No. 12-1117

In the Supreme Court of the United States

OFFICER VANCE PLUMHOFF, ET AL., PETITIONERS

v.

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

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONERS

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART A. DELERY
Assistant Attorney General
IAN HEATH GERSHENGORN
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
BARBARA L. HERWIG
JONATHAN H. LEVY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals failed to conduct a proper qualified-immunity analysis.

2. Whether petitioners are entitled to qualified immunity because it was not clearly established in 2004 that police officers violate the Fourth Amendment when they use deadly force to prevent a suspect who has led them on a high-speed chase through public streets and has operated a vehicle recklessly during a close-quarters encounter from resuming his vehicular flight.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes: Page

Statutes—Continued: Page

Miscellaneous:

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INTEREST OF THE UNITED STATES

This case presents the question whether law-enforcement officers who use deadly force to prevent a suspect from resuming a dangerous vehicular flight through public roads are entitled to qualified immunity from suit under 42 U.S.C. 1983. The same principles of qualified immunity that apply in civil actions against state and local officials under Section 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999). The United States has an interest both in ensuring the effective deterrence of unconstitutional conduct and in protecting its

employees from unduly burdensome litigation. In addition, the standard for determining whether a right is "clearly established" when an official asserts qualified immunity in civil litigation is identical to the standard for deciding whether a criminal defendant charged under 18 U.S.C. 241 or 242 had "fair warning" that he or she was violating a constitutional right. See *Hope* v. *Pelzer*, 536 U.S. 730, 740 (2002). The United States therefore has a substantial interest in the Court's disposition of this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fourteenth Amendments and 42 U.S.C. 1983 are reprinted in the appendix to this brief. App., *infra*, at 1a-3a.

STATEMENT

This case concerns a vehicular pursuit of a motorist by police officers that took place in 2004. The pursuit began in West Memphis, Arkansas, and ended in Memphis, Tennessee, when police officers fatally shot the driver and his passenger. Many of the events are captured on video recorded by three separate police-cruiser dashboard cameras. See J.A. 205-207 (identifying videos from patrol cars Nos. 279, 284, and 286, which are on file with the Court). The driver's survivors brought suit under 42 U.S.C. 1983 against each of the six officers involved in the pursuit.

1. Around midnight on July 18, 2004, Officer Joseph Forthman, a member of the West Memphis police force, pulled over an automobile driven by respondents' decedent Donald Rickard after noticing that it had an inoperable headlight. Pet. App. 19; see No. 279 Video 11:08:13. In the passenger seat of the vehicle was Kelly Allen. Pet. App. 19. As Officer

Forthman approached the driver's side, he noticed a large indentation in the windshield, "roughly the size of a head or a basketball." *Ibid.* (quoting defendants' statement of facts). After asking for Rickard's license and registration, Officer Forthman inquired about the windshield. *Ibid.*; No. 279 Video 11:08:24. Allen told him that it had broken after the car had hit a curb. Pet. App. 19-20. Officer Forthman then asked Rickard if he had been drinking alcohol and twice ordered him to step out of the vehicle. See *id.* at 20; No. 279 Video 11:08:57.

Instead of complying with the officer's instruction, however, Rickard sped away east on Highway I-40 toward the Arkansas-Tennessee border. See Pet. App. 20; No. 279 Video 11:09:20. Officer Forthman reported over his radio that a "runner" had fled a traffic stop and then proceeded to pursue Rickard. Pet. App. 20; No. 279 Video 11:09:35. He was quickly joined by fellow West Memphis police officer Vance Plumhoff, who became the lead officer in the pursuit. See Pet. App. 20. West Memphis Officers Jimmy Evans, Lance Ellis, Troy Galtelli, and John Gardner also eventually joined the chase, each in separate vehicles. *Id.* at 20-21. The vehicles driven by Officers Fortham, Ellis, and Galtelli each had a functioning dashboard camera that captured some of the ensuing events. See *id.* at 19-21.

The high-speed pursuit lasted for nearly five minutes, during which time Rickard swerved in and out of traffic. See No. 279 Video 11:09:20-11:14:15; Pet. App. 37-38. At one point, Officer Evans maneuvered his vehicle in front of Rickard's to perform a "rolling roadblock," and as he was doing so, Officer Plumhoff reported over the police radio that Rickard

had tried to ram his vehicle. See Pet. App. 21; No. 279 Video 11:11:36. Officer Forthman then stated over the radio that Rickard had tried to "ram another car." Pet. App. 21 (quoting defendants' statement of facts); No. 279 Video 11:11:41. Based on those actions, Officer Forthman told his fellow officers that they had "aggravated assault charges on him." Pet. App. 22; No. 279 Video 11:11:45.

As the pursuit continued, Rickard led the officers over the Mississippi River from Arkansas into Memphis, Tennessee. Pet. App. 22; No. 279 Video 11:12:33. Around that time, Officer Plumhoff reported over the radio that Rickard had committed another aggravated assault. Pet. App. 22; No. 279 Video 11:12:33. Once over the bridge, Rickard exited the highway. Pet. App. 22; No. 279 Video 11:13:18. As he made a quick turn, his car hit a police vehicle and spun around in a parking lot. Pet. App. 22. He then collided head-on with Officer Plumhoff's vehicle, although it is disputed whether he intended to do so. See *id.* at 22-23. His vehicle came to a stop adjacent to a building. See *id.* at 23; No. 279 Video 11:14:15.

Some of the officers then exited their vehicles and surrounded Rickard's car in a semicircle. Pet. App. 23; No. 279 Video 11:14:17. He immediately began to back up in an attempt to evade capture. Pet. App. 23; No. 279 Video 11:14:18; No. 286 Video 12:17:42. Officer Evans banged the butt of his gun against the window of Rickard's vehicle. No. 279 Video 11:14:19; No. 286 Video 12:17:43. As other officers approached Rickard's vehicle, its wheels were spinning and it moved slightly forward into Officer Gardner's vehicle. Pet. App. 23; No. 279 Video 11:14:23; No. 286 Video 12:17:43.

Officer Plumhoff, gun drawn, approached the vehicle very close to its front right tire. He then fired at Rickard three times. Pet. App. 23; No. 279 Video 11:14:21. Rickard nevertheless continued his attempt to escape, "revers[ing] in a 180 degree arc" onto the street, forcing Officer Ellis to step aside to avoid being hit. Pet. App. 24; No. 279 Video 11:14:24. Rickard put the vehicle in drive and started to head away from the officers. No. 279 Video 11:14:29; No. 284 Video 12:17:10. Officer Gardner then fired ten shots into the vehicle, at first from the passenger side and then from the rear as the vehicle moved farther away. Pet. App. 24; No. 279 Video 11:14:30; No. 284 Video 12:17:11; No. 286 Video 12:17:53. At the same moment, Officer Galtelli fired two shots into Rickard's vehicle. Pet. App. 24.

Rickard lost control of the vehicle and crashed into a building. Pet. App. 24; No. 279 Video 11:14:33-11:14:51. Rickard and Allen both died—Rickard from multiple gunshot wounds and Allen from the combined effect of a single gunshot wound to the head and the crash. Pet. App. 24; J.A. 60-61, 76-77 (autopsy reports).

2. Rickard's survivors (respondents here) sued the six officers involved in the chase (petitioners here) under 42 U.S.C. 1983 in the United States District Court for the Western District of Tennessee. They alleged, among other things, that petitioners' use of force had violated the Fourth Amendment. See *Tennessee* v. *Garner*, 471 U.S. 1, 9-12 (1985).

Petitioners moved for summary judgment or dismissal on the ground that they were entitled to qualified immunity from that claim. See *Saucier* v. *Katz*, 533 U.S. 194, 204-207 (2001). They argued that they

had not violated the Fourth Amendment and that, even if they had, it was not "clearly established" in 2004 that their actions violated Rickard's Fourth Amendment rights. Pet. App. 30. In support of their summary-judgment motion, petitioners submitted the three videos of the chase and sworn affidavits and deposition testimony by the officers. Each of the three officers who fired shots—Plumhoff, Gardner, and Galtelli—stated that he had feared that Rickard was threatening the officers with serious bodily injury or death, and Officers Gardner and Galtelli stated that they had believed that Rickard posed a threat to the general public. J.A. 183, 217, 224. As Officer Plumhoff recalled in his deposition, when he "heard the engine start to race and tires barking, squealing," as he stood next to the vehicle, he felt "like, oh, God, I'm about to get killed." J.A. 183.

3. The district court denied qualified immunity. See Pet. App. 30-42, 61-62.

a. The court first analyzed whether respondents had presented sufficient evidence to present their Fourth Amendment claim to a jury. See Pet. App. 32-41. The court explained that excessive-force claims are evaluated under the Fourth Amendment's reasonableness standard, which "asks whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 32-33 (internal quotation marks and citation omitted). That inquiry, the court said, requires a "measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case." *Id.* at 33 (citation omitted).

Applying that standard to the evidence proffered in petitioners' summary-judgment motion, the district court concluded that "[t]he undisputed facts do not support th[e] assertion" that petitioners' actions complied with the Fourth Amendment. Pet. App. 35. The court found significant that Officer Plumhoff had fired the first shots from what the court deemed to be the side of Rickard's vehicle, not the front of it; that Officers Gardner and Galtelli had fired their weapons "as the vehicle was passing or had passed the officers"; that no officers thought that Rickard or Allen was armed; and that Rickard was initially stopped for driving with an inoperable headlight, a misdemeanor under Arkansas law. *Id.* at 35-36; see Ark. Code Ann. §§ 27-36-204, 27-37-101 (West 2004).

The district court discounted the officers' testimony that Rickard had assaulted them with his vehicle during the chase, stating that whether those assaults occurred was disputed because the videos did not show them. Pet. App. 36-37. The court also found insufficient to justify the use of deadly force the fact that Rickard was driving dangerously at high speeds—"changing lanes and swerving through traffic"—and therefore posed a danger to civilians. See *id.* at 37-38. His dangerous driving was irrelevant to the Fourth Amendment question, the court believed, because it was "caused by the pursuit of the Rickard vehicle" by the officers. *Ibid.* According to the court, Rickard's reckless driving indicated that the officers should have ended the chase, because "[t]he only objectively reasonable threat that Rickard posed was the threat that the officers also posed by participating in the pursuit." *Ibid.*

The district court also dismissed petitioners' argument that Rickard had threatened their safety at the scene of the shooting. See Pet. App. 39-40. The court found it "not clear that his evasion of arrest was sufficiently dangerous to justify deadly force." *Id.* at 39. Although the video shows Rickard's car moving forward into Officer Gardner's vehicle, the court deemed it to be a "disputed issue" whether Rickard's car was "revving" when Officer Plumhoff fired the first shots. *Id.* at 40. And it noted that Rickard was driving away from the officers when Officers Gardner and Galtelli discharged their weapons. *Ibid.*

b. The district court then turned to the question whether it was "clearly established" in 2004 that petitioners had violated Rickard's Fourth Amendment rights. In a short discussion, the court held that it was. See Pet. App. 41-42. The court rested that conclusion on its determination that "the facts here do not support a finding that a reasonable officer would have considered the fleeing suspects a clear risk to others." *Id.* at 42.

4. a. Petitioners filed an interlocutory appeal of the district court's denial of qualified immunity. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). The court of appeals initially dismissed the appeal as barred by *Johnson* v. *Jones*, 515 U.S. 304 (1995), which held that federal appellate courts lack jurisdiction to consider an interlocutory appeal challenging "a *fact*-related dispute about the pretrial record" relevant to qualified immunity—*i.e.*, "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." *Id.* at 307. See 11-5266 Docket entry (6th Cir. July 5, 2011) (Order of Dismissal). In response to petitioners' rehearing petition,

however, the court vacated that order, concluding that "it appears that we have jurisdiction over at least some of the individual defendants' appellate issues." 11-5266 Docket entry (6th Cir. Sept. 14, 2011) (Order).

b. The court of appeals affirmed the district court's qualified-immunity ruling. See Pet. App. 1-15. Addressing the jurisdictional question, the court interpreted *Jones* together with *Scott* v. *Harris*, 550 U.S. 372 (2007), to require the court to undertake a review of the whole record to determine whether the district court's determination that genuine disputes of material fact exists was clearly incorrect. See Pet. App. 8, 11-12.

The court of appeals then held that the officers were not entitled to qualified immunity because, viewing the disputed facts in the light most favorable to respondents, it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. The court found particularly important the differences it perceived between this case and *Scott*, in which this Court held that a police officer's use of deadly force to terminate a high-speed pursuit did not violate the Fourth Amendment. See 550 U.S. at 381-386. The court acknowledged that "the framework of the two cases is similar," but it stated that the differences in their "details" rendered *Scott* "distinguishable." Pet. App. 8-9. "The fleeing motorist in *Scott*," the court said, "was still fleeing at very high speeds when he was rammed from behind" by a police cruiser, while in this case "the fleeing vehicle was essentially stopped and surrounded by police officers and police cars[,] although some effort to elude capture was still being made." *Id.* at 9. The court deemed it significant that in *Scott* the police had used a vehicle

maneuver to end the chase, whereas "the police here fired fifteen shots at close range." *Ibid.* It also found significant that the suspect's vehicle in *Scott* did not contain any other persons, while here the officers "knew there was a passenger in the fleeing vehicle." *Ibid.*

The court of appeals did not address whether, even if the officers' actions were unreasonable within the meaning of the Fourth Amendment, those actions violated any rights that were clearly established in 2004.

c. Judge Clay issued a concurring opinion to state his view that, contrary to the implication from a footnote in the majority opinion, there was no need for further discovery on the qualified-immunity issue. See Pet. App. 14-15.

SUMMARY OF ARGUMENT

I. The court of appeals failed to conduct even the most basic inquiries required by this Court's settled precedent on qualified immunity. Under this Court's decisions, a plaintiff seeking to overcome qualified immunity must demonstrate both that the defendant violated a constitutional right and that the right, framed at the appropriate level of specificity, was clearly established at the time that the conduct occurred. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 (2012). The court of appeals, however, held that petitioners were not entitled to qualified immunity only because it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. Even if correct, that addresses only whether petitioners violated the Fourth Amendment—the first prong of the qualified-immunity standard. It does not mean

that the right the officers violated was clearly established in 2004.

The court of appeals' analysis, moreover, focused almost exclusively on distinguishing this Court's decision in *Scott* v. *Harris*, 550 U.S. 372 (2007). But *Scott* does not support the view that the putative right at issue here was clearly established in 2004. *Scott* was decided in 2007, and in any event *Scott* held that the Fourth Amendment was *not* violated by the use of deadly force in a similar high-speed pursuit. That *Scott* may be distinguishable does not demonstrate that a reasonable officer would have concluded that the use of force in this case was unconstitutional. Given the court of appeals' complete failure to conduct a proper qualified-immunity analysis, it would be appropriate for this Court to vacate the decision below and remand for an evaluation of the summary-judgment record in light of the proper qualified-immunity standard.

II. If this Court elects in the first instance to reach the question whether petitioners are entitled to qualified immunity, it should hold that they are. Framed at the appropriate level of specificity, the question here is whether in 2004 it was clearly established that the police may not use deadly force to prevent a misdemeanant and his passenger from resuming a dangerous, high-speed chase on public thoroughfares after the driver had recklessly operated the vehicle both during the chase and in a close-quarters encounter with police. It was not. Neither the pre-2004 decisions of this Court nor those of the two potentially relevant circuits would have provided clear notice to a reasonable officer that the use of force in this case was unconstitutional.

Because the Fourth Amendment question in this case is novel and highly factbound, the better course, even if this Court decides the qualified-immunity issue, is for the Court to decline to decide the constitutional issue, just as the Court has done in recent Fourth Amendment cases. See *Stanton* v. *Sims*, 134 S. Ct. 3, 7 (2013) (per curiam); *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam).

ARGUMENT

The court of appeals misapplied the qualified-immunity standard set out in numerous decisions of this Court. Ignoring even the most basic aspects of the qualified-immunity analysis, the court of appeals denied immunity after determining only that a genuine question of material fact existed as to whether the officers had acted reasonably in using deadly force—the Fourth Amendment merits question. It never asked whether the putative right, considered at the proper level of specificity, was clearly established in 2004, when the conduct at issue occurred. See *Anderson* v. *Creighton*, 483 U.S. 635, 639-640 (1987). For that reason alone, it would be appropriate for this Court to vacate the decision below and remand for the court of appeals to conduct the qualified-immunity analysis in the first instance. If the Court elects to decide the qualified-immunity question, it should hold that petitioners are entitled to qualified immunity. In 2004, it was not clearly established that a police officer may not use deadly force to prevent a suspect who led police on a dangerous, high-speed chase through public roads and operated his vehicle recklessly during a close-quarters encounter from resuming his vehicular flight.

I. THE COURT OF APPEALS FAILED TO APPLY THE SETTLED QUALIFIED-IMMUNITY FRAMEWORK

A. Section 1983 of Title 42 provides a cause of action against state officials for the deprivation of constitutional rights under color of state law. See 42 U.S.C. 1983. This Court has interpreted Section 1983, as well as the similar implied right of action against federal officials, see *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to incorporate common-law principles of official immunity. See *Filarsky* v. *Delia*, 132 S. Ct. 1657, 1661-1662 (2012); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 806 (1982).

Under those principles, "government officials performing discretionary functions generally are granted a qualified immunity" from suit for alleged constitutional violations. *Wilson* v. *Layne*, 526 U.S. 603, 614 (1999). Qualified immunity shields individuals from suit unless their actions "violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Hope* v. *Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Harlow*, 457 U.S. at 818). The doctrine is designed to ensure both "that fear of liability will not unduly inhibit officials in the discharge of their duties," *Camreta* v. *Greene*, 131 S. Ct. 2020, 2030-2031 (2011) (internal quotation marks omitted), and that capable individuals are not deterred from participating in public service or distracted from the performance of their official responsibilities, *Mitchell* v. *Forsyth*, 472 U.S. 511, 525-526 (1985). Qualified immunity promotes those objectives by affording "both a defense to liability and a limited entitlement not to stand trial or face the other bur-

dens of litigation." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009) (internal quotation marks omitted).

Defeating a claim of qualified immunity requires a plaintiff to plead and ultimately prove that (i) the defendant committed "a violation of a constitutional right" and (ii) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009). To determine whether a right was "clearly established," a court must first define the right at the appropriate level of specificity. That is because framed at the broadest level—*e.g.*, the right to be free from unreasonable searches and seizures—any constitutional right would be clearly established, and thus no official would be entitled to qualified immunity. See *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 639. Accordingly, a right must be established "in a 'particularized' sense so that the 'contours' of the right are clear to a reasonable official." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) (quoting *Anderson*, 483 U.S. at 640).

Once the right is properly framed, a court must ask whether "every reasonable official would [have understood] that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093 (citation and internal quotation marks omitted; brackets in original). For that to be true, "existing precedent must have placed the * * * constitutional question beyond debate." *Ibid.* (citation omitted). This requires either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing that the official's conduct was unconstitutional. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (quoting *Wilson*, 526 U.S. at 617). Although the authority need not be "directly on

point," it must be sufficiently similar to place the relevant constitutional question "beyond debate." *Id.* at 2083.

B. The court of appeals in this case entirely failed to determine whether the putative right at issue was clearly established in 2004, when the vehicular pursuit and shooting took place. The words "clearly established" do not appear in its opinion, and the court did not undertake the basic inquiries required by this Court's decisions: defining the right at the appropriate level of specificity, canvassing pertinent authority, and ultimately determining whether a reasonable official would have understood clearly that her conduct violated the Constitution at the time it occurred.

Instead of following that framework, the court of appeals denied immunity on the ground that it could not "conclude that the officers' conduct was reasonable as a matter of law." Pet. App. 10. But that addresses only the Fourth Amendment merits question —*i.e.*, the first prong of the qualified-immunity standard. See *Scott* v. *Harris*, 550 U.S. 372, 381 (2007). Even if correct, that conclusion would not mean that it was "clearly established" in 2004 that the officers' actions violated the Fourth Amendment.

Indeed, this Court has repeatedly underscored that the Fourth Amendment reasonableness inquiry is not coextensive with the question whether the right was clearly established at the relevant time. See *Saucier* v. *Katz*, 533 U.S. 194, 203-205 (2001); *Anderson*, 483 U.S. at 643-644. With respect to excessive-force claims in particular, "[t]he inquiries for qualified immunity and excessive force remain distinct." *Saucier*, 533 U.S. at 204. For example, if an officer makes a reasonable mistake "as to whether a particular

amount of force is legal in th[e] circumstances," he is entitled to qualified immunity even if a court would ultimately conclude that his actions violated the Fourth Amendment. *Ibid.* That "breathing room," *Stanton* v. *Sims*, 134 S. Ct. 3, 5 (2013) (quoting *al-Kidd*, 131 S. Ct. at 2085), is particularly important in the excessive-force context. Because judicial decisions do "not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts," the requirement that the particularized right be clearly established "protect[s] officers from the sometimes hazy border between excessive and acceptable force." *Saucier*, 533 U.S. at 205-206 (citation and internal quotation marks omitted).

The court of appeals' nuanced comparison of the "details" of *Scott* and this case, Pet. App. 9, also illustrates how far that court strayed from this Court's established framework. *Scott*, which was decided three years after the events that occurred here, rejected an excessive-force claim on the merits after concluding that an officer had acted reasonably in ramming a suspect's car from behind during a high-speed chase. See 550 U.S. at 381-386. That this case may be "distinguishable" from *Scott* says nothing about whether it was clearly established in 2004 that the officers' actions violated the Fourth Amendment.

C. At the certiorari stage, respondents suggested that the "procedural history of the case" explains the court of appeals' failure to address whether the relevant constitutional right was clearly established. Br. in Opp. 12. In particular, respondents cited the court's apparent view that it lacked jurisdiction over some of petitioners' objections under *Johnson* v. *Jones*, 515 U.S. 304 (1995). See pp. 8-9, *supra*.

Johnson does not explain the court of appeals' failure to conduct a proper qualified-immunity analysis. Under *Johnson*, the court of appeals was generally required to accept the district court's determination of what facts respondents could prove at trial unless its conclusions were "blatantly contradicted by the record" (especially the video evidence). *Scott*, 550 U.S. at 380; see *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996) ("*Johnson* held * * * that determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case."). But once those facts were assumed, the court of appeals was required to determine whether that version of the facts demonstrated a violation of a constitutional right that was clearly established in 2004. Cf. *Scott*, 550 U.S. at 381 n.8 ("At the summary judgment stage, * * * the reasonableness of [an officer's] actions * * * is a pure question of law."). The court of appeals failed to address that question.

II. PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY

It would be appropriate for this Court to dispose of this case by vacating the court of appeals' judgment and remanding for that court in the first instance to evaluate the summary-judgment record in light of the proper qualified-immunity standard. See, *e.g.*, *Anderson*, 483 U.S. at 641, 646 & n.6. If the Court concludes that it is appropriate to conduct the qualified-immunity analysis itself, in the view of the United States, petitioners are entitled to qualified immunity. Even assuming that petitioners' actions violated the Fourth Amendment, the right they violated, defined

at the appropriate level of specificity, was not clearly established in 2004.

A. The first step in analyzing whether a right was "clearly established" is to define the right at the appropriate level of specificity. See *Wilson*, 526 U.S. at 615; *Anderson*, 483 U.S. at 639; p. 14, *supra*. As this Court has consistently instructed, the inquiry into whether an official's actions violated clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition," *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201), although it is not necessary that "the very action in question [have] previously been held unlawful," *Safford Unified Sch. Dist. No. 1* v. *Redding*, 557 U.S. 364, 377 (2009) (brackets in original).

Thus, for example, in *Saucier*, an excessive-force case, the Court framed the relevant inquiry not in terms of "the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," but instead in terms of whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." 533 U.S. at 201-202, 208. Likewise, in *Brosseau*, another excessive-force case, the Court asked whether it was clearly established that an officer may not "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 199-200.

Those decisions suggest that to define the right at issue in an excessive-force claim, a court should consider at least (i) the characteristics of the individuals against whom the force was used; (ii) the behavior of those individuals; (iii) the risk to other people posed by that behavior; and (iv) the level of force used by the officer.

Here, it is undisputed that Rickard had led officers on a "high-speed chase," Pet. App. 36, and at that time was "changing lanes and swerving through traffic," *id.* at 38, in an attempt to evade capture, and that, once cornered, "Rickard reversed in an attempt to escape" and continued that attempt even after the initial shots were fired, *id.* at 23. The video evidence demonstrates, moreover, that Rickard was operating the vehicle in a reckless manner during his close-quarters encounter with police, in which he made a series of sudden maneuvers with the car despite the fact that the officers were standing only steps away and ordering him to stop. See No. 279 Video 11:14:16-11:14:32; No. 286 Video 12:17:41-12:17:53. It is also uncontested that there was a passenger in the car and that Officer Plumhoff knew that when he fired the first shots. See J.A. 392. Therefore, the qualified-immunity question is whether a police officer may shoot a motorist who, having been stopped initially for a misdemeanor with a passenger in the vehicle, leads the police on a high-speed chase through public streets and then, once cornered, operates a vehicle in a dangerous manner in an attempt to evade capture and resume his flight.[1]

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[1] It was well established in 2004 that an officer may use deadly force against a suspect who poses an immediate and serious threat to himself or fellow officers. See *Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985). Thus, in some circumstances, it would be appropriate to

B. As so framed, the right at issue here was not clearly established in 2004.

1. No decision of this Court clearly established in 2004 that law-enforcement officers, confronted with a suspect who has previously led them on a dangerous, high-speed chase, and who operated a vehicle in a dangerous manner once cornered, may not use deadly force to prevent the suspect from resuming his vehicular flight. Under the standard announced in *Tennessee* v. *Garner*, 471 U.S. 1 (1985), "[w]here [an] officer has probable cause to believe that [a] 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." *Id.* at 11. But "[w]here 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." *Ibid.*

That "general constitutional rule" does not bar petitioners' conduct with "obvious clarity." *Hope*, 536 U.S. at 741 (quoting *United States* v. *Lanier*, 520 U.S. 259, 271 (1997)). Reckless driving in a high-speed pursuit does pose a significant risk to other people.

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add an additional factor to the definition of the right: that the suspect, in his attempt to evade capture, posed an immediate threat to the safety of the officers. Here, however, the district court concluded that a genuine dispute of material fact exists about the danger Rickard posed to the officers, relying in part on the fact that Officer Plumhoff was standing slightly to the side of Rickard's vehicle when he fired the first shots and thus was "in no danger of being hit by the vehicle." Pet. App. 35. Because the other facts make clear that qualified immunity is appropriate here, this Court need not seek to determine whether the district court's assessment comports with the video evidence. See No. 279 Video 11:14:15-11:14:32.

This Court explained in *Sykes* v. *United States*, 131 S. Ct. 2267 (2011), in the course of construing the term "violent felony" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), that vehicular flight from police officers "as a categorical matter * * * presents a serious potential risk of physical injury to another" because "[r]isk of violence is inherent to vehicle flight." 131 S. Ct. at 2273-2274. Vehicular flight, this Court concluded, "has violent—even lethal—potential for others." *Ibid.*; see also *id.* at 2289 (Kagan, J., dissenting) (explaining that "willfully flee[ing] from a law enforcement officer by driving at high speed or otherwise demonstrating reckless disregard for the safety of others * * * ordinarily presents a serious potential risk of physical injury to another") (internal quotation marks and citation omitted). Moreover, here, as the video makes clear, Rickard not only led police on a high-speed chase, he operated the vehicle recklessly during his subsequent close-quarters encounter with police. Given that, it would not have been "plainly incompetent," *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986), for a law-enforcement officer in 2004 to conclude that petitioners' use of deadly force was constitutional.

None of this Court's applications of *Garner*'s rule to a particular fact pattern placed the contrary view "beyond debate" in 2004. *Reichle*, 132 S. Ct. at 2093. *Garner* itself involved an unarmed suspect fleeing on foot, not a motorist who had already demonstrated a willingness to put people's lives in danger with his driving. Likewise, *Graham* v. *Connor*, 490 U.S. 386 (1989), did not involve a high-speed chase or any other conduct by the plaintiff that posed a danger to other people. See *id.* at 388-389. And *Saucier* did not in-

volve a high-speed chase or any other dangerous conduct, did not address the use of deadly force, and did not find that a constitutional violation had occurred. See 533 U.S. at 197-198. None of those decisions supports respondents' view that it was clearly established in 2004 that petitioners' use of force violated the Fourth Amendment. Because reasonable minds might have reached different conclusions, the "constitutional question * * * [wa]s by no means open and shut." *Wilson*, 526 U.S. at 615.[2]

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[2] The United States Department of Justice has as a policy matter defined "deadly force" as "the use of any force that is likely to cause death or serious physical injury." *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations* Pt. II, http://www.justice.gov/ag/readingroom/resolution14c.htm (last visited Jan. 3, 2014) (*Commentary*). The Department's policy statement provides that "[d]eadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person." *Policy Statement, Use of Deadly Force* Pt. I(A), http://www.justice.gov/ag/readingroom/resolution14b.htm (last visited Jan. 3, 2014). It further provides that "[w]eapons may not be fired solely to disable moving vehicles" and that "[w]eapons may be fired at the driver or other occupant of a moving motor vehicle only when * * * [t]he officer has a reasonable belief that the subject poses an imminent danger of death or serious physical injury to the officer or another; and * * * [t]he public safety benefits of using such force outweigh the risks to the safety of the officer or other persons." *Id.* Pt. V. The Commentary to the policy, however, notes that "the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits." *Commentary* Pt. I. In addition, the Commentary emphasizes that "[t]he reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene,

The court of appeals placed considerable weight on *Scott*. But that case was decided in 2007. It therefore "could not have given fair notice to [petitioners]" of what the Fourth Amendment requires. *Brosseau*, 543 U.S. at 200 n.4. And in any event, *Scott* does not clearly establish that petitioners' attempt to put an end to Rickard's high-speed flight violated the Fourth Amendment.

As discussed above, *Scott* considered the constitutionality of an officer's "attempt to stop a fleeing motorist from continuing his public-endangering flight by ramming the motorist's car from behind." 550 U.S. at 374. Applying the Fourth Amendment's reasonableness standard, the Court considered significant that the plaintiff "posed an actual and imminent threat to the lives of any pedestrians who might have been present, to other civilian motorists, and to the officers involved in the chase." *Id.* at 384. The Court also noted, however, that although the ramming maneuver "posed a high likelihood of serious injury or death" to the plaintiff, it did not entail "the near *certainty* of death posed by * * * pulling alongside a fleeing motorist's car and shooting the motorist." *Ibid.* The Court then undertook to "weigh[] the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing [the plaintiff]," in light of the fact that the plaintiff was the only culpable party. *Ibid.* The Court ultimately concluded that "[a] police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not

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who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving." *Id.* Pt. II.

violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death." *Id.* at 386.

If anything, that conclusion lends support to petitioners' argument that it was not clearly established in 2004 that their actions violated the Fourth Amendment. Rickard engaged in a "dangerous high-speed car chase that threaten[ed] the lives of innocent bystanders," *Scott*, 550 U.S. at 386, and petitioners used deadly force to terminate that chase after Rickard operated the vehicle in a reckless manner in an attempt to escape. Although the deadly force here was used during a period in which Rickard was not driving at high speeds, the district court found that it was undisputed that at that time Rickard was attempting to evade capture by getting back on the road. See Pet. App. 23. If successful in that attempt, Rickard might have posed precisely the same threat to innocent bystanders as the motorist in *Scott*.

Moreover, *Scott* makes clear that the district court erred in determining that the dangers Rickard posed to the public by "swerving in traffic while traveling at a high speed" and operating the vehicle with "disregard for the safety of others" were irrelevant to the Fourth Amendment analysis because they "were caused by the [officers'] pursuit of [his] vehicle." Pet. App. 37. The Court explained that it was "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." *Scott*, 550 U.S. at 385. A reasonable officer reviewing that discussion could conclude that she was not clearly required by the Constitution to give up the chase rather than use deadly force.

That is not to say that *Scott* is necessarily on all fours. For example, *Scott* did not address (and indeed distinguished) a situation, like the one here, in which an officer fires a weapon in an effort to stop the suspect's vehicular flight. See 550 U.S. at 384. And *Scott* likewise did not address a situation, like the one here, in which an officer is aware of the presence of an apparently innocent passenger whose safety would be affected by the use of force. But *Scott* itself did not clearly establish that the presence of either (or both) of those factors would render an officer's actions unconstitutional.

Accordingly, even if *Scott* had been on the books in 2004, a reasonable officer reviewing the opinion could have believed that it did not clearly forbid petitioners' use of force here.

2. In its qualified-immunity decisions, this Court has looked to circuit precedent to determine whether a constitutional principle was "clearly established." See *Pearson*, 555 U.S. at 244; *Brosseau*, 543 U.S. at 200-201; *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 378; *Hope*, 536 U.S. at 742-744. Here, the relevant circuit decisions do not demonstrate that petitioners violated Rickard's clearly established Fourth Amendment rights.

a. This case raises the unusual circumstance in which a vehicular pursuit began in one circuit (the Eighth) but the ultimate use of force occurred in another circuit (the Sixth). For that reason, the question arises which circuit authority should be considered "controlling," *Reichle*, 132 S. Ct. at 2094, in the qualified-immunity analysis. Ultimately, however, this case does not require the Court to resolve that issue, because under the law of both the Sixth and Eighth

Circuits in 2004, a reasonable officer could have believed that petitioners' use of force complied with the Fourth Amendment.

b. A reasonable officer canvassing Sixth Circuit precedent in 2004 would not have had clear notice that the Fourth Amendment prohibits the use of deadly force to prevent a person who has just led police on a high-speed, dangerous chase, and who operated a vehicle in a dangerous manner once stopped, from returning to the public roads. That circuit's most analogous pre-2004 decision, *Smith* v. *Freland*, 954 F.2d 343, cert. denied, 504 U.S. 915 (1992), also involved a police officer who shot a fleeing motorist to prevent him from returning to the road. In *Smith*, as here, the suspect had committed a minor traffic infraction (running a stop sign), which led to a high-speed chase. See *id.* at 344. As this Court explained in *Brosseau*, the chase "appeared to be at an end when [an] officer cornered the suspect at the back of a dead-end residential street." 543 U.S. at 200. But "[t]he suspect * * * freed his car and began speeding down the street," at which point "the officer fired a shot, which killed the suspect." *Ibid.* The Sixth Circuit held that the officer's actions did not violate the Fourth Amendment. It relied on the fact that "the suspect * * * 'had proven he would do almost anything to avoid capture' and that he posed a major threat to, among others, the officers at the end of the street." *Ibid.* (quoting *Smith*, 954 F.2d at 347). The Sixth Circuit further explained that even though the motorist did not have a firearm, "he was not harmless; a car can be a deadly weapon." 954 F.2d at 347.

A reasonable officer familiar with *Smith* could have concluded in 2004 that the use of force in this case was

not clearly prohibited because Rickard's reckless operation of the vehicle posed a danger to the public. As the Sixth Circuit later characterized its holding in *Smith*, "even though [the motorist] was unarmed and [the officer] may not have been in any immediate personal danger when he discharged his weapon, his actions were clearly reasonable given that these events happened very quickly and [the motorist's] continued escape would have posed a significant threat of injury to numerous others." *Dudley* v. *Eden*, 260 F.3d 722, 726 (2001). Although there are differences between *Smith* and this case—the suspect in *Smith* had indisputably assaulted a police officer during the chase and had crashed into an officer's unoccupied car when cornered—a reasonable officer could have concluded that those facts did not play a decisive role in the court's legal analysis.

Post-*Smith*, pre-2004 decisions of the Sixth Circuit also upheld under the Fourth Amendment the use of deadly force in reasonably similar circumstances. See *Dudley*, 260 F.3d at 727 (finding no Fourth Amendment violation for police shooting of bank-robbery suspect who had dangerously fled officers in vehicle); *Scott* v. *Clay Cnty., Tenn.*, 205 F.3d 867, 877-878, cert. denied, 531 U.S. 874 (2000) (finding no Fourth Amendment violation for police shooting of motorist after high-speed flight with a passenger in the vehicle). The Sixth Circuit has issued some decisions after 2004 denying qualified immunity to officers who fired at fleeing motorists. But even if those decisions had relevance here, none of them involved a suspect who had already engaged in dangerous driving and was attempting dangerously to evade apprehension after being cornered, and none interpreted the circuit's pre-

2004 precedents in a manner that would have clearly foreclosed the use of force here. See *Kirby* v. *Duva*, 530 F.3d 475, 482 (2008) (motorist "was moving slowly and in a non-aggressive manner, could not have hit any of the officers, and was stationary at the time of the shooting"); *Smith* v. *Cupp*, 430 F.3d 766, 769, 773-774 (2005) (suspect stole police car and was driving in a way that posed no risk to others); see also *Murray-Ruhl* v. *Passinault*, 246 Fed. Appx. 338, 340-342, 344-347 (6th Cir. 2007) (suspect attempted to evade capture by driving out of an alley past the police in a way that did not "pose[] a threat to anyone").

c. The pertinent Eighth Circuit authority also fails to demonstrate that petitioners' use of deadly force in the circumstances of this case was clearly foreclosed in 2004. In *Cole* v. *Bone*, 993 F.2d 1328 (1993)—also cited by this Court in *Brosseau*, 543 U.S. at 200—a high-speed pursuit began when the suspect drove a truck through a toll booth without stopping to pay the toll. See 993 F.2d at 1330. As here, the suspect was driving recklessly at high speeds, and the police had unsuccessfully attempted to execute a rolling roadblock. See *ibid.* But in addition, the protracted chase in *Cole* took place on congested roads, and during the chase the driver "forced more than one hundred cars off the road or out of the truck's way," including police vehicles, "and endangered the lives of many other motorists." *Id.* at 1331, 1333-1334. Eventually an officer shot out the back window of the truck and then shot the suspect in the head. See *id.* at 1331. The Eighth Circuit held that the shooting did not violate the Fourth Amendment. Because the officer "had probable cause to believe that the truck posed an imminent threat of serious physical harm to innocent

motorists as well as to the officers themselves" and that he had committed a crime by attempting to force officers off the road, the court determined that the "use of deadly force was constitutionally reasonable under *Garner*." *Id.* at 1333-1334.

A reasonable officer familiar with *Cole* would not have been on clear notice in 2004 that the decision unequivocally foreclosed petitioners' use of force. Although the district court in this case concluded that there exists a genuine dispute of material fact over whether Rickard assaulted any officers during the chase, it was reasonable for an officer in 2004 to believe that *Cole* did not foreclose the use of force even if a suspect does not assault officers, so long as he continues to pose a threat to the public through his reckless operation of a vehicle.

In *McCaslin* v. *Wilkins*, 183 F.3d 775 (1999), the Eighth Circuit upheld the denial of qualified immunity at summary judgment in a case that involved a shooting after a police chase. See *id.* at 778-779. The court's decision, however, rested on the district court's conclusion that there existed a genuine issue of material fact as to whether the suspect, after his car had careened into a ditch, had attempted to restart his vehicle and drive it toward police officers. See *id.* at 777. Although the officers claimed that he had "dr[iven] back up the hill at them, forcing them to protect themselves by firing several shots," other witnesses said that "the gunshots began almost immediately after [the suspect's] truck left the road" and that he had not turned the truck toward the officers. See *ibid.* The Eighth Circuit concluded that the factual question precluded summary judgment for the defendants, distinguishing *Cole* on the ground that in

that case "there was no dispute regarding what the driver was doing at the time the officer shot and killed him." *Ibid.* Here, as in *Cole*, there is no dispute that Rickard was trying to get back on the road when he was shot. See Pet. App. 23. A reasonable officer who had read *McCaslin* would not necessarily believe that shooting a suspect attempting to resume a dangerous vehicular flight is the Fourth Amendment equivalent of shooting a motorist sitting in a vehicle at rest in a ditch.

d. In sum, it was not clearly established in either the Sixth Circuit or the Eighth Circuit in 2004 that it violates the Fourth Amendment to use deadly force to prevent the flight of a motorist who operated a vehicle recklessly during a high-speed chase and in a close-quarters encounter with police. And respondents have not pointed to "a robust consensus of cases of persuasive authority" from other circuits as of 2004 supporting their claim. *al-Kidd*, 131 S. Ct. at 2084 (internal quotation marks and citation omitted).

C. Because it was not clearly established in 2004 that petitioners' actions violated the Fourth Amendment, they are entitled to summary judgment on qualified immunity. In *Pearson*, this Court held that courts may, in their discretion, resolve questions of qualified immunity on the "clearly established" prong without deciding whether a constitutional violation occurred, overruling its contrary conclusion in *Saucier*. See 555 U.S. at 236-243. The Court explained that deciding the constitutional question even where the law was not clearly established departs from "the general rule of constitutional avoidance and runs counter to the 'older, wiser judicial counsel 'not to pass on questions of constitutionality . . . unless

such adjudication is unavoidable.'" *Id.* at 241 (quoting *Scott*, 550 U.S. at 388 (Breyer, J., concurring) (quoting *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 105 (1944))).

In light of those principles, the United States respectfully advises that the better course in this case is to decline to reach the constitutional question, as this Court has done in a number of recent decisions. See *Stanton*, 134 S. Ct. at 7; *Reichle*, 132 S. Ct. at 2093-2094; *Messerschmidt* v. *Millender*, 132 S. Ct. 1235, 1249 (2012); *Pearson*, 555 U.S. at 243-245; *Brosseau*, 543 U.S. at 198. *Pearson* explained that "there are cases in which the constitutional question is so fact-bound that the decision provides little guidance for future cases." 555 U.S. at 237. This may be one of those cases. As the court of appeals found, it is difficult to determine "the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." Pet. App. 10. Deciding the underlying Fourth Amendment question might require this Court to determine, among other things, the highly case-specific question whether the district court properly concluded from the video evidence that the officers were not in physical danger, see note 1, *supra*. Moreover, the "details" that the court of appeals cited to distinguish *Scott*—that Rickard was not driving at a high speed when he was shot, that the police fired "fifteen shots at close range" rather than using a ramming maneuver, and that a passenger was in the car—may not recur together with any frequency. See Pet. App. 10 (observing that this case "is more complex in its facts than was *Scott*"). Resolving the merits of the Fourth Amendment claim could thus require a

heavily fact-intensive inquiry that might provide little guidance in future cases.

Excessive-force claims "do not frequently arise in cases in which a qualified immunity defense," or the analogous "fair warning" requirement for criminal liability, "is unavailable." *Pearson*, 555 U.S. at 236; see *Hope*, 536 U.S. at 740. For that reason, it would hinder "the development of constitutional precedent" if courts never reached the merits question in excessive-force cases where the right is not clearly established. *Pearson*, 555 U.S. at 236. But cases are likely to arise in the lower courts that entail less factual complexity than this case.

Two other factors, moreover, caution against seeking to resolve the constitutional question here. First, neither the district court nor the court of appeals distinguished among the different officers, even though only three of the six officers discharged their weapons, Officer Plumhoff discharged his weapon at a different point in the sequence of events than Officers Gardner and Galtelli, and the officers fired different numbers of shots. See Pet. App. 11 n.4. Moreover, Officers Gardner and Galtelli each heard over the radio that Rickard had committed aggravated assaults during the chase. See J.A. 216, 222. Even if the district court were correct that a genuine dispute of material fact exists about whether the assaults occurred, Pet. App. 36, Officers Gardner and Galtelli could have reasonably relied on the report of the assaults. Accordingly, a proper Fourth Amendment analysis would require this Court to analyze in the first instance—without the benefit of any discussion from the district court or the court of appeals, and without the

benefit of detailed briefing from the parties—the individual culpability of each of the six officers.

Second, this case presents a situation in which the conduct of the officers removed from the public roads a vehicle that threatened innocent bystanders, but put at risk (and indeed ended) the life of a passenger who, so far as the record reveals, was not believed to have engaged in any culpable conduct. The implications of that fact for the constitutional analysis is one that has not received substantial attention from the lower courts and that seems ill-suited for determination by this Court in the first instance.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART A. DELERY
Assistant Attorney General
IAN HEATH GERGSHENGORN
Deputy Solicitor General
JOHN F. BASH
Assistant to the Solicitor General
BARBARA L. HERWIG
JONATHAN H. LEVY
Attorneys

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APPENDIX

1. Amendment IV of 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.

2. Amendment XIV of the U.S. Constitution provides:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the

members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

3. 42 U.S.C. 1983 provides:

Civil action for deprivation of rights

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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.