No. 20-283

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

REPLY BRIEF FOR THE PETITIONER

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PRELIMINARY STATEMENT

In direct conflict with this Court's decision in *District of Columbia v. Wesby*, 138 S. Ct. 577 (2018), the Sixth Circuit Court of Appeals found that Metropolitan Nashville Police Department Officer and Petitioner Austin Bass lacked probable cause to arrest Respondent Patrick Greve for attempted burglary. The Sixth Circuit found a lack of probable cause merely because Greve, while draped in a tablecloth at 2 a.m. standing outside a locked nightclub with a broken door handle and a sounding burglar alarm, told Officer Bass that he had a right to re-enter and retrieve his belongings.

As outlined in Officer Bass's petition, the following facts—that Greve's response does not dispute—were known to Officer Bass at the time of Greve's arrest:

- Officer Bass responded to a burglar alarm activated at a nightclub. (Dispatch Tapes, Notice of Filing, RE 58, PageID# 532; Pl.'s Resp. to Stmt. of Undisputed Material Facts, RE 63, PageID# 550, ¶ 5.)
- Greve was outside the locked nightclub at 2 a.m. wrapped in a tablecloth. (Greve Dep., RE 53-1, PageID# 415; Bass Dep., RE 53-4, PageID# 446, 447; Pl.'s Resp. to Stmt. of Undisputed Material Facts, RE 63, PageID# 550, ¶ 6.)
- The doorknob was removed from the door and Greve admitted "that the door had fell off when [Greve] went to pull on it." (Greve Dep., RE 53-1, PageID# 420; Pl.'s

Resp. to Stmt. of Undisputed Material Facts, RE 63, PageID# 551, ¶ 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 Dep., RE 53-2, PageID# 439.)

There is no case from any jurisdiction that recognizes an individual's right to enter a closed and locked business without permission. Most jurisdictions define that as attempted burglary. Yet that is exactly what Greve attempted to do. Regardless of whether Greve had permission to be in the building at an earlier time of night, he had no authority to break into it, nor did Officer Bass have reason to believe otherwise. Accordingly, Officer Bass had probable cause to arrest Greve, and the Sixth Circuit erred in denying Officer Bass qualified immunity.

ARGUMENT

I. THIS COURT ROUTINELY CORRECTS THE PLAIN MISAPPLICATION OF THE QUALIFIED IMMUNITY DEFENSE, WHICH IS AN IMMUNITY FROM SUIT, AND SHOULD DO SO HERE.

Greve acknowledges that 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). Resp. 20-21. Rather, clearly established law must be "particularized" to the facts of the case. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). 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).

Greve argues, however, that the Sixth Circuit Court of Appeals did not examine the issue at an overgeneralized level and rather compared this case to others purportedly arising under similar circumstances. The problem for Greve, however, is that the cases he cites are distinguishable in key respects that he ignores.

Radvansky v. City of Olmsted Falls, 395 F.3d 291 (6th Cir. 2005), is distinguishable and highlights the flaw in the Sixth Circuit Majority Opinion's probable cause analysis. In *Radvansky*, the plaintiff *lived at the house* he attempted to enter—a fact on which the *Radvansky* opinion heavily focused. *Id.* at 302-03 ("Because a current tenant cannot be criminally liable for a trespass onto the property in his possession, it follows that a burglary charge against him cannot be sustained."). In other words, Radvansky had a right to re-enter his own locked home, which rendered his account relevant to the probable cause analysis. Greve, however, had no lawful right to break and enter another's locked business merely because he was inside the building earlier the same night.

Other cases to which Greve cites for the notion that a suspect's account must be considered are equally irrelevant, Resp. 24 (citing *Courtright v. City of Battle Creek*, 839 F.3d 513 (6th Cir. 2016); *Wesley v. Campbell*, 779 F.3d 421 (6th Cir. 2015); *Logsdon v. Hains*, 492 F.3d 334 (6th Cir. 2007)). Even crediting Greve's account, he still falls short of establishing a right to re-enter the nightclub at 2 a.m. when the business was closed to the public. There is no law to establish that officers must credit a suspect's explanation and ignore the factual scenario that the officer is confronted with. Leaving one's belongings somewhere does not create an unrestricted right to retrieve them. Greve's account, which at most established a *prior* right to be in the building, did not give him the right to *re-enter* the locked business at 2 a.m. Thus, Officer Bass's rejection of the account does not create a question of fact to be resolved at trial.

Whether the Sixth Circuit's Majority Opinion analyzed the issue at too high a level of generality or simply failed to cite *any* relevant law, the end result is the same: The Sixth Circuit blatantly misapplied the qualified immunity standard. Thus, the Court should grant the petition and reverse the denial of qualified immunity.

Greve's argument that Supreme Court review is not warranted merely to correct error also ignores this Court's unique treatment of the qualified immunity defense over time, with myriad cases recently decided on qualified immunity grounds. *E.g.*, *City of Escondido v. Emmons*, 139 S. Ct. 500, 503-04 (2019) ("The Court of

Appeals made no effort to explain how that case law prohibited Officer Craig's actions in this case. That is a problem under our precedents."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1153-54 (2018) (per curiam) ("Based on that decision, a reasonable officer could have believed the same thing was true in the instant case. In contrast, not one of the decisions relied on by the Court of Appeals supports denying Kisela qualified immunity." (internal citations omitted)); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam); *City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765, 1774 n.3 (2015) (collecting cases and noting that "[b]ecause of the importance of qualified immunity 'to society as a whole,' the Court often corrects lower courts when they wrongly subject individual officers to liability" (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982))).

Greve's response acknowledges this Court's pattern of correcting error in qualified immunity analysis "where the lower court issued a precedential opinion that this Court believed would lead other courts in that circuit down a misguided path." Resp. 22. In *Wesby*, for example, this Court exercised its discretion to "correct [a lower court's] errors" on both probable cause and qualified immunity "because the D.C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote.'" 138 S. Ct. at 589 (quoting *al-Kidd*, 563 U.S. at 735).

The same is true here, warranting the same necessary correction. Qualified immunity provides not merely immunity from liability, but immunity from suit. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Officer Bass should not be put through the rigors of trial in the absence of clearly-established law on point.

II. THE SIXTH CIRCUIT'S HEIGHTENED PROBABLE CAUSE STANDARD—WHICH REQUIRES AN OFFICER TO IGNORE EVIDENCE ESTABLISHING PROBABLE CAUSE AND GIVE WEIGHT TO THE SUSPECT'S EXPLANATION—CONFLICTS WITH ESTABLISHED PRECEDENT.

To determine whether an officer had probable cause for an arrest, this Court "examine[s] the events leading up to the arrest, and then decide[s] '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). It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Illinois v. Gates*, 462 U.S. 213, 243-44 n.13 (1983). Probable cause "is not a high bar." *Kaley v. United States*, 571 U.S. 320, 338 (2014).

As outlined above, Officer Bass properly found probable cause for Greve's arrest where Greve was wrapped in a tablecloth at 2 a.m. outside a nightclub with a sounding burglar alarm and the door handle lying on the ground. The nightclub owner also affirmed that Greve did not have the right to be inside the building.

Greve's attempts to muddy the water should be rejected because *these facts* establish the necessary

probable cause. Resp. 17-18. Greve also attempts to justify the Sixth Circuit's rejection of Officer Bass's version of the facts on grounds that Officer Bass's credibility was a question of fact for trial. But this argument ignores that the *undisputed* facts above provide probable cause for the arrest, rendering any other disputes irrelevant.

Importantly, the question is not whether Officer Bass had probable cause based on Greve's explanation. This Court in *Wesby* expressly rejected the notion "that officers must accept a suspect's innocent explanation at face value." 138 S. Ct. at 593.

But even if that were the question, Greve had no legal right to re-enter a locked building with a sounding alarm and a broken door handle at 2 a.m., as he admitted trying to do, regardless of whether he previously had permission to be inside. And those facts, which were presented to Officer Bass, indisputably establish that Greve was trying to do so. While Greve certainly found himself in a very inconvenient circumstance, that inconvenience did not give him the lawful right to break and enter a locked business at 2 a.m. That conduct, in addition to his use of a tablecloth as a shawl and the club owner's statement that Greve was not authorized to be in the building (which Greve does not dispute, Resp. 8), easily establish probable cause. Put another way, regardless of whether "Greve had 'an articulate reason to be at the club'" (Resp. 10), he had no authority, articulated or not, to break into the locked club.

In ignoring this basic, undisputed fact, and in reversing the grant of summary judgment to Officer Bass, the Sixth Circuit Majority Opinion 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. Accordingly, Officer Bass respectfully asks this Court to grant his Petition and resolve this conflict in law.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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