No. 18A-_______

IN THE
Supreme Court of the United States

FREDESVINDO RODRIGUEZ-GARCIA,
Applicant,

v.

PICHARDO DE VELOZ,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eleventh Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, applicant Fredesvindo Rodriguez-Garcia respectfully requests a 45-day extension of time, up to and including May 31, 2019, in which to file his petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, seeking review of that court's judgment in this case.

The Eleventh Circuit entered judgment on November 21, 2018. *See Pichardo de Veloz v. Miami-Dade County*, No. 17-13059 (App. 1a-27a). Applicant filed a timely petition for rehearing en banc, which was denied on January 16, 2019. *See* App. 28a-29a. The jurisdiction of this Court will be invoked under 28 U.S.C. § 1254(1). The time to file a petition for a writ of certiorari will expire without an extension on April 16, 2019. This application is timely because it is filed more than ten days prior to the date

on which the time for filing the petition is set to expire. Sup. Ct. R. 13.5, 30.

1. This case presents an important question of federal law involving the wrongful deprivation of qualified immunity to a jail doctor on an Eighth Amendment deliberate indifference claim for what can, at most, be described as negligent conduct. This Court, extoling the "importance of qualified immunity 'to society as a whole,'" has remarked that it "often corrects 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) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). In fact, the Court, in just the last eight years, has issued no fewer than ***seventeen*** decisions reversing lower court decisions denying qualified immunity to individual officers.[1]

This case presents a strong candidate for certiorari. The court of appeals both erroneously found the law clearly established and, just as egregiously, erroneously made that finding based on an argument the plaintiff did not raise until her reply brief on appeal. In so doing, the court created a circuit split, without justification, with the First through Tenth Circuits and the D.C. Circuit, all of which have refused to allow a § 1983 appellant to assert—or, of course, to prevail on the basis of—an argument she did not raise in her initial appellate brief.[2]

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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); *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017); *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015) (per curiam); *Sheehan*, *supra*; *Carroll v. Carman*, 135 S. Ct. 348 (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); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

[2] *See Buchanan v. Maine*, 469 F.3d 158, 170 n.7 (1st Cir. 2006); *Lore v. City of Syracuse*, 670 F.3d 127, 149 (2d Cir. 2012); *Harvey v. Plains Twp. Police Dep't*, 421 F.3d

After ignoring the clear waiver issue, the court of appeals stripped applicant of the qualified immunity that had been granted to him by the district court based on a new rule created and applied retroactively to him. Specifically, the court held that, in November 2013, it was clearly established by "obvious clarity" that the applicant's conduct (mistakenly assuming that a biological female inmate taking hormone replacement therapy was a biological male in the midst of transitioning to female and noting that mistaken assumption in her medical file) violated the Eighth Amendment right of a female inmate not to be "wrongfully misclassif[ied] . . . as a male inmate and plac[ed] . . . in the male population of a detention facility." App. 27a. The court cited no precedent in creating this rule, flouting this Court's unambiguous instruction that "[t]o be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent." *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018).

The court alternatively defined the right as a female detainee's right under the Eighth Amendment not to be "plac[ed]" within the male population, *see* App. 27a, a formulation that runs afoul of this Court's repeated admonition that lower courts not "define clearly establish law at a high level of generality." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (quoting *Sheehan, supra,* at 1775-76). The court "made no effort to explain how that" right (which the court similarly announced without a stated basis in case law) "prohibited [the applicant]'s actions in this case." *City of*

185, 192 (3d Cir. 2005); *Hensley ex rel. North Carolina v. Price*, 876 F.3d 573, 580 & n.5 (4th Cir. 2017), *cert. denied*, 138 S. Ct. 1595 (2018); *Lincoln v. Turner*, 874 F.3d 833, 850-51 (5th Cir. 2017); *Puckett v. Lexington-Fayette Urban Cty. Gov't*, 833 F.3d 590, 610-11 (6th Cir. 2016); *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 597 (7th Cir. 1997); *Brewington v. Keener*, 902 F.3d 796, 802-03 & n.4 (8th Cir. 2018); *George v. Morris*, 736 F.3d 829, 837 (9th Cir. 2013); *Zia Shadows, L.L.C. v. City of Las Cruces*, 829 F.3d 1232, 1239 n.3 (10th Cir. 2016); *Fox v. District of Columbia*, 794 F.3d 25, 29 (D.C. Cir. 2015).

Escondido v. Emmons, 139 S. Ct. 500, 503-04 (2019) (per curiam).

2. Counsel for the applicant have had have several professional obligations and pending deadlines in other matters in the time since the Eleventh Circuit's denial of rehearing en banc. Additionally, counsel have obligations and deadlines in other matters (some of which are summarized below) that will intensify in the time between this filing and the present deadline for filing a petition for a writ of certiorari.

Applicant's counsel are attorneys to the defendant Miami-Dade police officer in *Prosper v. Martin*, No. 17-20323, a § 1983 civil rights action in the U.S. District Court for the Southern District of Florida. During the period of time since rehearing en banc was denied, counsel have taken and defended a total of 19 depositions. The officer's motion for summary judgment and motions to exclude expert testimony are due March 25, 2019. A response to any motion for summary judgment or motions to exclude expert testimony filed by the plaintiff will be due April 8, 2019. Replies in further support of the defendant's summary judgment and *Daubert* motions will be due April 15, 2019—the day before the petition for a writ of certiorari is currently due.

Applicant's counsel are also attorneys to the defendants (Miami-Dade County and four Miami-Dade police officers) in *Rincon v. Miami-Dade County*, No. 16-22254, another § 1983 civil rights action in the U.S. District Court for the Southern District of Florida. The reply to the plaintiffs' response to Miami-Dade County's motion to dismiss are due March 15, 2019. The reply to the plaintiffs' response to the individual officers' motion to dismiss will be due March 22, 2019.

And applicant's counsel are attorneys to the defendant Miami-Dade police officer in *Mighty v. Miami-Dade County*, No. 14-23285, another § 1983 civil rights action in the U.S. District Court for the Southern District of Florida. Counsel had been prepar-

ing for trial in that action—which was set for the two-week period beginning March 4, 2019—throughout the first six weeks of this year, until the court, on February 11, unexpectedly continued the trial for six months, to the two-week period beginning September 16, 2019. A hearing on the parties' motions in limine has been set for March 26, 2019.

The duties of applicant's counsel to other client needs have conflicted and will conflict with their ability to prepare and file a petition for a writ of certiorari by the current deadline. Because it is impossible to competently and fully meet all client obligations, and because the requested modest extension of time to file the petition for a writ of certiorari would neither prejudice the respondent in this case nor result in any meaningful delay in the Court's consideration of the petition, good cause exists to grant the requested extension.

Wherefore, applicant respectfully requests that an order be entered extending the applicant's time to file a petition for writ of certiorari for 45 days, to and including May 31, 2019.

Dated: March 12, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Bernard Pastor, hereby certify that on March 12, 2019, a copy of this Application for Extension of Time to File a Petition for Writ of Certiorari in the above-entitled case was emailed to counsel for Respondent herein, listed below, with a copy by mail, first class postage pre-paid, to follow, in compliance with Supreme Court Rule 29.3:

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