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

REPLY TO BRIEF IN OPPOSITION

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Respondents fail to rebut the Petition's arguments: that qualified immunity has caused inter- and intra-circuit disarray, that a course correction is needed, and that this factually simple case leading to a demonstrably erroneous result is an ideal vehicle for reform. Most of Respondents' arguments rely on contested factual allegations that are irrelevant to the question presented, were not the basis for the decision below, and are inappropriate for consideration at summary judgment. Arguing, in effect, "Deny the Petition because we would win at trial on facts not addressed by the court below," is a non sequitur not just in terms of certiorari practice but also in terms of civil procedure.

At summary judgment, of course, the facts are viewed in the light most favorable to the non-moving party—here, Petitioner. A qualified immunity claim does not change this foundational principle of civil procedure. *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam). Accordingly, the question at this stage is not, as Respondents would have it, whether they would testify at trial they didn't see that Baxter's hands were up, but whether the court below erred in holding that unleashing a dog on an individual who had plainly surrendered and posed no threat did not violate clearly established law.

On the legal question actually decided below and presented here, no reasonable officer in the Sixth Circuit in 2014 could have concluded that the dog attack on Baxter was permissible. The contrary conclusion below illustrates all that is wrong with qualified immunity. The Petition should be granted.

I. RESPONDENTS' CENTRAL CLAIM THAT BAXTER DID NOT SURRENDER IGNORES THE BASIS FOR THE DECISION BELOW AND FLOUTS BASIC RULES OF CIVIL PROCEDURE.

Respondents' principal argument is that Baxter's account of the facts is mistaken because Respondents either did not see or were entitled not to believe that Baxter surrendered. *See, e.g.,* Opp. 1 (referring to the "undisputed fact … that Officer Harris never saw Petitioner's hands raised"); Opp. 16 ("Officer Harris never saw Baxter's hands raised"); Opp. 24 n.10 (charging that Baxter's entire case is a "tall tale"). Respondents' factual quarrel is doubly misplaced here.

First, it ignores the basis for the decision below. The panel never even mentioned Harris's allegation that he did not see Baxter raise his hands. Instead, the court of appeals granted qualified immunity on the assumption that Baxter had visibly surrendered, not based on doubt about whether the officers were aware of this fact. *See* Pet. App. 6a (discussing implications of Baxter's "rais[ing] his hands in the air before Harris released the dog"); *id.* at 7a (holding that "[e]ven if Baxter raised his hands," immunity was warranted). This Court reviews the decision below, not some set of facts Respondents hope to prove at trial.

Second, Harris's claim that he did not see Baxter raise his hands is disputed. See Pl.'s Opp'n to Summ. J., Statement of Disputed Facts Decl. 3, Dkt. 102, *Baxter v. Harris*, No. 3:15-CV-00019 (M.D. Tenn. filed Nov. 15, 2017) (sworn declaration: "Officer Harris saw plaintiff's hands raised in the

air").[1] Any factual dispute regarding whether the officers saw Baxter's hands up must be viewed in favor of Baxter, the non-movant on the summary judgment motion. *Tolan*, 572 U.S. at 656–57.

Respondents repeatedly ignore this basic principle. They accuse Baxter of "fabricat[ing] the facts," present a litany of assertions without any citations to the record, and essentially invite this Court to construe the record in *their* favor as movants for summary judgment. Opp. 24 n.10. That is not how summary judgment works.[2]

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[1] Respondents cite Baxter's deposition together with Harris's declaration, Opp. 4, but the deposition citation supports only the number of seconds that elapsed before Harris released the dog, not whether Harris saw Baxter's hands.

[2] The other "new" facts Respondents highlight are beside the point. That Baxter was warned about the dog release and remained hidden, Opp. 8, 14, is a fact about the *first* dog-release—*before* Baxter surrendered. Pet. 5. The amount of resources deployed to chase Baxter, Baxter's thought that "it looked pretty bad" when he fled, and the dog's training, Opp. 8, are irrelevant to the legal question the court of appeals decided: whether a police-dog attack on a suspect who has surrendered and poses no threat was clearly unconstitutional. That "Baxter remained silent," *id.*, is also irrelevant, because his actions in remaining still with his hands up indicated surrender—as the Sixth Circuit has repeatedly recognized. *See* Pet. 15. That "mere seconds elapsed" between when Respondents saw Baxter with his hands up and the dog attack does not change the fact that Respondents had time to see he had surrendered. *See* Pet. App. 10a (first panel, based on the complaint, narrating that Baxter sat down, put his hands up and "did not move" before the dog attack); *id.* at 12a (finding that Baxter's evidence "corroborates" the complaint). Finally, the fact Baxter was being pursued for burglary, Opp. 8, was known prior to discovery—it appeared at

Because Respondents' foundational premise about the facts of this case has no basis in the decision below and cannot be credited as a matter of elementary civil procedure, their citations to cases about dubious surrenders, Opp. 16-17, are inapposite. Viewing the facts in the non-movant's favor as required at summary judgment, the officers did not face, as did the defendant in one of Respondents' cases, a "rapidly escalating situation," involving "a severe threat to himself and the public." *Mullins v. Cyranek*, 805 F.3d 760, 767 (6th Cir. 2015). Baxter testified that "[a]fter elevating his hands, he did not move," and the record showed that five to ten seconds elapsed between the time Respondents surrounded him and the time Harris released the dog, Pet. App. 2a, 10a—plainly enough time to see that a man is seated with his hands up and therefore poses no threat.

Moreover, Respondents' authorities all involved either putatively armed suspects or a suspect's active resistance or flight right up to the moment force was used. *See Mullins*, 805 F.3d at 767 ("[A] reasonable officer in the same situation could have fired with the belief that Mullins still had the gun in his hand."); *Johnson v. Scott*, 576 F.3d 658, 659-60 (7th Cir. 2009) (suspect running from officers cried "I give up" just as officer and his police dog attacked); *Crenshaw v. Lister*, 556 F.3d 1283, 1287, 1292 (11th Cir. 2009) (at the time of purported surrender, officers "had every reason to believe" that suspect, who was "covered up in thick brush" was

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the top of Respondent Bracey's own police report. *See* Dkt. 10-1, at 38, *Baxter v. Harris*, No. 15-6412 (6th Cir. filed Mar. 4, 2016).

"armed and dangerous"); *McAlister v. Dean*, 2015 WL 4647913, at *3, *6 (E.D. Mo. Aug. 5, 2015) (officer was "not required to take [suspect's] … surrender at face value" where suspect had just shot at officers and had "a gun in easy reach"); *Ingram v. Pavlak*, 2004 WL 1242761, at *2, *4 (D. Minn. June 1, 2004) (officers acted reasonably in releasing dog on hiding suspect who "was actively resisting arrest ... by holding on to the doorknob when the officers attempted to open the door").

Here, by contrast, Baxter ceased all flight and sat down with his hands up, and Respondents do not assert that they feared for their safety once they discovered Baxter or that they believed he possessed a firearm. Nor would such fears have been reasonable, as Baxter's open hands were in plain view. And unlike cases in which a moving vehicle forced the issue, *e.g.*, *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (per curiam); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam), Baxter was seated and stationary, with his hands up, Pet. App. 10a, so there was no pressure on Officer Harris to act. Presented with this static situation, Harris had plenty of time to see that Baxter had surrendered. As the Sixth Circuit has recognized several times prior to 2014, the surrender rendered the dog attack unlawful. Pet. 13–15.

Respondents try to play up the level of danger they faced by pointing to the crime Baxter committed and the chase that preceded his surrender. Opp. 16. But neither factor obscures the meaning of Baxter's gesture, which took what the Sixth Circuit has called the "surrender position." *Ciminillo v. Streicher*, 434

F.3d 461, 463, 467 (6th Cir. 2006); *accord Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006).

In insisting qualified immunity is necessary to protect officers' "split-second" decisions, Opp. 25-26, Respondents ignore the protection the Constitution already offers officers in dangerous circumstances: the Fourth Amendment requirement of reasonableness, which this Court has held gives officers significant latitude in dangerous and unstable circumstances. *See, e.g., Plumhoff v. Rickard*, 572 U.S. 765, 777 (2014); *Scott v. Harris*, 550 U.S. 372, 383 (2007). Respondents are free to argue at trial that their actions in the situation they faced were reasonable, and if it is found at trial that the situation was as perilous as they now seek to portray, then they may prevail on the merits of the Fourth Amendment claim—without the need for immunity.

Respondents' efforts to muddy this factually and legally clear case fail. The court below granted summary judgment on the assumption that Harris saw Baxter surrender, and it is that holding that is under review, not a disputed alternative scenario Respondents hope to prove at trial. The summary judgment decision below presents a simple constitutional question: can an officer unleash a police dog on a suspect who has surrendered and poses no threat? Because no reasonable officer in the Sixth Circuit in 2014 could have believed that the answer was yes, immunity should have been denied.

II. QUALIFIED IMMUNITY HAS GENERATED CONFUSION AND DISARRAY, INCLUDING IN THIS CASE.

As Baxter has demonstrated, circuits are divided both within and among themselves regarding the application of qualified immunity, because the existing standard is unworkable. Pet. 9-10, 17-21. Respondents imply that the doctrinal quagmire Baxter identifies is merely a function of different facts producing different results, Opp. 21 n.9, but that truism does not justify courts' divergent approaches to the question of what makes a right "clearly established." That qualified immunity defies consistent application is confirmed by the experiences of judges who must apply it, Pet. 9-10, by specific examples of conflicting applications, Pet. 17-21, and by the two panel opinions in this case reaching opposite results on the same facts, Pet. 11.

Respondents repeat the claim from the decision below that new facts from discovery justified the change in result from the first panel to the second. Opp. 9. But Respondents ignore the district court's finding that Baxter's "testimony entirely corroborates all of the material facts alleged in his verified complaint, which the Sixth Circuit has already found could support a finding of excessive force," Pet. App. at 12a—a finding even the panel did not dispute and that Respondents do not challenge.

Respondents seek to justify the Sixth Circuit's about-face by pointing out that the first appeal was brought only by Bracey and that he raised an additional question concerning liability for failure to intervene. Opp. 5-6. But the first panel squarely addressed qualified immunity for *the dog attack*

itself, not just the failure-to-intervene issue: "The right to be free from the excessive use of force in the context of police canine units was clearly established by 2012[.]" *Id.* at 17a-18a. Thus, the first and second panels did in fact reach contradictory conclusions.[3]

III. RESPONDENTS' VEHICLE OBJECTIONS ARE MISPLACED.

Respondents are wrong that Baxter is arguing here for the first time that prior Sixth Circuit precedent clearly established the law. Opp. 10. In his brief to the Sixth Circuit, Baxter specifically cited *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012), in claiming Respondents violated his clearly established rights. *See* Resp. Br. of Appellee 22, Dkt. 14-1, *Baxter v. Bracey*, No. 18-5102 (6th Cir. filed Apr. 20, 2018). Both the district court and the decision below analyzed *Campbell*. Pet. App. 6a-7a, 11a. Thus, Baxter's is no "eleventh hour" argument, Opp. 10; it has been in the case all along.

Respondents' brief in opposition actually shows why this case is a *good* vehicle to consider reform of qualified immunity. Respondents try to distinguish *Campbell* by focusing on factual differences peripheral to *Campbell*'s holding that the Constitution prohibits using a police dog to attack a suspect who has surrendered and poses no threat (facts such as the number of police chasing each suspect, whether the suspect had been *previously*

[3] The failure-to-intervene issue is irrelevant here. It was neither addressed by the second panel nor encompassed within the Question Presented. Should the Court reverse, Bracey could reassert on remand any issue he has preserved.

warned *before* he surrendered, and the number of dog bites each suspect sustained, Opp. 13-14). But Respondents do not contend that these factual differences played any part in the decision below.[4] Instead, Respondents agree with Baxter about the reason the second panel granted qualified immunity: "Baxter does not point us to any case law suggesting that raising his hands, on its own, is enough to put Harris on notice that a canine apprehension was unlawful in these circumstances." Pet. App. 7a; *see* Opp. 11.

That approach epitomizes what is wrong with qualified immunity: some courts demand a level of factual congruence from prior precedent that is simply unrealistic and will result in immunity in all but a small and essentially arbitrary set of circumstances in which history has precisely repeated itself. The decision below is a stark example of qualified immunity's extreme results; the case is thus an excellent vehicle to consider a course correction.

IV. RESPONDENTS' OBJECTIONS TO RE-CONSIDERING QUALIFIED IMMUNITY DO NOT WITHSTAND SCRUTINY.

1. Respondents protest that Baxter has not offered proposals for reform. But the Petition mentions a range of possibilities, from a narrow

[4] Respondents also highlight a separate claim in *Campbell* regarding the training of the police dog there. Opp. 13. That *Campbell* involved an additional claim not at issue here does not detract from its holding on the issue that *is* presented here. *See Hope v. Pelzer*, 536 U.S. 730, 742 (2002).

reversal to correct some appellate courts' insistence on precise factual congruence in prior precedent, to abolishing the doctrine and returning official-accountability jurisprudence to its historical roots, with several intermediate reforms in between (proposed by various scholars). Pet. 32-33. Of course, Baxter has not fully discussed these alternatives in the Petition; they can be explored at the merits stage.

2. Respondents' mention of *Bivens* is a red herring. Baxter nowhere suggests that the immunity rules for § 1983 and *Bivens* should differ.

3. Respondents point out that Nashville is not required to indemnify them. But Professor Schwartz's comprehensive study found that "[b]etween 2006 and 2011, in forty-four of the country's largest jurisdictions, officers financially contributed to settlements and judgments in just .41% of the approximately 9225 civil rights damages actions resolved in plaintiffs' favor." Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). The study included not just jurisdictions where indemnification was mandatory, but also ones (like Nashville) where indemnification was optional, and even ones where indemnification was prohibited yet officers were still indemnified. *See id.* at 890, 905-06. Additionally, "[w]hen indemnification is discretionary, cities and counties virtually always decide to indemnify officers." Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1806 (2018). More fundamentally, review is warranted notwithstanding the miniscule chance that Respondents will be among the unlucky few

exceptions to the near-universal practice: The empirical data about indemnification practices nationwide cast doubt on one of the core assumptions underlying qualified immunity.

4. Respondents' defense of qualified immunity relies heavily on Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853 (2018), but these authors admit their historical account is not "exhaustive," *id.* at 1868, and that Professor Baude's historical analysis is correct that statutes providing for immunity "marked a departure from pre-founding 'common law.'" *Id.* at 1865 (citation and internal quotation marks omitted); *see generally* Pet. 24-29. Although Professors Nielson and Walker criticize one of Professor Schwartz's studies, they take no issue with the one Baxter cited, which shows that officers enjoy near-universal indemnification—a conclusion that undermines the assumption that qualified immunity is needed to shield officers from liability. Pet. 29-30.

The Chiarlitti paper, a dissertation by an education doctoral student, Opp. 24-25, helps Respondents even less. The paper surveyed 88 officers and found that of the 78 who responded, 76-78% said the prospect of liability had little or no effect on the decision whether to make a misdemeanor or felony arrest. Anthony P. Chiarlitti, *Civil Liability and the Response of Police Officers: The Effect of Lawsuits on Police Discretionary Actions*, Education Doctoral 61-62 (2016).[5] Fewer

[5] https://fisherpub.sjfc.edu/cgi/viewcontent.cgi?article=1264&context=education_etd.

than 10% said it had a "significant" effect. *Id.* Even that finding proves little, as the study did not ask what *type* of effect the fear of liability had. *See id.* at 58-64. If it causes officers to determine whether an arrest is constitutional, that is the very purpose of constitutional accountability.

The Court should reconsider whether qualified immunity is justified in light of the confusion it has generated among the lower courts, substantial scholarship showing that qualified immunity is ahistorical, empirical studies showing that it is unnecessary, and growing understanding of the doctrine's costs to the enforcement of constitutional rights. *See* Pet. 17-32; *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting); Br. of Cato Inst. as Amicus Curiae; Br. of Legal Scholars As Amici Curiae; Br. of Cross-Ideological Groups As Amici Curiae.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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