No. _____

In The
Supreme Court of the United States

MATTHEW SCHANTZ,

Petitioner,

v.

SHERIFF BENNY DELOACH,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Fourth Amendment entitle police to seize all speeding motorists by shooting them, regardless of the circumstances and independently of any demonstrable lethal threat beyond the mere fact they are speeding? More specifically, does the Fourth Amendment allow police to use deadly force to prevent the escape of a joyriding motorcyclist who has outrun police cars and avoided roadblocks rather than submitting to a traffic stop, but who has also maintained steady control of his bike without posing an immediate danger to any identifiable persons in his path?

2. Should the Court clarify *Saucier v. Katz*, 533 U.S. 194 (2001) (as modified by *Pearson v. Callahan*, 555 U.S. 223 (2009)) to provide needed guidance on how courts should exercise their discretion in determining which question to address first in conducting the two-pronged qualified immunity inquiry?

3. Since the Fourth Amendment requires that the use of force be objectively reasonable from the standpoint of a reasonable police officer at the scene – not just subjectively reasonable in the mind of the defendant officer – does Rule 56 permit a court to disregard the plaintiff's testimony about the lack of objective reasonableness on the defendant's motion for summary judgment?

PARTIES TO THE PROCEEDINGS

Petitioner, Matthew Schantz, was the appellant in the court below. Respondent, Benny Deloach, was the appellee in the court below.

RELATED CASES

- *Schantz v. Deloach*, No. 2:17-157, U.S. District Court for the Southern District of Georgia. Judgment entered February 4, 2020.
- *Schantz v. Deloach*, No. 20-10503, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered October 26, 2021.

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Petitioner filed a lawsuit under 42 U.S.C. §1983 against the elected sheriff of Appling County, Georgia for shooting him off his motorcycle because he turned around and fled a roadblock in violation of the Fourth Amendment and various provisions of Georgia law. (App. 63). At the close of discovery, the trial court granted summary judgment to Respondent on the Fourth Amendment claim and dismissed Petitioner's state law claims without prejudice. (App. 36). Petitioner appealed to the Eleventh Circuit, which affirmed the decision of the trial court. (App. 1). Petitioner filed a petition for rehearing *en banc* which was denied. (App. 61).

JURISDICTION

The decision of the Court of Appeals denying the petition for rehearing was issued on December 10, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1). This petition is timely filed under 28 U.S.C. §2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The right of the people to be secure in their persons . . . against unreasonable . . . seizures,

> shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . "

STATEMENT OF THE CASE

On the afternoon of June 17, 2016, Matthew Schantz was driving his new motorcycle to the beach, where he planned to meet up with his mother, an optometrist who was driving after work in her own car. While Matthew may have been a spoiled young man who behaved foolishly, the evidence shows that he was not a lethal threat and should not have been shot for running away from the sheriff of Appling County – who was more than fifty years his senior and should have known better. It is undisputed that Matthew committed multiple traffic violations after Appling County deputies attempted to stop him for not having a license tag for his motorcycle, and he would later own up to

that by pleading guilty and agreeing to serve a year in prison for those violations. However, he should not have been subjected to the additional unconstitutional punishment of being shot and seriously injured when he stopped at a roadblock, turned his bike around at the sight and sound of a racked shotgun, and then took off in the opposite direction.

Schantz's testimony is that he was fleeing the sheriff when shot, and that at no time did he ever drive his motorcycle toward the sheriff as he stood in the road holding a shotgun. Oddly, the sheriff claims that the first shot was just a warning shot fired while Schantz and his bike were stopped in the roadway, even though it would be reckless to discharge a firearm as a warning unless there were justification for deadly force – in which case shooting into the air would do nothing to stop a truly lethal threat. Schantz, however, says that the first shot was fired in his direction rather than up in the air, testifying that he saw the sheriff pointing the gun at him in his peripheral vision and he heard the ping of a projectile strike against metal and payment below.

As Schantz was completing the turn, the sheriff fired again, causing a shower of buckshot to penetrate the side of his helmet, face and neck along with various parts of the motorcycle. Trajectory analysis indicates that the shot came from behind, and the amount of spread between the buckshot pellets indicates that the shot was fired from a distance as the bike was being driven further away from the sheriff – not toward him.

Sheriff Deloach changed his story midway through the case. He initially told investigators and testified in his deposition that he shot Schantz because he thought Schantz was trying to run him over. But after Schantz's expert analyzed the evidence and concluded that Schantz was in fact driving away from Deloach's shotgun rather than toward it, the defense narrative claim shifted: instead of shooting to protect himself, Deloach now claimed that he was shooting to protect the public.

Deloach's defense is that Schantz was not merely fleeing, and that his disregard of traffic laws was itself justification for the use of deadly force – which would allow officers to shoot all traffic offenders if that were the case. By failing to address the constitutionality of that principle and simply holding that the law was not clearly established, the Court of Appeals created a presumptive rule that any motorcyclist in Georgia, Florida or Alabama who exceeds the speed limit can be lawfully shot and killed.

Deloach claimed for the first time on summary judgment that he heard a radio communication that Schantz had run a red light several miles earlier in the pursuit, and that alone made him a lethal threat. However, despite being given an opportunity to supplement the record in the trial court, he was not able to produce recordings of any radio traffic where that statement was made. Presumably he learned later – not only after his decision to use deadly force, but also after his deposition two years later – that Schantz had driven through a red light, but Schantz's testimony is clear

that 1) he did not proceed through the light until he was sure there was no approaching traffic, 2) the police officer who followed him through the light did the same thing, and 3) he never operated his motorcycle in a way which endangered the public – he simply outran the officers and then established enough distance that they were never able to catch up with him.

Schantz's testimony is a description of objective facts from his perspective which demonstrate the objective unreasonableness of the shooting, but the Court of Appeals chose to ignore it altogether by noting that Schantz's own "assessment that he drove safely . . . does not raise an issue of fact as to the objective risk Plaintiff presented from Defendant's perspective." (App. 29-30, n. 8). While the Court of Appeals characterizes Plaintiff's testimony as subjective and Defendant's current version of the story as objective fact rather than a subjective motive or explanation, reasonable jurors could see it the other way around. In any event, *both* parties' accounts should be considered by the jury as part of "the totality of the circumstances" in its determination of objective reasonableness. *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985); *Graham v. Connor*, 490 U.S. 386, 396 (1989).

Similarly, it is noteworthy that no officer considered Schantz to be a lethal threat when they saw him run the light with their own eyes, or else they would have shot him on the spot – as they would have been permitted to do under the logic of the Court of Appeals decision. As the nonmoving party on summary judgment, Schantz is entitled to all reasonable inferences

that can be drawn in his favor and Sheriff Deloach is entitled to none. *Tolan v. Cotton*, 134 S. Ct. 1861 (2014).

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals should have first addressed the question of whether the facts, viewed in the light most favorable to Schantz, support a Fourth Amendment violation.

Because the Fourth Amendment prohibits seizures – whether by a bullet or other means – which are "unreasonable," the standard of liability is one of objective reasonableness without regard for the subjective state of mind of the officer. *Tennessee v. Garner*, 471 U.S. 1 (1985); *Graham v. Connor*, 490 U.S. 386 (1989). Accordingly, the dispositive question under the Fourth Amendment is whether an objectively reasonable officer would have used deadly force under the facts and circumstances of this case.

The Court of Appeals skipped the question of whether a jury could find a Fourth Amendment violation on these facts, focusing instead on whether Deloach was entitled to qualified immunity. In determining whether an individual officer is entitled to qualified immunity, there are two inquiries involved:

(1) The Court must determine whether the facts alleged, taken in the light most favorable to the plaintiff, show that the

officer's conduct violated a constitutional right; and

(2) The Court must determine whether the right allegedly violated was clearly established under the law which existed at the time of the alleged violation.

Saucier v. Katz, 533 U.S. 194 (2001), *as modified by Pearson v. Callahan*, 555 U.S. 223 (2009). The problem with the Court of Appeals' decision to proceed directly to the second question without answering the first is, at best, a failure to provide needed clarity to law that the court suggests was a close question.[1] At worst, it represents a departure from its own prior decisions which do clearly establish the law, with the result being that the Court of Appeals is effectively destabilizing the law rather than stabilizing it. The goal of qualified immunity jurisprudence should be to improve the law, not muddy it with uncertainty, and the reluctance of some courts to tackle close questions by simply defaulting to the position that the law is unclear is a source of great frustration to advocates and jurists alike.

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[1] "Assuming Plaintiff's version of the facts is true, it is a closer question whether Defendant's use of deadly force against Plaintiff violated the Fourth Amendment. As such, we proceed directly to the clearly established law prong of the analysis. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (concluding that courts have discretion to decide "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand"). (App. 13-14).

The concurring opinion of Judge Jordan in this case is illustrative:

> . . . I reluctantly concur in the judgment. I say reluctantly because the Supreme Court's governing (and judicially-created) qualified immunity jurisprudence is far removed from the principles existing in the early 1870s, when Congress enacted 42 U.S.C. §1983. *See*, *e.g.*, *Zigler v. Abasi*, 137 S.Ct. 1843, 1870-72 (2017) (Thomas, J., concurring in part and concurring in the judgment); William Baude, Is Qualified Immunity Unlawful?, 106 Cal. L. Rev. 45, 55-61 (2018); Ilan Wurman, Qualified Immunity and Statutory Interpretation, 37 Seattle U. L. Rev. 939, 961-72 (2014). For a Court that consistently tells us that federal statutes are interpreted according to ordinary public meaning and understanding at the time of enactment, see *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018), and that §1983 preserved common-law immunities existing at the time of its enactment, *see Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), that is a regrettable state of affairs.
>
> Viewing the evidence in light most favorable to Mr. Schantz, Sheriff DeLoach used deadly force against him twice. Sheriff De-Loach first fired his shotgun at Mr. Schantz when he had stopped his motorcycle. When that first blast missed and Mr. Schantz understandably tried to drive away, Sheriff DeLoach fired at him again. This time the shot hit home, with the buckshot striking Mr. Schantz in the face and neck. **The notion that Sheriff**

> **DeLoach can escape liability for using deadly force under these circumstances – against an unarmed joyrider who was at rest on his motorcycle – stands §1983 on its head. . . .**

(App. 34-35) (emphasis added). In addition to standing Section 1983 on its head, Judge Jordan opines that the Court of Appeals decision "will lessen incentives for police departments to craft better policies for the use of deadly force." (App. 35).

Irrespective of whether a court ultimately decides that the law is clearly established, there are strong public policy reasons why the law should move forward for the sake of clarifying the legality of future police conduct:

> "Regardless of the formal relationship between the constitutional and state law standards and the administrative standard, it is clear that the administrative standard remains heavily informed by both." Seth W. Stoughton, Jeffrey J. Noble, & Geoffrey P. Alpert, Evaluating Police Uses of Force 104 (2020). See also Franklin E. Zimring, When Police Kill 219 (2017) ("[T]he main arena for the radical changes necessary to save many hundreds of civilian lives in the United States each year is the local police department, not the federal courts or Congress, not state government, not local mayors or city councils, not even the hearts and minds of the police officers on the streets. All of these people and institutions can help by influencing local police

> to create less destructive rules of engagement.").

Id. If the law were truly unclear, it should be incumbent upon courts to provide needed clarity where the facts in dispute necessarily implicate the unsettled issue – not to avoid the issue and fail to provide clarity for future cases.

While many cases can be decided without reaching a constitutional question, the default position where disputed facts give rise to a constitutional violation should be to address the underlying constitutional issue first – before deciding that the issue is moot because the law is not clearly established. If a court articulates that there is a 'close question' on whether a constitutional provision was violated, the better practice – for the sake of forward development of law and policy to conform to the needs of a changing society – is to decide that question rather than ignore it and leave future litigants without guidance.

While *Pearson* allows courts to determine the order of attack in the sound exercise of discretion, Petitioner respectfully submits that it is an abuse of discretion to hide behind *Pearson* simply to avoid tough but necessary decisions. In exercising their discretion under *Pearson* to decide the order of attack in carrying out the two-prong qualified immunity analysis, the preferred order should be to follow *Saucier* and start with the first question anytime a constitutional dispute is clearly and necessarily presented by the facts. 533 U.S. 194; 555 U.S. 223. The only time that *Pearson*

should allow departure from the *Saucier* order of attack is where there is a path to decision that does not raise the question of whether a constitutional principle is violated *or* whether that principle is clearly established. This is not such a case, and the Court of Appeals should have addressed the underlying constitutional issue even if its ultimate decision was to deny recovery on grounds that the subject constitutional violation was not clearly established at the time of the alleged violation. Either way, further guidance is necessary to assist the courts in exercising their sound discretion in a way that does not avoid or delay the adjudication of important constitutional questions, and this case is a good opportunity to provide that guidance.

B. In any event, the Court of Appeals erred in finding that the law was not clearly established based on an improper view of the evidence.

Where the issue of qualified immunity is raised on summary judgment, the facts and circumstances must be viewed in the light most favorable to the plaintiff as the nonmoving party:

> Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the "clearly established" right at issue on the basis of the "specific

> context of the case." Accordingly, courts must take care not to define a case's "context" in a manner that imports genuinely disputed factual propositions.

Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (internal citations omitted).

Qualified immunity protects officers from liability when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), cited in *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). All that is required is that "in the light of pre-existing law, the unlawfulness must be apparent." *Id.*

Factually identical precedent is not required if a "rule already identified by the decisional law" is articulated with sufficient clarity that it is not dependent on the peculiar facts of the case from which it arose.[2] *Hope*, 536 U.S. at 743.

> [I]f some authoritative judicial decision decides a case by determining that "X Conduct" is unconstitutional without tying that determination to a particularized set of facts, the decision on "X Conduct" can be read as having

[2] A "rule already identified by the decisional law" can even be derived from dicta in view of *Hope*'s reliance upon "the reasoning, but not the holding," of prior litigated cases. 536 U.S. at 743.

> clearly established a constitutional principle: put differently, the precise facts surrounding "X Conduct" are immaterial to the violation. These judicial decisions can control "with obvious clarity" a wide variety of later factual circumstances.

Vinyard v. Wilson, 311 F.3d 1340, 1351 (11th Cir. 2002) (citing *Hope*).

On its face, *Tennessee v. Garner* prohibits the use of deadly force against a fleeing felony suspect who is not armed or dangerous. In *Garner*, the Court ruled that it is a Fourth Amendment violation for a police officer to use deadly force to seize a fleeing felony suspect who "poses no immediate threat" to human life. 471 U.S. at 9-10. "A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead." *Id.* (emphasis added). In short, the force used must be reasonable under "the totality of the circumstances." 471 U.S. at 8-9. In this case, Schantz never used his motorcycle as a weapon, and the mere possibility that high-speed flight on a motorcycle could hurt someone does not escalate mere flight into a lethal threat as a matter of law.

Notwithstanding its decision in this case, the same Court of Appeals has succinctly restated the *Garner* rule as follows: "Where the suspect is not a fleeing felon and poses no immediate threat to the officer or others, the use of deadly force is a violation of the suspect's Fourth Amendment rights." *Harrell v. Decatur County*, 22 F.3d 1570, 1573 (11th Cir. 1994), *vacated on other grounds*, 41 F.3d 1494 (1995) (*en banc*). Under this

clear articulation of the law, there is a jury question as to whether Mr. Schantz – a fleeing traffic offender – posed an immediate threat of death or serious bodily harm sufficient to justify the use of deadly force against him.

Expanding the rationale of *Garner*, the Supreme Court held in *Graham v. Connor* that all excessive force cases involving an arrest, investigative stop, or any other "seizure" of a person at liberty are governed under the reasonableness standard of the Fourth Amendment, whether involving deadly or non-lethal force. Embracing the "totality of the circumstances" language from *Garner*, the Court stated as follows:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, [Cite omitted] however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. *See Tennessee v. Garner*, 471 U.S., at 8-9 (the question is "whether the totality of the circumstances justifie[s] a particular sort of . . . seizure").

490 U.S. at 396. In short, *Graham* required what was already implicit in *Garner*: that the force used be proportional to the threat posed by the suspect, listing the following factors which should be included in

consideration of the reasonableness of any use of force, deadly or otherwise:

1) "the severity of the crime at issue;"

2) "whether the suspect poses an immediate threat to the safety of the officers or others;" and

3) "whether he is actively resisting arrest ***or*** attempting to evade arrest by flight."

Id. (emphasis added). The use of the disjunctive "or" in factor #3 is consistent with the distinction recognized by *Garner* between an unarmed suspect who is merely running away and a suspect who is violently resisting arrest by brandishing a weapon, fighting the officer, or attempting to run over someone in a vehicle. *Compare Brosseau v. Haugen*, 543 U.S. 194 (2004) (shooting of fleeing felon was not unreasonable after he fought with a female officer who was trying to arrest him on a violent felony warrant, he appeared to run to his car to retrieve a weapon, and then began driving recklessly with officers and bystanders in or near his path).

Unlike the fleeing motorist in *Brosseau*, Schantz was not suspected of having committed a violent felony[3] (*Graham* factor #1), did not pose an immediate

[3] While the Court of Appeals makes the fair point that Schantz committed a felony once he fled the police at speeds more than 20 miles per hour above the speed limit, but that did not make him a *violent* felon. (App. 24, n. 5). In *Garner*, the Supreme Court rejected the outdated notion that merely labeling a crime as a 'felony' – which was rooted in an era where all felonies were punishable by death and felons would predictably use violence to avoid arrest – equates to justification for deadly force in modern

threat to the officer or others (*Graham* factor #2), and was attempting to elude officers by flight rather than physically resisting arrest by violence (*Graham* factor #3) – taking his testimony as true and viewing the physical evidence in the light most favorable to him as required on a motion for summary judgment. Schantz was initially pursued because his new motorcycle did not yet have a tag on it, but once he eluded and fled the officers, he committed additional traffic violations. An experienced motorcycle racer, he reached speeds of over 100 miles an hour on the open highway but did not drive in an assaultive or threatening manner. At the time he was shot, he was turning around at a roadblock and driving away from the sheriff – not toward him. This is supported by physical evidence and expert testimony (App. 74-100) which could lead a jury to conclude that the use of deadly force against him was unreasonable in the absence of an "immediate threat" to human life at the time the gun was fired. *Garner*, 471 U.S. at 9-10; *Graham*, 490 U.S. at 396. The Court of Appeals simply avoided that issue by reaching the strained conclusion that the law was not clearly established.

This case is readily distinguishable from those cited by the court below. In *Plumhoff v. Rickard*, 572 U.S. 765 (2014), officers shot a motorist who had rammed his vehicle into a police car and was

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society. The focus is on the violent threat posed by the suspect, not whether the underlying crime is a felony, a misdemeanor, or – as in this case – serious but nonviolent traffic offenses.

threatening to do so again.[4] There is a profound difference between committing traffic violations on the open road with no one in harm's way and using a vehicle as a weapon to assault pedestrians or motorists who are, but the Court of Appeals decision blurs over that important distinction. Asserting that "the most factually similar precedent *from the Supreme Court* is *Plumhoff*" – a case in which the fleeing motorist intentionally rammed into two patrol cars – the Court of Appeals conveniently downplayed its own precedent in cases which are materially more akin to this one.

One such case is *Vaughan v. Cox*, 343 F.3d 1323 (2003), which the Court of Appeals mischaracterized by stating that the suspect in that case neither "menaced" nor "was likely to menace others on the road at the time of the shooting."[5] (App. 29). To the contrary,

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[4] *See also Small v. Glynn County*, 77 F. Supp. 3d 1271 (S.D. Ga. 2014), which is distinguishable since Schantz was driving on an open road with nobody in his path while Mrs. Small was in a stopped car surrounded by officers on foot, and her vehicle lurched toward officers rather than turning away from them.

[5] The Court's use of the phrase "at the time of the shooting" is important because it emphasizes the rule under *Garner* and *Graham* that the fleeing suspect must present an imminent or immediate lethal threat, which means a clear and present danger *at the time deadly force is used* – not based upon speculation of a potential risk that might be posed to an unknown person at future time and place. That is clearly inconsistent with the panel decision's conjecture that "Defendant *might* nevertheless have perceived Plaintiff to pose a serious threat to other motorists and bystanders *if the chase continued*, given the events that preceded the shooting." (App. 30) (emphasis added). If "the events that preceded the shooting" were justification for the use of deadly force, why did other officers not shoot him when they had the chance?

the evidence in *Vaughan* was that the suspect had rammed a police vehicle in front of him and caused the officer to momentarily lose control of the vehicle – while driving on a heavily traveled interstate at 80 to 85 miles per hour in a 70-mile per hour zone. If anything, it is more dangerous to speed in heavy traffic on an urban interstate than to do so on a sparsely traveled rural highway with no vehicles in harm's way, and unlike the fleeing felon in *Vaughan* who was driving a truck hauling a stolen boat trailer, Schantz never collided or threatened to collide with any other vehicle. Yet the officer who fired at the fleeing truck in *Vaughan* was not entitled to qualified immunity, even though he had a reasonable belief that the fleeing driver had

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Does the Court really want officers to believe that they can preemptively use deadly force against any traffic offender who *might* be dangerous if allowed to continue driving?

That raises the further question of which is more dangerous to other motorists: a speeding vehicle which is essentially a guided missile, or an out-of-control vehicle which is now an unguided missile because its driver has a bullet in his head? Assuming, of course, that the bullet was well-aimed enough to hit its intended moving target rather than an innocent third party, who may be more endangered by a flying bullet than a fleeing driver (who presumably is trying to avoid being hurt by either a bullet or a crash). It stands to reason that if innocent motorists are in the immediate path of a fleeing vehicle, they are also in the path of bullets fired at the vehicle, and that they will remain in its path if the vehicle's driver is disabled and no longer able to steer around them. The implications of this ruling will be catastrophic if police officers in the Eleventh Circuit take their cues from the Court of Appeals decision and not from professional law enforcement standards and training which have long frowned upon such practices. (See publications cited by Jordan concurrence, App. 35).

engaged in assaultive behavior. If the shooting in *Vaughan* violated clearly established law when it occurred in 1998, the shooting which occurred here nearly 20 years later was just as clearly unconstitutional, particularly since the alleged threat posed by Schantz was no more imminent or lethal than the threat perceived by the officer who shot the plaintiff in *Vaughan*, and was arguably less so.

The same can be said for the other cases relied on by the panel decision while summarily rejecting Schantz's reliance on *Vaughan*. In *Pace v. Copobianca*, 283 F.3d 1275 (11th Cir. 2002), the driver was not merely fleeing but had driven aggressively toward several individuals in his path and was continuing to do so. The driver shot by police in *Mullenix v. Luna*, 136 S. Ct. 305 (2015) was not only using his car as an offensive weapon but had called the dispatcher claiming to have a gun and threatening to shoot the officers, and the suspect in *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007) aggressively resisted arrest and hijacked the arresting officer's patrol car. Similarly, the motorcyclist who was shot in *Willis v. Mock*, 600 Fed. Appx. 679 (11th Cir. 2015) (an unpublished decision cited by Appellee but not by the Court) not only attempted to elude officers but forced his way *through* a roadblock, squeezing between officers who shot at him but missed and then tased him, causing the bike to crash.

"Applying *Garner* in a common-sense way" like the Eleventh Circuit did in *Vaughan*, if the law was clearly established in 1998 that it was unreasonable to shoot into a fleeing vehicle being driven at high speed after

it has collided with a pursuing patrol car, then it is equally clear that it was unreasonable in 2016 to shoot a motorcyclist who was simply fleeing and not collided or attempted to collide with anyone. 343 F.3d at 1332-1333. Other Eleventh Circuit cases also underscore the principle that a suspect's flight which does not pose an immediate lethal threat cannot be met with deadly force. Like the panel decision, *Ayers v. Harrison*, 650 Fed. Appx. 709 (11th Cir. 2016) and *Gaillard v. Commins*, 562 Fed. Appx. 870, 877 (11th Cir. 2014)[6] are unpublished cases which do not clearly establish the law for the purposes of qualified immunity, but they do show that the law was already clearly established by the prior binding precedent which they cite – all of which predated the shooting in this case.

In *Ayers*, plainclothes officers in an unmarked car approached Ayers in a gas station parking lot with their guns drawn to make an arrest. *Id.* at 713. Ayers put his car in reverse to flee from the officers, but he "did not try to strike or run over any of the officers." *Id.*

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[6] *Galliard v. Commins* dealt with a suspected cocaine trafficker who abandoned a high-speed vehicular chase and took off on foot from law enforcement. 562 Fed. Appx. at 872. Although the suspect was unarmed, he was subjected to deadly force by an officer who ran into him with a patrol car. The court found that *Garner* was sufficient to clearly establish the law that "even in a car chase scenario, where the suspect 'did not use or did not threaten to use his car as a weapon,' " deadly force is constitutionally inappropriate. *Id.* at 876 (citing *Vaughan* and the published decision in *Morton v. Kirkwood*, 707 F.3d 1276, 1283 (11th Cir. 2013) (denying qualified immunity based on the broad principles of law established by *Garner* and *Vaughan* which applied with obvious clarity in that case).

When the officer fired at Ayers, no officer was in immediate danger of being struck by the car, and Ayers was retreating by traveling in his car away from the officers. *Id.* The facts at summary judgment in this case are materially similar: at the time he was shot, Schantz was clearly engaged in flight and there were no officers or bystanders in harm's way.

Ayers resolved the officer's claimed entitlement to qualified immunity by citing to *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) and *Lundgren v. McDaniel*, 814 F.2d 600 (11th Cir. 1987) for the common-sense proposition that "using deadly force against an unarmed, non-dangerous suspect is unconstitutional." *Ayers*, 650 Fed. Appx. at 714. If those cases from the 1980s were sufficient to clarify the law in *Ayers* for a shooting that occurred in 2009, then they are also sufficient – along with *Vaughan* and the other authority discussed above – to clarify the law for the 2016 shooting in this case.

Certiorari should be granted for the following reasons:

- The Court has an opportunity to decide whether the Fourth Amendment gives police officers a blank check to shoot any motorist who flees at high speed merely because of the potential danger caused by their speed when there is no immediate threat to any identifiable person in their path.
- The Court has an opportunity to clarify *Saucier v. Katz*, 533 U.S. 194 (2001) and

Pearson v. Callahan, 555 U.S. 223 (2009) to provide needed guidance on how courts should exercise their discretion in determining which question to address first in conducting the two-pronged qualified immunity inquiry?

- The Court has an opportunity to improve Fourth Amendment law by clarifying "the totality of the circumstances" to be considered in evaluating the objective reasonableness of a given use of force.

CONCLUSION

This Court should grant the writ, reverse the judgment below, and remand the case for trial on Petitioner's Fourth Amendment claim.

Respectfully submitted,

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