No. _____

In the
Supreme Court of the United States

PATRICIA NELSON, Next friend of N.K., a minor,
Petitioner

v.

ESTEBAN RIVERA, *Respondent.*

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

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER J. TRAINOR
Counsel of Record
AMY J. DEROUIN
Christopher Trainor & Associates
9750 Highland Rd.
White Lake, MI 48386
(248) 886-8650

Counsel for Petitioner

QUESTION PRESENTED

Whether the Sixth Circuit erred when it conspicuously disregarded the standard set forth in *Tolan v. Cotton*, 572 U.S. 650 (2014) by granting qualified immunity based upon the defendant officer's testimony while failing to consider not only minor N.K.'s testimony but also eyewitnesses' testimony and dash-camera video which support minor N.K.'s position that he was compliant and empty-handed at the time that he was shot.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Patricia Nelson, as Next Friend of N.K., a minor at the time of the subject incident, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit as to the denial for rehearing is available at *Nelson v. City of Battle Creek*, No. 18-1282, 2020 U.S. App. LEXIS 10317 (6th Cir. Apr. 1, 2020). The United States Court of Appeals Sixth Circuit's prior opinion, which reversed the denial of qualified immunity to Respondent Esteban Rivera is reported at *Nelson v. City of Battle Creek*, 802 Fed. App'x 983 (6th Cir. 2020). The district court's decision denying the motion for summary judgment as to qualified immunity is reported at *Nelson v. City of Battle Creek*, No. 1:16-cv-456, 2018 U.S. Dist. LEXIS 27780 (W.D. Mich. Feb. 21, 2018).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was filed on February 4, 2020. Petitioner's Petition for Rehearing was denied by the United States Court of Appeals for the Sixth Circuit on April 1, 2020. This Court extended time to file this Petition to August 29, 2020 based upon its Order dated March 19, 2020 in light of public health concerns relating to COVID-19. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

42 U.S.C. § 1983 reads, in pertinent part:

> 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….

STATEMENT

A. Factual Background

On November 16, 2013, fourteen-year-old minor N.K. and three of his friends were playing the familiar childhood game of cops and robbers in his neighborhood. **(A3, A22).** The game involved the girls laughing and running from minor N.K. as he jokingly chased them with an airsoft BB gun **(A3).** The game subsequently ended when the girls, needing to use the restroom, went into the local party store while minor N.K. remained outside. **(A3, A22).** At this time, the airsoft BB gun was entirely concealed within minor N.K.'s waistband. **(A3).**

When respondent Rivera arrived on the scene without activating his lights or siren, minor N.K. was initially crouched behind a sign in front of the store. **(A3, A22).** Minor N.K. began to approach his friends when respondent Rivera pulled in, parked his car at an angle, and shouted "let me see your hands!" **(A3, A22).** Minor N.K. removed the airsoft BB gun from his waistband, kicked it to the side, and was raising his hands in compliance with respondent Rivera's order when respondent Rivera shot minor N.K. in his right shoulder. **(A3, A16, A18, A22, A27, A29).** This is supported by minor N.K.'s own testimony in which he testified that at the time that he was shot, he had already visibly disposed of the BB gun and was putting his hands up. **(A16).** Moreover, one of the witnesses, minor S.C., testified "I see in the corner of my eye [minor N.K.] puts his hands up halfway and then the cop shot him." **(A16).** Likewise, another witness, minor S.W., testified that minor N.K. was shot after he had

already dropped the gun and moved his shoulder a little bit. **(A16).**

In addition to the witnesses' testimony, the video evidence supports that minor N.K. was visibly unarmed at the time he was shot by respondent Rivera. **(A3, A16, A19).** As can be seen in the video, the palm of minor N.K.'s right hand is empty immediately before minor N.K. is shot by respondent Rivera. **(A16, A19).** Moreover, both minor N.K. and respondent Rivera testified that when minor N.K. discarded the BB gun, he used his right hand. **(A16).** Therefore, the video does not contradict minor N.K.'s recitation of the facts but rather supports that he was unarmed and compliant at the time respondent Rivera fired the shot that hit minor N.K. in the right shoulder. **(A16, A19).**

B. Proceedings Below

Petitioner Patricia Nelson ("Ms. Nelson") filed the instant 42 U.S.C. § 1983 case on behalf of her minor son, N.K., where she alleged, in relevant part, that respondent Rivera's actions violated minor N.K.'s right to be free from excessive use of force when minor N.K. was shot in his right shoulder despite his compliance with respondent Rivera's order to put his hands in up as well as discarding the BB gun. **(A4, A21).** Respondent Rivera filed a motion for summary judgment where he argued that Ms. Nelson's Fourth Amendment claim should be dismissed based upon qualified immunity. **(A4, A21).**

1. On February 21, 2018, the United States District Court for the Western District of Michigan denied qualified immunity to respondent Rivera and held that Ms. Nelson raised a genuine issue of material fact regarding whether minor N.K. posed a threat at the time respondent Rivera shot him. **(A32).** The district court noted that the parties characterize the facts differently: respondent Rivera argued that minor N.K. was "brandishing" a gun and disobeyed a police order, while Ms. Nelson argued that minor N.K. had already disposed of the BB gun when he was shot and that minor N.K. was complying with respondent Rivera's order which was supported by the witnesses' testimony. **(A25-A26).** The district court opined that the facts likely supported a conclusion in between the differing versions of the facts, but it further recognized that the factual disputes must be viewed in the light most favorable to the plaintiff on a summary judgment motion. **(A27, A31-A32).** Furthermore, while respondent Rivera argued that the video evidence eliminated any issue of fact, the district court found that the video evidence was not conclusive as to the key disputed issues. **(A31).** Therefore, pursuant to *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998), the significant factual disputes precluded a grant of summary judgment. **(A31-A32).** Specifically, the district court correctly held, "the question of qualified immunity turns upon which version of the facts one accepts, precluding a determination of liability by the Court." **(A32).**

2. On February 4, 2020, the United States Court of Appeals for the Sixth Circuit issued an Opinion which reversed the United States District Court for the Western District of Michigan's denial of summary judgment and held that respondent Rivera was entitled to qualified immunity. **(A14).** Specifically, the Sixth Circuit held that a reasonable officer would not be aware that shooting minor N.K. violated his clearly established constitutional rights. **(A13-A14).** The Sixth Circuit noted that for the purposes of the appeal, respondent Rivera conceded that at the moment the bullet had hit minor N.K., minor N.K. had thrown away his gun and begun to raise his hands. **(A4).** The Sixth Circuit further cited *Sheets v. Mullins*, 287 F.3d 581, 585 (6th Cir. 2002) for the principle that "a defendant seeking qualified immunity must be willing to concede to the facts as alleged by the plaintiff and discuss only the legal issues raised by the case." **(A5).**

Despite acknowledging this well-established legal principle, the Sixth Circuit nevertheless favored respondent Rivera's allegation that he had "decided" to shoot before minor N.K. had disposed of the toy gun. **(A10).** Specifically, the Sixth Circuit held that "[i]t was not objectively unreasonable for Rivera to decide to shoot N.K. as he saw minor N.K. grip and raise his gun, even if the bullet ultimately struck minor N.K. after he had dropped the gun." **(A9).** Moreover, the majority Opinion made no reference to the witnesses' testimony, which supported that minor N.K. was shot after N.K. had disposed of the BB gun and he had already begun raising his hands, except to dismiss this testimony as irrelevant. **(A10).** The Sixth Circuit therefore did not take the evidence in the light most favorable to Ms. Nelson and minor N.K., which supported that respondent Rivera had not decided to shoot minor

N.K. until after he had disposed of the BB gun and was raising his empty hands in the air. **(A10).**

Judge Karen Nelson Moore dissented, noting that "the majority repeatedly accept[ed] Rivera's framing of the evidence over N.K.'s. More specifically, in its recitation of facts, the majority state[d] that '[w]hile N.K. was [pulling the gun out of his waistband and tossing it away], Rivera fired his weapon at N.K.'" **(A15).** Judge Moore further recognized that the majority Opinion accepted respondent Rivera's argument that he "decided" to shoot before minor N.K. had begun raising his hands as opposed to accepting the facts in the light most favorable to minor N.K.. **(A15).** To the contrary, Judge Moore relied upon the parties' deposition testimony in support of her opinion that there existed a question of fact as to whether respondent Rivera "shot [minor] N.K. *while* [minor] N.K. was throwing down his gun and raising his hands or *after* [minor] N.K. had taken those two actions." **(A16).** Judge Moore further relied upon the dashboard camera video, which did not contradict minor N.K.'s testimony but instead showed minor N.K.'s empty right hand "an instant after" respondent Rivera had ordered minor N.K. to show respondent Rivera his hands. **(A16).** Judge Moore therefore concluded that a reasonable jury could accept either respondent Rivera's narrative or minor N.K.'s narrative, and so, for the purposes of the appeal, the Sixth Circuit should have accepted minor N.K.'s narrative as true. **(A19).** Therefore, "[t]his case belongs in front of a jury." **(A19).**

3. On March 11, 2020, Ms. Nelson submitted her Petition for Rehearing En Banc or, in the Alternative, for Panel Rehearing where she argued the Opinion favoring qualified immunity for respondent Rivera was erroneous because of the following: (1) the Panel failed to take the facts in the light most favorable to Ms. Nelson as it is required to do based upon United States Supreme Court and Sixth Circuit jurisprudence governing an interlocutory appeal based upon qualified immunity; and (2) Panel incorrectly applied Ms. Nelson burden of proof as to the right being clearly established and mischaracterized the actual clearly established right at issue in this case. On April 1, 2020, the Sixth Circuit denied Ms. Nelson's Petition for Rehearing. **(A34).**

REASON FOR GRANTING THE WRIT

1. THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN ITS DECISION TO GRANT QUALIFIED IMMUNITY TO RESPONDENT RIVERA BY CONSPICUOUSLY FAILING TO APPLY LONGSTANDING PRECEDENT GOVERNING THE SUMMARY JUDGMENT STANDARD THAT THE COURT MUST ACCEPT THE FACTS IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY WHEN IT FAILED TO CONSIDER EVIDENCE IN FAVOR OF THE DENIAL OF QUALIFIED IMMUNITY WHICH INCLUDED, BUT IS NOT LIMITED TO, MINOR N.K'S TESTIMONY, WITNESSES' TESTIMONY, AND VIDEO EVIDENCE.

A. THE EVOLUTION OF THE SUMMARY JUDGMENT STANDARD

Pursuant to *Tolan v. Cotton*, 572 U.S. 650 (2014), when deciding a summary judgment motion premised upon qualified immunity, a court must apply the Fed. R. Civ. P. 56 summary judgment standard and accept the facts in the light most favorable to the nonmovant. *Id.* at 656-57. Notably, all inferences must be drawn in the nonmovant's favor even where the court decides only the clearly-established prong of the qualified immunity standard. *Id.* at 657.

Fed. R. Civ. P. 56 was first enacted in 1938 as part of the Federal Rules of Civil Procedure. Ilana Haramati, *Procedural History: The Development of Summary Judgment as Rule 56*, 5 NYU J.L & LIBERTY 173, 174-75 (2010). The Federal Rules, including Fed. R. Civ. P. 56, were implemented in response to an inefficient judicial

system in which complex procedural rules caused litigation to be a lengthy and involved practice. *Id.* at 184-85. The summary judgment rule specifically was intended to decrease such delays, especially those used by corporate defendants to burden poorer plaintiffs. *Id.* at 207. As such, summary judgment was initially designed to be used in favor of plaintiffs and only where no issue of fact existed. Suja A. Thomas, *Access to Justice and the Legal Profession in an Era of Contracting Civil Liability: Reforming the Summary Judgment Problem The Consensus Requirement*, 86 FORDHAM L. REV. 2241, 2243 (2018). While what is commonly referred to as "the trilogy" changed the way summary judgment has since been utilized, it is important to recognize the original intentions behind Fed. R. Civ. P. 56, specifically the fact that the rule was developed for the benefit of plaintiffs.

However, the summary judgment standard *did* change with the decision of three cases: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). *Matsushita*, the first case in the trilogy, involved an antitrust suit between American television manufacturers and 21 Japanese television manufacturers in which the American manufacturers alleged a predatory pricing scheme. *Id.* at 577. The Court ultimately held that the lower court erred by relying on irrelevant evidence and failing to consider the absence of a plausible motive to engage in predatory pricing, and it remanded for consideration of these factors. *Id.* at 583, 596. The Court warned that in antitrust law specifically, the "range of permissible inferences from ambiguous evidence" is limited. *Id.* at 588. Notably, Justice White, joined by Justices Brennan, Blackmun, and

Stevens, wrote a dissent to the *Matsushita* majority where he criticized the Opinion for (1) its "confusing and inconsistent statements about the appropriate standard for granting summary judgment"; (2) its "assumptions that invade the factfinder's province; and (3) the "nonexistent errors" in a case which plainly supports that the respondent raised genuine issues of material fact. *Id.* at 599.

The *Anderson* decision broadened the scope of the stricter summary judgment standard beyond the realm of antitrust. In *Anderson*, the plaintiff, a public official, brought suit against the defendants for libel following the publication of three articles. *Anderson*, 477 U.S. at 244-45. The Court held that in order to survive summary judgment, the plaintiff was required to set forth sufficient evidence to overcome the clear and convincing evidence standard which would be applied at trial. *Id.* at 254. In response to the *Anderson* decision, Justice Brennan dissented to criticize the summary judgment standard and opined that the majority opinion "could surely be understood as an invitation – if not an instruction – to trial courts to assess and weigh evidence as much as a juror would." *Anderson*, 477 U.S. at 266; see also Suja A. Thomas, 86 FORDHAM L. REV. at 2243; Suja A. Thomas, *The Fallacy of Dispositive Procedure*, 50 B.C. L. REV. 759 (2009). As such, Justice Brennan expressed concern that the courts would usurp the role of the jury and upend the right of civil litigants to a jury trial. *Id.* at 267. Likewise, Justice Rehnquist, joined by Justice Burger, authored a separate dissent where he emphasized that credibility determinations are the realm of the jury. *Id.* at 269.

Finally, in *Celotex*, a personal injury case involving exposure to asbestos products, the defendant corporation argued that the plaintiff failed to present any evidence that he was exposed to the asbestos product. *Celotex*, 477 U.S. at 320. The District of Columbia Circuit denied the summary judgment motion based on the fact that the defendant corporation did not present evidence or affidavits to support its arguments. *Id.* at 321. The Supreme Court reversed, holding that the plaintiff bore the burden of proving that he had been exposed to the asbestos product, and therefore, there could be no genuine issue of material fact. *Id.* at 323. Justice Brennan, joined by Justice Burger and Justice Blackmun, dissented from the *Celotex* majority to criticize the confusing and inconsistent standard that the opinion created. *Id.* at 329. Specifically, Justice Brennan argued that the defendant corporation ignored evidence in the record which supported the plaintiff's claim and that the defendant corporation failed to attack the adequacy of this evidence. *Id.* at 336. In Justice Brennan's view, Rule 56 requires that the moving party "affirmatively demonstrate that there is no evidence in the record to support a judgment for the nonmoving party" rather than placing the burden upon the plaintiff to prove the he has a case. *Id.* at 332.

The dissents to the aforementioned trilogy demonstrate the concerns that the lower courts would be tasked with impermissibly weighing evidence, thus invading the province of the jury. *Id.* at 329; *Matsushita*, 475 U.S. at 599; *Anderson*, 477 U.S. at 266. Moreover, research supports that summary judgment has been applied in ways that have strayed from the original intention of leveling the playing field for plaintiffs and has instead become a tool for the benefit of defendants.

Specifically, statistics show that the Courts of Appeals are 4.35 times more likely to reverse a denial of summary judgment than the Courts of Appeals are to reverse the district court's grant of summary judgment. Jonathan Remy Nash, *Unearthing Summary Judgment's Concealed Standard of Review*, 50 U.C. DAVIS L. REV. 87, 127-29 (2016). Furthermore, these reversals support defendants in civil rights cases. Kevin M. Clermont and Theodore Eisenberg, *Empirical and Experimental Methods of Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947, 971 (2002). One study which compared civil rights cases with negotiable instruments cases concluded that the advantage to defendants in the appellate courts only applied in civil rights cases. *Id*. In fact, one study of 28,748 summary judgment motions found that summary judgment was granted in 70% of civil rights cases, meaning that only 30% of cases survived summary judgment. Joe Cecil & George Cort, *Memorandum to Hon. Michael Baylson*, Estimates of Summary Judgment Activity in Fiscal Year 2006 (June 15, 2007), [https://perma.cc/DW66-3XRK]. These statistics support that when courts ignore the appropriate standard and instead "massage the facts" and thus fail to take into account the reasonable inferences in favor of the nonmoving party, the effects are significant and can be devastating for nonmoving parties. Suja A. Thomas, 86 FORDHAM L. REV. at 2252.

i. *Tolan v. Cotton*: "The Facts must be Taken in the Light Most Favorable to the Nonmoving Party" is the Appropriate Summary Judgment Standard as Applied to Qualified Immunity Cases

While the summary judgment standard has become more difficult for plaintiffs to overcome, lower courts still must take the facts in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650 (2014). In *Tolan*, the defendant police officer incorrectly entered the the vehicle's license plate number and concluded that it had been stolen. *Id.* at 651. After the plaintiff and his cousin had parked the vehicle in front of his parents' house, the defendant officer ordered both occupants out of the vehicle and onto the ground. *Id.* at 652. The driver's parents emerged from the house and explained that the car was not stolen. *Id.* Subsequently, the defendant officer grabbed the plaintiff's mother's arm and slammed her against the garage door. *Id.* at 653. The defendant officer testified to a different set of events where he merely escorted the plaintiff's mother to the garage. *Id.* The plaintiff testified that he then rose to his knees while the defendant officer testified that the plaintiff rose to his feet, but the parties agree that the plaintiff yelled at the defendant officer to get his hands off of his mother. *Id.* Without any verbal warning, the defendant officer drew his pistol and fired three shots at the plaintiff, resulting in a collapsed lung and pierced liver. *Id.* at 654. The plaintiff thereafter filed suit alleging excessive force in violation of the Fourth Amendment. *Id.* The district court held that the use of force was reasonable and therefore did not violate the Fourth Amendment. *Id.* The Fifth Circuit affirmed over a dissent, holding that even if the defendant officer's

actions violated the Fourth Amendment, he did not violate a clearly established right because a reasonable officer could have believed that the plaintiff presented an immediate threat to officer safety. *Id.* In support of its conclusion, the Fifth Circuit relied upon the following facts: (1) the front porch was dimly-lit; (2) the plaintiff's mother had refused orders to remain calm; and (3) the plaintiff's words had amounted to a verbal threat. *Id.* at 655. The Fifth Circuit also relied upon the defendant's allegation that the plaintiff was "moving to intervene" in the altercation between the defendant officer and the plaintiff's mother. *Id.*

The Court granted certiorari and vacated and remanded the Fifth Circuit's decision. *Id.* at 651. In its opinion, the Court emphasized the importance of viewing the evidence in the light most favorable to the nonmoving party. *Id.* at 657. Even in deciding the "clearly established" prong of the qualified immunity analysis, courts must define the right "on the basis of the 'specific context of the case.'" *Id.* The Court looked to evidence in the record where the plaintiff's testimony contradicted the facts relied upon by the Fifth Circuit. *Id.* at 658-59. The plaintiff testified that the front porch was *not* dimly-lit; the plaintiff's mother testified that she remained calm the entire time; and the plaintiff testified that he did *not* jump up to his feet but rather only rose to his knees. *Id.* at 659. Therefore, the Court held that the Fifth Circuit impermissibly failed to acknowledge and credit the plaintiff's evidence in his favor, and the Court remanded with instructions to properly draw factual inferences in the plaintiff's favor. *Id.* at 660.

Justice Alito, joined by Justice Scalia, concurred in the judgment only. Specifically, Justice Alito opined that

there was "no confusion in the courts of appeals about the standard to be applied in ruling on a summary judgment motion," and the correct standard was used. *Id.* at 661. However, Justice Alito conceded that genuine issues of material fact precluded a grant of summary judgment. *Id.* at 662. Moreover, the majority opinion explained that the Court addressed this case because the Fifth Circuit's opinion "reflects a clear misapprehension of summary judgment standards in light of our precedents." *Id.* at 659.

B. THE LOWER COURTS HAVE FAILED TO CORRECTLY APPLY THE SUMMARY JUDGMENT STANDARD IN THE QUALIFIED IMMUNITY CONTEXT BY FAILING TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE NONMOVING PARTY

The instant case is not the only case where the appellate court has misapplied the summary judgment standard in the qualified immunity context. In *Salazar-Limon v. City of Houston*, 826 F.3d 272 (5th Cir. 2016), the plaintiff was shot in the lower back during a traffic stop for drunk driving, and the plaintiff subsequently brought suit against the defendant police officer alleging excessive use of force. *Id.* at 274-75. The district court granted summary judgment based on qualified immunity, and the Fifth Circuit affirmed. In its recitation of the facts, the Fifth Circuit admitted that the parties disputed "certain details" of what occurred during the traffic stop which lead to the shooting. *Id.* at 275. Moreover, on appeal, the plaintiff argued that the district court erred by finding (1) that the highway was dimly lit; (2) that the defendant officer warned the plaintiff prior to the shooting; (3) that the plaintiff turned sharply towards the defendant officer; and (4) that the plaintiff reached for his waistband. *Id.* at 278.

Despite these alleged factual errors, the Fifth Circuit found that the plaintiff had failed to adequately dispute that the plaintiff had reached for his waistband and held, therefore, there was no question of fact that the defendant officer had acted reasonably under the circumstances because the act of reaching for the waistband could be understood as reaching for a weapon. *Id.* at 278-79. The Fifth Circuit ultimately held that the defendant officer was entitled to qualified immunity because he did not violate the plaintiff's constitutional rights.

The plaintiff petitioned for a writ of certiorari, which was denied by the Court. *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277 (2017). A concurrence written by Justice Alito and joined by Justice Thomas explained that the Court does not generally grant a writ of certiorari to review a factual question. *Id.* at 1278. Justice Alito further reiterated the Court's rule that the Court "may grant review if the lower court conspicuously failed to apply a governing legal rule," but argued that *Salazar-Limon* did not fall under that criteria. *Id.*

Conversely, Justice Sotomayor, joined by Justice Ginsberg, dissented from the denial of certiorari. *Id.* Justice Sotomayor opined that like *Tolan*, *Salazar-Limon* presented a scenario "reflect[ing] a clear misapprehension of summary judgment standards." *Id.*, quoting *Tolan*, 572 U.S. at 659. Justice Sotomayor further pointed out the discrepancies in the parties' recitation of the facts – specifically, that the plaintiff alleged he was shot in the back while walking away, but the defendant argued that the plaintiff turned and appeared to reach for his waistband. *Id.* at 1279. These different versions of the facts therefore should have precluded a grant of summary

judgment. *Id.* at 1281. Moreover, while the plaintiff did not make any statement about whether he reached for his waistband, his testimony that he was shot immediately while walking away could support a reasonable inference that he was shot unjustifiably. *Id.* at 1282. Justice Sotomayor further criticized the Court's willingness to "summarily reverse courts for wrongly denying officers the protection of qualified immunity involving the use of force" while choosing to ignore such errors when qualified immunity is improperly granted. *Id.* at 1282-83. Specifically, Justice Sotomayor cited *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullinex v. Luna*, 136 S. Ct. 305 (2015); *Taylor v. Barkes*, 135 S. Ct. 2042 (2015); *Carroll v. Carman*, 574 U.S. 13 (2014); and *Stanton v. Sims*, 571 U.S. 3 (2013) as examples of cases where the Court exercised its authority to overturn denials of summary judgment in qualified immunity cases. *Id.* at 1283. This raises a valid point – in *White*, the Court even admonished the Tenth Circuit for incorrectly applying the law in a "unique set of facts and circumstances," therefore acknowledging the factual question which was integral to that case. *White*, 137 S. Ct. at 552.

Since *Salazar-Limon*, the lower courts have repeatedly failed to take the facts in the light most favorable to the nonmoving party. The district court's opinion, *Day v. City of Indianapolis*, 380 F. Supp. 3d 812 (S.D. Ind. 2019), has a noticeably different recitation of the facts than the Seventh Circuit's opinion. In *Day*, an altercation occurred in which the plaintiff's decedent, an obese eighteen-year-old, and the defendant officer, who believed he witnessed the plaintiff's decedent pocketing a watch at a store within a local mall, confronted the plaintiff's decedent. *Id.* at 817. The plaintiff's decedent

ultimately returned the watch and began walking away. *Id.* The defendant officer testified that the plaintiff's decedent pulled out a gun, pointed it at the defendant officer, and then ran through the mall carrying the gun, while a witness officer testified that she believed she saw the handle of a gun sticking out of the plaintiff's decedent's pocket, but that the plaintiff's decedent never removed the gun and just ran. *Id.* Ultimately, the plaintiff's decedent was caught, handcuffed with a single set of chain handcuffs, and seated on the ground. *Id.* at 818. The plaintiff's decedent stated he was having trouble breathing, and the defendant officer told him to take deep breaths. *Id.* He was examined by medical personnel, deemed to be fine, and returned to police custody. *Id.* at 819-20. However, soon thereafter, the plaintiff's decedent appeared unresponsive and at that point the defendant officer added a second pair of handcuffs. *Id.* at 821. The plaintiff's decedent ultimately died, and the autopsy report listed contributory causes as "[s]ustained respiratory compromise due to hands cuffed behind the back, obesity, underlying cardiomyopathy." *Id.* The plaintiff brought suit alleging unreasonable seizure and excessive force. *Id.* The district court held that based on the factual disputes in the record and taking the facts in the light most favorable to the plaintiff, a reasonable jury could conclude that the defendant officers' actions constituted an unreasonable seizure. *Id.* at 826.

The defendant officers appealed, and Seventh Circuit's opinion deviated from the proper summary judgment standard that the facts must be taken in the light most favorable to the plaintiff *Day v. Wooten*, 947 F.3d 453, 456 (7th Cir. 2020). Specifically, the Seventh Circuit opined that an appellate court has the discretion to accept either

the district court's recitation of facts or the plaintiff's version of the facts. *Id.* The Seventh Circuit further opined that it had the discretion to examine additional evidence from the record. *Id.* Whereas the district court reasoned that the defendant officers' actions in ensuring that the plaintiff's decedent did not roll onto his back supported an inference that the officers were aware of the risk of asphyxiation, the Seventh Circuit opined that the record contained no evidence to support that the officers were aware that the handcuffs were causing the breathing difficulties. *Id.* at 462; *Day*, 380 F. Supp. at 828. The district court further identified evidence supporting that the plaintiff's decedent was unable to stand; his lips were pale; he was visibly overweight, and the defendant officer testified that the plaintiff's decedent was on the verge of hyperventilating. *Day*, 380 F. Supp. at 828. Moreover, in the district court's recitation of the facts, the defendant officers placed the plaintiff's decedent in two sets of handcuffs once they saw that he was unresponsive, which conflicts with the Seventh Circuit's finding that the defendant officers could not have connected the plaintiff's decedent's distress with the handcuffs. *Id.* at 821; *Day*, 947 F.3d at 464. Ultimately, the Seventh Circuit failed to consider the evidence in the light most favorable to the plaintiff, and it held that the defendant officers were entitled to qualified immunity. *Id.*

In *Calloway v. Lokey*, 948 F.3d 194 (4th Cir. 2020), the plaintiff was visiting an inmate when she was strip searched by two officers after she appeared to adjust her clothing. *Id.* at 197-98. In the Fourth Circuit's recitation of the facts, the defendant officers were also aware that the plaintiff had been acting nervous. *Id.* at 197. Moreover, the defendant officers had received a tip that the inmate that

the plaintiff was visiting had been "moving," a term for transporting contraband. *Id.* When confronted about whether she was carrying any illicit items, the plaintiff denied possessing any contraband and asked to see the video evidence at which point the defendant officers demanded that the plaintiff consent to a strip search. *Id.* at 199. The plaintiff was instructed to remove all of her clothing as well as her tampon, and the plaintiff complied with each of the defendant officers' orders. *Id.* The defendant officers found no contraband or evidence of wrongdoing by the plaintiff. *Id.* The plaintiff subsequently filed suit against the defendant officers, alleging, in relevant part, that the strip search violated her Fourth Amendment rights. *Id.* at 200. The district court granted summary judgment, and the plaintiff appealed, arguing that the district court "improperly resolved disputed facts" in favor of the defendant rather than the plaintiff. *Id.* at 201. The Fourth Circuit affirmed the district court, holding that the defendant officer had the requisite reasonable suspicion necessary to justify the strip search under the Fourth Amendment. *Id.* at 205.

Judge James A. Wynn dissented, arguing that the majority failed "to view the evidence in the light most favorable to [the] non-moving party." *Id.* Specifically, Judge Wynn first criticized the majority for aggregating the knowledge of all of the officers involved in the search "without regard to what information was actually known at the time by the decision-making officers." *Id.* at 207. One of the defendant officers had testified that he did not know that the plaintiff was acting nervous, and therefore, this information should not have been considered as part of the totality of the circumstances. *Id.* Moreover, the tip that the inmate was "moving" was, in fact, referred to by one of the

defendant officers as something he heard "through passing." *Id.* at 208. This testimony is less persuasive than the framing by the majority opinion, which characterized the information as "a more concrete tip." *Id.* at 203, 208. Furthermore, while the majority opinion agreed with the district court's assertion that the defendant officer, who ordered the search, "had a history of successfully identifying suspicious behavior that led to the interception of contraband," Judge Wynn identified that the defendant officer testified that he had twice observed visitors accessing contraband before, and the record contained no total number of times the defendant officer had identified suspicious behaviors where the visitor did not have contraband. *Id.* at 208-09. Therefore, the majority opinion simply accepted the characterization of the defendant officer's expertise. *Id.* at 209. Judge Wynn argued that taken in the light most favorable to the plaintiff, the facts supported that the defendant officers only knew that (1) the plaintiff appeared to adjust her pants; and (2) one of the defendant officers had heard that the inmate was "moving." *Id.* at 211. Therefore, "the officers in this matter were not entitled to summary judgment on the basis that no reasonable jury could find the search was not supported by reasonable suspicion." *Id.*

In *Kong v. City of Burnsville*, 960 F.3d 985 (8th Cir. 2020), the plaintiff's decedent was sitting in a parked car in a McDonald's parking lot where he was found rocking back and forth while slashing a knife through the air in front of him. *Id.* at 989. The defendant officers pointed their gums at the plaintiff's decedent while shouting at him to drop the knife. *Id.* The plaintiff's decedent did not respond or cease his movements, and the defendant officers broke the front passenger window and tased the plaintiff's

decedent. *Id.* at 990. The plaintiff's decedent squealed in pain and appeared to lunge towards the defendant officers, so the defendant officers tased him again. *Id.* The plaintiff's decedent stood up and ran, knife in hand, when the defendant officers fired 23 bullets, killing the plaintiff's decedent. *Id.* The plaintiff's decedent brought suit alleging excessive force. *Id.* The district court denied summary judgment, and the Eighth Circuit reversed. Specifically, the Eighth Circuit held that a reasonable officer would have believed that the law permitted shooting the plaintiff's decedent under the circumstances. *Id.* at 995.

Judge Jane Louise Kelly authored a dissenting opinion where she argued that the facts, taken in the light most favorable to the plaintiff, could support a reasonable jury in deciding that the defendant officers violated the plaintiff's decedent's clearly established right. *Id.* at 997, 1000. Judge Kelly identified that a reasonable officer would understand that the plaintiff's decedent's action in lunging towards the defendant officers upon being tased was an involuntary response to the electric current. *Id.* at 998. Judge Kelly further noted that the plaintiff's decedent was running away from both the officers and any other cars in the parking lot, despite the majority's description of the plaintiff's decedent running "in the general direction of the vehicle," though the majority concedes that he was "not running at it in particular." *Id.* at 990, 998. Moreover, Judge Kelly acknowledged a video interview in which none of the defendant officers alleged that the plaintiff's decedent had committed any violent felony before they decided to shoot. *Id.* at 998. This evidence, which is critical to the excessive force analysis, was omitted from the majority opinion. *Id.* Based upon the totality of the circumstances, Judge Kelly agreed with the district court's

holding that the use of deadly force was unreasonable under the circumstances and thus excessive. *Id.* at 999.

C. THE INSTANT CASE IS THE APPROPRIATE VEHICLE THROUGH WHICH TO ADDRESS THE WIDESPREAD CONSPICUOUS FAILURE TO APPLY THE *TOLAN V. COTTON* STANDARD TO MOTIONS FOR SUMMARY JUDGMENT BASED UPON QUALIFIED IMMUNITY

Given the widespread conspicuous failure to apply the proper legal rule with regard to summary judgment based upon qualified immunity, the Court must address this issue. Moreover, the instant case presents a compelling opportunity to do so. First, two out of four judges who viewed the evidence believed that a reasonable jury could find that respondent Rivera violated minor N.K.'s Fourth Amendment right to be free from excessive use of force. **(A32, A19).** Second, the instant case involves a minor. **(A3, A22).** There is therefore a particularly strong interest in ensuring that the unarmed and compliant fourteen-year-old boy shot by the police in this case can seek compensation for injuries which will affect him for the rest of his life. Third, the Sixth Circuit's framing of the evidence in this case clearly ignores the applicable standard under *Tolan*. Specifically, as addressed by Judge Moore in her dissenting opinion, "the majority repeatedly accept[ed] Rivera's framing of the evidence over N.K.'s. More specifically, in its recitation of facts, the majority state[d] that '[w]hile N.K. was [pulling the gun out of his waistband and tossing it away], Rivera fired his weapon at N.K.'" **(A15).** Moreover, the Sixth Circuit's majority opinion accepted respondent Rivera's argument that he had decided to shoot before N.K. had tossed away the toy gun. **(A15-A16).** The jury should be permitted to assess the

validity of that argument, and a reasonable jury could choose not to believe that respondent Rivera "decided" to shoot minor N.K. before he had disposed of the BB gun and instead believe the witnesses' testimony. Specifically, a reasonable jury could believe minor N.K.'s own testimony that at the time that he was shot, he had already visibly disposed of the BB gun and was putting his hands up; minor S.C.'s testimony that minor N.K. put his hands up halfway and then was shot by respondent Rivera; and minor S.W.'s testimony that minor N.K. was shot after he had already dropped the gun and moved his shoulder a little bit. **(A16).** The Sixth Circuit clearly believed respondent Rivera over minor N.K. in violation of the standard reiterated in *Tolan*. Finally, the video evidence in this case provides further support for Ms. Nelson's position that minor N.K. was unarmed and raising his empty hands at the time he was shot by respondent Rivera. **(A16).** Specifically, the video evidence shows minor N.K.'s open, empty right palm. **(A16).** Ms. Nelson's version of the facts therefore does not conflict with the video evidence, but rather, the video evidence supports Ms. Nelson's position that minor N.K. was unarmed and complying with respondent Rivera's orders at the time minor N.K. was shot. **(A16).**

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

CHRISTOPHER J. TRAINOR
Counsel of Record
Christopher Trainor & Associates
9750 Highland Rd.
White Lake, MI 48386
(248) 886-8650