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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Eleventh Circuit's decision is contrary to this Court's qualified immunity cases and must be corrected. Without citation to any applicable, pre-existing law, the court stripped qualified immunity from petitioner under an "obvious clarity" theory based on petitioner mistakenly assuming that a biological female detainee taking hormone replacement was a biological male in the midst of a gender transition; asking poorly worded questions, the answers to which confirmed his mistaken assumption; and deciding that inspecting the detainee's genitals would be unnecessary because he believed he had already correctly determined the detainee's gender. Though the Court's precedent does not require a case with identical facts to show clearly established law, it also does not authorize courts to strip qualified immunity from officials based solely on condemnation of the officials' acts. This Court should therefore restore petitioner's qualified immunity.

I. The Eleventh Circuit's Denial of Qualified Immunity Should Be Reversed.

1. Petitioner is entitled to qualified immunity because "none of the cases [the lower court relied on] *squarely governs* the case here." *Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015) (per curiam) (cleaned up). Of the cited Eighth Amendment cases that were in force in November 2013—what respondent calls the "well-established precedent of the Eleventh Circuit and this Court," Opp. Br. 7—*one* found a violation. In *Goebert v. Lee County*, the Eleventh Circuit concluded that a jail captain violated the Eighth Amendment by refusing to

allow a pregnant inmate to see an obstetrician because he flatly didn't believe her meritorious complaints. 510 F.3d 1312, 1327-31 (11th Cir. 2007). None of the decision's other cases, even those cited merely in passing, found a violation. *See Rhodes v. Chapman*, 452 U.S. 337 (1981); *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291 (11th Cir. 2009); *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005); *Chandler v. Crosby*, 379 F.3d 1278 (11th Cir. 2004); *see also Farmer v. Brennan*, 511 U.S. 825, 848-49 (1994) (remanding for determination of Eighth Amendment violation).

So respondent's argument that petitioner's conduct "fell squarely within the prohibition of *Farmer* and other deliberate indifference cases," Opp. Br. 16-17, is unsupported, given that one cited case actually found deliberate indifference and on conduct worlds away from the conduct she alleged. *See District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018) ("To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent. . . . It is not enough that the rule is suggested by then-existing precedent."). What's more, the single substantive proposition the court drew from its single case, *see* App. 19a ("Choosing to deliberately disregard, without any investigation or inquiry, everything an inmate says amounts to willful blindness." (quoting *Goebert*, 510 F.3d at 1328)), was defined at a high level of generality and falls far short of showing how "the violative nature of [petitioner's] *particular* conduct is clearly established," *Mullenix*, 136 S. Ct. at 308 (cleaned up).

2. Both the Eleventh Circuit and respondent incorrectly stress petitioner's conduct *resulting* in

respondent being placed with the male population as justifying depriving him of qualified immunity. Respondent argues that *Purcell*—a case the Eleventh Circuit cited for the high-level 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,'" App. 17a (quoting 400 F.3d at 1320)—gave fair notice to petitioner because both cases "involved claims that a prison official's acts created a serious risk of inmate-on-inmate assault." Opp. Br. 17. This conveniently ignores the disposition of *Purcell*: The court rejected the plaintiff's claim because she failed to show that inmates "were exposed to something even approaching the 'constant threat of violence.'" 400 F.3d at 1321.

This Court's qualified immunity cases are concerned with an official's actual conduct, not the result (or potential result) of that conduct. By respondent's logic, the existence of any deadly force case, regardless of disposition, would constitute fair notice to officers in all deadly force situations, because they "involve claims that an official's acts created a serious risk" of death. That is not the law. And the Eleventh Circuit offers no explanation as to how *Purcell*, an *unsuccessful* claim about nonmedical officials who did not commit a constitutional violation in failing to prevent an inmate being beaten by his cellmates, could provide reasonable warning to petitioner, a medical official, that his particular conduct would violate clearly established law. *Cf. City & County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776 (2015) (rejecting Ninth Circuit's reliance on one of its own cases to deny qualified

immunity because "the differences between that case and the case before us leap from the page").

3. Respondent maintains that the Eleventh Circuit correctly found a violation of clearly established law in "conclud[ing]" 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." Opp. Br. 15 (quoting App. 24a-25a).

That "conclusion" is sheer question-begging. It assumes without elaboration a "core" that the Eighth Amendment prohibits and then concludes—also without elaboration—that petitioner's conduct lies "so obviously" within this undefined "core" that every reasonable medical professional would know that an insufficient medical examination would exceed state medical-malpractice liability and reach constitutional dimensions.

The court constructed its conclusion out of language that was previously the exclusive province of Fourth Amendment caselaw. *Smith v. Mattox*, which introduced the idea of a "core" prohibition, explained that an excessive-force plaintiff could defeat qualified immunity "by showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." 127 F.3d 1416, 1419 (11th Cir. 1997). That "core" was conduct falling "so far beyond the hazy border between excessive and acceptable force that [the officer] had to know he was

violating the Constitution even without caselaw on point." *Id.* And it defined the "hazy border between permissible and forbidden force" as one "marked by [*Graham v. Connor*'s[1]] multifactored, case-by-case balancing test." *Id.*

For the next fifteen years, an unbroken chain of Eleventh Circuit precedent invoked the "core" concept in the Fourth Amendment context alone.[2] Through those decisions the court consistently described the "core" Fourth Amendment prohibition and clearly marked the "hazy border" separating that "core" from other constitutionally violative conduct.

Here, the Eleventh Circuit cut out "Fourth," pasted in "Eighth," and placed petitioner's conduct within that newly created "core" to strip him of qualified immunity,

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[1] 490 U.S. 386 (1989).

[2] *See Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000); *Brent v. Ashley*, 247 F.3d 1294, 1303 n.10 (11th Cir. 2001); *Skrtich v. Thornton*, 280 F.3d 1295, 1304 n.9 (11th Cir. 2002); *Lee v. Ferraro*, 284 F.3d 1188, 1199 (11th Cir. 2002); *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002); *Willingham v. Loughnan*, 321 F.3d 1299, 1302-03 (11th Cir. 2003); *Thomas v. Roberts*, 323 F.3d 950, 955 (11th Cir. 2003); *Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005); *Gray v. Bostic*, 458 F.3d 1295, 1307 (11th Cir. 2006); *Reese v. Herbert*, 527 F.3d 1253, 1274 (11th Cir. 2008); *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009); *Fils v. City of Aventura*, 647 F.3d 1272, 1291 (11th Cir. 2011); *Edwards v. Shanley*, 666 F.3d 1289, 1296 (11th Cir. 2012); *Terrell v. Smith*, 668 F.3d 1244, 1257 (11th Cir. 2012). Two decisions issued before this incident broke the chain, one involving Fourth *and* Fourteenth Amendment claims, and one involving Fourteenth Amendment claims; both found *no* violation of clearly established law. *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012); *Maddox v. Stephens*, 727 F.3d 1109, 1125-26 (11th Cir. 2013).

without ever defining the core as it had for the Fourth Amendment. App. 24a-25a. "[A]s should be painfully obvious from th[is] Court's serial reversals in this area—that's not how qualified immunity works." *Cole v. Carson*, — F.3d —, 2019 WL 3928715, at *23 (5th Cir. Aug. 20, 2019) (Ho & Oldham, JJ., dissenting).

Respondent's brief compounds the error. She contends that petitioner's conduct fell "'far beyond the hazy borders' [*sic*] of acceptable and unacceptable." Opp. Br. 12 (quoting *Vinyard v. Wilson*, 311 F.3d 1340, 1355 (11th Cir. 2002)). Not only does respondent omit the remainder of that passage from *Vinyard* ("far beyond the hazy border *between excessive and acceptable force*"), she also ignores that the "hazy border" is a concept that both the Eleventh Circuit and this Court have previously tied uniquely to excessive-force cases. *See, e.g.*, *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam); *Mullenix*, 136 S. Ct. at 312; *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004) (per curiam); *see also Vinyard*, 311 F.3d at 1350 n.18 ("Our 'hazy border' decisions concluded the law was clearly established that the force involved was excessive in the absence of any case law . . . ."). Even if the concept were to be applied to claims outside excessive force, what exactly is the "hazy border" in the context of an Eighth Amendment claim? What conduct falls on the "acceptable" side? What falls on the "unacceptable" side? Does the border shift in delay-in-medical-treatment cases versus conditions-of-confinement cases? The Eleventh Circuit has never asked these questions, much less answered them sufficiently to provide fair notice to officials.

4. Even if the clearly established law at issue had been defined, the Eleventh Circuit nonetheless failed to justify the conclusion that petitioner's conduct "obviously" violated it. This is simply not the "obvious" case respondent contends it is. *See* Opp. Br. 12-14.

Petitioner's conduct could not "obviously" violate clearly established law because his conduct, as alleged, was not sufficiently culpable. In November 2013, this Court's precedent had never held—or even suggested— a case to be "obvious" when the official's conduct was anything less than intentional. In *United States v. Lanier*, the Court proposed the hypothetical case of welfare officials selling foster children into slavery. 520 U.S. 259, 271 (1997). *Hope v. Pelzer* concerned conduct deemed "obvious cruelty." 536 U.S. 730, 745 (2002).

Intentional conduct alone does not necessarily make a case "obvious," as the cases the Court has affirmatively found *not* to be obvious illuminate. In *Brosseau v. Haugen*, an officer shot a man who had a warrant out for his arrest in the back as he attempted to flee in his vehicle. 543 U.S. at 194-97. The case was "far from the obvious one." *Id.* at 199. In *White v. Pauly*, an officer who arrived late to a standoff shot and killed a man without verbalizing a warning and without knowing whether the officers who were already there had identified themselves as law enforcement. 137 S. Ct. 548, 550 (2017) (per curiam). It too was "not a case where it is obvious that there was a violation of clearly established law." *Id.* at 552. And in *Kisela v. Hughes*, an officer, without warning, shot a woman who "had committed no illegal act [and] was suspected of no crime." 138 S. Ct. at 1155 (Sotomayor, J., dissenting). It, like the cases before it, was "far from an obvious case." *Id.* at 1153 (majority op.).

In the Eleventh Circuit, in the sixteen years between *Lanier* and this incident, all but four reported decisions denying qualified immunity to officials in "obvious" cases were cases that involved intentional, unreasonable, and frankly severe searches or seizures;[3] three of the other four also involved intentional conduct.[4] The only case involving less-than-

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[3] *See Smith*, 127 F.3d at 1419-20 (breaking non-resisting arrestee's arm while handcuffing him); *Priester*, 208 F.3d at 927-28 (permitting dog to attack handcuffed, compliant arrestee for two minutes); *Lee*, 284 F.3d at 1199 (slamming handcuffed, non-dangerous arrestee's head against the trunk of her car); *Vinyard*, 311 F.3d at 1355 (grabbing handcuffed, secured arrestee by the hair and arm and applying pepper spray); *Vaughan v. Cox*, 343 F.3d 1323, 1331 (11th Cir. 2003) (firing gun into the cabin of suspects' vehicle which was fleeing at 80 m.p.h. down a highway, without sufficient threat of harm to others); *Mercado*, 407 F.3d at 1160-61 (firing baton from close range at the head of suicidal man found crying on his floor); *Evans v. Stephens*, 407 F.3d 1272, 1283 (11th Cir. 2005) (en banc) (conducting unjustified, degrading, and forceful body cavity searches); *Gray*, 458 F.3d at 1307 (handcuffing compliant nine-year-old girl solely to punish her); *Reese*, 527 F.3d at 1274 (severely beating restrained, non-resisting suspect); *Oliver*, 586 F.3d at 907-08 (tasering compliant arrestee eight to twelve times over two minutes, including while he was writhing in pain on hot pavement and after he had gone limp); *Fils*, 647 F.3d at 1291-92 (tasering non-hostile, obedient arrestee); *Edwards*, 666 F.3d at 1298 n.5 (allowing dog to attack suspect for "obviously cruel and unreasonable" duration while suspect was laying prone with his hands exposed and begging to surrender).

[4] *See Braddy v. Fla. Dep't of Labor & Emp't Sec.*, 133 F.3d 797, 802-03 (11th Cir. 1998) (following subordinate down hallway, bullwhip in hand, saying "this is my sexual fantasy for you"); *Gonzalez v. Lee Cty. Hous. Auth.*, 161 F.3d 1290, 1311 (11th Cir. 1998) (firing employee for refusing to racially discriminate against tenants); *H.A.L. v. Foltz*, 551 F.3d 1227, 1231 (11th Cir. 2008) (knowingly placing children in foster home with sexually aggressive child and allowing them to remain there following reports of child-on-child sexual abuse).

intentional conduct concerned corrections officers who knew that an inmate was unconscious and not breathing yet did nothing for fourteen minutes—a knowing indifference. *Bozeman v. Orum*, 422 F.3d 1265, 1274 (11th Cir. 2005), *abrogated on other grounds by Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015).

The court's sparse analysis here neglects *Bozeman* and the identical-conduct cases, as well as the two other reported decisions finding an "obvious" violation of the Eighth Amendment. In *McMillian v. Johnson*, officers confined a pretrial detainee on death row just to punish him. 88 F.3d 1554, 1565 (11th Cir. 1996). And in *Brooks v. Warden*, decided after the incident here, the officer acted with "obvious cruelty": refusing to let an inmate being treated in a hospital use the toilet, forcing him to defecate into his jumpsuit and sit in his own feces for two days, refusing to allow nurses to clean him or give him an adult diaper, and laughing at and mocking him. 800 F.3d 1295, 1303, 1307 (11th Cir. 2015). The alleged conduct in those cases was obviously intentional.[5] Here, petitioner's was not. Yet the Eleventh Circuit nowhere explains why it readily equated petitioner's (at worst) medical malpractice

[5] For that matter, so was the co-defendant nurse's alleged conduct. Hers is not a subject of the petition, but it illustrates the absurdity of lumping petitioner's conduct in with hers to deem them both "obvious." The nurse allegedly ignored respondent's *affirmative* statements that she was a woman and had all of her female parts, "intentionally lied" to a corrections officer by indicating that she had seen respondent's male genitalia, wrote "male parts, female tendencies" on a form despite never seeing male genitalia, and responded to inquiries whether she had physically examined respondent by saying "she's a man." App. 21a. Conflating the nurse's conduct and petitioner's, as the Eleventh Circuit does, is unsupportable.

with the wanton and malicious conduct displayed by the officers in the court's only "obvious" Eighth Amendment cases, or with the intentional conduct in its other "obvious" cases.

A doctor ordering a detainee he *knows* to be a woman to be placed with a male population might be an "obvious" case. But that's not what happened here. Qualified immunity dissuades penalizing officials for mistakes, especially in unique circumstances. Petitioner's conduct in declining to physically examine respondent—neither plain incompetence nor knowing violation of law—does not amount to an "obvious" case.

II. Respondent Forfeited the Clearly-Established Argument.

It is undisputed that the district court dismissed the § 1983 claim against petitioner on qualified immunity grounds. App. 51a. For thirty-five years, a plaintiff seeking to overcome qualified immunity could do so "only by showing that [constitutional] rights were clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. 183, 197 (1984). Respondent did not attempt that showing until her reply brief on appeal.

Respondent now disingenuously argues that she should not be required to "anticipatorily rebut" the clearly established law argument. Opp. Br. 21. But even if respondent was unaware that qualified immunity would be at issue when she filed suit, she knew it from the moment the motion to dismiss was served. *Cf. R.J. Corman Derailment Servs., LLC v. Int'l Union of Operating Eng'rs*, 335 F.3d 643, 650 (7th Cir. 2003) ("[A] party cannot waive something that it does

not know is at issue."), *cited in* Opp. Br. 21. And she should have been aware of the wealth of caselaw outlining the two prongs to qualified immunity and her burden to defeat them both. Respondent should not be rewarded for deciding not to muster any argument on clearly established law either in the district court or in her opening brief on appeal—an unambiguous prerequisite to depriving petitioner of the defense. And petitioner should not be penalized for failing to "anticipatorily rebut" the eventual prevailing argument—on an issue that respondent bore the burden of proving yet failed to raise until the last minute.

CONCLUSION

Certiorari is appropriate where a lower court "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). The "importance of qualified immunity to society as a whole" is unquestioned. *Sheehan*, 135 S. Ct. at 1774 n.3 (cleaned up). Because the Eleventh Circuit's decision conflicts with this Court's qualified immunity cases, certiorari is justified.

The Court should grant the Petition.

Respectfully submitted,

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