No. 05-1631

In the Supreme Court of the United States

TIMOTHY SCOTT, PETITIONER

v.

VICTOR HARRIS

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

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether, or in what circumstances, a law enforcement officer violates the Fourth Amendment by attempting to terminate a suspect's high-speed vehicular flight by contacting the suspect's vehicle.

2. Whether, at the time of the incident, the law was clearly established that petitioner's conduct was objectively unreasonable under all the circumstances.

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INTEREST OF THE UNITED STATES

This case concerns when a law enforcement officer's use of force to terminate a suspect's high-speed vehicular flight is excessive under the Fourth Amendment, and when law enforcement officers are entitled to qualified immunity for such measures. The same principles of qualified immunity that apply in civil actions against state and local officials under 42 U.S.C. 1983 apply in civil actions against federal officials under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The United States also prosecutes numerous excessive-force cases under 18 U.S.C. 242, which makes it a federal crime to violate a person's constitutional rights. The United States therefore has a substantial interest in the Court's disposition of this case.

STATEMENT

1. At approximately 10:45 p.m. on March 29, 2001, Clinton Reynolds, a deputy in the Coweta County, Georgia, Sheriff's Department, clocked respondent Victor Harris driving approximately 73 miles per hour in a 55 mile-per-hour zone. Pet. App. 31a. Reynolds flashed his blue lights at respondent. *Id.* at 2a. When respondent failed to stop, Reynolds activated his siren and lights. *Ibid.* Respondent then sped up and headed toward the residential and commercial districts of Peachtree City. *Id.* at 2a-3a; Pet. 4. Respondent reached speeds of at least 90 miles per hour on a windy two-lane road, repeatedly passed vehicles by crossing double yellow traffic control lines, and ran a red light. Pet. App. 2a; see Pet. 4 (respondent drove "in excess of 100 miles per hour").

Reynolds radioed dispatch that he was pursuing a fleeing vehicle and did not know the driver's identity. Pet. App. 3a. He did not inform dispatch that the underlying charge was speeding. *Ibid.* Petitioner Timothy Scott—also a deputy sheriff in Coweta County—responded with backup assistance. *Ibid.* At this time, petitioner was working on an undercover drug operation and assumed that the pursuit was in connection with that operation. R. 48, at 114-117.

Entering Peachtree City, respondent turned into a shopping center parking lot near a drug store. Reynolds and two local city police officers followed respondent as he weaved through the shopping center parking lot, while petitioner proceeded around the opposite side of the lot to block the exit. Pet. App. 3a; Pet. 4-5. As respondent approached the exit, he collided with petitioner's vehicle and then sped off onto Highway 74. Pet. App. 3a.

Respondent raced down the highway, again reaching speeds of at least 90 miles per hour, passing more cars by crossing over double yellow control lines and running an additional red light. Pet. App. 2a, 3a; Pet. 5. By this point, petitioner sought "to end the chase as soon as possible because he

felt that [respondent] was acting in a reckless and extremely dangerous manner." Pet. App. 32a. Petitioner obtained approval from his supervisor to make physical contact with respondent's vehicle in a "Precision Intervention Technique" maneuver, which is designed to cause a vehicle to spin and come safely to a stop. *Id.* at 3a-4a.[1] Because respondent was traveling at such a high speed, however, petitioner concluded that he could not execute it safely. *Id.* at 4a. He decided instead to hit respondent's rear bumper with his push bumper. *Ibid.* Petitioner made this contact when no other motorists were in the immediate area to prevent an accident with an innocent motorist. *Id.* at 32a-33a; Pet. 5-6.

After petitioner bumped respondent, respondent lost control of his vehicle. Pet. App. 4a. Respondent's vehicle left the roadway, ran down an embankment, and crashed. *Ibid.* Respondent (who had not been wearing a seatbelt (Pet. 6)) was paralyzed by injuries he suffered in the crash. Pet. App. 4a.

2. Respondent filed an action under 42 U.S.C. 1983, alleging that petitioner and others had violated his constitutional rights and seeking damages. Respondent admitted that he drove up to 90 miles per hour in a 55 mile-per-hour zone, "pass[ed] improperly," and ran a red light, see Resp. Br. in Opp. to Pet. Mot. for Summ. J. 11-12, but he argued that petitioner violated his rights under the Fourth Amendment by making contact with his car in order to stop him.

The district court denied petitioner's motion for summary judgment on the basis of qualified immunity. Pet. App. 36a-42a. The district court held that a jury could conclude that petitioner's intentional contact between his vehicle and respondent's constituted a seizure, and that petitioner's use of force—deadly or not—was not "objectively reasonable." *Id.*

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[1] Petitioner's police department had a vehicle pursuit policy which provided that "deliberate physical contact between vehicles at any time may be justified to terminate the pursuit upon the approval of the supervisor." Pet. App. 23a n.2.

at 38a. "The central fact" for the court was that, at the time Deputy Reynolds "deci[ded] to instigate a high-speed chase, [respondent's] only crime was driving 73 miles per hour in a 55 miles-per-hour zone." *Ibid.* The court recognized that "[respondent] acted in an unsafe manner" during the chase, but refused to attribute much weight to that fact, because respondent "maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road." *Id.* at 39a. The court also refused to give any weight to respondent's collision with petitioner as respondent escaped from the parking lot, finding a material dispute about what happened. *Ibid.*

With respect to whether petitioner would nevertheless be entitled to qualified immunity on the ground that the violation, if any, was not "clearly established," the district court concluded that "there are material issues of fact * * * which present sufficient disagreement to require submission to a jury." Pet. App. 41a-42a.

3. The court of appeals affirmed the denial of qualified immunity to petitioner. Pet. App. 5a-29a. Conducting the "two-part inquiry" set out in *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001), Pet. App. 6a, the court held that, accepting respondent's allegations as true, petitioner's seizure of respondent was objectively unreasonable, and that the Fourth Amendment violation was clear at the time petitioner acted. See *Saucier*, 533 U.S. at 201 (explaining that qualified immunity turns on two-step inquiry under which a court must determine first whether "the facts alleged show the officer's conduct violated a constitutional right" and, if so, next determine "whether the right was clearly established").

The court of appeals reasoned that the case was governed by *Tennessee* v. *Garner*, 471 U.S. 1 (1985), which held unconstitutional a state statute that authorized the use of deadly force against an "unarmed, nondangerous suspect." Pet. App. 8a (quoting *Garner*, 471 U.S. at 11). The court of appeals explained that, under *Garner*, "the use of deadly force may

not be used to seize a fleeing felon 'unless it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others.'" *Ibid.* (quoting *Garner*, 471 U.S. at 3). The court concluded that a jury could find that petitioner had used "deadly force" to stop respondent because "an automobile, like a gun, can be used deliberately to cause death or serious bodily injury." *Id.* at 10a. The court further concluded that any such use of deadly force was excessive under the circumstances because "[petitioner] did not have probable cause to believe that [respondent] had committed a crime involving the infliction or threatened infliction of serious physical harm, nor did [respondent], prior to the chase, pose an imminent threat of serious physical harm to [petitioner] or others." *Id.* at 11a.

As for whether petitioner was nevertheless entitled to qualified immunity, the court concluded that *Garner* clearly established that petitioner's conduct was objectively unreasonable. Pet. App. 15a-16a. The court distinguished *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam), where this Court summarily reversed the denial of qualified immunity to an officer who shot a fleeing suspect after he jumped into a car to drive away from the police. The court explained that, in contrast to the situation that petitioner confronted, the officer in *Brosseau* "had arguable probable cause to believe that the suspect posed an imminent threat of serious physical harm to several officers and citizens in the immediate surrounding area." Pet. App. 18a. Thus, while *Garner* did not provide "fair notice" of a Fourth Amendment violation to the officer in *Brosseau*, the court reasoned, *Garner* provided such notice here. *Id.* at 19a.

The court rejected petitioner's argument that reading *Garner* as clear invalidation of his conduct was foreclosed by *Adams* v. *St. Lucie County Sheriff's Department*, 998 F.2d 923 (11th Cir. 1993) (per curiam), where the en banc court concluded that *Garner* did not clearly establish that ramming

a fleeing suspect's vehicle during a high-speed chase was an unreasonable seizure. Pet. App. 7a, 23a n.5. The court reasoned that *Adams* involved a chase that occurred before this Court's decision in *Brower* v. *County of Inyo*, 489 U.S. 593 (1989), which held that a roadblock could constitute a Fourth Amendment seizure. Pet. App. 19a. The court recognized that *Garner* was only a "general constitutional rule," but concluded nevertheless that petitioner had "fair warning" that his conduct was unconstitutional "even though the very action in question has [not] previously been held unlawful." *Id.* at 20a (quoting *Hope* v. *Pelzer*, 536 U.S. 730, 740-741 (2002)).

SUMMARY OF ARGUMENT

A. Petitioner did not violate respondent's Fourth Amendment rights, because the level of force he used was a reasonable response to respondent's extremely dangerous and reckless vehicular flight under the circumstances that he confronted. Respondent demonstrated his dangerousness by driving at exceptionally high speeds on a two-lane road, passing other cars by crossing over double yellow lines, running red lights, weaving through a shopping center parking lot, and continuing his flight after colliding with petitioner's vehicle. In light of the risk of serious injury or death that such conduct posed to the pursuing officers, other motorists, or pedestrians, petitioner reasonably decided to try to bring respondent's vehicle to a safe stop by bumping it from behind. The risk of harm to respondent from petitioner's conduct was proportionate to the risk of harm to the public from respondent's reckless flight.

In concluding otherwise, the court of appeals failed to follow this Court's rule that the reasonableness of force must be assessed from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham* v. *Connor*, 490 U.S. 386, 396 (1989). Indeed, the court relied on factors that were either wholly irrelevant or, at a minimum, not the kind of considerations that officers on

the scene could reasonably have been expected to take into account in the heat of respondent's high-speed flight, such as respondent's use of turn signals while executing illegal passing maneuvers, slowing down while running through red lights, and maintaining control of his vehicle despite driving 90 miles per hour in a 55-mile-per-hour zone. Police officers in the midst of a high-speed chase are not required to make on-the-spot judgments about whether fleeing drivers are "good" reckless drivers or bad ones before deciding what force to use to protect the public from their reckless flight. The court further erred in failing to attribute any weight either to respondent's collision with petitioner when petitioner sought to block respondent from exiting a parking lot or to respondent's decision to continue his flight in the wake of that collision.

The court also erred by minimizing the threat that respondent posed based largely on the conduct in which respondent engaged *before* the chase began. The reasonableness inquiry requires examination of the totality of the circumstances, and respondent's conduct *after* the chase began was highly relevant in gauging the threat posed by respondent to himself, police officers, other motorists, and bystanders in the commercial area where he was traveling, and to petitioner's calculus in deciding to try to stop respondent by making contact with his car. Regardless of why a driver chooses to flee police and embark upon reckless high-speed flight, he constitutes the same threat to the public behind the wheel. The grave threat posed by a suspect operating a motor vehicle in a reckless manner fundamentally distinguishes this context from the context of an officer confronting an "unarmed, nondangerous suspect," fleeing on foot. *Garner*, 471 U.S. at 11.

The court's emphasis on petitioner's ability to track down respondent at a later date was equally flawed. Under the court of appeals' approach, every law breaker in or with access to an automobile would have an incentive to flee, knowing that the Constitution prohibits the police from using force

against a suspect's car to terminate a high-speed chase. This Court has rejected such an approach to Section 1983 liability for alleged substantive due process violations, see *County of Sacramento* v. *Lewis*, 523 U.S. 833 (1998), and it should do so here as well. If the suspect's conduct in fleeing from the police itself presents an immediate danger to public safety—as a suspect's attempt to elude the police at high speeds while behind the wheel of a motor vehicle invariably will—the Constitution affords police the latitude to use force against the suspect to attempt to neutralize that danger so long as the level of force is proportionate to the threat.

B. Even if the level of force petitioner used to stop respondent violated the Fourth Amendment, petitioner is nevertheless entitled to qualified immunity because, at the time petitioner acted, the law did not put him on notice that his conduct was constitutionally unreasonable. Excessive force claims are heavily fact dependent. As a result, in the context of excessive force claims, this Court has made clear that an officer who stands accused of using constitutionally excessive force is entitled to qualified immunity unless the alleged violation was established in the "particularized" sense that a reasonable officer would have understood that his actions violated the law in the specific "situation he confronted." *Brousseau*, 543 U.S. at 199; *Saucier*, 533 U.S. at 202.

Brosseau and *Saucier* control this case and make clear that the court of appeals erred in relying on the general principle, established in *Garner*, that deadly force cannot be used to stop the flight of an unarmed, nondangerous suspect. Indeed, *Brosseau* summarily reversed a Ninth Circuit decision that had held, just as the court of appeals did here, that *Garner* clearly established that deadly force cannot be used to stop vehicular flight. *Brosseau* presented a much closer parallel to *Garner* in that at least the force used—a gunshot—was the same as in *Garner*. This case is distinct from *Garner* in both the means of flight (by car, rather than on foot) and the force used (using a police vehicle to stop the

fleeing vehicle, rather than a gunshot to the person). Nonetheless, *Brosseau* emphasized that both *Garner* and the more general rule of *Graham* informed the analysis and explained that cases involving the use of force to terminate vehicular flight do not lend themselves to a categorical rule; rather "the result depends very much on the facts of each case." 543 U.S. at 201.

The case with facts most analogous to those here did not give petitioner notice that his conduct was unlawful. To the contrary, in *Adams* v. *St. Lucie County Sheriff's Department*, the Eleventh Circuit observed that it was "doubtful" that an officer's ramming a suspect's car during a high-speed chase to halt the suspect's flight was excessive force and held that *Garner* did not provide a clear answer to the question. 962 F.2d 1563, 1577-1578 & n.6 (1992) (Edmonson, J., dissenting), adopted by the court en banc, 998 F.2d 923 (1993) (per curiam). Neither respondent nor the court of appeals pointed to any case holding otherwise, and many other decisions have upheld the use of even deadly force to stop reckless and dangerous vehicular flight. In these circumstances, any mistake on petitioner's part in concluding that respondent's conduct justified the level of force he used was undoubtedly reasonable. The court of appeals therefore erred in refusing to accord petitioner qualified immunity.

ARGUMENT

PETITIONER IS ENTITLED TO QUALIFIED IMMUNITY FROM RESPONDENT'S "EXCESSIVE FORCE" CLAIM

"Qualified immunity shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted." *Brousseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The doctrine "exists because 'officials should not err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (2001) (per

curiam) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). Qualified immunity thus provides "'ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Hunter*, 502 U.S. at 229 (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341 (1986)). The doctrine is particularly important in protecting the decisions of law enforcement officers who must make heat-of-the-moment judgments in response to complex and unfolding threats.

The qualified immunity defense has two steps. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). First, a court must decide whether "the facts alleged show the officer's conduct violated a constitutional right." *Ibid*. Second, if such a violation exists, the court must decide whether that right was "clearly established" at the time the officer acted such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id*. at 202. It is not enough for the plaintiff to identify some generalized constitutional right, such as the Fourth Amendment right to be free from the excessive use of force, that was established at the time of the relevant conduct. *Id*. at 201-202. As explained below, respondent's excessive force claim fails on both of these independent inquiries, and petitioner therefore is entitled to qualified immunity from suit.

A. The Force Used By Petitioner To Terminate Respondent's Vehicular Flight Was Reasonable, And Therefore Constitutional, Under The Circumstances

1. The legal standard for "excessive force" claims

In *Graham* v. *Connor*, 490 U.S. 386, 395 (1989), this Court held "that *all* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." The Court explained that "[d]etermining

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." *Id.* at 396 (internal quotation marks and citation omitted).

In *Tennessee* v. *Garner*, 471 U.S. 1 (1985), the Court held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* at 11. There, an officer shot and killed an unarmed suspect fleeing on foot from the site of a burglary. While the Court invalidated a Tennessee statute to the extent that it authorized the officer's use of deadly force against an "unarmed, nondangerous suspect," the Court made clear at the same time that the officer's conduct would have been reasonable had he "ha[d] probable cause to believe that the suspect pose[d] a threat of serious physical harm, either to the officer or to others." *Ibid.*

In *Graham*, the Court explained that *Garner* reflected application of the Fourth Amendment's traditional "totality of the circumstances" test to the use of deadly force to seize an unarmed and nondangerous suspect. See 490 U.S. at 396 (citing *Garner* for the proposition that "the question is 'whether the totality of the circumstances justifie[s] a particular sort of . . . seizure'"). Consistent with that understanding, the *Graham* Court emphasized that the Fourth Amendment reasonableness inquiry is highly fact-specific, "requir[ing] 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." *Ibid.* Moreover, in *Brosseau*, 543 U.S. at 198-199, although the Court expressly declined to reach the underlying Fourth Amendment question, it indicated that both *Graham* and *Garner* were relevant (even though *Brosseau* provided a clearer parallel with *Gar-*

ner than this case) and that the totality of the circumstances were relevant.

In determining whether an officer used unreasonable force, courts must take "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396. That perspective, the Court observed, is necessary to "allow[] 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." *Id.* at 396-397. The inquiry into reasonableness 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 397. A claim that a police officer used excessive force—deadly or not—in stopping a suspect's vehicular flight thus is governed by the Fourth Amendment's objective reasonableness standard and must be carefully evaluated from the officer's perspective and in light of all the surrounding circumstances that he faced.

2. Petitioner's use of force was not excessive

Petitioner's conduct was objectively reasonable in light of the facts and circumstances he confronted on the night of the high-speed chase precipitated by respondent.

a. At the moment petitioner decided to try to bring respondent's vehicle to a stop by hitting respondent's rear bumper with the push bumper of his vehicle, an officer in petitioner's position would have reasonably believed that respondent presented a substantial risk of serious injury or death to petitioner and others and that stopping respondent was necessary to prevent such harm and his escape. Respondent demonstrated his dangerousness in at least two separate ways.

First, respondent drove extremely recklessly. He reached speeds up to or exceeding 90 miles per hour on a windy two-lane highway (while numerous other cars were on the road),

crossed the double yellow line to pass cars, ran two red lights, swerved through a shopping center parking lot, and collided with petitioner's vehicle.[2] Respondent's reckless driving gave an officer in petitioner's position ample reason to conclude that respondent posed a substantial risk of serious injury or death to other motorists (or bystanders) who came into his path unless or until his flight was arrested. Respondent's willingness to lead police officers on a high-speed chase provided little prospect that respondent would cease his reckless flight absent successful escape, loss of control of respondent's own car, or direct intervention by the police. An officer could have also concluded that he had probable cause to believe that respondent's high-speed flight was both criminal and involved the threatened infliction of serious physical harm.[3]

Second, respondent struck petitioner's vehicle after petitioner had attempted to block respondent's exit from the shopping center parking lot and continued his flight. Judged from the perspective of the officer on the scene, a collision that facilitates or does not deter flight strongly suggests that the fleeing suspect presents a risk of serious harm, because it demonstrates that respondent had no intention of stopping, regardless of the obstacles lying or placed in his path. See *Garrett* v. *Athens-Clarke County*, 378 F.3d 1274, 1276-1281 (11th Cir. 2004) (per curiam) (fettering suspect (who died) by tying his wrists to his ankles and spraying him with pepper

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[2] Although there is some dispute over the specifics of the collision, and the facts must be evaluated in the light most favorable to respondent at this juncture, there is no dispute that a collision occurred. In addition, although the court of appeals stated that "the roads were mostly empty," Pet. App. 11a, the videotapes show otherwise.

[3] Respondent violated numerous laws, including Ga. Code Ann. § 40-6-181 (2004) (speeding) ; *id*. § 40-6-390 (reckless driving); *id*. § 40-6-395 (fleeing police officer); *id*. § 16-10-24 (2003) (obstruction of officers) , and potentially violated others, including Ga. Code Ann. § 16-5-21 (aggravated assault); *id*. § 16-7-22 or § 16-7-23 (criminal damage to property); *id*. § 16-7-24 (criminal interference with government property).

spray was not unreasonable because suspect—who had led officers on high-speed chase, continued driving after an officer had bumped his vehicle, struck an officer's vehicle, and wrestled with an officer—"ha[d] shown that he ha[d] every intention of fighting and forcibly escaping arrest"); *Smith* v. *Freeland*, 954 F.2d 343, 344-347 (6th Cir.) (shooting and killing fleeing suspect was not unreasonable because the suspect, who had exceeded 90 miles per hour during chase, struck officer's vehicle, and escaped officer's blockades, "had proven he would do almost anything to avoid capture"), cert. denied, 504 U.S. 915 (1992).

Because respondent's conduct presented a clear and immediate danger to public safety, and because respondent had demonstrated that he had no intention of ceasing that conduct, petitioner was justified in concluding that it was appropriate to take the step of contacting respondent's car from behind with his push bumper in an effort safely to stop respondent's dangerous flight. See *Adams* v. *St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1577-1578 (11th Cir. 1992) (Edmonson, J., dissenting) (observing that "it is doubtful that [the officer's repeated ramming of the fleeing suspect's vehicle] in this case was constitutionally excessive" because "[a] driver—even a misdemeanant—eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force"), adopted by the court en banc, 998 F.2d 923 (1993) (per curiam).

b. In reaching the contrary conclusion, the court of appeals erred in multiple ways.

First, the court of appeals erred by evaluating the reasonableness of petitioner's conduct solely by reference to *Garner*. In doing so, the court failed to follow the Court's more recent precedents in *Graham* and *Brosseau*, which made clear that *Garner* was merely an application of the Fourth Amendment reasonableness test to the facts that were specifically presented there. 490 U.S. at 395-396; 543 U.S. at 197.

The court of appeals concluded that petitioner used deadly

force, Pet. App. 11a, and thus placed petitioner in *Garner*'s box. *Garner*, however, especially in light of *Graham* and *Brosseau*, should not be read to adopt a single bright-line rule for all uses of potentially deadly force. *Brosseau* suggests that differences in the form of flight inform the Fourth Amendment calculus. Differences in the force used are at least as relevant, and bumping the suspect's car from behind, even at a high rate of speed, is not the equivalent to pointing a gun at the suspect and shooting him. An accurate gunshot is certain to cause serious injury or death to the suspect, whereas bumping the suspect's car from behind is not. As the Eleventh Circuit itself has observed, "[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." *Adams*, 962 F.2d at 1577. On this basis alone, *Garner*, while relevant, is not entitled to the controlling weight attributed to it by the court of appeals.[4]

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[4] The United States Department of Justice has as a policy matter defined "deadly force" as "the use of any force that is likely to cause death or serious physical injury." *Commentary Regarding the Use of Deadly Force in Non-Custodial Situations* pt. II (visited Dec. 12, 2006) <http://www.usdoj.gov/ag/readingroom/resolution14c.htm> (*Commentary*). The Department's policy statement provides that "[d]eadly force may be used to prevent the escape of a fleeing subject if there is probable cause to believe: (1) the subject has committed a felony involving the infliction or threatened infliction of serious physical injury or death, and (2) the escape of the subject would pose an imminent danger of death or serious physical injury to the officer or to another person." U.S. Dep't of Justice, *Policy Statement, Use of Deadly Force* pt. I(A) (visited Dec. 12, 2006) <http://www.usdoj.gov/ag/readingroom/resolution14b.htm> The policy addresses the firing of weapons at the occupants of motor vehicles or to otherwise disable motor vehicles, see pt. V, but it does not address the use of means other than firearms to terminate vehicular flight. Moreover, the Commentary to the policy notes that "the Department deliberately did not formulate this policy to authorize force up to constitutional or other legal limits." *Commentary* pt. I. In addition, the Commentary emphasized that "[t]he reasonableness of a belief or decision must be viewed from the perspective of the officer on the scene, who may often be forced to make split-second decisions in circumstances that are tense, unpredictable, and rapidly evolving." *Id.* pt. II.

Because (quite unlike the firing of a gun) the use of a vehicle to stop a fleeing suspect may not amount to deadly force in any number of circumstances, the Fourth Amendment reasonableness inquiry in this context should be conducted under the totality-of-the-circumstances inquiry applied in *Graham*. That inquiry may account for the fact that some uses of a vehicle may present a greater risk of injury or even death than others, but also is faithful to the Court's repeated insistence that, to ensure that the Constitution provides officers the latitude they need to do their jobs effectively, the inquiry into the reasonableness of the officer's conduct be fact-intensive and take into account the totality of the circumstances. See *Graham*, 490 U.S. at 396.

Moreover, *Garner* addressed the situation where an officer meets "an unarmed, nondangerous suspect." 471 U.S. at 11; see *id.* at 10 (focusing on "nonviolent suspects"). By definition, vehicle flight cases are fundamentally different, as *Brosseau* appears to recognize. A vehicle poses a potentially deadly risk to others, and a suspect operating a vehicle in a reckless fashion is thus always dangerous, independent of the seriousness of the underlying crime that led to the attempted stop and the ensuing flight. Accordingly, regardless of whether vehicle-to-vehicle contact may constitute deadly force, the inquiry discussed in *Garner* is doctrinally unfit for the vehicle-flight context.[5]

Second, the court erred by failing to apply *Graham*'s reasonable-officer-on-the-scene standard. *Graham*, 490 U.S. at 396-397. The court held that a reasonable jury could conclude that petitioner lacked probable cause to believe that respondent posed a threat of serious physical harm to the

[5] Even assuming that bumping a suspect's car constitutes deadly force, and that the *Garner* standard applies, petitioner did not use excessive force under the circumstances here. Petitioner had probable cause to believe that respondent posed a potentially grave threat to the public given the reckless manner in which he operated his vehicle and his refusal to comply with petitioner's efforts to prevent his escape.

officers who were chasing him or to other motorists or pedestrians. The court observed that "the roads were mostly empty and [respondent] remained in control of his vehicle." Pet. App. 11a. Those observations reflect application of precisely the type of 20/20 hindsight that *Graham* deemed improper.

It is undisputed that the officers observed respondent driving at least 90 miles per hour in a 55 mile-per-hour zone, passing vehicles on a two-lane road by crossing over double yellow traffic control lines, running through red lights, and driving through a shopping center. In the heat of a high-speed chase, the officers conducting the pursuit cannot be expected to count the number of vehicles on the roads (beyond those respondent passed by crossing the double yellow lines), pay attention to whether the suspect is using his turn signal when passing vehicles illegally (not a highly relevant consideration under the circumstances), or evaluate whether the precise speed at which the suspect drove through red lights mitigated the dangers that conduct inherently presents.

Moreover, even assuming respondent "remained in control" while driving recklessly, he still 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, because using turn signals to pass by crossing the double yellow line does not provide any protection to oncoming traffic, and running red lights presents a high risk to crossing traffic regardless of the precise speed at which the violation is accomplished. Thus, in the heat of the moment, police officers do not have to determine whether a suspect is a "good" reckless driver where, as here, reckless driving itself clearly poses a substantial risk to the public.

The court of appeals relied on the fact that, at the time petitioner bumped respondent, police blockades had cleared "the motorway * * * of motorists and pedestrians." Pet. App. 13a. But there is no evidence that petitioner was aware of the extent of the blockades such that he would have known

how far ahead of respondent the police had sealed off all roadways. Especially in light of respondent's escape from the shopping center parking lot exit blocked by petitioner's vehicle and the fact that the chase already had covered approximately nine miles, the police would have had to seal off an exceptionally large area to ensure that respondent would not run into another vehicle (or pedestrian). Moreover, rather than detracting from the reasonableness of petitioner's conduct, that the stretch of highway on which petitioner decided to bump respondent's vehicle had been cleared of traffic buttresses the reasonableness of his action, because it provides contemporaneous evidence that respondent's driving posed risks and it demonstrates that the police acted to minimize the risks posed to innocent persons.

Third, the court erred by refusing to attribute any weight to the collision in the parking lot on the ground that there was a material dispute regarding precisely what happened. As explained above, no matter who hit whom or whether or not respondent could have avoided the collision when petitioner sought to block the exit, there is no dispute that a collision occurred. A reasonable officer in petitioner's position would have concluded from respondent's refusal to stop—either before or after colliding with petitioner's vehicle—that respondent posed a substantial threat to public safety and that blocking his path would not be sufficient to stop him. See *Smith*, 954 F.2d at 347 ("[The pursuing officer] could reasonably believe that [the suspect] could escape the roadblock, as he had escaped several times previously.").

Fourth, the court of appeals erred by basing its determination that petitioner's conduct was unreasonable largely on what respondent had done to prompt the high-speed chase. Pet. App. 11a (emphasizing that respondent's infraction was speeding and that respondent, "*prior to the chase*, [did not] pose an imminent threat of serious physical harm to [petitioner] or others") (emphasis added). Under *Graham*, "the severity of the crime at issue" is only one of several factors

that courts should consider in evaluating the reasonableness of the officer's response. 490 U.S. at 396. That factor may have more weight when the means of attempted escape present no risk, as in the unarmed, nondangerous suspect fleeing on foot in *Garner*. But when the means of escape pose serious risks—as in the case of an armed suspect brandishing a weapon or a suspect fleeing at high-speed in a vehicle—the seriousness of the underlying offense is less relevant. Indeed, in many cases the courts of appeals have upheld the use of deadly force to terminate a high-speed chase that began after the observation of traffic violations. See *Pace* v. *Capobianco*, 283 F.3d 1275, 1276, 1281-1282 (11th Cir. 2002) (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially pulled over for driving without his headlights on); *Scott* v. *Clay County*, 205 F.3d 867, 871, 876-879 (6th Cir.) (holding constitutionally reasonable the shooting of a passenger in the vehicle of a fleeing suspect who was initially observed driving "erratically"), cert. denied, 531 U.S. 874 (2000); *Cole* v. *Bone*, 993 F.2d 1328, 1330, 1333-1334 (8th Cir. 1993) (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially observed failing to pay a toll); *Smith*, 954 F.2d at 344, 346-348 (holding constitutionally reasonable the shooting and killing of a fleeing suspect who was initially observed running a stop sign).[6]

[6] As a policy matter, some federal law enforcement components have decided to limit the circumstances in which vehicle pursuits of suspects are allowed. For example, the policy adopted by the United States Park Police provides that pursuit of a vehicle is authorized in three circumstances: (1) " the offense for which the suspect is being pursued" is a felony (but "[t]he act of fleeing and eluding the police shall not in itself be a pursuable offense") ; (2) "[t]he suspect presents a clear and immediate threat to public safety if not immediately apprehended"; or (3) the suspect has committed "[t]raffic violation(s) on limited access highways within primary [Park Police] jurisdiction." U.S. Park Police Gen. Order § 2205.01. The policy further provides that "[a]n officer shall not use his/her vehicle to strike or ram a suspect's vehicle with the intent of solely disabling the vehicle, unless he/she has been specifically trained in techniques that attempt to minimize danger to himself/herself

While the nature of the underlying offense remains relevant, when the circumstances of a suspect's flight create substantial risks, those circumstances are highly relevant to assessing the level of force that is appropriate to stop him. See *Graham*, 490 U.S. at 396 (courts should consider "whether the suspect poses an immediate threat to the safety of the officers or others" and whether the suspect "is actively resisting arrest or attempting to evade arrest by flight"). Regardless of what respondent did before he fled, the reckless manner in which he operated his vehicle therefore justified the use of force to terminate his flight.[7]

Because petitioner could have reasonably believed based on the totality of the circumstances that respondent was putting lives in danger by the reckless manner in which he was fleeing, the level of force that he employed was reasonable and commensurate to the threat respondent posed to public safety. See, *e.g.*, *Garrett*, 378 F.3d at 1280 (use of force that resulted in fleeing suspect's death was reasonable where suspect "repeatedly placed officers' lives and innocents' lives in danger by engaging the police in a multi-county chase that did not end until [the suspect] had crashed twice") (emphasis omitted); *Pace*, 283 F.3d at 1277, 1281 (fatal shooting was objectively reasonable where fleeing suspect led police on

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and others when making deliberate contact between vehicles." *Id.* § 2205.04(A)(11). Another example is the National Park Service (NPS) Manual, which governs the conduct of NPS rangers. It provides that "[d]eliberate contact between vehicles, forcing the pursued vehicle off the roadway, or ramming the pursued vehicle while it is in motion, are prohibited unless other reasonable alternatives have been exhausted." NPS, *RM-9*, *Law Enforcement Reference Manual* chap. 7-3, § 3.2.1 (May 2000). These policies, however, do not alter the constitutional standard of reasonableness, which takes into account all of the circumstances.

[7] The very fact of respondent's flight and his refusal to stop when his vehicle was blocked in the shopping center parking lot gave petitioner grounds to suspect that respondent had something to hide from law enforcement. See *Illinois* v. *Wardlow*, 528 U.S. 119, 124 (2000).

high-speed chase, turned in front of an officer, swerved at officers coming from opposite direction, almost hit a motorist head-on, and drove 50 to 60 miles per hour through private property); *Scott*, 205 F.3d at 872, 876-878 (shooting was objectively reasonable where fleeing car drove 85 to 100 miles per hour, narrowly missed unmarked police cruiser, crashed into a guardrail, and attempted to resume flight by accelerating into officer's path); *Cole*, 993 F.2d at 1330-1333 (fatal shooting was objectively reasonable where suspect driving truck exceeded 90 miles per hour, sped past road blocks, continued flight after one of the truck's tires was shot out, reportedly attempted to ram police cars, and ran motorists off the road); *Smith*, 954 F.2d at 347-348 (fatal shooting was objectively reasonable where the fleeing suspect "posed a significant threat to others" because he had driven recklessly and at high speed and had escaped police roadblocks).

Finally, the court of appeals' reliance on the prospect of a subsequent arrest to require officers to abandon a chase when the suspect is bent on escape gives law breakers a perverse incentive to step on the accelerator and resist an arrest or a show of authority. As Justice Kennedy observed in *County of Sacramento* v. *Lewis*, "[t]here is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often." 523 U.S. 833, 858 (1998) (concurring opinion); see *id.* at 865 (Scalia, J., concurring in the judgment).

The court of appeals' decision creates a perverse and dangerous regime in which police officers are effectively required to let suspects fleeing by vehicles escape, even when they reasonably believe that their continued flight presents serious risks to others. Moreover, there is no reason to assume that a suspect who recklessly flees the police in his car will suddenly become a model driver once he no longer sees a squad

car's lights in his rear-view mirror. Indeed, the suspect in that situation is more likely to assume that more police are waiting ahead and thus continue to drive in a reckless fashion in an effort to avoid capture.

c. Law enforcement agencies may reasonably reach different conclusions about whether, and in what circumstances, to authorize officers in the field to engage in high-speed vehicle pursuit of fleeing suspects, and when to permit officers to terminate such flight by vehicle-to-vehicle contact. But this Court need not constitutionalize that policy difference. Under the Fourth Amendment, the ultimate determination whether an officer who uses his vehicle in an effort to terminate a high-speed chase uses excessive force must be made in view of all the surrounding circumstances. The court of appeals in this case erred in concluding that petitioner's conduct was objectively unreasonable under the circumstances of respondent's high-speed vehicular flight.

B. In Any Event, Petitioner's Use Of Force Did Not Violate Any Clearly Established Right

Even assuming petitioner's conduct was objectively unreasonable, he is entitled to qualified immunity because he did not violate any clearly established right.

1. The law is not clearly established unless it provides the officer notice that his conduct is unlawful in the specific situation he confronts

"Qualified immunity is not the law simply to save trouble for the Government and its employees; it is recognized because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Will* v. *Hallock*, 126 S. Ct. 952, 959 (2006). In determining whether "the law on point" was clear, this Court has repeatedly emphasized that the relevant "law" is the law applicable in "the specific context of the case, not as

a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). Thus, the law must provide an officer clear notice "that his conduct was unlawful *in the situation he confronted*." *Id.* at 199 (quoting *Saucier*, 533 U.S. at 202) (emphasis added).

In *Brosseau*, this Court summarily reversed the denial of qualified immunity to an officer sued for a Fourth Amendment violation under Section 1983 for shooting a suspected felon as he attempted to flee in a vehicle. 543 U.S. at 201. The Ninth Circuit in that case had reasoned that *Garner* made clear that the officer's decision to shoot the suspect to prevent his vehicular flight was constitutionally unreasonable, because the suspect had not posed a sufficiently serious threat. *Haugen* v. *Brosseau*, 339 F.3d 857, 874 (2003).

This Court rejected the Ninth Circuit's approach, holding that it reflected a "clear misapprehension of the qualified immunity standard." *Brosseau*, 543 U.S. at 198 n.3. The Court explained that "this area [involving the use of deadly force to stop vehicular flight] is one in which the result depends very much on the facts of each case," *id.* at 201, such that "*Garner* alone [cannot] offer a basis for decision," *id.* at 199. Instead, the Court looked for law specifically governing "the 'situation [the officer] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight." *Id.* at 200 (quoting *Saucier*, 533 U.S. at 202).

The Court then discussed three out-of-circuit cases to which the parties had pointed, two of which had found no constitutional violation in the use of deadly force to terminate a high-speed chase. *Brosseau*, 543 U.S. at 200 (citing *Cole* and *Smith*). The Court concluded that "[t]he cases by no means 'clearly establish' that [the officer's] conduct violated the Fourth Amendment," but rather "suggest that [her] actions fell in the hazy border between excessive and acceptable force." *Id.* at 201 (internal quotation marks and citation omitted). See *Saucier*, 533 U.S. at 209 (qualified immunity appro-

priate where plaintiff failed to "identif[y] any case demonstrating a clearly established rule prohibiting the officer from acting as he did").

In *Brosseau*, the Court further observed that excessive force claims by their nature do not lend themselves to general rules. Rather, as the Court put it, "this area is one in which the result depends very much on the facts of each case." 543 U.S. at 201. The nature of excessive force claims thus makes it especially difficult for a plaintiff to show that prior case law put a defendant on notice that his conduct would be unlawful in the particular circumstances he confronted.

2. The court of appeals erred in holding that the law provided petitioner notice that his use of force was excessive

The court of appeals here rejected petitioner's qualified immunity defense on the very ground on which the Ninth Circuit had relied in *Brosseau*, namely, that *Garner* made clear that petitioner's conduct was objectively unreasonable. Pet. App. 15a. That analysis is flawed, *a fortiori*, because *Garner* is closer to *Brosseau* than it is to this case.

Garner is "cast at a high level of generality." *Brosseau*, 543 U.S. at 199. It did not provide notice to petitioner—in the specific situation he confronted—that his conduct was unlawful. To the contrary, *Garner* involved an unarmed and nondangerous suspect fleeing *on foot* who posed none of the same risks as a 3000-pound vehicle traveling at least 90 miles per hour and crossing double yellow lines on a two-lane road. Indeed, the officer in *Garner* did not even claim that the suspect posed an immediate threat to anyone, testifying only that he shot the suspect to prevent him from "get[ting] away." *Garner*, 471 U.S. at 4 n.3. *Garner* thus provides no guidance, much less clear guidance, to an officer confronted with a suspect using a vehicle in a reckless manner to escape apprehension. Cf. *Donovan* v. *City of Milwaukee*, 17 F.3d 944, 952 (7th Cir. 1994) ("[T]he facts of *Garner* are not sufficiently particu-

larized to put potential defendants on notice that striking a fleeing vehicle with their police cruisers constitutes an unreasonable seizure."). *Brosseau* made that much clear by refusing to find *Garner* controlling even though the force—a gunshot—was identical. Rather, *Brosseau* indicates that the differences in the means of flight render *Garner* inapposite. Here, both the force used (car bumper, as opposed to a gun) and the demonstrably reckless vehicular flight distinguish this case from *Garner* and make qualified immunity even more obviously appropriate than in *Brosseau*.

The court of appeals' earlier decision in *Adams* underscores its error in finding that petitioner had notice that his conduct was unlawful. There, in a case with facts closer to those here than those in any other decision cited by the court of appeals, the Eleventh Circuit sitting en banc reversed the district court's judgment denying qualified immunity to officers who "intentionally rammed the [suspect's] automobile several times" in an effort to force the fleeing suspect's vehicle off the road. *Adams*, 962 F.2d at 1565. The last contact between the vehicles caused the suspect to lose control and crash, killing his passenger. *Ibid*. The en banc court concluded that the officers were entitled to qualified immunity on several grounds. See *Adams*, 998 F.2d at 923 (adopting "the reasoning set out in the dissenting opinion of Judge Edmondson," 962 F.2d at 1573-1579).

In particular, the *Adams* court held that, even if the law in 1985 did clearly establish the seizure, the officers "were due qualified immunity" because the law did not clearly establish that the seizure was unreasonable. 962 F.2d at 1576. In so ruling, the court rejected the plaintiff's contention that *Garner* clearly established that point. The court explained that "[a] police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Id.* at 1577. The court elaborated that, "[e]ven if a policeman knew that he could not use 'deadly force' to stop a misdemeanant who was fleeing in a car, * * * a reasonable

policeman would [not] necessarily know that hitting the fleeing car was just like shooting a person: a use of deadly force per se—that is, force almost certain to cause death or great bodily harm (not just capable of it)." *Ibid.* See *id.* at 1577 n.6 ("*Garner* did not settle much except what *Garner*, itself, plainly decided given *Garner*'s facts.). The court further observed that, while it was unnecessary for it to decide whether the force used was in fact excessive, "it is doubtful that the alleged level of force in this case was constitutionally excessive" because "[a] driver—even a misdemeanant— eluding arrest in a car driven at high speeds creates a dangerous and potentially deadly force." *Id.* at 1577-1578.

Adams was a controlling decision from petitioner's own jurisdiction. At the time he acted, it would have provided more direct guidance to him than any other decision. The court of appeals dismissed petitioner's reliance on *Adams* on the ground that the incident in *Adams* occurred before this Court decided *Brower* v. *County of Inyo*, 489 U.S. 593 (1989).[8] Pet. App. 19a. The *Adams* court, however, did not limit itself to the question whether the ramming of the suspect's vehicle constituted a seizure triggering Fourth Amendment analysis; it squarely addressed whether *Garner* clearly established that the ramming was unlawful, assuming that there *was* a seizure. See *Donovan*, 17 F.3d at 952 (agreeing with *Adams* that "*Garner* is not the appropriate starting point for our analysis [of the law applicable to police seizures of fleeing vehicles] because *Garner*'s facts are too different").

In light of *Adams*, the court of appeals' error in this case is even more egregious than the Ninth Circuit's error in *Brosseau*. In *Brosseau*, the Court held that the Ninth Circuit

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[8] In *Brower*, this Court held that a suspect who led the police on a high-speed chase and was killed when he crashed into a roadblock stated a claim for relief under Section 1983 to the extent he alleged that "the roadblock [was set up] in such manner as to be likely to kill him." 489 U.S. at 599. That conclusion sheds no light on whether petitioner's conduct in this case was unreasonable, much less establishes that it was.

had erred in relying on out-of-circuit cases that did not "squarely govern" the specific situation that the defendant confronted and, instead, simply suggested that her conduct "fell in the hazy border between excessive and acceptable force." 543 U.S. at 201 (quoting *Saucier*, 533 U.S. at 206). In this case, the court of appeals not only failed to identify a precedent that "squarely" held that petitioner's actions crossed the line of acceptable force, but it also overlooked an en banc decision expressly indicating that it was "doubtful" that such conduct was unconstitutionally excessive and that had concluded that *Garner* did *not* provide clear guidance in the situation petitioner confronted.

Moreover, even apart from *Adams*, many decisions had held that the use of deadly force was justified as a means to terminate a high-speed chase. See *Scott*, *supra*; *Cole*, *supra*; *Smith*, *supra*. While the court of appeals attempted to distinguish *Cole* and *Smith* on the ground that the suspects' driving conduct in those cases was more extreme, see Pet. App. 28a n.15, the officers' use of force (shooting the suspects) in those cases was more extreme as well. In any event, at a minimum, those cases "undoubtedly show that this area is one in which the result depends very much on the facts of each case." *Brosseau*, 543 U.S. at 201. And the court of appeals pointed to no case with facts that would have put petitioner on notice that his conduct was unconstitutional in the specific circumstances he confronted. Given the state of the law on vehicular flight at the time petitioner acted, the court of appeals' holding that petitioner's alleged mistake of law was constitutionally unreasonable is untenable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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