No. 19-676

In the Supreme Court of the United States

JOSEPH A. ZADEH & JANE DOE,

Petitioners,

v.

MARI ROBINSON, SHARON PEASE & KARA KIRBY,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

WILLIAM P. DEMOND
Demond Law, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240

Counsel for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Cases—continued

Statutes, Rules, and Regulations

REPLY BRIEF FOR PETITIONERS

The Court should grant review to recalibrate or reconsider qualified immunity. Courts are frequently—and with good reason—questioning qualified immunity, while nonetheless dismissing claims on the basis of it. This should not continue. Whatever answer the Court may reach, it should resolve these significant questions with finality.

This case is an appropriate vehicle for review. Unlike other pending petitions, the officials faced no urgency here, no split-second decisionmaking. Qualified immunity, to the extent it applies at all, should be at its nadir when officials have time to deliberate. Additionally, the lower courts unanimously found a constitutional violation. This case therefore cleanly presents for review the "clearly established" prong of qualified immunity.[1]

Respondents' arguments are largely nonresponsive to the petition. They claim that this Court's doctrine is clear and that there is no division of authority below. BIO 8-20. Although that is incorrect, our principal rationale for review is the persistent objections levied against qualified immunity itself. See Pet. 13-16. To this, respondents offer no answer.

Respondents assert that the court below properly applied prevailing qualified immunity law. BIO 10-15, 34-35. But, because our argument is that the Court should recalibrate—or abandon—the doctrine, respondents' contentions are beside the point.

---

[1] The Court may wish to grant this petition along with *Corbitt* v. *Vickers*, No. 19-679. *Corbitt*, by contrast, involves alleged exigent circumstances, and it squarely presents the question of which party bears the burden with respect to qualified immunity.

Respondents claim that the doctrine of qualified immunity is correct (BIO 20-24) and that *stare decisis* supports it (BIO 25-28). These contentions are substantively mistaken, but most fundamentally they are issues to be resolved on the merits.

Finally, respondents assert that they did not violate petitioners' Fourth Amendment rights. BIO 28-33. But the court of appeals was unanimous in finding their conduct unconstitutional. That result was correct. Respondents' quarrel with the decision below is no reason to deny the petition—if anything, it supports further review.

A. Qualified immunity warrants revisiting.

1. Respondents disregard the principal basis on which we demonstrated that reevaluation of qualified immunity is warranted: The doctrine has come under sustained criticism from all quarters. Multiple Justices of this Court have questioned the scope and provenance of the doctrine. Pet. 13-14. Several judges across the lower courts—including Judge Willett in dissent here—have called on the Court to revisit it. *Id*. at 14-15. And members of the legal academy likewise urge reconsideration. *Id*. at 15.

This criticism is accelerating. For example, since the filing of the petition, another court has "note[d] the growing frustration with the qualified immunity doctrine," as it "lead[s] to the head-scratching and frustrating outcome of a 'right' becoming 'clearly established' at the pleasure and indeterminate speed of various jurists." *Jordan* v. *Howard*, 2020 WL 803119, at *8 (S.D. Ohio 2020) (quotation omitted). As the court continued, "that courts are so restricted by the restrictions and technicalities of this judicial doctrine is somewhat ironic given that the Supreme Court has broadly instructed that judges are to look to the 'factu-

al and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" *Ibid*. (quoting *Maryland* v. *Pringle*, 540 U.S. 366, 370 (2003)). Despite that critique, the court proceeded to award qualified immunity, granting judgment for the defendant officers. *Id*. at *12.

Jordan is far from alone in sharply criticizing qualified immunity—and then proceeding to apply the defense anyway. See, *e.g.*, *Stevenson* v. *City of Albuquerque*, 2020 WL 1906065, at *1 & *21 n.27 (D.N.M. 2020); *Lee* v. *University of N.M.*, 2020 WL 1515381, at *1 & *29 n.15 (D.N.M. 2020). When the presiding judge disparages the essential basis for his or her own decision, litigants will lose confidence in the judiciary.

This is not sustainable. Whatever the proper scope and vitality of qualified immunity, this Court should resolve it with clarity and finality.

Until it does so, litigants will file petition after petition, seeking review. See, *e.g.*, *Corbitt* v. *Vickers*, No. 19-679; *Kelsay* v. *Ernst*, No. 19-682; *Brennan* v. *Dawson*, No. 18-913; *Baxter* v. *Bracey*, No. 18-1287; *West* v. *Winfield*, No. 19-899; *Cooper* v. *Flaig*, No. 19-1001. More petitions are undoubtedly on the way.

This is a substantial and sufficient basis for review—and respondents have no answer.

2. Additionally, contrary to respondents' claims (BIO 10-20), there is persistent confusion below. The lower courts say so expressly. See, *e.g.*, *Jordan*, 2020 WL 803119, at *8. Judge Willett, for example, observed "the widespread inter-circuit confusion on what constitutes 'clearly established law.'" *Cole* v. *Carson*, 935 F.3d 444, 472 (5th Cir. 2019) (en banc) (Willett, J., dissenting).

This confusion results, in large measure, from inconsistencies in qualified immunity doctrine. Take

Ziglar v. *Abbasi*, 137 S. Ct. 1843, 1867 (2017). One sentence provides that, "if a reasonable officer might not have known *for certain* that the conduct was unlawful[,] then the officer is immune from liability." *Ibid*. (emphasis added). The *very next sentence* states that the test turns on whether officials "could * * * have predicted" that the Constitution bars their conduct. *Ibid*. These are not the same standard—an officer may "predict[]" that certain conduct is unlawful, while not "know[ing]" so "for certain."

Which is it? Some courts rely on the first sentence. See, *e.g.*, *Eves* v. *LePage*, 927 F.3d 575, 583 (1st Cir. 2019) ("[I]f an objectively reasonable official * * * 'might not have known for certain that [his] conduct was unlawful,' then [he] 'is immune from liability.'"); *Montgomery* v. *Newburn*, 2020 WL 1492846, at *5 (E.D. Ark. 2020) (similar). Others, the second. See, *e.g.*, *Bourne* v. *Gardner*, 270 F. Supp. 3d 385, 390 (D. Mass. 2017) (addressing whether officials could "have predicted" their actions violated the Constitution).

As it stands, a court may pick and choose which of this Court's disparate pronouncements it wishes to employ in any given case.

The Fifth Circuit, moreover, requires extreme factual similarity to existing precedent. We showed, for example, that *Morrow* v. *Meecham*, 917 F.3d 870 (5th Cir. 2019), required past cases to be so clearly on point that they would "foreclose" the particular official conduct at issue. Pet. 17-18. Respondents do not directly respond to *Morrow*. At best, they suggest (BIO 16) that *Morrow* is a gloss on this Court's decision in *Wesby*. Not so. Nothing in *Wesby* requires past precedent be so fundamentally on point that it "foreclose" any argument to the contrary. And, as we demonstrated (Pet. 18-20), other circuits employ a more flexible approach.

This remains true following *Cole* v. *Carson*, 935 F.3d 444 (5th Cir. 2019), which trained narrowly on an excessive force claim in view of *Tennessee* v. *Garner*, 471 U.S. 1 (1985). *Cole* does not apply to different constitutional violations.

And *Morrow* continues to govern. After *Cole*, the Fifth Circuit relied on *Morrow* for the proposition that a *plaintiff* must "show that the relevant right was clearly established." *McCoy* v. *Alamu*, 950 F.3d 226, 232 (5th Cir. 2020). That court continues to hold that, although qualified immunity is an affirmative defense, the burden rests on the *plaintiff* to rebut it. But see Pet. 19-21, *Corbitt* v. *Vickers*, No. 19-679. What is more, according to the Fifth Circuit, "'[t]he pages of the *United States Reports* teem with warnings about the difficulty of' showing that the law was clearly established." *McCoy*, 950 F.3d. at 232-233 (quoting *Morrow*, 917 F.3d at 874).

Altogether, in the Fifth Circuit, absent past precedent that "forecloses" a defendants' argument, qualified immunity bars the vindication of constitutional rights.

B. This is an appropriate vehicle to recalibrate or abandon qualified immunity.

This case presents an appropriate opportunity to recalibrate—or abandon—qualified immunity. There are multiple ways in which the Court could reform qualified immunity, some of which do not implicate *stare decisis*.

1. At minimum, as Judge Willett explained below (Pet. App. 33a-34a), the Court should confirm that precise factual similarity is not a prerequisite to a successful constitutional claim. Rather, the origin of qualified immunity focuses on whether a reasonable officer would know that his or her "conduct" is unlawful (see

Harlow v. *Fitzgerald*, 457 U.S. 800, 819 (1982)), not whether the same exact situation has previously been litigated.

Stare decisis presents no obstacle to this holding. Respondents agree that *Wesby* does not mandate precise factual similarity. BIO 8-9, 16. Rather, the critical question on this score is what *Wesby* and other authorities mean in practice.

Here, both the majority (Pet. App. 15a-16a) and dissent (*id*. at 33a-36a) below purported to apply *Wesby*. But they come to opposing views because of disagreement about how much similarity is enough. As we showed with respect to *Ziglar*, the standards this Court has previously announced are inconsistent from sentence to sentence *within* the same opinion. *Stare decisis* is no obstacle to bringing clarity to the current doctrinal muddle.

As the dissent explained, petitioners would prevail under a clarified standard. See Pet. App. 33a-36a. Indeed, the court of appeals' unanimous finding of a constitutional violation stems from settled doctrine. See pages 9-10, *infra*. A reasonable official would have "predicted" that this course of conduct is a constitutional violation. *Ziglar*, 137 S. Ct. at 1867.

2. The Court may further explain that, when there is no split-second urgency, less similarity to prior precedent is required to defeat qualified immunity.

As this Court has articulated the doctrine, exigent circumstances have contributed to broad grants of qualified immunity. See, *e.g.*, *Mullenix* v. *Luna*, 136 S. Ct. 305, 309 (2015). That is, in circumstances where officers must "make split-second judgments," the Court

has stated that more flexibility may be appropriate. *Plumhoff* v. *Rickard*, 572 U.S. 765, 775 (2014).[2]

Judge Willett put forth this "concrete proposal: clarifying the degree of factual similarity required in cases involving split-second decisions versus cases involving less-exigent situations." *Cole*, 935 F.3d at 472 (Willet, J., dissenting). When officials have time to seek legal counsel prior to acting, qualified immunity should do far less.

Here, there was no exigency. DEA filed a complaint about petitioners in September 2013, and the raid at issue here was conducted on October 22, 2013. Pet. App. 2a-3a. This search was pre-planned, and respondents had substantial time to deliberate. These were not officers acting in the heat of the moment, but bureaucrats executing an established plan.

3. The Court could also overturn qualified immunity in the whole. Although this is an issue for fulsome exploration during merits briefing, respondents' arguments do not withstand scrutiny.

Respondents assert that common-law defenses existed to shield public officials. BIO 20-21. That is our point. Pet. 22-23. The problem with qualified immunity is that it does not resemble those common-law defenses. *Ibid*. Even respondents' preferred authority (BIO 23) makes plain that, at common law, an officer had to show *good faith*, not merely objective reasonableness. BIO 23.

The correct result—which respondents' argument itself appears to suggest—is a return to the common-law defenses that existed at the time of the statute's

---

[2] The better approach is to bake exigent circumstances into the Fourth Amendment reasonableness analysis itself. See *Graham* v. *Connor*, 490 U.S. 386, 396 (1989).

enactment. Respondents' assertion that "the 1871 Congress that passed section 1983 expected" the courts to apply common-law defenses (BIO 22) is justification to adopt the defenses that *existed in 1871*—not to invent new ones.

Stare decisis does not justify retaining qualified immunity, especially in its present form. The doctrine is not a matter of statutory construction; rather, it was created by "freewheeling policy choices" that the Court has "previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring). As a "judge made" "rule," "change should come from this Court, not Congress." *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009). And a special justification for change is found in the serious violations of constitutional rights—including that found here—that a too-powerful form of qualified immunity leaves without remedy.

C. Respondents' quarrel with the court of appeals' Fourth Amendment holding is no obstacle to review.

In opposing review, respondents curiously assert that the court of appeals erred as to a central point—whether there was a Fourth Amendment violation. BIO 28-33. If anything, respondents' contention that the court of appeals erroneously resolved this case *supports* further review.

1. The Fifth Circuit expressly held that respondents' conduct violated the Fourth Amendment. Pet. App. 14a ("To summarize, we have concluded there was a violation of Dr. Zadeh's constitutional rights."); *id.* at 36a (Willett, J., dissenting) ("Everyone agrees [Dr. Zadeh's] Fourth Amendment rights were violated.").

In these circumstances, the Court may deem respondents' argument to the contrary forfeited because "[a] cross-petition is required * * * when the respond-

ent seeks to alter the judgment below." *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355, 364 (1994). The question is whether "[a]cceptance of respondent[s]' argument" would logically require modification of the judgment. *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S 66, 72 (2013).

That is the case here: A holding that there was no constitutional violation would provide respondents more relief than they obtained below. Indeed, this Court has held that an immunized officer enjoys Article III standing to appeal a judgment of "yes harm, no foul" (Pet. App. 36a) precisely *because* "he suffers injury caused by the adverse constitutional ruling," notwithstanding the grant of immunity: "Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." *Camreta* v. *Greene*, 563 U.S. 692, 702-703 (2011).

2. In all events, this is an excellent vehicle for review because the constitutional violation is beyond reasonable dispute. The majority below ruled for respondents simply because there was no sufficiently factually on-point authority. See Pet. App. 14a-20a.

a. Respondents' contention that the medical profession qualifies as a closely regulated industry (BIO 28-31) is irrelevant; respondents admit that this issue "did not infect the judgment." BIO 29. That is because, for purposes of its analysis, the court of appeals assumed that pain management clinics qualify as a closely regulated industry. Pet. App. 12a.

b. Even making that assumption, the Fifth Circuit correctly held that respondents' actions do not satisfy the three-part *Burger* test for warrantless administrative searches. Pet. App. 12a-14a.

Generally, "in order for an administrative search to be constitutional, the subject of the search must be af-

forded an opportunity to obtain precompliance review before a neutral decisionmaker." *City of L.A.* v. *Patel*, 135 S. Ct. 2443, 2452 (2015). That requirement of precompliance review may be dispensed with only if three conditions are met: "(1) There must be a substantial government interest * * * ; (2) the warrantless inspections must be necessary to further the regulatory scheme; and (3) the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *Id.* at 2456 (quoting *New York* v. *Burger*, 482 U.S. 691, 702-703 (1987)).

As the Fifth Circuit correctly held, the statutory and regulatory scheme here does not provide an adequate substitute for a warrant, because it is "purely discretionary" (Pet. App. 13a) and thus does not "limit the discretion of the inspecting officers" (*Burger*, 482 U.S. at 703). The inspection statute states only that "[t]he board may inspect a pain management clinic * * * as necessary to ensure compliance with this chapter." Tex. Occ. Code § 168.052(a). The implementing regulation effective in 2013 similarly failed to cabin discretion; it provided for searches "if the board suspects that the [clinic] is not in compliance with board rules." Pet. App. 87a-88a.[3] The statute and regulation authorizing subpoenas is also completely discretionary (Pet. App. 13a)—and, moreover, authorizes only subpoenas returnable within 14 days, not inspections or searches. Tex. Occ. Code § 153.007(a); 22 Tex. Admin. Code § 179.4; cf., *e.g.*, *In re Subpoena Duces Tecum*, 228 F.3d 341, 348 (4th Cir. 2000) ("A subpoena * * * commences an adversary process" and lacks "[t]he immediacy and intrusiveness of a search and seizure.").

---

[3] The regulation was amended in 2017 to provide triggering conditions for an inspection. See 42 Tex. Reg. 6117, 6118-6119.

What is more, for a no-notice search to be permissible, the "statute has to notify the public that the government can search on-demand." Pet. App. 30a-31a (Willett, J., dissenting). Here, however, neither statute provided notice to the regulated parties that unannounced searches were authorized. *Ibid*.

The contours of the constitutional right at stake were established clearly in *Burger* and reinforced by multiple decisions of the courts of appeals. Pet. App. 30a-31a. That other businesses have been found closely regulated (BIO 34) is beside the point, as the court of appeals was willing to assume that conclusion here. Any reasonable official, especially aided by time for cool deliberation, would "have predicted" that respondents' course of conduct was unconstitutional. *Ziglar*, 137 S. Ct. at 1867.

c. Respondents' objections are meritless. They first assert that there can be no Fourth Amendment concern "because the subpoena was 'jointly authorized' by Pease 'and her supervisor.'" BIO 32. Even more brazenly, they offer that "the requirement of * * * precompliance review is *satisfied*—not *triggered*—by a subpoena." BIO 33.

Both objections miss the point. The reason why administrative subpoenas generally satisfy the Fourth Amendment is that they provide "precompliance review *before a neutral decisionmaker*"; the constitutional concerns are not addressed simply by calling something a "subpoena" but requiring immediate compliance on pain of license suspension—regardless of whether a "supervisor" has signed off. *Patel*, 135 S. Ct. at 2452 (emphasis added).

Respondents also deny that they actually threatened to suspend Dr. Zadeh's license (BIO 33), but at this procedural stage, Dr. Zadeh's assistant's testimony

that "the investigators told her they would suspend Dr. Zadeh's license if the records they sought were not produced" (Pet. App. 3a) must be credited and viewed in the light most favorable to petitioners. Any factual dispute on that point is for trial.

* * *

As Judge Willett put it, "the judge-made immunity regime ought not be immune from thoughtful reappraisal." Pet. App. 27a. This case provides an appropriate opportunity for exactly that.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

EUGENE R. FIDELL
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4992

ANDREW J. PINCUS
CHARLES A. ROTHFELD
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

WILLIAM P. DEMOND
Demond Law, PLLC
1520 Rutland St.
Houston, TX 77008
(713) 701-5240

Counsel for Petitioners