No. 18-1510

IN THE

Supreme Court of the United States

FREDESVINDO RODRIGUEZ-GARCIA,
Petitioner,

v.

FIOR PICHARDO DE VELOZ, et al.,
Respondents.

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

RESPONDENT PICHARDO DE VELOZ'S BRIEF IN OPPOSITION

GARY KOLLIN
GARY KOLLIN, P.A.
1856 N Nob Hill Road, Ste 140
Fort Lauderdale, FL 33322

GONZALO BARR
GONZALO BARR LLC
201 Alhambra Cir., Ste 1200
Coral Gables, FL 33134-5111

DAVID KUBILIUN
GREENSPOON MARDER LLP
600 Brickell Ave., Ste 3600
Miami, FL 33131

ADAM R. PULVER
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Respondent Pichardo de Veloz

August 2019

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit properly held that a prison official who "strongly suspected" that a (female) inmate was a woman, but who nonetheless reassigned her to a men's prison without taking reasonable steps to confirm her sex, violated clearly established law.

2. Whether the Eleventh Circuit properly considered arguments made in an appellant's reply brief in response to arguments made by the appellee.

PARTIES TO PROCEEDING AND RELATED CASES

The parties to the proceeding in this Court are listed in the petition for writ of certiorari.

The following proceedings are directly related to this case:

- *De Veloz, et al. v. Miami-Dade County, et al.*, No. 17-13059, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered November 21, 2018.
- *De Veloz, et al. v. Miami-Dade County, et al.*, No. 16-23925-CIV-ALTONAGA, U.S. District Court for the Southern District of Florida. Judgment entered June 8, 2017.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGES**

INTRODUCTION

In 1994, this Court held that a prison official is deliberately indifferent and violates the Constitution when he puts a prisoner's life and safety at risk by "refus[ing] to verify underlying facts that he strongly suspect[s] to be true, or declin[ing] to confirm inferences of risk that he strongly suspect[s] to exist," despite an awareness of the harm posed by that risk. *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). Twenty-five years later, the Eleventh Circuit, citing *Farmer*, found that petitioner Dr. Fredesvindo Rodriguez-Garcia is alleged to have done exactly that. While working as a prison doctor, Petitioner reassigned respondent Pichardo de Veloz from a women's jail to a men's jail, despite overwhelming evidence that she is a woman and without so much as a visual exam. The court of appeals' denial of qualified immunity based on its conclusion that Petitioner's alleged conduct was obviously unconstitutional does not merit review.

Petitioner does not challenge the main portion of the unpublished decision below, in which the court of appeals found that the facts alleged fall squarely within the prohibitions against deliberate indifference identified in precedent of the Eleventh Circuit and this Court. Having reversed the district court's decision on that point, the court turned to an alternative ground for affirmance raised by Petitioner: whether the right implicated by Respondent's claim was clearly established. As this Court's decisions recognize, in a narrow category of circumstances, any reasonable government official would know that his conduct is unlawful, even in the absence of case law on similar facts. The court of appeals rightly concluded that the alleged conduct of Petitioner falls into that category, because such conduct "lies so obviously at the very

core of what the Eighth Amendment prohibits." Pet. App. 25a.

Cherry-picking facts and improperly asking this Court to make inferences against Respondent at the Rule 12(b)(6) stage, Petitioner attempts to recast the court's denial of qualified immunity based on what it found to be grievous facts into a threat to the orderly operation of prisons. Nothing in the Eleventh Circuit's opinion or approach to the qualified immunity analysis, however, is inconsistent with decisions of this Court or any court of appeals. To the contrary, the decision below reflects the well-accepted principle that "the more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082 (10th Cir. 2015) (Gorsuch, J.) (citation and internal quotation marks omitted). In finding the law sufficiently clearly established, the Eleventh Circuit properly focused on whether a reasonable officer would have had "fair warning" of the unlawfulness of his actions.

Petitioner's second question presented is based on the notion that, in her opening brief in the court of appeals, Respondent was obligated to anticipate that Petitioner would raise as an alternative ground for affirmance an issue that the district court did not reach. Specifically, the district court held that Respondent failed to allege a violation of a constitutional right and, therefore, did not reach the "clearly established" prong of the qualified immunity inquiry. Respondent's opening brief on appeal thus did not address the latter issue; this is not "waiver." In any event, a court of appeals may exercise discretion to consider (or decline to consider) issues raised for the first time in a reply

brief. Such an exercise of discretion would present no basis for certiorari review.

This Court's review is not merited.

STATEMENT OF THE CASE

A. Factual Background

In November 2013, Fior Pichardo De Veloz, a fifty-year-old "wife, mother, grandmother, prominent lawyer, and elected official in the Dominican Republic," flew to Miami to visit her pregnant daughter. Pet. App. 3a. Upon arrival, Mrs. Pichardo was arrested by the Miami-Dade Police Department on a decades-old warrant, *id.* at 66a, and transferred to Miami-Dade County's Turner Guilford Knight Correctional Center (TGK), *id.* at 4a. On the arrest affidavit, the officer who took her into custody noted, correctly, that Mrs. Pichardo is female. *Id.*

Under TGK procedures, officers conduct strip searches of detainees as part of the booking process. In doing, so, officers are tasked with both searching for contraband and confirming the sex of the detainee. *Id.* at 4a, 102a. If they encounter evidence that "the inmate is of the opposite gender than he or she appears to be," officers are directed to discontinue the search and call in a supervisor. *Id.* at 4a.

Accordingly, as part of Mrs. Pichardo's booking on the evening of her arrest, a female officer conducted a strip search of Mrs. Pichardo, requiring Mrs. Pichardo to take off her clothing, "lift her arms, turn around, bend over at the waist, grab her butt checks, spread, cough." *Id.* at 101a–02a. The officer "did not notice anything abnormal," gave Mrs. Pichardo the orange uniform reserved for female inmates and booked her into the jail as female. *Id.* at 4a–5a. On the file prepared

for Mrs. Pichardo at booking, the word "female" was written and circled in red, and the file was marked with a blue tab used for files of female inmates. *Id.* at 6a. An officer also completed a pre-screening medical assessment of Mrs. Pichardo, noting on a form that Mrs. Pichardo had a history of high blood pressure, was taking "hormone replacement pills," and was suffering from "Menopause Medical." *Id.* at 6a–7a.

Because of Mrs. Pichardo's history of high blood pressure, a TGK officer later that evening escorted her to the medical unit for an evaluation. *Id.* at 5a. She was not sent there "for a gender evaluation," was "wearing the orange uniform that female inmates wear," *id.* at 22a, and arrived "handcuffed along with other female inmates," *id.* at 5a.

Petitioner Dr. Fredesvino Rodriguez-Garcia, a physician for more than forty years, who had been working in the State of Florida's prison system for four years, met with Mrs. Pichardo. *Id.* at 125a. Although Mrs. Pichardo had been sent to the medical unit only because of her high blood pressure, Petitioner decided to reevaluate Mrs. Pichardo's sex, based solely on the indication in her file that she was taking hormone replacement therapy (HRT). Petitioner knew that "HRT is prescribed to treat women diagnosed with menopause," *id.* at 126a, and that the very same form indicated that Mrs. Pichardo was being treated for "Menopause Medical," *id.* at 125a. Nonetheless, because of the HRT, Petitioner "assumed that she was transgender," *id.* at 125a, and thus designated as her as male, *id.* at 128a.

Although his assumption differed from the results of a strip search conducted by a fellow prison employee

and was contradicted by Mrs. Pichardo's file, Petitioner did not take advantage of the tools at his disposal to confirm his "assumption." He did not perform a visual or manual exam of Mrs. Pichardo's body, *id.* at 7a–8a, although he later acknowledged that he has in the past conducted "visual checks to verify an individual's gender," *id.* at 127a. He did not ask Mrs. Pichardo if she was transgender, male, or ever had identified as male. He later stated that such questions would have been too "difficult" to ask, *id.* at 7a, so he instead asked "if she had all [of her] 'sex parts'" and whether she had "any surgery to her genitals," *id.* Mrs. Pichardo confirmed that she did have intact genitals and had never undergone surgery on them. *Id.*

Based on Petitioner's reclassification, the booking department initiated a transfer of Mrs. Pichardo to a male correctional facility, Metro West jail. *Id.* at 10a. When Mrs. Pichardo arrived at Metro West, the female officer in charge recognized that Mrs. Pichardo was female. She said to her, "You are a woman. Good luck if you are alive tomorrow." *Id.* Mrs. Pichardo was soon surrounded by approximately 40 male inmates, who harassed and laughed at her. *Id.* at 10a–11a. Mrs. Pichardo feared for her life, feeling "psychologically assaulted because everyone looked at her as if she was a piñata." *Id.* at 11a. Afraid to go to the bathroom, she urinated on herself. *Id.* at 10a.

That afternoon, Mrs. Pichardo's family struggled to locate her. *Id.* at 11a, 74a–75a. When her family members learned she was at a men's facility, they pointed out to jail staff that she was a woman. A female nurse at the men's jail then conducted a second strip search of Mrs. Pichardo, while jail personnel took pictures and several male corrections officers looked

on, laughing. *Id.* at 12a. That second strip search confirmed what the first one—ignored by Petitioner—had established: Mrs. Pichardo is female. *Id.* Mrs. Pichardo was then separated from the male population at the jail and, that evening, transferred back to a female unit at the TGK jail. *Id.*

B. Proceedings Below

On September 13, 2016, Mrs. Pichardo sued the officials responsible for placing her in a men's jail facility and other defendants, seeking damages for the trauma she suffered. *Id.* at 32a. The operative complaint alleges that Petitioner deprived her of her constitutional right to be free from deliberate indifference to a substantial risk of serious harm to her health and safety. *Id.* at 33a. Mrs. Pichardo's complaint alleges that Petitioner wrongfully classified her as male without taking reasonable steps to determine her sex, indifferent to a known risk to her safety and life. *See* 11th Cir. App. 55. As a result of Petitioner's acts, Mrs. Pichardo alleges, she suffered sexual harassment and injury, including severe lasting emotional distress, humiliation, anxiety, and psychological injury. *Id.* at 56.

The defendants each moved to dismiss the complaint, contending that Mrs. Pichardo had failed to sufficiently allege they had violated her constitutional rights and were thus entitled qualified immunity. Pet. App. 35a. The district court agreed, dismissing all of Mrs. Pichardo's federal claims and declining to exercise jurisdiction over the state-law claims. *Id.* at 33a–34a. Specifically as to Petitioner, the district court concluded that Mrs. Pichardo's complaint did not establish "the requisite 'subjective intent to punish' Pichardo and, therefore, [the allegations] do not make

out deliberate indifference claims under the Eighth Amendment." *Id.* at 46a. Having concluded that Mrs. Pichardo's complaint did not state a claim for a constitutional violation, the district court did not reach the question whether the complaint alleged a violation of a right that had been "clearly established" at the time of the incident. *See id.* at 50a–51a.

Mrs. Pichardo appealed the district court's decision as to Petitioner and one other defendant. *Id.* at 13a. In a unanimous, unpublished decision, the Eleventh Circuit reversed.

First, the court held that, when taken in the light most favorable to Mrs. Pichardo, the facts sufficiently alleged that Petitioner had violated Mrs. Pichardo's constitutional rights under well-established precedent of the Eleventh Circuit and of this Court. *Id.* at 15a–17a, 23a (citing *Farmer*, 511 U.S. at 837; *Bowen v. Warden Baldwin State Prison*, 826 F.3d 1312, 1320 (11th Cir. 2016); *Caldwell v. Warden, FCI Talladega*, 748 F.3d 1090, 1099–1100 (11th Cir. 2014); *Purcell ex rel. Estate of Morgan v. Toombs Cty.*, 400 F.3d 1313, 1319 (11th Cir. 2005); *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004)). The court noted that Petitioner did not dispute that Mrs. Pichardo had adequately alleged two of the three elements of deliberate indifference: a substantial risk of serious harm, and causation. *See id.* at 17a ("[N]o party disputes that placing a female in the general population of a male detention facility created an extreme condition and posed an unreasonable risk of serious harm to the female's future health or safety…. The parties also do not dispute that Mrs. Pichardo sufficiently alleged … causation."). The court also cited its 2005 decision in *Purcell* for the proposition "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." *Id.* (quoting 400 F.3d at 1320). The only element in dispute was whether Petitioner and his co-defendant had the requisite knowledge that Mrs. Pichardo "faced a substantial risk of substantial harm." *Id.* Engaging in that fact-bound analysis, the Court concluded

> that the extensive facts alleged in the second amended complaint give rise to the inference that, at a minimum, Nurse Harris and Dr. Rodriguez-Garcia "strongly suspected" that Mrs. Pichardo was a female but "refused to verify the underlying facts" that would prove her female gender to be true. They then (1) deliberately reclassified Mrs. Pichardo's gender as male, in the face of the contrary evidence that she was a woman, and (2) knew that reclassifying her as male would send her to the male jail population where her safety and life would be at risk. This amounts to deliberate indifference under *Farmer*.

Id. at 19a.

After concluding that Petitioner's conduct constituted deliberate indifference under *Farmer* and other case law, the court turned to the second part of the qualified immunity analysis, which Petitioner had raised as an alternative ground for affirmance: whether the right was clearly established. *Id.* at 23a. The court recognized that, in a small category of cases, "even in the absence of factually similar case law, prison officials can have fair warning that their con-

duct is unconstitutional when the constitutional violation is obvious." *Id.* at 24a (citing *United States v. Lanier*, 520 U.S. 259, 271 (1997); *Vinyard v. Wilson*, 311 F.3d 1349, 1350–51 (11th Cir. 2002)). Because 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 the defendants, the court found that the "conduct at issue here lies so obviously at the very core of what the Eighth Amendment prohibits." *Id.* The court reversed the district court's decision granting qualified immunity to Petitioner. *Id.* at 24a–25a.

Petitioner filed a petition for rehearing en banc, which the Eleventh Circuit denied without dissent. *Id.* at 61a–62a.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit correctly denied qualified immunity based on Petitioner's deliberate disregard of an obvious risk to Mrs. Pichardo's safety.

The Eleventh Circuit, like other circuits, recognizes that there are several ways in which an Eighth Amendment right can be "'clearly established such that a reasonable prison official would understand what he or she is doing violates that right.'" Pet. App. 23a (quoting *Brooks v. Warden*, 800 F.3d 1295, 1306 (11th Cir. 2015) (alterations omitted)).

> First, the plaintiff can point to a materially similar case decided at the time of the relevant conduct by the Supreme Court, the Eleventh Circuit, or the relevant state supreme court. Second, the plaintiff can identify a broader, clearly established principle that should govern the novel facts of the situation. Third, even in the

> absence of factually similar case law, prison officials can have fair warning that their conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as "obvious clarity" cases.

Id. at 24a (citing *Lanier*, 520 U.S. at 271; *J W ex rel. Tammy Williams v. Birmingham Bd. of Educ.*, 904 F.3d 1248, 1259–60 (11th Cir. 2018); *Vinyard,* 311 F.3d at 1350–51).

Petitioner's first question presented seeks review of the court of appeals' conclusion that this case is one of the rare ones that falls into the third category. That conclusion does not warrant review because it is correct and well-supported by case law. Moreover, the outcome here would be the same if the court had considered whether this case fell into the first category, as shown by cases discussed in the court's opinion.

A. The court of appeals correctly held that Petitioner's actions were "obviously" unlawful.

1. The Eleventh Circuit's narrow "obvious clarity" standard for egregious cases is consistent with the law of this Court and other courts of appeals.

In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court explained that a "general constitutional rule" might "apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *Id.* at 739 (quoting *Lanier*, 520 U.S. at 270–71). Denying qualified immunity to prison officers who had tied a prisoner to a

hitching post in the hot sun and denied him water, despite no case law addressing the use of hitching posts in the sun, the Court noted that "[a]rguably, the violation was so obvious that our own Eighth Amendment cases gave respondents fair warning that their conduct violated the Constitution." *Id.* at 741.

The Court has since reiterated the existence of these "rare" cases, where the obviousness of the violation provides sufficient notice to reasonable officials. *See*, *e.g.*, *Dist. of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) ("Of course, there can be the rare 'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances."); *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) (stating that "[t]he unconstitutionality of outrageous conduct obviously will be unconstitutional").

Contrary to Petitioner's suggestion, the Eleventh Circuit has not adopted a standard for obvious clarity that sweeps in large numbers of qualified immunity cases. Indeed, the Eleventh Circuit has repeatedly acknowledged that only "very occasionally" are there "exceptional case[s] in which a defendant officer's acts are so egregious that preexisting, fact-specific precedent was not necessary to give clear warning to every reasonable ... officer that what the defendant officer was doing must be 'unreasonable.'" *Rodriguez v. Farrell*, 280 F.3d 1341, 1350 n.18 (11th Cir. 2002); *see also Gaines v. Wardynski*, 871 F.3d 1204, 1209 (11th Cir. 2017) (stating that "this is not one of the rare and exceptional 'obvious clarity' cases"); *Coffin v. Brandau*, 642 F.3d 999, 1015–16 (11th Cir. 2011) (en banc) (stating "[o]ur case law has made clear that 'obvious clarity" cases will be rare" and finding that the case did not fall in that category).

Ignoring both the reasoning in the unpublished opinion below and the body of Eleventh Circuit precedent, Petitioner characterizes the court's standard as allowing a court to withhold "qualified immunity based solely on disapproval of an official's conduct," Pet. 19, or as "a conscience-shocking exception," *id.* at 24–25. Eleventh Circuit case law, however, is focused on whether officials "have fair warning that their conduct is unconstitutional when the constitutional violation is obvious." Pet. App. 24a (citing *Lanier*, 520 U.S. at 271; *Vinyard*, 311 F.3d at 1350–51). As Judge Pryor has explained, "obvious clarity" only applies to "official conduct [ ] so egregious that 'every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law.'" *Dukes v. Deaton*, 852 F.3d 1035, 1043 (11th Cir. 2017) (quoting *Coffin*, 642 F.3d at 1015); *see also Vinyard*, 311 F.3d at 1350, 1355 (limiting "obvious clarity" to cases where conduct is "far beyond the hazy borders" of acceptable and unacceptable, and thus "so bad that case law is not needed to establish that the conduct cannot be lawful"). This standard closely mirrors the language this Court has repeatedly used to carve out the "obvious clarity" exception.

As Petitioner concedes, Eleventh Circuit precedent is "consistent with this Court's obviousness cases." Pet. 26–27. In the cases cited by Petitioner, the Eleventh Circuit explained that an official will not be entitled to qualified immunity when his or her "conduct lies so obviously at the very core of what [a constitutional] Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of caselaw." *Priester v. City of Rivera Beach*, 208 F.3d 919, 926 (11th Cir. 2000); *see also Youmans v. Gagnon*, 626 F.3d 557, 563 (11th Cir.

2010) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004), for the proposition that "general tests may be sufficient to establish law clearly in 'an obvious case'"). Likewise here, the court held the conduct at issue "lies so obviously at the very core of what the Eighth Amendment prohibits" that its unconstitutional nature would be "readily apparent to any prison officer or medical personnel." Pet. App. 24a.

Petitioner, citing no case law, asserts that this Court has mandated a "two-step process for denying qualified immunity on obviousness grounds": first, noting pre-existing standards "identified in the decisional law … that could give the officer 'fair warning' of what the Constitution requires"; second, "determin[ing] whether the officer failed to heed that reasonable warning." Pet. 20. Not only is Petitioner's test not the law, it would eliminate the "obvious clarity" category in its entirety. That category by definition recognizes that a right can be clearly established "without a body of relevant case law." *Brosseau*, 543 U.S. at 199. As the Court explained in *Lanier*, an "obvious clarity" category is necessary because "[t]he easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.'" 520 U.S. at 272 (internal quotation marks omitted).

The Eleventh Circuit's approach is consistent with both this Court's and that of other courts. *See, e.g.*, *Lovett v. Herbert*, 907 F.3d 986, 992 (7th Cir. 2018) ("[I]n the rare case when the defendant officer's conduct is so egregious that it can be said to obviously violate the right at issue, the plaintiffs may not be required to present the court with any analogous

cases.") (internal quotation marks omitted); *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138–39 (9th Cir. 2018) (quoting *Brosseau*, 543 U.S. at 199); *Schneyder v. Smith*, 653 F.3d 313, 330 (3d Cir. 2011) ("A plaintiff 'can demonstrate that the right was clearly established … by presenting evidence that the Defendant's conduct was so patently violative of the constitutional right that reasonable officials would know without guidance from a court.'") (quoting *Estate of Escobedo v. Bender*, 600 F.3d 770, 779–80 (7th Cir. 2010))); *Jennings v. Jones*, 499 F.3d 2, 17 (1st Cir. 2007) (denying qualified immunity where the officer's "conduct was such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful").

Indeed, other courts of appeals have approvingly cited the very test that the Eleventh Circuit applied in the decision below. *See, e.g.*, *Thompson v. Cope*, 900 F.3d 414, 422 (7th Cir. 2018) (outlining the Eleventh Circuit's "obvious clarity" doctrine); *Schneyder*, 653 F.3d at 330–31 (citing *Vinyard*, 311 F.3d at 1351); *Meyer v. Bd. of County Comm'rs of Harper County, Okla.*, 482 F.3d 1232, 1242–43 (10th Cir. 2007) (quoting *Vinyard* when noting that "conduct [may be] so bad that case law is not needed to establish that this conduct cannot be lawful").

Because the Eleventh Circuit's standard is consistent with this Court's precedent and the holdings of other courts of appeals, certiorari review is not warranted.

2. The court of appeals correctly found that the facts alleged were so egregious as to put any reasonable officer on notice.

The Eleventh Circuit correctly found, on the facts alleged, that Petitioner's conduct satisfies the obvious clarity standard. As the court recognized, Mrs. Pichardo's allegations gave rise to the inference that Petitioner strongly suspected that Mrs. Pichardo was a woman, knew that a woman would be in extreme danger in a men's jail, and failed to take steps to address his strong suspicion. The court recited several reasons why a reasonable person in Petitioner's shoes would have known that Mrs. Pichardo was a woman. *See* Pet. App. 19a–20a, 21a–22a. And it found that Petitioner "knew that sending a woman to an all-male prison would pose a risk of serious harm to her safety." *Id.* at 22a. Based on the facts alleged and reasonable inferences drawn from them, the court concluded that the "conduct at issue lies so obviously at the very core of what the Eighth Amendment prohibits that the unlawfulness … was readily apparent to any prison officer or medical personnel in the shoes of" Petitioner. *Id*. at 24a–25a.

Petitioner argues that the court's holding was flawed because the court failed to identify a clearly established right or examine his "particularized conduct." Pet. 14. This argument ignores the Eleventh Circuit's discussion under the heading "Violation of a Constitutional Right." There, the court examined at length the Eighth Amendment "dut[y] on [prison] officials" in charge of the care of pre-trial detainees to "take reasonable measures to guarantee the safety of the inmates." Pet. App. 15a (quoting *Farmer*, 511 U.S. at 832, and citing *Goebert v. Lee Cty*., 510 F.3d 1312,

1326 (11th Cir. 2007)). It then explained how Petitioner's specific conduct violated that duty. *Id.* at 16a–23a.

Petitioner seems to take issue with the organization of the opinion, because the court did not repeat this discussion under the heading "Clearly Established Law." But a dispute over the format of a non-precedential opinion does not merit review. Given the record before the court at the motion to dismiss stage, the wealth of consistent precedent on "obvious clarity" cases, and the clear standards governing conditions of confinement in jails, the Eleventh Circuit correctly determined that Mrs. Pichardo had adequately alleged that Petitioner's deliberate indifference obviously violated her constitutional rights.

B. Existing case law was sufficient to put petitioner on notice that deliberate indifference to a risk of sexual assault violates the Constitution.

This case fits comfortably within the "obvious clarity" standard of *Hope* and other cases. In addition, the existing case law was sufficient to put Petitioner on notice that his deliberate indifference to Ms. Pichardo's safety was a violation of her constitutional rights. Review is unwarranted for this reason as well. *See United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984) (stating that "a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below").

The court of appeals found that Petitioner's alleged conduct fell squarely within the prohibition of *Farmer*

and other deliberate indifference cases.[1] As Petitioner notes, the court cited the clearly established right "to be 'reasonably protected from constant threat of violence and sexual assault by her fellow inmates.'" Pet. App. 17a (citing *Purcell*, 400 F.3d at 1320). Petitioner seeks to distinguish *Purcell* by stating that it was "about an inmate-on-inmate assault, not a medical misdiagnosis." Putting aside Petitioner's recharacterization of his own deliberate indifference as a "misdiagnosis," both *Purcell* and this case involved claims that a prison official's acts created a serious risk of inmate-on-inmate assault. It is only by fortune that Mrs. Pichardo was not assaulted in her time in a men's jail; as the court of appeals noted, it is "abundantly clear to us that housing a biological female alongside 40 male inmates poses an outrageous risk that she will be harassed, assaulted, raped, or even murdered." Pet. App. 17a. Petitioner violated Mrs. Pichardo's rights when he caused her to be subject to that risk. "That the Eighth Amendment protects against future harm

[1] Petitioner takes the court of appeals to task for applying Eighth Amendment jurisprudence to this case, which involves a pretrial detainee. Pet. 15. But the court of appeals explained that it was viewing Mrs. Pichardo's claims via an Eighth Amendment lens "[b]ecause *all parties* refer to Mrs. Pichardo's claims as Eighth Amendment claims," and because, as was clearly-established by Eleventh Circuit case law at the time of the acts in question, "the standards under the Fourteenth Amendment are identical to those under the Eighth." Pet. App. 15a,15a n.4 (citing *Goebert*, 510 F.3d at 1326) (emphasis added). Indeed, Petitioner conceded below that Mrs. Pichardo's claims "are subject to the same scrutiny as if they had been brought as deliberate indifference claims under the Eighth Amendment," and maintained that *Farmer* governed this case. Appellant's 11th Cir. Br. at 9, 10.

to inmates is not a novel proposition." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

Moreover, the petition ignores the court of appeals' extensive discussion of *Farmer*. In that case, the Court held that placing a "transsexual" female prisoner in a male general population prison, where she was beaten and raped, implicated the prisoner's rights under the Eighth Amendment. 511 U.S. at 830, 847. The Court explained that a prison official "would not escape liability if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Id.* at 843 n.8, *quoted in* Pet. App. 19a. The court of appeals concluded that Petitioner is alleged to have done exactly that here. Pet. App. 19a (citing *Farmer* and *Goebert*, 510 F.3d at 1328 (holding that a prison doctor's deliberate disregard of information, leading to a "misdiagnosis," constituted deliberate indifference)).

Farmer and *Goebert* are consistent with other decisions holding that medical professionals can be held accountable for deliberate indifference to a substantial risk of serious harm to inmates. For example, the Eleventh Circuit held thirty years ago that a prison doctor's "choice of an easier but less efficacious" method can constitute deliberate indifference. *Waldrop v. Evans*, 871 F.2d 1030, 1035 (11th Cir. 1989).

Petitioner suggests that applying the principles of *Purcell* and other cases to his deliberate indifference would define the right at issue at too high a level of generality. He suggests that, instead, Mrs. Pichardo can prevail only by identifying a case "holding that a medical provider who mistakenly determined that an

individual was transgender violated the Constitution," or by identifying a "clearly established constitutional right not to be subjected to a flawed medical examination." Pet. 18. But the qualified immunity analysis "do[es] not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 731 (2011). It is not "a scavenger hunt for prior cases with precisely the same facts" but a "more relevant inquiry of whether the law put officials on fair notice that the described conduct was unconstitutional." *Gomes v. Wood*, 451 F.3d 1122, 1134 (10th Cir. 2006) (cleaned up). No two cases are identical. And "a case need not be identical to clearly establish a sufficiently specific benchmark against which one may conclude that the law" prohibits his action or inaction. *Begin v. Drouin*, 908 F.3d 829, 836 (1st Cir. 2018); *see also Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful." (citations omitted)).

The court of appeals found that the complaint alleged *more* than a mere misdiagnosis or "mistaken" determination, but rather a deliberately indifferent action in spite of an obvious risk. A finding that these facts, if proved, violate clearly established law as set out in *Farmer* and other cases would be fully consistent with the holdings of other courts of appeals. For example, in *Hostetler v. Green*, 323 F. App'x 653 (10th Cir. 2009), then-Judge Gorsuch cited *Farmer* for the proposition that it has long been clearly established that "an inmate has an Eighth Amendment right to be protected against prison guards taking actions that are deliberately indifferent to the substantial risk of sexual assault by fellow prisoners." *Id.* at

659. The Tenth Circuit thus held that it was clearly established that allowing a male inmate to remain alone in a female inmate's cell, in violation of jail policy, violated an inmate's rights. Similarly, in *Velez v. Johnson*, 395 F.3d 732 (7th Cir. 2005), the Seventh Circuit found that a failure to respond to emergency calls from a prisoner who was being attacked violated clearly established law. The court stated that there is "plainly" a "right to be free from deliberate indifference to rape and assault." *Id.* at 736 (citing *Farmer*). *See also Johnson v. Lemartiniere*, 756 F. App'x 496, 497 (5th Cir. 2019) (noting that *Farmer* established "that prison officials have a duty to protect inmates from sexual abuse"). Petitioner points to no opinion of any court that would cause him to believe that it was permissible to ignore "strong suspicions" and contrary evidence as to an inmate's sex and reassign her to a prison for the opposite sex. [2]

II. The court of appeals' ruling on waiver does not warrant review.

In his brief below, Petitioner argued that Mrs. Pichardo had waived her right to argue that his conduct violated clearly established law because she did

---

[2] Petitioner attempts to evade the lower court's factual inferences and argue alternative explanations. But such an attempt is inappropriate, ignoring the requirement that, in the qualified immunity context as in others, courts draw reasonable inferences in favor of the plaintiff in resolving a motion to dismiss. *See, e.g.*, *Attkisson v. Holder*, 925 F.3d 606, 619 (4th Cir. 2019); *Charles v. Orange Cty.*, 925 F.3d 73, 81 (2d Cir. 2019); *Paez v. Mulvey*, 915 F.3d 1276, 1284 (11th Cir. 2019); *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 897 (6th Cir. 2019). If the facts are as Petitioner suggests, he will have the opportunity to present that argument to the district court, and perhaps the court of appeals, at the summary judgment stage and perhaps again at trial.

not use the words "clearly established" in her opening brief. The court of appeals did not respond to Petitioner's waiver argument, but its opinion indicates that the court rejected it. Here, Petitioner asks this Court to grant its petition to consider whether the court of appeals erred in addressing an issue that Petitioner argued had been waived. That question does not merit review. Petitioner did not waive the argument, and, in any event, the courts of appeals have significant discretion whether to consider a waived argument.

A. There was no waiver.

The district court decision appealed by Mrs. Pichardo addressed whether Petitioner had violated a constitutional right; it did not reach the question whether any such right was clearly established. Pet. App. 51a. Mrs. Pichardo's opening brief on appeal therefore addressed the issue decided by the district court, not the issue that it left undecided. In his brief as appellee, Petitioner argued that the district court decision was correct and that, in the alternative, the relevant right was not clearly established. Mrs. Pichardo's reply brief responded to both arguments.

Here, Petitioner argues that the court of appeals erred in considering Mrs. Pichardo's arguments on the clearly established prong because she waived any argument as to that prong. Mrs. Pichardo, however, was not "require[d] … to anticipatorily rebut" potential arguments that Petitioner might raise, and "[f]ailing to do so is not a forfeiture." *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 295 n.2 (5th Cir. 2019) (citing *R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs, Local Union 150*, 335 F.3d 643, 650 (7th Cir. 2003); *NLRB v. NPC Int'l, Inc.*, No. 13-0010, 2017

WL 634713, at *5 (W.D. Tenn. Feb. 16, 2017)). And because Petitioner made the substantive argument in his Eleventh Circuit answering brief, Mrs. Pichardo, as appellant, was "entitled to respond in [her] reply brief." *United States v. Brown*, 348 F.3d 1200, 1212–13 (10th Cir. 2003); *see also Wakefield v. Cordis Corp.*, 304 F. App'x 804, 807 n.4 (11th Cir. 2008) ("Though [appellant] raises this issue for the first time in a reply brief, we address it because it was in response to [appellee's] raising of the issue in its initial brief."). Petitioner's waiver argument thus fails on the merits.

B. Courts have discretion to consider an argument waived in an opening brief.

In any event, Petitioner's second question presented is not worthy of review because, as every circuit court has recognized, appellate courts "may in their discretion consider issues not properly raised in an opening brief." *Gambino v. Morris*, 134 F.3d 156, 169 (3d Cir. 1998) (Roth, J., concurring) (collecting cases); *see also Lawless v. Steward Health Care Sys., LLC*, 894 F.3d 9, 25 (1st Cir. 2018); *In re Harris*, 464 F.3d 263, 268 n.3 (2d Cir. 2006); *Friends & Residents of St. Thomas Twp., Inc. v. St. Thomas Dev., Inc.*, 176 F. App'x 219, 223 n.9 (3d Cir. 2006); *A Helping Hand, LLC v. Baltimore Cty., Md.*, 515 F.3d 356, 369 (4th Cir. 2008); *Ocwen Loan Servicing, L.L.C. v. Berry*, 852 F.3d 469, 472 (5th Cir. 2017); *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 955 (6th Cir. 1999); *United States v. Wilson*, 962 F.2d 621, 627 (7th Cir. 1992); *Olson v. Fairview Health Servs. of Minn.*, 831 F.3d 1063, 1075 (8th Cir. 2016); *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007, 1013 (9th Cir. 2007); *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1227 n.6 (10th Cir. 2017); *United States v. Campbell*, 912 F.3d 1340, 1355 (11th Cir. 2019); *Herbert v. Nat'l*

Acad. of Scis., 974 F.2d 192, 196 (D.C. Cir. 1992); *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

The rule that issues not briefed are deemed waived "is a prudential construct," *Ocwen Loan Servicing*, 852 F.3d at 472, "formulated for orderly briefing and argument of appeals," *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998). It "is not jurisdictional." *Id.* The Eleventh Circuit therefore had the discretion to consider the issue. And, even assuming Petitioner's premise that Mrs. Pichardo should have addressed the point in her opening brief on appeal, the court's consideration of the issue was not an abuse of discretion, where Petitioner addressed the question in his brief as appellee and at oral argument, and there was "no unfairness to [Petitioner] in considering the issue." *Harris*, 464 F.3d at 268. The court of appeals' consideration of the issue offers no basis for this Court's intervention.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GARY KOLLIN
GARY KOLLIN, P.A.
1856 N Nob Hill Road
Suite 140
Fort Lauderdale, FL 33322

GONZALO BARR
GONZALO BARR LLC
201 Alhambra Circle
Suite 1200
Coral Gables, FL 33134-5111

DAVID KUBILIUN
GREENSPOON MARDER LLP
600 Brickell Ave., Suite 3600
Miami, FL 33131

ADAM R. PULVER
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Respondent

August 2019