No. 18-348

IN THE

Supreme Court of the United States

ROBERT WEISLER, III,
Petitioner,

v.

JEFFERSON PARISH SHERIFF'S OFFICE ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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The petition established that this Court's decision in *Devenpeck* v. *Alford*, 543 U.S. 146 (2004) protects only police officers who maliciously or incompetently arrest someone for a crime he did not commit. Pet. 9-10. It further established that the decision is precedentially unsound and meets *every* element of the test for whether a precedent should be overruled. Respondents advance three irrelevant justifications for the decision below before finally attempting to defend the indefensible. Pet. Opp. i. First, they claim that Weisler waived the argument by not asking the district court to overrule *Devenpeck,* which is, of course, outside of the district court's authority. Second, they note that the lower courts expressly held that Weisler committed a crime—having his windows tinted too darkly. That, of course, is the problem here, since it was not the crime for which he was arrested. Third, they imply that this case is not a good vehicle, arguing that probable cause existed for the crime for which Weisler was arrested—impersonating a police officer. But neither court below so found, and *both* relied on *Devenpeck* to rule that probable cause to arrest for impersonating a police officer was irrelevant in light of Weisler having paid the fine for improper window tint.

Respondents do not dispute that this case presents an issue of exceptional importance. And this case remains the perfect vehicle for reevaluating *Devenpeck*. It cleanly presents the issue as the *only* reason for the decisions below in a factual circumstance that mirrors *Devenpeck* tightly, right down to having the same crime of arrest. If Respondents wish to assert they had probable cause to arrest for impersonating an officer on remand—even though one of the arresting officers admitted he

was unaware of an element of that crime, and that the facts did not support finding that element in this case —they may do so. But the courts below denied Weisler his day in court solely based on the citation for an improper window tint, and the only support for that was this Court's decision in *Devenpeck*. The crime of arrest was a crime Weisler did not commit. He was not even prosecuted for it. And yet, he has no Section 1983 claim for unlawful arrest, as *Devenpeck* protects officers who incompetently arrest for a crime the arrestee did not commit. The Court can and should overrule *Devenpeck* and overturn the decisions below, which relied on *Devenpeck*.

I. This Case Presents a Question of Exceptional Importance.

In her concurrence in *District of Columbia* v. *Wesby*, Justice Ginsburg noted that, in *Devenpeck*, the Court "set[] the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection." 138 S. Ct. 577, 594 (2018) (Ginsburg, J. concurring). Qualified immunity already protects all but the officers who are "plainly incompetent" or "knowingly violate the law." *Id.* at 589 (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). And under *Heck* v. *Humphrey*, a plaintiff cannot succeed in an action for false arrest under 42 U.S.C. § 1983 if the plaintiff was convicted of the crime for which he was arrested. 512 U.S. 477, 489 (1994). Thus, *Devenpeck* only operates in cases where an officer has maliciously or incompetently arrested someone for a crime he did not commit.

Unfortunately, this is not a narrow sliver of circumstances. *Devenpeck* has been cited in over 2,300 cases. It allows district courts and defense

counsel to scour the codebooks looking for any law that may have been broken, regardless of whether it actually supported the arrest, and regardless of whether the arresting officer even knew it was an arrestable offense. As a result, sham arrests are not subject to scrutiny for even the slightly clever officer or defense counsel, Elina Treyger, *Collateral Incentives to Arrest*, 63 Kan. L. Rev. 557, 611 (2015), and officers thus receive improper deference for arrests that target citizens for race or other immutable characteristics. It further diminishes the need for officers to know the law, Brian Foley, *Policing from the Gut: Anti-Intellectualism in American Criminal Procedure*, 69 Md. L. Rev. 261, 318 (2010), and it creates a legal trap for the plaintiff. Under qualified immunity, the plaintiff must establish the right violated at a high level of specificity. It is not enough that, here, Weisler had a Fourth Amendment right against false arrest. He had to have a Fourth Amendment right against false arrest for impersonation of an officer, among other factors. Yet the officers are held to a *lower* standard. Under *Devenpeck*, as long as the officers *could* have arrested him for *something*, they are immune from liability. Instead of a specific inquiry, the officers are shielded by a highly general review.

II. *Devenpeck v. Alford* Should Be Overruled.

Justice Ginsburg was correct that the Court should revisit *Devenpeck*. The Petition discussed the Court's six-factor test for determining whether precedent should be overturned, as well as an additional factor the Court has considered. Pet. 12-27. Respondents do not address the test at all. Each factor counsels in favor of overruling *Devenpeck* and refusing to protect officers who incompetently or maliciously arrest

someone for a crime he did not commit. (1) *Devenpeck* is ripe for review as a constitutional decision that does not rely on an interpretation of statute. Pet 13-14. (2) It cannot even arguably have engendered any reasonable reliance in light of the fact that it only protects the incompetent and the malicious. Pet. 14. (3) It has been further undermined by the broadening of qualified immunity since the decision. Pet. 15-16. (4) It was poorly reasoned, as fully discussed in the Petition. Pet. 16-21. (5) It poses a "direct obstacle" to the objectives stated in Section 1983—holding state actors accountable for violating individuals' constitutional rights. Pet. 21-23. And (6) it has suffered constant criticism as being completely inconsistent with a just system. Pet. 23-27.

Limiting officers' protection to the crime for which the plaintiff actually was arrested would probe no deeper than the inquiry allowed by *Rodriguez v. United States*. In *Rodriguez*, this Court recognized that the Fourth Amendment's reasonableness requirement does not foreclose considering an officer's motivation or mission in conducting a seizure. 135 S. Ct. 1609, 1616 (2015). There, the Court held that a traffic stop may not extend beyond the time reasonably required to complete the mission for which a person was stopped at the outset. *Id.* There is no reason courts could not apply the same standard to arrests, and determine whether there was probable cause to arrest under the arrest's mission—here, a purported criminal impersonation of an officer.

Respondents spend about a page at the back of their brief responding to this, but they do not address the six factors for overturning precedent, and they say nothing to address the importance of the issue. Pet. Opp. 18-19. Rather, they repeat a few quotes from

Whren—a criminal case—and fail to explain why the Court cannot or should not change its analysis in civil cases to whether it was reasonable to arrest Weisler for impersonating an officer, rather than whether it would have been reasonable to arrest Weisler for improper window tint, had officers actually done that.

III. This Case is the Appropriate Vehicle to Reassess *Devenpeck*.

Respondents primarily attack the petition by challenging it as a vehicle to address the propriety of this Court's decision in *Devenpeck*. None of these attacks present an obstacle to proper consideration of *Devenpeck*'s role in protecting officers who incompetently or maliciously arrest someone for a crime he did not commit.

1. Respondents start by asserting a duty to "point out in the brief in opposition any perceived misstatement made in the Petition," Pet. Opp. 6, but do not say that there was any misstatement. They note that everyone agrees Weisler did not ask the district court to overturn *Devenpeck*, Pet. Opp. 6, then "object to the Court considering the issue," citing *City of Springfield, Mass.* v. *Kibbe*, 480 U.S. 257 (1987). In *Kibbe*, the Court dismissed a writ as improvidently granted when the case challenged a jury instruction that the "petitioner accepted, and indeed itself requested." 480 U.S. at 259. The challenge to the instruction was based on an issue of first impression, so the courts below had the power to rule on it. *See*, *id.*, at 263-64 (O'Connor, J., *dissenting*). Here, the question presented asks the Court to overturn precedent that bound the courts below. It would have, of course, been futile to raise this in the district court, and for that reason, the issue is not waived. *See*, *e.g.*,

Ingber v. *Enzor*, 841 F.2d 450, 454-55 (2d Cir. 1988) (issue foreclosed by precedent when case at district court not waived because "[w]e see no value in imposing a responsibility to pursue such a 'patently futile' course". In any event, this question does not present a new claim or issue waived below. Instead, it is an argument to support Weisler's consistent claim—that he was arrested without probable cause—that would have been futile to raise in the district court. *See Citizens United* v. *Federal Election Com'n.*, 558 U.S. 310, 330-31 (2010).

2. Respondents next assert that probable cause to arrest Weisler for his improper window tint existed. Pet. Opp. 7-12. That, of course, is assumed to be true for the purposes of the Petition and only helps establish that this is a proper vehicle to re-examine *Devenpeck*. Nor is Respondents' argument that probable cause existed for the crime of actual arrest—impersonating an officer—relevant. *See* Pet. Opp. 13-15. Neither the district court nor the Fifth Circuit ruled that even arguable probable cause existed to arrest Weisler for impersonating an officer, so the case is not tainted with any ambiguity. Both courts expressly relied on *Devenpeck* and dismissed the claim because officers purportedly *could have* arrested Weisler based on his window tint. Pet. App. 7a-8a & 29a-31a. In any event, Respondents are simply wrong. The officers did not realize that attempt to gain favor is an element of the crime, and an officer testified that he did not believe Weisler attempted to gain favor.[1] Pet. 5.

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[1] Respondents assert that Weisler could have been arrested for violating prescription drug possession laws based on officers finding six pills *for which Weisler had proper prescriptions, but*

At this point, as a result of the Fifth Circuit's opinion, there is no question that (1) the officers *could have* arrested Weisler based on the window tint violation, (2) the officers did not arrest Weisler based on the window tint violation, (3) the officers arrested Weisler *solely* based on impersonating an officer, and (4) no court has found, even as an alternative basis for dismissal, that the officers had probable cause to arrest Weisler based on impersonating an officer. Even Respondents admit that *Devenpeck* was "based on facts very similar to the instant action." Pet. Opp. 7. This case presents the proper vehicle to reevaluate *Devenpeck* and overrule its protection of incompetent and malicious officers who unlawfully arrest someone based on a crime he did not commit.

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simply did not carry them everywhere he went, in a search incident to arrest. Pet. Opp. 15-18. Weisler ultimately produced valid prescriptions for each pill, and the charges were dropped. But that does not matter here. It is hornbook law, and common sense, that an arrest cannot be justified based on paraphernalia found *after* the arrest. Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* §5.4(a) (5th ed. 2012) ("If the police conduct a warrantless search of a person and find evidence of crime in the course of that search and then place the individual searched under arrest, it is clear beyond question that this search may not be justified as being incident to the subsequent arrest if the arrest is in turn based upon the fruits of the prior search. Such bootstrapping would render the Fourth Amendment a nullity."); *see also Henry* v. *United States*, 361 U.S. 98, 104 (1959) ("[A]n arrest is not justified by what the subsequent search discloses."). So Respondents cannot rely on finding the medication in a search incident to arrest to justify the arrest that precipitated the search.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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