NO. 18-____

IN THE
Supreme Court of the United States

FREDESVINDO RODRIGUEZ-GARCIA,
Petitioner,

v.

FIOR PICHARDO DE VELOZ, *et al.*,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

During a five-minute medical examination in a detention facility, Dr. Fredesvindo Rodriguez-Garcia mistakenly concluded that Fior Pichardo de Veloz, a female pretrial detainee in menopause, was a male in the midst of a gender transition. He based his conclusion on a note in Pichardo's file indicating that she was taking hormone replacement therapy, which he knew to be prescribed to both transgender individuals and women in menopause.

The court of appeals denied qualified immunity to Dr. Rodriguez-Garcia, without identifying precedent that clearly established a constitutional right and without addressing Pichardo's decision not to raise an argument that Dr. Rodriguez-Garcia's conduct violated clearly established law until her reply brief on appeal.

The questions presented are:

1. Did the court of appeals err in denying qualified immunity in the absence of precedent clearly establishing the violative nature of Dr. Rodriguez-Garcia's particular conduct?

2. Did the court of appeals err in refusing to find that Pichardo forfeited the argument that Dr. Rodriguez-Garcia is not entitled to qualified immunity?

PARTIES TO THE PROCEEDING

The Petitioner is Fredesvindo Rodriguez-Garcia, a physician employed by the Public Health Trust of Miami-Dade County, Florida, who was an appellee below.

The Respondent is Fior Pichardo de Veloz, who was an appellant below.

Fatu Kamara-Harris, who was an appellee below, has indicated to this Court her intention to file a separate petition for writ of certiorari (*see* No. 18-A-1043), but as it has not yet been filed, she is considered a respondent in this proceeding under Sup. Ct. R. 12.6.

Cesar Cristobal Veloz Tiburcio, an appellant below, is not a party to this petition.

Miami-Dade County, the Miami-Dade Corrections and Rehabilitation Department, the Public Health Trust of Miami-Dade County, and Travarri Johnson, appellees below, are not parties to this petition.

Tavarez Carter, Kimberly Jones, Bobby Marshall, Carlos A. Migoya, Audrey Morman, and Regina Price, defendants in the district court, are not parties to this petition.

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PETITION FOR WRIT OF CERTIORARI

This Petition concerns the Eleventh Circuit's decision to turn what would otherwise be medical malpractice at worst into an "obvious" violation of an unidentified constitutional right because the plaintiff was a pretrial detainee, and to do so even after the plaintiff had waived any such challenge to qualified immunity.

Eight years ago today—May 31, 2011—this Court heralded a new era in the law of qualified immunity, announcing in *Ashcroft v. al-Kidd* that a plaintiff seeking to abrogate the defense must identify "existing precedent" that placed the constitutional question of an officer's conduct "beyond debate," such that "every 'reasonable official would have understood that what he is doing violates'" a constitutional right. 563 U.S. 731, 741 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Since then, recognizing "the importance of qualified immunity to society as a whole," the Court has held fast to that standard, "often correct[ing] lower courts when they wrongly subject individual officers to liability." *City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (cleaned up). In fact, "often" may be an understatement; the Court has corrected lower courts' erroneous qualified immunity decisions sixteen times in half as many years.[1]

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[1] *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) (per curiam); *Kisela v. Hughes*, 138 S. Ct. 1148 (2018) (per curiam); *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018); *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S.

The Court should now correct the Eleventh Circuit for committing two manifest errors in depriving Petitioner Fredesvindo Rodriguez-Garcia of qualified immunity.

First, the court's unadorned conclusion that Dr. Rodriguez-Garcia was unworthy of qualified immunity was not based in precedent, controlling or otherwise. It contravenes *al-Kidd* and every decision thereafter, each of which requires a court to identify existing precedent as a prerequisite to denying qualified immunity. Downplaying its failure to find any precedent that "squarely governs the case here," *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam), the Eleventh Circuit asserted that it is "obvious" that placing a woman in the male population of a jail facility is "unlawful," and then erroneously, and without further elaboration, deprived Dr. Rodriguez-Garcia of qualified immunity notwithstanding his actual alleged conduct—that he performed a medical evaluation, albeit a flawed one.

Beyond violating this Court's precedent, the decision puts medical providers in Florida, Georgia, and Alabama jails in the impossible position of having to diagnose and treat pretrial detainees without any fair warning whether their particular conduct will—

Ct. 2042 (2015) (per curiam); *Sheehan*, *supra*, 135 S. Ct. 1765; *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam); *Plumhoff v. Rickard*, 572 U.S. 765 (2014); *Wood v. Moss*, 572 U.S. 744 (2014); *Stanton v. Sims*, 571 U.S. 3 (2013) (per curiam); *Reichle v. Howards*, 566 U.S. 658 (2012); *Messerschmidt v. Millender*, 565 U.S. 535 (2012); *Ryburn v. Huff*, 565 U.S. 469 (2012) (per curiam); *al-Kidd*, *supra*, 563 U.S. 731.

years down the road—be declared unconstitutional retroactively. The impression the court's threadbare analysis gives—an impression that is only bolstered by the court's apparent refusal to consider any of this Court's qualified immunity decisions from the last decade—is that the court "either does not understand the concept of qualified immunity or, in defiance thereof, impulsively determine[d] the 'right outcome' and construct[ed] an opinion to support its subjective judgments, which necessarily must ignore the concept and precedents of qualified immunity." *Luna v. Mullenix*, 777 F.3d 221, 222 (5th Cir. 2014) (Jolly, J., dissenting from denial of rehearing en banc).[2]

Second, as a procedural matter, the court failed to recognize that Respondent Fior Pichardo de Veloz had waived, and therefore forfeited, the issue of clearly established law. The court allowed her to overcome qualified immunity despite her unequivocal election not to raise the issue at any stage until the final pages of her reply brief on appeal. By relieving a plaintiff of her burden to define the clearly established constitutional right at issue and to furthermore demonstrate how an official's conduct violated that right, the Eleventh Circuit has inverted the plaintiff's burden to abrogate qualified immunity. Now, officials may risk losing the protection of qualified immunity unless they can prove the negative that a constitutional right was *not* clearly established, regardless of whether the plaintiff has timely addressed the issue. The court's decision is an aberration among the courts of appeals (and the

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[2] Judge Jolly's position ultimately prevailed. *Mullenix*, *supra*, 136 S. Ct. 305.

Eleventh Circuit's own case law). Rightly, no other court allows an appellant in a § 1983 action—plaintiff or officer—to prevail on a dispositive issue that she did not raise in her initial brief.

The Court should grant the Petition or, alternatively, summarily reverse the Eleventh Circuit's radical departure from this Court's law governing qualified immunity.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App. 1a-25a) was not reported but is available at 756 F. App'x 869. The Eleventh Circuit's order denying rehearing en banc (App. 61a-62a) was not reported. The memorandum opinion of the district court granting Dr. Rodriguez-Garcia's (and other defendants') motion to dismiss (App. 26a-60a) is reported at 255 F. Supp. 3d 1222.

JURISDICTION

The judgment of the Eleventh Circuit was entered on November 21, 2018. The Eleventh Circuit denied Dr. Rodriguez-Garcia's timely petition for rehearing en banc on January 16, 2019. On March 22, 2019, Justice Thomas extended the time for filing this petition for writ of certiorari to and including May 31, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent brought this action under 42 U.S.C. § 1983, alleging, *inter alia*, that petitioner acted with deliberate indifference to her rights under the Fourteenth Amendment. The Due Process Clause of the Fourteenth Amendment provides:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law . . . .

The Eleventh Circuit's opinion relied on the Eighth Amendment, which provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Finally, Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

I. Facts

On November 4, 2013, Fior Pichardo de Veloz, a fifty-year-old Dominican national, traveled from the Dominican Republic to Miami. App. 27a, 64a. At the time, she suffered from high blood pressure and was undergoing medically prescribed hormone replacement therapy (HRT) for menopause. App. 27a. Upon her arrival, she was detained on an outstanding federal warrant for trafficking and booked into the Turner Guilford Knight Correctional Center, a Miami-Dade County-operated detention facility. App. 27a, 66a-67a.

Due to her history of high blood pressure, she was escorted to a medical unit examination room to be evaluated by Dr. Fredesvindo Rodriguez-Garcia, the attending physician. App. 28a, 125a. No one but Dr. Rodriguez-Garcia and Pichardo were in the room during the five-minute examination. App. 6a.[3]

From the moment Pichardo entered the examination room, based solely on an entry in her file indicating that she was taking HRT, Dr. Rodriguez-Garcia concluded that Pichardo was a man undergoing a gender transition.[4] App. 126a. He was aware that HRT is prescribed to both women in menopause and transgender individuals, but he assumed, albeit mistakenly, that the detainee before him—Pichardo—was transgender. App. 126a. This assumption colored the remainder of the examination.

Dr. Rodriguez-Garcia inartfully asked Pichardo "in a general sense" if she had all her genitals and if she had any surgery to that area. App. 126a. Pichardo answered that she had all her genitals and had not had surgery to the area. App. 126a. Dr. Rodriguez-Garcia interpreted that response to mean that Pichardo had her original, male, genitalia. He did not ask if she was transgender or whether her current genitalia was male

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[3] Nothing in the record shows that Dr. Rodriguez-Garcia had any knowledge of anything that transpired either before Pichardo entered the examination room or after she left.

[4] Some portion of Pichardo's file apparently displayed the words "Menopause Medical," App. 84a, but nothing in the record shows that Dr. Rodriguez-Garcia saw those words and disregarded them—only that he saw the entry that she was taking HRT, App. 126a.

or female, and he did not ask why she was taking HRT because it was "a difficult question to ask." App. 126a. Thus, while clumsy and unsuccessful, Dr. Rodriguez-Garcia indubitably attempted to confirm his impression that Pichardo was male-to-female transgender.

In cases where a visual check of a detainee's genitals is needed to verify his or her sex, Miami-Dade Corrections and Rehabilitation Department policy dictates that the detainee be taken to the clinic where a doctor, nurse, and corrections officer are present. App. 127a. Dr. Rodriguez-Garcia had conducted such visual checks in the past, but he did not conduct one to verify Pichardo's sex; in his mind, he had already correctly determined that she was transgender. App. 127a. He noted as much on Pichardo's medical form: "male on hormonal treatment transgender." App. 128a. In the section of the form marked "Genital-Urinary System," Dr. Rodriguez-Garcia wrote "deferred," signifying that an assessment would be conducted later. App. 127a. He made a note that Pichardo could go to general population, and he prescribed her ibuprofen, an antacid, and a low-sodium diet, after which she left the examination room. App. 127a.

Pichardo was transported to an all-male facility and placed in a general population unit, where she spent six hours and four minutes. App. 67a-70a, 105a-110a. Officers afforded Pichardo the protections afforded to any female-presenting prisoner, placing her in a bunk nearest the front door where the officers are stationed. App. 91a. Surveillance video recorded her every movement during her time in the unit: It shows her walking around, making her bed, speaking with other detainees (almost always one-on-one, though once with

two other detainees), sitting and lying down on her bed, entering and exiting the restroom, and taking a dinner tray back to her bunk. App. 105a-110a. She was neither physically nor sexually assaulted while in the unit, although she alleges that she felt "psychologically assaulted." App. 66a, 70a.

Corrections officers later confirmed Pichardo's sex as female in response to her family's inquiring why she had been placed in an all-male unit. App. 11a-12a. Pichardo was then housed in an all-female unit until her release into the custody of the U.S. Marshals Service the following day. App. 12a.

II. Proceedings

Pichardo sued Miami-Dade County, the Public Health Trust, a number of corrections officers, a nurse, and Dr. Rodriguez-Garcia.[5] App. 32a-33a. She raised several federal and state-law claims, including one against Dr. Rodriguez-Garcia under 42 U.S.C. § 1983 alleging that he acted with deliberate indifference to her rights under the Fourteenth Amendment. App. 45a-46a.

Dr. Rodriguez-Garcia moved to dismiss,[6] arguing that he was entitled to qualified immunity because (1) Pichardo failed to allege a violation of a constitutional right, and (2) his conduct did not violate

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[5] Pichardo's husband asserted a state-law loss-of-consortium claim. That claim is not addressed in this Petition.

[6] The other defendants joined in the motion, but their arguments are not addressed in this Petition; neither is the nurse's participation in this litigation.

clearly established law. App. 36a, 46a. Pichardo's response did not address the assertion of qualified immunity, except to outline a generic legal standard that it never revisited. Opp. to Mot. to Dismiss 9, S.D. Fla. No. 16-23925, D.E. 83.

The district court granted the motion to dismiss. As to the deliberate indifference claim, the court exercised its discretion to decide which of the two prongs of the qualified immunity analysis to address first, *see Pearson v. Callahan*, 555 U.S. 223 (2009), and concluded that Pichardo failed to plausibly allege that Dr. Rodriguez-Garcia violated a constitutional right. As a result, Dr. Rodriguez-Garcia was entitled to qualified immunity. App. 45a-51a.

On appeal, Pichardo's initial brief contained no argument or analysis on qualified immunity. Her brief used the words "qualified immunity" exactly twice, and only in describing the procedural history:

> Defendants contended that [the operative complaint] failed to state a claim for violation of the Eighth Amendment and asserted qualified immunity for the actions of . . . Dr. Rodriguez Garcia . . . .
>
> Based upon these findings, the District Court found that Defendants were entitled to qualified immunity and granted Defendant's [*sic*] motion.

Initial Br. of Appellant 10, 12.[7] The brief used the words "clearly established" *once*, in claiming that Dr. Rodriguez-Garcia's "awareness of [her] sex was clearly established." *Id.* at 26. But "awareness of sex" is not the object of the "clearly established" prong of the qualified immunity analysis.

After Dr. Rodriguez-Garcia argued that Pichardo had "waived any challenges as to clearly established law, presenting no argument about this issue in her brief," Rodriguez-Garcia Answer Br. 24-25, Pichardo, in a terse discussion in the final pages of her reply brief, elected to address—for the first time since she had filed suit—the issue of clearly established law. She claimed that "a prisoner has a right, secured by the eighth . . . amendment[], to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates," Reply Br. of Appellant 13-14 (quoting *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1320 (11th Cir. 2005)). And without explaining how that abstract right applies to Dr. Rodriguez-Garcia's medical examination, she argued in conclusory fashion that he violated the right:

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[7] The parties, the district court, and the Eleventh Circuit all analyzed whether Pichardo had alleged a violation of a constitutional right under the Eighth Amendment instead of the Fourteenth. *See* App. 15a & n.4 ("As a pretrial detainee, Mrs. Pichardo's rights exist under the due process clause of the Fourteenth Amendment rather than the Eighth Amendment. Nonetheless, the standards under the Fourteenth Amendment are identical to those under the Eighth. . . . Because all parties refer to Mrs. Pichardo's claims as Eighth Amendment claims, we do too for purposes of this opinion." (cleaned up)).

> It cannot be disputed that placing a female inmate in the male population, and the officials' deliberate indifference to such a result, would be a violation of her constitutional rights. *See e.g. Farmer v. Carlson*, 685 F. Supp. 1335, 1342 (M.D. Penn. 1988) ("Clearly, placing plaintiff, a twenty-one year old transsexual, into the general population at . . . a [high-]security institution, could pose a significant threat to internal security in general and to plaintiff in particular."). "Exact factual identity with a previously decided case is not required, but the unlawfulness of the conduct must be apparent from preexisting law." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011). The obviousness of Defendants' actions satisfies this second element of "fair warning." Moreover, the novelty of such a scenario demonstrates not that the constitutional right was not clearly established, as argued by Dr. Rodriguez-Garcia, but rather that placing a female detainee within the male population is so clearly a violation as to not be in dispute. It was error for the District Court to grant [] qualified immunity based upon a failure to demonstrate a constitutional violation.

Id. at 14-15 (citation omitted). Dr. Rodriguez-Garcia had no opportunity to respond.

In spite of Pichardo's deficient briefing on clearly established law, the Eleventh Circuit found in her favor and reversed on that very issue. App. 14a-25a. The court concluded that she had plausibly stated a deliberate indifference claim against Dr. Rodriguez-

Garcia,[8] then rejected the district court's grant of qualified immunity. The relevant portion of its analysis of clearly established law was similarly terse:

> We conclude that at the time of this incident in 2013, every reasonable prison officer and medical personnel would have known that wrongfully misclassifying a biological female as a male inmate and placing that female in the male population of a detention facility was unlawful. The conduct at issue here lies so obviously at the very core of what the Eighth Amendment prohibits, that the unlawfulness of placing a female detainee within the male population was readily apparent to any prison officer or medical personnel in the shoes of [Dr. Rodriguez-Garcia]. Accordingly, [Dr. Rodriguez-Garcia is not] entitled to qualified immunity.

App. 24a-25a. The court did not address Dr. Rodriguez-Garcia's waiver argument and later denied his petition for rehearing en banc. App. 61a-62a.

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[8] Dr. Rodriguez-Garcia does not seek review of this finding. This Court need not—and oftentimes does not—review a lower court's decision whether a plaintiff stated a constitutional violation in cases where the decision on qualified immunity is clearly incorrect. *E.g.*, *Sheehan*, 135 S. Ct. at 1778 ("Because the qualified immunity analysis is straightforward, we not decide whether the Constitution was violated . . . ."). This is one of those cases.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit Manifestly Failed to Follow This Court's Qualified Immunity Precedent, and Summary Reversal Is Warranted.

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd*, 563 U.S. at 735 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). A clearly established right is one whose contours are "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (cleaned up). The legal rule on which a plaintiff seeks to rely cannot be one that has only been "suggested by then-existing precedent"; to the contrary, it must have such a "clear foundation" in precedent that it is considered "settled law." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) (cleaned up). The rule must also be specific enough that the unlawfulness of the officer's conduct "follow[s] immediately from the conclusion that the rule was firmly established." *Id.* at 590 (cleaned up).

In addition to identifying an applicable and specifically defined legal rule, a court must determine whether that rule "clearly prohibit[s] the officer's conduct in the particular circumstances before him." *Id.* Viewing the officer's particularized conduct through the lens of the circumstances he faced is essential: "The

dispositive question is 'whether the violative nature of *particular* conduct is clearly established,'" a question that "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742, and *Brosseau*, 543 U.S. at 198). In short, unless "controlling authority" or "a robust consensus of cases of persuasive authority" "placed the . . . constitutional question" of the officer's conduct "beyond debate," qualified immunity is granted. *al-Kidd*, 563 U.S. at 741, 742 (cleaned up).

The Eleventh Circuit defied this Court's instructions. It failed to identify a clearly established right, and it failed to explain how Dr. Rodriguez-Garcia's conduct in the circumstances of his medical examination violated it. Instead, the court proclaimed, without precedent from any court, and without relating any law to Dr. Rodriguez-Garcia's particularized conduct or circumstances, that "wrongfully misclassifying a biological female as a male inmate and placing that female in the male population of a detention facility" is "unlawful" and "obvious[ly]" unconstitutional. App. 24a.

In the Eleventh Circuit's misguided view, neither Dr. Rodriguez-Garcia's particularized conduct, nor the circumstances surrounding that conduct, nor even the threshold identification of a constitutional right, are relevant. All that is relevant is the result: Pichardo, a female detainee, was placed with the male population of a jail, so *whatever* Dr. Rodriguez-Garcia's conduct, qualified immunity must be withheld, because it resulted in her being placed there. That reasoning is

strictly contrary to this Court's precedent governing the determination of clearly established law.

A. The Eleventh Circuit cited no law clearly establishing a constitutional right.

The Eleventh Circuit's analysis of the question whether Dr. Rodriguez-Garcia's conduct violated clearly established law is a two-sentence discussion, devoid of precedent, concluding that his conduct was "obviously" "unlawful" under the Eighth Amendment. The Eleventh Circuit has assumed that *Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015)—which held that excessive force claims brought by pretrial detainees under the Fourteenth Amendment must be analyzed differently than those claims brought by convicted inmates under the Eighth Amendment—has left undisturbed its cases applying the Eighth Amendment to pretrial detainees' deliberate-indifference claims. *See Dang ex rel. Dang v. Sheriff of Seminole Cty.*, 871 F.3d 1272, 1279 n.2 (11th Cir. 2017). But neither that assumption nor the court's statement here that the Eighth and Fourteenth Amendment "standards" are "identical," App. 15a, should've relieved it of the obligation to identify an applicable, sufficiently defined constitutional right. Pichardo was not a convicted inmate. So no matter what "Eighth Amendment right" the Eleventh Circuit identified, App. 23a, it is impossible for Dr. Rodriguez-Garcia to have violated a right that Pichardo, a pretrial detainee, could not possibly have been afforded.

As it is, the court never actually defined what it considered "the Eighth Amendment right at issue" to be. App. 23a. It did refer in passing (elsewhere in its

opinion) to a prior Circuit case, which it said "explain[ed] that a prisoner has a right, secured by the Eighth Amendment, to be 'reasonably protected from constant threat of violence and sexual assault' by her fellow inmates." App. 17a (quoting *Purcell*, 400 F.3d at 1320). But if that's the right the court considered to be clearly established, then it has fallen victim to the same trap as many a fellow lower court—"defin[ing] clearly established law at a high level of generality," an act this Court continually forbids. *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam). Even if mistakenly concluding that a woman taking HRT is a man transitioning into a woman (particularly in an urban jail environment, where a transgender woman is perhaps just as likely or more likely to be found than a woman in menopause) is unlawful, that unlawfulness does not "follow immediately" from *Purcell*, a case about an inmate-on-inmate assault, not a medical misdiagnosis. *Wesby*, 138 S. Ct. at 590. As *Emmons* recently made clear, a court that "ma[kes] no effort to explain how [cited] case law prohibited [an officer]'s actions in" the case before it creates "a problem under [this Court's] precedents." 139 S. Ct. at 503-04. That problem requires correction.

The unsupported decision that Dr. Rodriguez-Garcia is not entitled to qualified immunity warrants summary reversal. *See White v. Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (summarily reversing denial of qualified immunity where the court of appeals "misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as [the defendant] was held to have violated" the Constitution); *Ryburn v. Huff*, 565

U.S. 469, 474 (2012) (per curiam) (summarily reversing denial of qualified immunity where "[n]o decision of this Court has found a Fourth Amendment violation on facts even roughly comparable to those present in this case"); *see also Wesby*, 138 S. Ct. at 591 (reversing denial of qualified immunity where, "[t]ellingly, neither the [court of appeals] nor [the plaintiffs] have identified a single precedent—much less a controlling case or robust consensus of cases—finding a [constitutional] violation under similar circumstances" (cleaned up)); *al-Kidd*, 563 U.S. at 741 (reversing denial of qualified immunity where, at the time of the plaintiff's arrest, "not a single judicial opinion had held that pretext could render an objectively reasonable arrest pursuant to a material-witness warrant unconstitutional"). *See generally Wearry v. Cain*, 136 S. Ct. 1002, 1007 (2016) (per curiam) ("[T]he Court has not shied away from summarily deciding fact-intensive cases where, as here, lower courts have egregiously misapplied settled law."). The Eleventh Circuit's inability to identify any precedent that clearly prohibited Dr. Rodriguez-Garcia's conduct in the particular circumstances before him, combined with both Pichardo's and the district court's acknowledgements of the novelty and uniqueness of the case, *see* Initial Br. of Appellant 22; App. 46a, should have signaled to the Eleventh Circuit that the law was not clearly established. *See Wesby*, 138 S. Ct. at 592 ("[T]he fact that a case is unusual, we have held, is 'an important indication . . . that [the officer's] conduct did not violate a "clearly established" right.'" (quoting *White*, 137 S. Ct. at 552)). What's more, its failure even to mention a single immunity decision from this Court's eight-year wave further

reveals its misunderstanding of the prerequisites to abrogating qualified immunity.

For his part, Dr. Rodriguez-Garcia is unable to locate a decision from any jurisdiction holding that a medical provider who mistakenly determined that an individual was transgender violated the Constitution. His conduct, had it taken place outside of a jail, would be considered (at worst) medical malpractice, which this Court held nearly half a century ago "does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); *see also County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) ("[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."). Therefore, it cannot be true that Pichardo had a clearly established constitutional right not to be subjected to a flawed medical examination.

There is no "settled law" here. It was not beyond debate in November 2013 that *every reasonable official* in Dr. Rodriguez-Garcia's place would have known that it was a clear violation of the Constitution—not simply a question of medical malpractice—to misdiagnose a female detainee on HRT as a male in the midst of a gender transition based on inartful questions about genitalia without further physical examination.

B. The Eleventh Circuit's view that an "obvious" case is one in which a court may withhold qualified immunity without identifying any clearly established law because it strongly objects to the official's conduct contravenes *United States v. Lanier* and *Hope v. Pelzer*, which permit the deprivation of qualified immunity only where the court first identifies pre-existing law and then decides that the official's conduct "obviously" violated that law.

Balking at this Court's continued insistence that a court identify precedent as a precondition to denying qualified immunity, the Eleventh Circuit found clearly established law based on the conclusory assertion that "prison officials can have fair warning that their conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases." App. 24a. This Court has, of course, acknowledged that "the unconstitutionality of outrageous conduct obviously will be unconstitutional," and that "even as to action less than an outrage, officials can still be on notice that their conduct violates established law . . . in novel factual circumstances." *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377-78 (2009) (cleaned up). That said, the Court has not authorized courts to withhold qualified immunity based solely on disapproval of an official's conduct. Yet that's what the Eleventh Circuit did here, and its distortion of "obvious clarity" is unmoored from any jurisprudential pier.

This Court explained in *United States v. Lanier*, that, in some cases, "a general constitutional rule

already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." 520 U.S. 259, 271 (1995) (cleaned up). In that small category of cases, § 1983 liability "may be imposed for a deprivation of a constitutional right *if, but only if,* 'in the light of pre-existing law the unlawfulness [under the Constitution is] apparent.'" *Id.* at 271-72 (alteration in original) (emphasis added) (quoting *Anderson*, 483 U.S. at 640). *Lanier* thus contemplated a two-step process for denying qualified immunity on obviousness grounds. First, a court must point to pre-existing law—the "general constitutional rule already identified in the decisional law"—that could give the officer "fair warning" of what the Constitution requires. *Id.* Then, and only then, may the court proceed to the second step and determine whether the officer failed to heed that reasonable warning—that is, whether that pre-existing law made the constitutional unlawfulness of the official's conduct apparent. The process is not without analogue: it closely resembles the typical clearly-established framework. *See, e.g.*, *Wesby*, 138 S. Ct. at 589-90. At bottom, all *Lanier* permits is the application of slightly broader-than-usual decisional law to novel factual circumstances in cases where an official's egregious conduct can be deemed an "obvious" violation of that decisional law.

This Court has found only one case to be "obvious." In *Hope v. Pelzer*, 536 U.S. 730 (2002), Alabama corrections officers punished a prisoner for disruptive conduct by handcuffing him to a post, shirtless, with his arms above his head for seven hours in the sun,

with little water and no bathroom breaks. While the prisoner was restrained, one officer taunted him about his thirst. He gave water to some nearby dogs and kicked the open water cooler onto the ground in front of the prisoner. *Id.* at 734-35. The constitutional violation inherent in this "wanton" conduct was blatant, and the Court found that the prisoner "was treated in a way antithetical to human dignity." *Id.* at 745.

Had this Eleventh Circuit panel presided over *Hope*, the qualified immunity analysis would've ended there. That the *Hope* Court did *not* terminate the analysis following a summary of the officers' actions reveals the Eleventh Circuit's error.

After reviewing the officers' conduct, the Court addressed the "salient question" of "whether the state of the law" at the time "gave [the officers] fair warning that their alleged treatment of Hope was unconstitutional." *Id.* at 740. The law *did* give the required fair warning, but not simply because the officers' conduct was "obvious[ly] cruel[]." *Id.* at 745. The Court acknowledged *Lanier*'s teaching that the law can be clearly established "despite notable factual distinctions between the precedents relied on and the cases then before the Court," but only "*so long as* the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *Id.* at 740 (emphasis added) (quoting *Lanier*, 520 U.S. at 269). And it was prior decisions that gave that reasonable warning to the corrections officers: longstanding circuit precedent had either prohibited extremely similar conduct, *see Gates v. Collier*, 501 F.2d 1291, 1306 (5th Cir. 1974) (holding that

"handcuffing inmates to the fence and to cells for long periods of time, . . . and forcing inmates to stand, sit or lie on crates, stumps, or otherwise maintain awkward positions for prolonged periods," violated the Eighth Amendment), *cited in Hope*, 536 U.S. at 743 ("In light of *Gates*, the unlawfulness of the alleged conduct should have been apparent to the respondents."), or suggested that similar conduct would give rise to an Eighth Amendment violation, *see Hope*, 536 U.S. at 743 (explaining that the "premise" of *Ort v. White*, 813 F.2d 318, 326 (11th Cir. 1987), that "physical abuse directed at a prisoner *after* he terminates his resistance to authority would constitute an actionable Eighth Amendment violation," "ha[d] clear applicability" in the case and "gave fair warning to respondents that their conduct crossed the line of what is constitutionally permissible" (cleaned up)). Moreover, a Department of Justice report on Alabama's use of the hitching post in the year before the incident had concluded that it was "used systematically as an improper punishment for relatively trivial offenses." *Id.* at 744 (cleaned up). Viewing the officers' conduct in the light of that pre-existing law, the Court held that it violated a clearly established right:

> *Gates* and *Ort*, as well as the DOJ report condemning the practice, put a reasonable officer on notice that the use of the hitching post under the circumstances alleged by Hope was unlawful. The "fair and clear warning" that these cases provided was sufficient to preclude the defense of qualified immunity . . . .

Id. at 745-46 (cleaned up) (quoting *Lanier*, 520 U.S. at 271).

Lanier and *Hope* stand for the proposition that a constitutional violation cannot be an "obvious" one without pre-existing law that gives officials "fair and clear warning" of the violative nature of their conduct. And this Court has applied *Lanier*'s two-step process in *refusing* to find cases to be "obvious." In each instance, the Court first identified pre-existing law—invariably *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989)—and then concluded that the officer's conduct was not obviously unlawful in light of that law. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) ("[T]he general rules set forth in *Garner* and *Graham* do not by themselves create clearly established law outside an obvious case. . . . This is far from an obvious case . . . ." (cleaned up)); *White*, 137 S. Ct. at 552 ("This is not a case where it is obvious that there was a violation of clearly established law under *Garner* and *Graham*."); *Brosseau*, 543 U.S. at 199 ("The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.").

This too is not an obvious case. In contrast to *Kisela*, *White*, and *Brosseau*, where the Court found an officer's conduct not obvious at *Lanier*'s second step, the Eleventh Circuit's analysis did not clear the *first* step. Nor could it. The state of the law in November 2013 did not alert Dr. Rodriguez-Garcia to the potential unconstitutionality of mistakenly misdiagnosing a pretrial detainee's gender. No law gave Dr. Rodriguez-Garcia *any* warning—let alone fair warning—that his conduct "crossed the line of what is constitutionally permissible," *Hope*, 536 U.S. at 743, until five years later when the Eleventh Circuit decided that it did.

That *post hoc* decision cannot be reconciled with *Lanier* and *Hope*, and it runs afoul of the touchstone of qualified immunity "that officials performing discretionary functions [not be] subject to suit when [open] questions are resolved against them only after they have acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Such "hindsight-based reasoning" as the Eleventh Circuit employed is precisely what qualified immunity doctrine rejects. *Id.* As Judge Kethledge recently put it, "No official—no matter how blameworthy he might be on moral grounds—can be expected to recognize in advance that a court will recast a legal rule so that it applies to conduct to which it has never applied before." *Guertin v. Michigan*, — F.3d —, —, 2019 WL 2133573, at *6 (6th Cir. May 16, 2019) (Kethledge, J., dissenting from denial of rehearing en banc). Indeed, this Court has "repeatedly told" lower courts not to do what the Eleventh Circuit did here—"create[] a new rule and then appl[y] that new rule retroactively against" an official. *Wesby v. District of Columbia*, 816 F.3d 96, 111 (D.C. Cir. 2016) (Kavanaugh, J., dissenting from denial of rehearing en banc).[9]

The Eleventh Circuit has it exactly backwards. It withheld qualified immunity because it decided that Dr. Rodriguez-Garcia's conduct "lies so obviously at the core of what the Eighth Amendment prohibits" that no pre-existing law is necessary. App. 24a. It essentially created, out of whole cloth, a conscience-shocking exception, grounded in the belief that a court can

[9] Then-Judge Kavanaugh's position ultimately prevailed. *Wesby*, *supra*, 138 S. Ct. 577.

circumvent the clearly-established analysis by invoking a moral condemnation of the official's conduct and denying qualified immunity based on that condemnation. This misapprehends the overarching concept of *Lanier* and *Hope*: a case can be "obvious" only where the official's conduct is first tied to the state of the law at the time. "[I]f, but only if," the reviewing court takes that initial step, *Lanier*, 520 U.S. at 271, can it then deem the conduct an "obvious" violation of that law. The Eleventh Circuit's belief, untethered from law, that Dr. Rodriguez-Garcia is not entitled to qualified immunity because it disapproves of his conduct—or, more accurately, of the eventual result of that conduct—is flawed for two reasons. First, the Eighth Amendment afforded Pichardo no rights. *See supra* at 15. And second, the court's *ipse dixit* that there is a jurisprudential "core of what the Eighth Amendment prohibits" has never been borne out. *Cf. Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (originating the "so obviously at the very core" language in a *Fourth* Amendment case where an officer's conduct violated pre-existing law by falling "obviously" outside the "hazy border between permissible and forbidden force" staked out by *Graham*).

This Court has never sanctioned the approach the Eleventh Circuit adopted here. The perceived conscience-shocking nature of an official's conduct has never obviated a court's obligation to identify and analyze clearly established law, much less in a case where the underlying conduct would in any other context be medical malpractice at most. If *Hope* itself were not proof enough of this, considering the self-

evident egregiousness of the Alabama corrections officers' conduct, the Court's decision in *Safford Unified School District No. 1 v. Redding*, *supra*, 557 U.S. 364, is yet more proof. There, eight Justices agreed that a school administrator violated the Fourth Amendment by subjecting a thirteen-year-old honors student to an "embarrassing, frightening, and humiliating" strip search that included forcing her to pull out her bra and the elastic on her underpants—exposing her breasts and pelvic area—on the "groundless suspicion that she might be hiding medicine in her underwear." *Id.* at 374-77 (majority op.), 380 (Stevens, J., concurring in part and dissenting in part). Although the intrusive search could have been perceived as a conscience-shocking constitutional violation,[10] the majority held that the administrator was entitled to qualified immunity because the governing law was not "sufficiently clear." *Id.* at 378-79. If "obvious clarity" really was shorthand for permitting courts to ignore pre-existing law or analysis of how an official's conduct violated that law, in favor of deciding years after the fact that what he did was "unlawful," the outcome of *Redding* would've been much different.

To be sure, the Eleventh Circuit has rendered decisions consistent with this Court's obviousness cases. The court has explained that under the obviousness exception, pre-existing law must "dictate,

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[10] Justice Stevens essentially did perceive it as such, calling the conduct "clearly outrageous." *Redding*, 557 U.S. at 380 ("I have long believed that it does not require a constitutional scholar to conclude that a nude search of a 13-year-old child is an invasion of constitutional rights of some magnitude." (cleaned up)).

that is, truly compel (and not just suggest or allow or raise a question about), the conclusion for every like-situated, reasonable government agent that what [the] defendant is doing violates federal law in the circumstances" before qualified immunity may rightly be denied. *Priester v. City of Rivera Beach*, 208 F.3d 919, 927 (11th Cir. 2000) (cleaned up); *see also Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir. 2010) (underscoring the "necessity of clear law being tied to the specific factual context": "The unlawfulness of a given act must be made truly obvious, rather than simply implied, by the preexisting law"). And recently, the court, citing *Hope*, reversed a denial of qualified immunity because "the unlawfulness of the defendant's actions must be apparent in light of pre-existing law," and, in that case, "[n]o pre-existing law compelled that conclusion for the [officials] under the circumstances." *Mikko v. City of Atlanta*, 857 F.3d 1136, 1148 (11th Cir. 2017) (cleaned up). These decisions make the court's decision here all the more inexplicable. In both *Mikko* and this case, for example, there was no applicable pre-existing law. But where the court in *Mikko* relied on the lack of law as grounds for reversing a denial of qualified immunity, the court here failed even to recognize a similar lack of law, yet it reversed a *grant* of qualified immunity.

The Eleventh Circuit once encouraged judges to "remember that the central idea" of qualified immunity "is this pragmatic one: officials can act without fear of harassing litigation only when they can reasonably anticipate—*before* they act or do not act—if their conduct will give rise to damage liability for them." *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996). It has

lost sight of that central idea. And its demonstrated willingness to disregard this Court's law depending on the case before it means that the fate of future qualified immunity defenses will be left to the luck of a panel draw or the whim of a panel's members. *Compare* App. 23a-25a, *with Young v. Borders*, 850 F.3d 1274, 1282 (11th Cir. 2017) (Hull, J., concurring in denial of rehearing en banc) ("Here, the panel was required to [affirm the grant of qualified immunity] because there is no prior case with facts remotely similar, much less particularized facts similar, to the facts in this case. More importantly, even the contours of the law in this type of unusual factual situation were not sufficiently clear such that a reasonable officer, in [the defendant]'s situation, would understand that what he is doing violates clearly established federal law."), *cert. denied*, 138 S. Ct. 640 (2018). That cannot be permitted.

This decision runs a substantial risk of dissuading medical professionals from working in detention centers by transforming every detainee they treat into a ticking constitutional time bomb. Accordingly, the Court should grant certiorari and restore Dr. Rodriguez-Garcia's qualified immunity, both because pre-existing law gave him "no fair and clear warning of what the Constitution requires" of his medical diagnoses, *Sheehan*, 135 S. Ct. at 1778 (cleaned up), and because, throughout this litigation, Pichardo has never proven that it did.

II. The Eleventh Circuit's Refusal to Find that Pichardo Had Forfeited the Issue of Clearly Established Law by Failing to Raise It Until Her Appellate Reply Brief Is an Aberration Among Its Own Law and the Law of Every Other Court of Appeals.

Theoretically, this Court need not even reach the substantive error outlined above, because it may choose to correct the Eleventh Circuit's equally outrageous procedural error: its failure to conclude that Pichardo forfeited her argument as to clearly-established law by not raising it in her initial brief.

Once an official demonstrates that he was performing a discretionary function, a plaintiff seeking to overcome qualified immunity bears two burdens: (1) to demonstrate a violation of a constitutional right; and (2) to demonstrate that the right was clearly established. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). The district court found that Pichardo's failure to satisfy the first prong was sufficient to resolve the qualified immunity question in Dr. Rodriguez-Garcia's favor, *see* App. 50a-51a, so it needn't have addressed whether the law was clearly established, *see Wesby*, 138 S. Ct. at 589 ("We continue to stress that lower courts should think hard, and then think hard again, before addressing both [clearly established law] and the merits of an underlying constitutional claim." (cleaned up)), and Pichardo had not raised that argument before the district court in any event. But regardless of where the district court's analysis ended, Pichardo, in seeking to abrogate qualified immunity on appeal, retained the burden to "establish *both* that the officer's conduct violated a constitutionally protected right *and* that the

right was clearly established at the time of the misconduct." *Alcocer v. Mills*, 906 F.3d 944, 951 (11th Cir. 2018) (emphases added). She opted to brush that instruction aside, devoting her entire initial brief to the first prong and making no mention of the second until the end of her reply brief.

The Eleventh Circuit disregarded Pichardo's choice not to meet her burden to satisfy the clearly-established prong. It should have found that she forfeited that argument and, as a result, refused to cast qualified immunity aside. *Cf. Cass v. City of Abiline*, 814 F.3d 721, 732-33 (5th Cir. 2016) (affirming grant of qualified immunity, even though the district court did not reach the clearly-established prong, because the plaintiffs "entirely failed" to bear their burden to show that the officer's conduct violated a clearly established right). Its failure to do so was manifest and prejudicial error.

"Appellate courts generally do not reach out to decide issues not raised by the appellant. Nor do they generally consider issues first mentioned in a reply brief." *Cone v. Bell*, 556 U.S. 449, 482 (2009) (Alito, J., concurring in part and dissenting in part) (cleaned up). "[W]here counsel has made no attempt to address [an] issue, we will not remedy the defect . . . ." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). For the most part, the Eleventh Circuit has followed this guidance, so correcting its unexplained departure from it in this instance is that much more necessary. The court has previously touted its "wall of precedent" that "a legal claim or argument that has not been briefed before the court is deemed abandoned and its merits will not be addressed":

> If an argument is not fully briefed (let alone not presented at all) to the Circuit Court, evaluating its merits would be improper both because the appellants may control the issues they raise on appeal, and because the appellee would have no opportunity to respond to it. Indeed, evaluating an issue on the merits that has not been raised in the initial brief would undermine the very adversarial nature of our appellate system . . . . In preparing briefs and arguments, an appellee is entitled to rely on the content of an appellant's brief for the scope of the issues appealed.

Norelus v. Denny's, Inc., 628 F.3d 1270, 1296-97 (11th Cir. 2010) (cleaned up).

But here, the court pierced its own wall of precedent. Even though Pichardo made no attempt to address clearly established law either before the district court or in her initial brief, the Eleventh Circuit considered the merits of her last-minute argument. Thus, Dr. Rodriguez-Garcia, who should have been "entitled to rely on the content of Pichardo's initial brief for the scope of the issues appealed," *id.* at 1297, was instead "deprived of a fair opportunity to respond," *Cone*, 556 U.S. at 482 (Alito, J., concurring in part and dissenting in part) (cleaned up). The court should have rejected the argument as forfeited, but instead it gave Pichardo a windfall in its willingness to neglect precedent and reverse the district court's judgment via an argument that never appeared—at any stage of the litigation—before the reply.

Decisions requiring a § 1983 plaintiff to satisfy both prongs of the qualified immunity analysis mean nothing if a plaintiff can decline to argue in the district court that the law was clearly established, decline to argue the same in her initial appellate brief, wait until her reply brief to bring it up for the first time, yet still prevail. The decision signals to public officers raising qualified immunity defenses that they have two choices: prophylactically anticipate every argument plaintiffs might raise at the last minute on appeal; or bear their burdens properly, expect plaintiffs to do the same, and be blindsided by arguments to which they are powerless to respond.

Such an approach has broader, more troubling implications even outside the realm of qualified immunity. In any manner of contexts, a panel of judges may decide who it believes should prevail and will work backwards to achieve that result, no matter the fatal defects in the "winner's" briefs. Our adversarial system should not reward either such eleventh-hour maneuvering or such results-oriented jurisprudence.

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Just as disquieting is that the Eleventh Circuit's decision to ignore Pichardo's forfeiture is a stark deviation from the decisions of its sister courts, each of which has refused to permit a § 1983 appellant to prevail on the basis of an argument she did not raise in her initial brief.

The Fifth Circuit got it right in *Lincoln v. Turner*, 874 F.3d 833 (5th Cir. 2017). There, as here, the district court granted the officer's motion to dismiss, finding that the plaintiff had failed to plead a

constitutional violation, so the official was entitled to qualified immunity. *Id.* at 838. The plaintiff cited no authority in her initial brief pertaining to clearly established law on her excessive force claim, and the officer's response pointed that out. *Id.* at 850-51. The Fifth Circuit, like the Eleventh here, disagreed with the district court and concluded that the plaintiff *had* plausibly stated a constitutional violation. *Id.* at 840. But when it came to deciding clearly established law, the Fifth Circuit stayed the course, and the Eleventh veered off. The Fifth Circuit concluded that the plaintiff had "waived argument as to the clearly established law prong and thus cannot overcome qualified immunity." *Id.* at 851 & n.92.

Lincoln is consistent with case law from the D.C. Circuit, *Fox v. District of Columbia*, which upheld qualified immunity where the plaintiff argued in her reply brief that authority she'd cited in her opening brief in support of finding a Fourth Amendment violation could also demonstrate that a Fourth Amendment right was clearly established. 794 F.3d 25 (D.C. Cir. 2015). The court rejected this after-the-fact characterization: the plaintiff "never argued in her opening brief that any of these cases (standing alone or read together) clearly established a Fourth Amendment violation under the circumstances of her seizure." *Id.* at 29. Her initial brief, like Pichardo's, "made no effort to identify the contours of the right at issue, let alone in a manner that would make it clear to a reasonable official that his conduct was unlawful in the situation he confronted." *Id.* (cleaned up). "As a result, she forfeited the argument" on clearly established law. *Id.*

The other Circuits agree with the Fifth Circuit and the D.C. Circuit, as well as the Eleventh Circuit's previously impenetrable wall of precedent.[11]

To be clear, barring an appellant from riding to victory on an argument that did not appear in her opening brief is not a consequence unique to plaintiff-appellants. The sword of appellate forfeiture cuts both ways, as shown in circuit decisions holding that an *officer*-appellant cannot expect to reverse a district court's judgment *denying* him qualified immunity unless he raises the relevant arguments in his opening brief.

There is no better example of this than the Fourth Circuit's decision in *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1595 (2018). There, two sheriff's deputies appealing a denial of qualified immunity failed to raise any argument on the clearly-established prong of the qualified immunity analysis in their opening brief. *Id.* at 580. The Fourth Circuit's description of their deficient brief is a dead ringer for Pichardo's:

> [The] opening brief contains . . . no argument on the "clearly established" prong of the qualified immunity test. It contains no citation to cases

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[11] *E.g.*, *Gray v. Cummings*, 917 F.3d 1, 13 n.7 (1st Cir. 2019); *Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012); *Harvey v. Plains Twp. Police Dep't*, 421 F.3d 185, 192 (3d Cir. 2005); *Puckett v. Lexington-Fayette Urban County Government*, 833 F.3d 590, 610-11 (6th Cir. 2016); *Duncan v. Wis. Dep't of Health & Family Servs.*, 166 F.3d 930, 934 (7th Cir. 1999); *Brewington v. Keener*, 902 F.3d 796, 802-03 & n.4 (8th Cir. 2018); *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1239 n.3 (10th Cir. 2016).

> actually applying the "clearly established" prong of the qualified immunity test. And it contains no citations to the record to indicate that the Deputies preserved the argument below.

Id. at 580 n.5. "As appellants, they were required to state their contentions and the reasons for them. This, the Deputies utterly failed to do." *Id.* (cleaned up). So, the court concluded, "by failing to preserve the issue [of clearly established law] in their opening brief, the Deputies waived it." *Id.*

The Ninth Circuit similarly affirmed a denial of qualified immunity to deputies who failed to argue in their opening brief for reversing the district court's finding of clearly established law:

> Usually we can start with the second prong of qualified immunity if we think it advantageous. Here, though, we are not satisfied that the deputies have adequately pursued that argument. . . . On appeal, the deputies have not advanced an argument as to why the law is not clearly established . . . . We will not do an appellant's work for it, either by manufacturing its legal arguments, or by combing the record on its behalf for factual support.

George v. Morris, 736 F.3d 829, 837 (9th Cir. 2013) (cleaned up). In both *Hensley* and *George*, the officers could have used their opening briefs to argue that the law was not clearly established. They did not, so the consequence of their decisions was forfeiture. Pichardo had a corresponding opportunity in her opening brief to argue that the law *was* clearly established. She did not. But the Eleventh Circuit imposed no consequence.

Indeed, it rewarded her: it allowed her to, belatedly and in cursory fashion, raise the argument when Dr. Rodriguez-Garcia could no longer respond to it, and to prevail because of it.

Without "meaningful adversarial engagement" on an issue, courts "run a serious risk of reaching an improvident or ill-advised opinion, not to mention causing unfairness to" the party left unable to respond. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1155 (10th Cir. 2013) (en banc) (Gorsuch, J., concurring) (cleaned up), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). Without *any* adversarial engagement on clearly established law, the Eleventh Circuit improvidently adopted Pichardo's out-of-time, one-sided argument. Doing so was contrary to precedent, and for good reason, no court of appeals has ever adopted its misguided approach. This Court should grant certiorari on this question and deem the issue forfeited.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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