No. 17-550

In the Supreme Court of the United States

EDWARD WIERSZEWSKI,
Petitioner,
v.
ALAN THIBAULT,
Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITIONER FOR WRIT OF CERTIORARI ON BEHALF OF EDWARD WIERSZEWSKI

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QUESTIONS PRESENTED

ISSUE I:

DOES PETITIONER WIERSZEWSKI HAVE STANDING TO SEEK SUPREME COURT REVIEW AND REVERSAL OF THE PORTION OF THE SIXTH CIRCUIT JUDGMENT DISMISSING, FOR LACK OF JURISDICTION, WIERSZEWSKI'S APPEAL FROM A DISTRICT COURT ORDER DENYING QUALIFIED IMMUNITY?

ISSUE II:

DID PETITIONER WIERSZEWSKI WAIVE SUPREME COURT REVIEW OVER THE ISSUE OF WHETHER HE VIOLATED A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT NOT TO BE SUBJECT TO ARREST FOR OPERATING UNDER THE INFLUENCE OF INTOXICANTS OTHER THAN ALCOHOL?

ISSUE III:

DOES *DISTRICT OF COLUMBIA V. WESBY* OFFER COMPELLING GUIDANCE REGARDING THE PROPER JUDICIAL RESOLUTION OF WIERSZEWSKI'S QUALIFIED IMMUNITY DEFENSE BEYOND THE ISSUE OF WHAT PRECEDENT SHOULD SERVE AS THE BASIS OF CLEARLY ESTABLISHED LAW?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

REPLY ARGUMENT I: PETITIONER WIERSZEWSKI HAS STANDING TO SEEK SUPREME COURT REVIEW AND REVERSAL OF THE PORTION OF THE SIXTH CIRCUIT JUDGMENT DISMISSING, FOR LACK OF JURISDICTION, WIERSZEWSKI'S APPEAL FROM A DISTRICT COURT ORDER DENYING QUALIFIED IMMUNITY 1

REPLY ARGUMENT II: PETITIONER WIERSZEWSKI DID NOT WAIVE SUPREME COURT REVIEW OVER THE ISSUE OF WHETHER HE VIOLATED A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT NOT TO BE SUBJECT TO ARREST FOR OPERATING UNDER THE INFLUENCE OF INTOXICANTS OTHER THAN ALCOHOL 5

REPLY ARGUMENT III: *DISTRICT OF COLUMBIA V. WESBY* OFFERS COMPELLING GUIDANCE REGARDING THE PROPER JUDICIAL RESOLUTION OF WIERSZEWSKI'S QUALIFIED IMMUNITY DEFENSE BEYOND THE ISSUE OF WHAT PRECEDENT SHOULD SERVE AS THE BASIS OF CLEARLY ESTABLISHED LAW 8

TABLE OF AUTHORITIES

CASES

Adams v. Robertson,
520 U.S. 83, 117 S. Ct. 1028,
137 L. Ed. 2d 203 (1997) 5, 7

Ashcroft v. al-Kidd,
563 U.S. 731, 735, 131 S. Ct. 2074,
179 L. Ed. 2d 1149 (2011) 2

Behrens v Pelletier,
516 U.S. 229, 116 S. Ct. 834,
133 L. Ed. 2d 773 (1996) 4, 5, 6

Campbell-Ewald Co v. Gomez,
136 S. Ct. 663, 193 L. Ed. 2d 571 (2016) 3, 4

Camreta v. Greene,
563 U.S. 692, 131 S. Ct. 2020,
179 L. Ed. 2d 1118 (2011) 1, 2, 3, 4

Chafin v. Chafin,
568 U.S. 165, 133 S. Ct. 1017,
185 L. Ed. 2d 1 (2013) 4

Citizens United v. F.E.C.,
558 U.S. 310, 130 S. Ct. 876,
175 L. Ed 2d 753 (2010) 6, 7

City of Canton v. Harris,
489 U.S. 378, 109 S. Ct. 1197,
103 L. Ed. 2d 412 (1989) 6, 7

Deposit Guarantee Nat'l Bank v. Roper,
445 U.S. 326, 100 S. Ct. 1166,
63 L. Ed. 2d 427 (1980) 1, 2, 3

District of Columbia v. Wesby,
___ U.S. ___, 2019 U.S. LEXIS 760
(No. 15-1485, 1/22/18) . . . . *passim*

Hernandez v. Mesa,
137 S. Ct. 2003, 198 L. Ed. 2d 625 (2017) 3

Johnson v Jones,
515 U.S. 304, 115 S. Ct. 2151,
132 L. Ed. 2d 238 (1995) 4, 5

Mitchell v. Forsyth,
472 U.S. 511, 105 S. Ct. 2806,
86 L. Ed. 2d 411 (1985) 4, 5

Mullenix v. Luna,
136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) 6

Ortiz v. Jordan,
562 U.S. 180, 131 S. Ct. 884,
178 L. Ed. 2d 703 (2010) 4, 5

Parr v. U.S.,
351 U.S. 513, 76 S. Ct. 912,
100 L. Ed. 2d 1377 (1956) 1, 2, 3

Pearson v. Callahan,
555 U.S. 223, 129 S. Ct. 808,
172 L. Ed.2d 565 (2009) 6

Plumhoff v. Rickard,
572 U.S. ___, 134 S. Ct. 2012,
188 L. Ed. 2d 1056 (2014) 2, 4, 6

Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151,
150 L. Ed.2d 272 (2001) 6

Taylor v. Barkes,
575 U.S. ___, 135 S. Ct. 2042,
192 L. Ed. 2d 78 (2015) 3

U.S. v. Windsor,
133 S. Ct. 2675, 186 L. Ed. 2d 808 (2013) . . 1, 2, 3

Warth v. Seldin,
422 U.S. 490, 95 S. Ct. 2197,
45 L. Ed. 2d 343 (1975) 2, 3

White v. Pauly,
580 U.S. ___, 137 S. Ct. 548,
196 L. Ed. 2d 463 (2017) 3, 6

Yee v. Escondido,
503 U.S. 519, 112 S. Ct. 1522,
118 L. Ed. 153 (1992) 5, 6, 7

Ziglar v. Abbasi,
137 U.S. 1843, 198 L. Ed. 2d 290 (2017) 2, 3

STATUTES

42 U.S.C. §1983 . . . . 1, 2, 4, 5, 8

REPLY ARGUMENT I:

PETITIONER WIERSZEWSKI HAS STANDING TO SEEK SUPREME COURT REVIEW AND REVERSAL OF THE PORTION OF THE SIXTH CIRCUIT JUDGMENT DISMISSING, FOR LACK OF JURISDICTION, WIERSZEWSKI'S APPEAL FROM A DISTRICT COURT ORDER DENYING QUALIFIED IMMUNITY

Citing *Deposit Guarantee Nat'l Bank v. Roper, 445 U.S. 326, 333, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980)* and *Parr v. U.S., 351 U.S. 513, 516, 76 S. Ct. 912, 100 L. Ed. 2d 1377 (1956),* Respondent Thibault argues that Petitioner Wierszewski lacks standing to seek Supreme Court review and reversal of the judgment of United States Court of Appeals for the Sixth Circuit dismissing, for lack of jurisdiction, an appeal from a District Court order which denied Wierszewski's request for summary judgment premised upon an assertion of qualified immunity from Thibault's false arrest claims under *42 U.S.C. §1983.* According to Thibault, Wierszewski was not aggrieved by the Sixth Circuit's dismissal because the Court of Appeals ultimately decided the merits of the qualified immunity defense.

Thibault's standing arguments are, quite simply, ludicrous.

Under general principles of appellate practice and prudence, a party who has prevailed on all appeal issues does not have standing to challenge the judgment in the party's favor. *U.S. v. Windsor, 133 S. Ct. 2675, 2687, 186 L. Ed. 2d 808 (2013); Camreta v. Greene, 563 U.S. 692, 702-704, 131 S. Ct. 2020, 179*

L. Ed. 2d 1118 (2011); Roper, supra; Parr, supra. The purpose of this general rule of prudential standing is to protect the courts from deciding abstract questions of wide public significance in cases where judicial intervention is not necessary to protect the litigating parties' rights and interests. *Windsor, 133 S. Ct. at 2686; Warth v. Seldin, 422 U.S. 490, 500, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).*

The appellate standing rule is a flexible one which permits appeals by prevailing parties where matters of public policy demand judicial guidance. *Windsor, supra; Camreta, 563 U.S. at 704, Roper, supra.* The Supreme Court has placed qualified immunity cases "in a special category when it comes to…review of appeals by winners." *Camreta, 563 U.S. at 704-705.*

Most recently, in *District of Columbia v. Wesby, ___ U.S. ___, 2019 U.S. LEXIS 760, *21 (No. 15-1485, 1/22/18),* this Court reaffirmed that it has discretion to correct lower court errors <u>at every step of the qualified immunity analysis</u> in order to advance the values that qualified immunity promotes. *Id.,* citing *Ashcroft v. al-Kidd, 563 U.S. 731, 735, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011)* and *Plumhoff v. Rickard, 572 U.S. ___, 134 S. Ct. 2012, 188 L. Ed. 2d 1056 (2014).* The values promoted by qualified immunity: (1) shielding governmental officials from the burdens of litigation and personal liability under *§1983* where the officials acted under the objectively reasonable belief that the contested actions were lawful; and, (2) avoiding the creation of precedent which would induce an undue fear of liability and, in turn, inhibit governmental officials from effective discharge of socially desirable duties. *Ziglar v. Abbasi, 137 U.S.*

1843, 1866-1867, 198 L. Ed. 2d 290 (2017); Hernandez v. Mesa, 137 S. Ct. 2003, 2007, 198 L. Ed. 2d 625 (2017); White v. Pauly, 580 U.S. ___, 137 S. Ct. 548, 551-552, 196 L. Ed. 2d 463 (2017); Taylor v. Barkes, 575 U.S. ___, 135 S. Ct. 2042, 2044, 192 L. Ed. 2d 78 (2015).

Clearly, the Sixth Circuit's judgment dismissing, for lack of jurisdiction, Petitioner Wierszewski's appeal from the denial of qualified immunity was not, in any sense, in Wierszewski's favor. Moreover, as posited at length in the Petition for Writ of Certiorari, Supreme Court intervention is necessary to protect Wierszewski's rights and interests. As such, Wierszewski indeed has standing to challenge the Sixth Circuit's judgment against him. *Windsor, supra; Camreta; supra; Roper, supra; Parr, supra; Warth, supra.*

Yet, Thibault insists that Wierszewski lacks standing because he cannot claim to be aggrieved by the Sixth Circuit's judgment since, notwithstanding the holding of lack of jurisdiction to entertain the appeal from the denial of qualified immunity, the majority panel proceeded to address the merits of Wierszewski's qualified immunity defense. In other words, Thibault contends that, because the Sixth Circuit opted to assess the merits of Wierszewski's qualified immunity arguments, the jurisdiction issue is now purely academic. Thibault is conflating the concept of standing with the concept of mootness.

A case is moot when intervening circumstances deprive the claimant of a personal stake in the outcome of the action, or, when it is impossible for a court to grant any effectual relief to the party. *Campbell-*

Ewald Co v. Gomez, 136 S. Ct. 663, 669, 193 L. Ed. 2d 571 (2016); Chafin v. Chafin, 568 U.S. 165, 172, 133 S. Ct. 1017, 185 L. Ed. 2d 1 (2013). A case is not moot so long as the parties have a concrete interest, no matter how minute, in the outcome of the action. *Campbell-Ewald Co., supra; Chafin, supra.*

Even if it is assumed, for the purposes of argument, only, that the jurisdictional issue is no longer live or solely dispositive, this case is not moot because: (1) without a doubt, the parties have personal stakes and concrete interests in the ultimate outcome of Thibault's currently alive *§1983* claims and Wierszewski's potentially dispositive qualified immunity defenses; and (2) it is certainly possible, and quite desirable, for the Court to grant the relief requested by Wierszewski. *Campbell-Ewald Co., supra; Chafin, supra.*

More to the point, assuming, for the purposes of argument, only, that Supreme Court review of the jurisdictional issue would amount to an academic exercise in this case, the Court, in its discretion, could and should directly address the issue for the benefit of the entire bench and bar. *Wesby, supra; Camreta, supra.* Only this Court has the authority to remind the federal circuit courts, including the Sixth Circuit, of the imperative, in every appeal, of fulfilling their core responsibility to exercise jurisdiction over legal issues presented by qualified immunity defenses. *Plumhoff, 134 S. Ct. at 2019-2020; Ortiz v. Jordan, 562 U.S. 180, 190, 131 S. Ct. 884, 178 L. Ed. 2d 703 (2010); Behrens v Pelletier, 516 U.S. 229, 312-314, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); Johnson v Jones, 515 U.S. 304, 319, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); Mitchell*

v. Forsyth, 472 U.S. 511, 526-528, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). This responsibility includes, where necessary, separation of reviewable legal issues from unreviewable factual ones in order to avoid the inappropriate dismissal of an entire appeal for lack of jurisdiction. *Ortiz, supra: Behrens, supra; Johnson, supra.*

In sum, Thibault's standing arguments are logically, factually, and legally defective and must be firmly rejected.

REPLY ARGUMENT II:

PETITIONER WIERSZEWSKI DID NOT WAIVE SUPREME COURT REVIEW OVER THE ISSUE OF WHETHER HE VIOLATED A CLEARLY ESTABLISHED FOURTH AMENDMENT RIGHT NOT TO BE SUBJECT TO ARREST FOR OPERATING UNDER THE INFLUENCE OF INTOXICANTS OTHER THAN ALCOHOL

Respondent Thibault argues that Petitioner Wierszewski has waived Supreme Court review of the issue of whether he violated a clearly established right not to be arrested without probable cause, by "largely ignoring" this issue before the Sixth Circuit.

Thibault's waiver argument amounts to pure jabberwocky.

As a general rule, only issues presented to and addressed by the courts of appeal are preserved for Supreme Court review. *Adams v. Robertson, 520 U.S. 83, 86, 117 S. Ct. 1028, 137 L. Ed. 2d 203 (1997); Yee v. Escondido, 503 U.S. 519, 544, 112 S. Ct. 1522, 118 L. Ed. 153 (1992).* This rule applies to *§1983* actions. *City*

of Canton v. Harris, 489 U.S. 378, 386, n. 5, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

Where an issue has been preserved for Supreme Court review, a petitioner is not bound by the precise arguments raised in the lower courts; a petitioner is completely free to reframe issues, tweak and enlarge arguments, and add legal authority. *Citizens United v. F.E.C., 558 U.S. 310, 330-331, 130 S. Ct. 876, 175 L. Ed 2d 753 (2010); Yee, 503 U.S. at 534-535.*

Petitioner Wierszewski has requested that, in the event the Supreme Court reverses the Sixth Circuit's dismissal for lack of jurisdiction, the Court directly address the issue of whether the District Court correctly denied summary judgment on grounds of qualified immunity. All qualified immunity defense requires resolution of whether: (1) the defendant's conduct violated a federal right or Constitutional guarantee; and (2) the right or guarantee, even if violated, was clearly established at the time of the misconduct. *Pearson v. Callahan, 555 U.S. 223, 232, 129 S. Ct. 808, 172 L. Ed.2d 565 (2009); Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed.2d 272 (2001); Behrens, 516 U.S. at 313.* Both inquiries must be addressed and qualified immunity must be conferred if either prong is resolved favor of the government official. *White, 137 S. Ct. at 551; Mullenix v. Luna, 136 S. Ct. 305, 308, 193 L. Ed. 2d 255 (2015); Plumhoff, 134 S. Ct. at 2022-2023; Pearson, 555 U.S. at 236.*

The entire Appellant's Brief submitted on behalf of Wierszewski to the Sixth Circuit is devoted to challenging the District Court's qualified immunity analysis, with comprehensive factual and legal

arguments proffered for the propositions that: (1) there is incontrovertible proof, in the form of a complete and accurate dash cam recording and other undisputed or indisputable evidence, that Officer Wierszewski had probable cause to arrest Thibault for driving under the influence of intoxicants; and, (2) under the totality of the particular circumstances and in light of then-exiting law, Officer Wierszewski should not and could not have reasonably expected that his arrest of Thibault would give rise to personal liability (Respondent's Appx., 2a-52a).

Additionally, the Sixth Circuit majority addressed both prongs of the qualified immunity defense, opining that: (1) Officer Wierszewski did not have probable cause to arrest Thibault; and, (2) Officer Wierszewski violated clearly established law by operating under the mistaken assumption that he possessed "free reign" to test and then arrest individuals who did not perform road side sobriety tests to his satisfaction (Petitioner's Appx., pp 11-30).

Hence, the issue of whether Wieszewski violated a clearly established right not to be arrested without probable cause was fully preserved for Supreme Court review. *Adams, supra; Yee, supra; Harris, supra.* This conclusion remains unchanged by Thibault's apparent – and incorrect – perception that Wierszewski's Petition for Writ of Certiorari reframed or added legal arguments. *Citizens United, supra; Yee, supra.*

In sum, Thibault's waiver arguments are factually and legally defective and must be firmly rejected.

REPLY ARGUMENT III:

DISTRICT OF COLUMBIA V. WESBY OFFERS COMPELLING GUIDANCE REGARDING THE PROPER JUDICIAL RESOLUTION OF WIERSZEWSKI'S QUALIFIED IMMUNITY DEFENSE BEYOND THE ISSUE OF WHAT PRECEDENT SHOULD SERVE AS THE BASIS OF CLEARLY ESTABLISHED LAW

In footnote three on page eighteen of his Brief in Opposition, Thibault remarks that, in *District of Columbia v. Wesby, 2018 U.S. LEXIS at *26, n. 8,* the Court declined to express its view about what legal precedent qualifies as controlling authority for the purposes of the "clearly established" prong of a qualified immunity defense.

However, the *Wesby* decision, issued after the filing of Wierszewski's Petition for Writ of Certiorari, offers compelling guidance on the critical qualified immunity issues presented in this case.

Specifically, in a unanimous decision, the *Wesby* Court reversed a judgment by the District of Columbia Circuit Court that: (1) the defendant police officers in a *§1983* action did not have probable cause to arrest the plaintiffs; and, (2) the officers were not entitled to qualified immunity. *Id., at *5-6.*

Specifically, the *Wesby* decision reaffirms Supreme Court precedent, cited by Wierszewski in his Petition for Writ of Certiorari, standing for the propositions that:

- To determine whether probable cause exists for a warrantless arrest, a reviewing court must examine the totality of the particular circumstances leading up to the arrest from the viewpoint of an objectively reasonable police officer. *Id., at 13-23.*

- Probable cause is "a fluid concept" that cannot and should not be "reduced to a neat set of legal rules," *Id., at 13, 23.*

- Probable cause determinations do not require meeting the "high bar" of actual criminal activity; rather, probable cause "requires only a probability or substantial chance of criminal activity." not an actual showing of such activity. *Id., at 13, 20.*

- When making probable cause determinations, police officers are permitted to take a suspect's nervous or unusual behavior into account. *Id., at *17-18.*

- When making probable cause determinations, police officers are not required to rule out suspects' innocent explanation for suspicious facts. *Id., at 19-21.*

- For the purposes of qualified immunity "clearly established" means that, at the time of the officer's conduct, there must have been a sufficiently clear legal foundation placing every reasonable police officer on notice that the particular conduct was unlawful. *Id., at 21- 22.*

- The "clearly established" component of qualified immunity is a demanding standard and protects

all but plainly incompetent police officers or officers who knowingly violate the law. *Id., at 22.*

- The "clearly established" standard – especially in the *Fourth Amendment* context – requires an assessment of whether there is existing law addressing the exact or closely similar factual circumstances. *Id., at 22-25.*

- Where police officers lacked actual probable cause, the officers are entitled to qualified immunity if, under the particular circumstances and in light of existing legal authority, they reasonably, even if mistakenly, believed that probable cause existed. *Id., at 25.*

- The consensus of federal authority in existence in and since 2008, is that suspects' innocent explanations – even if undisputed – "do not have automatic probable-cause vitiating effect" and, therefore, it is objectively reasonable for police officers "looking at the entire legal landscape" during that time frame to conclude that they need not accept suspects' innocent explanations "at face value". *Id., at *28-29.*

Furthermore, and critically, the *Wesby* decision fully supports Petitioner Wierszewski's prayer for review and reversal on the basis that the Sixth Circuit panel majority in this case violated Supreme Court precedent by:

- Viewing, in isolation, each factor relied upon by Officer Wierszewski when ascertaining whether probable cause existed to arrest Thibault for driving under the influence of non-alcohol

intoxicants, rather than considering the totality of the circumstances or "whole picture" encountered by Officer Wierszewski. *Id., at *19-20*.

- Dismissing outright factors or circumstances susceptible of innocent explanation. *Id.*

- Focusing upon whether Thibault was actually innocent of driving while impaired by non-alcohol intoxicants instead of considering whether the surrounding circumstances, as a whole, suggested impairment. *Id.*

- Concluding that Officer Wierszewski was not entitled to qualified immunity despite the utter lack of evidence that this officer was plainly incompetent or that he knowingly arrested Thibault without probable cause. *Id. at 22.*

- Concluding that Officer Wierszewski was not entitled to qualified immunity because neither the panel majority nor Thibault have identified a single precedent—much less a robust consensus of cases in existence in 2014—finding a *Fourth Amendment* violation in the specific circumstances presented in this case, namely, suspected impairment due to consumption of non-alcohol intoxicants. *Id. at 25* .

In short, *Wesby, supra,* fully supports Wierszewski's request that, in the event that the Supreme Court reverses the Sixth Circuit's dismissal, for lack of jurisdiction, the Court should:

- summarily reverse and vacate the Sixth Circuit's affirmation of the District Court's

denial of summary judgment on qualified immunity grounds and remand with instructions that a judgment be entered in favor of Wierszewski; or,

- reverse and vacate the Sixth Circuit's affirmation of the District Court's denial of summary judgment on qualified immunity grounds and remand the matter to the Sixth Circuit with instructions to decide the qualified immunity issues in accordance with binding Supreme Court precedent; or,

- grant the Petition for a Writ of Certiorari to the Sixth Circuit and review all the qualified immunity issue on the merits.

Respectfully submitted,

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