No. _____

In the
Supreme Court of the United States

JUSTIN SHULTZ and TERRY CHILDS,

Petitioners,

v.

JASON COLE,

Respondent.

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

JOINT PETITION FOR A WRIT OF CERTIORARI

Counsel for Officer Justin Shultz:
MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
BERNARD P. MATTHEWS, JR., *Counsel of Record*
Pa. I.D. 54880
bmatthews@mdbbe.com
724-836-4840
40 N. Pennsylvania Ave.
Suite 410
Greensburg, PA 15601
On Brief: CHARLES J. DANGELO, Pa. I.D. 60739
ALEXANDER W. BROWN, Pa. I.D. 322661

Counsel for Officer Terry Childs:
SIANA, BELLWOAR & MCANDREW, LLP
CHRISTOPHER P. GERBER, *Counsel of Record*
Pa. I.D. 76449
cgerber@sianalaw.com
610-321-5500
Ludwigs Corner Prof. Ctr.
941 Pottstown Pike, Suite 200
Chester Springs, PA 19425
On Brief: BRIAN C. CONLEY, Pa. I.D. 311372

QUESTIONS PRESENTED

1. When multiple police officers seek qualified immunity on a summary judgment motion, should their entitlement to qualified immunity be evaluated individually or collectively?

2. Did the court below act contrary to this Court's precedents by relying on a single inapposite precedent—its own—in determining that it was clearly established that business owners have a right to be free from retaliation directed toward their business by police officers after the owner complained to those police officers regarding their conduct?

PARTIES TO THE PROCEEDING

The caption names all of the parties to the proceedings in the court of appeals below.

Petitioners Justin Shultz ("Shultz") and Terry Childs ("Childs") were defendants in the district court. Respondent Jason Cole ("Cole") was the plaintiff. In the court of appeals, Shultz and Childs were the appellants and Cole was the appellee.

Other defendants at the district court were Chief Rick Encapera, California Borough, Pennsylvania, and Mayor Casey Durdines, who was later substituted for by Mayor Walter Weld, Jr. These other defendants were not parties in the court of appeals below.

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PETITION FOR A WRIT OF CERTIORARI

Officers Shultz and Childs respectfully petition for a writ of certiorari to review the order, entered on interlocutory appeal, of the United States Court of Appeals for the Third Circuit ("Third Circuit").

OPINIONS BELOW

The Third Circuit's decision is reported at --- F. App'x ----, 2018 WL 6822298 and is included in the Appendix at 1–13. The United States District Court for the Western District of Pennsylvania's decision is reported at 2017 WL 3503121 and is included in the Appendix at 14–69.

JURISDICTION

The Third Circuit issued its decision on December 28, 2018. App'x 2, 13. The Third Circuit denied Shultz's and Childs's timely petition for rehearing and rehearing en banc on January 22, 2019. Id. 71. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

The text of statutes or rules is not at issue in this Petition.

STATEMENT OF THE CASE

This case presents two legal issues of national import. First, when multiple police officers seek qualified immunity on a summary judgment motion, should courts analyze their entitlement to qualified immunity individually or collectively? The Third Circuit analyzed the officers' conduct together, going against a consensus of circuit court decisions holding that each officer's entitlement to qualified immunity must be evaluated separately. Should the Third Circuit's decision stand, police officers will be placed on trial for conduct attributable to other officers. Such a result does not comport with the policy behind qualified immunity: encouraging police officers to focus on policing rather than litigation.

Second, did the courts below err in holding that it was clearly established that a business owner has a right to be free from retaliation directed toward his business by police officers after complaining to police officers about their conduct? The Third Circuit below relied on a single inapposite case—its own precedent—in holding that such a right was clearly established. Much of the retaliatory conduct Officers Shultz and Childs are accused of involve legitimate police activity: patrolling near bars with a history of liquor law violations. Should the Third Circuit's decision stand, legitimate police activity near bars and other businesses will decrease, particularly if such establishments complain that police presence harms their business.

This lawsuit arose in a small college town in Southwestern Pennsylvania: California Borough. App'x 2. At issue is Cole's college bar: J. Cole's Inn, Inc. Id. at 3, 18–19. J. Cole's Inn has been cited numerous times for liquor law violations. Id. at 30–31. California Borough hired Officers Shultz and Childs in 2012. Id. at 19. Their interactions with J. Cole's Inn patrons and employees in the fall of 2012 raised the ire of Cole. Id. at 3. Cole confronted and complained to Officers Shultz and Childs about their conduct on February 15, 2013. Id. at 11, 25.

Cole contends that Shultz and Childs subsequently retaliated against him and his business in four ways: (1) stationing their police cars across the street from the bar; (2) following individuals who left the bar; (3) taking pictures of customers as they were waiting to enter the bar; (4) and using threatening and intimidating language in interactions with the bar's patrons. Id. at 3–4, 11, 25–26, 54. Cole claims these activities dissuaded individuals from patronizing J. Cole's Inn, causing monetary and reputational damages. Id. at 4, 26.

Cole sued Officers Shultz and Childs in District Court under 42 U.S.C. § 1983. Id. at 32–33. Cole brought six claims against Officers Shultz and Childs: (1) violation of Fourteenth Amendment substantive due process; (2) violation of Fourteenth Amendment equal protection; (3) First Amendment retaliation; (4) federal civil conspiracy; (5) trespass under Pennsylvania state law; and (6) tortious interference under Pennsylvania state law. Id. Officers Shultz and Childs moved for summary judgment and sought qualified immunity. Id. at 14–15. The District Court

denied Officer Shultz's and Officer Childs's motions in their entirety on August 16, 2017. Id. at 14–15, 68–69.

Officers Shultz and Childs appealed to the Third Circuit following the District Court's denial of summary judgment on the basis of qualified immunity, to the extent that decision turned on conclusions of law. Id. at 1–13; Mitchell v. Forsyth, 472 U.S. 511, 530 (1985); 28 U.S.C. § 1291. They argued that they were entitled to qualified immunity from Cole's Fourteenth Amendment substantive due process, Fourteenth Amendment equal protection, First Amendment retaliation, and federal civil conspiracy claims. Id. at 5. The Third Circuit, on December 28, 2018, partially agreed and held that Officers Shultz and Childs were entitled to qualified immunity from Cole's Fourteenth Amendment substantive due process and Fourteenth Amendment equal protection claims. Id. at 9–10. But the Third Circuit also affirmed the District Court in part and concluded that Officers Shultz and Childs must stand trial on Cole's First Amendment retaliation and federal civil conspiracy claims. Id. at 12–13.

Officers Shultz and Childs requested rehearing by panel or en banc by the Third Circuit; the Third Circuit denied the Officers' request on January 22, 2019. Id. at 70–71.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts with Other Circuits Regarding Whether Police Officers' Actions Should Be Reviewed Individually or Collectively on a Summary Judgment Motion Seeking Qualified Immunity

Officers Shultz and Childs each asserted the defense of qualified immunity to Cole's Section 1983 claims. Decisions issued by the Courts of Appeals of the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits hold that each defendant's entitlement to qualified immunity must be considered separately. However, the Third Circuit below held that the officers' entitlement to qualified immunity should be considered together. App'x 6. In a qualified immunity analysis, the allegations against each police officer must be considered individually, exclusive of conduct attributable to other police officers.

A. The District Court and Third Circuit Analyzed the Officers' Conduct Together

Cole argues that Officers Shultz and Childs violated his First Amendment rights by retaliating against him after he complained about their treatment of his employees and patrons. Both the District Court and the Third Circuit characterized the allegedly retaliatory conduct as follows: 1) stationing police cars

outside J. Cole's Inn, 2) following patrons who left J. Cole's Inn, 3) taking photographs of customers as they waited in line at J. Cole's Inn, and 4) using threatening or intimidating language to customers as they entered or exited J. Cole's Inn. Id. at 11, 25. However, the District Court and the Third Circuit failed to analyze the specific actions of the individual officers when evaluating their entitlement to qualified immunity. Instead, the District Court, without considering the specific conduct by each officer, merely found:

> There is evidence of record, **however tenuous**, that Officers Shultz and Childs **may have engaged** in retaliation following the February 2013 complaints by stationing police cars outside of the bar, following patrons who left the bar, taking photographs of customers waiting in line to get into the bar, and/or using threatening and intimidating language to customers as they entered or exited the bar.

Id. at 54 (emphasis added). The District Court remarkably acknowledged the lack of specific evidence concerning each officer's particular conduct, finding:

> [Cole] does not provide any specific information including the timing or frequency regarding this police presence, although former employees of J. Cole's Inn testified that police cars were stationed outside of J. Cole's Inn

> beginning in the Fall of 2012 through Spring 2013.

Id. at 26. The District Court also did not identify any specific actions of either officer that violated Cole's First Amendment rights. Despite the lack of individualized evidence, the District Court denied qualified immunity to Officers Shultz and Childs on Cole's First Amendment retaliation claim. Id. at 54.

The Third Circuit committed the same error on appeal. Without citing any legal authority, the Third Circuit held that because Cole alleged that Officers Shultz and Childs acted in concert, their actions may be considered together. Id. at 6.

B. A Consensus of Circuit Courts, Contrary to the Decision Below, Hold that Qualified Immunity is Considered Separately for each Defendant

In failing to consider the officers' actions separately, the courts below directly contradicted prior Third Circuit precedent and decisions of the Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. These cases all hold that, when evaluating defendants' entitlement to qualified immunity, each defendant's conduct must be separately evaluated. See, e.g., Drimal v. Tai, 786 F.3d 219, 226 (2d Cir. 2015); Grant v. City of Pittsburgh, 98 F.3d 116, 123 (3d Cir. 1996); Meadours v. Ermel, 483 F.3d 417, 422 (5th Cir. 2007); Phillips v. Roane Cty., 534 F.3d 531, 542 (6th Cir. 2008); Bakalis

v. Golembeski, 35 F.3d 318, 326–27 (7th Cir. 1994); Manning v. Cotton, 862 F.3d 663, 668 (8th Cir. 2017); Stivers v. Pierce, 71 F.3d 732, 750–51 (9th Cir. 1995); Hicks v. City of Watonga, Okla., 942 F.2d 737, 747 (10th Cir. 1991); Waldrop v. Evans, 871 F.2d 1030, 1034 (11th Cir. 1989).

To address qualified immunity, a court must decide two issues: (1) whether the facts that a plaintiff has shown make out a violation of a constitutional right and (2) whether the right at issue was "clearly established" at the time of the alleged misconduct. Pearson v. Callahan, 555 U.S. 223, 232 (2009). Qualified immunity is an objective question to be decided by the court as a matter of law. Doe v. Groody, 361 F.3d 232, 238 (3d Cir. 2004).

Individualized analysis is imperative in the qualified immunity realm where the doctrine "protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Pearson, 555 U.S. at 231 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (emphasis added). Moreover, such individualized analysis is necessary in light of this Court's recent, and frequent, admonition that the concept of "clearly established" must not be general but must be particularized to the facts of the case. See, e.g., White v. Pauly, 137 S.Ct. 548, 552 (2017); Wood v. Moss, 134 S.Ct. 2056, 2068 (2014); Plumhoff v. Rickard, 134 S.Ct. 2012, 2023, (2014); Taylor v. Barkes, 135 S.Ct. 2042, 2044 (2015); D.C. v. Wesby,

138 S.Ct. 577, 589 (2018); and City of Escondido, Cal. v. Emmons, 139 S.Ct. 500, 503 (2019).

In Grant, the Third Circuit emphasized that the court must consider whether "a reasonable public official would know that his or her specific conduct violated clearly established rights." Grant, 98 F.3d at 121 (emphasis added) (citing Anderson v. Creighton, 483 U.S. 635, 641 (1987)). The Third Circuit held that courts must analyze separately each defendant's conduct when evaluating each defendant's entitlement to qualified immunity. Grant, 98 F.3d at 123. The Second, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits agree. See, e.g., Drimal, 786 F.3d at 226; Meadours, 483 F.3d at 422; Phillips, 534 F.3d at 542; Bakalis, 35 F.3d at 326–27; Manning, 862 F.3d at 668; Stivers, 71 F.3d at 750–51; Hicks, 942 F.2d at 747; Waldrop, 871 F.2d at 1034.

The importance of an individualized qualified immunity assessment cannot be understated; it is axiomatic that a person can only be held liable for violating constitutional rights based upon their own conduct. Pearson, 555 U.S. at 232 ("qualified immunity is applicable unless the official's conduct violated a clearly established right.") (emphasis added). The Eight Circuit case Manning v. Cotton is instructive. 862 F.3d 663.

In Manning, the Eighth Circuit similarly stressed the need for individualized qualified immunity assessment. 862 F.3d at 668. The plaintiff claimed that two police officers violated her Fourth, Fifth and Fourteenth Amendment rights after drugs

were found on her person following a traffic stop. Id. at 666. Plaintiff contended the officers planted the drugs. Id. at 666. The district court denied qualified immunity to the officers on summary judgment, finding that "[i]f hypothetically speaking an officer illegally plants drugs on or around someone, there would be no qualified immunity," without analyzing each officer's conduct. Id. at 667–68. Finding that qualified immunity must be evaluated as to each officer's conduct "because a person may be held personally liable . . . only for his own conduct," the Eighth Circuit held that the district court erred by not conducting an individualized assessment. Id. at 668.

Neither the District Court nor the Third Circuit below considered the officers' actions individually. This alone provides a basis to grant certiorari and reverse the courts below. Both courts considered the alleged actions of "the police," without determining whether either officer engaged in such conduct. App'x 3–4, 6, 25–26, 54. Regarding the remaining allegations of retaliation (following individuals, taking pictures, and using threatening or intimidating language), the Panel failed even address whether Shultz or Childs individually engaged in such conduct. Id. at 3–4, 11.

In declining to assess the officers' conduct individually, the Third Circuit erroneously justified its position by stating "because Cole has alleged that Shultz and Childs acted in concert, the court may consider the officers' actions together." Id. at 6. The Panel cited to no authority for this proposition, which directly contradicts prior Third Circuit precedent

requiring an individualized qualified immunity assessment. See, e.g., Grant, 98 F.3d at 123; Rouse v. Plantier, 182 F.3d 192, 200 (3d Cir. 1999) (finding that the lower court erred in not addressing the conduct of each defendant individually).

Moreover, the Fifth Circuit addressed and rejected an "acted in concert" exception to the individualized analysis requirement. Meadours, 483 F.3d 417. In Meadours, the estate and survivors of the decedent brought an excessive force claim against four police officers who shot and killed decedent following a well-being check. Id. at 419–21. The lower court, in denying the officers' motions for summary judgment on qualified immunity, held that if the defendants acted in unison, their conduct should be considered collectively. Id. at 421. The Fifth Circuit rejected this rule on appeal and decided that each officer's actions must be considered independently, without exception. Id. at 422.

In failing to conduct an individualized analysis of each officer's qualified immunity defense in the instant matter, the Third Circuit erred. It considered Officer Shultz's and Officer Childs's conduct together, directly contradicting decisions by the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits. Accordingly, certiorari should be granted to resolve this conflict.

II. The Third Circuit Erroneously Held that it is Clearly Established that a Business Owner who Complains About Police Conduct may Bring a First Amendment Retaliation Claim Against Individual Police Officers

In denying qualified immunity to Officers Shultz and Childs from Cole's First Amendment retaliation claim, the Third Circuit relied on one case: Thomas v. Indep. Twp., 463 F.3d 285 (3d Cir. 2006). The Third Circuit interpreted Thomas as clearly establishing that a business owner has "the right to be free from police retaliation directed toward his business because he complained about the officers' conduct." App'x 12. This holding conflicts with Supreme Court precedent and precedents from other circuits.

Government officials are protected by qualified immunity "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. Police officers sued under Section 1983 are entitled to qualified immunity unless they (1) violated a statutory or constitutional right that (2) was clearly established at the time of the challenged conduct. Carroll v. Carman, 135 S.Ct. 348, 350 (2014). Courts may address the two qualified immunity elements in any order. Pearson, 555 U.S. at 236.

In White, 137 S.Ct. 548, the Supreme Court summarized the relevant law as follows:

Qualified immunity attaches when an official's conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" Mullenix v. Luna, 577 U.S., at ___, ___, 136 S.Ct. 305 (slip op., at 4–5) (2015). **While this Court's case law "'do[es] not require a case directly on point'" for a right to be clearly established, "'existing precedent must have placed the statutory or constitutional question beyond debate.'"** Id., at ___, 136 S.Ct. 305 (slip op., at 5). In other words, immunity protects "'all but the plainly incompetent or those who knowingly violate the law.'" Ibid.

....

Today, it is again necessary to reiterate the longstanding principle that "clearly established law" should not be defined "at a high level of generality." Ashcroft v. al-Kidd, 563 U.S. 731, 742 (2011). ***As this Court explained decades ago, the clearly established law must be "particularized" to the facts of the case.*** Anderson v. Creighton, 483 U.S. 635, 640 (1987). Otherwise, "[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." Id., at 639.

White, 137 S.Ct. at 551–52 (emphasis added) (citations omitted).[1]

The rights at issue must be framed "in light of the specific context of the case, not as a broad general proposition." Mullenix v. Luna, 136 S.Ct. 305, 308 (2015) (per curiam). "[A] legal principle must have a sufficiently clear foundation in then-existing precedent" to be considered clearly established. Wesby, 138 S.Ct. at 589. Such a clearly established rule must be "settled law," meaning its source is "controlling authority" or "a robust consensus of cases of persuasive authority." Id. at 589–90. The rule cannot merely be "suggested by then-existing precedent," it "must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." Id. at 590.

For the reasons that follow, Thomas did not create clearly established law applicable to Officers Shultz and Childs.

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[1] In the White opinion, the Supreme Court observed that it recently issued a number of decisions reversing federal courts in qualified immunity cases in order to defend the important social policy of qualified immunity and to prevent the protections of such immunity from being lost. 137 S.Ct. at 551–52. The Fifth Circuit has taken the Supreme Court's guidance to heart, concluding that courts must think twice about denying qualified immunity in any case where the police are not plainly incompetent or deliberately violating the law. Morrow v. Meachum, 17-11243, 2019 WL 1090956, *4 (5th Cir. Mar. 8, 2019).

A. The Third Circuit Repeated the Identical Error it Committed in Carroll v. Carman: Relying Upon a Single, Distinguishable Case to Conclude that Shultz and Childs Violated Clearly Established Law

In this matter, the Third Circuit erroneously relied upon a single case to find that clearly established law existed on First Amendment retaliation by the police. App'x 12; Thomas v. Indep. Twp., 463 F.3d 285 (3d Cir. 2006). The Third Circuit made the same mistake in Carroll v. Carman, 135 S.Ct. 348 (2014).

In Carroll, this Court reversed the Third Circuit's decision that a single circuit precedent constituted clearly established law in a Fourth Amendment suit. 135 S.Ct. at 350. The Carroll court expressed skepticism that clearly established law could be drawn from a single case, Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003), to support the Third Circuit's decision. See United States v. Baroni, 909 F.3d 550, 586 (3d Cir. 2018) (citing Carroll and observing the Supreme Court's suggestion that a single binding case from the defendant's jurisdiction is insufficient to give notice that certain conduct could lead to criminal punishment). The Carroll court observed that Estate of Smith did not even answer the question at issue and characterized the Third Circuit's reliance on Estate of Smith as perplexing. 135 S.Ct. at 351–52.

The Carroll Court also observed that other circuits "rejected the rule the Third Circuit adopted." Id. (citing other circuit decisions). While the Carroll court did not decide whether the Third Circuit or other circuits correctly decided the issue at hand, it indicated that the issue "was not 'beyond debate'" and concluded that the Third Circuit erred in not providing qualified immunity to the police officer. Id. at 352 (quoting Stanton v. Sims, 571 U.S. 3, 11 (2013) (per curiam)).

The Third Circuit here repeated the same mistake it committed in Carroll; it relied upon a single precedent—its own—to conclude Shultz and Childs violated Cole's clearly established rights despite the Tenth Circuit's opposite conclusion in a similar case. App'x 12. In Kozel v. Duncan, the Tenth Circuit held it was not clearly established that a police officer would violate the First Amendment by "increasing the law enforcement presence at a bar that has generated complaints of underage drinking . . . and that has complained of the presence of law enforcement personnel." 421 F. App'x 843, 848 (10th Cir. 2011). The Tenth Circuit searched for analogous cases and tellingly did not cite Thomas for its decision on First Amendment retaliation. Id.

Mr. Kozel contended that after he complained to the local district attorney about a sheriff's deputy parking in his bar's parking lot on a nightly basis, the sheriff and his deputies harassed his bar's patrons by parking patrol cars near his bar, entering the bar at all hours, and confronting his customers. Id. at 846. One of Kozel's claims was that the sheriff, Mr. Duncan, engaged in First Amendment retaliation

against him and his bar. Id. These allegations are remarkably similar to the conduct Cole accuses Shultz and Childs of. App'x 3–4, 11, 25–26, 54. Yet the Third Circuit below did not acknowledge the Tenth Circuit's decision in Kozel.

Regardless of whether the Third Circuit or Tenth Circuit is correct on whether it is clearly established that police officers violate the First Amendment by retaliating against a business after its owner complains to police or other local authorities about police conduct, this issue is not "'beyond debate.'"[2] Carroll, 135 S.Ct. at 352 (quoting Stanton, 571 U.S. at 11). This Court should reverse the Third Circuit's decision below for the same reasons it reversed the Third Circuit in Carroll.

B. Thomas Cannot Be Clearly Established Law Because it is not "Particularized" to the Facts in this Case

1. Thomas Involved Township Officials, not Individual Police Officers, who Allegedly Retaliated Through Intimidation and Harassment

In Thomas, a Township and Township officials allegedly embarked on a racially and ethnically motivated campaign to harass and intimidate a Lebanese-American businessman who wanted to

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[2] This Court could decide to resolve the split between the Third Circuit and Tenth Circuit on this issue.

transfer a restaurant liquor license to a location in the Township. 463 F.3d at 289–90. Although township officials used police officers to harass and intimidate, none of the defendants in Thomas were police officers. Id. at 285, 290.

The Thomas Court determined that the complaint stated a First Amendment retaliation claim against local government officials with policy making authority. Id. at 296. But Thomas provides no guidance to individual police officers as to the line between legitimate police conduct and retaliation; it lacks a particularized holding as to what types of police action violate a business owner's First Amendment rights. The essence of clearly established law is that, "at the time of the officer's conduct, the law was sufficiently clear that every reasonable official would understand that what he is doing is unlawful." Wesby, 138 S.Ct. at 589 (internal quotations and citations omitted). Thomas does not meet this standard.

Unlike the facts in Thomas, Cole, a bar owner, is suing Officers Shultz and Childs. App'x 3, 18–19, 32–33. Because the bar is in California, Pennsylvania, a college town, police officers there, like in college towns across the United States, must maintain a visible presence to deter underage drinking and disorderly conduct. Id. at 3, 18–19, 30–31. The public policy underlying qualified immunity would be defeated if police officers could not engage in crime prevention activity to reduce problems stemming from nuisance bars, underage drinking, and disorderly conduct.

2. Thomas is Similar to Lozman v. City of Riviera Beach and is not Clearly Established Law for Evaluating an Individual Police Officer's Conduct

Thomas is inapposite to this case because it involved Township supervisors implementing a policy of harassment. This Court recently adjudicated a similar case. Lozman v. City of Riviera Beach, 138 S.Ct. 1945 (2018). In Lozman, the plaintiff accused a city of retaliating against him, in violation of the First Amendment, by directing a police officer to arrest him. Id. at 1949–50. Even though a police officer arrested Mr. Lozman, the city's involvement in the alleged retaliatory arrest made it akin to official city policy. Id.

Like Lozman, the Township and officials in Thomas allegedly implemented a policy of harassment and intimidation of the plaintiffs while the police officers were tools used to harass. 463 F.3d at 289–90. Thomas involved racially motivated harassment by a Township and Township officials—members of the Board of Supervisors and the Township secretary/treasurer—who used law enforcement as a blunt instrument to harass and intimidate a person who wanted to transfer a liquor license. Id. The lesson of Thomas is that local government officials cannot use law enforcement to further a campaign of harassment and intimidation of a business owner based on his race and/or ancestry. Hence, Thomas does not constitute clearly established law applicable to individual police officers on First Amendment retaliation. Mullenix, 136 S.Ct. at 308.

3. *Thomas does not Contain Particularized, Established Facts for a Qualified Immunity Analysis*

While reviewing a Rule 12(b)(6) motion, the Thomas court held that the complaint was so factually deficient that qualified immunity could not be analyzed. 463 F.3d at 289. The Third Circuit vacated the district court's order and instructed the plaintiffs on remand to prepare a more definite statement of the facts. Id. Without established facts or a proper complaint with reasonably detailed allegations, the Thomas decision cannot constitute clearly established law as to First Amendment retaliation by police officers.

The Third Circuit decided Thomas under the obsolete Conley v. Gibson "no set of facts" pleading standard. 355 U.S. 41, 46 (1957) (holding that a complaint could not be dismissed "unless it appear[ed] beyond doubt that the plaintiff c[ould] prove no set of facts in support of his claim . . . .") Against this backdrop, the Third Circuit held that the Thomas plaintiffs "adequately pled First Amendment retaliation claims" because the complaint alleged that "Individual Defendants [none of whom were police officers] have engaged in a campaign of harassment and intimidation . . . ." 463 F.3d at 296. The Thomas court did not describe how the plaintiffs' factual assertions met the elements of a First Amendment retaliation claim. Id. Nor did the Thomas court make any police-specific holdings.

Although the Thomas complaint's averments held up under the deferential Conley pleading

standard, the Third Circuit did not decide whether the Thomas defendants were entitled to qualified immunity. Id. at 289. This occurred because of the divergent objectives of Conley and this Court's qualified immunity jurisprudence. In Hunter v. Bryant, this Court pronounced that "immunity questions [should be resolved] at the earliest possible stage in litigation." 502 U.S. 224, 227 (1991); see also Mitchell, 472 U.S. at 526 ("[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.") Yet Conley merely required that a complaint provide "the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests" to survive a motion to dismiss. 355 U.S. at 47. Conley and this Court's qualified immunity jurisprudence were at odds; plaintiffs could craft factually vague complaints meeting Conley's "no set of facts" pleading standard while preventing a qualified immunity analysis "at the earliest possible stage in litigation." Conley, 355 U.S. at 46; Hunter, 502 U.S. at 227.

The Third Circuit addressed in Thomas the conflict between Conley and this Court's qualified immunity jurisprudence. The Thomas defendants argued that "it is impossible to evaluate whether a particular action of a particular defendant violated clearly established law, since it is impossible to know, on the basis of the [c]omplaint, what the action is." 463 F.3d at 290. The Third Circuit agreed. It held that "when a complaint fashioned under the simplified notice pleading standard of the Federal Rules does not provide the necessary factual predicate" for a qualified

immunity determination, a motion for a more definite statement should be granted. Id. at 289. The Third Circuit elaborated that the Thomas complaint "present[ed] a textbook example of a pleading as to which a qualified immunity defense cannot reasonably be framed." Id. Therefore, the Third Circuit vacated the district court's denial of qualified immunity to defendants and remanded for an amended complaint to be filed. Id.

4. The Thomas Court Did Not Even Believe its Decision Placed the First Amendment Retaliation Claim Beyond Debate

The Thomas court characterized the complaint as supporting "a violation of extremely abstract constitutional rights" and it recognized that such abstract rights are insufficient to defeat qualified immunity. Id. at 300. The Third Circuit in Thomas also conceded that there was a dearth of "'precedent of sufficient specificity'" regarding a First Amendment right to be free of harassment. Id. at 296 n.4 (quoting McKee v. Hart, 436 F.3d 165, 173 (3d Cir. 2006) (holding that, where there is a dearth of precedent of sufficient specificity and factual similarity regarding the First Amendment right to be free from retaliatory harassment, the right could not be considered clearly established)).

At best, Thomas starts a debate regarding whether local government or police acts constitute First Amendment retaliation. Thomas does not place this question of law beyond debate. Officers Shultz and Childs are entitled to qualified immunity from Cole's First Amendment retaliation claim.

C. The Third Circuit Erred in Considering Thomas as Clearly Established Law Because this Court Subsequently Replaced Conley's No-Set-of-Facts Pleading Standard with Twombly's and Iqbal's Plausibility Pleading Standard

Thomas is not clearly established law because it is not beyond debate that its decision on First Amendment retaliation is prospectively applicable to the scenario Officers Shultz and Childs encountered. Just a few years after the Third Circuit decided Thomas, this Court adopted a new pleading standard. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" (quoting Bell Atl. Co. v. Twombly, 550 U.S. 544, 570 (2007))). The new Twombly and Iqbal pleading regime mooted the conflict between Conley and this Court's qualified immunity jurisprudence. Mitchell, 472 U.S. at 526. Thomas, which the Third Circuit decided as a workaround to this conflict, was abrogated. 463 F.3d at 289.

The First Amendment retaliation decision in Thomas is inapplicable under Twombly and Iqbal. Police officers are entitled to qualified immunity from Section 1983 claims unless they violate constitutional or statutory rights that were clearly established at the time of the conduct at issue. Harlow, 457 U.S. at 818. At the time Cole complained to Officers Shultz and Childs in February 2013 about their conduct, the Twombly and Iqbal pleading standard, as opposed to

Conley, applied. App'x 11, 25; Conley, 355 U.S. at 46; Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. The Thomas complaint lacked "the necessary factual predicate" for the Third Circuit to decide whether qualified immunity applied. 463 F.3d at 289. It was "a textbook example of a pleading as to which a qualified immunity defense cannot reasonably be framed." Id. If the Third Circuit came to these conclusions under Conley's deferential "no set of facts" pleading standard, it is not beyond debate that the factual averments in the Thomas complaint would have survived a motion to dismiss under the Twombly and Iqbal plausibility pleading standard. Conley, 355 U.S. at 46; Iqbal, 556 U.S. at 678; Twombly, 550 U.S. at 570. Thomas does not stand for clearly established law on First Amendment retaliation claims against police officers.

Considering Thomas as clearly established law is also problematic because the Third Circuit did not decide Thomas on the basis of qualified immunity. 463 F.3d at 289. The Third Circuit instead should have measured Officer Shultz's and Officer Childs's entitlement to qualified immunity from Cole's First Amendment retaliation claim against cases decided on the basis of qualified immunity. Because Thomas was not such a case, this Court should reverse the Third Circuit and hold that Officers Shultz and Childs are entitled to qualified immunity on Cole's First Amendment retaliation claim.

D. The Third Circuit's Holding that Thomas Constitutes Clearly Established Law Conflicts with Other Circuit Courts' Approach to Qualified Immunity Cases in which the Pleading Standard Changed Midstream

The Third Circuit's citing of Thomas as clearly established law for First Amendment retaliation claims—despite the Third Circuit remanding Thomas for a more specific complaint to be filed—contradicts how other circuit courts approach similar scenarios. Id.; App'x 12.

The Tenth Circuit and Ninth Circuit hold that civil rights plaintiffs who drafted pleadings under Conley's standard should be permitted to amend their pleadings to comply with Twombly's and Iqbal's pleading standard. See Robbins v. Oklahoma, 519 F.3d 1242, 1246–47, 1250, 1253–54 (10th Cir. 2008) (remanding a matter to allow the plaintiff to draft an amended complaint that complied with the Twombly/Iqbal pleading standard), and Moss v. U.S. Secret Serv., 572 F.3d 962, 965, 972, 974–75 (9th Cir. 2009) (same). The Robbins and Moss courts did not decide whether constitutional rights were violated or if said rights were clearly established. Instead, the Ninth and Tenth Circuits only held that the pleadings failed to state claims under Twombly and Iqbal and allowed the affected plaintiffs an opportunity to file amended pleadings. Robbins, 519 F.3d at 1246–47, 1250, 1253–54; Moss, 572 F.3d at 965, 972, 974–75.

The Third Circuit's approach to the case below and in Thomas contradicts that taken by the Ninth and Tenth Circuits in Moss and Robbins. Thomas was decided in 2006, which is before this Court imposed the Twombly and Iqbal pleading standard in 2007 and 2009, respectively. 463 F.3d at 285; Twombly, 550 U.S. at 554; Iqbal, 556 U.S. at 662. Still, Thomas is comparable to Moss and Robbins; the Third Circuit permitted the Thomas plaintiffs to amend their complaint and add more specific allegations to facilitate a qualified immunity analysis. 463 F.3d at 289. Thomas differs from Moss and Robbins because the Third Circuit did not just remand the case to district court for plaintiffs to file an amended complaint. Instead, the Third Circuit substantively held that plaintiffs "adequately pled First Amendment retaliation claims [under Conley]" because plaintiffs alleged "Defendants . . . engaged in a campaign of harassment and intimidation . . . ." Id. at 296. The Third Circuit below then cited Thomas's First Amendment retaliation holding to conclude that it was clearly established that Cole had "the right to be free from police retaliation directed toward his business because he complained about the officers' conduct." App'x 12.

The Third Circuit's citing of Thomas for a substantive legal proposition, despite remand being necessary in Thomas for a more specific complaint to be filed, squarely differs with the approach employed by the Ninth Circuit in Moss and the Tenth Circuit in Robbins. Whether a case remanded for lack of specificity in the qualified immunity context can be cited for a substantive statement of law on qualified immunity is not clearly established. This Court should

hold, in line with the Ninth and Tenth Circuits' approach, that such cases cannot be cited for substantive statements of constitutional law to show that such law is clearly established.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Counsel for Officer Justin Shultz:
MEYER, DARRAGH, BUCKLER, BEBENEK & ECK, P.L.L.C.
BERNARD P. MATTHEWS, JR., *Counsel of Record*
Pa. I.D. 54880, bmatthews@mdbbe.com
724-836-4840
40 N. Pennsylvania Ave., Suite 410
Greensburg, PA 15601
On Brief: CHARLES J. DANGELO, Pa. I.D. 60739
ALEXANDER W. BROWN, Pa. I.D. 322661

Counsel for Officer Terry Childs:
SIANA, BELLWOAR & MCANDREW, LLP
CHRISTOPHER P. GERBER, *Counsel of Record*
Pa. I.D. 76449, cgerber@sianalaw.com
610-321-5500
Ludwigs Corner Prof. Ctr., 941 Pottstown Pike, Suite 200
Chester Springs, PA 19425
On Brief: BRIAN C. CONLEY, Pa. I.D. 311372