This evidence is without dispute.*

Despite all of these agreements, and Sheila informing McCann that CNG and CJG could be cared for by her mother, who was en route to their home, or Trinidad if necessary, McCann, in consultation with her supervisor, Escamilla-Huidor, made the decision to instead seize CNG and CJG and take them away from their parents and home.

Escamilla-Huidor *claims* she did not know Sheila's mother was on her way to San Diego, or that the *licensed day care provider* would be willing to take the children at the time the seizure decision was made. She also claims she didn't know Cassandra had told McCann the October 2012 incident was an accident. However, *Escamilla-Huidor admits she knew that Rudy agreed to move out of the home until the investigation was complete, there was no evidence CNG or CJG had been abused in any way and that her reasons for seizing the children were based on speculation.*

During their conversations about CNG and CJG's unwarranted seizure from their parents on the afternoon of January 28, McCann and Escamilla-Huidor also made the decision to seize Cassandra, who was still at Sharp and was scheduled to go the inpatient therapeutic mental health facility. As with the other children, even though they had ample time to do so, McCann and Escamilla-Huidor refrained from making an attempt to obtain a warrant authorizing them take Cassandra into custody. Instead, Escamilla-Huidor called Sharp Mesa Vista on January 28 at approximately 5:20 p.m. and told the hospital that Child Protective Services was taking custody of Cassandra and instructed that she could not be discharged without CPS approval, ignoring the recommendations of Cassandra's doctors. McCann transported Cassandra to the County's shelter-care facility the following day.

All of the children were taken to the County's shelter-care facility, Polinsky Children's Center (PCC). This is a place where, in CNG's words, "innocence comes to die." McCann and Escamilla-Huidor's removal of the Garcia children from the care and custody of their parents has caused irreversible trauma in all three of the children. The County claims that it cannot stop children over 12 from leaving the facility. Subsequently, Cassandra, this troubled young girl, was able to walk out of the County shelter care facility four times in a three-month period. The last time she did, she was forcibly raped.

PROCEDURAL BACKGROUND

The present appeal is from a June 18, 2018 order from the Southern District of California, denying Petitioners' Motion for Summary Judgment requesting that they be held immune for their actions. (App. 16) In denying Petitioners' motion, the District Court stated: "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. 37, fn. 9)

On December 5, 2018, the District Court denied Petitioners' motion for reconsideration of the denial of summary judgment. (App. 88) Citing Ninth Circuit precedent that issues of qualified immunity should not be decided by the court when the answer "depends on genuinely disputed issues of material fact," the District Court reiterated that it had determined that genuinely disputed issues of material fact remained as to whether McCann and Escamilla-Huidor had reasonable cause to believe that any of the Garcia children were in imminent danger of serious bodily injury and that the scope of the intrusion was reasonably necessary to avert that injury. (App. 92)

The Ninth Circuit agreed the District Court properly denied qualified immunity on this claim "because the record is unclear on whether leaving the children in the home would have put them at risk of 'imminent danger of future harm.'" (App. 3) "These factual disputes prevent the conclusion that, as a matter of

law, imminent serious injury justified the warrantless removal of the sisters from their home." (App. 4) Most of the factual disputes involve the statements by Petitioners McCann and Escamilla-Huidor in the documents they later presented to the Juvenile Court to justify their removal of the children. As outlined above, the overwhelming evidence is these submissions were false.

In his concurring/dissenting opinion, Circuit Judge Collins stated that he would have reversed the denial of qualified immunity because, in his view, based on the "confluence of factors," there was no clearly established law which would have served to inform the social workers their actions were unconstitutional. (App. 11) Judge Collins then cites evidence to support his rationale which he claims he was viewing "in the light most favorable to Plaintiffs." (App. 11-12) Judge Collins however, cited *Petitioners'* recitation of that evidence, which is very much in dispute. (App. 12) His concurring/dissenting opinion served to underline the factual disputes which prevented both the district court and the Ninth Circuit panel from granting qualified immunity to McCann and Escamilla-Huidor.

ARGUMENT

I. THIS COURT SHOULD NOT GRANT CERTIORARI AS IT WOULD VIOLATE SUPREME COURT RULE 10

Supreme Court Rule 10 states that a petition for a writ of certiorari will be granted only for **compelling** reasons. Such reasons may include that a court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter. The Court "does not typically grant a petition for a writ of certiorari" to review a factual question. *Salazar-Limon v. City of Houston, Tex.*, ___ U.S. ___, 137 S.Ct. 1277, 1278, 197 L.Ed.2d 751 (Mem) (2017).

Here, Petitioners are requesting this Court to grant their petition for a writ of certiorari based on lower court decisions that denied them qualified immunity due to factual disputes that must be decided by the trier of fact before that issue can be determined. This is not the type of case that is appropriate for certiorari. In fact, this is not even the type of case that is appropriate for appellate review.

In both of its rulings, the district court held it was denying Petitioners' Motion for Summary Judgment (and therefore, qualified immunity) because there were disputed issues of material fact that were relevant to its analysis. The Ninth Circuit agreed, stating, "These factual disputes prevent the conclusion that, as a matter of law, imminent serious injury justified the

warrantless removal of the sisters from their home." (App. 4)

A judge's function on summary judgment "is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Tolan v. Cotton*, 572 U.S. 650, 656, 134 S.Ct. 1861, 188 L.Ed.2d 895 (2014). "Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id*. at 656-657. This applies "even when . . . a court decides only the clearly-established prong" of the qualified immunity standard. *Id*. at 657. Courts "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions." *Id*.

Here, the district court and the majority panel of the Ninth Circuit took care not to define the context of the case "in a manner that imports genuinely disputed factual propositions." In doing so, those courts properly held that disputed issues of fact prevented them from granting summary judgment.

Petitioners rely heavily on the dissent to the Ninth Circuit decision, wherein the Circuit Court Judge did exactly what this Court cautioned against in *Tolan*. In stating that he would have granted qualified immunity to Petitioners, the dissenting judge defined the case's context in the light most favorable to the Petitioners, who were the moving parties. He states:

> . . . the evidence established that Defendants were aware of the following circumstances at the time that they acted: that 1) a 16-year-old girl had reported to an initial social worker that her father had inappropriately fondled her while drunk and 2) that her parents would regularly drink until vomiting, 3) leaving her to care for her two- and ten-year-old sisters; that the 4) 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; 5) 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, 6) 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. (*Numbers inserted for clarity of discussion*). (App. 12)

Each of the 6 "facts" numbered in the above quote are not only "in dispute" but in most instances demonstrably false. The evidence supplied by Plaintiffs in opposition to Petitioners' Motion for Summary Judgment challenged every one of McCann's statements, either by showing opposing evidence, or by presenting evidence that her purported interviews never even occurred. Although the evidence was clearly disputed, Circuit Court Judge Collins, in essence, adopted

Petitioners' view of the evidence in connection with his dissent.

In *Johnson v. Jones*, 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), this Court held that a defendant may not appeal a district court's summary judgment order "insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. 304 at 320. In such cases, "a court of appeals may be required to consult a 'vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials.' That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment." *Ashcroft v. Iqbal*, 556 U.S. 662, 674, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citations omitted). Appeals on the issue of qualified immunity should only be available when the appeal presents a "purely legal issue," which is not true "when the district court determines that factual issues genuinely in dispute preclude summary adjudication." *Ortiz v. Jordan*, 562 U.S. 180, 188, 131 S.Ct. 884, 178 L.Ed.2d 703 (2011).

Due to the procedural backdrop of this appeal, the disputed material facts, and Rule 10's caution against granting certiorari where facts are in dispute in the underlying record, this Court should deny the Petition outright. "[G]enuine disputes are generally resolved by juries in our adversarial system." *Tolan*, 572 U.S. at 660. Such questions "cannot be withdrawn from the jury unless 'the facts and the law will reasonably support only one conclusion' on which 'reasonable

persons . . . could [not] differ.'" *Air Wisconsin Airlines Corp. v. Hoeper*, 571 U.S. 237, 259, 134 S.Ct. 852, 187 L.Ed.2d 744 (2014). The other issues raised by Petitioners (i.e., the qualified immunity standard cited by the district court and Ninth Circuit and citation to subsequent case authority) are not relevant to the reasons Petitioners' motion was denied.

II. THE NINTH CIRCUIT APPLIED THE PROPER TEST FOR QUALIFIED IMMUNITY

As discussed above, this Court need not address this issue because of the clear factual disputes that must first be resolved. Even if it were properly before this Court, however, the Ninth Circuit quoted and relied upon recent decisions by this Court on how to define "clearly established law" when deciding an issue of qualified immunity. Indeed, the Ninth Circuit panel repeated this Court's admonishment that clearly established law not be defined at a "high level of generality," while also recognizing this Court's repeated statement that it is not necessary to "identify a prior identical action to conclude that the right is clearly established." (App. 4, citing to *Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018)) The Ninth Circuit also noted that it was "beyond debate" that "children can only be taken from home without a warrant to protect them from imminent physical injury or molestation in the period before a warrant [can] be obtained." (App. 3)

The Ninth Circuit applied to this set of facts the precise test this Court has discussed in multiple decisions during the past ten years. As an example, in *District of Columbia v. Wesby*, ___ U.S. ___, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018), this Court stated:

> Under our precedents, officers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was "clearly established at the time." *Reichle v. Howards*, 566 U.S. 658, 664, 132 S.Ct. 2088, 182 L.Ed.2d 985 (2012). "Clearly established" means that, at the time of the officer's conduct, the law was "'sufficiently clear' that every 'reasonable official would understand that what he is doing'" is unlawful. *al–Kidd, supra*, at 741, 131 S.Ct. 2074 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). In other words, existing law must have placed the constitutionality of the officer's conduct "beyond debate." *al–Kidd, supra*, at 741, 131 S.Ct. 2074. This demanding standard protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).
>
> To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) (*per curiam*), which means it is dictated by

"controlling authority" or "a robust 'consensus of cases of persuasive authority,'" *al–Kidd, supra*, at 741–742, 131 S.Ct. 2074 (quoting *Wilson v. Layne*, 526 U.S. 603, 617, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999)). It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle*, 566 U.S., at 666, 132 S.Ct. 2088. Otherwise, the rule is not one that "every reasonable official" would know. *Id*., at 664, 132 S.Ct. 2088 (internal quotation marks omitted).

The "clearly established" standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him. The rule's contours must be so well defined that it is "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). This requires a high "degree of specificity." *Mullenix v. Luna*, 577 U.S. ___, ___, 136 S.Ct. 305, 309, 193 L.Ed.2d 255 (2015) (*per curiam*). We have repeatedly stressed that courts must not "define clearly established law at a high level of generality, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." *Plumhoff, supra*, at 2023 (internal quotation marks and citation omitted). A rule is too general if the unlawfulness of the officer's conduct "does not follow immediately

> from the conclusion that [the rule] was firmly established." *Anderson, supra*, at 641, 107 S.Ct. 3034. In the context of a warrantless arrest, the rule must obviously resolve "whether 'the circumstances with which [the particular officer] was confronted . . . constitute[d] probable cause.'" *Mullenix, supra*, at 309 (quoting *Anderson, supra*, at 640–641, 107 S.Ct. 3034; some alterations in original).

Id., 138 S.Ct. at 589-590.

Petitioners have latched onto the statement in the above-quoted decision: "A rule is too general if the unlawfulness of the officer's conduct 'does not follow immediately from the conclusion that [the rule] was firmly established.'" *Id*. at 590. This language came from an earlier Supreme Court decision, *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987). In *Anderson*, the court of appeals stated that the right violated was "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances." *Id*. at 640. The question presented was whether "a reasonable officer could have believed Anderson's warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed." *Id*. at 641.

In discussing the particularity requirement, this Court cited the oft-repeated rule: "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, . . . but it is to say that in the light

of pre-existing law the unlawfulness must be apparent." *Anderson, supra*, at 640 [citations omitted.] This Court recently emphasized that in analyzing qualified immunity, it is not required that the right be defined in the hyper-factual terms claimed by Petitioners. (*See*, *e.g.*, *Taylor v. Barkes*, 575 U.S. 822, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015), wherein the right at issue was defined as "an incarcerated person's right to the proper implementation of adequate suicide prevent protocols." *Id*. at 825.

Here, it is "beyond debate" in the Ninth Circuit that children can only be taken from the care, control, and custody of their parents without a warrant in cases where there is an articulable, imminent, and serious threat that the children will be physically injured or abused if the children are left in the custody or control of their parents during the time it would take to obtain a warrant; and that the only way to protect the children is to remove them from the care, custody or control of their parents. *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000); *Rogers v. County of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007); *Mabe v. San Bernardino County, Dept of Public Social Services*, 237 F.3d 1101 (9th Cir. 2001). The law requires that the social worker conduct a "thorough" investigation, pursuing "reasonable avenues of investigation," including investigating information that will clarify matters. *Wallis*, 202 F.3d at 1138. This is a rule that every social worker in the State of California knows – including Petitioners McCann and Escamilla-Huidor.

The only "articulable" "imminent" threat to the children at the time Petitioners removed them from their parents' care and custody was that based on highly disputed statements from McCann. Each of the statements upon which McCann relied to justify the removal is disputed and likely fabricated by McCann. It would be a true miscarriage of justice for a court to provide qualified immunity to a social worker who fabricated the claim of exigency to protect her from liability for her unconstitutional actions. It is well settled that a government official "may not knowingly use false evidence, including false testimony" to support their actions. *Napue v. People of State of Ill.*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959). This rule does not "cease to apply merely because the false testimony goes only to the credibility of the witness . . . A lie is a lie, no matter what its subject." *Id.* (*See also Hardwick v. County of Orange*, 844 F.3d 1112 (9th Cir. 2017), wherein the court stated that "[n]o official with an IQ greater than room temperature in Alaska could claim that he or she did not know that" the knowing submission of false evidence violated both state and federal law, and "is hardly conduct for which qualified immunity is either justified or appropriate." *Id.* at 1118-1119.

III. THERE IS NO SUPPORT FOR PETITIONERS' CLAIM THAT THE NINTH CIRCUIT APPLIED A LESSER QUALIFIED IMMUNITY STANDARD

Petitioners claim, again based on the dissent from the Ninth Circuit's decision, that the panel used a different qualified immunity standard and/or analysis than that used in excessive force cases. This comment was based on the panel's statement: "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." (App. 4) But the panel goes on to state: "In this case, however, we deal with a specific line of cases that provides 'clear notice of the law to social workers responsible for protecting children from sexual abuse and families from unnecessary intrusion,'" and cites this Court's repeated statement that "we need not identify a prior identical action to conclude that the right is clearly established." (App. 4)

The panel's conclusion was that no matter the standard, and because there were "disputed facts," including whether Petitioners were telling the truth about the reasons for the removal, it was "up to a jury to determine whether Defendants had 'reasonable cause to believe exigent circumstances existed,'" (App. 4), and thus the panel (like the District Court) could not find qualified immunity. There is thus no basis for this appeal or review.

Nevertheless, in the event this Court wishes to address the merits of the dissenting justice's critique of the panel, Respondents do contend, like Justice Clarence Thomas, that the "one-size-fits-all" application of qualified immunity across the spectrum of potential governmental action is an "odd fit" in situations, like the present case, where there is no need to make a split-second decision.

This Court developed the doctrine of qualified immunity to protect government officials "'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 229, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009), citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id*. (emphasis supplied) In *Harlow*, this Court held that qualified immunity should be defeated if an official "'*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] . . . " 457 U.S. 800, 815 (emphasis in original). "Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made

to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id*. at 819.

The language "he should be made to hesitate" is important in evaluating the application of qualified immunity across the spectrum of official government actions. In police misconduct cases, which are the types of cases most often reviewed by this Court, the law enforcement officers are making split-second decisions and may not have time or room to hesitate, and thus the level of specificity in defining the contours of their actions may need to be greater than that in cases where the official has the time to hesitate and evaluate the constitutionality of his or her conduct before acting. This factor was emphasized by this Court in *Kisela v. Hughes*, ___ U.S. ___, 138 S.Ct. 1148, 200 L.Ed.2d 449 (2018), wherein this Court noted that "Kisela had mere seconds to assess the potential danger." *Id*. at 1153.

In the past several years, Justice Thomas of this Court has emphasized the problems with "one size fits all" qualified immunity analysis in several dissents. (*See Baxter v. Bracey*, ___ U.S. ___, 140 S.Ct. 1862, 207 L.Ed.2d 1069 (2020), *Hoggard v. Rhodes*, ___ U.S. ___, 141 S.Ct. 2421 (Mem) (2021).) In *Hoggard*, Justice Thomas stated "the one-size-fits-all doctrine is also an odd fit for many cases because the same test applies to officers who exercise a wide range of responsibilities and functions." *Id*. "[W]hy should university officers, who have time to make calculated choices about enacting or enforcing unconstitutional policies, receive the same protection as a police officer who makes a

split-second decision to use force in a dangerous setting?" *Id*. at 2422.

In this case, and even assuming that a jury finds their stories to be credible, McCann and Escamilla-Huidor *had days*, not seconds, to make their decisions. Additionally, McCann had the opportunity to consult on multiple occasions with her supervisor, Escamilla-Huidor. They had time to "hesitate" to consider the constitutionality of their actions, and if need be go to court and obtain a warrant. In this situation, the contours of the rights involved were "sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it." *Kisela*, *supra*, 138 S.Ct. at 1153.

As stated above, in the Ninth Circuit, the clearly established case law at the time of the conduct at issue required articulable, imminent and serious physical injury or abuse to justify removing the children from the care and custody of their parents without a warrant. *Mabe, supra*, 273 F.3d at 1108-1109. As stated in *Rogers, supra*,

> . . . [p]rior to the events in question, we had repeatedly held that a family's rights were violated if the children were removed absent an imminent risk of serious bodily harm. A reasonable social worker would need nothing more to understand that she may not remove a child from [his or her] home on the basis of a [situation] that does not present such a risk.

487 F.3d at 1297.

Accordingly, in cases involving social worker's actions, the "appropriate" level of specificity is whether reasonable social workers would understand, based on prior case law, that their actions were unconstitutional. This does not require the hyper-factual-definition context claimed by Petitioners.

Notably, Petitioners claim their conduct should be governed by an even higher standard than that applied to law enforcement officers, maintaining the decisions of social workers are even more important than split-second, use-of-force, life and death, decisions made by law enforcement officers. This claim is ludicrous on its face. Further, Petitioners did not raise this in either the district court or the Ninth Circuit. Moreover, there is no basis for applying a hyper-factual analysis, even if the facts were undisputed. Cassandra was scheduled to go into an inpatient facility, and there was no danger to the other children that the alternatives presented to Petitioners could not have cured.[4]

The case law existing at the time of Petitioners' actions put them on fair notice that where they had *no articulable evidence* of any imminent risk to any of the Garcia children at the time they made the decision to remove them, it was unconstitutional to do so.

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[4] Petitioners could have asked Rudy to leave the home, could have asked both Sheila and Rudy to leave the home so the children could stay with their grandmother, or could have asked Trinidad, a licensed caregiver, to care for the children. Petitioners could have also sought a warrant.

The cases from other Circuits cited by Petitioners do not support their claim that the Ninth Circuit's analysis was contrary to this Court's precedent; or create a conflict amongst the circuits. In fact, in **all** of the cases Petitioners cite, the social workers *had obtained a court order prior to removing the children*, which was the most pertinent factor discussed by the court in deciding that the workers should be afforded qualified immunity.

In its discussion concerning social workers' potential immunities from the plaintiffs' claim that the social workers violated their constitutional rights when executing a removal order, the Sixth Circuit stated that when executing a warrant, the social workers were "acting in a police capacity rather than as legal advocates," and thus the qualified immunity doctrine rather than the absolute immunity doctrine afforded to legal advocates would apply. *Brent v. Wayne County Dep't of Human Services*, 901 F.3d 656, 685 (6th Cir. 2018). *There was no discussion of the specificity required in applying that doctrine.* The Seventh Circuit conducted the same analysis in *Millspaugh v. County Dept. of Public Welfare of Wabash County*, 937 F.2d 1172 (7th Cir. 1991), where the court held that an application for an order to obtain custody of children was "much like a police officer's affidavit for seeking a search warrant," which "falls outside the scope of absolute immunity." *Id*. at 1176. *The court did not discuss the contours of the right.*

In *N.E.L. v. Douglas County, Colorado*, 740 Fed. Appx. 920 (10th Cir. 2018), the court did address the

contours of the constitutional right, but found there was no clearly established law for wrongful removal when, as was the case in *N.E.L.*, the social worker had an *order to place the children in custody*. *Id*. at 930. It was that distinguishing factor alone that governed the court's decision that the social workers were entitled to qualified immunity. The same was true in *White by White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997), wherein the fact that the social worker sought a judicially approved order before removing the children was determinative in finding that she violated no clearly established law in the removal.

Here, Petitioners took *no steps* to obtain a court order to remove the Garcia children during the 5 days they had to investigate the allegations. That is likely because they had no articulable evidence that the Garcia children were at any risk, let alone imminent risk of serious physical harm when they made their decision to remove the children. As noted by the Seventh Circuit in *Millspaugh*, "immunity . . . may embolden social workers to pursue their private agendas." *Id*. at 1177. Petitioners are trying to use this Court as another step in that pursuit. The Ninth Circuit's analysis comports with decisions of this Court and other circuits. Petitioners knew the contours of the Garcia family's constitutional rights; but made the decision to ignore them; relying on the courts to accept false allegations as "facts" that would immunize them from their actions.

IV. THE NINTH CIRCUIT DID NOT RELY ON CASES THAT POST-DATED THE CONSTITUTIONAL VIOLATION

In its decision, the Ninth Circuit cited *Demaree v. Pederson*, 887 F.3d 870, 883 (9th Cir. 2018) twice, as follows:

> ("It is 'beyond debate,' . . . that existing Ninth Circuit precedent establishes that children can only be taken from home without a warrant to protect them from imminent physical injury or molestation in the period before a warrant could be obtained") (citing and discussing *Mabe v. San Bernardino County*, 237 F.3d 1101, 1108–09 (9th Cir. 2001) and *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000)) (App. 3)

> In this case however we deal with a specific line of cases that provides "clear notice of the law to social workers responsible for protecting children from sexual abuse and families from unnecessary intrusion." *Demaree*, 887 F.3d at 884 (citing and discussing *Mabe* and *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007)) (App. 4)

This issue is tangential to the primary issue which must be determined by this Court – whether there are disputed facts that require resolution by the trier of fact before any finding of qualified immunity can be made. However, the clear purpose of the Ninth Circuit's citations to *Demaree* is to show that, beginning as early as 2000 (and in 2008, when the conduct which was the subject of the *Demaree* action took place), there

was a clear line of authority in the Ninth Circuit that children can only be taken from their home without a warrant where there is imminent risk of physical injury in the period before a warrant can be obtained. The Ninth Circuit was not "relying" on *Demaree* as one of the cases that placed that issue "beyond debate," but simply pointing out that it was just one in a long line of cases preceding the case at bar, that set out the warrant requirement if there was no imminent physical danger to the children. This is far different than the situation in *Kisela v. Hughes*, *supra*, where the Court of Appeals relied on a post-conduct case as "[t]he most analogous Ninth Circuit case," which was "illustrative" of clearly established law. 138 S.Ct. at 1154.

CONCLUSION

This case involves numerous questions of fact, including questions as to whether the events Petitioners claim led to their removal of the Garcia children even occurred or whether they were fabricated by Petitioners. It is for a jury to decide these issues of fact before the question of qualified immunity can be considered. For that reason and the other reasons outlined above, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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