No. _____

In the
Supreme Court of the United States

JILL DILLARD, *et al.*,

Petitioners,

v.

KATHY O'KELLEY, *et al.*

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether the Court's opinion in *National Aeronautics and Space Administrator, et al. v. Nelson*, 562 U.S. 134 (2011), diverged from its previous holdings in *Whalen v. Roe*, 429 U.S. 589 (1977), and *Nixon v. Administrator of General Services et al.*, 433 U.S. 425 (1977), with respect to a constitutional right to informational privacy, such that officials who released personal information identifying minor victims of sexual abuse and the details of that abuse are entitled to qualified immunity.

2. Whether a constitutional right may be clearly established in the absence of controlling Supreme Court precedent for qualified immunity analysis. *Compare, e.g.*, *Carrillo v. Cnty. of Los Angeles*, 798 F.3d 1210 (9th Cir. 2015) (law clearly established for qualified immunity purposes based on controlling circuit authority even though the Supreme Court had not yet weighed in on the issue) *with Dillard v. O'Kelley*, 961 F.3d 1048 (8th Cir. 2020) (*en banc*) (law not clearly established, despite controlling circuit authority, because the Supreme Court was silent on the issue).

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs-Appellees below) are Jill Dillard, Jessa Seewald, Jinger Vuolo, and Joy Duggar.

Respondents (Defendants-Appellants below) are Kathy O'Kelley, Ernest Cate, and Rick Hoyt.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the *en banc* opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The court of appeals' *en banc* opinion reversing the original panel's opinion is reported at 961 F.3d 1048 (8th Cir. 2020). The original panel's opinion affirming the district court order denying the motion to dismiss is reported at 930 F.3d 935 (8th Cir. 2019). The opinion of the district court denying the motion to dismiss is unreported at No. 5:17-CV-5089, 2017 WL 4392049 (W.D. Ark. Sept. 29, 2017).

JURISDICTION

The Eighth Circuit entered judgment on June 15, 2020, after a petition for rehearing *en banc* was granted on October 17, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).[1]

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

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[1] This petition is timely pursuant to the Court's March 19, 2020, Order extending the time to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment.

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. 42 U.S.C. § 1983.

STATEMENT OF THE CASE

In *National Aeronautics and Space Administrator, et al. ("NASA") v. Nelson*, 562 U.S. 134, 147 n.10 (2011), the Court assumed—but did not hold—that a right to informational privacy exists. The Court declined to reach that broader issue because it was not raised by the parties. *Id.* So the Court "decide[d] the case before [it] and le[ft] broader issues for another day." *Id.* That day has arrived.

This case presents two important questions that have divided circuit courts: (1) Is there a constitutional right to informational privacy?; (2) Can a constitutional right be clearly established within a circuit, despite the absence of Supreme Court authority, when a controlling circuit opinion has decided the issue? The Eighth Circuit's *en banc* opinion answered "no" to both questions, putting it at odds with the majority of circuits to have considered each question.

The interlocutory appeal below addressed whether public officials in Arkansas, who recklessly provided a tabloid with a confidential police report detailing the sexual abuse of four minor girls, were entitled to qualified immunity. The shoddily redacted report, released under the Freedom of Information Act ("FOIA") in response to media pressure, revealed in obvious ways the identities of the child victims. The public quickly identified them as the sibling stars of the popular TV show *19 Kids and Counting*. As a result, those children, including a sister who was still a minor at the time of publication, were subject to a torrent of public harassment, and the fallout ultimately led to the cancellation of their reality television program.

The victims, Petitioners here, sued the officials under 42 U.S.C. § 1983 for violation of their constitutional right to informational privacy. After the district court denied a motion to dismiss on qualified immunity grounds, Respondents appealed to the Eighth Circuit. On appeal, a unanimous original panel affirmed, determining that then-binding circuit precedent clearly established that a disclosure that represents "a shocking degradation or an egregious humiliation . . . or a flagrant breach of a pledge of confidentiality" violates the constitutional right to privacy. *Dillard v. City of Springdale, Arkansas*, 930 F.3d 935, 941-42 (8th Cir. 2019).

But on rehearing, the *en banc* court accorded dispositive weight to *Nelson*—despite this Court's express declination there to reach the constitutional privacy issue—in undoing longstanding Eighth Circuit precedent. *Dillard v. O'Kelley*, 961 F.3d 1048, 1053-55 (8th Cir. 2020). In a four-way split, the majority held that, due to the silence of *Nelson*, there could not be a clearly established constitutional right to informational privacy. *Id.* On this basis, the majority concluded that Respondents were entitled to

qualified immunity—notwithstanding the well-established circuit rule up to that point recognizing a constitutional right to informational privacy. *Id.*

Judge Kelly, in dissent, emphasized that the Eighth Circuit "has repeatedly stated, in no uncertain terms, that 'the right to privacy embodied in the fourteenth amendment' protects 'an individual's interest in avoiding disclosures of personal matters.'" *Id.* at 1059. She noted that the Second, Sixth, and Tenth Circuits were in accord with this view. *Id.* at 1060-61. And critically, *Nelson* "purported to leave the state of the law intact." *Id.* at 1061. That was confirmed by the fact that this Court "expressly acknowledged that . . . different circuits had adopted different interpretations of when the disclosure of private information by government officials would violate the right to privacy," but "declined to decide which circuit's caselaw was correct." *Id.* at 1061-62.

In a concurrence joined by Chief Judge Smith, Judge Grasz declared "simply not true" the proposition espoused by the majority that "a right established in circuit precedent cannot be 'clearly established' for purposes of qualified immunity [ ] in the absence of definitive Supreme Court precedent." *Id.* at 1058. He observed that "other circuit courts would likely be quite surprised by this holding." *Id.* As a result, Judge Grasz opined that the original panel had, in fact, been bound by circuit precedent in ruling that a constitutional right to informational privacy was clearly established. *Id.* Nevertheless, according to Judge Grasz, this Court's ruling in *Nelson* compelled the counterintuitive conclusion that "[t]he constitutional right to informational privacy in the Eighth Circuit is dead." *Id.* at 1057.

The circumstances of this case, and the multiple divergent judicial opinions it has generated, highlight the need for this Court to render clarity

with respect to the two significant, recurring issues of constitutional law: informational privacy and qualified immunity. In *Nelson*, this Court recognized that "[s]tate and lower federal courts have offered a number of different interpretations" with respect to informational privacy. 562 U.S. at 146 n.9. *Nelson* has only deepened that judicial divide and resulted in a further circuit split that demands resolution of the threshold question regarding the existence of a constitutional right to informational privacy. The urgency of a definitive ruling from this Court continually grows, as governmental bodies across the country collect and store—and, as here, disclose—an ever-increasing amount of citizens' most sensitive personal data.

Equally important is a clear mandate on the contours of "clearly established" jurisprudence for qualified immunity. The *en banc* split below is emblematic of a broader confusion concerning the scope of constitutional rights that are sufficiently delineated to give rise to actionable claims. Specifically, as this case illustrates, it remains unclear whether a constitutional right is "clearly established" within a circuit even when a body of controlling circuit precedent has decided the issue. As a matter of fundamental fairness and due process, both public officials and constituents are entitled to such a basic understanding of constitutional protections. By resolving this question, the Court will restore circuit uniformity, promote public confidence on a pressing issue, and eliminate needless waste of judicial and party resources.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD RESOLVE CONFLICTING INTERPRETATIONS CONCERNING A CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY.

Over forty years ago, the Court suggested in two cases that the Fourteenth Amendment's due process clause *may* provide a right to be free from unwanted disclosure of private information. *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977); *Nixon*, 433 U.S. at 427; *see generally Leading Cases*, 125 HARV. L. REV. 231 (2011). The inconclusive holdings in *Whalen* and *Nixon* triggered a cascade of differing circuit court views on the existence of such a constitutional right and how it should be applied—a point the Court has specifically acknowledged. *Nelson*, 562 U.S. at 146-47 n.9 (recognizing that "[s]tate and lower federal courts have offered a number of different interpretations of *Whalen* and *Nixon* over the years").

Upon revisiting the topic more than three decades later, the Court in *Nelson* declined to pen a definitive answer to this open question. Instead, the Court simply "assum[ed], without deciding" the existence of a constitutional right to informational privacy, leaving that "broader issue[] for another day." *Id.* at 138, 146-47 n. 9 & 10. That approach, rather than maintaining the status quo in this area, has only further deepened the circuit divide on a contentious issue.

The Eighth Circuit's *en banc* opinion in this case held that, notwithstanding the implied suggestion in *Whalen* and *Nixon*—and the resulting proliferation of Eight Circuit authority clearly establishing a constitutional right to informational privacy within the circuit—the Court's silence in *Nelson* compelled a repudiation of that body of Eighth

Circuit law. The Eighth Circuit now stands with the D.C. Circuit in denying the existence of a constitutional right to informational privacy.

Sitting on the other side of the divide are the Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits. Absent resolution by this Court, those circuits will face the same dilemma encountered by the Eighth Circuit in this case: Is there a constitutional right to informational privacy, and in light of *Nelson*, can that right be clearly established under circuit law? As discussed below, this uncertainty for courts and litigants on an issue that is nearly ubiquitous in the digital age makes clear that the time is ripe for the Court to finally address the question reserved in *Nelson*.

A. *Whalen* and *Nixon* Have Led To Varying Interpretations Of The Suggested Constitutional Right To Informational Privacy Among The Circuit Courts.

The Court first suggested that the Constitution may protect individuals from unwanted disclosure of personal information in *Whalen*, 429 U.S. 589.

There, a group of physicians and patients challenged a New York statute that mandated the collection and storage of copies of physicians' prescriptions for schedule II drugs. *Id.* at 595. The patients claimed that the statute violated their right to privacy because it required the collection of their physicians' file, which included their names, addresses, and prescriptions. *Id.* at 593, 599-600. The Court identified "at least two different kinds" of privacy interests: (1) "[T]he individual interest in avoiding disclosure of personal matters"; and (2) "[T]he interest in independence in making certain kinds of important decisions." *Id.* at 599-600.

Whalen marked the first time the Court recognized a liberty interest in "avoiding disclosure of personal matters." 429 U.S. at 599. Citing Justice Brandeis's dissent in *Olmstead v. United States*, the Court articulated "'the right to be let alone' as 'the right most valued by civilized men'" and stated that "every unjustifiable intrusion by the government upon the *privacy of the individual*, whatever the means employed, must be deemed a violation of the Fourth Amendment." 429 U.S. at 599 n.25 (citing *Olmstead v. United States*, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting)) (emphasis added).

But *Whalen* did more. After deeming a constitutional right to avoid disclosure of personal matters essential to the enforcement of Bill of Rights guarantees, the *Whalen* Court indicated that any such right to privacy would stem from the "liberty interest" of the Fourteenth Amendment. *Id.* at 603-04. Ultimately, however, the Court concluded that neither the immediate nor threatened impact of the New York statute violated the patients' liberty interests because both the patients and physicians failed to demonstrate such effects. *Id.* at 598 n.23, 606 ("We simply hold that this record does not establish an invasion of any right or liberty protected by the Fourteenth Amendment.").

In the same Term, the Court also decided *Nixon*, which involved a challenge by the former president to compelled disclosure of his tape recordings and papers to the Administrator of General Services pursuant to the recently enacted Presidential Recordings and Materials Preservation Act. 433 U.S. at 429-30. Once again, the Court referenced the liberty interest in avoiding disclosure of personal matters, but did not find a constitutional violation. *Id.* at 457, 465 ("One element of privacy has been characterized as 'the individual interest in avoiding disclosure of personal matters['] . . . . [W]e

are compelled to agree with the District Court that appellant's privacy claim is without merit.").

Citing *Whalen*, the Court stated: "We may agree with appellant that, at least when Government intervention is at stake, public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity." *Id.* at 457. The Court employed a balancing test, concluding that Nixon's challenge was without merit. *Id.* at 465 (finding no constitutional violation considering, *inter alia*, Nixon's "lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening").

Whalen and *Nixon* therefore suggested but ultimately left unanswered whether the Constitution provides for a right to informational privacy. As the Court noted in *Nelson,* the circuit courts subsequently arrived at their own conflicting answers. 562 U.S. at 146 n.9; *compare, e.g., Franklin v. D.C.*, 163 F.3d 625, 637 (D.C. Cir. 1998) ("When we look beyond the Fourth or Eighth Amendments, we still cannot see how a prisoner's right to medical confidentiality can be derived from the Constitution.") *with Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) ("In *Whalen v. Roe*, the Supreme Court recognized that there exists in the United States Constitution a right to privacy protecting 'the individual interest in avoiding disclosure of personal matters.'"); *Douglas v. Dobbs*, 419 F.3d 1097, 1101 (10th Cir. 2005) ("[W]e have interpreted the Supreme Court's decision in *Whalen v. Roe* as creating a right to privacy in certain personal information."); *Hester v. City of*

Milledgeville, 777 F.2d 1492, 1497 (11th Cir. 1985) ("The 'individual interest in avoiding disclosure of personal matters' is protected by the 'confidentiality strand' of the constitutional right to privacy.") (internal citation omitted). *See also* Larry J. Pittman, *The Elusive Constitutional Right to Informational Privacy*, 19 NEV. L. J. 135, 173–75 (2018) (arguing that *Whalen* established a constitutional right to informational privacy); Erwin Chemerinsky, *Rediscovering Brandeis' Right to Privacy*, 45 BRANDEIS L. J. 643, 644 (2007) (arguing that the Supreme Court should find that there is a constitutional right to informational privacy under the liberty clause of the Fourteenth and Fifth Amendments).

B. *Nelson* Has Deepened The Nascent Post-*Whalen* Circuit Split And Threatens To Grow Confusion Moving Forward.

In *Nelson*, the Court encountered another opportunity to recognize a right to informational privacy. 562 U.S. at 134. Private contractors who worked for NASA's Jet Propulsion Laboratory had challenged the government's background check program utilizing certain mandatory questionnaires to determine the contractors' "suitability for government employment or a security clearance." *Id.* at 142. The contractors claimed that the mandatory questionnaires violated their constitutional right to informational privacy. *Id.*

Instead of resolving the threshold question of whether such a right exists, the Court opted to decide the case more narrowly:

> As was our approach in *Whalen*, we will assume for present purposes that the Government's challenged inquiries implicate a privacy interest of constitutional significance. We hold, however,

> that, whatever the scope of this interest, it does not prevent the Government from asking reasonable questions . . . in an employment background investigation that is subject to the Privacy Act's safeguards against public disclosure.

Id. at 147-48.

Assuming without recognizing a constitutional right to privacy, *Nelson* proceeded to engage in a balancing analysis and held that the governmental interest in the questionnaires outweighed any privacy right that the contractors may have. *Id.* at 151-53. In so doing, the Court not only further divided the circuits on the existence of an informational privacy right, but also created a *new* circuit split concerning the precedential value of *Whalen*.

Justice Scalia, in concurrence, warned that this practice of assuming a constitutional right, and resolving the case on that basis, would only lead to greater confusion across the circuits. *Id.* at 166-68. His view proved prescient. As demonstrated by the Eighth Circuit's four-way split *en banc* decision in this case, *Nelson* has further muddied the waters on a crucial issue of national importance, and if left unresolved, will inevitably lead to increasing levels of uncertainty and division among the federal courts.

C. The Eighth Circuit *En Banc* Decision Invites Multiple Circuit Splits That Will Likely Grow Over Time.

The decision below embodies the post-*Nelson* confusion concerning the right to informational privacy. Strikingly, it interpreted *Nelson* as "confirm[ing] that our court *and other circuits* erred in reading inconclusive statements in *Whalen* and *Nixon* as Supreme Court recognition of a substantive

due process right to informational privacy." *Dillard*, 961 F.3d at 1054 (emphasis added). The *en banc* court thus not only recognized its own departure from the law of sister circuits, but expressly invited those circuits to similarly cross the divide and repudiate the informational privacy right.

This movement by the Eighth Circuit in response to *Nelson* is not isolated. The D.C. Circuit, having previously declined to read into *Whalen* the existence of this constitutional right, has become further entrenched in its view—specifically finding validation in *Nelson*. *See In re U.S. Office of Pers. Mgmt. Data Security Breach Litig.*, 928 F.3d 42, 72 (D.C. Cir. 2019) (citing *Nelson* among other cases in declining to recognize a constitutional right to informational privacy). It is likely a matter of time before other circuits take up the Eighth Circuit's invitation and draw a similar conclusion from the equivocal silence of *Nelson*.

Some circuits, however, remain unmoved by *Nelson* and have instead doubled down on their extraction of privacy principles out of *Whalen*. *See, e.g., Hancock v. Cnty. of Rensselaer*, 882 F.3d 58, 65 (2d Cir. 2018) (citing both *Whalen* and *Nelson* while explaining that "[t]he Supreme Court has long implied that the zone of privacy protects the individual interest in avoiding disclosure of personal matters") (quotations omitted); *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 260 n. 8 (6th Cir. 2011); *Endy v. Cnty. of Los Angeles*, 975 F.3d 757, 768 (9th Cir. 2020) (finding that "federal constitutional law recognizes a right to informational privacy stemming from the individual interest in avoiding disclosure of personal matters") (quotations omitted); *Leiser v. Moore*, 903 F.3d 1137, 1143-44 (10th Cir. 2018) (declining to abrogate or overrule pre-*Nelson* precedent regarding right to informational privacy).

Adding to this confusion is an additional nuance in the Eighth Circuit's divergence from these sister circuits. Related to but distinct from the issue of informational privacy is how lower courts should treat predecessor opinions where, as in *Nelson*, a later decision of this Court casts uncertainty through mere silence. The Sixth Circuit, on the one hand, announced that *Nelson* did not provide "any reason to take the opportunity to revisit our past precedents in this matter." *Lee*, 636 F.3d at 260 n.8. Similarly, the Tenth Circuit declined post-*Nelson* to "say that our precedents on this issue are incorrect or that they have been overruled." *Leiser*, 903 F.3d at 1144. Judge Grasz, on the other hand, went to the opposite extreme in the opinion below, declaring that the "constitutional right to informational privacy in the Eighth Circuit is dead" as a result of *Nelson*. *Dillard*, 961 F.3d at 1057.

The polarization triggered by this Court's opaque jurisprudence on informational privacy—starting with *Whalen* and culminating in *Nelson*—is a clear signal that the time has arrived for a definitive ruling on this issue.

D. The Circuits Are Split Not Only As To The Existence Of A Right To Informational Privacy, But Also As To How That Right Should Be Applied.

Even among the circuits that have continued post-*Nelson* to recognize a constitutional right to informational privacy, there are striking variations in the application of this right. This adds yet another layer of uncertainty to this important area of law.

The Tenth Circuit has interpreted *Whalen* expansively as "creating a right to privacy in certain personal information." *Douglas v. Dobbs*, 419 F.3d 1097, 1101 (10th Cir. 2005). Based on this view, that

court extended constitutional privacy to pharmacy records, which it deemed "protected as a personal right." *Id.* at 1102.

In marked contrast, however, the Sixth Circuit construed *Whalen* narrowly and limited the right to exceptional situations. In *Kenny v. Bartman*, the court held that informational privacy "extends only to matters that implicate a fundamental liberty interest." No. 16-2152, 2017 WL 3613601, at *6 (6th Cir. May 19, 2017). To assess this, *Kenny* set forth a two-part test: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." *Id.* at *6 (citations omitted). The court added, "we have recognized a constitutionally-protected informational-privacy interest in only two circumstances: (1) where the release of personal information may lead to bodily harm, and (2) where the released information relates to matters 'of a sexual, personal, and humiliating nature.'" *Id.*

The Ninth Circuit similarly imposed an exacting standard for this right in *Coons v. Lew*, devising a rigorous five-factor analysis to evaluate a potential violation. 762 F.3d 891, 900 (9th Cir. 2014) (evaluating "(1) the type of information requested, (2) the potential for harm in any subsequent non-consensual disclosure, (3) the adequacy of safeguards to prevent unauthorized disclosure, (4) the degree of the need for access, and (5) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access" to "determine whether the governmental interest in obtaining information outweighs the individual's privacy interest").

The First Circuit, on the other hand, applied a more ambiguous assessment in *Nunes v. Mass. Dep't of Corr.*, in a case where prisoners challenged a policy that risked disclosure of their HIV status. 766 F.3d 136 (1st Cir. 2014). While acknowledging that a right to informational privacy might exist under *Whalen*, the court rejected strict scrutiny and held that the prisoners' rights had not been violated. *Id.* at 143 ("The Supreme Court has implied that the Constitution might protect in some circumstances 'the individual interest in avoiding disclosure of personal matters' from government infringement.").

Justice Scalia's warning in *Nelson* has thus aptly foreshadowed the sprawling divergence of judicial opinions on multiple levels: whether the constitutional right exists, how it should be applied, and what precedent remains good law. *See generally Leading Cases*, *supra*, at 231 (detailing the differing stances of the circuits on a constitutional right to informational privacy). The cascading effects have created conflicts even among district courts within the same circuit. *See e.g.*, *Huling v. City of Los Banos*, 869 F. Supp. 2d 1139, 1153 (E.D. Cal. 2012) ("In recent months, since the Supreme Court's ruling in *NASA v. Nelson,* district courts have not applied the caselaw in a uniform manner.") (collecting cases within the Ninth Circuit). Finality from this Court is plainly required to restore uniformity of constitutional protection across and within jurisdictions. *See generally* J. Clifford Wallace, *The Nature and Extent of Intercircuit Conflicts: A Solution Needed for a Mountain or a Molehill?*, 71 CAL. L. REV. 913, 923 (1983) ("There is, in reality, but one due process clause, and theoretically the question of what 'process' is constitutionally 'due' should not vary in cases presenting the same facts, either within one circuit or between two or more circuits."); *see also* Wade A. Schilling, *You Want to Know What? NASA v. Nelson and the Constitutional Right to*

Informational Privacy in an Ever-Changing World, 82 UMKC. L. REV. 823, 825 (2014).

E. Informational Privacy Is A Pressing Topic Across All Facets Of Society In This Digital Age.

This case would merit the Court's consideration even absent any circuit split. As several commentators have pointed out, an individual's informational privacy interest has become more relevant than ever. *See e.g.*, Chemerinsky, *supra,* at 656 (arguing that informational privacy "is in the most dramatic need of development" as "[t]echnology that Warren and Brandeis never could have imagined, that none of us could have imagined a relatively short time ago, presents unprecedented risks to informational privacy"); Schilling, *supra*, at 824.

Whether the Constitution provides for a right to informational privacy is far more than academic. Evolving technology has empowered federal and state governments to collect virtually limitless personal information about their citizens. Search engines and social media platforms enable further intimate insights. And electronic data storage now facilitates the permanent retention of massive historic data, which can be willfully or inadvertently disclosed without consent or due process.

Against this backdrop, it is imperative for the Court to conclusively determine whether the Constitution guarantees what Justice Brandeis once described to be "the most comprehensive of rights, and the right most valued by a civilized society," *Whalen,* 429 U.S. at 599 n.25 (citing *Olmstead*, 277 U.S. at 478), —and if so, how that right should be applied by the lower courts. If in fact such a right emanates from the Fourteenth Amendment, as some

circuits hold, strict scrutiny may be necessary to ensure that the government employ minimally invasive means in collecting sensitive information. *See e.g.*, *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) ("In *Whalen v. Roe*, the Supreme Court declared that the constitutional right to privacy grounded in the Fourteenth Amendment respects not only individual autonomy in intimate matters, but also the individual's interest in avoiding divulgence of highly personal information.").

Conversely, if this Court clarifies that such a constitutional right does not exist, then federal, state and local governments will be better equipped to evaluate whether current laws provide adequate privacy protections. *See e.g.,* 5 U.S.C. § 552a (2000) (the Privacy Act of 1974); 45 C.F.R. Parts 160, 164 (the Health Insurance Portability and Accountability Act of 1996); 15 U.S.C. § 6501 *et seq*. (the Children's Online Privacy and Protection Act of 1998; Cal. Civ. Code, § 1798.100 (Cal. Consumer Privacy Act). This case presents a unique opportunity for the Court to provide a clear path forward for each stakeholder in society to navigate the complexities that accompany inevitable governmental intrusions into the privacy of constituents.

II. THE QUALIFIED IMMUNITY RULING BELOW IMPLICATES MATTERS OF OVERRIDING NATIONAL IMPORTANCE THAT WARRANT THE COURT'S REVIEW.

A. The Circuits Lack Clarity On The Threshold Requirement For Precedent That Constitutes "Clearly Established" Law.

This case also offers the opportunity for the Court to render needed clarity on a critical aspect of

qualified immunity: whether circuit court precedent can by itself confer "clearly established" status within that circuit, or alternatively, whether controlling Supreme Court authority is required.

Judge Grasz noted in his concurrence below that the *en banc* majority's decision rested in part on the questionable proposition that "a constitutional right not definitively recognized by the Supreme Court cannot be 'clearly established' for purposes of qualified immunity analysis." *Dillard*, 961 F.3d at 1058. He mused that "many other circuit courts would likely be quite surprised by this holding." *Id.* at 1058 n.6 (citing cases from Second, Third, Seventh, Ninth, Tenth, and Eleventh Circuits finding that a right to informational privacy was clearly established based on circuit precedent).

As the decision below illustrates, the Court's jurisprudence on this point is unsettled at best. In *Harlow v. Fitzgerald*, the Court first articulated the "clearly established" standard, holding that executive branch officials are immune if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. 800, 818 (1982). The Court, however, declined at that time to resolve whether rights can be "clearly established" by lower court precedent. *Id.* at 818 n.32.

The Court has since hinted that qualified immunity can be overcome by an obvious constitutional violation, even in the absence of controlling Supreme Court precedent. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999) (suggesting controlling Supreme Court precedent is unnecessary in presence of "controlling authority" in a plaintiff's jurisdiction or a "consensus of cases of persuasive authority"); *see also Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (declining to invoke qualified immunity based on Eleventh Circuit precedent, United States

Department of Justice Report, and State Department of Corrections regulation). Indeed, in *Lane v. Franks*, the Court held "clear notice" was lacking solely due to a "discrepancy" in the Eleventh Circuit precedent—implying that uniformity within that circuit would have been sufficient to accord "clearly established" status. 573 U.S. 228, 245 (2014).

But a competing line of cases, in which the Court signaled hesitancy to sanction sole reliance on circuit law, has sown confusion. *Reichle v. Howards* notably avoided validation of the principle that "controlling Court of Appeals' authority could be a dispositive source of clearly established law," instead assuming without holding that to be the case (much as *Nelson* did in the context of informational privacy). 566 U.S. 658, 665 (2012). Similarly, in *Taylor v. Barkes*, the Court qualified potential reliance on a "robust consensus of cases of persuasive authority" with assumptive language—posing in hypothetical terms "*to the extent*" such a standard might exist. 575 U.S. 822 (2015) (per curiam) (quotations omitted). *See also Carroll v. Carman*, 574 U.S. 13, 17(2014) (per curiam); *Plumhoff v. Rickard*, 572 U.S. 765, 767 (2014). The Court has thus repeatedly toed the line without actually defining a rule, as recently acknowledged in *D.C. v. Wesby*, where the Court stated it has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." 138 S. Ct. 577, 591 n. 8 (2018).

The absence of clarity on this question reared its head in remarkable fashion here. Despite a well-established body of Eighth Circuit law affirming the existence of a constitutional right to informational privacy, as well as similar law from other circuits, the *en banc* court was compelled to overturn that precedent based entirely on this Court's silence in *Nelson*, with a member of the majority declaring that

the "constitutional right to informational privacy in the Eighth Circuit is dead." *Dillard*, 961 F.3d at 1057. This stance not only created a split with multiple circuits, *id.* at 1058 n.6, but it is only a matter of time before other circuits—and by extension, district courts—are confronted with the same quandary of whether controlling circuit authority possesses *any* precedential value in the qualified immunity context.

B. The Court Should Revisit And Provide Needed Guidance On The Scope Of Qualified Immunity.

The exacting standard imposed below—which forecloses nearly every avenue to satisfying the "clearly established" hurdle—highlights one of the most criticized aspects of the doctrine. Legal scholars and civil rights groups calling for abolition of qualified immunity have protested that in practice, the "clearly established" rule places an unfair burden on plaintiffs to identify controlling precedent with *identical* facts. As a result, as many judges and academics have noted, qualified immunity routinely denies justice to victims of egregious misconduct and undermines government accountability and public trust.[2] This feeds the concern that the harsh and unpredictable nature of qualified immunity will deter meritorious lawsuits from being filed in the first place. *See generally* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018).

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[2] The Court appeared to acknowledge this unfortunate reality in *Safford Unified School District #1 v. Redding*, stating that "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional, this being the reason, as Judge Posner has said, that '[t]he easiest cases don't even arise.'" 557 U.S. 364, 377 (2009) (quoting *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.)).

There are several compelling reasons for the Court to revisit the contours of this doctrine. Justice Thomas, concurring in *Ziglar v. Abbasi*, aptly observed that qualified immunity in its current form has no roots in the Constitution or traditional common law. 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) (quoting *Rehberg v. Paulk*, 566 U.S. 356, 363 (2012)).

The Court created this doctrine in *Pierson v. Ray*, 386 U.S. 547 (1967). Found nowhere in the Constitution or statutory law, the Court instead gleaned qualified immunity from the common-law defenses of good faith and probable cause available in the context of state-law false arrest and imprisonment claims. *Id.* at 556-57 ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983."). More than twenty-five years later, the Court clarified that qualified immunity stemmed from common-law defenses available in 1871—when Section 1983 became law. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (asking whether immunities "were so well established in 1871, when § 1983 was enacted, that 'we presume that Congress would have specifically so provided had it wished to abolish' them." (quoting *Pierson*, 386 U.S. at 554-55)).

But today's qualified immunity doctrine bears no resemblance to the common-law defenses available when Section 1983 became law. For example, in 1871, qualified immunity protected government officials who acted with a subjective, good faith belief that their conduct was lawful. The Court, however, eliminated consideration of officers' subjective intent in *Harlow v. Fitzgerald* and instead focused on whether the officer's conduct was

objectively reasonable. 457 U.S. 800 (1982). *See also Wyatt v. Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., concurring) (declining to decide "whether or not it was appropriate for the Court in *Harlow* to depart from history in the name of public policy").

Further departing from the roots of the doctrine, the Court has also in recent years required Section 1983 plaintiffs to, at minimum, proffer binding precedent or a consensus of cases so factually similar that every officer would know the conduct was unlawful. *Wesby*, 138 S.Ct. 577, 589-90 ("'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.") As commentators have noted, these are only a few aspects of the qualified immunity doctrine untraceable to common law defenses available in 1871. *See generally* Albert W. Alschuler, *Herring v. United States: A Minnow or a Shark?*, 7 OHIO ST. J. CRIM. L. 463, 465 (2010) (A justice who favored giving section 1983 its original meaning or who sought to restore the remedial regime favored by the Framers of the Fourth Amendment could not have approved of either *Pierson* or *Harlow*).

While the Court has acknowledged it "completely reformulated qualified immunity along principles not at all embodied in the common law," no course correction has yet been attempted. *See Anderson v. Creighton*, 483 U.S. 635, 645 (1987). This case offers the opportunity to more closely conform the doctrine to the "common-law backdrop against which Congress enacted the 1871 Act," rather than "the sort of 'freewheeling policy choices' that [the Court] ha[s] previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quoting *Rehberg*, 566 U.S. at 363).

Even setting aside the doctrine's Frankenstein-like expansion, in the wake of

numerous high-profile breaches of the public trust, there have been questions from all levels of the judiciary whether qualified immunity contributes to a crisis of confidence in government. As Justice Sotomayor explained, the application of qualified immunity has "render[ed] the protections of the Fourth Amendment hollow," *Mullenix v. Luna*, 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting), and has told "the public that palpably unreasonable conduct will go unpunished." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

A number of circuit court judges have also criticized the doctrine, openly beseeching the Court to reconsider qualified immunity altogether. *See e.g.*, *Zadeh v. Robinson*, 928 F.3d 457, 479, 480–81 (5th Cir. 2019) (Willett, J.) ("To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the *first* to behave badly . . . [T]his entrenched, judge-created doctrine excuses constitutional violations by limiting the statute Congress passed to redress constitutional violations."); *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."). *See also* Jon O. Newman (senior judge in the Second Circuit), *Here's a Better Way to Punish the Police: Sue Them for Money*, WASHINGTON POST (June 23, 2016), https://www.washingtonpost.com/opinions/heres-a-better-way-to-punish-the-police-sue-them-for-money/2016/06/23/c0608ad4-3959-11e6-9ccd-d6005beac8b3_story.html.

The district courts have weighed in, too. *See, e.g., Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n. 6 (E.D. Cal. 2019) ("[T]his judge joins with those who

have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."), *reconsideration denied*, No. 14-2111-JPO, 2018 WL 5112448 (D. Kan. Oct. 19, 2018), and *aff'd in part, rev'd in part and remanded sub nom. Estate of Smart by Smart v. City of Wichita*, 951 F.3d 1161 (10th Cir. 2020); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975 at *10 (E.D.N.Y. June 26, 2018) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny."); *Manzanares v. Roosevelt Cnty. Adult Detention Ctr.*, 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) ("[Q]ualified immunity has increasingly diverged from the statutory and historical framework on which it is supposed to be based."). *See also* Lynn Adelman (district judge in Wisconsin), *The Supreme Court's Quiet Assault on Civil Rights*, DISSENT (Fall 2017) (arguing that "[o]f all the restrictions that the Court has imposed on [Section 1983] … the one that has rapidly become the most harmful to the enforcement of constitutional rights is the doctrine of qualified immunity").

In fact, empirical evidence underscores the disconnect between the doctrine and its intended policy goals. While the Court has articulated a presumption that qualified immunity shields government officials from the burdens associated with discovery and trial, *Johnson v. Fankell*, 520 U.S. 911, 915 (1997) ("it provides the defendant with an immunity from the burdens of trial as well as a defense to liability"), the available evidence

contradicts this view.[3] *See also* Schwartz, *supra*, at 1804 (demonstrating that governments, not individual officials, paid approximately 99.98 percent of judgments for civil rights plaintiffs in lawsuits against police officers).

Beyond this, the doctrine has frayed the contours of constitutional rights. As demonstrated by the opinion below, lower courts possess discretion to grant immunity without first ruling on the underlying constitutional claims. Circumventing constitutional issues in this manner halts the development of a needed body of law at its inception. This concern is particularly amplified for constitutional claims aimed at new technologies (which often coincide with the informational privacy sphere) or novel fact patterns. *See generally* Schwartz, *supra*, at 1817. This reality, as Justice Sotomayor lamented in her *Mullenix* dissent, risks "render[ing] the protections of the Fourth Amendment 'hollow.'" 136 S. Ct. 305, 316 (2015) (Sotomayor, J., dissenting).

This hollowing of the Constitution has manifested itself in a crisis of public confidence. Recent headlines across the spectrum of media outlets confirm as much. There is a growing concern—widely articulated by citizens, pundits, scholars, and judges—that the absence of consistent accountability prevents justice and undermines trust in the judicial system. Bringing much-needed clarity

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[3] History shows that indemnification, rather than immunity, is the principled way to balance the competing concerns of ensuring victims a complete remedy while mitigating the harshness of strict liability in cases where federal officials made "reasonable" mistakes. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885 (June 2014) (law enforcement officers were almost never required to contribute to settlements and judgments entered against them).

to what constitutes "clearly established" law in the qualified immunity context will not only protect the constitutional rights of those most directly affected by the doctrine, but also represent a meaningful step toward restoring stability to this critical area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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