No. 20-43

In the Supreme Court of the United States

AMANDA N. REICH & ELISE DAVIDSON, successor administratrix of the estate of JOSHUA STEVEN BLOUGH,

Petitioners,

v.

CITY OF ELIZABETHTOWN, KENTUCKY, MATTHEW MCMILLEN & SCOT RICHARDSON,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents shot and killed Joshua Blough, petitioner's fiancé. In the ensuing Section 1983 litigation, they were granted summary judgment based on the confluence of two legal doctrines, both of which require correction.

First, the district court disregarded petitioner's sworn affidavit as to the key issue in the case, invoking the sham-affidavit rule. As properly applied, that rule is a narrow exception to the normal role of the judge at summary judgment, whose "function * * * is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Tolan* v. *Cotton*, 572 U.S. 650, 656 (2014) (quotation marks omitted). See also *Van Asdale* v. *International Game Tech.*, 577 F.3d 989, 998 (9th Cir. 2009) ("[T]he sham affidavit rule is in tension with the principle that a court's role in deciding a summary judgment motion is not to make credibility determinations or weigh conflicting evidence" and therefore "should be applied with caution.").

As applied by the Sixth Circuit, however, the exception threatens to swallow the rule. That court affirmed the exclusion of petitioner's affidavit despite that it was corroborated by other evidence, and that it can only be said to conflict with her prior testimony if that concept is expanded to the point of absurdity. As the Third Circuit has recognized, the Sixth Circuit's approach to the sham-affidavit rule is an outlier among the courts of appeals. See *Jiminez* v. *All Am. Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007) (acknowledging circuit split).

Second, the Sixth Circuit held in the alternative that, even if it were to consider petitioner's affidavit, respondents would escape liability via the clearly es-

tablished law prong of qualified immunity. Pet. App. 21a-22a. But as our petition documented, there is growing agreement among judges and other observers that qualified immunity has no basis in statute or common law; that it is unfair to litigants and bad for the development of the law; and that it is long overdue for reexamination. See Pet. 25-33.

The Court should grant certiorari to resolve these important questions.

A. The Court should resolve the circuit split over the scope of the sham-affidavit rule.

As we explained (Pet. 16-19), the Sixth Circuit is on the short side of a recognized circuit conflict regarding the scope of the sham-affidavit rule. See *Jiminez*, 503 F.3d at 254 (recognizing that while "[s]ome federal courts"—including the Sixth Circuit—"have adopted a particularly robust version of the sham affidavit doctrine," "this Court and other courts of appeals have adopted a more flexible approach").

1. Respondents deny the existence of this split—but they can do so only by blithely disregarding what the Sixth Circuit said, and did, in this case.

First, it is simply not true that the Sixth Circuit "only excludes 'plainly contradictory' affidavits." BIO 17. See also *id.* at 18 (asserting that "only subsequent affidavits that plainly contradict prior testimony are excluded"). That argument is directly at odds with what the Sixth Circuit panel below expressly said:

> [I]f no direct contradiction exists, "the district court should not strike or disregard th[e] affidavit *unless* the court determines that the affidavit 'constitutes an attempt to create a sham fact issue.'"

Pet. App. 9a (quoting *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir. 2006)) (emphasis added). In other words, courts are permitted to exclude an affidavit as a sham even "if no direct contradiction exists." *Ibid.*

Indeed, the Sixth Circuit went on to apply that principle here, concluding that, "[e]ven * * * viewing [petitioner's] affidavit as noncontradictory," it is appropriately excluded as a "sham." Pet. App. 11a.

As we explained, this approach is wildly out of touch with those of the other circuits, in which an actual contradiction of prior testimony is a necessary—though not sufficient—precondition to applying the sham-affidavit rule. Pet. 16-18; see, *e.g.*, *Van Asdale*, 577 F.3d at 998-999 (requiring a "clear and unambiguous" "inconsistency * * * to justify striking the affidavit"); *Furcron* v. *Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1306 (11th Cir. 2016) (sham-affidavit rule "only operates in a limited manner to exclude unexplained discrepancies and inconsistencies").

Second, respondents argue that the Sixth Circuit "has adopted a narrow definition of the term 'contradictory.'" BIO 17 (citing Pet. App. 9a). First of all, a narrow definition of "contradictory" does little to restrain the doctrine where, as we have demonstrated, affidavits may be excluded even if they are *not* contradictory. But even setting that problem aside, the Sixth Circuit's actual application of the doctrine belies any suggestion that its conception of contradiction is narrow in practice.

The "contradiction" identified by the court below was that petitioner, at her deposition, "said that she did not know" "the distance between Blough and the of-

ficers." Pet. App. 11a.[1] "Her [later] affidavit, asserting that she *does know*, therefore contradicts." *Ibid.*

As we explained (Pet. 21), to call that a contradiction is to deny the self-evident fact that people may, through objective records, have their recollections refreshed.[2] And it is not as if petitioner provided no explanation for the difference in her recall at her deposition and afterwards. To the contrary, she stated that, after having avoided the area for years "due to the severe emotional and mental trauma [she] suffered witnessing the shooting death of [her] fiancé," she "returned to the scene of the incident" after her deposition and recreated the shooting "with the aid of photographs of the scene taken by Kentucky State Police investigators." Pet. App. 72a-73a (Reich affidavit).

Respondents find it "amazing[]" that petitioner "then had total recall and vividly remembered, to the inch, where everyone was positioned during this 2015 shooting." BIO 20. But a picture is worth a thousand snarky words. Compare again the photographs at petition appendix 76a and 77a. It should be no surprise at all that someone who was present for the shooting would be able to accurately reconstruct the scene based

[1] In fact, while petitioner stated she did not "want to guess about it," she also testified, at the same deposition, to an estimated distance of "probably 20 feet" (Pet. App. 27a-28a)—a distance that matches rather closely the 25.5-foot measurement reflected in her affidavit.

[2] See Fed. R. Evid. 612; 1 *McCormick on Evidence* § 9 (8th ed. 2020) ("It is clear from everyday experience that the latent memory of an experience can sometimes be revived by a familiar image or statement. * * * A person's retrieval of any part of a past experience can help the person recall other parts in the same field of awareness, and a new experience can stimulate the recall of prior similar events.").

on the detailed, contemporaneous photographs petitioner had available to her. See Pet. 23-24.

This exercise also lays bare another way the Sixth Circuit has departed from the other courts of appeals. As we showed (at 18-19, 22-24), several circuits are explicit that they will "refuse[] to disregard" even an "otherwise questionable affidavit" "[w]hen there is independent evidence in the record to bolster" it. *Jiminez*, 503 F.3d at 254; accord *Palazzo ex rel. Delmage* v. *Corio*, 232 F.3d 38, 43-44 (2d Cir. 2000); *Gemmy Indus. Corp.* v. *Chrisha Creations Ltd.*, 452 F.3d 1353, 1359 (Fed. Cir. 2006); see 11 *Moore's Federal Practice* § 56.94[5][c] (2020) ("[W]hen there is independent evidence in the record to bolster an otherwise questionable affidavit * * * courts usually refuse to disregard the affidavit because the concern that the affidavit was offered simply to create a sham dispute as to a factual issue is alleviated.").

The Kentucky State Police photographs constitute exactly such corroborating evidence, as does the testimony of the officers themselves, who place all the actors in similar locations to those in petitioner's reconstruction. See Pet. 23-24. The dissenting judge below highlighted this corroboration (Pet. App. 29a-30a), but the majority did not even respond—and neither do respondents.

In sum, the circuits are plainly divided as to the scope of the sham-affidavit rule. See *Jiminez*, 503 F.3d at 254 (acknowledging split).

2. Respondents say nothing at all in response to our demonstration that the Sixth Circuit's approach represents a complete departure from the principles that animate the sham-affidavit doctrine—and that justify its existence as an exception to the normal rule

that a judge may not weigh the evidence at summary judgment. See Pet. 19-25. That silence is telling.

3. Respondents offer a fallback position, asserting that *even if* a circuit split exists, "[t]here is no need for national uniformity." BIO 26. To the contrary, the fact that petitioner's affidavit was excluded just because her fiancé happened to be shot in Kentucky—rather than one of thirty-one States and territories comprising the Second, Third, Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits—is exactly the kind of geographical disparity this Court routinely exercises its certiorari jurisdiction to correct.

Moreover, as we pointed out, the issue is constantly recurring. See Pet. 25 n.11 (noting that a Westlaw search for "sham" within three words of "affidavit" returned 235 federal opinions issued within the last twelve months). And it is important: If judges are permitted to freely disregard party affidavits at summary judgment—based not on truly unexplained conflicts with prior testimony but on a gut sense that the affidavit is unreliable—the entire character of the summary judgment procedure is transformed. See, *e.g.*, *Tolan*, 572 U.S. at 656 ("[A] 'judge's function' at summary judgment is not 'to weigh the evidence and determine the truth of the matter.'"); Fed. R. Civ. P. 56(c)(4) (allowing "[a]n affidavit" to be "used to * * * oppose a motion" for summary judgment).

This is not some quirky idiosyncrasy of the Sixth Circuit that may be safely let alone; rather, the sham-affidavit rule goes to the heart of summary judgment procedure—in many respects the centerpiece of federal civil litigation.

4. Finally, respondents suggest that certiorari is inappropriate because considering petitioner's affidavit "would not change the outcome of the respondents'

summary judgment motion." BIO 26 (capitalization altered). Not so. True, the district court observed in a footnote, after extensive analysis of the case under respondents' version of the facts, that "[e]ven if the Court accepted Reich's affidavit," that "would not change the Court's ruling." Pet. App. 53a-54a n.4.[3] But the court of appeals disagreed. For the Sixth Circuit panel, the difference between a five-foot distance and a twenty-five foot distance was the difference between constitutional exoneration, on the one hand; and a holding based solely on qualified immunity, on the other:

> [F]or the same reasons the officers did not violate constitutional law by shooting Blough if he was five feet away, they did not violate *clear* constitutional law by shooting Blough if he was twenty-five to thirty-six feet away.

Pet. App. 21a-22a. In other words, if petitioner's affidavit is considered, it is the clearly established law prong of qualified immunity that does all the work in this case. And as we explain, that doctrine is long overdue for reconsideration.

B. The Court should reverse or recalibrate qualified immunity.

The petition demonstrated that "a growing, cross-ideological chorus of jurists and scholars" is "urging re-

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[3] But cf., *e.g.*, *Wright* v. *Spaulding*, 939 F.3d 695, 701 (6th Cir. 2019) ("As Chief Justice Marshall explained * * * , '[t]he question actually before the Court is investigated with care, and considered in its full extent.' Collateral issues rarely receive the same treatment. Thus, dictum is less likely to reflect a court's deliberate judgment.") (citations omitted) (quoting *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)); *United States* v. *Burris*, 912 F.3d 386, 410 (6th Cir. 2019) (Kethledge, J., concurring in the judgment) ("The same criticism goes for alternative holdings.").

calibration of contemporary immunity jurisprudence and its real world implementation." *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring dubitante) (quotation marks omitted); see generally Pet. 26-30 (collecting authorities).

1. Respondents' first response is to characterize this demonstration as "noise from some news media, certain special interest groups, or political forces." BIO 28. Unlike respondents, we do not believe that the considered views of Justices Thomas and Sotomayor are "noise." See, *e.g.*, *Baxter* v. *Bracey*, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting from denial of certiorari) ("There likely is no basis for the objective inquiry into clearly established law that our modern [qualified immunity] cases prescribe."); *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (noting that the current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment"). The same goes for the numerous respected lower-court judges who have urged reconsideration of qualified immunity. Pet. 27-29. See also *Jamison* v. *McClendon*, __ F. Supp. 3d ___, 2020 WL 4497723, at *1-3, 7-17, 29 (S.D. Miss. Aug. 4, 2020) (offering exhaustive and scathing historical and doctrinal critique of qualified immunity, concluding that "the status quo is extraordinary and unsustainable," and calling on this Court to "waste no time in righting this wrong").

2. As for a substantive response, respondents offer four purported "policy reasons" for qualified immunity—but we have already answered each of them:

- "First, * * * the good faith decisions of government officials should be given the benefit of the doubt." BIO 28. That is a (charitable) *descrip-*

tion of qualified immunity, not a normative *justification* for the doctrine.

- "Secondly, qualified immunity allows courts to winnow certain cases from their already-crowded dockets." BIO 28. That is a bug, not a feature: Qualified immunity allows courts to avoid deciding difficult constitutional questions, leading to "stagnation" in the law of important rights. *E.g.*, *Zadeh* v. *Robinson*, 928 F.3d 457, 479-480 (5th Cir. 2019) (Willett, J., dissenting in part) (describing the "Escherian Stairwell" created by courts' reliance on the clearly established law prong: "Plaintiffs must produce precedent even as fewer courts are producing precedent."); see Pet. 29. And, because plaintiffs must allege and then prove that their constitutional rights were violated, qualified immunity only changes the outcome when there *is* a constitutional violation.
- "Thirdly, * * * [g]ood candidates" will supposedly be "reluctant to serve and protect as a sworn police officer if they have to risk their own personal assets to do so." BIO 29. As we explained, officers are universally indemnified, with individual officers ultimately responsible for only 0.02% of damages paid out to victims of police violence—or $200 out of a million-dollar damages award. Pet. 32; see Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014).[4]

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[4] In 99.59% of cases resolved in plaintiffs' favor, the individual officers involved contributed *zero* dollars to the settlement or damages award. Schwartz, *supra*, at 890.

- "Fourthly," respondents contend, "the immunity afforded by this doctrine is only 'qualified,' and is partial as opposed to absolute." BIO 29. That assumes the conclusion: One of our primary contentions is that, *as applied*, "qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior." *Zadeh*, 928 F.3d at 479 (Willett, J., dissenting in part); accord *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting) (the current "approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers."); see Pet. 27-28.

In any event, that these are purportedly "policy reasons" for qualified immunity (BIO 28) is part of our point. As Justice Thomas has repeatedly explained, the fact that "the Court adopted the [clearly established law] test not because of 'general principles of tort immunities and defenses,' but because of a 'balancing of competing values' about litigation costs and efficiency" is a reason to reconsider it, not to double down. *Baxter*, 140 S. Ct. at 1864 (Thomas, J., dissenting from denial of certiorari). See also *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in the judgment). In other words, "[u]ntil 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." *Id.* at 1872; see Pet. 31-32.

3. The remainder of respondents' brief is devoted to cataloguing Sixth Circuit precedents on the use of force[5] and arguing that "[t]here was no case on the

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[5] Some of respondents' characterizations are curious. Respondents maintain that the court granted qualified immunity in *Boyd* "despite the lack of imminent threat," but admit that the suspect

books that clearly established beyond debate that what these officers did was unconstitutional." BIO 36; see *id.* at 29-42.[6]

That is all largely beside the point. To the extent respondents are arguing that no constitutional violation occurred, if that were so clear, then the Sixth Circuit would have held as much—rather than relying on the clearly established law prong of qualified immunity once petitioner's affidavit was considered. Pet. App. 21a-22a; cf. *id.* at 39a (Moore, J., dissenting) (explaining that under Sixth Circuit precedent, "reasonable police officers do *not* shoot non-compliant persons brandishing knifes when they are *not* advancing toward another individual in the immediate area, even if the person is mentally ill, suicidal, and/or yelling threats to the officers.").

And if respondents' contention is instead that the clearly established law prong was applied appropriately here, that is irrelevant: Our principal argument is that the doctrine is wrong and should be reversed or recalibrated. The Court should grant certiorari to do just that.

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there was "pointing his gun at the officers." BIO 31 (citing *Boyd* v. *Baeppler*, 215 F.3d 594 (6th Cir. 2000)).

[6] In the course of their argument, respondents accuse us of several supposed misrepresentations that we are unable to locate anywhere in our petition. Compare BIO 38 ("Petitioners misrepresent this, arguing that Richardson's Shot #1 was to Blough's back and Shot #2 to his front."), with Pet. 9 (citing the Sixth Circuit majority for the fact that Blough was shot in the back). Compare also BIO 39 ("Petitioners further argue Blough's arm was not raised."), *ibid.* ("Petitioners argue that these neighbors did not see Blough and were safe in their homes."), with Pet. (not saying either of those things).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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