No. 18-1287

In The
Supreme Court of the United States

ALEXANDER L. BAXTER,

Petitioner,

v.

BRAD BRACEY AND SPENCER R. HARRIS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

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The Sixth Circuit Court of Appeals' unpublished Opinion granting Respondents' summary judgment based on the doctrine of qualified immunity can be found at 751 Fed. App'x 869 (6th Cir. 2018) (App. 1a). Also unpublished is the Sixth Circuit Court of Appeals' finding on the motion to dismiss. *Baxter v. Harris*, No. 15-6412, 2016 WL 11517046 (6th Cir. Aug. 8, 2016) (App. 14a).

JURISDICTIONAL STATEMENT

Respondents do not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(1), but deny that the case satisfies the standard set forth in Supreme Court Rule 10. Petitioner filed his Petition for Writ of Certiorari on April 8, 2019.

COUNTERSTATEMENT OF THE CASE

Petitioner, Alexander Baxter ("Baxter"), paints the facts as "straightforward" and focuses on the mere five seconds that passed between when Baxter raised his hands and when Respondent Officer Spencer Harris ("Officer Harris") released his K-9, Iwo. The crucial undisputed fact in the record, however, is that Officer Harris never saw Petitioner's hands raised. Moreover,

limiting the pertinent window of time to five seconds ignores the following:

On January 8, 2014, Baxter walked around "looking for something" because there were people who would buy laptops and other electronics from him. (Baxter Deposition ("Baxter Depo."), PageID# 458-459, RE 99-1.) He would open doors and if they were unlocked, he would run in, grab a few things, and run back out. *Id.* After breaking into a home on Portland Avenue, he stole some change, car keys and a bottle of liquor. *Id.* at PageID# 462. After observing Baxter enter the home, a neighbor called the police. (Declaration Spencer Harris ("Harris Dec.") ¶ 8, PageID# 516, RE 99-2.) While on the phone with the police, the neighbor saw Baxter leave the home and get into the car.

After seeing a police helicopter and a police car, Baxter knew the police were looking for him, and he bolted from the car to a home he had previously broken into. (Baxter Depo., PageID# 463-464, RE 99-1.) While fleeing, he acknowledged that "it looked pretty bad." *Id.* at PageID# 466.

Once officers arrived on the scene, they verified that Baxter had committed an aggravated burglary. (Harris Dec. ¶ 8, PageID# 516, RE 99-2; *see* Tenn. Code Ann. § 39-14-402 (defining aggravated burglary as burglary of a habitation)). Given Baxter's actions in fleeing and the serious crime he had committed, the K-9 unit was called in to assist in apprehension. (Harris Dec. ¶ 7-8, PageID# 516, RE 99-2.)

The aviation unit tracked Baxter to a home on Fairfax Avenue, where Baxter jumped through a ground floor window that led to a basement. (Baxter Depo., PageID# 464-465, RE 99-1.) He immediately ran across the room to look out another window for police, but upon hearing the police radio he went to a defensive position between a chimney and a water heater. *Id.* at PageID# 468. While light was coming in through the windows, Baxter still described the basement as dark. *Id.* at PageID# 468-469; Harris Dec. ¶ 12, PageID# 518, RE 99-2.

Baxter saw a police officer look into the windows, but does not know if the officer saw him. (Baxter Depo. PageID# 470, RE 99-1.) Despite knowing police surrounded the home, hearing police officers call for his surrender, and knowing that they intended to release a police dog, Baxter remained hidden and silent. *Id.* at PageID# 471-473.

Respondent Officer Brad Bracey ("Officer Bracey") shouted a warning into the basement that a K-9 would be released. (Harris Dec. ¶ 10-11, PageID# 516, RE 99-2.) Officer Harris then echoed the warning. *Id.* After Baxter failed to appear, Officer Harris released his K-9 partner, Iwo.[1] *Id.*; Baxter Depo., PageID# 473,

[1] Iwo is a malinois police dog that has been certified since August 18, 2010. To become certified, Iwo and Officer Harris completed 584 hours of training that included training on criminal apprehension. Thereafter, for five to ten hours each month, Iwo and Officer Harris completed additional training. Iwo will only respond to his handler and will not obey commands from any

RE 99-1. Iwo shadowed the path Baxter himself had previously taken. (Baxter Depo., PageID# 473, RE 99-1.)

Baxter then saw the two officers come around the water heater with Officer Harris eventually taking a position in front of him with Officer Bracey behind Baxter. *Id.* at PageID# 474-476.[2] Iwo came up to Officer Harris, who grabbed his chain while he reared up at Baxter. *Id.* at PageID# 477. For the next few moments, Officer Harris continued to shout at Baxter to put his hands up. *Id.* at PageID# 478-479. Baxter does not recall Officer Bracey saying anything; but, believes that Officer Bracey had a "sense" Officer Harris would let the dog go. *Id.* at PageID# 480.

At no point did Officer Harris see that Baxter's hands were up and only seconds passed before Officer Harris released Iwo. (Harris Dec. ¶ 13, PageID# 516, RE 99-2; Baxter Depo., PageID# 479, RE 99-1.) Baxter has never claimed that he told the officers that he intended to surrender or in any way communicated that he was not a threat.

According to Baxter, Iwo lunged and bit him multiple times under his left armpit. (Baxter Depo., PageID# 479, 482, RE 99-1.) Iwo is trained to bite once then to maintain the bite until commanded to release. Baxter's medical records reflect that he only received a

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other person, including another police officer. (Harris Dec. ¶ 4-5, PageID# 517, RE 99-2.)

[2] Respondents adopted Baxter's facts as to what transpired in the basement for purposes of summary judgment only.

single puncture wound, which is consistent with Iwo's training. (Nashville General Records, PageID# 519-524, RE 99-3.)

Once Iwo apprehended Baxter, Officer Bracey placed handcuffs on Baxter. (Baxter Depo., PageID# 488, RE 99-1.) Officer Harris reached in and pulled Iwo off of Baxter. *Id.* at PageID# 484. Baxter cannot recall if Officer Harris would have also given a verbal command to Iwo to release. *Id.* at PageID# 486. Additionally, Iwo is trained to only respond to his handler, whether it be to release a bite or in any other scenario. (Harris Dec. ¶ 6, PageID# 515, RE 99-2.)

REASONS FOR DENYING THE PETITION

I. THIS CASE IS NOT THE APPROPRIATE VEHICLE TO RE-CONSIDER QUALIFIED IMMUNITY

A. Baxter exaggerates the conflict between the Sixth Circuit's Opinion at the Motion to Dismiss stage compared to the Opinion at the Motion for Summary Judgment stage

Baxter devotes a substantial amount of briefing to manufacturing a conflict between the Sixth Circuit's Opinion on *Officer Bracey's* motion to dismiss and the Opinion on *Officer Harris's* motion for summary

judgement.[3] This Court should not grant review on the false premise that the doctrine of qualified immunity is in such disarray that separate panels in a single case are diametrically opposed. The Sixth Circuit Opinions can be harmonized by identifying specifically what the Court was deciding when. The appeal of the motion to dismiss only concerned Officer Bracey's conduct in the context of a failure to intervene claim and only included the facts that Baxter chose to embrace in the complaint. Then, after discovery, a more robust picture developed, and both Officer Harris and Officer Bracey asserted entitlement to qualified immunity in motions for summary judgment. A "conflict" between the Sixth Circuit's two Opinions only exists if the procedural posture of the two appeals and the facts developed during discovery are ignored. The harmony between the two Opinions militates against review.

When Officer Bracey moved to dismiss the complaint, he asserted his entitlement to qualified immunity on the failure to intervene claim. Notably, the question of the lawfulness of Officer Harris's conduct was not before the Sixth Circuit at the motion to dismiss stage.

Moreover, Baxter's complaint painted the interaction between himself and the officers with broad strokes. Only disclosing that "during the course of an arrest he ran and hid in the basement of a house,"

[3] As noted above, Officer Bracey also moved for summary judgment. The Sixth Circuit held that qualified immunity protected Officer Bracey's actions since it was not clearly established that Officer Harris's actions constituted excessive force.

before being confronted by Officers Harris and Bracey while sitting with his hands in the air. Then, without providing any context about the length of time that had elapsed, the complaint alleged that Officer Harris released his K-9 while Officer Bracey watched.

Based on these facts, the Sixth Circuit then inferred that "Bracey had the opportunity to intervene given his proximity to Baxter, and the means to prevent the harm from occurring either by instructing Harris not to release the animal or by restraining the animal himself until Harris could command it to stop." *Baxter*, 2016 WL 11517046 (6th Cir. 2016). This critical inference then permitted the Sixth Circuit to deny qualified immunity because, based only on the narrow facts Petitioner included in the complaint, it was clearly established that Officer Bracey must do more than watch a K-9 attack an individual who did not pose a threat and was not attempting to resist or flee. *Id.*

"It is axiomatic that the standards for dismissing a claim under FED. R. CIV. P. 12(b)(6) and granting judgment under . . . FED. R. CIV. P. 56 are vastly different." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3rd Cir. 2009). At that earlier stage, it is the defendant's conduct *as alleged in the complaint* that is scrutinized for "objective legal reasonableness." In contrast, at summary judgment, the court looks to the record as a whole instead of limiting its view to the pleadings. *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996).

It is the change in the scope of review, not confusion around qualified immunity, which compelled the

Sixth Circuit to reach a different conclusion in its later Opinion than it did in its first. Because "[t]he facts revealed during discovery add much-needed color to this case – as they often do." *Baxter v. Harris*, 751 Fed. App'x 869, 872 (6th Cir. 2018). Understandably, the Petition attempts to limit the additional facts by ignoring:

- Baxter committed aggravated burglary, a serious crime
- Metropolitan Nashville Police Department responded with multiple police resources, including patrol cars, aviation support, and the K-9 unit
- Baxter acknowledged this overwhelming show of force and believed "it looked pretty bad"
- Both Officer Bracey and Officer Harris warned Baxter that if he did not surrender that a police dog would be released
- Officer Harris and the K-9, Iwo, have completed extensive training, received the necessary certifications, and engage in on-going training
- Mere seconds elapsed between the Officers seeing Baxter and when Iwo was released
- Baxter remained silent

All of the above changed the analysis. Plus, for the first time, Officer Harris defended his conduct.

In the initial appeal, Officer Bracey did not address the legality of Officer Harris's actions. In other words, in the first appeal, both Officer Bracey and the Sixth Circuit took it as a given that Officer Harris's conduct, as alleged, was unconstitutional. Once the record developed, and the court had to analyze the issue, the additional facts removed Officer Harris's conduct from the orbit of *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2012), where it resided, uncontested, based solely on the complaint, and placed it in the hazy middle ground.[4] *Baxter*, 751 Fed. App'x at 873.

While a number of facts remained consistent between the motion to dismiss and the motion for summary judgment stages of litigation, several new facts developed that warranted attention, as noted above. Instead of ignoring the development of new facts, the Sixth Circuit properly included all facts in its analysis. Ultimately, the Petition should be denied because any conflict between the two Sixth Circuit Opinions is illusory.

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[4] Officer Harris maintains that his actions were constitutional. Given that the Sixth Circuit opinion did not address the constitutional question, and the petition ignores it, the response is likewise contained to the clearly established prong.

B. This case is not the appropriate vehicle because this Court would be essentially conducting a first review, not a final review.

This Court is not the forum for arguments to be raised for the first time. While at first blush it may appear that if the Petition is granted this Court would be conducting a "final review," in actuality, it would be a first review because Baxter has never before identified any case that "clearly established" the rights he seeks to vindicate. It is only at the eleventh hour that Baxter identifies a case that purports to support his Petition.[5]

The Sixth Circuit, as do other circuits, places the burden on the plaintiff to prove that a defendant is not entitled to qualified immunity. *Humphrey v. Mabry*, 482 F.3d 840, 846 (6th Cir. 2007); *accord Breen v. Texas A & M Univ.*, 485 F.3d 325, 331 (5th Cir. 2007) ("When a defendant invokes qualified immunity . . . the burden shifts to the plaintiff to rebut the applicability of the defense."); *Mannoia v. Farrow*, 476 F.3d 453, 457 (7th Cir. 2007) ("Although the privilege of qualified immunity is a defense, the plaintiff carries the burden of defeating it."); *Reeves v. Churchich*, 484 F.3d 1244, 1250 (10th Cir. 2007) ("Once a defendant has raised qualified immunity as an affirmative defense, the plaintiff bears the heavy two-part burden of demonstrating that (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established

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[5] As explained below, even if those cases had been brought to the attention of the Sixth Circuit, the outcome would be the same.

at the time of the alleged conduct."); *Andujar v. Rodriguez*, 486 F.3d 1199, 1203, n.2 (11th Cir. 2007) ("When it is undisputed . . . that government officials were acting within their discretionary authority, the burden is on the plaintiff to establish that qualified immunity is not appropriate.").

Citing *Pearson v. Callahan*, 555 U.S. 731, 735 (2011), the Sixth Circuit skipped to the "clearly established" prong in this case because it lacked the benefit of sophisticated briefing by both parties on the complex constitutional question that Baxter's claim presented.

Then, because Baxter had not pointed to "any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a K-9 apprehension was unlawful in these circumstances," the Sixth Circuit granted Officer Harris qualified immunity. *Baxter*, 751 Fed. App'x at 872. Now, Baxter purports to do just that. Officers Harris and Bracey are mindful that Baxter proceeded *pro se* until the filings in this Court. Nonetheless, the fact that this Court would be called upon to do a "first review" instead of a final review counsels against granting review.

C. The facts presented lie in the blurred middle ground between constitutional and unconstitutional. Accordingly, the Sixth Circuit correctly granted Officer Harris qualified immunity.

Relying on this Court's analysis and formulation of the clearly established prong in *District of Columbia*

v. Wesby, 138 S. Ct. 577, 589 (2018), the Sixth Circuit granted Officer Harris immunity. Review of the faithful application of this Court's precedent is unnecessary and the Petition should be denied.[6]

In *Wesby*, this Court reiterated "the precedent must be clear enough that every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply." *Id.* at 589. And that "the 'clearly established' standard also requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." *Id.* at 590. Characterizing the analysis as "straightforward," Justice Thomas noted that "tellingly, neither the panel majority nor the partygoers have identified a single precedent – much less a controlling case or robust consensus of cases – finding a Fourth Amendment violation under similar circumstances." *Id.* at 591.

Applying those principles here, the Sixth Circuit looked for "a single precedent" that found a Fourth Amendment violation under similar circumstances. The case with the most similar facts, *Robinette v. Barnes*, 854 F.2d 909, 913-14 (6th Cir. 1988), found the conduct constitutional. There, an officer used a

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[6] The thrust of the petition is that the Sixth Circuit erred in applying the settled rule of qualified immunity. As Justice Alito and Thomas opined in denying review in *Salazar-Limon v. City of Houston*, 137 S. Ct. 1277 (2017), this Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case."

well-trained K-9 to apprehend a fleeing suspect in a dark and unfamiliar location.

The seminal case in the Sixth Circuit, *Campbell*, which sets forth circumstances when use of a K-9 is unconstitutional, is distinguishable in several material ways. There, the officer and his K-9 partner did not conduct any follow-up training after their initial certifications. 700 F.3d at 783. Conversely, Officer Harris and Iwo completed their initial training and all follow-up training, receiving satisfactory marks each time.

Additionally, in *Campbell* only two officers responded to a call about a possible domestic situation because the plaintiff had been pounding on his girlfriend's front door. *Id.* at 784. After hearing the sirens, plaintiff fled to a nearby yard and lay on the ground. *Id.* at 785. At the time the K-9 officers responded, there was no reason to believe the plaintiff posed a threat. *Id.* at 787. In contrast, in this case, the police response to Baxter's aggravated burglary was overwhelming, with multiple police cars, aviation support, and the K-9 unit. Despite this vast response, and knowing it "looked pretty bad," Baxter ran and broke into yet another home. He sought an advantageous position in a darkened basement between a water heater and a chimney, permitting Officer Harris to infer that Baxter did not intend to surrender peacefully.

A final distinction is that the officer in *Campbell* never gave a warning before initiating the track of the plaintiff. *Id.* at 785. There, the K-9 found the plaintiff lying face down with his arms to his side and bit his

left leg first, and then continued to bite different places for 30 to 45 seconds. *Id.* at 785. Here, Baxter admits to hearing the K-9 warning and remaining hidden. When Officer Harris encountered Baxter, barely any time passed before Officer Harris deployed Iwo. Baxter's testimony establishes that as soon as Iwo had control of Baxter, Officer Bracey placed him in handcuffs, allowing Officer Harris to safely remove Iwo. Also, Iwo did not continually attack Baxter; rather, he complied with his extensive training and bit once and held Baxter to be secured.

Given the numerous factual distinctions between *Campbell* and the case here, the Sixth Circuit correctly refused to find that *Campbell* provided "fair notice" to Officer Harris that his conduct violated the Fourth Amendment. Baxter's myopic focus on the position of Baxter's hands during the fleeting seconds between when Officer Harris and Officer Bracey first encountered Baxter and the release of the police dog fails to account for the constellation of circumstances that surround an officer's use of force. Absent a case that accounts for those circumstances, this Court's precedent mandates that the balance tilt in Officer Harris's favor. Accordingly, review is not warranted because the Opinion below is correct and tracks this Court's well-settled precedents.

D. Even considering the cases that Baxter cites to, Officer Harris would still be entitled to qualified immunity.

The fact that the outcome *in this case* would be the same even if the Sixth Circuit considered the cases relied upon by Baxter makes this case a poor vehicle for resolving whatever confusion may exist surrounding qualified immunity. *See* Stephen M. Shapiro, et al., *Supreme Court Practice*, Ch. 4.4(f), p. 249 (10th ed. 2013) ("If the resolution of a clear conflict is irrelevant to the ultimate out-come of the case before the Court, certiorari may be denied.").

Baxter cites *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) for the proposition that the "gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law.'" Respondents do not disagree with that general principle. There, the officers chased a teenager with Downs Syndrome, wrongly believing him to be a criminal, then tore him from his mother's arms before slamming him against a car, and pinning him there for over fifteen minutes. Importantly, the officer admitted that he saw the plaintiff "surrendering." The facts in *Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 603 (6th Cir. 2006) are just as egregious. In the first incident before the court, the officer, at best, had suspicion of a drug deal when the officer chased an individual who refused to stop when asked. Once the officer caught up with the plaintiff, the plaintiff stood up from the bushes with his arms straight out. The officer whacked him twice with his baton and commented "that's for running from me." *Id.*

at 603. In the second instance, the same officer chased an individual suspected of being involved with car break-ins. The officer yelled "Stop or I'll shoot!" The individual complied with the officer's instructions and "screamed 'I'm stopping, I'm stopping.' " *Id.* at 604. The officer then used his baton to smack the back of the individual's head before tackling him and sitting on his back. *Id.* at 604.

In contrast, here it is unclear based on the facts if Officer Harris should have appreciated that Baxter had "surrendered." Baxter committed aggravated burglary and led a large police contingent on a chase. Then, when offered multiple opportunities to actually surrender, he remained hidden. Baxter's unwillingness to retreat from his defensive position, despite the overwhelming police presence, impacts how a reasonable officer perceives his subsequent actions. In each of the cases cited by Baxter, the plaintiff overtly communicated the intent to surrender and it could not reasonably be disputed that the officers had knowledge of that intent. Here, when Officers Harris and Bracey approached Baxter, Officer Harris never saw Baxter's hands raised. He only used Iwo for his safety, and released him once Baxter no longer posed a risk to him or Officer Bracey. Officer Harris never appreciated that Baxter had "surrendered" in the mere seconds that elapsed between approach and release of Iwo. *See Johnson v. Scott*, 576 F.3d 658, 660 (7th Cir. 2009) ("no law that we know of required Scott to take Johnson's apparent surrender at face value, a split second after Johnson stopped running"); *Crenshaw v. Lister*, 556

F.3d 1283, 1293 (11th Cir. 2009) ("it was objectively reasonable for Lister to question the sincerity of Crenshaw's attempt to [surrender] and use the canine to apprehend him. Lister was not required to risk his own life by revealing his position in an unfamiliar wooded area at night to an armed fugitive who, up to that point, had shown anything but an intention of surrendering"); *Ingram v. Pavlak*, No. Civ. 03-2531, 2004 WL 1242761, at *5 (D.Minn. June 1, 2004) (officers reasonably could send a dog into a closet to flush out a suspect because, although the suspect said he was surrendering, he continued to hide in the closet, and the officers could not predict what he might do); *McAllister v. Dean*, No. 4:13-CV-2492, 2015 WL 4647913, at *6 (E.D. Mo. Aug. 5, 2015) ("defendants had no way of knowing how plaintiff was going to behave and they were not required to take his apparent surrender at face value, especially with a gun in easy reach"); *see also Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015) (deadly force justified after the suspect threw his gun away because the officer faced a rapidly escalating situation and only five seconds elapsed between when the suspect threw his gun away and when he was shot).

This Court has previously granted officers qualified immunity in similar circumstances. For example, in *Mullenix v. Luna*, 136 S. Ct. 305 (2015), the defendant officer, instead of using road spikes to apprehend a fleeing felon, chose to shoot at a moving car to stop its progress, ultimately shooting and killing the suspect. *Id.* at 307. In upholding the denial of summary judgment, the Fifth Circuit agreed with the lower court

that there was a disputed fact about the immediacy of the risk posed by the suspect. The Supreme Court rejected that finding and chastised the Fifth Circuit for ignoring cases that supported the officer's assessment of the threat and relying on cases that were "too factually distinct to speak clearly to the specific circumstances." *Id.* at 311-12. Like the officer in *Mullenix*, Officer Harris is entitled to qualified immunity because Baxter ignores cases that support Officer Harris's assessment of the threat and relies on cases that are "too factually distinct to speak clearly to the specific circumstances." *Id.* at 311-12. Thus, this case is a poor vehicle for review because the outcome is the same even under the cases submitted by Baxter.

II. REVIEW IS NOT WARRANTED TO RE-EXAMINE THE DOCTRINE OF QUALIFIED IMMUNITY

A. Baxter embellishes the struggle that the lower courts have in defining clearly established law at the required level of specificity.

The Petition seeks not just to overturn the Sixth Circuit's ruling in this case, but to eliminate the doctrine of qualified immunity altogether based on a perception that the lower courts are in chaos trying to synthesize this Court's precedent.[7] As a threshold

[7] One solution to solving any perceived chaos is requiring that "clearly established law" only flow from this Court's precedents. This Court has "not yet decided what precedents – other than our own – qualify as controlling authority for purposes of

matter, for the last several years this Court's Opinions have left no question that clearly established law cannot be defined at a high level of generality. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019) ("the Court of Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam) (internal quotation marks omitted) (granting qualified immunity when the most analogous circuit precedent favored the officer and reiterating the specificity is especially important in the Fourth Amendment context); *White v. Pauly*, 137 S.Ct. 548, 551 (2017) (per curiam); *City and County of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774, n.3 (2015) (collecting cases).

By highlighting cases across the force spectrum, the Petition attempts to demonstrate hypothetical intra-circuit and circuit splits surrounding the clearly established inquiry. It is not surprising that by casting such a wide net the Petition has dredged up supposed conflicts.[8] In the K-9 arena, there is no such chaos. The

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qualified immunity." *Wesby*, 138 S. Ct. at 591, n.4. If circuit courts cannot form clearly established law, then the grant of qualified immunity to Officer Harris and Officer Bracey stands because this Court has never opined on a K-9 use of force.

[8] It is worth noting that the disagreement among judges about what is "clearly established" points towards strengthening qualified immunity. Judges, who have the benefit of 20/20 hindsight and endless opportunities to consider alternatives, find themselves grappling with constitutional parameters. Yet, this is what we ask officers to do in rapidly evolving, split second moments with lives in danger.

Sixth Circuit's analysis mirrors the analysis it previously used in deciding *Campbell* and the same framework embraced by the Eleventh Circuit.

In *Campbell*, the Sixth Circuit answered the question of whether or not the Fourth Amendment's protections against excessive force, as related to police dogs, was clearly established at the time the incidents in question occurred. 700 F.3d at 788. In answering the question, the *Campbell* panel, like the Sixth Circuit likewise did in this case, found that *Robinette* set the standard for when the use of a K-9 was reasonable. Namely, that a K-9 could be deployed when suspects: (1) were potentially dangerous based on the crimes that they had committed; (2) behaved irrationally; and (3) hid in spaces that left officers vulnerable to an ambush. Additionally, a properly trained K-9 must be utlized and an officer should issue warnings prior to releasing the dog for a K-9 apprehension to be a reasonable use of force. *Id.* at 789. At that time, *White v. Harmon*, 65 F.3d 169 (6th Cir. 1995) established the opposite end of the scale when an officer allowed an untrained K-9, with a history of biting, to bite a handcuffed suspect. Finding that the facts of *Campbell* closely aligned with *White* because the officer allowed an inadequately trained K-9 with no warning to bite suspects who were not fleeing, the Sixth Circuit denied qualified immunity.

Following the *Campbell* Court's lead, the Sixth Circuit below engaged in the same review of the

applicable cases.[9] Based on their review, the parameters for constitutional conduct existed between the facts in *Campbell* and the facts in *Robinette.* The Sixth Circuit noted that "[l]ike the suspect in *Robinette*, Baxter fled the police after committing a serious crime and hid in an unfamiliar location." He also ignored multiple warnings that a canine would be released, choosing to remain silent as he hid. *Baxter*, 751 Fed. App'x at 872. Likewise, the K-9 used had been well trained. The Court acknowledged that the "fit" with *Robinette* was not perfect but, given that most of the facts aligned with *Robinette* and not with *Campbell*, the Sixth Circuit granted qualified immunity.

The Eleventh Circuit has employed the same analytical technique in determining entitlement to qualified immunity in the K-9 context. Similar to the Sixth Circuit, under Eleventh Circuit precedent, on one end of the spectrum are cases where the crime at issue was minor, none of the circumstances indicated that the plaintiff was armed or posed an immediate threat, the plaintiff immediately submitted to the officers, and the plaintiff suffered over a dozen puncture wounds. *Jones v. Fransen*, 857 F.3d 843, 853 (11th Cir. 2017), citing *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir. 2000). On the opposite end are cases where the crime is serious – such as armed robbery – and the

[9] The Petition seems to suggest that using the same analysis should produce the same result time after time. Material factual distinctions matter in this realm. Recognizing those distinctions does not create chaos. Asking this Court to remove a well-established doctrine without proposing any vetted solution, however, would create chaos.

plaintiff violently flees the police and hides in a darkened area that is susceptible to ambush. *Id.* at 853-54, citing *Crenshaw*, 556 F.3d 1283. Where the use of the K-9 did not fall squarely at either end of the spectrum, the Eleventh Circuit granted qualified immunity. *Jones*, 857 F.3d 843. In granting qualified immunity to the officer in *Jones*, the Court noted that:

> Jones's case is not directly on all fours with either *Priester* or *Crenshaw.* As a result, neither case alone could have provided Defendants Officers the type of fair notice necessary to breach qualified immunity. And considering the cases together helps no more since *Priester* and *Crenshaw* reached opposite conclusions concerning whether an excessive force violation occurred.

Id. at 854.

As *Campbell*, *Jones*, and *Baxter* illustrate, courts are not in a perpetual state of confusion about their mandate in determining whether the law is clearly established. Rather, these cases demonstrate that the lower courts have taken this Court's admonishment to not define clearly established law at the highest generalized level quite seriously. The Sixth Circuit's faithful application of the qualified immunity doctrine in its Opinion here makes this case a poor vehicle for this Court's review. Accordingly, Baxter's Petition should be denied.

B. Qualified immunity exists to protect split second decisions, such as the one made in this case.

Ultimately, the Petition asks this Court to embrace chaos to the detriment of law enforcement at every level: local, state, and federal. Adopting a scorched earth approach, the Petition attacks the very reasoning underpinning qualified immunity. At least one scholar has provided some pushback. In "*A Qualified Defense of Qualified Immunity*," the authors posit that qualified immunity is supported by *stare decisis* and that the arguments posed by the Petition and amici about qualified immunity's historical underpinnings – or lack thereof – are not as comprehensive as suggested. 93 Notre Dame L. Rev. 1853, 1864 (2018) ("The truth is that the history is murky, which, under the law of precedent, counsels in favor of the status quo.")

Moreover, the article referenced above raises the thorny issue of *Bivens* liability. Qualified immunity protects federal officials as well as municipal officials. And this Court treats qualified immunity under *Bivens* and 42 U.S.C. § 1983 ("Section 1983") interchangeably. Abolishing qualified immunity based on the text of Section 1983 while preserving it under *Bivens* would lead to the absurd result of treating constitutional violations – even liability for the very same actions perhaps – differently depending on which governmental entity employs an officer.

While analyzing an array of issues and arguments to the contrary, the article ultimately concludes that the arguments swirling around qualified immunity are not sufficient to warrant reconsideration of the doctrine. *Id.* at 1885. Moreover, whatever grounds could be advanced for re-examining the reasoning behind the qualified immunity doctrine, this is not the case to undo decades of this Court's jurisprudence on which these Officers have relied.

Both Officer Harris and Officer Bracey face the very real possibility of personal liability. The Metropolitan Government of Nashville and Davidson County Code does not guarantee indemnification. Nashville, Tenn., Municipal Code § 2.40.140 (2019). Instead, it requires officers to endure the litigation process and an unfavorable judgment before the government will make any decision about indemnity. *Id.* That decision is at the *sole* discretion of the government. *Id.* Even then, for judgments indemnity is capped at $50,000. As a consequence, these officers have lived the last four years under a cloud of uncertainty about their professional and financial futures.[10] *See, e.g.*, Anthony P.

[10] A particularly heavy burden given that Baxter has wholly fabricated the facts about what occurred in the basement the night of his arrest. In reality, after police shouted two K-9 warnings, Iwo was released into the basement. Iwo found Baxter first, before Officer Harris ever had a visual on him. Once Iwo apprehended Baxter, Officer Harris asked Baxter to raise his hands in the air. Upon compliance, Officer Harris commanded Iwo to release, which he did. Officer Bracey then entered the basement to assist Officer Harris in searching Baxter. Officer Harris never approached Baxter with Iwo "rearing up and snapping." And Officer Bracey did not enter the basement until after Iwo had

Chiarlitti, *Civil Liability and the Response of Police Officers: The Effect of Lawsuits on Police Discretionary Actions*, Education Doctoral, Paper 262, St. John Fisher College, pg. 97 (2016)[11] (finding support for the idea that police officers are concerned about lawsuits and engage in depolicing, at least to some extent, as it concerns civil liability.)

At its heart, qualified immunity protects police officers' split second decisions. "[P]olice officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation," courts must afford them a measure of deference in their on-the-scene assessments about the application of force to subdue a fleeing or resisting suspect. *Saucier v. Katz*, 533 U.S. 194, 205 (2001) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989)).

The fleeting moments that officers have to react means that "reasonable people sometimes make mistaken judgments, and a reasonable officer sometimes may use unreasonable force. In that event, qualified immunity gives an officer the benefit of a margin of error." *See Saucier*, 533 U.S. at 205-06 (explaining that

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released and Baxter had been handcuffed. While Officers Harris and Bracey recognize that they were required to accept Baxter's "facts" for purposes of summary judgment, Baxter's lies about what actually happened further illustrate why his Petition should not be granted. The Court should not undertake possible sweeping reform of the entire doctrine of qualified immunity based on a tall tale spun by a litigant.

[11] *Available at* https://fisherpub.sjfc.edu/education_etd/262/.

qualified immunity operates in excessive force cases to protect officers from the sometimes hazy border between excessive and acceptable force (internal quotation marks omitted)); *Jennings v. Jones*, 499 F.3d 2, 18 (1st Cir. 2007) (observing that, in effect, "officers receive protection if they acted reasonably in exercising unreasonable force.").

In other words, qualified immunity exists because "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly" believe that their actions are legally justified. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

That is exactly the situation presented here. Unsure of who he was confronting, Officer Harris deployed his K-9. His use of the K-9 was not gratuitous. Rather, in those heartbeats between being in Baxter's proximity and the release of Iwo, he made a choice to engage in conduct that he believed was lawful, even if in 20/20 hindsight reasonable minds could determine that he made the wrong choice. Qualified immunity exists to protect decisions that are unclear in the heat of the moment. Reconsideration of the entire doctrine is not warranted when the grant of qualified immunity to Officer Harris demonstrates why it exists.

CONCLUSION

The Sixth Circuit's faithful application of this Court's qualified immunity jurisprudence does not warrant review. Baxter has failed to demonstrate that

any prior precedent of this Court, or the Sixth Circuit, placed the constitutional question beyond debate. Instead, Officer Harris's conduct occupied the middle ground between two competing precedents at either end of the force spectrum. Moreover, an across-the-board inquiry into qualified immunity is not warranted based on embellished claims of confusion. The grant of qualified immunity, here, served one of its fundamental purposes, of protecting officers' split second decisions. Accordingly, Officers Harris and Bracey request that this Court deny Baxter's Petition for Writ of Certiorari.

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