No. 14-1139

IN THE

Supreme Court of the United States

ESTATE OF ADAM BROWN,

Petitioner,

v.

BROWN COUNTY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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April 24, 2015

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REPLY BRIEF FOR THE PETITIONER

Most of the petition has been left unrebutted by the County. This reply first presents four points demonstrating that a palpable and important circuit conflict exists regarding the Rule 56(c) burden. It concludes with a showing that this case is an excellent vehicle for resolving the circuit conflict.

1. The County Agrees That the Sixth, Seventh, and Ninth Circuits Permit Summary Judgment Movants Merely to *Assert* That the Non-Movant Will Be Unable to Prevail at Trial

The County concedes the petition's analysis of what the County calls the "prevailing law," Opp. 12, of the Sixth, Seventh, and Ninth Circuits, which relieves some summary judgment movants (those who would not have the ultimate burden of proof at trial) of any Rule 56(c) burden to make a record-based showing. Pet. 18-20. The County does not dispute that this approach to *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), has been sharply criticized by several circuits. Pet. 20-21.

2. The County Does Not Dispute That Six Circuits Have Expressly Stated That Summary Judgment Movants *May Not* Rest on Mere Assertions

The law of the Sixth, Seventh, and Ninth Circuits plainly conflicts with the law of the other nine regional circuits regarding what burden Rule 56(c) imposes on summary judgment movants. These nine circuits rule in accord with the analysis of Justice White in his *Celotex* concurrence, that "[i]t is not enough to move for

summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." 477 U.S. at 328 (White, J., concurring). In these circuits even a summary judgment movant who would not have the trial proof burden must make *some* record-based showing that there is no genuine dispute as to some material fact before any burden of response shifts to the nonmoving party. Pet. 15-18.

As to *six* of the nine circuits (the First, Second, Fifth, Tenth, Eleventh, and D.C. Circuits), the County puts up no real fight. It does not — because it cannot — dispute that these circuits have expressly stated that a summary judgment movant may not rest on conclusory assertions.

The County's capitulation on this point is complete regarding the Fifth, Tenth, and D.C. Circuits. No case from these circuits is even cited in the opposition. The County only cites cases from the First, Second, and Eleventh Circuits. Opp. 13-15. But its opposition does nothing but complain that we have supplied merely "string citations," supposedly evidencing "rote, black-letter law . . . , having no bearing whatsoever on any matured circuit split or any issue relevant to the movant's burden." Opp. 13-14. The County is not correct.

First Circuit. Ignoring two other First Circuit decisions cited in Pet. 15-16, the County discusses only *In re Schifano*, 378 F.3d 60 (1st Cir. 2004), which it says "conduct[ed] no analysis of the moving party's initial burden" and focused only on "the non-moving party's showing in response . . . ." Opp. 14. At issue in *Schifano* was whether the personal debts of a construction contractor should be discharged by his Chapter 7 bankruptcy proceeding. His creditors claimed he had made fraudulent transfers in the year

before filing for bankruptcy. He successfully moved for summary judgment, winning the discharge. On appeal the First Circuit held that he met his Rule 56(c) burden by making a record-based demonstration that "there is a complete lack of evidence showing any transfer of assets" and that "there is no evidence showing that any transfers or concealment occurred in the year prior to the bankruptcy filing." 378 F.3d at 67.

Second Circuit. The County conveniently ignores both Second Circuit decisions cited in the petition. Pet. 16. It only refers to *Parker v. Sony Pictures Entertainment, Inc.*, 260 F.3d 100, 111 (2d Cir. 2001), for the proposition that to meet its Rule 56(c) burden, under *Celotex* a defendant need not prove a negative. Opp. 14-15. That aspect of *Celotex* is not at issue in this case. Pet. 12 (noting that in *Celotex* "'[t]he Court made clear that moving for summary judgment, a litigant need not submit 'affidavits or other similar materials *negating* the opponent's claim'") (quoting 577 U.S. at 323).

Eleventh Circuit. Likewise the County ignores the decision of the Eleventh Circuit in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) (cited in Pet. 18), which has been cited by other circuits and by scholars for its pioneering analysis of the Rule 56(c) burden (the Eleventh Circuit having taken, in *Clark*, perhaps the strongest position of *any* circuit against the view that *Celotex* permits summary judgment movants to rest on mere assertions).[1] The more recent

[1] For example, the Fifth Circuit has lauded the Eleventh Circuit's "thorough opinion" in *Clark* explicating "a common misinterpretation of Supreme Court decisions" regarding the Rule 56(c) burden. *Russ v. International Paper Co.*, 943 F.2d 589, 591 (5th Cir. 1991) (per curiam). Scholarship noting *Clark*'s importance includes Adam N. Steinman, *The Irrepressible Myth of* Celotex*: Reconsidering Summary Judgment Burdens Twenty Years After*

Eleventh Circuit case cited by the County is consistent with *Clark*.[2]

3. The County's Analysis of Decisions in the Three Remaining Circuits Further Supports the Importance of Review by This Court

As to the remaining circuits — the Third, Fourth, and Eighth Circuits — the County's analysis further bolsters the justification for granting certiorari. The County does not dispute the petition's showing that at least *some* decisions of these circuits (the petition cites

the Trilogy, 63 Wash. & Lee L. Rev. 81, 118-19 (2006) (criticizing *Clark* as imposing too heavy a burden); William W Schwarzer & Alan Hirsch, *Summary Judgment After* Eastman Kodak, 45 Hastings L.J. 1, 10-13 (1993) (same); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1051 n.365 (2003) ("The Eleventh Circuit, in particular, has taken a negative view of *Celotex*.") (citing *Clark*); and James V. Chin, Case Comment, Clark v. Coats & Clark, Inc.: *The Eleventh Circuit Clarifies the Initial Burden in a Motion for Summary Judgment*, 26 Ga. L. Rev. 1009, 1023 (1992) ("The Eleventh Circuit has taken a positive step toward explaining the commonly misunderstood and misapplied holding of *Celotex*.").

[2] The County contends that *Allen v. Board of Public Educ. for Bibb County*, 495 F.3d 1306 (11th Cir. 2007) (cited in Pet. 18), never analyzed whether defendant met its Rule 56(c) burden, but instead jumped "immediately" to "the sufficiency of the" plaintiff's summary judgment response. Opp. 14. The County overlooks *Allen*'s holding that the defendant actually met its Rule 56(c) burden. 495 F.3d at 1319 ("[I]t was the Board's burden to support the motion by reference to materials on file . . . . To that end, it referred the trial court to portions of some of Plaintiffs' depositions" which "supported the Board's argument . . . .").

seven), are in conflict with the law of the Sixth, Seventh, and Ninth Circuits. Pet. 16-17. The County merely argues that *other* decisions of the Third, Fourth, and Eighth Circuits follow the approach of the Sixth, Seventh, and Ninth Circuits, by allowing summary judgment movants to rest on mere assertions (it cites one decision from each circuit).

If this argument were correct, it would hardly diminish the need for this Court to grant review to resolve the meaning of Rule 56(c). Any showing by the County that some circuits are internally inconsistent — sometimes allowing summary judgment movants to rest on mere assertions, and sometimes not — would simply serve to further confirm what civil procedure scholars have long lamented: that confusion reigns in the lower federal courts regarding the proper construction of Rule 56(c), due to fundamental ambiguities in this Court's *Celotex* decision. Pet. 3-4 n.2; see also p. 7, *infra*.

But it is far from clear that the County is correct in its assertion that the Third, Fourth, and Eighth Circuit decisions it cites are consistent with the law of the Sixth, Seventh, and Ninth Circuits.

Third Circuit. The County argues that in *Singletary v. Pennsylvania Dept. of Corrections*, 266 F.3d 186, 192 n.2 (3d Cir. 2001), the court held that in moving for summary judgment, the governmental defendants had no "burden of showing a lack of a genuine issue" regarding the claim that a prisoner's suicide was the result of deliberate indifference by a particular prison official (Mazurkiewicz). Opp. 12. But in *Singletary* the Third Circuit stated that "the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact," and it apparently found that the defendants had met their Rule 56(c) burden by pointing out "that the record is lacking any evidence to

support that claim," because the plaintiff's "only evidence" was an expert report that did not "address what Mazurkiewicz knew or must have known . . . ." 266 F.2d at 192 n.2.

Fourth Circuit. The County cites *Cray Communications, Inc. v. Novatel Computer Systems, Inc.*, 33 F.3d 390, 394-95 (4th Cir. 1994), which it correctly describes as noting that under *Celotex*, a summary judgment movant need not prove a negative. Opp. 12-13. We agree that *Celotex* settled this specific point. Pet. 12. But nothing in *Cray* suggests that the Fourth Circuit permits movants to rest on mere assertions.

Eighth Circuit. Finally, ignoring the two decisions cited on page 17 of the petition in which the Eighth Circuit reversed grants of summary judgment due to defendants' failure to make a record-based Rule 56(c) showing, the County insists that "the Eighth Circuit has recognized that a movant without the burden of proof at trial need only *assert* a lack of evidence in support of the non-movant's claims in order to prevail on summary judgment." Opp. 13 (emphasis added). That is simply not true. In both cases cited, the defendant pointed to record materials showing the plaintiff could not meet its trial proof burden. In *Meterlogic, Inc. v. KLT, Inc.*, 368 F.3d 1017 (8th Cir. 2004), the defendant was able to "point to the absence of any evidence" on damages, *id*. at 1018, because the testimony of plaintiff's sole damages expert had been ruled inadmissible. *Id*. at 1019.

Pourmehdi v. Northwest Nat. Bank, 849 F.2d 1145 (8th Cir. 1988) (per curiam), in which the plaintiff sued a bank for malicious prosecution, is a somewhat less clear decision (spanning only six paragraphs). But apparently the court found the Rule 56(c) burden was met because the bank "pointed out to the trial court that there was no genuine issue as to the absence of

probable cause," given that the bank "had done no more than inform the prosecutor of the facts relating to a supposed crime," which "it had a legal right to do." *Id.* at 1146.

In ruling on the petition, this Court need not delve into the precise details of Third, Fourth, and Eighth Circuit law. The need for this Court to resolve the obvious confusion in the lower courts regarding Rule 56(c) is clear regardless of whether these circuits *always* apply a construction of Rule 56(c) that is in conflict with that of the Sixth, Seventh, and Ninth Circuits or, exhibiting internal inconsistency, only *sometimes* do so.

4. The County Does Not Dispute the Scholarly Consensus That Serious Confusion Has Long Existed Regarding the Rule 56(c) Burden

As Professor Steinman has summarized, this Court's *Celotex* decision presents "significant ambiguities" which have led many courts and commentators to read it "as placing essentially no burden at all on a defendant seeking summary judgment." Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 Wash. & Lee L. Rev. 81, 104, 109 (2006). Some scholars (such as Professor Redish) endorse this reading of *Celotex* and criticize courts that refuse to follow it, while others take the opposite view (such as Dean Friedenthal and the editors of *Moore's Federal Practice*). Pet. 3-4 n.2. The scholarly consensus that there is significant confusion and conflict in the lower courts concerning the Rule 56(c) burden is undeniable, and the County has made no effort to deny it.

5. This Case is an Excellent Vehicle

Despite the County's protestations, Opp. 8-10, this case is clearly an excellent vehicle for resolving the conflict and confusion dating back to *Celotex* concerning what initial burden Rule 56(c) imposes on a moving party that seeks summary judgment on the ground that the non-moving party cannot prove its case. A grant of certiorari is especially warranted in this case given that the Rule 56(c) issue almost always evades review by this Court.

Despite the importance of Rule 56(c) and the conflict in the circuits concerning its proper construction, the opportunities available to this Court to review this issue are inherently rare. Consider defendants who litigate in a circuit that applies the majority rule, interpreting Rule 56(c) to require a record-based showing on every motion. Even if that rule is incorrect, defendants burdened by it (who fall short of the required showing) will never be able to seek review in this Court. They cannot seek review *before* trial due to the final-judgment rule.[3] And they cannot seek review *after* trial because a party may not "appeal an order denying summary judgment after a full trial on the merits," as this Court held in *Ortiz v. Jordan*, 562 U.S. 180, 183-84 (2011).

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[3] Even public officials who enjoy a right not to be burdened by constitutional tort litigation if they can establish qualified immunity, and hence are granted the right of interlocutory appeal from a denial of summary judgment on their qualified-immunity defense, face a general rule that matters concerning sufficiency of the evidence may be reviewed only after final judgment. *E.g.*, *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011); *Terebesi v. Torreso*, 764 F.3d 217, 229 (2d Cir. 2014); *Younes v. Pellerito*, 739 F.3d 885, 888-90 (6th Cir. 2014); *George v. Morris*, 736 F.3d 829, 834-36 (9th Cir. 2013); *Morris v. Noe*, 672 F.3d 1185, 1188-89 (10th Cir. 2012).

Now consider plaintiffs who litigate in the Sixth, Seventh, or Ninth Circuits, which apply the minority rule permitting defendants to satisfy Rule 56(c) through mere assertions. Even if this rule is incorrect and unfairly burdens plaintiffs as well as the judicial system with wasteful motion practice, *see* Pet. 21-22, those plaintiffs will rarely end up seeking review in this Court. To minimize the risk of losing at the summary judgment stage, they will not rest on the argument that the defendant has not met its Rule 56(c) burden. Rather, despite the unfair imposition involved, they will painstakingly assemble their case in admissible form. If their evidence is sufficient to proceed with their case, summary judgment will be denied, and the Rule 56(c) issue will become moot. If their evidence is insufficient, they will have no practical incentive to seek review in this Court (as they will lose in the end, anyway), so the issue will again evade review.

Thus, the Rule 56(c) issue will be reviewable only in a case: (1) from the Sixth, Seventh, or Ninth Circuits (which follow the minority rule); (2) in which the defendant sought summary judgment by resting on mere assertions; and (3) in which the plaintiff has evidence sufficient to prove its case (and thus an incentive to appeal), but did not assemble that evidence in admissible form in response to the summary judgment motion.

This is precisely such a case. The County concedes point one: that the Seventh Circuit allows Rule 56(c) to be met based on mere assertions. Opp. 12. The County also concedes point three: that the Estate did not assemble its evidence in admissible form, so that this case's outcome now hinges on the meaning of Rule

56(c).[4] So this Court need examine only point two: whether the County sought summary judgment based on mere assertions, in a manner other circuits would not permit.

The answer is clearly yes. In its Seventh Circuit briefing, the County did not dispute that its memorandum in support of summary judgment *did not even mention* the Estate's unreasonable-search claim. Pet. 6 & n.6. The County now suggests it *did* mention that claim, quoting two pages of its memorandum. Opp. 8 (quoting 7th Cir. App. 92, 94). But these passages only appear in a section entitled: "VI. THE ESTATE CANNOT ESTABLISH AN OFFICIAL CAPACITY CLAIM." 7th Cir. App. 92-95. No mention of the Estate's search claim against the County was made in the sections of the County's memorandum analyzing Fourth Amendment issues (which discussed only the seizure claim against County deputies). *Id*. at 85-89. Even as to the *Monell* claim, the County merely *asserted* that the Estate could not prove the existence of an official policy that caused Adam Brown's death; no record material was referenced. *Id*. at 92-95. Ample

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[4] As part of its argument that this case is "a less-than-ideal vehicle," Opp. 8, the County faults the Estate for not putting a key expert report in admissible form. Opp. 9 (This is the same expert report the County never even *mentioned* in its summary judgment papers. Pet. 6). But, as the County does not dispute, whether a summary judgment response contains admissible evidence is irrelevant unless the movant first meets its Rule 56(c) burden. Pet. 11-12. When the Estate filed its summary judgment response in 2012, governing Seventh Circuit precedent indicated that a plaintiff need not respond to a summary judgment motion resting on mere assertions, *e.g.*, *Carmichael v. Village of Palantine, Ill.*, 605 F.3d 451, 460 (7th Cir. 2010), which helps explain why this is the rare case in which a plaintiff with a viable substantive claim *did not* assemble the evidence in admissible form, thereby acquiring standing to present the Rule 56(c) issue.

authority demonstrates that the circuits following the majority rule would never accept such bare assertions, unaccompanied by record references, as satisfying Rule 56(c). Pet. 15-18.

Clarification of Rule 56(c) is a task that those in charge of the Rules-revision process have left to this Court. Pet. 3-4 & n.3. This case is an excellent vehicle for this Court's resolution of what Dean Louis long ago identified as "the fundamental, unresolved question of summary judgment: What is the burden of production on the moving party, particularly the defendant, when this party will not have the burden of proof at trial?" Martin B. Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment, and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C. L. Rev. 1023, 1048 (1989).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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