No. 18-1173

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

BRIEF IN OPPOSITION

RAYMOND M. DEENY
Counsel of Record
SHERMAN & HOWARD L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440
rdeeny@shermanhoward.com

WILLIAM A. WRIGHT
SHERMAN & HOWARD L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202
(303) 297-2900

Counsel for Respondents

287778

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

LIST OF PARTIES

Petitioners' identification of the parties to the proceeding below is not fully accurate. Richard Bengtsson was Executive Director of the El Paso County Department of Human Services ("DHS") at the time the Complaint was filed. Julie Krow, Mr. Bengtsson's successor as DHS Executive Director, was substituted as a party on June 8, 2017.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents April Woodard, Christina Newbill, Shirley Rhodus, and Richard Bengtsson, by counsel, respectfully submit that the Court should deny the Petition for Writ of Certiorari. The Tenth Circuit Court of Appeals correctly ruled that Respondents did not have fair warning that the observation of I.B.'s partially unclothed body, without a warrant or parental consent, would be unconstitutional. In light of the dispositive issue, and in reliance on this Court's instructions, the Circuit Court avoided ruling on the alleged violation of the Constitution. This Court should reject the invitation to use this case to address abstract issues concerning constitutional rights and qualified immunity.

STATEMENT OF THE CASE

A. Factual Background

The First Amended Complaint, Pet'rs' App. 112a, contains the following relevant allegations: Petitioner I.B. was four years old in 2014. *Id.* 113a ¶ 8. Petitioner Jane Doe is I.B.'s mother. *Id.* 115a ¶ 16. From 2012 through 2014, the El Paso County Department of Human Services ("DHS") investigated I.B.'s home around half a dozen times, based on reports that I.B. was being abused. *Id.* 115a ¶ 15. Each case was closed as unfounded, or no documentation was kept. *Id.* ¶ 19.

DHS lacked written policies or guidelines about the use of photographs in investigations of child abuse. Pet'rs' App. 125a-126a ¶ 94. DHS's policy and custom

was to observe any area of a child's body upon which abuse was alleged. *Id.* 126a ¶ 99. When physical injuries were alleged to appear on areas of a child's body under clothes, caseworkers routinely would view those areas. *Id.* DHS took photographs of marks on the body, when observed, and also took photographs to show when no abuse is evident. *Id.* 129a ¶ 115. In accordance with statewide policy, DHS policy did not require parental consent. *Id.* 126a ¶ 96. Colorado law provides that "[a]ny . . . social worker . . . who has before him a child he reasonably believes has been abused or neglected may take or cause to be taken color photographs of the areas of trauma visible on the child." Colo. Rev. Stat. Ann. § 19-3-306 (West, Westlaw through 2019, ch. 65); Pet'rs' App. 125a-127a ¶¶ 91, 100.

I.B. attended the Head Start program at Oak Creek Elementary School in Colorado Springs, Colorado. Pet'rs' App. 115a ¶ 22. On November 22, 2013, DHS received a report that I.B. "had marks that resembled a hand print on her bottom" and that there was a "bruise the size of a dollar bill" on I.B.'s lower back. *Id.* 116a ¶ 24. Both a teacher and a behavioral health consultant at I.B.'s school had observed I.B.'s bottom. *Id.* ¶ 25.

A DHS caseworker responded to the report and also observed I.B.'s bottom. Pet'rs' App. 115a ¶ 27. The caseworker did not find marks that resembled a hand print on her bottom. *Id.* The investigation was closed as unfounded on January 30, 2014. *Id.* 117a ¶ 32. Petitioners describe this investigation by the caseworker as viewing "I.B.'s private areas" and as a "strip search." *Id.* 116a ¶¶ 30-31.

On January 22, 2014, a second report was made, apparently from I.B.'s school, related to a bruise on I.B.'s forehead. *Id.* 117a ¶ 34. This report was also determined to be unfounded. *Id.*

On December 9, 2014, DHS again received a report that I.B. was being abused. Pet'rs' App. 117a ¶ 35. The report included little bumps on I.B.'s 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. *Id.* ¶ 36. On December 10, 2014, Respondent April Woodard, a DHS caseworker, received permission from her supervisor, Respondent Christina Newbill, to view I.B.'s buttocks, stomach/abdomen, and back to look for marks or bruises. *Id.* ¶ 37.

Ms. Woodard met with I.B. and the school health paraprofessional in the nurse's room at I.B.'s school. Pet'rs' App. 117a ¶ 38. Ms. Woodard instructed I.B. to show her bottom, stomach, and back. *Id.* I.B. states that an adult took off all I.B.'s clothes. *Id.* ¶ 39. I.B. told Ms. Woodard she did not want photographs taken. *Id.* 118a ¶ 40. Ms. Woodard viewed I.B.'s "unclothed or partially clothed body" and took color photographs of what she observed. *Id.* 136a ¶ 152.

Ms. Woodard concluded that the marks observed were not consistent with the reporter's statement. Pet'rs' App. 118a, ¶ 47. The case was closed as unfounded on January 5, 2015. *Id.*

Respondent Bengtsson, as Executive Director of DHS, was responsible for developing and implementing

department policies.[1] Pet'rs' App. 130a ¶ 126. Respondent Rhodus is Children, Youth and Family Services Director at DHS. *Id.* 131a ¶ 127. She is responsible for instruction and training of DHS managers and for developing, implementing, and training in constitutional policies. *Id.* Respondents Bengtsson and Rhodus provided no constitutional limitations on how DHS interprets the Colo. Rev. Stat. Ann. § 19-3-306. *Id.* 127a ¶ 101.

B. Proceedings Below

I.B., through Jane Doe, sued under 42 U.S.C.A. § 1983 (West, Westlaw through P.L. No. 116-5) alleging violation of I.B.'s Fourth Amendment rights. I.B. and Ms. Doe brought other claims, against additional defendants, but those claims are no longer at issue. Defendants Woodard, Newbill, Bengtsson, and Rhodus moved to dismiss the Fourth Amendment-related claims for failure to state a claim and on grounds of qualified immunity. The District Court dismissed the claims on grounds of qualified immunity. Specifically, the District Court found that Ms. Woodard and Ms. Newbill did not have fair warning that they needed a warrant or exigent circumstances to take photographs of portions of I.B.'s unclothed body as part of DHS's investigation of allegations of child abuse. Pet'rs' App. 75a, 77a. The District Court also found that Ms. Woodard's conduct was objectively reasonable given the statutory language in Colo. Rev. Stat. Ann. § 19-3-306. *Id.* 77a. Finally, the District Court ruled Petitioners failed to show that Ms. Woodard's conduct did not meet

1. Richard Bengtsson was Executive Director of DHS at the time the Complaint was filed. Julie Krow, Mr. Bengtsson's successor as DHS Executive Director, was substituted as a party on June 8, 2017.

the minimal standards of reasonableness that accompany the special needs doctrine. *Id.* 78a-79a.

Petitioners' claims against Respondents Rhodus and Bengtsson were based in part on supervisor responsibility for Ms. Woodard's conduct. In the absence of a viable claim against Ms. Woodard based on violation of the Fourth Amendment, the District Court also dismissed the claims against Ms. Rhodus and Mr. Bengtsson. Pet'rs' App. 82a. The District Court dismissed other claims against Ms. Rhodus and Mr. Bengtsson based on their alleged failure to take sufficient steps to protect the confidentiality of investigatory photographs, because the First Amended Complaint stated only potential violations of the Fourth Amendment related to confidentiality. *Id.* 83a.

The District Court dismissed the Fourth Amendment-based claims without prejudice. When Petitioners moved to amend the First Amended Complaint, they attempted to plead that Woodard's actions failed to meet minimal standards of reasonableness under the special needs doctrine. The District Court denied the motion because the proposed Second Amended Complaint did not address the issue of qualified immunity. Pet'rs' App. 101a.

On appeal, the Tenth Circuit Court of Appeals affirmed the District Court's ruling. Pet'rs' App. 32a. The Tenth Circuit limited its qualified immunity analysis to the existence of clearly established law concerning Ms. Woodard's conduct. *Id.* 20a. It ruled that Supreme Court precedent was not applicable, and the Tenth Circuit itself had not held that a caseworker needed a warrant to examine and photograph a child's body when responding to allegations of child abuse. *Id.* 21a-24a. Decisions from

other circuits, in cases involving social workers, yielded varied results, again, providing no clear guidance to caseworkers. *Id.* 24a. The Tenth Circuit also concluded that Petitioners had not provided sufficient analysis to show that Ms. Woodard's conduct violated the minimal standards of reasonableness that apply under the special needs doctrine. *Id.* 26a.

SUMMARY OF THE ARGUMENT

The Court should not grant the Petition. The judgment below was soundly based on this Court's precedents concerning qualified immunity. Nothing in the case below suggests that this Court should exercise its supervisory power.

Nothing in the precedents from other circuit courts provides a compelling reason to grant the Petition. The asserted split among certain circuit courts on the constitutional issue is better described as the circuit courts reaching different results based on divergent facts. The Petition suggests a second split among the circuit courts exists concerning the standard for determining when a legal principle is clearly established. The Tenth Circuit judges who ruled on the case below all applied the more flexible standard, and the majority still found qualified immunity applied.

The Court's qualified immunity jurisprudence has been developed over the course of more than fifty years. The Petition presents no compelling reason for the Court to revisit its principles concerning qualified immunity in light of the case below.

ARGUMENT

I. QUALIFIED IMMUNITY PROTECTS GOVERNMENT OFFICIALS FROM SUIT WHEN THEY ACT REASONABLY.

A. Qualified immunity is an immunity from suit, not just a defense.

"Qualified immunity balances . . . the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights that every reasonable government official in their position would have known. *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

Qualified immunity is an "immunity from suit" and not just a defense to liability. *Pearson*, 555 U.S. at 231 (internal quotation marks omitted). The Court therefore has repeatedly "stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Id.* at 232 (internal quotation marks omitted).

B. Respondents are entitled to qualified immunity if the asserted constitutional right was not clearly established.

Qualified immunity protects government officials unless they are "plainly incompetent" or "knowingly violate the law." *Mullenix v. Luna*, 136 S. Ct. 305, 308

(2015) (internal quotation marks omitted). Once the defendant has moved to dismiss based on qualified immunity, the plaintiff must show (1) that a constitutional violation occurred and (2) that the constitutional right was clearly established at the time of the alleged violation. Pet'rs' App. 11a. The court may address either required prong first in light of the circumstances. *Pearson*, 555 U.S. at 236.

To show that a constitutional right was clearly established requires the legal principle to be settled law. *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). "It is not enough that the rule is *suggested* by then-existing precedent. The precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 590 (emphasis added). *See also City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) ("Under our cases, the clearly established right must be defined with specificity.").

II. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT RESPONDENTS WERE ENTITLED TO QUALIFIED IMMUNITY.

The Tenth Circuit Court of Appeals correctly determined that that state of the law in Colorado in 2014 did not give Respondents fair warning that a caseworker would violate the Constitution by observing a child's partially clothed body and taking photographs as part of an investigation of child abuse. Because the caseworker here did not have a warrant or parental consent, the Tenth Circuit's analysis began with the special needs doctrine. Pet'rs' App. 15a.

In a previous case, *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1212-14 (10th Cir. 2003), the Tenth Circuit had examined this Court's rulings on the special needs doctrine. By induction, the Circuit Court identified three features common to this Court's special needs doctrine cases: "(1) an exercise of governmental authority distinct from that of mere law enforcement—such as the authority as employer, the *in loco parentis* authority of school officials, or the post-incarceration authority of probation officers; (2) lack of individualized suspicion of wrongdoing, and concomitant lack of individualized stigma based on such suspicion; and (3) an interest in preventing future harm, generally involving the health or safety of the person being searched or of other persons directly touched by that person's conduct, rather than of deterrence or punishment for past wrongdoing." *Id.* at 1213-14 and n. 10 (citing seven opinions of this Court). When the special needs doctrine does apply, courts assess the reasonableness of the defendant's conduct (a) according to whether the search was justified at inception and reasonable in scope and circumstances, or (b) by balancing government and private interests. Pet'rs' App. 16a.

After reviewing the applicable law, and based on the principles from *Dubbs*, the Tenth Circuit determined that the need for a warrant, consent, or exigent circumstances—i.e. the inapplicability of the special needs doctrine—was not clearly established for caseworkers investigating allegations of physical abuse of a child. Focusing on the arguments Petitioners made below, the Tenth Circuit distinguished its own previous precedents. First, in *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993), the government official at issue was a police officer. Under the principles established in *Dubbs*, the special needs doctrine

did not apply to "mere law enforcement." Pet'rs' App. 17a, 22a. No police officer was involved in this case.

Second, in *Dubbs* itself, a school subjected an entire class of students to genital examinations and blood tests under circumstances in which members of the class could hear or see portions of other members' examinations. Pet'rs' App. 18a. *Dubbs*, 336 F.3d at 1199-1200. The Tenth Circuit did not rule in *Dubbs* on whether the special needs doctrine applied; instead, the court simply ruled the defendant's conduct was unreasonable, given the extreme "privacy deprivations" present in that case. Pet'rs' App. 18a. No similar privacy deprivations are alleged in this case. Ms. Woodard met I.B. in the nurse's room, with the school health representative. Pet'rs' App. 117a, ¶ 38. Everyone present was female. *Id.*

Third, in *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1248 (10th Cir. 2003), the Circuit Court had ruled that the special needs doctrine did not apply when a caseworker entered a home and removed the child. Pet'rs' App. 17a. This case does not involve a similar home invasion.

The other direct precedent on which Petitioners relied in the case below was *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Petitioners cited this case for the proposition that the special needs doctrine does not apply when the defendant's conduct is entangled with law enforcement. Pet'rs' App. 23a. The Tenth Circuit found *Ferguson* unrelated to the issue presented in this case. *Id.* 23a. In *Ferguson*, the police and the hospital collaborated on a policy that called for drug testing pregnant women, creating and maintaining the tests in a form admissible

as evidence, and specified the charges the police would bring against anyone who tested positive. *Ferguson*, 532 U.S. at 71-72. Here, a caseworker, in the presence of the school nurse, partially unclothed a child and took pictures in an investigation of suspected child abuse. Pet'rs' App. 23a. No police or prosecutors were present or alleged to be involved in setting the policy. *See* the discussion *infra* in Part III.C.

As Petitioners do here, they argued before the Tenth Circuit that the weight of other authority—cases from other circuit courts—clearly established that Ms. Woodard needed a warrant. The Circuit Court rejected the argument that a split of four circuit courts to two amounted to clearly established weight of authority. Pet'rs' App. 24a.

Moreover, the split was more apparent than real. The four cases that supported Petitioners' position relied on police involvement in the search at issue and/or on invasive medical or genital examinations. Pet'rs' App. 24a. *See Calabretta v. Floyd*, 189 F.3d 808, 820 (9th Cir. 1999) (noting that the constitutionality of the strip search could not be separated from the coerced entry into the home by the police officer who accompanied the social worker); *Good v. Dauphin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1096 (3d Cir. 1989) (considering a strip search that occurred in the context of a coerced entry); *Tenebaum v. Williams*, 193 F.3d 581, 588-91 (2d Cir. 1999) (considering social services department's removing a child from school and taking her to a hospital for a medical examination); *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002) (holding unconstitutional a "visual cavity search" of a child).

The Tenth Circuit also rejected Petitioners' argument that the observation of I.B.'s partially clothed body failed to meet minimal reasonableness standards, as was the case in *Dubbs*. Pet'rs' App. 26a. The Tenth Circuit elaborated on the argument in response to the dissenting opinion by Judge Briscoe. Relying on this Court's precedent, the Tenth Circuit ruled that, to show the observation lacked minimal reasonableness, Petitioners would have to apply law that involved state actors acting under similar circumstances. *Id.* at 27a (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Given this standard, *Dubbs* and *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009), were not comparable. In *Dubbs*, in order to comply with federal program requirements, the nurses conducted intrusive examinations of the genitals of all children in the class, and took blood specimens, all in circumstances where the children could see or hear portions of the examination performed on their classmates. Pet'rs' App. 27a-28a. In *Safford*, the strip search was to enforce school policy. *Id.* 28a-29a; *Safford Unified Sch. Dist. #1*, 557 U.S. at 371 (citing school policies). The searches in those cases were not reasonably related to the justification for the search. Pet'rs' App. 28a-29a. Neither case said anything about the scope of a search initiated to protect the child from physical abuse. *Id.* 29a.

The Tenth Circuit relied heavily on this Court's earlier cases concerning qualified immunity, and, fairly read, its reasoning is sound. The opinion below presents no need for this Court to exercise its supervisory power.

III. THE COURT SHOULD NOT GRANT THE PETITION TO ADDRESS GENERALLY THE CLAIMED CONSTITUTIONAL RIGHT.

Petitioners request the Court grant the Petition to address whether a caseworker requires a warrant to view and photograph a child's skin, under her clothes, while investigating reports that the child is a victim of physical abuse. Pet. 7, 8. This case presents a poor opportunity for such a general review. Here, the Tenth Circuit exercised its discretion under *Pearson v. Callahan*, 555 U.S. 223 (2009), and addressed only whether the constitutional principle at issue was clearly established. The Circuit Court did not weigh in on the alleged split among other circuit courts or on the wisdom of the discretion this Court had granted. To address the general issue as Petitioners request would require the Court to rule without the benefit of the reasoning of the court below.

A. The reported circuit split relies more on factual differences among the cases than on disagreement about applicable law.

Petitioners argue that the Court should grant review to resolve a split among six of the circuit courts on whether the special needs doctrine applies to social worker examinations of children based on suspicions of abuse. Pet. 8-9. This split relies more on factual differences than on any disagreement about applicable law.

As the Tenth Circuit noted, the four cases that Petitioners cite as supporting their position each have crucial factual features that are not present in this case. In *Calabretta v. Floyd*, 189 F.3d 808, 811 (9th Cir. 1999),

the social worker visited the child in the company of a police officer. The two insisted on entering the home, and this fact proved crucial. *See*, *e.g.*, *id.* at 815 (distinguishing *Wildauer v. Frederick County*, 993 F.2d 369 (4th Cir. 1993) on the basis of the coerced entry and the criminal investigation). The Ninth Circuit had already clearly established that no government official could enter a home without a warrant or exigent circumstances. *Id.* at 813. According to the Ninth Circuit, the issue of whether the social worker reasonably insisted that the child's mother pull the youngest child's underwear down to show whether there were marks, could not be separated from the coerced entry.[2] *Id.* at 20. Similarly, in *Good v. Daughin Cnty. Soc. Servs. for Children & Youth*, 891 F.2d 1087, 1096 (3d Cir. 1989), the alleged strip search occurred in the context of a coerced entry.

In the other two cases Petitioners cite as supporting their position, the examination of the child was significantly more invasive. In *Tenebaum v. Williams*, 193 F.3d 581, 588-91 (2d Cir. 1999), social workers, acting on the child's indication that she had been injured in the groin area by her father, removed a child from school and transported her to the hospital, where she was subjected to a medical examination. The Second Circuit ruled that a jury had to decide whether the social services representatives' conduct in removing the child from school was reasonable, under the special needs doctrine or any other standard.

2. The Ninth Circuit distinguished the strip search in *Calabretta* from that in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), not on the basis of a disagreement about applicable law, but because the social workers in *Darryl H.* had substantial reason to believe the children were abusively disciplined. *Calabretta*, 189 F.3d at 818.

Id. at 605. The medical examination, however, required parental consent or a court order. *Id.* at 606. Similarly, in *Roe v. Texas Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407-08 (5th Cir. 2002), the court held that a "visual cavity search" of a child requires probable cause, consent, or exigent circumstances.

Studied in moderate detail, the circuit courts that have considered social workers and the special needs doctrine divide because of the particular facts of the cases presented. The circuit court split, to the extent there is one, does not reflect divergent legal analyses.

B. The Court should not grant the Petition to revisit *Camreta v. Green*.

Petitioners also suggest that the Court use this case to complete its analysis of *Camreta v. Green*, 563 U.S. 692 (2011). Pet. 9. In *Camreta*, the Court found the constitutional issue to be moot because the victim had moved across the country. 563 U.S. at 710-711. If the Court were to grant the Petition in order to define the constitutional limits of a social worker's non-invasive examination of a child for signs of abuse, the Court's processes could be frustrated a second time. Just as the child in *Camreta* had moved across the country, so too has I.B. moved out of state. Pet'rs' App. 86a-87a. Given that the constitutional principle at issue was not clearly established, I.B. lacks a continuing interest in the controversy. *Camreta*, 563 U.S. at 693.

C. The caseworker's conduct was not entangled with law enforcement.

Citing *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), Petitioners argue that child abuse cases are entangled with law enforcement and therefore the special needs doctrine should not apply. Pet. 10. In *Ferguson*, the policy at issue was developed by the city Solicitor, based on the Solicitor's plan to prosecute pregnant users of cocaine on a child abuse theory. 532 U.S. at 71. The procedure for conducting the drug screen was designed to meet evidentiary standards for the prosecution. *Id.* at 71-72. Where drug use was identified after labor, the associated protocols called for the patient to be promptly arrested. *Id.* at 72. The policy also detailed the charges a woman would face for a positive test, based on the stage of pregnancy. *Id.*

This case presents no similar interconnection between the caseworker and law enforcement. No police officer accompanied Ms. Woodard, and no prosecutor was involved in preparing the practices Ms. Woodard followed.

Petitioners rely on Colorado law to show that DHS caseworkers are intertwined with law enforcement. Pet. 10. Colorado law does require DHS to report to law enforcement when it reasonably believes child abuse has occurred. Colo. Rev. Stat. Ann. § 19-3-308(5.5) (West, Westlaw through 2019, ch. 65). But, under Colorado law, physicians, coroners, dentists, optometrists, chiropractors, podiatrists, registered nurses, licensed practical nurses, veterinarians, firefighters, public and private school employees, dental hygienists, and photographic print processors, among others, have similar duties to report

reasonable cause to suspect child abuse to the county human services department or law enforcement. Colo. Rev. Stat. Ann. § 19-3-304 (West, Westlaw through 2019, ch. 65).

DHS's duty to report to law enforcement is balanced by Colorado law enforcement agencies' duty to report suspected intrafamilial abuse to the county department. Colo. Rev. Stat. Ann. § 19-3-308(5) (West, Westlaw through 2019, ch. 65). County human services departments are responsible to coordinate all investigations into reports of intrafamilial abuse or neglect and to cooperate with law enforcement, when "deemed appropriate." *Id.* § 19-3-308(4)(a). In short, the Colorado legislature wants the county departments and law enforcement to cooperate in the investigation of child abuse and to focus on "the best protection for the child." *Id.* § 19-3-308(5.5). This is far from the involvement of law enforcement officers in *Ferguson*, *Calabretta*, or *Good*.

D. The Court should not grant the Petition based on speculative constitutional violations.

Petitioners argue that a warrant requirement is "indispensable" because investigators may perform unnecessarily invasive searches. Pet. 11. Petitioners invite the Court to balance the competing aims of protecting children from abuse and Fourth Amendment protections for privacy and to lean heavily toward privacy. *Id.* 12. But the invitation relies on ungrounded fears that investigators *might* perform unnecessarily invasive searches. *Id.* 11. Petitioners do not explain how this case presents a compelling reason for the Court to engage in this balancing.

Petitioners also suggest that the "exigent circumstances" justification for a warrantless search is enough to protect children from abuse. Pet. 12. The "exigent circumstances" justification is generally limited to law enforcement. *See Kentucky v. King*, 563 U.S. 452, 460 (2011). The facts of this case do not suggest that the "exigent circumstances" justification alone adequately protects children. Here, DHS had received multiple reports that I.B. suffered physical abuse, apparently at home. Pet'rs' App. 115a-117a. Some of the alleged marks were beneath I.B.'s clothes. *Id.* 116a ¶ 24 (bottom and lower back), 117a ¶ 36 (lower back and stomach). As it turned out, the allegations of abuse were unfounded, but, at the inception of Ms. Woodard's investigation, she could not have known whether she would see marks caused by physical abuse. If Ms. Woodard had been restricted to the exigent circumstances justification applicable to law enforcement, the child might have been returned to an abusive home.

E. The Court should not grant the Petition to refine *Pearson v. Callahan*.

Petitioners suggest that the Court should grant the Petition to restrict lower courts' discretion to resolve qualified immunity questions before resolving the underlying issue of a violation of constitutional rights. Pet. 13. In *Pearson v. Callahan*, 555 U.S. 223 (2009), this Court rejected the "rigid" two-step process previously used under *Saucier v. Katz*, 533 U.S. 194 (2001). *Saucier* had required courts to determine whether a constitutional violation occurred before addressing whether the law was clearly established. For a multitude of reasons, this Court found the *Saucier* protocol poorly served the purpose of

qualified immunity, judicial economy, and judicial clarity. *Pearson*, 555 at 236-37.

Petitioners advocate for a return to *Saucier*, at least, in cases that address "constitutional merit questions that implicate a circuit split." Pet. 14. Petitioners' proposal does not address either the policy interests that lead to the creation of the qualified immunity doctrine or the courts' interest in judicial economy and clarity. Qualified immunity is not a defense to liability but an immunity from suit, including the rigors of discovery and prolonged litigation. *See Pearson*, 555 U.S. at 237 (the two-step *Saucier* approach "forces the parties to endure the burdens of suit…") (internal quotations marks omitted). Qualified immunity therefore should lead to the prompt dismissal of unfounded claims against government officials. Unfortunately, at the pleading stage, determining whether a constitutional violation actually occurred "may depend on a kaleidoscope of facts not yet fully developed." *Pearson*, 555 U.S. at 239 (internal quotation marks omitted). The mere fact that circuit courts divide over the issue will not crystallize a constitutional issue for a lower court's consideration. For instance, as with other social worker cases, the constitutional question might turn on the degree of invasiveness of the search or on the involvement of law enforcement. *See* Part III.A *supra*. The *Saucier* two-step process therefore infringes the public interest in allowing government officials to work reasonably without undue fear of litigation.

Petitioners' proposal also does not serve judicial economy and clarity. It may be obvious to a court that a particular case must be dismissed, because the constitutional principle at issue is not clearly established,

but, under the *Saucier* two-step process, the court must go through with the litigation, perhaps through trial, before reaching the inevitable resolution. Alternatively, the court may attempt to resolve the constitutional issue on the pleadings. As this Court recognized in *Pearson*, such situations may result in a court devoting less care to the constitutional issue than it normally would. *Pearson*, 555 U.S. at 239.

Thus, adopting Petitioners' proposal would present lower courts with a choice: either (i) decide the constitutional question prematurely and, perhaps, incorrectly or (ii) subject a government official to discovery so that the factual framework is sufficiently clear for a proper ruling, only to dismiss the constitutional claim on the second prong of the qualified immunity test immediately afterward.

As an alternative, Petitioners suggest that courts provide reviewable reasons for exercising their *Pearson* discretion. Pet. 15. This alternative also would result in a needless expenditure of scarce judicial resources, both for the district courts providing the reasons and the circuit courts reviewing the reasons on appeal.

No compelling reason exists to restrict lower courts' *Pearson* discretion in cases implicating circuit splits. Under *Pearson*, the circuit courts remain free to rule on the constitutional issue if they find it is appropriate to establish an important point of law or to address a recurring situation. *Pearson*, 555 U.S. at 242. Similarly, no compelling reason exists to require courts to set out their reasons for moving directly to a dispositive issue. Petitioners simply ask the Court to rebalance the very

interests already balanced in *Pearson*. The Petition presents no reason to do so based on the case below.

IV. THE COURT SHOULD NOT GRANT THE PETITION TO RECONSIDER STANDARDS FOR DETERMINING WHEN LAW IS CLEARLY ESTABLISHED.

Petitioners ask this Court to grant the Petition to clarify the standard for determining that a constitutional principle is clearly established. Pet. 15-16. While this Court, other courts, and commentators use various phrases to express the standard for clearly established law, Petitioners do not indicate the existence of a clear division among the circuit courts, nor did the Tenth Circuit address any such division. Again, nothing about the Petition is especially suitable for the clarification Petitioners request.

A. The Petition does not offer an opportunity to resolve a division between the "fair warning" standard and the "clearly established law" standard.

Petitioners suggest that a division exists between the majority in the court below and Judge Briscoe in dissent, over the standard for clearly established law. Pet. 15. More specifically, Petitioners suggest that the Court use this case to provide better guidance on the degree of factual similarity that must exist for a court to find that precedent clearly established a legal principle applicable to the presented facts. *Id.* 17. Petitioners ascribe the asserted confusion among the circuits to this Court's use of the "fair warning" standard of *Hope v. Pelzer*, 536 U.S.

730, 741 (2002) and the "clearly-established-law" test of *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015). Pet. 17-18.

This case does not present the division Petitioners identify. The majority in the court below did not rely on a standard other than the "fair warning" standard. Pet'rs' App. 12a (citing "fair warning" standard and noting both that, to be clearly established, a constitutional right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right, and that a general statement of law may give fair warning if, in the light of pre-existing law, the unlawfulness is apparent) (internal citations omitted). Nor did the dissenting opinion suggest a lower standard than the standard the majority used. Pet'rs' App. 45a (citing standard that precedent must be sufficiently clear for every reasonable official to interpret it to establish the particular rule the plaintiff seeks to apply). Rather, the majority and the dissenting opinion differed over whether the justifications offered for the searches in *Dubbs* and *Safford* were different. The dissent argued both cases were "justified by the state's interest in child welfare." *Id.* 45a. As noted elsewhere in the Response, the majority found (a) the concern in *Dubbs* to collect information on children's development, as required by regulation, and (b) the concern in *Safford* that the child was injuring others by distributing drugs were different from (c) the concern to protect I.B. from abuse. *Id.* 28a-29a.

Petitioners suggest limiting the "clearly established law" test to cases involving exigent circumstances. Pet. 19. Because the Tenth Circuit actually applied the lower, "fair warning" standard in this case, the Petition does not clearly present the issue Petitioners suggest.

Moreover, this Court clarified the standard for clearly established law last year in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018). In *Wesby*, there was no concern about exigent circumstances; nevertheless, the Court required the legal principle on which the plaintiff relied to be "settled law" and "clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 590. *See also City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) ("the clearly established right must be defined with specificity").

The Court has relied on a broad evidentiary standard to determine when qualified immunity is available to a public official. The standard lends itself to various illustrations. However, this Court reviews judgments, not statements in opinions. *Camreta v. Green*, 563 U.S. 692, 704 (2011). The Petition does not show that an actual disagreement exists among the circuit courts concerning the standard, nor that granting the Petition would provide a suitable opportunity to clarify the standard.

B. The Court should not grant the Petition to clarify *Safford*.

Petitioners also suggest this Court grant the Petition to revisit *Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364 (2009). According to Petitioners, the Tenth Circuit concluded that *Safford* applied only to strip searches to prevent a student from distributing medications. Pet. 20. This is an unsympathetic reading of the Tenth Circuit's ruling. The Tenth Circuit described the factual setting of *Safford*. The student in that case was searched because she "was suspected of harming others through drug distribution." Pet'rs' App. 28a. The Circuit Court

contrasted this with the circumstances of the search in this case. Here "[t]he child . . . was suspected of suffering abuse from a third party." *Id.* at 28a-29a. The Circuit Court did not limit the applicability of *Safford* to searches for illicit drugs.

Petitioners go on to assert that *Safford* clearly established the law for warrantless strip searches. Pet. 20. This Court did not go as far in *Safford* as the Petitioners suggest. *Safford* addressed searches in aid of school policies. The Court's opinion starts with a discussion of *New Jersey v. T. L. O.*, 469 U. S. 325 (1985). *Safford*, 557 U.S. at 370. *T.L.O.* balanced students' privacy interests against the interests of teachers and administrators in maintaining discipline. *T.L.O.*, 469 U.S. at 339-340. Similarly, *Safford* balanced privacy and the school's policies on nonmedical use, possession, or sale of drugs. 557 U.S. at 371. Against this limited universe, the Court ruled 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." *Safford*, 557 U.S. at 377. This is what the Court made clear. *Id. Safford* therefore is not so applicable to a caseworker searching a child for evidence that the child has been the victim of intrafamilial abuse that "every reasonable official would interpret it to establish" that Ms. Woodard's conduct was unconstitutional. *Wesby*, 138 S. Ct. at 590.

Relying on *Safford*, Petitioners suggest that, in the case below, Ms. Woodard should have conducted a preliminary search of visible areas of I.B.'s body, before moving on to examine and take pictures of her unclothed

or partially clothed body. Pet. 21. Petitioners go so far as to suggest that Ms. Woodard's initial review should have been limited to skin that was in plain view. *Id.* 22. Petitioners' point properly goes to the minimal standards of reasonableness applicable to any search, including one protected by the special needs doctrine. The search must be reasonable in its inception and reasonably related in scope to the circumstances. Pet'rs' App. 30a. Adopting Petitioners' suggestion, therefore, would not clarify whether Ms. Woodard should have known that observing I.B.'s bottom was unconstitutional.

Moreover, the facts of this case suggest that Ms. Woodard had reason to inspect the skin under I.B.'s clothes. The most recent allegations of abuse included reports of marks on I.B.'s stomach. Pet'rs' App. 117a ¶ 36. Previously, DHS had received reports of a hand print on I.B.'s bottom and a bruise on her lower back. *Id.* 116a ¶ 24. None of these would have been apparent on an investigation limited to skin that was in plain view. Given the history of abuse allegations, Ms. Woodard reasonably checked the locations where others had reported seeing signs of physical abuse.

The Petition does not present an opportunity for the Court to clarify the standards for determining when a legal principle is clearly established. The majority opinion from Tenth Circuit and the dissenting opinion agreed concerning the standard, and the standard used in the court below complies with this Court's recent statements in *Wesby*. The majority and dissenting opinion differed with regard to the relationship between the government interest justifying the search and the search itself.

V. THE COURT SHOULD NOT GRANT THE PETITION TO RECONSIDER ITS QUALIFIED IMMUNITY JURISPRUDENCE IN GENERAL.

Finally, Petitioners suggest the Court should use this case to revisit the foundational principles of qualified immunity. Pet. 25. Petitioners cite various statements from members of the Court and from commentators. *Id.* 25-26. Petitioners also point out that this Court has reviewed its qualified immunity jurisprudence in the past. *Id.* 26-27. Petitioners then open the curtains to provide a tantalizing glimpse of the policy choices the Court could make with regard to qualified immunity. Pet. 27-29. Petitioners' argument lacks any compelling reason to grant the Petition.

Petitioners propose the Court: (i) "clarify" what constitutes "clearly established law" or modify *Pearson*; (ii) confine qualified immunity to "split-second" decisions or to "high ranking" officials; (iii) allow plaintiffs to present sufficient objective evidence of bad faith to overcome qualified immunity; and (iv) allow for nominal damages or account for whether an official is indemnified. Pet. 27-29. Petitioners' first proposal is discussed in Part III of this Response. As described in detail above, the circuit courts are not as divided as Petitioners claim over the issue of when government officials may claim qualified immunity. Careful review of the context of the government officials' conduct in the various cases shows the apparent divisions among the circuit courts to be mostly fact-bound.

Petitioners' second proposal is to limit qualified immunity to split-second decisions or high ranking officials. Pet. 27. Adopting this proposal would make

qualified immunity unavailable to the vast majority of ordinary public officials. Law enforcement officers are among the few officials called upon to make split-second decisions. For example, law enforcement officers might engage in a high-speed car chase or a confrontation with an armed suspect. However, Petitioners' proposal would prevent qualified immunity from applying to other emergency situations. *See Green v. Post*, 574 F.3d 1294, 1301 (10th Cir. 2009) (holding that emergencies are "not limited to situations calling for split-second reactions," but also include decisions that "must be made in haste, under pressure, and frequently without the luxury of a second chance"). Conversely, Petitioners propose to limit qualified immunity to high ranking officials, who rarely, if ever, make split-second decisions. Pet. 27-28. Unlike law enforcement officers on the street, high ranking officials would be entitled to assert qualified immunity regardless of the circumstance. Thus, Petitioners' second proposal would transform qualified immunity into a set of bookends, applying only to the rare split-second decision or to the relaxed office of the high ranking official and leaving most officials, and most official duties, unprotected.

Petitioners' third proposal is to permit objective evidence of bad faith to overcome qualified immunity, even when no clearly established legal precedent gave officials fair warning that their conduct was unconstitutional. Pet. 27. Petitioners thus suggest an end run around *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Harlow*, the Court held that the government official's subjective intention plays no role in determining whether the official had qualified immunity. *Id.* at 817-18. The Court also equated objective evidence of bad faith with a clearly established legal principle that any government official

should have known. *Id.* at 818. Petitioners' proposal, however, would re-introduce allegations of malice or other subjective intent. For an example Petitioners cite one of the allegations in the present case—that Ms. Woodard lied about observing I.B.'s bottom. Pet. 28. The cited allegation is not objective evidence of bad faith; it does not show clearly established law. At most, it is evidence of Ms. Woodard's subjective state of mind when speaking to Ms. Doe after the investigation, and it is the kind of subjective evidence excluded by *Harlow*. 457 U.S. at 815 ("The subjective element of the good faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial."). Petitioners' proposal to re-create the subjective element of the good faith defense would interfere with purpose of qualified immunity to "shield government officials from harassment, distraction, and liability when they perform their duties reasonably" *Pearson*, 555 U.S. at 231.

Petitioners' fourth proposal is to allow for nominal damages or to account for whether an official is indemnified. Pet. 29. In support of this proposal, Petitioners cite a sentence from Justice Kennedy's dissent in *Camreta v. Green*, 563 U.S. 692, 716-730 (2011). The Justice suggested that "the 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." *Id.* In context, the quotation from Justice Kennedy is speculation concerning "refinements to our qualified immunity jurisprudence" that might be preferable to "altering basic principles of jurisdiction." *Id.* Petitioners' proposal calls for a sweeping overhaul of the qualified immunity doctrine. Nothing about the Petition

suggests that this case presents an opportunity to consider nominal damages or a voluntary waiver of attorney fees. Petitioners did not seek nominal damages or volunteer to waive their attorney fees.

Any of Petitioners' proposals would drastically remake, or perhaps repudiate, this Court's jurisprudence on qualified immunity. Petitioners do not suggest a compelling reason arising from the case below to engage in a wholesale re-writing of qualified immunity principles.

VI. THE COURT HAS NO COMPELLING REASON TO GRANT THE PETITION.

In their last major section, Petitioners summarize their reasons for the Court to grant the Petition. Pet. 30. As described throughout this Response, the reasons Petitioners advance are not compelling.

Petitioners suggest that the facts here are "clean" because the case was resolved on a motion to dismiss. Pet. 30. The facts are not clean; they are undeveloped. Even the key allegation concerning the search at issue is disjunctive. Petitioners allege "[a]round November or December 2014, Defendant Woodard searched I.B.'s person by viewing I.B.'s *unclothed or partially clothed* body, and taking color photographs of what she observed." Petr's' App. 136a ¶ 152 (emphasis added). The Petition does not even provide the Court with a clear case of a strip search.

Petitioners suggest that granting the Petition would allow the Court to address "a sizeable and intractable circuit split." Pet. 30. As described above, the cited split arises from the specific facts of the cases presented and not from a disagreement concerning the law.

Petitioners further suggest that the fact the Tenth Circuit did not weigh in on the circuit split is a positive consideration for granting the Petition, because the Court can address *Pearson*. Pet. 30. The lack of a related ruling from the court below leaves this Court to determine the constitutional issues in the echo chamber created by multiple rulings on different facts, commentators and law review articles, dicta, and dissenting opinions. In these circumstances, the case is not the "ideal vehicle" for the Court.

Similarly, the case is not "an excellent vehicle" for the Court to reconsider its qualified immunity jurisprudence. As described above, the judges in the case below did not disagree about the standard, nor did they disagree with this Court's recent discussions of the standard for clearly established law. Nothing about the facts or the judgments in this case give the Court compelling reasons to grant the Petition.

CONCLUSION

More than fifty years ago, in *Pierson v. Ray*, 386 U.S. 547, 555 (1967), this Court ruled that a police officer may be entitled to qualified immunity from § 1983 claims, explaining that a "policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." Seven years after *Pierson*, in *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974), this Court determined that a governor and his aides could receive protection under qualified immunity. *Scheuer* marked this Court's attempt to balance "the need to protect officials who are required to exercise

their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Eight years after *Scheuer,* in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court solidified the two-prong test for qualified immunity which shields officials from liability insofar as their conduct does not violate a clearly established statutory or constitutional right of which a reasonable official would have known.

In the nearly four decades since *Harlow*, this Court has issued more than thirty opinions addressing lower courts' application of qualified immunity to a wide array of actions taken by a wide array of public officials, including more than two dozen decisions favoring the application of qualified immunity. Last year alone, this Court decided three qualified immunity cases, two of which—*Kisela v. Hughes*, 138 S. Ct. 1148 (2018) and *Sause v. Bauer*, 138 S. Ct. 2561 (2018)—were unanimous while the other—*District of Columbia v. Wesby*, 138 S. Ct. 577 (2018)—was without a dissent. "The Court's embrace of qualified immunity has thus been emphatic, frequent, longstanding, and nonideological." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1858 (2018).

Petitioners suggest no compelling reason to unravel more than half a century of qualified immunity jurisprudence woven into American law. Responding to attacks on qualified immunity's underpinnings similar to those launched by Petitioners, two commentators noted:

> One may disagree with the Supreme Court's decision fifty years ago that qualified immunity

> applies in the Section 1983 context, but it is a decision. And one may disagree with the Court's decision thirty-five years ago in *Harlow v. Fitzgerald* that qualified immunity uses an objective rather than a subjective standard. But that question too has already been decided, as has the question whether qualified immunity applies outside of the context of false arrests. In fact, the thrust of *Harlow*'s holding commanded the support of the entire Court; Chief Justice Burger dissented because the holding did not go far enough. No one disputed the basic point that immunity exists and that it uses an objective standard.

Id.

The Petition presents no substantive split in the opinions of the circuit courts, nor has the Tenth Circuit departed from the usual course of judicial proceedings. Exercising discretion this Court has granted, the Tenth Circuit avoided ruling on a constitutional issue it did not have to address. It faithfully applied this Court's guidance on qualified immunity. Addressing a handful of cases that involve both social workers and the special needs doctrine, the Circuit Court focused on the context and substance of each relevant ruling, rather than cherry-picking phrases from the opinions that suited its purposes. The Court should deny the Petition.

Respectfully submitted,

Raymond M. Deeny
Counsel of Record
Sherman & Howard L.L.C.
90 South Cascade Avenue, Suite 1500
Colorado Springs, CO 80903
(719) 475-2440
rdeeny@shermanhoward.com

William A. Wright
Sherman & Howard L.L.C.
633 Seventeenth Street, Suite 3000
Denver, CO 80202
(303) 297-2900

Counsel for Respondents

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