No. 12-1117

In The
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, et al.,

Petitioners,

vs.

WHITNE RICKARD, a minor child, individually, and as surviving daughter of Donald Rickard, deceased, by and through her mother Samantha Rickard, as parent and next friend,

Respondent.

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

REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
A. The Sixth Circuit erred in analyzing whether the force was supported by subsequent case law as opposed to prohibited by clearly established law at the time the force was used	2
1. A general right to be free from excessive use force is not a "clearly established" right sufficient to overcome qualified immunity	2
2. Qualified immunity should have been upheld given the similarities with the uses of force in *Brosseau* and in *Scott*	5
a. Similarities to *Scott*	5
b. Similarities to *Brosseau*	7
B. The Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law	9
CONCLUSION	10

TABLE OF AUTHORITIES

Page

CASES:

Brosseau v. Haugen, 543 U.S. 194 (2004) .... *passim*

Filarsky v. Delia, 132 S. Ct. 1657 (2012) 2

Graham v. Connor, 490 U.S. 386 (1989) 4, 7

Pearson v. Callahan, 555 U.S. 223 (2009) 3, 10

Reichle v. Howards, 132 S. Ct. 2088 (2012) 3

Saucier v. Katz, 533 U.S. 194 (2001) 3

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

Sykes v. United States, 131 S. Ct. 2267 (2011) 6

Tennessee v. Garner, 471 U.S. 1 (1985) 4

CONSTITUTIONAL PROVISION:

U.S. Const. amend. IV 1, 3, 6, 9

RULE:

Supreme Court Rule 15.6 1

Petitioners file this brief pursuant to Supreme Court Rule 15.6 to reply to Respondent's brief. For the reasons provided, this Court should either reverse the Sixth Circuit's opinion summarily or grant the Petition for plenary review of the merits.

INTRODUCTION

Petitioners present two questions: whether the Sixth Circuit erred in denying qualified immunity without considering whether Petitioners violated "clearly established law"; and whether the Sixth Circuit erred by not finding the use of force was reasonable under the Fourth Amendment as a matter of law.

The gravamen of Petitioners' argument on the first question is that the circuit court distinguished the facts "in the details" from force ruled permissible three years later in *Scott v. Harris*, 550 U.S. 372 (2007) (Pet. App. at 8-9), thereby ignoring whether the force was clearly *un*reasonable under *pre-existing* law. Tellingly, Respondent argues simply that "the right to be free of excessive force was clearly established." (Resp. Opp. at 9.) Respondent's reliance on this broadly articulated right flies in the face of repeated admonitions that qualified immunity may not be denied based on case law that is "cast at a high level of generality." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). The absence of any analysis of "clearly established law" by the Sixth Circuit is egregious, warranting review by this Court.

On the second question, Respondent seeks to distinguish firing shots used from the vehicle ramming ruled permissible in *Scott* and attempts to align the facts with court decisions where no threat of physical harm was presented. (Resp. Br. at 21-23.) Police officers, however, are accorded broad discretion to employ force that is objectively reasonable in light of the risk of harm they are confronting. Petitioners urge this Court to uphold their use of force under the circumstances presented.

ARGUMENT

A. The Sixth Circuit erred in analyzing whether the force was supported by subsequent case law as opposed to prohibited by clearly established law at the time the force was used

1. A general right to be free from excessive use force is not a "clearly established" right sufficient to overcome qualified immunity

At its heart, qualified immunity is intended "to avoid 'unwarranted timidity' in performance of public duties, ensuring that talented candidates are not deterred from public service, and preventing the harmful distractions from carrying out the work of government that can often accompany damages suits." *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012). Consistent with this purpose, public officials must be

shown to have violated "clearly established law" so that "officials can reasonably anticipate when their conduct may give rise to liability for damages." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). Time and again, this Court has instructed that the evaluation "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Given the underpinnings of qualified immunity, it is troubling that *the term "clearly established" is nowhere to be found in the Sixth Circuit's qualified immunity discussion*. Instead, the Sixth Circuit denied qualified immunity finding that "we cannot conclude that the officers' conduct was reasonable as a matter of law." (Pet. App. at 10.) In so ruling, the circuit court conflated the reasonableness of force under the Fourth Amendment with the question of whether the law was clearly established for qualified immunity purposes. This analysis directly contravenes this Court's teaching that "if the plaintiff has satisfied [the] first step [of showing a constitutional violation], the court *must* decide whether the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (emphasis added).

The correct standard – never even articulated by the Sixth Circuit – is whether the right was "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle*, 132 S. Ct. at 2093. In the Fourth Amendment use of force context, this Court has explained that

"'[w]hen we look at decisions such as *[Tennessee v.] Garner*[, 471 U.S. 1 (1985)] and *Graham* [*v. Connor*, 490 U.S. 386 (1989)], we see some tests to guide us in determining the law in many different kinds of circumstances; but we do not see the kind of clear law (clear answers) that would apply' to the situation at hand." *Brosseau*, 543 U.S. at 199. *Brosseau* then held that "[t]he present case is far from the obvious one where *Graham* and *Garner* alone offer a basis for decision." *Id*.

By concluding that the force was not clearly reasonable based on distinctions from *Scott*, the Sixth Circuit shirked its obligation to identify the "clearly established" law that Petitioners allegedly violated in July 2004, three years before *Scott* was decided. Respondent's reliance on a general right to be free of excessive force cannot whitewash the injustice inherent in the analysis. Likewise, Respondent's argument that qualified immunity must be denied unless the force was "clearly reasonable" is misguided. (Resp. Br. at 13.) To the contrary, qualified immunity must be upheld unless the force was clearly established as *un*reasonable at the time the force was used. Because Respondent has not identified a violation of clearly established law, Petitioners have immunity from being sued.

2. Qualified immunity should have been upheld given the similarities with the uses of force in *Brosseau* and in *Scott*

Respondent contends that the force used in this case is distinguishable from *Brosseau* and *Scott*, both of which were decided *after* the events in this case in July 2004. Respondent suggests that Petitioners are being inconsistent by contending that the Sixth Circuit erred in relying on *distinctions* from *Scott* to deny qualified immunity while at the same time showing *similarities* with the force ruled reasonable in *Scott*. (Resp. Br. at 15.) In so urging, Respondent overlooks that if the facts are at all similar to subsequent cases that upheld qualified immunity, then Petitioners' use of force could not have been clearly unconstitutional when the force was used.

a. Similarities to *Scott*

The Sixth Circuit acknowledged "the similarity of the facts here to the facts in *Scott*," (Pet. App. at 8), where this Court found the governmental interest in protecting the public outweighed the "risk of serious injury or death" to the fleeing motorist. 550 U.S. at 386. As in this case, the fleeing motorist led police officers on an extended pursuit through traffic and at excessive rates of speed, refusing all efforts of capture and striking a police vehicle as part of the ongoing effort to elude capture. The officer in *Scott* rammed the fleeing motorist's vehicle at a point where "it was not threatening any other vehicles or pedestrians." 550 U.S. at 380 n.7. In this case, the shots were fired

as Respondent's decedent was about to race off having backed up his vehicle abruptly while officers were on foot imploring him to stop. As the Sixth Circuit noted, "[Petitioner] Ellis was standing near the rear passenger-side of Rickard's vehicle and had to step to his right to avoid the vehicle." (Pet. App. at 6 (quoting Pet. App. at 24).)

Respondent urges, nevertheless, that *Scott* should not apply because firing shots is deadlier than ramming a vehicle. In support, Respondent urges this Court to follow the Sixth Circuit's lead in dismissing *Sykes v. United States*, 131 S. Ct. 2267 (2011), where this Court recognized that vehicles are dangerous instrumentalities. (Resp. Br. at 27-28.) *Sykes*, however, simply acknowledged that "[i]t is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others." 131 S. Ct. at 2274. Respondent would have this Court ignore that common knowledge because it was expressed in a criminal case and not one involving the reasonableness of force in the Fourth Amendment context.

Respondent would further have this Court ignore its finding in *Brosseau* that driving could present an "imminent threat of serious physical harm to innocent motorists as well as to the officers themselves." 543 U.S. at 200; *see also id.* (stating that "a car can be a deadly weapon"). Moreover, *Scott* itself notes that the same holding applies "[w]hether or not Scott's actions constituted application of 'deadly force.'" 550 U.S. at 383. Indeed, ramming a vehicle could in some

instances be more likely to cause harm than bullets that have a smaller target and often go astray.

In sum, courts should be loath to second guess split-second decisions made with respect to force. *See Graham*, 490 U.S. at 396 ("The 'reasonableness' of a particular use of force must be judged from the perspective of the reasonable officer on the scene, rather than with the 20/20 vision of hindsight."). Respondent's attempt to differentiate *Scott* confirms that Petitioners' use of force was not clearly unconstitutional in July 2004.

b. Similarities to *Brosseau*

Respondent's attempt to differentiate the cases based on the type of force used is foreclosed further by *Brosseau*, where the officer discharged her weapon because she feared for the safety of "officers who she *believed* were in the immediate area, and for the occupied vehicles in Haugen's path and for any other citizens who *might* be in the area." 543 U.S. at 196 (emphasis added) (punctuation and internal quotation marks omitted). The suspect in that case had not yet driven the vehicle but the officer believed he would be a menace based on his conduct during a preceding foot chase. This Court found that firing the weapon was not a violation of clearly established law under the circumstances such that the officer was entitled to qualified immunity.

Petitioners' concerns are at least as compelling as those of Officer Brosseau, and likely more so. Whereas

the fleeing suspect in *Brosseau* had not yet driven the vehicle when the officer discharged her weapon, Rickard had led Petitioners on an extended high-speed pursuit, had collided with a police vehicle, and had swerved his vehicle in reverse forcing Petitioner Ellis to jump out of the way when the shots were fired. Also, whereas Officer Brosseau merely thought officers and citizens *might* be in the suspect's path, Petitioners were on foot around Rickard's vehicle when he was attempting to elude capture.

Respondent essentially asks this Court to draw a constitutional line between the shot fired by Officer Brosseau and the shots fired by multiple officers in this case. Because *Brosseau* was based on the "clearly established" prong of the inquiry only, it could not have drawn a substantive constitutional line. If *Brosseau* did draw such a line, it did so after the events in this case and therefore could not have established the law to guide Petitioners. Further, more than one officer discharged a weapon in this case, in contrast to the lone officer in *Brosseau*. (Pet. App. at 5-6.) Moreover, does Respondent suggest that the Constitution forbids an officer from firing more than one shot? And what about Petitioners Ellis, Evans, and Forthman, who fired no shots at all? These questions demonstrate the incongruity of Respondent's positions and confirm the need for substantive review by this Court.

B. The Sixth Circuit erred in denying qualified immunity by finding the use of force was not reasonable as a matter of law

"In judging whether [the officers'] actions were reasonable [under the Fourth Amendment], we must consider the risk of bodily harm that [the officers'] actions posed to respondent in light of the threat to the public that [the officers were] trying to eliminate." *Scott*, 550 U.S. at 383. The Sixth Circuit mis-stated this test as "the degree of danger that the officers were placed in as a result of Rickard's alleged conduct." (Pet. App. at 10.) Even under that more restrictive test, firearms were not used until after there had been an extended high-speed pursuit that involved a collision with a police vehicle and when Petitioners were on foot adjacent to Rickard's vehicle, at least one of whom had to jump out of harm's way. Moreover, the relative culpability of the people at risk of harm is relevant to the test. *Scott*, 550 U.S. at 384. In that respect, as in *Scott*, it was the suspect who intentionally placed himself and the public in danger by unlawfully engaging in the reckless, high-speed flight. Also as in *Scott*, the suspect was pursued by multiple police officers pleading with him to stop. By contrast, those who might have been harmed had Petitioners not taken the action they did were entirely innocent. As in *Scott*, the Sixth Circuit should have had little difficulty concluding the force was objectively reasonable as a matter of law.

CONCLUSION

Petitioners believe the Sixth Circuit's analysis is so clearly flawed that the denial of qualified immunity can be reversed summarily. Alternatively, Petitioners request that the petition be granted to allow for full consideration on the merits. Petitioners emphasize that "[q]ualified immunity is an immunity from suit and not a mere defense to liability." *Pearson*, 555 U.S. at 237 (internal quotation marks omitted). Absent review by this Court, Petitioners will be harmed irreparably and the analytical errors in the circuit court's opinion will continue to be precedent in the Sixth Circuit.

Respectfully submitted,

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