RECORD NO. 19-10013

In The
United States Court of Appeals
For The Fifth Circuit

JACQUELINE CRAIG, Individually and on Behalf of Minors J.H., K.H., and A.C.; BREA HYMOND,

Plaintiffs—Appellees,

versus

WILLIAM D. MARTIN,

Defendant—Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS NO. 4:17-CV-1020

AMICI CURIAE BRIEF OF INSTITUTE FOR JUSTICE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AND AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF TEXAS IN SUPPORT OF PLAINTIFFS—APPELLEES

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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that the following listed persons and entities, in addition to those listed in the parties' briefs, have an interest in the outcome of this case.

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Undersigned counsel further certifies, pursuant to Federal Rule of Appellate Procedure 26.1(a), that the Institute for Justice, American Civil Liberties Union Foundation, and American Civil Liberties Union Foundation of Texas (collectively, "amici") are not publicly held corporations and do not have any parent corporation, and that no publicly held corporation owns 10 percent or more of their stock.

Date: March 23, 2022

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INTERESTS OF AMICI[1]

The Institute for Justice ("IJ") is a nonprofit legal center dedicated to defending the foundations of free society. Because qualified immunity and related doctrines limit access to courts and hinder enforcement of these rights, IJ litigates government immunity and accountability cases nationwide.

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SUMMARY OF ARGUMENT

In addition to the reasons presented in Appellees' Petition, en banc review is necessary to correct the panel's misstatement of law: that the Constitution allows officers to use pain control maneuvers on restrained

[1] No party's counsel authored any portion of this brief. No party or person—other than amici—contributed money to fund this brief. Appellees have consented to the filing of this brief; Appellant has not. *See* Mot. for Leave to File.

individuals to compel them to answer questions. Under the panel's holding, the law in this circuit is now that an officer can purposefully inflict pain on a restrained, non-resisting person to compel her to speak, as long as the force seems "relatively minimal." But such actions are obviously unconstitutional.

As outlined in Part I, qualified immunity shields government officials from accountability unless they had "fair warning" that their conduct was unconstitutional. Recently, in a pair of cases summarily reversing this Court, the Supreme Court reiterated that obviousness is a source of clearly established law: *Taylor v. Riojas* and *McCoy v. Alamu*. Despite those reversals, as discussed in Part II, the panel here held that an officer's force against a restrained, non-resisting arrestee was reasonable because, in the panel's view, that force was "relatively minimal" and not factually identical to the force found unconstitutional in previous cases. This is an issue of exceptional importance that necessitates en banc consideration.

ARGUMENT

In this country, a government official cannot inflict pain to compel a person to speak. Yet, according to the panel's opinion, a police officer may wrench a handcuffed person's arms behind her back, admittedly applying a pain control maneuver, to make her answer his questions. In other words, the panel has sanctioned police officers to, at best, force arrestees into a game of "say uncle"[2] and, at worst, use tactics just short of the rubber hose[3] to get the answers they seek. But such behavior is obviously unconstitutional, and this Court should not condone it.

I. Obviousness Can Provide Fair Warning of Unconstitutionality.

Twenty years ago, the Supreme Court sought to remove the "rigid gloss" that tainted the qualified immunity standard.[4] In *Hope*, the Court acknowledged that courts often require a previous case with "materially similar" facts to find a law clearly established.[5] And then it rejected this

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[2] Kara Kovalchik, *Why Do We Say Uncle*, Mental Floss (Aug. 1, 2014), https://www.mentalfloss.com/article/57984/why-do-we-say-uncle.

[3] *See Williams v. United States*, 341 U.S. 97 (1951).

[4] *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

[5] *Id.*

requirement.[6] The concern, the Court explained, is not whether the "very action in question has previously been held unlawful," it's whether the officials had "fair warning that their alleged [behavior] was unconstitutional."[7] And in some situations, the constitutional law in question applies "with obvious clarity."[8] For the *Hope* Court, it was obviously clear—if not just from the nature of the violation itself, then from the reasoning in analogous cases, state regulations, and a government report—that the Constitution forbids fixing a prisoner to a hitching post for hours without reprieve.[9]

Recently, the Supreme Court summarily reversed this Court in two cases for their failure to heed *Hope*'s instructions. First, in *Taylor*, the Court reaffirmed that precedent was not necessary to fairly notify officials that forcing a prisoner to sleep in a cell teeming with excrement is

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[6] *Id.*

[7] *Id.* at 739–41.

[8] *Id.* at 741 (cleaned up).

[9] *Id.* at 741–44; *see also Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) ("[I]n an obvious case, [general] standards can 'clearly establish' the answer, even without a body of relevant case law.").

unconstitutional; it was obvious that the "conditions of confinement offended the Constitution."[10] Then, in *McCoy*, the Court reversed this Court's grant of qualified immunity to an official who pepper-sprayed a prisoner in the face "for no reason at all."[11] Together, these reversals reaffirm that qualified immunity will not shield government officials who engage in obviously unconstitutional conduct.

Following *Taylor* and *McCoy*, this Court has adopted and applied the Supreme Court's obviousness test. For instance, in *Villarreal v. City of Laredo*, this Court denied qualified immunity to officers who arrested a reporter for soliciting non-public information and publishing it.[12] This Court highlighted that even though the reporter had violated an existing law, that law was "so obviously unconstitutional" that it "require[d] officials to second-guess the legislature and refuse to enforce [it]."[13] And because "[a]n official who

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[10] *Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020).

[11] *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020), *rev'd*, 141 S. Ct. 1364 (2021) (mem.).

[12] 17 F.4th 532, 537, 540–42 (5th Cir. 2021).

[13] *Id*. at 541 (internal quotation omitted).

commits a patently 'obvious' violation of the Constitution is not entitled to qualified immunity," the officials there could not escape suit.[14]

Hope, *Taylor*, *McCoy*, and *Villarreal* present four different factual scenarios with one thing in common—unquestionable unconstitutionality. *Hope* and its progeny clarify that it's not enough to ask whether analogous precedent put an official on notice. Courts must also provide a careful, principled analysis of whether a constitutional right is so obvious that any reasonable officer would have fair warning that his behavior offended the Constitution. And they must do so in every case. Anything less risks "the danger of a rigid, overreliance on factual similarity."[15]

II. En Banc Review is Necessary to Ensure this Court Does Not Endorse Obviously Unconstitutional Conduct.

Martin's use of force against eighteen-year-old Brea Hymond—a Black woman who recorded Martin on her phone as he arrested her family—was obviously unconstitutional. After Martin secured Hymond's mother and little sister in the back of his police vehicle, after the situation was de-

[14] *Id.* at 540.

[15] *Hope*, 536 U.S. at 742.

escalating, after any conceivable threat to anyone's safety was fully extinguished, Martin unnecessarily re-escalated the encounter by confronting Hymond—who had been recording the incident from a distance and yelling at the officer that she was doing so—grabbing her, shoving her against his patrol car, ripping the phone out of her hand, and placing her under arrest for "interfering."[16] But Martin's display of authority did not end there.

While Martin stood by his patrol vehicle, effortlessly holding Hymond by his side with a single hand, Hymond repeated that she saw Martin "kick her," referring to J.H.[17] In response, Martin started questioning Hymond: "How old are you? What is your name?" Hymond did not immediately answer his questions. So, with Hymond's hands restrained behind her back,

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[16] ROA.371 (Martin Video at 5:10; Hymond Video at 16:10). While the basis for the arrest is independently troubling, Appellees' unlawful arrest claims are not currently before this Court.

[17] The panel characterized this kick as Martin "us[ing] his foot to force J.H.'s leg into the vehicle" because J.H. would not get in vehicle herself, Slip Op. at 8; however, the video reflects J.H., a fifteen-year-old, telling the officer that she did not know how to get into the vehicle with her arms handcuffed behind her back. ROA.371 (Martin Video at 4:30). As Martin admits on video, his response was to kick her in. ROA.371 (Martin Video at 8:08 (Woman: "You kicked my sister." Martin: "Yeah, I did.")).

Martin jerked her arms up into the air, applying a pain control maneuver taught in police training,[18] and repeated the question, enunciating in a slow, purposeful staccato: "What. Is. Your. Name?"[19]

As Appellees note in their petition, the panel erred in its assessment of the facts, warranting en banc review.[20] However, even accepting the panel's version of events, Martin's behavior was obviously unconstitutional. Every reasonable officer would have known that inflicting pain to compel someone to answer questions offends the Constitution. Yet in a single paragraph, without any citation to legal authority, the panel blessed this unconstitutional behavior:

> Hymond was shouting at Martin throughout the entire confrontation. She did not comply with any of Martin's commands or instructions. *Only after Hymond refused to provide Martin with her name did Martin employ any force against her.* Martin's use of force—lifting Hymond's handcuffed arms

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[18] Martin claims he used this maneuver because Hymond "posed a potential risk of escaping." Martin Br. at 30. But this assertion contradicts Appellees' well-pleaded facts and is belied by the video. ROA.371 (Martin Video at 6:40–7:10). As shown in the video, Martin easily held Hymond with a single hand. Only after she failed to answer his questions did he shove her arms as high as they could go, press her against his patrol car, and loudly repeat his question. The force was not to stop a physically resisting or fleeing suspect; it was to elicit an answer.

[19] ROA.371 (Martin Video at 6:55–7:10).

[20] *See generally* Appellees' Pet. for Reh'g En Banc at 9–11.

> behind her back—was relatively minimal. Hymond continued to verbally deride Martin while Martin was lifting her arms and immediately after he put her arms down. Given Hymond's continued resistance, Martin's use of force against Hymond was not objectively unreasonable.[21]

If this decision stands, the law in this circuit is that an officer can purposefully inflict pain on a restrained, non-resisting person to compel her to speak, as long as, in the court's subjective opinion, the force was "relatively minimal."[22]

Of particular note, the panel did not find that Hymond was *physically* or *actively* resisting Martin. It merely found that she did not answer his questions, she did not give into the pain tactic, and she continued to "verbally deride" Martin during and after he released his maneuver. In other words, the panel has sanctioned the use of physical force against an arrestee

[21] Slip Op. at 9 (emphasis added).

[22] The panel apparently uses "relatively minimal" to mean the force did not inflict extreme pain or injury. But as discussed below, the degree of injury does not answer whether the force was excessive. *See Alexander v. City of Round Rock*, 854 F.3d 298, 310 (5th Cir. 2017).

because that arrestee is not providing her name[23] and is exercising her right to criticize the officer.[24]

This conclusion contradicts clearly established law. The Supreme Court tells us that whether an officer's use of force is reasonable depends on: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of officers or others; and (3) whether the suspect was actively resisting arrest or attempting to flee.[25] And as has "long been established in [this] circuit: Officers engage in excessive force when they physically strike a suspect who is not resisting arrest."[26] Yet, here, the panel granted qualified immunity, finding not just a lack of clearly established precedent but a lack of any constitutional violation. Both

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[23] Texas law requires a *lawfully* arrested person to provide her name, address, and date of birth upon request, but it also imposes the appropriate penalty for this Class C misdemeanor: a fine not to exceed $500, not corporal punishment. Tex. Pen. Code § 38.02.

[24] *See, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 273 (1964) (holding that the right to criticize public officials is "the central meaning of the First Amendment").

[25] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

[26] *Joseph ex rel. Estate of Joseph v. Bartlett*, 981 F.3d 319, 342 (5th Cir. 2020) (citing *Darden v. City of Fort Worth*, 880 F.3d 722 (5th Cir. 2018)); *see also, e.g.*, *Cooper v. Brown*, 844 F.3d 517, 525 (5th Cir. 2016) (finding excessive force where officer did not release police dog's bite until after suspect, who did not pose a flight risk, was handcuffed); *Sam v. Richard*, 887 F.3d 710 (5th Cir. 2018) (finding excessive force where officer slapped, kneed, and pushed suspect).

conclusions are wrong: Martin battered a restrained woman who (1) was accused only of interfering in police activity *after* the two other arrestees were secured in the officer's vehicle; (2) inarguably posed no threat to anyone's safety; and (3) by the panel's own account, was not actively resisting arrest.[27]

To reach this conclusion, the panel reasoned that because the force used in this case was "far less severe"—apparently meaning inflicted less injury[28]—than that used in prior cases, those cases did not clearly establish the law at issue.[29] But this type of hair-splitting is improper under *Hope* and its progeny. And this Court has unequivocally held that whether force is excessive does not turn on the injury the person ultimately endured.[30]

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[27] *See Joseph*, 981 F.3d at 333 & n.51 (explaining the difference between "active" and "passive" resistance). The panel characterizes Hymond as engaging in "continued resistance." Slip. Op. at 9. However, the panel's own fact findings make clear that Hymond's only "continued resistance" was not answering questions and "yell[ing] at Martin." *Id.* at 3–4.

[28] *Id.* at 13. (comparing the force here to *Bush v. Strain*, 513 F.3d 492, 496 (5th Cir. 2008), where the officer's force caused two broken teeth).

[29] *Id.*

[30] *See Alexander*, 854 F.3d at 310 (explaining that the degree of injury is irrelevant to whether the use of force was unreasonable); *see also Graham*, 490 U.S. at 396.

Darden did not clearly establish that an officer may not strike a suspect *only* if the strike is hard.[31] *Sam* did not clearly establish that an officer's force is excessive *only* if he strikes the suspect three separate times.[32] In the Fifth Circuit, purposefully inflicting (or attempting to inflict) pain is unlawful if it is done against a suspect who is not actively resisting arrest.[33] Drawing the particular right at issue at any greater level of granularity, as the panel did here, risks "the danger of a rigid, overreliance on factual similarity."[34]

There may not be a factually identical case on point—one where an officer used a pain control maneuver on a restrained, non-resisting suspect to force her to answer his questions—but one is not necessary. Every officer was on notice that he could not strike a non-resisting suspect, and it is well-established in this circuit that "[q]ualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of

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[31] 880 F.3d at 731.

[32] 887 F.3d at 713 (denying summary judgment even though the injuries suffered were "insignificant").

[33] In fact, in most circumstances, the use of *any* force as part of a custodial interrogation is unconstitutional. *See, e.g.*, *Ikerd v. Blair*, 101 F.3d 430, 434 (5th Cir. 1996).

[34] *Hope*, 536 U.S. at 742.

applying it are novel."[35] Therefore, any reasonable officer would know that using a maneuver designed to inflict pain on a non-resisting arrestee—solely to make her answer questions—is beyond the pale. It is unreasonable. It is obviously unconstitutional.

CONCLUSION

En banc intervention is necessary to correct the panel's misstatement of law concerning the bounds of excessive force.

Dated: March 23, 2022

Respectfully submitted,

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[35] *Newman v. Guedry*, 703 F.3d 757, 763–4 (5th Cir. 2012).

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2022, I caused the foregoing Amici Curiae Brief of Institute for Justice, American Civil Liberties Union Foundation, and American Civil Liberties Union Foundation of Texas in Support of Plaintiffs—Appellees to be file electronically with the Clerk of the Court using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: March 23, 2022

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation in Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 2,544 words, excluding the parts of the brief exempted by Fed. R. of App. P. 32(f) and Fifth Circuit Rule 32.2.

2. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. of App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2022 in 14-point Palatino Linotype font.

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