18-1121

No. 18-____

In the Supreme Court of the United States

CAPTAIN JAMES LINLOR,

Petitioner,

v.

MICHAEL GERARD POLSON,
Formerly of the TSA, in His Individual Capacity,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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FEBRUARY 22, 2019

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QUESTIONS PRESENTED

Respondent, an individual capacity TSA screener seeks qualified immunity for alleged excessive force striking of a cooperative non-custodial airport passenger's genitals, later requiring surgery for attack-attributed nerve damage upon petitioner. The screener and TSA supervisors filed attestations that the striking was intentional, but laughed and refused several times to simply apologize. The admitted non-police TSA screener was eventually arrested by petitioner under common law for felony sexual battery. Qualified immunity, already being claimed by TSA screeners nationwide, violates district, 4th Circuit, and mandatory precedents barring qualified immunity and proscribing a 4th Amendment violation in closely parallel cases.

The district and appellate courts granted and affirmed en banc TSA's permanent self-written order to foreclose all future lawsuits against TSA by making TSA its own sole arbiter of future evidence decisions (with retroactive authority to render evidence inadmissible) and the authority and temptation to violate 49 U.S.C. § 114(r).

The refusal by the 4th Circuit and district court to recognize this TSA's screener's felony sexual battery arrest creates circuit splits with the 9th Circuit, the Virginia Supreme Court, and state courts nationwide. Virginia citizens and police off-duty or outside of their jurisdictions now face false arrest charges themselves for arresting felony suspects.

THE QUESTIONS PRESENTED ARE:

1. Whether the attested-as-intentional excessive and unreasonable force striking of a cooperative

passenger's genitals by a TSA screener not meeting mandatory precedent thresholds, should be allowed to usurp police powers and be granted qualified immunity to defeat an otherwise obvious 4th Amendment violation actionable under *Bivens*?

2. Whether the district court's granting of a permanent nation-wide order, verbatim-written by TSA, should be vacated since it grants authority for TSA to retroactively violate 49 U.S.C. § 114(r) and makes TSA the sole arbiter of its own decisions, effectively foreclosing all future lawsuits against TSA despite merits and remedies in established law?

3. Whether the Circuit split denying common law felony arrest rights in the 4th Circuit and Virginia district court, should be reconciled to accord with established law in the 9th Circuit, the Supreme Court in Virginia, and state courts nation-wide, to restore the rights of police and citizens to arrest felony suspects without themselves being liable for false arrest charges?

PARTIES TO THE PROCEEDING

PETITIONER

- Captain James Linlor, petitioner pro se.

RESPONDENT

- Michael Gerard Polson, in his individual capacity.

Respondent was defendant in the district court and defendant-appellee in the court of appeals. TSA is not a party to this case, but TSA and DOJ attorneys have represented respondent throughout this case.

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JURISDICTION

The Fourth Circuit issued its opinion on September 17, 2018. The Fourth Circuit denied a petition for rehearing en banc on November 27, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Following constitutional and statutory provisions are reproduced in the Appendix;

- U.S. Const. amend. IV (App.68a);
- 49 U.S.C. § 114(r) (App.68a); and
- 49 U.S.C. § 46110 (App.69a).

INTRODUCTION

This petition involves the unwarranted attempted usurping of police-granted qualified immunity in an unreasonable-force 4th Amendment claim under *Bivens* for an individual capacity former TSA screener, and granting by the district and 4th Circuit Court of Appeals of an order giving TSA authority to reclassify evidence in violation of 49 U.S.C. § 114(r). The qualified immunity claim violates mandatory precedent thresholds while encouraging future passenger harm and abuse. The TSA Order overturns established law while tempting TSA to shield itself and foreclose future lawsuits against TSA or its screeners via retroactive evidence re-categorizations without any checks-and-balances.

This case also created a Circuit split between the 4th and 9th Circuits, the Virginia Supreme Court, and most state courts nationwide, with the Virginia district and 4th Circuit courts being the only courts to decline to recognize the rights of police and citizens to arrest felony suspects under common law until local police can arrive and accept custody. This puts police and citizens throughout Virginia at-risk for false arrest charges themselves, if this important federal issue is not addressed.

This case therefore poses three questions involving civil rights and qualified immunity, improperly granting the right to overturn federal law to TSA, and rights of citizens and police to conduct common law felony arrests without themselves being subject to false arrest charges throughout Virginia.

1. An important question of federal law, as well as an important question of federal law that has not been, but should be, settled by the Supreme Court involves contradicting multiple mandatory, district, and appellate precedents, where the appellate-affirmed rulings improperly legalize even perpetrator-admitted intentional felony attacks on innocent cooperative travelers while usurping protections properly restricted to policing powers (and even then restricted within reasonableness and job scope limitations). The unprecedented ruling explicitly expands qualified immunity to all TSA employees regardless of victims' received injuries, severity, or lack of reasonableness in videotaped attacks, affecting travelers nationwide, which has previously been at bar in dozens of lawsuits with conflicting rulings.

2. An important federal question, and an important question of federal law in granting of a protective order overturning mandatory precedent, federal rules, and laws by Congress to foreclose all future lawsuits against TSA screeners, has so far departed from the accepted and usual course of proceedings that a Writ of Certiorari is warranted. The protective order, verbatim-requested by TSA grants authority to TSA to violate 49 U.S.C. § 114(r) and unilaterally re-define any evidence as inadmissible by claiming it is SSI (Sensitive Security Information).

3. An important federal question by the district and 4th circuit affirming circuit splits by refusing to recognize police and private citizens' authority to arrest felony suspects, despite that right being recognized by the Virginia Supreme Court, the 9th Circuit Court, and state courts nationally, has created a widespread risk of false arrest complaints and widespread litigation against police and individual citizens in Virginia, and citizens watch groups (such as the Guardian Angels who rely on such law to arrest and hold suspects until local police arrive).

STATEMENT OF THE CASE

A. Background

1. Unprovoked Attack by Respondent, Attestations of Intentional Attack, and Felony Arrest of Respondent

On March 10, 2016, petitioner, an off-duty airline captain, presented himself at a TSA security checkpoint at Dulles Airport in Virginia. Petitioner is also the highest-level of accredited senior cybersecurity consultant, cybersecurity architect, and cybersecurity auditor/validator for U.S. Government systems, and in multiple lines of work regularly creates, maintains, and ensures cybersecurity safeguarding of data at-rest and in-motion designated as FOUO (For Official Use Only), SSI (Sensitive Security Information), and classified pursuant to Executive Order 12598. Petitioner was

carrying smartcards used to access classified U.S. Government systems, and U.S. Government-issued identification, as well as FAA-issued aircrew credentials which he offered for inspection by the TSA screener (respondent), but respondent demanded that petitioner surrender his full set of cards and credentials. Petitioner explained that per federal rules listed in the Complaint and Petitions for reversal and rehearing, it was against federal laws and executive orders for petitioner to surrender the combined set of credentials outside of his control as respondent demanded. Respondent became irate, which petitioner attempted to de-escalate by calling for respondent's supervisor, and explaining to both of them that it is normal TSA procedures and occurs regularly with petitioner, for TSA to simply inspect petitioner's smartcards and identification credentials directly in front of petitioner, and hand them back to petitioner. At the supervisor's urging, respondent finally proximately inspected petitioner's cards and identification, cleared them as a non-threat for security, and handed them back to petitioner.

Respondent then instructed petitioner to submit to a pat-down search by standing on a TSA-provided floor-mat with footprints. On security video in-the-record, respondent is seen ordering petitioner to spread his legs wider than the TSA-recommended carpet-mat footprints on which petitioner was standing. In discovery deposition, respondent testified that "he did not know why" he asked petitioner to spread his legs wider that the footprints.

While ostensibly searching ("clearing") petitioner's legs, despite petitioner being cooperative, compliant,

non-custodial, and with no distracting or existing exigent circumstances, respondent karate-chopped petitioner's testicles with allegedly unreasonable and excessive force.

Petitioner doubled-over in pain, immediately stepped back off the floormat, and asked why respondent had struck him. Respondent laughed in response. Petitioner asked if the striking was accidental, and if so, demanded an apology from respondent. At this point, respondent's supervisor (a TSA supervisory transportation security officer, or STSO, William Whetsell) became involved as a witness and participant.

Respondent stated that his striking of petitioner "was intentional," and that he (respondent) could not be prosecuted. Respondent's STSO affirmed respondent's statements. After respondent refused two requests to apologize to petitioner in petitioner's attempts to de-escalate the situation, petitioner requested the STSO to call for airport police with petitioner's intent to press charges for felony-level sexual battery. Further TSA supervisors also responded, including the chief-of-station (a TSA federal security director, or FSD, Scott Johnson). Petitioner continued to request an apology, and warned respondent (in front of airport police and TSA witnesses) that if petitioner did not receive an apology, that petitioner would "place respondent under citizen's arrest for felony sexual battery." Respondent and all other TSA employees refused to apologize, and the FSD and others later filed attestations in-the-record that the striking was "intentional" and no apology was made.

Petitioner placed respondent Michael Gerard Polson under citizens arrest for felony sexual battery

(attested by statements from the airport police, TSA's STSO Whetsell and FSD, Johnson and other intermediate TSA supervisors. Petitioner requested airport police to accept custody of respondent, where in police and TSA attestations, airport police refused to accept custody of the felony arrested suspect (respondent), with this refusal to accept custody also attested to in witness statements in-the-record.

Petitioner requested on-the-spot for litigation holds of all nearby videos and any potentially relevant ESI, and repeated these same requests in writing to respondent (via TSA), and the Dulles airport authority (Metropolitan Washington Airports Authority, or MWAA).

2. Dismissive Violations of Judicial Canon by Local Magistrates Impeding All Attempts to Avoid Litigation by Petitioner

Despite petitioner residing in Nevada and having no ongoing contacts in Virginia, petitioner attempted three pre-arranged visits involving cross country travel with magistrates in Loudoun County, Virginia, to pursue a probable cause hearing and find equitable relief through the criminal justice system. Virginia judicial canon, in-the-record, states that conducting of probable cause hearings is the purview of magistrates. Three times, Loudoun Magistrates (including Chief Magistrate Black) refused on-the-record to compel respondent to be accepted by local police for custody and to conduct a probable cause hearing from the valid felony common law arrest of respondent Michael Gerard Polson.

After exhausting all criminal avenues, and further exhausting reasonable resolution through TSA's claims processes, petitioner filed the instant lawsuit now presented for review of federal issues and a circuit split.

3. Why Respondent's Fourth Amendment Violation Under *Bivens* Does Not Warrant Qualified Immunity

It is undisputed by TSA and existing law that TSA screeners are not police officers, and is widely held that airport screening as occurred in this case, while required by TSA if requested, is a consensual, non-custodial search.

Extensions of qualified immunity have generally been made based on mandatory precedent and numerous appellate and circuit decisions, examining the totality of the circumstances (including exigency and distracting factors), the custodial status of the victim, the reasonableness of the force used, and the harm incurred.

A Writ of Certiorari is appropriate because even though the Virginia district court Senior Judge James C. Cacheris denied respondent's initial Federal Rules of Civil Procedure 12(b)(6) motion for qualified immunity as it "straining credulity" that a Fourth Amendment violation had not occurred, a later judge in the district court found otherwise. This was despite petitioner's expressed concerns with mandatory precedent, and district and appellate precedent. Judge Cacheris also warned respondent and TSA and DOJ attorneys that their claims of "national security" would not be construed as "a touchstone" to permit

egregious violations of civil rights, and moreover that respondent had not explained how the specifically-pleaded alleged unreasonable and excessive force striking of petitioner's testicles averted a threat to national security and therefore warranted to be granted qualified immunity.

The resulting decision, surprisingly unpublished given the significance of this ruling and permanent orders issued during its adjudication, conflicts with mandatory precedent from *Graham v. Connor*, 490 U.S. 386 (1989) dismissing qualified immunity when the following criteria are not met:

1. there was no crime at issue, therefore no severity whatsoever was warranted or should be excused;
2. petitioner was never a suspect, and as shown on video with his legs ordered by respondent to have been spread wider than the TSA floormat footprints (as respondent testified in the record, without cause or excuse for stance widening), posed NO threat to the non-officer TSA screener nor to others; and
3. that petitioner was being fully cooperative to the search, and was not attempting any type of evasion.

The only reasonable conclusion is that respondent had no reasonable basis for striking petitioner's testicles, much less with excessive force.

4. How TSA's Self-Written Protective Order Unlawfully Overrules 49 U.S.C. § 114(r) and Permits TSA to Foreclose All Future Lawsuits

TSA's permanent protective order, which is explicitly written to survive this case (App.38a-44a), falsely implies a method of appeal, but in reality, the legal code referenced does not permit appeals of 49 U.S.C. § 114(r) rulings regarding SSI by TSA. The result is that TSA is the fox guarding the henhouse of evidence, and TSA's invidious foisting of this malicious "kill shot" permanent order is designed and drafted to appear reasonable, but intended to actually foreclose all future lawsuits against TSA if TSA curiously decides to re categorize any critical evidence as SSI if their attempts to have cases dismissed on other grounds, fail.

a. Analysis of TSA's Self-Controlling Protective Order Per 49 U.S.C. § 114 and 49 U.S.C. § 46110

49 U.S.C. § 114(r)(4)(A-D) provides four specific limitations of TSA authority.(App.69a)

> (4) Nothing in this subsection or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of title 49, Code of Federal Regulations)–
>
> (A) to conceal a violation of law, inefficiency, or administrative error;
>
> (B) to prevent embarrassment to a person, organization, or agency;
>
> (C) to restrain competition; or

> (D) to prevent or delay the release of information that does not require protection in the interest of transportation security, including basic scientific research information not clearly related to transportation security.

However, the TSA-written and verbatim-approved district court order, makes TSA the sole arbiter of its own decisions, with authority to re-categorize and restrict evidence so that TSA can never be sued again (or rather, that any lawsuit will fail), no matter the merits or issue, if TSA decides to retroactively categorize critical evidence by those plaintiffs as inadmissible. (App.38a-44a)

"In the event of a dispute regarding whether certain material contains SSI or whether certain information is SSI, the parties shall meet and confer in an attempt to resolve the dispute consensually. If the parties fail to resolve the dispute, TSA will issue a final order regarding the specific information at issue pursuant to 49 U.S.C. § 114(r). Final orders of the TSA concerning the designation of SSI are reviewable exclusively in the United States courts of appeals in accordance with 49 U.S.C. § 46110." (App.69a-70a)

However, 49 U.S.C. § 46110 specifically states (in part)

> "or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit . . . " (App.70a)

49 U.S.C. § 46110 therefore does not provide a mechanism for appellate review of orders made by TSA

under § 114(r), and in likely violation of 49 U.S.C. § 114(r), respondent's TSA attorneys are likely motivated to re categorize any evidence as SSI to make it inadmissible—case dismissed! TSA verbatim-wrote the order that was approved, and the order further states that "This Order shall survive the termination of this litigation." (App.44a) Respondent's TSA and DOJ attorneys clearly must have intended this disconnect, since it enables TSA to issue rulings even retroactively categorizing any evidence as Sensitive Security Information (SSI), which is inadmissible as evidence.

b. TSA's Order Is Designed to Encourage Violations of 49 U.S.C. § 114(r)

TSA's protective order encourages TSA to violate 49 U.S.C. § 114(r)

In the elements listed above, 49 U.S.C. § 114(r)(4) explicitly states (in part):

> "Nothing in this subsection or any other provision of law, shall be construed to authorize the designation of information as sensitive security information (as defined in section 1520.5 of Title 49, Code of Federal Regulations)—(A) to conceal a violation of law, inefficiency, or administrative error; (B to prevent embarrassment to a person, organization, or agency;"

However, attempting to conceal information is precisely what responent's TSA and DOJ attorneys did in this instant case by claiming that excessive force standards of how hard TSA screeners are allowed to strike passengers genitals were SSI, and the petitioner had no right to see them. (App.77a-88a) The

judge disagreed, and ordered respondent's TSA and DOJ attorneys to provide this limited and reasonable information. (App.56a-58a)

However, as noted in paragraph 1 of Background, petitioner is and was already a "covered person" pursuant to 49 C.F.R. § 1520.7, as an aircraft operator (that respondent's attorneys verified and submitted into the record, but then tried to contort the FAA's own statutes by claiming that this should only apply to Part 121 air carriers and not the Part 135 on-demand air carrier (typically known as "corporate" aviation) for which petitioner is a pilot-in-command. Petitioner also creates and uses SSI in his FAA- and national security consulting work, which respondent's attorneys discovered in their deposition of petitioner.

In the transcript of a conversation between petitioner and respondent's DOJ and TSA attorneys (App.79a), even after realizing petitioner's access to SSI and other information, one can read how respondent's attorneys contort themselves to try to wrap even non-SSI notes and other excessive force standards and guidance into the TSA Standard Operating Procedures manual, which previous lawsuits have deemed to be SSI and therefore blocked it from disclosure.

However, the permanent protective order (App.38a) solves this TSA headache problem by authorizing TSA to determine which evidence that shall be considered SSI. Since (as explained previously) no rights of appeal exist, that leaves TSA with an overwhelming temptation to foreclose most, if not all, future lawsuits simply by deeming all evidence to be SSI. With no oversight nor process of appeal, TSA truly is the fox guarding the evidence henhouse. It is difficult to believe that

TSA and DOJ attorneys, given the chance without oversight, would not jump at the chance to "accidentally on purpose" violate 49 U.S.C. § 114(r)(A-B) as cited above, just to have cases dismissed. And lest we forget, the permanent order was written by TSA, not by the Court. TSA's wording and faux appeals processes are hardly accidental; they are intended to restrict reasonable information so unreasonably as to deprive citizens of rights to due process, and reasonable discovery that violates multiple mandatory rules of discovery established by this Court in Fed. Rules of Civil Procedure.

This clear conflict-of-interest that respondent and his TSA/DOJ attorneys succeeded having authorized warrants a Writ of Certiorari to resolve such a wide departure from existing federal laws' checks and balances, that the TSA permanent order deserves to be vacated, to at least return federal rules of discovery back to the satus quo, not solely for petitioner, but for the unfortunate travelers who may fall victim to TSA's culture of abuse.

5. How the Circuit Split and Break with Nation-Wide Laws for Felony Common Law Arrests Puts Police and Ordinary Citizens At Risk

While the Virginia district court no doubt attempted to strike a balance in its decisions, the conclusion to refuse to recognize the felony arrest of respondent creates an untenable jeopardy for police and citizens in Virginia.

As attested in-the-record by the MWAA airport police report, STSO Whetsell, FSD Johnson, and multiple TSA intermediate supervisors, the common

law felony arrest of respondent Michael Gerard Polson was known to all as executed by petitioner, along with the clear request that MWAA airport police accept respondent Polson into their custody, and their subsequent unlawful refusal to accept custody. Unfortunately, this decision, called out in-the-record in multiple attestations by TSA witnesses, did not permit petitioner to simply follow normal criminal justice procedures, and be allowed to plead his case at a magistrate-conducted probable cause hearing.

The Virginia Supreme Court has already affirmed the rights of citizens to make felony common law arrests. *Hudson v. Commonwealth*, 266 Va. 371, 379 (Va. 2003)

Per the 9th Circuit, which is precisely the circumstances also in this case on petition:

> "A private person making a citizen's arrest need not physically take the suspect into custody, but may delegate that responsibility to an officer, and the act of arrest may be implied from the citizen's act of summoning an officer, reporting the offense, and pointing out the suspect." *Meyers v. Redwood City*, (9th Cir. 2005) 400 F.3d 765, 772.

Per *Wang v. Hartunian*, (2003) 111 Cal.App.4th 744, 750 which is precisely the circumstances also in this case on petition:

> "[T]he police were in fact obligated to take custody of Wang merely at the direction of Hartunian, that is, when Hartunian informed the police that he had arrested Wang.";

Kesmodel v. Rand, (2004) 119 Cal.App.4th 1128, 1137.

Noteworthy is that while the airport MWAA police were obligated to accept custody of felony sexual battery arrested respondent, petitioner would have been satisfied with respondent being accepted into custody and brought to a probable cause hearing conducted by a Loudoun County Magistrate. Three Magistrates all refused to order this, the local Loudoun County police refused to agree to accept custody and transport respondent to a hearing, and the Loudoun County Court later refused to hear petitioner's request without even more in-person trips cross-country to Virginia, denying petitioner the privilege to appear telephonically as granted to other plaintiffs. Petitioner was stonewalled.

Established law in-the-record clearly demonstrates a circuit split. (App.62a-63a, 72a-76a, 93a-115a) This split was unfortunately affirmed by the 4th Circuit's refusal for rehearing en banc, despite the above-listed references.

Since common law (citizens) arrests are documented in-the-record as used by off-duty or extra-jurisdictional police arrests, and likewise by citizens and groups nationwide in arresting felony suspects and holding them until local, on-duty police arrive, the refusal of only this Virginia district court and 4th Circuit, in opposition to 9th Circuit, Virginia Supreme Court, and state decisions nationally, puts Virginia police and citizens at-risk for false arrest prosecution. This clearly supports a cert-worthy request for this issue to be reviewed, and perhaps aligned, to bring Virginia federal courts into agreement with the Virginia

Commonwealth Supreme Court, the 9th Circuit, and other national state courts on this issue of common law felony arrests by police and citizens nationwide.

B. District Court Proceedings

As previously stated, before realizing that his medical injuries would not resolve and instead turn into medically-documented chronic pain, petitioner attempted to first avail himself of a simple apology, and the normal criminal law system. When that and resolution within TSA's complaint claims process also failed, petitioner attempted to file a case under seal, or alternatively, under a pseudonym so as to avoid public humiliation and awareness of the felony sexual battery attack.

The district court refused those requests, despite granting them to other, similar victims of felony sexual battery attacks. Petitioner was forced to proceed with this case under his full, true name.

Respondent, in his individual capacity, was represented by multiple TSA and DOJ attorneys throughout this case, with private attorneys from the airport authority (MWAA) joining them in siding against petitioner.

Numerous rounds of motions followed, most notably with respondent's TSA attorneys refusing to disclose any excessive force standards with which to evaluate the reasonableness of claims of excessive force used by respondent upon petitioner. The district court finally issued one, then two orders to compel production for the same evidence of excessive force standards, served sequentially upon respondent's attorneys and TSA. (App.56a-58a) Respondent's attorneys

claim to have provided the evidence, but petitioner provided attestations of half-empty, open envelopes being sent by TSA. Respondent and TSA never provided any standards supporting a reasonable standard to exist for TSA screeners to karate-chop compliant passengers' genitals. Without this withheld standard (if it exists), respondent's attack upon petitioner was undoubtedly unreasonable and excessive, and outside any job-related guidance, rendering it ineligible for qualified immunity.

Likewise, the single security video finally provided by respondent and TSA only after TSA admitted to editing the video, but not disclosing what was edited out, is clearly missing frames. Respondents attorneys testified in court that no frames are missing. In a Johnny Cochran-esque moment, if respondent/TSA cannot present the individuals who appear and vanish mid-frame in the security video in full court to perform the same feats, then the video must not be believed! Petitioner further asserts that the security video is facially defective, including based on the doll video in-the-record created by petitioner, where excessive force is demonstrated as hidden (or hideable) when frames are removed from a video. Without any chain of evidence, custody, or proof of what was potentially edited out, all evidence supporting a ruling of qualified immunity is impeached or undelivered.

Petitioner continued to suffer chronic pain from respondent's attack, and was under treatment throughout the case. Petitioner underwent nerve deadening state-of-the-art micro-surgery in April 2018, coincidentally just prior to the court's issuing of its denial

for reconsideration. Petitioner requested to supplement the record-on-appeal based on petitioner's surgery and medical attribution of cause to respondent's attack, particularly because petitioner's surgery occurred before the court's final order denying reconsideration. (App. 6a-9a, 93a-115a) However, the court denied this motion, despite this being critical evidence that could not have been produced earlier since the surgery had not yet occurred, and petitioner had no way of knowing the court's schedule for issuance of a final reconsideration ruling. (App.6a-9a)

C. Circuit Court Proceedings

Petitioner's motions for appeal and rehearing were thorough and well-pleaded. (App.93a-115a)

Despite this, the 4th Circuit found no cause for reversal, even on the Circuit split issue on common-law felony arrests of suspects. (App.1a-2a, 62a)

REASONS FOR GRANTING THE PETITION

This case is a clear-and-straightforward issue of nationwide importance, and is therefore an excellent vehicle for a Writ of Certiorari to enable the Supreme Court to review, align, and guide the three key issues presented, while not losing sight of the most important one: the constitutional 4th Amendment rights of all airline passengers to not be abused particularly unreasonable and excessive-force striking of their genitals, while still supporting TSA's mission in transportation security. As a professional pilot, petitioner has stated in-the-record his requests and de-

termination for good airport security. Neither respondent nor TSA have ever explained how striking of passengers' genitals contributes to support this transportation security mission. Furthermore, beyond even the attestations by TSA and airport police categorizing respondent's striking of petitioner's testicles as "intentional," so also is respondent's refusal to simply apologize and aid in de-escalating this incident firmly documented, and incompatible with any unintentional, accidental overuse of force.

Instead, respondent, but particularly his TSA/DOJ attorneys, appear to have seized on pro se petitioner as "an easy mark" for them to attempt (and temporarily succeed) at winning qualified immunity despite a clear abuse and use of unreasonable excessive force violating mandatory precedent thresholds, submitting unconscionable permanent protective orders for TSA to be able to block and foreclose future lawsuits via recategorization of evidence, and even convincing a district and circuit court to create a circuit split to avoid judicial notice (as requested by petitioner) of respondent Michael Gerard Polson's felony sexual battery arrest on March 10, 2016.

I. REASON FOR GRANTING A WRIT TO REVIEW QUALIFIED IMMUNITY IN THIS CASE

Abuse by TSA screeners is a continuing and growing problem, with numerous passengers nationwide reporting injuries at worst, and humiliation at best, by being struck in the genitals by overly aggressive TSA screeners. Given this extensive body of law applied below, including district, circuit, and mandatory precedents, a Writ to permit review and

guidance for precedents still not being followed is ripe for review to avoid daily harm to travelers.

Contributing factors seem to be a lack of TSA standards and training, but also egregious seeking of qualified immunity in this case. It is better for a Writ to be issued now, before more passengers are injured from excessive force striking of their genitals.

Moreover, TSA has provided documents in-the-record attesting that they pay TSA screeners a $250 cash bonus bounty as a direct result of abusing passengers. FSD Johnson specifically wrote a congratulatory note to respondent Polson, congratulating him on his "excellent performance" after hitting petitioner with alleged excessive force in violation of all mandatory precedent guidance, and in Polson refusing to simply apologize while Polson and TSA FSD Johnson both attested that respondent Polson's striking of petitioner's genitals was intentional.

This combination of the only reinforcement being towards more passenger abuse imply that urgent corrective guidance is needed to encourage TSA to not continue to encourage bad behavior by its employees, at the detriment and injury and humiliation of the traveling public every day.

Decisions of the United States Supreme Court and of the E.D.VA district and 4th Circuit are listed below and in-the-record, where an extensive body of law has found Fourth Amendment excessive force claims affirmed in closely similar cases, and qualified immunity similarly denied. *E.W. v. Dolgos*, 4th Cir. Feb 2018, 16-1608; *U.S. v. Cowden*, 4th Cir, 17-4046, Feb 2018; *Yates v. Terry*, 15-1555 4th Cir 2016; *Saucier v. Katz*, 533 U.S. 194, 201 2001; *Smith v. Ray*, E.D. VA

2015; *affirmed* 4th Cir 12-1503 2015; *Riley v. Dorton*, 4th Cir No. 94-7120 1997; *Graham v. Connor*, 490 U.S. 386 (1989); *Malley v. Briggs*, 475 U.S. 335 (1986); *Wolk v. Seminole County*, 276 Fed. App'x 898, 899 (11th Cir. 2008); *United States v. Drayton*, 536 U.S. 194, 201 (2002)

A. Application of Law: District, Fourth Circuit, and Mandatory Precedent Proscribe a Fourth Amendment Violation

As recently as February 2018 and prior to the April 15, 2018, reconsidered District Court's and Circuit Panel's rulings, the Fourth Circuit ruled in *Dolgos*, 4th Circuit, that a Fourth Amendment violation can and does occur as stated:

> "Dolgos took a situation where there was no need for any physical force and used unreasonable force disproportionate to the circumstances presented. We therefore find that Dolgos's actions amount to excessive force. As such, E.W. has demonstrated a violation of her constitutional rights under the Fourth Amendment."

Exceptionally noteworthy is that uncontested testimony by respondent and police and TSA supervisors affirm that petitioner was never in custody, was fully cooperative, and that no exigent or distracting circumstances occurred, as is evident on the video in the record (despite its missing frames). Mandatory precedent affirms, which the Circuit panel and District Court did not find convincing:

> "The constitutional standards for permissible force depend entirely upon the custodial

> status of the alleged victim of force—that is, whether the victim is in some stage of arrest, or a free citizen. A free citizen is protected under the 4th Amendment's search and seizure standard, and to violate the Constitution an official's use of force must not be "objectively unreasonable." *Connor*, 490 U.S. 386, 396-97

Petitioner claims that 4th Amendment protections are a "basic right" (per *Briggs*, 475 U.S. 335) such that, as Judge Cacheris opined in this instant case, " . . . gratuitously striking an individual in the groin while searching them violates the Fourth Amendment."

Per the Supreme Court, Fourth Amendment cases require courts to assess the reasonableness of [force] based on the circumstances. *Drayton*, 536 U.S. 194, 201 Since no amount of striking force against a passenger's testicles is possibly reasonable nor proscribed in TSA procedures, respondent's striking of petitioner's testicles is inherently a Fourth Amendment violation.

Precedent from other local cases, despite TSA and respondent repeatedly attesting and testifying in the record that TSA screeners are not law enforcement officers (LEOs), indicates that claims of excessive force support a Fourth Amendment violation in this E.D.VA district and Fourth Circuit even when LEOs are involved. Inarguably, a lesser standard exists here for a Fourth Amendment violation, which the Circuit panel and District Court should have used, but did not.

Precedent from actions in *Cowden*, 4th Circuit, parallel respondent Polson's attitude and actions in

this instant case, since respondent appears to have been angry that petitioner could not lawfully surrender U.S. Government DoD & FAA cards, resulting in apparent retribution by respondent's striking petitioner's genitals with excessive force. Petitioner's claim does not rely on respondent's potential state of mind. While injury is not required to support a Fourth Amendment violation, petitioner received injuries unresolved after more than a full year, and requiring nerve-deadening surgery directly attributed to the respondent's attack by the board-certified surgeon's statement and evidence (sealed in the record by the 4th Circuit, but apparently not considered).

B. Application of Law: District, Fourth Circuit, and Mandatory Precedent Bar Qualified Immunity in Parallel Cases and Circumstances

Violations of Fourth Amendment claims are well-established law from parallel cases in the E.D.VA district and Fourth Circuit, which the district court and Circuit panel failed to consider in their ruling and review, rendering qualified immunity inapplicable, and supporting vacating the Circuit panel's order and reversing in favor of petitioner. From *Terry*, 4th Circuit, this same 4th Circuit Court stated that it "carefully conducted a thorough analysis pursuant to Saucier and determined that Officer Terry's conduct violated a constitutional right which was 'clearly established' at the time of the violation," (quoting *Katz*, 533 U.S.) which occurred prior to March 10, 2016 —the date of respondent Polson's attack, defeating non-established law defenses. This Circuit Court has held that the law regarding excessive force violations was clearly established even that earlier gratuitous

excessive force cases closely paralleling this instant case—and just as Terry in that case was thus on fair notice—that even a police officer [even though respondent is well-known to have been merely a TSA screener and NOT to a police officer, and petitioner was in a consensual search] was not entitled to use "unnecessary, gratuitous, or disproportionate force [on a subject] who presented no threat to the safety of the officer or the public and who was compliant and not actively resisting arrest or fleeing." Respondent Polson's claims of non-established law, fail, supporting a writ and review of the decisions in this case.

Further district and circuit precedent support this Writ and review. The E.D.VA District Court, affirmed by this 4th Circuit Court, held in *Ray*, E.D.VA, the District Court's order denying Ray's motion for summary judgment on the basis of qualified immunity concerning Amanda Smith's excessive force claim, defeating non-established law claims. Yet in this instant case, the district court nevertheless granted arrested felony suspect and respondent's motion for summary judgment partially on the basis of qualified immunity. Thus, based on *Terry*, 4th Circuit, and *Ray*, E.D.VA (and deriving from *Katz*, 533 U.S.), the law was clearly established, defeating respondent's threadbare and contemptible demand for qualified immunity.

And lastly, for respondent to claim qualified immunity, he must have first proven that he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred (*Seminole County*, 276 Fed. App'x 898, 899). This was precisely the TSA excessive force evidence that petitioner tried multiple times to receive. (App.56a-58a, 77a-88a)

Respondent Polson testified in the record to "striking" petitioner's testicles, but claimed respondent (Polson) did not feel the striking was excessive, and that respondent (Polson) did not know it would be illegal and against the 4th Amendment to strike a compliant passenger's testicles with excessive force. The district court's senior judge cited in a motion ruling that this "strained credulity." Petitioner agrees with the Senior Judge's opinion.

II. Reason for Granting a Writ to Review a Permanent Protective Order in This Case

The protective order's analysis and TSA's fox guarding the hen-house self-authority to review any appeals or concerns with potential improper evidence re-categorization to foreclose lawsuits against TSA, were already performed. Plus as stated, this protective order is moot, since petitioner is on-record and known to TSA as having access to SSI and many other levels of restricted and classified information. A Writ to vacate this TSA protective order is ripe for review, before the order can do more damage than already in the instant case.

III. Reason for Granting a Writ to Review a Circuit Split in This Case

The circuit split's analysis was already performed, and the split occurred despite full briefings to the courts of the prior rulings. (App.64a, 93a-115a) The key concern is that the risk to law enforcement and citizens has not been widely published in this district. While the decisions in this case are unpublished for now, petitioner seeks for them to become published (if not reversed), and regardless, they open the door to

potential consideration in other cases in this district. This circuit split is ripe for review, before the harm caused by Virginia federal court's misalignment with the 9th Circuit, Virginia Supreme Court, and other courts nationwide bring liability upon police and citizens conducting common law felony arrests.

CONCLUSION

Based on the compelling nature of the three issues herein as described, the straightforward nature of this case making it an excellent vehicle for review and guidance, and ripeness of these issues affecting millions of traveling citizens, as well as a TSA power-grab and common law arrest powers restricted only in Virginia due to a circuit split, petitioner submits that this case is an excellent candidate for a Writ of Certiorari.

Petitioner respectfully requests that the Court grant this Petition for a Writ of Certiorari for the reasons as stated.

Respectfully submitted,

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