No. 06-895

IN THE
Supreme Court of the United States

ANTONIO BOSTIC,
Petitioner,

v.

LAQUARIUS GRAY,
Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly interpreted *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and other decisions of this Court when it rejected petitioner's argument that he had probable cause to arrest a nine-year-old girl for saying she would hit her gym teacher.

2. Whether the Eleventh Circuit's passing statement that petitioner did not consider the girl to be a physical threat at the time he handcuffed her is consistent with this Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), and other cases.

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Petitioner Deputy Antonio Bostic urges this Court to grant certiorari because, he contends, the Eleventh Circuit ignored his argument that he had probable cause to arrest and handcuff a nine-year-old girl for saying she would hit her gym teacher. Pet. 2. Bostic also argues that the court improperly relied on his subjectively "evil intentions" in denying his motion for summary judgment. *Id.* The court of appeals, however, made neither of the errors alleged by Bostic, and its application of established legal principles to the highly unusual facts of this case presents no issue necessitating review by this Court. Indeed, given the flagrant nature of Bostic's actions, no court could reasonably have reached any other result.

STATEMENT OF THE CASE

At the time this case arose, respondent Laquarius Gray was a nine-year-old student at Holt Elementary School in Tuscaloosa, Alabama. Pet. App. 2a. Gray's gym teacher, coach Lattuce Greer Williams, noticed that Gray was not doing her jumping jacks with the rest of the class and called her forward to stand against the wall of the gym. *Id.* Gray complied, but while doing so made a comment to Williams that she later acknowledged to be "disrespectful." *Id.* at 2a-3a. The exact nature of the comment was disputed. *Id.* at 2a-4a. Williams testified that Gray said "she would punch me or hit me, hit me in the face." *Id.* at 2a. Gray could not remember exactly what she said, but agreed that she said she would "do something" to Williams. *Id.* at 3a.

Another teacher, coach Tara Horton, overheard Gray's comment and called her over to talk, at which point Williams turned his attention back to the rest of the class. *Id.* at 4a. Horton later testified that she planned to give Gray a warning. *Id.* at 6a. She explained that she would not have been required to write Gray up, give her a detention, or send her to the principal's office because, as she put it, the incident "wasn't that major." *Id.* Both coaches testified that they were not afraid

of Gray and did not believe she would actually have hit either of them. *Id.* at 5a-6a. Indeed, Horton testified that Gray was not physically capable of hitting Williams in the face. *Id.* at 6a.

Before Gray could reach Horton, however, petitioner Deputy Antonio Bostic intervened. *Id.* at 4a. Bostic was a Tuscaloosa County Sheriff's Deputy who served as a "school resource officer" at the school. *Id.* at 4a-5a. Although Horton told Bostic that she would handle the matter, Bostic insisted on talking to Gray himself. *Id.* at 5a. Bostic escorted the girl into the lobby, where he told her to turn around, pulled her hands behind her back, and handcuffed her, tightening the handcuffs until they were painful. *Id.* Bostic then told Gray, "[t]his is how it feels when you break the law" and "[t]his is how it feels to be in jail." *Id.* Bostic left the handcuffs on for at least five minutes, while Gray sobbed. *Id.*

Gray filed suit against Bostic and other defendants on various causes of action, including a claim under 42 U.S.C. § 1983 asserting a violation of her Fourth Amendment rights. *Id.* at 6a. The district court granted defendants' motion to dismiss, but the U.S. Court of Appeals for the Eleventh Circuit reversed. *Id.* at 6a-7a. On remand, Gray filed an amended complaint asserting only her Fourth Amendment claims for excessive use of force and unreasonable seizure. *Id.* at 7a. After discovery, Bostic moved for summary judgment based on qualified immunity. *Id.* The district court denied the motion, and Bostic filed an interlocutory appeal. *Id.*

On appeal for the second time, Bostic argued that Gray's arrest was supported by probable cause because she had committed the crimes of harassment, disorderly conduct, and "terrorist threats." Ala. Code §§ 13A-10-15, 13A-11-7 & 13A-11-8(a). The court easily disposed of the probable cause issue, citing Alabama cases holding that conduct giving rise to criminal liability "has been generally more egregious and has

involved a credible threat" and noting the evidence that Gray did not pose a threat to anyone. Pet. App. 11a-12a, 22a n.7.

The court then moved to the main issue in the case—whether Bostic's conduct violated the reasonableness test established by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). Pet. App. 10a-16a. *T.L.O.* established a two-step inquiry for examining a claimed Fourth Amendment violation in a school setting: "first, one must consider whether the . . . action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified interference in the first place." *T.L.O.*, 469 U.S. at 341 (quotations omitted).

The court held that Bostic satisfied the first prong of the *T.L.O.* test because he had a reasonable basis for calling Gray over to question her about her comment. Pet. App. 11a-12a. On *T.L.O.*'s second prong, however, the court held that Bostic's decision to handcuff an elementary school student for more than five minutes was not reasonably related to the circumstances that justified Bostic's initial interference. *Id.* at 12a-13a. Considering the entirety of the record in the light most favorable to Gray, the court concluded that, "at the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety." *Id.* Given Gray's young age and the lack of a realistic physical threat, the court held that Bostic violated Gray's clearly established Fourth Amendment rights and thus affirmed the district court's denial of summary judgment. *Id.* Bostic then filed this petition for certiorari.

While the petition was pending, the case proceeded in the district court. The court granted judgment as a matter of law to Gray on the question of liability. At trial, the jury awarded her one dollar in nominal damages. Bostic again appealed to the Eleventh Circuit, and that appeal is pending.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit Properly Rejected Petitioner's Argument That He Had Probable Cause to Arrest Respondent.

A. The Eleventh Circuit Did Not Adopt the Rule that Petitioner Challenges.

Bostic cites no decision from any court that conflicts with the Eleventh Circuit's holding that a police officer violates *T.L.O.*'s reasonableness test by arresting a student at school when the student poses no realistic threat to anyone. Nor does Bostic dispute that the Eleventh Circuit's application of *T.L.O.* was clearly established law for purposes of qualified immunity. Instead, Bostic argues that the Eleventh Circuit ignored his argument that he had probable cause to arrest Gray for threatening her teacher. Pet. 2. Based on this alleged oversight, he argues that the Eleventh Circuit implicitly adopted the rule that handcuffing a student is unconstitutional *even if the officer has probable cause to make an arrest*. Pet. 5-8.

The court, however, never announced the rule that Bostic challenges. The court correctly noted that *T.L.O.* is an *exception* to the probable cause requirement, quoting *T.L.O.*'s holding that a search or seizure in a school setting "does not require *strict adherence* to the requirement that searches be based on probable cause." Pet. App. 10a (emphasis added) (citing *T.L.O.*, 469 U.S. at 341). Because *T.L.O.* established a lower burden for seizures in an educational setting, the court was correct to hold that "strict adherence" to the probable cause standard was not required. But in saying that probable cause was not *necessary* to justify the arrest, the court was not implicitly fashioning a rule that even an officer *with* probable cause to arrest a student—for example, an officer who witnesses a student openly selling drugs at school—cannot

constitutionally make the arrest. To the contrary, the court of appeals cited an earlier Eleventh Circuit case for the proposition that "*only arguable probable cause is required* to establish that an officer is entitled to qualified immunity." *Id.* (emphasis added) (citing *Durruthy v. Pastor*, 351 F.3d 1080, 1089 (11th Cir. 2003)).

Nor did the court ignore Bostic's contention that he had probable cause to arrest Gray. In a portion of the opinion not cited in Bostic's brief, the court examined and rejected his argument that Gray's conduct gave rise to probable cause to believe she committed the misdemeanor of harassment under Alabama law. Pet. App. 11a-12a, 22a n.7. The court noted that the criminal statute defining the crime of harassment prohibits a verbal threat only if "made with the intent to carry out the threat, that would cause a reasonable person who is the target of the threat to fear for his or her safety." *Id.* at 11a (citing Ala. Code § 13A-11-8(a)). The court acknowledged Gray's evidence—which, for purposes of summary judgment, it had to accept as true—that "neither Williams nor Horton feared for their safety." *Id.* It then cited Alabama cases addressing the crime of harassment and concluded that those cases involved conduct that was "generally more egregious" than the conduct at issue here and "involved a credible threat." *Id.* at 22a n.7. Thus, Bostic's contention that the court skipped over probable cause analysis is wrong.

Bostic relies for his reading of the Eleventh Circuit's decision on a single sentence of the opinion, where the court stated that, because *T.L.O.* requires something less than probable cause, it "need not reach the issue" of whether Bostic had probable cause to arrest Gray. *Id.* Although this statement, if read in isolation, could be somewhat ambiguous, Bostic's interpretation ignores the context in which the court made the statement. The bulk of the court's opinion focused on the key

question of whether Bostic's actions were constitutional under the *T.L.O.* standard, and the statement quoted by Bostic was made in a portion of the opinion analyzing whether Bostic's actions satisfied the first prong of the *T.L.O.* test. *Id.* at 11a-12a. Thus, its statement that it need not reach the question of probable cause at that stage of the *T.L.O.* analysis merely reflected its recognition that Bostic was not required to satisfy the relatively high probable cause standard because he could take advantage of the less strict reasonableness test under *T.L.O*. Bostic's interpretation of the court's opinion attempts to turn a statement of law *favorable* to him into reversible error.

The Eleventh Circuit's opinion properly applied this Court's Fourth Amendment jurisprudence to the facts of the case. Although Bostic may believe that the court came to the wrong conclusion, the question whether a court of appeals erred in evaluating the facts under the proper legal standard is not the type of question that this Court entertains absent extraordinary circumstances. *See* S. Ct. Rule 10 (review rarely granted where claimed error is the misapplication of a properly stated rule of law). The determination of probable cause is an individualized and fact-specific inquiry, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963), as is the determination of reasonableness under *T.L.O.* Here, the Eleventh Circuit emphasized the narrowness of its holding, noting that it did not hold "that the use of handcuffs during an investigatory stop of a nine-year-old child is always unreasonable, but just unreasonable under the particular facts of this case." *Id.* at 16a. The panel's factbound application of the law does not warrant review by this Court. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("[W]e do not grant a certiorari to review evidence and discuss specific facts.").

Moreover, the probable cause issue in this case turns not on the proper legal standard as a matter of federal constitutional

law, which is well established and not in dispute here, but on an analysis of whether Gray's actions arguably violated Alabama's criminal statutes. *See Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979) ("Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law."). Thus, although the question of probable cause is technically a federal issue, "[f]ederal law asks only whether the officers had probable cause to believe that the predicate offense, as the state has defined it, has been committed." *Williams v. Jaglowski*, 269 F.3d 778, 782 (7th Cir. 2001). When, as here, the scope of a federal right depends on issues of state law, this Court traditionally defers to the expertise of the district courts and courts of appeals over the state laws within their jurisdiction. *See, e.g.*, *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998); *see also Bishop v. Wood*, 426 U.S. 341, 346 & n.10 (1976) (collecting cases). Thus, this Court generally does not grant certiorari to decide whether a court of appeals correctly decided an issue of state law. *See Butner v. United States*, 440 U.S. 48, 51, 57-58 (1979).

Even if Bostic were correct that the court did not address his probable cause argument, it would indicate only, as Bostic's brief suggests, "that the Eleventh Circuit quickly determined an absence of probable cause or arguable probable cause and, simply saved all parties time by moving directly to *T.L.O.*" Pet. 7. Indeed, if the court had found merit in Bostic's probable cause assertions, it would have had no reason to reach the *T.L.O.* test in the first place. But, when reasonable suspicion is the key issue in the case, the courts of appeals—including the only school seizure case cited by Bostic—frequently do not engage in explicit discussion of probable cause. *See, e.g.*, *Phaneuf v. Fraikin*, 448 F.3d 591 (2d Cir. 2006); *Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141 (3d Cir. 2005); *Beard v. Whitmore Lake Sch. Dist.*, 402 F.3d 598

(6th Cir. 2005); *Wofford v. Evans*, 390 F.3d 318 (4th Cir. 2004); *Shade v. City of Farmington*, 309 F.3d 1054 (8th Cir. 2002); *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000); *Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316 (7th Cir. 1993). A court of appeals' refusal to discuss an unsupported argument is not error, *Flanigan's Enters., Inc. of Ga. v. Fulton County*, 242 F.3d 976, 987 n.16 (11th Cir. 2001), let alone one sufficient to justify this Court's intervention.

B. Remanding This Case to the Eleventh Circuit Would Serve No Purpose Because That Court Has Already Decided the Only Issues That Would Be Relevant on Remand.

Even assuming that the portions of the Eleventh Circuit's opinion Bostic singles out, read in isolation, are incorrect statements of law, it would not justify sending the case back to the Eleventh Circuit. Regardless of whether the court below technically left open the question of probable cause, there is no question as to what result it would reach on remand given its view of the facts and relevant state law. A remand under these circumstances would serve no useful purpose.

Bostic apparently believes that a nine-year-old's statement that she would hit her teacher is self-evidently illegal. Gray, however, was never charged with a crime, and the petition nowhere indicates which law Gray was supposed to have violated. Pet. 9. Bostic's briefs in the Eleventh Circuit were no more clear on this point—although he argued that committing a crime in the presence of a police officer creates probable cause for an arrest, he provided only cursory citations to the criminal statutes he believed Gray violated with no supporting analysis or case law. Bostic never quoted the relevant portions of the cited criminal statutes, set forth the elements of those crimes, or explained how Gray's actions supposedly implicated them.

These failures are not surprising, given that even a casual reading of the criminal laws on which Bostic relied demonstrates the absurdity of the assertion that Gray, an unarmed and harmless child, committed a crime under these circumstances. As the Eleventh Circuit noted, the crime of harassment under Alabama law covers only threats that would cause a reasonable person who is the target of the threat to fear for his or her safety. Pet. App. 11a. Here, the Eleventh Circuit held, for the reasons already discussed, that Gray "did not pose a threat to anyone's safety." *Id.* at 13a.

Although Bostic provided no citations to relevant case law in his brief, the Eleventh Circuit independently examined Alabama harassment cases in determining whether Gray's conduct may have given rise to probable cause. *Id.* at 22 n.7. For example, the court relied on *Fallin v. City of Huntsville*, 865 So. 2d 473 (Ala. Crim. App. 2003), in which the Alabama court found that a parent of a student committed harassment when the parent, a "large man," approached a cheerleading coach while yelling at her, waiving his arms, and pointing his finger. *Id.* at 477. In *Fallin*, the coach testified that she was "afraid for [her] safety," that she and the cheerleaders began retreating, and that she thought she might have to "defend [her]self." *Id.* She further testified that during the confrontation she was "visibly shaking . . . [a]nd [that she] was terrified." *Id.* The Eleventh Circuit in this case reasonably concluded that the conduct in *Fallin* was "generally more egregious" than the conduct at issue here. Pet. App. 22a n.7.[1]

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[1] The Eleventh Circuit also cited *B.B. v. State*, 863 So. 2d 132, 135-36 (Ala. Crim. App. 2003), in which the Alabama court found harassment based on a seventh grader's threat, uttered through clenched teeth, to kill his teacher. In addition to the threat, the

(continued...)

Aside from the crime of harassment, Bostic also relied on the Alabama statutes prohibiting disorderly conduct, Ala. Code § 13A-11-7, and "terrorist threats," § 13A-10-15. As with the crime of harassment, Bostic provided no case authority or analysis explaining how these statutes were supposed to apply to Gray's conduct. The crime of disorderly conduct, however, has similar elements to the crime of harassment and is inapplicable to Gray's conduct for the same reasons. *See* Ala. Code § 13A-11-7. The crime of "terrorist threats," a felony, is even more facially inapplicable. That statute is violated when a "person . . . threatens by any means to commit any crime of violence or to damage any property" by either "[t]errorizing another person" or "[c]ausing the disruption of school activities." Ala. Code § 13A-10-15. Gray neither "terroriz[ed]" anyone nor caused the disruption of school, and no reasonable police officer could believe that an anti-terrorism statute could

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[1](...continued)
student threw a desk across the room while saying, "I hate that teacher, I hate that teacher," and the teacher and a witness both testified that they feared the student would physically hurt someone. *Id.* In finding that the student's actions gave rise to charges of harassment, the court in *B.B.* relied on cases from other states where students had made genuine and believable threats of harm. *People ex rel J.P.L.*, 49 P.3d 1209, 1211 (Colo. Ct. App. 2002) (student said he had a list of students he was going to kill, pointed out specific people in the lunchroom whom he would target, and continued making threats even after told he was frightening other students); *State v. E.J.Y.*, 55 P.3d 673, 675 (Wash. Ct. App. 2002) (student threatened to "go get my gun and do like Columbine" along with other references to "Columbine" and "shooting," and teachers testified that they were afraid). These cases do not stand for the proposition that *every* threat by a child—no matter how harmless—is a crime.

be applied to the stray comment of a nine-year-old elementary school student.

Because the Eleventh Circuit repeatedly emphasized that Gray "did not pose a threat to anyone's safety," it has already decided the only issue that would be relevant on remand. Indeed, it defies reason that any court would hold that a nine-year-old's comment to her gym teacher—viewed in the light most favorable to her for summary judgment purposes—is a crime for which she can be arrested. To hold otherwise would be to criminalize a wide range of common statements made by children, whether in play or in anger, that cause no harm and pose no threat to anybody. No purpose would be served by remanding to the Eleventh Circuit for it to inevitably reach the same result.

II. The Eleventh Circuit Did Not Improperly Rely on Petitioner's Subjective Motives.

Bostic next argues that the Eleventh Circuit incorrectly relied on the fact that he intended to "punish" Gray by handcuffing her in support of its determination that the scope of the seizure was unreasonable. Pet. 8-11. Bostic claims the court's analysis is contrary to several of this Court's cases, including *Whren v. United States*, 517 U.S. 806 (1996). *Id.* Again, however, the court did not make the error that Bostic accuses it of making.

In analyzing the reasonableness of the seizure, the court correctly quoted *T.L.O.* to establish the relevant question: "whether Deputy Bostic's . . . handcuffing of Gray 'was reasonably related to the scope of the circumstances which justified the interference in the first place.'" Pet. App. 12a (quoting *T.L.O.*, 469 U.S. at 341). As the court noted, "[a] seizure will be permissible in its scope when the measures adopted are reasonably related to the objectives of the [seizure]

and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *Id.* Nowhere in the standard articulated by the Eleventh Circuit did the court state that an officer's subjective motives are a relevant consideration.

Nor did the court rely on Bostic's subjective motives in its application of the test to the facts of this case. Rather, the court explicitly relied on Gray's age and the lack of any realistic physical threat in holding that Bostic was not justified in handcuffing Gray. *Id.* at 12a-13a. As the court noted, Gray promptly complied with all her teachers' instructions and made no threatening gestures. *Id.* at 13a. Both coaches Williams and Horton testified that they had no fear for their safety, and Horton testified that Gray was physically incapable of harming anyone. *Id.* Moreover, at the time Bostic became involved, Williams had already turned his attention back to the class, and Horton had told Bostic that she could handle the situation. *Id.* at 5a-6a. There were thus no objective circumstances that would have led Bostic to believe that Gray had the intent or capacity to harm her gym coach physically or that a reasonable person would have been afraid. According to the court, "[t]he problem in this case for Deputy Bostic is that, at the time Deputy Bostic handcuffed Gray, there was no indication of a potential threat to anyone's safety." *Id.* at 12a-13a.

Near the end of its discussion of the second *T.L.O.* prong, the court noted that Bostic did "not even claim that he handcuffed Gray to protect his or anyone's safety" and, in fact, "candidly admitted that he handcuffed Gray to persuade her to get rid of her disrespectful attitude and to impress upon her the serious nature of committing crimes." *Id.* at 13a. In making this statement, however, the court was not relying on Bostic's subjective intentions to hold his actions unconstitutional; it was merely noting that, in addition to all the other evidence that Gray was not a realistic safety threat, Bostic himself *admitted*

she was not a threat. Bostic's admission established that even he did not have a reasonable argument that handcuffing Gray was justified because she committed a crime or to protect her teacher's safety. The Eleventh Circuit therefore did not commit any error.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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