No. 22A_____

IN THE

Supreme Court of the United States

KEVION ROGERS,

Applicant,

v.

JEFFREY JARRETT; JEREMY BRIDGES; TEXAS DEPARTMENT OF CRIMINAL JUSTICE,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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APPLICATION

To the Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

Pursuant to Rule 13.5 of the Rules of this Court and 28 U.S.C. § 2101(c), applicant Kevion Rogers respectfully requests a 30-day extension of time, to and including July 28, 2023, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

1. The Fifth Circuit entered judgment on March 30, 2023. *See Rogers* v. *Jarrett*, 63 F.4th 971 (App. 1a–16a). Unless extended, the time to file a petition for certiorari will expire on June 28, 2023. This application is being filed more than ten days before a petition is currently due. *See* Sup. Ct. R. 13.5. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1254(1).

2. Kevion Rogers, a trusted prison inmate, was working unsupervised in a prison hog barn when the ceiling collapsed and struck him on his head, knocking him temporarily unconscious and causing him a traumatic brain injury. Rogers was part of a team working on renovating the hog barn, supervised by Respondent Jeffrey Jarrett. Once Rogers regained consciousness another inmate took him to see Jarrett, and Rogers informed Jarrett that the ceiling had collapsed on him. Rogers had dust on him, which several eyewitnesses stated was insulation from the ceiling. Other eyewitnesses saw Rogers stammering soon after the incident, while Jarrett and others reported that Rogers walked normally into Jarrett's office.

3. Rogers demanded to go to the infirmary. Jarrett told him to keep working. Jarrett had known of a severe water leak that destabilized the hog barn's structure. But when Rogers reported that the ceiling collapsed on his head, Jarrett became agitated because Rogers "looked fine" and spoke without slurring.

4. Rogers left Jarrett's office and tried to continue working. But he was lightheaded and had to sit down. Soon enough, other inmates had to try to keep Rogers awake as he drifted in and out of consciousness. Another prison staffer arrived around lunchtime, and Rogers told the staffer that the ceiling had collapsed on his head. Rogers also showed the staffer some debris. Rogers again asked for medical treatment, but also said he wanted to eat lunch. The staffer called Jarrett's supervisor, Respondent Jeremy Bridges, who stated he would be over "later" to check on Rogers in his bunk. Rogers was brought back to his bunk.

5. By the time he reached the bunk, Rogers's condition began to further deteriorate—his head and eyes began swelling, his face began bruising, and he began showing signs of respiratory distress. Prison staff decided to bring him to the administrative building. On the way Rogers collapsed and seized and vomited. He again lost consciousness. Medical assistance was then summoned—for the first time—some three hours after Rogers regained consciousness post-collapse, and only after he was found vomiting, having a seizure, acting incoherent, and lacking the ability to respond to verbal communications. Eventually Rogers was carried by LifeFlight to a hospital, where he was diagnosed with a traumatic brain injury.

6. Rogers filed a lawsuit in Texas state court against Jarrett, Bridges, and the Texas Department of Criminal Justice. Rogers alleged state tort claims and, under 42 U.S.C. § 1983, violations of his Eighth and Fourteenth Amendment rights, in part alleging Respondents failed to provide him necessary medical treatment and were thus deliberately indifferent to his serious medical needs. Respondents removed the case to federal court.

7. Respondents asserted the defense of qualified immunity and moved for summary judgment on all claims. The District Court granted Respondents' summary-judgment motion as to Rogers's § 1983 claims, holding Respondents were entitled to qualified immunity, and remanded Rogers's state law claims to state court. App. 17a-35a. The District Court found "no evidence that would permit a jury to infer that Jarrett and Bridges had subjective knowledge of the severity of Rogers's condition." It reasoned that no jury could conclude that Jarrett or Bridges actually inferred Rogers was at substantial risk of serious harm; all they knew, according to the District Court, was that he had been hit in the head. Then, once Rogers's symptoms arose, prison staff rendered medical aid.

8. The Fifth Circuit agreed. App. 1a–16a. The panel determined Respondents were entitled to qualified immunity because Rogers failed to raise a fact dispute over whether Jarrett and Bridges acted with deliberate indifference, that is whether they knew of a substantial risk of harm and failed to act. App. 5a-8a. Jarrett and Bridges knew Rogers had been hit in the head, but did not observe any apparent injury other than a scraped knee. Once Jarrett and Bridges observed Rogers's

condition worsening, they did not fail to get him medical treatment. That was enough for the panel to reject Rogers's deliberate-indifference claims.

9. The panel also held that Respondents were entitled to qualified immunity because Rogers failed to show his rights were clearly established at the time of the alleged violation. App. 8a-10a. The panel reasoned that Rogers identified the right in question too broadly, rather than describing the particular conduct that is alleged to be clearly established. And the panel stated that cases do not clearly establish that the report of a strike to a prisoner's head triggers a duty to seek medical care for a prisoner.

10. Judge Willett concurred to highlight that the qualified-immunity doctrine may be "flawed—foundationally—from its inception." App. 12a-15a. Since *Pierson* v. *Ray*, 386 U.S. 547, 556-557 (1967), this Court has reasoned that certain common-law immunities existed when § 1983 was enacted in 1871, and that "no evidence" suggests that Congress meant to abrogate these immunities rather than incorporate them in § 1983, *Briscoe* v. *LaHue*, 460 U.S. 325, 337 (1983). But Judge Willet asks: "[W]hat if there *were* such evidence?" App. 12a.

11. According to Judge Willett, there is such evidence: the so-called Notwithstanding Clause. In fact, newly published scholarship raises this question and cuts at the very heart of § 1983 and the doctrine of qualified immunity. App. 12a (citing Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201, 201 (2023) ("This Article takes aim at the roots of the doctrine—fundamental errors that have never been excavated.").

12. As passed by Congress, Section 1 of the Civil Rights Act of 1871, now known as § 1983, read, in relevant part:

> [A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress . . . .

Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871). The so-called Notwithstanding Clause comprises the sixteen italicized words. The Clause "makes clear" that "[r]ights-violating state actors are liable—period—*notwithstanding* any state law to the contrary." App. 13a. But the Clause went missing by 1874, and not by Act of Congress, but instead by an "unauthorized alteration to Congress's language" by the "Reviser of Federal Statutes" in the first compilation of federal law. App. 13a-14a. The Reviser's error has never been corrected.

13. This Court's decades-long justification for qualified immunity has been that Congress would not have abrogated common-law immunities absent explicit language. But the Notwithstanding Clause—*i.e.*, part of the original statutory text Congress enacted in 1871—does just that. It negates the original interpretive premise for qualified immunity. This "undermine[s] the doctrine's long-professed foundation and underscore[s] that what the 1871 Congress meant for state actors who violate Americans' federal rights is not immunity, but liability—indeed, liability *notwithstanding* any state law to the contrary." App. 14a.

14. The Notwithstanding Clause thus raises a provocative question: "If a legislature enacts a statute, but no one bothers to read it, does it still have interpretive force?" App. 15a (citation omitted). Judge Willett raised this question in a concurrence because, given the decades of § 1983 case law, "[o]nly [the Supreme Court] can definitively grapple with § 1983's enacted text and decide whether it means what is says—and what, if anything, that means for § 1983 immunity jurisprudence." App. 15a. This case thus raises a question that strikes at the foundation of § 1983's qualified immunity doctrine, a question that this Court needs to address, a question that *only* this Court can address.

15. Neal Kumar Katyal of Hogan Lovells US LLP, Washington, D.C., was retained on behalf of Applicant Kevion Rogers to file a petition for writ of certiorari. Over the next several weeks, counsel is occupied with briefing deadlines and arguments for a variety of matters, including: (1) an answer to a petition for review in the California Supreme Court arising from *Myers v. Board of Equalization*, No. B307981 (Cal. App.), due on June 21; (2) a petition for certiorari in *Suski v. Coinbase*, No. 22-15209 (9th Cir.), due on June 23; (3) a joint status report and response to a motion for escrow disbursement in *Delaware v. Arkansas*, Nos. 22O145, 22O146 (U.S.), due on June 23; (4) a petition for rehearing en banc in *United States v. Paulson*, No. 21-55230 (9th Cir.), due July 3, 2023; (5) a response brief in Ma*ryland Shall Issue, Inc., et al. v. Anne Arundel County*, No. 23-1351 (4th Cir.), due July 10. Applicant requests this extension of time to permit counsel to research the relevant legal and factual

issues and to prepare a petition that fully addresses the important questions raised by the proceedings below.

16. For these reasons, Applicant respectfully requests that an order be entered extending the time to file a petition for certiorari to and including July 28, 2023.

Respectfully submitted,

/s/ Neal Kumar Katyal

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