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

REPLY IN SUPPORT OF CERTIORARI

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REPLY IN SUPPORT OF CERTIORARI

Respondents claim this case is "unremarkable." Opp. 1. In Respondents' view, federal law provides no redress when officers approach someone standing at the front door to his own home and repeatedly question him about whether he truly lives in the house; tell the person he is going to jail when he becomes annoyed by the unjustified intrusion; and tackle and punch him in effectuating an arrest. Officers are then free to file felony charges unsupported by probable cause so long as a court later finds probable cause for a separate misdemeanor charge. Respondents' arguments are breathtaking, find no support in this Court's precedent, and threaten to undermine core constitutional principles that protect all citizens in the sanctity of their homes.

As explained in the Petition, the Sixth Circuit's failure to consider the legal significance of the facts Mr. Howse presented at summary judgment conflicted with this Court's decision in *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam). In their Opposition, Respondents adopt the panel majority's error and attempt to justify their conduct by recasting the qualified immunity analysis in the light most favorable to them. But considering all facts in the light most favorable to Mr. Howse, as the law requires, Detective Middaugh's use of force in arresting Mr. Howse without probable cause was an unreasonable seizure under this Court's clearly established law, which several circuits have held under analogous facts. Respondents cannot avoid this circuit split by asserting that the other circuits' decisions were

implicitly overruled by a subsequent decision of this Court that neither mentioned those cases nor established new law. And Respondents' waiver argument ignores that the Sixth Circuit unequivocally passed upon the arguments Mr. Howse presents in the Petition.

Respondents largely sidestep Mr. Howse's malicious prosecution arguments, instead defaulting to the panel majority's erroneous conflation of false arrest and malicious prosecution claims. But differential treatment of these distinct claims is the prevailing standard in this Court and several courts of appeals. The panel majority's diverging approach creates a clear circuit split. Respondents' argument that Mr. Howse failed to demonstrate how the inclusion of felony charges for which there was no probable cause exposed him to a higher bail or a lengthier prison sentence imposes an evidentiary burden where none exists, and which other circuits have not recognized.

This Court's intervention is necessary to address the important legal issues presented in the Petition.

ARGUMENT

I. The Panel Majority's Qualified Immunity Ruling Conflicts with this Court's Precedent and Creates a Circuit Split.

At summary judgment, Mr. Howse presented evidence that, as he was talking on the phone with his mother and opening the front door to his home with his house key, a plainclothes officer approached him

and repeatedly asked whether he lived in the house.[1] App. 18–19. Mr. Howse answered that he did, but the officer took umbrage at his tone. App. 19. Rather than leave Mr. Howse alone or ask for identification, the officer told Mr. Howse he was going to jail and threw him to the ground. *Id.* As he handcuffed Mr. Howse, the officer struck Mr. Howse in the back of the neck, causing his face to hit the front porch, even though Mr. Howse had done nothing to threaten the officer or otherwise warrant the attack. *Id.*

a. Viewing the evidence in the light most favorable to Mr. Howse, the Fourth Amendment violation is obvious. Respondents do not dispute the absence of probable cause to arrest Mr. Howse, but the evidence shows Detective Middaugh did exactly that by telling Mr. Howse he was going to jail and throwing him onto the porch floor. It is axiomatic that tackling a suspect to arrest him without probable cause violates the Fourth Amendment. Pet. 23–24.

The panel majority could conclude otherwise only by disregarding a key fact showing the seizure was an arrest, *viz.*, Detective Middaugh *told* Mr. Howse he was going to jail. *See* Pet. 16. Respondents insist the panel majority considered this fact when it outlined Mr. Howse's evidence in the background section of its

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[1] Mr. Howse disputes Respondents' claim that they were both wearing visible tactical gear and vests that identified them as police officers. *See* Opp. 5. Facts favorable to Mr. Howse show that he could not identify Respondents as police officers when they approached him, and Respondents were driving an unmarked car. *See* App 3, 19.

opinion. *See* Opp. 15; App. 3–4, 6. But the panel majority wholly disregarded this key fact in rejecting Chief Judge Cole's analysis of whether Mr. Howse had been arrested. *See* App. 9 n.1, 20–22, 23 n.1. By failing to "properly . . . acknowledge key evidence offered by the party opposing" summary judgment in analyzing whether Detective Middaugh was entitled to qualified immunity, *Tolan*, 572 U.S. at 659, the Sixth Circuit repeated the Fifth Circuit's *Tolan* error.

Respondents argue that Mr. Howse waived this issue by not presenting it below. *See* Opp. 21. But Mr. Howse's complaint clearly and repeatedly asserts that his arrest was unlawful because the officers lacked probable cause. *See* Complaint, R.2, at ¶¶ 1, 15–16, 18, 22, 29, 45. And Mr. Howse argued below that his seizure was unconstitutional because the officers lacked both reasonable suspicion and probable cause. *See* App. Br., No. 19-3418, R.21, at pp. 20–21. In any event, even assuming he did not "press" the question presented in his Sixth Circuit brief, the question is still properly before this Court because the Sixth Circuit "passed upon" it. *See United States v. Williams*, 504 U.S. 36, 41 (1991) (explaining that this Court properly exercises jurisdiction "of an issue not pressed [below] so long as it has been passed upon" by the court below). Chief Judge Cole's dissent posited that Detective Middaugh was not entitled to qualified immunity because he used force to arrest Mr. Howse without probable cause, App. 20–25, and the panel majority addressed and rejected that position, App. 9 n.1.

Respondents also argue that Detective Middaugh did not effectuate an arrest by telling Mr. Howse he

was going to jail and then tackling him, because they had not yet placed him in a police vehicle. *See* Opp. 22–23. Neither the text of the Fourth Amendment nor this Court's precedent place a "police vehicle" limitation on what constitutes an arrest. By expressly stating his intent to remove Mr. Howse from his home and take him to jail before using force to subdue him, Detective Middaugh made clear that he was arresting Mr. Howse and was not engaged in an investigative *Terry* stop. App. 23 n.1; *see United States v. Sharpe*, 470 U.S. 675, 684–85 (1985) (an intrusive seizure that exceeds the scope of a brief investigative *Terry* stop constitutes an arrest). The cases Respondents cite are not to the contrary. Unlike here, they involve facts where officers crossed the line from a *Terry* stop to an arrest by placing individuals in a police vehicle after the end of the initial investigative encounter. *See United States v. Butler*, 223 F.3d 368, 374–75 (6th Cir. 2000); *United States v. Lopez-Arias*, 344 F.3d 623, 627–28 (6th Cir. 2003). Neither case suggests that the only way to arrest someone is by placing them in a police car.

b. Assuming Respondents' seizure of Mr. Howse on his front porch had been no more than a *Terry* stop, qualified immunity would be improper because Respondents lacked individualized facts giving rise to reasonable suspicion. *See Illinois v. Wardlow*, 528 U.S. 119, 123–24 (2000) (requiring officers to articulate "more than an 'inchoate and unparticularized suspicion or "hunch"' of criminal activity.") (citation omitted). At summary judgment, Mr. Howse's evidence showed that, at the time he was approached by Detective Middaugh, he was standing on the front porch of his own home, had his key in the front gate,

and was in the process of opening the gate. *See* App. 18–19. Based on those facts, Respondents had no reason to suspect Mr. Howse of any wrongdoing. In seeking to justify their seizure, Respondents rely on facts that are not individualized (*e.g.*, prior assaults and shootings in the neighborhood) and are premised on Respondents' failure to view the evidence in the light most favorable to Mr. Howse as the nonmoving party (*e.g.*, insisting Mr. Howse was lingering and looked nervous, when his summary judgment evidence shows he was simply entering his own home with his own key). Opp. 16.

c. Respondents' argument that the "clearly established" standard requires existing precedent with an identical factual scenario, Opp. 19–20, ignores this Court's repeated reminders that its precedents do not require a case directly on point where the governing rule's contours are well defined. *See Saucier v. Katz*, 533 U.S. 194, 202 (2001). This Court's precedents are clear that an officer cannot arrest someone without probable cause, conduct a *Terry* stop without individualized suspicion, or use excessive force when arresting someone. *See* Pet. 20–24. These principles prevail in obvious cases, like this one, where the officers' conduct violated these long-settled legal proscriptions. *See Taylor v. Riojas*, 141 S. Ct. 52, 53–57 (2020).

d. Other circuits have denied qualified immunity at summary judgment when, as here, officers tackled a suspect to effectuate an arrest where no circumstances suggested the person was dangerous or a flight risk. *See* Pet. 23–25. Respondents cannot and do not dispute

this point. Instead, Respondents dismiss the cases Mr. Howse cites as no longer good law because they purportedly conflict with *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015). *Sheehan*, in which officers tried to disarm a schizophrenic woman in crisis without first using practices designed to minimize risk with mentally ill persons, is inapposite here. *See Sheehan*, 135 S. Ct. at 1776 (explaining that a "cursory glance" at the unusual facts of *Sheehan* distinguished it from this Court's prior case law). *Sheehan* held that, under those decidedly different circumstances, *Graham*'s "objective reasonableness" standard did not give officers clear notice that their conduct was unlawful. *Id*. at 1775–76. *Sheehan* did not overrule *Graham*, or the decisions cited in the Petition which hold that *Graham* clearly establishes a Fourth Amendment violation under facts analogous to this case.

Respondents finally suggest that any circuit split weighs in favor of qualified immunity because it suggests the law was not settled at the time of Mr. Howse's arrest. *See* Opp. 28 n.3. That is a *non sequitur*. The cases highlighted in the Petition all held that official conduct like Respondents' was clearly unconstitutional and not covered by qualified immunity based on encounters that occurred well before Detective Middaugh arrested Mr. Howse in 2016. *See* Pet. 24–25. The panel majority's holding otherwise is at odds with the holdings in those circuits and thus creates the circuit split.

II. The Panel Majority's Malicious Prosecution Ruling Conflicts with this Court's Precedent and Creates a Circuit Split.

The Petition urges this Court to resolve an entrenched circuit split on the treatment of malicious prosecution claims where one of multiple underlying charges is supported by probable cause, and to bring the panel majority's treatment of malicious prosecution claims in alignment with this Court's precedent. Respondents' counterarguments are premised on a misreading of the case law and an adoption of the panel majority's flawed conflation of false arrest and malicious prosecution claims.

a. Respondents first attempt to minimize the gulf that exists between the panel majority's treatment of malicious prosecution claims and that of many other circuits by arguing that the panel majority "did not expressly reject the 'charge-by-charge' approach . . . or hold that, in all cases, a malicious prosecution claim fails when probable cause exists for any one charge against an arrestee." Opp. 7, 9. But that is exactly what the Sixth Circuit did. The panel majority held categorically, and not just on the facts of this case, that there was "no principled reason" for treating false arrest and malicious prosecution claims differently, and thus no reason to conduct a charge-by-charge assessment of probable cause for malicious prosecution claims. *See* App. 13. The court's reasoning reflects a fundamental misunderstanding of key distinctions between false arrest and malicious prosecution claims, *see infra* p. 12, Pet. 34–36, that

runs counter to the approach of at least the Second, Third, and Seventh Circuits. *Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Johnson v. Knorr*, 477 F.3d 75 (3d Cir. 2007); *Holmes v. Village of Hoffman Estate*, 511 F.3d 673 (7th Cir. 2007).

Respondents argue that the Third Circuit has framed the appropriateness of a charge-by-charge analysis as an "intensely fact-dependent inquiry." *See* Opp. 8–9 (citing *Kossler v. Krisanti*, 564 F.3d 181, 194 (3d Cir. 2009)). Even assuming that is true, the Third Circuit's approach conflicts with that of the panel majority below, which adopted a categorical rule applicable to all Fourth Amendment malicious prosecution claims. *See supra* p. 8. Respondents also argue that the Third Circuit's cases do not uniformly apply the charge-by-charge approach for the probable cause element of Fourth Amendment malicious prosecution claims. *See* Opp. 9 (citing *Wright v. City of Phila.*, 409 F.3d 595 (3d Cir. 2005)). The existence of any intra-Third Circuit conflict confirms the need for this Court to provide clarity to lower courts and resolve the unequivocal conflict between the decision below and the decisions of the Second and Seventh Circuits in *Posr* and *Johnson*.

Respondents argue that the Second Circuit's rationale for employing a charge-by-charge analysis—to avoid officers tacking on additional meritless charges and exposing the plaintiff to a higher bail or a lengthier sentence—is irrelevant here because Mr. Howse did not present evidence that he was exposed to higher bail, a lengthier sentence, or other unnamed "burdens" because of the additional charges. Opp. 8.

But the Second Circuit in Posr never suggested that the plaintiff had to argue or present evidence that he was exposed to higher bail or a lengthier sentence, and none of the plaintiffs in *Posr*, *Holmes*, or *Johnson* presented evidence that tacking on additional charges exposed them to higher bail or lengthier sentences. Such evidence is unnecessary because, as the Third Circuit has explained, "prosecution for multiple charges where the additional charges for which probable cause is absent *almost surely will place an additional burden on the defendant*." *Johnson*, 477 F.3d at 84 (emphasis added).

The *Posr* Court's exposition about the risk of added burdens was simply an explanation for why a finding of probable cause on a lesser offense should not foreclose a malicious prosecution claim on more serious charges that require different, and more culpable, behavior. *Posr*, 944 F.2d at 100. That is precisely the circumstance here, where the misdemeanor obstruction charge for which there may be probable cause is a lesser offense than the felony assault charges for which there is not. *See* Pet. 10.

Respondents also argue *Posr* is unhelpful because Second Circuit precedent requires a showing of actual malice to sustain a malicious prosecution claim, while the Sixth Circuit does not. *See* Opp. 10. (making the same argument with respect to the First and Fourth Circuits). But the *Posr* Court was not analyzing the malice element of the plaintiff's malicious prosecution claim. *See Posr*, 944 F.2d at 100. And circuits that do not require a showing of malice to maintain a malicious prosecution claim have expressly

incorporated the Second Circuit's reasoning as relevant to the probable cause element. *See, e.g.*, *Johnson*, 477 F.3d at 83.

Respondents further argue that the Seventh Circuit's decision in *Holmes*, in which the plaintiff asserted a malicious prosecution claim under state law, has no bearing on how courts should assess the probable cause element in Fourth Amendment malicious prosecution claims. Opp. 8. But the Seventh Circuit not only expressly adopted and applied the reasoning from federal circuit courts that permit a malicious prosecution claim where one of multiple charges is supported by probable cause, *see Holmes*, 511 F.3d at 682 (citing *Johnson* and *Posr*), the court also recognized that Illinois state courts follow the same rule, *see id.* at 683. Respondents offer no principled reason for ignoring the Seventh Circuit's approach as relevant to the circuit split created by the decision below.

Respondents have also failed to counter that other circuits have implicitly adopted the charge-by-charge approach, lean towards it, or have expressly left the question open. *See* Pet. 31–33. Respondents' Opposition simply highlights the need for this Court to clarify this area of law. *See* Opp. 8–9 (highlighting the intra-circuit split within the Third Circuit); *id.* at 11 (highlighting confusion within the Fourth Circuit on the issue).

b. Respondents cite to Justice Alito's dissent in *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911 (2017), to argue that this Court has never recognized a malicious prosecution claim under the Fourth Amendment. The

Petition acknowledges as much but explains that this Court has assumed the existence of such a claim, and that at least ten circuits explicitly recognize constitutional malicious prosecution claims under the Fourth Amendment. *See* Pet. 26 n.2. This Court must therefore provide clarity to the circuit courts about a recurring issue that has caused confusion and division, *viz.*, whether the existence of probable cause for one charge defeats a claim of malicious prosecution for more serious charges where probable cause was lacking.

Assuming a Fourth Amendment malicious prosecution claim is cognizable, this Court's precedent makes clear that the tort of malicious prosecution warrants different treatment than false arrest. *See* Pet. 36. Respondents' opposition emphasizing the similarities between the two claims is the exact error the panel majority made, *compare* Opp. 14 (highlighting that both false arrest and malicious prosecution claims arise under the Fourth Amendment, require a finding of probable cause, and involve the individual's right against unreasonable seizure) *to* App. 13 (same), and fails to acknowledge the myriad reasons for treating the two claims differently. *See* Pet. 36.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 12, 2021