No. 99-1977

In The
Supreme Court of the United States

October Term, 2000

Donald Saucier,

Petitioner,

v.

Elliot M. Katz and In Defense of Animals,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

BRIEF *AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF NORTHERN CALIFORNIA, THE NATIONAL LAWYERS GUILD, THE CENTER FOR CONSTITUTIONAL RIGHTS, AND LAMBDA LEGAL DEFENSE AND EDUCATION FUND, IN SUPPORT OF RESPONDENTS*

David Rudovsky
(*Counsel of Record*)
924 Cherry Street
Philadelphia, Pennsylvania 19107
(215) 925-4400

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Michael Avery
Suffolk Law School
41 Temple Street
Boston, Massachusetts 02114
(617) 573-8551

Alan L. Schlosser
American Civil Liberties Union Foundation of Northern California
1663 Mission Street
San Francisco, California 94103
(415) 621-2488

William Goodman
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

Ruth E. Harlow
Lambda Legal Defense and Education Fund
120 Wall Street, Suite 1500

New York, New York 10005
(212) 809-8585

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INTEREST OF *AMICI* [(1)]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae.* The American Civil Liberties Union of Northern California is one of its regional affiliates.

Throughout its eighty year history, the ACLU and its affiliates have been involved in many cases around the country challenging the use of excessive force by law enforcement officers. The question of whether law enforcement officers found guilty of using excessive force in the performance of their duties are nonetheless entitled to a qualified immunity against damages is therefore a matter of considerable concern to the ACLU and its members.

The National Police Accountability Project of the National Lawyers Guild (NLG) is dedicated to protecting all persons from the unlawful or unconstitutional use of police power. The Project provides information and resources necessary for police misconduct litigation and support for legislative efforts to strengthen remedies for the victims of police abuse.

The Center for Constitutional Rights (CCR) is a progressive law, education, and advocacy organization that is dedicated to the advancement of the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. The Center, which grew out of the civil rights movement in the Deep South in the 1960s, has long been in the forefront of social and economic justice litigation.

Excessive force claims are raised in a very large percentage of the police misconduct cases filed by the clients served by NLG and CCR. Recognition of a qualified immunity defense in excessive force cases would significantly impair the ability of these clients to obtain a meaningful remedy when their constitutional rights are violated. With over twenty-five years of active litigation on this issue, CCR and NLG seek this opportunity to make their views available to the Court.

Lambda Legal Defense and Education Fund (Lambda) is a national not-for-profit organization committed to achieving full recognition of the civil rights of lesbians, gay men, and people with HIV/AIDS through impact litigation, education, and public policy work. Founded in 1973, Lambda is the oldest and largest national legal organization dedicated to these concerns. Lambda is participating in this case because our members and clients regularly encounter law enforcement officers

in many circumstances, including in the course of engaging in First Amendment expression on issues of concern to lesbians, gay men and people with HIV/AIDS, as the targets of laws criminalizing lesbian and gay sexual conduct, and as the victims of anti-gay bias and hostility harbored by some law enforcement officials. Lambda's members and clients have suffered from the use of excessive force by law enforcement officers in the course of such encounters. Granting officers guilty of using excessive force a qualified immunity defense that is irreconcilable with their Fourth Amendment violation would seriously hinder the ability of Lambda's members and clients to obtain redress. It would also weaken the significant deterrent to the use of excessive force posed by the potential of a judgment against an officer guilty of objectively unreasonable conduct.

STATEMENT OF THE CASE [(2)]

On September 24, 1994, the public was invited to attend a special presentation by Vice President Gore at the Presidio Army base in San Francisco to celebrate the anticipated conversion of most of the Presidio to a national park. The conversion of the Presidio was a subject of some public controversy, particularly with respect to the possibility of animal experimentation at the Army's Letterman Hospital.

Respondent, a veterinarian who was then sixty years old, and other members of the organization In Defense of Animals, were among the several hundred members of the public who attended the event. Katz was seated in a public area, separated from the state and dignitary seating area by a waist-high cyclone fence. He was wearing a visible, knee-high leg brace because of a broken foot. He was not wearing a shoe on his injured foot.

On the day of the event, petitioner was working as a military police officer. According to his deposition testimony, he had been told by his superiors that demonstrations would not be allowed and had been instructed to "diffuse the situation if it arises," but not to "draw that much attention if we didn't have to." 194 F.3d at 965. Katz was "pointed out as one of the potential, you know, activists" and petitioner knew "who this person was . . . the person we need[ed] to keep an eye on." *Id.*

As Vice President Gore began speaking, respondent silently removed a cloth banner from his jacket and walked to the barrier. The banner measured approximately four feet by three feet and stated "Please Keep Animal Torture Out of Our National Parks." Katz intended to hang the banner over the fence so that Vice President Gore and other speakers could read it.

At this point petitioner and another officer grabbed him from behind and tore the banner away. Katz did not try to prevent them from taking the banner. The two military police officers then each took one of Katz's arms and "started sort of picking [Katz] up and kind of walking [him] out, kind of like very hurriedly, sort of like the bum's rush." *Id.* They took Katz to a military van parked behind the seating area and "violently threw" him inside. Katz was able "to kind of prevent" his head from smashing into the floor of the van and "was able to stop the downward and the forward motion by just catching [himself] so that [he] didn't smash [himself]." With "a great deal of effort," he was barely able "to prevent [himself] from getting seriously hurt." *Id.* at 965-66.

Katz was taken to a military police station. After being briefly detained, he was released and allowed to drive home. Katz was never informed of the basis for his detention or cited with any violation of any law or regulation.

Respondent brought this action against Specialist Saucier and other officials pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), alleging that they violated his Fourth Amendment rights by using constitutionally excessive force to arrest him. Following discovery, petitioner sought summary judgment on the merits and on qualified immunity grounds, arguing that a competent officer could reasonably have believed that the amount of force he used was consistent with the Fourth Amendment. The district court denied the motion, reasoning that the denial of summary judgment on the merits of the Fourth Amendment claim necessarily foreclosed the possibility of immunity. The district court held that "the qualified immunity inquiry is the same as the inquiry made on the merits," 194 F.3d at 966, and requires the court to consider whether the totality of the circumstances justified the seizure. The court of appeals affirmed. In excessive force cases, the court stated, the Fourth Amendment reasonableness test and the qualified immunity analysis both focus "on the objective reasonableness of the officer's conduct." *Id*. at 968. "Because of this parity," the court concluded, "we have repeatedly held that the inquiry as to whether officers are entitled to qualified immunity for the use of excessive force is the same as the inquiry on the merits of the excessive force claim." *Id*.

SUMMARY OF ARGUMENT

The qualified immunity defense is not applicable to claims of excessive force under the Fourth Amendment. The standard for determining whether excessive force has been used in a particular case is identical to the standard for determining whether an officer is entitled to qualified immunity from liability for a Fourth Amendment violation. To prove a Fourth

Amendment violation, the plaintiff must demonstrate that the officer acted in an objectively unreasonable manner and, in determining reasonableness, the factfinder must make "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving." *Graham v. Connor*, 490 U.S. 386, 397 (1989). As the courts have consistently recognized, the Fourth Amendment itself provides the officer with a wide zone of protection. The officer can use a range of force in response to perceived danger and need not use the least force necessary under the circumstances.

Once it is determined that the force that was used was objectively unreasonable, a defense of qualified immunity is logically inconsistent with the Fourth Amendment determination because it is measured by the same "objective reasonableness" standard. A police officer cannot have an objectively reasonable belief that the force used was necessary (thus entitling him to qualified immunity) when it has already been determined that an objectively reasonable officer could not have believed that the force used was necessary (thus establishing a Fourth Amendment violation). Any such findings would be irreconcilable. At the very least, the two inquiries merge into a single analytic question.

Qualified immunity is available in probable cause determinations because of the difficult legal issues that may be presented in any particular decision to arrest or search. No such difficult legal issues are presented in the excessive force context: the sole question for the officer is whether force is necessary to effect an arrest or other police action, or to defend oneself or others from harm. Given the broad protection the officer has under *Graham*, no officer who acts unreasonably for Fourth Amendment purposes could be said to act reasonably in terms of qualified immunity. The existence of such broad protection in the Fourth Amendment itself, moreover, eliminates any fear that officers will be unreasonably chilled from acting in the absence of a separate qualified immunity defense.

Petitioner's suggested standard for determining qualified immunity in the context of an excessive force claim demonstrates the duplicative nature of such an enterprise. According to petitioner, where a court has determined that the force used was objectively unreasonable, it would still have to ask whether this fact would be "obvious" to the officer. But in reaching the conclusion that the force was unreasonable in the first place under the *Graham* standard, the court will have considered this fact and already decided that it would have been apparent to an objectively reasonable officer that the force was excessive.

ARGUMENT

THE DETERMINATION THAT A POLICE OFFICER'S USE OF FORCE WAS *OBJECTIVELY UNREASONABLE*, AND THEREFORE EXCESSIVE UNDER THE FOURTH AMENDMENT, PRECLUDES A DETERMINATION THAT THE OFFICER ACTED IN AN *OBJECTIVELY REASONABLE* MANNER FOR PURPOSES OF QUALIFIED IMMUNITY

A. Introduction

Government officers and officials are entitled to a defense of qualified immunity where their alleged unconstitutional conduct "does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As this Court has developed and refined the defense, the primary focus is on the "objective reasonableness" of the officer's actions in the light of the legal principles that govern his conduct. *See Anderson v. Creighton*, 483 U.S. 635 (1987). Where an objectively reasonable officer would not know that his conduct was unconstitutional because the legal standard had not been clearly established at the time or because the contours of the constitutional right did not provide sufficient notice that his conduct was violative of the right asserted, the officer is entitled to the qualified immunity defense. *Id*. *See also United States v. Lanier*, 520 U.S. 259, 270 (1997).

The issue presented by this case is whether this defense should be available in cases where the plaintiff alleges a violation of the Fourth Amendment right to be free from excessive force during an arrest.[(3)] For the reasons set forth below, we submit that the defense of qualified immunity is entirely inconsistent with a determination that an officer acted in an objectively unreasonable manner in his use of force. The legal principle that excessive force violates the Fourth Amendment is clearly established, *Graham v. Connor*, 490 U.S. 386, and the standards for determining whether force was excessive and for deciding the qualified immunity issue are identical: was the force used objectively reasonable under the circumstances.

B. The Fourth Amendment Standard

In *Graham v. Connor*, the Court ruled that excessive force claims arising out of arrests, investigatory stops, or other seizures of "free citizens" are properly analyzed under the Fourth Amendment's objective reasonableness standard. The Court stated that reasonableness is to be determined by the "facts and circumstances of each particular case, including the severity of the

crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id*. at 396.

Most significantly, the Court defined "reasonableness" in a manner that gives the officers substantial latitude in determining whether and what type of force can be used. As the Court stated:

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *See Terry v. Ohio*, *supra*, 392 U.S. at 20-22.
>
> . . .
>
> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," *Johnson v. Glick*, 481 F.2d at 1033, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police 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.

Id. at 396-97.

Graham provides officers with a substantial margin of error. Thus, even where post-incident review demonstrates that the force used was unnecessary (for example, the suspect did not have the weapon the officer believed he possessed), there is no Fourth Amendment violation if the officer could have reasonably believed the force used was necessary. Accordingly, once a court or jury has determined that force was excessive, it has of necessity made the judgment -- with "allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain and rapidly evolving," *id*. at 397 -- that an objectively reasonable officer could not have thought that the force used was necessary or reasonable under the circumstances.

C. Qualified Immunity Cannot Be A Defense To A Claim Of Excessive Force Under The Fourth Amendment

In the rare situation where the standard for qualified immunity and the constitutional claim are identical, qualified immunity cannot be a separate defense to a claim of a constitutional violation. In the excessive force context, once it is determined that an objectively reasonable officer would not have used the force in question, it makes no sense -- indeed it is conceptually incoherent -- to assert that the very same objectively reasonable officer could have believed that the force was reasonable. In other words, a police officer cannot have an objectively reasonable belief that his conduct was lawful when the unlawfulness of that conduct rests on a determination that an objectively reasonable officer would not have acted in the same way in the same circumstances.

A significant number of lower federal courts have held that the Fourth Amendment and the qualified immunity doctrine pose precisely the same legal issue and that any differing determinations would be legally irreconcilable. *See, e.g.*, *McNair v. Coffey*, 234 F.3d 352 (7th Cir. 2000); *Frazell v. Flanagan*, 102 F.3d 877, 886-87 (7th Cir. 1966) ("once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful"); *Scott v. District of Columbia*, 101 F.3d 748 (D.C.Cir. 1996), *cert. denied*, 520 U.S. 1231 (1997); *Alexander v. County of Los Angeles*, 64 F.3d 1315 (9th Cir. 1995); *Roy v. City of Lewiston*, 42 F.3d 691 (1st Cir. 1994); *Street v. Parham*, 929 F.2d 537 (10th Cir. 1991); *Ramirez v. City of Reno*, 925 F.Supp. 681, 687-89 (D.Nev. 1996)("intrinsic analytical incompatibility of an excessive force claim with a qualified immunity claim" given the objective reasonableness test; the "two lines of inquiry converge"); *Landy v. Irizarry*, 884 F.Supp. 788 (S.D.N.Y. 1995).[(4)]

Petitioner, in arguing for a qualified immunity defense in excessive force cases, relies almost exclusively on *Anderson v. Creighton*, 483 U.S. 635. In our view, arguments based on *Anderson* are significantly misplaced. There, this Court ruled that the qualified immunity doctrine is applicable in cases alleging Fourth Amendment violations for warrantless searches or arrests without probable cause or exigent circumstances. The Court reasoned that where an officer is found to have violated the Fourth Amendment by making an arrest or conducting a search without the requisite cause or suspicion, the officer is entitled to the defense of qualified immunity *if* an objectively reasonable officer could have believed that probable cause existed. *Anderson* is premised on the understanding that the "reasonableness" element of probable cause is different from the "objectively reasonable" standard of qualified immunity. That is because the probable cause determination will often require the drawing of fine legal lines.[(5)] Recognizing that reality, this Court held in *Anderson* that given the "difficulty of determining whether particular searches or seizures comport with the Fourth Amendment . . . [l]aw enforcement officers whose judgments in making these difficult determinations are objectively *legally* reasonable . . . [are entitled to qualified

immunity]." *Id*. at 644 (emphasis added). Thus, in the probable cause context, a police officer might mistakenly violate a citizen's rights without acting unreasonably.

The probable cause determination for a search or seizure always requires an officer to decide whether the known facts would warrant a reasonable officer to believe that a crime has been committed or that a search would disclose contraband or material of evidentiary value, *Gerstein v. Pugh*, 420 U.S. 103 (1975), and must be made pursuant to evolving legal doctrine under the Fourth Amendment. Consider, for example, this Court's jurisprudence concerning investigatory stops or arrests of persons based on information provided by anonymous informants. In *Alabama v. White*, 496 U.S. 325 (1990), the Court determined that information from an anonymous source would justify an investigatory stop if critical *predictive* details were corroborated by the police. In *Florida v. J.L.*, 529 U.S. 266 (2000), the Court declined to extend *White* to situations where the anonymous source provided information regarding a man with a gun at a certain location, and police investigation led to an observation of a person fitting the general description at that location. In the wake of *J.L*. (and this Court's opinion in *Illinois v. Wardlow*, 528 U.S. 119 (2000)), there will no doubt be close cases, depending upon the information received, the observations of the officers and other relevant factors. *See, e.g*., *United States v. Valentine*, 232 F.3d 350 (3d Cir. 2000)(stop based on anonymous informant who personally provided information to police). And in some of these cases, an officer will make a stop on information that a court will later declare to be insufficient to satisfy the Fourth Amendment; yet, given the lack of a particularized legal standard, the officer may still have acted in an objectively reasonable manner.

No such legal difficulties face the officer who must determine how much force to use in a particular incident, whether in self-defense or in effectuating an arrest. This Court ruled in *Graham* that police officers act consistently with the Fourth Amendment when their conduct is objectively reasonable -- a nontechnical and deferential constitutional doctrine that reflects well established and commonly held judgments on the limits of police force.(6) This standard provides a margin of error, precludes "Monday morning quarterbacking" by a court, permits the officer a wide range of reasonable responses, and does not require the officer to make finely tuned legal determinations. Thus, once it has been determined that an officer has acted in an excessive fashion, it is not possible to claim that an objectively reasonable officer could have thought these actions to be proper.

In many "tense, uncertain and rapidly evolving" situations, reasonable force may comprise a range of options or responses that the officer might employ. Different officers in the identical situation, each behaving reasonably, might elect to use a baton, a chemical agent, a take-down hold, or a different technique; and each might use greater or lesser force, within a reasonable range, in employing the chosen technique.(7)

Recognition that reasonable force may include a range of responses is consistent with this Court's observation in *Graham* that "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." 490 U.S. at 396. Understanding that the Fourth Amendment recognizes a range of forcible responses as reasonable also implements this Court's injunction in *Graham* that there be "allowance for the fact that police officers are often forced to make split-second judgments." *Id*. at 396-97.

How wide the allowance or range may be "requires careful attention to the facts and circumstances of each particular case." *Id*. at 396. In some cases, the facts and circumstances may be simple enough that the range of permissible options available to the officer will be quite narrow. In some circumstances no use of force is reasonable if none is required. *See Cox v. Treadway*, 75 F.3d 230, 234 (6th Cir.), *cert. denied*, 519 U.S. 821 (1996); *Bauer v. Norris*, 713 F.2d 408 (8th Cir. 1983). In others, the difficulties confronting officers making split-second, life and death decisions may raise sufficient problems that the range of responses that should be deemed reasonable may be quite broad.

The critical point is that this "zone of protection" in use of force cases is provided as part of the Fourth Amendment reasonableness standard itself. And where, as here, the standard for determining qualified immunity is the *same* as that for deciding the constitutional question itself, the defense is superfluous. This is not a matter of semantics or linguistic similarity; rather, it is a case of doctrinal identity. In determining whether an officer's use of force was within a range of reasonable options, the jury is also (and necessarily) answering the question whether a reasonable officer "could have believed" his use of force "to be lawful." *Anderson v. Creighton*, 483 U.S. at 638. Once this question is answered, there is no other inquiry that must be resolved in order to impose liability.(8) The existence of such broad protection in the Fourth Amendment itself, moreover, eliminates any fear that officers will be unreasonably chilled from acting in the absence of a separate qualified immunity defense.

Petitioner correctly states that existing law protects an officer from liability by providing qualified immunity where "an appropriately competent officer could *reasonably have believed* that the search or seizure was reasonable within the meaning of the Fourth Amendment, even if such a belief would be erroneous." Pet.Br. at 19-20 (emphasis in original). But by the

same token, where the legal standard under the Fourth Amendment sustains use of force where an appropriately competent officer would reasonably believe that the force used was necessary, it is illogical to suggest that where the use of force is excessive that an "appropriately competent officer could reasonably believe" that such excessive force was reasonable.

Put another way, the law ultimately permits only a single right answer to the question of whether probable cause exists in any particular case, but not every wrong answer is therefore unreasonable. By contrast, there is rarely a single appropriate response in cases where the police determine that the use of force is necessary. Instead, there is a range of responses, some of which can be characterized as reasonable. However, once characterized as unreasonable for Fourth Amendment purposes, an officer's use of excessive force cannot later be characterized as reasonable for qualified immunity purposes.[(9)]

The duplicative nature of petitioner's suggested standard is made clear by his articulation of what a court would be required to do in applying a qualified immunity defense in use of force cases. According to petitioner, the determination on the merits of the Fourth Amendment question that an officer's use of force was not objectively reasonable is not conclusive; rather, the court must then decide whether it was "sufficiently obvious" that the force used was objectively unreasonable. Pet.Br. at 27. Petitioner's submission is flawed. This Court has used the term "obvious" in relationship to the qualified immunity defense only in a particular context, and even there the ruling did not carry the implications advanced by petitioner. In *Malley v. Briggs*, 475 U.S. 335 (1986), the officer properly submitted his probable cause allegations to a judge. The Court's desire to encourage police officers to seek prior judicial approval was reflected in its approach to the qualified immunity question. Thus, under the particular facts of *Malley*, the Court held:

> Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized.

Id. at 341.

Amici are unaware of any case, other than *Malley*, in which the Court has characterized the qualified immunity question in terms of the obviousness of the constitutional violation. The language of *Anderson v. Creighton*, on which petitioner so heavily relies, is far more typical. There, the Court stated that there would be no immunity if the violation of law would be "apparent" to a reasonable officer in light of clearly established law. Still, the terminology is less important than this Court's repeated acknowledgement that immunity is inappropriate where a reasonably competent officer would have known his actions to be in violation of the Fourth Amendment. As discussed above, this formulation is the same as that set forth in *Graham*, where the Court made it clear that the Fourth Amendment was violated whenever a reasonably competent officer would know that the use of force was excessive. Once this determination is made, a rule permitting reconsideration of the very same factor under the guise of qualified immunity would invite pure double-counting, would incorporate subjective factors into the qualified immunity analysis, and would effectively elevate the plaintiff's burden of proof in an excessive force case above the preponderance standard. *See McNair v. Coffey*, 234 F.3d at 355 (the argument for immunity in factually (as opposed to legally) close cases "is fundamentally a request to increase the plaintiff's burden of proof"); *see also Tatro v. Klein*, 41 F.3d 9, 14-15 (1st Cir. 1994).[(10)]

The doctrinal differences between probable cause and excessive force cases have been recognized by numerous federal courts. *See, e.g.*, *McNair v. Coffey*, 234 F.3d 352; *Humphrey v. Staszak*, 148 F.3d 719 (7th Cir. 1998); *Alexander v. County of Los Angeles*, 64 F.3d 1315; *Guffey v. Wyatt*, 18 F.3d 869 (10th Cir. 1994); *Street v. Parham*, 929 F.2d at 541 n.2 (because of the difficulty of deciding the probable cause issue, the conduct of the officer may be objectively reasonable even if cause did not exist, but in "excessive force cases, once a factfinder has determined that the force used was unnecessary . . . any question of objective reasonableness [is] . . . foreclosed"); *Landy v. Irizarry*, 884 F.Supp. 788; *Foote v. Spiegel*, 995 F.Supp. 1347, 1353 (D. Utah 1998).

In *Finnegan v. Fountain*, 915 F.2d 817, 824 n.11 (2d Cir. 1990), the court made the following pertinent analysis:

> In *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990), we made such a distinction between the reasonableness inquiries underlying a Fourth Amendment claim for an arrest without probable cause and qualified immunity. We stated that the probable cause inquiry involved essentially an *ex post* inquiry, judging reasonableness from the "actual circumstances . . . found as a matter of fact," while the qualified immunity involved an *ex ante* inquiry, judging reasonableness "from any reasonable point of view, including even a factual misperception, the officer may reasonably have harbored at the time the events took place." *Id*. at 75. It is questionable whether this same distinction holds up in the context of an excessive-force claim case, because the Supreme Court has made clear that the excessive-force inquiry is not made from an *ex post* perspective, but from the *ex ante* "perspective of a reasonable officer on the scene."

Likewise, in *McNair v. Coffey*, 234 F.3d 352, Judge Easterbrook rejected the argument that qualified immunity was available in a traditional use of force case. The Seventh Circuit restated its earlier determination that "once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful." *Id.* at 355 (quoting *Frazell v. Flanagan*, 102 F.3d at 886-87). But beyond this essential point, the court also pointed out that application of qualified immunity in this context would extend the doctrine well beyond historical or policy-based rationales. 234 F.3d at 355-56. Further, the court recognized that having the immunity doctrine turn on the issue of whether a reasonable officer would have "realized" that his conduct violated established legal standards (or as petitioner urges, whether it would be "obvious" to a reasonable officer that the objectively unreasonable conduct constituted excessive force) would in effect re-incorporate the element of subjectivity that both *Graham* and *Harlow v. Fitzgerald* reject. 234 F.3d at 355.

Petitioner asserts that *McNair* is wrongly decided and that its "characterization of *Anderson* is exactly backwards . . ." Pet.Br. at 36. We think that petitioner has not fairly read *McNair*. The court's rejection of qualified immunity in excessive force cases was based upon the fact that the legal standard for excessive force is now well settled *and* on the particularized manner in which *Graham* incorporated the standard of objective reasonableness into the Fourth Amendment test. 234 F.3d at 354. Petitioner's repeated assertion that he is entitled to qualified immunity unless the fact of his "objectively unreasonable" use of force would have been "obvious to him," Pet.Br. at 37, not only advances a defense built upon the subjective beliefs of petitioner but, as discussed above, would permit the kind of double-counting that is antithetical to any principled regime of qualified immunity.

In light of the argument we have made thus far, petitioner's claim that the rejection of a qualified immunity defense would "undermine[] the ability of courts to dispose of suits before trial . . .," Pet.Br. at 39, is surely erroneous. Properly applied, the Fourth Amendment standard governing use of force cases will provide the defendant with the same protection as qualified immunity. If the force used was objectively reasonable based on undisputed facts, the case will and should be dismissed pre-trial.

This Court has stressed that judicially created immunities should extend no further than is necessary to serve the policy that the immunity is intended to effectuate. *See, e.g.*, *Owen v. City of Independence*, 445 U.S. 622 (1980). And, as Judge Easterbrook recently stated in *McNair*:

> Let us never forget that immunity in ß1983 cases is a judicial invention. Congress provided for liability in absolute terms. Public officials who violate the Constitution or laws must pay.
>
> . . .
>
> The Supreme Court has justified immunity doctrines as approximating of the scope of public-official liability that prevailed when ß1983 was enacted. *See Richardson v. McKnight*, 521 U.S. 399, 402-07, 117 S.Ct. 2100, 138 L.Ed.2d 540 (1997); *Wyatt v. Cole*, 504 U.S. 158, 164, 112 S.Ct. 1827, 118 L.Ed. 2d 504 (1992). Fair enough in many parts of the law, but not when dealing with the fourth amendment. Until this century police faced absolute liability (in trespass or battery) for their acts; probable cause and reasonableness were defenses, and immunity (on top of these defenses) was unheard of.
>
> . . .
>
> All the great early opinions defining the scope of freedom from official intrusion resolve damages claims, without a hint that if the officers behaved unreasonably they might still be immune from liability. Thus a general doctrine of official immunity, independent of legal uncertainty, is not only anti-textual but also anti-historical in fourth amendment cases.

234 F.3d at 356.

Allowing a qualified immunity defense in this type of case will serve no legitimate purpose and can only serve to eviscerate the protections of the Fourth Amendment's proscription against excessive force.

CONCLUSION

The defense of qualified immunity is irreconcilable with a determination that an officer has violated the Fourth Amendment by use of excessive force. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

David Rudovsky
(*Counsel of Record*)
924 Cherry Street
Philadelphia, Pennsylvania 19107
(215) 925-4400

Steven R. Shapiro
American Civil Liberties Union Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

Michael Avery
Suffolk Law School
41 Temple Street
Boston, Massachusetts 02114
(617) 573-8551

Alan L. Schlosser
American Civil Liberties Union Foundation of Northern California
1663 Mission Street
San Francisco, California 94103
(415) 621-2488

William Goodman
Center for Constitutional Rights
666 Broadway
New York, New York 10012
(212) 614-6464

Ruth E. Harlow
Lambda Legal Defense and Education Fund
120 Wall Street, Suite 1500
New York, New York 10005
(212) 809-8585

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NOTES

1. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

2. Our statement of the case is based on the description set forth in the Ninth Circuit's opinion below. 194 F.3d 962.

3. This issue was left open in *Graham v. Connor*, 490 U.S. at 399, n.12.

4. Other courts have either decided the excessive force issue on qualified immunity grounds, without first deciding the Fourth Amendment issue, or have collapsed analysis of both issues into a single determination. However, in all of these cases, the courts have applied an objectively reasonable standard on the qualified immunity issue that is identical to the test for excessive force set forth in *Graham*. *See, e.g.*, *Sova v. City of Mt. Pleasant*, 142 F.3d 898 (6th Cir. 1998); *Harrell v. Decatur County*, 41 F.3d 1494 (11th Cir. 1995)(*en banc*); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159 (1995); *Roy v. City of Lewiston*, 42 F.3d 691. Of course, given this Court's ruling in *County of Sacramento v. Lewis*, 523 U.S. 833, __, 118 S.Ct. 1708, 1714 n.5 (1998), it is now clear that courts must first decide whether a constitutional claim is stated and only if the facts establish a violation should the court proceed to the qualified immunity analysis. In the excessive force context, since the two issues are identical, the

second step is plainly redundant. Moreover, as we argue below, application of the qualified immunity defense is unnecessary to protect objectively reasonable conduct. Adopting the contrary view, a number of courts have determined that there is a separate qualified immunity defense in excessive force cases. *See, e.g.*, *Oliveira v. Mayer*, 23 F.3d 642 (2d Cir.1994), *cert. denied*, 513 U.S. 1076 (1995); *Slattery v. Rizzo*, 939 F.2d 213 (4th Cir. 1991).

5. As the Second Circuit stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972)(on remand from Supreme Court), "even learned and experienced jurists have had difficulty in defining the rules that govern probable cause . . . . As he tries to find his way in this thicket, the police officer must not be held to act at his peril."

6.Indeed, the constitutional test is more deferential to the police officer than are the regulations of many major police departments. See Appendix to Brief, Use of Force Directive, Philadelphia Police Department.

7. Under *Graham*, police are generally not held to a retrospectively applied "least amount of force" test. Rather, as long as the force used was within a range of objectively reasonable options, the Fourth Amendment is satisfied. *See Forrett v. Richardson*, 112 F.3d 416, 420-21 (9th Cir. 1997), *cert. denied*, 523 U.S. 1049 (1998)(shooting violent felony suspect was reasonable even if his capture through other means was inevitable); *Scott v. Henrich*, 39 F.3d at 915 (reasonable to shoot armed man who confronted police at door); *Menuel v. City of Atlanta*, 25 F.3d 990, 996 (11th Cir. 1994)(fatal shooting of emotionally disturbed suspect was reasonable); *Forrester v. City of San Diego*, 25 F.3d 804, 807-08 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995)(use of "pain compliance techniques" to remove protestors was reasonable); *Plakas v. Drinski*, 19 F.3d 1143, 1148-49 (7th Cir.), *cert. denied*, 513 U.S. 820 (1994)(shooting of suspect was reasonable; officers not required to use available alternatives of maintaining distance from suspect with protection of barrier, or using chemical spray).

8. It follows from this analysis that there is no separate qualified immunity inquiry which a trial court must address at the summary judgment stage, on a motion for a verdict as a matter of law, or in connection with post-verdict motions. At such points, it will be appropriate for the court to consider only whether as a matter of law a jury could not find that the defendant's use of force fell outside the range of reasonable options and was constitutionally excessive.

9. Petitioner asserts that like the standard for probable cause, the concept of objective reasonableness for use of force does not establish "with clarity" whether the use of force will be considered lawful. But this is the wrong question and therefore the wrong answer. Where, as here, the constitutional standard articulated in this Court's decisions is defined so as to provide officers with a margin of error that will protect against liability except where an officer would not have reasonably thought the conduct to be legal, the "clarity" required by the qualified immunity doctrine is present.

10. Petitioner argues that qualified immunity is necessary since even judges disagree as to whether particular uses of force are in violation of the Fourth Amendment. Pet.Br. at 24. It is, of course, a characteristic of our appellate system that courts will divide on some issues. But once the majority has ruled, that decision is the conclusive determination of the merits of the case. In the context of use of force, a unanimous or majority appellate determination that the force used was excessive is a conclusive determination that no reasonable officer could have believed otherwise. Thus, it is erroneous to suggest that a divided court is proof of the proposition that a reasonable officer could have thought the force to be reasonable. Indeed, if this assertion were correct, where this Court rejects a qualified immunity defense by a divided Court, the officer could still claim this immunity on the theory that at least one Justice thought her actions to be objectively reasonable.

Nor can petitioner draw any support from *Wilson v. Layne*, 526 U.S. 603 (1999), or *Williams v. Taylor*, 529 U.S. 362 (2000). In *Wilson*, the Court granted qualified immunity to police who permitted the media to accompany them on a search of a house since the Court had never before decided the constitutionality of that practice. This was a prototypical qualified immunity case, turning on the unsettled nature of the legal claim. *Williams v. Taylor* concerned the scope of a federal court's habeas corpus review of the legal determination made by a state court. This Court ruled that not every "incorrect" application of federal law by a state court would be an "unreasonable" application of federal law as defined by the habeas statute, 28 U.S.C. ß2254(d)(1), in the context of a federal court's review of a state court's *legal determination of federal constitutional claims.* It is obvious that certain constitutional issues will not be settled until this Court has spoken. In such circumstances, the Court held, a lower court ruling may be "incorrect" but not "unreasonable" as that term is used in the habeas statute. If there is any analogy to qualified immunity, it would be to the test announced in *Harlow v. Fitzgerald*, 457 U.S. 800, where the Court was concerned with protecting government officials from liability where the plaintiff's legal theory had not yet been clearly established. This is a far cry from use of force claims, the standard for which is clearly established, and where once a court determines that the force used was excessive ("incorrect" in habeas terms), it is also by definition "unreasonable."