No. _____

In The
Supreme Court of the United States

AMANDA RENFROE, INDIVIDUALLY, AS THE WIDOW OF MICHAEL RENFROE, DECEASED; AMANDA RENFROE, AS THE NATURAL MOTHER AND ADULT NEXT FRIEND OF S.W.R., A MINOR, WHO ARE THE SOLE HEIRS-AT-LAW AND WRONGFUL DEATH BENEFICIARIES OF MICHAEL WAYNE RENFROE; THE ESTATE OF MICHAEL WAYNE RENFROE; AND AMANDA RENFROE, IN HER CAPACITY AS THE ADMINISTRATRIX OF THE ESTATE OF MICHAEL WAYNE RENFROE,

Petitioners,

v.

ROBERT DENVER PARKER AND SHERIFF RANDALL TUCKER, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. QUALIFIED IMMUNITY VIOLATES THE SEPARATION OF POWERS, IS REPUGNANT TO THE CONSTITUTION, AND IS VOID.

II. FACTUAL REASONABLENESS IS FOR A JURY TO RESOLVE, NOT A JUDGE.

PARTIES TO THE PROCEEDING

Petitioner Amanda Renfroe, in various capacities, and her minor child S.W.R., were the plaintiffs in the district court and were the appellants in the court of appeals proceedings. For the sake of clarity and brevity, "Amanda Renfroe" included and includes the following persons and entities in the district court, in the court of appeals, and in this Court: Amanda Renfroe, individually, as the widow of Michael Wayne Renfroe, deceased; Amanda Renfroe, as the natural mother and adult next friend of S.W.R., a minor, who are the sole heirs-at-law and wrongful death beneficiaries of Michael Wayne Renfroe; the Estate of Michael Wayne Renfroe; and Amanda Renfroe in her capacity as the Administratrix of the Estate of Michael Wayne Renfroe.

Respondents Robert Denver Parker and Sheriff Randall Tucker in their individual and official capacities were the defendants in the district court proceedings, were the appellees in the court of appeals proceedings, and are the respondents in this Court.

RELATED CASE

Amanda Renfroe, et al. v. Robert Denver Parker, et al., Fifth Circuit Court of Appeals case number 2020-61101 (pending appeal of district court's denial of Amanda Renfroe's Rule 60(b)(2) and 60(b)(3) motion based on the February 5, 2020 post-judgment production by the Mississippi State Medical Examiner of Michael Renfroe's autopsy).

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The district court order granting qualified immunity summary judgment is reported at 2019 WL2410084, and is reproduced at App. 15-28.

The district court order denying Amanda Renfroe's motion to reconsider the district court's rulings is reported at 2019 WL 3806641, and is reproduced at App. 29-42.

The Fifth Circuit Court of Appeals opinion is reported at 974 F.3d 594 (5th Cir. 2020), and is reproduced at App. 1-14.

The Fifth Circuit's October 14, 2020 denial of Amanda Renfroe's motion for rehearing *en banc* is reproduced at App. 45-46.

JURISDICTION

The Fifth Circuit Court of Appeals entered its opinion and judgment on September 10, 2020. App. 1-14. The court of appeals granted an extension of time to October 1, 2020 for filing a petition for rehearing. Amanda Renfroe filed her petition for rehearing on October 1, 2020, and the court of appeals denied the timely petition for rehearing on October 14, 2020. App. 45-46. Pursuant to this Court's March 19, 2020 Covid *Order*, petitioners' deadline to file this petition was automatically extended an additional 60 days to March 13, 2021, for a total of 150 days from October 14, 2020.

This petition is timely, and this Court has jurisdiction under 28 U.S.C. §1254(1).

PETITION FOR A WRIT OF CERTIORARI

Amanda Renfroe, individually, for her minor child S.W.R., and on behalf of the entities and representative capacities named *supra*, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fourth Amendment, and 42 U.S.C. §1983, which provide as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amd. IV (1791).

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within

> the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

INTRODUCTION AND STATEMENT OF THE CASE

The first issue in this case involves a challenge to qualified immunity which is a compelling issue of national importance. The instant challenge to qualified immunity involves a legal attack on qualified immunity that appears to be an issue of first impression: qualified immunity violates the separation of powers, is repugnant to the Constitution, and is therefore void.

The second issue in this case involves an issue that is also a compelling issue that became mired down in the qualified immunity rubric that controlled the entire litigation of this case in the district court. Amanda Renfroe's entire prosecution of her Fourth Amendment

excessive force claims was controlled by qualified immunity, and by the district court's fact-finding. The district court and the circuit court rulings run counter to this Court's precedent as set out in *Tolan v. Cotton*, 134 S.Ct. 1861 (2014). The district court and the court of appeals erroneously adopted the position that the reasonableness of the shooting and killing of Michael Renfroe was a pure question of law. The district court concluded that Parker's shooting and killing of Michael Renfroe was reasonable, and used this conclusion to erroneously conclude that Amanda Renfroe had not stated a Fourth Amendment violation. The ultimate factual reasonableness of the shooting and killing of an unarmed Michael Renfroe is for a jury to decide—not a judge.

Defendant Robert Parker made contact with Michael Renfroe and his wife Amanda Renfroe on June 8, 2018 at approximately 10:15 p.m. on a dark country road in Madison County, Mississippi. On the morning of June 8, 2018, Michael's mother Faye Renfroe contacted the Madison County Sheriff's office to ask for help with Michael. Michael had been found walking naked on the side of Highway 43, a state highway that runs through Madison County, Mississippi. App. 16. Michael had been showing other signs of mental illness, such as a delusion by Michael that he could see into the future. App. 66-67, ¶2.

Deputy Parker stopped his Tahoe approximately fifty (50) feet behind the Renfroe's pickup truck. Prior to shooting Michael four (4) times, Parker admits that he did not identify himself as a law enforcement

officer. Parker admits that he did not threaten to shoot. Parker admits that Michael was clad only in pajama bottoms, with no shoes. Parker admits that Michael was not armed with any weapon, and that Michael did not appear to have any weapon at all. Parker admits that he did not activate his blue emergency lights, and that the only lights Parker had on were his high beam headlights. District Court record at ROA.307-08.

Michael exited his truck, took a few steps, and went to the ground face down. Michael then stood and ran towards Parker's vehicle. Parker unsuccessfully deployed his Taser against Michael. Michael went off camera from Parker's dashcam. Parker was not wearing a body camera. After Michael went off camera, roughly even with the front of Parker's vehicle, there is no video of what transpired. There is no video of Parker's shooting of Michael Renfroe. There is audio of the shooting, but the events that transpired off camera are hotly debated and contested.

The four (4) gunshots fired by Parker created five (5) entry wounds in Michael's body, including one entry wound in the back of Michael's left hand that exited Michael's inside left wrist, and re-entered in Michael's abdomen. In her deposition, Amanda Renfroe stated that Parker fired at least two (2) shots at Michael after Michael was already on the ground. App. 78 (exhibit C to Chief Roy Taylor's expert report and opinions). Amanda Renfroe argued that the off camera audio indicates that Parker exited his vehicle seconds before shooting Michael with the four (4) rapid fire shots. In spite of the rapid fire shooting in only one (1) second,

Parker claimed in his deposition that he took a step back and was "backing up" from Michael after each of the four (4) shots:

> Q: Okay. So you say you were backing up for each shot?
>
> A: Yes, sir.
>
> Q: Okay. How many steps did you back up each time.
>
> A: I don't recall.

Robert Parker Deposition, pp.29-30. ROA.309-10.

As a result of Parker shooting Michael Renfroe four (4) times, Michael died at the scene. Amanda Renfroe was handcuffed and taken into custody, and was held overnight by the Madison County Sheriff for investigative detention. Amanda Renfroe was not charged with any crime.

Amanda Renfroe commenced this case on August 31, 2018 in the United States District Court for the Southern District of Mississippi. The district court had federal question jurisdiction of Amanda Renfroe's federal claims under 28 U.S.C. §1331; and 28 U.S.C. §1343. The district court had supplemental jurisdiction of the related state law claims under 28 U.S.C. §1367.

The district court stayed the case, except as to qualified immunity. Following the district court's local rule, L.U.Civ.R. 16(b)(3)(B) for immunity defenses, the district court ordered that " . . . all proceedings in this matter, including discovery except where it is related

to the issue of qualified immunity, are stayed pending this Court's ruling on all individual capacity defendant(s)' motions for summary judgment." *Order Setting Qualified Immunity Discovery Deadlines*, November 27, 2018, in case number 3:18-cv-609 (docket 9), United States District Court for the Southern District of Mississippi. The district court used the court's qualified immunity analysis to dismiss all of Amanda Renfroe's claims individually against Deputy Robert Parker and Sheriff Randall Tucker.

In reply to the defendants' qualified immunity motion for summary judgment, Amanda Renfroe argued in the district court that qualified immunity violates the separation of powers, that qualified immunity is therefore repugnant to the Constitution, and that qualified immunity is void. Amanda Renfroe also argued that because qualified immunity violates the separation of powers and is void, the defendants should not be allowed to assert qualified immunity as a defense.

Amanda Renfroe also argued that in the district court's qualified immunity analysis, the district court erred by conflating qualified immunity reasonableness with factual reasonableness. Without qualified immunity, the only reasonableness issue before any court would be a question of fact.

On June 6, 2019, Amanda Renfroe filed a related case on behalf of Michael Renfroe's estate, which is styled *The Estate of Michael Wayne Renfroe, and Amanda Kay Renfroe, in Her Capacity as Administratrix of the Estate of Michael Wayne Renfroe*, United

States District Court for the Southern District of Mississippi, case number 3:19-cv-396. The district court consolidated this "estate case" with the original 2018 case by order entered June 19, 2019.

In a post-judgment motion, Amanda Renfroe also contested the district court's fact-finding. Amanda Renfroe argued that the district court wrongly engaged in fact-finding, and argued that the district court wrongly concluded that Amanda Renfroe had not stated a Fourth Amendment violation. Amanda Renfroe also renewed her argument in the post-judgment motion that qualified immunity violates the separation of powers. The district court denied the post-judgment motion, and Amanda Renfroe filed a timely appeal in the Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE PETITION

I. Qualified Immunity Violates The Separation Of Powers, Is Repugnant To The Constitution, And Is Void.

The district court and the court of appeals elected not to address Amanda Renfroe's separation of powers attack on qualified immunity. In refusing to address Amanda Renfroe's separation of powers argument against qualified immunity, the district court and the court of appeals took the position that qualified immunity is settled precedent that only this Court can change. The Court should grant a writ of certiorari to settle a compelling constitutional issue of first

impression that Amanda Renfroe argued in the district court and in the court of appeals: qualified immunity violates the separation of powers, is repugnant to the Constitution, and is therefore void. A relevant decision of this Court that Amanda Renfroe cited in the court of appeals is this Court's precedent that "We do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether §1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-23 (1984).

A case from this Court since the October 14, 2020 conclusion of this case in the court of appeals squarely supports Amanda Renfroe's separation of powers attack on qualified immunity:

> To be sure, there may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead. To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. Congress is best suited to create such a policy.

Tanzin v. Tanvir, 592 U.S. ___, 141 S.Ct. 486, 493 (2020).

The district court utilized qualified immunity to dispose of this case. When the defendants filed their

answer asserting qualified immunity as a defense, the district court entered an order staying all parts of the case, and only allowed the case to proceed on the defendants' qualified immunity defense.

Amanda Renfroe strenuously argued in the district court and in the Fifth Circuit Court of Appeals that qualified immunity violates the separation of powers, is repugnant to the Constitution, and is void.

The Constitution vests Congress with the sole authority to legislate:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. Art. I, §1.

The "necessary and proper clause" sums up the fundamental separation of powers rule that Congress (not the judicial branch) makes the law. When Congress "makes" a law, the judicial branch has no authority to weigh policy and create exceptions or immunities to that law. Only Congress has the power . . . :

> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. Art. I, §8, Clause 18.

A 2018 concurring opinion by Justice Gorsuch recognizes and illustrates the fundamental constitutional rule that only Congress makes the law, and that in resolving disputes, the judicial branch must follow the law as written:

> The Constitution assigns "all legislative Powers" in our federal government to Congress. Art. I, §1. It is for the people, through their elected representatives, to choose the rules that will govern their future conduct. See: The Federalist No. 78, at 465 (A. Hamilton) ("The legislature . . . prescribes the rules by which the duties and rights of every citizen are to be regulated"). Meanwhile, the Constitution assigns to judges the "judicial Power" to decide "Cases" and "Controversies." Art. III, §2. That power does not license judges to craft new laws to govern future conduct, but only to "discern the course prescribed by law" as it currently exists and to "follow it" in resolving disputes between people over past events.

Sessions v. Dimaya, 138 S.Ct. 1204, 1227 (2018) (Justice Gorsuch concurring in part and in the judgment) (internal citations omitted).

This Court, in 1952, recognized that only Congress has the power to make law. "The Constitution does not subject this law-making power of Congress to presidential or military supervision or control." *Youngstown Sheet Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952).

The same rule applies to the judicial branch, because the Constitution does not cede the law-making

power of Congress to another branch. The judicial branch has no power to effectively amend §1983 by weighing policy and creating immunities or exceptions to §1983:

> "The Founders of this Nation entrusted the law-making power to the Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice."

Youngstown Sheet Tube Co. v. Sawyer, 343 U.S. 579, 589 (1952).

Using Congress' exclusive authority to weigh policy and write laws, Congress in 1871 created a private right of action against state and local government actors for constitutional or statutory deprivations under color of state law. This private right of action is now universally referred to as "Section 1983":

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory

> decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

The Fourth Amendment protects persons like Michael Renfroe against unreasonable seizures, which in this case resulted in Michael Renfroe's death:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amd. IV (1791).

Qualified immunity is a judicial branch policy decision that is wholly inconsistent with, and in many cases, eviscerates the clear language in §1983. Section 1983 contains no exceptions or immunities. To the contrary, §1983 uses clear and expansive language such as "every person" and "shall be liable." See: 42 U.S.C. §1983. The Mississippi Supreme Court states persuasively the clear meaning of the word "shall" when "shall" appears in a statute: "Shall is not a suggestion-it is a mandate." *Pickering v. Hood*, 95 So.3d 611, 615, ¶10 (Miss. 2012). "Shall be liable" in §1983 is a clear mandate by Congress. If the language in §1983 which

mandates that " . . . every person . . . shall be liable" is to ever be subject to policy exceptions and policy-based immunities, only Congress can make those policy decisions.

If qualified immunity is to be a policy exception to the clear mandates of §1983, Congress can amend §1983 and create exceptions and immunities. Courts have no authority under the separation of powers to weigh policy considerations and create exceptions to §1983:

> Petitioners' concerns may be well founded, but the remedy petitioners urge is not for us to adopt. We do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether §1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate.

Tower v. Glover, 467 U.S. 914, 922-23 (1984).

This Court recognized in *Harlow v. Fitzgerald* that qualified immunity is a policy decision. Without anyone making a separation of powers attack, *Harlow v. Fitzgerald* recognized in 1982 that qualified immunity is a " . . . ***public policy*** . . . ". *Harlow v. Fitzgerald*, 457 U.S. 800, 813 (1982) (emphasis added) (" . . . public policy at least mandates an application of the qualified immunity standard that would permit the defeat of insubstantial claims without resort to trial."). *Id.* at 813.

Harlow v. Fitzgerald, by weighing public policy, runs afoul of the separation of powers.

In 2009, without a separation of powers challenge against qualified immunity, the Supreme Court recognized that qualified immunity is a public interest (i.e., policy) balancing act: "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). The judicial branch policy balancing in *Pearson v. Callahan* runs afoul of the separation of powers.

This Court recognized in 1954 that under the separation of powers, policy decisions are the sole province of the legislative branch, not the judicial branch. "The selection of that policy which is most advantageous to the whole involves a host of considerations that must be weighed and appraised. That function is more appropriately for those who write the laws, rather than for those who interpret them." *United States v. Gilman*, 347 U.S. 507, 511-13 (1954).

In 2019, this Court in *United States v. Davis* recognized that Congress (not the courts) considers policy and writes the law:

> " . . . [T]his Court is not in the business of writing new statutes to right every social wrong it may perceive . . . " (recognizing that the writing of laws are " . . . options that belong to

> Congress . . . "). *United States v. Davis*, 588 U.S. ___ (2019); 139 S.Ct. 2319, 2336 (2019).

In *United States v. Davis*, Justice Gorsuch specifically recognizes that judges cannot read the law to satisfy judges' policy goals: "But what's all this talk of bad consequences if not to suggest that judges should be tempted into reading the law to satisfy their policy goals?" *Id*. at 2335.

More recently, this Court held with no dissent that the courts cannot make policy decisions that shield government employees from personal liability:

> To be sure, there may be policy reasons why Congress may wish to shield Government employees from personal liability, and Congress is free to do so. But there are no constitutional reasons why we must do so in its stead. To the extent the Government asks us to create a new policy-based presumption against damages against individual officials, we are not at liberty to do so. Congress is best suited to create such a policy. Our task is to simply interpret the law as an ordinary person would.

Tanzin v. Tanvir, 141 S.Ct. 486, 493 (2020) (cited *supra*).

In *Tanzin v. Tanvir*, this Court based its rejection of court-created policy exceptions to the Religious Freedom Restoration Act of 1993 (RFRA) in part on the damages action that is available under §1983. "This availability of damages under §1983 is particularly salient in light of RFRA's origins." *Id*. at 492. The *Tanzin*

rule against court-created RFRA immunities is also salient to qualified immunity: "Congress is best suited to create such a policy." *Id*. at 493.

The separation of powers prohibits the judicial branch from encroaching on the exclusive power of Congress to make the law. The separation of powers prohibits the judicial branch from creating exceptions and immunities to laws that were duly passed by Congress:

> The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this very structure of the Constitution that exemplifies the concept of separation of powers . . . While the boundaries between the three branches are not hermetically sealed, the Constitution prohibits one branch from encroaching on the central prerogatives of another.

Miller v. French, 530 U.S. 327, 341 (2000) (internal citations omitted).

The instant separation of powers attack is properly before this Court for the resolution of this case. Amanda Renfroe preserved for review her argument that qualified immunity violates the separation of powers and is void. Respectfully, this Court should enforce the separation of powers to reverse and remand this case. "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787."

Buckley v. Valeo, 424 U.S. 1, 124 (1976). "The Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." *Id.* at 123.

Amanda Renfroe went even further with her separation of powers attack in the district court and in the Fifth Circuit Court of Appeals. In arguing that qualified immunity violates the separation of powers, Amanda Renfroe also argued that qualified immunity is void. Amanda Renfroe argued that because qualified immunity runs afoul of the separation of powers, qualified immunity, like any law that is repugnant to the Constitution, is void. *Marbury v. Madison* held that part of a law passed by Congress unconstitutionally expanded this Court's Article III original jurisdiction, and was therefore void. The bottom-line holding in *Marbury v. Madison* also applies to any law created by the judicial branch in violation of the separation of powers:

> Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged.

Marbury v. Madison, 5 U.S. 137; 1 Cranch 137, 180 (1803). Just like in 1803, "The rule must be discharged." *Id.* at 180. Any attempt by the judicial branch to create

exceptions or immunities to a statute exceeds the courts' Article III powers, and is void.

Even if, hypothetically, Congress amended §1983 to allow courts to weigh policy and fashion immunities to §1983, that amendment would be a void expansion of the judicial branch Article III powers. " . . . (A) law repugnant to the constitution is void." *Marbury v. Madison*, 1 Cranch at 180. Any law that is created by the judicial branch, or by the executive branch, is void. If the president, as part of the executive branch, ordered by fiat that qualified immunity is to be an immunity and exception to 42 U.S.C. §1983, that fiat would be repugnant to the Constitution's separation of powers, and void. The judge-made law of qualified immunity runs afoul of the separation of powers. Qualified immunity is repugnant to the Constitution. Qualified immunity is void.

"Shall" is not a suggestion. The Fourth Amendment uses the word "shall" and §1983 also uses the word "shall." " . . . The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ***shall*** not be violated" . . .) (emphasis added). U.S. Const. Amd. IV (1791). "Every person . . . ***shall*** be liable to the party injured . . . ". (emphasis added). 42 U.S.C. §1983. The Constitution does not contain a safe harbor that allows the judicial branch to create immunities and exceptions to "shall."

In the many and varied qualified immunity pleadings filed in this Court, the petitioners and the

respondents wade off into the weeds to argue the competing policy implications of qualified immunity. Those certiorari policy arguments miss the mark entirely. Whether or not qualified immunity is good policy is off limits in the judicial branch. The separation of powers strictly limits those policy decisions to the legislative branch. "We do not have a license to establish immunities from §1983 actions in the interests of what we judge to be sound public policy. It is for Congress to determine whether §1983 litigation has become too burdensome to state or federal institutions and, if so, what remedial action is appropriate." *Tower v. Glover*, 467 U.S. 914, 922-923 (1984).

This Court should grant the petition, and settle this important and compelling issue that is now squarely before this Court: qualified immunity violates the separation of powers. "The Court has not hesitated to enforce the principle of separation of powers embodied in the Constitution when its application has proved necessary for the decisions of cases or controversies properly before it." *Buckley v. Valeo*, 424 U.S. 1, 123 (1976).

This Court should vacate, reverse, and remand. The Court should hold that qualified immunity violates the separation of powers, and that qualified immunity is therefore void. The Court should direct that Amanda Renfroe must be allowed to prosecute her federal claims without the unconstitutional and void albatross of qualified immunity.

II. Factual Reasonableness Is For A Jury To Resolve, Not A Judge.

The district court engaged in fact-finding and adopted Deputy Parker's version of the events leading up to Parker's shooting and killing of Michael Renfroe. The district court engaged in fact-finding, and then used this fact-finding to wrongly conclude that Amanda Renfroe failed to allege a Fourth Amendment violation. This fact-finding by the district court, respectfully, conflated the qualified immunity legal reasonableness issue with the factual reasonableness that is the sole province of the jury. If the Court agrees that qualified immunity violates the separation of powers, then the only reasonableness issue before the district court should be the factual reasonableness *vel non* of Deputy Parker's shooting and killing of Michael Renfroe.

The district court engaged in this fact-finding while refusing to consider Amanda Renfroe's sworn law enforcement expert opinions and report. This case directly conflicts with this Court's precedent in *Tolan v. Cotton*, because the district court and the court of appeals failed to credit the evidence that Amanda Renfroe presented. . . . "By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly 'weighed the evidence' and resolved disputed issues in favor of the moving party." *Tolan v. Cotton*, 134 S.Ct. 1861, 1866 (2014) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 249 (1986). "There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness

requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985). Amanda Renfroe argued to no avail in the district court and in the court of appeals that the district court conflated the initial question of law and the ultimate factual reasonableness of the use of deadly force.

Amanda Renfroe was required to show [1] an injury that [2] resulted directly and only from the use of force that was excessive to the need and that [3] the force used was objectively unreasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 740 (5th Cir. 2000). It is not disputed that Parker shot and killed Michael Renfroe. It is undisputed that Michael Renfroe was clad only in pajama bottoms. It is undisputed that Michael Renfro was not armed with any weapon. The factual dispute arises because Parker claims that his use of deadly force against Michael Renfroe was reasonable. Amanda Renfroe presented facts and evidence from which a jury could conclude that Parker's use of force was unreasonable.

To illustrate that the reasonableness of a Fourth Amendment seizure by use of deadly force is a fact question for a jury, we must look no further than the Fourth Amendment pattern jury instruction that the Fifth Circuit Court of Appeals publishes on its website for district courts to use when instructing juries in §1983 excessive force cases (excerpt here, full pattern jury instruction at App. 47-58):

> 10.1. 42 U.S.C. Section 1983 (. . . Excessive Force) . . . Plaintiff [name] claims

that Defendant [name] violated . . . the following constitutional right:

3. the constitutional protection from unreasonable arrest or seizure . . .

To recover damages for this alleged constitutional violation, Plaintiff [name] must prove by a preponderance of the evidence that:

1. Defendant [name] committed an act that violated the constitutional rights Plaintiff [name] claims were violated; and
2. Defendant [names]'s acts were the cause of the Plaintiff [names]'s damages. . . .

Finally, [as with other rights that I have discussed], the reasonableness of a particular use of force is based on what a reasonable officer would do under the circumstances and not on this defendant's state of mind. You must decide whether a reasonable officer on the scene would view the force as reasonable, without the benefit of 20/20 hindsight . . .

If you find that Plaintiff [name] has proved by a preponderance of the evidence that the force used was objectively unreasonable, then Defendant [name] violated Plaintiff [name]'s Fourth Amendment protection from excessive force [and your verdict will

> be for Plaintiff [name] on this claim] . . . [1]

Section 10.1, Fifth Circuit Pattern Jury Instruction on excessive force [excerpt]. App. 47-58.

There is a genuine issue of material fact " . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). A reasonable jury could hear these facts, including Amanda Renfroe's expert, and return a verdict for Amanda Renfroe. The district court stepped into the fact-finding role of the jury, and wrongly concluded that Deputy Parker's shooting and killing of Michael was reasonable. A reasonable jury could conclude that Deputy Parker used excessive force, and return a verdict for Amanda Renfroe.

The record more fully reflects the district court's fact-finding. One stark example in the record of how the district court wrongly engaged in prohibited fact-finding is this partial finding from the district court in its order granting summary judgment:

> A reasonable officer under these circumstances would have perceived a threat of death or serious bodily injury, so the use of deadly force was not excessive.

June 7, 2019 *Order* (dismissing the case). App. 23-24.

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[1] The Fourth Amendment does not qualify or limit "unreasonable" with the word "objectively." The word "objectively" does not appear anywhere in the text of the Fourth Amendment, and should not appear in the §1983 jury instruction.

The district court concluded that Deputy Parker acted reasonably and that the use of force was "not excessive," when there was evidence in the record from which a reasonable jury could have sided with Amanda Renfroe, and against Deputy Parker:

> Parker admits in his deposition that he did not identify himself as a law enforcement officer;
>
> Parker admits in his deposition that he did not state his intention to shoot;
>
> Parker admits in his deposition that he did not activate his blue lights, and that the only lights he had on were high beam headlights;
>
> Parker admits in his deposition that Michael Renfroe did not have a gun or a knife and " . . . didn't appear to have anything. . . .";

Source: district court record, (deposition of Robert Parker) exhibit "1" (docket 40-1) as part of Amanda Renfroe's response in opposition the defendants' qualified immunity motion for summary judgment. District Court record at ROA.307-08.

There is no mention in the dispatch records that Michael Renfroe was armed or dangerous. Parker's dispatch did not report that Michael Renfroe was armed, and did not report that Michael Renfroe had fired a weapon.

Amanda Renfroe's law enforcement expert, Chief Roy Taylor, opined to a reasonable degree of professional certainty in his sworn report that:

- Parker's use of force was unnecessary;
- Parker's use of force was unreasonable;
- the use of force resulted in Michael's death;
- Parker's use of force violated well established law enforcement use-of-force training and standards;
- Parker's use of force was a greater level of force than any other reasonable officer would have used under the same or similar circumstances in 2018.

Source: Chief Roy Taylor's sworn expert report. App. 59-74.

As part of his sworn report, Chief Taylor also noted that part of the dispute in this case was Amanda Renfroe's deposition testimony that Deputy Parker shot at Michael Renfroe while he was already on the ground:

> Amanda Renfroe stated that Michael Renfroe was lying on the ground when Deputy Parker shot the last two rounds into him.

See: App. 78 (part of Chief Taylor's sworn report and opinions, which included Chief Taylor's review of Amanda Renfroe's deposition).

Chief Taylor's report and opinions were sworn, and under penalty of perjury: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct." App. 73.

This claim by Amanda Renfroe that Chief Taylor incorporated into his report and opinions is in stark contrast to Parker's claim to the Mississippi Bureau of Investigation after the shooting that " . . . I then fired four shots toward the subject as he was actively running towards me." District Court record at ROA.162.

The defendants did not file a motion to strike Amanda Renfroe's expert report, and did not file any motion at all objecting to Amanda Renfroe's expert. The defendants forfeited any objection to Amanda Renfroe's law enforcement expert's report and opinions, and the district court should have considered Chief Roy Taylor's report and opinions:

> Failure to object to expert testimony forfeits the objection, precluding full review on appeal. *Rushing v. Kansas City Southern Railway Co.*, 185 F.3d 496, 506, WL 615161 (5th Cir. 1999), citing *Marceaux v. Conoco, Inc.*, 124 F.3d 730, 733 (5th Cir. 1997).
>
> This rule applies equally to evidence offered to support or oppose summary judgment. *Rushing* at 506, citing *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650, n.3 (5th Cir. 1992) (failure to object to summary judgment evidence waives any objection).

> The proper method of attacking the evidence is by a motion to strike that contains specific objections. *Rushing v. Kansas City Southern Railway Co.*, supra, at 506, citing: 11 James W. Moore et al., Moore's Federal Practice 56.14[4][a], at 56-197 (3d ed. 1999).

Even with the defendants' forfeiture of any objection to Amanda Renfroe's expert's sworn opinions and report, the district court still refused to consider Chief Roy Taylor's report and opinions. Amanda Renfroe asserted this forfeiture by the defendants in the district court and in the appeals court, to no avail. In defending against the defendants' qualified immunity summary judgment motion, Amanda Renfroe relied on binding Fifth Circuit precedent that allows plaintiffs to use experts in Fourth Amendment excessive force cases. In *Hayter v. City of Mount Vernon*, 154 F.3d 269 (5th Cir. 1998), the Fifth Circuit held that plaintiffs can use law enforcement experts to opine about the factual reasonableness of the use of force:

> Hayter's (the plaintiff's) law enforcement expert asserted that the defendants' conduct was objectively unreasonable . . . particularly when viewed in the light most favorable to Hayter, as the non-movant, the evidence obviously creates a disputed issue over the reasonableness of the defendants' conduct. We cannot say that it would be unreasonable for a jury to choose Hayter's expert rather than the defense's experts . . . *Id.* at 275.
>
> . . . Individuals will have a hard time succeeding in an excessive force case without the

> assistance of experts who are intimately acquainted with police procedure. Expert testimony is thus essential both in providing victims with "the only realistic avenue for vindication of constitutional guarantees," *Harlow*, 457 U.S. at 814, 102 S.Ct. 2727, as well as in serving § 1983's parallel deterrent function (internal citation omitted). *Kinney v. Weaver*, 367 F.3d 337, 362 (5th Cir. 2004) (majority opinion).
>
> Expert opinions are quite necessary to litigate certain claims (including, in some instances, those for excessive force) . . . *Id*. at 377 (dissenting opinion, agreeing that experts are permissible in excessive force cases).
>
> See also: *Johnson v. Thibodeaux City*, 887 F.3d 726 (5th Cir. 2018) (allowing expert testimony about police procedures, police training, and use of force). *Id*. at 737.

The district court and the circuit court committed reversible error by ignoring the sworn report and opinions of Amanda Renfroe's law enforcement expert.[2] When viewed in the light most favorable to the nonmovant, expert law enforcement opinions create " . . . a disputed issue over the reasonableness of the defendants' conduct." *Hayter v. City of Mount Vernon*, 154 F.3d 269, 275 (5th Cir. 1998).

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[2] The defendants also designated a law enforcement expert. The district court also refused to consider the defendants' law enforcement expert's report. Unlike Amanda Renfroe, the defendants did not contest or appeal the district court's refusal to consider the defendants' expert report.

Amanda Renfroe also opposed summary judgment in part by pointing the district court to multiple inconsistencies in Deputy Parker's accounts of his shooting of Michael Renfroe. In opposing summary judgment, Amanda Renfroe cited the district court to six (6) glaring inconsistent statements from Deputy Parker, including (summarizing):

> [1] inconsistency about when Parker exited his vehicle;
>
> [2] inconsistency about the claimed physical altercation;
>
> [3] inconsistent statements about Parker's lack of verbal commands;
>
> [4] a glaring inconsistency about how Parker claims to have fired four (4) shots at Michael Renfroe (claiming that he stepped back after each shot), vs. the rapid-fire audio on the dashcam (one second to fire all four shots) (modified here);
>
> [5] inconsistency about when Parker claims he feared for his life; and
>
> [6] a false claim to law enforcement about a supposed statement made by Michael Renfroe to Parker.

Source: District Court record, excerpt from Amanda Renfroe's response in opposition the defendants' qualified immunity motion for summary judgment. District Court record at ROA.289-295.

Respectfully, the district court wrongly resolved conflicting facts in favor of Defendant Parker—even when Parker created conflicting facts and stories himself. Put another way: Parker had trouble keeping his story straight, which is textbook material for a jury to consider and weigh. "The success of an attempt to impeach a witness is always a jury question, as is the credibility of the witnesses where they contradict one another, ***or themselves***." *Fireman's Mutual Insurance Company v. Aponaug Mfg. Co., Inc*., 149 F.2d 359, 363 (5th Cir. 1945) (emphasis added).

All of this fact-finding by the district court was conducted through the unconstitutional lens of qualified immunity. " . . . [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

The court of appeals decision in this case conflicts with the relevant decisions of this Court, because Amanda Renfroe is entitled to have a jury decide the factual reasonableness *vel non* of defendant Deputy Parker's shooting and killing of an unarmed Michael Renfroe.

> [T]he issue of whether reasonable officers in this situation would have credited the warnings from Darden and the other suspects is a

> factual question that must be decided by a jury. As the Supreme Court has made clear, at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter. Rather, the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Darden v. City of Fort Worth, 880 F.3d 722, 730 (5th Cir. 2018) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)).

"[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street," the caselaw "will not permit summary judgment in favor of the defendant official. . . . [A] trial must be had." *Cole v. Carson*, 935 F.3d 444, 455-56 (5th Cir. 2019) (on remand from the Supreme Court of the United States) (n.71: citing *Saucier v. Katz*, 533 U.S. 194, 216, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (Ginsburg, J. concurring) . . . see also *Tolan*, 572 U.S. at 660, 134 S.Ct. 1861; *id.* at 662, 134 S.Ct. 1861 (Alito, J., joined by Scalia, J., concurring in the judgment) (agreeing that "summary judgment should not have been granted" in that case because of the genuine issues of material fact)).

The district court wrongly engaged in fact-finding, wrongly sided with Deputy Parker, wrongly placed the summary judgment burden of proof on Amanda Renfroe, and then granted the defendants' qualified immunity motion for summary judgment. Based on the district court fact-finding, the district court mistakenly

concluded that Amanda Renfroe failed to allege a constitutional violation. The court of appeals affirmed.

The error of qualified immunity fact-finding in this case further strayed from this court's relevant decisions, because the district court was required to view the facts in the light most favorable to Amanda Renfroe. *Saucier v. Katz*, 533 U.S. 194 (2001) ("Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer violated a constitutional right . . . ?"). *Id*. at 201. Respectfully, the district court and the court of appeals did just the opposite: both lower courts strayed from this Court's precedent, and mistakenly viewed and weighed the facts in the light most favorable to Deputy Robert Parker. "[T]he court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party." *Tolan v. Cotton*, 134 S.Ct. 1861, 1868 (2014). Amanda Renfroe cited and argued *Tolan v. Cotton* in the district court, and in the court of appeals, to no avail. The district court, with respect, committed reversible error by totally disregarding Amanda Renfroe's sworn expert report and opinions. The district court, with respect, committed reversible error by adopting Deputy Parker's version of events, even where Deputy Parker made inconsistent statements.

This Court should vacate, reverse, and remand, and order that the district court improperly engaged in fact-finding, and improperly weighed the facts and evidence in favor of Deputy Parker. Qualified immunity

violates the separation of powers, and courts cannot and should not use qualified immunity to conflate legal issues and factual reasonableness.

In conjunction with reversal, this Court should also hold that by failing to object to Amanda Renfroe's law enforcement expert's report and opinions, the defendants forfeited and waived any objection they may have had.

On remand, Amanda Renfroe should be allowed to prosecute her deadly force Fourth Amendment claims based on the factual reasonableness *vel non* of Parker's shooting and killing of Michael Renfroe, without having to navigate the unconstitutional judge-made law of qualified immunity. Amanda Renfroe properly alleged and supported a Fourth Amendment seizure violation. "[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street," the caselaw "will not permit summary judgment in favor of the defendant official. . . . [A] trial must be had." *Cole v. Carson*, 935 F.3d 444, 455-56 (5th Cir. 2019).

The Court should find that Amanda Renfroe alleged a Fourth Amendment violation. Factual reasonableness is for a jury to decide, not a judge.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

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