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

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit properly dismissed the Petitioners' appeal upon a finding that it lacked jurisdiction because of factual disputes.

(2) Whether the Sixth Circuit properly affirmed the district court's denial of qualified immunity to police officers who chased a vehicle containing two unarmed suspects from West Memphis, Arkansas across the Mississippi River bridge into Memphis, Tennessee and then killed both occupants with a total of 15 gunshots fired into the vehicle (1) when there are disputes as to whether aggravated assaults claimed by the officers occurred and they do not show on the video (2) when there are disputes as to whether the officers reasonably perceived threats to themselves or others, and (3) when there are disputes as to whether their actions were ultimately objectively reasonable given that the video evidence demonstrates that the first three shots were fired by an officer from the passenger side of the vehicle, and the remaining 12 gunshots were fired by two other officers as the vehicle was passing and had passed the officers and was continuing to drive away from them down the street with no one in front of the vehicle (all of which is plainly demonstrated on the video).

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STATEMENT OF THE CASE

For the sake of brevity, Ms. Rickard adopts her Statement of the Case previously provided in response to the Petitioners' Petition, but also relies upon the additional facts set forth herein, particularly the testimony of the only two officers who have been deposed in the case thus far, the video evidence, and the summary of the rulings of the district court which were affirmed by the Court of Appeals below.

SUMMARY OF ARGUMENT

The Court of Appeals appropriately dismissed the Petitioners' appeal in this case, which was based upon the Petitioners' disagreement with the district court's reading of factual disputes. Based upon this Court's opinion in *Johnson v. Jones*, 515 U.S. 304 (1995), the Court of Appeals appropriately determined that subject matter jurisdiction was lacking. The factual disputes impact not only the issue of jurisdiction, but also the disposition of this case on a motion for summary judgment.

The courts below appropriately denied qualified immunity to the Petitioners. The district court found genuine issues of material fact based on key disputes: (1) disputes as to whether the claimed aggravated assaults occurred, as they do not show on the video; (2) disputes as to whether the officers reasonably perceived threats to themselves or others; and (3)

disputes as to whether Petitioners' actions ultimately were objectively reasonable.

There are facts which have not been previously developed for this Court which are set forth at length by Ms. Rickard herein to help illustrate the disputes and their significance, principally from the video evidence and the testimony of the officers. They demonstrate that the factual contentions of the Petitioners as to the degree of threat posed by Mr. Rickard do not show on the video, and in fact are undermined in several instances by the video and their own testimony.

The officers' conduct was appropriately found not to have been objectively reasonable in this case, and their efforts to convince this Court otherwise must be viewed in light of at least two fundamental problems. First, they seek to transfer the principles of this Court's opinion in *Scott v. Harris*, 550 U.S. 372 (2007), which approved the ramming of a suspect's vehicle to stop a chase, to a shooting situation, which this Court specifically distinguished in *Scott v. Harris*. Second, they argue, in effect, for the adoption of a blanket rule that shooting a suspect who flees in a vehicle is authorized because the suspect has fled in a vehicle.

Moreover, the issue of whether the Fourth Amendment has been violated can be (and in this case is) interrelated with whether there has been a violation of clearly established law. That is because the key disputed issue is the degree of threat Mr. Rickard posed to police. This is dictated by this

Court's opinion in *Tennessee v. Garner*, 471 U.S. 1 (1985), which ties the reasonableness of an officer's use of force to the degree of threat posed by a suspect. Both "prongs" of the qualified immunity analysis (whether there has been a constitutional violation, and whether clearly established law has been violated) can hinge on whose version of the disputed facts are to be believed, because if a plaintiff's version is to be believed, excessive force will have been used in violation of clearly established law; but if the officers' version of events is believed, the officers likely will not have violated clearly established law. In other words, the legal question can be completely dependent upon which view of the facts the jury believes. Cases since *Saucier v. Katz*, 533 U.S. 194 (2001) and *Scott v. Harris* have used such analysis.

In this case, the denial of qualified immunity was appropriate because of disputes about the degree of threat Mr. Rickard posed. However, in the alternative, if this Court deems additional analysis necessary as to the issue of whether clearly established law was violated, the Court can remand this case to the Sixth Circuit for that purpose as the Petitioners' amicus United States suggests, without deciding the issue of Fourth Amendment reasonableness, avoiding unnecessary expenditure of this Court's time and resources.

ARGUMENT

I. THE PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

A. The Court of Appeals appropriately dismissed the appeal initially for lack of jurisdiction over factual disputes as to the district court's view of the evidence.

As a threshold matter, Ms. Rickard respectfully submits that appellate jurisdiction is lacking in this matter, as the Sixth Circuit appropriately determined. Pet. App. at 12 ("whether we call it a dismissal for lack of jurisdiction or an affirmance of the denial of qualified immunity, the result is the same.") Procedurally, this case came to the Sixth Circuit as an interlocutory appeal of a finding which ultimately challenged the district court's reading of the factual evidence, pursuant to this Court's holding in *Johnson v. Jones*, 515 U.S. 304 (1995). The Petitioners may have glossed their contentions with perfunctory claims that the law was not clearly established, but the reality is that they were taking issue with the district court's reading of the facts. *See*, Relevant Documents, Ms. Rickard's Motion to Dismiss for Lack of Jurisdiction, 5/16/11, and Reply 6/1/11. Nevertheless, after initially dismissing the appeal, the Court of Appeals ultimately gave Petitioners the panel appeal they sought.

Pursuant to *Johnson v. Jones*, a determination that genuine issues of material fact create disputes

which preclude the defense of qualified immunity is not immediately appealable. Accordingly, Ms. Rickard respectfully reiterates that the Court of Appeals did not have jurisdiction over the instant appeal. A review of the Petitioners' submissions to the Court of Appeals illustrate why the instant appeal lacked subject matter jurisdiction. Petitioners' primary argument on appeal was a disagreement with the factual conclusions contained in the district court's order denying them qualified immunity. This attempt to question the evidentiary sufficiency of the district court's findings based on the record on interlocutory appeal was prohibited by this Court's opinion in *Johnson v. Jones*. The Petitioners clearly attempted to base their interlocutory appeal on the evidentiary sufficiency of the record in this case, and, although the Court of Appeals granted the Petitioners the appeal they sought after initially dismissing the appeal, it ultimately appropriately affirmed the district court in this case. Pet. App. at 12.

Because appellate jurisdiction does not extend to fact-based disputes, the Sixth Circuit properly affirmed the district court's order denying the Petitioners qualified immunity. It is worth noting, if only in passing, that the United States as amicus curiae takes the position that resort to *Johnson v. Jones* does not address the issue of whether clearly established law was violated, but the reality is that the issue of whether the Fourth Amendment has been violated can be (and in this case is) interrelated with the issue of whether there has been a violation of

clearly established law. That is because the key disputed issue is the degree of threat Mr. Rickard posed to police. In other words, the legal question can be dependent upon which view of the facts the jury believes. If the jury determines a police officer has shot an unarmed, nondangerous suspect without a reasonable belief that he posed a significant threat of death or serious injury, the officer will have violated the Fourth Amendment and clearly established law. Conversely, if the jury believes the officer's version of events and finds the suspect was a significant threat, the officer will likely be found to have used deadly force appropriately. The analysis of *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985) dictates this by forbidding the use of force on a suspect who is not a threat, but, in almost the same breath, authorizing the use of force on a suspect who *is* a threat. For this reason, cases have turned on the issue of whether and/or the degree to which the suspect was a threat. This case does as well.

B. Factual disputes in this case as to the alleged aggravated assaults, claimed "rammings," and ultimately the degree of threat Mr. Rickard represented impact not only the issue of appellate jurisdiction, but also whether the force used in this case was in violation of the Fourth Amendment, and whether clearly established law was violated.

Without waiving the position that the Court of Appeals did not have jurisdiction, Ms. Rickard provides the following in response to the arguments of Petitioners and their amici. Certain basic facts in this case are not in dispute, particularly since video "dash-cam" evidence[1] depicts most of the events. There is no dispute that there was a chase. There is no dispute that there was a shooting and Mr. Rickard and Ms. Allen were killed. However, as to some of the more detailed aspects of those facts, there are significant disputes that have not yet been developed for this Court.

Although it is lengthy, detailing the disputes is important because of some of the specific contentions the Petitioners have made (particularly as to what the facts are), and Ms. Rickard is providing additional

[1] It should be noted that the time counters on the three different dash-cam videos from Units 279, 284 and 286 were not synchronized, and in fact have variances between them of as much as approximately one hour. However, there is no dispute that the events began around midnight on July 18, 2004.

facts not provided by Petitioners, including their own testimony. Many of these facts are also visible from the video evidence. The testimony of Petitioners Vance Plumhoff and Joseph Forthman (the only two witnesses who have been deposed) and the video evidence factored into the denial of qualified immunity, which the Sixth Circuit affirmed.

In summary, a review of the video evidence and the testimony of the two officers reveals that the claimed aggravated assaults are not substantiated on the video and the degree of threat at the time deadly force was used was not as Petitioners now contend. More simply, the video evidence and testimony serve to undermine the version of the facts claimed by Petitioners. The existence of the factual disputes relates not only to the issue of whether excessive force was used in violation of the Fourth Amendment, but also whether a violation of clearly established law occurred. *See*, *e.g.*, *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), *reh'g den.*; *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), *cert. den.*, 559 U.S. 1007; *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005); and *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), discussed additionally below at III H and K. The key difference is ultimately in the degree of threat Mr. Rickard posed, which depends on the accuracy of the Petitioners' factual claims.

C. Dispute as to whether the claimed aggravated assaults actually occurred.

A justification offered by the Petitioners for continuing the chase and for the shooting in Memphis is that Donald Rickard committed aggravated assaults against various officers by attempting to ram them. A review of the video evidence (principally the Unit 279 video) and the testimony of the officers reveals that the district court below properly found genuine issues of material fact as to whether the aggravated assaults actually occurred as described.

While the chase was on Interstate 40, the officers claimed that Rickard attempted to ram police vehicles, which was the basis for the claims that he committed aggravated assaults. However, the video evidence shows (and it is admitted in deposition testimony) that there was no contact between the vehicles on I-40.

Specifically, Officer Plumhoff identified the first [alleged] aggravated assault, but Forthman does not know what that action was. Depo. of Forthman, at 68; JA 262-63. On I-40, it is Forthman's understanding that there was never any contact between the Rickard vehicle and any of the police vehicles [during the events represented to be aggravated assaults]. Depo. of Forthman, at 69; JA 263.

Officer Plumhoff, referring to the place on the videotape in which Plumhoff stated that Rickard "just tried to ram me," testified that Lieutenant Forthman's [Unit 279] tape shows where it happened, but "(t)he

yellow strobe on my vehicle pretty well washes out the detail." Depo. of Plumhoff, at 41; JA 351. [One] cannot see the event well on any of the three tapes. Depo. of Plumhoff, at 41; JA 351. [One] can see the Rickard vehicle come over to the right, but with the yellow strobe, it is hard from the video to determine the exact proximity. Depo. of Plumhoff, at 41; JA 351-52.

D. Another alleged aggravated assault – lane changing.

Officer Forthman identified the second aggravated assault (still on I-40) as a time when the Rickard vehicle "just happened to be going from one lane to another when he used his vehicle intentionally to keep – or, to even run Officer Evans off the road to keep him from going past him." However, Rickard did not run Officer Evans off the road. Depo. of Forthman, at 101-102; JA 277-78. Forthman could not tell from his vantage point how far the Rickard vehicle was in front of the Evans vehicle at the time Rickard changed lanes. Depo. of Forthman, at 107-108; JA 279-80. He did not know what the speed of the Rickard vehicle was when he changed lanes. Depo. of Forthman, at 108; JA 280. Forthman could not tell how far Evans moved to the left. Depo. of Forthman, at 108; JA 280. There is such a charge as an improper lane change; that is a misdemeanor. Depo. of Forthman, at 110-111; JA 282.

In concluding that a felony had just occurred, Forthman made the judgment that Rickard tried to ram Evans and Forthman without knowing the proximity of the vehicles to each other. Depo. of Forthman at 112; JA 283-84. Watching it on video in his deposition, Forthman could not answer whether it was an improper lane change because of the quality of the video and because he could not tell whether Rickard had his "blinker" on. Depo. of Forthman, at 113; JA 284-85.

E. Hearsay of another alleged aggravated assault.

Forthman heard one of the other officers say near a weigh station on I-40 that there was a vehicle assault, and from that, Forthman concluded that act converted the situation from a misdemeanor to a felony. Depo. of Forthman, at 84l; JA 269. The felony was an aggravated assault. Forthman did not know what the maneuver was, but he heard one of the other officers say it. Depo. of Forthman, at 84; JA 269-70.

F. Other claimed attempted rammings on I-40 not substantiated on the video.

Officer Plumhoff identified another incident at 11:11:43 on the time counter [Unit 279] at which it appeared to Plumhoff that Rickard had tried to ram a car. However, Plumhoff could not tell how far the officer was from those vehicles, and Plumhoff did not

know how far Plumhoff was from Rickard at that point. Depo. of Plumhoff, at 115; JA 382-83. Officer Plumhoff identified another time at which he claimed Rickard came over to the left toward Plumhoff when Plumhoff was trying to get past Rickard on the left, and Plumhoff had to drop back a little bit. That was at 11:12:40, but "the video is really not useful here" for that. Depo. of Plumhoff, at 116-117; JA 383-84.

G. Actual contact between vehicles: the Rickard vehicle was first hit from behind by a police vehicle, and other alleged "rammings" were disputed as not showing on the video evidence.

Although there was no contact between the vehicles on I-40, the video evidence does show contact once the vehicles crossed into Memphis. The Petitioners allege multiple times in their brief that the Rickard vehicle "rammed" the vehicles driven by Officers Plumhoff and/or Gardner. For example, at page 3 they indicate that Rickard "repeatedly rammed" Officer Gardner. At page 7 of their brief they identify (vaguely) what officers believed "appeared to them" to have been attempted rammings. Describing an incident in which there is undeniably contact between police vehicles shown on the video evidence, at page 8 of their brief they indicate that the Rickard vehicle was hit by a pursuing vehicle. That is a correct characterization of what occurred at 12:17:34-:36 on the Unit 286 video time counter, as the police vehicle struck the Rickard vehicle from behind, but that is

obviously different from the idea that Mr. Rickard "rammed" anyone. The connotation of the word "ram" necessarily implies intent on the part of Mr. Rickard to strike another car, which was not possible from Mr. Rickard at that time as shown on the Unit 286 video. At page 9 of their brief Petitioners again state that Rickard "rammed" the vehicle driven by Gardner, which they repeat on pages 37 and 39. They also state at page 27 that Mr. Rickard "rammed" into two separate vehicles, presumably referring to contact with Plumhoff and then Gardner.

H. A rear-end impact led to a collision with Plumhoff.

The problem with that repeated contention for Petitioners is that, respectfully, the video evidence does not support it. There is contact between vehicles, but not the kind that would fit the connotations of stating that Mr. Rickard "rammed" any of the vehicles. The video evidence also shows that the first [rear-end] contact noted above was actually the impetus for the second contact with a police vehicle, which was the contact between Mr. Rickard and the vehicle of Officer Plumhoff. That occurred as both vehicles were moving forward [Unit 286 video, at 12:17:34-:36], and is discussed more thoroughly below.

I. The alleged ramming of Officer Plumhoff's vehicle.

Again, notwithstanding the Petitioners' statements that Rickard "rammed" Officer Plumhoff's vehicle, the video and the testimony of the officers indicate that what more likely happened was that because Rickard was struck from behind by a police vehicle, that contact caused him to spin out, and the momentum carried the Rickard vehicle into contact with Officer Plumhoff's vehicle, while both were moving forward.

The testimony of Officers Forthman and Plumhoff is significant. With the [279] video stopped at 11:14:17, Forthman testified that Rickard had already "rammed" Officer Plumhoff's car. However, that does not show on the [279] camera. Depo. of Forthman, at 134; JA 298. As far as Forthman knows, it could have been both vehicles moving that struck when they struck. Depo. of Forthman, at 135; JA 299.

Plumhoff also believes the impact between the Rickard vehicle and his vehicle does not show on the [Unit 279] video. Depo. of Plumhoff, at 118; JA 385. However, Plumhoff believes that impact is partially shown on the camera of officer Galtelli [Unit 286]. Depo. of Plumhoff, at 119; JA 299. Plumhoff does not know whether Rickard hit other police vehicles or they hit him, but he spun out subsequent to some contact between vehicles. Plumhoff knows that. Depo. of Plumhoff, at 142; JA 396.

In fact, the Unit 286 video, at approximately 12:17:37, depicts the Rickard car moving forward from momentum created when it spun out after being struck by another police car and *then* colliding with Plumhoff's vehicle (which was also moving forward) rather than Rickard intentionally "ramming" Plumhoff at all. At a minimum, based upon the testimony and the cited portion of the Unit 286 video, reasonable minds could differ as to whether that claimed "ramming" right before the shooting was a "ramming" at all.

J. Video of the Rickard and Gardner vehicles in contact with each other.

The final contact between police vehicles and the Rickard vehicle (just before the first shots were fired) was between the Rickard vehicle and the vehicle of Officer Gardner. The Petitioners contend Rickard repeatedly rammed Gardner. However, a review of the Unit 279 video at 11:14:22 on the time counter indicates that the first contact between the vehicle of Officer Gardner and the vehicle driven by Mr. Rickard occurred as both vehicles were moving forward toward each other simultaneously, at visibly low speed. The same is true of the contact shown on the Unit 286 video at 12:17:43. Both vehicles are moving forward toward each other, but at low speed and within a tight space. This is not properly characterized as a "ramming" by Mr. Rickard, nor is it properly characterized as "reckless" maneuvering by the United States as amicus curiae at page 19 of its

amicus brief. It is, however, a slight move forward, as the United States indicates at page 4 of its brief.

The videos also show that the rest of the brief interaction between those two vehicles did not involve "repeated ramming." The videos go on to show that once the Rickard and Gardner vehicles were in contact with each other by 11:14:22 on the Unit 279 video and at 12:17:43 on the Unit 286 video, the vehicles remained in almost complete contact, bumper to bumper for the next few seconds, until Officer Plumhoff fired his three shots and then the Rickard vehicle began backing away and around the officers to drive away from them. While the Rickard and Gardner vehicles were in contact with each other it is true that the Rickard vehicle did rock briefly and the wheels did intermittently spin. However, Rickard did not (as the word "rammed" would imply) pull back appreciably and then drive forward with force into Gardner again, and to suggest that he did that "repeatedly" is not borne out by the video [Unit 279 video at 11:14:22-:25, and Unit 286 video at 12:17:43-:46].

The importance of these points about the word "rammed" goes beyond mere semantics, because significant connotations underlie the Petitioners' contentions that Rickard "repeatedly rammed" police cars, as though it were a unilateral act. True "rammings," had Rickard gathered up a head of steam and struck stationary police vehicles "repeatedly" as they contend, would seemingly represent a greater degree of threat.

The video and the testimony indicate, however, that the collision with Plumhoff's vehicle occurred while both cars were going forward, and the collision with Gardner's vehicle is similar: both vehicles were moving forward toward each other at low speed and Gardner actually appeared to be moving more forward than Rickard on the Unit 286 video. Officer Gardner has yet to be deposed in this case; although he tendered an Affidavit, he has not been subjected to cross-examination.

K. Dispute as to whether the officers who fired shots reasonably perceived a threat to themselves, fellow officers or the public, particularly once the vehicle backed away in a semicircle and headed past the officers.

The most significant disputed issue is whether the officers who fired shots (Plumhoff, Gardner and Galtelli) reasonably perceived a threat to themselves, fellow officers or the public so as to justify the firing of a total of 15 gunshots at the vehicle. Notwithstanding the description of the videos by the Petitioners, a review of the video from Unit 279 in particular reveals that the vast majority of the gunshots were fired into or at the vehicle after it had backed away from the officers in a semicircle and had begun to proceed eastbound on Jackson Avenue, just seconds before the driver lost control (presumably from multiple gunshot wounds) and crashed into a house. This Court noted the likelihood of this kind of outcome

(a crash following shots at a moving car) in *Scott v. Harris*, 550 U.S. 372, 384, specifically citing *Vaughan v. Cox*, 343 F.3d 1323, 1326 (11th Cir. 2003) (denying qualified immunity due to police gunfire at a moving vehicle).

L. Video evidence when the first shots were fired.

The Petitioners indicate that Plumhoff fired the first three shots because of the threat posed by Rickard. However, this is not consistent with Officer Plumhoff's own testimony upon his review of the video. Looking at the tape [from Unit 279], Plumhoff testified that he could see he was [actually] between the front edge of the front tire well and the right front corner of the front bumper of the Rickard vehicle, slightly to the side and *not in front of the Rickard vehicle*. Depo. of Plumhoff, at 124-125; JA 387-88.

In fact, a review of the Unit 279 video reveals plainly that Plumhoff was to the side of the right front wheel of the Rickard vehicle rather than facing the front of it directly, and clearly not in the path the Rickard vehicle would have taken had it moved directly forward. Contrary to the Petitioners' arguments at page 10 of their brief that he "could have" run over officers, at that instant the Rickard vehicle could not go forward toward Plumhoff because it was in contact with Officer Gardner's vehicle. This is significant because a recurrent theme of the Petitioners' contentions is that the subjective perceptions of

the officers – right or wrong – trumps the ultimate inquiry of objective reasonableness. Ms. Rickard acknowledges statements in case law according a measure of deference to officers' actions when events unfold quickly; however, such a consideration, taken to the extreme, would emasculate the inquiry of objective reasonableness. Although the speed of the events is a factor, the invocation of a rote "that's how it looked to me" is not an absolute defense to any challenge to objective reasonableness in an excessive force claim. While the officers' perceptions are part of the inquiry under the totality of the circumstances, their subjective reactions or beliefs do not preclude or completely control a review of objective reasonableness, particularly when video evidence does not support it.

M. The Petitioners' claims that Rickard nearly backed over Officer Ellis and struck the hand of Officer Evans.

The Petitioners also state multiple times in their brief that Rickard "nearly backed over" or "nearly ran over" Officer Ellis, e.g., at pages 10, 25, 27, 37, and 39 of their brief to this Court. However, a review of the Unit 279 video at 11:14:28 demonstrates that Officer Ellis took just one step to his right to avoid the vehicle as it was backing. In other words, contrary to the implications of the statements that Rickard "nearly backed over" or "nearly ran over" Officer Ellis, with connotations of a dramatic run and leap or dive to safety just in the nick of time, Officer Ellis needed

only one step away from the path of the vehicle. He has also not been deposed in this case yet.

On a similar note, Petitioners state at page 9 of their brief to this Court that Mr. Rickard "struck [Officer] Evans's right hand with some part of the Honda." Respectfully, that is not consistent with what they stated to the Sixth Circuit. For example, in their initial brief to the Sixth Circuit, at page 6, they referred to such contact as "not plainly visible on the video." At page 12 of that brief they referred to the vehicle as "reportedly" striking the hand of Officer Evans, at the bottom of page 19 of their original Sixth Circuit brief they stated the vehicle "may have struck" his hand, and at the top of page 22 of that same brief they stated "the Honda arguably struck" his hand. Officer Evans has not been deposed in this case.

N. The ten shots fired by Officer Gardner and two shots fired by Officer Galtelli.

The Petitioners correctly indicate in their brief to this Court that Officer Gardner (who has not been deposed) fired ten shots and Officer Galtelli (who has also not been deposed) fired two shots. They omit the testimony of Officer Forthman about the circumstances of those shots. At 11:14:31 on the [Unit 279] video Officer Gardner has just fired his first shot. Depo. of Forthman, at 154; JA 306. Forthman believes 11:14:31 is [also] the time the Rickard vehicle moved from going in reverse to going forward. Depo.

of Forthman, at 156; JA 307-08. Forthman testified that it is known [from the Unit 279 video in Forthman's car] that basically all of the ten shots fired by Gardner were during the time the car was moving forward [which was away from the officers]. Depo. of Forthman, at 158; JA 309. **When that car started going in the other direction [forward], it was not a threat to the people behind the car.** Depo. of Forthman, at 158; JA 309.

O. The severity of the crime prompting the initial traffic stop was low.

At the time Officer Forthman pulled the Rickard vehicle over, and when it ran, the only thing wrong was that there was a bad headlight and a broken front windshield. Depo. of Forthman, at 38; JA 245-46. A headlight out and a broken windshield would be misdemeanors. Depo. of Forthman, at 43; JA 248.

P. Rickard and Allen were not armed, and the officers pursuing them were not told the initial charges when initiating and continuing the chase.

Forthman agrees that Mr. Rickard did not have a gun that night, nor did [the passenger] Ms. Allen. Depo. of Forthman, at 187; JA 319. None of the officers that night said to Forthman that they were armed or they pulled a gun or it looked like they were going to shoot the officers. Depo. of Forthman, at 188; JA 319-20. The West Memphis Police Department's

Policy and Procedures concerning Police Pursuits, Chapter 2, Section 16, page 3 (JA 401), required the primary unit involved in a pursuit to advise of the reason for the pursuit, including crimes or violations committed. However, the testimony and the video evidence indicate the involved officers were never told the initial charges during the chase. At no point during the pursuit did Forthman tell the other officers that the fleeing car was [initially] stopped for having a headlight out and a broken windshield. Depo. of Forthman, at 62; JA 256. One of the primary things an officer is supposed to use in making the judgment to continue a pursuit is [a weighing of] the seriousness of the committed offense against the danger of the pursuit. Depo. of Forthman, at 63-64; JA 258. However, Officer Dykes [a supervisor not in the chase] and Officer Plumhoff were not able to make that judgment because they did not know what the offense was. Depo. of Forthman, at 64; JA 258.

II. PETITIONERS WERE PROPERLY FOUND NOT TO BE ENTITLED TO QUALIFIED IMMUNITY BECAUSE THEIR USE OF DEADLY FORCE WAS NOT OBJECTIVELY REASONABLE.

A. *Tennessee v. Garner*.

Ms. Rickard agrees this is a Fourth Amendment issue, and that case law from this Court indicates the issue is one of objective reasonableness. *Graham v. Connor*, 490 U.S. 386 (1989), and *Tennessee v. Garner*, 471 U.S. 1 (1985). The Petitioners argue their conduct

was objectively reasonable as a matter of law. This is belied by the many fact disputes noted in this case based on the video evidence and the testimony.

In 1985, 19 years before the events of this case, this Court stated the following about shooting a nonviolent fleeing suspect:

> The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so. . . . A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

471 U.S. 1, 11-12 (1985). This Court added that where a suspect threatens an officer with a weapon or provides probable cause to believe he poses a threat of serious physical harm, deadly force may be used to prevent escape. Id. at 12.

This Court's statements in *Garner* not only articulated a bedrock governing Fourth Amendment principle, but also this Court's word on what was "clearly established" law as soon as the ink was dry on the opinion in March of 1985: it is constitutionally unreasonable to shoot an unarmed, nondangerous fleeing suspect to prevent his escape.

In reaching its decision, this Court in *Garner* addressed the type of considerations that prevail in cases to this day, specifically balancing the nature and quality of an intrusion by police on an individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. 471 U.S. 1, 8. This Court determined that the intrusiveness of a seizure by means of deadly force is unmatched, Id. at 9, and that the use of deadly force frustrates the interest of the individual and of society in judicial determination of guilt and punishment. Id. This Court indicated it was not persuaded that shooting nondangerous fleeing suspects was so vital as to outweigh the suspect's interest in his own life, as the use of deadly force is a self-defeating way of apprehending a suspect because, if successful, it guarantees the criminal justice mechanism will not be set in motion. Id. at 10-11.

At its most basic level, this is a case about the shooting of an unarmed man and woman who drove away from police at a misdemeanor traffic stop in July of 2004. Most of the 15 shots were fired moments later at a moving vehicle as Mr. Rickard drove away from the officers.

B. The force used was not warranted by *Garner*.

Even as they argue to this Court that *Garner* is too general to have provided clearly established law in this case 19 years after *Garner* was decided,

Petitioners also seek to convince this Court that their actions were nevertheless objectively reasonable in light of *Garner*. Indeed, at page 39 of their brief, Petitioners state that because of the threat Mr. Rickard posed, "*Garner* applies." They contend that the videos demonstrate their actions were reasonable. At a minimum, reasonable minds could differ on the issue of the Petitioners' objective reasonableness, and the courts below did not err in this regard.

It is significant to note that a Shelby County, Tennessee grand jury indicted the three officers who fired their guns (Plumhoff, Gardner and Galtelli) for reckless homicide in the death of passenger Kelly Allen. *State of Tennessee v. Galtelli, et al.*, 2008 Tenn. Crim. App. LEXIS 80 (Tenn. Ct. Crim. App., Feb. 13, 2008), at * 1-2.[2] Although the Petitioners contend that Rickard was "reckless," and the United States as amicus curiae takes up that cry, e.g., at page 19 of its brief, the district attorney general in the State of Tennessee ultimately took the position that it was the three officers who fired their weapons who showed reckless behavior and disregard for innocent citizens. Specifically, the district attorney general contended that the interests of justice weighed against granting the officers pretrial diversion, emphasizing the importance of having people in a community feel they

[2] Although the records of the criminal cases against the Petitioners may have been expunged, Tenn. Code Ann. § 40-32-101(b)(2) provides that the "public records" to be destroyed in the expunction process do not include appellate court opinions.

are "protected by their law enforcement officers and not threatened by them." Id. at * 11.

The district attorney general added:

> The reckless nature of the offense resulting in the death of the victim, the fact that the [Defendants were] acting under the color of law, the fact that citizens should feel protected by and not threatened by law enforcement, the damage that this type of criminal behavior does to the judicial system, the need to put law enforcement on notice that this type of behavior will not be tolerated and the need to deter this type of behavior, the need to insure the community that this type of behavior will not be tolerated when weighed against the Defendant[s'] social history and work history indicate that pre-trial diversion is not the appropriate remedy in this case and would not be in the interest of justice.

Id. at * 12-13.

For the sake of accuracy, it is important to note that ultimately, the Tennessee Court of Criminal Appeals did affirm the trial court's order reversing the denial of pretrial diversion. Id. at * 27. However, the fundamental point remains: the State of Tennessee found the conduct egregious enough to warrant criminal indictments; yet the Petitioners contend their conduct should have been found reasonable as a matter of law.

In the face of the factual disputes noted in this case, the Petitioners' justifications such as the claimed aggravated assaults, attempted rammings, and threat in the parking area off of the highway fail. Although they specifically contend that the threat began again as Mr. Rickard backed up and tried to drive away, Officer Forthman's testimony undermines this. It was not reasonable to fire any of the 15 shots in this case.

C. The findings of the district court are based upon disputed facts.

The district court also rejected Petitioners' contentions that their conduct was reasonable as a matter of law, and the Sixth Circuit affirmed. On this issue, the district court found that the various alleged attempted rammings were not clearly demonstrated on the video evidence. Pet. App. at 36-38. Once the Rickard and Gardner vehicles were in contact with each other in Memphis, the district court noted that there was a dispute as to whether the Rickard vehicle's engine was "revving" or rocking back and forth, and whether engine noise in conjunction with a rocking motion should be characterized as a "revving." Pet. App. at 23, 40. With regard to the shooting, the district court found that the video from Unit 279 showed that Plumhoff was near the passenger side of the vehicle when he fired, and the district court indicated that [Gardner] then fired all ten of his shots while the vehicle was moving forward, away from the officers. Pet. App. at 24, 35. With regard to

the Petitioners' claims that the officers' actions were objectively reasonable, the district court found that the undisputed facts did not support that assertion. Pet. App. at 35. The district court specifically indicated that the officers did not believe the suspects were armed; the suspects were initially stopped because of an inoperable headlight; and they were driving away from the officers when the shots were fired. Thus the severity of the crime at issue was low and the suspects posed little immediate threat to the officers or others. Although the suspects were fleeing arrest, that factor alone was insufficient, per *Garner*, to support a finding that deadly force was reasonable. Pet. App. at 35-36. The district court observed that there was no contact between the vehicles on I-40 and the dashboard camera video shows only lane changes and swerving, and it is difficult to tell from the video what the proximity of the vehicles was to each other. Pet. App. at 36, 38.

The district court specifically addressed a series of cases, focusing on the use of force by police in response to claimed threats. The district court cited *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005), in which an officer shot a fleeing suspect who had stolen a police cruiser, asserting that he fired because the vehicle "was bearing down on them." The officer in *Smith* claimed that the suspect "rapidly accelerated directly at [him] and [another officer]" and he fired. The district court noted that the Sixth Circuit in *Smith* found that "[e]ven viewing the events in the heat of the moment, without 20/20 hindsight, a jury

could conclude that a reasonable officer in [the officer's] position was never in any danger." Id. at 774. The district court indicated that with regard to Mr. Rickard a reasonable jury could also determine that the belief that danger was imminent was not reasonable. Thus, granting summary judgment based on the absence of a constitutional violation would be inappropriate. Pet. App. at 40.

In finding the force in this case not to be objectively reasonable, the district court also contrasted the conduct of Mr. Rickard to the suspect in *Scott v. Clay Cnty., Tenn.*, 205 F.3d 867, 872, 878 (6th Cir. 2000) (finding that deadly force was reasonable as a matter of law against an unarmed fleeing suspect where, after leaping out of the car's path, the officer fired on the fleeing car as it turned directly toward another police cruiser), and with *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser that was blocking his escape, and was speeding up a street toward a roadblock manned by other officers). Pet. App. at 40. The district court also noted *Vaughan v. Cox*, 343 F.3d 1323, 1327, 1330 (11th Cir. 2003) (finding that district court erred in granting officer qualified immunity where officer contended that he fired during a pursuit because the suspect swerved as if to smash into his cruiser because a reasonable jury could find that fleeing suspect did not present an immediate threat), and *Sigley v. City of Parma*

Heights, 437 F.3d 527, 536 (6th Cir. 2006) ("[W]here there are contentious factual disputes relating to the reasonableness of an officer's use of deadly force, the court is precluded from granting summary judgment for [the] officers. . . ." Pet. App. at 41.

D. This Court should not decide that there is a blanket rule authorizing police officers to shoot a suspect in a vehicular chase to prevent escape.

This is a case about the firing of 15 total gunshots into a car which contained an unarmed man and an unarmed woman, initially stopped because of a headlight. Petitioners argue that their conduct was reasonable as a matter of law, based upon *Scott v. Harris* (authorizing the ramming of a fleeing vehicle to stop a chase but differentiating ramming from shooting) and *Sykes v. United States*, 564 U.S. 1 (2011) (finding that fleeing from police in a vehicle is a "violent felony" for sentencing purposes). They contend that this Court would not be extending *Scott v. Harris* by transferring its authorization of deadly force to a shooting case, or that it would only be a "narrow" extension of *Scott v. Harris* to apply it to these facts. Stated simply, they seek to stretch *Scott v. Harris* (and Fourth Amendment jurisprudence, which is necessarily fact-specific) much too far.

The Petitioners specifically contend that *Scott v. Harris* is "similar enough" to this case for the force to be found reasonable, but *Scott v. Harris*, as Ms.

Rickard has previously observed to this Court, is fundamentally different from this case. As Ms. Rickard noted in her Response to the Petitioners' Petition at pages 17-19, this Court itself noted in *Scott v. Harris* that a ramming is different from shooting a suspect. 550 U.S. at 383 (noting that a police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person).

When the arguments of the Petitioners and their amici are pieced together to form their inevitable conclusion, it becomes clear that they seek a blanket rule that the level of force utilized in this case is permissible and justified *as a matter of law because Mr. Rickard fled in a vehicle*. The rule they advocate for without quite saying so, lest it seem too overtly transparent, is that a suspect's flight in a vehicle triggers an *automatic* right to use deadly force.

Respectfully, this takes the line too far. Fourth Amendment jurisprudence, by its inherent nature, does not support such a blanket rule. This Court said as much in *Scott v. Harris*, indicating that in Fourth Amendment cases, "in the end, we must still slosh our way through the fact bound morass of reasonableness." 550 U.S. 372, 383. It was that exact point which led Justice Ginsburg, in her concurring opinion in *Scott v. Harris*, to indicate that the majority's opinion in *Scott v. Harris* should not be read "as articulating a mechanical, per se rule." Rather, the inquiry is "situation specific." 550 U.S. 372, 386 (Ginsburg J., concurring).

The infirmity of a blanket rule is actually illustrated by some of the Petitioners' own points. For example, at page 14 of their brief they argue that it was objectively reasonable for the officers to conclude Rickard was a danger not only to them but also "to himself" and his passenger. Although the initial stop was for a misdemeanor, because the two fled in a vehicle, the Petitioners ask this Court to approve the shooting as a matter of law (ostensibly that they had to *shoot* him repeatedly to protect him from himself).

In a different vein, at page 43 of their brief, the Petitioners come back to the same ultimate point of seeking a blanket rule by arguing that it was imperative that Rickard and Allen not be allowed to escape. Specifically, they offer a series of speculative possibilities, e.g., that Rickard "may have continued to drive recklessly," and he "might not have believed" the chase was off if officers stopped chasing. Although Ms. Rickard acknowledges that this Court provided parallel analysis in *Scott v. Harris*, the point remains that because there was a chase, the Petitioners are urging this Court to transfer the authorization of force held permissible in *Scott v. Harris* (a ramming) to a shooting situation in this case, which is fundamentally different. Mr. Rickard attempted to use the vehicle to escape. The Petitioners insist it was used (or attempted to be used) as a deadly weapon, but the district court found disputed issues, and the Court of Appeals, in reliance upon the video evidence based upon this Court's indication in *Scott v Harris* that it could rely on that evidence, appropriately affirmed.

Bearing in mind that traditional summary judgment analysis hinges on genuine issues of material fact, this Court's decision in *Scott* specifically addressed the resort to video evidence as a way to assess whether one party's version of events can be disregarded as "blatantly contradicted" in a qualified immunity case. Of course this Court did not indicate that video evidence will necessarily be per se dispositive evidence in all such motions for summary judgment. However, the danger in taking *Scott v. Harris* too far is to construe it as a judicially created "video exception" to the right to trial by jury. That is particularly true where – as in this case – the video undermines the version of events given *by the Petitioners*. The State of Tennessee – and the courts below – found the Petitioners' conduct to be something other than reasonable as a matter of law.

E. The fact that a chase in a vehicle occurred should not serve by itself to become a legal means of bootstrapping that fact into an unbounded and outright justification for the use of deadly force.

The Petitioners argue to this Court at pages 41-43 of their brief that a chase involving police is, by legal definition, a dangerous or violent felony. This would operate to convert someone who is not actually violent into someone who "is" by operation of law. However, a bootstrapping by operation of law to determine that Mr. Rickard was guilty of a dangerous

or violent felony just because he fled in a vehicle cannot be the foundation for a conclusion that he forfeited a right to live in favor of an expedited execution, particularly as a means of sidestepping disputed issues of fact. This Court rejected such a contention in *Garner*, *supra*. 471 U.S. 1, at 14 (indicating that the common law concept that deadly force was merely a speedier execution of one who had already forfeited his own life had always been questionable). The protections of the Fourth Amendment should not be forfeited merely because flight took place in a vehicle.

The conclusory contentions of the Petitioners that Mr. Rickard threatened them brings the issue into focus. Mr. Rickard did not threaten officers with a weapon. He did not have one. It is a subjective and unilateral argument that he *may* have attempted to attack because he was in a vehicle, but that contention goes precisely to the heart of how and why the degree of threat he posed is disputed. The Petitioners have *claimed* that Mr. Rickard attempted to attack them, but those acts are not borne out by the video, which the officers themselves have had to concede in their own testimony.

Their argument then defaults back to the position that shooting Mr. Rickard was justified because he fled in a vehicle, which is the inherent problem with bootstrapping by operation of law in the face of disputed facts to convert him into a "violent felon" who can then be shot for fleeing *because he fled in a vehicle*. The degree of threat Mr. Rickard presented therefore becomes central on both the issue of whether

a constitutional violation occurred and a violation of clearly established law: if Ms. Rickard's version of the facts is accepted, the dispute requires jury resolution. If the Petitioners' facts are accepted, it would not. The Petitioners' factual contentions, however, are undermined not only by the video evidence but also by their own testimony.

The extent to which Petitioners seek to bootstrap the fact that Mr. Rickard was fleeing in a vehicle in order to convert it into an ultimate justification for a shooting is illustrated by the fact that they refer to "dicta" from this Court's opinion in *Sykes v. United States*, 564 U.S. 1 (2011). On the issue of sentencing, *Sykes* is authority for the proposition that fleeing from police in a vehicle can be classified as a violent felony. However, it is a comparison of apples to oranges to apply *Sykes* to the Fourth Amendment setting in qualified immunity analysis. Only this Court can say if *Sykes* can be extended in the manner the Petitioners request. However, the problem with that, when combined with *Scott v. Harris*, is that to do so would be to lay down a blanket rule that effectively emasculates the Fourth Amendment in a manner inconsistent with the basic underpinning of *Garner*. It would be the per se forfeiture of life due to vehicular flight while disregarding factual issues, or, as the majority phrased it in *Lytle v. Bexar County*, 560 F.3d 404, 414 (5th Cir. 2009), discussed at III H, *infra*, a declaration of "open season" on suspects fleeing in vehicles.

F. The degree of force was excessive.

Although Petitioners attempt to dismiss the issue with a single footnote that only addresses the "clearly established" law prong of the qualified immunity analysis and a statement at page 29 of their brief that the number of shots is "constitutionally irrelevant," the degree of force utilized is important. This case involved 15 total shots at a vehicle containing an unarmed man and woman, the majority of them as the car went past and away from police. At that point, as Officer Forthman testified, the vehicle was not a threat to the officers behind the vehicle. This Court's per curiam opinion in *Brosseau v. Haugen*, 543 U.S. 194 (2004), indicated that one shot fired at a suspect seeking to escape in a car was in the "hazy border" between excessive and acceptable force. The operative concept in this area of litigation is the avoidance of "excessive force," and not a blanket authorization of the use of *unlimited* force. The fact that such a hazy border exists necessarily presupposes that it can be crossed.

At page 28 of their brief, Petitioners cite a handful of cases in a footnote, contending that it was not clearly established that officers do not have the right to use deadly force until a threat is eliminated. They argue, in effect, that *no* amount of force is excessive once the right to use it arises. However, a more detailed examination of the cases Petitioners cite reveals a series of critical distinctions, ultimately boiling down to a significant difference in the degree of threat posed to the officers. Stated more simply, the

cases cited by Petitioners involved a much greater – and more readily demonstrable – degree of direct threat to police officers than in this case.

For example, the Petitioners quote *Elliott v. Leavitt*, 99 F.3d 640 (4th Cir. 1996) (the only case among those cited on this issue predating 2004), for its indication that if it was objectively reasonable for officers to use deadly force [22 gunshots], it was reasonable for them "to continue firing until they were sure the threat to their lives had ceased." In *Elliott*, the threat posed by the intoxicated suspect was a gun pointed directly at officers with Elliott's finger on the trigger a few feet away inside a patrol car. Id. at 642. Unlike Elliott, in this case Rickard was not armed and was not facing the officers when they shot him. The Petitioners cite other cases involving suspects with guns, unlike Mr. Rickard. *See*, *e.g.*, *Estate of Rodgers v. Smith*, 188 Fed. Appx. 175 (4th Cir. 2006) (Rodgers was *known* to be armed and considered dangerous because he had abducted his ex-girlfriend at gunpoint a few hours before the shooting, and video evidence demonstrated that a gun actually fell from his hand during the shooting sequence); and *Jean-Baptiste v. Gutierrez*, 627 F.3d 816 (11th Cir. 2010) (after a brief chase, Officer Gutierrez turned a corner and faced Jean-Baptiste, who was holding a gun, at a distance of eight to ten feet. Id. at 819. Officer Gutierrez fired 14 shots. Jean-Baptiste had a nine millimeter gun with the safety lock disengaged, the hammer partially cocked, and a 12 round magazine. Id. at 819).

Only one of the cases cited by Petitioners involved an armed suspect with a weapon other than a gun: *Berube v. Conley*, 506 F.3d 79 (1st Cir. 2007) (police use of force held reasonable against a suspect carrying and raising a hammer six or seven feet away in the dark), and another case cited by Petitioners for the same basic line of argument is *Wilkinson v. Torres*, 610 F.3d 546 (9th Cir. 2010), in which police shot the driver of a stolen minivan who was accelerating near the officers in a muddy area. In this case, no officer fell down near the vehicle (which did occur in Wilkinson just before the shots were fired, leading Officer Torres to believe the officer had been run over). The vehicle in this case drove away until the driver, who had been shot multiple times, crashed – a predictable result in line with *Vaughan v. Cox*, as cited by this Court in *Scott v. Harris*.

In summary then, the cases Petitioners cite (in support of the argument that virtually no amount of force is excessive once it becomes reasonable to use force) are mostly concerned with a different *form* of threat (a gun versus a car) and a different *degree* of threat. Despite the arguments of the Petitioners, cases do reflect a more common-sense understanding that the privilege to use force is not perpetual or unbounded in degree. It is measured by the degree of threat, which is influenced by the form of the threat.

III. PETITIONERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY, AS THE DISTRICT JUDGE PROPERLY FOUND A VIOLATION OF CLEARLY ESTABLISHED LAW, AND THE DENIAL OF QUALIFIED IMMUNITY WAS APPROPRIATELY AFFIRMED BY THE SIXTH CIRCUIT; IN THE ALTERNATIVE, THIS COURT CAN REMAND FOR ADDITIONAL ANALYSIS AS TO WHETHER CLEARLY ESTABLISHED LAW WAS VIOLATED IF NECESSARY.

A. The Petitioners' belated arguments should be deemed waived.

The Petitioners argue to this Court that the Sixth Circuit erred by failing to analyze the "clearly established law" aspect of qualified immunity analysis. As a preliminary point, Ms. Rickard reiterates that this entire line of argument was not presented to the Sixth Circuit in either of the Petitioners' two separate petitions for rehearing to the Sixth Circuit and should be deemed waived. Respondent's Brief in Opposition to Writ of Certiorari, at 7-9, 30, and Appendix A and B thereto.

B. This Court can remand the issue of clearly established law, if necessary.

However, on a related note, as urged by the United States in its amicus curiae brief (e.g., at pages 11, 12, 17, 31 and 32), if this Court deems it significant that the words "clearly established" did not appear in the Sixth Circuit's opinion in this case as

an analytical shortcoming, it is obviously within this Court's power to remand this case to the Sixth Circuit to address the "clearly established" law prong of qualified immunity analysis. Doing so would, as the United States suggests, enable this Court to avoid deciding the constitutional question. Had the issue been raised in the Sixth Circuit instead of in this Court for the first time, the Sixth Circuit would have had the opportunity to address any such perceived analytical omission. However, Ms. Rickard respectfully submits that the constitutional violation and violation of clearly established law is clear in this case, for all of the reasons set forth herein.

C. The Petitioners violated clearly established law.

After *Tennessee v. Garner* in 1985, it was clearly established almost two decades before 2004 that it was constitutionally unreasonable to shoot an unarmed, nondangerous fleeing suspect dead in order to prevent his escape. It is significant that in *Garner* this Court also specifically rejected arguments that the Fourth Amendment "must be construed in light of the common-law rule, which allowed the use of whatever force was necessary to effect the arrest of a fleeing felon, though not a misdemeanant." Adopting such an argument would be, as this Court stated in *Garner*, "a mistaken literalism that ignores the purposes of a historical inquiry," because the common-law rule arose at a time when virtually all felonies were punishable by death. 471 U.S. 1, 12-13. This Court in

Garner added that changes since the initial formulation of that rule had "undermined the concept, which was questionable to begin with, that use of deadly force against a fleeing felon is merely a speedier execution of someone who has already forfeited his life." Id. at 14. This Court also indicated that the common-law had developed at a time when weapons were rudimentary and deadly force could be inflicted almost solely in a hand-to-hand struggle, which necessarily put the safety of the arresting officer at risk, Id. at 14-15, and handguns did not become available to police until later in order to use deadly force from a distance as a means of apprehension. 471 U.S. 1, at 15.

The factual parallels between this case and *Garner* bring *Garner* clearly into play, not only for what was deemed (un)reasonable force, but also what was clearly established long before July of 2004. Because this is a shooting case, the district court (which the Court of Appeals affirmed) appropriately focused on *Garner*. As a shooting case, *Garner* fits the "specific context," *Saucier v. Katz*, 533 U.S. 194, 201, of this case. Like the suspect in *Garner*, the officers in this case shot the driver and the passenger of the car dead. They were unarmed, like the suspect in *Garner*, and it is true that they were fleeing, just as Garner tried to do, but they had been stopped only for a misdemeanor.

A chase occurred and the Rickard vehicle was cornered, "essentially stopped" as the Sixth Circuit noted, and then the first three police shots were fired.

Plumhoff, who fired those first three shots, was not in front of the vehicle. He was to the side of it and not threatened by it. The vehicle backed around the officers and began to drive away from them, whereupon the next 12 shots were fired. At that point, by the admission of Officer Forthman, the vehicle was not a threat to the officers behind the car (a point notably overlooked by Petitioners and their amici). A reasonable officer would have known that when Rickard was not moving, and then when he was heading *away* from the officers, it was not reasonable to use deadly force on him (or Ms. Allen).

Therefore, in this shooting of an unarmed driver and passenger who had originally been stopped for a misdemeanor and fled in a vehicle, based upon *Garner* it was clearly established well before July of 2004 that it was constitutionally unreasonable to shoot simply to prevent escape. However, because a chase in a vehicle preceded the shooting, Petitioners would have this Court hold that something with near pinpoint specificity was required in this case to establish clearly what would violate the Fourth Amendment.

D. This Court's own case law makes clear that there need not be a case (or cases) exactly on point to establish law "clearly" for qualified immunity purposes.

The requirement to show what has been clearly established has been articulated in various ways, but ultimately boils down to a "knowledge" requirement,

e.g., that qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took" would violate constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982). Although it is realistically a fiction to believe police officers would spend time routinely reading qualified immunity decisions, by July of 2004, a reasonable officer would certainly have been expected to "know," in line with *Garner*, that it is constitutionally unreasonable to shoot an unarmed, nondangerous suspect dead. That is basic police training. Indeed, the officers' own written departmental policies support this point, paralleling *Garner* when a vehicle is involved. *See, e.g.*, JA 408, 411-12 (policy prohibiting the use of deadly force from or at any moving vehicle, except in a case where a violent felony has been committed in the officer's presence and the officer has determined that there is a much greater threat to innocent lives by not using deadly force, and urging officers to be extremely cautious in using deadly force in self-defense when the force used by the other person is an automobile and the other person is trying to get away. "The suspect's intentions are usually ambiguous, and the officer can usually escape harm at least as well by evading the vehicle" as by firing, particularly in a high speed chase).

The Petitioners and their amici stretch the analysis by emphasizing the most stringent sounding articulations of the test for clearly established law in isolation. For example, although it is true that this Court has used the words "beyond debate" to describe

clearly established law, and qualified immunity as protecting "all but the plainly incompetent or those who knowingly violate the law," it is also clear from this Court's cases that there is no requirement that there be a case exactly on point factually. This Court specifically said so in *Anderson v. Creighton*, 483 U.S. 635 (1987):

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has been previously held unlawful [internal case citation omitted]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. 635, 640. Additionally, in the later case of *Brosseau v. Haugen*, 543 U.S. 194 (2004) this Court also indicated that "of course, in an obvious case, these standards [of *Graham* and *Garner*] can 'clearly establish' the answer, even without a relevant body of case law." *Brosseau*, *citing Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly established). In *Hope v. Pelzer*, 536 U.S. 730 (2002), this Court rejected the notion that a government official's conduct had to be evaluated by cases that were "materially similar" or "fundamentally similar," noting that officials can still be on notice that their conduct violates established law "even in

novel factual circumstances," and the salient question is whether the law gave them "fair warning." 536 U.S. 730, 741.

Although Petitioners predictably rely on statements in later case law indicating that *Garner* and *Graham* are cast at a high level of generality, they fail to address the extent to which *Garner* fits the fact pattern in this case, including as to the issue of whether clearly established law was violated. In this regard, it is significant that Petitioners do argue (on the issue of whether the force was reasonable) that "*Garner* applies," and that they satisfy *Garner* [Petitioners' brief at 39], but their arguments are contingent upon the resolution of significant disputes, which arise because their own factual contentions are undermined by the video evidence and their own testimony. Their arguments are also undercut by the fact that many of the cases they rely on themselves analyze the issue with reference to *Garner*.

The net effect of the arguments of Petitioners (and amici, by extension), however, is a de facto requirement of a case exactly on point. The law is not so exacting, because this Court has already made that clear in *Anderson* and *Hope*, *supra*.

E. The officers who now claim they are immune from civil liability were themselves charged with the crime of reckless homicide for the incident at issue.

Additionally, it is again of significance that a grand jury in the State of Tennessee actually indicted Officers Plumhoff, Gardner and Galtelli for reckless homicide in the death of the passenger Kelly Allen.[3] This caused the case to be stayed. *See*, Relevant Documents in Western District of Tennessee No. 9 and 10, Motion to Stay and Supporting Memorandum, 10/13/05, No. 29, Order Staying Proceedings 5/10/06, and No. 32, Order Reopening Case 2/10/09. The Petitioners contend that their conduct in the shooting was objectively reasonable as a matter of law and could not have been found to violate clearly established law, but the State of Tennessee took the position that the officers acted recklessly.

F. The Court of Appeals appropriately affirmed the district court's denial of qualified immunity, which included a finding that clearly established law had been violated.

The Petitioners conclude that the Sixth Circuit's affirmance of the district court's denial of qualified

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[3] Along those lines, it is also noteworthy that the State of Tennessee is not one of the listed participants in the amicus curiae brief of the State of Ohio and 21 other states.

immunity necessarily conflated the first and second prongs of qualified immunity analysis because the Sixth Circuit did not directly mention clearly established law. Again, the Sixth Circuit was affirming the district court, which had directly addressed the issue. The Petitioners did not raise this issue to the Sixth Circuit when they sought rehearing.

As to the substance of the Petitioners' belated argument, what must be borne in mind is first how the case came procedurally to the Court of Appeals (as an interlocutory appeal of factual determinations foreclosed by *Johnson v. Jones*, *supra*) and second, what the Court of Appeals was affirming. The Court of Appeals was affirming a finding that the evidence, taken in the light most favorable to Ms. Rickard as nonmovant (including the video evidence), established a constitutional violation and a violation of clearly established law. This is what the Sixth Circuit affirmed, even if it did not use the words "clearly established" to specify the entirety of the scope of what it was affirming. Affirming the order of the district court denying summary judgment necessarily meant that it was affirming both "prongs" of qualified immunity analysis with the court below it having appropriately addressed both prongs. However, Petitioners assume the opposite necessarily occurred.

G. Factual disputes can and do determine not only whether a constitutional violation has occurred, but also a violation of clearly established law.

The findings of the district court which the Sixth Circuit affirmed included disputes about the degree of threat faced by the officers, which directly impacts the conclusion that clearly established law was violated. Given that it found a constitutional violation based upon the facts viewed in the light most favorable to Ms. Rickard, on the issue of whether clearly established law had been violated, the district court indicated that the relevant question was whether the officers' perceptions were reasonable in determining that Rickard posed a threat sufficient to justify deadly force. Pet. App. at 42. The district court proceeded to address *Brosseau v. Haugen*, as it had been cited by the Petitioners, noting that the Petitioners argued no court had found a Fourth Amendment violation where a police officer shot a fleeing suspect "who presented a risk to others." Pet. App. at 42. The district court noted that *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), addressed "the opposite situation, where a fleeing suspect poses no immediate threat, and holds '[i]t is clearly established constitutional law that an officer cannot shoot a non-dangerous fleeing felon in the back of the head." Pet. App. at 42. Because the district court found that the facts in this case do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others, the district court found Mr. Rickard's

right to be free from excessive force clearly established and the officers not entitled to qualified immunity. Pet. App. at 42.

The analysis of the district court was appropriate because the claimed degree of threat was indeed a key issue. In reliance principally on *Saucier v. Katz*, 533 U.S. 194 (2001), Petitioners and their amici emphasize the separation of the issue of a violation of constitutional rights from the issue of whether the law at the time was clearly established. Without any disrespect to the points made by this Court in *Saucier*, the bright line between fact disputes and issues of law they advocate is not as ironclad and simple to apply in practical reality as Petitioners and their amici suggest. They would have this Court adopt a clear line between factual and legal questions in qualified immunity analysis as a one-size-fits all approach.

However, there is at least one problem with such a proposed bright line. Notwithstanding *Saucier*, disputed facts in excessive forces can and do influence not only whether there has been a constitutional violation, but also whether clearly established law has been violated, particularly where the degree of threat from the suspect determines the answer to one (or both) questions. The reason for that is ultimately fairly straightforward: generally, if the police are correct about the degree of threat posed by the suspect, their force is likely to be found reasonable, but if they are wrong and the plaintiffs are correct, the force is

likely to be found unreasonable and in violation of clearly established law, per *Garner*.

H. *Vaughan v. Cox* and *Lytle v. Bexar County.*

This is illustrated by cases such as *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003), *reh'g den*. In *Vaughan*, the Eleventh Circuit found that the district court erred in granting an officer qualified immunity where the officer contended that he fired his gun during a pursuit because the suspect swerved as if to smash into his cruiser, indicating that a reasonable jury could find that the fleeing suspect did not present an immediate threat. The *Vaughan* court added that the officer was not foreclosed from asserting a qualified immunity defense at trial, however, because if the jury were to accept that the suspect had intentionally swerved toward the police cruiser, the jury could conclude that the officer had probable cause (under *Garner*) to believe the suspect had committed a crime involving the infliction or threatened infliction of serious physical harm. 343 F.3d 1323, 1333.

Lytle v. Bexar County, 560 F.3d 404 (5th Cir. 2009), *cert. den*., 559 U.S. 1007, also shows that which view of the facts prevails can determine not only what was reasonable, but also a violation of clearly established law. The issue in *Lytle* was the distance and direction of a vehicle in which Heather Lytle was riding. She was killed from police gunfire after a brief chase. The parties disputed the distance

and direction of the vehicle, which bore directly on the issue of what degree of threat the vehicle presented to the officer.

On appeal, the Fifth Circuit noted that the two prongs of qualified immunity involve the complexity of two overlapping objective reasonableness inquiries, first addressing whether there was a constitutional violation, and then, if the court found the officer's conduct not reasonable under the Fourth Amendment, "we must ask the somewhat convoluted question of whether the law lacked such clarity that it would be reasonable for an officer to erroneously believe that his conduct was reasonable." 560 F.3d 404, 410.

The Fifth Circuit in *Lytle* noted that where the issue of whether the officer's conduct was reasonable is less clear, such a situation "mandates a number of factual inferences, [and] the case falls within the province of a jury." Id. at 411, noting that "we must remain mindful of the role the jury can play in this determination," and that this approach comports with the decision of the Supreme Court in *Scott v. Harris.*[4]

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[4] Along these lines, Petitioners and their amici insist that reasonableness is an issue of law for the court and not of fact for the jury, but it is important to note that this Court's opinion in *Scott v. Harris* indicated that reasonableness becomes an issue of law once the court has drawn inferences in favor of the nonmoving party "to the extent supportable by the record." 550 U.S. 372, 381 n.8. In this case, however, because the officers' own testimony and video evidence undermine their contentions,

(Continued on following page)

The *Lytle* Court indicated that the issue of distance and direction was "essential to determining whether the [car] posed a threat of harm at the time O'Donnell fired and the reasonableness of any response thereto." Id. at 412. The Fifth Circuit indicated that if the facts were as O'Donnell alleged, he would be entitled to qualified immunity because he was addressing a threat of immediate and severe harm. Id. at 412. However, if the facts were as Lytle alleged, the threat of harm "was potentially much different," and therefore distance and direction were relevant to the degree of threat O'Donnell would have faced when he fired. Id.

The Fifth Circuit agreed with the district court that distance and direction were essential to determining the extent of the threat the car actually posed. Id. at 413. The Fifth Circuit proceeded to cite a series of cases indicating that the justification to use force ceases as the threat ceases, Id. at 413, and indicated it had to assume that there was no threat to O'Donnell at the time of the shooting, with the lack of such a threat weighing against reasonableness. Id. at 414. In response to Officer O'Donnell's argument that *Scott v. Harris* authorized the use of force because there had been a chase, the Fifth Circuit disagreed, indicating that this Court's opinion in *Scott* "did not declare open season on suspects fleeing in motor vehicles." 560 F.3d 404, 414.

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the factual disputes should be questions for the jury and not the Court as a matter of law.

Having found O'Donnell could be determined to have acted unreasonably, the Fifth Circuit noted that O'Donnell had "fair warning" that his conduct would violate constitutional rights, Id. at 417, and it did not need to "dwell" on the issue:

> It has long been clearly established that, absent any other justification for the use of force, it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others [internal case citations omitted]. This holds as both a general matter, see *Garner*, 471 U.S. at 11-12, and in the more specific context of shooting a suspect fleeing in a motor vehicle [internal case citations omitted].
>
> . . .
>
> We therefore hold that, were a jury to accept Lytle's version of the facts, it could conclude that O'Donnell had violated Heather Lytle's clearly established constitutional right to be free from an unreasonable seizure. Because Lytle's version of disputed facts permits a decision adverse to O'Donnell, the district court was correct to conclude that O'Donnell's entitlement to qualified immunity turns on the resolution of these factual issues.

Id. at 417-18.

Based upon not only *Lytle*, but also *Vaughan*, and *Smith v. Cupp*, *supra*, it was appropriate for the district court to have denied qualified immunity to

the officers, and the Sixth Circuit appropriately affirmed that denial of qualified immunity.

I. The Court of Appeals did not err in comparing the Petitioners' 2004 conduct to the facts of this Court's 2007 opinion in *Scott v. Harris*.

The Court of Appeals devoted a portion of its opinion to addressing (and ultimately distinguishing) this Court's opinion in *Scott v. Harris*. Petitioners contended to the courts below and now to this Court at page 23, footnote ten of their brief that *Scott* is "controlling," at least as to the issue of whether the force utilized in this case was reasonable. Therefore, the Sixth Circuit analyzed *Scott v. Harris* and distinguished it (properly, as even Petitioner's amicus the United States concedes that *Scott v. Harris* is not on all fours with the instant case).

The Petitioners now contend to this Court (without having raised it to the Sixth Circuit) that the Sixth Circuit erred by distinguishing *Scott v. Harris* on the issue of whether there was a violation of clearly established law (as out of proper time sequence), but that is not supported by any indication whatsoever on the part of the Sixth Circuit. That is the gloss the Petitioners and their amici have placed on the situation.

J. *Brosseau v. Haugen* does not illustrate that in 2004 it was not clearly established that the Petitioners could not fire 15 shots at a fleeing unarmed suspect.

The Petitioners contend this Court's opinion in *Brosseau v. Haugen* shows that it was not clearly established in July of 2004 that their use of force violated the Fourth Amendment. Respectfully, *Brosseau* is too significantly distinguishable on its facts to be conclusive in this case. The degree of force is the principal distinction, particularly in response to the disputed level of threat posed by Mr. Rickard. *Brosseau* involved one shot, which this Court found to be within the "hazy border" between acceptable and excessive force. By contrast, this case involved 15 shots at a vehicle containing an unarmed man and woman, and under the circumstances can and should be considered an "obvious" case per *Hope v. Pelzer*, *supra*.

In *Sample v. Bailey*, 409 F.3d 689 (6th Cir. 2005), the Sixth Circuit rejected the same type of argument based on *Brosseau* that Petitioners make now, calling for a high and specific degree of particularity. Applying *Garner*, the *Sample* Court indicated that when a general constitutional principle is not tied to particularized facts, it can clearly establish law applicable to different sets of detailed facts. Id. at 699. The Court found it to be clearly established since *Garner* that a criminal suspect has a right not to be shot unless he

is perceived to pose a threat to officers or others during flight. In this case, however, genuine issues of material fact about the degree of threat rendered qualified immunity inappropriate.

K. The district court, which the Sixth Circuit affirmed, appropriately analyzed precedent.

The district court in this case addressed a series of cases on the issue of what was clearly established, including cases from the Sixth Circuit. *See infra*, at II C.

Petitioners, for the first time in this case, now cite the unpublished case of *VanVorous v. Burmeiste*r, 96 Fed. Appx. 312, 2004 U.S. App. LEXIS 7920 (6th Cir. April 20, 2004) for the proposition that case law in the Sixth Circuit did not clearly establish that the Petitioners' actions were unconstitutional in July of 2004. *VanVorous* was not cited to the district court or the Sixth Circuit. At any rate, it is significantly distinguishable on its facts, which is important because those facts differentiate the degree of threat posed. The Petitioners indicate at page 29 of their brief to this Court that the Sixth Circuit found the actions of officers reasonable in firing on VanVorous because he was "actively using his vehicle as a weapon against police and dangerously attempting to escape and evade apprehension." The *VanVorous* opinion does not indicate whether video evidence

existed, but the facts as stated in the opinion indicate that it was uncontroverted that VanVorous crashed into a police car at approximately 14 miles per hour and then began pushing the vehicle back toward a ditch.

The video evidence in this case reveals key differences. First, any collisions occurring between Rickard and police vehicles (after Rickard was initially rear-ended) occurred while the vehicles were moving toward each other. Second, unlike *VanVorous*, the videos in this case show Rickard did not push Gardner's vehicle backward. Instead, it was Rickard who backed up and drove in the *opposite* direction trying to get away from the officers with gunfire continuing (at which point, as Officer Forthman testified, Rickard was not a threat to those behind him).

Smith v. Cupp, *supra*, is of particular significance. In finding gunfire against a suspect fleeing in a vehicle unreasonable (the arrestee had gained control of a police vehicle), the Sixth Circuit analyzed the issue under *Garner* (from 1985) and, distinguishing *Brosseau* on its facts, found *Garner* had clearly established that a non-dangerous fleeing felon could not be shot in the back of the head. 430 F.3d 766, 776. Although it was decided in 2005, *Smith v. Cupp* addressed conduct in 2002, which substantially predates the conduct in this case, and the right at issue was found to be clearly established as "an obvious case" because the general rule applied with

"obvious clarity." Id. at 777. The same is true of *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir. 2006), decided in 2006 but also analyzing under *Garner* and addressing conduct which occurred in 2002, and noting that the clearly established law should not be framed "by resolving all of the disputed facts against the Plaintiffs." Id. at 537.

Respectfully, the cases, viewed together in summary form, reveal that courts in both the Sixth Circuit and the Eighth Circuit (1) have historically analyzed excessive force claims with reference to *Garner*, (2) and disputes (or the lack thereof) about the degree of threat posed by the suspects have often determined whether qualified immunity is proper. Again, this is because whether a violation of clearly established law has occurred can turn on whether the jury accepts the version of the police or the plaintiff on the degree of threat posed to police. *See*, *e.g., Scott v. Clay County, Tenn.*, 205 F.3d 867 (6th Cir. 2000) (in a case involving a chase followed by a shooting, analyzing qualified immunity under *Graham* and *Garner*, shooting officer's actions held objectively reasonable when suspect turned and drove vehicle directly toward another officer before he fired. Id. at 872, 879); *VanVorous v. Burmeister*, 96 Fed. Appx. 312, 2004 U.S. App. LEXIS 7920 (6th Cir. April 20, 2004) (analyzing the issue of threat the suspect posed under *Garner*, actions of officers found reasonable in firing on a suspect who crashed into a police car at approximately 14 miles per hour and then began

pushing the police vehicle back toward a ditch); *Sigley v. City of Parma Heights*, 437 F.3d 527 (6th Cir. 2006) (analyzing under *Garner*, factual dispute as to reasonableness of officers' actions and whether suspect posed danger to officers and others precluded qualified immunity, because, viewing the facts in the light most favorable to the Plaintiff, Mockler (who shot Davis) was running behind Davis's car and out of danger and Davis drove in a manner to avoid others on the scene in an attempt to flee; accepting these facts as true, Mockler "would have fair notice" that shooting Davis in the back was unlawful when he did not pose an immediate threat to other officers); *Smith v. Cupp*, 430 F.3d 766, 770 (6th Cir. 2005) (analyzing under *Garner*, qualified immunity denied to officer who shot fleeing suspect, when officer asserted he fired because the suspect's vehicle "rapidly accelerated directly at [him] and [another officer]; officer conceded after the fact that he had fired while the car was passing him, and Court found that even viewing the events in the heat of the moment, without 20/20 hindsight, a jury could conclude that a reasonable officer in the officer's position was never in any danger. Id. at 774); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992) (finding that deadly force was not unreasonable as a matter of law where suspect had attempted to ram a cruiser, was cornered, sped forward, and crashed into a police cruiser that was

blocking his escape, and was speeding up a street toward a roadblock manned by other officers).

The cases therefore collectively illustrate the basic principle that the degree of threat helps dictate the analysis, with *Garner* as the established foundation.

L. Eighth Circuit precedent.

The Petitioners present a territorial argument that Eighth Circuit law did not clearly establish that their actions were unconstitutional. Although the chase began in Arkansas, the deadly force was used in Tennessee. Therefore, the district court applied Sixth Circuit law.

However, like the cases in the Sixth Circuit, the Eighth Circuit police chase cases discussed have also involved analysis based upon *Garner*, and the qualified immunity analysis has turned on the degree of threat posed to police at the time force was used, with qualified immunity being denied when the degree of threat was disputed. If Petitioners' own position is to be credited that Eighth Circuit precedent applies, perhaps the best example is *McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999), cited by the United States as amicus in support of Petitioners (analyzing the Fourth Amendment issue under *Garner*, and holding qualified immunity properly denied as to officer who fired on vehicle after a chase because genuine issues of material fact existed "as to whether

McCaslin posed a threat to officers or others after he went off the road and whether force was necessary to prevent his escape"). *See*, *also, Hernandez v. Jarman*, 340 F.3d 617 (8th Cir. 2003) (analyzing under *Garner*, and holding force objectively reasonable when, during chase, suspect turned and drove toward officers and officer fired four shots, killing suspect who was found to have intentionally caused collision. Id. at 622); and *Cole v. Bone*, 993 F.2d 1328 (8th Cir. 1993) (analyzing under *Garner* and *Graham*, and holding force objectively reasonable where suspect, after approximately 50 mile high speed chase, sped past a roadblock).

Like *Vaughan v. Cox* in the Eleventh Circuit, *Lytle v. Bexar County* in the Fifth Circuit, and *Smith v. Cupp* in the Sixth Circuit, *McCaslin v. Wilkins* in the Eighth Circuit helps illustrate that qualified immunity can and should be denied where genuine issues of material fact exist as to whether a suspect posed a sufficient threat to officers at the time force was used. Such issues clearly exist in this case and qualified immunity was therefore properly denied.

CONCLUSION

The courts below appropriately denied qualified immunity to the Petitioners in this case. This Court should affirm the Court of Appeals; however, in the alternative, in the event this Court believes the Court

of Appeals should have provided specific analysis as to the issue of whether the Petitioners violated clearly established law, this Court can remand this case to the Sixth Circuit without deciding whether the officers' conduct was objectively reasonable as a matter of law under the Fourth Amendment.

Respectfully submitted,

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