No. 05-1631

In The Supreme Court of the United States

TIMOTHY SCOTT,
a Coweta County, Georgia, Deputy,

Petitioner,

v.

VICTOR HARRIS,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Is it "objectively reasonable" under the Fourth Amendment for a police officer to terminate a high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk?

2. Whether, at the time of the incident, it was "clearly established" that an officer's terminating a dangerous high-speed pursuit by bumping the fleeing suspect's vehicle with his push bumper violated the suspect's Fourth Amendment rights?

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The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005). (J.A. at 65.) The opinion of the United States District Court for the Northern District of Georgia is unreported and reproduced in the Joint Appendix. (J.A. at 38.)

JURISDICTION

The Eleventh Circuit entered judgment on December 23, 2005. (J.A. at 65.) Petitioner filed a timely petition for rehearing en banc on January 11, 2006. The Eleventh Circuit entered an order denying the petition on February 17, 2006. (J.A. at 91.) Petitioner filed a petition for writ of certiorari on May 18, 2006, and the Court granted the petition on October 27, 2006. *Scott v. Harris*, 127 S. Ct. 468 (2006). The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent seeks damages pursuant to 42 U.S.C. § 1983 for an alleged violation of his rights under the Fourth Amendment to the United States Constitution. The Fourth Amendment provides as follows:

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

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in pertinent part, as follows:

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

STATEMENT OF THE CASE

This case involves a police officer's effort to end a dangerous high-speed car chase. The pursuit lasted about six minutes and covered between eight and nine miles, for an average speed of between 80 and 90 miles per hour. (R. 36, Ex. A, 78-22:48:08; R. 36, Ex. A, 66-22:48:47; J.A. at 30.)[1]

[1] The pursuit was videotaped by cameras located in the officers' cruisers. Record 36, Exhibit A consists of the video recordings from the vehicles of Deputy Timothy Scott and Deputy Clinton Reynolds. The videotapes are denoted by vehicle number – No. 66 for Scott and No. 78 for Reynolds – and time as reflected on the video counter. According to the videotape on Reynolds's cruiser, Scott's vehicle made contact with Harris's vehicle six minutes and eight seconds after Reynolds had initially switched on his siren to signal that Harris should pull over. (R. 36, Ex. A, 78-22:48:08; R. 36, Ex. A, 66-22:48:47.) As Harris admits, the pursuit covered between eight and nine miles. (J.A. at 30.) Based on

(Continued on following page)

On the evening of March 29, 2001, Coweta County Deputy Sheriff Clinton Reynolds observed respondent Victor Harris traveling at 73 miles per hour in a 55 miles-per-hour zone. Reynolds attempted to pull over Harris by flashing his lights and then turning on his siren. Instead of stopping, Harris began to speed away. He passed motorists by crossing over double yellow traffic control lines and raced through a red traffic light. (R. 36, Ex. A, 78-22:48, 78-22:44:36; R. 49 at 50; R. 36, Ex. 6.) Reynolds radioed dispatch and reported that he was following a fleeing vehicle.

At the time of Reynolds's call, petitioner Timothy Scott, another Coweta County Deputy Sheriff, was parked by a church about a mile away. Along with Reynolds, his assignment was to assist undercover officers who were making a controlled buy of illegal drugs. When Scott heard Reynolds's report, he assumed the pursuit was in connection with the undercover operation. (R. 48 at 114-17.) Scott became one of several police officers who joined the chase to assist Reynolds. After Scott joined the pursuit, he estimated the speeds to be in excess of 100 miles per hour on a narrow two-lane road. (R. 36, Ex. A, 78-22:42:48, 22:44:09; R. 49 at 50; R. 36, Ex. 6.) Harris cannot dispute these speeds. (R. 38 at 38, 100, 120.)

With Scott and other law enforcement officers hot on his trail, Harris veered into a drug store parking lot that was part of a shopping complex. The shopping complex was apparently closed for the night at the time. Scott was unable to stop his vehicle in time to follow Harris into the parking lot, but he entered the exit to the complex and

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this distance and the time recorded, Harris's speed averaged 80 to 90 miles per hour.

attempted to block Harris from escaping. Unfortunately, Scott's effort to stop Harris in the parking lot proved unsuccessful. As the videotape of the chase demonstrates, Harris was undeterred by Scott's vehicle blocking the exit; Harris collided with Scott's car and then sped off back onto another road, Highway 74, where he once again raced down a two-lane road at high speeds, crossing double yellow control lines and running a red light.

Police officers from the neighboring jurisdiction of Peachtree City had observed the pursuit and decided on their own initiative to block off a few intersections on the road. However, Scott testified that he was not familiar with the area, knew that not all cars had been stopped, and did not know where the intersections were located. (R. 48 at 188.) It was at that point that he requested approval from his supervisor to stop Harris's vehicle by force.

To do so, Scott intended to employ a Precision Intervention Technique ("PIT") maneuver, which causes the fleeing vehicle to spin to a stop. Although permission was granted, he became concerned that the vehicles were moving too quickly to safely execute the maneuver. Instead he picked a moment when no motorists or pedestrians appeared to be in the immediate area, and made contact with Harris's vehicle by using his push bumper. As Scott explained,

> [A]s I made the attempt to start this [PIT], I realized I wasn't going to be able to do it, but there was either a – a red light or a vehicle ahead of us and I needed to get that car stopped now while there was nobody around, so I decided to make direct contact with his vehicle with my push bumper.

(R. 48 at 147.) As Scott further testified, his intent was to stop the pursuit, "not for the vehicle to wreck." (R. 48 at 150.) Moments later, Harris lost control of his car and swerved off the side of the road and rolled down an embankment before coming to a complete stop. Harris was not wearing a seatbelt, and he was severely injured when his car rolled down the embankment.

Harris filed suit under 42 U.S.C. § 1983 alleging violations of his federal constitutional rights as well as Georgia law. All claims have been dismissed on motion, except for a Fourth Amendment claim against Scott in his individual capacity.[2] On interlocutory appeal, the Eleventh Circuit applied the excessive force standard of *Tennessee v. Garner*, 471 U.S. 1 (1985), a case involving an officer who shot and killed an unarmed suspect who was attempting to escape on foot. *Harris*, 433 F.3d at 813.[3] In an opinion authored by Judge Barkett, the Eleventh Circuit ruled that the *Garner* test applied because Scott's contact with Harris's vehicle constituted "deadly force." *Id.* at 814. Under the *Garner* test, the Eleventh Circuit ruled, Scott's use of deadly force was impermissible because "Scott did not have probable cause to believe that Harris had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did Harris, prior to the chase, pose an imminent threat of serious physical harm to Scott or others." *Id.* at 815. "The use of deadly

[2] All claims against Coweta County and all remaining state law claims were dismissed by the district court upon reconsideration following the Eleventh Circuit's interlocutory ruling.

[3] The panel filed an initial opinion that appeared at *Harris v. Coweta County*, 406 F.3d 1307 (11th Cir. 2005). On rehearing, the panel substituted a second opinion published at *Harris v. Coweta County*, 433 F.3d 807 (11th Cir. 2005).

force is not 'reasonable' in a high-speed chase based only on a speeding violation and traffic infractions where there was little, if any, actual threat to pedestrians or other motorists, as the roads were mostly empty and Harris remained in control of his vehicle, and there is no question that there were alternatives for a later arrest." *Id*.

The Eleventh Circuit denied qualified immunity to Scott as well. According to the Eleventh Circuit, the *Garner* framework made it clearly established as of 2001 that contact with Harris's vehicle violated his Fourth Amendment rights. *Id.* at 817-21. By 2001, the Eleventh Circuit wrote, "the law was clearly established that a seizure must be reasonable under the circumstances, which include a review of the offense charged; that an automobile can be used as deadly force; and that deadly force cannot be used in the absence of the *Garner* preconditions." *Id*. at 818-19. Thus, the Eleventh Circuit concluded, Scott should have known in light of these principles that his contact was unconstitutional. *Id*. This Court granted certiorari to review both the constitutionality of Scott's use of force and his claim of qualified immunity. *Scott v. Harris*, 127 S. Ct. 468 (2006).

SUMMARY OF THE ARGUMENT

Scott's contact with Harris's vehicle was objectively reasonable because, under the facts and circumstances presented, he reasonably believed that his actions avoided a greater risk of serious injury or death. Reasonableness under the Fourth Amendment requires a balancing of interests. The Court must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests

at stake. Reasonableness must be judged from the perspective of the officer on the scene, rather than with the 20/20 vision of hindsight. When an officer attempts to end a dangerous high-speed automobile chase, reasonableness requires a direct balancing of the risks of acting and the risks of failing to act. A fleeing car can be a deadly weapon, and an officer who acts reasonably to minimize the dangers of death or injury satisfies the Fourth Amendment.

Scott properly recognized that Harris was a continuing danger to the public, and he acted reasonably to defuse the danger. Scott personally observed Harris driving recklessly and dangerously at extremely high speeds, through red lights, and on the wrong side of the road. Scott had unsuccessfully tried to stop Harris in the parking lot just moments earlier; instead of stopping, Harris collided with Scott's car, managed to sneak by it, and then raced out of the parking lot and back on to a highway where the high-speed chase continued. In light of Harris's driving, Scott acted reasonably in attempting to stop Harris's car. Scott asked for and obtained permission to stop Harris's vehicle. He picked a flat part of the road where no other cars were present and approached Harris's car with caution. The difference between the speed of the two cars at the moment of contact was slight. Given the options that Scott faced, his attempt to stop Harris's fleeing vehicle by using his push bumper was an objectively reasonable choice designed to protect the public.

Finally, if this Court holds that Scott's conduct violated the Fourth Amendment, Scott is nonetheless entitled to qualified immunity. A reasonable officer in Scott's position could have and would have believed that his conduct was lawful in light of clearly established law and

the information the seizing officer possessed. This Court's precedents on excessive force are cast at a high level of generality, and how they apply to many specific cases remains uncertain. Further, the lower court precedents relating to vehicle contacts are both sparse and uncertain. The most relevant cases on the books at the time suggested that Scott's conduct was legal. As a result, Scott is entitled to qualified immunity.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO TERMINATE A HIGH-SPEED PURSUIT IF THE OFFICER REASONABLY BELIEVES THAT DOING SO WOULD AVOID A GREATER RISK OF BODILY INJURY OR DEATH

The Fourth Amendment prohibits unreasonable searches and seizures. Viewing the facts most favorably to Harris, as required in the summary judgment context, Harris was "seized" for purposes of the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989). The key question is whether the seizure was constitutionally reasonable. *Graham v. Connor*, 490 U.S. 386 (1989), sets out the basic principles governing whether a use of force is reasonable:

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has

> long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.

Id. at 396 (citations and internal quotation marks omitted). The Court continued,

> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. . . . With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is 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 396-97 (citations and internal quotation marks omitted).

In the context of efforts to end high-speed pursuits using vehicle-to-vehicle contact, objective reasonableness must be evaluated with a rule that mirrors and reinforces the basic balancing test demanded by the Fourth Amendment. An officer's effort to stop a fleeing car is constitutionally permissible when the officer reasonably believes that his actions are needed to avoid a greater risk of bodily injury or death. Reasonableness requires a balancing of interests, and in the case of high-speed police pursuits, the two sides of the constitutional balance involve risks of harm to a person's safety. Letting the chase continue creates certain risks, as does trying to bring the chase to an end. As a result, an officer's effort to stop a fleeing car is clearly reasonable to avoid a greater risk of bodily injury or death. In that context, the public interest in trying to defuse an extremely dangerous situation caused by the suspect's reckless driving outweighs the "nature and quality of the intrusion on the individual's Fourth Amendment interests." *United States v. Place*, 462 U.S. 696, 703 (1983).

The balance of interests in a police pursuit begins with the recognition that an automobile is "a dangerous instrumentality." *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930). When a driver decides to put himself and others at risk by "taking his chances" of outrunning the police, he creates a series of tragic but predictable risks of harm to himself, innocent bystanders, and the police. A car

driven recklessly at excessive speeds is analogous to a bullet, and no one – not even the driver – knows what it might strike. Perhaps the fleeing car will hit a bystander, such as another driver or a pedestrian. Perhaps it will hit an officer, injuring or killing him. Having decided to take his chances that he can outrun the police, the driver recklessly endangers the lives of himself and the public. When an officer acts reasonably to minimize the risk, the balance of interests plainly tips in the direction of reasonableness. *Cf.* MODEL PENAL CODE § 3.02(1)(a) (Proposed Official Draft 1962) ("Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented. . . . ").

It is true that the police generally have the option of calling off the pursuit, which in some circumstances may lessen the risk. But that does not render all uses of force constitutionally unreasonable in this context; calling off the pursuit does not eliminate the risk to the public, as the driver will continue to drive recklessly for a period of time after the officer withdraws. During that time frame, anything is possible. The driver may not even notice or acknowledge that the risk of capture has ended. Having decided in the heat of the moment to take his chances and try to outrun the police, the driver is unlikely to be thinking rationally. Even if the police cars no longer appear in the rear view mirror, the driver cannot know if the risk of capture has ended. Perhaps the police cars have just taken a different path, and will cut him off at the next intersection or exit. Perhaps the police have called ahead to set up

a road block. Piloting his car at perilously high speed, the fleeing driver remains a serious threat to the public.

Further, the government's interest in stopping the suspect includes furthering important law enforcement interests that are not served if the fleeing driver is permitted to escape. A driver's decision to take his chances and try to escape from the police typically triggers considerable criminal liability. The fleeing driver has not only committed the offense that led the police to engage him initially, but likely has committed a series of other dangerous offenses that may include reckless driving, aggravated assault, endangerment, obstruction, and eluding a peace officer.

Finally, the decision to flee suggests a possibility of other serious criminal activity. Law-abiding drivers normally behave more cautiously when a police officer makes his presence known. Many drivers instinctively slow down. Speeding away naturally arouses a reasonable officer's suspicion; while "not necessarily indicative of wrongdoing, . . . [flight] is certainly suggestive of such." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). For these reasons, the possibility of ending the chase by letting the suspect escape does not make vehicle contact constitutionally unreasonable. The key question is whether the officer reasonably believes that the vehicle contact is needed to avoid a greater harm of bodily injury or death.

The Eleventh Circuit analyzed the reasonableness of the seizure in this case using the framework announced by this Court in *Tennessee v. Garner*, 471 U.S. 1 (1985). In *Garner*, a police officer shot and killed a boy who was fleeing on foot after stealing a purse. The officer realized

that the suspect was not armed, and the officer was not in fear of anyone's safety. Nevertheless, when the suspect began to climb a chain-link fence, the officer shot him in the back of his head, killing him. The Court interpreted the general command of reasonableness to create the following rule to govern firing a weapon at an unarmed fleeing suspect:

> 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. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect. A police officer may not seize an unarmed, nondangerous suspect by shooting him dead.

Id. at 11. In contrast,

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

Id. at 11-12.

Garner applies in special circumstances when it is clear that the force used by an officer amounts to deadly force. In that context, *Garner* accurately translates the

general requirement of reasonableness into a specific constitutional rule. However, *Garner*'s special rule is not useful when the question of deadly force is open and unclear; in those circumstances, the general reasonableness test is more appropriate. When an officer tries to stop a vehicle by using direct vehicle contact, the line between force and "deadly force" becomes very difficult to identify. Vehicle contact can range from a very slight touch to a violent collision. The odds that contact will create a substantial risk of death will vary tremendously, and are difficult for an officer to know in the heat of the moment. Given this uncertainty, *Garner*'s framework should be reserved for cases in which the officer would know with certainty that his use of force will be deadly. Applying *Garner* to vehicle-contact cases such as this one would provide the police with very little guidance on when they can use direct contact to stop a fleeing vehicle. The better approach is to apply a general balancing test that focuses on a reasonable officer's perception of what steps will lessen the risk of serious injury or death.

Consider the difficulty an officer faces trying to determine if *Garner* applies to vehicle contact designed to end a high-speed chase. Deadly force generally incorporates the notion of "substantial risk" or "likelihood" of death. *See, e.g.*, MODEL PENAL CODE § 3.11(2) (Proposed Official Draft 1962) (defining "deadly force" as "force that the actor uses with the purpose of causing or that he knows to create a substantial risk of causing death or serious bodily injury"); *Brower*, 489 U.S. at 599 (suggesting that deadly force is action that is "likely to kill" a suspect). However, police officers cannot know the precise odds that a very particular contact in a very particular way creates just enough risk of serious harm to constitute

"deadly force." Every case is different, as the risks depend on the totality of the circumstances. Like close-up street encounters, automobile pursuits "are incredibly rich in diversity." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Contact can occur at different speeds, in different directions, and in different road conditions. Police officers are not mechanical engineers who can calculate the risks of a given contemplated contact in a rapidly evolving police chase. Causation can be difficult to predict, and an officer might intend to contact in one way but end up making contact in a different way.

The Fourth Amendment does not and should not require police officers to make such delicate and complex judgments in the field. "Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001). The *Garner* test was designed to guide constitutional reasonableness when the use of deadly force is clear. In the case of vehicle contact to end a car chase, however, a general balancing test is both more accurate than *Garner* in this setting and more readily applied by an officer in the field. A general balancing of interests captures reasonableness in the context of an automobile chase far better than *Garner*. Each case is different and depends on the totality of the circumstances, and officers are well equipped to make fact-sensitive decisions as to how to minimize the harms.

Garner guides an officer whose goal is to prevent an unarmed suspect's escape. *Garner*, 471 U.S. at 21 ("Officer Hymon could not reasonably have believed that Garner – young, slight and unarmed – posed any threat. . . . [T]he armed burglar would present a different situation."). In automobile pursuits, *the fleeing suspect's means of escape is also his weapon*. The suspect does not choose whether to escape *or* risk harm to others; by continuing to flee, the suspect chooses to escape *and* risk harm to others.

Reasonable efforts to stop a dangerous vehicle can be analogized to searches and seizures justified by exigent circumstances. Last Term's decision in *Brigham City v. Stuart*, 126 S. Ct. 1943 (2006), is instructive. In *Stuart*, four police officers responded to a late-night call about a loud party at a home. Upon arriving at the home, they heard shouting from inside, and through a screen door observed a fight taking place in the kitchen. The officers entered the kitchen to stop the fight. A unanimous Court held that the officers' entry into the home was constitutionally reasonable. "In these circumstances," the Court concluded, "the officers had an objectively reasonable basis for believing both that the injured adult might need help and that the violence in the kitchen was just beginning." *Id.* at 1949. The Court continued,

> Nothing in the Fourth Amendment required [the officers] to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee,

> poised to stop a bout only if it becomes too one-sided.

Id. Because the officers had a reasonable basis for concluding that their acts were needed to avoid injury, and the steps they took were reasonable ones, their entry into the home did not violate the Fourth Amendment. *Id.*[4]

The same principle applies in the context of efforts to end a dangerous high-speed chase. Nothing in the Fourth Amendment requires an officer to wait until the fleeing driver kills someone, or until it becomes clear that a catastrophe is seconds away. The officer is not a referee who can only observe the fleeing vehicle as its driver puts innocent lives at risk. The officer can take steps to seize the fleeing vehicle to protect the public just as officers may enter a home to protect the victim of a fight. So long as the officer's seizure is reasonable, it complies with the Fourth Amendment.

II. THE SEIZURE IN THIS CASE WAS CONSTITUTIONALLY REASONABLE

Under these constitutional principles, the seizure of Harris's car was reasonable. By the time Scott used force to stop Harris's vehicle, Harris had established that his reckless driving posed a substantial and ongoing threat to the public, the officers, and himself. At the time of making contact, Scott faced a dilemma. Harris obviously was not going to stop on his own. If Scott allowed Harris to continue to drive recklessly at such dangerous speeds, there

[4] Although *Stuart* happened to involve searches, the same principle applies to seizures. *See*, *e.g.*, *Illinois v. McArthur*, 531 U.S. 326, 332 (2001).

was a significant risk of a crash that could kill or injure innocent bystanders or Harris himself. In that context, Scott reasonably believed that his actions were needed to avoid a greater threat of harm. He acted as a reasonable officer to minimize the harm by using a technique that he reasonably believed would stop Harris's vehicle with as low a risk of harm as Harris's driving allowed under the circumstances.

"Street pursuits always place the public at some risk," *California v. Hodari D.*, 499 U.S. 621, 627 (1991), and it is tragic that Scott's reasonable efforts to stop Harris's vehicle did not produce the safe result that Scott desired. However, the tragedy does not change the fact that the constitutional inquiry is prospective: the question is whether, *at the time Scott made contact*, it was reasonable to believe that making contact would avoid a greater risk of harm. *Graham*, 490 U.S. at 396. Because it is clear from the facts that such a belief was reasonable for an officer in Scott's position, no Fourth Amendment violation occurred.

Consider the threat to public safety Harris posed from the perspective of a reasonable officer in Scott's position. Scott joined the pursuit after it was initiated by another officer and was under the reasonable belief that he was pursuing a suspect who was part of a controlled buy of illegal drugs. As the videotape taken from Scott's squad car reveals, Scott personally observed Harris's reckless and dangerous driving at extremely high speeds, through red lights, past parked cars, and on the wrong side of the road. Scott had personally observed Harris swerve into the parking lot to try to elude the officers who were pursuing him.

And perhaps most importantly, Scott had personally observed Harris at very close range as Harris escaped the parking lot despite Scott's car being placed in the way and the presence of several other squad cars surrounding him. Instead of stopping when Scott's car blocked the exit, Harris hit Scott's squad car, managed to sneak past it, and then sped out of the parking lot and back onto a highway, where Harris quickly accelerated to dangerous speeds and continued to drive recklessly. At that point, it reasonably appeared that Harris was simply unwilling to allow his vehicle to be stopped under any circumstances. Scott had two options: stop Harris's car by force or ignore the continuing threat to public safety.

It was reasonable that Scott chose the former option over the latter. A reasonable police officer could not ignore the ongoing danger and wait until an injury or death occurred. Harris might not have realized that he was no longer being followed, and might have continued to drive recklessly, continuing to put himself and the public at risk. Even if Harris had recognized that he was no longer being followed and had stopped driving dangerously that particular time, he might feel emboldened in the future by recollections of his daring and successful escape. A reasonable officer in Scott's position would not let those public-safety risks go unaddressed. "Nothing in the Fourth Amendment required [Scott] to wait" until someone died or was injured, or until the threat to life and limb was only two or three seconds away. *Stuart*, 126 S. Ct. at 1949.

A reasonable officer would also recognize the public interest in the enforcement of the law. Scott did not know the offense that had led to the initial chase; although he believed the pursuit arose from a controlled buy of illegal drugs, the offense was not announced over the police radio.

Certainly, he knew that Harris likely had committed a number of serious offenses in the course of the chase, above and beyond whatever the initial offense may have been. Those offenses may have included (1) aggravated assault, GA. CODE ANN. § 16-5-21; *Durrance v. State*, 549 S.E.2d 406, 408 (Ga. Ct. App. 2001); (2) simple battery, GA. CODE ANN. § 16-5-23; (3) criminal damage to property, GA. CODE ANN. §§ 16-7-22 and -23; (4) criminal interference with government property, GA. CODE ANN. § 16-7-24; (5) obstruction of an officer, GA. CODE ANN. § 16-10-24; *Dukes v. State*, 622 S.E.2d 587, 588 (Ga. Ct. App. 2005); (6) eluding, GA. CODE ANN. § 40-6-395; (7) reckless driving, GA. CODE ANN. § 40-6-390; and (8) intentional operation of a motor vehicle to create danger to persons or property, GA. CODE ANN. § 40-6-251. The governmental interest in enforcement of the law, combined with the interest in public safety, made it a reasonable decision to stop Harris's car using force rather than ignore the ongoing threat to public safety.

Scott's means of stopping Harris's vehicle was reasonable as well. Unfortunately, Harris was driving his car at such a dangerously high speed that Scott's options were limited. As the videotape of the incident reveals, Harris was driving at very high speeds, many miles per hour over the speed limit. However, there was no sign that Harris planned to slow down. In addition, there was no indication of any conditions ahead that might force Harris to change his speed to a point where it would be easier to stop Harris's vehicle more safely. Scott asked for and obtained permission to stop Harris's vehicle. He had originally planned to execute a PIT maneuver, which at appropriate speeds can spin the vehicle to a stop, but he realized that Harris was driving too fast for a PIT maneuver to work

safely. Instead, Scott tried to "bump" Harris's car with his push bumper.

Finally, Scott's execution of his decision to stop Harris's vehicle by making physical contact was also reasonable. Scott did his best to pick a part of the road that would minimize the threat to both the public and Harris. Scott selected a part of the road that was straight and flat, and he intentionally picked a part of the road where there were no other cars. The difference between the speed of the two cars at the moment of contact was slight. Given the options that Scott faced, his attempt to stop Harris's fleeing vehicle by "bumping" it was an objectively reasonable choice.

By the time he made contact with Harris's vehicle, Scott and his fellow officers had exhausted all other means of neutralizing the serious risk of bodily harm and death that Harris created by his manner of driving. They had flashed blue lights at him, turned on their sirens, and blocked intersections; Scott even attempted to block the exit from the shopping center. Harris ignored or evaded all of these means. Scott reasonably believed that Harris had to be stopped by force, and he picked a way to do so that was as reasonable as could be expected in light of the very difficult circumstances Harris created by his dangerous driving.

The Eleventh Circuit concluded that the seizure was unreasonable under *Garner*. *Harris*, 433 F.3d at 813. However, the Eleventh Circuit's analysis was flawed. First, *Garner* should not apply because vehicle contact, such as the contact in this case, is not "deadly force." The classic example is firing a gun in a person's direction, as in

Garner. Bumping a fleeing car is very different. As the Eleventh Circuit recognized in a similar case,

> A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person. A gun is an instrument designed for the destruction of life or the infliction of injury, and death or injury *will result* if a person is struck by a bullet. While an automobile is capable of lethality, it is not designed to kill or injure; and even when automobiles strike each other, death and injury may well not result.

Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1577 (11th Cir. 1992) (Edmondson, J., dissenting), *adopted by the court en banc*, 998 F.2d 923 (11th Cir. 1993) (per curiam).

Here, the contact between the two vehicles is consistent with an attempt to stop Harris's vehicle, not to kill him. Scott approached Harris's vehicle cautiously and even called off the sweeping motion required for a PIT maneuver because of Harris's speed. The difference in speeds between the two cars at the moment of contact was small, and the contact itself was a bump from the rear, not a continual ramming off the road. Considering the use of force at its moment of application, as this Court must under *Graham*, Scott's contact with Harris's vehicle should not be understood as a use of deadly force.

Second, even if *Garner* applies, the facts of this case satisfy the *Garner* test. Scott had probable cause to believe that Harris's outrageous driving posed a continuing danger to the public. Probable cause refers to a "fair probability," *Illinois v. Gates*, 462 U.S. 213, 238 (1983), and in this case there was a fair probability that Harris posed "a threat of serious physical harm, either to the officer or

to others." *Garner*, 471 U.S. at 11. Scott saw Harris cross double yellow lines to pass cars in his way, driving on the wrong side of the road at speeds reaching 100 miles per hour on a curving two-lane road at night. Scott even observed Harris crash into Scott's own vehicle and then continue to drive on in the same reckless manner as before. In light of that experience, captured on videotape, Scott clearly had "probable cause to believe that [Harris] pose[d] a threat of serious physical harm, either to the officer or to others." *Id.*

In its decision, the Eleventh Circuit ruled that Scott lacked probable cause because under Harris's version of the facts, Harris was not driving dangerously:

> [T]aking the facts from the non-movant's viewpoint, Harris remained in control of his vehicle, slowed for turns and intersections, and typically used his indicators for turns. He did not run any motorists off the road. Nor was he a threat to pedestrians in the shopping center parking lot, which was free from pedestrian and vehicular traffic as the center was closed. Significantly, by the time the parties were back on the highway and Scott rammed Harris, the motorway had been cleared of motorists and pedestrians allegedly because of police blockades of the nearby intersections.

Harris, 433 F.3d at 815-16 (citations omitted). Although disputed facts must be construed in Harris's favor at summary judgment, this characterization of the facts does not accurately summarize the totality of the circumstances from "the perspective of a reasonable officer on the scene." *Graham*, 490 U.S. at 396. For example, as the videotape reveals, the road had not been cleared of motorists even though Peachtree City officers, unbeknownst to Scott,

were attempting to block off some of the intersections. Likewise, while Harris managed to remain largely in control of his vehicle, the question is not whether Harris *ended up* causing injuries, but rather whether probable cause – i.e., a fair probability – existed that Harris posed "a threat of serious physical harm, either to the officer or to others." *Garner*, 471 U.S. at 11. In other words, the probable cause inquiry is prospective; it focuses on the chances that the suspect raises a threat of future danger based on past and present conduct. The officer's focus is not on Harris's ability to escape unharmed, but on protecting the public from the ongoing risk of harm. In this case, the evidence of Harris's reckless and dangerous driving amply demonstrated probable cause that satisfies *Garner*.

III. IT WAS NOT CLEARLY ESTABLISHED AT THE TIME OF THE INCIDENT THAT SCOTT'S USE OF HIS PUSH BUMPER TO END THE PURSUIT VIOLATED HARRIS'S FOURTH AMENDMENT RIGHTS

If this Court concludes that Scott violated the Fourth Amendment, the Court should nonetheless reverse under the doctrine of qualified immunity. Scott's decision to use his push bumper to protect the lives of innocent persons from the risks created by Harris's dangerous driving did not violate "clearly established" law. To find otherwise would reduce the requirement of "fair and clear warning" that Scott's conduct violated the Fourth Amendment to no warning at all. *Hope v. Pelzer*, 536 U.S. 730, 746 (2002).

Qualified immunity applies when an officer acting in his official capacity makes a reasonable mistake as to the facts, the law, or some combination of the facts and law

surrounding a police investigation. *Saucier v. Katz*, 533 U.S. 194, 205 (2001). The doctrine recognizes that the police may make understandable errors and that the difficult task of protecting the public without fear of harassing litigation demands a rule other than strict liability. *See, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Immunity for law enforcement officers is rooted in the policy consideration that "the public interest requires decisions and action to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974).

An officer conducting a search is entitled to qualified immunity if "a reasonable officer could have believed" that the search was lawful "in light of clearly established law and the information the searching officers possessed." *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Of course, "[t]he operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Id.* at 639. "It could plausibly be asserted that any violation of the Fourth Amendment is 'clearly established,' since it is clearly established that the protections of the Fourth Amendment apply to the actions of police." *Wilson v. Layne*, 526 U.S. 603, 615 (1999).

> But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that [the Court's] cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639. Here, the appropriate level of specificity requires the Court to determine whether a

reasonable officer could have believed that Scott's use of his push bumper to terminate the risk posed by Harris's dangerous and reckless vehicular flight to be lawful, in light of clearly established law and the information Scott possessed.

The answer is clearly "yes." At the time of this incident, no case had held that vehicle-to-vehicle contact used to end an automobile chase violated the Fourth Amendment. For example, in *Adams v. St. Lucie County Sheriff's Dep't*, 998 F.2d 923 (11th Cir. 1993) (en banc) (per curiam), the Eleventh Circuit adopted Judge Edmondson's dissent in a vacated panel decision involving a high-speed chase through a residential neighborhood that lasted about ten miles. The pursuing officer "intentionally rammed the automobile several times," and after the last contact the fleeing vehicle spun out of control and was "demolished." *Adams*, 962 F.2d at 1565. A passenger in the fleeing vehicle died from injuries sustained in the crash. *Id.*

The Eleventh Circuit did not decide whether the officer's conduct in that case was an unreasonable seizure. Instead, the Eleventh Circuit adopted Judge Edmondson's view that the officer was entitled to qualified immunity because there were no cases "stating or even hinting that ramming a speeding car that presents danger to the public would be an unreasonable seizure under the Fourth Amendment." *Id*. at 1578. Judge Edmondson's opinion noted that vehicle-to-vehicle contact was very different from a shooting, and suggested that it was inappropriate to analyze the legality of a vehicle contact case under *Garner*. *Id*. at 1574 ("I think *Garner*'s facts are too different from this case.").

The Seventh Circuit reached a similar decision the following year in *Donovan v. City of Milwaukee*, 17 F.3d 944 (7th Cir. 1994), where the officers ended a high-speed chase by ramming into the suspect who was on a motorcycle. The Seventh Circuit reasoned that because the suspect had been on a motorcycle rather than in a car, the use of the car in that context was deadly force. *Id.* at 949. Much like the Eleventh Circuit in *Adams*, the Seventh Circuit in *Donovan* did not resolve whether the ramming violated the Fourth Amendment. Instead, the court resolved the case on the ground that the officer was entitled to qualified immunity. *Id*. at 950.

Even more on point is *Weaver v. State*, 63 Cal. App. 4th 188 (1998), in which a California state court held that officers did not violate the Fourth Amendment when they used vehicle-to-vehicle contact to end a pursuit where the driver had not lost control of his vehicle nor driven at particularly high speeds, but had violated many traffic laws. The driver had at one point pulled into a residential driveway, and an officer had partially blocked the exit. However, the driver was able to "squeeze back out of the driveway, after striking the front bumper" of the officer's patrol car. The patrol car was not damaged, and the pursuit continued. *Id*. at 194. The officer eventually concluded that he would use vehicle-to-vehicle contact to end the pursuit for safety reasons; the contact led the fleeing car to crash, and a passenger in the car was badly injured. The court held that the officer's seizure of the fleeing car was constitutionally reasonable under the circumstances of that case:

> [The driver] exhibited a wanton disregard for public safety and a willingness to persist in violent conduct to evade the police, even ramming a

> police car in his attempt to escape when he clearly had an opportunity to stop the pursuit in a safe manner when he had pulled into a driveway.

Id. at 208-09. In addition to *Weaver*, a number of cases had held that firing a weapon into the passenger compartment to stop a fleeing vehicle was permitted under the Fourth Amendment where the violator's reckless driving threatened the safety of officers and civilians. *See, e.g.*, *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000) (passenger injured by bullet fired at fleeing vehicle); *Cole v. Bone*, 993 F.2d 1328, 1330-33 (8th Cir. 1993) (driver shot in the head); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992) (driver shot and killed).

As these cases suggest, it was not clearly established in 2001 that Scott's conduct violated Harris's rights. Furthermore, the most analogous case (*Weaver*) upheld vehicle-to-vehicle contact, and several cases have authorized firing a gun to stop reckless drivers in appropriate settings. The federal appellate cases declined to answer how the Fourth Amendment applies to vehicle-to-vehicle contact. No authorities clearly established that Scott's use of his push bumper was unconstitutional.

This Court's per curiam summary reversal in *Brosseau v. Haugen*, 543 U.S. 194 (2004), is directly on point. In that case, Officer Brosseau shot Kenneth Haugen in the back as he attempted to flee in his vehicle. Brosseau had responded to a report that some men were fighting in the yard of Haugen's mother. Upon Brosseau's arrival, Haugen ran through the yard and hid in the neighborhood, forcing Brosseau to call for assistance. After

30 to 45 minutes of searching, an officer reported that a neighbor had seen a man in her backyard. When Haugen saw Brosseau running in his direction, he fled into a Jeep and locked the door. Brosseau believed that Haugen went to the Jeep to retrieve a weapon. Brosseau arrived at the Jeep, pointed her gun at Haugen, and ordered him to get out of the car. Haugen ignored her command repeatedly, as Brosseau tried to break the window by hitting it with her gun. A fight followed, and in the midst of it, Haugen started the Jeep. At this point, Brosseau jumped back and fired one shot, hitting Haugen in the back. Haugen later filed a Fourth Amendment claim against Brosseau. *Id*. at 195-97.

The Court did not reach the merits of the Fourth Amendment issue, but reversed the Ninth Circuit's decision that had denied Brosseau qualified immunity. The Court stressed that *Garner* and *Graham* offered only very general guidance. Such general guidance was insufficient to strip the officer of qualified immunity in the context of most excessive force claims, as "this area is one in which the result depends very much on the facts of each case." *Id*. at 201. The Court stated,

> The Court of Appeals . . . proceeded to find fair warning in the general tests set out in *Graham* and *Garner*. In so doing, it was mistaken. *Graham* and *Garner*, following the lead of the Fourth Amendment's text, are cast at a high level of generality. Of course, in an obvious case, these standards can "clearly establish" the answer, even without a body of relevant case law. See *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (noting in a case where the Eighth Amendment violation was "obvious" that there need not be a materially similar case for the right to be clearly

> established). See also *Pace v. Capobianco*, 283 F.3d 1275, 1283 (C.A.11 2002) (explaining in a Fourth Amendment case involving an officer shooting a fleeing suspect in a vehicle that, "when we look at decisions such as *Garner* and *Graham*, we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply" to the situation at hand). The present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision.

Id. (some citations omitted).

The same reasoning applies to this case. As far as counsel are aware, no court has *ever* ruled that conduct such as Scott's violates the Fourth Amendment. If that is to become the law, it is obviously not a standard that was clearly established on March 29, 2001. For the Eleventh Circuit to hold to the contrary, the panel had to implicitly overrule its en banc precedent in *Adams* and tease apart the facts of *Brosseau*. *Harris*, 433 F.3d at 812 n.5, 819. Given the very strong reasons why the seizure should be deemed reasonable, and particularly the strong public interest in ending dangerous automobile pursuits, it was certainly reasonable for Scott to conclude that his conduct comported with the Fourth Amendment's concerns.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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