No. 99-1977

In the Supreme Court of the United States

DONALD SAUCIER, PETITIONER

v.

ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF AUTHORITIES

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1. Respondent agrees that "[t]here is a significant split among the circuit courts" concerning the proper test for qualified immunity in Fourth Amendment unreasonable force cases. Resp. Br. 1. Respondent further agrees that the petition for a writ of certiorari "should be granted" in this case to resolve that division of authority. *Ibid.* See also *id.* at 2 (division in circuit authority responsible for "unequal outcomes" and "disarray" in appellate caselaw). Finally, respondent confirms that this case both properly raises the issue and provides an appropriate vehicle for resolving it. See *id.* at 5 ("split in the circuits can be resolved" in this case; "Court should use this case" to instruct trial courts on how to handle qualified immunity in such cases).

2. After agreeing that this Court should grant the petition for a writ of certiorari, respondent turns to the merits, contending that courts should equate the qualified immunity inquiry in excessive force cases with the test of substantive reasonableness under the Fourth Amendment, as the Ninth Circuit did below. See Resp. Br. 3-5. Respondent, however, makes no effort to reconcile that immunity standard (or the court of appeals' rationale for it) with this Court's cases, including *Anderson* v. *Creighton*, 483 U.S. 635 (1987), which specifically addresses qualified immunity in the Fourth Amendment context. See Pet. 15-22. Nor does respondent attempt to reconcile the court of appeals' decision with this Court's repeated recognition that qualified immunity cannot be denied merely because the conduct is later held to be unlawful; instead, the Court has explained, immunity may be denied only "if, on an objective basis, it is *obvious* that *no reasonably competent officer* would have concluded" that the conduct was lawful at the time the defendant acted. *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986) (emphasis added). See also *ibid.* ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"); *Wilson* v. *Layne*, 526 U.S. 603, 614-615 (1999) ("'[C]learly established' for purposes of qualified immunity means that '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson* v. *Creighton*, 483 U.S. at 639-640); *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (qualified immunity "'gives ample room for mistaken judgments' by

protecting 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley*, 475 U.S. at 343, 341)).[1]

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[1] While respondent devotes some of his brief to "clarification" of certain facts, Resp. Br. 1, he does not suggest that the clarifications affect the suitability of this case as a vehicle for further review. Nor do we, since they do not signal the presence of factual disputes that might preclude or complicate resolution of the qualified immunity issues presented by the petition. First, respondent points out that he denied resisting arrest or pushing off the bumper with his feet. See *ibid.* We do not (for present purposes) contend otherwise, but we do point out that the issue here is not what respondent did; it is what the officers reasonably believed. See Pet. 29-30 (citing *Hunter*, 502 U.S. at 228). Second, respondent suggests (Resp. Br. 2) that petitioner and the other officers did not confront an "atmosphere of uncertainty," because respondent had been "pointed out" to the officers before they arrested him. That, however, is not inconsistent with our assertion (Pet. 29) that there was uncertainty, not as to respondent's identity as a potential protester, but rather as to his likely response, and the likely response of the crowd around him, to the officers' attempt to take him into custody. See Pet. 26-27. Finally, respondent argues (Resp. Br. 2) that he fell "headlong" into the van because, although respondent testified that he caught himself or "brace[d] himself with his hands," that action merely prevented him from striking his head, and did not prevent him from falling down. Any disagreement on that point appears to be over the meaning of the word "headlong"—*i.e.*, over whether or not the word properly applies to a fall in which the individual uses his hands to limit the fall and suffers no physical injury—and not over the events that took place. See *Webster's New World Dictionary* 644 (1986) (defs. 1 and 2) (defining headlong as "with uncontrolled speed and force" or as "headfirst"). The fundamental nature of respondent's fall—forward, inside the van—is not contested. Nor are the facts that the "shove" respondent characterizes as "violent" came from Sergeant Parker rather than petitioner, Pet. 27-28 & n.19, or that respondent suffered no injury of any variety, Pet. 3. There thus are no material disputes concerning the facts that must be taken as true at this stage of the case, and much of the relevant conduct (includ-

Instead, respondent argues that employing different tests for qualified immunity and substantive reasonableness under the Fourth Amendment would be unnecessarily confusing, Resp. Br. 3-4, and would permit judges to substitute their views of the evidence for the jury's, *id.* at 3, 4. Neither contention is correct. As *Anderson* v. *Creighton* itself proves, there is nothing unnecessarily confusing about employing the traditional qualified immunity standard, even where the constitutional standard itself is defined in terms of reasonableness, and at least six courts of appeals have applied that teaching in excessive force cases. See Pet. 13-15. A court addressing a qualified immunity claim on summary judgment must, for purposes of the motion, resolve all material factual disputes in favor of the plaintiff and "look[] to the evidence before it (in the light most favorable to the plaintiff)." *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996). The court then must ask whether, under those circumstances, any reasonable officer could have thought the conduct in question lawful. If the answer is "yes," immunity must be granted. See *Malley*, 475 U.S. at 341 ("if officers of reasonable competence could disagree on" the lawfulness of the conduct, "immunity should be recognized"). If instead, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct was lawful, immunity should be denied. *Ibid.*

The fact that the case concerns a Fourth Amendment unreasonable force claim does not alter the fundamental nature of the qualified immunity inquiry. Even if the officer's conduct might be "objectively unreasonable" and thus a violation of the Fourth Amendment, *Gra-*

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ing respondent's fall) is in any event recorded on the videotape that has been submitted to this Court.

ham v. *Connor*, 490 U.S. 386, 397 (1989), the officer is entitled to immunity unless the conduct was so clearly proscribed by the Fourth Amendment—*i.e.*, the unreasonableness sufficiently well established—at the time the officer acted that no reasonably competent official could have thought the conduct lawful. See *Priester* v. *City of Riviera Beach*, 208 F.3d 919, 926-927 (11th Cir. 2000) (immunity is appropriate unless conduct "was so far beyond" the sometimes "hazy border between excessive and acceptable force that [the official] had to know he was violating the Constitution," *i.e.*, unless "application of the [excessive force] standard would inevitably lead every reasonable officer in [the defendants'] position to conclude the force was unlawful") (citations omitted); *Finnegan* v. *Fountain*, 915 F.2d 817, 822-824 (2d Cir. 1990) (even if officer exerts "constitutionally excessive force," qualified immunity is appropriate unless it "should have been apparent" that the "particular degree of force under the particular circumstances was excessive").[2]

Nor does applying the ordinary qualified immunity test in Fourth Amendment unreasonable force cases permit courts to intrude into "the role of the jury" by "second guess[ing] the jury after it has applied the

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[2] Respondent also argues that whether "one or two officers would have thought the conduct reasonable" should make no difference, because the standard is objective rather than subjective. Resp. Br. 5. But the objective standard, as described by this Court, is whether, "on an objective basis, it is obvious that no reasonably competent officer would have concluded" that the conduct is lawful. *Malley*, 475 U.S. at 341. In other words, the conduct is protected by qualified immunity unless any officer who engages in it would be either "plainly incompetent or * * * knowingly violat[ing] the law." *Hunter*, 502 U.S. at 229 (quoting *Malley*, 475 U.S. at 341).

Graham standard." Resp. Br. 4. A court no more intrudes on the jury's function in excessive force and qualified immunity cases than in any other situation in which a court grants judgment as a matter of law.[3] Moreover, when courts address qualified immunity, they view the *facts* in the light most favorable to the verdict (where the issue arises after trial) or the non-moving party (if the issue arises on summary judgment). That requirement ensures that courts do not intrude on the jury's factfinding role.

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Last term, this Court granted a writ of certiorari in *Snyder* v. *Trepagnier*, cert. granted, 525 U.S. 1098 (1999) (No. 98-507), to resolve the same issue raised by this case. Because *Snyder* settled before decision, the writ was dismissed. See 526 U.S. 1083 (1999). This case presents the Court with an appropriate occasion to resolve the issue that dismissal in *Snyder* left unresolved, and which still divides the courts of appeals.

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[3] See *Weisgram* v. *Marley Co.*, 120 S. Ct. 1011, 1018 (2000); see also Fed. R. Civ. P. 50 advisory committee's note (1991 Amendment) ("The expressed standard makes clear that action taken under the rule is a performance of the court's duty to assure enforcement of the controlling law and is not an intrusion on any responsibility for factual determinations conferred on the jury by the Seventh Amendment or any other provision of federal law.").

For the foregoing reasons and those stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2000