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No. 12-1117

In the

Supreme Court of the United States

OFFICER VANCE PLUMHOFF, *et al*.,

Petitioners,

v.

WHITNE RICKARD, A Minor Child, *etc*.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SUPPORTING RESPONDENT

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This brief is submitted on behalf of the National Association of Criminal Defense Lawyers as amicus curiae in support of respondent.

INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL's approximately 10,000 direct members in 28 countries—and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys—include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel.

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[1] Pursuant to this Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief. Amicus affirms, pursuant to Rule 37.6, that no counsel for any party authored this brief in any manner, and no one, other than amicus, made a monetary contribution to the preparation or submission of this brief.

NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the individual liberties guaranteed by the Fourth Amendment. In the furtherance of this and its other objectives, the NACDL files approximately 50 amicus curiae briefs each year, in this Court and others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because the decision of the court below raises important issues regarding the scope of the protections of the Fourth Amendment.

SUMMARY OF ARGUMENT

If this Court concludes that the court of appeals failed to determine whether the actions of the petitioners in 2004 violated then clearly established law, it should remand the case to the court of appeals with instruction to do so in the first instance. This case presents a substantial number of distinct constitutional claims involving multiple defendants and numerous disputed questions of fact. This Court should not, without benefit of a thorough analysis by the lower courts, undertake to resolve whether the relevant law was clearly established in 2004.

For similar reasons, if the Court decides to remand this case to permit the court of appeals to decide whether the asserted constitutional rights were clearly established at the time of the shootings, the Court should not attempt to resolve all the constitutional questions posed by this case.

Under *Tennessee v. Garner* only a current significant threat of death or serious injury can justify the use of deadly force. It was clearly established in 2004 that such force could no longer be utilized once a threat had ended. The petitioners may not justify their use of force on asserted dangers than had ended before the shots were fired.

Petitioners argue that Rickard's driving was "a danger to himself" and "posed a threat" to his passenger. Neither circumstance, if present, would warrant killing Rickard (to protect him from injury in a car crash) or using force virtually certain to kill his passenger.

The courts below properly identified several material disputed facts underlying petitioners' claim of qualified immunity. The video recordings do not demonstrate that Rickard attempted to ram police cars on the highway, or that he succeeded in doing so in the parking lot. Petitioners cannot rely on their own affidavits to establish the existence of undisputed facts supporting summary judgment. Because the petitioners are interested parties, a jury would not be required to believe their testimony. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U.S. 133 (2000).

The United States contends that "the video makes clear" that Rickard's car was being operated in the parking lot "in a dangerous manner." That assertion is at odds with footnote one of the government's brief, which does not challenge the district court's conclusion that the video was inconclusive at best. The "maneuvers" on which the government

apparently relies occurred *after* the police began shooting at Rickard, not before.

The United States contends that the use of lethal force was justified because Rickard had led a "high-speed" chase. But the record does not contain conclusive evidence regarding the speed of Rickard's car. A police affidavit asserts only that Rickard was going "at least 75 [m.p.h.]" on I-40. The speed limit on that interstate highway is 70 miles per hour.

ARGUMENT

I. IF THE COURT OF APPEALS FAILED TO DETERMINE WHETHER PETITIONERS CONDUCT VIOLATED RICKARD'S CLEARLY ESTABLISHED CONSTITUTIONAL RIGHTS, THIS COURT SHOULD REMAND THE CASE TO THE COURT OF APPEALS WITH INSTRUCTIONS TO DO SO

Petitioners and the Solicitor General contend that the court of appeals erred in failing to determine the state of the law at the time the incident occurred. Pet. Br. 13-14; U.S. Br. 13. The Solicitor General suggests that if the Court finds that the court of appeals erred in this manner, it should "remand for the court of appeals to conduct the qualified-immunity analysis in the first instance." U.S. Br. 12. With respect to that issue, we agree with the Solicitor General. If the Court concludes that the court of appeals failed to determine the state of the law in 2004, the Court should decline to answer the qualified immunity question in the first instance, and should instead remand the case to the lower court.

The Court does not normally decide issues that were not resolved below. *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470 (1999). When the Court concludes that a lower court erred in one respect, and resolution of the case turns on other issues that the lower court did not address, the Court typically remands for resolution of the unresolved issues.

Nothing in the procedural posture of this case warrants departing from the Court's usual practice of remanding a case in such circumstances. To the contrary, the case presents an unusually complex controversy, which would entangle the Court in a number of factbound and subsidiary questions. *See Douglas v. Indep. Living Ctr. of S. California, Inc*., -- U.S. --, --, 132 S. Ct. 1204, 1211 (2012) ("Given the complexity of these cases, rather than ordering reargument, we vacate the Ninth Circuit's judgments and remand the cases, thereby permitting the parties to argue the matter before that Circuit in the first instance.").

In order to address the qualified immunity issues raised by this case, the Court would first have to compare the conflicting accounts of the plaintiff and defendants and evaluate their differences in light of the substantial record, a process that would involve carefully reviewing the three video recordings. The district court concluded that in several important respects the recordings do not support, conclusively or perhaps at all, the defendants' version of the facts. The United States understandably declines to

attempt to resolve these disagreements. U.S. Br. 19-20 n.1.

The Court would then have to assess the differences between the knowledge, and actions, of the multiple defendants. With regard to the chase on I-40, some officers could see what Rickard was doing, while others could not; who could see what is not always clear. Several officers made statements on the radio about what was going on; which other officers heard those statements is not apparent from the record. J.A. 216, 222 It would be necessary to determine whether these radio broadcasts could be relied on by other officers. *See* U.S. Br. 32-33. During the events in the parking lot immediately preceding the shooting of Rickard and Allen, the individual defendants were at various locations, and could have perceived the developments differently. For example, officer Galteli stated that at the time he mistakenly believed that the first shots—which were actually fired by officer Plumhoff --had been fired by Rickard. J.A. 216. These differences in what each officer knew would bear on whether he was entitled to qualified immunity.

The 15 bullets were fired over a period of time under varying circumstances; those differences may well be relevant to whether the shooter would be entitled to qualified immunity.[2] Some shots were fired while Rickard was moving alongside officer

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[2] *See Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994) (stating that the appropriate method of analysis is to "carve up the incident into segments and judge each on its own terms to see if the officer was reasonable at each stage").

Plumhoff, or in the direction of officer Ellis, while other bullets were fired after Rickard was moving away from (and thus assuredly not endangering) all the officers.[3] J.A. 165-66, 211. Some shots were fired through the passenger window, posing a particular danger to Allen, while others were fired at the moving car from a sufficient distance that accurate aim would have been difficult. While in most instances the officers held their guns at eye level and could aim them at Rickard, the first shots were fired by Plumhoff when he was standing close to the passenger side of the car, and presumably could not have actually seen Rickard when he fired. Thus, in addition to any differences deriving from variations in what particular officers knew, qualified immunity might to some degree have to be assessed on a bullet-by-bullet basis.

That analysis would be further complicated by the fact that the petitioners have adduced a number of distinct justifications for their actions, which to some extent have evolved over the course of the litigation. The United States presents yet additional fact-bound theories as to why the petitioners should be accorded qualified immunity. Each of these different arguments would have to be considered separately as to each of the defendants, and perhaps as to each bullet.

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[3] *See Ellis v. Wynalda*, 999 F.2d 243, 247 (7th Cir. 1993)("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity.").

Finally, it would be necessary to assess the numerous issues thus identified in light of what law was clearly established in 2004 in the Sixth and Eighth Circuits, and to decide—to the extent that those circuits' case law differed—which circuit's law would be controlling.[4]

It would be inappropriate for this Court to attempt all of this without the benefit of such a particularized analysis by the court of appeals. In the past, the Court has expressed reluctance to address a question "without the benefit of a thorough lower court opinion." *Zivotofsky ex rel. Zivotofsky v. Clinton*, -- U.S. --, 132 S. Ct. 1421, 1430 (2012). If, after the lower courts decide these issues on remand a party seeks review by this Court, the issues presented will be cleaner and in all likelihood considerably narrowed and more focused.

II. IF THE COURT REMANDS THE QUALIFIED IMMUNITY ISSUES, IT SHOULD NOT REACH THE CONSTITUTIONAL QUESTIONS

The Solicitor General suggests that if the Court decides that the qualified immunity questions should be considered in first instance by the court of appeals, "the better course in this case is to decline to reach the constitutional question…." U.S. Br. 31; see Resp. Br. 3. We agree.

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[4] *See Reichle v. Howards*, 132 S. Ct. 2088, 2094 (2012); *see also* U.S. Br. 25.

Unlike *Scott v. Harris*, 550 U.S. 372 (2007), which involved only a single officer, act, and constitutional question, this case presents a multiplicity of officers, actions, and distinct constitutional questions. All of those questions would have to be resolved before the Court could conclude, as it did in *Scott*, that no violation had occurred.

In light of the unresolved factual disputes in this case, any issues addressed by this Court would have an unavoidable hypothetical quality. The Court would be undertaking to decide whether constitutional violations would be presented by a case in which all of those disputes were resolved in favor of the plaintiff. Were the case to proceed to trial, the jury's findings of fact might present a far different set of constitutional questions. To the extent that petitioners rely on the speed of the chase that occurred on I-40, the Court's task at this juncture would be confounded by that fact that the record contains little evidence, and nothing conclusive, about how fast Rickard was driving.

Because of the unresolved factual issues, the justification for the shooting of Rickard and Allen would have to rest exclusively on the speed with which Rickard drove during the car on I-40. That would present a constitutional issue that is fairly uncommon. In virtually all the lower court decisions involving firing at fleeing motorists, the drivers have taken some other, more dangerous actions that posed a distinct and graver risk of harm to others.

The circumstances of this case are also idiosyncratic because the officers fired at a car in

which there was an innocent passenger, and did so in a manner that virtually assured that the passenger would be killed, as indeed she was. Plaintiff argues that this circumstance weighs heavily against the reasonableness of the actions of the defendant officers, several of whom were subsequently indicted for killing Allen. Because it is virtually unheard of for law enforcement officers to direct a fusillade of bullets at a moving car with an innocent passenger, this issue—whatever its merits—is unlikely to arise with any frequency.

III. A NUMBER OF PROFFERED JUSTIFICATIONS ARE INCONSISTENT WITH CLEARLY ESTABLISHED LAW IN 2004

1. Petitioners repeatedly rely on events that had ended before lethal force (or much of it) was used. Pet. Br. 3, 21-22, 27. But, as this Court held in *Tennessee v. Garner*, 471 U.S. 1 (1985), it is the current existence of once the threat of danger to officers or others, not a past threat, that alone justifies the use of deadly force. 471 U.S. at 3 (deadly force may be employed when "officer has probable cause to believe that the suspect *poses* a significant threat of death or serious physical injury to the officer or others") (emphasis added); *id*. at 11 ("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.") (emphasis added). *Scott v. Harris*, 550 U.S. 372, 386 (2007), held that a "police officer's attempt to *terminate* a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth

Amendment, even when it places the fleeing motorist at risk of serious injury or death." (emphasis added).

Prior to 2004, several circuits had held—and no circuit had ruled to the contrary—that when the threat to officers or the public ends, so too does the justification for employing deadly force.[5] In *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir. 1992), for example, police officers twice fired at a mentally ill individual when he charged the officers with a knife. The assailant retreated to another part of the building, and ten minutes later again approached the officers, this time without the weapon. The police fired again, killing him. The court of appeals noted that it had clearly established that a "person has a right not to be shot unless he is perceived to pose a threat to the pursuing officers or others." *Id*. at 1045 (*citing Robinson v. Bibb*, 840 F.2d 349, 351 (6th Cir.1988)). The court then found that plaintiffs raised "a genuine issue of fact as to whether, in the [later] . . . round of discharges of the officers' revolvers, the officers may have shot Bubenhofer

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[5] *E.g.*, *Abraham v. Raso*, 183 F.3d 279, 294 (3d Cir. 1999) ("A passing risk to a police officer is not an ongoing license to kill an otherwise unthreatening suspect."); *Wynalda*, 999 F.2d at 247 ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."); *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992) (dividing shooting into two segments and holding that even if the use of deadly force was justified initially, "the exigency of the situation lessened dramatically" and the second use of deadly force was unreasonable).

even though he posed no serious threat of physical harm." *Id.*[6]

Petitioners appear to acknowledge that under clearly established law when a threat ends, the need for deadly force ends as well. *See* Pet. Br. 28 ("Rather, the circuit courts have held [prior to 2004] that where deadly force is constitutionally permissible, it remains permissible until the threat is eliminated; that is, officers can continue using such force *during the pendency of a threat*.") (emphasis added).

Petitioners nevertheless contend that "the use of deadly force" was needed "to end this high-speed chase" on the highway because it endangered the public. Pet. Br. 3.[7] Petitioners also argue that

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[6] Post-2004 decisions have repeatedly reached the same conclusion. *E.g.*, *Lytle v. Bexar Cnty., Tex.*, 560 F.3d 404, 413 (5th Cir. 2009) ("But an exercise of force that is reasonable at one moment can become unreasonable in the next if the justification for the use of force has ceased."); *Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) ("We therefore hold that force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated."); *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011) ("Even where an officer is initially justified in using force, he may not continue to use such force after it has become evident that the threat justifying the force has vanished.").

[7] *See also* Pet. Br. 4 ("When properly applied, are entitled to qualified immunity because it was not beyond debate in July of 2004 that their use of deadly force to *end* the threat posed during this dangerous high-speed police chase violated a clearly established constitutional rule.") (emphasis added); Pet. Br. 3, 21-22, 27.

deadly force was needed to end the highway high-speed chase because officers were in danger when they tried to keep up with Rickard. *See* Pet. Br. 4 ("jeopardizing the safety" of "the officers in the pursuit"), 15. It is undisputed, however, that at the time the officers fired on the vehicle, Rickard had voluntarily left the highway and the highway chase had ended. *See* U.S. Br. 24 (noting that "the deadly force here was used during a period in which Rickard was not driving at high speeds").

Petitioners argue that the use of deadly force was justified because Rickard posed a threat to the safety of the officers standing near his car in the lot. *See* Pet. Br. 10. Officer Gardner claimed that he fired his weapon because the vehicle posed "a danger to the safety of police officers" J.A. 223-24. And officer Galtelli stated that he fired his weapon because of the threat to his own safety. J.A. 216-17, 217. The videotape, however, indisputably shows that at the moment officers Gardner and Galtelli fired their weapons, Rickard's vehicle was moving away from them. *See* U.S. Br. 5 (citing to the videotape and stating that Rickard's vehicle was moving away from the officers when Gardner and Galtelli fired 12 total shots into Rickard's vehicle).[8] Assuming arguendo that Rickard's car presented a threat to the safety of officer Plumoff who fired when the car was next to him, and regardless of whether the other officers had reason to be fearful before Rickard backed away from them, by the time Gardner and Galtelli began firing, those threats had ended.

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[8] No. 279 Video 11:14:29; No. 279 Video 11:14:30; No. 284 Video 12:17:10; No. 284 Video 12:17:11; Pet. App. 24.

2. Petitioners argue that Rickard's driving endangered Rickard himself, and that they fired at Rickard to protect him from injuring himself in a crash. Pet. Br. 14 ("It was objectively reasonable for defendant to conclude that Rickard was a danger to himself."); Pet. Br. 25 ("Rickard was a danger to himself"). But no reasonable officer could have believed that it was reasonable to kill Rickard in order to save him from the "danger to himself" posed by his own driving.[9] Such a practice is so clearly unconstitutional that it need not have been decided in a similar case to give officers clear warning that their actions were in violation of the law. *See United States v. Lanier*, 520 U.S. 259, 271 (1997) ("The easiest cases don't even arise. There has never been ... a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability.") (citations omitted).

3. Petitioners argue that the use of deadly force was justified as a means to protect Rickard's passenger, Kelly Allen. Pet. Br. 14 ("It was objectively reasonable for defendants to conclude that Rickard was a danger to … his passenger."); Pet. Br. 25 (Rickard "continued to pose a threat of serious

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[9] *See Mercado v. City of Orlando*, 407 F.3d 1152, 1157 (11th Cir. 2005) (finding officer's actions in shooting a non-dangerous suicidal suspect in the head with a Sage Launcher, which caused permanent brain damage, were clearly an unreasonable response to the suspect's threat of pointing a knife at his own heart).

physical injury or death to … his passenger.”). Assuming arguendo that Rickard was indeed driving in a manner that “pose[d] a threat of serious physical injury or death to . . . his passenger,” the type of force used by the police was clearly unreasonable. The police did not use a type of force calculated to disable without injuring Allen. To the contrary, the police resorted to a level of force that was virtually certain to, and indeed did, kill Allen herself. The officers fired 15 bullets into the car, three from Allen’s side of the car, and others at the moving car as it drove at increasing distance away from the shooters. Because they continued to fire as the car picked up speed, it was highly likely that Allen would be killed or injured if the bullets disabled Rickard and the car crashed. The autopsy on Allen confirmed that either the bullet that struck her in the head, or the crash of the car, would have resulted in her death. Pet. App. 24; J.A. 60-61, 76-77 (autopsy reports). No officer could believe that it would be reasonable to take steps virtually guaranteed Allen’s death in order to protect her from a “threat of serious physical injury or death.”

4. Petitioners argue that the use of deadly force was justified because officers were subjectively afraid when they fired. Pet. Br. 9-10. But it was clearly established law prior to 2004 that only objective conditions, not the subjective motivations or fears of law enforcement officers, “bear[] on whether a particular seizure is unreasonable under the Fourth Amendment.” *See Graham v. Connor*, 490 U.S. 386, 397 (1990). Similarly, the availability of qualified immunity depends on objective factors; what the

officers subjectively believed is "irrelevant." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

IV. A NUMBER OF THE JUSTIFICATIONS PROFFERED BY PETITIONERS REST ON DISPUTED FACTS

1. The courts below concluded that summary judgment was inappropriate in this case because there were disputed issues of material fact. Pet. App. 10, 36, 38, 40. Petitioners make no effort to address what factual issues may or may not be disputed. Petitioners instead assert that "the court of appeals fail[ed] to note any disputed material facts in its opinion." Pet. Br. 16; *see id*. at 13 "[w]hile the court of appeals suggested that factual disputes existed, it failed to say what they were"). That is incorrect. First, the Sixth Circuit pointed out that the district court had identified a number of specific facts that were in dispute, and accepted the trial court's assessment of those disputes.[10] The district court had identified three such material factual disputes, and

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[10] Pet. App. 10 n.3 ("The district court made a number . . . of findings as to disputed issues of fact, which we do not repeat here, and which we cannot say were 'blatantly and demonstrably false.'"); see *id.* at 8.

In light of *Johnson v. Jones*, 515 U.S. 304 (2005), where a district court has concluded that a claim of qualified immunity turns on disputed issues of fact, the Sixth Circuit will overturn that district conclusion only when "'the trial court's determination that a fact is subject to reasonable dispute is blatantly and demonstrably false.'" Pet. App. 8 (quoting *Moldowan v. City of Warren,* 578 F.3d 351, 370 (6th Cir. 2009)). Because the district court determinations with regard to the three identified disputes in this case were clearly correct, this Court need not determine what standard of review governs such determinations.

the court of appeals quoted two of those determinations. Pet. App. 4-5. Second, the court of appeals specifically explained that the video recordings on which defendants relied failed to resolve questions about "the degree of danger that the officers were placed in as a result of Richard's alleged conduct." Pet. App. 10; see *id*. at 9. Under these circumstances it was clearly incumbent upon to address whether the issues identified by the district court were disputed and material.

2. Although the procedures governing litigation of qualified immunity are in certain respects different than those applicable to most other issues, a motion for summary judgment based on qualified immunity must satisfy the usual standard established by Rule 56 of the Federal Rules of Civil Procedure. Summary judgment can be granted only "if the movant shows that there is no genuine dispute as to any material fact…." Fed. R. Civ. P. 56(a).

> [When a] case [is] decided on summary judgment, there have not yet been factual findings by a judge or jury . . . . When things are in such a posture, courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962) (*per curiam*). . . . In qualified immunity cases, this usually means adopting . . . the plaintiff's version of the facts.

Scott v. Harris, 550 U.S. 372, 378 (2007).

A movant can meet the Rule 56 standard by showing that there are no disputes of fact at all, that any disputes of fact are not material, or that the evidence regarding a disputed issue of material fact is so conclusive that no reasonable jury could resolve that dispute in favor of the non-moving party. Although summary judgment regarding a dispute regarding material fact can be based on a video recording of the events in question, the standard for doing so is a demanding one. The unusual videotape in *Scott* provided a basis for summary judgment because it "quite clearly contradict[ed] the version of the story told by [the plaintiff]." 550 U.S. at 378.

> When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. . . . Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.

550 U.S. at 380. But where reasonable viewers could disagree about what is depicted on a videotape, or about the inferences to be drawn from those events, the recording does not conclusively resolve the underlying dispute. Like any other type of evidence, a videotape must do more than provide support, even strong support, for the contention of the moving party; a video recording must, even when looked at in the light most favorable to the non-moving party, "utterly discredit" that party's contention. If

"reasonable minds could differ as to the import of the evidence," that evidence would not support an award of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986).

This Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), limits the extent to which a party seeking summary judgment regarding a disputed issue of material fact may rely on depositions or affidavits. *Reeves* held in the context of a post-trial motion for judgment as a matter of law that the court "must disregard all evidence favorable to the moving party that the jury is not required to believe." 530 U.S. at 151. "The court may only give credence to . . . 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* (quoting 9A c. Wright & A. Miller, Federal Practice and Procedure, § 2529, 299 (2d ed. 1995)). That same limitation applies to the materials that may be relied on to obtain summary judgment. The standard for summary judgment under Rule 56 is "very close" to the Rule 50 directed verdict standard, the key difference being "procedural." *Liberty Lobby, Inc.*, 477 U.S. at 251 ("'… summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted.'") (internal citation omitted).

The limitation in *Reeves* is of particular importance where, as here, the only witnesses other than the moving party who would have had personal

knowledge of the material issue in question have died at the hands of the moving party. In that situation, although the non-moving party might have little or no direct evidence of its own that contradicted the evidence of the moving party, a jury assuredly would not be "required to believe" the account of the moving, and undeniably interested, party. Of course, at trial a jury would be free to credit the testimony of the moving party, but no court would instruct a jury that it was obligated to do so. The brief for respondent challenges the affidavits and deposition statements of the defendants by arguing that those statements are inconsistent or ambiguous. But even if the testimonial evidence proffered by a moving party is completely consistent and entirely without ambiguity, a jury would not be "required to believe" that evidence if the statements came from interested witnesses.

In the instant case, the petitioners offered in support of their summary judgment motion two quite different types of evidence. First, they relied on affidavits and deposition testimony from the petitioners themselves. Second, they put in the record three video recordings of all or part of the events leading to Rickard's death. Because the petitioners themselves were necessarily interested parties, the district judge properly limited its inquiry to whether the video recordings, like the recording in *Scott v. Harris*, "quite clearly contradict the version of [the events urged by plaintiffs]." 550 U.S. at 378.

3. In the district court petitioners asserted that during the chase on I-40 Rickard repeatedly

attempted to ram the cars of the police officers. Correctly restricting his inquiry to whether the video tapes themselves provided conclusive evidence of such assaults, the district judge concluded the tapes did not. “Although the Rickard vehicle and the officers were engaging in a high-speed chase, the video of the pursuit does not show any assaults, but only the Rickard vehicle changing lanes. It is difficult to determine the exact proximity of the vehicles during the case. The . . . videos of the chase[] would not support a reasonable person in concluding that there were aggravated assaults.” Pet. App. 36. The videos are inconclusive, in part, because the cars of officer Plumhoff, (who was leading the chase) and officer Evans had no video recorders, and the recorder in officer Gardner's car did not work. Pet. App. 20-21.[11]

In this Court petitioners assert repeatedly that Rickard attempted to ram the police cars while they were on the highway. Petitioners do not, however, contend that the video recordings themselves depict such events. Rather, petitioners argue that “[i]n deposition and affidavit testimony, the officers described what appeared to them to be Rickard attempting to veer or ram his car into Plumhoff's and Evans's police cars . . . . (J.A. 176-77[Plumhoff

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11 *See* Pet. App 21-22 (“Whether there were in fact felony charges at this point is disputed. . . . That activity is not clearly depicted on the video and is disputed.”), 38 (“The videotape here shows only that the vehicles were changing lanes and swerving through traffic. Based on that evidence, the Court concludes that the officer's perception that they were the victims of assault was not objectively reasonable.”).

affidavit], 228 [Evans affidavit], 234 [same]).” (Pet. Br. 7). But because Plumhoff and Evans are petitioners, and thus interested parties, the jury would not be required to believe their testimony, and it cannot be relied upon to demonstrate that there is conclusive evidence regarding that issue. Petitioners also point to the fact that during the chase Plumhoff and Evans reported on their radios that Rickard had acted in that manner; but the recording only conclusively establishes that the reports were made over the radio, not that the reports were accurate (or necessarily believed by the officers). Of course, at trial a jury might chose to find the radio reports significant evidence supporting the officer’s testimony, but it would not be required to do so. The radio recordings alone are assuredly not conclusive; indeed, at least unless merely intended to corroborate trial testimony by the two officers, the recordings themselves would be inadmissible hearsay if offered to prove the truth of their contents.

In the district court the petitioners contended that Rickard, after leaving the highway, intentionally drove into a head-on collision with officer Plumhoff's car, and that court understood the petitioners to argue as well that Rickard's car spun out after he deliberately hit officer Evans’ car. Neither Plumhoff's car nor Evans’ car had video recorders, and the district judge thus concluded that the circumstances of those collisions were disputed issues. “Defendants . . . argue that Rickard posed an immediate threat because he intentionally rammed two police vehicles in Memphis. . . . Whether the Rickard vehicle intentionally collided with the vehicles or collided with the Plumhoff vehicle as a result of momentum

from an unintentional collision with the Evans vehicle is a disputed issue of material fact. As such, it cannot serve as the foundation for concluding that the officers' conduct was objectively reasonable."[12] Pet. App. 38; *see* Pet. App 4 (quoting district court)). In this Court, petitioners appear to have abandoned the contention that the collision with Plumhoff's or Evans' cars were deliberate acts on Rickard's part. They refer to the collision with Plumhoff without asserting that Rickard intended that collision, or was in control of his car, when it occurred[13], and they note that Evans was following Rickard when their cars collided.[14]

The district court also concluded that there was a material dispute of fact as to whether Rickard was "revving" his car engine when (or immediately before) the officers began firing. In the lower court the petitioners relied heavily on their contention that Rickard was doing so, apparently on the theory that by gunning his engine Rickard was indicating an intent to accelerate in the direction of the officers. The trial judge concluded that the video recording, although depicting this period of time, was not

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12 "Defendants assert that the Rickard vehicle then turned directly toward Plumhoff's vehicle and had a head-on collision with it. Plaintiffs dispute these statements and aver that the Rickard vehicle was still moving forward after contact with Evans' vehicle and that this momentum caused the collision with Plumhoff's vehicle." Pet. App. 22-23.

13 Pet. Br. 8 ("Rickard collided head-on with Plumhoff's cruiser"), 27 ("collided with police vehicles"), 37 ("there was a collision between Rickard and Plumhoff's cars, and Rickard spun out").

14 Pet. Br. 8 ("Rickard was hit by a pursuing vehicle.").

sufficiently clear to establish the correctness of this contention. "Defendants assert that [Rickard's] vehicle engine was 'revving,' but Plaintiffs dispute this and state that the vehicle was rocking back and forth, and it is unclear whether the engine noise in conjunction with this rocking motion should be characterized as revving the engine." Pet. App 23; *see* Pet. App. 5 (quoting district court)).[15] Petitioners no longer refer to this "revving" theory, which they apparently have abandoned.

In this Court, rely on a different account of what occurred after Rickard's car spun out onto the parking lot. Earlier, in their briefs in the court of appeals, petitioners described Rickard's car as merely "rocking back and forth against the front of Gardner's car as its tires squealed/spun." Defendants-Appellants' Brief, 5.[16] The phrase "rocking back and forth" suggests that the motion was the incidental effect of the failure of the tires on Rickard's car to get enough traction to move the car in one direction. But in this Court petitioners advance a far more threatening account of what occurred, describing Rickard as having "accelerated" and deliberately and repeatedly "ramming" into Gardner's car. (Pet. Br. 3, 9, 27, 32, 37, 39). That suggests that Rickard drove deliberately and with considerable force into Gardner's car, backed away,

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15 "Although the . . . Defendants contend that the car was 'revving' when the first shots were fired, that is a disputed issue." Pet. App. 40.

16 See Defendants-Appellants' Reply Brief, 2 ("The video . . . reveals that Rickard's car's tires were spinning freely and rocking against one of the police cars.").

and then did the same thing several more times.[17] The video recording of these events, however, does not support petitioners' current account; rather, they show Rickard's car, as petitioners asserted below, merely rocking back and forth, as he attempts, initially without success, to back up, touching Gardner's car only incidentally with no acceleration in the direction of that car or without any other indication of an intent on Rickard's part to hit the officer's vehicle.

Petitioners offer two justifications for the use of force based on what occurred when Rickard, subsequent to his contact (of whatever nature) with the Gardner car had ended, was backing out of the parking lot. Petitioners assert that Rickard's car hit Evans on the hand[18], and that Ellis was forced "to step to his right"[19] to avoid being struck by Rickard's car. The first contention rests solely on Evans' deposition; because a jury would not be required to believe the assertion that Rickard actually injured Evans, that assertion cannot support summary judgment. Ellis can be seen on the video stepping to one side as Rickard backs out of the lot, but both Ellis and the car are moving slowly. Petitioners do not contend that Rickard was trying to hit Evans, or

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17 *See* Pet. Br. at 3 ("Three of the officers used deadly force only after Rickard repeatedly rammed a police car in front of him and then drove in reverse in the direction of officers on foot trying to arrest him."). This suggests that Rickard was deliberately (and repeatedly) driving forward when he hits Gardner's car.

18 Pet. Br. 10 (citing J.A. 229 and 234).

19 Pet. Br. 10; see *id.* at I, 27, 37, 39.

even that Rickard knew that Ellis was standing behind his car. No less importantly, both of these events occurred *after* the shooting began; the officers began firing before Rickard began to back away from Gardner's car. [20] Actions taken by Rickard after the shooting began obviously cannot provide a justification for the first volley of shots that occurred at an earlier point in time. In the district court, petitioners argued that once the officers began to fire at Rickard at close range, it was an "astonishing act of defiance" on the part of Rickard to attempt to drive away from the officers who were shooting at him.[21] But surely any sensible adult would flee from gunmen—police officers or not—who were trying to kill him.

4. Although the petition in this case insisted the circumstances here are indistinguishable from those in *Scott v. Harris*, the differences are palpable. Harris was driving on a two-lane winding country road, with oncoming traffic and possible pedestrians at risk. Rickard was on a divided, six lane interstate highway; there was no oncoming traffic and no pedestrians. Harris deliberately drove into the oncoming lane; Rickard did not, and could not have done so. Harris, but not Rickard, ran through several red lights. Harris was driving 85 m.p.h. on a road with a 55 m.p.h. speed limit; at that speed he was at

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20 Pet. Br. 9 ("[i]mmediately after the Honda began ramming Gardner"s patrol unit, Plumhoff fired three rounds at the driver"), 32 ("While at the time of the first three shots in this case, Rickard was not covering much ground in the Honda, he was using it to ram Officer Gardner's car.").

21 Defendants' Statement of Undisputed Material Facts, 13.

great risk of losing control of his car when rounding curves, and had to move into oncoming traffic whenever he wanted to pass a car going the speed limit. In the instant case the only affidavit regarding Rickard's speed states it was "at least 75 m.p.h." J.A. 353. The speed limit on I-40 is 70 m.p.h.[22], and like all interstate highways it is curved and banked in a manner to permit cars to drive with safety at speeds that would be dangerous on a windy country road. For a number of years in past decades, several western states had substantially higher speed limits on roads of similar design.

Element	***Scott v. Harris*** **Chase**	***Plumhoff v. Rickard*** **Chase**
Passenger	No	Yes
Rate of speed	85 m.p.h. in 55 m.p.h. zone	"At least 75" in 70 m.p.h. zone
Number of lanes	2 lanes	6 lanes
Divided lanes	No	Yes
Oncoming traffic	Yes	No (divided)
Ran red lights	Yes (2)	No

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[22] *See* Governors Highway Safety Association, Survey of the States: Speeding, United States Department of Transportation Federal Highway Administration (2005), http://safety.fhwa.dot.gov/speedmgt/ref_mats/fhwasa09028/resources/surveystates_speeding.pdf.

Pedestrians nearby	Yes	No
Forced cars to pull over	Yes	Disputed
Winding road	Yes	No
Type of force used	P.I.T. maneuver on clear road	15 bullets

V. The Government Does Not Advance a Sound Basis for Concluding That the Defendants Are Entitled to Qualified Immunity

The United States does not rely on the disputed facts that are the bases for the defendants' argument for qualified immunity. The government specifically takes no position as to whether the video recording demonstrates that while in the lot Rickard "posed an immediate threat to the safety of the officers." U.S. Br. 20-21 n.1. It merely notes that there is a dispute as to whether Rickard intentionally rammed Plumhoff's car. U.S. Br. 4. The government's brief observe that several officers reported on the radio that Rickard had attempted to collide with them on the highway, but does not assert Rickard actually attempted to do so. U.S. Br. 3-4. And the United States does not even mention the defendants' contention that Rickard repeatedly accelerated and rammed Gardner's car in the parking lot; to the contrary, the government's brief describes the video as revealing only that Rickard's vehicle "moved slightly forward into officer Garner's vehicle." U.S. Br. 4.

The Solicitor General contends, however, that the limited facts that are undisputed are sufficient to demonstrate that the defendants are entitled to qualified immunity.

1. The government relies, first, on a repeated assertion that "the video makes clear" (U.S. Br. 21) that during the time Rickard's car was in the parking lot he operated it "recklessly" (U.S. Br. I, 11, 12, 21, 30) or "in a dangerous manner." (*Id.* 21, 26; *see id*. 27 ("attempted dangerously to evade apprehension after being cornered")). The Solicitor General's assertion that Rickard was operating the car in the parking lot in a "dangerous manner" is inconsistent with footnote 1 of the government's brief, which expressly does not challenge the district court's conclusion that there is a genuine dispute of material fact as to whether Rickard posed a danger to the officers. U.S. Br. 19-20 n.1.

In seven of these passages, the government's brief simply does not explain what actions by Rickard constituted that assertedly reckless or dangerous conduct. Such a conclusory assertion, without more, is insufficient to support a claim of qualified immunity. In one passage the government does offer an explanation of this contention.

> The video evidence demonstrates . . . that Rickard was operating the vehicle in a reckless manner during his close-quarters encounter with the 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.

U.S. Br. 19.

The first "maneuver" that is visible in the video recordings is that Rickard backed away from most of the officers. Although one officer (Plumhoff) was beside the car, Rickard drove straight back. Another officer (Ellis) was behind the car, but Rickard drove sufficiently slowly that Ellis said he "moved out of the way" avoid the car. J.A. 211. The car does not appear to be moving at any great speed, as Ellis's response confirms. What is visible on the recording does not conclusively demonstrate dangerous behavior.

The other "maneuver" that occurred when, having backed away from the officers, Rickard put his car in drive and drove out of the lot. Although the officers may have at that point been "only steps away," they were behind Rickard and he was driving away from them. Obviously that maneuver posed no danger to the officers; whether Rickard changed gears or drove away "suddenly" is not apparent on the recording.

Even if Rickard's actions in backing away from the officers, or in driving out of the lot, could be characterized as reckless or even dangerous, those maneuvers occurred *after* the police began firing at Rickard. The government repeatedly describes the sequence of events as though the officers did not fire at Rickard until after (and because) he had backed away, turned his car, and was driving away—the

asserted "sudden maneuvers." "[P]etitioners used deadly force to terminate th[e] chase *after* Rickard operated the vehicle in a reckless manner in an attempt to escape." (Emphasis added).[23] Most of the bullets, however, were actually fired before the point in time when the "maneuver[s]" relied on by the government occurred.

2. The government suggests that a reasonable officer could believe that the use of lethal force was warranted because, before Rickard left the highway, he was driving at "high-speed." (U.S. Br. 11, 12, 19, 20, 21, 26, 30). But the United States advances no contention regarding either the actual speed of

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[23] U.S. Br. I ("question presented is whether are entitled to qualified immunity where police officers "use deadly force to prevent a suspect who . . . *has operated* a vehicle recklessly during a close-quarters encounter from resuming his vehicular flight")(emphasis added), 11 ("the question here is whether in 2004 it was clearly established that the police may not use deadly force to prevent a misdemeanant . . . from resuming a dangerous, high-speed chase . . . *after* the driver *had recklessly* operated the vehicle . . . in a close-quarters encounter with police")(emphasis added), 12 ("[i]n 2004, it was not clearly established that a police officer may not use deadly force to prevent a suspect who . . . *operated* his vehicle recklessly during a close-quarters encounter from resuming his vehicular flight")(emphasis added), 19 ("the qualified-immunity question is whether a police officer may shot a motorist who . . . once cornered, operates a vehicle in a dangerous manner in an attempt to evade capture and resume his flight")(footnote omitted), 26 ("[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 . . . .*operated* a vehicle in a dangerous manner once stopped, from returning to the public roads")(emphasis added).

Rickard's car or the speed limit on I-40. On an interstate highway, cars driving at or even below the posted speed limit would normally be described as moving at a high speed. There could of course be cases in which a car's speed was so great, in the context of the circumstances in which the car was being driven, that the speed alone posed a sufficiently real threat of harm to bystanders or pursuing police as to arguably meet the standard in *Tennessee v. Garner*, 471 U.S. 1 (1985). But a party asserting a claim of qualified immunity must establish the speed with which a car was traveling, and articulate why—on the road and in the circumstances at issue—it presented such a danger.[24] The United States does neither.

The United States also asserts that the manner in which Rickard was driving his car on I-40 was "dangerous." U.S. Br. 11, 12, 20, 26. But the meaning of this contention is unclear. Perhaps the government contends that the speed of Rickard's car alone was sufficient to endanger others, but such a contention cannot succeed when the government takes no position as to how fast Rickard's car was traveling, or why that speed would be dangerous on a divided interstate highway expressly designed for high speeds. Perhaps the government credits the

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[24] The United States sought to do so in its brief in *Scott v. Harris*. "It is undisputed that the officers observed respondent driving at least 90 miles per hour in a 55 mile-per-hour zone . . . . [H]e . . . presented a serious risk to other vehicles or pedestrians, because anyone driving 90 miles per hour can lose control at any moment and does not have sufficient time to react to unpredictable events." Brief for the United States as Amicus Curiae Supporting Petitioner, 17.

contention that Rickard repeatedly attempted to ram police cars while on the highway; but the government does not disagree with the district court's conclusion that that contention presented a genuine issue of material fact.

The government at one point argues that "*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 . . . Pet. App. 37." U.S. Br. 24. But the reference to "swerving" and "disregard for the safety of others" are not findings by the district court, but summaries by that court of the factual contentions advanced by the defendants.

The United States suggests that a reasonable officer could conclude that the Sixth Circuit decision in *Smith v. Freland*, 954 F.2d 343 (6th Cir.), cert. denied, 504 U.S. 915 (1992), had held that police may use lethal force to prevent a motorist from returning to the road if the driver has led police on "a high-speed chase." U.S. Br. 26. The driver in *Smith* had been traveling "at speeds in excess of ninety miles per hour," 954 F.3d at 343, in a residential neighborhood. *Scott v. Clay County, Tennessee,* 205 F.3d 867, 878 (6th Cir. 2000). No reasonable officer could conclude that *Smith* had held that such force was permissible against anyone who drives on an interstate highway at any speed that could be labeled "high-speed." The court's conclusion in *Smith* that the driver "had proven he would do almost anything to avoid capture," 954 F.2d at 347, clearly rested on the fact that the driver in that case

twice attempted to crash into police cars, successfully crashed into another, and then "smash[ed] into [a] fence and gate" as he drove off. 954 F.2d at 344. The Sixth Circuit concluded that the driver "posed a significant threat of injury to numerous others," *Dudley v. Eden*, 260 F.3d 722, 726 (2001), because he had in fact attempted to injure the police officers. The government describes *Scott v. Clay Cnty, Tenn.,* 205 F.3d 867 (6th Cir.), cert. denied, 531 U.S. 874 (2000), as "finding no Fourth Amendment violation for police shooting [a] motorist after [a] high-speed flight." (U.S. Br. 27). The driver in *Scott* had done far more than just fell; he attempted to run over a Sheriff and Deputy Sheriff, "commit[ing] serious, life-threatening crimes in the presence of the defendant officers." 205 F.3d at 877.

In the instant case, Rickard had chosen to exit I-40; the issue is whether the manner in which he had driven on the highway demonstrated he was likely to drive on city streets in a manner that posed a significant threat to the safety of others.[25] If there were an indisputable video recording which demonstrated that while on the highway Rickard had driven at 100 m.p.h., repeatedly attempted to ram police cars, and swerved in front of other cars, forcing them to the side of the road, those would be facts on the basis of which a reasonable officer could

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[25] "If successful in that attempt [to get back on the road], Richard *might* have posed precisely the same threat to innocent bystanders as the motorist in *Scott*." U.S. Br. 24(emphasis added).

conclude that the use of lethal force was justified to prevent Rickard from returning to the road. But the unresolved disputes about what occurred on I-40 preclude summary judgment on such a theory.

Respectfully submitted,

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