

No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does binding authority holding that a police officer violates the Fourth Amendment when he uses a police dog to apprehend a suspect who has surrendered by lying down on the ground “clearly establish” that it is likewise unconstitutional to use a police dog on a suspect who has surrendered by sitting on the ground with his hands up?

2. Should the judge-made doctrine of qualified immunity, which cannot be justified by reference to the text of 42 U.S.C. § 1983 or the relevant common law background, and which has been shown not to serve its intended policy goals, be narrowed or abolished?

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
OPINIONS BELOW	3
JURISDICTION.....	3
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.....	3
STATEMENT.....	4
REASONS FOR GRANTING THE PETITION.....	9
I. THE DECISION BELOW IS WRONG AND DEMONSTRATES THAT QUALIFIED IMMUNITY HAS GENERATED CONFUSION AND REQUIRES RECONSIDERATION	9
A. The Decision Below Is Wrong Because It Required Petitioner To Identify A Case With Identical Facts To Defeat Qualified Immunity.	11
B. Qualified Immunity Decisions Among And Within The Courts Of Appeals Are Rife With Inconsistency.....	17
II. QUALIFIED IMMUNITY IS AN ATEXTUAL, AHISTORICAL, CONCEDEDLY JUDGE- MADE DOCTRINE THAT DOES NOT SERVE ITS PURPORTED POLICY OBJECTIVES AND IMPAIRS THE ENFORCEMENT OF CONSTITUTIONAL NORMS	22

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RECONSIDERING QUALIFIED IMMUNITY	34
CONCLUSION.....	36
APPENDIX	
Court of appeals opinion (Nov. 8, 2018)	1a
District court opinion denying summary judgment (Jan. 19, 2018).....	9a
Prior court of appeals opinion affirming denial of motion to dismiss (Aug. 30, 2016)...	14a
Prior district court opinion denying motion to dismiss (Nov. 9, 2015).....	19a
Prior magistrate’s report and recommendation recommending denial of motion to dismiss (Sept. 18, 2015)	23a

TABLE OF AUTHORITIES

CASES

<i>Anderson v. Creighton</i> , 483 U.S. 635 (1987)	23, 30
<i>Anderson v. Myers</i> , 182 F. 223 (C.C.D. Md. 1910).....	27, 28
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011).....	10, 29
<i>Baker v. City of Hamilton</i> , 471 F.3d 601 (6th Cir. 2006)	13, 14, 15
<i>Baynes v. Cleland</i> , 799 F.3d 600 (6th Cir. 2015)	19, 20
<i>Beckwith v. Bean</i> , 98 U.S. 266 (1878)	26
<i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004)	34
<i>Buckley v. Fitzsimmons</i> , 509 U.S. 259 (1993)	23
<i>Campbell v. City of Springboro</i> , 700 F.3d 779 (6th Cir. 2012)	<i>passim</i>
<i>Camreta v. Greene</i> , 563 U.S. 692 (2011)	31
<i>Casey v. City of Federal Heights</i> , 509 F.3d 1278 (10th Cir. 2007)	20
<i>Ciminillo v. Streicher</i> , 434 F.3d 461 (6th Cir. 2006)	15, 16
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998)	23
<i>Edrei v. Maguire</i> , 892 F.3d 525 (2d Cir. 2018)	18
<i>Golodner v. Berliner</i> , 770 F.3d 196 (2d Cir. 2014).....	10
<i>Gravelet-Blondin v. Shelton</i> , 728 F.3d 1086 (9th Cir. 2013).....	20, 21

<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	22, 23, 29, 30
<i>Henson v. Santander Consumer USA Inc.</i> , 137 S. Ct. 1718 (2017)	23
<i>Holloman v. Harland</i> , 370 F.3d 1252 (11th Cir. 2004)	18
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	<i>passim</i>
<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991).....	35
<i>Kisela v. Hughes</i> , 138 S. Ct. 1148 (2018)	16, 17, 32
<i>Latits v. Philips</i> , 878 F.3d 541 (6th Cir. 2017) ..	19, 20
<i>Little v. Barreme</i> , 6 U.S. 170 (1804).....	24, 28
<i>Lowe v. Raemisch</i> , 864 F.3d 1205 (10th Cir. 2017), <i>cert. denied sub nom. Apodaca v.</i> <i>Raemisch</i> , 139 S. Ct. 5 (2018)	21
<i>Malley v. Briggs</i> , 475 U.S. 335 (1986)	23
<i>Manzanares v. Roosevelt Cty. Adult Det. Ctr.</i> , 331 F. Supp. 3d 1260 (D.N.M. 2018)	9
<i>Marbury v. Madison</i> , 5 U.S. 137 (1803).....	31, 32
<i>Martin v. City of Broadview Heights</i> , 712 F.3d 951 (6th Cir. 2013)	13, 14
<i>Mattos v. Agarano</i> , 661 F.3d 433 (9th Cir. 2011)	18, 20, 21
<i>McKenney v. Mangino</i> , 873 F.3d 75 (1st Cir. 2017)	17
<i>Miller v. Horton</i> , 26 N.E. 100 (Mass. 1891)	27
<i>Mitchell v. Harmony</i> , 54 U.S. 115 (1851).....	25
<i>Morris v. Noe</i> , 672 F.3d 1185 (10th Cir. 2012)	21

<i>Murray v. The Charming Betsy</i> , 6 U.S. 64 (1804)	24, 28
<i>Myers v. Anderson</i> , 238 U.S. 368 (1915)	27
<i>Ortiz v. Kazimer</i> , 811 F.3d 848 (6th Cir. 2016)	13
<i>Pearson v. Callahan</i> , 555 U.S. 223 (2009)	23, 34
<i>Phillips v. Community Ins. Corp.</i> , 678 F.3d 513 (7th Cir. 2012)	18
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	22, 28, 29
<i>Poindexter v. Greenhow</i> , 114 U.S. 270 (1885)	26, 27
<i>Richardson v. McKnight</i> , 521 U.S. 399 (1997).....	30
<i>Robinette v. Barnes</i> , 854 F.2d 909 (6th Cir. 1988)	<i>passim</i>
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001).....	22
<i>Scheuer v. Rhodes</i> , 416 U.S. 232 (1974).....	22, 29
<i>Shekleton v. Eichenberger</i> , 677 F.3d 361 (8th Cir. 2012)	17, 18
<i>Sims v. Labowitz</i> , 885 F.3d 254 (4th Cir. 2018)	17
<i>Thompson v. Clark</i> , 2018 WL 3128975 (E.D.N.Y. June 26, 2018).....	10
<i>Tolan v. Cotton</i> , 572 U.S. 650 (2014)	10, 12
<i>Turner v. Scott</i> , 119 F.3d 425 (6th Cir. 1997)	6
<i>Wood v. Strickland</i> , 420 U.S. 308 (1975)	22, 23
<i>Zadeh v. Robinson</i> , 902 F.3d 483 (5th Cir. 2018)	9, 21
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)	32, 34
<i>Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012).....	35

STATUTES

28 U.S.C. § 1254(1) 3
42 U.S.C. § 1983.....*passim*
U.S. Const. amend. IV*passim*
U.S. Const. amend. VIII 21

RULES

D.C. Ct. App. R. 49(c)(8) 36

OTHER AUTHORITIES

Aaron L. Nielson & Christopher J. Walker,
Strategic Immunity,
66 Emory L.J. 55 (2016)..... 31
David E. Engdahl, *Immunity and
Accountability for Positive Governmental
Wrongs*, 44 U. Colo. L. Rev. 1 (1972) 24, 25
Erwin Chemerinsky, *Federal Jurisdiction*
(7th ed. 2016)..... 10, 11
J. Story, *Commentaries on the Constitution*
(3d ed. 1858) 25
J. Story, *Commentaries on the Law of Agency*
(5th ed. 1857)..... 25
James E. Pfander & Jonathan L. Hunt,
*Public Wrongs and Private Bills:
Indemnification and Government
Accountability in the Early Republic*,
85 N.Y.U. L. Rev. 1862 (2010) 24
Joanna C. Schwartz, *Police Indemnification*,
89 N.Y.U. L. Rev. 885 (2014) 29, 30

Joanna C. Schwartz, <i>The Case Against Qualified Immunity</i> , 93 Notre Dame L. Rev. 1797 (2018)	33
John C. Jeffries, Jr., <i>The Liability Rule for Constitutional Torts</i> , 99 Va. L. Rev. 207 (2013)	33
John C. Jeffries, Jr., <i>What's Wrong with Qualified Immunity?</i> 62 Fla. L. Rev. 851 (2010)	9, 17
John F. Preis, <i>Qualified Immunity and Fault</i> , 93 Notre Dame L. Rev. 1969 (2018)	33
Richard Fallon, Jr., et al., <i>Hart & Wechsler's The Federal Courts and the Federal System</i> (7th ed. 2015).....	10, 24
William Baude, <i>Is Qualified Immunity Unlawful?</i> 106 Cal. L. Rev. 45 (2018).....	24, 25, 27, 28

INTRODUCTION

Petitioner Alexander Baxter was bitten by a police dog that was unleashed on him while he was sitting with his hands in the air, having surrendered to police. The court of appeals held that qualified immunity defeated Baxter's claim—despite a prior appellate panel's denial of immunity on these facts earlier in the same case, and despite precedent in the same circuit holding that unleashing a dog on a man who had surrendered by lying down was a clearly established constitutional violation. The decision below is an archetypal example of the problems with current qualified immunity doctrine and warrants this Court's review.

Qualified immunity, which shields government officials from suit for constitutional violations unless the right they violate was “clearly established,” has rightly been the subject of increasing criticism from judges and scholars. The doctrine is nowhere to be found in the text of the statute that purportedly incorporates it, 42 U.S.C. § 1983, but the Court created the doctrine in 1967 by reference to what it understood to be a common law tradition of immunity. Yet recent study has demonstrated that this understanding was mistaken. In fact, the consistent common law practice at the Founding was to hold officers liable for their constitutional violations, without immunity. Likewise, in 1871, when § 1983 was enacted, no generally-applicable common law defense resembling qualified immunity existed.

In the years since the Court created qualified immunity, it has substantially reconfigured it for

reasons of pure policy, divorced from history and text. So to whatever extent the original qualified immunity doctrine may have resembled a good faith defense historically available for certain common law torts, it no longer does. And empirical studies cast serious doubt on whether qualified immunity fulfills the policy goals for which the Court designed it.

While the doctrine's usefulness in serving its purported goals has become increasingly dubious, the costs of qualified immunity to the legal system are clear. The doctrine stultifies the development of constitutional law and leaves the contours of constitutional rights undefined, by encouraging judges to avoid constitutional questions even when they are sharply presented. Qualified immunity has also evaded consistent application by the courts of appeals because the "clearly established" standard is unadministrable. It has created a hodgepodge jurisprudence that does little to guide judges, law enforcement officers, or the public. And qualified immunity weakens respect for the rule of law by ensuring that many constitutional violations go unredressed.

Here, for example, the court below concluded that precedent holding that the Fourth Amendment prohibited unleashing a dog to attack a suspect who had surrendered by lying on the ground did not clearly establish that it prohibited unleashing a dog to attack a suspect who had surrendered by sitting on the ground with his hands up. That obviously wrong result calls, at a minimum, for this Court to hold that "clearly established law" was defined here at too demanding a level of specificity.

The case also exemplifies broader problems with qualified immunity that warrant reconsideration of the doctrine. Baxter's factually simple and legally straightforward case provides an ideal vehicle for doing so.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Sixth Circuit is reported at 751 Fed. App'x 869 and reproduced in the Appendix at 1a. The district court's unreported decision denying summary judgment is reproduced at 9a. The unreported prior decision of the court of appeals affirming the denial of a motion to dismiss based on qualified immunity is available at 2016 WL 11517046, and the unreported district court decision it affirmed is at 2015 WL 6873667; these opinions are reproduced at 14a and 19a, respectively. The magistrate's report and recommendation recommending denial of the motion to dismiss is reproduced at 23a.

JURISDICTION

The court of appeals entered its judgment on November 8, 2018. Pet. App. 1a. Justice Sotomayor extended the time to file this petition to April 8, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. IV, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches

and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

STATEMENT

In seeking review of the disposition of a motion for summary judgment, the facts will be recounted in the light most favorable to the non-moving party, Petitioner Alexander Baxter. On January 8, 2014, Respondents Brad Bracey and Spencer Harris, officers of the Metropolitan Nashville Police Department, pursued Baxter in response to a report of a residential burglary during which Baxter, a homeless man, had been trying to steal video games, laptops, or computers from unlocked houses. Pet. App. 2a, 9a.

When he realized the police were pursuing him, Baxter fled from one home into the basement of another. *Id.* at 9a. Respondents followed Baxter into the second home. *Id.* They shouted warnings into the basement that if Baxter did not surrender Harris would release his police dog. *Id.* Baxter stayed where he was and initially did not surrender. *Id.* Harris released the dog, who “found [Baxter], began barking, and ran back and forth across the basement.” *Id.* at 10a. The officers then entered the basement, and Harris secured the dog by its collar. *Id.*

“Officer Harris remained in front of [Baxter], ordering him to ‘show me your hands,’ while Officer Bracey circled around behind. [Baxter] testified that at that moment, he ‘was sitting on his butt with his hands up in the air.’ After elevating his hands he did not move.” *Id.* (alterations and internal citation omitted). Five to ten seconds elapsed, *id.* at 2a, providing the officers further confirmation that Baxter had come to a halt and surrendered.

But instead of arresting Baxter, “[s]uddenly, without warning, Officer Harris released [the dog]” to attack him. *Id.* at 10a. As alleged in his original complaint and corroborated by Baxter’s later testimony, *id.* at 12a, the dog bit his armpit, *id.* at 19a, which was exposed because his arms were raised in surrender. Baxter was taken to a hospital for emergency medical treatment. *Id.* at 10a, 25a.

Baxter filed a pro se complaint asserting that Harris’ second deployment of the dog and Bracey’s failure to intervene violated the Fourth Amendment.

Id. at 3a.¹ Bracey moved to dismiss, arguing that his failure to intervene did not violate Baxter’s clearly-established rights. Based on a magistrate’s report and recommendation, the district court denied qualified immunity. *Id.* at 22a, 28a.

Bracey appealed, and the court of appeals affirmed. Under circuit law, a failure-to-intervene claim requires a showing of excessive force and that the non-intervening officer knew or should have known about it and had both the opportunity and the means to prevent the excessive force. *Id.* at 16a (citing *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997)). The court held that the facts as pleaded—that Baxter “surrendered” when he “sat on the ground with his arms in the air,” *id.* at 16a, that the officers were positioned on either side of him, *id.*, and that Officer Harris restrained the dog by the collar before releasing it to attack Baxter, *id.* at 17a—“could support a finding that the officers were in no danger and that Baxter was neither actively resisting nor attempting to flee.” *Id.* at 16a-17a. Accordingly, Baxter stated a claim for excessive force. *Id.* at 17a. In addition, the court held that “[t]he 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. In *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012), the court had held that an officer clearly violated the Fourth Amendment when he used a police dog without warning against an unarmed residential burglary suspect who was in a known outdoor location at night and was lying on the

¹ Petitioner later amended his complaint; the only amendment was to remove a John Doe defendant. *Id.* at 21a.

ground with his arms at his side. *Id.* at 787, 789. Based on *Campbell* and on prior circuit law establishing that an officer can be liable for his failure to intervene to prevent a use of excessive force, *see* Pet. App. 18a (citing *Turner*, 119 F.3d at 429), the court of appeals affirmed the denial of qualified immunity to Bracey.

After discovery, both officers sought summary judgment, asserting qualified immunity. The district court denied the motion, 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." *Id.* at 12a.

Respondents' appeal was heard by a different panel than the one that had heard the first appeal. The new panel parted company with the prior panel and reversed the district court, holding that the officers' actions did not violate clearly established law. *Id.* at 1a-2a. Other than the addition of a few details, including that five to ten seconds elapsed between when Officer Harris located Baxter sitting on the floor with his hands in the air and when he released the dog to attack Baxter, *id.* at 2a, the appellate court's recitation of the facts tracked the district court's. *See id.* at 2a-3a.

The second panel recognized similarities between Baxter's case and *Campbell* but concluded that "Baxter's case looks closer to *Robinette* [*v. Barnes*, 854 F.2d 909 (6th Cir. 1988)]," Pet. App. 6a, which held that an officer did not use excessive force when he used a dog to apprehend a suspect who *had not surrendered* and was evading arrest. *See Robinette*, 854 F.2d at 910-11. The *Robinette* court held that, in

these circumstances, the officer was justified in viewing the suspect as a potential threat. *Id.* at 913. *Robinette* expressly distinguished the case of “a criminal suspect who ... posed no threat to the officer.” *Id.* at 914. Nonetheless, the second appellate panel in *Baxter* reasoned 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.” Pet. App. 6a.

The second panel acknowledged that the prior panel had reached the opposite conclusion. *Id.* at 7a. The second panel justified changing course with the observation that the prior panel “looked only at the facts as pleaded in the complaint The facts revealed during discovery add much-needed color to this case.” *Id.* But the second panel did not disagree with the district court’s characterization of Baxter’s testimony as entirely corroborating the facts pleaded in the complaint—including the fact that the second dog-deployment (the one Baxter challenged) occurred “[s]uddenly, without warning” and after Baxter was sitting on the ground with his hands raised in surrender. *Id.* at 10a. The court of appeals acknowledged that Baxter had his hands up, *id.* at 6a, but nonetheless held that qualified immunity was warranted because “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.” *Id.* at 7a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS WRONG AND DEMONSTRATES THAT QUALIFIED IMMUNITY HAS GENERATED CONFUSION AND REQUIRES RECONSIDERATION.

At the time Baxter was attacked, Sixth Circuit precedent established that an officer cannot constitutionally deploy a police dog against a suspect who has already surrendered and is not in a position to harm anyone or to flee. Nonetheless, the court below held that the dog attack here did not clearly violate Baxter's Fourth Amendment rights because he surrendered by sitting and raising his hands, whereas in the prior case, the suspect had laid down on the ground. This decision is plainly wrong and—particularly in light of the first panel's opposite conclusion on the same facts—epitomizes the dysfunctionality of qualified immunity.

Judges and scholars have recognized that qualified immunity's key requirement—that courts determine when a particular act has violated “clearly established” law—is “a mare's nest of complexity and confusion.” John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?* 62 Fla. L. Rev. 851, 852 (2010). The problem, Judge Willett has explained, is that “courts of appeals are divided—intractably—over precisely what degree of factual similarity must exist” for the law to be “clearly established.” *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring dubitante); *see also, e.g., Manzanares v. Roosevelt Cty. Adult Det. Ctr.*, 331 F. Supp. 3d 1260, 1293 n. 10 (D.N.M. 2018) (expressing similar concern); *Thompson v. Clark*, 2018 WL 3128975, at

*12 (E.D.N.Y. June 26, 2018) (noting conflict among Supreme Court decisions on this point); *see generally Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014) (“Few issues related to qualified immunity have caused more ink to be spilled than whether a particular right has been clearly established.”). Leading scholars of federal jurisdiction have identified the same problem. *See* Richard Fallon, Jr., et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 1047-50 (7th ed. 2015) (“Hart & Wechsler”); Erwin Chemerinsky, *Federal Jurisdiction* 595 (7th ed. 2016).

This Court’s instructions have not always pointed in the same direction. Courts are “not to define clearly established law at a high level of generality,” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), because immunity cannot be denied unless “the contours of a right are sufficiently clear that every reasonable official would have understood that *what he is doing* violates that right.” *Id.* at 741 (citation, internal quotation marks, and source’s alteration marks omitted, and emphasis added). Yet the Court has also rejected the requirement that “the facts of previous cases be materially similar” to those at issue in order to overcome immunity. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (citation and internal quotation marks omitted). Instead, what is required is that precedent provide the officer “fair warning” that his conduct crosses the constitutional line. *Id.* at 741; *accord Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam). As Dean Chemerinsky has explained, “There is an obvious tension between *Hope v. Pelzer*, declaring that there need not be a case on point ... and the subsequent cases, finding qualified

immunity based on the lack of a case on point.” Chemerinsky, *supra*, at 595.

Faced with these conflicting imperatives, courts struggle to define rights at the appropriate level of generality—and to do so with consistency. The task of applying qualified immunity in a consistent and principled manner has left the circuits in disarray, divided both among and within themselves.

Here, for instance, two different panels of the Sixth Circuit considered essentially the same facts—first, taking the facts alleged in Baxter’s complaint as true for purposes of a motion to dismiss, Pet. App. 16a-17a, and second, drawing inferences in Baxter’s favor, *id.* at 4a, on a record with testimony “entirely corroborat[ing]” his allegations, *id.* at 12a. But the two panels arrived at conflicting answers as to whether the unconstitutionality of the dog attack was “clearly established.” The second panel decision (at issue here) effectively required a prior case with identical facts in order to defeat immunity. That approach is directly contrary to *Hope*, and reversal is warranted on that ground alone. More broadly, the disagreement between the two panels in Baxter’s case is a microcosm of the conflict throughout the courts of appeals regarding the level of factual similarity needed to find the law “clearly established.”

A. The Decision Below Is Wrong Because It Required Petitioner To Identify A Case With Identical Facts To Defeat Qualified Immunity.

Any reasonable officers in the shoes of Respondents Harris and Bracey would have known

that unleashing a police dog against Baxter after he surrendered by raising his hands in the air was unconstitutionally excessive force. Two years before Baxter was attacked, the Sixth Circuit held that a clearly established Fourth Amendment violation occurred when an officer released a police dog on a burglary suspect who was not fleeing or resisting arrest and had effectively surrendered by lying on the ground. *Campbell v. City of Springboro*, 700 F.3d 779 (6th Cir. 2012). Using this Court’s rubric from *Graham v. Connor*, 490 U.S. 386, 397 (1989), *Campbell* considered two plaintiffs’ claims of excessive force at the hands of the same officer deploying the same police dog. The facts in one of the two incidents at issue in *Campbell* are remarkably similar to the facts in this case. The first Sixth Circuit panel to consider Baxter’s case was therefore correct when it concluded that *Campbell* precludes Respondents’ qualified immunity defense: it gave Officers Harris and Bracey “fair warning,” *Tolan*, 572 U.S. at 656; *Hope*, 536 U.S. at 741, that the Constitution prohibits using a police dog to attack a suspect who has surrendered and poses no threat.

In *Campbell*, police were called to a residence by neighbors who observed Campbell pounding on the front and back doors. 700 F.3d at 784. When Campbell heard sirens, he fled and lay down on the ground near an adjacent building. *Id.* The police arrived and “conclude[d] that they were dealing with an attempted burglary and that the suspect was likely still in the area.” *Id.* at 785. The officer handling the dog was not “aware of a specific threat to anyone at the time.” *Id.* at 787. “When the officers found Campbell, he was lying face down with his arms at his side. ... At no point was Campbell

actively resisting arrest.” *Id.* Yet “without warning,” the officer deployed the police dog. *Id.* at 789. Based on these facts, the court affirmed the denial of summary judgment to the officers, holding both that a reasonable jury could find for Campbell on his excessive force claim, *id.* at 787, and that qualified immunity must be denied, *id.* at 789.²

Campbell is no outlier. Rather, it reflects a faithful synthesis of basic Fourth Amendment principles that are well-established in the Sixth Circuit (and should in any event be obvious). First, “the gratuitous use of force against a suspect who has ‘surrendered’ is ‘excessive as a matter of law.’” *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 852 (6th Cir. 2016) (holding that this principle was clearly established by 2010, and collecting authorities); accord *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006) (“Because Baker had surrendered before being struck, a reasonable jury could conclude that Officer Taylor’s strike to Baker’s head was unjustified and excessive.”).

Second, initial flight from the police does not justify a later use of force after a suspect is no longer fleeing or resisting arrest. See *Martin v. City of Broadview Heights*, 712 F.3d 951, 959 (6th Cir. 2013)

² The court also held that Campbell could proceed to trial on a second theory: that deploying the dog was unreasonable because the dog had been improperly trained. See *id.* at 787. That *Campbell* addressed more than one issue does not lessen the force of its on-point holding here. See *Hope*, 536 U.S. at 742 (“The fact that *Gates* found several forms of punishment impermissible does not ... lessen the force of its holding with respect to handcuffing inmates to cells or fences for long periods of time.”).

(observing that the “mere fact that [plaintiff] tried to escape from [officer’s] control does not justify the latter’s conduct as a matter of law,” and citing the 2006 *Baker* decision, 471 F.3d at 607-08, “finding that a suspect’s attempt to evade arrest by running two blocks from an officer did not preclude his claim of excessive force or justify the officer’s subsequent baton strikes”).

As the Sixth Circuit panel that first heard this case concluded, *Campbell* plainly defeats qualified immunity here. When Officer Harris released the dog to attack Baxter, he and Officer Bracey were positioned on either side of Baxter inside a basement, and Baxter was sitting with his hands up, unarmed. Thus Baxter, like Campbell, posed no threat and was not actively resisting arrest when Officer Harris released the dog to attack him. Campbell was lying on the ground with his arms at his sides; Baxter was sitting on the ground with his hands outstretched above him.

Notwithstanding the similarities between this case and *Campbell*, and in the face of the first Sixth Circuit panel decision, the second Sixth Circuit panel held that no prior case clearly established that it was unreasonable for Officer Harris to sic his dog on Baxter. The second panel likened Baxter’s case to *Robinette v. Barnes*, 854 F.2d 909, 913-14 (6th Cir. 1988), which “upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location,” Pet. App. 6a—even though Baxter was, of course, no longer “fleeing” when Officer Harris released his dog the second time. *Robinette* explained that a reasonable officer would believe that a suspect “who had been warned ... that

a dog would be used, and who gave every indication of unwillingness to surrender, posed a threat to the safety of the officers.” *Id.* at 913-14. Baxter, however, does not fit this description, having raised his hands in an obvious indication of surrender.

The second panel justified breaking with the first panel by pointing to facts developed in discovery, but the most important “fact” the panel cited—that “Baxter ... was warned twice, and still never communicated with the officers before being apprehended,” Pet. App. 7a-8a—is not a fact at all but an inexplicable mischaracterization of Baxter’s putting his hands up, which not only is a universal signal for surrender but also has been specifically recognized as the “surrender position” by prior Sixth Circuit precedent. *See Ciminillo v. Streicher*, 434 F.3d 461, 463, 467 (6th Cir. 2006) (reversing summary judgment on qualified immunity grounds, because when the plaintiff “slowly walked towards the officers with his hands above his head,” his use of the “surrender position” “demonstrated that he was not armed, and thus posed no threat to the officers’ safety”); *accord Baker*, 471 F.3d at 607 (describing suspect who emerged from bushes with his hands up as having “surrendered” such that a reasonable jury could find “that he was unarmed, was compliant, and was not a significant threat”). The significance of Baxter’s gesture was clear even to the second panel, which grudgingly acknowledged that Baxter’s “raising his hands in the air before Harris released the dog ... might show that he did not pose the kind

of safety threat justifying a forceful arrest.” Pet. App. 6a (citing *Ciminillo*, 434 F.3d at 467).³

The panel’s choice to look to *Robinette* instead of *Campbell* demonstrates how unpredictable and arbitrary the application of qualified immunity doctrine has become. The panel’s own statement of its reason for distinguishing *Campbell* is telling: “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.” *Id.* at 7a. *Campbell* was non-threatening because he lay on the ground; Baxter, because he sat down with his hands up. In both cases, the relevant fact is that it was clear that the suspect posed no threat; if anything, Baxter should have been seen as *less* threatening because officers were on both sides of him and because of his decision to assume what the Sixth Circuit has recognized as the “surrender position.” *Ciminillo*, 434 F.3d at 467. Differentiating between these two cases because of the suspect’s precise posture epitomizes the “rigid[] overreliance on factual similarity” that this Court has rejected, *Hope*, 536 U.S. at 742; accord *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (stating that the Court’s doctrine

³ The other newly “revealed” facts the second panel cited occurred before Baxter’s surrender (“Baxter fled the scene, hid in the basement, was warned twice,” *id.* at 7a), or were not the basis for Baxter’s claim (“[the dog] was well-trained,” *id.*), or do not undermine Baxter’s claim (the fact that Harris released the dog occurred “within only a few seconds after entering the basement,” *id.* where Baxter had already “surrendered by raising his hands in the air before Harris released the dog,” *id.* at 6a).

“does not require a case directly on point for a right to be clearly established” (citation and internal quotation marks omitted)).

If *Campbell* and the broader body of Sixth Circuit jurisprudence regarding the implications of a suspect’s surrender do not clearly establish that the facts in this case could support a jury’s finding of excessive force, then nothing short of a prior case with precisely identical facts will suffice to defeat qualified immunity. The decision below wrongly immunizes officers for attacking a defenseless man who has clearly indicated his surrender and posed no threat. And it did so based on a doctrine that has defied consistent and principled application.

B. Qualified Immunity Decisions Among And Within The Courts Of Appeals Are Rife With Inconsistency.

The conflict between the first and second panels in Baxter’s case is not isolated. Rather, the circuits are divided among and within themselves about how to approach the “clearly established” question. See Jeffries, *supra*, at 852 (“The circuits vary widely in approach[.]”). The decision below conflicts with the decisions of several other circuits rejecting its hair-splitting approach. See, e.g., *Sims v. Labowitz*, 885 F.3d 254, 264 (4th Cir. 2018) (denying qualified immunity although “no other court decisions directly have addressed circumstances like those presented here”); *McKenney v. Mangino*, 873 F.3d 75, 82 (1st Cir. 2017) (declining to require “a case presenting a nearly identical alignment of facts” to deny qualified immunity (citation and internal quotation marks omitted)); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) (denying qualified immunity to

officer who used a Taser on “nonviolent, nonfleeing misdemeanor” even though “we had not yet had an opportunity” to address a case involving such facts); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1279 (11th Cir. 2004) (no qualified immunity for school officials who punished a student for silently raising a fist during daily flag salute; court refused to “distinguish, on constitutional grounds, between a student with his hands in his pockets or at his sides ... and a student with his hand in the air”).

Conflict concerning the “clearly established” inquiry has led to conflicts in its application. For instance, the Second and Seventh Circuits have held that the constitutional limits on the use of new weaponry can be “clearly established” even if courts have not previously considered those specific weapons. *See Edrei v. Maguire*, 892 F.3d 525, 542 (2d Cir. 2018) (denying qualified immunity to officers who employed long-range acoustic device despite absence of cases about that specific weapon because “novel technology, without more, does not entitle an officer to qualified immunity”); *Phillips v. Community Ins. Corp.*, 678 F.3d 513, 528 (7th Cir. 2012) (denying immunity for excessive force claim for using a device akin to a bean-bag shotgun, even though no prior case held the use of that weapon unconstitutional). But in *Mattos v. Agarano*, 661 F.3d 433 (9th Cir. 2011) (en banc), the Ninth Circuit took the opposite approach, granting immunity to an officer who deployed a Taser on a non-threatening victim of a domestic dispute, because “there was no Supreme Court decision or decision of our court addressing the use of a Taser in dart mode.” *Id.* at 452 (internal quotation marks omitted).

Indeed, the “clearly established” standard is so murky that it has engendered many conflicts *within* the circuits. The rift between the first and second panels here is one example of such a conflict, but it is not alone, even within the Sixth Circuit.

For example, in *Baynes v. Cleland*, 799 F.3d 600 (6th Cir. 2015), the Sixth Circuit considered whether a district court had erred in granting qualified immunity to an officer sued for handcuffing a suspect too tightly, where no case addressed the specific circumstances presented—the plaintiff complained only once, and the police-car ride during which he was handcuffed was only 20 minutes long. *See id.* at 615. The court of appeals reversed the grant of immunity because circuit precedent holding that “excessively forceful or unduly tight handcuffing is a constitutional violation” established the law at the requisite level of specificity. *Id.* at 614. “Requiring any more particularity than this,” the court explained, “would contravene the Supreme Court’s explicit rulings that neither a ‘materially similar,’ ‘fundamentally similar,’ or ‘case directly on point’—let alone a factually identical case—is required.” *Id.* (citing *Hope*, among other cases).

But in *Latits v. Philips*, 878 F.3d 541 (6th Cir. 2017), the same court required just such particularity in prior precedent. There, officers chased a motorist and momentarily subdued him; when the motorist then attempted to drive off, one of the officers, standing at the side of the car, shot him. *Id.* at 546. The driver, according to the court, “did not present an imminent or ongoing danger.” *Id.* at 552. Notwithstanding circuit precedent that “had clearly established that shooting a driver while positioned to

the side of his fleeing car violates the Fourth Amendment, absent some indication suggesting that the driver poses more than a fleeting threat,” the court granted qualified immunity. *Id.* at 553 (citation and internal quotation marks omitted). It explained that prior circuit cases establishing the law had involved drivers who “attempted to *initiate* flight” whereas in *Latits*, the officer pulled the trigger as the driver attempted to *re-initiate* flight after he had already been stopped. *Id.* Thus, as in the decision below, *Latits* granted qualified immunity based on minute factual distinctions of the type the Sixth Circuit disavowed in *Baynes* and this Court abjured in *Hope*.

Qualified immunity jurisprudence is equally muddled in other circuits. Just two years after the Ninth Circuit granted immunity to the Taser-firing officer in *Mattos*, a panel from that circuit endorsed the opposite approach to excessive force claims involving new technologies. *See Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) (“[I]t does not matter that no case of this court directly addresses the use of [a particular weapon]; we have held that [a]n officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury.” (citation and internal quotation marks omitted) (second and third alteration in original)). The Tenth Circuit’s qualified immunity jurisprudence is similarly fractured. *Compare Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007) (“[W]e need not have decided a case involving similar facts to say that no reasonable officer could believe that he was entitled to behave as Officer Sweet allegedly did” when he tackled and

used a Taser on a “nonviolent misdemeanor[].”), *and Morris v. Noe*, 672 F.3d 1185, 1197-98 (10th Cir. 2012) (denying qualified immunity even though court “found no cases addressing the type of force used here”), *with Lowe v. Raemisch*, 864 F.3d 1205, 1209-10 & n.9 (10th Cir. 2017), *cert. denied sub nom. Apodaca v. Raemisch*, 139 S. Ct. 5 (2018) (granting qualified immunity for prisoner’s 25-month deprivation of outdoor exercise, despite circuit precedent holding that a 36-month deprivation of outdoor exercise stated an Eighth Amendment claim, because prior case focused on whether 36-month deprivation could imply deliberate indifference to Eighth Amendment rights rather than whether such a deprivation was “sufficiently serious” to constitute an Eighth Amendment violation).

Unlike a typical intra-circuit conflict that might be resolved through en banc rehearings, these conflicts involve an inquiry that has defied consistent application across and within circuits and over time, so the difficulties are likely to persist. For instance, the Ninth Circuit’s *Mattos* decision recognizing broad immunity for cases involving new police weaponry was contradicted in that circuit’s *Gravelet-Blondin* decision just two years later, even though *Mattos* was decided en banc.

In sum, the disarray among the courts of appeals regarding the factual similarity required to establish the law “leaves the ‘clearly established’ standard neither clear nor established among our Nation’s lower courts.” *Zadeh*, 902 F.3d at 498 (Willett, J., concurring dubitante).

II. QUALIFIED IMMUNITY IS AN ATEXTUAL AHISTORICAL, CONCEDEDLY JUDGE-MADE DOCTRINE THAT DOES NOT SERVE ITS PURPORTED POLICY OBJECTIVES AND IMPAIRS THE ENFORCEMENT OF CONSTITUTIONAL NORMS.

The problems with qualified immunity exemplified by this case transcend both the dog attack at issue here and the inconsistencies among and within the circuits regarding the definition of “clearly established” law.

A. Since this Court created qualified immunity as a defense against civil rights actions under 42 U.S.C. § 1983, *see Pierson v. Ray*, 386 U.S. 547, 556-57 (1967), it has regularly provided course corrections. The Court modified the doctrine several times in its early years. *See, e.g., Scheuer v. Rhodes*, 416 U.S. 232, 247 (1974) (defining test as variable based on the responsibilities of the particular officer alleged to have violated the law); *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (extending doctrine to non-law enforcement personnel). The Court then overhauled the doctrine entirely in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), eliminating the “subjective” prong of qualified immunity and reducing the test to whether a defendant’s conduct “violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818. In a series of cases in the late 1990s and early 2000s, the Court imposed a sequencing requirement on the process of adjudicating qualified immunity, *see Saucier v. Katz*, 533 U.S. 194, 201 (2001), but then abandoned the

sequencing requirement in response to judicial and scholarly criticism. *Pearson v. Callahan*, 555 U.S. 223, 234-35, 237-42 (2009).

In announcing these various changes, the Court has been “forthright in revising the immunity defense for policy reasons.” *Crawford-El v. Britton*, 523 U.S. 574, 594 n.15 (1998); *see also Anderson v. Creighton*, 483 U.S. 635, 645 (1987) (“[T]he Court [in *Harlow*] completely reformulated qualified immunity along principles not at all embodied in the common law.”); *Wood*, 420 U.S. at 318 (extending qualified immunity to cover school officials based in part on “strong public-policy reasons”).

None of these developments, including the initial creation of qualified immunity, can be traced to the text of § 1983, which “admits of no immunities.” *Malley v. Briggs*, 475 U.S. 335, 339 (1986). That fact, on its own, casts doubt on qualified immunity, for “it is never [the Court’s] job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have” wanted. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017).

B. The Court’s original justification for departing from the text of § 1983 was a set of assumptions about its common law background. The Court viewed § 1983 as incorporating immunities that “were so well established in 1871, when § 1983 was enacted, that ‘we presume that Congress would have specifically so provided had it wished to abolish’ them.” *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting *Pierson*, 386 U.S. at 554-55).

But recent historical analysis shows that qualified immunity is divorced from history as well as text; the common law did not recognize the sweeping immunity that the Court began applying in 1967. As Professor William Baude has demonstrated, “lawsuits against officials for constitutional violations did not generally permit a good-faith defense during the early years of the Republic,” and the “strict rule of personal official liability, even though its harshness to officials was quite clear, was a fixture of the founding era.” William Baude, *Is Qualified Immunity Unlawful?* 106 Cal. L. Rev. 45, 55-56 (2018) (quoting David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. Colo. L. Rev. 1, 19 (1972)); accord James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. Rev. 1862, 1863-64 (2010); see generally Hart & Wechsler, *supra*, at 1041 (noting that the current qualified immunity standard is “broader than that recognized at common law”).

For instance, in *Little v. Barreme*, 6 U.S. 170 (1804), the Supreme Court affirmed a judgment for damages against a U.S. Navy captain for the unlawful seizure of a vessel even though he acted pursuant to a Presidential directive. As Chief Justice Marshall explained, “the instructions cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass.” *Id.* at 179. Likewise, in *Murray v. The Charming Betsy*, 6 U.S. 64 (1804), another captain who wrongfully confiscated a vessel had apparently acted “upon correct motives, from a sense of duty,” *id.* at 123-24, but the Court (again per Chief

Justice Marshall) nonetheless affirmed the district court’s judgment against the captain for the wrongful seizure, *id.* at 125.⁴ Thus, as Professor Baude summarizes, “good-faith reliance did not create a defense to liability—what mattered was legality.” Baude, *supra*, at 56; *accord* Engdahl, *supra*, at 18 (noting that the public official “was required to judge at his peril whether his contemplated act was actually authorized ... [and] judge at his peril whether ... the state’s authorization-in-fact ... was constitutional.”).

The Founding-era approach to official liability persisted in the years leading up to the enactment of § 1983 in 1871. For instance, in *Mitchell v. Harmony*, 54 U.S. 115 (1851), the Court upheld an award of more than \$90,000 against a U.S. Army colonel for seizing the property of a merchant in Mexico during the Mexican-American War. *See id.* at 116, 118, 137. The Court explained that, even assuming the defendant’s “honest judgment” that an emergency justified the seizure, the question whether in fact such an emergency existed was for the jury, and its negative answer was sufficient to hold the officer liable. *See id.* at 133-35, 137. Two treatises published in the late 1850s likewise reflect the absence of official immunity. *See* J. Story, *Commentaries on the Law of Agency* § 320 (5th ed. 1857) (“[Public officials] incur the same personal responsibility, and to the same extent, as private agents.”); J. Story, *Commentaries on the Constitution* § 1676 (3d ed. 1858) (“If the oppression be in the exercise of

⁴ The Court did reverse as to the precise calculation of damages, which required reassessment on remand. *See id.* at 125-26.

unconstitutional powers, then the functionaries who wield them, are amenable for their injurious acts to the judicial tribunals of the country, at the suit of the oppressed.”).

In the early years after enactment of § 1983, the Court continued to adhere to the Founding-era view. For instance, in *Beckwith v. Bean*, 98 U.S. 266 (1878), the Court ordered a new trial of officials who had been found liable for assault, battery, and false imprisonment of the plaintiff, whom the officials believed was aiding deserters during the Civil War. *Id.* at 267-68, 285. The ground for reversal was the lower court’s failure to admit evidence of the defendants’ good faith, *id.* at 275, 285, but the Court explained that such evidence was admissible only regarding whether punitive damages should be awarded, as “compensation cannot be diminished by reason of good motives upon the part of the wrongdoer,” *id.* at 276. The Court elaborated: “A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act[.]” *Id.* at 277 (citation omitted). In *Poindexter v. Greenhow*, 114 U.S. 270 (1885), the Court reversed a judgment in favor of a city official who took the plaintiff’s personal property. *See id.* at 273-74, 306. The Court reiterated (there in the context of a dispute over sovereign immunity) that a plaintiff whose rights are violated must have a remedy against the official wrongdoer notwithstanding his governmental affiliation: “[H]ow else can ... principles of individual liberty and right be maintained, if, when violated, the judicial tribunals are forbidden to visit penalties upon individual offenders, who are the instruments of

wrong, whenever they interpose the shield of the state?” *Id.* at 291. Writing for the Massachusetts Supreme Judicial Court just a few years later, Justice Holmes held members of a town health board liable for mistakenly killing a horse they thought diseased, even though they were ordered to do so by a government commissioner. *Miller v. Horton*, 26 N.E. 100, 100-01 (Mass. 1891).

The repeated recognition of officers’ amenability to suit guided the Court in interpreting § 1983 itself in *Myers v. Anderson*, 238 U.S. 368, 378, 383 (1915), which upheld the liability of Maryland officials under § 1983 for enforcing a state statute that denied African-Americans the right to vote in violation of the Fifteenth Amendment. Before the Court, “the state officials argued, among other things, that they could not be liable for money damages if they had in good faith thought the statute constitutional” and that § 1983 preserved a “traditional” malice requirement. Baude, *supra*, at 57 (quoting defendants’ briefs). The Court summarily rejected the defendants’ arguments for “nonliability ... of the election officers for their official conduct,” 238 U.S. at 378-79—i.e., for official immunity.

Although the Court did not discuss its reasoning on this point, the circuit court whose order it affirmed did so. *Anderson v. Myers*, 182 F. 223 (C.C.D. Md. 1910). Considering whether the plaintiffs needed to plead “that the defendants acted willfully, maliciously, fraudulently, or corruptly” in order to recover under § 1983 (referred to in the opinion by its prior citation, Revised Statutes § 1979), *id.* at 229, the lower court applied the same

approach to official liability that had prevailed since *Little and Charming Betsy*:

[W]hen it says (section 1979) that ‘every person who, under color of any statute of any state, subjects or causes to be subjected any citizen of the United States to deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,’ what can it mean but that the enforcement of the state law is of itself the wrong which gives rise to the cause of action? ...

[A]ny one who does enforce [a state law later ruled unconstitutional] does so at his known peril and is made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and no allegation of malice need be alleged or proved.

Id. at 230. It was not until nearly a century after the enactment of § 1983 that the Court in *Pierson* created the defense of “good faith and probable cause”—the forerunner of qualified immunity.

Moreover, there was no “freestanding” good faith defense available at common law for tort claims generally. *See* Baude, *supra*, at 58-60. Certain early common law torts did allow a good faith defense, but pursuant to the law of that specific tort only. *Id.* Accordingly, there was no justification for reading a general good-faith immunity into § 1983, which includes claims for types of violations (such as

discrimination or abridgment of freedom of speech) for which there were no common law analogues. And those good-faith defenses that existed for the handful of common law torts that are somewhat analogous to certain § 1983 claims bear little resemblance to modern qualified immunity doctrine, which has been stripped of the requirement that the officer act in “good faith.” *Harlow*, 457 U.S. at 817-18. Thus, modern qualified immunity doctrine simply *did not exist at all before the Court created it*.

C. As a matter of policy, qualified immunity fails to perform its putative functions. The primary justifications for qualified immunity are to prevent chilling officers’ performance of their duties by freeing them from the fear of personal liability for reasonable mistakes, and to guard against the unfairness of requiring officers to pay damages just because they failed to predict the future course of constitutional law. *See, e.g., al-Kidd*, 563 U.S. at 746-47; *Harlow*, 457 U.S. at 814; *Scheuer*, 416 U.S. at 240; *Pierson*, 386 U.S. at 555. But recent empirical research shows that qualified immunity is wholly unnecessary to achieve these objectives.

Officers are virtually never at risk of monetary liability—and they know they are not—because of the near-universal practice of indemnification by the governments that employ them. A recent study of eighty-one geographically diverse law enforcement agencies of various sizes nationwide (including twelve of the twenty largest departments nationwide) found that officers contributed to payments in less than one-half of one percent of civil rights damages actions resolved in plaintiffs’ favor. *See* Joanna C. Schwartz, *Police Indemnification*, 89

N.Y.U. L. Rev. 885, 889-90 (2014). Further, “[o]fficers did not contribute to settlements and judgments even when indemnification was prohibited by statute or policy. And officers were indemnified even when they were disciplined, terminated, or prosecuted for their misconduct.” *Id.* at 937.⁵

Modern indemnification practice contradicts the Court’s explicit assumptions about the prevalence of indemnification. Over three decades ago in *Anderson v. Creighton*, the plaintiffs argued that government indemnification practices counseled against the expansion of qualified immunity; the Court rejected that proposition because plaintiffs “could not reasonably contend that [indemnification programs] make reimbursement sufficiently certain and generally available to justify reconsideration of the balance struck in *Harlow* and subsequent cases.” 483 U.S. at 641 n.3. The Court did not opine on the plaintiffs’ logic, only the empirical claim underlying it. And the Court has subsequently recognized that “employee indemnification ... reduces the employment-discouraging fear of unwarranted liability.” *Richardson v. McKnight*, 521 U.S. 399, 411 (1997). Thus, the recognition that indemnification is practically certain undermines the assumption that qualified immunity is needed to shield officers from liability.

⁵ Schwartz identifies a mechanism through which indemnification occurs even when legally prohibited: “Jurisdictions may sidestep prohibitions against indemnification of punitive damages by vacating the punitive damages verdict as part of a post-trial settlement.” *Id.* at 921.

D. The costs of qualified immunity to the rule of law are real and significant. Because qualified immunity relies centrally on the question of when the unlawfulness of particular conduct has been “clearly established”—an inquiry for which a consistent standard has eluded federal courts for a generation—the jurisprudence of qualified immunity is beset with inconsistency. *See supra* Part I.B. Because courts are allowed to resolve the qualified immunity inquiry without saying what the law is, “the qualified immunity situation threatens to leave standards of official conduct permanently in limbo.” *Camreta v. Greene*, 563 U.S. 692, 706 (2011). Because courts have discretion to choose whether to resolve the constitutional merits question, the process introduces an opportunity for strategic decisionmaking—and recent scholarship suggests such strategic decisionmaking in fact is occurring. *See* Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 *Emory L.J.* 55, 63 (2016) (finding meaningful differences in applications of the doctrine by appellate panels composed entirely of judges appointed by a Republican President versus panels entirely appointed by a Democratic President). And because qualified immunity, by design, defeats claims even where the Constitution has been violated, it widens the gulf between rights and remedies and thereby erodes the force of constitutional rights themselves:

The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no

remedy for the violation of a vested legal right.

Marbury v. Madison, 5 U.S. 137, 163 (1803).

It is no wonder, then, that several Members of this Court have expressed concern about the doctrine in recent Terms. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“Until we shift the focus of our inquiry to whether immunity existed at common law, we will continue to substitute our own policy preferences for the mandates of Congress.”); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., joined by Ginsburg, J., dissenting) (arguing that the Court’s qualified immunity jurisprudence “sends an alarming signal to law enforcement officers and the public” that officers “can shoot first and think later” and that “palpably unreasonable conduct will go unpunished”); *see also id.* (describing the Court’s approach to qualified immunity as “one-sided” and warning that such an approach “gut[s] the deterrent effect of the Fourth Amendment”).

E. Merits briefing is needed to explore fully the alternatives to the current qualified immunity regime; it is enough to note here that several could be viable. The simplest approach, and the one most faithful to the text and historical context of § 1983, would be to abolish the defense and return the statute to its plain meaning. Because of the near-universal practice of indemnification, this outcome would not implicate the principal concern animating the creation of the doctrine in the first place—eliminating the supposed inhibiting effect on good-

faith official action created by fear of personal liability.

Should the Court decline that option, there are any number of approaches it might adopt that would bring the doctrine closer to its historical roots and mitigate the considerable costs that the current doctrine imposes. Scholars, for example, have proposed numerous modifications. *See, e.g.*, John F. Preis, *Qualified Immunity and Fault*, 93 Notre Dame L. Rev. 1969, 1986 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1833-34 (2018); John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 Va. L. Rev. 207, 258-64 (2013).

At a minimum, the Court should grant review to make clear that the court of appeals here applied an overly stringent approach to determining whether the law was “clearly established,” and the Court should take the opportunity to provide much-needed guidance to lower courts in their application of this standard. As this case and those discussed above illustrate, the standard has sown confusion and conflict within and across circuits and would benefit from further elaboration. In particular, the Court should reaffirm that a case with identical facts is not necessary to establish that conduct is clearly unconstitutional.⁶

“Where a decision has been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts,

⁶ Indeed, the decision below is so evidently wrong that a per curiam reversal would be warranted.

these factors weigh in favor of reconsideration.” *Pearson*, 555 U.S. at 235 (citation, internal quotation marks, and source’s alteration marks omitted). Qualified immunity as currently configured is unmoored from its foundations, unjustified by its goals, and unworkable in practice. It has generated confusion, conflict, and inconsistency in the lower courts. As Justice Thomas has advised, “In an appropriate case, we should reconsider our qualified immunity jurisprudence.” *Ziglar*, 137 S. Ct. at 1872 (opinion concurring in part and concurring in the judgment). This is such a case.

III. THIS CASE PROVIDES AN IDEAL VEHICLE FOR RECONSIDERING QUALIFIED IMMUNITY.

Several aspects of Baxter’s case make it a particularly appropriate one in which to address critical questions about the scope and propriety of qualified immunity.

First, no procedural obstacles or ancillary questions would obstruct this Court’s direct consideration of the questions presented.

Second, the facts are simple. Officers pursued a suspect; he initially ran but then surrendered by sitting down with his hands up; one of the officers nonetheless decided to sic a police dog on him, causing physical injuries requiring emergency hospital treatment. Baxter’s situation thus lacks the complexity of cases with intricate background facts that informed officers’ judgment about how or whether to seize a suspect. *Cf. Brosseau v. Haugen*, 543 U.S. 194, 195-96 (2004) (per curiam) (recounting much more complicated facts); *Hunter v. Bryant*, 502

U.S. 224, 224-26 (1991) (per curiam) (same). Accordingly, reaching the underlying doctrinal question here should be straightforward.

Third (and related), the summary judgment posture ensures that the factual backdrop for considering the qualified immunity question is not abstract. Instead, the Court has before it a developed record in which the the Court's resolution of the qualified immunity issue will directly drive the outcome of the litigation. The qualified immunity issue is squarely presented and has been considered twice by the court of appeals, so there is no risk that this Court will be called upon to provide a "first view" as opposed to a "final review." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012).

Finally, and perhaps most important, the case exemplifies the many problems with the qualified immunity doctrine in practice, including the difficulty of consistent application (even in a single case), the difficulty of identifying the appropriate level of generality at which to define the right at issue, the absence of clear guidance for future conduct, and absurd results. Baxter's case thus enables the Court to evaluate the operation of qualified immunity in a context in which its flaws make a difference—putting the Court in the best position to determine whether these infirmities are justified by the policy concerns that have animated the doctrine and driven its development for half a century.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

**NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION**

File Name: 18a0566n.06

Case No. 18-5102

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ALEXANDER L.
BAXTER,

Plaintiff-Appellee,

v.

BRAD BRACEY;
SPENCER R. HARRIS,

Defendants-
Appellants.

FILED
Nov 08, 2018
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE
UNITED STATES
DISTRICT COURT FOR
THE MIDDLE
DISTRICT OF
TENNESSEE

OPINION

BEFORE: THAPAR, BUSH, and NALBANDIAN,
Circuit Judges.

NALBANDIAN, Circuit Judge.

A neighbor caught Alexander Baxter burglarizing a house and called the police. Soon Baxter heard sirens and saw a helicopter looking for him, so he ran to another house (one he had broken into before) and hid in the basement. But the canine unit arrived and quickly sniffed him out. After giving several warnings, one of the officers released his dog, who apprehended Baxter with a bite to the arm. Baxter says he had already surrendered when the dog was released, and so the two officers violated his constitutional right to be free from excessive force. The case is before us now on an interlocutory appeal after the district court denied the officers' claims of

qualified immunity. We reverse that decision because the officers' conduct, whether constitutional, did not violate any clearly established right.

I.

Officers Spencer Harris and Brad Bracey arrested Alexander Baxter on January 8, 2014 after he committed an aggravated burglary and fled the scene. A neighbor caught Baxter breaking into a home and called the police. He fled once he heard sirens and saw the helicopter—first hiding in a car, and then seeking refuge in the basement of a house he had previously broken into. There, Baxter hid between a chimney and a water heater while he watched and listened to the officers outside.

Harris and Bracey were part of Nashville's canine unit, which is deployed for serious crimes such as aggravated burglary. The two of them entered the house with their dog, Iwo. Bracey announced they would release the canine if Baxter did not surrender. Although Baxter heard the warnings, he stayed quiet. Harris—the dog's handler—repeated the warning. Again, Baxter remained quiet. So Harris released Iwo, who quickly found Baxter downstairs.

The two officers followed Iwo into the basement and—according to Baxter—surrounded him. Baxter claims that he raised his hands in the air when they came downstairs. But he never responded to the officers' warnings or communicated about where he was hiding. Within five to ten seconds of discovering Baxter, Harris again released Iwo—this time to apprehend him. Iwo restrained Baxter with a bite to the arm. The medical records

reveal only one bite on Baxter's underarm, revealing that Iwo followed his training by apprehending Baxter with a single bite. Harris eventually commanded Iwo to release Baxter and placed him under arrest.

Baxter, proceeding pro se, sued Harris and Bracey under 42 U.S.C. § 1983. He asserts an excessive-force claim against Harris and a failure-to-intervene claim against Bracey. Originally, Bracey alone moved to dismiss the suit against him, arguing that qualified immunity shielded him from Baxter's somewhat amorphous claim that he failed to prevent the canine apprehension. Baxter's complaint, we held, pleaded sufficient facts to withstand a motion to dismiss. But those facts must bear out during discovery for Baxter to defeat a motion for summary judgment. And that is where we are today.

After discovery, both officers moved for summary judgment, and the district court rejected both claims. The district court held that summary judgment was inappropriate because Baxter's testimony corroborated the factual assertions in the complaint that this court previously upheld against a motion to dismiss. If those facts were enough to defeat qualified immunity in a complaint, the court reasoned, Baxter's supporting testimony should do the same. Harris and Bracey then filed this interlocutory appeal. *See Plumhoff v. Rickard*, 572 U.S. 765, 771–72 (2014).

II.

Our inquiry here is guided by the interlocutory posture of the case. Because the district court denied summary judgment to the defendants, we must

determine whether “the undisputed facts or the evidence viewed in the light most favorable to the plaintiff fail to establish a *prima facie* violation of clear constitutional law.” *Berryman v. Rieger*, 150 F.3d 561, 563 (6th Cir. 1998). We will not weigh into credibility issues or try to resolve factual disputes. *See Estate of Carter v. City of Detroit*, 408 F.3d 305, 310 (6th Cir. 2005). Our task is much simpler. We must decide the “neat abstract issue[] of law” regarding whether Baxter’s version of the facts amounts to a clear constitutional violation. *See Berryman*, 150 F.3d at 563 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

The clarity of the constitutional violation is critical. An individual suing under § 1983 must demonstrate two things: First, that the officer violated his constitutional rights. And second, that the violation was “clearly established at the time.” *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). The “clearly established” prong sets up an exacting standard in which the plaintiff must show that “every reasonable official would understand that what he is doing is unlawful.” *Id.* (internal citations and quotations omitted). “It is not enough that the rule is *suggested* by then-existing precedent”—it must be “beyond debate” and “settled law.” *Id.* at 589–90 (emphasis added) (quoting *Hunter v. Bryant*, 502 U.S. 224, 228 (1991)). The effect is that qualified immunity protects “all but the plainly incompetent or those who knowingly violate the law.” *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Relevant here, courts can jump straight to the second question and dispose of a claim without

deciding whether the officer's conduct violated the plaintiff's constitutional rights. *See Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). So long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed. *See id.* Proceeding in this way is often appropriate in “cases in which the briefing of constitutional questions is woefully inadequate.” *See Pearson v. Callahan*, 555 U.S. 223, 239 (2009). By resolving the issue on only the second prong, courts avoid “expending scarce judicial resources to resolve difficult and novel questions of constitutional or statutory interpretation that will have no effect on the outcome of the case.” *Ashcroft*, 563 U.S. at 735 (internal quotations and citations omitted).

That is the case here. The officers are entitled to qualified immunity because Harris's use of the canine to apprehend Baxter did not violate clearly established law. And because this court does not have the benefit of sophisticated adversarial briefing from both parties, we decline to resolve the more complex constitutional question raised by Baxter's claim. *See Pearson*, 555 U.S. at 239.

The Fourth Amendment's prohibition against unreasonable seizures protects individuals from an officer's use of excessive force while making an arrest. *See Graham v. Connor*, 490 U.S. 386, 394–95 (1989). Whether the force was excessive turns on its objective reasonableness under the totality of the circumstances. *Id.* at 395–96; *Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001). And the reasonableness of the officer's force “must be judged from the perspective of a reasonable officer on the

scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396.

We have demarcated the outer bounds of excessive-force cases involving canine seizures with some degree of clarity. In this circuit, for example, we have held that officers cannot “use[] an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing.” *Campbell v. City of Springboro*, 700 F.3d 779, 789 (6th Cir. 2013). But just as clearly, we have upheld the use of a well-trained canine to apprehend a fleeing suspect in a dark and unfamiliar location. See *Robinette v. Barnes*, 854 F.2d 909, 913–14 (6th Cir. 1988). These cases and their progeny establish guidance on the ends of the spectrum, but the middle ground between the two proves much hazier.

Baxter’s case looks closer to *Robinette* than *Campbell*—but the fit is not perfect. Like 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. And unlike *Campbell*, the canine here was properly trained with no apparent history of bad behavior. All of these facts would lead a reasonable officer to believe that the use of a canine to apprehend Baxter did not violate the Fourth Amendment. See *Graham*, 490 U.S. at 396; *Robinette*, 854 F.2d at 913–14.

Militating against those facts is Baxter’s claim that he surrendered by raising his hands in the air before Harris released the dog. This conduct might show that he did not pose the kind of safety threat justifying a forceful arrest. See, e.g., *Ciminillo v. Streicher*, 434 F.3d 461, 467 (6th Cir. 2006). But

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. That's because even with Baxter's hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk—all factors the *Campbell* court identified as significant to determining whether the seizure was lawful. See *Campbell*, 700 F.3d at 788–89.

Given all of this, we cannot say that Harris violated any clearly established law in using Iwo to apprehend Baxter. Even if Baxter raised his hands, the other circumstances—undisputed in the record below—weigh against a finding that “every reasonable official would understand that what [Harris did] is unlawful.” *Wesby*, 138 S. Ct. at 589 (internal quotations omitted). For that reason, Harris is entitled to qualified immunity.

We reach this decision mindful of the fact that, on appeal from the prior motion to dismiss, we held that Baxter's right to be free from excessive force was clearly established under *Campbell*. But there, we looked only at the facts as pleaded in the complaint. Baxter alleged that he surrendered before the arrest, and his complaint was understandably silent about whether Iwo had proper training or the time that elapsed before Harris released the dog. The facts revealed during discovery add much-needed color to this case—as they often do. We now know that Iwo was well-trained, that Harris released him within only a few seconds after entering the basement, and that Baxter fled the scene, hid in the basement, was warned twice, and still never communicated with the

officers before being apprehended. All of these facts change the analysis and move the well-pleaded claims to a place where we cannot say that “every reasonable official would understand that what he is doing is unlawful.”¹ *Wesby*, 138 S. Ct. at 589 (internal quotation marks omitted).

Finally, it follows from there that Bracey receives the same protection of qualified immunity. Police officers “can be held liable for failure to protect a person from the use of excessive force.” *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Such a claim requires proving that the officer “observed or had reason to know that excessive force would be or was being used” and “the officer had both the opportunity and the means to prevent the harm from occurring.” *Id.* While there are numerous reasons to find that Baxter cannot prevail on this claim, the first is the most obvious: If it is not clearly established that Harris used excessive force in apprehending Baxter, it cannot be that Bracey observed or had reason to know that excessive force would be used.

III.

For the above-stated reasons, we **REVERSE** the district court’s order denying summary judgment.

¹ It also bears mentioning that only Bracey filed the initial motion to dismiss. Harris, who is directly responsible for the canine apprehension, defends his conduct under qualified immunity for the first time.

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

ALEXANDER L.
BAXTER,
Plaintiff,

vs.

SPENCER R. HARRIS
AND BRAD BRACEY,
Defendants.

Civil Action No.
3:15-CV-00019

HON. BERNARD A.
FRIEDMAN

OPINION AND ORDER
DENYING DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This matter is before the Court on defendants' motion for summary judgment [docket entry 99]. The issues have been sufficiently briefed, so the Court will decide the motion without a hearing.

In January 2014, defendants responded to a report of a residential burglary. Plaintiff, a homeless man, had been trying to steal video games, laptops, or computers from unlocked houses. Pl.'s Dep. pp. 15–16. When defendants arrived at the scene, plaintiff fled into the basement of a nearby house. Defendants followed plaintiff to the house. They shouted a warning into the basement that they would release police dog Iwo unless plaintiff surrendered. *Id.* at 30; Harris Aff. ¶¶ 10–11. Plaintiff refused to surrender. Pl.'s Dep. p. 30.

Here the stories diverge. Plaintiff claims that defendants released Iwo into the basement while they remained upstairs. *Id.* Iwo found plaintiff, began barking, and ran back and forth across the basement. *Id.* The defendants came downstairs, and Iwo ran up to Officer Harris, who secured him by the collar. *Id.* at 31, 34. Officer Harris remained in front of plaintiff, ordering him, “show me your hands,” while Officer Bracey circled around behind. *Id.* at 32–33, 35. Plaintiff testified that at that moment, he “was sitting on [his] butt with [his] hands up in the air.” *Id.* at 32. After elevating his hands he did not move. *Id.* at 35. Suddenly, without warning, Officer Harris released Iwo. *Id.* Iwo bit plaintiff “two or three times,” drawing blood. *Id.* at 39.

Officer Harris avers, however, that they released Iwo only because plaintiff never elevated his hands or “communicated that he intended to surrender peacefully.” Harris Aff. ¶¶ 13–14. Medical records show that plaintiff suffered a single puncture wound. Defs.’ Mot. Ex. 3.

In January 2015, plaintiff filed the instant complaint. In July 2015, Officer Bracey filed a motion to dismiss based on qualified immunity, which the Court denied. Officer Bracey appealed that decision to the Sixth Circuit. In August 2016, the Sixth Circuit upheld this Court’s decision, stating:

In assessing claims of excessive use of force, courts apply an objective reasonableness standard, considering the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the

suspect was actively resisting arrest or attempting to evade arrest by flight. *See Campbell*, 700 F.3d at 786–87. Baxter’s complaint alleges that he hid in a basement to avoid arrest but was soon discovered by Harris and Bracey as a canine unit searched the other side of the basement. The canine unit rejoined Harris in front of Baxter, who had surrendered by this point. Bracey was positioned behind Baxter, who sat on the ground with his arms in the air. These facts could support a finding that the officers were in no danger and that Baxter was neither actively resisting nor attempting to flee. Taken in a light most favorable to Baxter, the allegations thus establish that excessive force was being used when the canine attacked, and that Bracey was in a position to observe the use of excessive force.

The complaint also alleges that Harris restrained the canine by its collar prior to releasing it and that Bracey, who stood behind Baxter, did nothing but watch while the canine attacked. 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. The complaint pleads sufficient facts to establish that

Bracey violated Baxter's constitutional rights by failing to intervene to protect Baxter from the use of excessive force.

Aug. 30, 2016, Order Denying Defendant's Appeal, pp. 2–3. In short, the Sixth Circuit held that the complaint's facts could reasonably support a finding of excessive force.

Under Fed. R. Civ. P. 56(a), summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” “A material issue of fact exists where a reasonable jury, viewing the evidence in the light most favorable to the non-moving party, could return a verdict for that party.” *Vollrath v. Georgia-Pacific Corp.*, 899 F.2d 533, 534 (6th Cir. 1990).

Here, plaintiff'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. There is a genuine dispute as to the exact circumstances of the arrest. A reasonable jury, viewing the evidence in the light most favorable to plaintiff, could find that defendants used excessive force. And although Officer Harris avers that Iwo would not have responded to Officer Bracey had he intervened, Harris Aff. ¶ 15, this naked averment alone does not dispel genuine dispute as to whether Officer Bracey's intervention would have been futile.

Accordingly,

IT IS ORDERED that defendants' motion for summary judgment is denied.

s/Bernard A. Friedman
BERNARD A. FRIEDMAN
SENIOR UNITED STATES DISTRICT JUDGE
SITTING BY SPECIAL DESIGNATION

Dated: January 19, 2018
Detroit, Michigan

**NOT RECOMMENDED FOR FULL-TEXT
PUBLICATION**

No. 15-6412

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ALEXANDER L.
BAXTER,
Plaintiff-Appellee,
v.
SPENCER HARRIS,
Defendant,
and
BRAD BRACEY,
Defendant-
Appellant.

FILED
Aug 30, 2016
DEBORAH S. HUNT, Clerk

ON APPEAL FROM THE
UNITED STATES
DISTRICT COURT FOR
THE MIDDLE
DISTRICT OF
TENNESSEE

ORDER

BEFORE: COLE, Chief Judge; SILER and
STRANCH, Circuit Judges.

Officer Brad Bracey of the Metropolitan Nashville Police Department (MNPd) filed this interlocutory appeal of the district court's order denying his motion for qualified immunity in a civil rights action filed by Alexander Baxter under 42 U.S.C. § 1983. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See Fed. R. App. P. 34(a)*.

Baxter claimed that MNPD Officer Spencer Harris used excessive force in releasing a canine unit after Baxter had already surrendered and that Bracey failed to intervene to prevent the use of excessive force. Bracey filed a motion to dismiss, arguing that Baxter failed to state a claim upon which relief could be granted due to Bracey's qualified immunity. *See* Fed. R. Civ. P. 12(b)(6); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A magistrate judge recommended that Bracey's motion be denied, reasoning that Baxter had raised several issues of material fact that counseled against granting Bracey qualified immunity—whether Baxter had already surrendered when the canine was released, whether Bracey could have intervened, and whether Bracey lied in his report summarizing the events of the arrest. The district court adopted the report and recommendation over Bracey's objections and denied Bracey's motion to dismiss. Bracey filed the instant interlocutory appeal.

On appeal, Bracey limits his arguments to the strictly legal question of whether the facts alleged in the complaint establish a violation of a clearly established Fourth Amendment right to protection against the excessive use of force. Thus, the court has jurisdiction over this interlocutory appeal. *See Phillips v. Roane Cty.*, 534 F.3d 531, 538 (6th Cir. 2008) (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)).

On appeal from the denial of a motion to dismiss based on qualified immunity, this court “review[s] de novo whether the complaint alleges [a] violation of a clearly established constitutional right.” *Heyne v. Metro. Nashville Pub. Sch.*, 655 F.3d

556, 562 (6th Cir. 2011). “In order to determine whether or not qualified immunity applies in an excessive force claim, the Court must engage in a two-step inquiry, addressing the following questions: (1) whether, considering the allegations in a light most favorable to the injured party, a constitutional right has been violated, and if so, (2) whether that right was clearly established.” *Campbell v. City of Springboro*, 700 F.3d 779, 786 (6th Cir. 2012) (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).

We have held that a police officer may be held liable for failing to intervene to protect a person from the excessive use of force under the Fourth Amendment if: “(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.” *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997).

In assessing claims of excessive use of force, courts apply an objective reasonableness standard, considering the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. *See Campbell*, 700 F.3d at 786–87. Baxter’s complaint alleges that he hid in a basement to avoid arrest but was soon discovered by Harris and Bracey as a canine unit searched the other side of the basement. The canine unit rejoined Harris in front of Baxter, who had surrendered by this point. Bracey was positioned behind Baxter, who sat on the ground with his arms in the air. These facts could support a finding that the officers were in no danger and that Baxter was neither actively

resisting nor attempting to flee. Taken in a light most favorable to Baxter, the allegations thus establish that excessive force was being used when the canine attacked, and that Bracey was in a position to observe the use of excessive force.

The complaint also alleges that Harris restrained the canine by its collar prior to releasing it and that Bracey, who stood behind Baxter, did nothing but watch while the canine attacked. 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. The complaint pleads sufficient facts to establish that Bracey violated Baxter's constitutional rights by failing to intervene to protect Baxter from the use of excessive force.

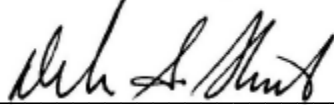
Our next inquiry is whether the right to protection against the use of excessive force was clearly established at the time. "To determine whether a constitutional right is clearly established, 'we must look first to decisions of the Supreme Court, then to decisions of this court and other courts within our circuit, and finally to decisions of other circuits.'" *Brown v. Lewis*, 779 F.3d 401, 418–19 (6th Cir. 2015) (quoting *Baker v. City of Hamilton*, 471 F.3d 601, 606 (6th Cir. 2006)). A right is "clearly established" if its contours are "sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Harris v. City of Circleville*, 583 F.3d 356, 366–67 (6th Cir. 2009).

The right to be free from the excessive use of force in the context of police canine units was clearly

established by 2012, when in *Campbell* we held that officers who used an inadequately trained canine, without warning, to apprehend two suspects who were not fleeing, acted contrary to clearly established law. *See* 700 F.3d at 789. The right to intervention to prevent the use of excessive force was also clearly established. *See Turner*, 119 F.3d at 429. The contours of a suspect's right to intervention to prevent a violent canine apprehension where officers were in no danger and the suspect was neither resisting nor fleeing were sufficiently clear that a reasonable officer in Bracey's position would understand that doing nothing but watch a police canine attack would violate the suspect's constitutional rights. Under these circumstances, Bracey is not entitled to qualified immunity.

The district court's order is **AFFIRMED**.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

ALEXANDER L.
BAXTER,

Plaintiff,

v.

SPENCER R. HARRIS,
et al.,

Defendants.

No. 3:15-cv-00019
Judge Sharp/Knowles

ORDER

Plaintiff Alexander L. Baxter, an inmate at the Bledsoe County Correctional Center proceeding pro se, has filed a civil rights complaint pursuant to 42 U.S.C. § 1983. He alleges that on January 8, 2014, Officers of the Metropolitan Nashville Police Department, including Defendant Brad Bracey, utilized excessive force when arresting him in violation of his Fourth Amendment rights. Specifically, Plaintiff alleges that after he had surrendered Officers Harris and Bracey released a K-9 dog and watched as the dog attacked Plaintiff, resulting in deep lacerations to his armpits. Plaintiff also alleges that the officers submitted a false police report describing his arrest as a K-9 apprehension despite the fact that the dog was not released until after Plaintiff's surrender.

Magistrate Judge Knowles has issued a Report and Recommendation ("R & R") (Docket No. 48) in

which he recommends that Defendant Bracey's Motion for Judgment on the Pleadings (Docket No. 16) and/or Motion to Dismiss for Failure to State a Claim (Docket No. 37) be denied. Defendant Bracey filed objections to the R & R (Docket No. 54), to which Plaintiff has responded (Docket No. 60). Having considered the matter de novo as required by Rule 72 of the Federal Rules of Civil Procedure, the Court agrees with the recommended disposition.

In deciding to approve the R & R, the Court has considered the objections levied by Defendant Bracey. Defendant Bracey's first objection takes issue with the fact that the magistrate judge did not treat his Motion to Dismiss as unopposed. Although Plaintiff filed a response to the Motion for Judgment on the Pleadings, Plaintiff did not respond to the Motion to Dismiss until after the entry of the R & R (Docket No. 59). In issuing the R & R, the magistrate judge looked to Plaintiff's earlier-filed response to the Motion for Judgment on the Pleadings (Docket No. 21). According to Defendant Bracey, Plaintiff's filing of an Amended Complaint, terminated the Motion for Judgment on the Pleadings and rendered all accompanying filings moot. Defendant argues that therefore magistrate judge could not consider Plaintiff's earlier response and was bound to treat the Motion to Dismiss as unopposed.

Defendant is correct that Plaintiff's Amended Complaint rendered the Motion for Judgment on the Pleadings moot. See Ky. Press Ass'n, Inc. v. Ky., 355 F. Supp. 2d 853, 857 (E.D. Ky. 2005) ("Plaintiff's amended complaint supercedes the original complaint, thus making the motion to dismiss the original complaint moot.") (citing Parry v. Mohawk

Motors of Mich., Inc., 236 F.3d 299, 306 (6th Cir. 2000)), app. dis., 454 F.3d 505 (6th Cir. 2006). In the instant case, however, the only difference between Plaintiff's original and amended complaints was the removal of John Doe as a defendant. (Docket No. 34). "All other pleadings in the original complaint remain the same." (Id. at 1). Moreover, the same standard applies to both motions:

A Motion for Judgment on the Pleadings under Rule 12(c) of the Federal Rules of Civil Procedure 'is appropriately granted when no material issue of fact exists and the party is entitled to judgment as a matter of law.' In making that determination, the Court utilizes the same standards as those used to determine if the Complaint is subject to dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Foster v. Amarnek, No. 3:13-516, 2014 WL 1961245, at *1 (M.D. Tenn. May 14, 2014) (citations omitted). The arguments and information contained in Plaintiff's response to the Motion for Judgment on the Pleadings therefore apply with equal force to Defendant's Motion to Dismiss. Magistrate Judge Knowles's thorough review of the entire record does not provide grounds for objection.

Defendant next objects on the ground that the magistrate judge "erred by analyzing qualified immunity in only a generalized sense and ignoring the lack of authority regarding when a police officer can be said to have failed to intervene in a use of force involving a K-9." This is not so: Magistrate

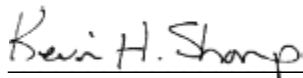
Judge Knowles specifically analyzed Plaintiff's excessive force claim as a failure to intervene claim and found that material facts going to that claim remain in dispute. Indeed, Magistrate Judge Knowles lists at least three issues of material fact that go to whether or not Defendant Bracey is liable for failure to intervene. (Docket No. 48 at 4). Magistrate Judge Knowles also relied on clearly established authority from the Sixth Circuit, Turner v. Scott, 119 F.3d 425, (6th Cir. 1997), which sets forth a test for failure to intervene claims. (Docket No. 54 at 4-5). The Court finds that the magistrate judge properly analyzed Plaintiff's claim.

In sum, the Magistrate Judge thoroughly discussed and rejected Defendant's arguments in favor of dismissal and the Court finds no error in that analysis.

Accordingly, the Court hereby rules as follows:

- (1) The R & R (Docket No. 48) is ACCEPTED and APPROVED;
- (2) Defendant Bracey's Motion to Dismiss (Docket No. 37) is DENIED;
- (3) Defendant Bracey's Motion for Judgment on the Pleadings (Docket No. 16) is TERMINATED AS MOOT.

It is SO ORDERED.



KEVIN H. SHARP
UNITED STATES DISTRICT JUDGE

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

ALEXANDER L.
BAXTER,

Plaintiff,

v.

SPENCER HARRIS,
et al.,

Defendants.

Case No. 3:15-cv-00019
Judge Sharp/Knowles

REPORT AND RECOMMENDATION

This matter is before the Court upon two Motions filed by Defendant Brad Bracey: the first, a Motion for Judgment on the Pleadings filed pursuant to Fed. R. Civ. P. 12(c), and the second, a Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6).¹ Docket Nos. 16, 37. Defendant Bracey has contemporaneously filed supporting Memoranda of Law arguing that Plaintiff's claims against him should be dismissed because he is qualifiedly immune. Docket Nos. 17, 38.

Plaintiff has filed a Response to Defendant Bracey's Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(c), but has not responded to his Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). Docket No. 21.

¹ Defendant Bracey is the only Defendant who is a party to the instant Motions.

Plaintiff filed this pro se, in forma pauperis action pursuant to 42 U.S.C. § 1983, arguing that Officers of the Metropolitan Nashville Police Department, including Defendants Harris and Bracey, utilized excessive force when arresting him, in violation of his Fourth Amendment rights. Docket No. 1.² Specifically, Plaintiff avers:

. . . The petitioner admittedly submits that during the course of an arrest he ran and hid in the basement of a house. Officer Harris and Officer Bracey soon entered the basement with a K-9. The petitioner sat close to the window upon which the officers entered with the K-9. The petitioner watched the K-9 running around on the other side of the basement. The officers located the petitioner first, then the K-9 ran up and one of the officers was holding the K-9 by the collar. The petitioner sat on the ground, frozen still, with his hands raised in the air. The K-9 was barking and rearing up trying to get at the petitioner. When the K-9 ran up to the officer, the petitioner had surrendered.

² Plaintiff has filed an Amended Complaint, which states in its entirety:

In his original complaint the plaintiff named Spencer Harris, Brad Bracey and John Doe as defendants. The only amendment is that the plaintiff removes John Doe as a defendant. All other pleadings in the original complaint remain the same.

Docket No. 34.

The petitioner was at gun-point with a flashlight shining on him. It was daylight outside, and there was lots of light shining through the windows. One officer was in front of the petitioner, and the other officer was behind the petitioner. The petitioner was not physically resisting. The petitioner did nothing to provoke any force. The officer in front of the petitioner then released the K-9, and both officers stood and watched as the K-9 attacked. The officer behind had an opportunity to intervene and stop the attack. He didn't. The officer in front eventually stepped in and removed the K-9. The [sic] called it a K-9 apprehension, but there were no bites under/on the petitioner's arms, no bites under/on the petitioner's legs, no bits [sic] on under/on the petitioner's hands, nor were there any other bites on any part of the petitioner's body. The petitioner was transferred to Metro Nashville General Hospital with deep lacerations under the pit of his arms only. . . .

Id., p. 2-3.

Plaintiff seeks compensatory and punitive damages. *Id.*, p. 7.

Defendant Bracey filed the instant Motions arguing that he is qualifiedly immune. Docket Nos. 16, 37. Defendant Bracey argues that he did not know that the K-9 would be used and did not have the opportunity or ability to stop the use of the K-9.

Id.; Docket Nos. 17, 38. He further argues that Plaintiff's Complaint does not allege sufficient facts to show that he failed to intervene during the use of another officer's K-9 police dog or that he violated any clearly established right of Plaintiff. *Id.*

Plaintiff responds that "qualified immunity is not possible when there are disputed facts that must be resolved" and argues that "[f]actual disputes clearly exist" in this case. Docket No. 21. Plaintiff further responds that "[e]ven though Officer Bracey was 'not in control of the K9' and was only 'standing behind plaintiff when the K9 bit plaintiff,' he is still not relieved of culpability." *Id.* Plaintiff continues: "After failing to intervene to stop the attack, as adequately pleaded by the plaintiff, Officer Bracey went on to show malice and deception and an attempt to conceal the attack by filing a false police report in which he stated it was a 'K9 apprehension.'" *Id.* Plaintiff maintains that: (1) Defendant Bracey can be held liable for failing to intervene; (2) he had an "absolute right" to be free from the use of excessive force; and (3) that right was clearly established. *Id.*

In order to hold Defendant Bracey liable for excessive use of force, Plaintiff must prove that he: "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force." *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997). Generally, "mere presence . . . , without a showing of direct responsibility for the action, will not subject an officer to liability." *Ghandi v. Police Dep't of City of Detroit*, 747 F.2d 338, 352 (6th Cir. 1984). An individual officer may be held

liable for failure to prevent the excessive use of force, however, where: “(1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring.” *Turner*, 119 F.3d at 429. “Each defendant’s liability must be assessed individually based on his own actions.” *Binay v. Bettendorf*, 601 F.3d 640, 650 (6th Cir. 2010).

As pertains to Defendant Bracey specifically, the allegations of Plaintiff’s Complaint are that Defendant Bracey entered the basement with another officer and a K-9; that Defendant Bracey was behind him and stood and watched the other officer release the K-9; and that, despite having “an opportunity to intervene and stop the attack,” “[h]e didn’t.” Docket No. 1. Plaintiff additionally contends that Defendants Bracey and Harris “lied in their police reports.” *Id.*

Plaintiff has raised several issues of material fact that counsel against finding Defendant Bracey qualifiedly immune at this juncture of the proceedings. The first issue of material fact is whether Plaintiff had already surrendered at the time the K-9 was released. Plaintiff avers that the release of the K-9 was excessive and unwarranted because he “sat on the ground, frozen still, with his hands raised in the air”; he had surrendered and was at gunpoint with a flashlight shining on him; he was not physically resisting; and he did nothing to provoke any force. Docket No. 1. The second issue of material fact is whether Defendant had an opportunity to intervene against the release and attack of the K-9, and failed to do so. Plaintiff avers

that he did. *Id.* The third issue of material fact is whether Defendant Bracey lied in his police report regarding Plaintiff's arrest. Again, Plaintiff contends that he did. *Id.*

Plaintiff has a clearly established right to be free from the excessive use of force during an arrest, and to have truthful police reports filed regarding said arrest. Accepting Plaintiff's factual allegations as true, Plaintiff has raised genuine issues of fact that go to the heart of Defendant Bracey's qualified immunity defense. Accordingly, it would be inappropriate to grant Defendant Bracey's Motion for Judgment on the Pleadings and/or Motion to Dismiss.

For the reasons discussed above, the undersigned recommends that the instant Motions (Docket Nos. 16, 37) be DENIED.

Under Rule 72(b) of the Federal Rules of Civil Procedure, any party has fourteen (14) days after service of this Report and Recommendation in which to file any written objections to this Recommendation with the District Court. Any party opposing said objections shall have fourteen (14) days after service of any objections filed to this Report in which to file any response to said objections. Failure to file specific objections within fourteen (14) days of service of this Report and Recommendation can constitute a waiver of further appeal of this Recommendation. *See Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L. Ed. 2d 435 (1985), *reh'g denied*, 474 U.S. 1111 (1986); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72.


E. CLIFTON KNOWLES
United States Magistrate Judge