No. 19-679

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

While working with fellow officers to apprehend a fleeing subject, Michael Vickers attempted to shoot an approaching dog. It is undisputed that the dog was Vickers's intended target. However, the shot missed the dog and struck the leg of Petitioner Amy Corbitt's minor child. It is likewise undisputed that Vickers did *not* intend to apply any sort of force to the child when he discharged his weapon. The Eleventh Circuit held that Vickers's motion to dismiss should have been granted on qualified immunity grounds, because the law applicable in that circuit at the time of the incident did not clearly establish an innocent bystander's right to be free from accidental applications of force.

Corbitt claims that the appellate courts are split as to whether a plaintiff is required to plead around qualified immunity. But the cases cited by Corbitt largely predate the Court's rulings in *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009), which require plaintiffs to plead factual allegations that plausibly support their claims. Since *Twombly*, this Court has made clear that a Plaintiff must plead facts that would allow her to establish both that her rights were violated, and that those rights were clearly established at the time of the violation, in order to avoid dismissal on qualified immunity grounds. Further, even if there were some ambiguity as to the pleading standard regarding qualified immunity, this case would not be the appropriate vehicle to address that issue, as Vickers would be entitled to dismissal on qualified immunity

grounds under either of the pleading standards identified by Corbitt.

Corbitt also suggests that the doctrine of qualified immunity should be revisited and perhaps discarded in its entirety. But qualified immunity is strongly supported by *stare decisis*, and the Court has on many occasions explained the need to protect officers like Vickers who make split-second decisions in tense and uncertain situations. Moreover, this case – which comes before the Court without the benefit of an evidentiary record and is based on an inartfully drafted complaint – is a flawed vehicle for consideration of this issue to the extent consideration is otherwise warranted. Additionally, even if Corbitt were correct that qualified immunity leads to inequitable outcomes when properly applied, that issue would not be implicated here, given that Corbitt's discussion of this specific case presents a garden-variety (and erroneous) argument that the Eleventh Circuit actually *mis*applied the relevant law.

Neither of the questions set forth in the Petition is actually raised by this case, and both of the questions set forth in the Petition are answered by this Court's existing jurisprudence. The Petition should be denied.

RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Because this case was resolved at the pleadings stage, the only facts to be considered are those in the

complaint. The fact most critical to the Court's evaluation of the Petition is accurately presented – it is undisputed that when Vickers fired the shot that struck SDC, his intent was to strike Bruce the dog instead. Petition, p. 7. However, in reaching its conclusion that Vickers fired his weapon at "a non-threatening dog [] roaming the property," the Petition either fails to mention, or fails to fully analyze, a number of important admissions and factual revelations contained in the complaint. Petition, p. 2. Taken together, those omitted allegations make up a trail of breadcrumbs leading to a very different picture than the one set forth in the Petition.

Central to Corbitt's Petition is the conclusory statement that "No agent or employee at the scene had the need to shoot at the family pet, nor did anyone appear to be threatened by its presence."[1] Dkt. 1, ¶ 29. As the Eleventh Circuit noted, the complaint is devoid of any *factual* allegations to support either of the legal conclusions contained in this sentence; tellingly, Corbitt does not supply any information about whether Bruce was a toy poodle trotting through the yard with its tail wagging, a snarling pit bull charging Vickers, or something in between. *Corbitt v. Vickers*, 929 F.3d 1304, 1322 (11th Cir. 2019). However, the complaint supplies, albeit obliquely, significant information that

[1] Given Corbitt's allegations that she was inside her home during the events at issue, and that every person in the yard over the age of three was lying facedown on the ground, it is unclear who would have actually observed either the dog's behavior or the officers' reactions, other than the officers themselves. Dkt. 1, ¶ 24.

supports the opposite conclusion – namely, that the dog was acting in a threatening manner and there was reason to use force against it.

Twice, Corbitt suggests that it would have been appropriate for someone to "subdue" the dog.[2] In the first instance, she states that no one attempted to "restrain or subdue" the dog after Vickers first shot at the animal, leaving no question that she understands that the word "subdue" means something other than merely "restrain." Dkt. 1, ¶ 28. In the second instance, Corbitt states that a Taser or pepper spray would have been "an *appropriate* alternative means to subdue the dog," essentially admitting that the dog's behavior warranted the use of at least some amount of force. *Id.*, ¶ 41 (emphasis supplied). By acknowledging that it would have been "appropriate" for Vickers to "subdue" the dog by force, Corbitt constrains herself to the position that Vickers crossed a line by using his firearm, specifically, for that purpose.

Likewise, several additional pieces of information scattered throughout the complaint, taken together, indicate that the dog was advancing rapidly on Vickers at the time he fired the second shot. Corbitt states that

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[2] Throughout this Court's jurisprudence, the term "subdue" is used to denote the act of neutralizing a threat to officer safety, and Corbitt does not indicate that she intends some alternate meaning for the word in her complaint. *See*, *e.g.*, *City & Cty. of San Francisco, Calif. v. Sheehan*, 575 U.S. 600 n. 2, 135 S. Ct. 1765, 1771, 191 L. Ed. 2d 856 (2015) (agreeing with lower court that "[e]ven if [plaintiff] was on the ground, she was certainly not subdued" because she was still holding a knife).

the dog was "approaching his owners" when Vickers fired. Dkt. 1, ¶ 28. The only members of Corbitt's household who were in the yard, and thus Bruce's only nearby "owners," were SDC and his older brother. *Id.*, ¶¶ 6, 7. SDC was only inches away from Vickers, meaning that the dog was necessarily approaching Vickers as well. *Id.*, ¶ 24. After Vickers fired his first shot, the dog retreated under the family's mobile home, reappeared, and was "approaching his owners" (and Vickers) when Vickers fired the second shot. *Id.*, ¶ 28. The time elapsed between the first and second shots, according to Corbitt, was *eight to ten seconds*.[3] *Id.*

The facts that Corbitt elected to include in her complaint[4] indicate that the dog was not idly

[3] Corbitt's admission that only eight to ten seconds elapsed between Vickers's first and second shots greatly undermines her complaint that Vickers did not "ask someone to restrain the animal . . . during the interim." Dkt. 1, ¶ 28. That so little time elapsed between the moment Vickers first encountered the dog and the moment he fired the second shot also goes a long way toward explaining why Vickers did not holster his firearm and switch to his Taser or pepper spray to "subdue" the dog. *Id.*, ¶ 41.

[4] While she may now regret some of her earlier choices, Corbitt was ultimately responsible for drafting her complaint. Corbitt's candor allowed for an early resolution of this suit, but she certainly could have chosen to omit the facts that doom her case – namely, that Vickers intended to shoot the dog and not SDC, and that it was "appropriate" to use some amount of force to "subdue" the dog. And, to the extent that additional allegations of fact could have buttressed the legal conclusions on which Corbitt now seeks to rely, Corbitt could have chosen to include those as well. That she did not include such allegations is almost certainly, again, indicative of admirable candor rather than an absent-minded failure to include highly relevant and truthful information.

wandering the yard; he was approaching Vickers when the second shot was fired. And he wasn't walking up slowly; he was moving quickly enough to "retreat" from Vickers, disappear under the mobile home, change directions, reappear, and begin heading back toward Vickers in only eight to ten seconds. Corbitt admits that it would have been "appropriate" to "subdue" the dog with a Taser or pepper spray. These facts cannot be ignored simply because they are scattered somewhat haphazardly throughout the complaint, and they greatly strengthen Vickers's entitlement to qualified immunity under any standard.

REASONS FOR DENYING THE PETITION

I. Review is not warranted to examine the pleading standard applicable to plaintiffs who may face qualified immunity.

A. The Court has made clear, post-*Twombly* and *Iqbal*, that a plaintiff must plead sufficient facts to show that a defendant violated her clearly established rights in order to avoid dismissal on qualified immunity grounds.

Corbitt states that "the Court should resolve whether qualified immunity is a pleading requirement." Petition, p. 12. The Court has already done so. "The doctrine of qualified immunity protects government officials from liability for civil damages 'unless a plaintiff pleads facts showing (1) that the official

violated a statutory or constitutional right, and (2) that the right was "clearly established" at the time of the challenged conduct.'" *Wood v. Moss*, 572 U.S. 744, 757, 134 S. Ct. 2056, 2066–67, 188 L. Ed. 2d 1039 (2014), quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011). In setting forth the pleading standard applicable to claims that may implicate qualified immunity, the unanimous Court in *Wood* was unequivocal – the burden is on a plaintiff to plead around qualified immunity.

To the extent a circuit split on this issue ever existed, it was resolved by *Twombly, Iqbal*, and the subsequent pronouncements from this Court of the pleading standard governing qualified immunity. *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). The principal cases cited by Corbitt in support of her position that the Second and Fourth Circuits do not require plaintiffs to plead around qualified immunity rely on the same, outdated, pre-*Twombly* authority. *See Brown v. Halpin*, 885 F.3d 111, 117 (2d Cir. 2018), quoting *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004)[5]; *Owens v. Baltimore City State's Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014), quoting *Field Day, LLC v.*

[5] Curiously, the *Brown* court quotes both its own 2004 case relying on the pre-*Twombly* "no set of facts" standard and placing the burden for demonstrating entitlement to qualified immunity on a defendant, and in the same paragraph, quotes this Court's opinion in *Ashcroft v. al-Kidd*, which places the burden for pleading around qualified immunity squarely on the plaintiff. 885 F.3d at 117.

Cnty. of Suffolk, 463 F.3d 167, 191–92 (2d Cir. 2006), quoting *McKenna*, 386 F.3d 432. Corbitt's excerpts from these cases regarding the pleading standard for qualified immunity originate in a 2004 opinion from the Second Circuit, *McKenna v. Wright*. 386 F.3d 432. The pleading standard set forth in *McKenna* – that a motion to dismiss may be granted "only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief" – was overturned in *Twombly*. *Id.* at 436; *Twombly*, 550 U.S. at 577 ("Today . . . the Court scraps *Conley's* 'no set of facts' language") (Stevens, J., dissenting). *McKenna* is no longer good law, and courts err to the extent that they continue to rely on it to supply the pleading standard for qualified immunity.

The principal case discussed by Corbitt for the Eighth Circuit, *Kulkay* v. *Roy*, can likewise be traced back to a pre-*Twombly* opinion. 847 F.3d 637, 642 (8th Cir. 2017), quoting *Carter v. Huterson*, 831 F.3d 1104, 1107 (8th Cir. 2016), quoting *Bradford v. Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005). While it is true that the Second, Fourth, and Eighth Circuits have republished statements tied to the *Conley* pleading standard, even post-*Iqbal*, the applicable pleading standard has not actually been a central issue in these cases. Moreover, recent opinions from all three circuits have cited and applied the correct standard, as set forth in *Ashcroft v. al-Kidd*, placing the burden squarely on plaintiffs to plead facts demonstrating that their clearly established rights have been violated. *See*, *e.g.*, *Ganek v. Leibowitz*, 874 F.3d 73, 80 (2d

Cir. 2017) (quoting *al-Kidd* to establish pleading standard for qualified immunity and reversing trial court's denial of motion to dismiss on qualified immunity grounds); *Attkisson v. Holder*, 925 F.3d 606, 623 (4th Cir. 2019), as amended (June 10, 2019) (quoting *al-Kidd* to establish pleading standard for qualified immunity and affirming trial court's grant of motion to dismiss on qualified immunity grounds); *Payne v. Britten*, 749 F.3d 697, 704 (8th Cir. 2014) (noting that district courts have an obligation to resolve qualified immunity questions at the earliest possible stage of litigation, chastising the district court for failing to rule on a motion to dismiss asserting qualified immunity, and stating that the lower court was required to "determine whether the complaint alleged enough facts to demonstrate the violation of a *clearly established* statutory or constitutional right") (emphasis in original).

In only one case discussed by Corbitt was the applicable pleading standard for claims involving qualified immunity actually at issue. The Third Circuit's opinion in *Thomas v. Independence Tp.* was issued in September 2006 – ten months prior to this Court's ruling in *Twombly* – and has not aged well. 463 F.3d 285 (3d Cir. 2006). *Thomas* begins by quoting extensively from *Conley* to set forth the applicable pleading standard, noting the now-overturned rule that a plaintiff is not required to "set out in detail the facts upon which he bases his claim." *Id.* at 295. Citing several of its own prior cases relying on *Conley*, the Third Circuit continued: "a civil rights complaint [is] not subject to

dismissal due to the absence of factual allegations" because "a plaintiff need not plead facts." *Id.*

The *Thomas* court acknowledged an "inherent tension" between these principles (all of which would be overruled by this Court less than a year later in *Twombly*) and the rule that immunity issues should be resolved at the earliest possible stage of litigation. 463 F.3d at 299. A complaint could comply with *Conley's* simplified notice pleading standard, the court noted, and still not "provide good fodder for the framing of a qualified immunity defense." *Id.* The court did note the rule, set forth by this Court in *Mitchell v. Forsyth* and affirmed in *Behrens v. Pelletier*, that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." *Id.* at 293, quoting *Behrens v. Pelletier*, 516 U.S. 299, 305, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996), quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Constrained, however, by the pre-*Twombly* pleading rules that did not obligate a plaintiff to plead facts, the *Thomas* court reconciled these issues by holding that "when a plaintiff, *on his own initiative*, pleads detailed factual allegations, the defendant is entitled to dismissal before the commencement of discovery unless the allegations state a claim of violation of clearly established law." *Thomas*, 463 F.3d 285, 293 (3d Cir. 2006) (emphasis in original). Otherwise, the court concluded, "the burden of pleading qualified immunity rests with the defendant," and a plaintiff "has no obligation to

plead a violation of clearly established law in order to avoid dismissal on qualified immunity grounds." *Id.*

The *Thomas* court's analysis of the pleading standard for qualified immunity under *Conley* became outdated the day *Twombly* was issued by this Court.[6] District courts in the Third Circuit began noting that *Thomas* had been abrogated, at least in part, by *Iqbal*. *See*, *e.g.*, *Gorman v. Bail*, 947 F. Supp. 2d 509, 524 (E.D. Pa. 2013). And any lingering question about whether the *Thomas* court's ultimate conclusion was correct was answered in the negative by this Court's statement of the qualified immunity pleading standard in *al-Kidd*. The Third Circuit, like all the others on the same side of Corbitt's alleged circuit split, now cites *al-Kidd* to supply the pleading standard for qualified immunity, and places the burden to plead a violation of clearly established law firmly on the plaintiff. *See*, *e.g.*, *Mirabella v. Villard*, 853 F.3d 641, 648 (3d Cir. 2017) (quoting *al-Kidd* to establish pleading standard for qualified immunity and reversing trial court's denial of motion to dismiss on qualified immunity grounds).

The appellate courts are not divided on the pleading standard applicable to claims involving qualified immunity, nor should they be, given that this Court has provided unambiguous guidance on the issue. At most, some courts have quoted generalized language

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[6] So, too, did this Court's opinion in *Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit*, which likewise relied on *Conley* to establish the pleading standard applicable to qualified immunity. 507 U.S. 163, 168, 113 S. Ct. 1160, 1163, 122 L. Ed. 2d 517 (1993).

from older cases based on *Conley's* outdated pleading standard, but there is no indication that any of these passing references have actually led to incorrect rulings. Courts in every circuit now cite and apply the pleading standard set forth by this Court in *al-Kidd*: qualified immunity bars a plaintiff's claims unless she has pleaded facts showing that her clearly established rights were violated. *Ashcroft v. al-Kidd*, 563 U.S. 731, 735, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011). There is no issue here for the Court to address.

B. Vickers is entitled to qualified immunity under either of the pleading standards discussed in the Petition.

Because there can be no genuine dispute that the pleading standard for qualified immunity is well-settled, and that the Eleventh Circuit correctly stated and applied that standard in this case, Vickers will not belabor this second point. However, it is worth noting that even if the circuit split argued by Corbitt did exist, this case would be a poor vehicle to address that split because Vickers would be entitled to qualified immunity under either of the standards identified by Corbitt.

Of the incorrect alternate pleading standards advanced by Corbitt, the one provided for the Second Circuit is perhaps the most transparently wrong, because it quotes directly from *Conley v. Gibson*: "[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). As discussed above, this is neither *the* correct standard nor even *a* viable option, because it relies on outdated law. But Vickers would be entitled to qualified immunity even under this standard.

The single most important piece of information in Corbitt's complaint is her acknowledgment that when Vickers shot SDC in the leg, he did so accidentally, because he was trying instead to shoot Bruce the dog. Corbitt's admission that Vickers did not intend to shoot SDC brings this case squarely under this Court's ruling in *Brower v. Inyo*:

> A seizure occurs even when an unintended person or thing is the object of the detention or taking [cit.], but the detention or taking itself must be willful. This is implicit in the word "seizure," which can hardly be applied to an unknowing act. . . . [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied. . . . We think it enough for a seizure that a person be stopped by the very

> instrumentality set in motion or put in place in order to achieve that result.

Brower v. Cty. of Inyo, 489 U.S. 593, 596–99, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628 (1989).

The Eleventh Circuit has applied *Brower* in various cases involving unintended applications of force, and has uniformly concluded that no clearly established Fourth Amendment violation occurs where an officer intends to exert force against one target and accidentally strikes someone else. *See*, *e.g.*, *Speight v. Griggs*, 620 F. App'x 806, 809 (11th Cir. 2015) (holding that a case involving a plaintiff who may have been shot accidentally "turns on the issue of whether [the officer] intended to shoot [the plaintiff]," and that a Fourth Amendment violation could have occurred only if the officer did intend to shoot the plaintiff); *Cooper v. Rutherford*, 503 F. App'x 672, 674 (11th Cir. 2012) (granting qualified immunity to officer who intended to shoot suspect but accidentally shot innocent bystander mother and child). *Cf. Vaughan v. Cox*, 343 F.3d 1323, 1326 (11th Cir. 2003) (denying qualified immunity where officer fired weapon hoping to disable car or driver in order to apprehend passenger, but shot instead hit passenger, because the passenger was "hit by a bullet that was meant to stop him.").

By pleading that Vickers was trying to shoot the dog when he accidentally shot SDC, Corbitt placed on the face of the complaint the facts necessary to establish Vickers's entitlement to qualified immunity. Because it is undisputed that Vickers did not intend to

shoot SDC, and because the existence of a constitutional violation under these circumstances turns solely on the question of intentionality in the Eleventh Circuit, there are no additional facts Corbitt could plead to escape the bar of qualified immunity. Even under the outdated pleading standard that Corbitt urges the Court to apply, Vickers would be entitled to immunity, and this case consequently does not raise the issue that Corbitt asks the Court to review.

II. Review is not warranted to "recalibrate or reverse" the doctrine of qualified immunity.

A. Qualified immunity is strongly supported by *stare decisis* and is necessary for the reasons set forth in the Court's ample jurisprudence on this issue.

"*[S]tare decisis*, this Court has understood, is a 'foundation stone of the rule of law.'" *Allen v. Cooper*, No. 18-877, 2020 WL 1325815, at *6 (U.S. Mar. 23, 2020), quoting *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798, 134 S.Ct. 2024, 188 L.Ed.2d 1071 (2014). To reverse a decision, this Court demands a "'special justification,' over and above the belief 'that the precedent was wrongly decided.'" *Id.*, quoting *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266, 134 S.Ct. 2398, 189 L.Ed.2d 339 (2014). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v.*

Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 2609, 115 L. Ed. 2d 720 (1991). "*[S]tare decisis* carries enhanced force when a decision [] interprets a statute" – including where "a decision has announced a judicially created doctrine designed to implement a federal statute" – because "critics of [this Court's] ruling can take their objections across the street, and Congress can correct any mistake it sees." *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 135 S. Ct. 2401, 2409, 192 L. Ed. 2d 463 (2015).

As Corbitt notes, the federal courts rule on qualified immunity "with great frequency"; she cites more than 6000 decisions in 2018 alone. Qualified immunity in its current form has been the law for nearly forty years. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982) ("We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."). To say that the doctrine of qualified immunity is well-established would be a gross understatement. The vast majority of current government officials and employees have relied on the safeguards provided by qualified immunity for the entire duration of their careers.

Against this backdrop, Corbitt offers the intractable suggestion the Court overhaul in some unspecified manner, or outright abolish, qualified immunity. "No factors," she argues, "counsel in favor of retaining

qualified immunity in its current fashion." Petition at 32. This statement at the very end of Corbitt's brief, and the two cases it cites to support the breezy assertion that "[t]he Court has previously altered its judge-made rules regarding Section 1983, without serious hesitation," are the closest Corbitt comes to acknowledging *stare decisis*. The Court likely did not "seriously hesitate" in making the earlier changes to qualified immunity identified by Corbitt because those changes were adjustments to the framework used to evaluate qualified immunity – not elimination of the entire doctrine and invalidation of countless longstanding decisions.

A recent article probes many of the arguments advanced by Corbitt about the lack of historical basis for qualified immunity, and concludes that "[t]he truth is that the history is murky, which, under the law of precedent, counsels in favor of the status quo." Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1864 (2018). Precursors to the doctrine of qualified immunity, and even elements of the current doctrine, have been in place since the founding of the country. *Id.* at 1865-66. And qualified immunity in its present incarnation is deeply entrenched in this Court's jurisprudence. "[M]uch of qualified immunity falls squarely within statutory *stare decisis*," and Corbitt's argument that "no factors counsel in favor of retaining qualified immunity in its current fashion" cannot be taken seriously. *Id.* at 1857. Her failure to meet *stare decisis* head on makes plain that she cannot effectively rebut it.

"[P]olice officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Plumhoff v. Rickard*, 572 U.S. 765, 775, 134 S. Ct. 2012, 2020, 188 L. Ed. 2d 1056 (2014). Qualified immunity exists to protect those officers who, in the heat of the moment, make reasonable but ultimately mistaken decisions about how much force to use. *Id.* Abandoning qualified immunity – and to be clear, Corbitt suggests no concrete alternative to discarding the doctrine wholesale – would leave hundreds of thousands of law enforcement officers exposed to potential liability, likely second-guessing themselves in situations where a hesitation to act could mean the difference between life and death.[7] And the "goal of qualified immunity to avoid excessive disruption of government" would hardly be served by abolishing the doctrine and forcing governmental entities and their employees into protracted litigation for nearly any claim filed. *Saucier v. Katz*, 533 U.S. 194, 195, 121 S. Ct. 2151, 2153, 150 L. Ed. 2d 272 (2001).

Qualified immunity has a richer history, broader goals, and far stronger support from the doctrine of *stare decisis* than Corbitt suggests. The Petition offers no "special justification" for overturning or reworking

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[7] Countless other government employees would likewise be exposed, potentially causing serious (although perhaps not life-threatening) consequences ranging from delays and inefficiency to mass attrition.

qualified immunity, and without one, the Court should not disturb its long-established precedents.

B. This case was decided at the pleadings stage, and would make a poor vehicle for consideration of this issue if consideration were necessary.

To the extent that qualified immunity needs to be reexamined by the Court, it is difficult to conceive of a more ill-suited vehicle for the issue than this case. Another petition currently pending before the Court and seeking review of this same issue states that its "facts are simple" and that its "summary judgment posture ensures that the factual backdrop for considering the qualified immunity question is not abstract." *Baxter v. Bracey*, 18-1287, pp. 34-35. The same cannot be said here.

Corbitt's argument that this case is a "compelling" vehicle for reevaluating qualified immunity purports to be based on the facts, but in fact relies on the legal conclusions in her complaint that are contradicted by her factual allegations. Specifically, she states that "There is no indication – none whatsoever – that Officer Vickers faced any meaningful threat when he shot SDC," and opines that Fourth Amendment use-of-force claims will be rendered meaningless if qualified immunity is allowed to stand based on the facts of this case. Petition, pp. 26-27. The problem is that, while the only fact truly necessary for the lower courts to resolve this case was adequately pleaded, the numerous

additional facts upon which Corbitt's Petition is premised are ambiguous and underdeveloped in the complaint.

The trial court denied, and the Eleventh Circuit then reversed and granted, Vickers's motion to dismiss. This case was resolved at the pleading stage, and the facts before the Court on review would be only those contained in Corbitt's complaint. The complaint does state clearly that Vickers was trying to shoot the dog when he accidentally shot SDC instead, and is thus well pleaded with respect to the central fact underlying the Eleventh Circuit's grant of qualified immunity. However, the allegations regarding the threat (or lack thereof) posed by the dog and perceived by Vickers are much murkier. As noted in the above statement of facts, Corbitt offers the conclusory statement that no one "appear[ed] to be threatened" by the dog's presence alongside a highly contradictory admission that it would have been "appropriate" to "subdue" the dog with pepper spray or a Taser. Likewise, she opines that no one "had the need to shoot at the family pet," but also pleads facts showing that the dog was quickly approaching Vickers when he fired the shot that struck SDC.

For proof that Corbitt's conflicting statements of fact and conclusions of law are a hindrance to judicial review of this case, the Court need look no further than the back-and-forth between the majority and the dissent in the Eleventh Circuit about whether a reasonable officer in Corbitt's position could have perceived a need to "subdue" the dog. *Corbitt v. Vickers*, 929 F.3d

1304, 1322, 1325 n. 3 (11th Cir. 2019). That discussion, of course, could have been avoided by reference to Corbitt's own admission that it would have been "appropriate" to subdue the dog with some amount of force, and her complaint that none of the officers acted to do so in the eight to ten seconds between Vickers's two shots. But with this information buried among contradictory legal conclusions and other allegations, it is understandable that the Eleventh Circuit overlooked it.

The "facts" that Corbitt claims make this case an appealing vehicle to review qualified immunity are in fact a hodgepodge of legal conclusions and factual allegations, many of which are irreconcilable. As Corbitt acknowledges, thousands of qualified immunity cases are decided in the lower courts every year. If the Court determines that qualified immunity should be reviewed, it will have its pick of cases offering straightforward and thoroughly developed factual records. This case, whose record consists solely of a confusingly drafted complaint, does not offer the firm foundation on which a ruling so consequential would need to rest.

C. The Petition argues that the Eleventh Circuit misapplied the law, and thus does not raise the issue of whether qualified immunity leads to undesirable outcomes when properly applied.

"A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule

of law." Supreme Court Rule 10. Corbitt's claimed premise is that the doctrine of qualified immunity leads to inequitable results when correctly applied, and should be reexamined and revised or discarded. But the actual crux of her argument is that the Eleventh Circuit *mis*applied the relevant law and consequently came down on what Corbitt believes to be the wrong side of a circuit split. The Petition thus presents only a garden-variety question of whether the Eleventh Circuit "misappl[ied] a properly stated rule of law," and certiorari would not be warranted even if qualified immunity needed to be reevaluated and this case otherwise presented an ideal vehicle for that analysis.

"[U]ntil recently," Corbitt claims, "qualified immunity turned on whether 'a reasonable official would understand that *what he is doing* violates' a constitutional right." Petition, p. 27 (emphasis supplied by Petitioner). She does not, however, go on to cite any other cases where this standard has been rejected or misconstrued, or identify a time frame during which some shift in the application of this standard has occurred. Instead, she simply quarrels that the Eleventh Circuit failed to apply that standard in this case. According to Corbitt, the rule that qualified immunity turns on whether an official would have known his conduct was unlawful was applied right up until her case was decided, at which point the Eleventh Circuit conjured a new standard. Even if Corbitt were correct, it would mean only that her case was potentially wrongly

decided – not that it exposes some fundamental flaw in the doctrine of qualified immunity.

Corbitt suggests that qualified immunity should not have been available to Vickers because "there is no doubt that Vickers' conduct – his firing of his gun in the particular circumstances present – violated long-established constitutional safeguards." Petition, p. 28. But Corbitt's argument in support of this conclusion is both factually and legally flawed. First, she correctly states that deadly force is justified where an officer faces an "imminent threat" – but goes on to claim that "Vickers faced no threat" because "the suspect and bystanders were all subdued" and "no weapons were present." *Id.* Corbitt admitted in her complaint that Bruce the dog had *not* been "subdued," and also acknowledged that it would have been "appropriate" for Vickers to use at least some amount of force to subdue him.

Corbitt's second argument – that this case leads to a "perverse outcome" inasmuch as she might have suffered a constitutional injury if Vickers had been successful in (intentionally) shooting the dog, but suffered no constitutional injury where Vickers (unintentionally) hit SDC's leg instead – reveals that her position is, at base, nothing more than a disagreement with the Eleventh Circuit's application of this Court's intentionality requirement in *Brower*. Corbitt attempts to offhandedly dismiss that requirement, arguing that it is inapplicable, both because SDC was already seized and because Vickers's act of firing his weapon was intentional. Petition, pp. 29-30. But other than a generalized quote taken from a case that did not

involve the application of force to a person already seized, Corbitt offers *no* authority to support these sweeping statements of law.

In its opinion, the Eleventh Circuit grapples thoroughly and incisively with the issues that Corbitt waves away in only a few sentences. The court notes dicta in *Brower* suggesting that the accidental effects of force intentionally applied do not rise to the level of a Fourth Amendment violation. *Corbitt v. Vickers*, 929 F.3d 1304, 1319 (11th Cir. 2019), citing *Brower v. Inyo*, 489 U.S. at 596, 109 S. Ct. at 1381. In fact, the court notes that there is a circuit split on the question of "whether government action which accidentally harms the plaintiff can rise to the level of a Fourth Amendment violation," and cites a number of factually analogous cases from other appellate courts holding that answer "no." *Id.* at 1319-20, n. 12.[8] Corbitt does not

[8] *See Schultz v. Braga*, 455 F.3d 470, 479–83 (4th Cir. 2006) (declining to extend Fourth Amendment protections to "reasonably foreseeable" victim of officer's gunshot where victim was already seized by traffic stop and officer did not intend to shoot her but instead intended to shoot her passenger); *Childress v. City of Arapaho*, 210 F.3d 1154, 1155–57 (10th Cir. 2000) (holding no Fourth Amendment seizure occurred when two escapees abducted plaintiff and her two-year-old daughter and stole their minivan, and law enforcement officers shot intending to restrain the minivan and escapees but accidentally injured plaintiff and her daughter who were hostages in the minivan); *Medeiros v. O'Connell*, 150 F.3d 164, 167–69 (2d Cir. 1998) (in similar factual situation, holding no Fourth Amendment seizure and relying upon *Brower*, 489 U.S. at 596, 109 S. Ct. at 1381, for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct); *Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 795 (1st Cir. 1990) (in a similar factual

address any of that authority, instead offering only her own unsupported statements as to what she believes the law on this issue to be. Petition, p. 30.

The true essence of Corbitt's dispute with the Eleventh Circuit's ruling is that the court came down on the "claims of accidental harm do not give rise to a Fourth Amendment violation" side of the circuit split, and declined to join the minority of circuits applying a reasonableness standard to those claims. Yet Corbitt's Petition does not even mention the existence of a circuit split, instead attempting to frame the Eleventh Circuit's decision not to apply a reasonableness standard as "stem[ming] directly from prevailing, wayward qualified immunity standards." She does not identify what those standards are, and she does not explain how the Eleventh Circuit's well-reasoned choice of a side in an established circuit split has anything to do with the application of "qualified immunity standards." It does not.

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situation, holding: "[a] police officer's deliberate decision to shoot at a car containing a robber and a hostage for the purpose of stopping the robber's flight does not result in the sort of willful detention of the hostage that the Fourth Amendment was designed to govern," and relying upon *Brower* for the proposition that the Fourth Amendment addresses misuse of power, not accidental effects of otherwise lawful conduct); *cf. Dodd v. City of Norwich*, 827 F.2d 1, 7 (2d Cir. 1987) (rejecting a Fourth Amendment claim of a § 1983 plaintiff where suspected burglar was deemed to have been already seized and holding: "It makes little sense to apply a standard of reasonableness to an accident.").

Given that the Petition filed in this case has been filed in substantially similar form in at least one other action, and the brief of *amici curiae* has been submitted to the Court three different times, it is clear that the reevaluation of qualified immunity is a cause in search of a vehicle.[9] But this is not a case of qualified immunity gone awry; instead, it involves the Eleventh Circuit's choice between two frameworks for analysis of whether constitutional injury can result from accidental harm, and its straightforward application of the chosen framework. That Corbitt bookends her quarrels about the standard chosen with general discussion of qualified immunity does not convert this into a case about whether qualified immunity is fundamentally flawed.

Corbitt's core argument is that the Eleventh Circuit chose and applied the wrong standard to her claim of accidental harm, not that it applied the law faithfully yet reached an unacceptable result. This garden-variety disagreement with an appellate ruling is not the kind of issue for which certiorari should be granted – especially where, as here, the disagreement is unfounded and ill-supported.

[9] *See Zadeh v. Robinson*, 19-676; *Baxter v. Bracey*, 18-1287.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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