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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY

The doctrine of qualified immunity is widely misunderstood. After this Court reversed two denials of qualified immunity in excessive force cases earlier this term, commentators and scholars renewed the familiar chorus of criticism, arguing that the doctrine, at its core, is nothing more than a legal device empowering police officers to act with impunity. In reality, the doctrine protects the public by ensuring that public servants—especially those who protect the vulnerable under tense and uncertain circumstances—have the breathing room to make difficult decisions.

Here, social workers Caitlin McCann and Gloria Escamilla-Huidor considered the information that was presented to them, and took action to protect young Cassandra and her sisters from further sexual abuse. This is precisely the type of weighty decision-making that qualified immunity is designed to protect. This case goes to the very core of the doctrine and why it is necessary to promote the public good.

Here, the Ninth Circuit's denial of qualified immunity, if left undisturbed, will have profound consequences for the social work profession and the hundreds of thousands of vulnerable children that social workers are obligated to protect. There is a growing wave of section 1983 litigation targeting social workers, particularly those in the child welfare field, but this Court has never addressed qualified immunity in the context of social work. With no assurance from this Court that their decisions will be protected, social

workers confronting difficult cases will hesitate to take the actions necessary to protect children. And in the field of child welfare, nearly every case is difficult.

If section 1983 requires such timidity of social workers, even when they suspect recurring child abuse, this Court should grant certiorari and make that plain. If qualified immunity instead insulates social workers from personal liability, except when the unconstitutionality of their actions "follows immediately" from prior law, then this Court should grant certiorari and reverse. Regardless of the eventual outcome, the question calls out for an answer on the merits. Vulnerable children and families need social workers who can act confidently and decisively. That cannot happen so long as social workers are forced to operate under a cloud of legal uncertainty.

I. THIS PETITION ASKS THE COURT TO ADDRESS THE CLEARLY ESTABLISHED PRONG, NOT TO REVISIT THE FACTS

A. The Petition Presents Clean Legal Issues, And Respondents' Attempt To Muddy The Factual Waters Is Unavailing.

This petition presents three questions of law: (1) whether this Court's "follow immediately" requirement, which recently resurfaced in *D.C. v. Wesby*, 138 S. Ct. 577 (2018), should play a more prominent role in the qualified immunity analysis; (2) whether qualified immunity provides less protection to social workers

than it does to police officers; and (3) whether cases that postdate the alleged constitutional violation can play any role in the "clearly established" inquiry.

Petitioners seek certiorari so social workers across the country can understand the rules governing their decisions, and so they have fair notice of how much breathing room they have when making hard decisions. Respondents do not quarrel with the importance of the issues, and they make no effort to harmonize the inter-circuit (Pet. 15–21) and intra-circuit splits (Pet. 29). Nor do they address the troubling trend in the Ninth Circuit of applying a more lenient qualified immunity test in unpublished cases (Pet. 21–22), or of amending opinions to fortify questionable qualified immunity denials (Pet. 21 n.5).

Instead of addressing the issues that bear on the certiorari determination, respondents attempt to relitigate summary judgment by characterizing the record as a factual morass, and attacking the credibility of the petitioners along the way. Respondents miss the mark in three respects.

First, respondents frame their discussion under the familiar *Tolan* standard for summary judgment, arguing that factual disputes precluded summary judgment. But this case involves the "clearly established" prong, and the inquiry is primarily legal, not factual. The existence of disputed facts does not defeat summary judgment on qualified immunity; rather, courts are to consider disputed facts in the light most favorable to the non-movant, and to consider them alongside

the undisputed facts. The approach that respondents urge—denying summary judgment any time the plaintiff can dispute any fact—would effectively write qualified immunity out of the law. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001) ("[D]eny[ing] summary judgment any time a material issue of fact remains . . . could undermine the goal of qualified immunity. . . ."); *Bingue v. Prunchak*, 512 F.3d 1169, 1173 (9th Cir. 2008) (mechanical approach "would eviscerate the very purpose of qualified immunity, which is to protect defendants even from defending the action").

Second, Judge Collins identified the key facts, "*viewed in the light most favorable to Plaintiffs*." App. 11. Specifically:

- Cassandra reported that Mr. Garcia had fondled her while drunk.
- Cassandra reported that her parents would drink until vomiting, leaving her to care for her younger sisters.
- When asked if Mr. Garcia had inappropriately touched her younger sisters, Cassandra did not answer, and started to cry.
- Cassandra's ten-year-old sister confirmed her parents drank until vomiting (although "not so much lately").
- At the time, it would have taken 24 to 72 hours to obtain a warrant to bring the children into protective custody.

App. 11–12.

Respondents make the conclusory statement that the facts identified by Judge Collins are "in dispute [and] in most cases demonstrably false," but fail to provide any further explanation. *See* Opp. 15. That is not enough. As one court put it: "[A] party's labelling or characterizing a fact as 'disputed' does not make it so—the record evidence the opposing party points to must support the dispute of fact. . . ." *U.S. E.E.O.C. v. Bob Evans Farms, LLC*, 275 F. Supp. 3d 635, 638 (W.D. Pa. 2017).[1]

Third, respondents miss the mark in speculating that McCann tampered with the record. Neither the district court, the majority below, nor the dissent below credited such contentions. And respondents' citation to a separate district court decision (in which Judge Benitez found it "alarming" that McCann had sent an erroneous letter) fails to note that the erroneous letter had no consequence at all. On appeal, the Ninth Circuit dismissed plaintiffs' counsel's characterization of the letter as "pure hyperbole." *Dees v. Cnty. of San Diego*, 960 F.3d 1145, 1153 (9th Cir. 2020), cert. denied,

[1] Moreover, most of the purported disputes are immaterial. What matters here is the information known to McCann at the time of her decision. It is not relevant that Mr. Garcia, *at deposition*, denied that he was drunk, and claimed he had only a drink or two. It is not relevant that he claimed his wife had only one scotch. And it is not relevant that Cassandra, *at deposition*, backtracked on her report of sexual assault by claiming the hospital worker was "poking and prodding and using my feelings against me." Rather, the qualified immunity analysis must be undertaken "from the perspective of a reasonable [official] on the scene, rather than with the 20/20 vision of hindsight." *S.B. v. Cnty. of San Diego*, 864 F.3d 1010, 1014 (9th Cir. 2017).

141 S. Ct. 1501 (2021). The plaintiffs in *Dees* and in this action are represented by the same counsel.

B. This Case Is At Least As Cert-Worthy As The Ten Qualified Immunity Cases This Court Has Recently Reviewed.

Respondents' claim that a grant of certiorari would violate Rule 10 has no merit. This Court has granted certiorari and issued per curiam reversals of qualified immunity denials ten times in the past seven years alone. Two of these reversals were issued earlier this term. *See City of Tahlequah, Oklahoma v. Bond*, ___ S. Ct. ___, 2021 WL 4822664 (Oct. 18, 2021); *Rivas-Villegas v. Cortesluna*, ___ S. Ct. ___, 2021 WL 4822662 (Oct. 18, 2021). Notably, of this Court's ten recent qualified immunity decisions, five reversed the Ninth Circuit.

For two reasons, the decision below is an especially strong candidate for certiorari and reversal. First, while some of the Ninth Circuit's published decisions have signaled adherence to this Court's admonitions (*see S.B.*, 864 F.3d at 1015 ("We hear the Supreme Court loud and clear.")), its unpublished decisions have been less circumspect. *See* Pet. 21–23. This case provides a vehicle for cautioning the lower courts that unpublished qualified immunity opinions are subject to the same scrutiny as published opinions.

Second, this Court's ten reversals all involved police officers, allowing space for a "social worker exception" to take root in the lower courts. Guidance specific

to section 1983 actions against child welfare social workers, which has matured into a full-scale litigation industry, is necessary. As petitioners explain below (*see* Section III, *infra*, at pp. 11-13) social workers—especially those charged with investigating child abuse—deserve the protections of qualified immunity as much as police officers, if not more.

II. THE NINTH CIRCUIT HAS LOST SIGHT OF THE "FOLLOW IMMEDIATELY" REQUIREMENT

Respondents further ask this Court to deny certiorari because, in their view, there was no legal error below. It is "beyond debate," they argue, that McCann's and Escamilla-Huidor's actions violated the Constitution. Opp. 21, citing *Wallis v. Spencer*, 202 F.3d 1126 (9th Cir. 2000); *Rogers v. Cnty. of San Joaquin*, 487 F.3d 1288 (9th Cir. 2007); *Mabe v. San Bernardino Cnty.*, 237 F.3d 1101 (9th Cir. 2001).

But none of respondents' cases address facts similar to those at issue—a teenager complained of neglect and sexual abuse due to a parent's excessive drinking; the parents showed hostility and disregard toward the child-victim; obtaining a warrant for removal would result in leaving the children in the home for up to three days; and the suspected abuser recently started drinking again. There is no prior case addressing comparable facts, and a social worker would instead need to extrapolate from generic legal principles. *See Kirkpatrick v. Cnty. 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."); *Mueller v. Auker*, 700 F.3d 1180, 1188 (9th Cir. 2012) ("The phrase 'imminent danger' has not been given any detailed definition, either by *Wallis* or any other case, that could have guided [the official].").

Moreover, it does not "follow immediately" from any of respondents' cases that the social workers violated the Constitution. Respondents' first case, *Wallis*, merely states the exigency rule at the highest level of generality. *Wallis*, 202 F.3d at 1138. It provides no guidance, however, as to how the rule would apply to the circumstances facing McCann and Escamilla-Huidor. App. 9–10 (Collins, J., dissenting—"[T]he mere articulation of the very generally worded standard in *Wallis* is not sufficient, without more, to show that Defendants violated clearly established law.").

Plaintiffs' two remaining cases are inapposite, and the claimed unconstitutionality of McCann and Escamilla-Huidor's actions does not "immediately follow" from them. In *Mabe*, the social worker could have obtained a warrant to remove the children from their home within a few hours. *Mabe*, 237 F.3d at 1101. Here, it would have taken 24-72 hours. In *Mabe*, there was no "concern that the child would be . . . further abused during the time it would take to get a warrant." *Id.* at 1108. Here, waiting for a warrant would leave the children with the suspected abuser for up to three nights.

Moreover, in *Mabe*, *after* the social worker conducted her home visit and concluded that the father

was abusive, she left the child at home for four days before even presenting her report for committee review. *Id*. at 1105. This case is far different. McCann coordinated with the Police Department the same day she received the abuse referral, and began her investigation within one day of hearing back. Once she reached the conclusion that the children were not safe, she contacted Escamilla-Huidor and removed the children *on the spot*.

Rogers, too, is inapposite. In *Rogers*, the social worker was concerned about malnourishment, a dirty home, and neglect. *Rogers*, 487 F.3d at 1291. Here, McCann was concerned about sexual assault. In *Rogers*, the social worker waited eleven days after assignment to visit the home. Here, McCann called the police immediately, and conducted her home visit within a day of hearing back. In *Rogers*, the social worker did not remove the children until seven days after her home visit. Here, McCann was so concerned after meeting with Cassandra that she removed the children *on the spot*.

There is no prior precedent from which the unconstitutionality of the challenged actions would "follow immediately," and the Ninth Circuit's failure to address the requirement led it into error. This is not an isolated problem. The Ninth Circuit has all but lost sight of the "follow immediately" requirement, citing it only ***once*** (out of over 40 published qualified immunity decisions) since this Court reiterated the requirement in *Wesby* in 2018.

The other circuits have fared better, but not by much. *See* Pet. 12, n.1. All too often, judges favoring an expansive reading of qualified immunity cite the prohibition on defining rules at "too high a level of generality" (per *White*), while those favoring a narrow reading respond by noting that there is no need for "a case directly on point" (per *Mullenix*). Except in the clearest of cases, both the rule and its limitation can be stretched or contracted to support a grant or a denial.

The lower courts need tools to navigate this ambiguous space. In response to the abstract rule and the abstract exception, one can nearly always ask—how general is too general? But the "follow immediately" test is affirmative and active, and it encourages lower courts to consider how government officials *think* and make *decisions* about constitutional rights. Such officials should be liable for missteps only if the unconstitutionality of their actions, in the particular circumstances they face, is *immediately evident* from the prior cases on which they are presumed to have been trained.

This Court should grant certiorari to reaffirm the importance of the "follow immediately" requirement.

III. SOCIAL WORKERS DESERVE AT LEAST AS MUCH BREATHING ROOM AS POLICE OFFICERS, AND OFTENTIMES MORE

If respondents were correct that the undisputed record showed that Mr. Garcia merely "jostled the sleeping figure to wake her up" (Opp. 4), and that Cassandra's report of abuse was not serious because she was just "a troubled young woman in a mental institution" (Opp. 2), then this would not be a difficult case.

But respondents' recounting of the facts is a caricature of the actual record. Justice Collins listed the actual undisputed facts in his dissent, and they paint a troubling picture of abuse. App. 11–12. Cassandra had complained of sexual abuse; her father had started drinking again; and when asked if her father had also molested her young sisters (who were two years old and ten years old), Cassandra fell silent and began to cry.

To be sure, the information presented to McCann was uncertain and ambiguous in some respects. But that is the norm in social work. Social workers are charged with investigating the most intimate aspects of family life, and determining what goes on behind closed doors in troubled homes. There are rarely disinterested witnesses inside such homes, and there are rarely neutral bystanders. There are no body-worn cameras or security videos. And there are rarely any paper trails. Rather, social workers must talk to family members and assess their credibility, weighing the

information they provide against information from teachers, doctors, and any other witnesses.

It is the rare investigation where all witness testimony aligns, and all available evidence is in harmony. And it is commonplace for child-victims to delay full disclosure, initially testing the waters by revealing only fragments of the full picture of abuse. Social workers must weigh discordant facts, assess shifting stories, and decide which accounts to believe.

Here, McCann did just that, and decided there were far too many red flags. With the concurrence of her manager, she decided she could not leave the Garcia children alone with their father for the 24-72 hours that it would take to get a warrant. This is precisely the type of decision that the doctrine of qualified immunity is designed to protect. Social workers must assess the totality of the information, and make hard decisions, often on the spot, about the best interests of the child. The information they have is almost always imperfect, and the consequences of inaction are profound.

Certiorari is warranted to address how qualified immunity applies to social workers. Indeed, respondents' own brief confirms a point of agreement between the parties—that a one-size-fits-all approach to qualified immunity makes little sense. Opp. 25. Rather, this Court should direct lower courts to look at the specific circumstances that social workers face, the seriousness of the potential harm, and the urgency of their decisions. Here, all factors align in counseling toward a

robust immunity. When social workers are forced to make on-the-spot decisions based on imperfect information, they need to be afforded as much leeway as police officers, if not more.

IV. A CASE THAT POST-DATES THE EVENTS AT ISSUE SHOULD PLAY *NO* ROLE IN THE ANALYSIS

Below, the Ninth Circuit relied on *Demaree v. Pederson*, 887 F.3d 870, 883 (9th Cir. 2018), a case that post-dated the events at issue. This was, as Judge Collins put it, "plainly improper." App. 14. *Kisela* should have put this issue to rest, but the lower courts continue to cite and rely on such cases. This Court should grant certiorari to put an end to the practice.

CONCLUSION

Social workers need latitude to make difficult decisions, and children and families need social workers to have the courage to take decisive actions. This Court should provide clear direction that the doctrine of qualified immunity applies with full vigor in actions involving social workers. Qualified immunity is much more than a defense that insulates police officers from liability for excessive force. Rather, this case is the perfect vehicle for reiterating that the doctrine exists to protect the public, including vulnerable children, by

ensuring that our public servants are not driven by fear.

Respectfully submitted,

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