No. 19-899

In The

Supreme Court of the United States

SHANIZ WEST,

Petitioner,

v.

DOUG WINFIELD, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents have provided no reason to deny the petition for certiorari. There is a longstanding split of authority over what counts as "clearly established" law for purposes of qualified immunity—both in general and specifically as applied to the sort of consent searches at issue in this case. And respondents present no persuasive explanation for why this case is not a suitable vehicle for resolving that split. The petition for certiorari should therefore be granted.

A. The circuit split is real.

The petition argues that certiorari should be granted in part because "the courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for a prior case to have "clearly established" a rule of law for purposes of qualified immunity. *Zadeh* v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part); see also Pet. 10–17. And this fundamental division has resulted in innumerable disagreements about specific issues—including, as seen in this case, over how qualified immunity applies when an officer with consent to search exceeds what any competent officer could understand as the scope of consent. Pet. 10–14. Respondents can refute the existence of neither the broad nor the narrow split described in the petition.

Respondents attempt to wave away the broad split by claiming that this Court's precedents establish a

clear rule that qualified immunity is warranted unless a court can "identify a case where an officer acting under similar circumstances was held to have violated" the Constitution—unless the caselaw is enough to make it indisputable that the officer had "fair warning" of the unlawfulness of his conduct. Br. in Opp. 5–8. That is, indeed, what this Court's cases say, and lower courts uniformly quote this Court's description of these two poles. But in trying to navigate between them, those courts come to different results, which is what matters—after all, this Court "reviews judgments, not statements in opinions." *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956). Respondents simply ignore the cases cited in the petition that demonstrate the lower courts' "intractabl[e]" and outcome-determinative disagreements over how navigate between these two poles. Pet. 10–17.

Simply put, respondents' sanguine view of the lower courts' uniformity cannot be squared with what those courts actually do. Indeed, it took less than a week after respondents filed their brief for a circuit court to issue an opinion irreconcilable with the brief's argument. As noted above, respondents say there are only two ways to defeat qualified immunity: Find a factually on-point case or establish that an officer's conduct is so "egregious" that its illegality was obvious. Br. in Opp. 9–10. But mere days after that brief was filed, the Eleventh Circuit issued an opinion reaffirming its long-held view that there are instead "three different ways that a plaintiff can prove that a particular constitutional right is clearly established": by providing a

case on point, by showing the "obvious[]" illegality of the official's conduct, ***or*** by "show[ing] that a broader, clearly established principle should control the novel facts of a particular case." *Waldron* v. *Spicher*, No. 18-14536, 2020 WL 1444963, slip op. at 11–12 (11th Cir. Mar. 25, 2020). There is no denying that the courts of appeals have different views of the law; respondents simply fail to acknowledge those clearly stated views.

And respondents fare no better when it comes to the narrower split about qualified immunity in the context of consent searches. The petition explained that lower courts disagree about how to treat this Court's decision in *Florida* v. *Jimeno*, 500 U.S. 248 (1991), which establishes that consent searches must be limited to the scope of consent. Pet. 10–14. The Sixth and Seventh Circuits have held that the principle established in *Jimeno* is enough to defeat qualified immunity when a search exceeds what any competent officer could understand as the scope of consent; the majority below says it is not. *Ibid.* (citing *Shamaeizadeh* v. *Cunigan*, 338 F.3d 535, 546 (6th Cir. 2003) and *Michael C.* v. *Greisbach*, 526 F.3d 1008 (7th Cir. 2008)).

Respondents offer two arguments in an attempt to harmonize *Shamaeizadeh* and *Michael C.* with the majority opinion below. Neither is persuasive.

First, respondents suggest that the scope-of-consent opinions might all be in harmony because "[i]t may well be" that the Sixth Circuit was really just saying that the officers' conduct was so outrageous as to be "obvious[ly]" unconstitutional, and the Seventh

Circuit was doing the same. Br. in Opp. 12–13. But this misconstrues the decisions: Both of them found that (1) this Court's decision in *Jimeno* had "clearly established" a rule that consent searches were limited to the scope of consent and (2) that a reasonable officer would thus have been on notice that their searches violated this rule. *Shamaeizadah*, 338 F.3d at 547, 550; *Michael C.* 526 F.3d at 1017. In other words, they found (as other courts have in other contexts) that "a broader, clearly established principle should control the novel facts in this situation." *Mercado* v. *City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). The dissent below pressed exactly this analysis, and the majority rejected it, refusing to find that *Jimeno* was sufficiently factually analogous to clearly establish anything with respect to this case. App. 14.

Respondents next argue that there is no split because any differences between the Sixth and Seventh Circuit's approach and the approach of the majority below were resolved by this Court's decision in *Ashcroft* v. *al-Kidd*, 563 U.S. 731 (2011). See Br. in Opp. 14–16.

This is incorrect. In *al-Kidd*, this Court found that the Attorney General was entitled to qualified immunity—but only after it first rejected the underlying constitutional claim on the merits. *al-Kidd*, 563 U.S. at 735, 740; see also Pet. 19 n.8. *al-Kidd* therefore is an imperfect guide to what courts ought to do with meritorious but somewhat factually novel constitutional claims. And the Court's opinion does not purport to change what it means for law to be clearly established. Instead, the opinion simply reaffirms the two

principles of qualified immunity that lower courts struggle to reconcile: On the one hand, courts are warned "not to define clearly established law at a high level of generality[,]" *al-Kidd*, 563 U.S. at 742, and they are simultaneously cautioned that this does not mean the analysis requires "[a] case directly on point" so long as " 'every reasonable official would [have understood] that what he is doing violates' " the Constitution. *Id.* at 741 (citation omitted). As noted above, supra at 2, the distance between these two principles is the subject of the split of authority among the circuits.

Unsurprisingly, then, neither the Sixth nor the Seventh Circuit has agreed with respondents' suggestion that *al-Kidd* requires it to change its approach to qualified immunity. Quite the opposite: The Sixth Circuit has already expressly rejected the idea that *al-Kidd* changes anything about its qualified-immunity jurisprudence. *Baynes* v. *Cleland*, 799 F.3d 600, 617 (6th Cir. 2015). In *Baynes*, the Sixth Circuit undertook an exhaustive review of this Court's cases governing when a right is "clearly established" for purposes of qualified immunity. *Id.* at 610–13. And it concluded in no uncertain terms that neither *al-Kidd* nor any other intervening decisions of this Court had "altered our Circuit's previous holdings to now require such a high degree of factual similarity" to render a right clearly established. *Id.* at 617. To the contrary, *al-Kidd* merely "set the outer bounds of the 'clearly established' inquiry[,]" which did not upset the Sixth Circuit's existing caselaw. *Ibid.*

The Seventh Circuit is no different. In *Abbott* v. *Sangamon County*, for example, the court asked whether an officer who tased a motionless suspect was entitled to qualified immunity when no binding precedent involved the use of a taser. 705 F.3d 706, 725 (7th Cir. 2013). The Seventh Circuit noted that the Ninth Circuit had held (much as it did below) that the absence of cases specifically involving tasers meant that qualified immunity was mandatory. *Id.* at 732 (citing *Mattos* v. *Agarano*, 661 F.3d 433, 452 (9th Cir. 2011)). But the Seventh Circuit disagreed with the Ninth, choosing instead to follow the Sixth Circuit in finding that "just as defining a right too broadly may defeat the purpose of qualified immunity, defining a right too narrowly may defeat the purpose of § 1983." *Ibid.* (citing *Hagans* v. *Franklin County Sheriff's Office*, 695 F.3d 505, 508–09 (6th Cir. 2012)). The Seventh Circuit was perfectly aware of *al-Kidd*, *id.* at 713, 725, but it did not hold that *al-Kidd* required a different approach to qualified immunity.

In short, if respondents' argument is that *al-Kidd* resolved the split of authority by changing the law in the Sixth and Seventh Circuits, the Sixth and Seventh Circuits disagree.

The petition establishes that the division of authority in the lower courts is real, persistent, and ripe for resolution by this Court. Pet. 10–17. Respondents largely sidestep this division and, to the extent they engage with it, their arguments conflict with the express statements of the lower courts themselves. The petition for certiorari should therefore be granted.

B. This case is a good vehicle.

1. This case is a good vehicle to resolve this division of authority. The only question presented by the petition is the question on which the majority and the dissent disagreed: Whether respondents are entitled to qualified immunity on the claim that their destruction of petitioner's home exceeded the scope of her consent to "get inside" that home. While respondents make extensive reference to their own summary-judgment evidence in an effort to make their conduct seem more reasonable, Br. in Opp. 3–5, the reasonableness of the search is not at issue here. Only the scope of consent matters. And the relevant facts there are undisputed: Petitioner gave officers on the scene her keys and her consent to "get inside" her home to search for a fugitive. When she gave that consent, the officers had planned to (as they said) get inside the house to search for the fugitive. Later, their plan changed from getting inside the house to bombarding it with objects from the outside, but they never informed petitioner of their change in plans or obtained her consent to it. Pet. 4–5. Respondents do not dispute these facts.

Indeed, respondents' only argument that this case is *not* a suitable vehicle for resolving the question presented is that the court below resolved the qualified-immunity question without resolving the underlying constitutional question. Br. in Opp. 16–18. But this Court can review the qualified-immunity question decided below with or without a formal pronouncement

from the lower court about the constitutionality of respondents' conduct.[1]

To the contrary, the lower court's failure to squarely address the constitutionality of respondents' conduct is just one more reason certiorari should be granted here. The majority below held that respondents were entitled to qualified immunity because no reported federal case had said that consent to enter a home does not include consent to launch grenades into it from the outside. And there is still no such case: If a government official in the Ninth Circuit obtains consent to enter a home today, he will still be entitled to qualified immunity if he decides to instead bombard it with grenades from the sidewalk. This is backwards. The consent exception to the Fourth Amendment's warrant requirement is meant to be "jealously and carefully drawn[.]" *Georgia* v. *Randolph*, 547 U.S. 103, 109 (2006). The majority opinion below uses qualified immunity to transform that narrow exception into a genuinely limitless shield against liability. Certiorari is therefore required to prevent the narrow exception from becoming the general rule.

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[1] Moreover, as explained in the petition, that constitutional issue is not hard: No court anywhere has held that consent to enter a home includes the consent to inflict serious, lasting damage on that home from the outside. See Pet. 11 & n.4. And the majority below expressly disclaimed any suggestion that it was holding that a competent officer could have understood petitioner's consent to enter her home as including consent to destroy her home from the outside. Pet. 7.

2. Respondents' remaining arguments, Br. in Opp. 18–23, go solely to the merits of the question presented rather than to the suitability of this case as a vehicle. Both the petition and several *amici* argue that this Court should revisit the doctrine of qualified immunity and either reject it wholesale or at least use the specific facts of this case to clarify the boundaries of the doctrine. Pet. 18–23; see also Br. of Legal Scholars 5–21; Br. of DKT Liberty Project et al. 5–20; Br. of Cato Institute 4–24. In answering these arguments, respondents do not suggest that they are not fairly encompassed within the question presented or that this case is in any way a poor vehicle for resolving them.[2]

Instead, respondents simply contend that these arguments are wrong: They say that this Court need not revisit the scope of its qualified-immunity jurisprudence, that the doctrine should apply here (where officers had hours to consider their actions) just as strongly as in situations that call for split-second decisions, and that qualified immunity is perfectly

[2] Respondents do, however, fault petitioner for failing to raise below her arguments about the proper scope of this Court's qualified-immunity doctrine. Br. in Opp. 20. Even setting aside the fact that these arguments would have been misplaced—lower courts are in no position to reconsider or limit this Court's doctrines—the precise arguments made below are irrelevant here. *Lebron* v. *Nat'l R. R. Passenger Corp.*, 513 U.S. 374, 379 (1995) ("Our traditional rule is that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.' ").

consonant with the history of common-law immunities. Br. in Opp. 18–23.

These arguments are unpersuasive. Stare decisis is not a reason for maintaining the doctrine of qualified immunity if it cannot be justified on its own terms. See Br. of Legal Scholars 20–21. Respondents' arguments for granting qualified immunity to government officials who have had hours to consider the wisdom and legality of their actions run counter to this Court's own longstanding justification for the doctrine. See Pet. 18–19. And respondents' arguments about the common law are not responsive to petitioner's historical argument. The petition argues that qualified immunity is ahistorical because there was no tradition of immunity to trespass suits for government officials and that the development of these immunity doctrines "almost entirely post-dated the enactment of Section 1983." Pet. 22 & n.11. Respondents counter this by asserting that there was a robust tradition of common-law immunity—a claim they support by citing only cases that post-date the adoption of Section 1983. Br. in Opp. 22–23.[3]

But beyond being unpersuasive, respondents' merits arguments are premature: The place for merits

[3] In any event, the majority rule in 1871 (and long thereafter) was that an officer who "by mistake, wantonness, or abuse of authority . . . [broke] into the house of a man in search of a person who [was] not there [was] liable in damages[.]" 2 William Murfree, *A Treatise on the Law of Sheriffs and Other Ministerial Officers* § 156, at 81 (St. Louis, Nixon-James Printing Co. 1884); see also Pet. 19–23.

arguments is in merits briefing. The only question at present is whether the petition should be granted so that merits briefing can occur. The brief in opposition provides no persuasive reason that it should not be.

* * *

For the foregoing reasons and those stated in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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