No. 13-731

# In The Supreme Court of the United States

DEPUTY JARRETT MORRIS, DEPUTY JOSEPH SCHMIDT and DEPUTY JEREMY ROGERS,

*Petitioners,*

v.

CAROL ANN GEORGE,

*Respondent.*

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

## BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND THE LEAGUE OF CALIFORNIA CITIES AS AMICI CURIAE IN SUPPORT OF PETITIONERS



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## CORPORATE DISCLOSURE STATEMENT

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties.*

The League of California Cities is an association of 470 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians.**

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* The California State Association of Counties sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

** The League of California Cities is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page

## CASES



## STATUTES



## OTHER

## AMICI SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties and the League of California Cities respectfully submit this brief as amici curiae in support of Petitioners.

## INTEREST OF AMICI[1]

The California State Association of Counties is an association of all 58 of the California counties, and the League of California Cities is an association of 470 California cities. Under California law,[2] cities and counties must generally defend law enforcement officers employed by them when the officers are sued for job-related actions. When, as here, qualified immunity from suit under 42 U.S.C. § 1983 is denied on the basis of faulty circuit precedent, taxpayer resources must be spent defending such lawsuits instead of on public services. Individual law enforcement officers also spend time in civil litigation that they should instead spend protecting and serving the public.

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or part by counsel for any party. No person or entity other than amici made a monetary contribution to this brief's preparation or submission. The parties were notified more than ten days prior to the due date of this brief of the intention to file.

[2] See California Government Code § 825.

## STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth in the Petition for Writ of Certiorari.

## SUMMARY OF ARGUMENT

This Court recently reaffirmed (in a case from the Ninth Circuit) that qualified immunity from suit under 42 U.S.C. § 1983 "gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Stanton v. Sims,* 134 S.Ct. 3, 5 (2013).

However, Ninth Circuit precedent continues to discourage lower courts from granting qualified immunity by:

(1) Discouraging lower courts from accepting the eyewitness testimony of law enforcement officers, when no other eyewitnesses are available;

(2) Precluding appellate review of evidentiary determinations related to denial of qualified immunity.

Unless this Court grants certiorari, lower courts in the Ninth Circuit will continue to unjustly deny qualified immunity to law enforcement officers based on circuit precedent, and those denials of qualified immunity will continue to be categorically unreviewable on appeal.

Alternatively, amici respectfully suggest the Court hold this petition pending its decision in *Plumhoff v. Rickard,* No. 12-1117, another qualified immunity case involving a Fourth Amendment use-of-force claim.

## ARGUMENT

### I. WHEN DETERMINING QUALIFIED IMMUNITY ON SUMMARY JUDGMENT, UNDISPUTED AND CORROBORATED EYEWITNESS OFFICER ACCOUNTS SHOULD NOT BE OVERCOME BY SPECULATIVE OPINION EVIDENCE MANUFACTURED FOR LITIGATION

Certiorari should be granted to correct Ninth Circuit precedent that encourages lower courts to deny well-supported summary judgment qualified immunity motions based on manufactured evidence (such as speculative opinions of hired witnesses) that is blatantly contradicted and utterly discredited by well-corroborated eyewitness accounts of law enforcement officers, supported by the record taken as a whole.

In this case, evidence supporting the officers' summary judgment motion included declarations establishing that respondent's decedent Donald George did not comply with officers' shouted commands to drop his gun and show his hands, that he pointed his loaded gun at an officer before he was shot, and that he continued to point his gun at that

officer after the first shot was fired. A bystander who lived in Mr. George's house corroborated that warnings were heard "before the shooting started." Pet. App. at 48-54.

Such evidence was discussed in Judge Trott's dissent; the majority opinion did not mention it. The majority opinion stated that appellate courts are categorically prohibited from reviewing the summary judgment record in an interlocutory immunity appeal, where the district court has – even erroneously – identified the existence of a material fact dispute. Pet. App. at 9. Consequently, the majority opinion merely stated that "the district court concluded that Carol [George]'s evidence, which included an expert witness's report, called into question whether Donald ever manipulated the gun, or pointed it directly at deputies." Pet. App. at 6. The majority opinion further stated that the lower court "parsed the deputies' testimony for inconsistencies, found that medical evidence (and Carol's declaration) called into question whether Donald was physically capable of wielding the gun as deputies described, and found parts of Carol's expert's testimony probative." Pet. App. at 10-11.

As explained in Judge Trott's dissent, the district court denied summary judgment based on "Mrs. George's manufactured declaration" that Mr. George "was unable to stand on his own without holding his walker and hold a gun with both hands in front of him." Pet. App. at 32, 57. It was also defeated by the report of a hired expert who opined: "(1) that the

deputies are lying, (2) that he doesn't believe Mr. George knew the deputies were in his backyard or that he could hear the deputies commands, (3) that Mr. George could not have uttered any coherent words in response to the deputies commands, and (4) that Deputy Schmidt could not see a gun in Mr. George's hands when Deputy Schmidt was yelling at him on the patio." Pet. App. at 61. It was further defeated because officers had different recollections about who decided "to set up a perimeter around the house" (no one disputed that perimeters were set up), and about "who saw Mr. George first and how he was holding the gun." "Everyone, everyone agrees he was carrying a loaded gun in his hands." Pet. App. at 58.

The majority opinion briefly acknowledged *Scott v. Harris,* 550 U.S. 372 (2007), a case in which the plaintiff had been injured while leading officers on a car chase. The court of appeals had denied qualified immunity based on affidavits that subdivided the dangerous chase into seemingly-inert driving maneuvers. "Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test. . . ." *Id.* at 378-379. In *Scott*, this Court viewed the video of the chase and saw that it "more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380. This Court held that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that

no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Id.*

The majority opinion in this case gave little consideration to *Scott v. Harris,* stating that "no videotape, audio recording, or similarly dispositive evidence . . . 'blatantly contradict[s]' or 'utterly discredit[s]' Carol's side of the story." Pet. App. at 13. However, "Carol's side of the story" was blatantly contradicted and utterly discredited by the well-corroborated accounts of the officer-eyewitnesses to the shooting. Pet. App. at 48-54.

Unfortunately for officers asserting qualified immunity, Ninth Circuit precedent encourages lower courts to ignore or minimize law enforcement officer eyewitness accounts when no other eyewitness accounts are available. Under circuit precedent, lower courts "may not simply accept what may be a self-serving account by the police officer." *Scott v. Henrich,* 39 F.3d 912, 915 (9th Cir. 1994). The majority opinion relied on that precedent. Pet. App. at 10.

In this case, the majority opinion used immaterial circumstances to fill the vacuum created by omission of eyewitness accounts: "Mr. George had not committed a crime, and . . . he was not actively resisting arrest or attempting to evade arrest by flight." Pet. App. at 18. As noted in Judge Trott's dissent, those factors were true for John Hinkley before he shot President Reagan, Jared Loughner before he shot Congresswoman Giffords and Judge Roll, Adam

Lanza before Sandy Hook, and James Holmes before the Aurora slaughter. Pet. App. at 38. One could add: John Wilkes Booth before he shot President Lincoln, Mark Chapman before he gunned down John Lennon, Cain before he slew Abel. If qualified immunity is to offer meaningful protection to all but the plainly incompetent and those who knowingly violate the law, deadly events should be judged by all material circumstances, not by substituting immaterial circumstances for material ones.

When, as here, a plaintiff relies on "manufactured" declarations questioning well-corroborated officer eyewitness accounts, this Court's *Scott v. Harris* rationale should enable summary judgment to be granted when, as here, qualified immunity is lawfully justified.

## II. NINTH CIRCUIT PRECEDENT EFFECTIVELY PRECLUDES APPELLATE REVIEW OF QUALIFIED IMMUNITY DENIALS

Another reason for granting certiorari is to correct Ninth Circuit precedent that effectively precludes appellate review of lower-court denials of qualified immunity. The majority opinion in this case holds that the lower court's finding "that the parties' evidence presents genuine issues of material fact is categorically unreviewable on interlocutory appeal." Pet. App. at 9. The majority so held even though this Court set aside a similar finding in *Scott v. Harris*. The crucial jurisdictional fact overlooked by the

majority was that this case – like *Scott v. Harris* – was not merely about evidentiary sufficiency. Rather, this case, like *Scott,* presented a legal question for appellate review: as a matter of law, how qualified immunity applied to a Fourth Amendment use-of-force claim. Given the existence of a proper legal question, a court of appeals is not jurisdictionally barred from peering behind the curtain and examining the summary judgment record.

In *Johnson v. Jones,* 515 U.S. 304 (1995), this Court limited appellate jurisdiction in interlocutory appeals of denial of qualified immunity when they are based solely on evidence sufficiency issues. Judge Trott's dissent interprets *Johnson* in a manner that harmonizes this Court's more-recent *Scott v. Harris* opinion:

> Noting clearly that Jones did offer sufficient information to support a verdict in his favor, 515 U.S. at 307-08, *Johnson* held that we will not on interlocutory appeal revisit that issue, *id.* at 313. *Scott v. Harris*, on the other hand simply says, *but* if after examining the "record as a whole" it becomes clear to *an appellate court* that the plaintiff has *no* case sufficient to survive Rule 50(c), the unique preemptive purpose of qualified immunity prevails, and the case shall be dismissed now, not later. 550 U.S. at 380. I repeat what the Court said in *Scott v. Harris* about the plaintiff's alleged facts: they must be "supportable by the record." 550 U.S. at 381 n.8 (emphasis omitted). In our case, the

> complaint's allegations find no factual support in the record. Accordingly, as defined by *Scott v. Harris*, the record taken as a whole issue is a *quintessential issue of law*, not just of disputed facts.

Pet. App. at 45-46.

It is no answer to say that officers can wait until after unfavorable verdicts to appeal denials of qualified immunity. First, forcing officers to trial denies officers protection from the burdens of trial, which is a crucial aspect of qualified immunity. Second, the Ninth Circuit has placed significant barriers against post-verdict review of qualified immunity denials. Ninth Circuit precedent provides that a verdict against officers (in a case arising from an officer shooting) "precludes us from hypothesizing about whether [the officer] could have believed that a legitimate law enforcement objective existed." *A. D. v. State of Cal. Highway Patrol,* 712 F.3d 446, 456 (9th Cir. 2013). Ninth Circuit Model Civil Jury Instructions do not call on jurors to decide disputed facts in Fourth Amendment use-of-force cases; instruction 9.22 is typically given, allowing jurors to decide the ultimate legal question of Fourth Amendment reasonability. (http://www3.ce9.uscourts.gov/jury-instructions/node/160).

## III. ALTERNATIVELY, THE COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *PLUMHOFF V. RICKARD*

This Court's forthcoming decision in *Plumhoff v. Rickard*, No. 12-1117, set for oral argument on March 4, 2014, is likely to affect the disposition of this case. There are many commonalities, substantive and procedural, between this case and *Plumhoff*. These commonalities counsel holding this petition until after *Plumhoff* is decided.

Substantively, this case and *Plumhoff* turn on the same law: they both involve a claim of qualified immunity from a Fourth Amendment deadly force claim. *Plumhoff* is the first case of this kind to be heard by the Court since *Scott v. Harris* in 2007. Thus, the decision in *Plumhoff* will likely contain helpful guidance for lower courts with regard to the substantive law that applies in deadly force cases. That guidance will be applicable to this case.

Procedurally, this case, like *Plumhoff*, reached this Court by way of an interlocutory appeal of a denial of qualified immunity. And like the decision below in this case, the decision of the court of appeals in *Plumhoff* addressed the question of appellate jurisdiction to review the summary judgment record in a qualified immunity appeal. Both the Sixth Circuit and the Ninth Circuit appear to have adopted the same piecemeal view of appellate jurisdiction: they state that even where an appeal presents a proper legal question for review, a court of appeals is jurisdictionally barred from reviewing the summary

judgment record, even if the district court has erroneously ruled there is a material factual dispute.

Amici are not the only ones to have noted similarities in the Sixth and Ninth Circuit's incorrect views of appellate jurisdiction in immunity appeals. The State of Ohio and 21 other States filed an amicus brief in *Plumhoff* that addressed this very error, and that brief extensively discussed the Ninth Circuit's decision here. Amicus Brief of the State of Ohio and 21 Other States in Support of Petitioners, *Plumhoff v. Rickard*, No. 12-1117 (filed Jan. 6, 2014), at 9, 10, 14, 19 (http://sblog.s3.amazonaws.com/wp-content/uploads/2014/01/12-1117-tsac-Ohio-amicus.pdf).

The petition in this case squarely presents the same jurisdictional issue highlighted by the State of Ohio *et al.* in its *Plumhoff* brief. The State of Ohio *et al.* discussed the great national importance of this issue, and amici here concur. An erroneous immunity decision that presents a genuine legal issue should not be insulated from appellate review merely because a district court's decision (finding material factual disputes) placed more emphasis on the mere existence of disputes, rather than whether those disputes were material. Jurisdiction should not be a piecemeal matter where denials of qualified immunity are involved. So long as there is a question of materiality – a legal question – appellate courts should exercise jurisdiction over the entire appeal.

For all of these reasons, amici respectfully suggest that, if the Court is not inclined to grant this

petition outright, the Court should hold the petition, pending its decision in *Plumhoff*.

## CONCLUSION

Qualified immunity should be judged with reference to an officer's actions – not with reference to "manufactured" evidence and speculative opinions of hired witnesses. If any kind of evidence is officially singled out for judicial skepticism, it should be the sort of hired-witness evidence that the lower court relied on to deny qualified immunity in this case. As Judge Trott noted in his dissent, "[t]here is no such thing as an expert on these issues short of medically-trained personnel familiar with Mr. George's senses." Pet. App. at 62.

This Court should grant certiorari to correct misguided Ninth Circuit precedent that enables well-supported qualified immunity motions to be defeated by "manufactured" evidence and speculative opinions of hired witnesses, and that effectively forecloses appellate review when qualified immunity is erroneously denied based on such evidence. Alternatively, amici urge this Court to hold this petition, pending its decision in *Plumhoff*.

If this Court does not intervene, entities such as those composing amici will continue to spend

taxpayer resources to defend civil litigation that should not have survived early dismissal.

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Respectfully submitted,

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