No. 20-636

In the Supreme Court of the United States

SHASE HOWSE,

Petitioner,

v.

THOMAS HODOUS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CITY OF CLEVELAND, OHIO; BRIAN MIDDAUGH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CITY OF CLEVELAND, OHIO,

Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

The question presented is the following:

> Did the Sixth Circuit's decision affirming summary judgment adequately apply governing precedent concerning malicious prosecution and qualified immunity for Fourth Amendment excessive force claims, such that there is no compelling reason for review on a writ of certiorari?

Petitioner gives a misleading statement of the questions presented. Petitioner's first question presented is:

> Whether the law is clearly established that an officer cannot arrest a person whom the officer has no reason to believe committed a crime, tackle him to effect the arrest, and then strike him in the neck when he poses no threat to anyone's safety.

This improperly converts Petitioner's initial encounter with the police on the front porch of his home from a *Terry* stop into an arrest and ignores Petitioner's admitted active resistance. Petitioner asks the Court to believe that the police arbitrarily decided to arrest Petitioner for no reason, then tackled him and struck him in the neck for good measure. This does not accurately reflect the undisputed facts on the record.

Petitioner's second question presented is:

> Whether a Fourth Amendment malicious prosecution claim must be dismissed simply because one of multiple underlying charges is supported by probable cause.

Petitioner here seeks to create a circuit conflict when none exist. The majority below conformed its holding to the prevailing standard for evaluating Fourth Amendment malicious prosecution claims, both in the circuits and in this Court.

Thus, Respondents object to both of the alleged questions presented by Petitioner.

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INTRODUCTION

Nothing in this case warrants this Court's review. Supreme Court Rule 10 provides that a petition "will be granted only for compelling reasons." Seeking to offer a compelling narrative, Petitioner rewrites the record of his initial encounter with the police on the front porch of his home to convert it from a *Terry* stop into an arrest, and he mischaracterizes the majority's mainstream qualified immunity analysis as being a defiant holding that is contrary to governing authority.

The majority's decision was an unremarkable affirmance of summary judgment against a claimant who incorrectly alleges that his constitutional rights were violated when he was arrested following his belligerent refusal to cooperate during an investigatory stop. No conflict among the circuits is presented here, nor is there any departure from the accepted and usual course of judicial proceedings or a decision that conflicts with relevant decisions of this Court. Sup. Ct. R. 10.

Consistent with Rule 10, the petition should be denied because the asserted error essentially "consists of erroneous factual findings or the misapplication of a properly stated rule of law." Even in a close case where a party feels was wrongly decided, "error correction … is outside the mainstream of the Court's functions and … not among the 'compelling reasons' … that govern the grant of certiorari." *Barnes v. Ahlman*, 140 S. Ct. 2620 (Mem), 2622, 207 L.Ed.2d 1150 (Aug. 5, 2020) (citation omitted) (Sotomayor, J., dissenting).

The majority's decision affirming summary judgment correctly applied governing precedent concerning qualified immunity for Fourth Amendment excessive force claims and properly analyzed the malicious prosecution claims. There is no compelling reason for review on a writ of certiorari.

STATEMENT OF THE CASE

This case arises from an investigatory stop of a verbally combative and actively resisting suspect who interfered with the police officers' attempt to investigate a suspected break-in into a home they mistakenly believed to be vacant. Plaintiff/ Petitioner Shase Howse contends that Defendants/ Respondents Thomas Hodous and Brian Middaugh violated his constitutional rights in doing so.

On the evening of July 28, 2016, Hodous and Middaugh were on patrol in an unmarked car in the neighborhood of East 102 Street and St. Clair Avenue in Cleveland, Ohio, as members of the Gang Impact Unit of the Cleveland Division of Police. Police were concerned about a recent increase in felonious assaults and shootings in the neighborhood, as well as possible gang-related violence in connection with a nearby outdoor "vigil" memorial at the location of an earlier homicide. Hodous Dep., R.25-2, pp. 262-65, 271; Middaugh Dep., R.25-1, pp. 143-144.

As the officers were driving by a duplex house at 747 E. 102 Street, a man could be seen lingering on the front porch. Hodous Dep., R.25-2, pp. 282, 291; Middaugh Dep., R.25-1, pp. 153, 155. The officers were suspicious because the house looked vacant and

because the man looked nervous when he saw them pass. Hodous Dep., R.25-2, pp. 288-89. The side-by-side front doors of the duplex appeared to be boarded up with bars over them; and there were garbage cans in the driveway with boards up against them. Middaugh Dep., R.25-1, pp. 148-49, 151-52. Middaugh was aware of a problem with criminal trespassing and illegal activity in abandoned houses in the city. Middaugh Dep., R.25-1, pp. 135-36. It was getting dark out, and the area was not well-lit. Hodous Dep., R.25-2, p. 283; Middaugh Dep., R.25-1, p. 148. The officers initially kept driving slowly past the house but decided to investigate further as the suspect continued to linger on the porch. Hodous Dep., R.25-2, pp. 294, 289-90; Middaugh Dep., R.25-1, pp. 155, 160.

In fact, the house was not vacant; Howse lived there with his mother. Howse Dep., R.25-3, pp. 386-87. Howse was standing on the porch after returning from a walk to a convenience store. Howse presumably was on edge after already having been stopped and frisked by another police officer that evening on his way to the store. Howse Dep., R.25-3, pp. 401-02. Hodous and Middaugh were not aware of this previous encounter with the police. Hodous Dep., R.25-2, p. 276; Middaugh Dep., R.25-1, p. 166. Based on their experience and training, and the facts available to them at the time, they suspected Howse of attempting to break into the vacant home. Hodous Dep., R.25-2, pp. 311, 314, 336. They also feared he might be armed. Middaugh Dep., R.25-1, p. 160.

Middaugh, who was in the front passenger seat, asked Howse if he lived there. Howse said yes.

Hodous Dep. R.25-2, pp. 292-95, 299. Middaugh then exited the vehicle and asked Howse, "Are you trying to break in?" Hodous Dep., R.25-2, p. 303. Howse became agitated and said something like, "Fuck you. Leave me the fuck alone." Hodous Dep., R.25-2, pp. 300-03, 312; Middaugh Dep., R.25-1, p. 176. Middaugh walked up to the porch to investigate if Howse lived there. Hodous Dep., R.25-2, p. 307. Middaugh believed Howse was squaring up to fight and was growling at him, so he asked Howse to put up his hands. Howse refused. Hodous Dep., R.25-2, p. 310; Middaugh Dep., R.25-1, p. 177.

According to Howse's version of the encounter, Middaugh questioned Howse from the front seat of the police car after having backed up. Howse testified that Middaugh said, "Are you sure this is your home?" and Howse responded, "Yes, this is my home. What the fuck?" Howse heard Middaugh make some comment to the effect of Howse having a smart mouth. Howse testified that Middaugh then exited the car and continued asking him if he lived there. Middaugh ordered him to put his hands behind his back and said that Howse was going to jail, to which Howse repeated that he lived there and was not doing anything wrong. Howse Dep., R.25-3, p. 411; Howse Aff., R.33-1, p. 810.

Howse testified that, "at this point I am screaming at the top of my lungs, 'I live here, I live here.'" Howse Dep., R.25-3, pp. 411-12. He also testified that he refused to put his hands behind his back. Howse Dep., R.25-3, p. 413 ("Q. …you admit that he told you to put your hands behind your back and you refused? A. …yes, I did"). Howse testified that, after he resisted

the officer's commands, Hodous helped Middaugh grab him and put him to the floor of the porch. Howse Dep., R.25-3, pp. 411-12. Howse testified that when he was on the floor, he resisted the officers' efforts to handcuff him by stiffening his body. Howse Dep., R.25-3, p. 415 ("I was not letting him handcuff me").

Howse denied assaulting the officers, as they testified occurred. Hodous Dep., R.25-2, pp. 319-20. Howse alleged that his head was slammed down onto the floor of the porch and that Middaugh hit him twice on the neck with his forearm while he was on the floor. Howse Dep., R.25-3, p. 412. After Howse's mother had arrived, he calmed down and was placed under arrest. Howse Dep., R.25-3, pp. 417, 423. Howse refused medical treatment at the scene and did not seek out medical attention afterwards. Howse Dep., R.25-3, pp. 421-22. Howse testified that he was in jail for "two nights and three days," in that he recalls being jailed on a Thursday night and released on the following Sunday. Howse Dep., R.25-3, p. 427.

Hodous and Middaugh completed use of force reports. Use of Force Reports, R.37-2, R.37-4, pp. 866-880. The reports state that both officers were wearing Cleveland Police-issued tactical gear and protective vests, which would have identified them as law enforcement officers. Use of Force Reports, R.37-2, R.37-4, pp. 866, 870.

On July 28, 2016, Middaugh signed a Complaint against Howse for assault on a police officer. Complaint, R.29-5, p. 736. On September 7, 2016, Howse was indicted by a Cuyahoga County Grand Jury on two felony counts of assault on a police officer in

violation of Ohio Revised Code § 2903.13(A) and one count of obstructing official business in violation of Ohio Revised Code § 2921.31(A). Indictment, R.25-4, pp. 448-49. On October 4, 2016, all charges against Howse were dismissed by the Prosecutor at the recommendation of Middaugh. Hodous Dep., R.25-2, pp. 334-35. Middaugh testified that he was motivated in part by a discussion with Howse's mother about Howse's mental health as well as the desire to avoid Howse having a felony on his record. Middaugh Dep., R.25-1, pp. 216-17.

Howse then sued Hodous and Middaugh under 42 U.S.C. § 1983 for violating his Fourth Amendment rights, bringing causes of action for excessive force, malicious prosecution, and state law claims of assault and battery. He also sued the City of Cleveland, claiming that the City was responsible for the Fourth Amendment violations. Complaint, R.2. The district court granted summary judgment for the defendants, R.41, which was affirmed by the court of appeals, R.44. The court below unanimously affirmed summary judgment for Hodous on the excessive force claim, and Chief Judge Cole issued a separate dissenting opinion as to the claims against Middaugh and the malicious prosecution claim against Hodous. R.44, pp. 940, 937-945. This petition then followed as to the claims against Hodous and Middaugh, but not as to the claim against the City (or the officers in their official capacities).

REASONS FOR DENYING THE PETITION

I. THIS CASE DOES NOT CREATE A CONFLICT AMONG THE CIRCUIT COURTS

The majority's holding on the malicious prosecution claim is not in conflict with the Second, Third and Seventh Circuits. The majority did not expressly reject the "charge-by-charge" approach (*i.e.*, that probable cause must have existed for each charge for an officer to defeat a malicious prosecution claim) or hold that, in all cases, a malicious prosecution claim fails when probable cause exists for any one charge against an arrestee. A closer review of the majority's opinion and the decisions of its sister circuits reveals no square conflict on this narrow issue.

In response to the dissent's citation to other circuit court opinions, the majority reasoned as follows:

> The contrary conclusions of other circuits don't persuade us otherwise. The Second Circuit has held that each criminal charge must be supported by probable cause. Otherwise, the court reasoned, an officer might tack on many additional (meritless) charges. Tacking on meritless charges, however, does not change the nature of the seizure. If hypothetically it were to change the length of the detention, that would be a different issue. But the plaintiff has not presented any evidence that the additional assault charges caused Howse to suffer longer detention.

Opinion at n. 3, R.44, p. 933 (internal citations omitted).

To the extent the Second, Third and Seventh Circuit cases cited by Petitioner rationalize adopting a charge-by-charge analysis because tacking on additional charges may additionally burden the plaintiff, those decisions are not in conflict with the majority. Petition, pp. 28-30. *See Posr v. Doherty,* 944 F.2d 91, 100 (2d Cir. 1991), *Johnson v. Knorr*, 477 F.3d 75, 84 (3d Cir. 2007) and *Holmes v. Village of Hoffman Estate*, 511 F.3d 673, 682 (7th Cir. 2007). The issue was not addressed below because that evidence was never presented and the argument had not been made by Petitioner.

The majority's decision is not in conflict with the Seventh Circuit at all. The Seventh Circuit in *Holmes*, *supra*, analyzed the plaintiff's claim of malicious prosecution under Illinois state law. No constitutional analysis was performed to determine whether the Seventh Circuit recognized a claim of malicious prosecution in the context of an action brought pursuant to 42 U.S.C. § 1983. Nor did the court in *Holmes* engage in any analysis concerning which constitutional provision would govern such a claim. Of note, until this Court's decision in *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017), the Seventh Circuit had evaluated unlawful pretrial detention claims (frequently referred to as malicious prosecution) under the Due Process Clause rather than the Fourth Amendment. *Id.*, 916-17.

The Third Circuit has held that the appropriateness of a charge-by-charge analysis is an intensely fact-dependent inquiry. *Kossler v. Crisanti*, 564 F.3d 181, 194 (3d Cir. 2009). Therefore, while some courts in the Third Circuit follow the narrow holding in *Johnson*,

supra, others follow *Wright v. City of Philadelphia*, 409 F.3d 595, 604 (3d Cir. 2005), which had held that the existence of probable cause on one charge disposed of the plaintiff's malicious prosecution claims on all the remaining charges.

In fact, referring to *Johnson* and *Wright,* the en banc panel in *Kossler* noted, "if one of those two cases must control for purposes of analyzing the probable cause element, it would be *Wright*, not *Johnson*, that controls." *Kossler,* 194, n. 8; s*ee also Peterson v. Corbett,* No. 3:08-CV-2292, 2012 WL 12864183, *12 (M.D. Pa. Dec. 13, 2012), *Laphan v. Haines*, No. 14-4063, 2016 WL 627246, *5, n. 10 (E.D. Pa. Feb. 17, 2016). The en banc panel in *Kossler* recognized that the holdings in *Wright* and *Johnson* are difficult to reconcile, but "both illustrate that the analysis of malicious prosecution claims involving multiple charges is a fact-intensive one." *Kossler, supra*, 194.

As in the case at hand, the Third Circuit's decision to conduct a charge-by-charge analysis in *Johnson* depended heavily on the unique facts of that case. The majority's analysis is therefore not squarely in conflict with *Johnson* because both courts' decisions depended on the particular facts before them. The majority below concluded that Petitioner had failed to present any evidence establishing that he was additionally burdened by having to defend against the assault charges, which is entirely consistent with Third Circuit precedent. *See*, *e.g.*, *Campeggio v. Upper Pottsgrove Twp.,* No. 14-1286, 2014 WL 4435396, *9 (E.D. Pa. Sept. 8, 2014) ("a plaintiff cannot establish a malicious prosecution claim if the charges for which there was no

probable cause did not additionally burden the plaintiff.")

The Second Circuit's decision in *Posr*, *supra,* does not present a square conflict either, albeit for different reasons. The Second Circuit applies a hybrid constitutional/common law analysis to malicious prosecution claims, requiring actual malice as an element of a malicious prosecution claim brought pursuant to 42 U.S.C. § 1983. *See Posr*, *supra,* 100. The Second Circuit in *Posr* drew upon the danger of an officer's ill will as the primary reason for adopting its charge-by-charge analysis: "an officer with probable cause as to a lesser offense could tack on more serious, unfounded charges which would support a high bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses." *Id.*

The Sixth Circuit, along with the First and Fourth Circuits, does not factor the officer's intent into its probable cause analysis in malicious prosecution cases. *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010) ("[i]n the context of malicious prosecution, the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice"); *see also Hernandez-Cuevas v. Taylor,* 723 F.3d 91, 102 (1st Cir. 2013) and *Brooks v. City of Winston-Salem, NC*, 85 F.3d 178, 183-85 (4th Cir. 1996). Therefore, the officers' purported intent of "tacking on more charges" was irrelevant to the majority's analysis, where the focus was on the seizure itself and not the officers' intent in effecting the seizure. Because Petitioner presented no evidence that he was additionally

burdened by the seizure as a result of the additional assault charges, his claim failed in the context of the objective analysis employed by the majority.

Petitioner's observation that the other circuits "have implicitly adopted" a charge-by-charge analysis (Petition, p. 31) is questionable at best. The Tenth Circuit "hasn't definitively spoken to the question either way." *Van De Weghe v. Chambers*, 569 F. App'x 617, 620 (10th Cir. 2014) (also noting that, on the issue of a charge-by-charge analysis, it would be "difficult to conjure how [the plaintiff] might have cleared the 'clearly established law' hurdle" when judges disagree on a constitutional question.)

The Fourth Circuit has not formally adopted a specific approach to Fourth Amendment malicious prosecution claims. *See*, *e.g.*, *Safar v. Tingle*, 859 F.3d 241, 246 (4th Cir. 2017) (ultimately declining to determine whether an officer had a duty to withdraw warrants upon learning they were meritless because such duty was not clearly established); *see also Iacobucci v. Town of Bonneau*, No. 2:18-0152-DCN-BM, 2019 WL 5874210 (D. SC May 29, 2019) (declining to follow a charge-by-charge analysis of a malicious prosecution case because it was not clearly established in the Fourth Circuit and also noting that, even if the court were to adopt such an analysis, the plaintiff presented no evidence to show that he was additionally burdened by not having the additional charge dismissed prior to the dismissal of all the other charges). Finally, the Eighth Circuit does not recognize malicious prosecution as a constitutional tort actionable under 42 U.S.C. § 1983. *Bates v. Hadden*,

576 F. App'x 636 (8th Cir. 2014), *Harrington v. City of Council Bluffs, Iowa,* 678 F.3d 676 (8th Cir. 2012).

It is notable that Petitioner only started to advocate for the charge-by-charge analysis of the probable cause element for the first time after he lost his appeal below. The arguments advanced here were not presented in the district court or to the majority panel who made the decision. In an attempt to create a conflict, Petitioner now cherry-picks select decades-old cases that have either no application at all or had evolved to the extent of contradicting Petitioner's own arguments, as is evident from the more recent pertinent cases from the Third Circuit. In sum, Petitioner has failed to show a conflict requiring this Court's review.

II. THE MAJORITY CORRECTLY APPLIED THE LAW TO PETITIONER'S MALICIOUS PROSECUTION CLAIMS

Petitioner contends that the majority failed to follow this Court's precedent in *Wallace v. Kato*, 549 U.S. 384 (2007), when it drew analogies between malicious prosecution and false arrest claims. Contrary to Petitioner's characterization, the majority's decision and analysis are consistent with this Court's treatment of pretrial detention cases, albeit not termed as "malicious prosecution."

This Court has not expressly recognized the constitutional tort of malicious prosecution as actionable under 42 U.S.C. § 1983. *See, generally, Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 921-922 (2017). Instead, in *Manuel* this Court held that "the Fourth Amendment governs a claim for unlawful

pretrial detention even beyond the start of legal process," leaving it to the lower courts to determine both the elements of and the rules associated with an action seeking damages for such an action. *Id.* 920.

In his dissenting opinion, Justice Alito, joined by Justice Thomas, agreed with the Court's *Manuel* holding that the protection provided by the Fourth Amendment continues to apply after "the start of legal process," if the legal process is "understood to mean the issuance of an arrest warrant" or first court appearance. *Id*. at 923. However, in noting that the Court did not resolve the question of whether a Fourth Amendment malicious prosecution claim is cognizable through 42 U.S.C. § 1983, Justice Alito explained that malicious prosecution claims should not be governed by the Fourth Amendment at all. Justice Alito reasoned, in part, that the traditional elements of a tort of "malicious prosecution," including the element of malice, severely mismatch the Fourth Amendment principles, noting "it is firmly established that the Fourth Amendment standard of reasonableness is fundamentally objective." *Id.* at 925, *quoting al-Kidd*, *supra*, 736.

The Sixth Circuit has been equally skeptical of employing the term "malicious prosecution" to describe claims arising out of unconstitutional pretrial detentions. *Sykes, supra,* 310 ("[w]e recognize that 'designating the constitutional claim as one for "malicious prosecution" is both unfortunate and confusing. A better name that would perhaps grasp the essence of this cause of action under applicable Fourth Amendment principles might be "unreasonable

prosecutorial seizure"') (citations omitted). The Sixth Circuit held in *Sykes* that malice is not an element of a § 1983 suit for malicious prosecution. *Id.*

In drawing analogies between the constitutional tort of false arrest and the unfortunately named claim for "malicious prosecution," the majority correctly applied the principles that govern both claims. The Fourth Amendment is the constitutional right deemed to be violated under both types of claims, the commonality consistent with this Court's precedent. *See Manuel*, *supra*, 918 ("pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case"). Both require a finding of probable cause. *See Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest). Finally, both claims involve the individual's right against unreasonable seizure. To that extent, claims for false arrest and "malicious prosecution" are more analogous than they are dissimilar, and the majority did not deviate from this Court's analysis in *Wallace,* which was applied in the narrow context of accrual of a statute of limitations.

In conclusion, the majority properly applied the law in analyzing Petitioner's malicious prosecution claims and created no conflict with this Court's precedent or with its sister circuits. For these reasons, the petition should be denied.

III. THE MAJORITY CORRECTLY APPLIED THE LAW TO PETITIONER'S EXCESSIVE FORCE CLAIMS

A. SUMMARY JUDGMENT STANDARD CORRECTLY APPLIED

Petitioner argues that the majority misapplied the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure because it failed to "properly acknowledge" three alleged facts: (1) Detective Middaugh told Howse "you are going to jail," (2) Detective Middaugh struck Howse on the back of the neck while attempting to handcuff him, and (3) the events occurred on Howse's porch. Petition, p. 13.

In its recitation of facts, the majority accepted Howse's version of the facts, specifically acknowledging that the events took place on Howse's porch, that he was struck in the back of his neck and that Detective Middaugh allegedly stated "you are going to jail." Opinion, R.44, pp. 926-27. These facts did not alter the majority's legal analysis, but they were never discounted. In applying qualified immunity, the majority analyzed the totality of circumstances in light of what was known to the officers as the events unfolded rather than surgically dissecting the facts, as Petitioner suggests should have been done.

In *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), this Court criticized the lower court for "view[ing] each fact in 'isolation, rather than as a factor in the totality of the circumstances.'" *Id.*, 588, *citing Maryland v. Pringle*, 540 U.S. 366, 372, n. 2 (2003); *see also U.S. v. Cortez*, 449 U.S. 411, 417-18 (1981)

(applying the totality of circumstances to investigatory stops). The "totality of circumstances" analysis requires courts to consider "the whole picture." *Cortez*, *supra*, 417. The Supreme Court's "precedents recognize that the whole is often greater than the sum of its parts – especially when the parts are viewed in isolation." *Wesby*, *supra*, 588, *citing U.S. v. Arvizu,* 534 U.S. 266, 277-278 (2002). The process of analyzing the totality of the circumstances "does not deal with hard certainties, but with probabilities." *Cortez, supra*, 418. In determining whether a stop is justified by a reasonable suspicion, the officer can make "inferences and deductions that might well elude an untrained person." *Id.* The information collected by the officer "must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.*

In this case, the totality of circumstances leads only to the conclusion that Middaugh and Hodous had a reasonable suspicion that a crime was committed or about to be committed. This is based on their law enforcement experience as members of the Gang Impact Unit, their familiarity with the neighborhood and the high incidence of violent crime in the neighborhood, coupled with their observation of an individual lingering on the front porch of what appeared to be a vacant home, fumbling in front of him but not entering the home and appearing nervous. Even after he was asked what he was doing and responding that he lived there, Howse still did not enter the home. Once the officers approached Howse in an attempt to further investigate, he appeared furtive, nervous and hostile and refused to follow the officers'

commands, necessitating his handcuffing. He actively resisted the officers' attempts to handcuff him before and after he was on the ground, as he admitted in his deposition. The totality of circumstances supported the officers' conclusion that Howse's detention was warranted by reasonable suspicion and the application of force was reasonable under the circumstances.

It would also have been contrary to law for the majority to impute Petitioner's subjective experience to what was known to the officers at the time of the encounter. Twenty/ twenty hindsight has no place in qualified immunity jurisprudence. The officers' actions are to be examined in light of what was known to them as the events unfolded. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2007 (2017) ("[f]acts an officer learns after the incident ends - whether those facts would support granting immunity or denying it—are not relevant.").

The officers did not know Howse lived in the house, which appeared abandoned, and they were not required to accept Howse's claim that he lived there, given his nervousness and agitation and the appearance of the house. *See*, *e.g.*, *Wesby*, *supra*, 577-78 (officers were not required to accept a version of the facts from a witness who was nervous, agitated and evasive.) Objectively, the officers encountered a suspect who appeared to be attempting to break into a vacant home; and the situation quickly escalated as he refused to follow orders, was swearing and screaming at the top of his lungs, and was physically resisting attempts to handcuff him for officers' safety (all by his own admission).

The majority properly applied the summary judgment standard in conducting its qualified immunity analysis by viewing the facts in the light most favorable to Petitioner but also following this Court's mandate in viewing the totality of the circumstances based on information that was known to the officers as they encountered the situation.

B. QUALIFIED IMMUNITY STANDARD CORRECTLY APPLIED

Petitioner manipulates the operative facts of the case in order reduce the "clearly established" analysis for application of qualified immunity[1] to a level of generality that has been repeatedly rejected by this Court. Petitioner attempts to transform the detention from a *Terry* stop to a full-blown arrest in order to argue that Petitioner's right to be free from use of excessive force during an arrest which was not supported by probable cause was so obvious that it was clearly established. Petition, p. 21.

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[1] "Qualified immunity is warranted even if a constitutional violation has occurred if the right violated was not clearly established." *Rodriguez v. City of Cleveland*, 439 F. App'x 433, 447-48 (6th Cir. 2011), *cert den.* 566 U.S. 987 (2012); *Schulkers v. Kammer*, 955 F.3d 520, 532-33 (6th Cir. 2020) (a defendant enjoys qualified immunity unless he or she (1) violated a constitutional right and (2) the right was clearly established). The Court may proceed directly to the "clearly established" inquiry. *Rodriguez*, *supra*, at 448. *Pearson v. Callahan*, 555 U.S. 223, 232-33 (2009).

1. *The majority reviewed the officers' conduct at the level of specificity required by this Court*

Petitioner places the "clearly established" standard by which he believes the officers' actions ought to have been judged for purposes of qualified immunity at a high level of generality, which has been repeatedly rejected by this Court. *See City and Cty. of San Francisco v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1776 (2015) ("[q]ualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures"); *White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("[t]oday, it is again necessary to reiterate the longstanding principle that 'clearly established law' should not be defined 'at a high level of generality'"); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (noting that the Supreme Court has repeatedly told courts not to define clearly established law at a high level of generality); *City of Escondido, Calif. v. Emmons*, 139 S. Ct. 500, 503 (2019) ("[t]he Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality").

This Court has repeatedly emphasized that specificity "is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts."

Kisela, *supra*, 1152, *quoting Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (*per curiam*); *see also Wesby*, *supra*, 590. To be clearly established, "a legal principle must have a sufficiently clear foundation in then-existing precedent." *Wesby*, *supra*, 589. The rule must be "settled law," which means it is dictated by "controlling authority" or "a robust consensus of cases of persuasive authority." *Wesby*, 589-590, *quoting Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*) and *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-742 (2014).

Additionally, "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless *existing precedent 'squarely governs' the specific facts at issue*." *Kisela*, *supra*, 1153, *citing Mullenix*, *supra*, 13 (emphasis added). "An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that *any* reasonable official in the defendant's shoes would have understood that he was violating it." *City of Escondido, Calif. v. Emmons*, 139 S. Ct. 500 (2019), *citing Kisela*, *supra*, 1153 (emphasis added).

The majority applied the required level of specificity to the officers' conduct under the particular circumstances of this case. Petitioner's suggestion that the facts of the case present an obvious constitutional violation would have required the majority to reject this Court's precedent and apply the standard of conduct at a high level of generality, which has been specifically rejected by this Court.

2. *Petitioner's manipulation of the record cannot change the fact that there was no obvious constitutional violation justifying review at an impermissible level of generality*

Petitioner manipulates the facts in an attempt to change the parameters of the "clearly established" standard applicable in this case from permissibly specific to impermissibly general. He does so by transforming what was an investigatory detention into a full-blown arrest, which would require the higher burden of showing probable cause rather than reasonable suspicion, and thus make the "arrest" and the subsequent use of force an obvious constitutional violation. Specifically, Petitioner argues that the alleged "you are going to jail" statement made by Middaugh, coupled with an attempt to handcuff Petitioner after he refused to comply, made it obvious that the investigatory stop of Howse ripened into an arrest at the moment the officers took him to the ground. Petitioner advances that, under these circumstances, it was clearly established that the arrest was not supported by probable cause. Therefore, it purportedly follows, the prohibition against the use of excessive force during an unlawful arrest was so obvious that it was clearly established.

There are several problems with this argument. First, Petitioner never challenged the validity of his arrest; nor did he state a claim for "false arrest" in his Complaint or argue this issue in the Courts below. Complaint, R.2; Opinion, R.44, p. 928. The Court should not consider arguments not raised below. *See*

e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (ordinarily the Supreme Court does "not decide in the first instance issues not decided below") (citation omitted).

Having failed to challenge the validity of the arrest in the courts below, Petitioner indirectly attacks the arrest by reinventing the timeline and changing his arguments completely. (Compare Petitioner's Appellate Brief wherein he expressly argues that Howse's "seizure" was "without the requisite individualized, reasonable, articulable suspicion that Shase Howse was armed or had committed or was about to commit a crime," referring to the standard for investigatory stops under *Terry v. Ohio,* 392 U.S. 1 (1968); App. Br., 6th Cir. No. 19-3418, R.21, 25.) Nowhere in his appellate brief in the court below does Petitioner advance the argument that it was not a *Terry* stop, after all, but an arrest unsupported by probable cause.

Second, in response to the same argument made by Sixth Circuit Chief Judge Cole in his dissenting opinion, the majority concluded that "[t]he mere act of handcuffing someone doesn't transform a stop into an arrest, … an officer *may* temporarily handcuff someone during a *Terry* stop 'so long as the circumstances warrant that precaution.'" Opinion at n. 1, R.44, p. 930 (italics in original), *quoting U.S. v. Foster,* 376 F.3d 577, 587 (6th Cir. 2004).

A stated intent to arrest someone does not transform an investigatory stop into an arrest. Although there is no bright line to distinguish an investigative detention from an arrest, the Sixth

Circuit has historically held that police officers cross that line when they place a suspect in a police vehicle for questioning. *See U.S. v. Butler,* 223 F.3d 368, 375 (6th Cir. 2000) ("[t]he officer's continued detention of Defendant in the back of the locked patrol car ripened the investigatory stop into an arrest"); *U.S. v. Lopez-Arias*, 344 F.3d 623, 627-28 (6th Cir. 2003) (the Sixth Circuit has long recognized that an investigatory stop crosses the line and becomes an arrest when a suspect is placed in a police vehicle); Opinion at n. 1, R.44, p. 930 ("Of course, the officers hadn't removed Howse from the scene when they initially threw him down. So that would mean the officers didn't need probable cause until they removed him from his home and took him to the station") (citations omitted).

It follows that, even under Petitioner's fact scenario, the officers would not have known that they were effecting an arrest rather than an investigatory stop or that Howse's detention would have to be supported by probable cause. In other words, it was not clearly established that Middaugh and Hodous were effecting an arrest rather than an investigatory stop when they attempted to handcuff Howse or that the encounter, at that point, required more than a reasonable suspicion that a crime was or about to be committed.

Petitioner contends this presents an obvious case, yet, in light of Sixth Circuit precedent, it is far from obvious. Petitioner fails to cite any cases which, under these circumstances, would have put the officers on notice that their conduct was unconstitutional. *See*, *e.g.*, *Anderson v. Creighton*, 483 U.S. 635, 640-41 (1987) (the lower court erred in failing to address whether the

circumstances with which the defendants were confronted constituted probable cause and exigent circumstances; the conclusion that the search was objectively unreasonable did not "follow immediately" from the principle that warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment; therefore the violation was not clearly established).

Third, Petitioner's argument must fail because he essentially uses a separate Fourth Amendment violation (the allegedly illegal arrest) as the basis for liability for the use of force committed during the allegedly illegal arrest. In *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1543 (2017), this Court was confronted with the same question:

If law enforcement officers make a "seizure" of a person using force that is judged to be reasonable based on a consideration of the circumstances relevant to that determination, may the officers nevertheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force?

The Court answered that question in the negative, holding that "[a] different Fourth Amendment violation cannot transform a later, reasonable use of force into an unreasonable seizure." *Id.*, 1544. So it must also follow that a separate Fourth Amendment violation

cannot revive an officer's liability for a use of force to which qualified immunity applies.[2]

3. *The alleged unconstitutionality of the officers' actions was not clearly established under Sixth Circuit precedent*

A persuasive line of authority in the Sixth Circuit justifies the use of force to subdue and control an actively resisting suspect like Howse. In *Stanfield v. City of Lima*, 727 F. App'x 841 (6th Cir. 2018) (underlying facts taking place in 2013), the Court found that the officers were entitled to qualified immunity in performing a takedown of an intoxicated suspect. The plaintiff argued that he merely lost his balance when

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[2] Petitioner's fall back argument, that the detention was not supported by a reasonable suspicion, is not supported by law. This Court has previously acknowledged that "[a]rticulating precisely what 'reasonable suspicion' and 'probable cause' mean is not possible." *Ornelas v. U.S.,* 517 U.S. 690, 695 (1996). "They are commonsense, nontechnical conceptions that deal with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"" *Id., citing Illinois v. Gates*, 462 U.S. 213, 231 (1983) (additional citations omitted). This Court has described reasonable suspicion was a "particularized and objective basis" for suspecting the person stopped of criminal activity. *Id.* at 696, *quoting Cortez*, *supra*, 417-418. Here, Middaugh and Hodous encountered an individual in a high-crime area, in the dark hours of the night, lingering on the front porch of what looked like a vacant home and appearing nervous. The suspicion that Howse may have been attempting to break into the house was entirely reasonable. The suspicion of criminal activity and the possibility that Howse was potentially armed was further bolstered by his belligerent behavior and admitted refusal to cooperate.

the officers were putting his hands behind his back and thus used excessive force in taking him to the ground. The court's decision pivoted on the determination whether the plaintiff's conduct could be considered "active resistance." *Id.*, 847-48. *See also Jackson v. Washtenaw Cty.*, 678 F. App'x 302, 306-07 (6th Cir. 2017) (firing a taser at an individual suspected of drug activity who fled into his mother's house after being told to stop was objectively reasonable because the officer had reason to believe the suspect may be armed; "[w]here a suspect has refused to follow police orders and may be in possession of a weapon, we have determined there is no clearly established right to resist that can defeat qualified immunity").

In *Rudlaff v. Gillispie*, 791 F.3d 638 (6th Cir. 2015) (cited on p. 6 of decision below, R.44, p. 930), the Sixth Circuit found that use of a knee strike and a taser to subdue an arrestee who was struggling to keep the officers from handcuffing him was objectively reasonable. Finding pivotal the arrestee's own admission that he was trying to prevent the officers from handcuffing him, i.e. that he was resisting arrest, the court found the officers' use of force justified. *Id.* at 641 ("[a]ctive resistance includes 'physically struggling with, threatening, or disobeying officers," and "it includes refusing to move your hands for the police to handcuff you, at least if that inaction is coupled with other acts of defiance") (citations omitted). *See also Caie v. West Bloomfiel Twp.*, 485 F. Appx 92, 96-97 (6th Cir. 2012) (use of taser in drive-stun mode on a mentally ill arrestee found to be objectively reasonable, even though he was not being arrested for a crime; "the fact that Plaintiff was taken to the ground and

arguably 'subdued' when [the officer] employed the taser does not … compel the conclusion that … use of force was unreasonable" because "there is no dispute that Plaintiff continued to be uncooperative by actively resisting the officers' attempts to secure his arms behind his back.")

In *Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2008), the Sixth Circuit held that the officers acted in an objectively reasonable manner when they forcefully twisted the 78-year-old arrestee's arms behind his back, acutely rupturing his bicep. The Court found that the arrestee's intoxication, coupled with his verbal refusal to put his hands behind his back and abusive language justified the officers' actions. *Id.* at 248.

Petitioner's resort to cases from the First, Tenth and Ninth Circuits in an attempt to create a circuit split on this issue is to no avail. (*Blankenhorn v. City of Orange,* 485 F.3d 463 (9th Cir. 2007); *Raiche v. Pietroski*, 623 F.3d 30 (1st Cir. 2010); *Morris v. Noe*, 672 F.3d 1185, 1198 (10th Cir. 2012), Petition, pp. 24-25.) These cases had been decided before *City and County of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 (2015), where this Court admonished the circuit courts against resort to the general *Graham* factors in defining the clearly established standard and reversed the Ninth Circuit's denial of qualified immunity. *See also Pauly*, *supra* (reversing the Tenth Circuit's denial of qualified immunity); *Kisela*, *supra* (reversing the Ninth Circuit's denial of qualified immunity); *Emmons*, *supra* (reversing the Ninth Circuit's denial of qualified immunity). Rather than creating a circuit split, the Sixth Circuit followed the express directive from this

Court that officers' conduct must be evaluated with the requisite level of specificity. Petitioner's manipulation of facts does not turn this case into one presenting such an obvious constitutional violation as to overlook this Court's precedent.[3]

In conclusion, the majority correctly applied the summary judgment standard, viewing the facts in the light most favorable to Petitioner while considering the totality of the circumstances and what was known to the officers as the events unfolded. The majority correctly applied the clearly established standard by reviewing the officers' conduct with the level of specificity required by this Court and in light of the Sixth Circuit precedent which has held that officers' actions in analogous situations did not violate the Fourth Amendment.

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[3] Even if this Court were to determine that a conflict among the circuits exists, the officers would be entitled to qualified immunity based, in part, on the very existence of the alleged conflict. The officers should not be expected to be held liable for a violation of a legal standard that is not only not clearly established, but one that is subject to varying degrees of disagreement among the circuits. *See*, *e.g.*, *Wilson v. Layne,* 526 U.S. 603, 618 (1999) ("[if] judges … disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy").

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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