No. 16-1155

In the Supreme Court of the United States

FREDERICK MILLER,

Petitioner,

v.

MARY STAMM, personal representative of the estate of Carl A. Stamm, IV,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

Petitioner Frederick Miller intentionally hit Carl Stamm's speeding motorcycle with his police cruiser. Stamm violently slammed against petitioner's vehicle, and he died nearly immediately.

A unanimous, unpublished decision of the Sixth Circuit held that "it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others." Pet. App. 10. It concluded that petitioner is not entitled to summary judgment on qualified immunity because "[t]he evidence, construed in the light most favorable to [respondent]," indicates that petitioner intended to "caus[e] the deadly collision," and that Stamm "posed no immediate threat to others." *Id*. at 9, 10.

The lower court's legal holding is correct: this Court has reiterated on numerous occasions that officers may use deadly force to apprehend a fleeing suspect only in circumstances where the suspect poses a danger to others.

Because he has no basis to quarrel with this legal holding, petitioner instead asks this Court to reevaluate the underlying factual record. In his telling, Stamm *did* pose a danger to the public. But this is just a request for error correction. And it is a meritless one at that; indeed, petitioner disregards that the officer leading the chase as well as the officer who investigated the incident both agree that use of deadly force was unwarranted in these circumstances. Review should be denied.

A. Legal background.

The Fourth Amendment limits the quantum of force that police may use to effect a seizure. See *Graham* v. *Connor*, 490 U.S. 386, 388 (1989). This "requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396 (quotations omitted).

A police officer conducts a "Fourth Amendment seizure * * * when there is a governmental termination of freedom of movement *through means intentionally applied*." *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989). When a "police cruiser * * * pull[s] alongside [a] fleeing car and sideswipe[s] it, producing [a] crash, then the termination of the suspect's freedom of movement" constitutes a "seizure." *Ibid.*

B. Factual background.

1. Petitioner Frederick Miller is an officer with the Fowlerville Police Department.

In 2006, a psychological evaluation found petitioner to be "'moderately deficient' in 'judgment' (including life and death situations)." Pet. App. 29. At the time, his police chief had expressed that "he was unsure whether Officer Miller had the emotional stability to perform in stressful situations and * * * was concerned about whether Officer Miller could restrain himself from overreacting." *Ibid.*

During a psychologist interview, petitioner "described the role of the police as 'judge, jury, and executioner.'" Pet. App. 29-30. The psychologist concluded that Miller's "problem-solving abilities were not adequate for complex situations" and that Miller

"could not be fully rehabilitated." *Id.* at 29. The Fowlerville Police Department nonetheless retained Miller on active duty.

2. On the night of May 16, 2011, after spending the evening with his grandparents, Carl Stamm visited a friend's home in Brighton, Michigan. Pet. App. 23. While there, Stamm drank some alcohol; it was later determined that his blood alcohol level was 0.10, which is "slightly greater" than the level required for him to be legally intoxicated. *Id.* at 27. Stamm left his friend's house on his motorcycle at around four in the morning and headed for home. *Id.* at 23-24.

At around 4:20 a.m., Livingston County Sheriff's Deputy Ray Marino observed Stamm travelling just over 100 miles per hour along Interstate 96. Pet. App. 24. There, I-96 is a six-lane freeway—that is, it has three lanes of travel in each direction—with a speed limit of 70 miles per hour. *Ibid.*

Deputy Marino activated his overhead lights, intending to pull Stamm over for speeding. Pet. App. 24. When Stamm did not slow down, Deputy Marino radioed dispatch that a pursuit was underway. *Ibid.*

A video camera mounted on Deputy Marino's police cruiser recorded Stamm "maneuvering around several cars and trucks" on I-96, while Deputy Marino followed. Pet. App. 24. Some ten seconds after Deputy Marino began pursuing Stamm, the freeway narrowed from six lanes to four—that is, two lanes of travel in each direction. *Ibid.* The speed limit remained 70 miles per hour. *Id.* at 37.

Petitioner answered the dispatch and entered I-96 some distance ahead of Stamm. Pet. App. 25. Deputy Marino instructed him to "jump on now, get

in the right lane, and turn on your overheads." *Ibid.* Miller later testified that he understood he was being told to stay in the right lane so that Stamm and the pursuit vehicles could pass him, and he could then join the pursuit. *Id.* at 27. Ignoring this instruction, petitioner responded that he was "going to try and stay in front" of Stamm. *Id.* at 25.

Petitioner rolled down the on-ramp into the right lane of the freeway at roughly 36 miles per hour, reaching a top speed of 43 miles per hour (despite a speed limit of 70 miles per hour) before beginning to slow down again. Pet. App. 25. As Stamm approached petitioner's cruiser from behind, Stamm moved from the right lane into the left lane. *Ibid.* Petitioner followed suit and drifted to the left, straddling the dividing line between the two lanes for approximately five seconds. *Ibid.* Petitioner applied his brakes several times during this period. *Ibid.*

While he was about halfway between the two lanes, petitioner pressed his brakes again and jerked his cruiser back to the right. Pet. App. 25. Stamm's motorcycle crashed into his police cruiser. *Ibid.* Evidence from petitioner's patrol car reveals that he was travelling 31 miles per hour just prior to impact. D. Ct. Dkt. No. 18-16, at 20-21.

Stamm was thrown from his motorcycle; his head hit the metal portion of the police cruiser between the rear windshield and the back seat window. Pet. App. 26. Stamm dropped to the roadway and skidded along the pavement, coming to rest on the grassy median, unconscious and hardly breathing. *Ibid.* He was pronounced dead a short time later. *Ibid.* Petitioner was not injured by the collision. *Id.* at 40.

At the time and place of the crash, there were "no vehicles to be seen in the immediate vicinity" (Pet. App. 41), and during the entirety of the chase, there were "no pedestrians or businesses in sight" (*id.* at 40). There was a "large median"—one of a hundred feet or more—"dividing" the road on which Stamm drove "from oncoming traffic." *Id.* at 8. This is the Google Maps street view of the final GPS coordinates from petitioner's dash-cam recording: goo.gl/aCXoSw.[1]

The Livingston County Sheriff's Department immediately investigated the incident, and Deputy Chad Sell was dispatched to the scene. Pet. App. 26. Deputy Sell ultimately concluded that, "based on the initial circumstances of the vehicle pursuit by Deputy Marino, the use of deadly force by Officer Miller was not warranted." *Ibid.* (quotation omitted).

Deputy Marino, who had been involved in the chase from the beginning, similarly testified "that he believed a rolling roadblock"—that is, the use of a police cruiser to block the motorcycle's path—"would not have been appropriate under the circumstances." Pet. App. 28.

Geoffrey Alpert, a professor in criminology and use-of-force, later examined the factual record and provided expert testimony. Pet. App. 28-29. He arrived at several conclusions:

- "It appears as if [petitioner] was driving into the lane where Stamm was traveling to continue his rolling roadblock. Just be-

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[1] The GPS coordinates of the final dash-cam recording from petitioner's cruiser were 42.6466, -84.0884. D. Ct. Dkt. No. 18-16, at 52.

fore the collision, Mr. Stamm had moved right but [petitioner], seemingly in an effort to stay ahead of him to continue his rolling roadblock also moved right." D. Ct. Dkt. No. 18-9, at 3.

- Petitioner's "involvement with the chase was against policy because he could not balance the need to apprehend the suspect with the risks of the pursuit given his lack of knowledge of the purpose of the chase." Pet. App. 28-29.
- Petitioner "established a rolling road block driving at or under 40 mph which was an unreasonable tactic." *Id.* at 29.

C. Proceedings below.

Carl Stamm's mother, Mary Stamm, respondent here, brought this action in the Eastern District of Michigan on behalf of her son's estate. She asserted a claim pursuant to 42 U.S.C. § 1983, alleging that petitioner's use of deadly force violated the Fourth Amendment, along with other constitutional and state-law claims. Pet. App. 23.

1. Petitioner Miller moved for summary judgment on the basis of qualified immunity. The district court denied that motion. Pet. App. 33-44.

The district court first found that, construing the evidence in the light most favorable to respondent, a reasonable jury could conclude that petitioner intentionally caused the collision with Stamm's motorcycle—rendering petitioner's conduct a Fourth Amendment seizure. Pet. App. 35-38. The court reasoned that "Officer Miller was travelling, *at his fastest*, 43 miles per hour on a highway with a 70 mile per hour

speed limit and in front of [a] vehicle he knew was traveling in excess of 100 miles per hour" (*id.* at 37), and that Miller braked several times while changing lanes to stay in front of Stamm's motorcycle (*id.* at 37-38).

The district court next held that "a reasonable juror could conclude that deadly force was not necessary under the circumstances," making Miller's seizure of Stamm unreasonable. Pet. App. 38-41. In particular, the district court considered and distinguished *Scott* v. *Harris*, 550 U.S. 372 (2007), and *Abney* v. *Coe*, 493 F.3d 412 (4th Cir. 2007):

> In both *Abney* and *Scott*, the threat of serious injury to others was clearly established. In both of those cases, the pursued vehicle was fleeing along a two-lane road with traffic coming in the opposite direction. In [*Scott*], the pursuit also took place in a business area where there was pedestrian traffic. Here, Stamm was being pursued at 4:20 a.m., along a highway six and then four lanes wide, with a large median dividing him from oncoming traffic and no pedestrians or businesses in sight.

Pet. App. 40 (citations omitted).

Finally, the district court held that, at the time of the crash, it was clearly established that Miller's conduct was unlawful. Pet. App. 42-44. The district court concluded that, since "the risk of harm to others [was] not significant, particularly where Stamm [was] on a motorcycle and not in a car," prior cases denying qualified immunity in similar circumstances would have given fair warning to a reasonable officer that Miller's actions were prohibited. *Id.* at 43.

The district court dismissed respondent's due process claim (Pet. App. 44-45), as well as the municipal liability claim against petitioner's police department (*id*. at 45-51).

2. Petitioner brought an interlocutory appeal to the Sixth Circuit. In an unpublished, unanimous opinion, Judge Gibbons, joined by Judge Siler and Judge Cook, affirmed the district court's denial of qualified immunity. Pet. App. 2.

The court identified the district court's determinations that genuine disputes of material fact exist with regard to both Miller's intent to collide with Stamm and whether Stamm's conduct posed a threat to others. Pet. App. 7. The court then held that "it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others." *Id.* at 10. And because, "[u]nder Mrs. Stamm's version of the facts, * * * the risk to others at the time of Miller's use of force was minimal," the court affirmed the district court's denial of qualified immunity. *Ibid*.

Petitioner sought rehearing *en banc*. No judge requested a vote, and the petition was denied. Pet. App. 56.

REASONS FOR DENYING THE PETITION

The Sixth Circuit's unanimous, unpublished decision does not merit review. The lower courts held that whether Stamm posed a danger to others is a disputed question of fact that cannot be resolved at the summary judgment stage. Petitioner asks this Court to conclude otherwise. Review of that issue is unwarranted: it is nothing more than a request for error correction; there was, in any event, no error be-

low; and, finally, this issue is outside the scope of interlocutory appellate jurisdiction.

To the extent that the petition can be construed as anything beyond a request for error correction, it lacks merit. It has been clearly established for decades that officers may not use deadly force to apprehend a motorcyclist in circumstances where the suspect poses no significant danger to anyone. Petitioner does not appear to disagree. A holding otherwise—that officers have unlimited authority to use deadly force to apprehend *any* fleeing suspect, regardless whether the suspect poses a threat to others—would be a shocking and unjustified result.

A. The petition rests on a meritless request for error correction.

The lower courts both found that "[a] reasonable juror could conclude that [petitioner] deliberately used deadly force against Stamm when he posed no immediate threat to others." Pet. App. 9. As the district court put it, "[v]iewing the evidence in the light most favorable to plaintiff, there is a question of fact as to whether Stamm posed a significant threat to others." *Id.* at 41. Likewise, the court of appeals recognized the "material disputed fact[] * * * whether Stamm posed an immediate threat to others." *Id.* at 2.

The petition rests on the contrary assertion—that petitioner is entitled to summary judgment on the basis of qualified immunity because Stamm did in fact pose a threat to others, and that no reasonable jury could conclude otherwise. Petitioner argues that "Stamm's dangerous and reckless conduct posed a significant, immediate threat to the officers and other motorists on the road that night." Pet. 3. Peti-

tioner relies on this assertion repeatedly. See *id.* at 15 (Stamm "posed an immediate threat to the safety of the officers involved and civilian motorists on the roadway."); *id.* at 26 (Stamm's "dangerous conduct posed an immediate threat to the safety of the officers involved and civilian motorists on the roadway.").

Such a naked request for error correction never merits the Court's attention. And that is especially so when, as here, the petitioner mischaracterizes some aspects of the factual record and wholly disregards others. Additionally, the appellate courts lack interlocutory jurisdiction to review the district court's determination that there exist disputed questions of fact.

1. As Justice Alito recently reiterated, the Court "rarely grant[s] review where the thrust of the claim is that a lower court simply erred in applying a settled rule of law to the facts of a particular case." *Salazar-Limon* v. *City of Houston*, No. 16-515, slip op. at 5 (2017) (Alito, J., concurring in denial of cert.).

That observation disposes of this petition. Petitioner does not seriously dispute the legal holding below—that it is "clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others." Pet. App. 10.

Instead, he asks the Court to reevaluate the record anew and conclude—at the summary judgment stage—that Stamm necessarily posed a risk of danger sufficient to warrant the use of deadly force. But that question is inherently case-specific; evaluation of *this* particular record has no institutional significance. That is likely why the court of appeals resolved this matter via an unpublished opinion.

In short, petitioner's request for error correction does not merit further review.

2. Review is especially unwarranted because, in arguing that Stamm posed a public danger, petitioner repeatedly mischaracterizes the factual record. Indeed, petitioner's statement of the case is notable insofar as it fails to address how the lower courts construed the record. See Pet. 3-8.

First**,** the petition repeatedly refers to the stretch of Interstate 96 where the incident occurred as a "two-lane highway" (Pet. 3, 15, 26), presumably to make the case appear similar to *Scott* v. *Harris*. The petition describes, in adjacent paragraphs, the "two-lane highway" involved here and the "two-lane roads" at issue in *Scott*. Pet. 15. But as the dash-camera video relied on by the Court in *Scott* reveals, the "narrow, two-lane roads" (*Scott*, 550 U.S. at 379) on which "most portions" of the chase took place (*id.* at 375) had two *total* lanes—that is, one lane for each direction of travel separated by a double-yellow line (not a median). See *Video Resources: Scott v. Harris*, Supreme Court of the United States (Apr. 30, 2007), goo.gl/RDO01L. In contrast, the narrowest portion of Interstate 96 at issue here has two lanes *in each direction*—four lanes in total—with a wide, grass-filled median dividing the two directions of traffic. Pet. App. 24, 40. The distinction is critical to the fact-bound reasonableness analysis demanded by the Fourth Amendment, as the narrowness of the roads in *Scott* was a significant contributing factor to the danger posed by the chase. See *Scott*, 550 U.S. at 379-380.

Second**,** the petition repeatedly states that Stamm's motorcycle "forc[ed] other motorists off of the roadway." Pet. 2. See also *id.* at 6 ("Stamm * * *

caused other motorists to drive off of the roadway to avoid him * * * ."), 9, 15, 26. But the petition offers no citation to the appendix (or anything else) to substantiate this claim. And for good reason—there is nothing in the record that supports it. What the video taken from Deputy Marino's police cruiser shows is that other vehicles had moved to the wide right-hand shoulder of the freeway *by the time Deputy Marino passed them with his overhead lights and siren deployed*. D. Ct. Dkt. No. 16-5. Viewed in the light most favorable to respondent—and, indeed, in the light most favorable to common sense—this shows nothing more than that the motorists yielded the right of way to an emergency vehicle, as Michigan law requires them to do. See Mich. Comp. Laws § 257.653. The video evidence certainly does not require a conclusion that Stamm's lone motorcycle somehow took up *both* westbound lanes of I-96, leaving only the shoulder for other drivers.[2]

***Third*,** the petition makes repeated mention of Stamm "weaving in and out of vehicular traffic * * * and narrowly missing hitting a civilian motorist." Pet. 2. See also *id.* at 3-4, 9, 15, 26-27. Again, this alarmist characterization of the facts has no basis in the record. The district court found merely that Stamm "maneuver[ed] around several cars and trucks." Pet. App. 24. Indeed, with regard to the maneuver that the petition repeatedly describes as "barely missing" another vehicle (Pet. 4), Deputy Sell—the Sheriff's Department investigator on the

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[2] Again, petitioner's characterization of this case is presumably intended to call to mind the facts of *Scott*, in which the fleeing driver actually *did* force other motorists off the road. *Scott*, 550 U.S. at 379.

case—agreed that Stamm "had no trouble getting around that car." D. Ct. Dkt. No. 18-13, at 125. More generally, Deputy Sell wrote in his report about Stamm's "speed and skill on the motorcycle," and later explained that statement, testifying that Stamm "knows how to do a high speed lane maneuver, a high speed lane change. He knows how the bike feels and how the bike reacts at that high speed." *Id.* at 120, 121. The petition's description of the chase is incompatible with the view of the facts most favorable to respondent.[3]

In fact, petitioner has baked these factual obfuscations into the question presented. Petitioner asks the Court to resolve whether the use of force was reasonable in circumstances where a motorcyclist "weaved in and out of vehicular traffic causing civilian motorists to leave the roadway, and narrowly missed striking a civilian vehicle." Pet. i. But, because that does not describe this case when construing the record in the manner most favorable to respondent, this case does not implicate the question presented.

3. Not only does petitioner distort the record in material ways, he disregards significant additional evidence on which the lower courts relied. See, *e.g.*, Pet. App. 27-29.

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[3] Additionally, despite his apparent willingness to concede "for purposes of appeal that the collision was intentional" (Pet. 3), petitioner repeatedly attempts to recharacterize the collision with Stamm as an accident. See *ibid.* ("Officer Miller accelerated and tried to move out of the way * * * ."); *id.* at 5 ("When Officer Miller * * * realized that Stamm was behind him, he accelerated and jerked his patrol vehicle to the right.").

As the lower courts recognized (see Pet. App. 2, 35), on a motion for summary judgment, the governing standard is clear: the court must view the facts in the light most favorable to the non-moving party. See, *e.g.*, *Tolan* v. *Cotton*, 134 S. Ct. 1861, 1866 (2014). In addition to the video recordings, there is substantial additional evidence in the record. But the petition disregards all of it.

To begin with, Deputy Marino—the officer who initiated and led the chase—"testified that he believed a rolling blockade would not have been appropriate under the circumstances of the pursuit." Pet. App. 28. In particular, Deputy Marino explained that whether to use a "rolling blockade"—the kind of force petitioner used here—"depends on the severity of the crime and why the person is being stopped." D. Ct. Dkt. 18-10, at 21. He continued:

> Q. In this situation, Stamm was wanted for a traffic violation for excessive speed?
>
> A. Correct.
>
> Q. So would a rolling blockade be indicated in that situation?
>
> A. No.

Ibid. Deputy Marino's view that the use of deadly force was unwarranted is powerful evidence of whether Stamm posed a risk to others. Yet, despite asking this Court to reevaluate whether Stamm posed a danger—and despite the lower courts' reliance on Deputy Marino's testimony (see Pet. App. 28)—petitioner says nothing at all about it.

Petitioner also disregards the investigation report. The lead investigator, Deputy Sell, wrote that, "based on the initial circumstances of the vehicle

pursuit by Deputy Marino, the use of deadly force by Officer Miller was not warranted." Pet. App. 26. See also D. Ct. Dkt. 16-3, at 2. Deputy Sell observed that "[t]he only information provided for the vehicle pursuit was a speeding motorcycle refusing to stop for police." D. Ct. Dkt. 16-3, at 2. Deputy Sell's report thus confirms Deputy Marino's testimony: neither the officer on the scene nor the investigating officer perceived that Stamm posed the sort of public danger that would justify the use of deadly force. Again, the petition does not address this evidence.

An expert on the use of force, Geoffrey Alpert, testified that petitioner's conduct was unreasonable because he did not know the purpose of the pursuit. Pet. App. 28-29. As a result, petitioner "could not balance the need to apprehend the suspect with the risks of the pursuit given his lack of knowledge of the purpose of the chase." *Ibid*. The petition does not respond.

Finally, the argument that petitioner now advances—that he was justified in using deadly force because Stamm posed a threat to others (see, *e.g.*, Pet. 3)—is inconsistent with what petitioner told an investigator hours after the incident. When detective Mark Klein interviewed petitioner immediately after the crash, petitioner never asserted that Stamm posed a public danger and that he was thus attempting to seize him. To the contrary, petitioner repeatedly asserted that he was *not* trying to hit Stamm's motorcycle with his cruiser, and that the crash was a mere accident.

In particular, petitioner stated that he was attempting to position his vehicle so that Stamm "could just go straight on through." See D. Ct. Dkt. No. 18-14, at 12. Petitioner reiterated that his "desire was to

allow him to get past." *Ibid*. Detective Klein suggested that "down the road somebody's going to say something about this being the use of deadly force, taking the lane from the motorcyclist." *Id*. at 13. But petitioner denied that: "No. My intent was to let him have that lane. * * * So that he could go by me." *Ibid*.

Thus, in the immediate aftermath of the incident, petitioner's assertion was that striking Stamm's motorcycle was an *accident*—not that it was a reasonable use of force under the circumstances. But, when the physical evidence was examined, petitioner's assertion of an accident unraveled; the physical evidence instead indicates that petitioner intentionally slowed his vehicle down and changed lanes to block Stamm's motorcycle from passing. Pet. App. 37-38.

On the morning of the event, when the incident was fresh in his mind—and before he was aided by counsel—petitioner never once suggested that he used deadly force as a reasonable response to some asserted danger that Stamm posed.[4] Nor did any other witness to the event assert that deadly force

[4] This is a stark departure from other cases involving the use of deadly force to end a vehicular chase. In *Scott*, the pursuing officer "radioed his supervisor for permission" to use a "Precision Intervention Technique ('PIT') maneuver" and he ultimately "applied his push bumper to the rear of respondent's vehicle." 550 U.S. at 375. In *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2017-2018 (2014), officers intentionally fired their weapons at the vehicle. Thus, in both *Scott* and *Plumhoff*, the officers candidly acknowledged that they used deadly force—they simply believed it justified under the circumstances. Here, by contrast, petitioner asserted that he was justified to use deadly force only after his initial explanation—that the crash was an accident—proved meritless.

was reasonable; indeed, Deputy Marino, who led the chase, says that deadly force was *not* justified. A jury could of course consider that petitioner's current theory is one that he introduced long after the fact, in response to litigation.

Considering the video evidence, the testimony of Deputy Marino, Deputy Sell's report, Alpert's expert testimony, *and* petitioner's own admissions, a jury could surely conclude that Stamm posed no danger to anyone, rendering petitioner's use of deadly force unreasonable. The lower courts were thus correct to conclude that whether Stamm posed a danger—and thus whether use of deadly force was reasonable in the circumstances—is a question incapable of resolution at the summary judgment stage.

4. Not only is the result reached below correct, but the appellate courts lack interlocutory appellate jurisdiction to review what the district court identified as a disputed question of fact.

In *Johnson* v. *Jones*, 515 U.S. 304, 307 (1995), the Court held that "defendants cannot immediately appeal" a district court's determination "whether or not the evidence in the pretrial record was sufficient to show a genuine issue of fact for trial." Questions relating to "evidence sufficiency" are thus outside the proper scope of an interlocutory appeal. *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2019 (2014). *Plumhoff* applied *Johnson* to conclude that, when there is no dispute of fact or evidentiary sufficiency, courts may review the *legal* question of whether an officer's conduct amounted to a constitutional violation. *Ibid.*

Johnson and *Plumhoff* thus establish that appellate courts have jurisdiction to review the denial of petitioner's request for qualified immunity—but only

insofar as petitioner raises "a dispute concerning an 'abstract issu[e] of law' relating to qualified immunity." *Behrens* v. *Pelletier*, 516 U.S. 299, 313 (1996) (alteration in original). It may not, by contrast, review the district court's determination whether "the evidence in the summary judgment record was sufficient to support a contrary finding" regarding disputed factual questions, including whether Stamm posed a danger. *Plumhoff*, 134 S. Ct. at 2019.

That is how the court of appeals properly evaluated this matter. It expressly disregarded petitioner's appeal insofar as he refused to "concede," for purposes of the appeal, respondent's "version of the facts with regard to Miller's intent or the threat Stamm posed to others." Pet. App. 11.

Because petitioner has now woven these questions together, there is no means for the Court to disentangle the issue on which it has jurisdiction (the abstract questions of law) from that which it does not (petitioner's challenge to the district court's identification of disputed questions of historical fact). Review is thus improper.

* * *

The petition rests on the assertion that Stamm posed a risk of danger to others. But that argument for error correction mischaracterizes the video recordings and disregards additional, highly probative evidence. It also is an argument that is outside the scope of appellate jurisdiction. Once that assertion is set aside, the petition collapses.

B. It is clearly established that officers may not use deadly force to apprehend a motorcyclist who poses no danger to others.

To the extent that the petition can be understood as a challenge to the legal holding below, it lacks all merit.

As the court of appeals observed, "it has been settled law for a generation that, under the Fourth Amendment, where a suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." Pet. App. 9-10 (quotations omitted and alterations adopted). And it is "clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others." *Id*. at 10.

This holding—which is so unexceptional that the court of appeals unanimously reached it in an unpublished opinion—is clearly correct. Even now, petitioner does not make any serious argument to the contrary.

Further review is unwarranted. The lower courts applied the proper framework for qualified immunity. Applying that framework, they correctly recognized that it is clearly established that officers may not use deadly force to apprehend a fleeing motorcyclist unless the suspect poses a threat to others. *Scott* and *Plumhoff* are not to the contrary, and there is no circuit split. A holding otherwise—that an officer may, in all cases, use deadly force to apprehend a fleeing motorcyclist—would rewrite this Court's Fourth Amendment jurisprudence.

1. Contrary to petitioner's contentions (see, *e.g.*, Pet. 20-23), the lower courts properly applied the governing standards for qualified immunity.

For a right to be clearly established, "[t]he 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). But it is not the case that "an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Ibid.* (citing *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985)). Indeed, this Court does not "require a case directly on point" (*Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (quoting *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011))), since "general statements of the law are not inherently incapable of giving fair and clear warning" (*United States* v. *Lanier,* 520 U.S. 259, 271 (1997)). To deny qualified immunity, it is sufficient that "existing precedent [has] placed the * * * constitutional question beyond debate." *Mullenix*, 136 S. Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 741).

The lower courts applied precisely this framework. The district court observed that "courts must not define the right at 'a high level of generality.'" Pet. App. 42 (quoting *al-Kidd*, 563 U.S. at 742). Thus, "statements of general applicability typically do not apply in determining whether a constitutional violation was clearly established," save in circumstances of an "obvious case." *Ibid*. "Rather, courts must define the right 'on the basis of the specific context of the case.'" *Ibid*. (quoting *Tolan*, 134 S. Ct. at 1866).

Affirming, the court of appeals likewise underscored that "the key determination is whether a de-

fendant moving for summary judgment on qualified immunity grounds was on notice that his alleged actions were unconstitutional." Pet. App. 9 (quotation omitted and alteration adopted). And the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Ibid*. (quotation omitted). Thus, while qualified immunity does not "require a case directly on point," "existing precedent must have placed the statutory or constitutional question beyond debate." *Ibid*. (quoting *al-Kidd*, 563 U.S. at 741). At bottom, "[t]he 'clearly established' prong must be applied 'in light of the specific context of the case, not as a broad general proposition.'" *Ibid*. (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)).

2. In applying that proper framework, the lower courts arrived at the correct result—"it is clearly established law that an officer may not use his police vehicle to intentionally hit a motorcycle unless the suspect on the motorcycle poses a threat to the officer or others." Pet. App. 10.

***First*,** the court of appeals (Pet. App. 9-10) and district court (*id*. at 40) appropriately relied on the Sixth Circuit's earlier decision in *Walker* v. *Davis*, 649 F.3d 502 (6th Cir. 2011). There, like here, a police officer intentionally struck a fleeing motorcyclist with his police cruiser. *Id*. at 503. And there, like here, the motorcyclist—who had led the police on a chase over highways, through a red light, and into a field—"posed no immediate threat to anyone." *Ibid*. "It is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force." *Id*. at 503-504. And since the motorcyclist

"posed no immediate threat to anyone," the officer violated clearly established law. *Id.* at 503.

Petitioner asserts that the panel's reliance on *Walker* was "woefully misplaced" because the case "was decided *after* the * * * May 17, 2011 incident." Pet. 23. But this disregards *Walker*'s holding: that the motorcyclist's right not to be killed by a police cruiser was clearly established *at the time of the incident*—that is, in 2008. *Walker*, 649 F.3d at 503-504. See also *Walker* v. *Davis*, 643 F. Supp. 2d 921, 925 (W.D. Ky. 2009) (identifying date of incident). *Walker* recognized that a clearly established right *already existed* prior to petitioner's conduct in this case. The Sixth Circuit appreciated this distinction and properly consulted *Walker* in reaching its decision. See Pet. App. 10 ("Though *Walker* was decided after the events giving rise to this case, its principle was not new, as we explicitly noted.").

Nor does the Sixth Circuit's indirect citation—through *Walker*—to *Tennessee* v. *Garner*, 471 U.S. 1 (1985), render its conclusion flawed. Petitioner argues (Pet. 23) that "the general principle" of *Garner* was "rejected in *Mullenix* [v. *Luna*, 136 S. Ct. 305 (2015)]." But *Mullenix* held no such thing: the Court there merely noted that "[t]he general principle that deadly force requires a sufficient threat *hardly settles this matter*" because there *was* a threat in that case sufficient to make the reasonableness of the force at issue an unsettled question. *Mullenix*, 136 S. Ct. at 309 (emphasis added). See also *id.* at 312 ("[W]hen Mullenix fired, he reasonably understood Leija to be a fugitive fleeing arrest, * * * who was armed and possibly intoxicated, who had threatened to kill any officer he saw if the police did not abandon their pursuit, and who was racing towards Officer

Ducheneaux's position."). Indeed, the Court in *Scott* v. *Harris* made clear that while *Garner* did not "establish a magical on/off switch," *Garner* is still valid as "an application of the Fourth Amendment's 'reasonableness' test." *Scott*, 550 U.S. at 382.

Second, the district court identified additional Sixth Circuit authority holding that when a fleeing suspect does not pose a danger to the public, it is unreasonable to apprehend him through the use of deadly force.

The district court relied (Pet. App. 42) on the holding of *Smith* v. *Cupp*, 430 F.3d 766, 773 (6th Cir. 2005), that "a suspect fleeing in a car that has never posed a danger to anyone has the clearly established right not to be seized with deadly force." There, as here, "[i]f the facts are taken in the light most favorable to the plaintiffs, no person at the scene was ever in danger." *Id*. at 774. Given that it was clearly established in the Sixth Circuit that an officer may not use deadly force to apprehend a fleeing *motorist* when there was no danger to the public, it follows that such force may not be used in like circumstances against a *motorcyclist*. See also Pet. App. 44 (citing *Sample* v. *Bailey*, 409 F.3d 689, 699-700 (6th Cir. 2005)).

Third, the district court also relied on the Eighth Circuit's decision in *Hawkins* v. *City of Farmington*, 189 F.3d 695 (8th Cir. 1999)—and the court of appeals affirmed. See Pet. App. 40-41. There, the officer had positioned his squad car on the median of a divided highway, waiting for a motorcycle being pursued by law enforcement. *Hawkins*, 189 F.3d at 698. When a motorcycle traveled along the highway into view, the officer slowly rolled his car into both lanes of the roadway, colliding with the motorcycle.

Id. at 698-700. No other vehicles were on the highway. *Id.* at 698. Faced with these facts, the court held that "there is evidence from which a jury can find that [the officer's] conduct was unreasonable." *Id.* at 702.

The district court reasoned that *Hawkins* is "analogous" to the circumstances here. Pet. App. 40. It observed that, in *Hawkins*, "[t]he court concluded that because the defendant acted intentionally and because there were no other vehicles near the site of the crash, there was sufficient evidence for a reasonable juror to find that an officer using a rolling roadblock acted unreasonably." Pet. App. 41. Similarly, "[h]ere, while the motorcycle passed other vehicles while Deputy Marino was pursuing him, at the time and place of the collision with Officer Miller, there are no vehicles to be seen in the immediate vicinity. Deputy Marino testified that under these circumstances he believed the use of deadly force was unreasonable." *Ibid*.

Fourth**,** although *Walker*, *Cupp*, and *Hawkins* are more than sufficient authority to demonstrate that the right at issue was clearly established at the time of the incident here, that conclusion is further reinforced by additional Sixth Circuit precedent.

In 1994, the Sixth Circuit held that "an officer violates a clearly established right * * * if he pulls his squad car onto a highway with knowledge or reason to know that an approaching motorcyclist will not have time or the ability to stop or otherwise safely avoid collision with the car." *Buckner* v. *Kilgore*, 36 F.3d 536, 540 (6th Cir. 1994). The court went on to deny qualified immunity to the officer who had executed the roadblock, because there were genuine issues of material fact as to the reasonableness of his

actions. *Ibid.* The facts are strikingly similar to those here: a 100 mile-per-hour motorcycle chase down a divided, four-lane highway, ended by an officer's decision to intentionally block the motorcyclist's path, causing a collision. See *id.* at 538.

Even earlier, in 1988, the Sixth Circuit addressed a police vehicle's intentional collision with a fleeing motorcycle in *Kuhar* v. *Hanton*, 836 F.2d 1348 (6th Cir. 1988). There, the police pursued one of two drag-racing motorcyclists through the surface streets of Cleveland, Ohio for ten to fifteen minutes at speeds up to seventy miles per hour, until an officer swerved in front of the motorcyclist, who crashed into the police cruiser. *Id.* at *1. The court held that "the officer's movement of his vehicle in the path of plaintiff when he was so close as to create an immediate collision and significant injury, if proven, could be found against the backdrop of the totality of the circumstances to constitute unreasonable force in the attempt to apprehend this plaintiff." *Id.* at *3.

Taken together, *Walker*, *Cupp*, *Hawkins*, *Buckner*, and *Kuhar* clearly establish that an officer may not strike a speeding motorcyclist with a police cruiser as a means of ending a chase, in circumstances where the motorcyclist does not pose an immediate threat to anyone. That rule, clearly established for decades, controlled the outcome here.

Fifth**,** as this Court recently confirmed, *Garner* and *Graham* will constitute clearly established law "by themselves" in an "obvious case." *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017).

If any case may qualify as "obvious," this must be it: it is obviously unreasonable to use deadly force to apprehend a fleeing motorcyclist who poses no dan-

ger to others. Pet. App. 9-10. Indeed, a central touchstone of Fourth Amendment reasonableness has long been that an officer may not use "deadly force" unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." *Garner*, 471 U.S. at 3.

Here, the *Graham* factors overwhelmingly demonstrate that this use of force, taking the facts in light most favorable to respondent, was unreasonable. Any competent officer would have recognized as much. Indeed, both Deputy Marino (who initiated and led the chase) and Deputy Sell (who investigated the incident) acknowledged that the use of force was unreasonable here. Pet. App. 41.

To begin with, "the nature and quality of the intrusion on the individual's Fourth Amendment interests" (*Graham*, 490 U.S. at 396) could not be more extreme. As the panel below rightly noted, "[i]t is only common sense—and obviously so—that intentionally ramming a motorcycle with a police cruiser involves the application of potentially deadly force." Pet. App. 10 (alteration in original) (quoting *Walker*, 649 F.3d at 503-504). Any reasonable officer would know that an intentional collision with a motorcyclist "traveling in excess of 100 miles per hour" would likely result in the motorcyclist's death. *Id*. at 37.

And, when the evidence is viewed in the light most favorable to the respondent (see *Tolan*, 134 S. Ct. at 1866), "the countervailing governmental interests at stake" (*Graham*, 490 U.S. at 396) are minimal. As the district court found, "Stamm was being pursued at 4:20 a.m. along a highway six and then four lanes wide, with a large median dividing him from oncoming traffic and no pedestrians or busi-

nesses in sight." Pet. App. 40. He was being pursued only for speeding. *Id.* at 4. See also *Graham*, 490 U.S. at 396. He maneuvered his motorcycle with "speed and skill" and had "no trouble" avoiding the few other vehicles on the road. See D. Ct. Dkt. No. 18-13, at 125. Indeed, "[d]uring th[e] pursuit, the greatest risk was to Stamm, who was on a motorcycle which is less stable and significantly lighter than the cars and trucks on the highway." Pet. App. 40. And "at the time and place of the collision with Officer Miller, there [were] no vehicles to be seen in the immediate vicinity." *Id.* at 41.

Given these circumstances, the Sixth Circuit—and the district court before it—was correct to hold that, if Stamm posed a minimal threat to others, petitioner's intentional use of force almost certain to kill Stamm violated clearly established law.

3. Petitioner nonetheless argues that *Scott* and *Plumhoff* compel granting him qualified immunity at this juncture. Pet. 15-20. That is incorrect.

The facts of *Scott* v. *Harris*, 550 U.S. 372 (2007), are markedly different from those here, both with respect to the danger posed by the fleeing motorist, and the gravity of the force exerted by law enforcement.

Most importantly—and most obviously—the suspect in *Scott* was fleeing the police in a car, not a motorcycle. *Scott*, 550 U.S. at 374. This informs every aspect of the analysis in that case. Here, by contrast, Stamm drove a motorcycle. As both the Sixth Circuit and the district court recognized, a motorcycle inherently presents less danger to other motorists than does a full-sized vehicle like a car or truck. Pet. App. 10, 40.

Additionally, the conduct of the driver in *Scott* posed a far more significant risk to the public. The driver there "rac[ed] down narrow, two-lane roads in the dead of night at speeds that are shockingly fast." *Scott*, 550 U.S. at 379. He "cross[ed] the double-yellow line" into oncoming traffic, and "force[d] cars traveling in both directions to their respective shoulders to avoid being hit." *Ibid.* He "r[a]n multiple red lights," and at one point collided with a police vehicle in a shopping center parking lot, before speeding off again. *Id.* at 375, 379. Importantly, the chase took place on surface streets, and therefore "posed an actual and imminent threat to the lives of any pedestrians who might have been present." *Id.* at 384. In short, *Scott* involved "a Hollywood-style car chase of the most frightening sort." *Id.* at 380.

Although Stamm rode his motorcycle with speed, he did so on a nearly deserted, six and then four lane limited-access freeway with a 70 mile-per-hour speed limit. There was "a large median dividing him from oncoming traffic and no pedestrians or businesses in sight." Pet. App. 8. And he was not out of control; as the investigating Deputy testified, Stamm had "skill on the motorcycle," and "kn[ew] how to do a high speed lane maneuver, a high speed lane change." D. Ct. Dkt. No. 18-13, at 120, 121. He "had no trouble" maneuvering around the few other vehicles on the road. *Id.* at 125. Thus, unlike the driver in *Scott*, he did not drive into oncoming traffic. He did not force any other vehicles from the road, he ran no red lights, and he did not endanger any pedestrians. As the district court rightly recognized, Stamm's con-

duct pales in comparison to the danger created by the flight in *Scott*. Pet. App. 39-40.[5]

Scott is further distinguishable because the kind of force at issue is materially different. In *Scott*, the officer's action was not as dangerous as other possible modes of seizure: "A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." *Scott*, 550 U.S. at 383. See also *id.* at 384 ("Scott's actions posed a high likelihood of serious injury or death to respondent—though not the near *certainty* of death posed by, say, * * * pulling alongside a fleeing motorist's car and shooting the motorist."). This conclusion makes sense: a driver or passenger in a modern car, surrounded by seatbelts, airbags, and engineered crumple zones, might well survive even a high-speed collision.

Striking a motorcycle traveling at 100 miles per hour, on the other hand, poses vastly greater risk. As Michigan's driver's education handbook puts it: "Any crash between a larger vehicle and a motorcyclist * * * *almost always injures or kills* the operator of

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[5] Petitioner also suggests that the Sixth Circuit ran afoul of *Scott* by considering the fact that there were no other motorists present when Miller collided with Stamm. Pet. 8, 15-16. Not so. *Scott*'s only teaching in this regard is that a temporary absence of danger to pedestrians will not—on its own—render a use of force unreasonable when the fleeing suspect has created the sort of circumstance that invites danger to pedestrians. See *Scott*, 550 U.S. at 379-380 & n.7. *Scott* certainly does not intimate that a court cannot consider such an absence of immediate danger at the time of seizure, in conjunction with the minimal level of risk up to that point, as part of its analysis of "the totality of the circumstances." *Plumhoff*, 134 S. Ct. at 2020 (citing *Graham*, 490 U.S. at 396).

the smaller vehicle." State of Michigan, *What Every Driver Must Know* 64 (2016) (emphasis added), goo.gl/GV2p1r.

Plumhoff v. *Rickard*, 134 S. Ct. 2012 (2014) is similarly not on point. Like this case, *Plumhoff* involved the application of deadly force to end a police chase, but the similarities end there. To begin with, *Plumhoff*—like *Scott*—involved a car, not a motorcycle. As the lower courts here recognized, the danger posed by a motorcycle materially differs. And, again, intentionally striking a speeding motorcycle is a different sort of use of force—it will almost always result in death or exceptionally serious injury.

Beyond that, *Plumhoff* involved a driver who demonstrated a significantly greater risk to the public. He had already crashed into *three* police vehicles, and he made a swerving maneuver to escape several officers who had surrounded the car *on foot*—one of whom only just escaped being run over. 134 S. Ct. at 2017-2018. The chase also occurred partially on surface streets in a major city, potentially exposing even more pedestrians and bystanders to danger. *Id*. at 2017. There was no comparable risk here—especially when the facts are viewed in the light most favorable to respondent.

Finally, the *Plumhoff* driver was suspected of crimes in addition to speeding. He was known to have "an indentation roughly the size of a head" in his windshield when the chase began, justifying "a suspicion that somebody had been struck by that vehicle, like a pedestrian." 134 S. Ct. at 2017 & n.1 (quotations omitted). Stamm, on the other hand, was being pursued only for speeding. Pet. App. 4. The "severity of the crime at issue" is, of course, relevant to reasonableness. *Graham*, 490 U.S. at 396.

Mullenix is also off the mark. There, "[t]wice during the chase," the suspect called the police dispatcher, "claiming to have a gun and threatening to shoot at police officers if they did not abandon their pursuit." *Mullenix*, 136 S. Ct. at 306. This immediate threat to officer safety is wholly distinct from the circumstances here.

4. Petitioner's assertion of a split among the circuits (Pet. 24-27) is similarly incorrect.

Coker v. *Arkansas State Police*, 734 F.3d 838 (8th Cir. 2013), did not involve the use of deadly force. There, at a low speed, an officer "bumped" a motorcycle with his patrol car, causing it to "tip over"; the motorcyclist was able to immediately "jump[] up and r[u]n to the side of the road." *Id.* at 840. As the district court in that case put it, the officer "bumped at a very low speed the rear tire of Coker's motorcycle." *Coker* v. *Ark. State Police*, 2012 WL 4888441, at *1 (E.D. Ark. Oct 12, 2012). See also *id.* at *3 ("[The officer] and Coker were going at a very low speed—certainly no more than 10 or 15 mph—at the time of the second bump."). A "bump[] at a very low speed" is an entirely different sort of use of force than an intentional collision with a motorcycle traveling at or above 100 miles per hour.

What's more, the Eighth Circuit in *Coker* actually *denied* qualified immunity, because the real issue in that case was whether the officer had used excessive force by kicking the motorcyclist and breaking his facial bones with a metal flashlight. *Coker*, 734 F.3d at 840, 843. In *Coker*, the court of appeals did not analyze whether the officer's non-deadly use of force to effect the seizure was reasonable under the circumstances. *Coker* thus has no bearing here.

So too with *Abney* v. *Coe*, 493 F.3d 412 (4th Cir. 2007). There, the motorcyclist was first observed by police when he "crossed a double yellow line to pass a vehicle on a curve," while speeding. *Id.* at 416. He then led police on an extended chase "replete with examples of reckless driving * * * executed with little consideration for the lives and safety of other motorists." *Ibid.* He barreled down "narrow, winding, two-lane roads," and "illegally passed vehicles by crossing double yellow lines on no less than five occasions—many of which involved speed, sharp curves, or both." *Id.* at 416-417, 418. He ran several stop signs, on one occasion in the opposite lane of traffic, and "pulled straight into traffic" on a highway. *Id.* at 414, 417 (quotation omitted). Riding in the opposite lane against oncoming traffic, he forced at least one car off the road. *Id.* at 414. The chase took place during the day and on surface streets, making the risk to pedestrians and other bystanders extreme. *Id.* at 418.

It is no surprise, then, that the district court below had no trouble distinguishing *Abney*. Pet. App. 39-40. In contrast to the extreme danger posed to oncoming motorists, potential pedestrians, and officers in Abney's path, "[d]uring th[e] pursuit [on I-96], the greatest risk was to Stamm." *Id.* at 40. The Fourth Circuit's holding in *Abney* on the particular facts presented there is not incompatible with the decision below.

5. Granting qualified immunity in this case at this juncture—where there is a disputed question of fact regarding whether Stamm posed a danger to anyone—would massively expand the circumstances in which police may use deadly force to apprehend suspects. It would signal a stark retreat from *Gar-*

ner, *Graham*, *Scott*, *Plumhoff*, and *Mullenix*—all of which properly trained on whether, and to what extent, the fleeing suspect posed a danger to others. It is telling that petitioner himself does not even seek this result; his petition instead rests on a fanciful view of the record and a request for this Court to intervene to resolve a disputed question of fact.

While police officers have broad latitude in the discharge of their duties designed to protect the public, it has been the law for decades that officers may not intentionally use deadly force in circumstances where a fleeing suspect poses no material threat to others. See *Garner*, 471 U.S. at 3. That holding is fundamental. Contrary to petitioner's asserted view, police officers do not, in our society, play the role of "judge, jury, and executioner." Pet. App. 29-30.

CONCLUSION

The petition should be denied.

Respectfully Submitted,

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