

No. _____

In The
Supreme Court of the United States

AUSTIN J. BASS,

Petitioner,

v.

PATRICK M. GREVE, et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

KELI J. OLIVER*
ALLISON L. BUSSELL
MELISSA ROBERGE
DEPARTMENT OF LAW FOR THE
METROPOLITAN GOVERNMENT
OF NASHVILLE AND DAVIDSON
COUNTY, TENNESSEE
P.O. Box 196300
Nashville, TN 37219
Telephone: (615) 862-6341
Facsimile: (615) 862-6352
keli.oliver@nashville.gov

Counsel for Petitioner
**Counsel of Record*

QUESTIONS PRESENTED

Officer Austin Bass (“Officer Bass”) responded to a burglar alarm and found Patrick Greve (“Greve”) outside a locked and closed nightclub, wrapped in a tablecloth, with watery bloodshot eyes and the handle to the door at Greve’s feet. Greve informed Officer Bass that he had attempted to enter the locked building to retrieve some of his personal belongings. The nightclub manager informed Officer Bass that Greve was not authorized to enter the locked building. Officer Bass arrested Greve for public intoxication and attempted burglary. The questions presented are:

1. Whether Officer Bass had probable cause to arrest under the Fourth Amendment where the suspect admitted to trying to enter a closed and locked building, breaking a door handle in the process, but offered a questionable claim of an innocent mental state when explaining his behavior to Officer Bass.
2. Whether, even if there was no probable cause to arrest Greve for any offense, Officer Bass was entitled to qualified immunity because the law was not clearly established in this regard.

PARTIES TO THE PROCEEDINGS

Petitioner Austin Bass, in his individual capacity, was a Defendant-Appellee in the Court of Appeals.

Respondent Patrick Greve was the Plaintiff-Appellant in the Court of Appeals.

Respondents M Sreet Entertainment Group and Oleg Bulet were Defendant-Appellees in the Court of Appeals.

CORPORATE DISCLOSURE STATEMENT

Petitioner Austin Bass is a natural person, not a corporation.

RELATED CASES

- *Greve v. Bass, et al.*, No. 3:16-cv-00372, U.S. District Court for the Middle District of Tennessee. Judgment entered September 6, 2018.
- *Greve v. Bass, et al.*, No. 18-6069, U.S. Court of Appeals for the Sixth Circuit. Judgment entered February 25, 2020.
- *Greve v. Bass, et al.*, No. 18-6069, U.S. Court of Appeals for the Sixth Circuit. Judgment entered April 1, 2020.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
RELATED CASES	ii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
OPINIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVI- SIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	3
A. Factual Background	4
B. Relevant Case Proceedings	6
C. Basis for Federal Jurisdiction	7
REASONS FOR GRANTING THE PETITION.....	8
I. THE SIXTH CIRCUIT’S DECISION RE- QUIRING A POLICE OFFICER TO CREDIT A SUSPECT’S EXPLANATION CREATES A HEIGHTENED STANDARD OF PROB- ABLE CAUSE THAT CONFLICTS WITH PRECEDENT FROM THIS COURT, OTHER CIRCUITS, AND EVEN THE SIXTH CIR- CUIT ITSELF	8

TABLE OF CONTENTS—Continued

	Page
II. THIS COURT SHOULD REVERSE AND GRANT QUALIFIED IMMUNITY TO OFFICER BASS BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT HE DID NOT HAVE PROBABLE CAUSE TO ARREST GREVE UNDER THE PRECISE CIRCUMSTANCES THAT HE FACED.....	15
CONCLUSION.....	20

APPENDIX

United States Court of Appeals for the Sixth Circuit Opinion, dated February 25, 2020	App. 1
United States District Court for the Middle District of Tennessee Memorandum and Order, dated September 6, 2018	App. 43
United States Court of Appeals for the Sixth Circuit Order denying <i>en banc</i> review, dated April 1, 2020	App. 60

TABLE OF AUTHORITIES

	Page
CASES	
<i>Ahlers v. Schebil</i> , 188 F.3d 365 (6th Cir. 1999)	12
<i>Ashcroft v. al-Kidd</i> , 563 U.S. 731 (2011)	15
<i>City and County of San Francisco v. Sheehan</i> , 135 S. Ct. 1765 (2015)	19
<i>Criss v. Kent</i> , 867 F.2d 259 (6th Cir. 1988).....	12
<i>Crockett v. Cumberland Coll.</i> , 316 F.3d 571 (6th Cir. 2003)	12
<i>District of Columbia v. Wesby</i> , 138 S. Ct. 577 (2018).....	9, 10, 16, 17, 18
<i>Greve v. Bass</i> , 805 F. App'x 336 (6th Cir. 2020).....	1
<i>Greve v. Bass</i> , 3:16-CV-0372, 2018 WL 4254650 (M.D. Tenn. Sept. 6, 2018).....	1
<i>Hunter v. Bryant</i> , 502 U.S. 224 (1991)	15
<i>Illinois v. Gates</i> , 462 U.S. 213 (1983).....	8
<i>Kaley v. United States</i> , 571 U.S. 320 (2014)	8
<i>Marks v. Carmody</i> , 234 F.3d 1006 (7th Cir. 2000)	10
<i>Maryland v. Pringle</i> , 540 U.S. 366 (2003)	8
<i>Mitchell v. Forsyth</i> , 472 U.S. 511 (1985)	19
<i>Mullenix v. Luna</i> , 136 S. Ct. 305 (2015).....	16
<i>Ramirez v. City of Buena Park</i> , 560 F.3d 1012 (9th Cir. 2009).....	11
<i>Royster v. Nichols</i> , 698 F.3d 681 (8th Cir. 2012)	11
<i>Saucier v. Katz</i> , 533 U.S. 194 (2001).....	18

TABLE OF AUTHORITIES—Continued

	Page
<i>Sennett v. United States</i> , 667 F.3d 531 (4th Cir. 2012)	11
<i>White v. Pauly</i> , 137 S. Ct. 548 (2017).....	16, 17
<i>Williams v. Consol. City of Jacksonville</i> , 381 F.3d 1298 (11th Cir. 2004).....	19
 CONSTITUTIONAL PROVISION	
U.S. Const. amend. IV	2
 STATUTES	
28 U.S.C. § 1254	1
28 U.S.C. § 1291	8
28 U.S.C. § 1331	7
42 U.S.C. § 1983	2
Tenn. Code Ann. § 39-14-402.....	3
Tenn. Code Ann. § 39-14-408.....	3
Tenn. Code Ann. § 39-17-310.....	3

PETITION FOR A WRIT OF CERTIORARI

Petitioner Austin Bass respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

**OPINIONS BELOW**

The opinion of the Court of Appeals is reported at 805 F. App'x 336 (6th Cir. 2020); it is reproduced in the appendix hereto ("App.") at App. 1. The opinion of the District Court for the Middle District of Tennessee is reported electronically at 3:16-CV-0372, 2018 WL 4254650 (M.D. Tenn. Sept. 6, 2020) and reproduced at App. 43. The denial of Officer Bass's petition for *en banc* review by the Sixth Circuit Court of Appeals is reproduced at App. 60.

**JURISDICTION**

The judgment of the Court of Appeals was entered on February 25, 2020. By Order entered April 1, 2020 (App. 60), the Court of Appeals denied Petitioner Austin Bass's petition for a rehearing *en banc*. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).



**CONSTITUTIONAL AND STATUTORY
PROVISIONS INVOLVED**

The Fourth Amendment, 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.

Section 1983, Title 42, provides, in relevant part:

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,
...

Tennessee law defines the offenses of attempted burglary, public intoxication, and vandalism, in pertinent part, respectively, as follows:

A person commits the offense of vandalism “who knowingly causes damage to or the destruction of any real or personal property of another or of the state, the United States, any

county, city, or town knowing that the person does not have the owner's effective consent; . . .”

Tenn. Code Ann. § 39-14-408;

A person commits the offense of public intoxication when the person “appears in a public place under the influence of a controlled substance, controlled substance analogue or any other intoxicating substance to the degree that [t]he offender may be endangered; [t]here is endangerment to other persons or property; or [t]he offender unreasonably annoys people in the vicinity.”

Tenn. Code Ann. § 39-17-310(a);

Attempted Burglary: Attempted burglary occurs when a person, “without the effective consent of the property owner,” attempts to enter “a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault.”

Tenn. Code Ann. § 39-14-402(a).



STATEMENT OF THE CASE

The questions presented arise from a summary judgment granted by the District Court and reversed by the Sixth Circuit as to Petitioner Officer Bass. The factual background of this case is discussed in detail in the District Court Opinion, as set forth immediately

below. In addition, where necessary, references herein are made directly to other documents identified by name, record entry number (“RE ___”), and record page number (“PageID# ___”).

A. Factual Background

Jack Gavin hired Patrick Greve to work a private event for recording artist Erica Nicole at a local Nashville Restaurant/Club known as Citizen (the “Club”) on February 24, 2015. Plaintiff’s duties at the Club included working as a general gopher or roadie, setting up and breaking down the stage, and taking photographs. Howard Bennett served as the production manager and sound engineer for the Erica Nicole event, and Austin Rothrock and Kendal Kramer were also hired to work as part of the stage crew. During the event, Plaintiff drank some alcoholic beverages and said hello to Oleg Bulut, the manager of the Club, as Mr. Bulut passed through the kitchen.

After the event, Plaintiff believed his shift was over, but Gavin asked Plaintiff to help Kramer and Rothrock load up the truck. The truck used by Plaintiff, Kramer, and Rothrock to reload the equipment was stationed at the end of the ramp to the Club, and anyone who stepped out six or seven steps from the Club front door would have been able to see the flatbed truck. After loading out the stage equipment, Plaintiff tried to open the door to the Club and discovered it was locked. When

Plaintiff realized he could not reenter the Club, Plaintiff began telephoning Gavin and searched for Gavin's vehicle, which was parked in the Whiskey Kitchen parking lot across the street from the Club. When Kramer realized he was locked out he went around the building banging on doors and shouting, and ultimately found a piece of conduit and used it to open the front door to the Club. Kramer recalls the alarm to the Club going off when the door opened, but no other person was with him when he pried open the door. When Plaintiff returned to the Club from a nearby parking lot, Kramer and Rothrock informed Plaintiff they had their stuff and drove away, leaving Plaintiff.

After Kramer and Rothrock drove away, Plaintiff tried to open the front door to get his coat, tie, shirt, and camera bag from inside the Club, and the door handle fell off. Once the door handle to the Club came off in his hand, Plaintiff wrapped himself in a tablecloth and waited for someone to show up since Gavin was his ride home. Plaintiff heard the alarm going off at the Club before the police officers arrived. The first person to arrive was Officer Austin Bass of the Metro Nashville Police Department. When Officer Bass saw Plaintiff, Plaintiff was wearing a tablecloth, and Officer Bass understood he was responding to a possible burglary. Office Bass arrived at 2:00 a.m. the morning of February 24, 2015. Officer Bass testified it was cold, Plaintiff was not wearing adequate clothing and the Club alarm was going off. Officer Bass approached

Plaintiff, who informed Officer Bass that he needed his coat and other belongings from inside the Club. Officer Bass then placed Plaintiff in handcuffs and inside the police car. Mr. Bulut returned to the Club in response to being told the Club alarm was going off. Mr. Bulut was asked by Officer Bass whether Plaintiff was authorized to be at the Club at that time or to reenter the building; Mr. Bulut replied he was not. Mr. Bulut then entered the Club to disable the alarm and walk through the building with police officers to determine if anything was missing or out of place.

After speaking with Mr. Bulut, Officer Bass charged Plaintiff with attempted burglary and public intoxication. A Night Court Commissioner found probable cause for the charges of attempted burglary and public intoxication. On June 1, 2015, the two criminal charges initiated against Plaintiff were dismissed without trial, with those dismissals being the final disposition of the charges.

(App. 44-46).

B. Relevant Case Proceedings

Petitioner Officer Bass arrested Plaintiff, Patrick Greve, on February 25, 2015, for attempted burglary and public intoxication. The following year on February 25, 2016, Plaintiff filed suit against Officer Bass, the Metropolitan Government of Nashville and Davidson County, M Street Entertainment, and Oleg Bulut. (Complaint, RE 1, PageID# 1-18). The district

court dismissed the claims against the Metropolitan Government on March 3, 2017. (Memorandum and Order on Metro Motion to Dismiss, RE 47, PageID# 307-314). Officer Bass moved for summary judgment on February 1, 2018. (Motion for Summary Judgment, RE 53, 54, 55, PageID# 385).

On September 6, 2018, the District Court granted the remaining defendants' motions for summary judgment finding, among other things, that Officer Bass had probable cause to arrest Plaintiff for attempted burglary and public intoxication. (App. 43-59). Plaintiff timely filed his appeal on October 4, 2018. (Notice of Appeal, RE 87, PageID# 2269-2270). On February 25, 2020, a divided panel of the Sixth Circuit reversed the grant of summary judgment to Officer Bass, with the Majority Opinion basing its ruling on Officer Bass not accepting Greve's explanation for his behavior on the night in question: "Officer Bass's refusal to consider the totality of facts and circumstances undermines his contention that he had probable cause to arrest Greve. That refusal, if proven at trial, would be a violation of Greve's rights." (App. 29). Officer Bass then filed a petition for rehearing *en banc* that was denied on April 1, 2020. (App. 60).

C. Basis for Federal Jurisdiction

The U.S. District Court for the Middle District of Tennessee has subject matter jurisdiction over this matter because it involves a federal question. 28 U.S.C. § 1331. The Sixth Circuit Court of Appeals had

jurisdiction over the appeal because it was an appeal from a final decision by the District Court. 28 U.S.C. § 1291.



REASONS FOR GRANTING THE PETITION

I. THE SIXTH CIRCUIT’S DECISION REQUIRING A POLICE OFFICER TO CREDIT A SUSPECT’S EXPLANATION CREATES A HEIGHTENED STANDARD OF PROBABLE CAUSE THAT CONFLICTS WITH PRECEDENT FROM THIS COURT, OTHER CIRCUITS, AND EVEN THE SIXTH CIRCUIT ITSELF.

To determine whether an officer had probable cause for an arrest, “we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.” *Maryland v. Pringle*, 540 U.S. 366, 371 (2003). Probable cause is “a fluid concept” that is “not readily, or even usefully, reduced to a neat set of legal rules,” *Illinois v. Gates*, 462 U.S. 213, 232 (1983). It “requires only a probability or substantial chance of criminal activity, not an actual showing of such activity.” *Id.* at 243-244 n.13. Probable cause “is not a high bar.” *Kaley v. United States*, 571 U.S. 320, 338 (2014).

Officer Bass had probable cause to arrest Greve for vandalism, public intoxication, and attempted burglary and, as the Sixth Circuit Dissenting Opinion

points out, was under no obligation to “credit [] the story of a visibly intoxicated man wrapped in a tablecloth over the club manager who had no apparent reason to lie.” (App. 42). The Majority Opinion’s holding otherwise creates a probable cause standard that requires a police officer to credit a suspect’s explanation of innocence even in light of contradictory evidence, and thus conflicts with previous decisions of this Court, other Circuit Courts of Appeals, and even previous decisions of the Sixth Circuit itself. Thus, review by this Court is warranted.

Specifically, the Sixth Circuit’s ruling conflicts with this Court’s decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), which addressed similar issues of police officers faced with making credibility determinations and decisions as to whether a person’s belief that he had a right to be in a residence or establishment that did not belong to him could defeat probable cause. *Wesby* involved the arrest of partygoers at a residence where the partygoers believed they had a right to be by way of permission of the purported lessee. And the *Wesby* Court expressly rejected the notion “that bona fide belief of a right to enter defeats probable cause, that officers cannot infer a suspect’s guilty state of mind based on his conduct alone, or that officers must accept a suspect’s innocent explanation at face value.” *Id.* at 593.

Notwithstanding *Wesby*, the Sixth Circuit found that Officer Bass lacked probable cause to arrest Greve for attempted burglary because Greve, although he admitted trying to access the locked nightclub, had

belongings left in the nightclub, believed that he had a right to try and re-enter the locked nightclub to retrieve those belongings, and articulated that belief to Officer Bass. But, pursuant to this Court’s precedent, “innocent explanations—even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect.” *Id.* at 577.

Moreover, in this case, Greve’s explanation *was* contradicted. The Sixth Circuit Majority Opinion largely disregards the contradictory statements of Oleg Bulut, the nightclub manager who responded to the burglar alarm that also brought Officer Bass to the scene because, in hindsight, those statements appear to have been inaccurate. But Officer Bass had no reason to know that at the time, and “probable cause does not require officers to rule out a suspect’s innocent explanation for suspicious facts.” *Wesby*, 138 S. Ct. at 588. Because the Sixth Circuit’s decision introduced a heightened standard of probable cause requiring officers to credit a suspect’s statements even in the face of contradictory evidence, it conflicts with *Wesby*, and this Court should grant this Petition to resolve that conflict.

In addition, the Sixth Circuit’s imposition of this heightened standard of probable cause to arrest is contrary to decisions of myriad other Circuits. For example, the Seventh Circuit held in *Marks v. Carmody*, 234 F.3d 1006 (7th Cir. 2000) that police officers did not need to “accept as established the evidence [the suspect] had proffered that tended to show that he did not act with the requisite intent to defraud” since “[i]ssues

of mental state and credibility *are for judges and juries to decide.*” *Id.* at 1009 (emphasis added). Similarly, the Eighth Circuit has stated that “[i]t is usually not possible for an officer to be certain about a suspect’s state of mind at the time of a criminal act,” and that an officer “need not rely on an explanation given by the suspect.” *Royster v. Nichols*, 698 F.3d 681, 688 (8th Cir. 2012). The Fourth Circuit has also ruled that the probable cause standard gives officers latitude to discount innocent explanations for suspicious behavior. *See Sennett v. United States*, 667 F.3d 531, 536 (4th Cir. 2012) (a suspect’s “innocent explanations for his odd behavior cannot eliminate suspicious facts from the probable cause calculus”). And the Ninth Circuit has explicitly pointed out why crediting a suspect’s claims of an innocent state of mind should not be a part of the probable cause analysis at the time of arrest, noting that “[r]arely will a suspect fail to proffer an innocent explanation for his suspicious behavior. The test is not whether [his] conduct . . . is consistent with innocent behavior; [police] officers do not have to rule out the possibility of innocent behavior [before making an arrest].” *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1024 (9th Cir. 2009).

Finally, the Sixth Circuit ruling that Officer Bass should have credited Greve’s “innocent” explanation for why he was attempting to access a locked building and to allow that explanation to trump all other facts known to Officer Bass at the time contradicts longstanding precedent within the Sixth Circuit itself. The Sixth Circuit has long held that a police officer “is

under no obligation to give any credence to a suspect's story," *Criss v. Kent*, 867 F.2d 259, 263 (6th Cir. 1988), and that a "plausible explanation" should not "in any sense require the officer to forego arrest pending further investigation if the facts as initially discovered provide probable cause," *id.*; see also *Crockett v. Cumberland Coll.*, 316 F.3d 571, 581-83 (6th Cir. 2003); *Ahlers v. Schebil*, 188 F.3d 365, 371 (6th Cir. 1999).

Here, the facts known to Officer Bass at the time of Greve's arrest, in addition to Greve's explanation of his behavior, were as follows:

1. He was responding to a burglar alarm being activated at a nightclub. (Dispatch Tapes, Notice of Filing, RE 58, PageID# 532; Plaintiff's Response to Statement of Undisputed Material Facts, RE 63, PageID# 550, ¶ 5).
2. Greve was outside the nightclub at 2:00 a.m. wrapped in a tablecloth (Greve Depo., RE 53-1, PageID# 415; Bass Depo., RE 53-4, PageID# 446, 447; Plaintiff's Response to Statement of Undisputed Material Facts, RE 63, PageID# 550, ¶ 6).
3. Greve admitted to pulling the door knob off. (Greve Depo., RE 53-1, PageID# 420; Plaintiff's Response to Statement of Undisputed Material Facts, RE 63, PageID# 551, ¶ 8).
4. Greve had bloodshot, watery eyes. (Officer Billy Price Depo., RE 53-5, PageID# 459-460; Bass Declaration, RE 53-9, PageID# 464, ¶ 4; Mugshot, RE 53-7, PageID# 462).

5. Greve admitted trying to enter a closed and locked establishment. (Greve Depo., RE 53-1, PageID# 420; Price Depo., RE 53-5, PageID# 459).
6. Greve's explanation for entering a locked building was that he was trying to retrieve his belongings. *Id.*
7. The nightclub manager did not identify anything that did not belong at the nightclub during the walk through with Officer Bass and other police officers. (Bass Depo., RE 53-4, PageID# 451, 452, 453).
8. The nightclub manager, who Greve said could identify him as a worker rather than a potential burglar, told Officer Bass that Greve "was not authorized to be there." (*Id.*; Bulut Depo., RE 53-2, PageID# 439).

The Sixth Circuit Majority Opinion gave short shrift to these undisputed facts supporting probable cause in its analysis, however. As the Sixth Circuit Dissenting Opinion correctly pointed out, the Majority Opinion was tethered to the notion that Officer Bass was required to make a credibility determination as to who was being truthful with him on the scene: Greve or Oleg Bulut, as the two of them told Officer Bass contradictory stories. Bulut told the officers on the scene that the nightclub closed at 10:00 p.m., at which time Bulut "personally saw all the items and personnel out of the [nightclub]." Bulut also told officers that any items left inside the nightclub belonged to the photography company that had already made arrangements

to pick the equipment up the next day. Bulut insisted that Greve was not authorized to be in the Club and indicated willingness to press charges against Greve. (App. at 39-42). These statements directly contradicted Greve's statements and were made by an individual who undisputedly had a legitimate reason to be at the nightclub at that time. The Sixth Circuit Majority Opinion's refusal to recognize the import of these contradictory statements, and its ruling that Officer Bass had some sort of obligation to credit Greve's story simply because he was not behaving as a typical suspect might at the scene of the crime, is inconsistent with the established law of this Court and of multiple Courts of Appeals.

The Sixth Circuit reversed the grant of summary judgment to Officer Bass because "in deciding whether he had probable cause to arrest (and recommend prosecution of) Greve, Bass was required to consider all of the facts and circumstances readily and reasonably within his knowledge, and that his failure—actually *refusal*—to do so in this case, if proved at trial, would be a violation of Greve's rights." (App. 25). In reality, as pointed out by the Dissenting Opinion, the Majority based its reversal on Officer Bass's decision not to credit "the story of a visibly intoxicated man wrapped in a tablecloth over the club manager who had no apparent reason to lie." (App. 42).

In reversing the grant of summary judgment to Petitioner Officer Bass, the Sixth Circuit announced a new standard for probable cause requiring a police officer to accept a suspect's claim of an innocent state

of mind, even when reasonable circumstantial grounds exist to doubt the suspect's credibility. Doing so contravenes clear and settled Supreme Court precedent and precedent from various federal Circuits, including previous cases from the Sixth Circuit; therefore, Officer Bass respectfully asks this Court to grant his Petition and resolve this conflict in the law.

II. THIS COURT SHOULD REVERSE AND GRANT QUALIFIED IMMUNITY TO OFFICER BASS BECAUSE IT WAS NOT CLEARLY ESTABLISHED THAT HE DID NOT HAVE PROBABLE CAUSE TO ARREST GREVE UNDER THE PRECISE CIRCUMSTANCES THAT HE FACED.

Qualified immunity attaches when an official's conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." And as this Court has often reiterated:

To be clearly established, a legal principle must have sufficiently clear foundation in then-existing precedent. The rule must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991) (*per curiam*), which means it is dictated by "controlling authority" or "a robust 'consensus of cases of persuasive authority,'" [*Ashcroft v. al-Kidd*, *supra*, [563 U.S. 731][,] 741-742 (quoting *Wilson v. Layne*, 526 U.S. 603, 617 (1999))]. It is not enough that the rule is suggested by then-existing precedent. The precedent must be clear enough that every

reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply. *See Reichle [v. Howards]*, 566 U.S. [658][,] 666 [(2012)]. Otherwise, the rule is not one that “every reasonable official” would know. *Id.* at 664 (internal quotation marks omitted).

District of Columbia v. Wesby, 138 S. Ct. 577, 589-90 (2018).

Recognizing the importance of the qualified immunity doctrine, this Court has repeatedly admonished lower courts that “clearly established law” should not be defined “at a high level of generality.” *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). The clearly established law must be “particularized” to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Otherwise, “[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.” *Id.* at 639. When no case puts a defendant on notice that his conduct during the relevant time frame was unlawful, he should be granted qualified immunity. *See, e.g., White v. Pauly*, 137 S. Ct. 548, 552 (2017). That the rule of law be specifically delineated is “especially important in the Fourth Amendment context.” *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015).

In recent years, this Court has defined the contours of “clearly established law” even more precisely, holding that, to show that a right was “clearly established,” a plaintiff (or court) must point to a specific

case or cases with similar factual circumstances in which an officer has been held to have violated the Fourth Amendment.¹ *See Wesby*, 138 S. Ct. at 582; *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (*per curiam*). Specifically, the *White* Court, in reversing the lower court and granting qualified immunity, noted that the Tenth Circuit failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment, instead relying on excessive force principles at only a general level. 137 S. Ct. at 552. Likewise, the *Wesby* Court, in reversing and granting qualified immunity, scolded the D.C. Circuit’s failure to identify “a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances.” *Id.* at 591 (citations omitted).

The Sixth Circuit Majority Opinion, like the Tenth Circuit in *White* and the D.C. Circuit in *Wesby*, did not identify a single precedent finding a Fourth Amendment violation under similar circumstances to those that Officer Bass faced. Instead, the Majority cobbled together holdings from three separate cases, with varying facts,² to support their ruling that it was clearly

¹ The exception to the rule that a similar case must be identified is an “obvious case” where “a body of relevant case law” is unnecessary. *See Wesby*, 138 S. Ct. at 582. The Sixth Circuit did not contend that this case is such an “obvious case” that would trigger this exception.

² Indeed, the Dissenting Opinion readily distinguishes the cases relied upon by the Majority. (App. 39-42). Moreover, the existence of a Dissent illustrating that three learned judges

established that Officer Bass lacked probable cause to arrest Greve. In doing so, the Majority Opinion did exactly what the Supreme Court has taken other federal courts to task for doing when reversing those federal courts' denials of qualified immunity and indeed, what now-Justice Kavanaugh criticized the D.C. Circuit for doing in his dissent from the denial of the *en banc* petition in *Wesby*—"creat[ing] a new rule and then appl[y]ing that new rule retroactively against the police officer[]." *Wesby v. D.C.*, 816 F.3d 96, 111 (D.C. Cir. 2016).

During his encounter with Greve, Officer Bass was faced with an unusual factual scenario that, quite candidly, is not well-represented in Fourth Amendment case law. And none of the cases cited by the Sixth Circuit Majority Opinion, even when read together, would have made it "clear to [Officer Bass] that [his] conduct was unlawful in the [particular] situation he confronted." Thus, Officer Bass should have been granted qualified immunity. *See Saucier v. Katz*, 533 U.S. 194 at 194-95 (2001) (citations omitted). This Court should grant review to apply the "clearly established law" standard in accordance with its well-established precedent.

Whether qualified immunity has been erroneously denied to a law enforcement officer sued for trying to carry out his duties on behalf of the government is a

cannot agree as to whether probable cause existed under the circumstances of this case highlight that the law was not "clearly established" in that regard.

question of exceptional importance warranting review. *See, e.g., Williams v. Consol. City of Jacksonville*, 381 F.3d 1298, 1306 (11th Cir. 2004) (noting that race and qualified immunity were two “critically important areas” and thus *en banc* review was justified). The underlying purpose of qualified immunity, where applicable, is to protect government officials such as police officers from having to participate in protracted litigation that might distract those officers from carrying out their duties of protecting and serving the public. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). In that respect, qualified immunity is important not just to individual litigants but to “society as a whole.” *City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015).

Here, the Sixth Circuit Majority Opinion’s denial of qualified immunity undermines the very foundations of the qualified immunity doctrine. It is necessary, particularly in the Fourth Amendment context, to maintain uniformity of court decisions because those decisions directly impact the ability of police officers to perform their duties of protecting and serving the public on a day-to-day basis. The Sixth Circuit’s decision here contravenes established qualified immunity precedent and, far from clearly establishing what constitutes probable cause, makes an officer’s job in determining what may or may not be a lawful arrest even more difficult. Indeed, the Sixth Circuit’s ruling may very well result in a troubling chill in routine law enforcement activity if the Majority Opinion’s conclusion that an officer must credit the alibi of a suspect is

upheld. Accordingly, this case warrants this Court's review.



CONCLUSION

WHEREFORE, Petitioner Austin Bass respectfully requests that this Court grant his Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

KELI J. OLIVER*

ALLISON L. BUSSELL

MELISSA ROBERGE

DEPARTMENT OF LAW FOR THE

METROPOLITAN GOVERNMENT

OF NASHVILLE AND DAVIDSON

COUNTY, TENNESSEE

P.O. Box 196300

Nashville, TN 37219

Telephone: (615) 862-6341

Facsimile: (615) 862-6352

keli.oliver@nashville.gov

Counsel for Petitioner

**Counsel of Record*