No. 18-____

IN THE

Supreme Court of the United States

I.B. AND JANE DOE,

Petitioners,

v.

APRIL WOODARD, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner I.B. was four years old when respondent Woodard, a state caseworker, strip-searched and photographed her at preschool. Woodard had neither a warrant nor parental consent. All she had was a report making unfounded abuse allegations—specifically, of various marks or bruises on I.B. And a narrower, initial search of I.B. (or even looking at areas of I.B.'s body in plain view) readily would have disproven these allegations. Woodard eventually acknowledged that no marks on I.B.'s body were consistent with the unfounded allegations. Woodard then lied about the incident to I.B.'s mother, petitioner Jane Doe, for weeks.

A divided Tenth Circuit panel affirmed the dismissal of petitioners' Fourth Amendment claims on qualified-immunity grounds. The questions presented are:

1. Whether the Fourth Amendment requires a caseworker who suspects abuse to obtain a warrant to strip-search a child, an issue that has produced an acknowledged 4-2 circuit split—and is nearly identical to the issue this Court granted certiorari on but did not resolve in *Camreta* v. *Greene*, 563 U.S. 692, 698 (2011).

2. Even if a warrant is not required in this context, whether clearly established law prohibits conducting warrantless strip searches of children at school where there are no "specific suspicions" of danger or wrongdoing justifying the "categorically extreme intrusiveness of a search down to the body." *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 376-377 (2009).

3. Whether this Court should reconsider its qualified-immunity jurisprudence to accord with historical common-law practice and to eliminate the widespread confusion plaguing current qualified-immunity doctrine.

PARTIES TO THE PROCEEDING BELOW

Petitioners I.B. and Jane Doe were plaintiffs in the U.S. District Court for the District of Colorado and appellants in the U.S. Court of Appeals for the Tenth Circuit.

Respondents April Woodard, Christina Newbill, Shirley Rhodus, and Richard Bengtsson were defendants in the district court and appellees in the Tenth Circuit.

The El Paso County Board of County Commissioners was a defendant in the district court. Petitioners did not appeal the district court's ruling dismissing their claims against the Board.

Reggie Bicha and Julie Krow were defendants in the district court but were not parties to the Tenth Circuit appeal. The parties stipulated to the dismissal of petitioners' claims against these defendants in the district court.

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (App. A) is reported as *Doe* v. *Woodard*, 912 F.3d 1278 (10th Cir. 2019). The court of appeals' judgment (App. B) is unreported.

The district court's memorandum opinion and order (App. C) granting respondents' motion to dismiss is unreported and available as *Doe* v. *Krow*, No. 15-cv-001165-KLM, 2017 WL 9620291 (D. Colo. June 12, 2017). The district court's judgment (App. F) is unreported. The district court's order denying petitioners' motion for leave to amend their complaint (App. D) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in appendices to this petition. App. G; App. H.

STATEMENT

A. Factual Background

In this motion-to-dismiss posture, "the Court accepts the allegations in the complaint as true." *Hernandez* v. *Mesa*, 137 S. Ct. 2003, 2005 (2017) (per curiam).

1. A state official strip-searched and photographed four-year-old petitioner I.B. at her preschool, without a warrant or parental consent. App., *infra*, 112a.

In December 2014, the El Paso County Department of Human Services ("DHS"), a Colorado state agency, received a report that I.B. was being abused and had "little bumps on [her] face, a bruise about the size of a nickel on her neck, a small red mark on her lower back, two small cuts on her stomach, and bruised knees." App., *infra*, 117a.[1] The next day, DHS caseworker respondent April Woodard received permission from her supervisor, respondent Christina Newbill, to inspect I.B.'s buttocks, stomach, and back for marks and bruises. *Ibid.*

Woodard went to Oak Creek Elementary School in Colorado Springs, where I.B. attended the preschool Head Start Program. App., *infra*, 115a, 117a. I.B. was

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[1] The First Amended Complaint (App. I) is the operative complaint. Petitioners' proposed Second Amended Complaint (App. J) indicates that the source of this report was someone at I.B.'s school. App., *infra*, 158a-159a. The courts below denied petitioners' motion for leave to file the Second Amended Complaint on the theory that respondents had qualified immunity because clearly established law did not prohibit their conduct. *Id.* at 38a-39a & n.28; *id.* at 101a-102a. Given the error on qualified immunity, it was also error to deny this motion for leave to amend—as the dissent below explained. *Id.* at 51a n.5; *id.* at 51a-52a.

taken to the school nurse's office. *Id.* at 117a. There, Woodard undressed I.B. without asking for permission. *Id.* at 117a, 119a.[2] Then, over I.B.'s protests, Woodard "took color photographs of private and unclothed areas of I.B.'s body" with a county-issued cellphone. *Id.* at 118a. Woodard did not find marks on I.B.'s body consistent with the report of abuse. *Ibid.* If the report had been true, multiple marks would have been visible without undressing I.B. or viewing her intimate parts. See *id.* at 117a.

Woodard also went to I.B.'s home to investigate the report. App., *infra*, 118a. Woodard discussed the case with I.B.'s mother—petitioner Jane Doe, a disabled Army veteran—but did not tell Doe that Woodard had strip searched and photographed her four-year-old daughter. *Id.* at 113a, 118a-119a.

Doe did not learn about the strip search until, about a week later, I.B. confided: "I hope she [Woodard] doesn't come again because I don't like it when she takes all my clothes off." App., *infra*, 119a. Doe immediately contacted I.B.'s school, but no one initially would admit that the strip search had occurred. *Ibid.* Eventually, school officials told Doe that a DHS caseworker had strip searched I.B. *Ibid.* Doe then sought to contact DHS officials, and she eventually reached Woodard, who denied having strip searched I.B. *Ibid.*

A few weeks later, Doe learned that her daughter had been photographed during the strip search. I.B. told Doe that someone had taken pictures of her with her clothes off, "even though she told them not to." App., *infra*, 119a. For weeks, Doe attempted to contact DHS. *Ibid.* The

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[2] In their proposed Second Amended Complaint, petitioners allege that before she was strip searched, I.B. told Woodard that, while she gets red dots on her face when she cries, she did not have any other "owies." App., *infra*, 184a.

agency ignored her. *Ibid.*

At the end of January 2015, Woodard contacted Doe and told her that the case had been closed. App., *infra*, 119a. In fact, it had been terminated as unfounded three weeks earlier. *Id.* at 118a. During this conversation, Woodard finally admitted that she had undressed and then photographed I.B. *Id.* at 119a-120a. Doe told Woodard that Doe had contacted an attorney. *Id.* at 120a.

The very next day, another DHS caseworker visited Doe's home—this time claiming a report of abuse had been made regarding I.B.'s younger brother. App., *infra*, 120a. Like the other reports, this report was also unfounded. *Id.* at 121a. Doe later requested records of this visit under the Colorado Open Records Act, but none were produced. *Id.* at 120a.

2. The invasive strip search caused I.B. to suffer trauma similar to that suffered by children who are sexually abused. App., *infra*, 121a. She was angry and upset about the strip search and talked about it frequently. *Ibid.* After the strip search, I.B. said she did not want to attend school and did not feel safe, and she left the school where the strip search occurred. *Ibid.* Like others similarly traumatized, I.B. has also suffered an erosion of her natural protective boundaries, including an inappropriate willingness to remove her clothes for strangers and in front of peers. *Ibid.* Petitioners have used pseudonyms in this lawsuit because of the "humiliation and trauma" I.B. has experienced. Dist. Ct. Doc. 27 at 2.

3. Unfortunately, this was not the first time I.B. had been strip searched at preschool based on unfounded allegations.

A November 2013 report to DHS—apparently from I.B.'s school—alleged "marks that resembled a hand print on [I.B.'s] bottom" and a "bruise the size of a dollar bill" on I.B.'s lower back. App., *infra*, 116a. A DHS caseworker

performing the investigation observed I.B.'s buttocks. *Ibid.* I.B. was then just three years old. *Ibid.* The caseworker found no evidence of abuse, and DHS closed the investigation as unfounded. *Id.* at 116a-117a. Doe was cooperative in these DHS investigations, and each of these reports ultimately proved unfounded. *Id.* at 116a, 118a, 121a.

B. Proceedings Below

I.B. and Doe filed suit, and two of the five claims they raised remain live for purposes of this certiorari petition.[3] Both claims allege violations of the Fourth Amendment and 42 U.S.C. § 1983 based on the unlawful strip search and photographing of I.B.[4]

The district court granted respondents' motion to dismiss both Fourth Amendment claims on qualified-immunity grounds. App., *infra*, 80a, 83a. Petitioners then moved to amend their First Amended Complaint, but the district court denied that motion, holding that any amendment would be futile because Woodard's strip search did not violate clearly established law. *Id.* at 101a-102a.

A divided panel of the Tenth Circuit affirmed. App., *infra*, 2a-3a. On the first question presented regarding whether a warrant was needed to strip-search I.B., the

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[3] Petitioners do not seek certiorari review of their substantive-due-process claims (Claims 3 and 4) and never appealed the dismissal of their claim against the Board of County Commissioners (Claim 5). App., *infra*, 9a n.10.

[4] Claim 1 raises an individual-capacity claim against Woodard, and Claims 1 and 2 raise supervisory-liability, individual-capacity claims against respondent DHS officials Newbill, Rhodus, and Bengtsson. App., *infra*, 134a-141a. The court below rejected the supervisory-liability claims because it concluded that Woodard's strip search did not violate clearly established law. *Id.* at 32a. As the dissent below recognized, reinstating the Fourth Amendment claim against Woodard would require reinstating these supervisory-liability claims as well. *Id.* at 40a-41a.

majority acknowledged an entrenched inter-circuit conflict. *Id.* at 18a-19a. It then reasoned there could be no clearly established law *because of* the circuit split. *Id.* at 23a-24a. Rather than address this important constitutional question and clearly establish the law within the Tenth Circuit, the majority skipped this threshold issue without further explanation. *Id.* at 24a-32a.

The panel then considered the second question presented: whether petitioners could show that the strip search violated clearly established Fourth Amendment standards applicable to warrantless strip searches. This Court addressed that issue in *Safford Unified School District No. 1* v. *Redding*, 557 U.S. 364 (2009). The Court sought "to make it clear" that an intrusive strip search of a child was justifiable only with "specific suspicions" that evidence of danger or wrongdoing will be found in the area searched. The majority below nevertheless refused to apply *Safford*, dismissing it as involving a search for "medications" rather than for evidence of "abuse." App., *infra*, 28a-29a.

Judge Briscoe concurred in part and dissented in part. Unlike the majority, she would have ruled for petitioners on the second question presented, because "[a]ny reasonable person would have known, based on [*Safford*], that Ms. Woodard's search violated the Fourth Amendment." App., *infra*, 40a. "The report of abuse was limited to I.B.'s neck, back, stomach, and knees—all non-private, or at least less private, areas of I.B.'s body." *Id.* at 50a. There was thus only a "general background possibilit[y]" that stripping I.B. of her clothes would uncover evidence of abuse—a type of suspicion that *Safford* held "'fall[s] short' when 'the categorically extreme intrusiveness of a search down to the body of a' child is at issue." *Ibid.* (first alteration in original) (quoting *Safford*, 557 U.S. at 376). It made no difference that *Safford* involved a search for medications rather than abuse, as a child-abuse investigation

"does not relieve a social worker of her obligation to justify the search of a child's intimate areas with 'facts,' not 'general possibilities.'" *Id.* at 46a-47a (quoting *Safford*, 557 U.S. at 376).

REASONS FOR GRANTING THE PETITION

This petition presents three independently certiorari-worthy questions. On the first question, the majority opinion below acknowledged the entrenched 4-2 circuit split on whether caseworkers need a warrant before strip-searching a child on suspicion of abuse. This Court previously granted certiorari to determine what Fourth Amendment standard applies to caseworkers' child-abuse investigations in *Camreta* v. *Greene*, 563 U.S. 692, 698 (2011). Mootness prevented the Court from resolving that important question, *ibid.*, and this case squarely presents this recurring issue. This case also provides the Court an ideal opportunity to refine *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009). The Court should clarify that courts should exercise their *Pearson* discretion to reach the merits question when it implicates a circuit split—or at least provide sufficient reasons for leaving the law undeveloped.

The second question presented offers this Court an ideal vehicle to resolve widespread confusion among the circuits on what constitutes "clearly established law" for purposes of qualified immunity. Existing qualified-immunity jurisprudence requires a plaintiff to show: (1) a constitutional violation and (2) that the right violated was "clearly established." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). But many jurists and commentators have recognized that this second inquiry creates intractable difficulties for lower courts—particularly regarding how factually similar one case must be to clearly establish the law in the next.

Indeed, the Tenth Circuit's divided decision creates a separate split—with at least the Fifth and Eleventh

Circuits—on what law *Safford Unified School District No. 1* v. *Redding* clearly established. 557 U.S. 364 (2009). There, this Court "ma[d]e it clear" that the Fourth Amendment prohibits warrantless searches when no "specific suspicions" of danger or wrongdoing justify the "categorically extreme intrusiveness of a search down to the body" of a child. *Id.* at 376-377. The majority below, however, narrowly cabined *Safford* to its precise facts—a search for medications. The debate between the majority and the dissent below regarding *Safford* is a prime example of the circuit confusion regarding the clearly-established-law test.

The third question presented asks this Court to reconsider its qualified-immunity jurisprudence. Members of this Court and other jurists have raised significant concerns about the existing doctrine; so have commentators from across the ideological spectrum. This growing chorus demonstrates that modern qualified-immunity doctrine is not grounded in the common law and may no longer effectively serve its stated purposes.

I. THE COURT SHOULD GRANT REVIEW OF WHETHER A WARRANT IS GENERALLY REQUIRED FOR A CASEWORKER TO STRIP-SEARCH A CHILD ON SUSPICION OF ABUSE

The Tenth Circuit below acknowledged an entrenched circuit split on the first question presented, and this Court in *Camreta* v. *Greene* previously granted certiorari on a nearly identical issue. 563 U.S. at 698. The Court should grant review again here.

A. There is an acknowledged 4-2 circuit split

As the court of appeals below recognized, "[f]our other circuits * * * have held that social worker examinations of children based on abuse suspicions are not candidates for special needs analysis." App., *infra*, 19a. In other words, the Second, Third, Fifth, and Ninth Circuits have held that

caseworker searches of children based on abuse suspicions require a warrant. *Id.* at 19a-20a (citing *Tenenbaum* v. *Williams*, 193 F.3d 581, 606 (2d Cir. 1999); *Good* v. *Dauphin Cty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1094-1095 (3d Cir. 1989); *Roe* v. *Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-408 (5th Cir. 2002); *Calabretta* v. *Floyd*, 189 F.3d 808, 820 (9th Cir. 1999)).

By contrast, two other circuits—the Fourth and Seventh—require neither a warrant nor probable cause under these circumstances. Instead, they apply a "special needs balancing test." App., *infra*, 18a-19a (citing *Wildauer* v. *Frederick Cty.*, 993 F.2d 369, 373 (4th Cir. 1993); *Darryl H.* v. *Coler*, 801 F.2d 893, 904 (7th Cir. 1986)).

This Court in *Camreta* previously granted certiorari to resolve whether the Fourth Amendment's traditional warrant requirement applies in the context of a child-abuse investigation.[5] Both the *Camreta* certiorari petition and the Ninth Circuit's vacated decision there cited many of the same cases identified by the Tenth Circuit here as establishing this circuit split.[6] See *Greene* v. *Camreta*, 588 F.3d 1011, 1026 n.11 (9th Cir. 2009). But this Court was unable to resolve this important constitutional question in *Camreta* because the case became moot. 563 U.S. at 698. Without this Court's guidance, the circuits have been unable to resolve their disagreement.

B. A caseworker must have a warrant based on probable cause before strip-searching a child on suspicion of abuse

The majority position in the circuit conflict is correct: The Fourth Amendment generally requires a state caseworker to obtain a warrant before strip-searching a child

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[5] Petition for Writ of Certiorari at i, *Camreta* v. *Greene*, No. 09-1454 (U.S. May 27, 2010).

[6] *Id.* at *23-25.

on suspicion of abuse. That standard applies because a strip search on suspicion of abuse is entangled with law enforcement, requiring a neutral judicial officer to issue a warrant or an equivalent court order helps protect children against unnecessarily invasive searches that can cause grave and permanent harm, and the separate exigent-circumstances exception would still allow warrantless searches where a child is in imminent danger.

1. A state-initiated search conducted by an official investigating abuse is too entangled with law enforcement to fall within the special-needs exception to the warrant requirement. Searches that are not "divorced from the State's general interest in law enforcement" generally require warrants. *Ferguson* v. *City of Charleston*, 532 U.S. 67, 79 (2001). The mere fact that a caseworker, rather than a police officer, performs a search with the intent to protect a child's welfare does not eliminate the need for a warrant—particularly if the search results are shared, or the investigation is performed, with law enforcement. *Id.* at 81-86 (holding the warrant requirement applied to hospital drug tests of pregnant women whose results were shared with police for prosecution).

Child-abuse investigations and law enforcement are inexorably linked. Child abuse—the suspected conduct under investigation—is a serious crime. DHS must provide notifications to law enforcement and conduct certain investigations in conjunction with or at the direction of local law enforcement agencies. *E.g.*, Colo. Rev. Stat. Ann. §§ 19-3-306(2), 19-3-308(4) & (5)-(5.5). As the Fifth Circuit has explained, because "disentangling [the goal of protecting a child's welfare in child-abuse investigations] from general law enforcement purposes is difficult," such investigations must proceed under "traditional Fourth Amendment analysis." *Roe*, 299 F.3d at 407.

Moreover, a state-initiated abuse investigation—even when conducted at a school—is not enforcing school policies or maintaining classroom order. The two circuits that have allowed caseworkers to strip-search a child without a warrant relied on *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985). See *Wildauer*, 993 F.2d at 372; *Darryl H.*, 801 F.2d at 901, 903-904. And this Court in *T.L.O.* held that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere *with the maintenance of the swift and informal disciplinary procedures needed in the schools*." 469 U.S. at 340 (emphasis added). But the lower Fourth Amendment standard based on the need to maintain school order should not control. The mere fact that Woodard chose to go to I.B.'s school, instead of I.B.'s home, to perform the invasive strip search does not transform the abuse investigation into one related to school order and discipline.[7]

2. The warrant requirement is also indispensable because without judicial oversight, investigators may perform unnecessarily invasive searches with grievous consequences on the searched children. A strip search is not a minor intrusion; it is a massively invasive ordeal that can inflict the very harm it is intended to stop and "result in serious emotional damage." *Safford*, 557 U.S. at 375

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[7] Similarly, the common-law doctrine of *in loco parentis* would not have shielded respondents here, either. Abuse investigations by state caseworkers are not the "routine business of school administration," which concerns how to "set and enforce rules and to maintain order." *Safford*, 557 U.S. at 383 (Thomas, J., concurring in the judgment in part and dissenting in part) (quoting *Morse* v. *Frederick*, 551 U.S. 393, 414 (2007) (Thomas, J., concurring)). In all events, this doctrine did not shield bad faith or excessively injurious actions. See, *e.g.*, *State* v. *Pendergrass*, 19 N.C. 365, 366 (1837) ("[T]eachers exceed the limits of their authority when they cause lasting mischief [to a child's welfare].").

(quotation marks and citation omitted); *accord T.L.O.*, 469 U.S. at 337-338 ("A search of a child's person * * * is undoubtedly a severe violation of subjective expectations of privacy."). "[E]ven though the strip search might be a one-time occurrence, it can be traumatic and have a long-term negative impact on the child." Steven F. Shatz, et al., *The Strip Search of Children and the Fourth Amendment*, 26 U.S.F. L. Rev. 1, 12-13 (1991). Affected children may "suffer from a range of responses including trauma, anxiety, fear, shame, guilt, stigmatization, powerlessness, self-doubt, depression, and isolation." Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 520 (2005).

Concern for child welfare requires balancing the severe harms that strip searches can cause with the state's legitimate interest in protecting children from potential abuse. But a person performing an investigation "may lack sufficient objectivity to weigh correctly the strength of the evidence supporting the contemplated action against the individual's interests in protecting his own liberty and the privacy of his home." *Steagald* v. *United States*, 451 U.S. 204, 212 (1981). Thus, "[i]njecting a neutral arbiter into the equation enhances the likelihood if not assures that these two competing values [of exhaustive investigation and child privacy] will be more properly balanced." Coleman, 47 Wm. & Mary L. Rev. at 526.

3. The gravity of child abuse cannot justify sacrificing the Fourth Amendment's traditional protections. If there is reason to believe a child is in immediate danger, the exigent-circumstances exception can still allow a warrantless search. See *Roe*, 299 F.3d at 407; *Good*, 891 F.2d at 1093-1094; *Tenenbaum*, 193 F.3d at 605.

C. This Court should refine *Pearson* v. *Callahan* and require lower courts to address threshold constitutional questions implicating an existing circuit split in qualified-immunity cases

1. This case also presents an opportunity for this Court to refine *Pearson* v. *Callahan*. *Pearson* gives courts "sound discretion" in certain cases to skip the threshold constitutional issue and resolve a qualified-immunity case based on a lack of clearly established law. 555 U.S. at 236. But exercised indiscriminately, that discretion can cause constitutional law to stagnate. To eliminate this problem without sacrificing the benefits of *Pearson*, the Court should direct lower courts to address threshold constitutional issues that are the basis of an existing circuit split—or at the very least provide persuasive and reviewable reasons for skipping these important constitutional issues.

The Tenth Circuit's decision below, invoking *Pearson* to skip the important Fourth Amendment warrant question here (App., *infra*, 11a-12a, 20a-24a), only further contributed to the disarray among the lower courts on this issue. Previous Tenth Circuit decisions have fallen on different sides of the acknowledged circuit split, as the Ninth Circuit's vacated decision in *Camreta* recognized. 588 F.3d at 1026 n.11 (comparing *Franz* v. *Lytle*, 997 F.2d 784, 791 (10th Cir. 1993), with *Doe* v. *Bagan*, 41 F.3d 571, 575 n.3 (10th Cir. 1994)). The lower court's refusal to address the recurring warrant question only heightens the need for this Court's review. This Court has repeatedly reviewed and provided needed guidance on threshold Fourth Amendment questions—even if the particular plaintiff cannot rely on that holding due to the clearly-established-law prong of the qualified-immunity inquiry. See, *e.g.*, *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014); *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011); *Safford*, 557 U.S. at 377-379. Providing that guidance here will finally resolve a circuit split that has persisted for decades and implicates the

safety and privacy of some of society's most vulnerable members.

That is also why this Court should make a narrow, but important, clarification to *Pearson*: It should require lower courts in qualified-immunity cases to address constitutional merits questions that implicate a circuit split. As the Court has explained, it is "'often beneficial'" for courts to address the threshold constitutional question, "because it 'promotes the development of constitutional precedent * * * .'" *Plumhoff*, 572 U.S. at 774 (quoting *Pearson*, 555 U.S. at 236); see *al-Kidd*, 563 U.S. at 735. Unfettered *Pearson* discretion, in contrast, can encourage "law stagnation"—even when guidance is most needed. Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 23-24 (2015).

Addressing threshold constitutional questions that implicate a circuit split provides heightened benefits. Difficult and recurring questions generate splits—precisely the kinds of issues that justify spending "scarce judicial resources" to resolve. *Pearson*, 555 U.S. at 236. A circuit split also indicates that the issue has crystallized, mitigating concerns that an issue would be "prematurely and incorrectly decided." *Id.* at 239 (citation omitted).

Indeed, in *Camreta*—confronting a nearly identical Fourth Amendment issue and the same circuit split—this Court specifically approved of addressing the constitutional merits question, even though the law was not clearly established. See 563 U.S. at 706-707 (calling this "advantageous," as it did not "leave standards of official conduct permanently in limbo" and instead provided "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment"). The panel below should have done the same, rather than leaving this recurring question unresolved in the Tenth Circuit.

2. Alternatively, at a minimum this Court should require lower courts to provide reviewable reasons for their decisions not to address the constitutional merits question in qualified-immunity cases. See Nielson & Walker, 89 S. Cal. L. Rev. at 7. One recent empirical study discovered that "[w]hen deciding whether to exercise discretion [under *Pearson*], the courts provided reasons in about one in ten instances." *Ibid.*

But as Nielson and Walker have argued, requiring an explanation would entail a small expenditure of judicial resources while producing many procedural benefits—including promoting rational decision-making, limiting the exercise of discretion, aiding further judicial review, enhancing the decision's legitimacy, and helping develop manageable standards. *Id.* at 56-60. A reason-giving requirement would help discourage the tendency towards the path of least resistance (and thus law stagnation) "by ensuring that all the relevant pros and cons for exercising *Pearson* discretion are considered." *Id.* at 60.

II. THE COURT SHOULD GRANT REVIEW TO ADDRESS WIDESPREAD CIRCUIT CONFUSION OVER THE CLEARLY-ESTABLISHED-LAW TEST AND RESOLVE A SEPARATE CIRCUIT SPLIT REGARDING WHAT LAW *SAFFORD* CLEARLY ESTABLISHED

The disagreement between the majority and dissent below exemplifies the widespread inter-circuit confusion over how to identify clearly established law in qualified-immunity cases. Furthermore, the Tenth Circuit's decision below creates a separate circuit split with the Fifth and Eleventh Circuits regarding what law *Safford* clearly established.

A. There is widespread confusion among the circuits about what constitutes clearly established law

1. Jurists have recognized the confusion plaguing the lower courts on what constitutes clearly established law. See, *e.g.*, *Zadeh* v. *Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring *dubitante*) ("[T]he 'clearly established' standard [is] neither clear nor established among our Nation's lower courts."); *Golodner* v. *Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) ("Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established."); *Volkman* v. *Ryker*, 736 F.3d 1084, 1090 (7th Cir. 2013) ("Typically, '[t]he difficult part of this inquiry is identifying the level of generality at which the constitutional right must be clearly established.'" (alteration in original) (quoting *Casey* v. *City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007))); *Moran* v. *Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("[T]his court has itself acknowledged * * * the difficulty of divining clearly established legal principles from multifactor balancing tests.").

Commentators, too, have repeatedly identified this confusion. See, *e.g.*, Richard Fallon, Jr., et al., Hart and Wechsler's The Federal Courts and the Federal System 1047-1050 (7th ed. 2015) (Hart and Wechsler) (discussing the difficult issues that arise when applying the clearly-established-law test); Erwin Chemerinsky, Federal Jurisdiction 595 (7th ed. 2016) ("[T]here is great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity."); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 75 (2017) ("[T]he restrictive manner in which [the Court] defines 'clearly established law' * * * creates confusion in the lower courts."); Karen M. Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 Wm. & Mary Bill Rts. J. 913, 925 n.68 (2015) ("[W]hether a right

is found to be 'clearly established' is very much a function of which circuit (and I would add, which judge) is asking the question * * *.").

The most significant area lacking clarity is that "courts of appeals are divided—intractably—over precisely what degree of *factual similarity* must exist" for one case to clearly establish the law in a later case. *Zadeh*, 902 F.3d at 498 (Willett, J., concurring *dubitante*) (emphasis added). The Eighth Circuit, for example, uses "a flexible standard, requiring some, but not precise factual correspondence with precedent, and demanding that officials apply general, well-developed legal principles." *Mountain Pure, LLC* v. *Roberts*, 814 F.3d 928, 932 (8th Cir. 2016) (quotation omitted). By contrast, in the Eleventh Circuit, "preexisting case law that has applied general law to specific circumstances will almost always be necessary." *Gray* v. *Bostic*, 625 F.3d 692, 706 (11th Cir. 2010) (Wilson, J., dissenting from denial of rehearing en banc) (quoting *Thomas ex rel. Thomas* v. *Roberts*, 323 F.3d 950, 954 (11th Cir. 2003)).

Circuits have also created diverging tests for determining whether the law is clearly established. See, *e.g.*, *Stamps* v. *Town of Framingham*, 813 F.3d 27, 34 (1st Cir. 2016) (the "clearly established" test has "two elements"); *Jermosen* v. *Smith*, 945 F.2d 547, 550 (2d Cir. 1991) (the test has "three factors"); *Echols* v. *Lawton*, 913 F.3d 1313, 1324 (11th Cir. 2019) (plaintiffs can "demonstrate that the contours of the right were clearly established in one of three ways") (citation omitted). The Tenth Circuit has purportedly "adopted a sliding scale to determine when law is clearly established." *Casey*, 509 F.3d at 1284. But the majority below did not apply this test—or even mention it. See App., *infra*, 11a-13a.

2. This circuit confusion owes its origin to two diverging lines of this Court's precedents. This is not surprising, given that Members of this Court have criticized the

clearly-established-law test from its inception: "One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are 'unquestioned constitutional rights.'" *Wood* v. *Strickland*, 420 U.S. 308, 329 (1975) (Powell, J., joined by Burger, C.J., and Blackmun and Rehnquist, JJ., concurring in part and dissenting in part).

One line of authority holds that the "salient question" is whether the law gives an official "fair warning" that his actions are unconstitutional. *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002). Fair warning requires that it should be apparent a particular action is unlawful, but it is unnecessary that "the very action in question [have] previously been held unlawful." *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (citation omitted)). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741; accord, *e.g.*, *Sause* v. *Bauer*, 138 S. Ct. 2561, 2562-2563 (2018) (per curiam). The dissent below followed this approach, recognizing that *Safford* clearly established the law that dictates the outcome in this case.

The majority below, however, relied on a second line of this Court's precedent imposing a far higher hurdle to meet the clearly-established-law test. These decisions hold that "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quoting *al-Kidd*, 563 U.S. at 742). Almost every case in this second line involves claims about either (1) a police officer's split-second decision to use force or (2) a high-level official's discretionary decision-making. See App., *infra*, 29a-31a (citing *White* v. *Pauly*, 137 S. Ct. 548, 550 (2017) (per curiam) (use-of-force); *Mullenix*, 136 S. Ct. at 306 (use-of-force); *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 587-589 (2018) (false arrest); *Kisela* v. *Hughes*, 138 S.

Ct. 1148, 1152 (2018) (per curiam) (use-of-force)).

As commentators have noted, these decisions "require that the prior precedent clearly establishing the law have facts *exceedingly similar* to those in the instant case." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1815 (2018) (emphasis added). The majority below required near-absolute similarity here, relying on recent decisions from this Court "stress[ing]" that clearly established law "'must be particularized to the facts of the case.'" App., *infra*, 30a (quoting *White*, 137 S. Ct. at 552).

"There is an obvious tension between *Hope v. Pelzer*, declaring that there need not be a case on point * * * and the subsequent cases, finding qualified immunity based on the lack of a case on point." Chemerinsky, Federal Jurisdiction 595. Since both lines of this Court's precedent are still good law, only this Court can resolve that tension.

3. One refinement the Court could consider is distinguishing the factual similarity demanded for split-second decisions to use force versus other contexts where government officials make non-exigent decisions with ample time for more considered judgment. This Court has emphasized that "'[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Kisela*, 138 S. Ct. at 1152 (quoting *Graham* v. *Connor*, 490 U.S. 386, 396 (1989)). The same level of protection, however, may not be necessary or even beneficial in cases like this one, where a state official was addressing a non-exigent situation that allowed for more time to decide how to proceed.

B. The decision below is irreconcilable with the law that *Safford* clearly established and creates a new circuit split

The Tenth Circuit concluded that *Safford* did not clearly establish that Woodard needed specific suspicions of danger or wrongdoing before conducting a warrantless strip search of I.B. *Safford*, it opined, merely set forth a test "at a high level of generality" that applies only to strip searches "to prevent a student from distributing medications." App., *infra*, 28a, 29a-30a. This myopic conclusion was erroneous and creates a separate circuit split that this Court should resolve.

1. Even if no warrant is required in this context (but see *supra* Part I), *Safford* has *already* clearly established the law for such warrantless strip searches:

> We do mean * * * to *make it clear* that the *T.L.O.* concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

557 U.S. at 377 (emphasis added).

That paragraph from *Safford*—alone—is enough to clearly establish that an official must have "specific suspicions" of danger or wrongdoing to justify a highly intrusive warrantless strip search. But *Safford* removed any doubt by reiterating the heightened standard that applies to these invasive searches. The Court repeated that a strip search is "categorically distinct, requiring distinct

elements of justification." *Id.* at 374. Put another way, "when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, *general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off*." *Id.* at 376 (emphasis added).

Additionally, *Safford* made clear that whether a warrantless strip search is permissible can turn on the results of a narrower, preliminary search. In *Safford*, the Court explained that there was not sufficient suspicion when a narrower, "preceding search * * * yielded nothing." *Ibid.*

2. Yet here, Woodard made no attempt at a narrower, "preceding search" of the areas of I.B.'s body referenced in the report. *Ibid.* Thus, as in *Safford*, "the content of the suspicion failed to match the degree of intrusion." *Id.* at 375.

And as pleaded here, nothing close to "specific suspicions" of danger or wrongdoing justified a massively invasive strip search of a four-year-old child. As the dissent below noted, just like in *Safford*, the search was "conducted by multiple adults, on school property, without parental notification, consent, or presence." App., *infra*, 45a. At best, the abuse report Woodard was investigating created a mere "general background possibilit[y]" that a strip search would uncover evidence of abuse, beyond what the report specifically alleged and on the private areas of I.B.'s body. *Safford*, 557 U.S. at 376. That lower degree of suspicion is exactly what *Safford* held "fall[s] short" of the justification required for an intrusive strip search. *Ibid.*

As the dissent below explained, given the allegations actually made in the report, Woodard could not "have had a 'specific suspicion[]' that evidence of abuse would be found in the private areas of I.B.'s body." App., *infra*, 50a (alteration in original) (quoting *Safford*, 557 U.S. at 377). The report claimed a few bumps, bruises, and small cuts

or red marks—and mainly in areas visible *without* disrobing I.B. The allegations may have justified (1) asking I.B. questions, (2) examining I.B.'s skin that was in plain view, and (3) performing a targeted search of any skin areas the report specifically mentioned. Instead, Woodard skipped any narrower search to corroborate the report and took the "quantum leap" to a strip search—with photographs—that *Safford* clearly prohibits. 557 U.S. at 377. Woodard even later admitted that the marks she observed "were not consistent with" the report, App., *infra*, 118a—meaning that a narrower search here would have avoided the traumatic escalation causing long-term harm to a young girl.

3. The majority's main error below was treating *Safford* as a medication-contraband case rather than a case establishing the Fourth Amendment law for warrantless school strip searches—as if this Court must decide a case about every last possible rationale for a strip search at a highly granular level before the law can be clear. Under the proper standard, I.B.'s strip search violated clearly established Fourth Amendment law.

Safford unambiguously declared that it was "mak[ing] it clear" that the "specific suspicions" standard—"requiring distinct elements of justification"—governs warrantless strip searches of children. 557 U.S. at 374, 377. *Safford* did not limit the requisite "specific suspicions" based on the purpose of the particular search at issue in that case—finding medications. See *id.* at 377. Instead, *Safford* stated there must be specific suspicions that the private area to be searched would have evidence of "danger" or "wrongdoing." *Ibid.* The Court explained that the heightened "specific suspicions" justification was necessary because of the "categorically extreme intrusiveness of a search down to the body," *id.* at 376-377—a characteristic that *all* strip searches share.

In other words, the underlying Fourth Amendment

doctrine does not turn on whether the warrantless strip search aims to uncover evidence of abuse, theft, possession of contraband, or some other danger or wrongdoing. The dissent below thus correctly concluded that *Safford* clearly established the "specific suspicions" requirement for Woodard's strip search—even though the strip search I.B. endured sought evidence of abuse rather than contraband. App., *infra*, 44a-46a. This requirement of distinct justification applies to searches that seek to prevent "danger" or to uncover "evidence of wrongdoing." 557 U.S. at 377.

In cabining *Safford* as a mere medication case, the majority below relied on a distinction without a difference. As a result, children in the Tenth Circuit lack even a minimal established level of protection against warrantless school strip searches—unless the search is for medication. That is remarkable when the established majority position among the circuits is that a *warrant backed by probable cause* is required for caseworker strip searches of children on suspicion of abuse. See *supra* p. 8. And even the Fourth and Seventh Circuits—which do not require a warrant in this context—both recognized decades ago that there are still some established Fourth Amendment protections over warrantless strip searches. *Wildauer*, 993 F.2d at 372 ("In determining whether a search and seizure is reasonable [under the Fourth Amendment], we must balance the government's need to search with the invasion endured by the plaintiff." (citing *T.L.O.*, 469 U.S. at 337)); *Darryl H.*, 801 F.2d at 900 ("'A search of a child's person * * * is undoubtedly a severe violation of subjective expectations of privacy.'" (quoting *T.L.O.*, 469 U.S. at 740-741)).

4. The Tenth Circuit's refusal to apply *Safford* as clearly established law creates a separate circuit split. In contrast to the decision below, the Fifth and Eleventh Circuits have held that *Safford* clearly established that officials must have heightened, distinct justification before

conducting a warrantless strip search of a child—and not just for those searches seeking hidden medication.

The Fifth Circuit held that officials who strip-searched middle-school girls on suspicion of stolen money violated the clearly established law that "additional requirements apply" to warrantless strip searches. *Littell* v. *Houston Indep. Sch. Dist.*, 894 F.3d 616, 623 (5th Cir. 2018). And the Eleventh Circuit recognized that clearly established law required "distinct elements of justification" to justify a strip search of a seventh-grade student suspected of likely possessing marijuana hidden under his clothes. *D.H. by Dawson* v. *Clayton Cty. Sch. Dist.*, 830 F.3d 1306, 1316 (11th Cir. 2016) (quoting *Safford*, 557 U.S. at 374).

And even before *Safford*, the Second and Seventh Circuits correctly recognized that *T.L.O.* and the Fourth Amendment require heightened justification for a warrantless strip search. See *Phaneuf* v. *Fraikin*, 448 F.3d 591, 596 (2d Cir. 2006) ("[T]he very intrusive nature of a strip search[] require[es] for its justification a high level of suspicion.") (internal citation omitted); *Cornfield by Lewis* v. *Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1321 (7th Cir. 1993) ("What may constitute reasonable suspicion for a search of a locker or even a pocket or pocketbook may fall well short of reasonableness for a nude search.").

After *Safford* clearly established the law for warrantless strip searches of children, officials have abundant fair notice that they need "specific suspicions" of danger or wrongdoing to conduct such a warrantless strip search. 557 U.S. at 377. The Court should grant review of this second question presented to address not only the widespread circuit confusion regarding the clearly-established-law test, but also to resolve this important circuit split over what law *Safford* clearly established.

III. This Case Provides A Valuable Opportunity For This Court To Reconsider Its Qualified-Immunity Jurisprudence

The Court should also grant review to reconsider its qualified-immunity jurisprudence in general.

A. Several Members of this Court have acknowledged practical and doctrinal problems with existing qualified-immunity jurisprudence. See *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., joined by Ginsburg, J., dissenting) (emphasizing the increasing tendency of qualified-immunity jurisprudence to act as "an absolute shield" that "gut[s] the deterrent effect of the Fourth Amendment"); *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) ("In an appropriate case, we should reconsider our qualified immunity jurisprudence."); *Camreta*, 563 U.S. at 728 (Kennedy, J., joined by Thomas, J, dissenting) (inviting reconsideration of qualified-immunity jurisprudence regarding nominal damages to allow courts to reach the merits of claims without imposing massive personal liability); *Crawford-El* v. *Britton*, 523 U.S. 574, 611-612 (1998) (Scalia, J., joined by Thomas, J., dissenting) ("We find ourselves engaged, therefore, in the essentially legislative activity of crafting a sensible scheme of qualified immunities for the statute we have invented—rather than applying the common law embodied in the statute that Congress wrote."); *Wyatt* v. *Cole*, 504 U.S. 158, 171 (1992) (Kennedy, J., joined by Scalia, J., concurring) ("Under the principles set forth in *Celotex* and related cases, the strength of factual allegations such as subjective bad faith [in qualified-immunity cases] can be tested at the summary-judgment stage.").

Commentators have also urged this Court—with recent frequency—to reconsider its qualified-immunity jurisprudence. *E.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 55 (2018); Scott

Michelman, *The Branch Best Qualified to Abolish Immunity*, 93 Notre Dame L. Rev. 1999, 2007-2008 (2018); John F. Preis, *Qualified Immunity and Fault*, 93 Notre Dame L. Rev. 1969, 1980-1981 (2018); Schwartz, 93 Notre Dame L. Rev. at 1801-1802.

B. Modifying or repudiating current qualified-immunity jurisprudence finds substantial support from multiple perspectives. The text of 42 U.S.C. § 1983 makes "no mention" of qualified-immunity "defenses." *Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980). Congress enacted § 1983 during Reconstruction to provide remedies for citizens when state officials violated their federal rights. But qualified immunity insulates officials from civil liability. And under the common law, "there was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment." Baude, 106 Calif. L. Rev. at 55; see also Hart and Wechsler 1041 (noting that the current qualified-immunity standard is "broader than that recognized at common law"). Yet, this Court has justified qualified immunity based on implying official immunities that existed at "common law." *Imbler* v. *Pachtman*, 424 U.S. 409, 421 (1976).

Existing qualified-immunity doctrine has also proven difficult to apply. As discussed above, see *supra* pp. 16-19, much of this consternation stems from the clearly-established-law test. The disarray has required repeated interventions by this Court. Since just 2012, the Court has issued 11 per curiam qualified-immunity decisions. And since 1985, the Court has heard 46 cases dealing with aspects of the doctrine after full briefing and argument.

Moreover, this Court has not hesitated to revisit its qualified-immunity and § 1983 cases when necessary. See, *e.g.*, *Pearson*, 555 U.S. at 242 (abrogating *Saucier* v. *Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 815-816

(abrogating *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974)); *Monell* v. *Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 695 (1978) (partially overruling *Monroe* v. *Pape*, 365 U.S. 167 (1961)). *Stare decisis* therefore has less force with qualified immunity, a judicially-created doctrine that has been altered several times. See, *e.g.*, Michael L. Wells, *Qualified Immunity After* Ziglar v. Abbasi*: The Case for a Categorical Approach*, 68 Am. U. L. Rev. 379, 406-407 (2018); Michelman, 93 Notre Dame L. Rev. at 2007-2008.

C. As noted above, there are strong legal, historical, and practical arguments for reconsidering qualified immunity entirely. But this Court would also have numerous options for modifying or repudiating existing qualified-immunity jurisprudence without wholly jettisoning the doctrine. Full briefing can examine the options in detail, but several potential pathways are readily apparent:

1. Two valuable modifications have already been discussed. The Court can clarify what constitutes "clearly established" law. See *supra* p. 19. And it can refine *Pearson*. See *supra* pp. 13-15.

2. The Court also could confine qualified immunity (a) to contexts where split-second decisions are needed or (b) for high-ranking officials. Most of this Court's decisions granting qualified immunity fall into either one of these two categories. See *supra* pp. 18-19 (collecting such cases). Under this approach, qualified immunity would be limited to particular functions or officials—as is already true with absolute immunity. See, *e.g.*, Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 Iowa L. Rev. 261, 332 (1995).

3. This Court could additionally allow plaintiffs to present sufficient *objective* evidence of bad faith to overcome qualified immunity—even absent existing precedent with sufficient factual similarity to satisfy the clearly-estab-

lished-law test. Qualified immunity was initially recognized and justified as giving officials a "good faith" defense. *Pierson* v. *Ray*, 386 U.S. 547, 556-558 (1967). Objective evidence of bad faith, then, should overcome this immunity defense.

Harlow foreclosed plaintiffs from relying on *subjective* evidence of bad faith that would necessarily invite intrusive discovery into officials' motives. 457 U.S. at 815-816. But it appears *Harlow* did not intend to preclude plaintiffs from relying on *objective* evidence. See *id.* at 819 ("By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct."). Clearly established law may be one form of objective evidence showing bad faith. But there are others. Here, petitioners pleaded that Woodard failed to conduct a narrower search to corroborate the allegations and then lied about having conducted the strip search and photographing. This is objective evidence of bad faith that does not require deposition testimony about Woodard's subjective state of mind.

In all events, the Court could consider cabining *Harlow* to the context of high-ranking officials—which was the fact pattern there. *Id.* at 802. After all, concerns about intrusive discovery would be at their zenith for apex depositions of high-ranking officials. Furthermore, in the more than 35 years since *Harlow*, the legal landscape has changed significantly. See, *e.g.*, Wells, 68 Am. U. L. Rev. at 422-424 & n.256. For example, *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986), evaluates a subjective-bad-faith allegation under a stringent test at the summary-judgment stage, "alleviat[ing] th[e] problem" of weak claims proceeding to trial. *Wyatt*, 504 U.S. at 171 (Kennedy, J. concurring); see, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 380-381 (2007) (claim "blatantly contradicted by the record" cannot survive summary judgment). Likewise, this Court's recent decisions regarding pleading

requirements prevent implausible claims from getting to discovery. *E.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 680 (2009).

4. Finally, the Court could modify qualified-immunity doctrine to allow for nominal damages in certain circumstances or account for whether an official is indemnified. See *Camreta*, 563 U.S. at 728 (Kennedy, J., dissenting) ("[T]he objectives of qualified immunity might be satisfied if there were no bar to reaching the merits and issuing judgment when requested damages are nominal and substantial attorney's fees are waived or not allowed."); James E. Pfander, *Resolving the Qualified Immunity Dilemma: Constitutional Tort Claims for Nominal Damages*, 111 Colum. L. Rev. 1601, 1606-1607 (2011); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1870 (2010).

* * *

This third question presented is directly implicated here. If petitioners prevail on the first question presented, they would not be able to overcome qualified immunity based on this constitutional merits holding unless the existing clearly-established-law test is modified or repudiated. Such a change would likewise permit petitioners to overcome qualified immunity if they could not show clearly established law for the second question presented. "[A] growing, cross-ideological chorus" is urging this Court to reconsider its qualified-immunity jurisprudence. *Zadeh*, 902 F.3d at 499 (Willett, J., concurring *dubitante*). This petition presents a significant opportunity for the Court to do so.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO CONSIDER THE IMPORTANT AND RECURRING QUESTIONS PRESENTED

This case is an ideal vehicle to consider each of the three certiorari-worthy questions presented. The court of appeals affirmed the granting of respondents' motion to dismiss, so a ruling for petitioners would provide them relief by reinstating their lawsuit. Moreover, this motion-to-dismiss posture presents clean facts, as the Court would simply take petitioners' pleaded facts as true instead of having to grapple with disputed facts. This vehicle thus presents poignant facts ideal for addressing the questions presented: four-year-old I.B. was strip searched and photographed at preschool by Woodard; the warrantless search occurred without consent or exigent circumstances; the report of abuse was unfounded and the injuries it reported were not consistent with those Woodard observed; a narrower preliminary search would have confirmed the allegations were unfounded; and Woodard lied to Doe for weeks about the incident. *Supra* pp. 2-4.

Given that the three questions presented have already percolated for some time, the Court has a wide array of lower court opinions and commentary to aid in resolving these important issues. On the first question regarding a warrant requirement in this context, a sizeable and intractable circuit split has produced many separate opinions thoroughly addressing this important Fourth Amendment issue. That the court below did not address this issue is actually an additional reason this Court should grant review: The Court can provide guidance to courts of appeals in light of *Pearson* that they must either address, or at a minimum explain why they are not addressing, a substantial merits issue that has produced a circuit split in a qualified-immunity case. On the second question presented, the lengthy dissent below and other circuits' analyses crystalize the issue about what warrantless strip-search

law *Safford* clearly established. And while only this Court can address the third question, substantial commentary reevaluating qualified immunity in light of the common law and doctrinal developments makes that reconsideration ripe. Plus, the posture of this case well positions this Court to leverage that analysis. In short, there is no reason for the Court to let these exceptionally important issues percolate any further.

This case, in particular, is an excellent vehicle for the Court to review its qualified-immunity precedents. First, the existence of this Court's 2009 *Safford* opinion—which expressly said it was creating clear law—affords the Court a clean opportunity here to elucidate what counts as clearly established law. Second, petitioners pleaded significant allegations of bad faith—most importantly, Woodard lying for weeks about the strip search and photographs. If the Court were to return qualified immunity to a good-faith defense, these allegations of bad faith would directly matter in this case—for both the warrant and clearly-established-law questions presented. Third, this case does not arise in the tense situation where officials—such as police officers—had to make split-second decisions. The Court could therefore refine its precedents outside that context, which could possibly call for different standards as discussed above. See *supra* p. 27.

Each of the three questions presented independently warrants this Court's review. Together, they present the ideal vehicle to address not only the important recurring question of what standards apply when government officials strip search children, but also to reconsider the Court's qualified-immunity doctrine in light of the significant concerns raised by Members of this Court, lower courts, and commentators from across the ideological spectrum.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 2019

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