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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent Vickers shot and badly injured SDC, a ten-year-old boy. SDC was lying face-down, at Vickers's order. Bruce, a dog, was loose in the yard. While none of the six or more other police officers at the scene showed any interest in Bruce—the complaint repeatedly alleges that the dog was non-threatening—Vickers shot at it twice. The second bullet, while missing the dog, struck SDC.

Petitioner, SDC's mother, has properly pleaded a Fourth Amendment claim. The facts alleged, if true, render the use of *any* deadly force unreasonable. And even if some force were reasonable, it was unreasonable for Vickers to discharge his firearm while pointed at SDC, lying face-down on the ground, only eighteen inches away.

The district court denied respondent's motion to dismiss. The Eleventh Circuit's finding of qualified immunity—on interlocutory appeal, and over a dissent—warrants review.

As to the first question presented, respondent does not deny the conflict among the circuits. Nor could he: The courts of appeals have taken diametrically opposed views as to who bears the burden regarding the qualified immunity defense at the pleading stage. Respondent instead focuses on the merits, arguing that the Eleventh Circuit correctly placed the burden on petitioner to plead around an affirmative defense. Not only is that substantively wrong, but it is no reason to deny review—whoever bears the burden, it should be uniform. And this case squarely presents the question: The court of appeals expressly relied on this burden to grant respondent qualified immunity. Respondent's efforts to draw adverse factual conclusions fail, and respondent is flatly wrong about the scope of the Fourth Amendment's reasonableness requirement.

As to the second question, this case is an excellent vehicle to revisit qualified immunity. The early grant of qualified immunity here demonstrates how the doctrine has grown too muscular, and this case provides the Court a broad spectrum of options for recalibrating it—including correcting the pleading rules, focusing the analysis on the officer's conduct, reaffirming *Hope* v. *Pelzer*, or identifying that absolute factual similarity is not required. *Stare decisis* is inapplicable to each of these solutions. And, given that the doctrine has no statutory or common-law basis—it was created through judicial policymaking—reconsideration in whole is also warranted.

A. The Court should resolve who bears the burden at the pleading stage.

1. Respondent cannot meaningfully contest that the circuits are divided. See Pet. 12-18.

Respondent's main argument appears to be that "*Twombly*, *Iqbal*, and the subsequent pronouncements from this Court" have "resolved" the "circuit split." BIO 7. But, in light of continuous, published, circuit court opinions post-dating those cases, that contention is incorrect.

In each of the Second, Third, Fourth, and Eighth Circuits, qualified immunity is properly treated as an affirmative defense; defendants thus bear the burden of demonstrating entitlement to dismissal of a complaint on this ground. See, *e.g.*, *Brown* v. *Halpin*, 885 F.3d 111, 117 (2d Cir. 2018); *E.D.* v. *Sharkey*, 928 F.3d 299, 306 (3d Cir. 2019); *Betton* v. *Belue*, 942 F.3d 184, 190 (4th Cir. 2019); *Kulkay* v. *Roy*, 847 F.3d 637, 642 (8th Cir. 2017). District courts in each of these circuits

follow this published authority, as they must, confirming its vitality.[1]

Respondent contends that these four circuits rely on "outdated, pre-*Twombly* authority." BIO 7. But the relevant question is not *why* the circuits are in conflict; it is whether there *is* a disagreement. The conflict is clear. And since this question is certain to arise hundreds—if not thousands—of times each year (*id*. at 18-19), review here is warranted.

2. These circuits, moreover, apply the correct law. Qualified immunity is an affirmative defense, and the defendant bears the burden at the pleading stage.

Respondent disregards *Gomez* v. *Toledo*, 446 U.S. 635, 640 (1980), which held that, "since qualified immunity is a defense, the burden of pleading it rests with the defendant." Like any affirmative defense, whether to assert it lies in the defendant's discretion; the Court has thus "never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action"—and a plaintiff therefore has no "obligation to anticipate such a defense." *Ibid*. See also *Crawford-El* v. *Britton*, 523 U.S. 574, 586-587 (1998); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982). Tellingly, respondent has no response to any of this authority.

What is more, this Court has already rejected efforts by the lower courts to impose such an elevated pleading standard on Section 1983. See Pet. 19-20. After certain courts of appeals required plaintiffs to plead

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[1] See, *e.g.*, Second Circuit: *Rodriguez* v. *Town of Ramapo*, 412 F. Supp. 3d 412, 446 n.20 (S.D.N.Y. 2019); Third Circuit: *Zisa* v. *Haviland*, 2020 WL 1527862, at *7 (D.N.J. 2020); Fourth Circuit: *Smith* v. *City of Greensboro*, 2020 WL 1452114, at *5 (M.D.N.C. 2020); Eighth Circuit: *Mills* v. *Cole*, 2019 WL 5295525, at *1 (W.D. Mo. 2019).

that defendants "cannot successfully maintain the defense of immunity" (*Leatherman* v. *Tarrant Cty. Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054, 1057 (5th Cir. 1992)), this Court rejected the rule. A plaintiff's obligation is to state the basis for a defendant's liability, *not* to defeat all possible affirmative defenses. See 507 U.S. 163, 165, 167 (1993).

Respondent asserts that this Court's decisions in *Twombly* and *Iqbal*—which he repeatedly notes "overturned" *Conley* v. *Gibson*, 355 U.S. 41 (1957) (BIO 8; see also BIO 9, 10, 11, 12)—have rendered *Leatherman* a dead letter. See BIO 11 n.6. Not so. This conflates two very different things.

Twombly and *Iqbal* establish *how* a plaintiff must plead required elements, not *what elements* must be pleaded. They obligate Section 1983 plaintiffs to allege facts that, if proven, "plausibly suggest an entitlement to relief." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 681 (2009). Here, petitioner must plausibly allege that respondent violated SDC's Fourth Amendment rights.

Twombly and *Iqbal* do not turn affirmative defenses, such as qualified immunity (*Gomez*, 446 U.S. at 640), into pleading requirements. Even after *Iqbal* and *Twombly*, "an affirmative defense to a plaintiff's claim for relief" is "not something the plaintiff must anticipate and negate in her pleading." *Perry* v. *Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1986 n.9 (2017). Rather, a defendant may prevail on an affirmative defense at the motion-to-dismiss stage only where "the allegations in the complaint suffice to establish that ground." *Jones* v. *Bock*, 549 U.S. 199, 215 (2007).

Ashcroft v. *al-Kidd*, 563 U.S. 731, 735 (2011) (see BIO 6-7), did not purport to overturn *Gomez*, *Harlow*, *Leatherman*, or *Crawford-El*. To the contrary, *al-Kidd* cited *Harlow* for the qualified immunity standard (563

U.S. at 735), and *Harlow* in turn underscored that qualified immunity "is an affirmative defense that must be pleaded by a defendant official." *Harlow*, 457 U.S. at 815.

Qualified immunity was appropriate in *al-Kidd* because the facts that *were* pleaded established the defense. There, the plaintiff "concede[d] that individualized suspicion supported the issuance of the material-witness arrest warrant." *al-Kidd*, 563 U.S. at 740. The Court concluded that this concession meant both that there was "no Fourth Amendment violation" (*ibid.*) and that any arguable violation was not clearly established (*id.* at 741-742). *al-Kidd* thus rested on the straightforward rule that a plaintiff may plead herself out of court by alleging facts that "establish" an affirmative defense. *Jones*, 549 U.S. at 215.

So too in *Wood* v. *Moss*, 572 U.S. 744 (2014). There, the facts were agreed: Two groups of protestors, one supporting the president and one opposing him, were placed at unequal distances from the president. *Id.* at 749-751. The Court concluded that no clearly established law provided protestors the right to be equally distant from the target of the protest. *Id.* at 759-762. *Wood*, like *al-Kidd*, did not place the burden of avoiding a quality immunity defense on the plaintiff.

To the extent language from *al-Kidd* and *Wood* can be read as conflicting with the express holdings of *Gomez* and *Leatherman*, that tension—and the conflict over the pleading standard among the courts of appeals—is a reason for granting certiorari, not denying it.

3. The circumstances presented by *al-Kidd* and *Wood*—where the facts as pleaded by the plaintiff established a right to qualified immunity—differ materially from those here. Indeed, the court of appeals rec-

ognized that "hypothetical" additional allegations—consistent with the existing complaint—could have satisfied the "clearly established" prong of the doctrine. See Pet. App. 33a n.18. Ultimately, the court of appeals held that the *absence* of such allegations negating qualified immunity meant that petitioner failed to carry her pleading burden. Pet. 17-18. That outcome is wholly contrary to the rule established in *Gomez*.

Respondent offers two responses—he asks this Court to draw factual conclusions based on cherry-picked words in the complaint (BIO 2-5), and he argues that no Fourth Amendment violation is cognizable because he tried to shoot the dog, not SDC (BIO 12-15, 24-26). Both arguments fail.

a. Stripping statements from context, respondent asks this Court to accept the factual conclusion that "the dog was acting in a threatening manner." BIO 4. But the court of appeals rejected the premise that respondent "did feel the need to subdue the dog." Pet. App. 33a n.18. The court understood that it is consistent with the complaint's allegations for the dog to have been a nonthreatening "toy poodle." *Ibid*. What did the work was the burden the court of appeals erroneously placed on petitioner.

The complaint's paragraph 28 says that "at no time did any other agent or employee of Coffee County attempt to restrain or subdue the animal." Pet. App. 71a-72a. That does not suggest, as respondent asserts, that it would have been "appropriate" to "subdue" the dog. BIO 4. It suggests, if anything, the polar opposite—that no one other than respondent thought subduing the dog was warranted; if so, likely one of the several other officers would have taken some action.

Paragraph 41 similarly makes no concession that the dog was dangerous. See Pet. App. 76a-77a. It simp-

ly identifies that, *if* subduing the dog was reasonable in the circumstances, respondent could have used a Taser or pepper spray, especially in view of the close proximity of several children. *Ibid*. It is not the admission that respondent conjures. See BIO 21. And that the dog was "approaching his owners" (BIO 5) does not render it a threat.

The allegations of the complaint are ultimately clear:

- "Bruce posed no threat." Pet. App. 78a.
- When respondent shot at the dog, there was no "immediate threat or cause." *Id*. at 71a.
- No one was "threatened" by Bruce's "presence." *Id*. at 72a.
- "No agent or employee at the scene had the need to shoot at the family pet." *Ibid*.

Together, petitioner has sufficiently alleged that the dog was non-threatening. She certainly has not alleged that it *was* threatening.

But even if that were not so, that still does not preclude petitioner's Fourth Amendment claim. Even assuming that respondent could have been justified in shooting at the dog in the abstract (he was not), that does not mean that he was free to do so in a yard full of detained children. Even when the use of some force is justified, an officer still must exercise that force in a reasonable manner. See, *e.g.*, *Scott* v. *Harris*, 550 U.S. 372, 380-384 (2007) (use-of-force claims are not governed by "a magical on/off switch," but instead ask "whether [the officer's] actions were objectively reasonable"); *Plumhoff* v. *Rickard*, 572 U.S. 765, 774 (2014) (objective reasonableness "requires analyzing the totality of the circumstances"). That analysis takes into account whether there was "a safer way, given the time,

place, and circumstances," to effect the seizure. *Scott*, 550 U.S. at 386 (Ginsberg, J., concurring); see *id.* at 380, 383-384 (majority opinion) (considering quantum of force and risk to "innocent bystanders"). Here, there plainly was.

b. Respondent argues that he could not have violated SDC's rights because he did not seize him within the meaning of the Fourth Amendment. BIO 13-15, 24-26. We answered this point already (Pet. 28-30), and respondent does not join issue.

The Fourth Amendment claim has two principal components—whether there is a "seizure" and, if so, whether the use of force was reasonable in the circumstances. See *Plumhoff*, 572 U.S. at 774.

As to the first, a seizure is effected by "a governmental termination of freedom of movement *through means intentionally applied*." *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989). The Court has cautioned not to "draw too fine a line" in "determining whether the means that terminates the freedom of movement is the very means that the government intended." *Id*. at 598.

SDC was undeniably seized *prior* to the shooting. See Pet. 29. SDC was lying face down on the ground, at gunpoint, pursuant to officer orders not to move. Pet. App. 13a-14a. This obviously qualified as a seizure—and respondent does not disagree. Thus, when respondent shot SDC, a Fourth Amendment seizure had *already* occurred, triggering an obligation for respondent to act reasonably when intentionally using force. Indeed, respondent's use of force served to *continue* his seizure of SDC, as it was part of his (unreasonable) actions to control the scene.

Respondent's cases (BIO 14, 24-26 & n.8) address a very different issue—whether a shot intentionally fired that accidentally hits a *non-seized* bystander may qual-

ify as a Fourth Amendment seizure. That issue, however interesting, is not implicated by *these* facts. Here, Vickers seized SDC, and then Vickers intentionally used force. Vickers was thus obligated to act reasonably vis-à-vis SDC. We explained this earlier (Pet. 29-30), and respondent fails to demonstrate why this is anything other than a straightforward application of settled Fourth Amendment law. Respondent's argument—which improperly gained traction below—demonstrates how qualified immunity causes courts to lose sight of fundamental constitutional principles.

As to the second question, we explained that petitioner has adequately alleged that the use of force was unreasonable. Given her allegations that the dog posed no threat, *no* use of force was reasonable in the circumstances. See Pet. 28. And, even if some force was reasonable, it was unreasonable for respondent to fire his gun when pointed at SDC, only eighteen inches away. See pages 7-8, *supra*.

B. The Court should reverse or recalibrate qualified immunity.

Alternatively or additionally, the Court should reform the doctrine of qualified immunity.

1. This case is well-suited to revisit the scope and contours of qualified immunity.

That this claim was resolved by the court of appeals on a motion to dismiss makes it especially appropriate for review. It highlights how qualified immunity pretermits factual development of substantial constitutional claims. And it underscores how qualified immunity has morphed into a powerful presumption that all such claims face dismissal.

Respondent's main response is to quarrel with the factual allegations. BIO 19-20. Respondent will have

an opportunity to establish his preferred version of what occurred, but now is not that time.

2. This case presents the Court several options to reform qualified immunity.

As the first question presented demonstrates, proper application of the pleading standard will preclude premature dismissal of substantial claims.

Beyond that, this Court's precedents have focused on whether a reasonable officer would know that his or her "conduct" (see, *e.g.*, *Harlow*, 457 U.S. at 819) is unlawful, regardless of the specific nature of the legal theory. Pet. 27-28. As Judge Browning explained in colorful detail, that—not factual identity with judicial precedent—is how officers are trained. Pet. 24-25. Relevant here, reasonable officers would know that respondent's "conduct"—using deadly force to shoot a non-threatening dog directly adjacent to a child in his custody—was a violation of established rights. The Eleventh Circuit's search for factual identity with past cases (Pet. App. 27a-28a) obfuscates the clarity of the constitutional rights at issue here.

Further, *Hope* v. *Pelzer*, 536 U.S. 730, 741 (2002), establishes that there is no qualified immunity when a constitutional violation is "obvious." Reaffirmation of that doctrine would, for similar reasons, resolve this case—and bring needed flexibility to the qualified immunity doctrine.

Alternatively, the Court could return qualified immunity to its roots—the common-law elements of the torts at issue. In *Pierson* v. *Ray*, 386 U.S. 547, 554-556 (1967), the Court identified that certain historical torts included embedded defenses, like "good faith," that properly calibrated the rights of law enforcement with those of the public they serve. But as qualified immunity has evolved into an across-the-board defense, that

calibration has gone by the wayside. See William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45 (2018). Returning qualified immunity to the common law would strike the appropriate balance.

3. *Stare decisis* does not, contrary to respondent's claim (BIO 15-19), present a compelling basis for retaining qualified immunity in present form.

Several of the options we present do not implicate *stare decisis* considerations at all. Reinforcing the "conduct"-based approach of *Harlow* and its progeny is faithful *adherence* to stare decisis. So too is confirming the vitality of *Hope* v. *Pelzer*. Likewise, reaffirming *Gomez*—which established the pleading burden—is compelled by *stare decisis*.

As for returning to the common-law defenses—in place of qualified immunity altogether—that result is justified by the lack of legal foundation underlying qualified immunity. Neither text nor common law supports the current qualified immunity doctrine. Pet. 31-32. See also *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) (a decision that is "badly reasoned" is more ripe for review). It was created by "freewheeling policy choices" that the Court has "previously disclaimed the power to make." *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., dissenting). As a "judge made" "rule," "change should come from this Court, not Congress." *Pearson* v. *Callahan*, 555 U.S. 223, 233-234 (2009). And the special justification stems from the egregious violations of constitutional rights—including that alleged here—that a too-powerful form of qualified immunity leaves without remedy.

CONCLUSION

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

Respectfully submitted.

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