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,
Respondent.

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

BRIEF OF NATIONAL POLICE ACCOUNTABILITY PROJECT AND HUMAN RIGHTS DEFENSE CENTER AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
P.O. Box 1151
Lake Worth, FL 33460
(561) 360-2523

CYNTHIA HEENAN
NATIONAL POLICE ACCOUNTABILITY PROJECT
499 7th Avenue, 12 N
New York, NY 10018
(212) 630-9939

CHRISTOPHER A. WIMMER
Counsel of Record
EMERGENT LEGAL
25 Taylor Street
San Francisco, CA 94102
(415) 894-9284
cwimmer@emergentlegal.com

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

CORPORATE DISCLOSURE STATEMENT

The National Police Accountability Project and Human Rights Defense Center are nonprofit organizations that have no parent company and do not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

OTHER AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are nonprofit public interest organizations dedicated to protecting the rights of individuals in their encounters with American law enforcement.

The **National Police Accountability Project** ("NPAP") is a nonprofit organization founded by members of the National Lawyers Guild. NPAP has more than five hundred attorney members throughout the United States who represent plaintiffs in police misconduct cases, and NPAP often presents the views of victims of civil rights violations through *amicus* filings in cases raising issues that transcend the interests of the parties. One of the central missions of NPAP is to promote the accountability of police officers and their employers for violations of the Constitution or laws of the United States.

The **Human Rights Defense Center** ("HRDC") is a Washington nonprofit charitable corporation headquartered in Florida that advocates on behalf of the human rights of those held in American prisons and detention facilities of all types. HRDC's advocacy efforts include publishing Prison Legal News, a monthly publication that covers criminal justice-related news and litigation nationwide, as well as publishing and distributing self-help reference books for prisoners.

---

[1] Counsel for the *amici* provided counsel of record for the parties timely written notice of the intent to file this brief. Both petitioners and respondent consented. In addition, no counsel for any party authored any part of this brief, and no party or counsel to a party made a monetary contribution intended to fund the preparation or submission of the brief.

The intended beneficiaries of HRDC's activities include victims of excessive force, and many members of PLN's audience are likewise subject to the frequent use of excessive force.

This case raises significant issues regarding the handling of summary judgment and the availability of interlocutory appeals in police misconduct cases. *Amici* submit this brief to ensure that the right to jury trial is preserved in those matters.

SUMMARY OF ARGUMENT

Around midnight on July 18, 2004, an Arkansas police officer stopped Donald Rickard and Kelley Allen for a broken headlight. Rickard and Allen fled, and several officers pursued them across state lines into Tennessee. After cornering Rickard and Allen in a parking lot, the officers shot them 15 times at close range, killing both.

Based upon their review of the record, *amici* believe that the officers acted unreasonably and in violation of clearly established law, and that the respondent, Rickard's minor daughter, may be able to prevail at trial. The District Court reached the same conclusion, as did the Court of Appeals. The District Attorney General for the relevant county in Tennessee found the officers' conduct to be so egregious as to warrant criminal prosecution.

This Court may differ in its view of the record. It may agree with the petitioners and their supporting *amici* that the officers reasonably perceived that shooting Rickard and Allen was appropriate in light of their vehicular offense, flight, and the risks to members of the public. But the role of this august institution is

not to conduct detailed reviews of trial court records and make factual determinations. As a matter of constitutional law, that is primarily the function of the jury; as a matter of statute, precedent, and policy, it is secondarily the remit of the District Court.

Petitioners and their *amici* ask this Court to view the petition as one raising only legal issues by describing the facts—based on highly contested interpretations of three partial videos of the stop, pursuit, and shootings—as undisputed. They even invite this Court to create a new rule that the reasonableness of the use of force is *always* a purely legal issue, making interlocutory appeals available in virtually every qualified immunity case. This Court should decline these invitations to gut the jury trial right held by victims of police abuse. Video, especially incomplete, low-quality video shot from a police cruiser dashboard, does not eliminate the possibility of genuine factual disputes. And qualified immunity reasonableness analysis is a "factbound morass" suited for jurors and trial judges, not appellate courts.

The opinion of the Court of Appeals should be affirmed, and the case remanded to the District Court for trial.

ARGUMENT

I. The Existence of Video Does Not Eliminate Factual Disputes

Videotape evidence does not eliminate the need for jury fact-finding, and that is particularly so in this case. The Constitution reserves to juries the resolution of disputed factual issues in suits at common law. *See generally* U.S. Const. amend. VII ("In Suits at common

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."); *see also*, *e.g.*, *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935) ("The aim of the amendment . . . is to preserve the substance of the common-law right of trial by jury, . . . and particularly to retain the common-law distinction between the province of the court and that of the jury, whereby, in the absence of express or implied consent to the contrary, issues of law are to be resolved by the court and issues of fact are to be determined by the jury under appropriate instructions by the court."). Suits under section 1983 alleging violations of civil rights are "Suits at common law" for purposes of the Amendment, and so a plaintiff is entitled to a jury trial in such matters. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-10 (1999). As this Court has explained, intrusions on this right must be "scrutinized with the utmost care." *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 565 (1990) (quoting *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959)).

The proliferation of videotape evidence is not a legitimate basis for limiting the right to jury trial. Juries have long evaluated the credibility of in-court testimony, the content of recorded statements or writings, and the narrative provided by photographs. Video is no different. Like these other sources of evidence, it requires the fact-finder to evaluate the credibility of what is being said (*e.g.*, here, when the officers claimed they saw Rickard ramming police cars).

And, like these other sources of evidence, video requires the fact-finder to reach conclusions about what happened based on a partial view of the world. We cannot see what is happening off camera. We cannot see what happened before the video began, or after it stopped. We cannot see what happened from other angles. We are thus left to make interpretations about the historical record based on incomplete facts.

Common sense tells us that, as a result of this inevitable exercise in interpretation, different viewers will perceive events recorded on video differently. Consider the debates that rage over what "actually" happened on instant replay in the National Football League. Despite cameras of the highest quality recording events from numerous different vantages, reviewed at both regular speed and in slow motion, reasonable minds can differ about something as simple as whether a ball touched the ground before it was caught. Why would it be any easier to reach consensus about something as "tense, uncertain, and rapidly evolving," *Graham v. Connor*, 490 U.S. 386, 396-97 (1989), as a charged confrontation between a police officer and a citizen, recorded by low-quality dashboard cameras capturing only portions of the interaction?

Empirical data confirms that video evidence does not eliminate the possibility of factual disputes. A study published in the Harvard Law Review in 2009 showed 1,350 Americans the videotape at issue in *Scott v. Harris*, 550 U.S. 372 (2007), and asked them to provide their views on the factual issues this Court identified as dispositive. While a substantial majority (75%) interpreted the videotape as this Court did—identifying the citizen as the more culpable party,

and the police officers' use of force as reasonable—a significant minority (25%) did not. Instead, these viewers saw the police as the source of the danger posed by the flight, and found the deliberate ramming of the citizen's vehicle unnecessary to avert the risk to the public. Dan. M. Kahan, David A. Hoffman, and Donald Braman, Whose Eyes Are You Going to Believe? *Scott v. Harris* and the Perils of Cognitive Illiberalism, 122 Harv. L. Rev. 837, 864-66 (2009). Thus, had the *Scott* matter gone to trial, at least some rational jurors might have found in favor of the plaintiffs—as might not only Justice Stevens, but also the distinguished jurists on the lower courts. *See Scott* at 390-96 (Stevens, J., dissenting) (offering an interpretation of events recorded on video that differed from that of the majority, but matched that of the trial and appellate courts).[2]

Here, there is considerable dispute about what happened on the summer night Rickard and Allen were shot, despite the existence of three dashboard videotapes. As respondent's brief catalogs, the videos, affidavits, and deposition testimony leave significant questions regarding:

- Whether Rickard intentionally struck any officer's vehicle during the highway portion of the pursuit;

---

[2] Even witnessing an event firsthand does not ensure that one will know the "actual" story. "The most common cause of wrongful convictions is eyewitness misidentification." Gross, Jacoby, Matheson, Montgomery & Patil, Exonerations in the United States 1989 Through 2003, 95 J. of Crim. Law & Criminology 523, 542 (2005).

- Whether Rickard struck any other vehicle;
- Whether Rickard's collision with a police cruiser in the parking lot was caused by an officer ramming him from behind;
- Whether Rickard nearly struck one officer and struck the hand of another;
- Whether the officers were at any risk of being hurt after Rickard backed away and began to drive past them;
- Whether, at the time the officers fired 15 times, Rickard and Allen posed a threat to any member of the public.

These factual disputes prevent the grant of qualified immunity, because they raise the possibility that the officers violated Rickard's clearly-established constitutional rights. Far from settling the matter as a legal issue, "the video makes clear the highly fact-dependent nature of this constitutional determination." *Scott* at 387 (Breyer, J., concurring).

Based on the record before this Court, a number of rational actors have concluded that the officers might have acted unreasonably. Following a detailed analysis of the facts and relevant law, the District Court concluded that there were issues for trial because "the severity of the crime at issue was low, and the suspects posed little immediate threat to the officers or others[;]" it was unclear "[w]hether [Rickard's supposed] assaults" on the officers by ramming his car into theirs had "occurred[;]" the pursuing officers might be just as culpable for creating a hazard to other drivers as was Rickard; and the officers' claimed

perceptions that they had been assaulted and that Rickard presented an imminent danger to others were not reasonable. *Estate of Allen v. City of W. Memphis*, 2011 WL 197426, at *8-10 (W.D. Tenn. Jan. 20, 2011). The Court of Appeals, "[a]fter carefully reviewing the video," held that it "cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred. . . . [p]articularly . . . as it relates to the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." *Estate of Allen v. City of W. Memphis*, 509 Fed. App'x 388, 392 (6th Cir. 2012). Moreover, the District Attorney General for Shelby County, Tennessee elected to criminally prosecute the officers, and denied their request for pretrial diversion. In his opinion, the officers "acted in an extremely reckless manner without regard for innocent people resulting in the death of the victim[,]" and "the videotapes of the incident did not support [their] request" for diversion. *State v. Galtelli*, 2008 WL 427257, at *4 (Tenn. Crim. App. Feb. 13, 2008). The contention of the officers and their *amici* that the relevant facts undisputedly show the officers' reasonableness is thus unsupportable.

This Court should not displace the historical, constitutionally-reserved jury function of resolving disputed factual issues. Instead, it should affirm the decision of the Court of Appeals and remand this matter to the District Court for trial.

II. At Summary Judgment, Even When Video Is Available, Disputed Factual Issues Prevent a Grant of Qualified Immunity

When a defendant moves for summary judgment on qualified immunity grounds, this Court's precedents require a trial court to evaluate whether (1) the officer's conduct violated a statutory or constitutional right, and (2) whether the right was clearly established. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). This Court has recently held that these inquiries need not be conducted in sequential order. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Regardless of the order in which the analysis is conducted, however, these inquiries are fact-bound ones, and a dispute about the underlying facts prevents a grant of qualified immunity.

Whether an officer has violated a constitutional right depends on factual determinations that may be contested. *See*, *e.g.*, *Scott* at 378 ("The first step in assessing the constitutionality of [an officer's] actions is to determine the relevant facts."). For example, one cannot determine whether a Fourth Amendment right has been violated without "slosh[ing] our way through [a] factbound morass" that includes such factors as "the risk of bodily harm" to the citizen posed by the officer's use of force, the "threat to the public" posed by the citizen, the "number of lives at risk," and the "relative culpability" of those involved. *Scott* at 383-84. *See also id*. at 386 (Ginsburg, J., concurring) (considering the risks to others posed by the pursuit and the availability of safer means of terminating the flight); *id*. at 387 (Breyer, J., concurring) ("These are the factual inputs that permit the court to carry out the ultimate

constitutional test of balancing 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'"). That the Fourth Amendment analysis depends on the "objective reasonableness" of the officer's conduct does not make it any less a question of fact. Although "[t]he question we need to answer is whether [the officer's] actions were objectively reasonable[,]" there is no avoiding the "factbound morass." *Scott* at 381, 383.

The "clearly established right" prong of the qualified immunity analysis also depends on factual findings that may be disputed. To decide whether precedent would have put a reasonable officer on notice that his conduct violated a citizen's constitutional rights, one must determine the facts of the present encounter, and then compare them to the facts of prior cases finding constitutional violations. This inquiry "is one in which the result depends very much on the facts of each case," and it "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, 201 (2004). How many shots were fired? Where were the police officers? What offense had the citizen committed? Was the citizen attempting to flee? Did he present a threat to others around him? What would the officers on the scene have perceived to be happening? *See*, *e.g.*, *Brousseau*, 543 U.S. at 199-200; *Saucier v. Katz*, 533 U.S. 194, 208-09 (2001). *See also*, *e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioners at 19 (arguing that relevant facts include "(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").

In its *amicus* brief in support of the petitioners, the National Conference of State Legislatures ("NCSL") argues that, once a set of "historical facts" is established, officers are entitled to draw "every reasonable conclusion about the law and the facts, as well as many unreasonable ones[,]" without liability. Brief of the National Conference of State Legislatures, et al., at 11-12. From this, the NCSL concludes that the reasonableness of an officer's conduct under both prongs of the qualified immunity analysis is a legal issue suitable for immediate determination by a court rather than a jury. *E.g.*, *id*. at 13, 27. This argument fails because it assumes what it seeks to prove. The very purpose of summary judgment is to determine whether there are triable issues of fact. If there are (as both lower courts here held), then there is not a given set of "historical facts" from which a court can make legal determinations, and the matter must be submitted to a jury. It is that jury which is charged with the responsibility to determine the facts, draw inferences, and render a verdict.

The upshot, then, is that disputed factual issues—which can persist even when video is available—prevent the grant of summary judgment in the qualified immunity context. The Court should affirm the decision of the Court of Appeals and remand for trial by the District Court.

III. Even Where Video Is Available, Interlocutory Appeals Should Not Be Available When the Challenge Is to the Sufficiency of the Evidence

While affirming the decision below, this Court should take the opportunity to clarify that interlocutory appeals of denials of qualified immunity are not available when the officers are challenging factual determinations made by the trial court, as is the case here.

Until 2007, this Court's precedents had long made clear that interlocutory appeals were only available where a trial court had entered a decision within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), this Court applied *Cohen* to hold that an appellate court had jurisdiction over an interlocutory appeal by a public official from a summary judgment order denying qualified immunity. That jurisdiction, however, was limited to purely legal issues:

> An appellate court reviewing the denial of the defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal

> norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528. These questions of law were appealable, in significant part, because they were separate from the underlying merits of the plaintiff's case. *Id*. at 528-29.

Consistent with *Mitchell*, in *Johnson v. Jones*, 515 U.S. 304 (1995), this Court affirmed that interlocutory appeals are not available to public officials denied summary judgment on qualified immunity grounds on the basis of a trial court's determination that there remained genuine issues of fact for trial. *Johnson*, 515 U.S. at 313 (a trial court order determining "which facts a party may, or may not, be able to prove at trial" is "not a 'final decision' within the meaning of the relevant statute"). The Court determined that "precedent, fidelity to statute, and underlying policies" all favored limiting interlocutory appeals on qualified immunity grounds to "abstract issues of law," even though such a rule "forces public officials to trial." *Id.* at 317. It acknowledged that appellate courts might not always be able to easily distinguish between reviewable claims of legal error and nonreviewable claims of factual error, but determined that limiting review to questions of pure law was "more manageable" than any other alternative. *Id*. at 318-19.

In *Scott*, the Court tacitly deviated from these precedents. There, the trial court denied qualified immunity at the summary judgment stage after finding genuine issues of fact for trial. The appellate court permitted an interlocutory appeal, and affirmed the trial court. This Court reversed. It did not address *Johnson*, and did not expressly consider whether an interlocutory appeal was appropriate. However, it remarked generally that orders denying qualified immunity could be subject to interlocutory appeal, 550 U.S. at 376 n.2; and it conducted an independent review of the record and determined that, contrary to the trial court, there was no genuine issue for trial, 550 U.S. at 379-80 & 383-85.

The appellate courts' efforts to reconcile these decisions have produced varying, contradictory rules. *Compare*, *e.g.*, *George v. Morris*, 736 F.3d 829, 835-36 (2013) (concluding that *Scott* had not abrogated *Johnson*) and *Romo v. Largen*, 723 F.3d 670, 675 (6th Cir. 2013) (same) with *Johnson v. Niehus*, 491 Fed. App'x 945, 949-53 (11th Cir. 2012) (reading *Johnson* narrowly and adopting the intensive factual review of *Scott*) and *Lewis v. Tripp*, 604 F.3d 1221, 1225-26 (10th Cir. 2010) (viewing *Scott* as an exception to *Johnson*); *see also*, *e.g.*, *Blaylock v. City of Philadelphia*, 504 F.3d 405, 414 (3d Cir. 2007) (viewing *Scott* as "the outer limit of the principle of *Johnson*"). This tension was apparent in the proceedings below, where the Court of Appeals initially dismissed the interlocutory appeal for want of jurisdiction; then reversed course and accepted the appeal; and ultimately upheld the District Court decision on alternative bases. "Whether we call it a dismissal for lack of jurisdiction or an affirmance of the

denial of qualified immunity, the result is the same." *Estate of Allen*, 509 Fed. App'x at 393.

This Court should now clarify that *Scott* did not create an exception to *Johnson*, and that interlocutory appeals challenging a trial court's factual determinations are not permissible. *Johnson* reached the correct result. Where a defendant seeks to appeal a denial of qualified immunity because he disagrees with the facts found by the trial court, he is not seeking resolution of a separate, abstract legal issue unconnected from the merits. To the contrary, he is leveling a direct attack on those factual findings, no matter how he labels it. Detailed review of the summary judgment record to identify jury issues is the trial courts' bailiwick, and an "unwise use of appellate courts' time . . . ." *Johnson*, 515 U.S. at 317. Nothing about the availability of videotape alters this calculus. The circuit courts' confusion over the scope of permissible appeals following *Scott* warrants limitation of that decision to its facts, not disposal of the careful consideration of statute, precedent, and policy found in *Johnson*.

In addition to providing doctrinal clarity, a ruling affirming *Johnson* and limiting *Scott* to its facts would have valuable practical consequences. Permitting interlocutory appeals of factual determinations adds years to the time for resolution of suit, paradoxically undercutting the very protection it is intended to provide, as officers remain under the shadow of liability during the pendency of the appeal. That same delay also harms citizens and next of kin who have suffered potentially fatal mistreatment at the hands of those officers, and who must watch their cases wend,

piecemeal, through the courts before they receive a verdict on their claims. Where facts are in dispute, the parties and the judicial system benefit from a prompt jury determination.

* * * *

This case brings to the fore important questions about the role of the jury in qualified immunity cases. The combination of procedural proposals made by the petitioners and their *amici*, if accepted by this Court, would dramatically undermine the jury trial right in police misconduct cases. Because (in their view) videotape can eliminate the possibility of factual disputes, every case where there is videotape presents purely legal issues that could be resolved at summary judgment. And, for the same reasons, if summary judgment is denied to the officers, they will have an interlocutory appeal—where the admittedly "factbound" issues of the nature of the seizure, the characteristics and conduct of the citizens, and the risks presented by the citizens and the officers would be reviewed on ostensibly "legal" grounds. If this view were to prevail, numerous cases that ought to be evaluated by the diverse American jury pool living near to the original events will instead by resolved by a few judges drawn overwhelmingly from this nation's top universities, far removed from the facts in time and space, on a cold record. The Seventh Amendment demands better than that. Where facts are in dispute, summary judgment should be denied and interlocutory appeals barred, so that victims of police abuse may receive their constitutionally guaranteed jury verdict.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeals and remand the matter for trial before the District Court.

Respectfully submitted,

CHRISTOPHER A. WIMMER
Counsel of Record
EMERGENT LEGAL
25 Taylor Street
San Francisco, CA 94102
(415) 894-9284
cwimmer@emergentlegal.com

LANCE WEBER
HUMAN RIGHTS DEFENSE CENTER
P.O. Box 1151
Lake Worth, FL 33460
(561) 360-2523

CYNTHIA HEENAN
NATIONAL POLICE ACCOUNTABILITY PROJECT
499 7th Avenue, 12 N
New York, NY 10018
(212) 630-9939

Counsel for Amici Curiae