No.

IN THE

Supreme Court of the United States

SHASE HOWSE,

Petitioner,

v.

THOMAS HODOUS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CITY OF CLEVELAND, OHIO; BRIAN MIDDAUGH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS AN EMPLOYEE OF THE CITY OF CLEVELAND, OHIO,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

JAMES L. HARDIMAN, ESQ
3615 Superior Avenue,
Ste. 3101-D
Cleveland, Ohio 44144

Counsel for Petitioner
**Counsel of Record*
Additional counsel on back cover

CHRISTOPHER KEMMITT
MAHOGANE D. REED†
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th St., NW, Ste 600
Washington, DC 20005
(202) 682-1300

† *Admission Pending*

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether the law is clearly established that an officer cannot arrest a person whom the officer has no reason to believe committed a crime, tackle him to effect the arrest, and then strike him in the neck when he poses no threat to anyone's safety.

2. Whether a Fourth Amendment malicious prosecution claim must be dismissed simply because one of multiple underlying charges is supported by probable cause.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Shase Howse; Respondents Thomas Hodous and Brian Middaugh; Defendant-Appellee City of Cleveland, Ohio; and Defendant John Doe.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF AUTHORITIES......................................vi

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS AND ORDERS BELOW 1

JURISDICTION 1

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT 3

I. Detective Middaugh Unlawfully Arrests and Assaults Mr. Howse. 4

II. The District Court Grants Summary Judgment for the Detectives, a Divided Panel of the Sixth Circuit Affirms, and the Sixth Circuit Denies Rehearing over the Dissent of Four Judges 7

REASONS FOR GRANTING THE PETITION 12

I. The Sixth Circuit's Qualified Immunity Ruling Contradicts this Court's Precedent and Creates a Circuit Split...................................12

A. The Decision Below Fails to Apply the Governing Legal Rule that in Qualified Immunity Cases, as in Other Cases, the Summary Judgment Record Must Be

Viewed in the Light Must Favorable to the Nonmovant 15

B. The Decision Below Fails to Apply the Governing Legal Rule that General Statements of the Law Provide Clear Notice of Fourth Amendment Violations in Obvious Cases 20

II. The Sixth Circuit's Malicious Prosecution Ruling Contravenes this Court's Precedent and Creates a Circuit Split 26

A. The Decision Below Creates a Circuit Split on Whether the Existence of Probable Cause to Support One of Multiple Charges Precludes a Plaintiff from Pursuing a Malicious Prosecution Claim for the Remaining Charges 28

B. The Decision Below Contradicts This Court's Differential Treatment of Malicious Prosecution and False Arrest Claims 34

CONCLUSION 36

Appendix A Opinion and Judgment in the United States Court of Appeals for the Sixth Circuit (March 18, 2020) ..... App. 1

Appendix B Memorandum Opinion in the United States District Court for the Northern District of Ohio Eastern Division (April 15, 2019) ..... App. 31

Appendix C Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the Fourth Circuit (June 8, 2020) .... App. 64

TABLE OF AUTHORITIES

Page(s)

Cases

Albright v. Oliver,
510 U.S. 266 (1994) (per curiam) 25

Blankenhorn v. City of Orange,
485 F.3d 463 (2007) 24

Bovat v. Vermont,
__ S. Ct. __ (2020) 18

Brown v. Texas,
443 U.S. 47 (1979) 12, 21

Casey v. City of Federal Heights,
509 F.3d 1278 (10th Cir. 2007) 24

City of Indianapolis v. Edmond,
531 U.S. 32 (2000) 17, 21

Collins v. Doyle,
209 F.3d 719 (5th Cir. 2000) 32

Devenpeck v. Alford,
543 U.S. 146 (2004) 34

District of Columbia v. Wesby,
138 S. Ct. 577 (2018) 13, 20

El-Ghazzawy v. Bethiaume,
636 F.3d 452 (8th Cir. 2011) 18

Elmore v. Fulton County School Dist.,
605 F. App'x. 906 (11th Cir. 2015)........................30

Graham v. Connor,
490 U.S. 386 (1989)...................................... *passim*

Harrington v. City of Council Bluffs, Iowa,
678 F.3d 676 (8th Cir. 2012)................................32

Heck v. Humphrey,
512 U.S. 477 (1994)..33

Holmes v. Village of Hoffman Estate,
511 F.3d 673 (7th Cir. 2007).............26, 29, 30, 34

Howse v. Hodous,
960 F.3d 905 (6th Cir. 2020)..................................1

Howse v. Hodous,
No. 1:17 CV 1714, 2019 WL 1509139
(N.D. Ohio Apr. 5, 2019) 1

Johnson v. Knorr,
477 F.3d 75 (3d Cir. 2007) 26, 28, 29, 34

Lassiter v. City of Bremerton,
556 F.3d 1049 (9th Cir. 2009)...............................30

Lundstrom v. Romero,
616 F.3d 1108 (10th Cir. 2010)............................18

Manuel v. City of Joliet, Ill.,
137 S. Ct. 911 (2017)..25

Maryland v. Pringle,
540 U.S. 366 (2003) 21

Mendonca v. City of Providence,
170 F. Supp. 3d 290 (D.R.I. Mar. 15, 2006) 30

Miller v. Spiers,
339 F. App'x 862 (10th Cir. 2009) 31

Morris v. Noe,
672 F.3d 1185 (2012) 24

Payton v. New York,
445 U.S. 573 (1980) 18

Posr v. Doherty,
944 F.2d 91 (2d Cir. 1991) 26, 27, 28, 34

Raiche v. Pietroski,
623 F.3d 30 (2010) 23

Rivera-Marcano v. Normeat Royal Dane Quality,
998 F.2d 34 (1st Cir. 1993) 30

Salazar-Limon v. City of Houston,
137 S. Ct. 1277 (2017) 14, 19, 25

Sykes v. Anderson,
625 F.3d 294 (6th Cir. 2010) 25

Tennessee v. Garner,
471 U.S. 1 (1985) 13, 22

Terry v. Ohio,
392 U.S. 1 (1968) 17, 18, 21

Tolan v. Cotton,
572 U.S. 650 (2014) (per curiam) .... *passim*

Uboh v. Reno,
141 F.3d 1000 (11th Cir. 1998) 26, 30

Van De Weghe v. Chambers,
569 F. App'x 617 (10th Cir. 2014) 31

Wallace v. Kato,
589 U.S. 384 (2007) 26, 32, 33, 34

White v. Pauly,
137 S. Ct. 548 (2017) .... *passim*

Constitutional Provisions

U.S. Const. amend. IV 2

Federal Statutes

28 U.S.C. § 1254 1

42 U.S.C. § 1983 2

State Statutes

Ohio Rev. Code Ann. § 2921.31(a) 10

Rules

Fed. R. Civ. P. 56 12

PETITION FOR WRIT OF CERTIORARI

Petitioner Shase E. Howse prays that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, *Howse v. Hodous*, 953 F.3d 402 (6th Cir. 2020), affirming the judgment of the district court, is reproduced at Appendix A, App. 1–30. The opinion of the United States District Court for the Northern District of Ohio, *Howse v. Hodous*, No. 1:17 CV 1714, 2019 WL 1509139 (N.D. Ohio Apr. 5, 2019), granting summary judgment to the Respondents, is reproduced at Appendix B, App. 31–63. The order of the United States Court of Appeals for the Sixth Circuit denying rehearing en banc, *Howse v. Hodous*, 960 F.3d 905 (6th Cir. 2020), is reproduced at Appendix C, App. 58–62.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit entered its judgment and opinion on March 18, 2020. App. 1. That court denied a timely petition for rehearing en banc on June 8, 2020. App. 64. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Amend IV

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

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

At summary judgment, Petitioner Shase Howse presented evidence that as Mr. Howse was entering his home, a plainclothes police officer approached him, told him he was going to jail, and threw him to the ground. Mr. Howse had done nothing illegal, and the officer had no reason to suspect otherwise. In the course of handcuffing Mr. Howse, the officer struck him in the back of the neck, causing his face to hit the front porch, even though Mr. Howse had done nothing to threaten the officer. The officer's conduct plainly violated the Fourth Amendment's prohibition against unreasonable seizure, both because the initial seizure was unlawful and because the officer used excessive force in effectuating it. A divided panel of the Sixth Circuit nonetheless granted the officer qualified immunity. In so doing, it made the very error that this Court recognized as warranting summary reversal in *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam): defining the context of the clearly established law inquiry in a way that failed to consider all of the evidence presented by the nonmovant. The majority compounded that error by concluding the officer was entitled to summary judgment because Mr. Howse did not identify a prior case with similar facts. The majority failed even to consider this Court's precedent recognizing that prior cases with similar facts are not necessary when the constitutional violation is obvious.

After Mr. Howse was arrested in the absence of probable cause, he was charged with three offenses—two felony assaults and one misdemeanor charge for obstructing official business. All three charges were

dismissed. Yet, the majority below concluded he could not maintain a malicious prosecution claim with respect to any of the three charges based solely on the fact that (in its view) there was probable cause to support the misdemeanor charge. In so doing, the majority compared malicious prosecution claims to false arrest claims, notwithstanding this Court's clear instruction that those claims are entirely distinct. That decision also created a clear split of authority with several other circuits.

The decision below represents a departure from this Court's precedent and creates a circuit split on two important issues of federal law. It presents the Court with an important opportunity to reaffirm its commitment to the Fourth Amendment's fundamental protections against government misconduct that invades a person's liberty, especially when entering their own home. Certiorari should be granted.

I. Detective Middaugh Unlawfully Arrests and Assaults Mr. Howse.

On the evening of July 28, 2016, then-20-year-old Shase Howse walked up the steps of his front porch. As he crossed the porch, he fished his keys from his pocket while chatting on the phone with his mother. App. 33. He reached the front door and put his key in the lock when an unmarked car stopped in front of his house. *Id.* A man in the passenger seat asked Mr. Howse whether he lived there. The man was white; Mr. Howse is Black. Mr. Howse replied truthfully, "Yes, this is my house, I live here." *Id.* The car began to drive away when Mr. Howse noticed the

front passenger saying something to the driver. *Id.* After the two men exchanged words, the car backed down the street to Mr. Howse's home. *Id.*

The front passenger demanded again that Mr. Howse tell him whether he lived there. Frustrated, Mr. Howse replied, "Yes, this is my home. What the fuck?" *Id.* In response, the man—who was 5'11" and weighed 220 pounds—got out of his car and told Mr. Howse—who is 5'6" and weighs 140 pounds—"you have a smart mouth and a bad attitude." App. 34, ROA 139. Two other men, both larger than Mr. Howse, followed the first man out of the car. App. 31, ROA 165.

The man from the passenger seat "continued to make reference to [Mr. Howse's] smart mouth" and asked him for a third time, "are you sure you live here?" App .31, ROA 411. Mr. Howse replied, "yes, I live here. I live here." App. 17, ROA 411. Although Mr. Howse had an ID in his pocket that showed he lived in the house, the man never requested it. App. 35. Instead, the man walked up to Mr. Howse, who was still on the phone with his mother, and told him to put his hands behind his back because he was going to jail. App. 3, 17, 31.

Mr. Howse responded by saying, "I live here. I live here. You have no right." ROA 414. "And then [the man] just tackled [him]." *Id.* The man—Detective Brian Middaugh—had not identified himself as a police detective, and Mr. Howse did not know that he was an officer until Detective Middaugh "was on top of [him] yelling." App. 31, ROA 810 ¶ 22. Pinned under Detective Middaugh, Mr. Howse stiffened his arms to try to keep Detective Middaugh and the other officers

from placing them behind his back, but he never struck anyone or tried to free himself. App. 31, ROA 415.

Mr. Howse's mother, Nicholasa Santari, returned home a short time later to find three men in dark clothing on her porch—one of them straddling her son—while her son screamed, "I live here. I live here." App. 31, 35. She called out, and when Mr. Howse heard her voice, he raised his head from the ground and looked in her direction. As his mother watched, one of the men struck him twice in the back of the neck with his fist, slamming his face into the porch. App. 34–35. Ms. Santari pleaded with the officers to stop beating her son and to tell her what was happening. ROA 734 ¶¶ 12–13.

The officers then placed Mr. Howse in handcuffs and transported him to the Cleveland City Jail, where he was detained for the weekend. App. 35. Detective Middaugh signed a complaint against Mr. Howse, falsely charging him with assault and battery. App. 47, ROA 811 ¶ 41.

After his mother posted his bond, Mr. Howse was released from jail. He had never been arrested before and assumed that the State would drop the charges against him "once someone in a position of authority looked at [the] facts and realized that I had been arrested while attempting to enter my home." ROA 810 ¶ 30. Instead, a grand jury indicted Mr. Howse for two counts of assault on a police officer, both felonies, and one count of obstructing official business, a misdemeanor, based in part on Detective Middaugh's complaint. On August 2, 2016, the State arraigned Mr. Howse, a judge set his bond at $1,000,

and he retained a defense attorney. ROA 811 ¶¶ 32, 34. Through his attorney, the State sought to determine whether Mr. Howse would entertain a misdemeanor plea offer or a diversion program, both of which he rejected. ROA 811 ¶¶ 36–37.

On September 14, 2016, Mr. Howse filed a "Citizen Complaint Form" with the City of Cleveland, stating that "Cleveland Police came on to my property, threw me to the floor and commenced striking me." App. 47, ROA 822. Less than three weeks later, the State dismissed all charges against Mr. Howse. App. 48.

II. The District Court Grants Summary Judgment for the Detectives, a Divided Panel of the Sixth Circuit Affirms, and the Sixth Circuit Denies Rehearing over the Dissent of Four Judges.

In July 2017, Mr. Howse filed suit in Ohio state court against the officers involved in the incident—Brian Middaugh and Thomas Hodous—and the City of Cleveland. He alleged that the officers violated his Fourth Amendment rights by seizing him without reasonable suspicion or probable cause, using excessive force, and participating in his malicious prosecution. He also raised a state law claim for assault and battery. The Defendants removed the suit to federal court the following month.

After the close of discovery, the district court granted summary judgment to the Defendants on all claims. App. 62–63. The court rejected Mr. Howse's arguments that he was unlawfully detained and

subject to excessive force, reasoning that "[t]he detectives observed Mr. Howse on the front porch of what they mistakenly believed to be a vacant home in a high crime area, and that "[t]he Detectives used force no greater than necessary to control the situation." App. 57. The court rejected Mr. Howse's malicious prosecution claim based on its view that "[t]he Detectives had probable cause to arrest Mr. Howse[,] and[] the undisputed facts were sufficient to support the charges filed against him." App. 60.

A divided panel of the Sixth Circuit affirmed. The majority acknowledged Mr. Howse's argument that the detectives both "stopped him without reasonable suspicion and used excessive force during his arrest." App. 7. But the panel ignored the former argument and ruled that the latter was barred by qualified immunity.

In conducting its qualified immunity analysis, the majority stated: "we must examine the particular situation" and determine "whether the law clearly established that [the officers'] conduct was unlawful." App. 8 (emphasis omitted). The majority defined the "particular situation" as "whether every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." *Id.* In its view, Mr. Howse had to present a case where a court had ruled that an officer acting under similar circumstances had violated the Fourth Amendment. "Without such a case, the plaintiff will almost always lose." *Id.* Because Mr. Howse did not identify a case presenting the same factual situation, the court ended

its analysis and ruled that the officers were entitled to qualified immunity. *See* App. 9.

Chief Judge Cole dissented from the panel's grant of qualified immunity to Detective Middaugh, explaining that the majority's conclusions were "predicated on resolving key factual disputes in the officers' favor" or disregarding Mr. Howse's evidence. App. 18 (Cole, C.J., dissenting). To wit, the majority ignored the fact that "[p]rior to Middaugh telling Howse he was going to jail and attempting to arrest him, Howse had done nothing illegal at all, and the officers do not allege otherwise." App. 21–22. "In fact, as Middaugh attempted to arrest Howse, his *only* professed basis for doing so was Howse's profanity." *Id.*

The dissent also rejected the majority's framing of the excessive force issue, stating: "We should instead be asking whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest that person without probable cause." App. 23. (footnote omitted) Chief Judge Cole concluded that the answer was "yes." Whether an officer has used excessive force is governed by four factors set forth in *Graham v. Connor*, 490 U.S. 386, 396 (1989), and "clearly established law on those factors compels the conclusion that the force used in throwing Howse to the ground was excessive." App. 24.

The majority and dissent also diverged on how to resolve Mr. Howse's malicious prosecution claim. All three judges agreed that to win his malicious prosecution claim Mr. Howse "must show (among other things) that the officers helped start a

prosecution against him without probable cause." App. 10. But they disagreed on what to do if one charge was supported by probable cause while others were not.

Here, the officers charged Mr. Howse with three offenses: two felony counts of assaulting a police officer and one misdemeanor count of obstructing official business. According to the majority, Mr. Howse's malicious prosecution claim must fail solely because Mr. Howse provided the police with probable cause for obstructing official business by "stiffening up his body and screaming" "to make it more difficult for the officers to arrest him."[1] App. 11. Analogizing malicious prosecution claims to false arrest claims, the majority concluded that "because there was probable cause for" the obstructing official business charge, "Howse cannot move forward with *any* of his malicious-prosecution claims." *Id.*

Chief Judge Cole rejected the majority's premise. He wrote: "The Supreme Court tells us that the tort of malicious prosecution is 'entirely distinct' from the tort of . . . false arrest, as the former remedies the wrongful institution of legal process and the latter remedies detention in the absence of legal process." App. 25 (Cole, C.J., dissenting) (citing *Wallace v. Kato*, 589 U.S. 384, 390 (2007)). "[T]he majority determines that these 'entirely distinct' claims must necessarily be analyzed in the exact same way, despite myriad

[1] Obstructing official business requires interference with a public official's performance of a "lawful duty," Ohio Rev. Code Ann. § 2921.31(a), but Detective Middaugh was carrying out an arrest without probable cause. The majority made no effort to explain why Detective Middaugh's attempt to carry out an arrest without probable cause constituted "a lawful duty."

reasons to follow the Supreme Court's direction and treat them differently." *Id.* Chief Judge Cole explained that he would join the Second, Third, Seventh, and Eleventh Circuits in holding that a malicious prosecution claim can proceed even where one of multiple charges is supported by probable cause. App. 26–28.

Following the panel's affirmance, Mr. Howse petitioned for rehearing en banc. App. 60. The Sixth Circuit denied the petition. Judge Gibbons filed a dissent from the denial joined by Chief Judge Cole, Judge White, and Judge Stranch. App. 67. In Judge Gibbons' words, "[t]he panel's holding with respect to malicious prosecution claims, which adopts a one-size-fits-all approach to false arrest and malicious prosecution, is a precedent-setting error of exceptional public importance." *Id.* "It is at odds with Supreme Court precedent, and our precedents. And it fails to engage with the many compelling reasons offered by our sister circuits for declining to adopt such an approach." *Id.* (quotation marks and citations omitted).

The dissenting judges also supported rehearing the panel's qualified immunity decision. The dissent noted that the Sixth Circuit had long emphasized that qualified immunity decisions must pay attention to the specific factual circumstances of the case. *See id.* "And yet, in framing Shase Howse's right in this case, the panel fails to account for his suspected criminality (none), location (home), or conduct (truthfully answering questions)." *Id.* Judge Gibbons stated that while qualified immunity cases "frequently raise grounds for reasonable disagreement—and rarely

warrant *en banc* rehearing"—the majority's decision "erode[s] . . . confidence in the judiciary" by failing to carefully define Mr. Howse's rights. App. 67–68.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's Qualified Immunity Ruling Contradicts this Court's Precedent and Creates a Circuit Split.

The Fourth Amendment prohibits seizures absent "a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity," and it prohibits arrests absent "'probable cause' to believe that the suspect is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51 (1979). The Fourth Amendment also prohibits the "objectively unreasonable use of force" during a seizure or arrest, *Graham*, 490 U.S at 397, which is determined by balancing "'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tolan*, 572 U.S. 650, 656 (2014) (per curiam) (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), and citing *Graham*) (additional quotation marks omitted).

Applying these clearly established principles, Mr. Howse's Fourth Amendment claim must be decided by a jury. Viewing the summary judgment record in the light most favorable to Mr. Howse, as Rule 56 requires, Detective Middaugh arrested Mr. Howse without probable cause or even reasonable suspicion, and he did so by employing precisely the kind of "objectively unreasonable use of force"

forbidden by the Fourth Amendment. *Graham*, 490 U.S. at 397.

The panel below nevertheless granted Detective Middaugh summary judgment, reasoning that "the unlawfulness of [his] conduct" was not "clearly established at the time [he and another officer] approached and arrested Howse." App. 7. But, by 2016, this Court's precedent made it "'clear to a reasonable officer that [it] was unlawful'" to arrest someone without probable cause, and to tackle and then strike them in the course of doing so. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

In reaching a contrary conclusion, the panel majority made two errors that contravene this Court's qualified immunity precedent and warrant certiorari review. First, the panel "failed properly to acknowledge key evidence offered by the party opposing" summary judgment and therefore did not "define the 'clearly established' right at issue on the basis of the 'specific context of the case.'" *Tolan*, 572 U.S. at 657 (quoting *Saucier*, 533 U.S. at 201). The panel did not address the evidence that Detective Middaugh tackled Mr. Howse for the purpose of taking him to jail even though Mr. Howse was simply entering his own home with his own key; that Detective Middaugh twice struck Mr. Howse in the neck, causing his face to hit the porch; or that this force was applied to effectuate a seizure on the front porch of Mr. Howse's own residence.

Second, the panel majority concluded that, absent a prior case involving similar facts where an officer's conduct was held unlawful, "the plaintiff will

almost always lose." App. 8. But this Court has repeatedly reaffirmed that "'general statements of the law are not inherently incapable of giving fair and clear warning' to officers," and that *Graham* and *Garner* themselves create clearly established law in "'obvious case[s].'" *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citations omitted); *accord Wesby*, 138 S. Ct. at 590. Even though the dissent explained why this is an obvious case under the Fourth Amendment and *Graham*, the majority ignored that controlling decision.

Although prior cases with similar facts are important when the constitutional violation is not obvious, this Court does not require a prior "'case directly on point.'" *White*, 137 S. Ct. at 551 (citations omitted). Rather, the touchstone of the qualified immunity analysis is whether "existing precedent . . . place[s] the [lawfulness of the particular seizure] 'beyond debate.'" *Id.* (citations omitted). Existing precedent puts it beyond debate that a police officer cannot arrest someone without probable cause as he is using his key to enter his own home, or throw him down to the ground in the course of doing so. Nor can an officer strike a suspect twice in the neck when the suspect poses no threat to the officer.

The decision below also creates a split of authority with other circuits, which have denied qualified immunity in analogous cases involving obvious Fourth Amendment violations even in the absence of a factually similar prior case. And this issue is important. The federal courts are routinely faced with disputes about the scope of qualified immunity "in cases involving allegations that a law

enforcement officer engaged in unconstitutional conduct." *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277, 1278 (2017) (Alito, J., joined by Thomas, J., concurring in denial of certiorari). It is therefore important for this Court to provide guidance when, as here, "the lower court conspicuously failed to apply a governing legal rule." *Id.*

A. The Decision Below Fails to Apply the Governing Legal Rule that in Qualified Immunity Cases, as in Other Cases, the Summary Judgment Record Must Be Viewed in the Light Must Favorable to the Nonmovant.

In *Tolan v. Cotton*, this Court emphasized that the qualified immunity standard does not authorize a departure from the basic rules of summary judgment. Therefore, just as in any other case, "courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment," and they "must view the evidence 'in the light most favorable to the opposing party.'" 572 U.S. at 656, 657 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970)). This is because "a 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Id.* at 656 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986)).

Tolan further stressed that this Court's "qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-

established prong of the standard." *Id.* at 657. In cases "alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue based on the 'specific context of the case.' Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions.'" *Id.* (citations omitted).

Here, the Sixth Circuit framed the question as whether "every reasonable officer would know that law enforcement cannot tackle someone who disobeyed an order and then use additional force if they resist being handcuffed." App. 8. But that framing reflected the same error the Fifth Circuit made in *Tolan*. It was premised on the Sixth Circuit's "fail[ure] to properly acknowledge key evidence offered by the party opposing" summary judgment, 572 U.S. at 659: that Detective Middaugh told Mr. Howse he was "going to jail" before ordering him to put his hands behind his back and then throwing him to the ground. As Chief Judge Cole explained in dissent, that meant Detective Middaugh tackled Mr. Howse in order to effectuate an arrest. *See* App. 21.

And it is undisputed that Detective Middaugh lacked probable cause for an arrest. As Chief Judge Cole explained, "[p]rior to Middaugh telling Howse he was going to jail and attempting to arrest him, Howse had done nothing illegal at all. . . ." App. 19. "Instead, Howse had only repeatedly asserted the (true) fact that he lived at the residence and sworn at the plainclothes officers when they kept asking him the same question." *Id.* Had the majority acknowledged all of Mr. Howse's evidence and viewed that evidence

in the light most favorable to him, it would have asked a different question, *viz.*, "whether it violates a clearly established constitutional right for an officer to throw a person to the ground in order to arrest that person without probable cause." App. 20–21 (footnote omitted).

The answer to that question is obviously no. As the majority acknowledged: "Of course, it's true that an officer cannot *arrest* someone without probable cause." App. 9 n.1. And the majority did not dispute that Officer Middaugh lacked probable cause to arrest Mr. Howse. Instead, the majority stated that "it isn't obvious that the officers were effectuating an arrest (rather than an investigatory stop) when they tackled and handcuffed Howse," because "[t]he mere act of handcuffing someone doesn't transform a stop into an arrest." *Id.* In so doing, the majority improperly drew an inference ("it isn't obvious") in favor of Defendants, the moving parties. Moreover, the panel responded to an argument Chief Judge Cole did not make. As Chief Judge Cole explained, it was clear that Detective Middaugh was arresting Mr. Howse not because Detective Middaugh handcuffed Mr. Howse, but because Detective Middaugh told Mr. Howse that he was "going to jail." App. 23 n.1. Indeed, both "parties agree[d] that Middaugh deployed the force in question while executing an arrest." App. 20. The majority simply ignored that evidence.

Moreover, even an investigatory stop requires individualized suspicion of criminal wrongdoing. *See, e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000). Taking Mr. Howse's evidence as true and drawing all reasonable inferences in his favor,

Detective Middaugh lacked any individualized suspicion that would support even an investigatory stop; he instead chose to arrest Mr. Howse because he did not like Mr. Howse's "smart mouth and . . .bad attitude." App. 33–34. Mr. Howse used his key to enter his own residence, and then repeatedly (and accurately) told officers that he lived in the home in response to their questions. He did not flee or threaten the officers, and the fact that he used profanity while truthfully answering their questions does not provide individualized suspicion of criminal wrongdoing. The majority simply assumed that Detective Middaugh had reasonable suspicion to support a *Terry* stop without crediting, or addressing, the summary judgment evidence presented by Mr. Howse. *See* App. 9 n.1.

The majority also "failed to properly acknowledge" two other important pieces of evidence offered by Mr. Howse. *Tolan*, 572 U.S. at 659. First, the majority did not acknowledge that, after tackling Mr. Howse, Detective Middaugh struck him twice in the back of the neck while handcuffing him. The majority instead referred vaguely to "additional force," suggesting that it was justified because Mr. Howse "resist[ed] being handcuffed" by stiffening up his body. App. 8. But while certain kinds of "additional force" may be justified when an individual stiffens up his body (even where, as here, he does not threaten or attempt to harm the officer), that does not mean *any* type of additional force is justified. *See, e.g.*, *Lundstrom v. Romero*, 616 F.3d 1108, 1123 (10th Cir. 2010) (use of non-de minimis force must be reasonably necessary to protect officer safety or maintain status

quo); *El-Ghazzawy v. Bethiaume*, 636 F.3d 452, 457 (8th Cir. 2011) (similar, discussing *Graham* and *Terry v. Ohio*, 392 U.S. 1 (1968)).

Second, the majority did not acknowledge where all of these events occurred: the front porch of Mr. Howse's residence where he lived with his mother. This Court has "long recognized the relevance of the common law's special regard for the home to the development of Fourth Amendment jurisprudence." *Payton v. New York*, 445 U.S. 573, 597 n.45 (1980). As Justice Gorsuch recently stated in another Fourth Amendment case: "The Constitution's historic protections for the sanctity of the home and its surroundings demand more respect from us all than was displayed here." *Bovat v. Vermont*, __ S. Ct. __ (2020) (Statement Respecting the Denial of Certiorari, joined by Sotomayor & Kagan, JJ.).

In sum, the Sixth Circuit made the very error the Fifth Circuit made in *Tolan*, and its error warrants this Court's review. As explained in *Tolan*, although "'this Court is not equipped to correct every perceived error coming from the lower federal courts,'" intervention is warranted in qualified immunity cases when, as here, "the opinion below reflects a clear misapprehension of summary judgment standards in light of our precedents." *Id.* at 659 (citation omitted); *see also Salazar-Limon*, 137 S. Ct. at 1278 (Alito, J., joined by Thomas, J., concurring in denial of certiorari).

B. The Decision Below Fails to Apply the Governing Legal Rule that General Statements of the Law Provide Clear Notice of Fourth Amendment Violations in Obvious Cases.

The key issue in qualified immunity cases such as this is whether the officer had fair and clear warning that his conduct was unlawful. *See, e.g.*, *White*, 137 S. Ct. at 552. In "'the light of pre-existing law the unlawfulness must be apparent'" to a reasonable officer. *Id.* (citation omitted). The Sixth Circuit understood these principles to mean that, absent a prior case involving similar facts where the officer's conduct was held to have violated the Fourth Amendment, "the plaintiff will almost always lose," and it failed even to consider whether this case involves an obvious Fourth Amendment violation. App. 8 (citation omitted). The Sixth Circuit's approach finds no support in this Court's precedent, and it misconstrues this Court's instructions about the significance of prior cases involving similar facts.

This Court has emphasized that clearly established law should not be defined at too high of a level of generality, in a way that would "'convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" *White*, 137 S. Ct. at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). But this Court has also stressed that its precedent "'does not require a case directly on point'" for an officer to have fair notice that his conduct is unlawful, and that "'general statements of the law are

not inherently incapable of giving fair and clear warning' to officers." *Id.* (citations and alterations omitted). The key is whether "the rule's contours [are] so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" *Wesby*, 138 S. Ct. at 590 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)).

In cases involving general standards like probable cause or unreasonable use of force, "officers will often find it difficult to know how the general standard . . . applies in 'the precise situation encountered.'" *Id.* (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017)). In those circumstances, a factually similar prior case is generally necessary for the officer to be on notice that his conduct is unlawful. *See id.* But "often" does not mean "almost always," and in some cases the application of the legal rule is clear even in the absence of a prior case involving similar facts. Ultimately, it is the clarity of the legal rule that matters. *See id.*

Here, viewing the summary judgment record in the light most favorable to Mr. Howse, the unlawfulness of Detective Middaugh's conduct is clear based on the general rules established by this Court's precedent. The rule that an officer cannot arrest someone in the absence of probable cause is clearly established, *see, e.g., Brown*, 443 U.S. 47, 51 (1979), and the panel majority acknowledged as much. App. 9 n.1. That rule alone supplies the requisite clearly established law because it is undisputed that Detective Middaugh did not have probable cause to arrest Mr. Howse. Probable cause requires a "'reasonable ground for belief of guilt'" that is

"particularized with respect to the person to be searched or seized." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Mr. Howse was simply using his own key to enter his own residence, as he repeatedly told Detective Middaugh. Therefore, Detective Middaugh had no reasonable and particularized grounds to believe Mr. Howse had committed a crime. *See id.*

Even if Detective Middaugh had not arrested Mr. Howse, he would have needed reasonable suspicion for a *Terry* stop. As a matter of clearly established law, he had no such reasonable suspicion because he had no individualized basis for suspecting Mr. Howse of criminal wrongdoing before telling him he was going to jail, ordering him to put his hands behind his back, and throwing him to the ground. Determining how much individualized suspicion is enough may normally require a prior case with similar facts to put a reasonable officer on notice that his conduct is unlawful. But no similar case is required when, as here, an officer has no individualized suspicion *at all* because the need for some individualized suspicion is clearly established by this Court's precedent. *See, e.g.*, *Edmond*, 531 U.S. at 37.

This Court's precedent also clearly establishes that Officer Middaugh violated the Fourth Amendment by using excessive force in arresting Mr. Howse. *Graham* prohibits the "objectively unreasonable" use of force during a seizure, 490 U.S. at 397, which "requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Tolan*, 570 U.S. at 656 (quoting *Garner*,

471 U.S. at 8) (additional quotation marks omitted). This is a general standard, but "'general statements of the law are not inherently incapable of giving fair and clear warning' to officers." *White*, 137 S. Ct. at 552 (citations and alterations omitted). And this Court has recognized that *Graham* and *Garner* are themselves sufficient in obvious cases. *See White*, 137 S. Ct. at 552. Indeed, in *Tolan*, the Court cited the general standards discussed in *Graham* and *Garner* as setting forth the relevant rule for qualified immunity purposes without any elaboration of those basic principles. *See Tolan*, 572 U.S. at 656.

This is an obvious case under *Graham* and *Garner*. It is beyond debate that being thrown to the ground while entering one's own home is a substantial "'intrusion on [an] individual's Fourth Amendment interests.'" *Tolan*, 572 U.S. at 656. Viewing the summary judgment record in the light most favorable to Mr. Howse, that substantial intrusion was not supported by any "governmental interest[] alleged to justify the intrusion," because Mr. Howse had done nothing to suggest he had violated the law or posed a danger to anyone.

Graham also identified the following factors to consider in analyzing whether an officer's use of force was unconstitutionally excessive: the severity of the crime at issue, whether the person seized poses an immediate threat to the safety of officers or others, and whether the person is actively resisting or attempting to flee. *Graham*, 490 U.S. at 396. As Chief Judge Cole explained in dissent, all of these factors favor Mr. Howse: (1) "Howse did not commit (and Detective Middaugh had no reason to believe he had

committed) any crime"; (2) there is no evidence that Mr. Howse "posed an immediate threat to the safety of any officer" or anyone else; and (3) Mr. Howse did not resist or attempt to flee prior to being tackled, "as he was immediately thrown to the ground by Middaugh." App. 25.

Without citing *Graham* or addressing any of these factors, the panel majority granted qualified immunity to Detective Middaugh based on the lack of a prior case with similar facts. *See* App. 9. In so doing, the Sixth Circuit contravened this Court's precedent that *Graham* itself establishes clear law in obvious cases. *White*, 137 S. Ct. at 552. In addition, the Sixth Circuit created a circuit split with several other circuits, which have recognized that *Graham* put officers on notice that it constituted excessive force to tackle a suspect under factual circumstances analogous to this case.

In *Raiche v. Pietroski*, 623 F.3d 30 (2010), the First Circuit held that tackling the plaintiff was an unconstitutional use of excessive force because he had done nothing to suggest the use of such force was justified. *See id.* at 38–39. The court held that the facts showed "'such an obvious violation of the Fourth Amendment's general prohibition on unreasonable force that a reasonable officer would not have required prior case law on point to be on notice that his conduct was unlawful.'" *Id.* (citation omitted). Similarly, in *Morris v. Noe*, the Tenth Circuit held that *Graham* itself established that an officer violated the Fourth Amendment's prohibition on excessive force by tackling a person in order to make an arrest, when the person "posed no threat to [the officer] or others, nor

did he resist or flee," even though—unlike here—the person had walked toward a group of officers and asked them a "potentially confrontational question." 672 F.3d 1185, 1198 (2012). The Court of Appeals concluded that the right at question "was clearly established, even in the absence of similar prior cases," because "the force [was] clearly unjustified based on the *Graham* factors." *Id*. at 1197. Finally, in *Blankenhorn v. City of Orange*, 485 F.3d 463, 478–79 (2007), the Ninth Circuit reached a similar conclusion relying solely on the *Graham* factors in a case where multiple officers tackled a suspect, even though the suspect had failed to comply with a verbal order by the officers.

As Judge McConnell put it in another case, even in the absence of a "similar factual situation," *Graham* makes clear that an officer is "not entitled to immunity from an excessive force claim" when there are "'no substantial grounds for a reasonable officer to [believe] that there was legitimate justification for' his conduct." *Casey v. City of Federal Heights*, 509 F.3d 1278, 1284–85 (10th Cir. 2007) (citation omitted). By failing to recognize and apply that principle here, the Sixth Circuit both contravened this Court's precedent and created a circuit split.

This Court has recognized the importance of granting review when the federal appellate courts misapprehend its qualified immunity precedent. *See, e.g.*, *White*, 137 S. Ct. at 551; *Tolan*, 572 U.S. at 659; *see also Salazar-Limon v. City of Houston*, 137 S. Ct. at 1277 (Alito, J., joined by Thomas, J., concurring in denial of certiorari). Given the clarity of the errors described above, the Court should grant review in this

case and either summarily reverse or schedule the case for merits briefing and argument to consider both issues presented by the petition.

II. The Sixth Circuit's Malicious Prosecution Ruling Contravenes this Court's Precedent and Creates a Circuit Split.

Like most circuits, the Sixth Circuit "recognize[s] a . . . constitutionally cognizable claim of malicious prosecution under the Fourth Amendment,"[2] which "encompasses wrongful investigation, prosecution, conviction, and incarceration." *Sykes v. Anderson*, 625 F.3d 294, 308 (6th Cir. 2010). To prevail on such a claim, a plaintiff must prove (1) that a criminal prosecution was initiated against them and that the defendant made, influenced, or participated in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) that the criminal proceeding was resolved in the plaintiff's favor. *Id.* at 308–09.

The decision below affirmed the dismissal of Mr. Howse's malicious prosecution claim based on the conclusion that Mr. Howse failed to satisfy *one*

---

[2] In *Albright v. Oliver*, 510 U.S. 266 (1994) (per curiam), this Court reserved the question whether a malicious prosecution claim is cognizable under the Fourth Amendment. Ten circuits agree that it is. *But see Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 923–24 (2017) (Alito, J., dissenting) (agreeing with the Seventh Circuit that such claims are not cognizable).

element (lack of probable cause for a criminal prosecution) for *one* of the three charges underlying his claim (obstruction of official business). App. 10–13. The majority concluded that because Detective Middaugh had probable cause to charge Mr. Howse with obstruction of official business, Mr. Howse could not proceed on his malicious prosecution claim for the assault charges. *Id.* at 13.

The majority's decision warrants review by this Court for two reasons. First, the majority's decision creates a clear split of authority with other circuits. Most other circuits have held that probable cause to support one of multiple charges underlying a malicious prosecution claim does not extinguish a plaintiff's claim with respect to other charges where there was no probable cause. *See Posr v. Doherty*, 944 F.2d 91 (2d Cir. 1991); *Holmes v. Village of Hoffman Estate*, 511 F.3d 673 (7th Cir. 2007); *Johnson v. Knorr*, 477 F.3d 75 (3d Cir. 2007); *see also Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998). The Sixth Circuit is the only circuit to definitively take the opposite approach.

Second, notwithstanding this Court's consistent treatment of false arrest and malicious prosecution claims as "entirely distinct," *Wallace*, 549 U.S. at 390, the majority "adopt[ed] a one-size-fits-all approach to false arrest and malicious prosecution" claims, App. 67. This Court's intervention is necessary to resolve the circuit split and correct the inconsistency between the decision below and this Court's precedent.

A. The Decision Below Creates a Circuit Split on Whether the Existence of Probable Cause to Support One of Multiple Charges Precludes a Plaintiff from Pursuing a Malicious Prosecution Claim for the Remaining Charges.

In the decision below, the majority held that because probable cause supported the misdemeanor obstruction charge against Mr. Howse, the panel did not need to assess whether the remaining charges were prosecuted with probable cause. *See* App. 13. This is an anomaly among the circuit courts, most of which allow malicious prosecution claims to proceed even where probable cause existed for at least one of several underlying charges.

The Second, Third, and Seventh Circuits have all expressly held that courts should assess probable cause for each charge underlying a malicious prosecution claim independently, and that malicious prosecution claims may proceed where probable cause existed for at least one—but not all—of multiple underlying charges. In *Posr v. Doherty*, 944 F.2d 91, 100 (2d Cir. 1991), the Second Circuit ordered a new trial on the issue of whether an officer was liable for malicious prosecution. Posr had been charged with disorderly conduct, resisting arrest, and assaulting an officer; all charges were ultimately dismissed on the motion of the prosecutor. *Id.* at 94. Posr then sued two officers for malicious prosecution, among other claims. *Id.* at 95. At trial, the district court instructed the jury that if it "found probable cause supporting any of the three charges of disorderly conduct, resisting arrest

and assault lodged against Posr, no liability for malicious prosecution could be found as to any of the charges filed." *Id*. at 100.

The Second Circuit held that the district court's instructions were improper because they did not instruct the jury to "separately analyze the charges claimed to have been maliciously prosecuted." *Id*. The court reasoned that it "should not allow a finding of probable cause on [the disorderly conduct] charge"—a lesser charge than resisting arrest and assaulting an officer—"to foreclose a malicious prosecution cause of action on charges requiring different, and more culpable, behavior." *Id*. To hold otherwise, the court observed, would permit "an officer with probable cause as to a lesser offense [to] tack on more serious, unfounded charges which would support a high[er] bail or a lengthy detention, knowing that the probable cause on the lesser offense would insulate him from liability for malicious prosecution on the other offenses." *Id*.

In *Johnson v. Knorr*, 477 F.3d 75, 84 (3d Cir. 2007), the Third Circuit took the same approach and reversed a district court's holding that the existence of probable cause for one charge barred the plaintiff from maintaining a malicious prosecution claim for other charges. The Third Circuit agreed with the Second Circuit's decision in *Posr*. It explained that a contrary ruling would allow officers to tack on more serious and unfounded charges for which there was not probable cause "either for the arrest or for [the] initiation of the criminal proceedings merely because there was probable cause for the arrest on any charge." *Id*.

The Third Circuit also specifically rejected the reasoning adopted by the majority in this case, i.e., the panel's comparison of malicious prosecution claims to false arrest claims. In *Knorr*, the court explained that requiring a charge-by-charge analysis of probable cause underlying a malicious prosecution claim "is not inconsistent with the principle that, in analyzing false arrest claims," a court can insulate a defendant from liability by finding "only that probable cause existed as to any offense that could be charged under the circumstances." *Id.* at 84–85 (alterations omitted). For false arrest claims, the existence of probable cause for one offense justifies the arrest even if there was insufficient cause to arrest on the other offenses. *Id.* at 85. The same is not true in the malicious prosecution context, where the existence of probable cause to charge and prosecute on one offense does not justify the other charges for which there is no probable cause. *See id.*

The Seventh Circuit agreed in *Holmes v. Village of Hoffman Estate*, 511 F.3d 673 (7th Cir. 2007), that if a person is prosecuted on multiple charges, the basis for each charge must be examined separately. And if probable cause is lacking as to any charge, the defendants can still be liable for malicious prosecution on the unsupported charge. It explained that "[l]ogic supports" distinguishing between malicious prosecution and false arrest in this context. *Id.* at 682. "An arrested individual is no more seized when he is arrested on three grounds rather than one; and so long as there is a reasonable basis for the arrest, the seizure is justified on that basis even if any other ground cited for the arrest was flawed." *Id.* But

when it comes to prosecution, the number and nature of the charges matter: "the accused must investigate and prepare a defense to each charge, and as the list of charges lengthens (along with the sentence to which the accused is exposed), the cost and psychic toll of the prosecution on the accused increase." *Id.* Further, "when an officer prepares and signs a criminal complaint, he typically will have more of an opportunity to reflect on the nature and ramifications of the accused's conduct than he did in making the arrest." *Id.* at 683. Thus, the Seventh Circuit concluded that it is "reasonable to demand that each charge that a police officer elects to lodge against the accused be supported by probable cause." *Id.*

Other circuits have implicitly adopted this same charge-by-charge approach for malicious prosecution claims. In *Uboh v. Reno*, 141 F.3d 1000 (11th Cir. 1998), the Eleventh Circuit considered whether a prosecutor's dismissal of one of multiple charges in an indictment counted as "favorable termination" for a malicious prosecution claim. The plaintiff had been convicted of the other charges set forth in the indictment, but the Eleventh Circuit permitted his malicious prosecution claim for the dismissed charges to proceed. *Id.* at 1006; *accord Elmore v. Fulton County School Dist.*, 605 F. App'x. 906 (11th Cir. 2015) (observing that "[g]enerally, in contrast to false-arrest claims, probable cause as to one charge will not bar a malicious prosecution claim based on a second, distinct charge as to which probable cause was lacking"). In *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054 (9th Cir. 2009), the Ninth Circuit dismissed a malicious prosecution

claim, but only after separately analyzing all of the underlying charges and determining that each was supported by probable cause. And in *Rivera-Marcano v. Normeat Royal Dane Quality*, 998 F.2d 34 (1st Cir. 1993), the First Circuit acknowledged the prevailing view of other circuits that permits a "plaintiff [to] maintain a malicious prosecution action based on one groundless accusation, when probable cause existed for one or more other accusations made concurrently." *Id.* at 38 (citing *Posr*); *accord Mendonca v. City of Providence*, 170 F. Supp. 3d 290, 302 (D.R.I. Mar. 15, 2006) (observing that "while the First Circuit has not definitively ruled on the subject, it has acknowledged [the] trend" of permitting malicious prosecution claims for distinct charges where at least one charge did arise from probable cause).

The Tenth Circuit has at times recognized and applied the charge-by-charge approach as the prevailing one, and at other times it has not. In *Miller v. Spiers*, 339 F. App'x 862 (10th Cir. 2009), the court recognized that under the common law of malicious prosecution, a plaintiff can "challenge prosecutions on a charge-by-charge basis." *Id.* at 867. Because of this, the panel held that the plaintiff's convictions for one charge "[did] not necessarily foreclose his malicious prosecution claim concerning the charges that were ultimately dismissed." *Id.* at 868. The court in *Van De Weghe v. Chambers*, 569 F. App'x 617 (10th Cir. 2014) (Gorsuch, J.), noted that *Miller*, as an unpublished opinion, was not binding law and held that officers were entitled to qualified immunity because the plaintiff had not identified any clearly established law "suggesting that a claim for malicious prosecution lies

when one charge is supported by probable cause but other simultaneous charges arising from the same set of facts are not." *Id.* at 619. In so holding, then-Judge Gorsuch recognized that the Tenth Circuit had not "definitively spoken to the question either way" and outlined the diverging approaches among the circuits on the issue. *Id.* at 620.[3]

The Fifth and Eighth Circuits have expressly left the question open. *See Collins v. Doyle*, 209 F.3d 719 n.15 (5th Cir. 2000) ("expressly reserv[ing]" the question whether a charge-by-charge analysis of probable cause is appropriate); *Harrington v. City of Council Bluffs, Iowa*, 678 F.3d 676, 680 n.5 (8th Cir. 2012) (declining to address arguments about whether probable cause to suspect plaintiffs of car theft was sufficient to defeat a malicious prosecution claim based on prosecution for murder without probable cause); *id.* at 683 (Colloton, J., dissenting) (highlighting "conflicting signals" in the case law about whether the existence of probable cause to arrest for one claim would defeat some or all of the plaintiffs' malicious prosecution claims).

Most circuits to consider the issue have coalesced around the principle that a malicious prosecution claim with multiple underlying charges does not fail simply because there was probable cause to support one of the underlying charges. The Sixth Circuit stands alone in expressly concluding otherwise. This Court should review this case to unify the circuit courts' approach to these claims.

---

[3] The panel majority resolved Mr. Howse's malicious prosecution claims on the merits and did not discuss the "clearly established law" prong of the qualified immunity inquiry.

B. The Decision Below Contradicts This Court's Differential Treatment of Malicious Prosecution and False Arrest Claims.

In *Wallace v. Kato*, this Court explained that the torts of malicious prosecution and false arrest are "entirely distinct." 549 U.S. at 390. The constitutional tort of false arrest "consists of detention without legal process," *id.* at 389–390, while the constitutional tort of malicious prosecution consists of "detention accompanied . . . by wrongful institution of legal process." *Id.* at 390 (alternation and footnote omitted). This distinction is also evident in other cases from this Court. In *Heck v. Humphrey*, 512 U.S. 477, 484 (1994), this Court characterized malicious prosecution claims as "unlike the related cause of action for false arrest or imprisonment" in determining the statute-of-limitations accrual date for the former claim.

In contrast to this Court's distinct treatment of false arrest and malicious prosecution claims, the decision below held that Fourth Amendment malicious prosecution claims must be treated like false arrest claims because of a purported equivalence between the two claims:

> [C]laims for false arrest and malicious prosecution both arise under the Fourth Amendment. They both hinge on an alleged unreasonable seizure. And they both rise and fall on whether there was probable cause supporting the detention.

> Indeed, just like in the context of false arrests, a person is no more seized when he's detained to await prosecution for several charges than if he were seized for just one valid charge. In the end, there's no principled reason for treating a Fourth Amendment malicious-prosecution claim differently than a Fourth Amendment false-arrest claim.

App. 13. (footnote omitted) The majority's assessment misses fundamental distinctions between the two claims that this Court and other circuits have recognized.

The majority's assertion that false arrest and malicious prosecution claims both "hinge" on an unlawful seizure diverges from how this Court has characterized them: false arrest claims concern detention without legal process and primarily address the lawfulness of the initial seizure; malicious prosecution claims, on the other hand, concern unlawful detention plus the "wrongful institution of legal process." *Wallace*, 549 U.S. at 390.

This Court has held that the probable-cause-to-arrest inquiry for false arrest claims is based on whether the facts known by the arresting officer at the time of arrest objectively provided probable cause to arrest. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004). Thus, false arrest claims hinge on an alleged unlawful seizure. But malicious prosecution claims hinge on the unlawful commencement of legal process. *Wallace*, 549 U.S. at 389–90. And the question of whether probable cause supports the initiation of a legal process comprised of multiple charges necessarily

turns on the validity of each charge. *Johnson*, 477 F.3d at 85; *see also Wallace*, 549 U.S. at 390.

The panel majority's reasoning also ignores the myriad additional reasons to treat the two claims differently. *See* App. 25–29. As various other circuits have recognized, not conducting a charge-by-charge analysis for malicious prosecution claims would permit officers to charge the accused with more crimes than probable cause supports. *Posr*, 944 F.2d at 100. It fails to remedy the harms when an accused is required to investigate and defend against meritless charges. *Holmes*, 511 F.3d at 683. And it would increase "the cost and psychic toll of the prosecution on the accused." *Id.*; *see also Wallace*, 549 U.S. at 390 (damages for a malicious prosecution claim are based on the abuse of judicial process and not the detention itself).

The panel majority's fundamental premise—that "there's no principled reason" for treating malicious prosecution and false imprisonment claims differently—disregards these principles and improperly conflates the two "entirely distinct" legal claims. The lower court's logic conflicts with this Court's precedent and was a "precedent-setting error" that warrants this Court's review. App. 67.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHERRILYN A. IFILL
Director-Counsel
JANAI S. NELSON
SAMUEL SPITAL*
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
(212) 965-2200

CHRISTOPHER KEMMITT
MAHOGANE D. REED†
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
700 14th St., NW Suite 600
Washington, DC 20005
(202) 682-1300

JAMES L. HARDIMAN, ESQ
3615 Superior Avenue,
Ste. 3101-D
Cleveland, Ohio 44144

Counsel for Petitioner.

**Counsel of Record*
† *Admission Pending*

November 5, 2020