No. 19-626

In the Supreme Court of the United States

ROBERT HUFF, JUSTIN MOHNEY and JEFF BRENEMAN,
Petitioners,

v.

MICHELLE CHOATE, individually and on behalf of the heirs of Deanne Choate and as Administrator of the Estate of Deanne Choate,
Respondent.

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

Reply Brief for the Petitioners

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A. The split is real and the Tenth Circuit is in the distinct minority.

The Petition raises a purely abstract question of law over which there is a very real split among the circuits. Respondent takes no heed of the split, mentioning only that the "reckless creation" theory has been "rejected by a few Courts of Appeals" when reformulating the first Question Presented. BIO, i. The Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits have all addressed and rejected the "reckless creation" approach embraced by the Tenth Circuit, see Pet. 16–20, whereas the approach found traction only in the First, Ninth, and Tenth Circuits. *Id*. at 21. The Tenth Circuit itself acknowledges the split, though not its breadth. *Pauly v. White*, 874 F.3d 1197, 1220 n.7 (10th Cir. 2017) *cert. denied*, 138 S.Ct. 2650 (2018) (citations omitted) ("[T]he concept that pre-seizure conduct should be used in evaluating the reasonableness of an officer's actions is not universally held among other circuits.").

The Petition identified and discussed, at length, the serious problems posed by the "reckless creation" theory. Pet. 12–25. Respondent makes no attempt to defend or justify the "reckless creation" theory and does not refute that the Petition raises an important issue that this Court should address. Respondent chooses instead to focus on perceived jurisdictional and vehicle issues. Respondent is incorrect—there is no jurisdictional bar and this case is an ideal vehicle to address the important questions presented.

B. There is no jurisdictional bar.

1. The Petition presents a pure question of law.

The Tenth Circuit had, and this Court has, jurisdiction over this interlocutory appeal on the purely abstract question of law: Can an officer can be held liable under 42 U.S.C. § 1983 for pre-seizure conduct which does not itself amount to an unreasonable seizure under the Fourth Amendment if that pre-seizure conduct can be viewed to have recklessly led to the later need to use deadly force?

Respondent's assertions about appellate jurisdiction miss the mark. Far from ignoring the Tenth Circuit's holding that it lacked jurisdiction, Petitioners present that erroneous conclusion and waive it to and fro. When a district court concludes that disputed issues of fact remain, an appellate court may still consider the legal question of whether the Petitioners' conduct, taken in the light most favorable to the plaintiff, violates clearly established law. *Behrens v. Pelletier*, 516 U.S. 299, 312–13 (1996).

The fundamental holding in *Mitchell v. Forsyth* established that denial of qualified immunity is an appealable order under the collateral order doctrine. 472 U.S. 511 (1985). The court of appeals there, like here, held it lacked jurisdiction over the denial of qualified immunity. *Id*. at 518. *Mitchell* teaches that "the purely legal question on which [Petitioner's] claim of immunity turns is 'appropriate for our immediate resolution' notwithstanding that it was not addressed by the Court of Appeals. (Citation omitted.) We therefore turn our attention to the merits of [Petitioner's] claim

of immunity." *Id.* at 530. Respondent acknowledges that, where this Court finds that it has jurisdiction over a case it may, under *Mitchell*, address arguments not addressed by a lower court. BIO, 8.

Nothing in the Petition turns on the fact question identified by the district court. The lower courts' holdings—that liability can be imposed for fatal uses of force where the use of force itself was reasonable but was made necessary by pre-seizure conduct that "recklessly created" the need to use deadly force—remains at issue without regard to how the fact question is resolved. The very purpose of qualified immunity is to shield government officials from liability for civil damages where their conduct does not violate clearly established rights—it is a defense both to the burdens of discovery and a defense to standing trial on a theory of liability that does not violate the constitution. *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), and *Mitchell*, 472 U.S., at 526).

The decisions by the lower courts hold there is an avenue to impose liability for pre-seizure conduct even if the officers acted reasonably at the exact moment of the shooting if that pre-seizure conduct recklessly created the need to use force. There is no question but that appellate jurisdiction exists over the legal question of whether that holding, if accepted by a jury, violates the law at all let alone clearly established law *Behrens*, 516 U.S. at 312–13.

The district court denied qualified immunity to Petitioners Huff and Mohney based on two theories/paths to liability:

(1) the jury could conclude Ms. Choate did not point her gun at Officer Mohney and, thus, conclude the shooting was unreasonable, or

(2) even if the jury agreed Ms. Choate pointed her gun at Mohney and the shooting was reasonable at the exact moment of the shooting, the pre-seizure conduct of Officer Breneman, Officer Huff and/or Officer Mohney recklessly created the need to use deadly force.

Theory/path #1 must go to trial against Huff and Mohney based on their shooting of Ms. Choate. The lower courts' decisions would require a trial and allow liability on theory/path #2 as to Huff, Mohney and the City of Gardner (based on the *Monell* claim against Gardner based on Breneman's pre-seizure conduct). Pet. App. 32–4a (Huff and Mohney), 14a–16a (Huff and Mohney), 17a–21a (City)

The equation of the lower courts is antithetical to the Fourth Amendment:

Conduct which *does not* amount to a seizure and *does not violate the Fourth Amendment*	+	A fatal use of force that is *reasonable* at the exact moment force is used	=	An Unreasonable seizure that violates the Fourth Amendment

The issue presented is a pure question of law over which the circuits are split. This split will not go away on its own and the lower courts are in need of this Court's guidance.

B. The Petition furthers the purpose of qualified immunity.

Mendez and *Sheehan* absolutely apply as both teach that the reasonableness of a given seizure is judged by reasonableness of the force used at the time of the seizure notwithstanding 20/20 hindsight may suggest tactical mistakes may have led to the necessity to use a greater level of force. *City & Cty. of San Francisco, Calif. v. Sheehan* 135 S.Ct. 1765, 1777 (2015); *County of Los Angeles v. Mendez*, 137 S.Ct. 1539, 1546–47 (2017). Respondent posits liability may be imposed for excessive force without regard to the question of whether the seizure was reasonable under the Fourth Amendment. That notion was rejected by this Court in both *Mendez* and *Sheehan.*

Sheehan held that, even if officers had misjudged, a Fourth Amendment violation is not established based merely on bad tactics that result in a deadly confrontation that could have been avoided. 135 S.Ct. at 1777. *Mendez* held an officer's intentional or reckless provocation of a violent confrontation does not render and otherwise reasonable defensive use of force unreasonable under the Fourth Amendment. 137 S.Ct. at 1546. Further, a use of force that is reasonable under the Fourth Amendment at the moment of a distinct seizure is not made unconstitutional even by a "different Fourth Amendment violation that is somehow tied to the eventual use of force." *Id*. at 1547. Both *Sheehan* and *Mendez* again emphasized that Courts must not judge officers with "the 20/20 vision of hindsight." *Sheehen*, 135 S.Ct. at 1777 (quoting *Graham*, 490 U.S., at 396); *Mendez*, 137 S.Ct. at 1546 (quoting *Graham*, 490 U.S., at 396).

The Petition furthers the purpose of qualified immunity for Petitioners Huff and Mohney so as to protect them from a trial on a theory that allows liability without regard to the question of whether the decedent posed a real and deadly threat to the officers at the moment they used force and shot her. The Petition furthers the purpose of qualified immunity for Petitioner Breneman by ensuring the lower courts "do not insulate constitutional decisions at the frontiers of the law from our review or inadvertently undermine the values qualified immunity seeks to promote." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011).

C. There is no vehicle problem.

Respondent answers at length an argument Petitioners do not make while ignoring one actually made. Petitioners' argument does not turn on the fact question identified by the lower courts, contrary to the assertions by respondent. BIO 9–11, 18–20. Petitioners acknowledged the necessity of a trial on the straight-up question of whether Ms. Choate in fact pointed a gun at Officer Mohney prior to the shooting. Pet. 10. Respondent has no answer, however, for the Questions Presented that Petitioners ought not stand trial on the question of whether they can be held liable under § 1983 for having "recklessly created" the need to use deadly force.

While there has been no finding that Ms. Choate threatened force before the officers shot her (BIO at 3, 20), the decisions below permit liability under § 1983 without regard to whether she did. If she didn't, the use of deadly force was arguably unreasonable; if she

did, the need to use deadly force was arguably "recklessly created."

The court of appeals' remand for further proceedings and the possibility that another avenue/theory of liability will be presented to a jury provides no reason for denying certiorari on the issue of law that is squarely presented here. Indeed, *Mendez* rejected the Ninth Circuit's "provocation" doctrine but remanded the case to "revisit the question" of whether a different constitutional violation unrelated to the reasonableness of the shooting was nonetheless the proximate cause for the injuries. 137 S.Ct. at 1549.

Unless corrected, the court of appeals' erroneous decision will have adverse impacts far beyond two officers in Gardner, Kansas. Future panels of the Tenth Circuit and district courts throughout that circuit will be bound by the court of appeals' holding that pre-seizure conduct in *refraining* from aggressively restraining an emotionally disturbed person will result in liability under § 1983 if events escalate to a use of deadly force—even when the force itself is objectively reasonable at the moment it was used. Because that decision will itself create "clearly established law" within the Tenth Circuit, individual officers will be required pay it heed on pain of losing the qualified immunity defense that shielded Petitioner Breneman in this case. The natural result of will be the aggressive restraint of emotionally disturbed persons for fear the encounter may escalate to a use of force that might have been avoided by a less confrontational approach.

Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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