No. 13-551

IN THE
Supreme Court of the United States

ROBERT R. TOLAN,

Petitioner,

v.

JEFFREY WAYNE COTTON,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN REPLY FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

There is pervasive division among the lower courts regarding the proper framework for analyzing claims of qualified immunity. Departing from the two-pronged test set forth in *Saucier v. Katz*, 533 U.S. 194 (2001), the Fifth Circuit asks not only whether the plaintiff (i) alleged or demonstrated a constitutional violation and (ii) whether the right in question was clearly established, but also (iii) whether the officer's conduct was nonetheless reasonable.

Some courts use the same approach as the Fifth Circuit, while others have expressly rejected it. Second and Sixth Circuit panels disagree with one another about the appropriate standard in successive cases, and several judges have commented on the ongoing uncertainty facing trial courts and litigants.

This question is not simply semantic, as respondent suggests; the choice of standard dictates the outcomes of cases. Several courts have found that plaintiffs satisfied the traditional two prongs but granted immunity anyway, or (as in this case) bypassed either or both of the first two prongs but bestowed immunity after finding that the defendant's conduct was reasonable.

Respondent defends including the unauthorized third prong on the unremarkable ground that the facts matter when making immunity determinations. But the third prong engrafted by the Fifth Circuit on the *Saucier* test goes beyond simply supplying context to determine whether the applicable law was clearly established; it adds an extra element of factual reasonableness to the legal question of immunity.

Petitioner was misidentified as a car thief and shot on his knees on his own front porch. Because the Fifth Circuit applied the wrong legal standard to respondent's claim of immunity, he was denied a jury trial on his claim that respondent violated his Fourth Amendment rights. This Court should grant the petition to clarify the appropriate legal standard for qualified immunity claims.

I. THE CIRCUITS ARE IN DISARRAY OVER THE APPROPRIATE QUALIFIED IMMUNITY ANALYSIS.

Respondent attempts to minimize the conflict between lower courts by asserting that some merely "enunuciat[e] the multipart standard with greater specificity," using three rather than two prongs. Resp. Br. 28, 34–35. But the circuit split involved here is more than a matter of wording or numbering; it dictates the substance of the immunity analysis and changes the outcomes of cases.

The courts of appeals are unquestionably divided in how they decide immunity claims. *See* Pet. Part II. The Sixth Circuit engages in a reasonableness analysis similar to the Fifth Circuit test, but only in "certain cases." *Hoover v. Walsh*, 682 F.3d 481, 492 n.35 (6th Cir. 2012). The Tenth Circuit uses a reasonableness inquiry as part of its immunity analysis but adds that "a defendant should only rarely be able to succeed" on that basis. *Roska v. Peterson*, 328 F.3d 1230, 1251 (10th Cir. 2003) (citation and internal quotations omitted).

In direct conflict, the Seventh Circuit has specifically declined to "append a third prong to the two-part *Saucier* test." *Jones v. Wilhelm*, 425 F.3d 455, 460–61 (7th Cir. 2005). That court expressly rejected an officer's claim that immunity "should be decided

based on whether police officers acted reasonably under the circumstances they faced" even where "there was clearly established law which was violated." *Id.*; *accord Phelan v. Vill. of Lyons*, 531 F.3d 484, 489 (7th Cir. 2008) (reaffirming *Jones*). The First Circuit does not apply a third, objective reasonableness prong anymore, though it did before this Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009). *See Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009).

The Second Circuit reflects the overall confusion. That court has sometimes described the analysis as involving two steps, and other times three. *Compare Hilton v. Wright*, 673 F.3d 120, 126 (2d Cir. 2012) (two steps), *with Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013) (three steps). It once "clarif[ied]" that the second and third steps are "part of the same inquiry," *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415, 433 n.11 (2d Cir. 2009), only to hold later that a separate third step is "indispensable," *Taravella v. Town of Wolcott*, 599 F.3d 129, 135 (2d Cir. 2010). These "inconsistent directives" to the district courts, *Pinter v. City of New York*, 710 F. Supp. 2d 408, 423 (S.D.N.Y. 2010), *rev'd*, 448 F. App'x 99 (2d Cir. 2011), led one to lament that the circuit's "qualified immunity case law is itself not 'clearly established.'" *Ricciuti v. Gyzenis*, 832 F. Supp. 2d 147, 162 n.2 (D. Conn. 2011)

Several judges have acknowledged the disarray in this area. *See, e.g.*, *Walczyk v. Rio*, 496 F.3d 139, 165 (2d Cir. 2007) (Sotomayor, J., concurring); *Higgins v. Penobscot Cnty. Sheriff's Dep't*, 446 F.3d 11, 15 (1st Cir. 2006) (Howard, J., concurring). Indeed, "[t]he case law is divided, not only in [the Second] Circuit, but also in courts around the country."

Taravella, 599 F.3d at 138 n.2 (Straub, J., dissenting).

Respondent insists that the division among the courts of appeals is merely cosmetic, Resp. Br. 33, but the presence of the third "reasonableness" prong can dictate the outcome of cases by "giv[ing] defendants a second bite at the immunity apple." *Walczyk*, 496 F.3d at 169 (Sotomayor, J., concurring). Under the three-pronged test, a court might find a violation of clearly established rights but nevertheless still conclude that immunity applies because the officer's conduct appears to be "reasonable" in some generic sense. *See, e.g.*, *Gonzalez*, 728 F.3d at 155–58; *Taravella*, 599 F.3d at 134–35; *Wilson v. City of Boston*, 421 F.3d 45, 52–59 (1st Cir. 2005); *Byers v. City of Eunice*, 157 F. App'x 680, 682–85 (5th Cir. 2005); *Feathers v. Aey*, 319 F.3d 848, 848–51 (6th Cir. 2003). In addition, adding a third step to the analysis could complicate decisions on injunctive relief, making the issue more than "merely theoretical." *Higgins*, 446 F.3d at 17 (Howard, J., concurring).

II. THE FIFTH CIRCUIT'S THREE-PRONGED IMMUNITY ANALYSIS CONFLICTS WITH THIS COURT'S PRECEDENT.

This Court has never suggested that a third, reasonableness prong is included in the qualified immunity analysis. Yet the Fifth Circuit used this third step to engage in a lengthy factual examination of whether it was reasonable for respondent to shoot petitioner. Respondent defends this approach by maintaining that the facts provide necessary context to determining whether the plaintiff's rights were clearly established under the second prong of the *Saucier* analysis. Resp. Br. 19–26, 29, 35–36. But the Fifth Circuit's approach does more—it adds a

third step, ad hoc reasonableness test at odds with this Court's authority. *See Walczyk*, 496 F.3d at 168-69 (Sotomayor, J., concurring).

This Court explained in *Saucier* that qualified immunity is analyzed in two steps: whether the plaintiff has alleged or shown a constitutional violation, and whether the right in question was clearly established. 533 U.S. at 201. In this case, the first prong hinges on whether the officer used reasonable force in light of the threat on the scene, while immunity "has a further dimension"—whether he reasonably gauged "the legal constraints" on his conduct. *Id.* at 205. Immunity applies "[i]f the officer's mistake as to what the law requires is reasonable." *Id*. In other words, the second prong of the immunity analysis contemplates assessing the "objective *legal* reasonableness" of the defendant's conduct. *Pearson*, 555 U.S. at 244 (emphasis added) (citation and quotation omitted); *see also Crawford-El v. Britton*, 523 U.S. 574, 589 (1998) (stating that the second prong "is an essentially legal question" (citation and internal quotations omitted)). There is no free-floating third step centered on factual reasonableness.

Nonetheless, the Fifth Circuit bifurcated the second prong and imported factual reasonableness into the immunity analysis as a third step.[1] As the panel observed:

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[1] The Fifth Circuit's third step, like those of other circuits, seems to stem from improper reliance on circuit precedent that predates, and conflicts with, *Saucier*. *See, e.g.*, Pet. App. 10 (citing *Hare v. City of Corinth*, 135 F.3d 320, 326 (5th Cir. 1998)); *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211–12

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> To be sure, it was clearly established that shooting an unarmed, non-threatening suspect is a Fourth–Amendment violation. *But, that is only half of the equation for second-prong analysis*; the remainder depends upon the totality of the circumstances as viewed by a reasonable, on-the-scene officer without the benefit of retrospection.

Pet. App. 14 (emphasis added) (internal citations omitted); *see also* Pet. App. 10 (describing second prong's "two separate inquiries" (citation and quotation omitted)). This third "half of the equation" has nothing to do with whether respondent misjudged applicable law or lacked fair warning of Fourth Amendment principles. Instead, the Fifth Circuit "slosh[ed] . . . through the factbound morass of 'reasonableness,'" *Scott v. Harris*, 550 U.S. 372, 383 (2007), and granted immunity based on "the reasonableness of [respondent's] belief as to the appropriate level of force." *Saucier*, 533 U.S. at 205. Once the Fifth Circuit "determine[d] whether the right at issue was clearly established for the particular context that the officer faced, the qualified immunity analysis [should have been] complete." *Walczyk*, 496 F.3d at 167 (Sotomayor, J., concurring).[2]

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(2d Cir. 2003) (citing *X-Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65–66 (2d Cir. 1999)).

[2] Respondent quotes *dicta* from *Pearson* that immunity applies whether the error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." Resp. Br. 23 (quoting *Pearson*, 555 U.S. at 231). The phrase originated in *Butz v. Economou*, 438 U.S. 478, 507 (1978), and was para-

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The "dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. In other words, "whether a right is clearly established is *the same question* as whether a reasonable officer would have known that the conduct in question was unlawful." *Walczyk*, 496 F.3d at 166 (Sotomayor, J., concurring) (emphasis in original). "[A]dditional guidance" in the form of a third reasonableness inquiry, Resp. Br. 28, has no basis in this Court's jurisprudence and offers judges license to resolve disputed factual questions that properly rest with juries.

III. THIS CASE IS A SOUND VEHICLE FOR ADDRESSING THE PERSISTENT CONFUSION.

The state of the law governing qualified immunity is muddled across the circuits for two independent reasons. First, several courts erroneously add the

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phrased in *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting). But in *Butz* and *Groh*, the violation did not turn on whether an official acted unreasonably given surrounding facts. *See Butz*, 438 U.S. at 482; *Groh*, 540 U.S. at 554–59; *id.* at 573 (Thomas, J., dissenting) ("[T]he Court declines to perform a reasonableness inquiry."). In Fourth Amendment cases where the violation consists of factually unreasonable conduct, this Court has specifically held that the second step looks distinctly at whether the defendant reasonably misjudged the law. *See Saucier*, 533 U.S. at 204–06. Moreover, *Groh* makes clear that "[i]f the law [i]s clearly established, the immunity defense ordinarily should fail" without a separate, ad hoc inquiry into factual reasonableness. 540 U.S. at 563–64 (citation and quotation omitted).

third, reasonableness step to the immunity inquiry in all types of civil rights cases. In cases alleging violations of constitutional provisions other than the Fourth Amendment, the third step becomes an untethered, all-purpose reasonableness inquiry that improperly entitles defendants to immunity irrespective of whether reasonableness is an element of the underlying alleged violation. *See, e.g.*, *Taravella*, 599 F.3d at 135–36 (due process context). Second, this additional step is "especially [problematic] in Fourth Amendment cases" because courts use it to collapse the two traditional steps of the analysis despite *Saucier's* instruction. *Higgins*, 446 F.3d at 15–17 (Howard, J., concurring). This case is therefore an appropriate vehicle both to reiterate the appropriate framework governing qualified immunity and to reemphasize that the two prongs remain distinct in Fourth Amendment cases. *Saucier*, 533 U.S. at 203–04.

Further percolation is unnecessary. Courts like the Fifth and Sixth Circuits have acknowledged and reaffirmed their three-step tests even after *Saucier*. *See supra* Part I. Other courts, such as the First and Seventh Circuits, have expressly rejected applying the third step. *See id.* Still others, including the Second Circuit, acknowledge that they use a third step but allow the confusion to persist from case to case, perplexing district courts. *See id.* The division among the circuits is well developed and entrenched. There is no reason for this Court to defer resolution of this persistent controversy.

Because the Fifth Circuit applied an incorrect legal standard, respondent ultimately resorts to defending the shooting on the facts. He claims that because he "made a reasonable decision to fire after ob-

serving petitioner's actions," he would "be granted judgment upon analysis of the first prong" of qualified immunity even if the Fifth Circuit misconceived the second prong. Resp. Br. 30, 36–37. Not likely.

The key facts of the encounter are sharply disputed. Respondent claims that the scene was "fairly dark" and that this led him to focus on petitioner's "total movement" rather than his hand—but petitioner and his mother testified that the scene was adequately illuminated and that respondent should have been able to see what was happening. *Compare* Resp. Br. 13, 16, *with* Pet. App. 96. Respondent claims that petitioner's mother was moving around, disruptive, "argumentative," "upset," and "flipped her arm up" to move his—but she testified that she was calmly talking with the other officer on the scene when respondent slammed her into the garage door without provocation. *Compare* Resp. Br. 14–15 (citation and quotation omitted), *with* Pet. App. 41, 96–98. Respondent claims that petitioner was in a crouch, "angrily turning" toward him, and poised to charge forward—but petitioner testified that he was on his knees and "didn't jump up off the ground. I just simply got up. Started to get up. Before I could stand up, I was shot." *Compare* Resp. Br. 16, *and* Pet. App. 49–50, 52, *with* Pet. App. 75 (internal citations and quotations omitted). Most importantly, respondent claims that he saw petitioner's right hand "at his waistband" and thought he was drawing a gun—but petitioner testified that he did not gesture toward or away from his waist. *Compare* Resp. Br.

16, *with* Pet. App. 76, 98, 102 ("I didn't run at him. I didn't jump up and make any crazy movements.").[3]

Factual disputes like these, particularly when centered on parties' differing accounts of whether a suspect made a motion that could be construed as reaching for a weapon, are typically grounds for denying summary judgment.[4] Nor is respondent's expert testimony that officers "cannot be trained to positively identify a weapon before resorting to deadly force" dispositive. Resp. Br. 30 (citation and quotation omitted). Petitioner has never maintained

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[3] Respondent charges petitioner with relying on evidence ruled inadmissible by the district court, Resp. Br. 2–3, but he points to a page in the petition citing the opinion by Judge Dennis. *See id.* at 4. Regardless, the facts discussed in the petition and Judge Dennis's opinion are drawn from the testimony of various witnesses and other testimony by petitioner, not his excluded affidavit, and can all be found in the opinions below. *See* Pet. 5–7; Pet. App. 2–6, 23–53. Moreover, petitioner did challenge exclusion of the affidavit in the court of appeals. Appellants' Br. 33 n.6.

[4] *See, e.g.*, *Ribbey v. Cox*, 222 F.3d 1040, 1042–43 (8th Cir. 2010) (dispute over whether suspect reached for gun); *Jefferson v. Lewis*, 594 F.3d 454, 461–63 (6th Cir. 2010) (dispute over whether suspect pointed object at officer or merely gripped doorknob); *White v. Gerardot*, 509 F.3d 829, 834–35 (7th Cir. 2007) (dispute over whether suspect's hands were at waist motioning as if reloading); *Curry v. City of Syracuse*, 316 F.3d 324, 333–34 (2d Cir. 2003) (dispute over whether suspect reached for weapon in sock); *Wilson v. City of Des Moines, Iowa*, 293 F.3d 447, 452–54 (8th Cir. 2002) (dispute over whether suspect assumed shooting stance and reached into waistband); *Cunningham v. Gates*, 229 F.3d 1271, 1288–89 (9th Cir. 2000) (dispute over whether suspect reached toward waistband).

that officers must wait until they see a suspect wield a weapon before shooting.

* * *

The Fifth Circuit's use of the third step—employed by other circuits as well—cannot be squared with this Court's longstanding precedent. This case is a sound vehicle to clear up the confusion among the circuits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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