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 OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF GEORGIA AS *AMICI CURIAE* SUPPORTING RESPONDENT

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FDN.
125 Broad Street
New York, NY 10004
(212) 549-2611

GERALD R. WEBER
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA
75 Piedmont Avenue,
Suite 514
Atlanta, GA 20202
(404) 523-6201

HAMILTON P. FOX, III *
BRIAN C. SPAHN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(202) 383-0100

* Counsel of Record for the *Amici Curiae*

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INTEREST OF *AMICI CURIAE* [1]

The American Civil Liberties Union is a nonprofit and nonpartisan organization of more than 550,000 members nationwide. The ACLU of Georgia is one of its statewide affiliates. As part of its mission, the ACLU seeks to preserve each citizen's right to due process and to fair treatment by the government whenever the loss of liberty or property is at

[1] Pursuant to Rule 37.6, the ACLU states that no counsel for a party authored this brief in whole or in part and that no person other than the ACLU, its members, and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

stake. This case raises several important issues related to the qualified immunity defense in constitutional tort actions. One issue, and the principal focus of Respondent's brief, is whether qualified immunity was properly denied on the record as it now stands. A second, threshold issue is whether the district court decision denying Petitioner's motion for summary judgment on qualified immunity grounds was properly subject to immediate appeal. That jurisdictional question has broad practical significance. Too often, and for too many plaintiffs, the cost and delay associated with an appeal of an order denying qualified immunity can effectively undermine enforcement of the civil rights laws. Respondent, for example, has not had his day in court for nearly six years since the night he was injured, and his plight is not unusual. The ACLU therefore submits this brief on the jurisdictional issue to assist the Court in its resolution of this case.

STATEMENT

On March 29, 2001, at approximately 10:42 p.m., Deputy Clinton Reynolds of the Coweta County, Georgia Sheriff's Office clocked Respondent Victor Harris's car traveling 73 miles per hour in a 55 miles-per-hour zone. (J.App. at 11).[2] From this point forward, some of the crucial facts are in dispute. Scott claims that Harris picked up speed when Reynolds flashed his lights. (*Id.*) Harris denies that he increased his speed after seeing Reynold's blue lights. (J.App. at 11-12). Reynolds made the decision to stop Harris and charge him with a speeding violation. (*Id.*) Once in pursuit, Reynolds broadcast Harris's tag number to his dispatcher. (J.App. at 17). Reynolds did not broadcast any information concerning the underlying charge that precipitated the pursuit. (J.App. at 17-18). Coweta County Deputy,

[2] Where appropriate throughout this brief, *amici* cite to the Joint Appendix filed in this Court by Petitioner on December 13, 2006 indicated by "J.App.". Citations to the record are indicated by the letter "R.".

Timothy Scott, heard Reynold's broadcast and joined the pursuit. (*Id.*)

Harris claims that Scott did not know of or request information pertaining to the underlying basis for the pursuit until the pursuit concluded. (*Id.*) However, Scott asserts in his brief to this Court that he assumed (incorrectly) that the pursuit was part of an undercover narcotics operation. (Brief for Petitioner at 3.) After entering Peachtree City, in Fayette County, Georgia, Harris claims that he slowed his car, turned on his blinker and entered into an empty drug store parking lot. (J.App. at 21). Scott asserts that Harris was driving recklessly and that he veered into the parking lot. (Brief for Petitioner at 3.) After missing the entrance, Scott drove his car around the parking lot and attempted to block Harris from exiting by driving directly into the path of Harris's car. (J.App. at 20-21). When he realized that Scott was in his path, Harris attempted to turn left to avoid hitting Scott, but their cars came into contact with each other, causing minor damage to Scott's cruiser. (J.App. at 22-23). Scott contends that Harris was boxed in and deliberately collided with Scott's cruiser in an attempt to escape. (J.App. at 22).

Harris, followed by Scott and Reynolds, left the parking lot. The Peachtree Police Department blocked the intersections of the subsequent pursuit route. (J.App. at 23). Scott was now driving the lead pursuit car. (J.App. at 28-29). He requested permission via radio to use a Precision Intervention Technique maneuver ("PIT"). (J.App. at 24-25). Scott claims that he was familiar with the PIT maneuver by talking with fellow Coweta County Deputy Sheriffs who had received proper training. (R. 49 at 137-41). However, Harris denies that Scott had any high-speed pursuit training. (J.App. at 25). After receiving approval to "take out" Harris, Scott decided instead to ram Harris's bumper because the speed was too fast for the PIT technique to be used. (J.App. at 26, 28-30). As a result of being rammed by Scott, Harris's car

left the road and crashed into an embankment. (J.App. at 29-30). Scott is now a quadriplegic as a result of injuries suffered in the crash. (J.App. at 41-42).

Harris filed this action asserting that Scott used excessive force to apprehend him in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. (R. 1). Scott filed a Motion for Summary Judgment asserting qualified immunity. (R. 36). The district court denied summary judgment, holding that genuine issues of material fact existed. (J.App. at 38-64). Based on these unresolved factual disputes, and viewing the evidence in a light most favorable to Harris as the non-moving party, the district court ruled:

> [T]hat a reasonable jury could find, under Harris's version of the facts, that Scott's use of force was unconstitutional because it was not an objectively reasonable use of force. (J.App. at 47).
>
> A rational fact finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others. The record does not reflect that he had menaced or was likely to menace others. (*Id.* at 48).
>
> [T]he record reflects that [Harris] maintained control over his vehicle, used his turn signals, and did not endanger any particular motorist on the road. (*Id.*)
>
> Viewing the facts in Harris's favor … it appears that either Scott hit Harris [in the parking lot], or that the crash was an accident. (*Id.*)
>
> Under this version of the facts, a fact finder could conclude that when Scott rammed Harris's vehicle, he faced a fleeing suspect who, but for the chase, did not present an immediate threat to the safety of others since the underlying crime was driving 73 miles per hour in a 55 miles-per-hour zone. A jury could also find that Scott's use of force—ramming the car while traveling at

> high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable. . . . Thus, a fact issue remains regarding whether Scott violated the Fourth Amendment by using excessive force to seize Harris. (*Id.* at 49).
>
> Although the Court is loath to question the judgment of police officers and recognizes that Defendants' version of the facts is quite different from Plaintiff's version, the Court is compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury. (*Id.* at 50-51).

The Eleventh Circuit affirmed the district court's ruling with respect to Scott, holding that a reasonable jury could find that Scott violated Harris's Fourth Amendment rights. (J.App. at 79). The Eleventh Circuit failed to address the jurisdictional question, simply stating, "[a] defendant's entitlement to qualified immunity is a question of law. . . ." (J.App. at 69).[3]

SUMMARY OF ARGUMENT

For the reasons set forth by Respondent and other supporting *amici*, the ACLU agrees that qualified immunity was properly denied by both courts below. This brief, however, addresses the preliminary question of whether an immediate appeal was proper on the facts of this case. We believe it was not.

A district court's denial of a claim of qualified immunity is appealable only to the extent that it turns on a pure issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). A defendant "may not appeal a district court's summary judgment

[3] Harris raised and preserved the jurisdictional issue in his Eleventh Circuit brief (Brief of Plaintiff/Appellee at 1-3) and in his Opposition to the Petition for Certiorari (Respondent's Response to Petition for Certiorari at 11).

order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson v. Jones,* 515 U.S. 304, 319-20 (1995). Here, the district court's denial of Petitioner Scott's summary judgment motion expressly determined that the pretrial record set forth a genuine issue of fact for trial. Among other things, the court concluded that a reasonable jury could find, under Respondent Harris's version of the facts, that Scott's use of force was unconstitutional because it was not objectively reasonable. Moreover, the court found that a rational fact finder could find that a reasonable officer would not have believed that because of Harris's traffic offense, he posed an immediate threat to the safety of others. As in *Johnson v. Jones,* therefore, the district court order in this case identified a fact-related dispute about the pre-trial record. Its holding that the evidence in the pre-trial record was sufficient to show a genuine issue of fact for trial is, thus, not appealable.

Scott is only able to assert an issue that is appealable by mischaracterizing the district court's ruling. Although never explicitly stated, Scott's argument assumes that the district court erred in ruling that a finder of fact could conclude that Harris was not endangering innocent lives. His qualified immunity arguments are all premised on the "fact" that Harris was endangering others. To raise an appealable issue of law, Scott would have to claim that it was reasonable to ram Harris's car to make a traffic arrest even though there was no immediate threat to Scott, his fellow officers, or innocent parties. Scott has not raised that pure issue of law, and therefore, there was no jurisdiction in the court of appeals to hear his appeal.

ARGUMENT

THE DISTRICT COURT'S QUALIFIED IMMUNITY DECISION RESTS ON THE DETERMINATION THAT THERE WERE GENUINE ISSUES OF FACT FOR TRIAL AND THUS WAS NOT PROPERLY SUBJECT TO IMMEDIATE APPEAL.

A. The District Court's Order Provides No Collateral Issue For The Appellate Court To Review.

Appeals before the end of district court proceedings are the exception, not the rule. *Johnson v. Jones*, 515 U.S. 304, 309 (1995). "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. The collateral order doctrine provides that certain orders amount to "final decisions," immediately appealable under 28 U.S.C. § 1291, even though the district court may have entered those orders before the case has ended. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Collateral orders are those that fall within "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* The collateral order doctrine has been restated as a three part test requiring that the order sought to be appealed "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Johnson*, 515 U.S. at 310-11 (quoting *Puerto Rico Aqeduct and Sewer Authority v. Metcalf & Eddy, Inc.* 506 U.S. 139, 144 (1993) (brackets in original) quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). An order denying summary judgment based on a claim of qualified immunity may be an appealable collateral order, but

only if it presents the pure legal issue as to whether the facts alleged by the plaintiff demonstrate a violation of clearly established federal law. *Mitchell v. Forsyth*, 472 U.S. 511, 520 (1985) (reviewing the constitutionality of a warrantless wiretap).

In *Johnson v. Jones*, this Court held that the collateral order doctrine does not provide for an appeal from an order denying a motion for summary judgment based on qualified immunity if the issue raised on appeal is "whether or not the evidence in the pretrial record [is] sufficient to show a genuine issue of fact for trial." 515 U.S. at 307. In *Johnson*, the plaintiff accused police officers of using excessive force. *Id.* Three of the officers moved for summary judgment on the ground that there was no evidence that they beat or abused the plaintiff. *Id.* The plaintiff challenged this claim. *Id.* at 307-08. The district court denied summary judgment. Taking the evidence in the light most favorable to the plaintiff, it ruled that "there is sufficient circumstantial evidence supporting [plaintiff's] theory of the case." *Jones v. Village of Villa Park*, 1993 WL 437415, *3 (N.D. Ill. 1993).

The three officers appealed, asserting the defense of qualified immunity. Their argument, however, was based on a claim that the district court erred in finding that there was sufficient record evidence to submit the case to a jury. *Johnson*, 515 U.S. at 308. They did not deny that if they had beaten the plaintiff as he alleged, they lacked immunity. *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994). This was then a factual dispute over which the court of appeals found it lacked jurisdiction to hear an immediate appeal. *Id.*

This Court affirmed the Seventh Circuit. Analyzing the rationale underlying *Mitchell v. Forsyth*, the Court found that rationale did not apply to cases that did not present "neat abstract issues of law." *Johnson*, 515 U.S. at 317. In *Mitchell*, the issue was purely legal; in *Johnson* the issue was one of fact—was there evidence to support a claim that the police-

man had beaten the plaintiff. *Johnson*, 515 U.S. at 307. In *Mitchell*, the legal issue of whether the law was clearly established did not require the appellate courts to "consider the correctness of the plaintiff's version of the facts . . ." 472 U.S. at 528. In *Johnson*, the same fact-related issues underlay the immunity issue and the case on the merits. 515 U.S. at 315. As this Court explained:

> Where . . . a defendant simply wants to appeal a district court's determination that the evidence is sufficient to permit a particular finding of fact after trial, it will often prove difficult to find any such "separate" question-one that is significantly different from the fact-related legal issues that likely underlie the plaintiff's claim on the merits.

Id. at 314 (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248 (1986); *Elliott v. Thomas*, 937 F.2d 338, 341 (CA7 1991); *Wright v. South Arkansas Regional Health Center, Inc.*, 800 F.2d 199, 203 (CA8 1986)). This Court limited appeals of claims of qualified immunity to cases presenting "neat abstract issues of law" and held a defendant asserting qualified immunity may not appeal a summary judgment denial insofar as the issue is whether the pre-trial record sets forth a genuine issue of fact for trial. *Johnson*, 515 U.S. at 317. In *Crawford-El v. Britton*, this Court affirmed its holding in *Johnson*, noting that it refused in *Johnson* to create an exception to the settled interlocutory appeal rule and rejecting the argument that the policies behind the qualified immunity defense justify interlocutory appeals on questions of evidentiary sufficiency. 523 U.S. 574, 595 (1998) (citing *Johnson*, 515 U.S. at 317-18).

In the present case, the district court found that Harris had raised a genuine issue of fact as to whether his conduct would place anyone else at risk. (J.App. at 48). This is precisely the sort of factual issue that is not appealable under *Johnson v. Jones*. Resolving the facts in the non-movant's favor, as it

must, the district court concluded that "[a] rational fact-finder could find that a reasonable officer would not have believed that because of his traffic offense, Harris posed an immediate threat to the safety of others." (J.App. at 48). Except for the incident in the parking lot, "Harris did not use his vehicle in an aggressive manner," and taking the facts in Harris's favor, "either Scott hit Harris, or . . . the crash was an accident." (*Id*.) "[T]he decision to ram the vehicle came minutes later, when Harris was driving away from the officers, and when there were no other motorists or pedestrians nearby, thus casting doubts on Defendants' assertion that at the time of the ramming, Harris posed an immediate threat of harm to others." (J.App. at 48-49). Accordingly, a jury could "find that Scott's use of force—ramming the car while traveling at high speeds—was not in proportion to the risk that Harris posed, and therefore was objectively unreasonable." (*Id.*) (citing *Vaughn v. Cox*, 2003 U.S. App. LEXIS 18066, at *16 (11th Cir. 2003)) (stating that a reasonable jury could conclude that an officer's use of deadly force against two fleeing suspects was unreasonable where the officer "simply faced two suspects who were evading arrest and who had accelerated to eighty to eighty-five miles per hour in a seventy-miles-per-hour zone in an attempt to avoid capture.") Thus, the court was "compelled to conclude that there are material issues of fact on which the issue of qualified immunity turns which present sufficient disagreement to require submission to a jury." (J.App. at 51) (citing *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 251-52 (1986)).

B. Petitioner Ignores The District Court's Ruling That Summary Judgment Was Inappropriate On His Qualified Immunity Claim Because A Triable Issue Of Fact Exists.

1. *The Issues Scott Has Raised Assume Facts That The District Court Found Were Controverted.*

An examination of Scott's qualified immunity argument reveals that he does not raise a neat abstract issue of law, but rather, as in *Johnson*, is challenging whether the pre-trial record sets forth a genuine issue of triable fact. By refusing to accept the findings of the district court, Scott implicitly invites this Court to search the record and conclude that the district court erred when it found there was sufficient evidence to support a finding that Harris did not pose a threat to the lives or safety of others. That this is so is revealed by Scott's articulation of the Questions Presented. The first is whether his conduct was objectively reasonable when he made a split-second decision to strike Respondent Harris's car with his bumper "*when the suspect has demonstrated that he will continue to drive in a reckless and dangerous manner that puts innocent lives at risk*." (Brief for Petitioner at i.) (emphasis added). The second question Scott has presented is whether it was clearly established at the time of the incident that the Fourth Amendment was violated when a law enforcement officer bumps a fleeing suspect's vehicle "*terminating a dangerous high-speed pursuit*." [4] (*Id.*) (emphasis added).

[4] The Statement of Issues in Defendant's Court of Appeals brief continued similar language: "Whether Deputy Scott's conduct in contacting plaintiff's vehicle rises to the level of constitutional violation *where plaintiff was an imminent threat to public safety*." (Def. Appellate Brief at 3.) (emphasis added).

Scott can create a collateral issue for appeal only by misstating the district court's ruling. The district court did not hold that it would be objectively unreasonable to ram Harris's vehicle if Harris had demonstrated that *he would continue to drive in a reckless and dangerous manner that would endanger the lives of innocent persons.* Nor did it hold that it was clearly established that *a dangerous, high-speed pursuit* could not be terminated by bumping the fleeing vehicle. Rather, it ruled that there was a genuine issue of fact as to whether Harris's driving was so dangerous and so reckless that it threatened the lives and safety of innocent persons. (J.App. at 48). The record was such that a finder of fact might find that Harris was not endangering innocent lives. Scott therefore has not presented neat abstract legal issues to this Court but implicitly asks the Court to comb the record and rule that the district court erred when it found the evidence to present a triable issue of fact.

2. *Scott Chose Not To Claim There Would Be No Constitutional Tort If The Facts Were All Resolved In Harris's Favor.*

Scott does not argue that there was no clearly established constitutional tort if he used deadly or unreasonable force to seize a suspect who had merely committed a traffic offense and whose flight did not put the lives and safety of others at risk. He did not make such a claim in the courts below, and he does not make such a claim here. While Scott does not explicitly say, as the officers did in *Johnson*, that he would not be entitled to immunity if the facts were resolved entirely in Harris's favor, he effectively concedes this point. His failure to claim that he would be entitled to immunity, regardless of how a jury found the facts, is an implicit acknowledgment that he has not raised a purely legal issue. Rather, it is crucial to his qualified immunity defense that the safety and lives of others were at risk and that Harris would continue to engage in reckless and dangerous driving even if Scott had broken off the chase.

Whether Harris's driving was putting the lives of others at serious risk of death and whether he would have continued to do so were disputed issues of fact. The record did not conclusively resolve these issues. For example, at one point in the chase, there was a minor collision in a parking lot between Harris's and Scott's cars. Scott claimed that Harris rammed him, but Harris claimed the contact was unintentional, resulting from Scott driving his car directly into Harris's path and Harris's effort to avoid a collision. (J.App. at 22-23). Similarly, Scott claimed Harris's driving endangered others, but taking the facts in the light most favorable to Harris, the district court found that when Scott sought permission to make physical contact in order to stop Harris, "there were no motorists or pedestrians nearby . . . ." (J.App. at 48). There was also a dispute as to whether Scott slowed down or sped up before he rammed Harris. (J.App. at 29).

3. *Scott's Brief Before This Court Ignores The District Court's Findings.*

An examination of the Brief for Petitioner shows how he has ignored the findings of the district court as to what material facts are in dispute, and instead has assumed a version of the facts most favorable to himself. Two recent courts of appeals opinions have cautioned police officers, appealing the denial of summary judgment motions raising qualified immunity in cases asserting Fourth Amendment violations arising out of arrests involving excess force, that they must accept the facts presented by the plaintiff below or found by the district court. In *Sallenger v. Oakes*, ___ F.3d ___, 2007 WL 60422 (7th Cir.) (Decided Jan. 10, 2007), the court noted that the officers' brief seemed to question the findings of the district court that there exist genuine issues of material fact as to whether excessive force was used. "Importantly, though, a defendant in such a case must accept the facts as found by the district court in order for us to have jurisdiction to hear the case." *Id.* at *6 (citation

omitted). Because the officers conceded in response to a motion to dismiss and at oral argument that they accepted the district court's version of the facts for summary judgment purposes, a motion to dismiss for lack of jurisdiction was denied. *Id.* The court noted that in light of the officers' concession, it could decide qualified immunity as a matter of law without reviewing the findings of fact. *Id.*

The same issue arose in another case decided on the same day in another circuit. In *Adams v. Speers*, ___ F.3d ___, 2007 WL 60386 (9th Cir.) (Decided Jan. 10, 2007), the court noted that at times the officer's briefs "lapse into disputing [plaintiff's] version of the facts and even into offering his own version of the facts." The court warned the California Attorney General who was defending the officer that "such practice could jeopardize our jurisdiction to hear the interlocutory appeal." *Id.* at *1. Such an appeal from a ruling on immunity can be made "only if [the officer] accepts as undisputed the facts presented by the appellees." *Id.* The court was able to hear the appeal because the briefs showed that the officer was aware of the maxim governing such appeals, and accordingly the court construed his position to be that accepting the facts as pled, he was entitled to qualified immunity. *Id.* Scott, however, does not accept the facts as found by the district court.

The following examples are references to assertions in Scott's brief before this Court, followed by either what the district court actually found or what the court found that the record, taken in the light most favorable to Harris, might support:

- Scott assumed the pursuit was part of an undercover narcotics operation. (Brief for Petitioner at 3.) There was no such finding by the district court. Such a finding would turn entirely on Scott's credibility. The district court found only that Scott did not know what Harris was suspected of doing. (J.App. at 50).

- Scott was under the reasonable belief that he was pursuing a suspect who was part of a controlled buy of illegal drugs. (Brief for Petitioner at 18.) There was no such finding by the district court. (J.App. at 50). The claim would be based solely on the credibility of Scott's testimony.
- Undeterred by Scott's effort to block him in the parking lot, Harris collided with Scott's car. (Brief for Petitioner at 4.) Either Scott hit Harris or the collision was an accident. (J.App. at 48).
- Scott picked a moment to ram Harris when there were no motorists or pedestrians around. (Brief for Petitioner at 4.) Harris posed no immediate threat in part because the Peachtree Police had blocked the intersections, and there were no pedestrians or motorist in the vicinity. (J.App. at 48-49). The district court made no finding as to Scott's motive.
- Scott testified his intention was to stop Harris and not wreck his vehicle. (Brief for Petitioner at 5.) The district court made no such finding, which would turn entirely on Scott's credibility.
- Scott attempted to end a dangerous, high speed automobile chase. (*Id*. at 7.) At the time of the ramming, Harris posed no immediate threat of harm to others. (J.App. at 48-49).
- Scott asked for and obtained permission to stop Harris's vehicle. (Brief for Petitioner at 7.) Scott asked permission to employ a PIT maneuver, received approval to "take him out," and then decided to ram Harris at high speed because the speed was too fast to use the PIT maneuver. (J.App. at 40-41).
- Breaking off pursuit would not eliminate risk to the public because the driver would continue to drive recklessly after the officers withdrew. (Brief for Petitioner at 11.) (There is no record support cited.) No such finding was made by the court; Harris posed no immediate threat to others. (J.App. at 49).

- Harris had established that his reckless driving posed a substantial and ongoing threat to the public, the officers, and himself. (Brief for Petitioner at 17.) Harris posed no immediate threat to others. (J.App. at 49).[5]

4. *Taking The Facts In The Light Most Favorable To Harris, Scott Committed A Clearly Established Constitutional Tort.*

Given the state of the record and resolving the factual disputes in Harris's favor, a jury could find that this is a case of a law enforcement officer so reckless that he engaged in a high-speed chase without learning for what offense the suspect was wanted. The suspect was sought for only a traffic violation. Although the suspect tried to avoid a collision, the officer and the suspect accidentally collided when the officer drove his car into the suspect's path. The officer's car was damaged. He then obtained permission to employ a low-speed impact technique to stop the suspect, even though he had not been trained in this technique. He could not employ the technique because of the speed of the chase. Enraged by the damage to his vehicle, and frustrated by his inability to stop the suspect, the officer determined to employ a highly dangerous, high-speed ramming technique. He did so even though it was late at night, on a road with no traffic or pedestrians. No other motorist or pedestrian had been injured or even suffered a close call. The suspect had maintained control of his car at all times, and at the time of the ramming, was driving away from the officer and posed no immediate threat of harm to others. The officer accelerated before he

[5] The United States' brief similarly misstates the record. *See* Brief for the United States as *Amicus Curiae* at 2 (Scott assumed he was in pursuit in connection with undercover operations; Harris struck Scott), *Id.* at 3 (Harris was acting recklessly and endangering others; Scott made contact when no other motorists were in the area to prevent an accident), *Id.* at 6 (extremely dangerous vehicular flight; serious risk of injury and death).

rammed the suspect, increasing the force of impact. The officer knew or should have known that the likely result when a vehicle is rammed from behind at high speed is that the driver will lose control and the vehicle will collide with some object before it stops. Such a collision at high speed is life threatening.

Tennessee v. Garner, 471 U.S. 1 (1985), and *Graham v. Connor*, 490 U.S. 386 (1989), established that a police officer acts unreasonably when he uses deadly force to seize an unarmed, nondangerous suspect. Only if the officer has probable cause to believe that the suspect poses a threat of serious physical harm either to the officer or others, is it constitutionally reasonable to prevent escape by using deadly force. *Garner,* 471 U.S. at 11. Under the scenario set forth above, Scott would not have had probable cause to believe that Harris posed a serious threat to the officers or others. This contrasts with the facts in *Brosseau v. Haugen*, 543 U.S. 194 (2004), this Court's most recent decision on the qualified immunity question. In *Brosseau*, where this Court ruled that the unconstitutionality of the use of deadly force was not clearly established, the suspect was wanted on a no-bail, felony warrant; had been fighting with others when the officer arrived; was believed by the officer to have a weapon in his car; and admitted to having driven his car in a manner indicating "a wanton or wilful disregard for the lives . . . of others." *Id.* at 195-97.[6] Here, taking the facts in the light most favorable to Harris, he was not wanted for a felony, but for speeding; he had not fought anyone; there was no suggestion that he had a weapon; and his driving did not threaten others. Again, assuming Harris's version of the facts, Scott acted unreasonably by using deadly force to seize an

[6] There was no jurisdictional issue in *Brosseau* because the district court had granted the officer's motion for summary judgment, which was clearly a final order terminating the case.

unarmed, nondangerous suspect, which *Garner* and *Graham* clearly establish is a Fourth Amendment violation.

While there are certainly no conclusive findings that this scenario actually occurred, a jury could so find depending on how it evaluates the evidence and the creditability of the witnesses, including Scott. Because Scott implicitly and correctly concedes he would not be immune under this factual scenario, the issues he brings to this Court assume contested facts, *e.g.*, that Harris posed a threat to the lives of others if he was not stopped. By assuming that there was such a threat, Scott assumes facts about which there is a genuine dispute, and which the district court determined a jury might find to the contrary. This Court can only rule in Scott's favor if it inspects the record and overturns the district court's finding that the record supports a factual scenario contrary to Harris's version. In short, this case presents factual issues that must be resolved by the trier of fact and that cannot be appealed until that occurs.

5. *Even If Scott Had Raised A Pure Legal Issue, This Court Should Not Review The Pendant Claim of Whether The Record Evidence Raised Material Issues of Fact.*

If Scott had raised the issue in the district court and on appeal whether it was clearly established that a law enforcement officer may not use deadly force to apprehend a suspect in a traffic offense when there is no evidence that he was fleeing in a fashion that endangered the safety and lives of innocent persons, he might have raised an appealable issue, although not one on which he could prevail. Even if Scott's argument could be construed as raising this pure legal issue, the court of appeals should have declined to hear the pendant issue of whether there was a genuine factual issue for trial, once a determination had been made that Scott could not prevail on the issue of law.

In *Johnson*, this Court addressed the concern that defendants might seek to create a reviewable summary judgment order by adding a reviewable claim to a motion that otherwise would create an unreviewable order. 515 U.S. at 318. This Court conceded that, "if the District Court . . . had determined that beating respondent violated clearly established law, petitioners could have sought review of *that* determination." *Id.* [7] Nevertheless, this Court emphasized that it did not follow that a court of appeals would review the more important determination that there was a genuine issue of fact for trial, as to whether the beating had in fact occurred. *See id.* Moreover, while "pendant appellate jurisdiction" over factual issues may sometimes be appropriate when an abstract issue of law has been raised, this Court has placed its trust in courts of appeals to deny jurisdiction where the appealable issue is simply a means to lead the court to review the underlying factual matter. *Id.* (citing *Natale v. Ridgefield*, 927 F.2d 101, 104 (CA2 1991) (saying exercise of pendant appellate jurisdiction is proper only in "exceptional circumstances"); *United States ex. rel. Valders Stone & Marble, Inc. v. C-Way Constr. Co.*, 909 F.2d 259, 262 (CA7 1990) (saying exercise of such jurisdiction is proper only where there are "'compelling reasons'")). [8]

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[7] The parallel finding here would be a determination that using deadly force to apprehend a traffic law suspect, who posed no immediate threat to others, violated clearly established Fourth Amendment standards.

[8] Appellate Courts have heeded this Court's caution against engaging in a detailed fact-based analysis in immediate appeals. *See Howser v. Anderson*, 150 Fed.Appx. 533, 540 (6th Cir. 2005) (quoting *Johnson*, 515 U.S. at 316) (holding the court lacked jurisdiction over the appeal because genuine issues of material fact as to whether a police officer had cause to believe that the decedent posed a threat of serious physical harm to the officer or others existed); *McKinney v. Duplain*, 463 F.3d 679, 689 (7th Cir. 2006) (rejecting appellate jurisdiction because a factual issue remained as to whether it was reasonable for the defendant to believe that the situation posed a threat of serious physical harm to himself or others);

C. This Court's Post-*Johnson* Opinion In *Behrens v. Pelletier* Does Not Alter The Fact That The District Court's Ruling In This Case Is Not Appealable.

Although procedurally complex, and primarily focusing on the question of whether a defendant could raise qualified immunity on a motion for summary judgment following a denial of a motion to dismiss raising the same issue, the relevant facts of *Behrens v. Pelletier*, 516 U.S. 299 (1996) are simple. Pelletier was hired by a savings and loan subject to Federal Home Loan Bank Board approval. *Id.* at 302. Behrens refused to give that approval because of a pending investigation of another institution that had employed Pelletier. *Id.* Pelletier was therefore fired. He sued claiming a substantive due process violation for interference with his clearly established constitutionally protected property and liberty rights, including his right to earn a future livelihood in the industry. *Id.*

Behrens raised qualified immunity in his summary judgment motion, contending that his actions had not violated any of Pelletier's clearly established rights regarding his employment. *Id.* at 303. The district court denied the motion with a simple statement that there were unresolved material issues of fact. The court of appeals dismissed Behrens's appeal for lack of jurisdiction. *Id.* at 305.

Before this Court, Pelletier argued that the district court's decision was not appealable because its order had rested on the ground that material issues of fact remain. *Id.* at 312. This Court rejected this over-broad interpretation of *Johnson v. Jones*. *Id.* at 312-13. Instead it held that *Johnson* meant

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Linbrugger v. Abercia, 363 F.3d 537, 544 (5th Cir. 2004) (court lacked jurisdiction over sheriff's deputy's appeal given that there was a material factual dispute as to the actual or perceived provocation and resistance by the plaintiff, and the extent and proportion of the defendant's response).

that "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision.'" *Id*. at 313. In *Behrens*, even though the conduct was controverted, taking the facts that were controverted in the light most favorable to the plaintiff, the defendant argued that there was no violation of clearly established law. The district court rejected that contention, giving rise to an appealable final order.

Here the district court found that under some version of the controverted facts, Scott's conduct did violate clearly established law. For example, it said that the controverted facts could be resolved to conclude that Scott rammed Harris even though he posed no danger to others at the time. (J.App. at 49). Scott does not contend that if those facts are true, he would not have committed an established violation of law. Instead, he argues that those facts are not true. He therefore seeks to appeal whether the evidence could support a finding that particular conduct occurred, *e.g.*, that Harris's driving did not threaten the lives of others. *Behrens* reaffirms the holding in *Johnson* that such a sufficiency judgment is not immediately appealable just because it arises in a qualified immunity case.

CONCLUSION

The judgment of the court of appeals should be vacated for lack of jurisdiction and this case should proceed to trial on the merits. Alternatively, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES UNION FDN.
125 Broad Street
New York, NY 10004
(212) 549-2611

GERALD R. WEBER
AMERICAN CIVIL LIBERTIES UNION OF GEORGIA
75 Piedmont Avenue,
Suite 514
Atlanta, GA 20202
(404) 523-6201

HAMILTON P. FOX, III *
BRIAN C. SPAHN
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(202) 383-0100

* Counsel of Record for the *Amici Curiae*

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