No. 23-541

IN THE

Supreme Court of the United States

MICHAEL DONNELLON, DEPUTY, *et al.*,

Petitioners,

v.

JOHN JORDAN,

Respondent.

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

BRIEF IN OPPOSITION

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195

ROBERT M. LIECHTY
Counsel of Record
ROBERT M. LIECHTY PC
1800 Gaylord Street
Denver, CO 80206
(303) 319-8382
rliechty@crossliechty.com

Counsel for Respondent

326994

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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FACTUAL BACKGROUND

In 2018, respondent John Jordan's nephew was involved in a motor vehicle accident in Bennett, Colorado. The nephew was driving a truck owned by Jordan's company and he called Jordan shortly after the accident occurred. Officers Donnellon and Jenkins were dispatched to the scene to investigate. Mr. Jordan could not locate proof of insurance in the truck, so he called his office to send a photo of the insurance card to his phone. At all times, he stood on a curb 20-40 feet from where the officers were standing.

The call was recorded and its transcript preserves the dispute between Jordan and the officers.[1] During the first two and half minutes, Jordan was talking to his secretary about the insurance card. At two and one-half minutes, Jordan made several comments critical of the manner in which the officers were investigating the incident. E.g. Tr. 3:49[2] ("Quit making statements . . . . If you guys want their statements, let them give their statements"). Although most of the officers' initial reaction was not audible because they were too far away, Jordan was concerned with how they were manipulating the juvenile witnesses. At three minutes into the recording, Jordan told the officers that they were "way too high strung." At around three and a half minutes, Jordon on three occasions mocked the officers with "Don't shoot me." (Tr.

1. The district court, who had the audio recording, concluded that the transcript "appears to accurately reflect the content of the encounter between Plaintiffs and the officers." Pet. App. 27, n. 2.

2. For ease of reading, respondent abbreviates "3 minutes, 49 seconds" to "3:49."

3:33, 3:37, and 3:39). One of the officers responds with a string of insults. Tr. 3:32. ("[Y]ou are being a complete disgrace to your son," 3:32.; "That's a great way to show your son how to act," 3:35; "You're a terrible father," 3:38; you are "an embarrassment," 3:40). Jordan's first raised voice came at 3:33 when he sarcastically said, "Don't shoot me man." He raised his voice three times after that. At 3:54, one of the officers told Jordan to leave, which Jordan declined to do.

At 4:11, one of the officers told Jordan to put his hands behind his back. At 4:12, Jordan said, "Hey can you send me a proof of insurance on 18?" What happened next is largely in dispute.

At 4:16, there are "sounds of scuffle." According to Jordan, this was the sound of the officer tackling him. Jordan caught himself with an outstretched arm to keep his head from hitting the ground. An officer then kicked out that arm, causing Jordan's head to hit the ground. An officer then put a knee on Jordan's cheek before handcuffing him. Pet. App. 18-20.

The officers gave a different account. They asserted that before taking him to the ground they told Jordan multiple times to put his hands behind his back, giving him ample time to end his conversation and put away his phone. They maintain that when the officer grabbed Jordan's arm, Jordan pulled his arm away, resisting the efforts to handcuff him. According to the officers, they did not tackle Jordan, but merely used a "takedown maneuver," the nature of which was not more specifically described. Once on the ground, Jordan allegedly used his arm to push back in an attempt to resist arrest. After that an

officer used an "arm sweep" so that Jordan would be flat on the ground. The officers denied that either had put a knee on Jordan's cheek while he was lying on the ground. Pet. App. 18-19.

Jordan was charged with obstruction of justice and resisting arrest. Both charges were dropped.

PROCEEDINGS BELOW

Jordan filed this action under 42 U.S.C. §1983. He alleged three claims against the officers: unlawful seizure (sometimes referred to in the courts below as unlawful or false arrest), malicious prosecution, and excessive force. After discovery, the officers moved for summary judgment on the basis of qualified immunity. The district court granted that motion on all the claims. The circuit reversed.

The courts below and the parties agree that whether there was an unlawful seizure and a malicious prosecution both turned on whether the officers had probable cause to arrest Jordan. Whether the officers had qualified immunity thus depends on whether there was arguable probable cause for that arrest. Pet. App. 40-41. The district court concluded that there were no genuine issues of fact relevant to those claims. It held that the facts demonstrated that there was arguable probable cause to arrest Jordan on two grounds: his shouting interfered with the ability of the officers to investigate the accident (Pet. App. 43-45), and he had disobeyed the officers' order to leave the scene. Pet. App. 44. With regard to the excessive force claim, the district court concluded that an arguable basis for the force that was used was established by the fact that Jordan was under arrest at the time and that he

had "refused to put his hands behind his back as ordered." Pet. App 37.

The court of appeals reversed, relying primarily on the large number of unresolved factual disputes. The officers' account of the relevant events, it noted, often conflicted with Jordan's assertions, or with the recording of what had transpired. Pet. App. 6 (two references), 15 (two references), 18, 20 (two references). Because the officers had sought summary judgment, the panel reasoned, the court was required to resolve those disputes in favor of Jordan—the nonmoving party—and to look at the evidence in the light most favorable to Jordan. Pet. App. 9, 13 n. 5, 15 (two references), 16, 20 (two references).

With regard to the claims of unlawful seizure and malicious prosecution, the court of appeals noted that probable cause could not be based on the mere fact Jordan had been critical of the officers. Mere criticism, this Court had held in *City of Houston v. Hill*, 482 U.S. 451 (1987), is constitutionally protected. Pet. App. 9-11. The court of appeals recognized, however, that such criticism could be a basis for probable cause if it actually obstructed the work of the police, such as by shouting so loud that witnesses could not be questioned, or by coaching witnesses. Pet. App. 11-12 (citing *Hill*, 482 U.S. at 462 n. 11).[3] The court concluded, however, that there were factual disputes as to whether Jordan's shouting had prevented the questioning

3. "[I]f the act of criticizing itself is so loud that an officer is prevented from executing his or her duties, then the officer may restrict the speech based on this physical act, which does not rely on the content of the speech. . . . [I]f criticism of an officer has the function of coaching a witness, then an officer may take measures to prevent this coaching."

of witnesses (Pet. App. 15-16) or had constituted witness coaching. (Pet. App. 13, n. 5, and 15). "At this procedural juncture, there are too many outstanding factual questions to grant summary judgment for the Deputies [regarding arguable probable cause of obstruction of justice]." Pet. App. 16. With regard to Jordan's failure to leave the scene as directed, the court noted that the officers could not constitutionally order Jordan to leave merely because he was criticizing them. Pet. App. 12.

Similarly, the court of appeals concluded that unresolved factual disputes precluded summary judgment regarding qualified immunity for the excessive force claim. "As for potential resistance, the Deputies claim that after Mr. Jordan was taken to the ground, he used his right arm to push back in an attempt to resist arrest. Mr. Jordan disagrees with these facts, claiming that he used his right arm to prevent his face from hitting the ground." Pet. App. 20. "[W]hether Mr. Jordan did or did not resist arrest remains a key factual question." Pet. App. 22 n. 11. "The parties disagree exactly how th[e] [events of the arrest] played out. Deputy Jenkins claims that Mr. Jordan 'pulled away' from his grip after his arm was grabbed, . . . but Mr. Jordan denies this." Pet. App. 6.

REASONS TO DENY THE PETITION

There Is No Circuit Conflict

This Court ordinarily grants review only to resolve an important conflict among the courts of appeals, or between a federal circuit and the highest court of a state. Sup. Ct. Rule 10(a). The petition does not contend that any such conflict exists. Petitioners cite only a single court of

appeals decision outside of the Tenth Circuit, quoting it just for the routine proposition—which they do not suggest the Tenth Circuit disputed—that police officers are not expected to have exceptional legal acumen. Pet. 35-36 (quoting *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982)); see Pet. App. 8 ("[t]o show that the law is clearly established, a plaintiff must normally point to a 'Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts.'") (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007) (*en banc*)).

There Are No Exceptional Circumstances Requiring Review

Absent an important conflict among the lower courts, this Court will only grant review in the most exceptional circumstances. No such circumstances are present here. This case is an intensely fact-bound application of well-established legal standards. Petitioners insist that the Tenth Circuit decision is unsound, but do not identify any consideration warranting expenditure of this Court's limited resources.

The Tenth Circuit's decision rested largely on its view that the record presented unresolved factual disputes about a number of key issues; its opinion is replete with references to that problem.[4] The petition contends that

4. Pet. App. 6 ("[t]he parties dispute exactly how these events played out"; "the parties . . . disagree about when these commands happened"), 9 ("when the facts are viewed in the light most favorable to Mr. Jordan"),13 n. 5 ("[a]t a later stage of this case, a factfinder may determine [the fact in a manner favorable to the defendants] . . . [W]e construe the facts most favorably to Mr. Jordan at this time

the court of appeals got that all wrong. Petitioners insist that the relevant facts are actually undisputed. Pet. 13, 23, 25, 26, 34. And, petitioners contend, the court of appeals got the facts wrong. Pet. 33 ("court of appeals failed to adhere to the factual record"), 34 ("the Tenth Circuit departed from the undisputed record"). But the Tenth Circuit's characterization of the record is entirely correct. And even if it were not, any fact-specific error would not warrant review by this Court.

Petitioners contend that the court of appeals erred in construing the facts favorably to Jordan because the case involves "an appeal from the grant of qualified immunity." Pet 23 (quoting Pet. App. 13, n. 5). But in the cited passage, as elsewhere, the court made clear it was so construing the facts because this is "an appeal from the Deputies' motion for summary judgment." Pet. App. 13, n. 5.

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because this case comes before us as an appeal from the deputies' motion for summary judgment"), 15)"'[t]aking all the facts in the light most favorable to' Mr. Jordan—as we must do at summary judgment"; "[o]n [Jordan's] version of the facts"; "under his account of the facts"; "[Deputy's account] is irreconcilable with a view of the record most favorable to Mr. Jordan"), 15-16 ("the Deputies' claim . . . is also unsupported by the transcript recording when viewed most favorably to Mr. Jordan"), 16 "[a]t this procedural juncture, there are too many outstanding factual questions to grant summary judgment for the Deputies", 18 ("[a]ccording to Mr. Jordan's presentation of the facts"), 20 ("[u]nder [Jordan's] account of the facts"; "Mr. Jordan disagrees with the[] facts [asserted by the deputies]"; "we must 'tak[e] all the facts in the light most favorable to' Mr. Jordan at summary judgment"), 20 n. 8 ("[f]rom the recording, it is unclear whether the second instruction comes before, during, or after the tackle"; "we must 'credit [Mr. Jordan's] version of the events on summary judgment"), 22 n. 11 ("whether Mr. Jordan did or did not resist arrest remains a key factual question"), 22 ("taking the facts in the light most favorable to Mr. Jordan").

In the court of appeals, petitioners asserted that Jordan's shouting interfered with the ability of witnesses to hear the deputies' questions; their argument drew no distinction between the questioning of the nephew and questioning of other witnesses who might have been on the scene.[5] The Tenth Circuit pointed to substantial evidence that the deputies had no difficulty questioning the nephew (Pet. App. 15-16), and in this Court the officers no longer assert the shouting interfered with questioning him. Instead, the officers in this Court insist that the court of appeals erred because it failed to separately analyze whether Jordans' remarks interfered with questioning other witnesses. Pet. 7, 9, 13, 15, 23, 24. But petitioners drew no such distinction in the court below, which cannot be faulted for failing to address an argument that was never made. Petitioners do not contend that the other witnesses were closer to Jordan than was the nephew, or that any other witnesses were unusually soft spoken or had poorer hearing than the nephew.

The petitioners object that "[t]he Tenth Circuit . . . simply ignores Jordan's refusal to depart from an active investigation scene in response to a lawful order from Officer Jenkins." Pet. 24; see Pet. i, 23, 25, 26, 29. But the court of appeals clearly did address that issue, holding that a police officer cannot constitutionally order a speaker to

5. Appellees' Response Brief, 8 ("Due to Mr. Jordan's yelling, Deputy Jenkins was unable to get an explanation from witnesses (including Mr. Jordan's nephew) as to how the accident occurred"), 13 ("With 'raised . . . voice,' he verbally interjected himself into the Deputies' attempt to question Mr. Jordan's nephew for four to five minutes—so much so that neither the nephew nor other witnesses who were being interviewed could not [sic] hear the Deputies' questions.").

leave the scene merely because the speaker is criticizing the police (Pet. App. 12), a holding which petitioners do not disagree with or even mention. Petitioners' argument appears to rest on the assumption that Jordan was in fact shouting down the deputies and/or witnesses, or was coaching the witnesses, which would have provided a basis for a lawful order. But whether either of those things was occurring remains in dispute, as the court of appeals correctly observed.

Petitioners contend that the use of force was warranted because Jordan had failed to comply when ordered to put his hands behind his back. Pet. 29. But, as the court of appeals explained, whether a reasonable officer could have thought Jordan was refusing turns on the timing of the events in question. According to the officers, force was used because Jordan failed to comply with repeated orders to put his hands behind his back, over a period of time long enough that Jordan could easily have ended his call and put away his phone before complying. But according to Jordan, the officers tackled him to the ground within two to four seconds of the first order, when they would have realized that he had not yet had time to end the call, put away his phone, and comply.

Petitioner's principal legal contention, set out in their first question presented, is that the court of appeals "negated the objective Fourth Amendment standard of *Maryland v. Pringle*, 540 U.S. 366 (2003)," because of the manner in which the court below applied the First Amendment decision in *Hill*. Pet. i, 17, 21. Petitioners concede that the decision below recognized the holding in *Hill*, at footnote 11, that the First Amendment would not apply if a speaker were so loud that an officer could not do

his or her job, or if a speaker were coaching a witness. But, petitioners insist, the Tenth Circuit refused to consider whether those exceptions applied in this case. "The court acknowledged footnote 11 in *Hill* and the limits contained therein but *declined to apply them* to the undisputed facts of the case. . . ." Pet. 13-14 (emphasis added). "[T]he court held *Hill* combined with *Guffey* [*v. Wyett*, 18 F.3d 869 (10th Cir. 1994)] clearly established that the officers lacked probable cause to arrest Jordan *without any assessment* of the exceptions noted in *Hill*." Pet. 15 (emphasis added). But the Tenth Circuit *did* assess those exceptions, holding that factual disputes prevented determination at summary judgment of whether Jordan was that loud, or was coaching a witness. The court of appeals rejected the assertion of qualified immunity predicated on those proffered claims of probable cause, not because of *Hill*, but because of the unresolved disputes about the facts critical to an objective probable cause determination.

Petitioners object that a footnote in the decision below referred to a Tenth Circuit opinion that had been decided *after* Jordan's arrest. Pet. 16-17, 30; see *Surat v. Klamser*, 52 F. 4th 1261, 1274-75 (10th Cir. 2022); Pet. App. 22 n. 11. They argue that

> any level of reliance on *Surat* by the Tenth Circuit is . . . in direct contravention of this Court's holding in *Kisela* [*v. Hughes*, 138 S. Ct. 1148 (2018)] reminding courts that "the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law *at the time of the conduct.*"

Pet. 30-31 (quoting *Kisela*, 138 S. Ct. at 1152 (emphasis in petition). But the Tenth Circuit expressly explained that it was *not* relying on *Surat* precisely because that case was decided before Jordan's arrest.

> In *Surat*, we recently extended the holding of *Morris* [*v. Noe*, 672 F.3d 1185 (10th Cir. 2012)] and held that minor resistance does not justify a takedown maneuver. . . . However, we held that [a takedown maneuver based on minor resistance] was not *clearly* unconstitutional under *Morris* because *Morris* had only established that a takedown maneuver is unconstitutional when there is *no* resistance . . . . *Surat* was decided in November 2022, so at the time of Mr. Jordan's September 2018 arrest, it was only clearly established [by *Morris*] that a takedown maneuver is unconstitutional where there is no resistance whatever.

Pet. App. 22, n. 11(emphasis in opinion).

In short, there is no reason for this Court to grant review of this case.

A Subsidiary Issue Exists

In the event that this Court grants the petition, respondent submits that there is a purely legal subsidiary issue within the second issue framed by petitioners – did the enacting Congress in 1871 intend to exclude immunities as defenses to actions under 42 USC §1983?

A subsidiary issue arises from the premise that "'[t]he statement of any question presented is deemed to comprise every subsidiary question fairly included therein.'" *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167, fn. 1 (2009). In *Gross*, the parties asked the Court to decide whether a plaintiff must "present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case." In this context, the *Gross* Court determined that it must first decide whether the burden of persuasion ever shifts to a defendant in an alleged mix-motive discrimination claim brought under the ADEA. Id., at 173.

Thus, if this Court grants *certiorari*, respondent will address the above subsidiary issue in his response brief because this Court may determine if qualified immunity applies herein only if qualified immunity applies to a §1983 claim in the first instance.

This issue, the intent of the 1871 Congress regarding the application of immunity to a §1983 claim, was first explicitly raised by Prof. Alexander Reinert in *Qualified Immunity's Flawed Foundation*, 111 *Calif. L. Rev.* 201 (2023). He noted that the original statute contained what he calls the Notwithstanding Clause, which reads as follows: "any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding." See Civil Rights Act of 1871, ch. 22, §1, 17 Stat. 13.

When these words are replaced (in italics below) in the present codified version of §1983, the statute that Congress passed in 1871 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall, *any such law,*[6] *statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

These words certainly call into question the common-law defense of good faith raised in *Pierson*, because that defense was a law of the State. It also calls into question the reasoning behind *Harlow* because its new formulation of the defense was to modify the existing common law: "the dismissal of insubstantial lawsuits without trial … requires an adjustment of the 'good faith' standard established by our decisions." *Harlow*, at 814-15.

Only this Court may address whether its prior precedent is correct. See, e.g., *Rogers v. Garrett*, 63 F.4th 971 (5th Cir. 2023), in a §1983 immunity inquiry, the concurrence recognized that ""as middle-management circuit judges,' we cannot overrule the Supreme Court.'" Only that Court can definitively grapple with §1983's

6. Respondent recognizes a possible ambiguity as to whether "any such law" refers to the "statute, ordinance, regulation" etc., in the color-of-state-law provision, or whether it refers to "any rights, privileges, or immunities," *etc.*

enacted text and decide whether it means what it says – and what, if anything, that means for §1983 immunity jurisprudence.'"

The recognition of the words in the original statute is not new, as the *Rogers* concurrence notes:

> Not all Supreme Court Justices have overlooked the Notwithstanding Clause. In Butz v. Economou, the Court quoted the as-passed statutory language, including the Notwithstanding Clause, yet, in the same breath, remarked that §1983's originally enacted text "said nothing about immunity for state officials." [Four Supreme Court citations omitted.] Indeed, members of the Supreme Court have often noted the Notwithstanding Clause's existence and omission from the U.S. Code. [Twelve Supreme Court citations omitted.]

See *Rogers*, 63 F.4th at 981, fn. 11. Nonetheless, in spite of this acknowledgment, this Court has never addressed whether the statute precludes the defense herein.

The cat is now out of the bag with the *Rogers* concurrence and the Reinert treatise. That is, sooner or later this Court will have to address the original intent of the 1871 Congress in passing what is now codified as §1983. There is no impediment that the codified version may prevail because, when there is a conflict between the Statutes at Large or its codification, the Statutes at Large prevails. See *U.S. Nat'l Bank v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993)("Though the appearance of a

provision in the current edition of the United States Code is 'prima facie' evidence that the provision has the force of law, it is the Statutes at Large that provides the 'legal evidence of laws'"…)(citations omitted).

Nor will there be a chance for this issue to develop in the district or circuit courts below because, as the *Rogers* concurrence notes, the lower courts are incompetent to address the issue. They will only be able to summarily reject such a futile argument. Only this Court may address the issue.

CONCLUSION

For the above reasons, *certiorari* should be denied.

Respectfully submitted,

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
P.O. Box 353020
Seattle, WA 98195

ROBERT M. LIECHTY
Counsel of Record
ROBERT M. LIECHTY PC
1800 Gaylord Street
Denver, CO 80206
(303) 319-8382
rliechty@crossliechty.com

Counsel for Respondent