No. 20-877

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' arguments in opposition to certiorari are breathtaking yet predictable. As explained in the Petition, the Eleventh Circuit's failure to consider the legal significance of the facts Mr. King presented at summary judgment conflicted with this Court's decision in *Tolan v. Cotton*, 572 U.S. 650 (2014) (per curiam). The Eleventh Circuit improperly weighed the evidence for the White officers, instead of the Black citizen, at the summary judgment stage. 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. King as the law requires, summary judgment should never have been granted.

The Eleventh Circuit also strayed from this Court's precedent in *Hope v. Pelzer*, 536 U.S. 730 (2002). In their brief in opposition, Respondents focus too much on the facts in *Hope* and not on the Court's holding that obviously unconstitutional conduct is clearly established whether there is case law precisely on point. This case also presents an opportunity for the Court to reexamine modern qualified immunity jurisprudence and in particular the requirement of "clearly established."

Finally, Respondents' brief in opposition only emphasizes the necessity of granting the petition, either for plenary review of the questions presented or summary reversal.

ARGUMENT

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.

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 interpreting the evidence, federal judges must give the benefit of all doubts and debatable inferences to the plaintiff. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). Our system does not allow defendants to win cases on paper, without having to face a jury, when reasonably minded jurors might not accept what they claim to be true. We allow juries to determine what is true and what is false when the evidence is disputed. And even when the facts are undisputed, but different inferences may be reasonably drawn from the facts, we still let the jury decide the case.

The Respondents' response to Mr. King's petition for writ of certiorari confirms that certiorari or at least summary reversal is warranted. The officers' brief is full of factual statements, which they claim are undisputed, but which disregard the much more reasonable inferences and conclusions that reasonable jurors would draw. BIO 1. From the beginnings of this case to the present, the officers' counsel, the district judge, and

the appellate judges have given the benefit of the doubt to the officers. At every stage, they have cast the officers' actions in the best light, and then professed these are allegedly the undisputed facts. While the undersigned counsel for Mr. King have seen this phenomenon throughout their decades of practice, the practice seems to enjoy a zenith of strength in police misconduct cases, and it is particularly strong here. Someone needs to recognize the "elephant in the room." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

As part and parcel of this phenomenon, the Respondents' Brief in Opposition goes so far as to actually quote the online Urban Dictionary in defense of the officers and the appellate panel's bizarre distinction between the phrase "fuck you over" and "fuck you up." BIO 19, fn.16. The not-so-subtle suggestion of the officers is: *See, we know Black people, here is the proof how they talk. Our officers are so smart. We know how to talk to them. You have to use strong words with them, or they will not do what is right. We are really the good guys. The Urban Dictionary proves it.* There is no evidence that the officers ever consulted the Urban Dictionary, or that the officers were trying to make such a distinction, or that Mr. King even knew there was such a distinction, or that the Urban Dictionary existed. This is just another stroke in the defense's and the lower courts' constant drumbeat of excuses for what we all know is inexcusable behavior. To give some reason – any reason – for the courts to pass off the officers' conduct as reasonable.

Another example is how the officers' response has spun Mr. King's testimony that "fuck you over" could

"mean anything." Mr. King testified: "It can mean being shot. It can mean being anything. My life – I was nervous and scared." He also testified "fuck you over" meant "if you cross over them, then they're going to deal with you in a bad way, like get shot or killed, anything. So that's how I felt. That's how I was feeling, and they left me no choice." App. 7a. The officers' response ignores the obvious thrust of his testimony – that he took the repeated statements that the officers would "fuck him over" as a threat against his life but argues that since "anything" could include something benign, innocent, or merely conversational the officers must have meant to use the phrase "fuck you over" in a benign, innocent, or merely conversational way. Then, somehow, this becomes the only reasonable conclusion that can be drawn from the evidence.

It was normal practice of the Warrior Police Department to write a citation and tow a vehicle, and not arrest or jail an individual for these offenses, and one officer (Pridmore) had arrested no one for these offenses before. Why the change in protocol? King pleaded, "can y'all just stop doing this and get me wherever y'all got to do," which indicated that even a hard negotiating stance was unconstitutional. Why keep King handcuffed until after they talked to Brown? Why the thug-like antics, like telling King as he drove away they were "watching [him] to make sure [he] didn't try nothing stupid," and giving him one last "if you fuck over us, we're going to fuck over you."

A plausible inference is suggested by the Respondents. It is made to seem rational and reasonable. Then it somehow becomes the only conclusion that can be

drawn. Then it is written down as the undisputed fact. This practice is wrong. It is derogatory of the right to trial by jury. And it should stop.

The undersigned counsel for Mr. King has always thought these kinds of arguments and judicial findings, which especially saturate the defense briefs and judicial opinions, were intentional violations of our civil procedure rules for summary judgment motions. However, we now wonder if they are instead driven by a somewhat involuntary reaction of good people facing an uncomfortable truth – that Black Americans, and especially young Black men, are treated differently by law enforcement in America. Or perhaps it comes from an over-concern about a slippery slope, that if there is a trial in this case officers will not be able to use confidential informants and agents anymore. Regardless of the root of it, if we are being real and authentic (which we should), there is no reason for these officers to be using the word "fuck" at all with Mr. King, much less verbally pummeling him with it repeatedly in the most threatening way possible. Mr. King was honest with them from the beginning, did everything he could to help the officers and their partners know about, understand, and find the fugitive. He showed no loyalty to his acquaintance. By even the officers' accounts, he was calm, non-threatening, and helpful. Yet the officers and their partners kept him handcuffed and trapped in the back of a police SUV for two hours, and progressively got angrier and more forceful with him, repeatedly telling them they would "fuck him over" if he did not risk his life to help them. Why?

What would the appellate panel have held if this had been a White college kid from an affluent neighborhood on probation for a marijuana offense and was told by seven officers of color for two hours that they were going to "fuck him over" if he did not help, and he got shot in a similar sting?

The undersigned counsel for Mr. King know and understand this Court does not, and cannot, regularly review and get involved in cases where there is a dispute of facts. However, this is not a normal case. 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. We need not wait for the deadlocked Congress to take up police reform. We already have laws on the books, (1) 42 U.S.C. § 1983, passed by Congress to protect Black Americans from abuse of law enforcement during Reconstruction, and (2) our very fair summary judgment procedures, which allow cases of disputed fact to be publicly tried before a jury of citizens in our courts. The officers can make their arguments there was no coercion and/or that Mr. King allegedly did not understand to a jury. That is the American way. However, this Court cannot condone the holding of the appellate panel, that it is allegedly undisputed that these officers did not intend to coerce and threaten to physically harm Mr. King.

Respondents provide a lengthy discussion of why they say this case is distinguishable from those cases where there was a factual dispute. BIO 21-24. No case-by-case reply is necessary here because Respondents'

sole basis for distinguishing those cases is to adopt Respondents' facts in their favor and then say those facts are "undisputed" here. As shown above, that is not how the summary-judgment analysis works. *Tolan*, 134 S. Ct. at 1868 (The "opinion below reflects a clear misapprehension of our summary judgment standards in light of our precedents.").

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.

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

Petitioner cited another case decided three months after this case by the very same panel. In *Cantu v. City of Dothan*, the panel held the exact opposite as it did in this case. 974 F.3d 1217, 1221 (11th Cir. 2020). In *Cantu*, the panel 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. Respondents failed to address this important argument raised by Petitioner.[1]

III. The Court Should Grant Review To Remove The "Clearly Established" Requirement Of Qualified Immunity.

Make no mistake about it – qualified immunity is on the chopping block. Courts, congresspeople, advocacy groups, and commentators across the ideological spectrum have called on this Court to do away with qualified immunity or greatly limit the defense.[2] Calls

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[1] Respondents also failed to distinguish *Taylor v. Riojas*, 141 S. Ct. 51 (2020) (per curiam).

[2] For a description of criticisms of qualified immunity by courts, commentators, and advocacy groups, *see* Joanna C. Schwartz, *After Qualified Immunity*, 120 Colum. L. Rev. 309, 311-12 (2020).

to end qualified immunity multiplied following the killing of George Floyd by Minneapolis Police Officer Derek Chauvin. Lower court opinions, law review articles, and amicus briefs submitted to the Court have argued that qualified immunity bears little resemblance to its common law roots, fails to achieve its policy goals of shielding government officials from the costs and burdens of liability, and undermines government accountability.[3] Even members of the Court have suggested that it is time to reconsider the doctrine.[4] And the rage of the Nation is focused right now on the trial of former Minneapolis Police officer Derek Chauvin's murder trial in the death of George Floyd. Floyd, a 46-year-old Black man, died in May 2020 after Chauvin placed his knee on Floyd's neck while he pleaded, "I can't breathe."

Petitioners contend that at a minimum, the Court should grant review to remove the "Clearly Established" requirement of qualified immunity. The heart of qualified immunity is easily stated. Plaintiffs seeking money damages from a government official pursuant to the leading federal causes of action for alleged

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[3] *See* Schwartz, *supra* note 1 (describing these arguments). *See also* Joanna C. Schwartz, *Qualified Immunity and Federalism All the Way Down*, 109 Geo. L.J. 305, 307 (2020).

[4] *See*, *e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (recommending that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence"); *Mullenix v. Luna*, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting) (criticizing qualified immunity for "sanctioning a 'shoot first, think later' approach to policing").

violations of federal rights – namely, § 1983 (for state officers)[5] and *Bivens* (for federal officers)[6] – must establish that their rights were not only violated but also "clearly established" when the government officer violated those rights. This clearly established requirement – the *immunity* in qualified immunity – has prompted sharp criticism, especially in recent years.

Respondents' defense of the clearly established requirement of qualified immunity ignores the common law history and scholarly research refuting the notion that qualified immunity has common law origins. Pet. 29-32. Instead, Respondents argue that Petitioner did not address how his textual argument did not explain this Court's expansion of 42 U.S.C. § 1983 in *Monroe v. Pape*, 365 U.S. 167 (1961), overruled on other grounds, *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658 (1978) or *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). But because this Court's original determination that the common law provided a general defense to official liability was erroneous, its statements referring back to that purported common law defense simply built on that initial error.

[5] 42 U.S.C. § 1983 (2018).

[6] *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

CONCLUSION

The Court should grant the petition for a writ of certiorari. Alternatively, the decision below should be summarily reversed.

Respectfully submitted,

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