No. 12-1117

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONERS' BRIEF

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit wrongly denied qualified immunity to Petitioners by analyzing whether the force used in 2004 was distinguishable from factually similar force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007). Stated otherwise, the question presented is whether, for qualified immunity purposes, the Sixth Circuit erred in analyzing whether the force was *supported* by subsequent case decisions as opposed to *prohibited* by clearly established law at the time the force was used.

2. Whether the Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law when, under Respondent's own facts, the suspect led police officers on a high-speed pursuit that began in Arkansas and ended in Tennessee, the suspect weaved through traffic on an interstate at a high rate of speed and made contact with the police vehicles twice, and the suspect used his vehicle in a final attempt to escape after he was surrounded by police officers, nearly hitting at least one police officer in the process.

RULES 24.1(b) AND 29.6 STATEMENT

Plaintiffs (respondents here) are a minor W.R., Individually, and as Surviving Daughter of Donald Rickard, Deceased, by and Through Her Mother Samantha Rickard, as Parent and Next Friend.

Defendants (Petitioners here) are West Memphis, Arkansas Police Officers Vance Plumhoff, John Bryan Gardner, Troy Galtelli, Lance Ellis, Jimmy Evans, and Joseph Forthman.

There is a consolidated case in the district court where the plaintiffs are the Estate of Kelly Allen, Deceased, Clayton David Allen, a minor M.N.A. and minor A.L.A. The defendants in that case are the same as here, plus the City of West Memphis and Mayor William H. Johnson and Chief of Police Robert Paudert.

There are no corporations as a party to this case.

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The amended opinion of the court of appeals (Pet. App. 1) is reported as *Estate of Allen v. City of West Memphis*, 509 Fed. Appx. 388 (6th Cir. 2012).

The district court's opinion in the consolidated cases (Pet. App. 16) is reported as *Estate of Allen v. City of West Memphis*, Nos. 05-2489, 05-2585, 2011 WL 197426, 2011 U.S. Dist. LEXIS 5606 (W.D. Tenn., Jan. 19, 2011).

JURISDICTION

The first opinion of the court of appeals was October 9, 2012. Petitioners filed a petition for rehearing en banc which was denied on November 14, 2012, but the opinion was modified and a concurring opinion was added. Pet. App. 1. Rehearing was finally denied December 13, 2012. Pet. App. 63.

This Court's jurisdiction is based on 28 U.S.C. §§ 1254(1), 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 524-30 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

A. Introduction

This case involves a demonstrably dangerous car chase of Respondent's decedent, Donald Rickard, by Petitioners who were police officers of the City of West Memphis, Arkansas, on the night of July 18-19, 2004. Near the end of this chase, Rickard's car spun out and came to a near stop in a parking lot in downtown Memphis, Tennessee. Three of the officers used

deadly force only after Rickard repeatedly rammed a police car in front of him and then drove in reverse in the direction of officers on foot trying to arrest him. Rickard was shot and his passenger, Ms. Allen, was struck by a bullet fragment. The car finally ran off the left side of the road and crashed. Tragically, both Rickard and Allen were killed.

Two suits were filed, one each by the estates of the driver and passenger. The Petitioners filed a third-party claim against the Estate of Rickard in response to the suit filed by the Estate of Allen, the Passenger's Estate. The two suits were consolidated by the district court. After discovery, the officers moved for summary judgment because it was not clearly established that the use of deadly force to end this dangerous high-speed chase was objectively unreasonable. The undisputed material facts came from depositions, affidavits, statements to the Memphis Police Department, and three video recordings ("dash-cam" videos) of the entire chase and shooting. The district court denied summary judgment based on qualified immunity[1] to the officers, and the U.S. Court of Appeals for the Sixth Circuit affirmed, holding that it "cannot conclude that the officers'

[1] However, the district court granted Petitioners' motion as it related to the federal claims made by the Estate of Allen. Petitioners took an interlocutory appeal from the denial of qualified immunity as to the federal claims made by the Estate of Rickard, which is why only that portion of the case is before the Court.

conduct was reasonable as a matter of law." Pet. App. 12.

The Sixth Circuit failed to properly apply this Court's qualified immunity jurisprudence in numerous respects. It assessed Petitioners' behavior based on decisions by this Court several years *after* the underlying incident; it defined clearly established law at "too high a level of generality"; and it collapsed the Fourth Amendment reasonableness inquiry with the qualified immunity inquiry. When properly applied, Petitioners are entitled to qualified immunity because it was not "beyond debate" in July of 2004 that their use of deadly force to end the threat posed during this dangerous high-speed police chase violated a clearly established constitutional rule. The Sixth Circuit also erred in holding that Petitioners' use of deadly force violated the Fourth Amendment. Their actions were objectively reasonable under *Scott v. Harris*, 550 U.S. 372 (2007), *Tennessee v. Garner*, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), because Rickard committed felony fleeing and aggravated assault in both Arkansas and Tennessee, jeopardizing the safety of his passenger and himself, every occupant of the 29 vehicles he passed on the streets and highways, and the officers in the pursuit. When the shots were finally fired, the threat was continuing and had not abated.

B. The initial stop, chase, and final stop of the Rickard vehicle

West Memphis Police Lieutenant Joseph Forthman stopped a white Honda Accord about midnight July 18, 2004, in the parking lot of a gas station in West Memphis for having a headlight out. Rickard was the driver of the car, and Allen was his front seat passenger. Pet. App. 3. As he approached the car, Forthman noticed a broken indentation in the windshield about the size of a human head or a basketball. Forthman Dep. at 27:2-6 (J.A. 134). Allen, the passenger, volunteered that the damage to the windshield resulted from the car hitting a curb. *Id*. at 27:8-16 (J.A. 134). Forthman noticed glass chips and dust still on the dashboard. *Id*. at 27:6-7 (J.A. 134). Forthman questioned Rickard for a few moments, asking for his identification, where he had come from and where he was going, and whether he had any beer to drink that night, seeing a case of beer in the car's back floorboard. *Id*. at 27:18-24, 28:1-9, 31:15-19 (J.A. 134-35, 138). Rickard claimed that the pair had come from their hotel, but could not give the name or location of the hotel. Video of Unit 279 (Forthman) at 11:09-15. He further claimed they were going to purchase a light to fix their inoperable headlight. *Id*. When Rickard was going through his wallet, Forthman noticed that Rickard appeared to repeatedly skip over an identification card and that his hands were shaking. *Id.* at 27:20-24, 28:1-9 (J.A. 134-35). Forthman then asked Rickard to get out of the car. *Id*. at 29:13-14 (J.A. 136).

Rickard did not exit the car or respond. Forthman again ordered Rickard to get out of the car and Rickard disobeyed the officer's command. Video of Unit 279 (Forthman) at 11:09:18. Rickard instead drove off, fleeing the traffic stop. Forthman ran to his police cruiser and began to purse the Honda. He radioed that he was in pursuit and gave a description of the vehicle and his location. Video[2] of Unit 279 (Forthman) at 11:09:21.

Several more West Memphis officers joined in the Rickard pursuit: Vance Plumhoff, Jimmy Evans, Lance Ellis, Troy[3] Galtelli, and Bryan Gardner. Plumhoff soon became the lead police vehicle in the pursuit. "Dash-cams" in three of the six police vehicles recorded all or parts of the chase and subsequent activity. Pet. App. 3

Rickard entered I-40[4] heading east to Memphis. He crossed over the I-40 DeSoto bridge from Arkansas

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[2] The Videos were requested by this Court and provided to the Court by the district court.

[3] He is incorrectly named "Tony" in various documents and pleadings in the case.

[4] I-40 is a busy interstate highway that runs from Barstow, California to Wilmington North Carolina, for over 2,400 miles. The stretch in West Memphis, Arkansas where I-40 (east and west) and I-55 (north and south) travel together for a little over two miles for many years has long been the second busiest route for tractor trailer traffic in the United States. Noel E. Oman, *Agency touts I-40-to-I-55 link: Delta Regional Authority is adding its resources to project*, Ark. Dem.-Gaz. July 5, 2006, § Ark. at 1 (Internet version at 9).

into downtown Memphis, Tennessee. During the chase, Plumhoff stated on the police radio that "he just tried to ram me." Forthman said on his radio, recorded on the video, that "he is trying to ram another car," followed by "[w]e do [now] have aggravated assault charges on him." Pet. App. 3-4 (bracketed material added); Video of Unit 279 (Forthman) at 11:11:36-37. (J.A. 176-77, 228, 234).

In deposition and affidavit testimony, the officers described what appeared to them to be Rickard attempting to veer or ram his car into Plumhoff's and Evans's police cars, which they reported over their radio during the pursuit. (J.A. 176-77, 228, 234); Pet. App. 4; Video of Unit 279 (Forthman) at 11:11:36.

While on I-40, Rickard dangerously weaved and passed approximately 29 civilian motorists, some of whom were forced to the side of the interstate due to Rickard's dangerous high-speed driving. Video of Unit 279 (Forthman) at 11:09:22-11:14:17. With officers still in pursuit, Rickard abruptly veered off I-40 into downtown Memphis at the Danny Thomas Boulevard Exit. *Id*. at 11:13:22. As he exited, Rickard pulled directly in front of and cut off a truck pulling a trailer; the driver of that vehicle had to brake quickly in order to avoid hitting Rickard. *Id*. The vehicles proceeded onto Alabama Avenue briefly before Rickard turned right onto Danny Thomas Boulevard. *Id*. at 11:13:33. At that point, Officer Evans is heard on the radio asking whether to terminate the pursuit. Evans asked: "terminate the pursuit?" Vance Plumhoff responded: "negative. See if you can get in front of

him." *Id*. at 11:13:51 (J.A. 339). As Rickard approached Jackson Avenue, he made a sharp right turn onto Jackson and was hit by a pursuing police vehicle.[5] Aff. of Evans, ¶ 14 (J.A. 227-29); Video of Unit 279 (Forthman) at 11:14:11. That caused Rickard's vehicle to spin around in a parking lot at the intersection of Danny Thomas and Jackson. Video of Unit 279 (Forthman) at 11:14:15; *Estate of Allen*, 509 Fed. Appx. at 390.

The three dash-cam videos provide a complete view of all that follows. Rickard collided head-on with Plumhoff's cruiser and this is captured precisely on Video of Unit 286 (Galtelli) at 12:17:44; (J.A. 182). Plumhoff thought his car was disabled based on the impact and force of the collision. Plumhoff Depo. at 66:7-9; 76:16-23 (J.A. 182, 185-86).[6]

After Plumhoff's collision with Rickard's vehicle, Rickard was not stopped and he continued to refuse to submit to the officers' commands and show of authority as the six West Memphis officers attempted to arrest him. (J.A. 182-83, 197-98). They formed a semicircle around his vehicle and attempted to use

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[5] It was not a PIT maneuver. "PIT" stands for "precision intervention technique" and is a technique where officers make contact with the back of a vehicle they are pursuing in a manner that makes the suspect's vehicle spin to a stop. *Scott v. Harris*. 550 U.S. 372, 375 (2007).

[6] Plumhoff was apparently driving the police car seen on dash-cam video as immediately dropping out of the second pursuit and pulling over on Jackson Avenue.

the building in the parking lot to prevent him from fleeing. Video from Unit 279 (Forthman) at 11:14:21. Evans and Plumhoff got out of their vehicles and came at Rickard on foot. Evans tried to get into the vehicle in order to stop the driver by beating on the passenger-side window and windshield with the butt of his firearm. Aff. of Evans, ¶ 16 (J.A. 229). Rickard struck Evans's right hand with some part of the Honda while Evans was attempting to gain entry into the car. (J.A. 229, 234) Evans testified via affidavit that he feared for his safety due to Rickard's actions. (J.A. 230).

Other officers, including Lance Ellis, were on foot in close proximity to the Honda. Video of Unit 279 (Forthman) at 11:14:21-29. Rickard accelerated and spun his tires as he rammed Gardner's occupied police cruiser. Rickard was trying to escape by pushing the police cruiser out of his way. Aff. of Gardner ¶¶ 18-20 (J.A. 223); Plumhoff Depo. 127:21-128:1 (J.A. 197); Video of Unit 279 (Forthman) at 11:14:20-24; Video of Unit 286 (Galtelli) at 12:17:42-46. Gardner was still briefly in his car and then exiting his car during the time Rickard was ramming it. Video of Unit 279 (Forthman) at 11:14:20-24. Immediately after the Honda began ramming Gardner's patrol unit, Plumhoff fired three rounds at the driver through the windshield from the right front fender of the Honda. Video of Unit 279 (Forthman) at 11:14:22-24; Video of Unit 286 (Galtelli) at 12:17:43-46; Plumhoff Depo. at 67:6-19 (J.A. 183). Video of Unit 286 (Galtelli) at 12:17:47; Video of Unit 279

(Forthman) at 11:14:22-34; Plumhoff Depo. at 127:21-128:1 (J.A. 197); Aff. of Gardner ¶ 18 (J.A. 223).

At the time Plumhoff fired, Rickard could have easily run Plumhoff, Gardner, or Evans over with the Honda given their proximity to it while on foot. Video of Unit 279 (Forthman) at 11:14:21-24. Plumhoff testified he used deadly force at that time because he feared he would be seriously injured or killed given Rickard's use of the car as a weapon. (J.A. 183).

After Plumhoff shot, Rickard reversed his car, making a U-turn in the parking lot and escaped onto Jackson Avenue. Aff. of Gardner ¶ 21 (J.A. 223); Video of Unit 286 (Galtelli) at 12:17:47. As Rickard reversed onto Jackson Avenue, Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid Rickard hitting him. Video of Unit 279 (Forthman) at 11:14:25-29; Video of Unit 286 (Galtelli) at 12:17:47-51; Video of Unit 284 (Ellis) at 12:17:08-10; Aff. of Ellis ¶15 (J.A. 211); Forthman Depo. at 152:5-20 (J.A. 165-66). Ellis testified via affidavit that he feared serious physical injury at that time. (J.A. 211). Gardner then fired ten shots at the driver. Galtelli also fired two shots at Rickard. Video of Unit 279 (Forthman) at 11:14:31-32; Video of Unit 284 (Ellis) at 12:17:11; Video of Unit 286 (Galtelli) at 12:17:52; Forthman Depo, at 131:11-24, 153:17-154:5 (J.A. 160, 167). Both Gardner and Galtelli provided affidavit testimony that Rickard posed a risk to their safety, the safety of their fellow officers, and the safety of the general public. (J.A. 217, 223-24). Three of Petitioners never used deadly force: Officers

Forthman, Evans, and Ellis. Video of Unit 279 (Forthman), 11:14:22-11:14:32.

Rickard finally lost control of his car and crashed into a low retaining wall and then went briefly airborne into a building at the corner of Jackson Avenue and Manassas Street. Right before crashing, however, Rickard pulled in front of an oncoming vehicle on Jackson Avenue. Video of Unit 279 (Forthman) at 11:14:48. Tragically, both Rickard and Allen died. Pet. App. 6 (quoting *Estate of Allen v. City of West Memphis*, 2011 WL 197426, *3 (W.D. Tenn. Jan. 20, 2011)).

C. Proceedings in the District Court

Plaintiff-respondent, the Estate of Donald Rickard, filed a state court civil suit in Shelby County, Tennessee, against Petitioners, the Mayor and Chief of Police of the City of West Memphis, Arkansas, and the City itself, alleging violations of Rickard's rights under, *inter alia*, the Fourth and Fourteenth Amendments to the United States Constitution. Additionally, the Respondents asserted violations of the Arkansas and Tennessee Constitutions, various state torts, and asserted various state statutory causes of action.[7] The Petitioners removed the Shelby County state case to the U.S. District Court for the Western District of

[7] Only the issues arising under the Fourth Amendment to the United States Constitution, by and through 42 U.S.C. § 1983, are before this Court.

Tennessee. *Estate of Rickard v. City of West Memphis*, 05-2585 (W.D. Tenn. 2005)

The case was consolidated with *Estate of Allen* in the district court and that portion of the case (passenger case) remains pending in the Western District of Tennessee. Following discovery, the Petitioners moved for summary judgment and asserted qualified immunity. The district court granted summary judgment to Petitioners on the claims made by the Passenger's Estate, but denied Petitioners summary judgment and qualified immunity to as to the claims made by the Rickard Estate under the Fourth Amendment. The Petitioners took an interlocutory appeal to the Sixth Circuit of the denial of qualified immunity regarding the Respondent's Fourth Amendment claim.

D. Appeal to the U.S. Court of Appeals for the Sixth Circuit

The Sixth Circuit affirmed the denial of summary judgment based on qualified immunity. The court of appeals reasoned that, at the time of the shooting in this case, Rickard was "essentially stopped" and surrounded by police and police cars. While the court of appeals noted Rickard was still making "some effort" to elude capture (Pet. App. 9), the court found that it could conclude as a matter of law that Rickard's conduct was sufficient to justify a reasonable officer using deadly force to end the pursuit.

Notably, the court of appeals found that, from its view of the videos, it could not determine the degree of danger to the officers. Consequently, the court of appeals affirmed the denial of qualified immunity, citing *Scott v. Harris*, and concluding *Scott* was factually distinguishable. 509 Fed. Appx. at 391. While the court of appeals suggested that factual disputes existed, it failed to say what they were and, most importantly, whether they were material, i.e., outcome determinative, of the question of immunity. Rather, it appears that the circuit court characterized Rickard as essentially stopped, distinguished cases where the fleeing motorist was not stopped, and based its decision on that distinction. Furthermore, the Sixth Circuit never addressed the second prong of *Saucier v. Katz*, 533 U.S. 194 (2001), which it was required to do, i.e., whether the Petitioners violated clearly established law as of July 2004.[8]

Petitioners sought certiorari from this Court, which was granted November 15, 2013.

SUMMARY OF THE ARGUMENT

The court of appeals improperly applied the law of qualified immunity in a number of ways: it either

[8] *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) ("if the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct.").

merged the two prong test into one or simply failed to address the "clearly established" prong of a qualified immunity analysis. The circuit court also applied rules that were not defined at a sufficient level of specificity to put Petitioners on notice that their conduct was unconstitutional and applied case law that was decided after Petitioners' encounter with Rickard. Moreover, the court of appeal's holding was in direct contradiction of its own precedent prior to July 2004 on qualified immunity and use of deadly force.

When the qualified immunity test is properly applied to the undisputed facts in this case, it is clear Petitioners are entitled to reversal and qualified immunity from this suit.

Furthermore, based on the videos and the undisputed material facts, Petitioners' actions were objectively reasonable, and, therefore, did not violate the Fourth Amendment. It was objectively reasonable for Petitioners to conclude that Rickard was a danger to himself, his passenger, the Petitioners, and to the public in general based on the undisputed facts in this case.

Finally, as a matter of public policy, we must not encourage individuals to flee from the police by telling officers they simply cannot engage in high-speed pursuits. This is true whether the initiating event is a felony or a misdemeanor. Moreover, we should not encourage individuals to drive dangerously and threaten officers and the public at large with

their vehicles. The only recourse some officers have in some situations: shooting to disable the threat.

It is tragic that Rickard and his passenger died because of an encounter that started out as a traffic stop for a burned out headlight. Regardless, Rickard's reckless felony flight and aggravated assault on police officers transformed the nature of the encounter and ultimately led to his own death and the death of his passenger. When Petitioners shot Rickard, they were shooting a felon who remained a threat to the officers and the public at large. This Court should afford qualified immunity to the Petitioners.

ARGUMENT

"Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) (quoting *Harlow v. Fitzgerald*, 475 U.S. 800, 818 (1982)). Courts have discretion which of the two prongs to analyze first. *al-Kidd*, 131 S. Ct. at 2080; *Pearson*, 555 U.S. at 236-38. As shown below, Petitioners are entitled to qualified immunity because Rickard cannot satisfy either prong. Because the Sixth Circuit's errors with respect to the second, "clearly established law," prong

are so manifest, we begin there and then turn to the first prong.

The matter was heard by the district court on the Petitioners' motion for summary judgment. While the Sixth Circuit found a question remained for the jury, that question was really an issue of law for the Court to decide. This is evident from the court of appeals' failure to note any disputed material facts in its opinion. This Court has already found that "objective reasonableness" under the Fourth Amendment based on a set of historical facts is a question of law. *Scott*, 550 U.S. at 382 & n.8 (2007).

I. Petitioners are entitled to qualified immunity because the law at the time of their conduct did not clearly establish that they violated the Fourth Amendment.

In this case, it was not clear to "every reasonable official" that Petitioners conduct violated the Fourth Amendment. The constitutional issue underlying the Petitioners' use of force was not "beyond debate" as of July 2004. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). If it is at least arguable, for qualified immunity purposes, that the officers' actions were within the law, then the officers are entitled to qualified immunity. *Id.*, 132 S. Ct. at 2096.

Qualified immunity serves important policy purposes: First, "'[q]ualified immunity gives government officials breathing room to make reasonable but mistaken judgments,'" and protects "'all but the

plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims*, 134 S. Ct. 3, 4 (2013) (per curiam) (quoting *al-Kidd* at 131 S. Ct. at 2085) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

Secondly, it enables courts to avoid deciding constitutional questions unnecessarily – if a right was not clearly established, a court need not determine whether the officers' actions were objectively reasonable. *Reichle*, 132 S. Ct. at 2093; *Pearson*, 555 U.S. at 236-38. In every Fourth Amendment case, qualified immunity offers additional protection beyond the constitutional objective reasonableness analysis.

The Sixth Circuit either improperly conflated the two distinct questions[9] under the *Saucier* qualified immunity analysis or simply failed to answer both of those questions as it was required by precedent to do. *Pearson*, 555 U.S. at 232 ("if the plaintiff has satisfied [the] first step, the court must decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct."). The result is the same: the Sixth Circuit never discussed whether the use of force by Petitioners violated clearly established law at the time the force was employed in July of 2004.

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[9] *al-Kidd*, 131 S. Ct. at 2084 ("The general proposition . . . that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.").

The very nature of the "clearly established" inquiry requires courts to consider only that law that was known or could be known to the officers at the time of their conduct. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

"To be clearly established, a right must be sufficiently clear 'that every reasonable official would [have understood] that what he is doing violates that right.'" *Reichle*, 132 S. Ct. at 2093. Existing precedent must have made the question presented so clear that it was "beyond debate" at the time the officials acted. *Id*. "Clearly established" means a reasonable officer understands whether their actions violate a suspect's rights because the contours of the right are clearly defined. *al-Kidd*, 131 S. Ct. at 2083. And, this Court has often admonished lower courts "not to define clearly established law at a high level of generality." *Id*. at 2084 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999); *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987)).

This Term, the Court held in *Stanton v. Sims*, that an officer [Stanton] who entered the plaintiff's yard in pursuit of another person had qualified immunity because the officer "was not 'plainly incompetent'" based on the state of the law *at the time* he entered Sims' yard. 134 S. Ct. at 7. In *Stanton*, the Court reviewed its own cases, district and circuit court cases from the district where the action occurred as well as state decisions and concluded the constitutional question was not "beyond debate" *at the time* Stanton entered Sims' yard. *Id*. Consequently,

the Court reversed and granted the officer qualified immunity. *Id*.

Here, the Sixth Circuit misapplied the qualified immunity doctrine in multiple ways. When the doctrine is properly applied, the result is plain: Petitioners are entitled to qualified immunity, for the law in July 2004 supported their actions; further, it assuredly did not clearly establish that their actions were unconstitutional.

A. The court of appeals improperly applied the qualified immunity doctrine.

1. The court of appeals either failed to apply the "clearly established" prong of the doctrine or conflated the two prongs.

The Sixth Circuit affirmed the denial of qualified immunity because it could not conclude "that the officers' conduct was reasonable as a matter of law." Pet. App. 10. That resolved (incorrectly, we submit) only the first prong of the qualified immunity analysis. At that point, one would have expected the court to turn to the second prong: Whether the unlawfulness of Petitioners' actions was clearly established at the time they engaged in it. But the court did no such thing. That is manifest error. As explained above, an officer is entitled to qualified immunity unless his conduct, at the time he engaged in it, was clearly unlawful.

To the extent the Sixth Circuit concluded that the qualified immunity doctrine seeks to distinguish between officers who acted reasonably from those who acted unreasonably – and by finding that it could not conclude Petitioners' conduct was reasonable as a matter of law, it resolved both prongs of the doctrine at once, it committed reversible error. In *Saucier v. Katz*, 533 U.S. 194 (2001), this Court expressly rejected that approach. That case, like this one, involved a claim of excessive force in violation of the Fourth Amendment. And, claims of excessive force are analyzed under the Fourth Amendment's objective reasonableness standard. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

In *Saucier*, the "Court of Appeals concluded that qualified immunity is merely duplicative in an excessive force case, eliminating the need for the second step where a constitutional violation could be found based on the allegations." 533 U.S. at 203. That is because, the court thought, both steps "concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene." *Id*. at 200. But just as the Court rejected that reasoning in Fourth Amendment search cases in *Anderson v. Creighton*, 483 U.S. 635 (1987), it rejected it in excessive force cases in *Saucier*.

The reasoning of the Ninth Circuit in *Saucier* – and the Sixth Circuit here – misperceived the nature of the qualified immunity inquiry, which "has a further dimension than the excessive-force reasonableness inquiry established in *Graham*." *Saucier*, 523 U.S. at 205.

> The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal restraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. . . . If the officer's mistake as to what the law requires is reasonable, . . . the officer is entitled to the immunity defense.

Put another way, "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts." *Id*. The qualified immunity doctrine therefore "protect[s] officers from the sometimes hazy border between excessive and acceptable force, and to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful." *Id*. at 206 (citations and quotation marks omitted).

The Sixth Circuit wrongly denied Petitioners that protection. It should have, but did not, look at its precedents (and those of the Eighth Circuit) in similar cases to determine whether they clearly established the unlawfulness of Petitioners' conduct.

Petitioners also submit the court of appeals improperly applied the law of qualified immunity as it pertains to claims of excessive force in direct contradiction of this Court's precedent. It was not sufficiently clear, so as to place the constitutional question "beyond debate" in July 2004, whether it was objectively reasonable to shoot a dangerous suspect to end

the threat he posed with a vehicle in a high-speed chase. Moreover, to the extent that it *was* clear, case law strongly suggested that Petitioners' actions did not violate Rickard's constitutional rights. The court of appeals also improperly denied qualified immunity by relying on cases decided *after* the encounter between Petitioners and Rickard, rather than cases before and up to the time that the events in this case occurred in 2004.

2. The court of appeals improperly assessed Petitioners' 2004 conduct by comparing it to the facts of a 2007 case.

The court of appeals was obligated to consider only law that was available to the officers *at the time of the incident*, not later, in answering the second prong of the qualified immunity analysis. *See Brosseau*, 543 U.S. at 198 & 200 n.4 ("These [post-conduct] decisions, of course, could not have given fair notice to Brosseau and are of no use in the clearly established inquiry.") It could not seriously be suggested that, by reference to subsequent case law, Petitioners had fair notice of what was and was not prohibited by our Constitution.

The court of appeals relied on this Court's 2007 decision of *Scott v. Harris* to decide the immunity

question posed in Petitioners' appeal.[10] This is unfair to Petitioners, indeed, any public servant, requiring them to look into the future to determine whether their actions are potentially unreasonable. The only qualified immunity cases cited by the court of appeals that were decided before the incident in question were from the Eleventh Circuit. But, Petitioners live and work in the Eighth Circuit, and the incident occurred in the Sixth Circuit.[11] Petitioners could not have known that their actions would be held to violate the law in either the Sixth or the Eighth Circuit based on Eleventh Circuit precedent.

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[10] As discussed below, the court of appeals was also incorrect in distinguishing the facts of *Scott* from the facts of this case. Indeed, the decision in *Scott* applies to this case and is controlling, and it was reasonable as a matter of law for Petitioners to use deadly force given the dangers posed by Rickard. Rickard's unrestrained flight that endangered the officers and the public, and his manner of driving depicted in the three dash-cam videos was, without doubt, the commission of dangerous and ongoing felonies. Ark. Code Ann. § 5-54-125(d)(2) (fleeing in a vehicle if operated in a manner that creates a substantial danger of death or serious physical injury to others is a felony); Tenn. Code Ann. §§ 39-13-103(b)(2) (reckless endangerment with a deadly weapon is a felony) and 39-16-603 (evading arrest that endangers others is a felony); Ark. Code Ann. § 5-13-204(a)(1) (aggravated assault). Indeed, anyone who reviews the video evidence in this case can see the dangers posed by Rickard during the pursuit and until it finally ended after officers used deadly force.

[11] The Sixth and Eighth Circuit law is in accord on the substantive questions posed in this case.

B. The law in July 2004 did not clearly establish that Petitioners' use of deadly force was objectively unreasonable in violation of the Fourth Amendment.

No one disputes that the general "objective reasonableness" standard of *Graham* was clearly established in July 2004. To the extent the court of appeals concluded that Petitioners violated *that* clearly established law, it made the identical mistake the courts of appeals made in *Saucier* and *Brosseau*: the *Graham* standard is "cast at a high level of generality" and therefore does not answer whether the law was "'clearly established' in a more particularized sense, and hence more relevant sense[:], . . . [W]hether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Brosseau*, 543 U.S. at 199; *Saucier*, 533 U.S. at 202. In making that particularized assessment, courts must recognize that "[t]he 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." *Graham*, 490 U.S. at 396-97. There is no "magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Scott v. Harris*, 550 U.S. 372, 382 (2007).

A proper qualified immunity inquiry shows that Petitioners did not violate clearly established law when they used deadly force to end the threats posed

by a dangerous high-speed chase where the suspect refused all efforts to stop. The law did not put reasonable officers on notice that the specific undisputed conduct in this case could violate a suspect's constitutional rights.

1. *Brosseau v. Haugen* shows the law was not clearly established at the time of the events in this case.

Under *Brosseau* and *Saucier*, then, the appropriate issue here is whether it was clearly established in July 2004 that the use of deadly force to end the threats posed by Rickard in a high-speed chase violated the Fourth Amendment. Here, Rickard took Petitioners on a dangerous, fast-paced chase for miles on city streets and interstate highways. He sped and weaved in and out of traffic, cut off vehicles in flight, collided with police vehicles, nearly backed over an officer, and continued to pose a threat of serious physical injury or death to officers, the public, himself, and his passenger. Only then did three of the Petitioners utilize deadly force to try and end the threats posed by Rickard.

In December 2004, just five months after the events in this case, this Court held in *Brosseau* that there was no clear answer to the question whether it is acceptable "to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." 543 U.S. at 200. *Brosseau* involved a police officer who

shot a dangerous fleeing suspect in the back. This Court did not rule on the first prong of *Saucier*, but rather reviewed only the "clearly established" issue of the second prong of the qualified immunity analysis. *Id*. at 198. The Court recognized that as of February 21, 1999 (the date of the shooting in *Brosseau*) no other court had found a Fourth Amendment violation when a police officer "shot a fleeing suspect who presented a risk to others."[12] *Id*. at 200

Comparing the facts in *Brosseau* and those in this case, it is clear the Officers did not violate any clearly established constitutional right. In that case, an officer responded to a report of a fight at a residence. *Id*. at 195. Upon arrival, the officer searched for the suspect until the officer saw the suspect running in a neighbor's driveway. *Id*. at 195-96. The officer chased the suspect, who was able to enter a Jeep. *Id*. The officer with her gun drawn ordered the suspect to exit the vehicle. *Id*. The officer attempted to prevent the suspect from starting the Jeep, but she was unsuccessful. *Id*. When the suspect started the Jeep, it caused the officer to step back. *Id*. As the vehicle began to move, the officer "fired one shot through the rear driver's side window at a forward angle, hitting Haugen [the suspect] in the back." *Id*. at 196-97. The officer explained that she fired her weapon because she feared for the safety of other

[12] The Supreme Court only reviewed cases issued before February 21, 1999. *Brosseau*, 543 U.S. at 200 n.4.

officers in the area, as well as the safety of citizens in the area. *Id*. at 197.

The Court analyzed cases from the Sixth and Eighth Circuits, in which the courts of appeals "found no Fourth Amendment violation when an officer shot a fleeing suspect who presented a risk to others." *Id.* at 200-01 (discussing *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993)). The Court also considered a case from the Seventh Circuit in which that court reached the opposite conclusion. *Brosseau*, 543 U.S. at 201. After observing that "this area is one in which the result depends very much on the facts of each case," the Court concluded that the "cases by no means 'clearly establish' that Brosseau's conduct violated the Fourth Amendment." *Id*.

Because the threat to the officers and the public posed by Rickard was even greater than the threat posed by the fleeing felon in *Brosseau*, its holding controls here: the law was not clearly established on July 18, 2004 that Petitioners violated Rickard's constitutional rights.

Rickard dangerously passed 29 vehicles, crossed state lines, rammed his car into two separate police cars prior to Petitioners' first use of deadly force, and then nearly backed over Officer Ellis. Rickard posed a threat of serious bodily harm or death to himself, his passenger, the public and the Petitioners before, during, and after the use of deadly force in this case. Unlike the perhaps speculative risk posed by Haugen

in *Brosseau* to officers and the public, Rickard was a demonstrable threat and continued to be such a threat even after deadly force was employed.

Furthermore, it was not clearly established in July of 2004 (and it is still not clearly established) that, where deadly force is authorized, officers may not continue to use such force until a threat is eliminated. Rather, the circuit courts have held that where deadly force is constitutionally permissible, it remains permissible until the threat is eliminated; that is, officers can continue using such force during the pendency of a threat.[13] The number of shots fired by

[13] *See*, *e.g.*, *Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996), concurring opinion on denial of rehearing, 105 F.3d 174 (4th Cir. 1997) ("The number of bullets fired is likewise irrelevant; if it was objectively reasonable for the officers to use deadly force, it was also objectively reasonable for the officers to continue firing until they were sure the threat to their lives had ceased."); *Estate of Rogers v. Smith*, 188 Fed. Appx. 175, 182-83 (4th Cir. 2006) (repeatedly shooting suspect who pulled gun after a traffic chase ended); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) ("It may well be true that Conley continued to fire as Berube fell to or lay on the ground. But it is clear from the very brief time that elapsed that she made a split-second judgment in responding to an imminent threat and fired a fusillade in an emergency situation. Conley's actions cannot be found unreasonable because she may have failed to perfectly calibrate the amount of force required to protect herself."); *Wilkinson v. Torres*, 610 F.3d 546, 551 (9th Cir. 2010) (not unreasonable to shoot the driver of a minivan sliding around in wet grass and mud who's driving created a serious risk of danger to an officer in the way); *Jean-Baptist v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) (first high-speed chase then chase on foot, and officer

(Continued on following page)

three of six Petitioners is constitutionally irrelevant because Rickard indisputably remained a threat even after deadly force was employed in this case. In the very least, the firing of fifteen shots at a motorist, over a matter of approximately ten seconds, to end the threat posed by the motorist did not violate any clearly established law under the Fourth Amendment in July of 2004. Therefore, Petitioners are entitled to qualified immunity.

2. Sixth Circuit case law did not clearly establish that the Petitioners' actions were unconstitutional in July 2004.

Case law arising from the place of the shooting (the Sixth Circuit) and where the officers worked (the Eighth Circuit) demonstrates that Petitioners' conduct did not violate clearly established law. Starting with the Sixth Circuit: In April 2004, three months before Petitioners' encounter with Rickard, the Sixth Circuit held that officers were reasonable in firing on a suspect who was actively using his vehicle as a weapon against police and dangerously attempting to escape and evade apprehension. *VanVorous v. Burmeister*, 96 Fed. Appx. 312, 314 (6th Cir. 2004). Officers received a call that someone, later identified as John VanVorous, was vandalizing a local gas station. *Id.* at 313. Officers eventually located

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confronted armed robbery suspect; 14 shots were not unreasonable).

VanVorous in a red GMC Jimmy. *Id.* The vehicle sped away, and the officers gave chase. *Id.* Other officers joined the chase, and the chase continued beyond city limits. The Sixth Circuit described the reckless and dangerous driving that led to the officers shooting VanVorous, which was very similar to the circumstances Petitioners faced in this case:

> . . . VanVorous drove onto a grassy patch of land, fishtailed, and headed back the way he had just traveled. The state troopers followed the Jimmy onto the grass, and the next two police cars in pursuit attempted to box VanVorous in as he drove back toward them. VanVorous, however, was able to maneuver between the two vehicles and continue on his way, just as Burmeister was arriving in the area. Rather than trying to evade the last police car, VanVorous drove eastward in the westbound lane and crashed into Burmeister's vehicle at a speed estimated to have been approximately 14 miles per hour. After the collision, VanVorous continued to rev his engine and began pushing the police cruiser backward. While VanVorous continued to force the cruiser backward toward a ditch, Burmeister jumped from the vehicle and fired his weapon at the Jimmy numerous times. The two state troopers rushed to the scene, broke the windows on the Jimmy with their flashlights or night sticks, and when that action failed to stop VanVorous, they opened fire on him.

Id. at 313-14.

The district court ruled that the officers' efforts were reasonable, because they were attempting to prevent the escape of a suspect they reasonably believed posed a danger. *Id*. (quoting *Garner*, 471 U.S. at 3). In the alternative, the district court held that even if the officers' actions were unreasonable, there was no clearly established law to put the officers on notice that shooting a suspect in those circumstances was unlawful. *Id*. The Sixth Circuit affirmed application of qualified immunity.

In *VanVorous*, the Sixth Circuit took note of the district court's emphasis on "the uncontroverted evidence that [the suspect] continued to rev his engine while pushing the police car toward a ditch, squealing his tires, creating an enveloping cloud of smoke, and threatening to disengage his vehicle from the cruiser at any moment." *Id.* at 314. The Sixth Circuit wrote, "In short, in concluding that the defendants' responses were objectively reasonable, the district judge accurately described the inherent danger of the situation facing the city and state police." *Id.*; *see also Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000).

That case is discussed in detail because it is so closely on point with this case. In both cases, the suspect presented a significant danger to the officers and the public at large. Also, in both cases the suspect used his vehicle as a deadly weapon. Thus, because the threat remained, and because the cases discussing this issue permit officers to utilize deadly force to

stop such a threat, Petitioners did not violate clearly established law as of July 2004.

The foundation of the court of appeals' opinion in this case is its finding that Rickard was "essentially stopped" at the time force was used. However, that characterization of the events in this case is, we respectfully submit, blatantly contradicted by the undisputed video evidence. The video recordings show Rickard was never actually stopped in any sense until he crashed down the road from where the shooting took place. This is the same error committed by the Eleventh Circuit in *Scott v. Harris*, prior to this Court's reversal. 550 U.S. at 378-79. While at the time of the first three shots in this case, Rickard was not covering much ground in the Honda, he was using it to ram Officer Gardner's car.

Based on *VanVorous* alone, and given the undisputed facts as shown by the dash-cam videos and the testimony of the Petitioners, the holding of the court of appeals was incorrect because the clearly established law in the Sixth Circuit *did*, in fact, permit officers to use deadly force in a situation very similar to the one Petitioners faced. Consequently, the Sixth Circuit committed error in failing to grant the officers qualified immunity in this case because its own precedent established Petitioners did not violate clearly established law.

3. Eighth Circuit law also did not clearly establish that the Petitioners' actions were unreasonable at the time.

Petitioners were certified law enforcement officers in the Eighth Circuit, and they were informed by their own Circuit's decisions in ascertaining the clearly established law as of the date of the incident in this case. Those decisions did not clearly establish that Petitioners acted unconstitutionally; if anything, they support the lawfulness of their conduct.

In *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993), the Eighth Circuit found the decision by a police officer to shoot a suspect upon probable cause that the vehicle driven by the suspect posed an imminent threat of serious physical harm was not objectively unreasonable. Like the case here, the Court noted the reasonableness of the officer's conduct because "Rice had seen the truck force several motorists off the road and threaten the safety of many others." *Id*. Additionally, the court also found that the officers who did not "seize" the suspect and were not sued as supervisors were summarily entitled to summary judgment, *id*., which is the case here as it pertains to Petitioners Forthman, Ellis, and Evans.

Similarly, in *Hernandez v. Jarman*, 340 F.3d 617, 623 (8th Cir. 2003), decided 11 months before this incident, the Eighth Circuit held the use of deadly force permissible if an officer has probable cause to believe that a suspect posed serious physical injury or

a threat of death to the officer or others. *Id*. at 623. The court summarized the events as follows:

> The undisputed facts in this case demonstrate that Six Feathers [the suspect] continually eluded the officers and took them on a lengthy and highly dangerous chase. Near the end of the pursuit, Six Feathers intentionally drove his car directly into Tarrell's [a sheriff deputy] vehicle. Jarman [a sheriff deputy] testified that it was his belief that Six Feathers was an "immediate threat." Jarman further testified that, after the collision, he believed Six Feathers, as he was backing up and turning his car in Jarman's direction, intended to run him over.

Id. (bracketed material added). "[W]e hold that Jarman's use of deadly force was objectively reasonable under the circumstances as Jarman knew them to be at that time." *Id*. Indeed, in this case, there are multiple instances of such conduct against the officers and each officer has testified to the threat of serious harm they perceived. Ignoring such testimony would impermissibly be engaging in 20/20 hindsight. Most importantly, *Hernandez* demonstrates that Petitioners' conduct did not violate clearly established law in July of 2004.

* * *

No matter which source the Court looks to, Petitioners are entitled to qualified immunity because they had every reason to believe their conduct was objectively reasonable.

> But whether or not the constitutional rule applied by the court below was correct, it was not "beyond debate." *al-Kidd*, *supra*, at ___, 131 S.Ct. 2074, 2083 (slip op., at 9). [Petitioners] may have been mistaken in believing [their] actions were justified, but [t]he[y were] not "plainly incompetent." *Malley*, 475 U.S., at 341.

Stanton, 134 S. Ct. at 7 (bracketed material added). Because the Petitioners' conduct was not, as established by clear prior case law, unconstitutional "beyond debate," they did not violate clearly established law and are entitled to qualified immunity. The court of appeals thus incorrectly denied qualified immunity, and the judgment should be reversed.

II. Petitioners are entitled to qualified immunity because their use of deadly force was an objectively reasonable response to Rickard's felony fleeing in a high-speed chase across state lines under *Scott v. Harris, Tennessee v. Garner*, and *Graham v. Connor*.

It is settled that excessive force claims must be analyzed pursuant to the Fourth Amendment objective reasonableness standard. *Graham*, 490 U.S. at 395. Determining the objective reasonableness of a particular seizure under the Fourth Amendment "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing

governmental interests at stake." *Id.* at 396 (internal quotation marks and citation omitted).

When analyzing officers' actions under the Fourth Amendment, the proper question is whether the officers' actions were objectively reasonable in light of the totality of the circumstances they faced. *Id.* at 396-97. The inquiry is necessarily fact-specific, "requir[ing] careful attention to 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*. *See also*, *Brousseau*, 543 U.S. at 198-99.

The proper perspective to consider is that "of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight" to "allow 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." *Graham* at 396-97. Given the danger Rickard posed to Petitioners and the public throughout the incident and up to its very end, Petitioners' actions were objectively reasonable.

A. *Scott v. Harris* is similar enough for Petitioners' use of deadly force to be objectively reasonable

The measures Petitioners took to terminate the dangerous vehicular flight of the decedent were objectively reasonable under the circumstances. The facts here are similar to those in *Scott v. Harris*, 550 U.S. 372 (2007), where this Court held, "A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386. In *Scott*, the officer rammed the suspect's vehicle with a police cruiser to stop the suspect's dangerous flight. *Id.* at 375. Here, there was a collision between Rickard and Plumhoff's cars, and Rickard spun out. The officers managed to form a semicircle around Rickard's vehicle with their cars and then approached him on foot. Rickard remained a threat in the Honda as he rammed Officer Gardner's car and nearly ran over Officer Ellis. The Petitioners used the only remaining force available to them: their firearms. *See Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992).

Scott held it is acceptable for an officer to ram a suspect's car, forcing him off the road, to stop the dangerous threat posed by the fleeing felon, even though the officer's conduct "places the fleeing motorist at risk of serious injury or death." It follows, then, that officers could permissibly fire their weapons at a

dangerous fleeing motorist in an effort to stop the threat he poses even though it risks injury or death.

The Court, in conducting the balancing test from *Graham v. Connor*, considered the number of lives at risk and further said: "it was respondent, after all, who intentionally placed himself and the public in danger . . . " by his dangerous flight. *Scott*, 550 U.S. at 384. The Court also recognized that the public was innocent relative to the suspect's culpability. *Id*. Notably, the rule announced by the Court in *Scott* permits officers to terminate a dangerous chase by means that are likely to cause serious physical injury or death. *Id*. at 386. The use of firearms by Petitioners, given the undisputed facts in this case, fits easily within the rule laid out in *Scott*, and no extension of that rule is necessary in this case to conclude Petitioners' conduct was objectively reasonable.

Even if this case presented the occasion to consider a narrow extension of *Scott v. Harris*, that is consistent with the public policy discussed by the Court there: "Second, we are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness." *Id*.

B. The force used by Petitioners was objectively reasonable and warranted by 1985's *Tennessee v. Garner*.

The videos demonstrate how dangerous this police chase was, and the Officers provided testimony describing the dangers Rickard posed from their perspectives on the scene of the event. The question remains: Was Rickard's offense sufficiently dangerous to warrant the use of deadly force to stop this high-speed chase as a matter of law?

In *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985), this Court balanced the interests of the individual to live against the public and law enforcement interests in preventing escape of a fleeing felon, there a nonviolent felon. *Id*. at 9-10.

Rickard's dangerous high-speed flight from his traffic stop in West Memphis, Arkansas, weaving in and out of traffic on busy I-40 constituted a dangerous felony in risking the lives of everyone he passed on the road, as well as himself, and the officers pursuing him.[14] He then rammed police cars and nearly backed his car over an officer on foot. Then, undeterred, he continued his dangerous flight. Thus, *Garner* applies, *id.* at 1112:

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[14] "Headlong flight wherever it occurs is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).

> Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

And *Garner* was decided in 1985, 19 years before this incident.

The use of deadly force in this case was objectively reasonable under *Tennessee v. Garner* and *Graham v. Connor*. Rickard was a fleeing felon, wielding his Honda as a deadly weapon, intent on never being captured. He had employed force against officers, and he posed a continuing threat them and to innocent bystanders. *Garner* at 11-12.

Under the circumstances here, considering the rule in *Garner* from 1985, reinforced by the dicta in *Sykes* from 2011 (discussed below), the use of deadly force to stop Rickard was objectively reasonable.

Furthermore, as stated previously, when police officers are confronted with a threat of deadly force and they fire their weapons, various circuit courts have ruled they can keep firing until the threat is over. *See*, note 13.

Petitioners' actions in using deadly force to stop the threat posed by Rickard were objectively reasonable, and the court of appeals should be reversed.

C. As a matter of public policy, this Court has already held officers do not have to allow a suspect in a dangerous police chase to escape, and that public policy holding in *Scott* should apply here.

In *Scott*, this Court considered an argument that the police should simply allow suspects to escape when the vehicular flight is high-speed and therefore dangerous. 550 U.S. at 385. The Court rejected that argument because there was no guarantee that ceasing pursuit would eliminate the danger. *Id.* First, the officers would have no way to communicate to the driver that they were really giving up the chase. *Id.* Second, the Court was reluctant to lay down a rule requiring officers to allow fleeing felons to get away by driving recklessly – this could encourage suspects to try to get away. *Id.* The Court laid down "a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id*. at 386.

In *Sykes v. United States*, 131 S. Ct. 2267, 2273-74 (2011) this Court held that felony flight in a vehicle is a "dangerous felony" for a U.S. Sentencing

Guidelines enhancement. The Court elaborated, in language fully applicable to this case:

> Because an accepted way to restrain a driver who poses dangers to others is through seizure, officers pursuing fleeing drivers may deem themselves duty bound to escalate their response to ensure the felon is apprehended. *Scott v. Harris*, 550 U.S. 372, 385 (2007), rejected the possibility that police could eliminate the danger from a vehicle flight by giving up the chase because the perpetrator "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow.

As the Court further acknowledged: "once the pursued vehicle is stopped, it is sometimes necessary for officers to approach with guns drawn to effect arrest. Confrontation with police is the expected result of vehicle flight. It places property and persons at serious risk of injury." *Id*. at 2274. The Court referred to statistics of police reports involving vehicular flight and said: "Although statistics are not dispositive, here they confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id*.

Therefore, vehicular flight involves a dangerous felony as a matter of law and " . . . the intervening pursuit creates high risks of crashes." *Id*. In this case, the undisputed facts demonstrate the dangers recognized in *Sykes*. And, had Petitioners simply let the

decedent drive away, how would they have communicated to him that the pursuit had ended other than just slowing down? *See Scott*, 550 U.S. at 385. The decedent may have continued to drive recklessly, endangering more lives, simply because he thought the police were still trying to catch him. *See id.* Even if the Petitioners could have told the decedent that they would no longer chase him, he might not have believed them. *See id.* With so much uncertainty as to whether the pursuit would continue, he "might have been just as likely to respond by continuing to drive recklessly as by slowing down and wiping his brow." *Id.* Considering *Sykes*, and the undisputed video evidence in this case demonstrating the dangers associated with high-speed police chases, police cannot permit a suspect to continue to dangerously flee and endanger the officers and the public.

Additionally, a holding that requires officers to allow a suspect to escape after he threatens them with his vehicle is sure to create perverse incentives. The Court's recognition in *Sykes* demonstrates officers are already facing dangerous conditions, so we should not encourage any additional dangers. Therefore, the Court should rule that, based on the undisputed facts, the Petitioners are entitled to immunity as a matter of law.

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CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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