No. 20-600

IN THE

Supreme Court of the United States

ANTHONY SEVY,

Petitioner,

v.

COURT OFFICER PHILIP BARACH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Sixth Circuit err by granting Defendant qualified immunity on the issue of whether to extend First Amendment protection to disorderly conduct where the plaintiff claims that his arrest was justified, but the amount of force used to execute it was excessive and in retaliation for his protest executed in an unlawful fashion?

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INTRODUCTION

This Court should decline to review the issue presented in this case because it is not the expansive First Amendment issue expressed by Plaintiff, nor is case law split on the issue. The law is already clear: the First Amendment does not protect disorderly conduct and the Fourth Amendment is the proper vehicle to rectify excessive force violations. Plaintiff has boldly misrepresented the issue and the case law cited in his petition. And, while Plaintiff is not wrong in his suggestion that the issue of police retaliation through force is both poignant and relevant to American society today; he is wrong to suggest that this case presents an opportunity to address such issues.

Here, it is undisputed that the Defendant had lawful authority to arrest the Plaintiff for disorderly conduct, i.e. unprotected speech. Plaintiff's comparisons to officers responding to crowds of protesters holds no water when viewed in this context because the protesters there are engaged in *protected speech* and the officers have no lawful basis to arrest them. To permit Plaintiff's claims here would discourage officers from employing any level of force in the face of a need to exercise lawful authority.

Moreover, contrary to Plaintiff's statements, he is not left without remedy for the force employed against him; his Fourth Amendment claim provides a vehicle to address his injuries regardless of his plea to disorderly conduct. Thus, the Sixth Circuit correctly concluded that the Defendant Court Officer is entitled to qualified immunity and this Court need not take up this matter for review.

STATEMENT

Plaintiff's statement of the case omits two facts that necessitate inclusion: following the incident at the court house, a Judge signed a warrant for Plaintiff's arrest on charges of "assaulting or obstructing a public officer, Mich. Comp. Laws § 750.479, and disturbing the peace, Mich. Comp. Laws § 750.170." [Petition App. 29, District Ct. Opinion] He later pled no contest to the charge of disturbing the peace. [Petition App. 29, District Ct. Opinion]

This plea underlies the Sixth Circuit's decision to grant Defendant Court Officer Phillip Barach qualified immunity on Plaintiff's First Amendment Retaliation claim. [Petition App. 10-12] The Sixth Circuit analyzed its own existing precedent, alongside that of this Court and other Circuits, and found that it need not reach the constitutional question because in February 2017, when the arrest occurred, it was not clearly established that an officer could also violate the First Amendment solely by applying excessive force when making an otherwise lawful arrest. [Petition App. 10-12]

ARGUMENT

I. PLAINTIFF HAS CRAFTED AN ISSUE WHERE NONE EXISTS THROUGH A SERIES OF MISREPRESENTATIONS THAT DO NOT WARRANT THIS COURT'S ATTENTION.

Plaintiff is reaching beyond reality to entice this Court to review his matter, and in doing so, Plaintiff commits the unforgivable folly of misrepresentation. Plaintiff's

misrepresentations fall into two categories: first, he misrepresents the current state of the law by omitting controlling precedent; second, he misrepresents the legal holdings and factual backgrounds of the case law he relies upon to advance his position that the Sixth Circuit erred. When these misrepresentations are corrected, there should be no basis for the Court to review this matter.

A. Plaintiff's narrow *Graham* application is unsupported by case law and Plaintiff omits the controlling precedent that negates his argument.

Plaintiff posits that the Sixth Circuit erred in broadly interpreting this Court's holding in *Graham v. Connor*, 490 U.S. 386 (1989), because it "runs directly against Supreme Court precedent and the precedent of other Circuits." [Petition, p. 9] Plaintiff never cites to any precedent that holds *Graham* is intended to be read in such a narrow fashion.

Instead, Plaintiff illogically relies on a string of *Bivens* cases to support his proposed narrow *Graham* interpretation that would allow the First Amendment to ensnare itself with use of force reviews. Without support, he posits that *Graham* should be read to support a First Amendment claim premised on use of force because the two amendments have been applied in similar fashions in the *Bivens* context. In doing so, Plaintiff omits that this Court has never extended *Bivens* actions to the First Amendment, and has, instead, suggested that such extensions are "disfavored." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017).

The Third Circuit Court of Appeals in *Mack v. Yost*, 968 F.3d 311, 325 (3rd Cir. 2020), recently applied *Ziglar* to overrule one of the very cases Plaintiff relies on, *Paton v. La Prade*, and held that *Bivens* does not extend to redress First Amendment claims. *See also Bistrian v. Levi*, 912 F.3d 79, 95 (3rd Cir. 2018); *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520, 523–24 (6th Cir. 2020). Plaintiff's failure to discuss these cases erodes his credibility along with the premise of his argument. By misrepresenting the case law to support his made-up narrow interpretation, he has not presented this Court with a basis for review, but merely the writer's *ipse dixit*.

B. Plaintiff has misrepresented the legal holdings of other First Amendment retaliation claims to fabricate a conflict with the Sixth Circuit's decision where no actual conflict exists.

Plaintiff also misrepresents the holdings of the lower courts cited in his brief to suggest that this Court should correct the Sixth Circuit's holding because it is in conflict with these other courts. A string of cases (*Cook*, *Campbell*, *Lopez*, *Watison*, *Mussa*, *Bio-Ethical Reform*) across pages six and seven of Plaintiff's petition create the illusion that other courts have considered this issue and held, or at least suggested, that retaliation claims can proceed based on allegations of excessive force. This is not true; these cases do not stand for that proposition. Plaintiff has misrepresented the legal and factual basis of those cases.

Moreover, the few courts that have considered this issue have reached similar holdings as the Sixth Circuit did in this case; some have even gone a step further and found

that constitutional violations for retaliation cannot proceed where there were lawful grounds for force. *Price v. Elder*, 175 F. Supp. 3d 676, 678–79 (N.D. Miss. 2016); *Anderson v. Franklin Cnty., Mo.*, 192 F.3d 1125, 1132 (8th Cir. 1999) (holding that alleged excessive force and arrest "plainly implicates the protections of the Fourth Amendment and that no cognizable § 1983 First Amendment claim has been asserted"); *Jenkins v. Town of Vardaman, Miss.*, 899 F.Supp.2d 526, 534 (N.D. Miss. 2012) ("An allegation that excessive force was used in the course of making an arrest is clearly a Fourth Amendment, not a First Amendment, matter."); *Kirk v. Bostock*, No. 09–CV–15018–DBH, 2011 WL 52733, at *3 (E.D. Mich. Jan. 7, 2011) (granting summary judgment on First Amendment claim based on "the same set of facts" as the Fourth Amendment excessive force claim); *Montoya v. City of Albuquerque*, No. 03–CV–0261–JB, 2004 WL 3426436, at *10 (D.N.M. May 10, 2004) ("The Court believes that allowing Plaintiffs to proceed with their First Amendment retaliation claim would unnecessarily complicate excessive force claims brought under the Fourth Amendment and would be contrary to the Supreme Court's holding in *Graham v. Connor*."); *Lagrone v. Hall*, No. 91–CV–7133–ACW, 1992 WL 350702, at *3 (N.D.Ill. Nov. 23, 1992) (dismissing First Amendment claim based on excessive force, and noting "that the Fourth Amendment is the only appropriate vehicle for relief on a claim of excessive use of force during an arrest").

Two common, and significant, strings run through *Cook*, *etc.* that differentiate those cases from this matter but were not mentioned by Plaintiff. The first is that none of the defendants in those cases had lawful authority to use any level of force. Not one defendant, not even the officer

in *Campbell* that used excessive force after an arrest was complete, had authority *at that time of the disputed force* to use some level of force. *Campbell v. Mack*, 777 Fed. App'x 112, 134 (6th Cir. 2019). In each case, the defendants' retaliatory actions were not intimately intertwined in a "Gordian knot" with their lawful arrest actions. [Petition App. 11]

The second is that the plaintiffs were all engaged in protected speech. None of the plaintiffs in any case cited by Plaintiff admitted to engaging in disorderly conduct prior to the disputed force. Plaintiff Sevy did though, eliminating any First Amendment protections for his conduct.

Plaintiff misrepresented these cases as factually similar, when, in reality, they are dissimilar in the most relevant manners. Plaintiff did not present any case law which supports his position that other courts have decided this issue similar to the manner he now asks this court to apply the First Amendment. These misrepresentations alone should dissuade this Court from reviewing this matter; but, when read in conjunction with opinions of the courts that have considered the issue – and decided to the contrary – this Court's decision should become all the more clear. Moreover, these other opinions demonstrate that this issue is not yet ripe for consideration by this Court, when so few courts have flushed out the issues associated with untying the "Gordian knot" created by Plaintiff's plea.

II. THE SIXTH CIRCUIT PROPERLY DECIDED THE ISSUE ON THE GROUNDS OF QUALIFIED IMMUNITY BECAUSE *GRAHAM* CONCLUSIVELY DECIDED THE ISSUE AND ANY DEVIATION WOULD DISTURB THE CLARITY ACHIEVED BY *GRAHAM*.

The Sixth Circuit correctly applied this Court's precedent on the clearly established analysis. This Court has highlighted that in cases of first impression qualified immunity is generally extended to "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)) (referencing *Wilson v. Layne*, 526 U.S. 603, 618 (1999)). The issue in this case surely cannot clear the "clearly established" hurdle because *Graham,* decided in 1989, established that an officer's use of force during a lawful arrest must be evaluated under the Fourth Amendment. *Graham*, 490 U.S. at 395 (holding "explicit[ly]" that "all claims that law enforcement officers have used excessive force…in the course of an arrest…should be analyzed under the Fourth Amendment…"). What Plaintiff now advocates for—analysis of use of force under the First Amendment as well—is contrary to *Graham*'s explicit statement.

This Court should reject the invitation to expand the use of force analysis to incorporate the First Amendment as doing so would create confusion for law enforcement when faced with split-second arrest decisions. As this Court recognized in *Nieves*, "protected speech is often a 'wholly legitimate consideration' for officers when deciding whether to make an arrest." *Nieves*, 139 S. Ct. at 1724, 204 L.Ed. 2d 1. It would create an untenable and

dangerous standard for law enforcement to expand an officer's considerations in those split-second decisions to also consider the First Amendment implications of force where lawful grounds already present themselves.

Moreover, this case does not present the Court with the opportunity to create such expansion because, unlike *Nieves*, probable cause is not even in dispute. Here, it is conclusively established that Defendant had lawful authority to arrest Plaintiff. As the Sixth Circuit suggested, even if the Court were to reach the constitutional question, Plaintiff would have a difficult time succeeding due to the "thorny" issues related to causation and probable cause that led this Court to previously reject retaliation claims in *Nieves v. Bartlett,* 139 S. Ct. 1715, 204 L. Ed. 2d 1 (2019). [Petition App. 10]

Plaintiff's difficulty lies in the fact that he engaged in, at a minimum, a mix of protected and unprotected speech by pleading to disorderly conduct. [Petition App. 10] This Court's causation analysis in *Nieves* should apply equally to force retaliation claims because "it would be 'particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct.'" [Petition App. 10, quoting *Nieves*, 139 S. Ct. at 1724.] Plaintiff's proposed force retaliation claim would require the impossible delineation between which amount of force was due to an officer's animus towards the protected speech, which amount was animus due to the illegal conduct, and which was due to a legitimate government interest. Thus, this case does not present a clear foundation for this Court to even consider an expansion of *Graham.*

This Court should instead allow the Sixth Circuit ruling to stand under the qualified immunity analysis and the probable cause bar adopted in *Nieves*.

CONCLUSION

Plaintiff has not properly presented any issue for this Court to review at this time. His legal arguments are unsupported theories, riddled with misrepresentations. The issue at the heart of this petition is whether the Court should inextricably intertwine the First and Fourth Amendments to allow a retaliation claim for force applied during the act of a lawful arrest. Allowing such an analysis would extend the protections of the First Amendment to a mix of unprotected and protected speech and create a difficult, and unmanageable framework of analysis for law enforcement and courts. Therefore, Defendants urge this Court not to review this matter at this time.

Respectfully submitted,

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