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IN THE
Supreme Court of the United States

NITA GORDON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ANTONIO GORDON,
Petitioner,

v.

KEITH BIERENGA,
Respondent.

**APPLICATION TO THE HON. BRETT M. KAVANAUGH
FOR A 45-DAY EXTENSION OF TIME WITHIN WHICH TO FILE
A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT**

Pursuant to Rule 13.5 of the Rules of this Court, Applicant Nita Gordon moves for an extension of time of 45 days, up to and including June 6, 2022 (accounting for weekends and holidays pursuant to Rule 30.1), within which to file a petition for a writ of certiorari.

1. Applicant will seek review of the judgment in *Gordon v. Bierenga*, No. 20-2013 (6th Cir.). A copy of the panel's opinion, dated December 14, 2021, is attached as Exhibit 1. A copy of an order denying a petition for rehearing en banc, dated January 21, 2022, is attached as Exhibit 2. The current deadline for filing a petition for writ of certiorari is April 21, 2022. This application is filed more than 10 days before the date the petition is due. *See S. Ct. R. 13.5.* The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).
2. Good cause exists for an extension. Applicant retained the undersigned as new counsel and therefore seeks a 45-day extension to June 6, 2022, so that counsel can

review the record, study the relevant case law, and prepare a petition.

3. An extension is further justified by the press of business on other matters.

The undersigned are responsible for the following engagements with imminent deadlines:

a) Motions in limine due April 8, 2022 in *Shorter v. City of Greenville*, No. 4:20-cv-10 (N.D. Miss.). Trial is scheduled to begin in this case on June 6, 2022, and trial preparation is well underway.

b) An opening brief in *Teeter v. Loomis Armored*, No. 21-2426 (4th Cir.) due April 13, 2022.

4. Moreover, the undersigned represents Applicant as part of a law-school clinical program, which permits law students to gain valuable experience on appellate matters. The current deadline coincides with the end of the academic semester and related student deadlines (e.g., reading period, final examinations, etc.), and an extension would allow students to work with the undersigned on this matter without academic conflicts.

5. Finally, an extension is warranted because this case presents substantial and important questions of law with which this Court has frequently grappled and on which the federal courts of appeals are divided.

a. Antonino Gordon died after Officer Keith Bierenga shot him through his car window as he exited the drive-through of a White Castle restaurant in Royal Oak, Michigan. *See Gordon v. Bierenga*, No. 18-13834, 2020 WL 5411329 (E.D. Mich. Sept. 9, 2020). Prior to the shooting, Bierenga pursued Mr. Gordon after he drove away from a traffic stop that Bierenga initiated when Gordon merged lanes too quickly. *Id.* at 2. Bierenga initially lost track of Gordon, but twenty minutes later, Bierenga

observed Gordon's vehicle in line at a White Castle drive-through. *Id.*

b. While Gordon paid for his order at the drive-through window, Bierenga attempted to block Gordon's vehicle with his police cruiser, exited the cruiser, and drew his gun. *Id.* at 3. Gordon attempted to make a three-point turn to exit the drive-through line while Bierenga positioned himself alongside Gordon's driver's side door and window. *Id.*

c. As Gordon started to drive away from Bierenga and the White Castle drive-through, Bierenga fired four shots into Gordon's driver's side window. *Id.* Bierenga inflicted one gunshot wound to Gordon's right arm and one fatal wound to his chest. *Id.* Gordon continued to drive his vehicle for a short distance, losing consciousness soon thereafter; he was subsequently transported to a local hospital where he died from the gunshot wound. *Id.*

d. Gordon's estate sued Bierenga under 42 U.S.C. § 1983 for a violation of his Fourth Amendment rights. Finding that Sixth Circuit precedent clearly established Gordon's right to be free from excessive force under the facts of this case, the district court denied Bierenga's motion for summary judgment based on qualified immunity.

e. In the decision below, the Sixth Circuit reversed the district court's denial of qualified immunity, holding that—while precedent similar to the facts of this case existed in the circuit—none of the cases contained facts similar *enough* to this case to put every reasonable officer in Bierenga's position on notice that his conduct violated the Fourth Amendment. *See Ex. 1.* The Sixth Circuit thereafter denied rehearing en banc. *See Ex. 2.* In doing so, the Sixth Circuit further entrenched a divide among the federal courts of appeals about the level of factual specificity with

prior precedent necessary to clearly establish constitutional violations. *Compare Morrow v. Meachum*, 917 F.3d 870, 874–75 (5th Cir. 2019) (demanding an extremely high level of “specificity and granularity” with respect to clearly established law) and *Kelsay v. Ernst*, 933 F.3d 975, 978–79 (8th Cir. 2019) (same) with *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) (declining to require a case “directly mirroring the facts at hand” to find clearly established law), *Thompson v. Virginia*, 878 F.3d 89 (4th Cir. 2017) (same), *Phillips v. Cnty. Ins. Corp.*, 678 F.3d 513 (7th Cir. 2012) (same), and *Ioane v. Hodges*, 939 F.3d 945 (9th Cir. 2018) (same).

f. The Sixth Circuit’s decision conflicts with the precedents of this Court, splits with decisions from several other circuits, and presents a question of tremendous importance on the scope and operation of qualified immunity.

An extension of time will help to ensure that the petition clearly and thoroughly presents the vitally important and complicated issues raised by the Sixth Circuit’s decision.

6. For the foregoing reasons, Applicant hereby requests that an extension of time be granted, up to and including June 6, 2022, within which to file a petition for a writ of certiorari.

Respectfully submitted,

s/ Tiffany R. Wright
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