No.

In the Supreme Court of the United States

AMY CORBITT, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF SDC, A MINOR,

Petitioner,

v.

MICHAEL VICKERS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Officer Vickers and several other police officers pursued a criminal suspect into Amy Corbitt's yard. Six children, including Corbitt's ten-year-old son, SDC, were at play. Vickers and his fellow officers ordered the children—at gunpoint—to lie on the ground, face-down. The children complied. Meanwhile, the unarmed criminal suspect was readily compliant with the officers.

While holding the children on the ground, weapons drawn, Vickers fired his gun twice at Corbitt's pet dog. He missed the dog both times. The second time he fired, Vickers shot SDC in the back of the knee, seriously injuring him. SDC, still lying face down on the ground at Vickers' order, was eighteen inches away from Vickers.

Corbitt filed this suit, alleging that Vickers violated SDC's constitutional rights. In particular, Corbitt alleged that, because Vickers faced no threat, his use of deadly force was unreasonable. Vickers sought dismissal, asserting qualified immunity. The district court denied Vickers' motion, and Vickers took an interlocutory appeal. The Eleventh Circuit, holding that the plaintiff is obligated to plead around qualified immunity, concluded that the complaint failed to establish that qualified immunity is inapplicable.

This petition presents two questions:

1) Whether qualified immunity is an affirmative defense (placing the burden on the defendant to raise and prove it) or whether it is a pleading requirement (placing the burden on a plaintiff to plead its absence).

2) Whether the Court should recalibrate or reverse the doctrine of qualified immunity.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Amy Corbitt respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit (App., *infra*, 1a-41a) is available at 929 F.3d 1304. The opinion of the district court (App., *infra*, 42a-82a) is not reported but can be found at 2017 WL 6028640.

JURISDICTION

The judgment of the court of appeals was filed on July 10, 2019. Justice Thomas extended the time to file this petition to December 6, 2019. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 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 * * *.

STATEMENT

SDC, then a ten-year-old boy, and five other children were playing in their own yard. At least seven police officers pursued an unarmed criminal suspect (unknown to the children) into the yard. The officers ordered the children, a supervising adult, and the suspect all to lie on the ground, face down. Everyone—

including the suspect—complied. The children were held on the ground at gunpoint.

The family's pet dog, Bruce, was also in the yard. Although the dog posed no threat, Vickers shot at the dog and missed. The dog retreated under the house, but soon returned and approached his owners. Vickers shot again, missing the dog once more. But this time Vickers shot SDC through the back of his knee, resulting in serious injuries. When Vickers fired his gun, SDC was a mere *eighteen inches* away.

In sum, Vickers was faced with the following circumstances: At least seven police officers were apprehending an unarmed, compliant suspect; several children were present in the yard, all lying face down per officer orders; and a non-threatening dog was roaming the property. Against that backdrop, Vickers chose to fire his gun twice, intentionally, resulting in a severe gunshot wound to a ten-year-old boy.

Petitioner brought a Section 1983 claim, asserting that Vickers violated SDC's constitutional rights.

Vickers filed a Rule 12(b)(6) motion to dismiss, asserting qualified immunity. In a thorough opinion, the district court denied that motion. Vickers then brought an interlocutory appeal. A divided panel reversed, granting Vickers qualified immunity. It reasoned, first, that no in-circuit case was sufficiently analogous to inform Vickers that firing his weapon in these circumstances violated SDC's constitutional rights. Second, the court held that there was no obvious constitutional violation at stake. It concluded that, although Corbitt pleaded that the dog was non-threatening and that Vickers faced no serious threats when he discharged his weapon, these allegations did not satisfy Corbitt's supposed burden of pleading *around* qualified immunity on the face of the complaint.

Further review is warranted for two independent reasons.

First, the circuits are divided regarding who bears the burden with respect to qualified immunity at the pleading stage. To be sure, all agree that, to survive a Rule 12(b)(6) motion, a plaintiff is obligated to allege facts that, if proven, would plausibly establish the violation of a constitutional right. But the circuits disagree as to how to apply that requirement.

Several circuits hold that, since qualified immunity is an affirmative defense, dismissal is improper if a "clearly established" violation of constitutional rights is consistent with the complaint's allegations. Stated inversely, a defendant will prevail on a 12(b)(6) motion asserting qualified immunity only if the facts necessary to support the defense are pleaded on the face of the complaint.

But the Eleventh Circuit, along with a few others, holds that qualified immunity is a pleading requirement as to which the plaintiff bears the burden. Thus, unless a plaintiff specifically pleads *around* the defense, courts are to dismiss Section 1983 claims at the pleading stage. This presents a significant hurdle, however, because plaintiffs may not possess all of the relevant facts before discovery.

This important and frequently recurring question warrants review. That is especially so because the approach taken below is irreconcilable with the operation of an affirmative defense, and also because the Court has previously repudiated, decades ago, a similar attempt at a heightened pleading standard in the qualified immunity context. The Court should reaffirm the vitality of that law, which is inconsistent with the decision below. The Court may wish to consider summarily reversing on this issue.

Second, the Court should revisit qualified immunity in the whole. The doctrine has morphed from limited immunity into impenetrable armor, precluding citizens from vindicating violations of their constitutional rights. Justices of this Court—and a chorus of judges across the country—have expressed an interest in reexamining the doctrine. For good reason: Qualified immunity is devoid of any statutory or common-law origin. It sprang instead from judicially announced policies, but recent experience shows that the doctrine fails to accomplish its objectives.

This case is a particularly compelling one for review. There is little doubt that, if the allegations of the complaint are true, Vickers violated SDC's constitutional rights. At the time Vickers shot him, SDC was "seized" within the meaning of the Fourth Amendment—indeed, he was lying face down on the ground, pursuant to police orders, with guns pointing at him. He was not free to leave. And, when Vickers shot his gun, he intentionally used force. The discharge of the weapon was not accidental.

Thus, when Vickers discharged his weapon, the Fourth Amendment obligated him to assess whether the use of deadly force was justified in view of the totality of the circumstances. Here, those circumstances were these: The criminal suspect was unarmed and compliant with police orders, the family pet was nonthreatening, there were at least seven police officers at the scene, and, when Vickers shot SDC, the boy was only eighteen inches away. It was clearly established—if not obvious—that use of force in these circumstances is unreasonable.

Indeed, scores of cases have held that officers may not use their guns when there is no meaningful threat—precisely the case here. And, in an especially perverse twist, if Vickers had *successfully* shot Bruce

the dog, petitioner Corbitt would certainly have a constitutional claim for the destruction of her property. The effect of the holding below is to provide the household pet greater Fourth Amendment protection than a child. Vickers' conduct was plainly unconstitutional—and the court below should have held so.

Instead of focusing on whether Vickers' *conduct* was lawful, the court of appeals fixed on whether the particular *theory of liability* had previously been employed in that circuit. As the court reasoned, no prior cases addressed a police officer intentionally shooting at a dog and hitting a nearby, innocent child who was seized at the time. That may well be true. These are unusual—indeed, exceptional—circumstances. But it blinks reality to conclude that an objectively reasonable officer could believe that the use of deadly force was lawful just because no court had previously held that the *precise same* conduct, in the *precise same* context, violates the law.

Under the modern qualified immunity doctrine, not only was petitioner denied a remedy, but the court of appeals left the law unsettled moving forward. If these same circumstances reoccur in the Eleventh Circuit, there will be no remedy for the shooting of an innocent child. That is not just wrong, it is dangerous.[1]

A. Factual Background

On July 10, 2014, SDC, a ten-year-old boy, was playing in his yard with five other children; Damien

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[1] This petition is being filed together with another in *Zadeh* v. *Robinson*, which also asks the Court to reconsider its qualified immunity doctrine. See 928 F.3d 457 (11th Cir. 2019). The reasoning contained in that petition applies fully here. The Court may wish to grant the petitions together to explore all salient issues, or grant one and hold the other.

Stewart, the father of two of the children, was supervising. App., *infra*, 2a, 64a. SDC's mother—petitioner Amy Corbitt—"and two other minors were inside." *Id*. at 2a.

While these children were at play in their own yard, a police operation was underway in the vicinity. Respondent, Officer Vickers, was part of a team seeking to apprehend a criminal suspect, Christopher Barnett. App., *infra*, 2a. Barnett was a stranger to the Corbitts; they had never met. *Ibid*. When Barnett wandered into the area, "the operation spilled over onto [Corbitt's] property." *Ibid*.

Upon arriving in the yard, Officer Vickers "demanded the children get down on the ground with the barrel of loaded guns shoved into their backs." App., *infra*, 49a. See also *id*. at 13a ("Vickers ordered SDC and the other children to the ground and held them there at gunpoint."). The officers "outnumbered the children" (*id*. at 70a)—meaning that more than six police officers were present.

One of Vickers' fellow officers handcuffed Stewart (App., *infra*, 43a), holding "a *gun* against his back" (*id*. at 36a). Throughout the incident, Stewart and the children (over the age of three) obeyed the officers' orders and remained on the ground. *Id*. at 43a, 71a.[2]

"Barnett (the fleeing suspect) 'was visibly unarmed and readily compliant' with officers." App., *infra*, 3a. The officers proceeded to apprehend him. *Ibid*.

While the scene was secured—with officers holding the minor children on the ground at gunpoint—Bruce, the family dog, was in the yard. App, *infra*, 3a. Nobody

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[2] Officers left the two children under the age of *three* unattended; they "roamed the adjacent street, screaming and crying." App., *infra*, 43a.

"appear[ed] to be threatened by [Bruce's] presence." *Id.* at 72a. Officer Vickers, who has "an extensive history of using unnecessary excessive force" (*id.* at 75a), nonetheless "discharged his firearm at [Bruce]." *Id.* at 71a. "He missed, and Bruce retreated under the Corbitt's residence." *Id.* at 37a.

After Officer Vickers shot at Bruce the first time, he did not "ask someone to restrain the animal." App., *infra*, 71a. "No other efforts were made to restrain or subdue the dog." *Id.* at 3a. Vickers was carrying, but did not use, his Taser or pepper spray. *Id.* at 43a.

Shortly thereafter, Bruce returned and "approach[ed] his owners." App., *infra*, 72a. At this time, "SDC was approximately eighteen inches from Defendant Vickers, lying on the ground, face down, pursuant to [Vickers'] orders." *Ibid.* SDC was "'readily viewable'" to Vickers. *Id.* at 37a. "Other minor children were also within only a few feet of Defendant Vickers." *Id.* at 72a.

Despite being so close to SDC, "Vickers fired a second shot at the dog." App., *infra*, 3a. He missed again. This time, however, he hit SDC in the back of the knee. *Ibid.*

"Medical imaging confirmed a serious gunshot wound to SDC's right knee." App., *infra*, 3a. "Bullet fragments remained in the wound for an extended period of time after the shooting." *Ibid.* "SDC suffered severe pain and mental trauma," and he requires "ongoing care from an orthopedic surgeon." *Ibid.*

B. Proceedings Below

1. Amy Corbitt brought this suit against Officer Vickers, alleging that Vickers' close-range shooting of

SDC violated his Fourth and Fourteenth Amendment rights. App., *infra*, 3a-4a.[3]

Vickers moved to dismiss on the basis of qualified immunity. See App., *infra*, 46a. The district court denied his motion, reasoning that, when Vickers "demanded the children get down on the ground with the barrel of loaded guns shoved into their backs," "reasonable people [would] believe they were 'not free to leave'." *Id*. at 49a (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980)). The court thus concluded that "Vickers effectuated a seizure even before firing his weapon." *Ibid*.

Additionally, though Vickers was aiming at Bruce when he fired, a reasonable jury could find that "Vickers fired his weapon at the animal in order to keep control of SDC * * *, that is, in order to continue [his] seizure." App., *infra*, 51a. What is more, "the weapon was intentionally fired"—this is not a case of "accidental firing." *Id.* at 50a n.4 (emphasis omitted). A jury could thus conclude that Vickers' attempt to shot Bruce was "in furtherance of the seizure." *Id.* at 53a.

In these circumstances, "the force [Vickers] exerted intentionally is certainly capable of excess." App., *infra*, 51a. And, because he "did intend to exert force"—at least "against the animal"—the question for qualified immunity purposes was "whether or not that exertion of force was excessive or objectively reasonable." *Id*. at 55a. At this stage, there is no basis to conclude that "Bruce exhibited any signs of aggression." *Id*. at 56a. Rather, the court credited the allegations that no one

[3] While the litigation initially involved additional parties and claims, only the constitutional claims against respondent Vickers remain.

"'appear[ed] to be threatened by [Bruce's] presence.'" *Ibid*.

The court recognized that the Rule 12(b)(6) posture bore on the analysis: "It may well be that the record will develop in a much different fashion. Facts remain to be developed including details about the pet, its history, appearance, behavior, relationship to Plaintiffs, etc." App., *infra*, 56a. But, "[a]t this stage, the complaint makes sufficient allegations to proceed." *Ibid*. The court specifically observed that its denial of the motion for qualified immunity "does not preclude Vickers from raising the defense of qualified immunity at a later stage of the case." *Ibid*.

2.a. Vickers took an interlocutory appeal of the denial of the motion to dismiss; the Eleventh Circuit reversed the district court, and remanded with instructions to dismiss. App., *infra*, 1a-35a.

At the outset, the court of appeals held that it is a plaintiff's burden to overcome a qualified immunity defense. App., *infra*, 10a. "To overcome a qualified immunity defense, the plaintiff must make two showings"—that "'the defendant violated a constitutional right'" *and* that "the violated right was 'clearly established.'" *Ibid*. According to the court, the plaintiff must "show that the state of the law gives officials fair warning of a clearly established right." *Id*. at 11a.

The court held that the Fourth Amendment governed this incident because "SDC was already 'seized' when Vickers fired at the dog." App., *infra*, 13a-14a.[4] The court thus defined the contours of the Fourth Amendment analysis: "at the time Vickers fired at the dog, SDC just happened to be playing in his own yard

[4] Alternatively, the Fourteenth Amendment's due process clause would govern. App., *infra*, 13a & 16a n.11.

when, for reasons beyond his control, his yard became the scene of an arrest operation." *Id*. at 17a. Per the court, the issue was thus whether there are "clearly established Fourth Amendment rights" regarding "Vickers's action of intentionally firing at the dog and unintentionally shooting SDC." *Ibid*.

The court proceeded to reject two theories by which it believed Corbitt could carry her burden of demonstrating that the right was "clearly established."

First, the court sought to determine whether specific Eleventh Circuit case law addressed circumstances where the victim was "not the intended target of the arrest operation" and also "not the intended target of [the officer's] gunshot." App., *infra*, 21a. The court concluded that "[n]o case capable of clearly establishing the law for this case holds that a temporarily seized person—as was SDC in this case—suffers a violation of his Fourth Amendment rights when an officer shoots at a dog—or any other object—and accidentally hits the person." *Id*. at 25a. In the court's view, the circumstances here were "[u]nlike any prior cases." *Id*. at 21a.

Second, the court held that this "is not a case that so obviously violates the Fourth Amendment that prior case law is unnecessary to hold Vickers individually liable for his conduct." App., *infra*, 30a. In particular, the court "decline[d] to accept [petitioner's] conclusory allegations that there was no need to subdue the dog." *Id*. at 33a. Although the court acknowledged that petitioner pleaded "that the dog presented no threat," the court found this insufficient because the complaint included "no allegations of actual fact indicating that the dog was non-threatening." *Id*. at 33a n.18.

The court offered "hypothetical illustrations of allegations of actual fact which Corbitt might have alleged," including "that the dog was a small and non-

aggressive breed, like a toy poodle." App., *infra*, 33a n.18. Thus, the court concluded that petitioner could not "overcome the high legal threshold" necessary to avoid the qualified immunity defense. *Id*. at 34a.

The court did not address "whether a constitutional violation occurred in the first place;" it "expressly [took] no position as to that question." App., *infra*, 35a.

b. Judge Wilson dissented. *See* App. 36a-41a. He reasoned:

> Consider the present facts and circumstances: officers arrived at a home and found the subject of their search. At gunpoint, the officers ordered the suspect and all persons in the area—including six children—to the ground. Everyone complied. A nonthreatening family pet was present on the scene; there is nothing to suggest that this pet acted with hostility or threatened the safety of anyone—including the officers. With all the children and the suspect still lying on the ground pursuant to the officers' commands, Officer Vickers shot at the family pet. He missed. He waited. He shot again. He missed again, instead striking a child who had been—at all times—lying within arm's reach of the officer.
>
> This conduct—discharging a lethal weapon at a nonthreatening pet that was surrounded by children—is plainly unreasonable.

App., *infra*, 38a-39a.

The court had previously, Judge Wilson explained, "denied qualified immunity when the defendant-officer exhibited excessive force in the face of no apparent threat." App., *infra*, 40a. Because Vickers "fac[ed] no apparent threat," and because he was "a mere foot and

a half from S.D.C. and was only a few feet from several other children," "[n]o reasonable officer would engage in such recklessness and no reasonable officer would think such recklessness was lawful." *Id*. at 41a.

REASONS FOR GRANTING THE PETITION

The petition presents two questions warranting review: whether the Eleventh Circuit erred by transforming qualified immunity into a pleading requirement, and whether the Court should recalibrate or reverse the qualified immunity doctrine.

I. THE COURT SHOULD RESOLVE WHETHER QUALIFIED IMMUNITY IS A PLEADING REQUIREMENT.

The courts of appeals disagree as to whether qualified immunity is an affirmative defense (placing the burden with a defendant asserting the defense) or a heightened pleading requirement (obligating a plaintiff to plead around it). Here, applying its precedent, the Eleventh Circuit deemed it the *plaintiff*'s obligation to plead around qualified immunity. This is an issue of considerable importance, and the rule embraced below is flatly wrong. Further review is warranted.

A. The circuits are divided.

1. Several circuits hold that, because qualified immunity is an affirmative defense, defendants bear the burden of demonstrating entitlement to dismissal. Because these circuits have not adopted avoidance of qualified immunity as a pleading requirement, a Section 1983 plaintiff need not allege facts that *avoid* a qualified immunity defense.

In the **Eighth Circuit**, "[d]efendants seeking dismissal under Rule 12(b)(6) based on an assertion of qualified immunity 'must show that they are entitled to qualified immunity on the face of the complaint.'" *Kulkay* v. *Roy*, 847 F.3d 637, 642 (8th Cir. 2017) (quot-

ing *Carter* v. *Huterson*, 831 F.3d 1104, 1107 (8th Cir. 2016)). If the complaint does not establish a defendant's right to qualified immunity, the motion is denied. *Ibid*. See also, *e.g.*, *Stanley* v. *Finnegan*, 899 F.3d 623, 627 (8th Cir. 2018); *Dadd* v. *Anoka Cty.*, 827 F.3d 749, 754 (8th Cir. 2016).

The **Third Circuit** rejected the "unprecedented rule" that would "*requir[e]* a plaintiff to set forth allegations negating an affirmative defense." *Thomas* v. *Indep. Twp.*, 463 F.3d 285, 293 (3d Cir. 2006). Because "the burden of pleading qualified immunity rests with the defendant, not the plaintiff," "a plaintiff has no obligation to plead a violation of clearly established law in order to avoid dismissal on qualified immunity grounds." *Ibid*. More recently, the Third Circuit confirmed that, "[w]hile the plaintiff must sufficiently plead a violation, the burden is on the defendants to establish they are entitled to qualified immunity." *E.D.* v. *Sharkey*, 928 F.3d 299, 306 (3d Cir. 2019). See also *Collick* v. *William Paterson Univ.*, 699 F. App'x 129, 131 (3d Cir. 2017).

The **Fourth Circuit** agrees that, when presented at the motion-to-dismiss stage, the qualified immunity defense "'faces a formidable hurdle,'" because "dismissal under Rule 12(b)(6) is appropriate only if a plaintiff fails to state a claim that is *plausible* on its face." *Owens* v. *Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014). "The plaintiff's complaint will not be dismissed as long as he provides sufficient detail about his claim to show that he has a more-than-conceivable chance of success on the merits." *Ibid*. See also *Betton* v. *Belue*, __ F.3d __, 2019 WL 5700353, at *4 (4th Cir. 2019) ("The burden of establishing the affirmative defense of qualified immunity rests on the party seeking to invoke it."); *Lane* v. *Anderson*, 660 F. App'x 185, 190 (4th Cir. 2016).

Likewise, in the **Second Circuit**, "[a] *defendant* presenting an immunity defense on a motion to dismiss must * * * show not only that 'the facts supporting the defense appear on the face of the complaint,'" but also that "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.'" *Brown* v. *Halpin*, 885 F.3d 111, 117 (2d Cir. 2018). A defendant must therefore prove entitlement to the immunity defense at the pleading stage. *Ibid*. See also, *e.g.*, *Kass* v. *City of New York*, 864 F.3d 200, 206 (2d Cir. 2017).

2. In contrast, other circuits obligate Section 1983 plaintiffs to anticipate and plead around qualified immunity.

The **Fifth Circuit** holds that, when a defendant asserts a qualified immunity defense, "the plaintiff 'must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm alleged *and that defeat a qualified immunity defense with equal specificity*.'" *McLin* v. *Ard*, 866 F.3d 682, 688 (5th Cir. 2017) (quoting *Zapata* v. *Melson*, 750 F.3d 481, 485 (5th Cir. 2014)) (emphasis added; alteration omitted). The court found that qualified immunity barred the case because the plaintiff "fail[ed] to plead a violation of a 'clearly established' constitutional right." *Id*. at 696.

The Fifth Circuit frequently applies this rule. See, *e.g.*, *Patel* v. *Texas Tech Univ.*, 727 F. App'x 94, 94-95 (5th Cir. 2018); *Lincoln* v. *Barnes*, 855 F.3d 297, 301 (5th Cir. 2017); *Hinojosa* v. *Livingston*, 807 F.3d 657, 664 (5th Cir. 2015); *Torns* v. *City of Jackson*, 622 F. App'x 414, 416 (5th Cir. 2015); *Bosarge* v. *Mississippi Bureau of Narcotics*, 796 F.3d 435, 439 (5th Cir. 2015); *Webb* v. *Livingston*, 618 F. App'x 201, 206 (5th Cir. 2015); *Backe* v. *LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012).

The **Eleventh Circuit** applies this same standard. In *Gates* v. *Khokhar*, the Eleventh Circuit held that, when a defendant can demonstrate that "he was acting within the scope of his discretionary authority," "the burden shifts to the plaintiff to establish that qualified immunity is not appropriate by showing that (1) the facts alleged make out a violation of a constitutional right and (2) the constitutional right at issue was clearly established at the time of the alleged misconduct." 884 F.3d 1290, 1297 (11th Cir. 2018). Thus, the *plaintiff* must allege facts in the complaint that defeat qualified immunity. *Ibid*. What is more, the Eleventh Circuit places the presumption in favor of qualified immunity: "qualified immunity will be denied only if the preexisting law by case law or otherwise" renders "obvious" that the defendant "violated the plaintiff's rights in the specific set of circumstances at issue." *Ibid*. (quotations omitted).

Again, the Eleventh Circuit applies this law with considerable frequency. See, *e.g.*, *Sebastian* v. *Ortiz*, 918 F.3d 1301, 1307 (11th Cir. 2019); *Q.F.* v. *Daniel*, 768 F. App'x 935, 944 (11th Cir. 2019); *Washington* v. *Rivera*, 939 F.3d 1239, 1245 n.10 (11th Cir. 2019); *Bowen* v. *Warden Baldwin State Prison*, 826 F.3d 1312, 1319 (11th Cir. 2016).

Similarly, in the **D.C. Circuit**, "[t]he proponent of a purported right has the 'burden to show that the particular right in question was clearly established' for qualified-immunity purposes." *Daugherty* v. *Sheer*, 891 F.3d 386, 390 (D.C. Cir. 2018) (alteration omitted). See also *Dukore* v. *District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015). The **Sixth Circuit** agrees that, to survive a motion to dismiss, a plaintiff must allege facts that "plausibly mak[e] out a claim that the defendant's conduct violated a constitutional right that was clearly established law at the time, such that a

reasonable officer would have known that his conduct violated that right." *Buddenberg* v. *Weisdack*, 939 F.3d 732, 738 (6th Cir. 2019) (quoting *Johnson* v. *Moseley*, 790 F.3d 649, 653 (6th Cir. 2015)).[5]

* * *

These divergent approaches have significant practical consequences. All circuits agree that a Section 1983 plaintiff must allege conduct that, if proven, would establish a violation of his or her constitutional rights. In some circuits, including the court below, a plaintiff must also allege specific facts that, if proven, would demonstrate that the violation was of clearly established law. Other circuits, however, place the burden on a defendant, holding that dismissal is warranted only if the qualified immunity defense is apparent on the face of the complaint.

This distinction has significant implications in circumstances—like those here—where a court believes that the complaint's allegations plausibly, but not necessarily, allege a constitutional violation that is "clearly established." As Judge Easterbrook once put it, "the choice between decision without evidence (Rule 12) and decision with evidence (Rule 56) could be decisive." *Jacobs* v. *City of Chicago*, 215 F.3d 758, 776 (7th Cir. 2000) (Easterbrook, J., concurring).

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[5] The Seventh Circuit is internally conflicted. Compare *Reed* v. *Palmer*, 906 F.3d 540, 548 (7th Cir. 2018) ("Because a qualified immunity defense so closely depends 'on the facts of the case,' a 'complaint is generally not dismissed under Rule 12(b)(6) on qualified immunity grounds.' * * * To state a 'plausible' claim, a plaintiff need not include every detail or fact related to the basis of her allegations.") with *Hardeman* v. *Curran*, 933 F.3d 816, 820 (7th Cir. 2019) (At the motion to dismiss stage, "[w]hen attempting to defeat an assertion of qualified immunity, the burden is on the plaintiffs to show that a particular right is 'clearly established.'").

B. This case is an appropriate vehicle to resolve an important and frequently recurring issue.

1. To begin with, the court of appeals' resolution of the question presented dictated the outcome below. The Eleventh Circuit applied the same broad approach it has taken throughout its qualified immunity jurisprudence: "Generally speaking, it is proper to grant a motion to dismiss on qualified immunity grounds when the 'complaint fails to allege the violation of a clearly established constitutional right.'" App., *infra*, 8a-9a. Moreover, "'[o]nce an officer has raised the defense of qualified immunity, the burden of persuasion on that issue is on the plaintiff.'" *Id*. at 9a.

This holding was essential to the court's grant of qualified immunity. The court recognized that, even if prior cases had not addressed an identical fact pattern, qualified immunity may not shield a defendant where the relevant governing principle applies with "obvious clarity" or the official's conduct "obviously violates the constitution." App., *infra*, 11a-12a (quotations & alterations omitted).

But the court held that, as the complaint was pleaded, petitioner could not invoke these arguments in response to the qualified immunity defense. See App., *infra*, 29a-30a. The court could not "conclude that no reasonable officer would have fired his gun at the dog under the circumstances." *Id*. at 30a. While petitioner alleged in the complaint that no one at the scene "appear[ed] to be threatened" by the dog's "presence," meaning that "no use of force should have been used aside from the arrest and physical restraint" of the criminal suspect (*id*. at 72a), the court of appeals found these allegations "conclusory" (*id*. at 33a).

The court reasoned that, to avoid qualified immunity, petitioner had to plead "actual facts demonstrating that every objectively reasonable officer in [respondent's] shoes would necessarily perceive a total lack of reason to subdue a dog roaming freely at the scene of an active arrest." App., *infra*, 32a-33a.

The court recognized that such facts would be *consistent* with the allegations contained in the complaint. Indeed, the court "suggest[ed] hypothetical illustrations of allegations of actual fact" that petitioner could have used to apparently defeat qualified immunity. App., *infra*, 33a n.18. Petitioner could have "alleged that the dog was a small and non-aggressive breed, like a toy poodle," or that "the dog was walking slowly towards its owners and not barking at all." *Ibid*.

Ultimately, the court reasoned that, because the "allegations of the complaint are lacking in allegations of actual facts that paint a scenario that so clearly and obviously presented" an obvious violation of constitutional law, petitioner did not "overcome the high legal threshold placed on plaintiffs who seek to overcome an officer's qualified immunity defense." App., *infra,* at 33a-34a.

The outcome here thus turned squarely on the Eleventh Circuit's conclusion that a Section 1983 plaintiff has the burden in the complaint to plead around a qualified immunity defense.

2. Beyond this case, this is a frequently recurring question of considerable importance. Every year, litigants file thousands of Section 1983 cases, and motions to dismiss are ubiquitous. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 30 tbl.3 (2017). Every time a qualified immunity defense is raised at the Rule 12(b)(6) stage, the question posed here is at issue. Whatever the answer, it is important

that courts and litigants have certainty as to the rules governing these commonplace motions.

C. Qualified immunity is an affirmative defense, not a pleading requirement.

Review is also warranted because the decision below misapprehends the law governing affirmative defenses.

"[Q]ualified immunity is an affirmative defense and * * * 'the burden of pleading it rests with the defendant.'" *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) (quoting *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980)). See also *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982) ("Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official."). A Section 1983 claim requires allegations that the defendant has violated a constitutional right; the Court "has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action." *Gomez*, 446 U.S. at 640. Thus, the Court specifically rejected "imposing on the plaintiff an obligation to anticipate such a defense" in the complaint. *Ibid*. Indeed, qualified immunity is waivable; defendants may choose to forego a qualified immunity defense in any given case.

The Court has effectively addressed this question already, holding that a plaintiff need not plead around qualified immunity in a complaint. Three decades ago, the Fifth Circuit adopted a "heightened pleading requirement" for Section 1983 cases. *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir. 1992). The court held that Section 1983 plaintiffs must "'state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity.'" *Ibid*.

(quoting *Elliott* v. *Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)). Simply put, the Fifth Circuit had turned qualified immunity into a pleading requirement.

The Court reversed "the Fifth Circuit's application of a more rigorous pleading standard," which was "a more demanding rule for pleading a complaint under [Section] 1983 than for pleading other kinds of claims for relief." *Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 165, 167 (1993). It "is impossible to square the 'heightened pleading standard' * * * with the liberal system of 'notice pleading' set up by the Federal Rules." *Id*. at 168. *Leatherman* precludes the very same approach some lower courts have now revived.

Evaluating *Gomez* and *Leatherman*, Judge Easterbook opined that "Rule 12(b)(6) is a mismatch for immunity and almost always a bad ground of dismissal." *Jacobs*, 215 F.3d at 775 (Easterbrook, J., concurring). This follows from the "usual practice"—a plaintiff need neither predict nor plead around affirmative defenses in a complaint. *Jones* v. *Bock*, 549 U.S. 199, 212 (2007). Affirmative defenses are *not* "pleading requirement[s]." *Id*. at 215. Rather, a defendant may succeed on a Rule 12(b)(6) motion to dismiss with respect to an affirmative defense only where "the allegations in the complaint suffice to establish that ground." *Ibid*.

Thus, for a defendant to prevail on an affirmative defense in a motion to dismiss, "the applicability of the defense has to be clearly indicated and must appear on the face of the pleading to be used as the basis for the motion." 5B Fed. Prac. & Proc. Civ. § 1357 (3d ed.). See also *Gomez*, 446 U.S. at 640. As one court explained, "[a] complaint states a claim on which relief may be granted whether or not some defense is potentially available. This is why complaints need not anticipate

and attempt to plead around defenses." *United States* v. *N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004). See also *Fed. Trade Comm'n* v. *Morton Salt Co.*, 334 U.S. 37, 44 (1948) (burden to establish an affirmative defense is borne by the party asserting it); 5 Fed. Prac. & Proc. Civ. § 1277 (3d ed.).

Putting this together, a plaintiff must "plausibly" state a claim of a violation of a constitutional right. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). But there is no obligation for a plaintiff to plead facts that avoid qualified immunity. Rather, a defendant succeeds on the defense at the motion-to-dismiss stage in only those cases where it is conclusively established on the face of the complaint.

II. THE COURT SHOULD RECALIBRATE OR REVERSE QUALIFIED IMMUNITY.

Additionally or alternatively, the Court should reevaluate qualified immunity in the whole. From Justices of this Court to judges across the lower courts, a chorus of voices has raised substantial questions regarding the doctrine's scope and legal foundation. The Court should address the criticisms leveled, resolving the issue one way or the other. Until then, qualified immunity will be asserted in thousands of cases each year—often, in circumstances like those presented here, as a defense to shocking constitutional violations. And operation of qualified immunity will result in constitutional stagnation, where certain rights remain perpetually undeveloped.

Review of qualified immunity is additionally warranted because the current doctrine lacks legal underpinning. It is devoid of any statutory or common-law support. The doctrine grew wholesale from this Court's broad policy assessments. And time has shown that—even if those policy judgments could support the doc-

trine—qualified immunity does not accomplish these stated goals.

A. The Court should examine the qualified immunity doctrine.

The scope and viability of the prevailing qualified immunity doctrine requires careful evaluation—significant criticisms have surfaced, the doctrine presently leads to stagnation in the refinement of governing constitutional standards, and the issue arises with considerable frequency.

1. In recent years, criticism of prevailing qualified immunity doctrine has been widespread and sustained. Justice Thomas, for example, recently "note[d] [his] growing concern with [the Court's] qualified immunity jurisprudence." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). As the doctrine has evolved, the Court has "'completely reformulated qualified immunity along principles not at all embodied in the common law.'" *Id.* at 1871 (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 645 (1987)). And, because the Court's "analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act," the Court no longer is "interpreting the intent of Congress in enacting the Act." *Ibid*. (quotation alteration omitted). Justice Thomas ultimately urged that, "[i]n an appropriate case, we should reconsider our qualified immunity jurisprudence." *Id*. at 1872.

Justice Sotomayor has likewise expressed concerns regarding the current reaches of the doctrine. *Kisela* v. *Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting). Because "[n]early all of the Supreme Court's qualified immunity cases come out the same way—by finding immunity for the officials," Justice Sotomayor cautioned that the current "one-sided ap-

proach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers." *Ibid*. In the Fourth Amendment context, the result is to "gut[]" its "deterrent effect." *Ibid*. More broadly, this "sends an alarming signal to law enforcement officers and the public"—"It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished." *Ibid*.

Judges across the lower courts have taken note—raising sharp concerns regarding the current calibration of qualified immunity. Judge Willett, for example, recently added his "voice to a growing, cross-ideological chorus of jurists and scholars urging recalibration of contemporary immunity jurisprudence." *Zadeh* v. *Robinson*, 902 F.3d 483, 499-500 (5th Cir. 2018) (Willett, J., concurring dubitante) (footnotes omitted). Judge Willett continued:

> To some observers, qualified immunity smacks of unqualified impunity, letting public officials duck consequences for bad behavior—no matter how palpably unreasonable—as long as they were the first to behave badly. Merely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question "beyond debate" to "every" reasonable officer.

Zadeh v. *Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part).

These concerns are broadly recognized. See *Morrow* v. *Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.) ("Some—including Justice Thomas—have queried whether the Supreme Court's post-*Pierson* qualified-immunity cases are 'consistent with the common-law rules prevailing when [Section] 1983 was enacted] in 1871.'" (alteration omitted)); *Rodriguez* v.

Swartz, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.) ("Some argue that the 'clearly established' prong of the analysis lacks a solid legal foundation."); *Thompson* v. *Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.) ("Scholars have criticized [the qualified immunity] standard."); *Ventura* v. *Rutledge*, 2019 WL 3219252, at *10 n.6 (E.D. Cal. 2019) ("[T]his judge joins with those who have endorsed a complete re-examination of the doctrine which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Thompson* v. *Clark*, 2018 WL 3128975, at *10 (E.D.N.Y. 2018) (Weinstein, J.) ("The legal precedent for qualified immunity, or its lack, is the subject of intense scrutiny.").

In critiquing prevailing doctrine, Judge James Browning supplied a district court perspective: "Factually identical or highly similar factual cases are not * * * the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way." *Quintana* v. *Santa Fe Cty. Bd. of Comm'rs*, 2019 WL 452755, at *37 n.33 (D.N.M. 2019). In Judge Browning's view, the current "obsession with the clearly established prong" improperly "assumes that officers are routinely reading Supreme Court and [circuit court] opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work." *Ibid*. That is not how police operate: "in their training and continuing education, police officers are taught general principles, and, in the intense atmosphere of an arrest, police officers rely on these general principles." *Ibid*. In requiring a "highly factually analogous case," this Court's jurisprudence "has either lost sight of reasonable officer's experience or it is using that language to mask an in-

tent to create 'an absolute shield for law enforcement officers.'" *Ibid*.

Until this Court examines it, the qualified immunity doctrine will continue to face criticism. See, *e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 46-49 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018); Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 11-12 (2017).

2. The current state of qualified immunity jurisprudence leaves significant violations of constitutional rights without vindication. "This current 'yes harm, no foul' imbalance leaves victims violated but not vindicated. Wrongs are not righted, and wrongdoers are not reproached." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part).

And, given the frequent use of qualified immunity, courts fail to refine the contours of constitutional rights—perpetually locking in the cycle of immunity. Indeed, that is what occurred here, as the court of appeals flatly declined to assess whether SDC had stated a constitutional claim. See App., *infra*, 35a ("[W]e need not reach the other qualified immunity question of whether a constitutional violation occurred in the first place. This opinion expressly takes no position as to that question.").

This now occurs frequently, with courts "avoid[ing] scrutinizing the alleged offense by skipping to the simpler second prong." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). See also *Sims* v. *City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting that the case was the "fourth time in three years that an appeal has presented the question whether someone who is not a final decisionmaker can

be liable for First Amendment retaliation."); Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 37-38 (2015) (finding a post-*Pearson* decrease in the willingness of circuit courts to decide constitutional questions). This result, when compounded with lower court's restrictive reading of the "clearly established" standard, has produced an "Escherian Stairwell" in which "[p]laintiffs must produce precedent even as fewer courts are producing precedent." *Zadeh*, 928 F.3d at 479-480 (Willett, J., concurring in part and dissenting in part).

3. Review is also warranted because these questions recur with enormous frequency. A Westlaw search found around 6,000 federal opinions mentioning qualified immunity in 2018 alone. And, each year, tens of thousands of lawsuits are filed that may implicate qualified immunity. See Civil Federal Judicial Caseload Statistics, tbl. C-2 (Mar. 31, 2018) (identifying that, for 12 months ending in March 2018, 15,020 "other civil rights" lawsuits, 20,673 prisoner civil rights cases, and 10,947 prison condition cases were filed—virtually all of which could involve a qualified immunity defense).

B. This case is a compelling vehicle for examining qualified immunity.

This is a compelling case for the Court to evaluate the scope of qualified immunity. Here, a police officer intentionally fired his weapon, and he shot a 10-year-old boy, who was lying face-down on the ground, a mere eighteen inches away. App., *infra*, 3a. There is no indication—none whatsoever—that Officer Vickers faced any meaningful threat when he shot SDC. *Id.* at 39a, 72a. As the dissent put it, "no competent officer would fire his weapon in the direction of a nonthreatening pet while that pet was surrounded by children."

Id. at 36a. If qualified immunity bars this claim, there is nothing meaningful left to Fourth Amendment use-of-force claims.

The majority below reached the opposite conclusion because, in its view, there was no on-point case law establishing that "intentionally firing at the dog and unintentionally shooting SDC" violates the Fourth Amendment. App., *infra*, 17a. In particular, applying now-prevailing standards, the court reasoned that there were no cases "making it obviously clear that volitional conduct which is not intended to harm an already-seized person gives rise to a Fourth Amendment violation." *Id.* at 21a. Petitioner needed specific authority "involv[ing] conduct that was intentional as to the injured plaintiff." *Ibid*.

But this holding—no doubt spurred by this Court's jurisprudence—turns constitutional claims on their heads. Previously, qualified immunity focused on whether officials were on notice that particular *conduct* was unlawful—regardless whether the legal theory of liability had been used in past cases.

That is to say, at least until recently, qualified immunity turned on whether "a reasonable official would understand that *what he is doing* violates" a constitutional right. *Carroll* v. *Carman*, 135 S. Ct. 348, 350 (2014) (emphasis added) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). "Where an official could be expected to know that certain *conduct* would violate statutory or constitutional rights," the law is clearly established. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982) (emphasis added). Thus, the "salient question" for the "clearly established" prong of the qualified immunity test was "whether the state of the law at the time of an incident provided fair warning to the defendants that their alleged *conduct* was unconstitutional." *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014)

(emphasis added) (internal quotation marks and alterations omitted).

Here, there is no doubt that Vickers' *conduct*—his firing of his gun in the particular circumstances present—violated long-established constitutional safeguards. That is so for at least two reasons.

First, it is fundamental that police officers cannot intentionally fire their guns—that is, use deadly force—absent a weighty interest, such as an imminent threat. And the Eleventh Circuit has often "found it unreasonable for police to shoot an unarmed suspect, even when the suspect has physically struggled with officers." *Smith* v. *LePage*, 834 F.3d 1285, 1297 (11th Cir. 2016) (collecting cases). Indeed, that court understood that *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985), made the use of "deadly force" unreasonable in circumstances where an individual is non-threatening, suspected of a misdemeanor offense, and attempting to escape. *Smith*, 834 F.3d at 1297.

On the allegations of the complaint, *no* use of deadly force was justified. Vickers faced no threat: the suspect and bystanders were all subdued, no weapons were present, and *nothing*—per the allegations—posed any sort of danger to any officer. The relevant rules of conduct for Vickers and other officers on the scene had been established for decades—shooting one's gun was not reasonable *at all*.

Second, in what is perhaps the most perverse twist of this case, if Vickers had *succeeded* in hitting Bruce the dog, petitioner (Bruce's owner) would certainly have had a Fourth Amendment claim for injury to her property. "Every circuit that has considered the issue has held that the killing of a companion dog constitutes a 'seizure' within the meaning of the Fourth Amendment." *Viilo* v. *Eyre*, 547 F.3d 707, 710 (7th Cir. 2008).

See also, *e.g.*, *Carroll* v. *County of Monroe*, 712 F.3d 649, 651 (2d Cir. 2013); *Maldonado* v. *Fontanes*, 568 F.3d 263, 271 (1st Cir. 2009); *San Jose Charter of Hells Angels Motorcycle Club* v. *City of San Jose*, 402 F.3d 962, 975 (9th Cir. 2005); *Altman* v. *City of High Point*, 330 F.3d 194, 204-205 (4th Cir. 2003); *Brown* v. *Muhlenberg Twp.*, 269 F.3d 205, 210-211 (3d Cir. 2001); *Lesher* v. *Reed*, 12 F.3d 148, 150-151 (8th Cir. 1994).

It is thus established that "the use of deadly force against a household pet is reasonable only if the pet poses an immediate danger and the use of force is unavoidable." *Viilo*, 547 F.3d at 710. Here, there is no basis whatever to conclude that the dog posed a threat to Vickers.

Through its application of qualified immunity in this case, the Eleventh Circuit has reached the puzzling result that SDC, an innocent *child*, has less constitutional protection than the family pet. That is an untenable conclusion.

One final point. SDC's status as an "innocent bystander" (App., *infra*, 17a) is not a meaningful obstacle to the assertion of this Fourth Amendment claim. The court of appeals agreed—as it must—that Vickers had seized SDC at the time of the shooting. *Id*. at 13a-14a. That conclusion is obvious: Vickers and the other officers ordered SDC (and the other children), at gun point, to lie face-down on the ground. *Ibid*. They were not free to leave; *of course* they were seized.

What is more, Vickers' firing of his gun was admittedly intentional; the shot was not some accident. App., *infra*, 22a. The court of appeals focused (*id*. at 22a-23a) on this Court's conclusion that there is a "Fourth Amendment seizure" when "there is a governmental termination of freedom of movement *through means in-*

tentionally applied." *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989). But that is doubly off-base here. Vickers' shot *after* SDC was admittedly seized; at the time of the shooting, Vickers already had a Fourth Amendment obligation vis-à-vis SDC to act reasonably. Additionally, Vickers' shot *was* intentional.

When an officer seizes an individual, and then the officer intentionally uses deadly force, the officer has a Fourth Amendment obligation to act reasonably with respect to those he has already seized. That requires an officer to "analyz[e] the totality of the circumstances" when using force. *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014). Here, when Vickers used force to shoot at the dog, part of the "totality of the circumstances" included that SDC was eighteen inches away, directly in the path of where Vickers intentionally fired his weapon. Vickers surely had to take SDC's presence into account when assessing the reasonability of his firing the gun.

For its part, the Eleventh Circuit does not point to a single case in which an already-seized individual, subjected to intentional police force, was found to categorically lack Fourth Amendment rights. Yet the upshot of the holding below is to proclaim, throughout the Eleventh Circuit, that even following a Fourth Amendment seizure, an officer need not act reasonably. This sort of dangerous holding stems directly from prevailing, wayward qualified immunity standards.

C. Qualified immunity is inconsistent with the text and history of Section 1983.

Review is additionally warranted because qualified immunity, as currently formulated, bears no relation to either the text of Section 1983 or the common-law immunities from which it sprang. See *Ziglar*, 137 S. Ct. at 1869-1872 (Thomas, J., concurring); William Baude, *Is*

Qualified Immunity Unlawful?, 106 Cal. L. Rev. 45 (2018).

1. The current qualified immunity doctrine has no basis in the text of Section 1983. The Court has acknowledged this point time and again—Section 1983 "on its face admits of no immunities" (*Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976)), and "[Section 1983's] language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted" (*Owen* v. *City of Independence*, 445 U.S. 622, 635 (1980)).

Rather than growing out of any textual hook, qualified immunity was borne out of a putative "good faith" defense to a few specific torts. *Pierson* v. *Ray*, 386 U.S. 547, 554-556 (1967). It is now applied to all Section 1983 claims. But scholarship suggests that no such free-standing defense existed at common law. See Baude, *supra*, at 55-57. See also *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) ("[S]ome evidence supports the conclusion that common-law immunity as it existed in 1871 looked quite different from our current doctrine").

Indeed, the current doctrine bears no resemblance whatsoever to any common-law immunity defense. The modern test refers to whether the right in question was clearly established. See *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). This reflects, the Court itself acknowledges, "principles not at all embodied in the common law" when Section 1983 was enacted. *Anderson*, 483 U.S. at 645. See also Baude, *supra*, at 60.

2. Rather than emanating from text or history, qualified immunity was informed by judge-made policy determinations. In particular, the Court was concerned with the imposition of personal liability on public officials and the burden of litigation. See *Harlow*, 457 U.S.

at 813-814 (addressing perceived social costs of claims against government officials). But, as Justice Thomas observed, these "qualified immunity precedents * * * represent precisely the sort of freewheeling policy choices that [the Court has] previously disclaimed the power to make." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring) (quotation and alteration omitted).

Beyond that, qualified immunity has proven not to accomplish the goals it seeks. As for officer liability, indemnification is the norm. One study found that officers in a sample of settlements for police misconduct only paid 0.02% of the damages paid to plaintiffs, demonstrating the strong protection already afforded by indemnification. Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885, 890 (2014). And there is evidence that qualified immunity plays no meaningful role in alleviating litigation burdens. See Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 48-51 (2017). While justified solely by judicially identified policy, decades of experience have proven that those policies are not meaningfully advanced by the doctrine.

3. No factors counsel in favor of retaining qualified immunity in its current fashion. The Court has previously altered its judge-made rules regarding Section 1983, without serious hesitation. See, *e.g.*, *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009) (overruling *Saucier* v. *Katz*, 533 U.S. 194 (2001)); *Harlow*, 457 U.S. at 816-818 (overruling subjective-good faith requirement identified in *Scheuer*, *Gomez*, and other authorities). Having been "tested by experience" (*Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173-174 (1989)), existing doctrine has proven not just ineffective at accomplishing its stated ends, but affirmatively detrimental to litigants and the law alike.

* * *

The Court should grant plenary review and resolve the questions presented. Alternatively, in light of the egregious departure from *Leatherman*—and the extraordinary nature of these allegations—it should summarily reverse. The court of appeals' resolution of this case on a motion to dismiss, before there could be any factual development, was manifestly improper.

CONCLUSION

The Court should grant the petition. Alternatively, it should summarily reverse.

Respectfully submitted.

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