No. _____

IN THE
Supreme Court of the United States

GREGORY V. TUCKER,
Petitioner,
v.

CITY OF SHREVEPORT; C. B. CISCO;
T. KOLB; W. MCINTIRE; Y. JOHNSON,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents are police officers who tackled, punched, and kicked Petitioner Gregory Tucker after they pulled him over for non-functioning brake and license plate lights. When Mr. Tucker brought suit under 42 U.S.C. § 1983 challenging Respondents' use of excessive force, the district court denied the officers' summary judgment motion seeking qualified immunity. A panel majority of the Fifth Circuit reversed, opining that the extant law did not clearly establish that repeatedly beating and kicking an unarmed, compliant man was excessive. In making that decision, the Fifth Circuit required petitioner to identify precedent with nearly identical facts to overcome the qualified immunity defense. The questions presented are:

1. Whether the Fifth Circuit's holding conflicts with *Taylor v. Riojas*, which held that officials responsible for violating an individual's constitutional rights could have fair warning that their actions were unconstitutional, even if there is no precedent containing the same facts, and this Court's decisions that have explicitly held that precedent need not be fundamentally similar or contain materially similar facts to give officers fair warning.

2. Whether police officers are entitled to qualified immunity so long as there is no prior caselaw declaring their actions unconstitutional in an identical fact pattern in the same circuit, as the Fifth and Eighth Circuit have held, or whether

prior caselaw can clearly establish a constitutional violation despite some factual variation, as the First, Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have held.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Gregory Tucker, who was the plaintiff-appellee in the Court of Appeals for the Fifth Circuit.

Respondents, who were defendants-appellants in the Court of Appeals for the Fifth Circuit, are the City of Shreveport and police officers Chandler Cisco, Tyler Kolb, William McIntire, and Yondarius Johnson of the Shreveport Police Department.

RELATED PROCEEDINGS

Tucker v. City of Shreveport, No. 17-CV-1485 (W.D. La.) (partial judgment entered Feb. 27, 2019)

Tucker v. City of Shreveport, No. 19-30247 (5th Cir.) (judgment entered May 18, 2021)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

INTRODUCTION

One night in Shreveport, Louisiana, four police officers violently struck, kicked, and punched Gregory Tucker who had been pulled over for non-functioning brake and license plate lights. Dash camera videos show that Mr. Tucker complied with all of the officers' orders after being pulled over. But the officers threw him to the ground, beat him, and kicked him repeatedly, all before informing him that he was under arrest.

Tucker brought excessive force claims and the officers moved for summary judgment on the basis of qualified immunity. The district court properly denied their motion because forcing to the ground and repeatedly striking a man who is not physically resisting or attempting to flee is a clearly established violation.

A panel majority of the Fifth Circuit reversed the district court's decision. The Fifth Circuit held that the law was not clearly established, because it could not find a prior Fifth Circuit case with precisely the same facts. However, the narrow reasoning employed by the Fifth Circuit was expressly rejected by this Court in *Taylor v. Riojas* and *Hope v. Pelzer*. Additionally, the circuits are split on this issue – how similar must precedent be to the facts of a case for a constitutional right to be clearly established? For these reasons, the court should review the Fifth Circuit's decision.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at 998 F.3d 165 and is reproduced at Pet. App. 1a-42a. The district court's memorandum and order denying summary judgment in part is unreported, but is available at 2019 WL 961993 and reproduced at Pet. App. 43a-77a.

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit entered its judgment on May 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides in relevant part:

> 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 be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

This petition arises from a violent encounter between Respondent Shreveport Police Department Officers Chandler Cisco, Tyler Kolb, William McIntire, and Y. Johnson and Petitioner Gregory Tucker. On November 30, 2016, Petitioner was driving on 70th Street in Shreveport, Louisiana with defective brake and license plate lights. Pet. App. 2a. After observing the non-functioning lights, Cisco activated his police cruiser lights and siren, and followed Tucker for about two minutes before Tucker stopped in the driveway of a home. *Id.* at 44a. Tucker did not speed, and he observed all traffic laws during the drive. *Id*.

Tucker complied with all of Cisco's orders, fully cooperating while exiting the vehicle and consenting to a first pat-down search. *Id*. at 44a-45a. Cisco directed Tucker to place his hands on Cisco's cruiser, and Tucker did so. *Id*. at 44a. While Tucker was leaning on the hood of Cisco's cruiser, he rested his weight primarily on his elbows and made hand gestures as he spoke. *Id*. at 44a-45a. His hands

remained visible and remained in the space above the hood. *Id.* at 45a. Tucker consented to a second pat-down search. *Id*. As that search was in progress, McIntire and Johnson arrived. *Id*. As McIntire approached them, Cisco instructed Tucker to place his hands behind his back. *Id*. Without indicating that he was under arrest, McIntire grabbed Tucker's arm. *Id*. McIntire and Cisco slammed Tucker to the ground. *Id*. McIntire struck Tucker twice in the face while pulling him to the ground. *Id*. at 45a-46a. The force used by McIntire and Cisco caused Mr. Tucker's head to hit the pavement. *Id*. at 45a.

Kolb arrived and he and Johnson immediately joined in as the officers repeatedly punched and kicked Tucker while he lay face-down on the ground. *Id*. Tucker was vocal throughout the encounter, but the tone of his voice noticeably changed as the officer beat him: he sounded like a man in pain. *Id*. at 46a. After beating Tucker for over a minute, the officers stood him up. *Id*. Johnson testified that there was "a lot of blood" on his face. *Id*. The officers ultimately arrested Tucker for failure to have working brake and license plate lights, flight from an officer, and public intimidation. *Id*.

Tucker sued the respondent officers and the City of Shreveport under 42 U.S.C. § 1983.[1] Petitioner claimed, as relevant here, that the officers violated his Fourth Amendment rights by using unreasonable and

[1] Petitioner also advanced claims under the Louisiana Constitution and state tort law based on the officers' use of excessive force. These claims were not relevant to the interlocutory appeal and remain pending in the District Court. Pet. App. at 39a.

excessive force. Pet. App. 43a. Respondents moved for summary judgment on qualified immunity grounds. *Id*. The district court denied the motion, holding that "in the absence of overt physical resistance to being handcuffed, flight or the prospect of flight, and instructions or warnings beyond one request to place his hands behind his back, forcefully pulling Tucker to the ground such that his face struck the concrete would have violated clearly established law." *Id*. at 66a.

Respondents appealed the district court's decision to the Court of Appeals for the Fifth Circuit, arguing that the officers' use of force was not clearly excessive or unreasonable. *Id*. A panel majority of the Court of Appeals reversed the district court's ruling, holding that Respondents were entitled to qualified immunity because the law was not clearly established to provide fair warning to Respondents that their actions were unconstitutional. *Id*.

Judge Higginson dissented. *Id*. at 40a-42a. He noted the existence of jury questions inherent in the officers' justification to throw Tucker, "a motorist whose brake light was out," to the pavement and repeatedly punch, kick, and strike him. *Id*. at 40a. Aware of the appellate court's limited jurisdiction on interlocutory review, Higginson described "the law [as] clearly established that the use of violent physical force against – not to mention the extreme violence of kicking – an arrestee who is not actively resisting arrest is a constitutional violation." *Id*. (citing *Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th Cir. 2018)).

REASONS FOR GRANTING THE WRIT

I. The Court Should Resolve the Fifth Circuit's Disregard for the Court's Long-Held Obviousness Principle of Qualified Immunity

Recently, this Court summarily reversed one Fifth Circuit grant of qualified immunity and vacated another. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (*per curiam*), *summarily reversing* 946 F.3d 211 (5th Cir. 2019); *McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (mem.), *granting, vacating, and remanding* 950 F.3d 226 (5th Cir. 2020). *Taylor* and *McCoy* reaffirmed this Court's long-held principle that, in an obvious case, where the defendant has "fair warning" that their conduct violates a constitutional right, there need not be factually similar precedent to clearly establish a constitutional violation. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[A] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997))). However, in disregard of this Court's precedent, the decision below fails to apply *Taylor v. Riojas*, and more specifically, any of the precedent *Taylor* reaffirmed. *See, e.g.*, *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (*per curiam*) ("Of course, in an obvious case, [the *Graham* excessive-force factors] can 'clearly establish' the answer, even without a body of relevant case law.") (citing *Hope*, 536 U.S. at 738); *see also Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir.

2012) (quoting *Brosseau*, 542 U.S. at 199).[2] Thus, the Court should grant this petition to resolve inconsistencies in the application of the obviousness principle.

The decision below exemplifies the Fifth Circuit's mistaken and diverging resistance to the role that obvious unconstitutionality plays in qualified immunity analysis.[3] Under this Court's precedent, obvious cases of unconstitutional conduct bypass the need for materially similar precedent. *See Taylor*, 141

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[2] The nature of the Fifth Circuit's error places this petition within this Court's Rule 10. *See Taylor*, 141 S. Ct. at 54 (Alito, J., concurring). The decision below does not constitute "the misapplication of a properly stated rule of law." *Id*. at 55. Rather, the decision below simply misstates the law in light of *Taylor*. *See* Pet. App. 10a-13a.

[3] Another reason that the decision below fails to properly analyze qualified immunity is that the lower court failed to address each officer's individual conduct—instead, the lower court assessed the officers collectively. Under this Court's precedent, and under the Fifth Circuit's precedent, qualified immunity must be analyzed on an officer-by-officer basis. *See Taylor*, 141 S. Ct. at 54; *see also Dyer v. Houston*, 964 F.3d 374, 382 n.6 (5th Cir. 2020) ("[I]n assessing qualified immunity, a court must 'consider the conduct of each officer independently,' not 'collectively.'"). Put differently, when the lower court approached this "fact-laden, extended, and brutal police-citizen encounter" as two discrete events—the tackling or "[t]akedown" and the beating or the "[f]orce [o]n [t]he [g]round"—the lower court considered the conduct of each officer collectively. Pet. App. 13a, 27a, 42a. In particular, the lower court collectively analyzed: (1) Respondent McIntire's opinion that the area was "a high-crime area"; (2) Respondent Cisco's height and size in relation to the Petitioner; (3) and Respondent Kolb's uncertainty regarding whether Petitioner was armed. Pet. App. 22a, 23a, 37a (distinguishing this case from *Ramirez v. Martinez*, 716 F.3d 369, 378 (5th Cir. 2013)).

S. Ct. at 52-54; *Brosseau*, 543 U.S. at 199; *Hope*, 536 U.S. at 741. In concluding that this police beating was not obviously unconstitutional, the decision below diverges from other courts regarding what constitutes obviously unconstitutional conduct.

For example, since *Taylor v. Riojas*, federal appellate courts, including the Fifth Circuit, have taken the first steps toward ceasing the overly rigid application of the "clearly established" prong of qualified immunity in obvious cases. *See, e.g.*, *French v. Merrill*, __ F.4th __, __, No. 20-1650, 2021 WL 4488110 (1st Cir. Oct. 1, 2021) (applying *Taylor* and concluding that the "officers engaged in precisely the kind of warrantless, unlicensed physical intrusion on the property of another that [precedent] clearly established as a Fourth Amendment violation"); *Aguirre v. City of San Antonio*, 995 F.3d 395, 424 (5th Cir. 2021) ("[I]t would have been 'obvious' to a reasonable officer that the use of such a severe tactic against this particular person would be constitutionally proscribed, and [the officer] would have no recourse to qualified immunity.") (citing *Taylor*, 141 S. Ct. at 52-54) (Jolly, J., concurring); *Williams v. Maurer*, 9 F.4th 416, 440 (6th Cir. 2021) (applying *Taylor* and generally concluding, "[i]f Defendants forcibly entered Mitchell's home armed with neither a warrant nor an exception to the warrant requirement, the use of any amount of force to effectuate this unconstitutional action constituted unreasonable 'gratuitous violence'" (quoting *Walters v. Stafford*, 317 F. App'x 479, 491 (6th Cir. 2009))); *Taylor v. Ways*, 999 F.3d 478, 493 (7th Cir. 2021) (applying *Taylor* in the employment discrimination context and reasoning that, because of the obvious

unlawfulness of racially discriminatory employment practices, the defendant-government-employer had "'fair and clear warning' . . . that he was violating the constitution"); *Truman v. Orem City*, 1 F.4th 1227, 1241 (10th Cir. 2021) ("Just like any reasonable correctional officer should understand the inmate in *Taylor*'s conditions of confinement offended the Constitution, so too should any reasonable prosecutor understand that giving a medical examiner fabricated evidence and then putting him on the stand to testify based on that false information offends the Constitution."). In most circuits, courts assessing obvious cases of unconstitutional conduct have had little difficulty in identifying general constitutional principles that satisfy the fair warning objective of the clearly established standard.

On the other hand, here, and in other cases, the Fifth Circuit continues to evade *Taylor* and the obviousness principle explained by this Court in *Hope*. Generally, the Fifth Circuit sets the bar for obviously unconstitutional conduct inappropriately high. In this case, the lower court entirely disregards *Taylor* and its predecessors. In other cases, the court unduly narrows *Taylor*'s holding and isolates it from its precedent.[4]

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[4] For example, in *Cope v. Cogdill*, the Fifth Circuit offered a reading of *Taylor* that only applies to facts that are "particularly egregious." 3 F.4th 198, 206 (5th Cir. 2021). There, the court granted qualified immunity to a prison officer despite video evidence showing that prison officer's indifference as a prison detainee hanged himself with a telephone cord. *Id.* at 203, 212 ("Monroe wrapped the phone cord around his neck around 8:37 a.m., while Laws continued mopping."). Notwithstanding the officer's reluctance to violate prison policy and enter the cell alone, the detainee's estate sued for the officer's failure to

As this Court has emphasized, the hallmark of qualified immunity's clearly established prong is fair warning. *Taylor*, 141 S. Ct. at 53-54. Every reasonable officer knows that kicking an unarmed man, who is surrounded by officers, is not actively resisting, lies prone, and is handcuffed, offends the Constitution. Fifth Circuit precedent and an abundance of excessive force case law, including this Court's precedent, simply confirms this obviousness. *See* Pet. App. 40a ("The law is clearly established that the use of violent physical force against—not to mention the extreme violence of kicking—an arrestee who is not actively resisting arrest is a constitutional violation." (citing *Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th

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promptly call emergency medical services. *Id.* at 209. The court reasoned *Taylor* did not affect its analysis despite the prison officer's obviously unconstitutional conduct because the facts of the case were not at the same level of egregiousness as in *Taylor*. *Id.* at 206.

As *Cope* demonstrates, the Fifth Circuit has interpreted *Taylor* narrowly and differently from other circuits. *Compare id.* (narrowing *Taylor*'s holding to particularly egregious scenarios), *with Ways*, 999 F.3d at 493 (applying *Taylor*'s obviousness principle broadly in the employment discrimination context), *and Truman v. Orem City*, 1 F.4th at 1241 (applying *Taylor*'s obviousness principle broadly in a case where a prosecutor fabricated evidence and submitted the fabricated evidence at trial).

However, *Cope*'s narrow reading of *Taylor* is unsupported by this Court's precedent. For example, in *Hope v. Pelzer*, this Court did not limit obviousness to particularly egregious facts. 526 U.S. at 744-45. Instead, this Court emphasized the existence of a governmental report forbidding the conduct-at-issue. *Id.* Thus, the Court concluded that defendant officers had sufficient notice to constitute fair warning of their unconstitutional practice of shackling. *Id.* at 746.

Cir. 2018) (compiling cases from 2008, 2012, and 2013))); *see also Graham v. Connor*, 490 U.S. 386, 396 (1989) (noting the importance of whether an arrestee is "actively resisting arrest" as an important factor for determining reasonable use of force); *Newman*, 703 F.3d at 764 ("'[I]n an obvious case,' the *Graham* excessive-force factors themselves 'can clearly establish the answer, even without a body of relevant case law.'" (quoting *Brosseau v. Haugen*, 543 U.S. at 199)). More specifically, at the time of this brutal police-citizen encounter, Fifth Circuit precedent clearly established that "'pulling one's arm out of an officer's grasp, *without more,* is insufficient to establish an immediate threat to the safety of the officer' for purposes of the *Graham* factors." Pet. App. 21a (quoting *Ramirez*, 716 F.3d at 378) (emphasis in original). Nonetheless, the court below distinguished *Ramirez* based on *de minimis* factual variations, including Respondent McIntire's opinion that the area was "a high-crime area" and Petitioner Mr. Tucker's height and baggy clothing. Pet. App. 21a. Such demanding factual distinction disregards this Court's precedent. *See Taylor*, 141 S. Ct. at 52-54 (reversing the Fifth Circuit's conclusion that housing an inmate in a cell flooded with human waste for six days was not a clearly established constitutional violation because precedent only governed housing an inmate in similar conditions for months at a time). Thus, Respondent officers had sufficient notice to constitute a fair warning under this Court's precedent.

As one Fifth Circuit Judge aptly put it, *Taylor* affirms that "[c]ourts need not be oblivious to the obvious." *Ramirez v. Guadarrama*, 2 F.4th 506, 523

(5th Cir. 2021) (mem.) (Willett, J., dissenting in denial of en banc rehearing). As the Fifth Circuit has acknowledged, this was no mere suggestion. *See id.* at 514 (Oldham, J., concurring in denial of en banc rehearing) (characterizing *Taylor* as "orders"); *see also id.* at 516 (Willett, J., dissenting in denial of en banc rehearing) (characterizing *Taylor* as a "directive[] . . . which [the Fifth Circuit] must heed."). Because the decision below effectively disregards *Taylor*, the Court should summarily reverse or, in the alternative, remand with instruction to reconsider in light of *Taylor*.[5]

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[5] To be clear, *Taylor* did not announce new law. *See Hope*, 536 U.S. at 738, 741. Nonetheless, the Fifth Circuit has expressed some uncertainty over whether *Taylor* is a new gloss or a simple revitalization of dormant precedent. *Compare Ramirez*, 2 F.4th at 514 (Oldham, J., concurring in denial of en banc rehearing) (characterizing *Taylor* as new law—"[a]nd these summary orders are particularly remarkable because they are the Court's first- and second-ever invocations of the obvious case-exception to the clearly established law requirement"), *with id.* at 522-23 (Willett, J., dissenting in denial of en banc rehearing) (explaining that *Taylor* merely reaffirmed a twenty-year-old Supreme Court precedent). However, this Court's citations to *Brosseau* and *Hope* in *Taylor* confirm that this Court simply reaffirmed long-held principles of qualified immunity. *See Taylor*, 141 S. Ct. at 53-54 (quoting *Brosseau*, 543 U.S. at 198; then citing *Hope*, 536 U.S. at 741). *Brosseau*'s citation to *Hope* further cements this conclusion. *Brosseau*, 543 U.S. at 199 ("[I]n an *obvious* case, the [*Graham* excessive-force factors] themselves can clearly establish the answer, even without a body of relevant case law.") (citing *Hope*, 536 U.S. at 738) (emphasis added); *accord Darden*, 880 F.3d at 722. Thus, *Taylor* is not new law. And though *Taylor* was not specifically briefed, the precedent *Taylor* reaffirms—namely, *Brosseau*—was briefed and therefore properly raised.

II. The Court Should Resolve the Dispute over the Proper Application of Qualified Immunity

The checkered application of qualified immunity law among the United States Courts of Appeal necessitates clarification by the Court. The circuits vastly differ in their interpretation of the Court's qualified immunity precedent. This has led to divisive and acknowledged intra- and inter-circuit splits among the lower courts, creating a mess of qualified immunity law.

A. The Circuits Split over the Appropriate Source of Precedent and the Degree of Factual Similarity to Precedent Required for a Constitutional Right to Be Clearly Established

The circuits take vastly different approaches in analyzing whether precedent is clearly established. The Court recently prescribed in *District of Columbia v. Wesby* that "a legal principle must have a sufficiently clear foundation in then-existing precedent" to be clearly established. 138 S. Ct. 577, 589 (2018). The law must be clear enough that every reasonable officer would understand their actions to be unlawful. *Id.*; *see also Mullenix v. Luna*, 577 U.S. 7, 11 (2015)). Other recent cases by the Court give direction on the level of specificity required for the law to be clearly established. *Kisela v. Hughes*, 138 S. Ct. 1148, 1154 (2018) (instructing the lower court not to read prior precedent too broadly when deciding

whether a new set of facts is governed by clearly established law); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) ("While this Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.' " (alteration in original) (quoting *Mullenix*, 577 U.S. at 12.

Despite this direction, the circuits have taken different approaches in defining the clearly established standard and diverge on the appropriate source and breadth of case law that can render an action "clearly established." The Fifth Circuit's decision further deepens this split. As illustrated in the decision below, the Fifth Circuit requires that precedent clearly establish the claimed constitutional violation with "specificity and granularity," in order for a plaintiff to defeat a qualified immunity defense. *See Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019). The Fifth Circuit routinely requires this degree of particularity to affirm that an officer's actions constitute a clearly established constitutional violation. *See Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2019), *vacated sub nom. Taylor v. Riojas*, 141 S. Ct. 52 (2020); *Morrow v. Meachum*, 917 F.3d 870, 974-75 (5th Cir. 2019); *McCoy,* 950 F.3d at 231-32 (5th Cir. 2020). The Fifth Circuit commanded this nearly impossible standard in the decision below and has continued to employ it in subsequent cases. Pet. App. 17a; *see Cope*, 3 F.4th at 204-06.

The Eighth Circuit imposes a similar strict standard. The Eighth Circuit granted qualified immunity to a police officer in *Kelsay v. Ernst*, holding

that none of the Eighth Circuit cases presented by the plaintiff "squarely govern[ed] the specific facts at issue," and therefore the law was not clearly established. 933 F.3d 975, 980, 982 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). In *Kelsay*, a police officer used force on the plaintiff after she ignored the officer's commands and walked away. *Id.* at 978. The plaintiff cited to cases clearly establishing that an officer may not use force on a nonviolent misdemeanant who is interfering with or disrespecting police officers by refusing to follow officer commands.[6] *Id.* at 980. Because the commands in the cited cases did not include a command to stop walking, the Eighth Circuit granted the officers qualified immunity for restraining the plaintiff in a bear hug and throwing her to the ground, causing her to lose consciousness and break her collar bone. *See id.* at 978, 981-82.

Conversely, the Ninth Circuit directs courts to "'look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts'" in the absence of binding precedent. *Drummond ex rel. Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003) (quoting *Malik v. Brown*, 71 F.3d 724, 727 (9th Cir. 1995); *see Jessop v. City of Fresno*, 936 F.3d 937, 941 (9th Cir. 2019) ("We may look at unpublished decisions and the law of other circuits, in

[6] The plaintiff cited to *Shekleton v. Eichenberger*, 677 F.3d 364-65 (8th Cir. 2012); *Shannon v. Koehler*, 616 F.3d 855, 864-65 (8th Cir. 2010); *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009); and *Montoya v. City of Flandreau*, 669 F.3d 867, 871-72 (8th Cir. 2012).

addition to Ninth Circuit precedent."). In *Drummond ex Rel. Drummond v. City of Anaheim*, the Ninth Circuit denied qualified immunity to police officers despite the absence of a factually similar Ninth Circuit case. 343 F.3d at 1061. The Ninth Circuit reasoned a local newspaper article, similar cases in the Western District of Michigan and the Southern District of Indiana, and departmental training provided the officers with fair warning that the force was excessive. *Id.* at 1061-62. Similarly, the First Circuit denied qualified immunity even though the district court could not find a factually similar case within circuit in *McKenney v. Mangino*. 873 F.3d 75, 82-83 (1st Cir. 2017). The court explained "such an exacting degree of precision is not required to thwart [a] qualified immunity defense." *Id.* at 82.

Further, the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have found that a case with the same facts is not required for the law to be clearly established. *See Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful."); *Thompson v. Virginia*, 878 F.3d 89, 98 (4th Cir. 2017) ("In the absence of directly on-point, binding authority, courts may also consider whether the right was clearly established based on general constitutional principles or a consensus of persuasive authority."); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) ("Every time the police employ a new weapon, officers do not get a green pass to use it in any manner until a case from the Supreme Court or from this circuit involving that particular

weapon is decided."); *Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("The qualified immunity analysis involves more than a scavenger hunt for prior cases with precisely the same facts."); *Vinyard v. Wilson*, 311 F.3d 1340, 1351 (11th Cir. 2002) ("When looking at case law, some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts.").

Not only is there an acknowledged *inter*-circuit split over the clearly established standard, there are also several *intra*-circuit splits. For example, in *Baynes v. Cleland*, the Sixth Circuit held that precedent was sufficient "to put a reasonable officer on notice that excessively forceful or unduly tight handcuffing is a constitutional violation under the Fourth Amendment," despite the absence of a case with those same facts. 799 F.3d 600, 614 (6th Cir. 2015). The Sixth Circuit reasoned that "[r]equiring any more particularity than this would contravene the Supreme Court's explicit rulings that neither a 'materially similar,' 'fundamentally similar,' or 'case directly on point' – let alone a factually identical case – is required, and that the specific acts or conduct at issue need not previously have been found unconstitutional for a right to be clearly established law." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *Hope*, 536 U.S. at 742-43; and *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

However, two years later, the same court required the exact particularity that it said would contravene the Supreme Court's explicit rulings. *See Latits v. Phillips*, 878 F.3d 541, 552 (2017). In *Latits v.*

Phillips, the Sixth Circuit granted qualified immunity to an officer, holding that his conduct, although objectively unreasonable, was not a violation of the law clearly established at the time of his actions. 878 F.3d at 553. Prior precedent involved officers shooting a non-violent driver who attempted to *initiate* flight, while in the case at hand, the police officer shot the non-violent driver when he attempted to *re-initiate* flight after being stopped. *Id.* at 553. Requiring that degree of particularity is what the court in *Baynes* condemned. 799 F.3d at 614.

It is clear that the circuits "are divided – intractably – over precisely what degree of factual similarity must exist." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J. concurring in part, dissenting in part). The Court does not demand "a case directly on point," but the law must be "particularized" to the facts of the case in order for it to be clearly established. *Id.* (quoting *Kisela,* 138 S. Ct. at 1152; *White v. Pauly*, 137 S. Ct. at 552). This circuit split illustrates that "the 'clearly established' standard is neither clear nor established in our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part, dissenting in part). The Court should grant certiorari to resolve this split and clarify the clearly established standard.

B. The Question Is Important

Qualified immunity is a frequently recurring issue. But instead of becoming clearer every time it is addressed, the opposite occurs. Qualified immunity cases are unpredictable, because the lower courts apply the standards differently. Circuit courts

disagree on the appropriate sources of precedent and on the degree of factual similarity to that precedent required for a constitutional violation to be clearly established. These disagreements, on questions that come up in every qualified immunity case, lead to outcomes that would have been different had the case been brought in a different circuit, or even a different court in the same circuit. Geography-dependent outcomes undermine public confidence in our justice system and are inconsistent with our system of federal government. The law should be the same no matter what court a case arises in.

Not only do these cases have consequences for litigants and the parties involved, but they also affect the way in which the public views our legal system. Qualified immunity is a defense that can be asserted by any public official, not just police officers. However, police officers' assertions of qualified immunity are deservedly among the most prominent issues in the public consciousness today. Granting certiorari to clarify these questions will serve the public in general and police officers in particular. Accountability and transparency foster the public trust on which their work depends. The Court should grant certiorari to support accountability in policing and uniformity of the administration of justice.

C. This Case Is an Ideal Vehicle for the Court to Address this Disagreement

The facts of this case and the analysis of the Fifth Circuit make it an appropriate one in which to address the disagreement among the lower courts.

First, the facts are tragically familiar. Four police officers, three of them white, beat an unarmed, black man. This case is representative of police stops that have captured our attention across the country.

Second, the decision below directly poses the question of what is required to prove that a constitutional violation is clearly established.

Third, the facts are simple. A police officer pulled a man over for non-functioning brake lights; he complied with all the officer's commands and consented to two pat-down searches; a second police officer arrived; the officers threw the unarmed man to the ground, punching, striking, and kicking him; two more police officers arrived and joined in; the man was injured. There is video evidence to support Mr. Tucker's factual assertions. This is not a case that requires analysis of intricate background facts that informed the officers' judgment about how and when to use force on a suspect.

Finally, there are no ancillary issues that would interfere with the Court's consideration of the questions presented. Whether Respondents were entitled to qualified immunity was the only issue addressed in the decision below.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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