Docket No. 22-1157

IN THE
SUPREME COURT OF THE UNITED STATES

CRAIG ROPER,
Petitioner,

v.

DE'ON L. CRANE, INDIVIDUALLY AND AS
THE ADMINISTRATOR OF THE ESTATE OF TAVIS M. CRANE
AND ON BEHALF OF THE STATUTORY BENEFICIARIES,
G.C., T.C., G.M., Z.C., A.C.,
THE SURVIVING CHILDREN OF TAVIS M. CRANE,
ALPHONSE HOSTON, AND THE CITY OF ARLINGTON,
Respondents.

REPLY IN SUPPORT OF APPLICATION FOR STAY OF DISTRICT COURT PROCEEDINGS PENDING DISPOSITION OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Officer Roper filed a Petition for Writ of Certiorari asking this Court to review a Fifth Circuit three-judge panel's opinion which denied Officer Roper qualified immunity even though the District Court had granted a Summary Judgment ruling upholding his qualified immunity. Six Circuit Judges dissented from the Fifth Circuit's denial of re-hearing *en banc*, and one circuit judge, who concurred on denial of re-hearing *en banc* agreed with the District Court's ruling and would have affirmed it if given the chance. *Crane v. City of Arlington*, 60 F.4th 976, 977 (5th Cir. 2023) (James C. Ho, Circuit Judge concurring in denial of re-hearing *en banc*).

Officer Roper's Petition demonstrates that the Fifth Circuit erroneously analyzed Officer Roper's alleged violation of clearly established law using the broad requirements of an excessive force claim under *Garner*[1] and *Graham*[2] to conclude that it would have been obvious to Officer Roper that his actions were clearly unlawful (Petition pp. 25-37). In doing so, the Fifth Circuit did not faithfully adhere to this Court's precedents which require a case specific analysis of particular facts when evaluating whether an officer's use of force in the context of fast-moving events violated clearly established law. *Brosseau v. Haugen*, 543 U.S. 194, 195-197 (2004); *Plumhoff v. Rickard*, 577 U.S. 765, 776-780 (2014). This Court corrected the Fifth Circuit's similar flawed analysis eight years ago. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015).

The Application seeks a stay not only in respect of the historical purposes and

[1] *Tennessee v. Garner*, 471 U.S. 1 (1985).
[2] *Graham v. Connor*, 490 U.S. 386 (1989).

background of qualified immunity recognized by this Court, but also to avoid the District Court taking action or issuing rulings that would be inconsistent with this Court's determination of qualified immunity (Application pp. 18-19). Officer Roper therefore seeks to stay proceedings to avoid irreparable harm and to protect this Court's jurisdiction to resolve the Fifth Circuit's failure to faithfully adhere to this Court's controlling precedents.

CRANE OVERLOOKS THIS COURT'S RULE 23.3

Crane's Response seems to suggest that Officer Roper should have gone directly to this Court with an application for a stay rather than taking the time to seek a stay first at the Fifth Circuit and second at the District Court. Not once does Crane address this Court's Rule 23.3 which requires that an applicant for a stay "shall set out with particularity why the relief sought is not available from any other court or judge." Officer Roper reasonably read this rule to require that he must first attempt to obtain relief from both lower courts. As the Application notes, Officer Roper and the City of Arlington joined in an unopposed Motion Stay the Mandate of the Fifth Circuit (Apx. A, pp. 1A-22A). Despite no opposition to the Motion to Stay Mandate in the Fifth Circuit proceedings, Crane now asserts that there will be some unspecified harm to Respondents if proceedings are stayed long enough for this Court to exercise its jurisdiction and determine the Petitions for Writ of Certiorari (Response, p. 15).

Crane's Response overlooks most of Officer Roper's substantive arguments and instead focuses on an overall contention that Officer Roper took too long to bring this Application for a stay to this Court (see Response discussion at pp. 13-14).

None of the cases the Respondents cited involved a situation in which a public official first obtained a summary judgment upholding his qualified immunity, and a later appellate proceeding overturned the summary judgment in favor of the Petitioner/Applicant for a stay. This Court has disapproved of clear gamesmanship when a party has waited so that the Application for a stay was not brought at such a time as to allow consideration of the merits without requiring entry of a stay (*see Nelson v. Campbell*, 541 U.S. 637, 649-650 (2004)(cited in Response at p. 14)). The stage of proceedings here does not preclude consideration of the merits of Officer Roper's Petition if a stay is granted. *Nelson*, 541 U.S. at 650.

In yet another case Respondents cite, a state appellate court enjoined a state criminal trial that had already begun, and the state prosecutor in the criminal proceedings did not seek any relief from this Court as to the interruption of the criminal trial proceedings. *Foster v. Gilliam*, 515 U.S. 1301, 1302-1303 (1995)(Response, p. 14). It was only then that the state sought relief from interruption of the state trial court proceedings, and the state also sought a stay of the trial court's order releasing the criminal defendants/respondents from custody. *Foster*, 515 U.S. at 1303. Chief Justice Rehnquist sitting as a Circuit Judge refused to overturn or stay the state appellate court order which interrupted the trial proceeding because the interruption had already occurred, and such an interruption could not be undone. However, despite the state's delay in seeking an application for stay of the order releasing the criminal defendants from custody, Justice Rehnquist concluded that a stay of that order should be granted because the state had met traditional criteria for a stay of the enlargement of a prisoner in a habeas corpus

proceeding. *Foster*, 515 U.S. at 1303.

Here, with the trial scheduled to occur May 6, 2024 (D. Ct. 100 p. 1), there is currently no trial proceeding ongoing that would be interrupted by a stay. In fact, Officer Roper has applied for the stay within enough time so that the Court may rule on the Application sufficiently in advance of the trial date to allow for consideration of the merits of the Application and potentially the merits of his Petition for Writ of Certiorari. *See Nelson*, 541 U.S. at 650. Officer Roper's Application should not be denied because of the timeframe in which it was filed.

POST REMAND PROCEEDINGS IN DISTRICT COURT

Throughout Crane's Response, Respondents magnify proceedings that took place in the District Court after remand from the Fifth Circuit. Crane would have this Court believe that Roper was the driving force behind District Court proceedings and that he somehow had a strategy of litigating in the District Court while waiting to file his Petition and then his Application for a Stay in this Court. But the record shows this is simply not correct.

During District Court proceedings prior to the Appeal, the District Court issued an Order on September 17, 2020 requiring De'On Crane to provide documentation confirming her authority to represent the Estate of Tavis Crane and authority to represent the minor children (D.Ct. Doc. 62 pp. 1-3).

During September 2020, the City of Arlington (Petitioner in Case No. 22-1151) served Respondents with narrowly tailored discovery requests regarding De'On Crane's representation of the Estate and the minor children (see D.Ct. Docs 104, 105 and supporting appendix 106). When it appeared that the requested information had

not been provided as required by the September 17, 2020 Order, Officer Roper and the City of Arlington obtained another Order requiring compliance with the September 17, 2020 Order and then obtained an Order postponing the District Court's mediation deadline (Orders, D. Ct. Docs. 121 and 124).

Thus, at the time Officer Roper filed his Motion to Stay Proceedings in the District Court July 31, 2023 (Appx. A pp. 25a-40a), other than the parties amending pleadings in recognition of the proceedings in the Fifth Circuit, the only activity that had taken place in the District Court were efforts to postpone the mediation proceedings due to Respondents' failure to comply with requirements that had existed for three years. At that point Respondents had not initiated any discovery or taken any active steps to move the case forward in the District Court. Respondents sought discovery only after the District Court denied Officer Roper's request for a stay (see Order, D. Ct. Doc. 130; Appx. E p. 51a; Appx. F pp. 52a-55a; Appx. G pp. 56a-119a).

COINBASE ANALYSIS SUPPORTS OFFICER ROPER'S APPLICATION

Respondents assert Officer Roper incorrectly attempts to apply *Coinbase Inc. v. Bielski*, 599 U.S. ___, 143 S.Ct. 1915 (2023). Officer Roper correctly asserts that because he previously had obtained a final Summary Judgment in his favor, and this proceeding is not from an interlocutory appeal in which his qualified immunity was denied, this amounts to an even more compelling reason "to apply the *Coinbase* analysis to this case to require a stay of the District Court's proceedings" (Stay Application, p. 3, contrasted with partial out of context quote in Crane's Response at p. 7).

In *Coinbase* this Court recognized that when a party has agreed to arbitration

instead of litigation proceedings to resolve a dispute, the party who had unsuccessfully sought arbitration was entitled to an interlocutory appeal and a stay of district court proceedings pending resolution of the arbitrability issue on appeal. *Coinbase*, 143 S.Ct. at 1918. As Officer Roper pointed out, this Court was persuaded by the Circuits which recognize an automatic stay of district court proceedings pending determination of qualified immunity when the public official appeals from a denial of qualified immunity (Application at p. 3 citing *Coinbase*, 143 S.Ct. at 1920 n. 4). This Court cited with approval the practices of several different circuits which recognize an automatic stay of district court proceedings while the qualified immunity interlocutory appeal is ongoing – unless the District Court has certified that the appeal is frivolous.

Importantly, in this case the District Court certainly has not certified that Officer Roper's position is frivolous – the District Court originally granted summary judgment to Officer Roper upholding his qualified immunity. On denial of re-hearing *en banc*, five dissenting judges joined in an opinion stating they would have affirmed Officer Roper's qualified immunity, and Judge Ho who concurred in denial of re-hearing *en banc*, clearly stated that he would have affirmed the summary judgment of dismissal and that he agreed with his dissenting colleagues. *Crane*, 60 F.4th at 977, 978-979. Six federal judges have written or joined opinions stating that Officer Roper is entitled to qualified immunity. *Coinbase* clearly supports Officer Roper's application for a stay to the extent Officer Roper asserts that the purpose of his qualified immunity defense is defeated if he is subject to district court litigation proceedings, and that the public policy underpinning the qualified immunity defense

is defeated if his stay is not granted.

WHEN THE RESPONDENTS ASSERT THIS COURT IS UNLIKELY TO GRANT CERTIORARI AND REVERSE THE COURT OF APPEALS, THEY IGNORE CONTROLLING FACTS RECOGNIZED IN THE FOUR OPINIONS WRITTEN OR JOINED BY TEN FEDERAL JUDGES

Arguing that this Court is unlikely to grant certiorari and reverse the Court of Appeals, the Respondents assert that Officer Roper shot a non-violent suspect after the suspect had done nothing more than verbally resist a command to step out of his parked car and there was no immediate threat or attempt to flee (Response p. 10). The Crane Respondents can only paint such a tranquil scene as the backdrop to Officer Roper's use of force by ignoring undisputed video evidence recognized and discussed in every opinion written or joined by 10 federal judges.

Officer Roper was inside the so-called parked car using his left arm to wrestle Crane with his right hand holding a gun pressed to Crane's side. During this struggle, with Crane sitting in the driver's seat and Officer Roper in the backseat with the rear door open while Officer Roper was partially hanging out, Crane's car engine began to roar, the tires spun, the car shook and smoke came from the car (*Crane*, 542 F.Supp.3d at 512-513, District Judge Pittman's Opinion; *Crane*, 50 F.4th at 460, 464, three-judge Panel Opinion; 60 F.4th at 979, dissenting from Denial of Re-hearing En Banc, joined by five circuit judges; *Crane*, 60 F.4th at 977-978, Circuit Judge Ho concurring in denial of re-hearing en banc but expressing agreement with the dissent's recognition of these facts captured on video).

Despite this undisputed evidence, the three-judge panel concluded that Crane's so-called "parked" car did not pose an imminent risk to Officer Roper or the other two officers because the car was not a threat until it began to move, which the

panel concluded did not occur until Roper shot Crane (*Crane*, 50 F.4th 464). The panel's analysis is in direct conflict with this Court's controlling precedent as to both components of the qualified immunity defense.

In *Plumhoff*, this Court held that police officers did not violate Fourth Amendment reasonableness standards by firing shots into a suspect's vehicle killing the driver and passenger. *Plumhoff v. Rickard*, 572 U.S. 765, 770, 778 (2014). In *Plumhoff*, the first shots were fired before the suspect's vehicle moved from a stopped position. *Plumhoff*, 572 U.S. at 769-770. This Court recognized that the suspect's vehicles tires were spinning, and his car was rocking back and forth indicating that [the suspect] was using the accelerator even though his bumper was flush against a police cruiser. At this point, before the first shots were fired into the suspect's car, this Court stated that under these circumstances all that a reasonable officer could conclude was that the suspect was intent on fleeing and posing a deadly threat for others on the road. *Plumhoff*, 572 U.S. at 776-777. This Court concluded the officers had not violated the Fourth Amendment. *Plumhoff*, 572 U.S. 776-777. The Panel's conclusion is in direct conflict with the analysis and holding required by the controlling authority of *Plumhoff*.

In *Plumhoff*, this Court went on to analyze the second component of qualified immunity – whether any constitutional violation involved a clearly established right. *Plumhoff*, 572 U.S. at 778-779. When this Court concluded that the Plaintiffs in *Plumhoff* had not defeated the second component of qualified immunity – a violation of a clearly established right – this Court's decision was governed by its own earlier decision in *Brosseau v. Haugen*, 543 U.S. 194 (2004). *Plumhoff*, 572 U.S. at 779. As

this Court recognized in *Plumhoff*, *Brosseau* involved a police officer firing at a fleeing vehicle to prevent possible harm to other officers on foot who she believed were in the immediate area or who occupied vehicles in the driver's path or any other citizens who might be in the area. *Plumhoff*, 572 U.S. at 779 *citing Brosseau*, 543 U.S. at 197.

When analyzing whether a clearly established right was involved, this Court recognized both in *Plumhoff* and *Brosseau* that use of lethal force as a response to a vehicular flight is an area "in which the result depends very much on the facts of each case". This Court held that *Garner* and *Graham* were cast at too high a level of generality and therefore did not clearly establish that the Officer's decision was unreasonable. *Plumhoff*, 572 U.S. at 779 *citing Brosseau*, 543 U.S. at 196. Therefore, to defeat immunity under the controlling precedents of *Plumhoff* and *Brosseau*, the Crane Respondents must

> "… show at a minimum either (1) that the officer's conduct in this case was materially different from the conduct in *Brosseau* or (2) that between February 21, 1999 and [the date of Officer Roper's conduct] there emerged either "controlling authority" or a 'robust consensus of cases of persuasive authority'".

Plumhoff, 572 U.S. at 779-80.

In this Court, just like in the lower courts, the Respondents are incapable of citing any authority that meets either of these two criteria. The one Fifth Circuit case which Respondents point to simply has no bearing on the controlling facts in this case. *Deville v. Marcantel*, 567 F.3d 156, 168 (5th Cir. 2009)(Response pp. 10-11). In *Deville*, the suspect driver was not reported to have a history of warrants or any indication she was preparing to flee. *Deville*, 567 F.3d at 167. Other than the *Deville* suspect sitting in a stationary car with a running engine, no other facts existed

similar to the facts facing Officer Roper as discussed in the four opinions written or joined by 10 federal judges. The facts immediately facing Officer Roper were similar to the facts this Court recognized in *Plumhoff* as allowing a reasonable officer to conclude the suspect was intent on fleeing and posing a deadly threat. *Plumhoff*, 572 U.S. at 776-777. Applying this Court's *Plumhoff* analysis of the Fourth Amendment component and applying *Plumhoff* and *Brosseau* to the clearly established law component of qualified immunity, it is certain that the *Deville* case has no bearing on this situation involving Officer Roper. The analysis advocated by the Respondents and used by the three-judge panel – which relied on *Garner* and *Graham* as clearly establishing the law – is in direct conflict with this Court's holdings in *Brosseau*, *Plumhoff*, and *Mullenix,* and cries out for this Court's necessary intervention and reversal of the three-judge panel's Opinion.

RESPONDENTS IGNORE THE STRONG PUBLIC POLICY UNDERPINNING QUALIFIED IMMUNITY, IGNORE THE PUBLIC'S INTEREST IN CONSISTENCY WITHIN THE FIFTH CIRCUIT AND IGNORE POTENTIAL INTERFERENCE WITH THIS COURT'S JURISDICTION

Without discussing the alleged irreparable harm Respondents claim they will suffer if District Court proceedings go forward, Crane also does not address the public policies underpinning qualified immunity, does not discuss the Fifth Circuit's ongoing conflict with this Court's decisions and its inconsistent treatment of qualified immunity, and does not address the potential that proceedings in the District Court could not only conflict with this Court's ultimate treatment of the case, but could interfere with the Court's jurisdiction over the case (Response pp.11-17).

In arguing that a balance of equities precludes Officer Roper's request for a stay of district court proceedings, the Respondents do not explain their changed

position. In the Fifth Circuit Court, Crane did not oppose the same stay which Officer Roper has now sought in this Court. Despite remaining silent as to the change in their position, they simply assert that they will somehow suffer some unexplained irreparable harm.

The Respondents do not address the public policy interests that underpin qualified immunity as explained by this Court's cases which include *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). As this Court recognized in *Harlow*, claims against public officials involve not only costs not only to these officials but costs to society as a whole, including diversion of official energy from pressing public issues and deterrents of citizens from accepting public office and the danger that fear of being sued will dampen the ardor of all but the most resolute or most irresponsible public officials in discharging their duties. *Harlow*, 457 U.S. at 814. These concerns were again recognized in *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

Although the City of Arlington did not join in Officer Roper's application because it is procedurally not in a position to do so at this stage, this Court has also recognized that allowing proceedings to go forward as to Petitioners who do not or cannot participate in a qualified immunity-based request for a stay of discovery proceedings should not impact the entitlement of Officer Roper to the relief he is seeking. As this Court recognized in *Iqbal*, 556 U.S. at 685-86, it will certainly be necessary for Officer Roper to participate in District Court proceedings including discovery to ensure the case does not develop in a misleading or slanted way that prejudices his position. . The Respondents do not address these factors.

Crane likewise does not address Judge Ho's and the five dissenting Judge's

assertion that there is uncertainty in the Fifth Circuit's precedents "which grow into a briar patch of conflicting rules, ensnaring district courts and litigants alike". *Crane*, 60 F.4th at 978, 979. Only this Court can clear the briar patch the Fifth Circuit has created and free district courts and litigants from their ensnarement in that briar patch.

Officer Roper's Application stated the obvious that continued proceedings in the District Court could result in rulings that prove to be inconsistent with this Court's eventual determination of the outcome of qualified immunity (Application pp. 18-19). At most, the Respondents appear to argue that they somehow know the pace at which this Court will take action in the present case, and based on their prediction that this Court will dispose of the case before the District Court takes any actions that could be in conflict with this Court's disposition of the case.

However, in a case in which three police officers asserted qualified immunity to claims they used excessive force by shooting an armed suspect, the undersigned experienced dramatically different timetables in two Petitions for Writ of Certiorari challenging first the Fifth Circuit's three-judge panel decision, and a second Certiorari proceeding in which a Petition was filed to challenge the Fifth Circuit's *en banc* denial of qualified immunity after vacation of the Fifth Circuit panel and remand from this Court.

The first proceeding was Case No. 16-351, *Michael Hunter, et al. v. Randy Cole, et al.* The Petition for Writ of Certiorari was filed September 15, 2016, the case was distributed for this Court's November 22, 2016 conference, and on November 28, 2016 this Court granted the Petition, vacated the three-judge panel's decision and

remanded the case for further consideration in light of *Mullenix v. Luna*, 577 U.S. 7 (2015).

The second filing in this Court arising from the same proceedings was Case No. 19-753, *Michael Hunter, et al. v. Randy Cole, et al.* That second Petition for Writ of Certiorari was filed December 9, 2019. Thereafter the case scheduled for conference six times between February and June 11, 2020. The Petition was denied June 15, 2020.

Officer Roper's case is currently scheduled for conference September 26, 2023. This case is presently set for Trial in the District Court May 6, 2024 (Scheduling Order, D. Ct. Doc. 100 p. 1). In the present case, if this Court follows a timetable similar to that in *Hunter v. Cole*, Case No. 19-753, the present case could be tried before this Court disposes of the Petition for Writ of Certiorari. Such action would not only defeat the public policies underpinning Officer Roper's qualified immunity, this could also interfere with this Court's jurisdiction by putting the case to trial in the District Court before this Court disposes of the case. Granting the stay will protect this Court's jurisdiction.

CONCLUSION

For the reasons stated in the Application and addressed herein, this Court should grant Officer Roper's Application to Stay Proceedings until this Court has disposed of his Petition for Writ of Certiorari.

Respectfully submitted,

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