SUPREME COURT OF THE UNITED STATES

No. 99–1977

DONALD SAUCIER, PETITIONER *v.* ELLIOT M. KATZ AND IN DEFENSE OF ANIMALS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 18, 2001]

JUSTICE GINSBURG, with whom JUSTICE STEVENS and JUSTICE BREYER join, concurring in the judgment.

In *Graham* v. *Connor*, 490 U. S. 386 (1989), the Court announced and described an "objective reasonableness" standard to govern all claims that law enforcement officers, in violation of the Fourth Amendment, used excessive force in the course of an arrest. Measuring material facts of this case that are not subject to genuine dispute against the *Graham* standard, I conclude that officer Saucier's motion for summary judgment should have been granted. I therefore concur in the Court's judgment. However, I would not travel the complex route the Court lays out for lower courts.

Application of the *Graham* objective reasonableness standard is both necessary, under currently governing precedent, and, in my view, sufficient to resolve cases of this genre. The Court today tacks on to a *Graham* inquiry a second, overlapping objective reasonableness inquiry purportedly demanded by qualified immunity doctrine. The two-part test today's decision imposes holds large potential to confuse. Endeavors to bring the Court's abstract instructions down to earth, I suspect, will bear out what lower courts have already observed– paradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both

hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful? See, *e.g.*, *Roy* v. *Inhabitants of City of Lewiston*, 42 F. 3d 691, 695 (CA1 1994); *Rowland* v. *Perry*, 41 F. 3d 167, 173 (CA4 1994). Nothing more and nothing else need be answered in this case.

I

All claims that law enforcement officers have used excessive force in the course of an arrest, *Graham* made explicit, are to be judged "under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." 490 U. S., at 395. Underlying intent or motive are not relevant to the inquiry; rather, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them." *Id.*, at 397. The proper perspective in judging an excessive force claim, *Graham* explained, is that of "a reasonable officer on the scene" and "at the moment" force was employed. *Id.*, at 396. "Not every push or shove," the Court cautioned, "even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Ibid.* (citation omitted). "The calculus of reasonableness" must allow for the reality that "police officers are often forced to make split-second judgments" about the force a particular situation warrants "in circumstances that are tense, uncertain, and rapidly evolving." *Id.*, at 396–397.

Under *Graham*'s instructions, the question in this case is whether officer Saucier, in light of the facts and circumstances confronting him, could have reasonably believed he acted lawfully. Here, as in the mine run of excessive force cases, no inquiry more complex than that is warranted.

Inspecting this case under *Graham*'s lens, and without doubling the "objectively reasonable" inquiry, I agree that Katz's submissions were too slim to put officer Saucier to the burden of trial. As the Court points out, it is not genuinely in doubt that "[a] reasonable officer in [Saucier's] position could have believed that hurrying [Katz] away from the scene . . . was within the bounds of appropriate police responses." *Ante*, at 13. Katz's excessive force claim thus depended on the "gratuitously violent shove" he allegedly received. *Ante*, at 12–13; see Brief for Respondents 3, n. 2 (conceding that "the gratuitous violent shove" was essential to Katz's excessive force claim).

Yet Katz failed to proffer proof, after pretrial discovery, that Saucier, as distinguished from his fellow officer Parker,[1] had a hand in the allegedly violent shove.[2] Saucier, in his deposition, denied participating in any shove, see App. 39–40, while Katz, in his deposition, said, without elaborating: "They [Parker and Saucier] pretty much threw me in. Just shoved me in," *id.*, at 25. But critically, at no point did Katz say, specifically, that Saucier himself, and not only Parker, pushed or shoved.

Katz's reluctance directly to charge Saucier with pushing or shoving is understandable in view of a television news videotape of the episode Katz presented as an exhibit to his complaint. See App. to Pet. for Cert. 27a. The videotape shows that the shove, described by Katz as gratuitously violent, came from the officer on the right

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[1] Though named as a defendant, Parker was never served with the complaint, and therefore did not become a party to this litigation. See Brief for Petitioner 3, n. 4.

[2] See Fed. Rule Civ. Proc. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response . . . must set forth specific facts showing that there is a genuine issue for trial.").

side of the police van, not from the officer positioned on the left side. It is undisputed that the officer on the right is Parker, the officer on the left, Saucier. See Pet. for Cert. 27–28, and n. 19; Brief for Petitioner 50, n. 26. Mindful of *Graham*'s cautionary observation that "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment," 490 U. S., at 396 (citation omitted), and in view of Katz's failure to deny that the shove alleged to establish excessive force came from Parker alone, not from Saucier, I am persuaded that Katz tendered no triable excessive force claim against Saucier.[3]

II

In the Court's opinion, *Graham* is inadequate to control adjudication of excessive force cases. *Graham* must be overlaid, the Court maintains, by a sequential qualified immunity inquiry. *Ante*, at 5. The Court instructs lower courts first to undertake what appears to be an unadorned *Graham* inquiry, *i.e.,* to consider initially whether the parties' submissions, viewed favorably to the plaintiff, could show that the officer's conduct violated the Fourth Amendment. *Ante*, at 5, 6. If the plaintiff prevails on that "threshold question," *ante*, at 5, the trial court is then to proceed to the "dispositive [qualified immunity] inquiry," asking "whether it would be clear to a reasonable officer that the conduct was unlawful in the situation he confronted," *ante*, at 6.[4]

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[3]As the Court observes, there is a dispute whether Katz was resisting arrest at the time he was placed in the van. *Ante*, at 3. That dispute is irrelevant, however, in view of the absence of any indication that Saucier employed excessive force in removing Katz from the site of the celebration and placing him in the van. See *Rowland* v. *Perry*, 41 F. 3d 167, 174 (CA4 1994) ("[d]isputed versions of the facts alone are not enough to warrant denial of summary judgment").

[4]The Court's observation that "neither respondent nor the Court of

In the instant case, however, the Court finds that procedural impediments stop it from considering first "whether a constitutional right would have been violated on the facts alleged." *Ante*, at 5, 12. The Court therefore "assume[s] a constitutional violation could have occurred," *ante*, at 12— *i.e.*, it supposes a trier could have found that officer Saucier used force excessive under *Graham*'s definition. Even so, the Court reasons, qualified immunity would shield Saucier because he could have "concluded he had legitimate justification under the law for acting as he did." *Ante*, at 13.

Skipping ahead of the basic *Graham* (constitutional violation) inquiry it admonished lower courts to undertake at the outset, the Court failed to home in on the duplication inherent in its two-step scheme. As lower courts dealing with excessive force cases on the ground have recognized, however, this Court's decisions invoke "the same 'objectively reasonable' standard in describing both the constitutional test of liability [citing *Graham*, 490 U. S., at 397], and the . . . standard for qualified immunity [citing *Anderson* v. *Creighton*, 483 U. S. 635, 639 (1987)]." *Roy*, 42 F. 3d, at 695; see *Street* v. *Parham*, 929 F. 2d 537, 540 (CA10 1991) (describing excessive force case as one "where the determination of liability and the availability of qualified immunity depend on the same findings"). In other words, an officer who uses force that is objectively reasonable "in light of the facts and circumstances confronting [him]," *Graham*, 490 U. S., at 397, simultaneously meets the standard for qualified immunity, see *ante*, at 6, and the standard the Court set in *Graham* for a decision

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Appeals ha[s] identified any case demonstrating a clearly established rule prohibiting the officer from acting as he did," *ante*, at 14, must be read in light of our previous caution that "the very action in question [need not have] previously been held unlawful" for a plaintiff to defeat qualified immunity, *Anderson* v. *Creighton,* 483 U. S. 635, 640 (1987).

on the merits in his favor. Conversely, an officer whose conduct is objectively unreasonable under *Graham* should find no shelter under a sequential qualified immunity test.

Double counting "objective reasonableness," the Court appears to suggest, *ante*, at 4–5, is demanded by *Anderson*, which twice restated that qualified immunity shields the conduct of officialdom "across the board." 483 U. S., at 642, 645 (quoting *Harlow* v. *Fitzgerald*, 457 U. S 800, 821 (1982) (BRENNAN, J., concurring)); see also *Anderson*, 483 U. S., at 643 ("we have been unwilling to complicate qualified immunity analysis by making the scope or extent of immunity turn on the precise nature of various officials' duties or the precise character of the particular rights alleged to have been violated"). As I see it, however, excessive force cases are not meet for *Anderson*'s two-part test.

Anderson presented the question whether the particular search conducted without a warrant was supported by probable cause and exigent circumstances. The answer to such a question is often far from clear.[5] Law in the area is constantly evolving and, correspondingly, variously interpreted. As aptly observed by the Second Circuit, "even learned and experienced jurists have had difficulty in defining the rules that govern a determination of probable cause . . . . As he tries to find his way in this thicket, the police officer must not be held to act at his peril." *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F. 2d 1339, 1348 (1972) (on remand). In this light, *Anderson* reasoned: "Law enforcement officers whose judgments in making these difficult determinations

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[5] *Wilson* v. *Layne*, 526 U. S. 603 (1999), is a prototypical case. There, the Court accorded qualified immunity to police who permitted the media to accompany them on a search of a house. The constitutionality of the ride-along practice was unsettled at the time of the incident-in-suit in *Wilson*, and remained so until this Court spoke.

[whether particular searches or seizures comport with the Fourth Amendment] are objectively legally reasonable should no more be held personally liable in damages than should officials making *analogous determinations* in other areas of law." 483 U. S., at 644 (emphasis added).

As the foregoing discussion indicates, however, "excessive force" typically is not an "analogous determination." The constitutional issue whether an officer's use of force was reasonable in given circumstances routinely can be answered simply by following *Graham*'s directions. In inquiring, under *Graham*, whether an officer's use of force was within a range of reasonable options, the decision-maker is also (and necessarily) answering the question whether a reasonable officer "could have believed" his use of force "to be lawful," *Anderson*, 483 U. S., at 638. See *Street*, 929 F. 2d, at 541, n. 2 (because of difficulty of deciding probable-cause issues, the conduct of an 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 under the circumstances, any question of objective reasonableness has also been foreclosed").

The Court fears that dispensing with the duplicative qualified immunity inquiry will mean "leaving the whole matter to the jury." *Ante*, at 4. Again, experience teaches otherwise. Lower courts, armed with *Graham*'s directions, have not shied away from granting summary judgment to defendant officials in Fourth Amendment excessive force cases where the challenged conduct is objectively reasonable based on relevant, undisputed facts. See, *e.g.*, *Wilson* v. *Spain*, 209 F. 3d 713, 716 (CA8 2000) ("address[ing] in one fell swoop both [defendant's] qualified immunity and the merits of [plaintiff's] Fourth Amendment [excessive force] claim" and concluding officer's conduct was objectively reasonable in the circumstances, so summary judgment for officer was proper); *Roy*, 42 F. 3d, at 695 (under

single objective reasonableness test, district court properly granted summary judgment for defendant);[6] *Wardlaw* v. *Pickett*, 1 F. 3d 1297, 1303–1304 (CADC 1993) (same). Indeed, this very case, as I earlier explained, see *supra,* at 2–4, fits the summary judgment bill. Of course, if an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official. And that is as it should be. When a plaintiff proffers evidence that the official subdued her with a chokehold even though she complied at all times with his orders, while the official proffers evidence that he used only stern words, a trial must be had. In such a case, the Court's two-step procedure is altogether inutile.

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For the reasons stated, I concur in the Court's judgment, but not in the two-step inquiry the Court has ordered. Once it has been determined that an officer violated the Fourth Amendment by using "objectively unreasonable" force as that term is explained in *Graham* v. *Connor*, there is simply no work for a qualified immunity inquiry to do.

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[6] Upholding summary judgment for a police officer who shot an armed, intoxicated, belligerently behaving arrestee, the First Circuit in *Roy* elaborated: "[T]he Supreme Court intends to surround the police who make these on-the-spot choices in dangerous situations with a fairly wide zone of protection in close cases. Decisions from this circuit and other circuits are consistent with that view. And in close cases, a jury does not automatically get to second-guess these life and death decisions, even though the plaintiff has an expert and a plausible claim that the situation could better have been handled differently." 42 F. 3d, at 695 (footnote omitted).