No. _____

In The
Supreme Court of the United States

TRINELL KING,

Petitioner,

v.

RICKY PRIDMORE,
COREY ARCHER and ANDREW HILL,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents Ricky Pridmore, Corey Archer, and Andrew Hill are White police officers who treated Petitioner Trinell King, a young Black citizen, as a tool and pawn. The officers repeatedly told King they would "fuck him over" if he did not work their sting operation to catch an armed felon. Because of this pressure, King gave in and was shot five times in the gunfight during the "botched sting."

The Eleventh Circuit weighed the evidence in favor of the officers at the summary judgment stage and held that the officers were entitled to qualified immunity because King's rights were not clearly established. The Court stated it would have ruled for King had the officers told King they would "fuck him up" instead of repeatedly telling him they were going to "fuck him over."

The questions presented for review are:

1. In granting the officers qualified immunity, the Eleventh Circuit disregarded the summary judgment standard in *Tolan v. Cotton*, 572 U.S. 650 (2014), when it improperly weighed the evidence in favor of the White officers, instead of the Black citizen.

2. The Eleventh Circuit's holding conflicts with *Hope v. Peltzer*, 536 U.S. 730 (2002) and cases from the Fourth, Eighth, and Ninth Circuits, which rejected a requirement that previous cases be "fundamentally similar" or involve "material similar" facts.

QUESTIONS PRESENTED – Continued

3. Should the judge-made doctrine of qualified immunity be narrowed to remove the "clearly established" requirement?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Trinell King, and Respondents Ricky Pridmore, Corey Archer and Andrew Hill, all police officers with the Warrior Police Department. Former defendants Jimmy Rodgers, Dylan McCoy, Ray Horn, and the City of Warrior were voluntarily dismissed at the district court level and are not part of this appeal.

RELATED PROCEEDINGS

King v. City of Warrior, No. 2:17-cv-00174-KOB, U.S. District Court for the Northern District of Alabama. Nonfinal judgment entered April 7, 2017.

King v. Pridmore, No. 2:17-cv-00174-KOB, U.S. District Court for the Northern District of Alabama. Nonfinal judgment entered November 29, 2017.

King v. Pridmore, No. 2:17-cv-00174-KOB, U.S. District Court for the Northern District of Alabama. Nonfinal judgment entered April 17, 2018.

King v. Pridmore, No. 2:17-cv-00174-KOB, U.S. District Court for the Northern District of Alabama. Final judgment entered September 6, 2018.

King v. Pridmore, No. 18-14245, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered July 30, 2020.

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INTRODUCTION

Respondents were White police officers for the City of Warrior, a city just outside of Birmingham, Alabama, that is predominantly White. Following a traffic stop, a passenger in Petitioner Trinell King's vehicle, Donovan Brown, who unbeknownst to King had outstanding warrants and a gun, fled into the woods. King cooperated with the officers during their manhunt for Brown, yet he was kept handcuffed in the back of a police SUV for two hours. Ultimately the officers threatened to harm him and forced him to participate in a sting operation to capture Brown. King was shot five times in the gunfight between the police officers and Brown when the sting failed. King brought this suit under 42 U.S.C. § 1983 challenging the officers' conduct as violating the Thirteenth and Fourteenth Amendments and Alabama law.

In its decision below, the Eleventh Circuit recognized that police officers who threaten citizens with physical harm to make them work a sting violate the Constitution. The Court incorrectly concluded that all jurors would agree that when the White police officers told King, a young Black male, that they would "fuck him over" if he did not help them, that the officers meant only that they intended to lawfully pursue charges against him. The Court violated the qualified immunity summary judgment standard by accepting the White police officers' purported intention, rather than the objective intent conveyed to Mr. King as a young Black man. The panel also held that even if the officers physically threatened Mr. King, they would be

entitled to qualified immunity because there was no precedent clearly establishing that their conduct was unconstitutional.

This Court should review the decision below for three reasons.

First, the Eleventh Circuit conspicuously disregarded this Court's precedent in *Tolan v. Cotton* when it improperly weighed the evidence for the White officers, instead of the Black citizen, at the summary judgment stage. The decision below conflicts with this Court's precedent governing the legal rule that in qualified immunity cases, the summary judgment record must be viewed in the light most favorable to the nonmovant and splits from decisions of the Fourth, Eighth, and Ninth Circuits that properly applied the qualified immunity summary judgment standard.

Second, the Eleventh Circuit also strayed from this Court's precedent in *Hope v. Peltzer*, and split from decisions of other circuits, which hold that obviously unconstitutional conduct is clearly established regardless of prior case law addressing similar facts.

Third, this case presents an opportunity for the Court to reexamine modern qualified immunity jurisprudence and in particular the requirement of "clearly established."

OPINIONS AND ORDERS BELOW

The opinion of the Eleventh Circuit is reported at 961 F.3d 1135; it is reproduced in the Appendix ("App.) at 1a-26a. The order of the district court granting summary judgment is not officially reported but may be found at 2018 WL 4257934; it is reproduced at App. 27a-54a. The final order of the district court is reproduced at App. 55a-56a. The unpublished order of the Eleventh Circuit denying the petition for panel rehearing and rehearing en banc is reproduced at App. 57a-58a.

JURISDICTION

The Eleventh Circuit entered its judgment on June 5, 2020. App. 1a. A timely petition for panel rehearing and rehearing en banc was denied on July 30, 2020. App. 58a. By its Order dated March 19, 2020, this Court extended the time for filing petitions for certiorari to 150 days from the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides that "the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise

reexamined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Section 1 of the Thirteenth Amendment to the U.S. Constitution provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. Const. amend. XIII, § 1.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. XIV, § 1.

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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 OF THE CASE

Because the district court dismissed King's claims on summary judgment, the facts in this petition are his "version of the facts." *Scott v. Harris*, 550 U.S. 372, 378 (2007) ("In qualified immunity cases, this usually means . . . the plaintiff's version of the facts."). The

facts and inferences are viewed in the light most favorable to King. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

I. King Was Shot Five Times After He Was Forced by the Officers to Participate in a Sting Operation to Capture an Armed Felon.

Mid-morning on September 28, 2015, Petitioner Trinell King was driving his girlfriend's car on a State highway in Warrior, Alabama; Donovan Brown was a passenger. App. 3a. Officer Ricky Pridmore of the City of Warrior Police Department was on patrol with his K9 and performed a traffic stop of King because the car did not have a tag. *Id*.

King provided Pridmore with his identification. Brown gave Pridmore a fake name and date of birth. When Pridmore went back to his police SUV to check on their identities, Brown told King he had outstanding warrants and a gun and would run. App. 3a. Brown opened the front passenger door, jumped out of the car and ran across the highway into the woods, taking his gun with him. App. 32a. After Brown ran into the woods, Pridmore charged up to King with his gun drawn and ordered him out of the car. King told Pridmore that Brown had a gun. Pridmore handcuffed King, placed him in the back seat of the patrol vehicle and locked him inside. App. 5a.

Pridmore retrieved a K9 from his police SUV and chased Brown on foot. *Id*. Other Warrior police officers, including Respondents Corey Archer and Andrew Hill,

came to the scene and joined in the foot search for Brown. App. 32a. Four or five other White officers arrived on the scene and asked King questions about Brown. King had already told Pridmore that Brown had a gun. He gave the other officers Brown's real name, told them about his outstanding warrants and provided them with Brown's cell phone number. App. 6a. King remained handcuffed in the back of the police SUV during the manhunt. App. 5a.

Two hours later, Pridmore and Archer returned to the scene. App. 6a. The officers were frustrated in their failed search for Brown. *Id*. Archer and Pridmore devised a ruse to catch Brown. They opened the door of the police SUV and surrounded King while he was still handcuffed and seated. The officers told King he had to help them catch Brown, and they wanted King to pick him up.

King testified that he did not want to help them catch Brown. "[He] knew Brown was armed, that the police were looking for him, and that it would be dangerous for [him] if [he] picked [Brown] up. [He] was never asked . . . whether [he] wanted to go pick Brown up. Instead, [they] kept telling [him] that [he] had to go." App. 7a. King told the officers, "can y'all just stop doing this and get me wherever y'all got to do and let me go because I didn't do nothing wrong." *Id*. King testified the officers "were going to hurt [him] if [he] refused." *Id*. He testified he "was ready to go to jail, to have the car towed, pay any traffic offenses, and fight false charges if the [officers] had not threatened to hurt [him]." App. 9a. The officers repeatedly told him "we're

going to make sure we fuck over you, if you fuck over us." King was "scared," "felt threatened," believed "[his] life was in danger," and only "gave in" because "[he] had no choice." App. 7a.

The panel held the officers only meant to "fuck him over" by charging him with traffic or parole violations. While this was how the threats started, King indicated the threats became more sinister and menacing.[1] King testified in his deposition that as a young black man living in the streets of Birmingham, "fuck him over" meant that "if you cross over them, then they're going to deal with you in a bad way, like get shot or killed, anything. That's how I was feeling, and they left me no choice." App. 8a, 33a (emphasis added).

Brown called King's phone while King was handcuffed, sitting in the SUV and surrounded by six or seven officers standing over him. Archer was holding King's phone. App. 9a. King testified "I was afraid [the officers] might hurt me if I continued to refuse to pick up Brown, I told Brown while on speaker phone with [the officers] listening that the police let me go and that I would pick him up." King explained:

> [Archer] answered my phone and put it on speaker phone. . . . So, when we hung up the phone, they drove me to . . . a field with nothing but rocks. . . . [Archer] said, once again, if

[1] The officers disputed these events. They testified that they were going to write King a ticket, let him go, tow the car, and "go eat lunch" when *King* allegedly proposed the sting to capture Brown. But the officers admitted that King "wasn't free to leave and go back home if he wanted to." *Id*.

> you fuck over us, we're going to fuck over you. And they told me what to do, crank the car up, pick him up, they're going to be far behind me and they're going to pull the car over.

King further testified:

> I was locked in the back of a patrol SUV and handcuffed. The only time the door was opened was when I was surrounded by officers and still handcuffed. I was only let out of handcuffs, allowed out of the back seat, and given the keys back to the car after I "gave in" and told [the officers] I would pick up Brown. At no time did [the officers] tell me I was free to leave, that I could just go to jail, or that I could just choose not to pick up Brown. *They made it very clear I had no choice in the matter*. . . . [I could not] have just driven away. . . . The [officers] would have hurt me if I had done that.

App. 8a, 33a (emphasis added).

The officers took King's car off of the tow truck, removed his handcuffs and put him in his car. App. 9a. The Officers planned to have five vehicles and seven armed officers involved in the sting. The officers told King to drive to the nearby access road of the interstate and to get on the interstate going south toward Birmingham, where the officers would then stop his car at a certain point on the interstate against a wall. App. 33a.

King picked up Brown as the officers ordered. App. 10a. But the officers did not follow their own plan.

Instead, they attempted to conduct the traffic stop too soon. App. 34a. When Brown saw the five patrol cars, he pulled out his gun and started shooting. The officers returned fire. Brown was shot thirteen times, and King was shot five times. App. 10a. No officer was hurt.

II. King Files Suit Challenging the Constitutionality of the Officers' Conduct, and the District Court Holds that the Officers Are Entitled to Qualified Immunity.

King sued the officers under 42 U.S.C. § 1983 and Alabama state law, alleging that the officers acted with deliberate indifference to his health and safety by forcing him to participate in Brown's capture under threats in violation of his constitutional rights.[2] App. 10a.

The district court granted summary judgment in the officers' favor. The court held that the officers were entitled to qualified immunity on the constitutional claims and State agent immunity on the Alabama law claims. App. 29.

The district court recognized that the officers put King in "a half-baked sting operation" that "unsurprisingly, went awry," that "King established that he did

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[2] King did not contend that the traffic stop or his initial handcuffing, detainment and questioning of him, was unlawful or improper. Nor did he contend that their intentional shooting of Brown (and mistaken shooting of him) was unlawful or improper under the circumstances. Instead, it was the officers' unconstitutional and tortious conduct that occurred between these two events that subjected them to liability. App. 10a.

not voluntarily consent to participate in the sting," and that the officers "used . . . King as unwilling bait" and "forced" him to "act[ ] as the [o]fficers' lure in the botched sting." App. 28a. While unwilling to hold there was a constitutional deprivation, the court analogized that the officers "cannot evade liability for a shark attack when it forced the victim to play the role of bait – a role that carrie[d] predictable and inherent risks of harm" because "they remove the victim's ability to choose whether he faces those inherent risks." App. 42a.

The court correctly held that "the critical question is whether . . . King voluntarily consented to act as bait, or whether the officers forced him on the hook. . . . " App. 43a. But the district court ultimately weighed the evidence and inferences against King and held that "[c]onsidering their context and the circumstances," it was allegedly undisputed that the officers' acts "would not have been plainly or obviously coercive to a reasonable officer," and "[n]o reasonable officer would have known th[at the officers'] acts rendered . . . King's consent to participate in the sting operation involuntary." App. 29a.

The district court then held that the asserted constitutional violation – that the officers forced King to participate in the dangerous sting operation with deliberate indifference to his health and safety – was not clearly established. App. 29a. The court concluded that although the Officers' acts may have left "Mr. King" with the belief he had no choice but to participate in

the sting, the same acts would not have been plainly or obviously coercive to a "reasonable officer." App. 29a.

III. The Eleventh Circuit Makes Its Own Factual Findings and Concludes that Even Had the Officers Physically Threatened Mr. King, the Officers Would Be Entitled to Qualified Immunity Because There Was No Precedent Clearly Establishing that Their Conduct Was Unconstitutional.

The Eleventh Circuit affirmed. In conducting its qualified immunity analysis, the Court recited the familiar summary judgment standard, noting that summary judgment is properly granted "*only* if the movant shows that there is no genuine dispute as to any material fact." App. 3a. But like the district court, the Eleventh Circuit also improperly weighed the evidence in favor of the White officers instead of the young Black citizen. To get to its conclusion, the panel inoculated the officers' threatening language to make it seem innocent and disregarded the totality of the evidence about what happened. Six or seven officers, including the three Respondents, stood over King while he was handcuffed in the back of a police SUV (where he had been for two hours) and repeatedly threatened to "fuck him over" if he did not pick up Brown.

The panel also held that even had the officers physically threatened Mr. King, they would be entitled to qualified immunity because there was no prior case clearly establishing that their conduct was

unconstitutional.[3] The court concluded that "[i]t cannot be maintained that all objectively reasonable officers in their position would have known – *with obvious clarity* – that what they said, in context, would necessarily be understood as a threat of false criminal charges and physical violence in violation of the Constitution. While King may have *subjectively* interpreted the officers' words to that effect, that is categorically not the standard we must apply." App. 21a-22a.

King timely filed a petition for rehearing en banc. The Eleventh Circuit denied the petition on July 30, 2020. App. 58a. The judgment issued on August 7, 2020. *Id*. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With This Court's Precedent Governing The Legal Rule That In Qualified Immunity Cases, The Summary Judgment Record Must Be Viewed In The Light Most Favorable To The Nonmovant, and Splits From Decisions of Other Circuits Denying Qualified Immunity.

While the summary judgment standard has become more difficult for plaintiffs to overcome, lower courts still must take the facts in the light most

[3] The Eleventh Circuit also held that qualified immunity automatically vests the officers with Alabama State-agent immunity. Thus, disposition of the federal claims also disposed of King's State law claims. (App. 25a).

favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650 (2014). In *Tolan*, the circumstances surrounding the shooting of a young, unarmed, black male on his own front porch were disputed, but the Fifth Circuit gave the officer the benefit of the doubt based on his version of the facts. The defendant police officer incorrectly entered a 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 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. Then the officer grabbed the plaintiff's mother's arm and slammed her against the garage door. *Id.* at 653.

The 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 officer testified that the plaintiff rose to his feet, but the parties agreed that the plaintiff yelled at the officer to "Get your fucking hands off my mom." *Id*. With no verbal warning, the officer drew his pistol and fired three shots at the plaintiff, resulting in serious injuries. *Id.* at 654. Plaintiff filed suit alleging excessive force in violation of the Fourth Amendment. *Id.*

The district court held that using force was reasonable. *Id*. The Fifth Circuit affirmed over a dissent, holding that even if the 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 these 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 (emphasis added). The Fifth Circuit also relied upon the officer's allegation that the plaintiff was "moving to intervene" in the altercation between the officer and the plaintiff's mother. *Id.*

This Court granted certiorari and vacated and remanded the Fifth Circuit's decision, emphasizing 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, this Court stressed that the lower 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.

This Court rejected the Fifth Circuit's determination that plaintiff's admonition to "[g]et your fucking hands off my Mom" was a verbal threat, explaining that "a jury could reasonably infer that his words, *in context*, did not amount to a statement of intent to inflict harm," especially given testimony that plaintiff "was not screaming." *Id*. (emphasis added). 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, this 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. The majority opinion[4] explained that the Court addressed this case because the Fifth Circuit's opinion "reflect[ed] a clear misapprehension of summary judgment standards in light of [its] precedents." *Id.* at 659.

A. The Eleventh Circuit conspicuously disregarded this Court's precedent in *Tolan v. Cotton* by granting qualified immunity based upon its interpretation of the evidence when it improperly weighed the evidence for the White officers, instead of the Black citizen.

In *Tolan v. Cotton*, this Court emphasized that the qualified immunity standard does not authorize a departure from the basic rules of summary judgment. Therefore, just as in any other case, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," and "must view the evidence 'in the light most favorable to the opposing

[4] Justice Alito, joined by Justice Scalia, concurred in the judgment only. Specifically, Justice Alito opined 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.

party.'" 572 U.S. at 656. This is because "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

The Eleventh Circuit egregiously erred in applying the governing legal rule by crediting the White police officers' purported intention rather than how the jury could interpret their intent based on the words and conduct conveyed towards Mr. King, a young Black man, and the widespread police brutality experienced by Black Americans, especially in Birmingham. The Eleventh Circuit panel made the very error this Court recognized as warranting reversal in *Tolan*. The law does not allow judges to decide which version of plausible conflicting descriptions of incidents is more credible, but the panel did precisely that, stretching the facts to create a questionable opposing inference, and then claiming it was the only reasonable inference that the jury could draw.

The Eleventh Circuit stated that "[i]f the officers had told King 'help us, or we're going to f**k you up' (or something like that) then King would have a more compelling argument." App. 16a. However, there is no difference between "we're going to fuck you up" and "we're going to fuck you over," when considered in context, and both are threatening words to use against a young Black man handcuffed in the back of a police vehicle for two hours – a man who had fully cooperated with them to that point. *Tolan*, 572 U.S. at 589.

Threatening comments are circumstantial evidence of mental state that can be considered in determining the intent underlying police conduct.

Judges are not equipped to determine from a cold transcript whether a threat has been made. And judges are not experts on how police officers talk to Black Americans and vice-versa, or the methods of discourse used in the streets. The Seventh Amendment requires that the right of trial by jury be "preserved." U.S. Const. amend. VII. Chief Justice Rehnquist recognized that "[i]t is *precisely because* the Framers believed that they might receive a different result at the hands of a jury of their peers than at the mercy of the sovereign's judges, that the Seventh Amendment was adopted." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 354 (1979) (Rehnquist, J., dissenting). The Founders wanted jurors to "bring to a case their *common sense* and *community values*" and believed their inexperience in the law was "an *asset* because it secures a *fresh perception* of each trial, avoiding the stereotypes said to infect *the judicial eye*." *Id*. at 355 (emphasis added). Finally, juries are able to pick-up on the "passional elements in our nature, and thus keep the administration of law in accord with the wishes and feelings of the community" because "a jury would reach a result that a judge either *could not or would not* reach." *Id.*

Here, the panel reached a result that a jury *would not* have reached. The panel held the officers were making "mere enticements" to make King help the officers, and just pointing out that King "could have been lawfully charged with at least three motor vehicle

violations." App. 15a. However, no one uses the word "fuck" to make anything "enticing." Instead, it is used to force or scare others into submission. When made by a White police officer to a young, Black, American man, it is terrifying.

Conversely, the officers would not be "fucking King over" by arresting him or towing the car. They would only be doing what they had the right to do. It would be very odd for an officer, who is in the right, to phrase things in such a way if he did not mean to be threatening or scary. And regardless of what words were used, it is not what one says, but how one says it, that has the greatest impact on the listener. The powerful have always been able to manipulate the weak by subtle gestures and actions contrary to, and out of place with, the spoken words accompanying them.

The panel recognized "King may have subjectively interpreted the officers' words as a threat of physical violence," but claimed he just misunderstood the situation, or the officers did not know how they were making him feel. App. 21a-22a. However, many Americans would find that King did not misunderstand anything, and that the officers knew full well what they were doing. The jury must decide if there was coercion.

B. The Eleventh Circuit's holding that the officers were entitled to qualified immunity conflicts with decisions of the Fourth, Eighth, and Ninth Circuits that properly applied the qualified immunity summary judgment standard.

The Eleventh Circuit's holding directly conflicts with decisions of the Fourth, Eighth and Ninth Circuits denying summary judgment under similar circumstances.

In *Williams v. Holley*, the officer contended there was insufficient evidence for a reasonable juror to find his decision to use lethal force against the plaintiff was unreasonable. 764 F.3d 976 (8th Cir. 2014). The district court denied the officer's qualified immunity summary judgment, and the Eighth Circuit affirmed holding that the district court properly applied the qualified immunity summary judgment standard, citing *Tolan*. *Id*. at 980. "[The officer], in essence, contend[ed] the court is bound to accept his version of events because he [was] the only surviving eyewitness of the altercation." *Id*. The Court held that "[the officer] . . . overlook[ed] the circumstantial evidence which show[ed] possible inconsistencies with [the officer's] account of the shooting. As the district court found, the circumstantial evidence raised questions of fact regarding material aspects of [the officer's] account of the event. We must view these inconsistencies in the light most favorable to [the plaintiff], giving [the plaintiff] the benefit of all reasonable inferences." *Id*.

In *Cruz v. City of Anaheim*, the district court granted summary judgment for officers based on their uncontradicted version of the facts. 765 F.3d 1076 (9th Cir. 2014). But the Ninth Circuit held this question should not be answered by considering only the officers' self-serving testimony. *Id*. at 1080. Instead, the court must consider whatever circumstantial evidence might discredit their story. This, along with other "material factual discrepancies," led the Ninth Circuit panel to reverse summary judgment. *Id.*

Finally, although not a qualified immunity case, in *Jacobs v. N.C. Admin. Office of the Courts*, the Fourth Circuit relied on *Tolan* to reverse a summary judgment that reflected a "clear misapprehension of summary judgment standards." 780 F.3d 562, 568 (4th Cir. 2015). The appellate court noted that "[s]trikingly, both of the district court's key factual findings . . . rest[ed] on factual inferences contrary to Jacob's competent evidence" and that the district court "state[d] the facts in the light most favorable to the [defendant] – not Jacob, the nonmovant." *Id*. "In this case, as in *Tolan*, the district court erred by failing to consider all of the evidence in the record." *Id*. at 569.

C. The Decision below further entrenches a deep split on applying the qualified immunity summary judgment standard.

This case is not the only case where an appellate court has misapplied 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 Sixth and Seventh Circuits properly applied *Tolan* and reached the opposition conclusion in three qualified immunity cases.

The district court's opinion in *Nelson v. City of Battle Creek*, No. 1:16-cv-456, 2018 WL 1010217 (W.D. Mich. 2018), had a noticeably different recitation of the facts than the appellate court's opinion. *Nelson v. City of Battle Creek*, 802 Fed. App'x 983 (6th Cir.) (unpublished), *petition for cert. filed sub nom*, *Nelson v. Rivera*, (Aug. 26, 2020) (No. 20-245).[5] The district court denied summary judgment holding that "the question of qualified immunity turns on which version of the facts one accepts, precluding a determination of liability by the court." The Sixth Circuit reversed. *Id*. at 987. The dissent noted that contrary to *Tolan*, the panel majority repeatedly accepted the officer's framing of the evidence over the plaintiff. *Id*.

Similarly, in *Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020), *petition for cert. filed*, (Nov. 5, 2020) (No. 20-636),[6] the Sixth Circuit affirmed summary judgment in

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[5] The Question Presented in the *Nelson* petition is "[w]hether 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." (Petition, p. i).

[6] In granting the officer qualified immunity, the Sixth Circuit "made the very error that this Court recognized as warranting summary reversal in *Tolan v. Cotton*, 572 U.S. 650, 656 (2014)

an officer's favor. The dissent noted that "[m]any of the majority's conclusions . . . [were] predicated on resolving key factual disputes in the officers' favor" and that "[p]roperly considering those factual disputes under the standard [that] precedent mandates compels a different conclusion than the majority's."). *Id*. at 411 (Cole, C.J., dissenting in part). The petition is premised on the appellate court's failure to follow *Tolan*.

In *Day v. Wooten*, the Seventh Circuit opined that an appellate court had the discretion to accept either the district court's recitation of the facts or the plaintiff's version of the facts. 947 F.3d 453, 456 (7th Cir. 2020), *petition for cert. filed*, (Oct. 5, 2020) (No. 20-477).[7] The Seventh Circuit further opined that it had the discretion to examine additional evidence from the record. *Id*. 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.

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. This case presents a compelling opportunity to do so. First, there is a particularly strong

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(per curiam): defining the context of the clearly established law inquiry in a way that failed to consider all of the evidence presented by the nonmovant." (Petition, p. 3).

[7] The petition addresses the "new" factual determinations made by the appellate court and addresses how the court "essentially construe[d] disputed and undisputed facts in a light most favorable to" the officers. (Petition, p. 36).

interest in ensuring that the young black man shot five times by the police in this case can seek compensation for injuries which will affect him for the rest of his life. Second, the Eleventh Circuit's framing of the evidence in this case clearly ignores the applicable standard under *Tolan*. The Eleventh Circuit clearly believed the Officers over King in violation of the *Tolan* standard to qualified immunity motions for summary judgment.

II. The Decision Below Regarding The Absence Of Clearly Established Law Conflicts With This Court's Precedent Which Holds That Obviously Unconstitutional Conduct Is Clearly Established Even If There Is No Case Law Precisely On Point.

A key issue in qualified immunity cases such as this is whether the officer had fair and clear warning that his conduct was unlawful. *Saucier v. Katz*, 533 U.S. 194, 206 (2001). In the light of preexisting law, the unlawfulness must be apparent to a reasonable officer. The Eleventh Circuit understood these principles to mean that, absent a prior case involving similar facts where the officer's conduct was held to have violated the Thirteenth and Fourteenth Amendments, the plaintiff will almost always lose, and it failed even to consider whether this case involves obvious constitutional violations. The Eleventh Circuit's approach finds no support in this Court's precedent, and it misconstrues this Court's instructions about the significance of prior cases involving similar facts.

A. The Eleventh Circuit's determination regarding the absence of clearly established law is contrary to *Hope v. Peltzer* which held that obviously unconstitutional conduct is clearly established whether or not there is case law precisely on point.

The panel's determination regarding the absence of clearly established law is contrary to *Hope v. Peltzer* which held that obviously unconstitutional conduct is clearly established whether there is case law precisely on point. 536 U.S. 730, 739 (2002). *Hope* laid the groundwork for the "obvious clarity" exception. The plaintiff was a prisoner handcuffed to a hitching post twice as punishment for his disruptive conduct. *Id.* at 733–34. Once, he was kept shirtless in the hot sun for seven hours, was given no bathroom breaks, and was taunted by a guard for being thirsty. *Id*. The Eleventh Circuit held that conduct violated the Eighth Amendment, but the guards were entitled to qualified immunity because the closest pre-existing decisions "though analogous were not materially similar." *Id*. at 735–36.

This Court agreed that the conduct violated the Eighth Amendment but reversed the Eleventh Circuit's holding that the guards were entitled to qualified immunity. Requiring all plaintiffs to find a "materially similar" pre-existing case was a "rigid gloss on the qualified immunity standard" that was "not consistent" with earlier precedent. *Id.* at 739. The Court held, "[a]s the facts [were] alleged by Hope, the Eighth Amendment violation is obvious." *Id.* at 738. It was obvious

enough that a reasonable official would understand that doing what the guards did violated the Eighth Amendment even though "the very action in question ha[d not] previously been held unlawful." *Id.* at 739. The Court elaborated: "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding. The same is true of cases with 'materially similar' facts." *Id.* at 741.

This Court has since cited *Hope* as the precedential basis for the principle that conduct may so obviously violate the Constitution that no pre-existing case law is needed to show it is clearly established law. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. 364, 377–78 (2009) (citing *Hope* for the proposition that "officials can still be on notice that their conduct violates established law . . . in novel factual circumstances"); *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("in an obvious case, these standards can 'clearly establish' the answer, even without a body of relevant case law."); *accord Tolan*, 572 U.S. at 656.

Three months after deciding this case *the very same panel* decided *Cantu v. City of Dothan*. An officer shot and killed an unarmed, nonviolent individual during an arrest, doing so without forewarning to the individual and to the surprise of the other officers. 974 F.3d 1217, 1221 (11th Cir. 2020). The Eleventh Circuit reversed summary judgment based on the officer's assertion of qualified immunity, finding the officer's conduct "so obviously violate[d] the Constitution that no

pre-existing case law is needed to show that it is clearly established law." *Id*. at 1233. The court recognized that to demonstrate a constitutional violation as "clearly established," a plaintiff must "point[ ] to a case, in existence at the time, in which the Supreme Court or [the Eleventh Circuit] found a violation based on materially similar facts." *Id*. at 1232. But the court acknowledged that sometimes, this conduct will be so extreme that a plaintiff can "defeat a qualified immunity defense by 'showing that the official's conduct lies so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official,' " avoiding what the Supreme Court has deemed a "rigid, overreliance on factual similarity." *Id*. (citing *Hope*, 536 U.S. at 742). The Eleventh Circuit cited *Tolan* for this proposition of law. *Id.* at 1233.

Viewing the evidence in the light most favorable to the plaintiff, the court determined that "the use of lethal force was so obviously excessive that any reasonable officer would have known that it was unconstitutional, even without pre-existing precedent involving materially identical facts." *Id*. at 1235. Because the individual was not committing a dangerous felony, was in the officers' custody when he was shot, and was provided no warning of deadly force, he was subject to conduct by the officer that obviously violated the Fourth Amendment.

A very recent case decided by this Court also supports this point. In *Taylor v. Riojas*, a prisoner spent six days in prison between two cells: one covered in

massive amounts of feces and the other frigidly cold with a clogged drain overflowing with raw sewage. 141 S. Ct. 51, (U.S. Nov. 2, 2020) (per curiam). The Fifth Circuit concluded that the prison officials responsible for the inmate's confinement did not have " 'fair warning' that their specific actions were unconstitutional." 946 F.3d 211, 212 (5th Cir. 2019) (quoting *Hope*, 536 U.S. at 741). Finding the prisoner had an obvious right to be free from "deplorably unsanitary conditions," this Court reversed the Fifth Circuit's grant of qualified immunity on summary judgment, rejecting that "[t]he law wasn't clearly established" because of "ambiguity in caselaw." *Id*. at n. 2 (citation omitted). Instead, the Court held the prisoner's right was so obvious that "ambiguity in the caselaw" could create no doubt.[8] *Id*. Thus, "no reasonable correctional officer could have concluded that, under the extreme circumstances of this case, . . . [the conditions were] constitutionally permissible." *Id*. at *1 (citing *Hope*, 536 U.S. at 741) (explaining "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

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[8] This Court noted that although an officer-by-officer analysis would be necessary on remand, the record suggested that at least some officers involved in the prisoner's ordeal were deliberately indifferent to the conditions of his cells. *See*, *e.g.*, 946 F.3d at 218 (one officer, upon placing the prisoner in the first feces-covered cell, remarked to another that the prisoner was " 'going to have a long weekend' "); *ibid.*, and n. 9 (another officer, upon placing the prisoner in the second cell, told the prisoner he hoped the prisoner would " 'f***ing freeze' ").

B. The improper factual determinations did not define the clearly established right at issue based on the "specific context of the case."

What the law does or does not clearly establish to assess qualified immunity is a question of law. But factual issues are an inherent part of the analysis; this Court has instructed lower courts that "the dispositive question is 'whether the violative nature of [the] *particular* conduct is clearly established,'" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011) (emphasis added), and that the inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id*. (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). In a case like this one, where the court has found the facts on summary judgment insufficient to determine exactly what the particular conduct was, let alone whether it violated King's constitutional rights, the court could not fairly rule on the immunity defense. See *Tolan*, 572 U.S. at 657 (holding that even when "a court decides only the clearly-established prong of the standard," it "must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions").

Here, the Eleventh Circuit's improper factual determinations did not "define the 'clearly established' right at issue on the basis of the 'specific context' of the case." *Id.* This Court has recognized in the Section 1983 deliberate indifference context that an officer's knowledge of the risk of serious harm to the plaintiff

may be established by "inference[s] from circumstantial evidence" or "from the very fact that the risk was obvious." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

III. The Court Should Grant Review To Remove the "Clearly Established" Requirement.

Many believe that the judicially-created doctrine of qualified immunity is "beyond repair." Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 Notre Dame L. Rev. 1887, 1892 (2018). This Court should grant this petition because it presents an ideal vehicle for reexamining modern qualified immunity jurisprudence and in particular the clearly established requirement, which derives neither from the text of § 1983 nor the common law of official immunity. Nothing in the language of § 1983, as originally enacted or as currently codified, requires that a constitutional violation be clearly established. "This 'clearly established' requirement is not in the Constitution or a federal statute." *Jamison v. McClendon*, No. 16-cv-595-CWR, 2020 WL 4497723 at *13 (S.D. Miss. Aug. 4, 2020) (noting this Court "came up with [clearly established] in 1982" in *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). *See also* William Baude, *Is Qualified Immunity Unlawful*?, 106 Cal. L. Rev. 45, 81 (2018).

The divergent approaches of the courts of appeals demonstrate that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring

in part, dissenting in part). "The question of 'what makes the law clearly established' is riddled with contradictions and complexities." Karen M. Blum, *Section 1983 Litigation: The Maze, The Mud, and The Madness*, 23 Wm. & Mary Bill Rts. J. 913, 945 (2015). See also John C. Jeffries, Jr., *What's Wrong with Qualified Immunity*?, 62 Fla. L. Rev. 851, 869 (2010) (discussing "the divergent approaches of the Circuits" in determining whether prior precedent clearly establishes a constitutional violation for qualified immunity purposes). The practical cost of this confusion is that it largely nullifies § 1983.

What began two generations ago by this Court to apply a narrow good-faith defense to a false arrest claim (because bad faith is an element of that claim at common law) has since been transformed to judicial policy preference into a near total liability shield in all Section 1983 claims. The language of Section 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980). "Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.'" *Jamison*, 2020 WL 4497723 at *13. Qualified immunity is one reason why police are emboldened to violate citizen's constitutional rights without fear of repercussions. This near-universal protection of government officials is contrary to the intent of the Section 1983 statute.

The Thirteenth and Fourteenth Amendments were created to protect Black Americans. Section 1 of the Ku Klux Act of 1871, now codified at 42 U.S.C. § 1983, uniquely targeted state officials who "deprived persons of their constitutional rights." *Baxter v. Bracey*, 140 S. Ct. 1862 *1 (2020) (Thomas, J., dissenting). The doors to the courthouse were opened to "any person who had been deprived of [their] federally protected rights by a defendant acting under color of state law." Zach Lass, *Lowe v. Remisch: Lowering the Bar of the Qualified Immunity Defense*, 96 Denv. L. Rev. 177, 180 (2018). *See also Mitchum v. Foster*, 407 U.S. 225, 239, 242 (1972) (citations omitted).

Here, the Eleventh Circuit immunized White officers from shooting King five times while participating in a dangerous sting operation he was unable to refuse. His claims were dismissed on summary judgment on qualified immunity grounds, even though the White officers' conduct clearly, obviously and egregiously violated both the Thirteenth and Fourteenth Amendments. The Eleventh Circuit panel found that no prior case law "clearly established" these rights in a factually similar way. Taking a step further, the panel also narrowed its "clearly established" definition of the right upon finding – as a matter of law – that no reasonable officer could have known that the words and conduct that plainly threatened King would force him to do what the officers wanted. Its ultimate holding that these officers allegedly did not know what they did was coercion, gives bad officers in Alabama, Georgia, and Florida cover to do this again. If they say the

right words, and they will be immune. If telling a citizen they will "fuck them over" is not coercion, no citizen, Black, White, or otherwise, will be safe.

Finally, this case falls squarely within the ongoing public conversation about White law enforcement officers violating the constitutional rights of non-combative African American males accused of a minor infraction. This is an appropriate time for change. There is an ongoing national conversation sparked by outrage, protests, and riots about how qualified immunity unfairly shields law enforcement officers from liability for force. The country is embroiled in a great public debate on whether Black Americans suffer disproportionate scrutiny, harm, and abuse by police officers. Stated more succinctly, whether Black Lives Matter.[9] "Recently publicized episodes of police misconduct vividly illustrate the costs of unaccountability. Indeed, the NAACP Legal Defense Fund has explicitly called for "re-examining the legal standards governing . . . qualified immunity." William Baude, *Is Qualified Immunity Unlawful*?, 106 Calif. L. Rev. 45, 48 (2018). This case enables the Court to consider the continued validity of

[9] As context, the Eleventh Circuit's opinion in this case was issued on June 5, 2020, at the peak of tensions between peaceful protestors and the police, immediately after some (but not all) law enforcement agencies had responded to peaceful demonstrations near the White House (comprised largely of Black and other Americans of Color) with smoke, gas, spray, rubber bullets, flash grenades, and officers in battle gear pushing them with shields, batons and horses.

the clearly established requirement in qualified immunity jurisprudence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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