No. 22-1157

IN THE

Supreme Court of the United States

CRAIG ROPER,

Petitioner,

v.

DE'ON CRANE, *et al.*,

Respondents.

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

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUMMARY OF THE ARGUMENT

While attempting to arrest Tavis Crane, Officer Roper struggled with Crane inside his car while officers were nearby outside his vehicle. Twelve seconds after Crane began pressing his car's accelerator, revving the engine, and spinning his car's tires, Crane's vehicle drove over an officer.

Before the Court, is whether an objective officer could believe it reasonable to shoot Crane during the twelve seconds before his car ran over the officer, and whether it was obvious to every reasonable officer that shooting Crane in these circumstances was clearly prohibited by established law.

Officer Roper made the split-second decision to fire under these exigent circumstances that were rapidly evolving. *Plumhoff v. Rickard*, 572 U.S. 765, 776-77 (2014) and the other cited cases demonstrate that Officer Roper's reasonable reaction to the threat of harm that existed did not violate the Fourth Amendment. It was not obvious to every reasonable officer informed by this Court's decisions in *Brosseau v. Haugen*, 543 U.S. 194 (2004) and the other cases cited in this brief that shooting Crane was clearly illegal in these circumstances.

The Fifth Circuit panel erred when it denied qualified immunity on the rationale that shooting Crane was *obviously* unreasonable, instead of properly applying precedents of this Court which establish Officer Roper did not violate the Fourth Amendment or clearly established law. The Court's intervention is necessary to preserve its precedent the Fifth Circuit erodes through this

opinion, and others,[1] based on purported *obvious* Fourth Amendment violations during split-second decisions.

REASONS FOR GRANTING THE PETITION

A. The Court should correct the Fifth Circuit opinion that erodes immunity doctrine by erroneously applying the obvious case exception.

Instead of responding to the questions Officer Roper presented, Respondents avoid the questions. Respondents instead pose a broad question, the answer to which would be less "'beneficial' in 'develop[ing] constitutional precedent.'" *See Plumhoff*, 572 U.S. at 774 (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Respondents argue the prior decisions of this Court are inapplicable because "every one of the cases [Officer Roper] cite[s] as supporting [his] position involved officers who used deadly force on a suspect who was **already fleeing** in a manner that posed a serious risk of immediate harm to officers and civilians…" (Response p. 2) (emphasis added).

But in trying to *prevent* the dangers from occurring which are inherent in a vehicle fleeing, Officer Roper and other reasonable officers rely on principles enunciated in this Court's decisions. "The Court has … never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone be a

1. *Cole v. Carson*, 935 F.3d 444, 453 (5th Cir.), *cert. denied*, *Hunter v. Cole*, 141 S.Ct. 111 (2020). (Seven Judges dissented from the *en banc* opinion in *Cole)*; *Frank v. Parnell*, 2023 WL 5814938 *1, 6 (5th Cir. September 8, 2023); *Aguirre v. City of San Antonio*, 995 F.3d 395, 415-16 (5th Cir. 2021).

basis for denying qualified immunity." *Mullenix v. Luna*, 577 U.S. 7, 15 (2015) (*per curiam*).

In *Plumhoff*, 572 U.S. at 776, the Court acknowledged the suspect came to a near standstill but that did not end the chase. Less than three seconds later, officers fired shots into Rickard's car while, like Crane, "Rickard was obviously pushing down on the accelerator because the car's wheels were spinning, and then Rickard threw the car into reverse 'in an attempt to escape.'"

Additionally, the Court's "decision in *Brosseau* [cite omitted], squarely demonstrates that no clearly established law precluded petitioners' conduct at the time in question." *Plumhoff*, 572 U.S. at 779. In *Brosseau*, the driver "had **just begun to drive off** and was headed only in the general direction of…" "'other officers on foot who [she] *believed* were in the immediate area,' 'the occupied vehicles in [his] path,' and 'any other citizens who *might* be in the area.'" *Mullenix*, 577 U.S. at 14 (emphasis added) (quoting *Brosseau*, 543 U.S. at 197).

Under these decisions, the predicate question is whether an objective officer could believe it reasonable to shoot Crane, who had warrants for his arrest, had locked the doors and raised the windows of his vehicle, had verbally and physically refused to comply with police commands to turn off and exit his vehicle, as Crane revved the engine and spun its tires while Officer Roper was partially inside the vehicle near an open door, with officers nearby outside the vehicle. (Pet. App. 7a, 15a, 29a-30a, 42a).

If the Court finds that an officer could not believe it reasonable to shoot Crane under these circumstances, the subsequent immunity question is whether it was obvious to every reasonable officer that Crane's conduct posed no serious threat to life that warranted shooting him to stop risk of harm.

But without identifying any case in which a court has held that an officer reacting to a threat like that facing Officer Roper was found to have violated federal law, the Fifth Circuit held it was *obvious* to every reasonable officer that Crane posed no risk of harm to anyone, and therefore Officer Roper's conduct was clearly unlawful (Pet. App. 22a-23a). This is despite this Court's recognition that,

> "After surveying lower court decisions regarding the reasonableness of lethal force as a response to vehicular flight, [the Court] observed that **this is an area 'in which the result depends very much on the facts of each case**' and that the cases 'by no means clearly established that the officer's conduct violated the Fourth Amendment.'"

Plumhoff, 572 U.S. at 779 (emphasis added) (quoting *Brosseau*, 543 U.S. at 201) (internal quotations omitted).

Respondents and the Fifth Circuit panel erroneously rely on the *obvious case exception* to avoid this Court's consistent holdings in dynamic circumstances that courts must identify and assess clearly established law based on the particular facts of each case. *Mullenix*, 577 U.S. at 14; *Plumhoff*, 572 U.S. at 778-779; *Scott v. Harris*,

550 U.S. 372, 381-383 (2007); and *Brosseau*, 543 U.S. at 197-199 rejected the argument that *Graham v. Connor*, 490 U.S. 386 (1989) *and Tennessee v. Garner*, 471 U.S. 1 (1985) provide the appropriate measure for determining immunity for use of force in dynamic circumstances.

Under this Court's decisions, to defeat immunity Respondents must show either that (1) Officer Roper's conduct was materially different from the conduct in *Brosseau* or (2) between February 21, 1999, and February 1, 2017, there emerged either controlling authority or a robust consensus of cases of persuasive authority altering the Court's analysis of immunity. *Plumhoff*, 572 U.S. at 779-780. Respondents fail to establish either.

The Court has never found the obvious case exception applicable in rapidly evolving events requiring an officer's split-second decision. *Compare*, *Taylor v. Riojas*, 592 U.S. ___, 141 S.Ct. 52, 53-54 (2020) (no exigency and particularly egregious facts involving a prisoner's conditions of confinement over several days).

B. Respondents fail to identify facts which demonstrate an objective officer could not reasonably perceive Crane's actions as posing a serious risk of harm.

1. Officer Roper presents the facts in the light most favorable to Respondents.

In his Petition, Officer Roper presented the factual findings made by the district court, the Fifth Circuit panel that decided the appeal, and the other Fifth Circuit judges who expressed factual findings, all construed in the light most favorable to Respondents in accordance with FED. R. CIV. P. 56. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

Respondents argue that by presenting the facts in the light most favorable to Respondents, Officer Roper has presented a new justification for shooting Crane. But to the contrary, Officer Roper consistently testified throughout the litigation that he first shot Crane later in the sequence of events than Valencia Johnson, the backseat passenger, testified the initial shots were fired. (ROA.1006). But in conformance with FED. R. CIV. P. 56, Officer Roper argued in the lower courts as he does in this Court that even if the Court accepts the facts as Valencia Johnson perceived them, which Respondents argue are the facts in the light most favorable to Respondents, Officer Roper is entitled to immunity because an objective officer could reasonably believe it lawful to fire to prevent Crane from harming others. (ROA.1113-1119). The District Court correctly found that regardless of which version of the timing of the shots is accepted, Officer Roper did not use force that was clearly excessive under Fourth Amendment standards. (Pet. App. 33a).

The material facts establish that an officer could reasonably believe Crane's conduct posed a serious threat to life at the moment Valencia Johnson said Crane was initially shot and thereafter until Crane's vehicle stopped moving. *See Plumhoff* 572 U.S. at 777.

2. Respondents do not challenge the following undisputed facts.

This Court has authority to determine and evaluate facts that are material to application of immunity precedents. *See Scott*, 550 U.S. at 380. Respondents do not dispute the following. Crane had outstanding arrest warrants, locked the doors and raised the windows of his

vehicle, verbally and physically refused to comply with police commands to exit or turn off his vehicle. Crane was in the driver's seat when Officer Roper entered Crane's vehicle from the rear, driver's side door. Officer Roper reached over the driver's seat and, construing the facts in the light most favorable to Crane, Officer Roper placed his left arm across Crane's neck, pointed the gun in his right hand at Crane, and told Crane to turn the car off or he would be shot. (ROA. 1068-1071, 1001-1007) (Response at pp. 3-4).[2]

Viewing the facts in the light most favorable to Respondents, when Crane reached toward the area of his vehicle where the keys and the gear shift were located (App.30a) and while the car's engine was revving and tires were spinning, Officer Roper fired the initial two shots striking Crane. (ROA.1070, 1004).

Immediately thereafter, Crane's vehicle launched into reverse, plowed over Officer Bowden and smashed into her police vehicle, after which Crane's vehicle changed direction, propelled forward, and ran over Officer Bowden a second time. *Id.* Officer Roper then shot Crane two more times while Crane's vehicle traveled down the street with the rear door open and Officer Roper near the open door. (ROA. 1070, 1004-1006).

Valencia Johnson's perception of the objective facts was that Crane was reaching for the car keys when he

2. Respondents argue Officer Roper used a chokehold. Valencia Johnson declared Officer Roper's arm was around Crane's neck (ROA.1070). Regardless of the characterization the Court credits, Officer Roper is immune.

was shot. (ROA.1070) (Response at p. 5). Officer Roper's perception at this moment was that Crane was reaching for the gear shifter. (ROA.1004).[3] Based on Valencia Johnson's perception, the panel opined Crane posed no danger.

3. Recordings refute assertions no reasonable jury could believe.

In *Scott*, 550 U.S. at 380, the Court held that when a recording establishes facts, a court should adopt that version of facts for purposes of ruling on a motion for summary judgment. In this case, video identified as ROA.1021 proves the following facts which further establish the reasonableness of Officer Roper's actions as follows:[4]

23:53:03 Brake lights activated and deactivated [5]

23:53:05 Brake lights reactivated

23:53:11 Officer Roper placed his right leg inside Crane's vehicle

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3. Neither Valencia Johnson, nor Officer Roper, had any identifiable basis to confirm either of their subjective perceptions about *what* Crane was reaching for or *why* he was reaching at this moment. Regardless of the characterization the Court credits, if either, Officer Roper is immune.

4. Regardless of whether the Court finds that no reasonable jury could believe any or all of Respondents' arguments, the facts, viewed in the light most favorable to Respondents do not refute immunity.

5. The recordings depict military time.

Officer Eddie Johnson was positioned behind Crane's vehicle

23:53:17 Crane pressed the accelerator causing the engine to rev and tires to spin as his vehicle swayed or rocked continuously
Valencia Johnson displayed both hands outside the vehicle

23:53:25 Valencia Johnson's hands withdrew inside the vehicle

23:53:27 Backup lights activated as Officer Bowden stepped behind vehicle

23:53:29 Vehicle propelled rearward over Officer Bowden

23:53:30 Crane's vehicle struck police vehicle

23:53:32 Crane's vehicle changed direction and travelled forward over Officer Bowden and down the road with the door ajar

For the first time, Respondents argue in this Court that Officer Roper's gunshots caused the vehicle to rev and tires to spin (Response at pp. 11-12). Valencia Johnson's declaration does not mention the revving engine and tires spinning, she declared the car shifted into reverse and moved backward after Officer Roper shot Crane (ROA.1070).

In this Court, Respondents argue the engine revved *after* shots were fired (Response p. 13 n. 3). However, all of the Judges who have reviewed the record found that the

engine was revving, and the tires were already spinning, when Officer Roper first fired. (Pet. App. 15a, 30a, 42a).

Valencia Johnson testified that Crane "lowered his right hand … and when he did, I heard a shot. I saw Tavis's head fall backwards and then the car began to move backward until it ran into something. After the car ran into something, it started to go forward and when it did, I heard two more shots from the officer's gun." ROA.1070.

Analyzing these facts in the light most favorable to Respondents, Officer Roper shot Crane shortly before 11:53 p.m. and 27 seconds. **Ten seconds after Crane began to rev his engine and spin his tires**, Crane's vehicle shifted into reverse and the backup lights on his vehicle activated as Officer Bowden stepped behind Crane's vehicle. Two seconds later, Crane's vehicle propelled over Officer Bowden at 11:53 p.m. and 29 seconds. The recording together with Valencia Johnson's declaration proves that Crane's vehicle was spinning its tires 12 seconds before Crane was shot (ROA.1021).

The undisputed evidence also establishes that throughout his encounter with Crane inside the vehicle, Officer Roper had his left arm and hand near Crane's neck and Officer Roper held his handgun in his right hand. (ROA. 1004-05, 1070). From the rear seat, and with both of his hands in use, Officer Roper was unable to operate the gas pedal, brakes, or gear shift of Crane's vehicle. *Id.* The district correctly found that *only Crane* could have operated his vehicle as it was. (App.33a).

Regardless of how the Court interprets the recorded evidence,[6] Respondents fail to identify any genuine dispute in the material evidence that prevents the Court from granting immunity to Officer Roper.

C. Respondents fail to analyze the facts from the perspective of a reasonable officer.

Respondents ask the Court to affirm denial of immunity based on arguments construing the facts from the *point of view* of Valencia Johnson and Respondents, but this argument conflicts with immunity precedent. The Court is required to interpret disputed facts most favorably to Respondents, *Scott*, 550 U.S. at 380, but must still judge the materiality of facts from the "perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Plumhoff*, 572 U.S. 775 (quoting *Graham*, 490 U.S. at 396. The Court "thus 'allo[ws] for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.'" *Plumhoff*, 572 U.S. at 775 (quoting *Graham*, 490 U.S. at 396-397).

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6. The Court could take judicial notice, under FED. R. EVID. 201, of facts not subject to reasonable dispute, here the fact that a driver cannot spin a vehicle's tires when the tires are on pavement and the transmission's gears are not engaged. When the vehicle's gears are not engaged, vehicle tires do not spin when the accelerator is pressed so Crane must have applied the vehicle's brakes while he spun the tires with his car in gear. But regardless of whether the Court finds that no reasonable jury could believe that Crane's vehicle was in "park" (or not in gear), when he spun his tires, the facts, viewed in the light most favorable to Respondents, do not refute immunity.

Evaluating the material evidence from that perspective, this Court recognized that a reasonable officer could only conclude a driver was attempting to dangerously flee when his vehicle's tires were spinning while the car rocked back and forth, and that firing shots to stop that threat did not violate the Fourth Amendment. *Plumhoff*, 572 U.S. at 770, 776. An objective officer could reasonably believe this statement of the law from *Plumhoff* applied in the situation Officer Roper encountered.

Respondents argue Officer Roper violated the Fourth Amendment by attempting to *prevent* a vehicle from fleeing like those in *Mullenix*, *Plumhoff*, and *Scott*, based on the argument that a vehicle pursuit had yet to occur when Officer Roper fired, but the Court found in *Mullenix*, 577 U.S. at 17 "the law does not require officers in a tense and dangerous situation to wait until the moment a suspect uses a deadly weapon to act to stop the suspect." (quoting *Long v. Slaton*, 508 F.3d 576, 581-82 (11th Cir. 2007)).

Viewed from a reasonable officer's viewpoint, an objective officer could reasonably believe Crane's conduct posed a serious risk of harm to officers and others. In deciding the questions presented, the Court need only apply *Mullenix, Plumhoff, Scott* and *Brosseau*.

CONCLUSION

Applying the precedents cited herein to the particular facts Officer Roper encountered as this Court's precedent requires, this is not a case where it is obvious that there was a violation of the Fourth Amendment or clearly established law. The Court should grant certiorari, correct the Fifth Circuit's errors, and enter judgment in favor of Officer Roper.

Dated: September 29, 2023

Respectfully submitted,

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