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Supreme Court draws criticism for shielding police against wrongful-shooting claims

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It all happened in less than a minute. Three police officers arrived outside a small house with a chain-link fence near the University of Arizona campus in Tucson. They were responding to a "check welfare" report of woman hacking at a tree with a knife. They saw a young woman emerge from the house holding a large kitchen knife and walk down the driveway toward Sharon Chadwick, who owned the home.

The officers called out, "Drop the knife!," but Amy Hughes did not acknowledge them and kept walking. Cpl. Andrew Kisela dropped to his knees and fired through the fence, hitting her with four shots. Hughes was wounded but survived, and later sued Kisela, claiming unreasonable seizure and an excessive use of force.

But the Supreme Court will decide whether she can take her claim before a jury. Lawyers for the Police Department have appealed a 9th Circuit ruling that allowed Hughes to sue, arguing her case should be tossed out because there is no proof of a "constitutional violation."

And they stand a good chance of succeeding. In recent years, the justices have regularly shielded police from being sued, even when officers wrongly shoot innocent people in their own homes.

They have done so by extending a rule adopted in the 1980s that gave government officials "qualified immunity" from being sued over constitutional violations unless they did something that the court had already clearly defined as illegal and unconstitutional. It is not enough to cite the words of the Constitution, such as its ban on "unreasonable searches and seizures." To bring a claim before a jury, the injured plaintiff must show the officer had obviously and unquestionably violated a recognized and specific right. In practice, this rule has served as a broad shield to prevent cases from proceeding.

It is a trend that has long drawn the ire of civil rights lawyers, who say it denies victims the right to hold officers accountable for an excessive use of force, particularly when cases don't result in criminal prosecution or disciplinary action. But in the past year, the precedent has also come under attack from University of Chicago law professor William Baude, a prominent conservative legal scholar, and from the libertarian CATO Institute for what it called the court's "unlawful assault on civil rights and police accountability."

Baude, a former clerk for Chief Justice John G. Roberts Jr., contends the high court has "concocted" an immunity doctrine for the police that is not based on the law or history. "It's an unlawful invention, a judge-made doctrine, and it seems to be getting worse in the Supreme Court," he said last week.

At issue in this debate is one of the nation's most important but little-known civil rights laws. Shortly after the Civil War, the Reconstruction Congress passed the Ku Klux Klan Act of 1871 to extend the Constitution's legal protections to all Americans, including newly freed slaves. One provision said that "any person" who acts "under color of any law" and who deprives someone of "any rights, privileges or immunities secured by the Constitution shall be liable to the party injured." It includes no exceptions and gives no officials immunity.

The law remains on the books and is known to lawyers as Section 1983 of the U.S. Code. But since the 1970s, the high court has been unwilling to follow the law as it is written. It held that judges and prosecutors are immune from such suits. And more recently, the justices have said the police cannot be sued unless it is "beyond debate" they have violated "clearly established" law.

Three years ago, the justices tossed out an excessive-force lawsuit brought by a mentally ill San Francisco woman who was shot in her private room in a group home. A social worker had reported Teresa Sheehan was not taking her medication, but when two officers tried to force their way into her room, she reacted angrily and told them to get out. A few minutes later, they pushed door open again, and when Sheehan grabbed a bread knife, they shot her five times.

The Supreme Court said they were entitled to immunity. This legal shield gives officers "breathing room to make reasonable but mistaken judgments," said Justice Samuel A. Alito Jr. It "protects all but the plainly incompetent or those who knowingly violate the law.… The Constitution is not blind to the fact that police officers are often forced to make split-second judgments," he added. (Sheehan later won a settlement from the city based on a separate claim arising from the Americans with Disabilities Act.)

Clark Neily, a vice president at CATO, says the "all but the plainly incompetent" standard is one that "protects police from misconduct that would send someone without a badge to jail. Would you wish to be treated in a hospital that held its doctors to that incredibly low standard?"

Last year, the high court overturned a $4-million verdict against two Los Angeles County deputies who fired 14 shots at a couple sleeping in a shed behind a house in Lancaster. The officers did not have a search warrant, but they were in the area looking for a wanted man. When they pulled back the curtain to the shed, Angel Mendez reached for a BB gun. Both he and his wife were shot several times, and Mendez lost his leg.

The 9th Circuit Court, based in San Francisco, has been less willing to shield the police from such suits. Its judges allowed Teresa Sheehan to sue the officers who shot her, and they upheld the verdict for Mendez because the officers "barged into the shack unannounced." But the Supreme Court disagreed, saying the officers reacted reasonably because Mendez was holding a gun. "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," Alito wrote.

UCLA law professor Joanna Schwartz, an expert on police misconduct litigation, faults the court for refusing to set limits for the police. "When the Supreme Court announces new rules, police departments pay attention," she said. But repeatedly, the court has blocked suits that could establish clearer rules. This may "encourage a 'shoot first, think later' policy," she said. She noted that while lawsuits are brought against individuals, "officers never pay out of their own pocket." Liability claims are paid by the departments that employ them.

Often in recent years, the high court has issued short, unanimous decisions, without hearing arguments, to reverse rulings that allowed injured plaintiffs to sue the police. On Friday, the justices will meet privately and consider Arizona's appeal in Kisela vs. Hughes.

A three-judge panel of the 9th Circuit refused to give the officer immunity from Hughes' "excessive force" claim. The judges said Chadwick, the Tucson homeowner who was supposedly threatened, said Hughes was "composed and non-threatening. Multiple witnesses attest that Ms. Hughes never raised the knife as she neared Ms. Chadwick."

Vince Rabago, a Tucson lawyer who represents Hughes, said two officers reacted calmly, but not Kisela. "There was no crime reported. No impending danger. This was to check on the welfare of this woman," he said. Chadwick "was shocked at how fast it happened. She was saying, 'Hey, calm down.' And the police officer fires his gun." Officer Kisela has since been dismissed from the University of Arizona police department, Rabago said.

The 9th Circuit concluded that while some key facts are in dispute, a "rational jury could find that [Hughes] had a constitutional right to walk down her driveway holding a knife without being shot."

Lawyers for Arizona said the court should "summarily reverse the 9th Circuit" and dismiss the lawsuit. "Qualified immunity exists to protect the public from unwarranted timidity on the part of public officials," they said. "In this case, Corporal Kisela was concerned about the safety of an unarmed individual being threatened by another person wielding a knife and ignoring officers' instructions to drop the weapon. If the decision below is allowed to stand, the public will, indeed, want for protection."

The justices may act on the appeal as soon as Monday.

Last year, Justice Clarence Thomas cited law professor Baude's criticism of the court's approach to these cases. "In the appropriate case, we should reconsider our qualified immunity jurisprudence," he wrote.

Baude says he is hopeful that Thomas is not alone. "With increased public awareness of the problems of police misconduct, I do think it is the right time to rethink this area of the law," he said. "But whether other members of the court will agree, I don't know."