No. 12-1117

IN THE
Supreme Court of the United States

OFFICER VANCE PLUMHOFF, *et al.*,
Petitioners,
v.
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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and Federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,068 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and educational organization of over 9,000 appointed chief

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk (Rule 37.2). This brief was not written in whole or in part by the parties' counsel, and no one other than the amici made a monetary contribution to its preparation (Rule 37.6).

executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearinghouse for legal information and cooperation on municipal legal matters.

Amici and their members represent all levels of state and local government, including law enforcement agencies such as state police, county sheriff departments, and city police departments. Amici and their members have an interest in ensuring that law enforcement officers have appropriate flexibility to make critical decisions to use force to protect the public, without facing the specter of money damages and attorneys' fees awards, staggering defense costs, and the distractions of civil lawsuits. Although this Court's recent decisions have emphasized the crucial role of qualified immunity, lower courts continue to improperly deny officers the protection of qualified immunity in cases involving Fourth Amendment force claims. Lower courts are denying immunity in these cases based on a misunderstanding of the correct principles that apply at summary judgment. Even when the material facts

are not disputed, lower courts are treating disputes about whether force was reasonable as a reason to not even address whether the officers have immunity. Amici and their members have an interest in this Court reminding lower courts of the rules that apply at summary judgment when determining claims of immunity from Fourth Amendment force claims, and amici respectfully urge the Court to do so in its decision in this case.

SUMMARY OF ARGUMENT

After this Court's recent decisions in *Brosseau v. Haugen*, 543 U.S. 194 (2004) (per curiam), and *Scott v. Harris*, 550 U.S. 372 (2007), finding officers immune from Fourth Amendment deadly force claims, this case should have been an easy one for the court of appeals to find that the petitioner officers were immune. Here, respondent's decedent Donald Rickard engaged in behavior more dangerous than the behavior of the respondents in both of those cases combined. And under this Court's recent immunity decisions, officers are immune where the existence of a constitutional violation is not "beyond debate," *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074, 2083 (2011)—or, put differently, when the lawfulness of officers' conduct is "arguable," *Reichle v. Howards*, 132 S. Ct. 2088, 2096 (2012), in light of existing law.

Notwithstanding this precedent, the court of appeals denied immunity at summary judgment. The court of appeals denied immunity and held that a trial was needed, but not because there was a genuine conflict about *what happened*. Rather, there were competing arguments in the tranquility of the courtroom about whether, on these facts, officers on the scene could have concluded that the threat Rickard posed to them—and the innocent public—made deadly

force reasonable under the Fourth Amendment. The court of appeals never addressed the distinct issue of whether the officers still had immunity, even if the force was unreasonable.

The court of appeals made a fundamental error in not addressing the separate question of immunity. Even assuming for a moment that there was a material factual dispute here whether the Fourth Amendment was violated, that did not preclude resolving the immunity question. As this Court explained in *Saucier v. Katz*, 533 U.S. 194 (2001), the immunity inquiry in a force case is separate from the Fourth Amendment inquiry, and it involves significantly greater deference to officers' judgments. That deference means that what might count as a material factual dispute for purposes of summary judgment at the first prong of a qualified immunity analysis—whether the Fourth Amendment was violated—is no longer material at the second, "clearly established law," prong of the immunity analysis. Qualified immunity permits officers to make mistaken judgments, so long as their judgments are not "plainly incompetent." *Stanton v. Sims*, No. 12-1217, 2013 WL 5878007, at *2 (U.S. Nov. 4, 2013) (per curiam). That protection applies to officers' conclusions about the law *and* the facts. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). Even when the facts most favorable to the plaintiff might prove an unreasonable seizure under the Fourth Amendment, a material factual dispute does not exist for immunity purposes unless those facts compel a conclusion that the officers' actions were so obviously egregious that they were outside the range of conduct permitted by immunity. The court of appeals erred in denying the officers the range of judgments about the law and the facts that qualified immunity entitles them to make.

Other lower courts have denied immunity in recent Fourth Amendment force cases, based on the same fundamental confusion about which disputes at summary judgment are factual and which disputes are legal. As a result, countless officers and their public employers must needlessly face the burdens of litigation and trial—and every officer must make life-or-death decisions in the shadow of potentially devastating personal liability.

Given the persistence of these errors, amici respectfully urge this Court to use this decision to summarize the rules that differentiate material factual disputes from legal arguments at summary judgment, when officers invoke qualified immunity from Fourth Amendment force claims: Officers retain qualified immunity from Fourth Amendment force claims so long as it is arguable, on the historical facts[2] most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on the historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a plainly incompetent officer could conclude that force was reasonable.

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[2] This Court's decisions use the term "historical facts" as a shorthand way to describe the facts available to the officer at the time of the challenged search or seizure, to which the court then applies Fourth Amendment law to determine whether the officer's conduct was reasonable. *E.g., Maryland v. Pringle*, 540 U.S. 366, 371-72 (2003).

ARGUMENT

I. The court of appeals denied qualified immunity, even though immunity was plainly warranted, because it mistook competing legal arguments about reasonableness for factual disputes that precluded summary judgment.

After this Court's two most recent decisions finding law enforcement officers immune from Fourth Amendment force claims—*Brosseau*, 543 U.S. 194, and *Scott*, 550 U.S. 372—there should have been little doubt that qualified immunity shields the petitioners here from the respondent's similar Fourth Amendment force claim. After all, in this 2004 incident, Rickard managed to engage in more dangerous behavior than the respondents in *both* of those earlier cases *combined*.

Rickard began this incident like Victor Harris, by fleeing a traffic stop and driving recklessly along the freeways, threatening the lives of innocent motorists and police officers. Rickard continued to menace motorists and officers even as he attempted to elude the police by crossing the Mississippi River from Arkansas into Tennessee, and then darting off the freeway to Memphis surface streets.

Then, after officers used their vehicles to partially box in Rickard's car in a Memphis parking lot, Rickard reenacted Kenneth Haugen's dangerous behavior. Like Haugen, Rickard refused to stop even when an officer on foot ordered him to do so and pounded on his windshield with a pistol. And like Haugen, Rickard persisted in his reckless flight, endangering other officers who were on foot as well as innocent drivers on the nearby roadway. If anything, Rickard posed a

greater threat than Haugen: while Officer Brosseau's fellow officers were a few houses away, here several officers were on foot, right next to Rickard's vehicle. The videos show Rickard's car's tires spinning as he rammed a police vehicle with petitioner Plumhoff next to him. Then, Rickard reversed his vehicle in a 180-degree turn, and another officer had to dodge the vehicle to avoid getting run over. Unlike Haugen, Rickard had already amply demonstrated his willingness to use his vehicle to menace innocent motorists on the public roadways and the police officers trying to arrest him.

The case for immunity should have been apparent here. Given that Rickard posed a risk to officers and the public greater than the risks in *Brosseau* and *Scott*, it was at least "arguable," *Reichle*, 132 S. Ct. at 2096, that deadly force was a reasonable response here. Indeed, as petitioners have shown, several lower court decisions found deadly force reasonable on similar facts, or at least that qualified immunity applied. Pet'rs' Br. 28-35.

Nevertheless, the court of appeals denied immunity. It denied immunity without identifying any genuine dispute about what Rickard did,[3] or the amount of

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[3] The videos in this case certainly do not *create* a factual dispute about whether Rickard tried to ram officers' vehicles on the freeway—or about any other fact in the case. The court of appeals concluded, correctly, that the videos simply don't show much at certain points of the incident, stating that, "After carefully reviewing the video, as did the district judge, we cannot conclude that it provides clear support for either the plaintiff's or the defendants' version of what occurred." Pet. App. 10; *accord id.* at 9 (whether officers were in personal danger "is not resolved by the video recordings"). The respondent likewise acknowledges this. Opp'n to Pet. 3 (during the freeway pursuit, "it is difficult to tell from the video what the proximity of the vehicles was to

force the officers used. Indeed, respondent identifies no dispute about the material facts to which the officers testified. Rather, respondent identified only disputes about the "characterizations" of those facts, such as what conclusions a reasonable officer could draw from Rickard's behavior about the threat Rickard posed. Opp'n to Pet. 7, 30. Similarly, respondent urged that the number of shots fired could lead a jury to find the force unreasonable. *Id*. at 16-17. The court of appeals agreed with respondent that there was a triable issue. Accordingly, the court of appeals adopted the district court's conclusions that on "the facts, considered in a light most favorable to the plaintiff," a reasonable officer would not "have considered Rickard's continued flight a clear risk to others." Pet. App. 6, 12. The court of appeals found a triable issue of fact, not because there was a genuine conflict about *what happened*, but rather because there was a conflict about whether, on those facts, officers could conclude deadly force was reasonable. *Id.* at 10. The court of appeals also relied on that triable issue in denying qualified immunity. *Id.* at 12. Apart from that, the court offered no explanation of why it did not analyze the state of case law as of 2004 to determine whether it was at least arguable that deadly force was permissible. *Id.*

The court of appeals' decision not to analyze similar cases to determine whether the law here was "clearly established" as of 2004 was based on a more fundamental mistake in its analysis. That mistake was to identify the disputes in this case as factual disputes that precluded summary judgment, when

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each other."). Of course, if the videos do not clearly depict what occurred, then they cannot create a genuine factual dispute about what occurred.

they were actually legal disputes capable of resolution by the court.

The court of appeals took the view that when officers are confronted with behavior like Rickard's, officers cannot rely on legal rules that state what inferences an objectively reasonable officer is (or is not) entitled to draw from that behavior, about whether the person may pose a threat of death or serious physical injury to officers or the public. And officers cannot rely on a legal rule that deadly force is reasonable in the face of such a threat. Nor can officers rely on the leeway that qualified immunity permits officers for their legal *and* factual judgments.

II. When an officer invokes qualified immunity from a Fourth Amendment force claim at summary judgment, a plaintiff is entitled to have evidentiary disputes about what happened—the historical facts—resolved in his or her favor, but disputes about what an officer could have concluded from those historical facts, and the ultimate reasonableness of force, are legal arguments.

The court of appeals here found a factual dispute, even though the disputed issues before it were actually legal ones. Such a mistake is not surprising, for two reasons. First, there is a close connection between the facts and the law in a force case. As this Court has observed, even when the facts are undisputed, the legal task of determining what is reasonable force under the Fourth Amendment involves "slosh[ing] our way through the factbound morass of 'reasonableness,'" *Scott*, 550 U.S. at 383. Second, the likelihood of mistaking legal disputes for factual ones only increases when officers invoke their right to immunity

at summary judgment. On the one hand, procedural summary judgment law obligates the court to resolve material factual disputes in favor of the non-moving party. But on the other hand, substantive immunity law requires deference to officers' judgments about the significance of what happened—including judgments about the facts, even if they are mistaken. *Pearson*, 555 U.S. at 231. That substantive law renders many supposed factual disputes immaterial. These difficulties have led other lower courts to make similar errors at summary judgment, and mistakenly deny immunity. *Infra* Part III.

Given these difficulties, the lower courts would be well served by a plain statement from this Court that draws lines between the deference that a plaintiff's facts receive at summary judgment, and the deference that officers receive as a matter of immunity law with regard to the conclusions they are permitted to draw from those facts. Amici respectfully urge that the applicable rule can be stated as follows: Officers retain qualified immunity from Fourth Amendment force claims so long as it is "arguable," *Reichle*, 132 S. Ct. at 2096, on the historical facts most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on these historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a "plainly incompetent," *Stanton*, 2013 WL 5878007, at *2, officer could conclude that force was reasonable.

This standard follows from the rules that govern motions for summary judgment, *infra* Part II.A, and

from this Court's Fourth Amendment decisions, *infra* Part II.B., and immunity decisions, *infra* Part II.C.

A. What counts as a material factual dispute depends on whether a court proceeds on the first or second prong of qualified immunity analysis.

The first task in any summary judgment motion, including motions invoking immunity in a Fourth Amendment force case, is "to determine the relevant facts." *Scott*, 550 U.S. at 378. But what facts are relevant at summary judgment is governed by the substantive law applicable to the motion. "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). In a qualified immunity case, the governing law is different depending on whether a court proceeds on the first or second prong of the analysis. Therefore, what counts as the "relevant facts" and a "material" dispute is different, depending on whether a court proceeds on the first prong—whether the officer's conduct violated the Fourth Amendment—or the second—whether the unlawfulness of the officer's conduct was beyond debate under clearly established law, after allowing for factual mistakes that are not so unreasonable only a plainly incompetent officer would make them.

Officers begin with a great deal of deference to their view of the facts as a matter of regular Fourth Amendment analysis. *Infra* Part II.B. Immunity then increases the degree of that deference. *Infra* Part II.C. Indeed, immunity allows officers every reasonable

conclusion about the law and the facts, as well as many unreasonable ones. *Pearson*, 555 U.S. at 231. Given this legal standard, a plaintiff's argument that other inferences and conclusions from the facts would have been more reasonable under the circumstances does not present a material factual dispute, except in cases of obviously egregious force.

B. At the first prong of immunity analysis, the Fourth Amendment entitles officers to make reasonable inferences about dangerousness from the historical facts most favorable to the plaintiff—even if there might have been other plausible inferences to the contrary.

Under this Court's Fourth Amendment decisions, officers are entitled to draw reasonable inferences and conclusions from the historical facts to decide whether they face a dangerous individual or situation. Once the historical facts are established for purposes of summary judgment, the law does *not* require any continuing acceptance of inferences favorable to the plaintiff. As a matter of law, officers are entitled to draw inferences from those historical facts that a reasonable officer could draw, regardless of whether there might be some innocent explanation for the facts. It is a legal matter what inferences the law permits officers to make on a given set of facts. The obligations of the Fourth Amendment do not vary from place to place or jury to jury.

1. Under *Graham v. Connor*, 490 U.S. 386, 388 (1989), a claim that an officer used excessive force in making a search or seizure is governed by the "objective reasonableness" standard of the Fourth Amendment. This Court has previously explained that the reasonableness of force under the Fourth

Amendment on a given set of facts is a "pure question of law." *Scott*, 550 U.S. at 381 n.8. With regard to that legal question, the most hotly disputed issue in most Fourth Amendment cases involving deadly force—including this one—is whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Assessing the existence of probable cause to believe a suspect poses a threat of serious physical harm requires consideration of what inferences and conclusions an officer is entitled to draw from the facts before him or her.

a. This Court's Fourth Amendment force decisions have not expressly stated whether an officer's inferences and conclusions about the existence of a threat are factual or legal for purposes of summary judgment. However, these decisions strongly suggest that the validity of an officer's judgments about dangerousness, on a given set of historical facts, presents a legal issue.[4] That suggestion is correct. After all, the reasonableness of an officer's threat assessment on a given set of facts is central to a determination of whether deadly force was reasonable under the Fourth Amendment. *Id.*; *accord Scott*, 550 U.S. at 384; *Brosseau*, 543 U.S. at 197-198; *Garner*, 471 U.S. at 11; *cf. Graham*, 490 U.S. at 396 (identifying threat posed by seized individual as factor in reasonableness analysis).

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[4] Because immunity law permits officers to make mistaken judgments about the law, the facts, and mixed questions, *Pearson*, 555 U.S. at 231, these distinctions lose significance at the second prong of immunity analysis. *Infra* Part II.C.

This Court's force decisions provide further support for the view that this is a legal issue. These decisions repeatedly emphasize the deference that officers receive for their judgments about the facts in force cases. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Whether force appears reasonable is measured from the perspective of the officer, not a lay juror: "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham*, 490 U.S. at 396 (citing *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968)). And in *Saucier*, this Court expressly confirmed that the test for reasonable force requires *deference* to the judgment of a reasonable officer. "We set out a test [in *Graham*] that cautioned against the '20/20 vision of hindsight' in favor of deference to the judgment of reasonable officers on the scene." *Saucier*, 533 U.S. at 205 (quoting *Graham*). Likewise, in *Scott*, the reasonableness analysis relied on inferences that the officers were permitted to draw that the respondent would be a threat to the public if officers called off their pursuit. 550 U.S. at 385. This Court rejected the suggestion that an inference about the probability that the respondent would continue to pose a danger would be a "factual assumption[]" in favor of the officer, and that accepting this inference would somehow violate normal summary judgment principles. *Id*. at 385 n.11.

All of these decisions indicate that Fourth Amendment force law entitles officers to make reasonable inferences and judgments about dangerousness based

on the historical facts—notwithstanding that a lay jury might find other inferences plausible.[5]

b. In deferring to the professional judgment of reasonable officers, this Court's force decisions are consistent with its other Fourth Amendment prece-

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[5] It is not always easy to draw lines between determining the "historical facts" in a Fourth Amendment case, *Pringle*, 540 U.S. at 371-72, and the judgments a reasonable officer is entitled to make given those facts. Nor is it necessary to do so in very clear cases. For example, in *Scott* the fact that the respondent was driving dangerously was so clear that no exercise of professional judgment was required to reach that conclusion. There, the Court reviewed the record to assess whether a reasonable jury could agree with respondent on "the factual issue whether respondent was driving in such fashion as to endanger human life." 550 U.S. at 380. The Court found the respondent's driving was so plainly dangerous that no reasonable jury could believe that he was not driving dangerously.

If *Scott* had been a closer case, *Graham*'s principles of adopting the officer's perspective and deference to reasonable judgments by officers on the scene would have supported differentiating between the "historical facts" as they appeared to the officers—matters such as the driver's speed, lane changing, and violations of the rules of the road—and a reasonable officer's judgments from these historical facts about whether the driver posed a danger. Then, the court would ask: Would a reasonable officer conclude on these historical facts that the driver was driving in such a fashion as to endanger human life?

Regardless of the boundary between factual and legal issues for purposes of pure Fourth Amendment analysis, however, the court asks a different question at the second prong of immunity analysis, *infra* Part II.C. Given that immunity permits officers to make legal and factual judgments about which reasonable people could disagree, the fact-law distinction disappears so long as officers' judgments are involved. Therefore, at the second prong, the court would ask: Given the historical facts, would "every reasonable official," *Al-Kidd*, 131 S. Ct. at 2083, reach the conclusion that the respondent was not driving in a fashion as to endanger human life?

dents. As discussed above, *Graham* relied on *Terry* for its core principle of deference to reasonable officer judgments about officer safety and public safety. In *Terry*, this Court explained that an officer may rely on the historical facts and on "reasonable inferences which he is entitled to draw from the facts in light of his experience," in assessing "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27. Similarly, in *Michigan v. Long*, 463 U.S. 1032 (1983), this Court explained that an officer could search the passenger compartments of a vehicle "if the police officer possesses a reasonable belief based on specific and articulable facts which, *taken together with the rational inferences from those facts*, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id*. at 1049 (quoting *Terry*, 392 U.S. at 21) (internal quotation marks omitted and emphasis added). In these contexts, the central exercise in the reasonableness analysis is determining what inferences an objectively reasonable officer is entitled to draw from a given set of facts concerning the existence of a danger to officers or others. This is no different from determining reasonableness in a force case.

Likewise, the legal principles that apply to Fourth Amendment probable cause analysis should also apply to officers' judgments about the existence of a threat. It is for good reason that this Court in *Garner* stated the relevant test as "*probable cause to believe* that the suspect poses a *threat* of serious physical harm, either to the officer or others." *Garner*, 471 U.S. at 11 (emphasis added). Just as officers must make decisions to arrest for criminal conduct in the face of

uncertainty, so must they also make decisions whether to use force. "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar v. United States*, 338 U.S. 160, 175 (1949). Thus, when officers assess probable cause, they are entitled to rely on inferences from the facts before them that a reasonable officer could make. "[O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas v. United States*, 517 U.S. 690, 700 (1996). In determining probable cause to arrest, a court considers both the "historical facts" and the "reasonable inference[s]" that could be drawn from them, "viewed from the standpoint of an objectively reasonable police officer." *Maryland v. Pringle*, 540 U.S. 366, 371-72 (2003) (quoting *Ornelas*, 517 U.S. at 696) (internal quotation marks omitted). Probable cause law entitles officers to make these inferences so long as they are reasonable. A contention that other inferences were more reasonable is a legal argument, not a factual dispute. There is no reason to depart from these Fourth Amendment principles in force cases.

2. Respondent here suggests that disputes about "reasonableness" are factual. Opp'n to Pet. 5. But on a given set of historical facts, the reasonableness of force is not a jury question, any more than whether certain facts give rise to probable cause to arrest is a jury question. Rather, it is a "purely legal question." *Scott*, 550 U.S. at 381 n.8. Treating this question as a factual one would mean that the Fourth Amendment's reasonableness standard would vary from place to place and time to time—a consequence that this Court

has found unacceptable in its Fourth Amendment decisions. *See, e.g., Devenpeck v. Alford*, 543 U.S. 146, 154 (2004) (rejecting "closely related offense" rule for probable cause to arrest, and stating, "We see no reason to ascribe to the Fourth Amendment such arbitrarily variable protection."); *Ornelas*, 517 U.S. at 697 (holding that *de novo* review applies to probable cause determinations, and noting this standard prevents "varied results [that] would be inconsistent with the idea of a unitary system of law").

There may be some surface appeal to analogizing the "reasonableness" determination under the Fourth Amendment to the "reasonableness" determination in a state law negligence case, where the jury traditionally decides whether reasonable care was exercised. But that analogy falls apart in light of the differences between state negligence laws and the Constitution. The results of tort cases may vary on similar facts, but the Constitution does not.

> [T]he Constitution is not a form of tort law. It creates legal rules. Permitting the jury freedom to determine for itself whether particular conduct was reasonable within the meaning of the fourth amendment would introduce the *ex post* reassessment that *Graham* decried. Under the Constitution, the right question is how things appeared to objectively reasonable officers at the time of the events, *not* how they appear in the courtroom to a cross-section of the civilian community.

Bell v. Irwin, 321 F.3d 637, 640 (7th Cir. 2003). Under this Court's cases, the reasonableness of force should be a question of law, involving the balancing of governmental interests and individual interests. Juries do not do that. Courts do. *E.g., Scott*, 550 U.S.

at 384 ("So how does a court go about weighing the perhaps lesser probability of injuring or killing numerous bystanders against the perhaps larger probability of injuring or killing a single person?").

C. At the second prong of immunity analysis, officers are entitled to every arguable inference about dangerousness from the historical facts most favorable to plaintiff, as well as great latitude in their perception of those facts—and officers lose immunity only if their force was so obviously egregious in light of clearly established law that only a plainly incompetent officer would have concluded the force was lawful.

While *plaintiffs* get the benefit of favorable factual inferences when it comes to determining the historical facts—what happened—immunity law demands that *officers* receive the benefit of every inference that could be drawn from the historical facts concerning the danger posed by a suspect. "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.'" *Pearson*, 555 U.S. at 231 (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)); *Butz v. Economou*, 438 U.S. 478, 507 (1978). This principle protects officials' judgments about dangerousness, regardless of whether these are characterized as factual, legal, or mixed judgments. And this Court's Fourth Amendment immunity decisions have protected officers' judgments about dangerousness, without parsing any such distinctions.

1. Qualified immunity provides breathing room for officials to vigorously enforce the law without undue fear of personal liability, and without the distractions incident to a civil lawsuit. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012); *Pearson*, 555 U.S. at 231. And in force cases, this protection is even more consequential. Hesitating to act in the face of a potential threat to the innocent public or police officers can have devastating and even fatal results, far worse than time and money spent in civil litigation. *See, e.g.*, DEPT. OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, LAW ENFORCEMENT OFFICERS KILLED & ASSAULTED 2012, Table 1 (48 law enforcement officers feloniously killed in 2012), Table 65 (52,901 officers assaulted in 2012, with 14,678 officers injured), http://www.fbi.gov/about-us/cjis/ucr/leoka/2012/tables; *State Trooper Seriously Injured After Intentionally Hit By Car in Pulaski Co.*, WSET.COM, Jan. 26, 2013, http://www.wset.com/story/20713689/state-trooper-seriously-injured-after-intentionally-hit-by-car-in-pulaski-co (driver allegedly intentionally drove at police officer at a high rate of speed and struck him); *Beaumont Police Officer Killed When Struck by Chase Suspect*, KHOU.COM, July 9, 2011, http://www.khou.com/news/local/Beaumont-police-officer-struck-killed-by-chase--125265004.html (suspect allegedly intentionally struck police car head-on during high-speed chase killing the officer); *San Francisco Man Gets Life In Prison For Killing Police Officer*, SANFRANCISCO.CBSLOCAL.COM, Jan. 25, 2011, http://sanfrancisco.cbslocal.com/2011/01/25/san-francisco-man-gets-life-in-prison-for-killing-police-officer/ (officer struck and killed during a car chase).

Qualified immunity gives officers protection commensurate with these high stakes. As this Court has explained, qualified immunity precludes individual

damages liability for violating a constitutional right unless the law is so clear that "every reasonable official would have understood that what he is doing violates that right." *Al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (internal quotation marks omitted). The situation must be so clear-cut that it is "beyond debate" that the official transgressed the Constitution. *Id.* Liability is reserved for actions that only a "plainly incompetent" official could have considered lawful. *Stanton*, 2013 WL 5878007, at *2.

Qualified immunity recognizes that police are not judges and should not be held personally liable based on fine distinctions made with the security of hindsight.

> The policeman is not expected to know all of our precedents or those of the Supreme Court, or to distinguish holding from dicta, or to put together precedents for line-drawing, or to discern trends or follow doctrinal trajectories. Otherwise, qualified immunity would be available only to a cop who is a professor of criminal procedure in her spare time. The police cannot be expected to know such things at risk of *personal liability* for the policeman's savings, home equity, and college funds.

Gonzalez v. City of Schenectady, 728 F.3d 149, 162 (2d Cir. 2013). Thus, in the absence of uniform on-point case law prohibiting conduct on a given set of facts, immunity is lost only if the official conduct is "obviously egregious" under the Constitution. *Becker v. Bateman*, 709 F.3d 1019, 1025 (10th Cir. 2013) (holding officer immune from Fourth Amendment force claim).

Immunity applies equally to Fourth Amendment claims, notwithstanding that officers might end up immunized for unreasonable searches and seizures. *Anderson*, 483 U.S. at 644. And qualified immunity applies equally to force claims, providing an additional layer of protection and even greater deference to officers than the already deferential Fourth Amendment test for reasonable force. *Saucier*, 533 U.S. at 205-06. The immunity serves to "protect officers from the sometimes hazy border between excessive and acceptable force." *Id*. at 206.

The fact-bound nature of Fourth Amendment reasonable force analysis does not call for bypassing an immunity analysis where the facts are undisputed but reasonable people could disagree about the reasonableness of force. Rather, the fact-bound nature of the analysis often leaves room for debate about whether force was reasonable. That is precisely the zone in which immunity protects officers' judgments. This Court recognizes that the factual specificity of force cases makes it difficult to identify clearly established prohibitions on officials' conduct.

> It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. . . .
>
> *Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances.

Id. at 205; *see also Brosseau*, 543 U.S. at 201 ("[T]his area is one in which the result depends very much on the facts of each case."). The need for qualified immunity to protect officers is even greater in this area of the law, so that officers are not held liable for breaching unforeseen legal prohibitions that are highly fact specific.

Immunity protects fact-specific judgments by officials, like the judgments involved in evaluating the risk posed by a situation or by a suspect. In recognition of the reality that officials are called upon to make judgments about the facts as well as the law, this Court applies qualified immunity to both kinds of judgments. *Pearson*, 555 U.S. at 231. Under this principle, a court analyzing immunity is indifferent to whether an officer's judgment is factual or legal. A court need not differentiate between an official's perception of the facts, his or her professional judgments about what inferences to draw from the facts, or his or her ultimate judgments about reasonableness. A mistake at any of these steps is permissible, so long as it is not a mistake that only a plainly incompetent officer would make. Given a set of facts, a court is obligated to allow any conclusion from those facts that a reasonable officer could arguably draw. And in light of those facts and conclusions—and then-clearly established law—a court must recognize immunity unless only a plainly incompetent officer could have concluded that his or her conduct was permitted by the Fourth Amendment.

2. In practice, this Court has applied great deference in Fourth Amendment immunity cases when it comes to officers' evaluation of possible threats to officer safety or public safety. If an inference about dangerousness is at least arguable, the officer receives

the benefit of that inference. Under this Court's immunity decisions, whether the facts permit an inference of dangerousness is a legal question—not a factual one that triggers an obligation at summary judgment to accept whatever alternative interpretation of the facts is tendered by the non-moving party.

a. Recently, this Court's decision in *Ryburn v. Huff*, 132 S. Ct. 987 (2012) (per curiam), involved officers who were investigating a rumor that a student was planning to "shoot up" his school. After an initial investigation at the student's school, officers visited the student at home. The student's mother did not want to talk with the officers and refused to let them in. When the officers asked her whether there were guns in the home, she immediately turned around and ran into the house without a word. Officers were "scared" because they "'didn't know what was in that house' and had 'seen too many officers killed,'" and they were "concerned about 'officer safety.'" *Id*. at 989. The officers followed the mother into the home. The student's family sued the officers for the entry, claiming it violated the Fourth Amendment. The district court found immunity, but the court of appeals denied immunity.

This Court summarily reversed, and stated the deferential standard that applies to officers' legal and factual judgments in identifying dangerous situations. "In sum, *reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted* them to enter the Huff residence if there was an objectively reasonable basis for fearing that violence was imminent." *Id*. at 992 (emphasis added). The officers also received deference as to whether there was an objectively reasonable

basis to fear imminent violence: "And a reasonable officer could have come to such a conclusion based on the facts as found by the District Court." *Id*. (emphasis added). Citing *Graham*, the Court emphasized that "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Id.* at 991-92.

b. The deferential analysis in *Ryburn* was consistent with *Saucier*, where this Court first explained in detail how officers claiming immunity from a Fourth Amendment force claim are entitled to all inferences that a reasonable officer could draw regarding a safety threat—and some unreasonable ones—even at summary judgment. So long as "a reasonable officer" in the same position "could have believed" that his or her response "was within the bounds of appropriate police responses," the officer is immune. *Saucier*, 533 U.S. at 208. Where an officer does "not know the full extent of the threat" posed by an individual, that uncertainty weighs in favor of immunity, not against it. *Id.* Therefore, in *Saucier*, where the "circumstances show[ed] some degree of urgency" to get a potentially threatening protestor away from the Vice President, *id*. at 209, the Court did not parse the degree of urgency or whether a jury might conclude that the situation was not actually so urgent. Regardless of what a jury might think, immunity applied because the facts *permitted* the officer to conclude that some threat was present.

c. In *Brosseau*, 543 U.S. 194, this Court applied *Saucier*'s principles of deference to officer judgments about public safety and officer safety to find immunity for the use of deadly force. Respondent Haugen had an outstanding no-bail felony warrant and initially

attempted to flee from officers on foot. He jumped into his Jeep, locked the door, and started to drive away, even after Officer Brosseau smashed the window and struck him with her pistol. Brosseau then fired at Haugen from the back, because she was "fearful for the other officers on foot 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." *Id*. at 197 (internal quotation marks omitted, alterations in original).

As in *Ryburn*, this Court summarily reversed the court of appeals' denial of immunity. And like in *Ryburn* and *Saucier*, this Court deferred to the officer's assessment of risk presented by this situation. For purposes of immunity analysis, this Court accepted the officer's assessment that "persons in the immediate area [were] at risk from the flight." *Id*. at 200. Notably, the Court did so even while construing the material facts at summary judgment most favorably to the non-moving party. *Id*. at 195, n.2. The Court's analysis reflected that in an immunity case, construing the facts at summary judgment favorably to the non-moving party does not mean accepting the non-moving party's arguments about what risk assessment was warranted on those facts. Even at summary judgment, the officer received the benefit of her judgments about dangerousness, because her judgments were not so unreasonable that they fell outside the range of judgments that immunity permits. For purposes of immunity analysis, all that mattered in *Brosseau* was that there were civilians and officers in the neighborhood, and that Haugen was continuing his efforts to flee the police behind the wheel of a vehicle.

d. The exceedingly deferential perspective that a court adopts in an immunity case is one reason why immunity remains a legal question for the court in Fourth Amendment cases, even when a jury could take a different view if it were charged with determining "reasonableness." "[T]he court should ask whether the agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed five years after the fact." *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991) (per curiam) (finding immunity from Fourth Amendment arrest claim).

In summary, when a court is evaluating at summary judgment whether officers are immune from a Fourth Amendment force claim, courts must resolve all disputes about the historical facts in favor of the plaintiff—but then the court must draw inferences from these historical facts that a reasonable officer could arguably draw regarding the threat posed by the suspect. That distinction is consistent with normal summary judgment rules because the question of what conclusions a reasonable officer is entitled to draw from these historical facts is a matter of immunity law, not a factual issue. So long as it is "arguable," *Reichle*, 132 S. Ct. at 2096, that an officer's force was reasonable in light of clearly established law and the facts before him or her, immunity applies. The only factual or legal judgments forbidden to officers are those that are so unreasonable that only a "plainly incompetent" officer could make them, *Stanton*, 2013 WL 5878007, at *2.

III. The Court should provide much-needed guidance to lower courts about the rules that apply at summary judgment when officers invoke qualified immunity from Fourth Amendment force claims.

1. In light of this Court's precedents, the error in the court of appeals' analysis was to conclude that immunity must be denied if there are arguments that could be made that the force was unreasonable. But, as discussed above, one does not follow from the other.

There was no dispute here about what happened. Rather, respondent's contentions were *arguments* about (a) the conclusions a reasonable officer could draw from these historical facts about whether Rickard posed a threat of death or serious physical injury, and (b) whether deadly force was ultimately reasonable. Neither of these contentions are material factual disputes for purposes of immunity analysis.

a. It is not material at summary judgment whether there were potentially plausible inferences that Rickard was not dangerous. The existence of competing inferences about dangerousness does not create a material factual dispute, so long as the inferences indicating dangerousness are not so unreasonable that only a plainly incompetent officer could draw them. Applying this standard to the record here, there would not be unanimity among every reasonable officer that there was no probable cause to conclude Rickard posed a threat of serious physical injury or death to officers or the public. Therefore, this contention does not present a triable issue.

b. Given that officers were entitled to conclude that Rickard posed a threat of death or serious physical injury to officers or the public, it was not

clearly established that the amount of force used by each officer here—two, ten, and three shots—was clearly unreasonable under the Fourth Amendment. Respondent has urged that this force was unreasonable because it was more certain to cause death than the force officers used in *Scott* (ramming the vehicle) or *Brosseau* (one officer firing one shot). Whether or not this argument makes any sense for deadly force incidents that post-date this Court's 2007 decision in *Scott*, qualified immunity law means that this argument has no merit in relation to this 2004 incident.

No clearly established law as of 2004 required officers to distinguish between the various tools available to stop a fleeing driver that might involve deadly force—force likely to cause death or serious bodily injury—based on the relative likelihood that different tools would be more or less certain to cause death. As of 2004, deadly force was a single category as far as the law was concerned, and no Supreme Court case suggested that there were differences in degrees of deadly force. Indeed, as petitioners have argued, Pet'rs' Br. 28-29, 40, several decisions of the courts of appeals have found that where officers are initially justified in using deadly force, they are justified in continuing to fire shots until they can confirm that the resisting suspect has surrendered or been disarmed. And other decisions of the courts of appeals found immunity where officers used their firearms rather than their patrol vehicles to stop a dangerous vehicle from fleeing because clearly established law did not distinguish between these degrees of deadly force. *Id.* at 29-34.

These courts of appeals rulings are in accord with the professional judgments of local law enforcement

agencies that all of these instrumentalities constitute deadly force. Police training standards dictate that any number of bullets fired constitutes deadly force, and officers' decisions about when to stop firing at a suspect are to be guided by officers' certainty that the threat that initially justified deadly force has been neutralized. *See, e.g.,* DAVID KLINGER, INTO THE KILL ZONE: A COP'S EYE VIEW OF DEADLY FORCE 34 (2004); Thomas D. Petrowski, *Use-of-Force Policies and Training, A Reasoned Approach (Part Two)*, 72 FBI LAW ENFORCEMENT BULLETIN 24, 29 (Nov. 2002), http://leb.fbi.gov/2002-pdfs/leb-november-2002. Similarly, local law enforcement agencies treat the force used in *Scott*—intentionally colliding with a fleeing vehicle—as deadly force. An International Association of Chiefs of Police study of police department vehicle pursuit policies in the United States indicated that a majority of police department vehicular pursuit policies that were reviewed classified any "contact" tactic like an intentional collision as deadly force. CYNTHIA LUM & GEORGE FACHNER, POLICE PURSUITS IN AN AGE OF INNOVATION AND REFORM 42-43 (2008).

Given these judgments by the courts of appeals and law enforcement professionals—that all of these instrumentalities are classified as deadly force—one cannot conclude that only a plainly incompetent officer could have believed in 2004 that the law required differentiating between them.

Under the correct standard, the petitioners here retain immunity.

2. Regrettably, the error the court of appeals made here is not unique. Even after *Brosseau* and *Scott*, lower courts continue to deny immunity based on a mistaken view that disputes about the reasonableness

of force under the Fourth Amendment preclude a determination of qualified immunity. Other courts and other decisions have similarly treated disputed *arguments* about Fourth Amendment reasonableness as if they were disputes about historical *facts*, and consequently denied qualified immunity at summary judgment, notwithstanding that there were very few or no disputes about the historical facts—only attorneys' arguments about what conclusions should be drawn from those facts. For example, in *Glenn v. Washington County*, 673 F.3d 864 (9th Cir. 2011), the court of appeals upheld a denial of immunity at summary judgment on the basis that "[o]n the facts presented here, viewed favorably to the plaintiff, the officers' use of force was not undisputably reasonable." *Id*. at 872. The court reasoned that in a multi-factor reasonableness analysis, some factors could cut in favor of the plaintiffs, while others could cut in favor of the officers. Hence, the dispute about reasonableness had to be decided by a jury. *Id*. at 878. And having decided that the reasonableness of force was a jury question, the court of appeals expressly declined to engage in any analysis of whether clearly established law prohibited deadly force. *Id.* at 870.[6] Other decisions of the courts of appeals show the same error. *See, e.g., Walker v. Davis*, 649 F.3d 502 (6th Cir. 2011) (denying immunity in split decision, where motorcyclist led officers on ten-mile pursuit and officer rammed motorcyclist); *Kanda v. Longo*, 484 Fed.

[6] The court denied immunity, even while candidly recognizing that "[a] jury could view the facts as the district court did, and likewise reach the conclusion that the officers' use of force was reasonable." *Id*. at 878. But it does not follow from this that immunity should be *denied*. This Court has explained that immunity must be *granted* when the existence of a constitutional violation is not "beyond debate," *Al-Kidd*, 131 S. Ct. at 2083.

Appx. 103, 104-05 (9th Cir. 2012) (denying immunity in split decision, on basis that a jury could weigh factors in Fourth Amendment force analysis differently from district judge who found immunity on undisputed facts); *Hermiz v. City of Southfield*, 484 Fed. Appx. 13, 17 (6th Cir. 2012) (refusing to review on appeal "factual" question whether reasonable officer could conclude a threat existed on the facts).

3. Given the persistence of these errors in the lower courts, amici respectfully urge that this Court take this opportunity to remind the lower courts of the fundamental legal principles that guide the immunity analysis in Fourth Amendment force cases at summary judgment.

This Court's recent decisions have emphasized a court's duty in immunity cases to review then-existing case law governing official conduct, to determine whether it was at least arguably lawful for officials to engage in the challenged conduct. *Stanton*, 2013 WL 5878007, at *2; *Reichle,* 132 S. Ct. at 2095; *Ryburn*, 132 S. Ct. at 990; *Al-Kidd*, 131 S. Ct. at 2083. However, in Fourth Amendment force cases, many lower courts err before even reaching this step of the analysis. Too many lower courts are denying immunity outright, on the mistaken understanding that when the reasonableness of force is subject to dispute, immunity cannot be granted. Too many lower courts are operating under the mistaken understanding that at summary judgment officers are not entitled to every reasonable inference of dangerousness (and even some unreasonable ones) that they can draw from the undisputed historical facts. As a result, law enforcement officers and their state and local government employers are embroiled in protracted and wasteful litigation and trials.

Therefore, amici respectfully urge this Court to use this decision to outline the rules that apply at summary judgment to claims of qualified immunity from Fourth Amendment force claims: Officers retain qualified immunity from Fourth Amendment force claims so long as it is arguable, on the historical facts most favorable to plaintiff, that the force was reasonable. In evaluating immunity, a court must adopt the inferences that a reasonable officer could arguably draw from the historical facts, regardless of whether those inferences are factual or legal. It is a legal question whether—based on these historical facts, the inferences an officer could arguably draw from them, and clearly established law—only a plainly incompetent officer could conclude that force was reasonable.

CONCLUSION

We respectfully request this Court to reverse the judgment of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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