No.

IN THE

Supreme Court of the United States

NITA GORDON, as personal representative of the estate of Antonio Gordon

Petitioner,

v.

KEITH BIERENGA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent is a Royal Oak, Michigan police officer who killed Antonino[1] Gordon, the deceased husband of Petitioner Nita Gordon, when Respondent fired four shots directly into Mr. Gordon's driver's side window after a series of minor traffic violations; despite Mr. Gordon's efforts to avoid arrest by Respondent, he did not pose an imminent risk to either Respondent or the public. Petitioner brought suit under 42 U.S.C. § 1983 challenging Respondent's conduct as violative of the Fourth Amendment. The district court concluded that Respondent violated the Fourth Amendment rights of Mr. Gordon because he was not an "imminent or serious danger" to either Respondent or any bystanders. Nonetheless, the Sixth Circuit reversed the district court's denial of summary judgment and granted Respondent qualified immunity on the grounds that—despite the existence of precedent similar to the facts of the present case—the precedent was not similar enough to clearly establish Respondent's conduct as unconstitutional under these precise circumstances. The questions presented are:

1. Does qualified immunity protect government officials so long as no prior precedent exists recognizing the unconstitutionality of a fact pattern exactly analogous to the underlying case, as the Fifth, Sixth, and Eighth Circuits have held, or can a constitutional

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[1] Although the deceased's name is listed in the caption as "Antonio," he is correctly called "Antonino." Out of respect for the deceased, where appropriate this petition will refer to him by his correct name.

violation be clearly established with prior precedent with some factual variation, as the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have held?

2. Should the judge-made doctrine of qualified immunity, which is absent from the text of 42 U.S.C. § 1983, be narrowed or abolished?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were Petitioner Nita Gordon, as personal representative of the estate of Antonino Gordon and Respondent Keith Bierenga.

CORPORATE DISCLOSURE STATEMENT

Petitioner is an individual and therefore has no parent corporation and no stock.

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INTRODUCTION

The Constitution does not permit officers to kill fleeing suspects who pose no imminent danger to the officer or the public. However, Respondent, Officer Keith Bierenga, did precisely that when he killed Petitioner's husband, Antonino Gordon. But Officer Bierenga will not stand trial for his unconstitutional act. Not because this Court has not clearly stated that it is unconstitutional to kill a fleeing suspect who poses no imminent danger to the officer or the public, and not because the Sixth Circuit's own precedent does not say the same, but because the Sixth Circuit has determined that no prior case presents precisely the same factual pattern as the case at bar. That stringent interpretation of the clearly established prong of the qualified immunity analysis under 42 U.S.C. § 1983 is erroneous. Even worse, that erroneous interpretation is not alone among the courts of appeal. Indeed, the Fifth, Sixth, and Eighth Circuits all cloak unconstitutional acts by state officials in qualified immunity by applying this stringent standard. Meanwhile, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits apply the doctrine in a more reasonable manner, rightly allowing for some factual variations in the precedent that clearly establishes a constitutional violation. This deeply entrenched circuit split further exacerbates the injustice imposed on the public by the qualified immunity doctrine writ large and this petition should be granted to resolve that split.

This case also presents a clear, unencumbered vehicle for this Court to reconsider the propriety or proper boundaries of the qualified immunity doctrine.

Qualified immunity doctrine is an atextual, ahistorical judicial creation that members of this Court, the judiciary at-large, academics, and the public have increasingly criticized for its weak foundations. But even if some form of qualified immunity doctrine may be justified by historical common law, modern qualified immunity is completely unmoored from those origins. The doctrine has taken on a life of its own, bearing almost no resemblance to the narrow exception the Court established over 50 years ago. Accordingly, this Court should grant this petition to abolish or reevaluate qualified immunity doctrine.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 20 F.4th 1077 and is reproduced at Pet. App. 3a. The order of the district court denying summary judgment is not officially reported but may be found at 2020 WL 5411329 and is reproduced at Pet. App. 19a. The unpublished order of the Court of Appeals denying the petition for rehearing en banc is available at 2022 WL 326696 and reproduced at Pet. App. 1a.

JURISDICTION

The Sixth Circuit entered its judgment on December 14, 2021. Pet. App. 3a. A timely petition for rehearing en banc was denied on January 21, 2022. Pet. App. 1a. Petitioner sought and received an extension to file this petition by June 6, 2022. *Gordon v. Bierenga*, No. 21A594.This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner seeks damages under 42 U.S.C. § 1983 for a violation of Mr. Gordon's rights under the Fourth Amendment.

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983.

STATEMENT OF THE CASE[2]

A. Factual Background

On April 10, 2018, Respondent Keith Bierenga shot and killed Antonino Gordon as Mr. Gordon drove away from the drive-through of a White Castle restaurant in Royal Oak, Michigan after Respondent attempted to apprehend Mr. Gordon for a series of non-violent traffic violations.

1. *Respondent Pulls Mr. Gordon Over For Minor Traffic Violations*

Prior to firing several shots directly through the window of the driver's side of Mr. Gordon's car, Respondent observed Mr. Gordon merging lanes abruptly, which caused the car behind him to slow quickly. Pet. App. 20a-21a. In an attempt to pull over Mr. Gordon, Respondent followed him for several blocks with his lights activated, ultimately turning on his siren. Pet. App. 21a. After a few blocks, Mr. Gordon stopped in the center lane at a red light at which point Respondent approached to speak with him. Pet.

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[2] These facts are drawn primarily from the district court's summary judgment order, which relied on undisputed video footage from the scene. Pet. App. 20a.. Because this case was resolved at summary judgment, any facts shown by the video footage but subject to multiple interpretations are viewed in the light most favorable to Mr. Gordon. *See Godawa v. Byrd*, 798 F.3d 457, 463 (6th Cir. 2015). Any other facts not shown by the video and accompanying interferences are also viewed in the light most favorable to Mr. Gordon at this stage. *Tolan v. Cotton*, 572 U.S. 650 U.S. 657 (2014) (per curiam).

App. 21a. During his attempt to speak with Mr. Gordon, Respondent did not inform him of the reason for the stop, and he did not indicate to Mr. Gordon that he was under arrest. Pet. App. 21a. Respondent also did not see or smell drugs in the vehicle,[3] nor did he see any firearms. Pet. App. 21a.

While Respondent tried to talk to Mr. Gordon, the traffic light turned green. Pet. App. 21a. Mr. Gordon drove away and made a rapid left turn in front of oncoming traffic into a White Castle parking lot. Pet. App. 21a.. Respondent returned to his police cruiser and pursued Mr. Gordon, notifying dispatch that Mr. Gordon fled. Pet. App. 22a. After circling the White Castle parking lot, Respondent saw no sign of Mr. Gordon. Pet. App. 22a. With Mr. Gordon gone, Respondent exited the parking lot and proceeded to drive-through the streets adjacent to the White Castle. Pet. App. 22a.

[3] Respondent testified that Mr. Gordon appeared to possibly be "under the influence of something." Pet. App. 21a-22a. However, as the district court noted, video evidence, contrary to Respondent's testimony, showed Mr. Gordon's face was neither pale nor sweaty, and his eyes did not appear to be glossy. Pet. App. 23a. Further, Respondent inexplicably at no point indicated to dispatch his belief that Mr. Gordon was under the influence of any substance and made such a claim for the first time in his deposition testimony. Pet. App. 40a-41a.

2. *Respondent Shoots Mr. Gordon Four Times Through Mr. Gordon's Driver Window As Mr. Gordon Attempts To Drive Away*

Approximately twenty minutes later, Respondent saw a vehicle like the one Mr. Gordon was driving in line at the drive-through of the White Castle restaurant. Pet. App. 22a. As Mr. Gordon paid for his meal, Respondent parked diagonally directly in front of Mr. Gordon's vehicle in an apparent attempt to block his exit. Pet. App. 22a. At this time, there was another vehicle about three feet behind Mr. Gordon's car in the drive-through line. Pet. App. 22a-23a.

According to the district court and as clearly shown in a video recording from the White Castle drive-through camera, Mr. Gordon was "engaging normally and responsively with the cashier." Pet. App. 23a. He did not appear under the influence of any substance but rather "appear[ed] to be making eye contact [as] he wait[ed] calmly in the car while the cashier made change." Pet. App. 23a.

Immediately upon parking, Respondent exited his vehicle, drew his gun, and approached Mr. Gordon's front driver's side window. Pet. App. 23a. Mr. Gordon then looked over his right shoulder and reversed his vehicle to begin what appeared to be a "three-point turn" in an effort to leave the drive-through line because Respondent's police cruiser and the vehicle behind Mr. Gordon's car boxed him in. Pet. App. 24a. At this point, Respondent moved intermittently between the front and side of Mr. Gordon's vehicle, keeping his

gun pointed directly at Mr. Gordon the entire time. Pet. App. 24a.

When Mr. Gordon reversed his vehicle, he bumped the car behind him. Pet. App. 24a. He then turned his wheels sharply to the right and drove forward in an apparent attempt to avoid Respondent and his cruiser. Pet. App. 24a. Mr. Gordon successfully avoided Respondent, but his car bumped into the back wheel of Respondent's vehicle. Pet. App. 24a. Mr. Gordon reversed one final time to complete his maneuver away from the White Castle, as Respondent moved to the left of Mr. Gordon's vehicle and positioned himself flush with the rolled-down driver window. Pet. App. 24a. He pointed his gun directly at Mr. Gordon from a short distance away. Pet. App. 24a.

Having backed his vehicle up several feet away from Respondent's police cruiser, Mr. Gordon began to drive away from the White Castle, Respondent's car, and Respondent himself. Pet. App. 24a.. As Mr. Gordon slowly moved away, Respondent yelled "stop" before he fired four gunshots into Mr. Gordon's driver's side window. Pet. App. 24a. According to one eyewitness at the scene, Mr. Gordon "was only attempting to flee the scene [and] [h]is vehicle wasn't in a position to cause harm to the officer." Pet. App. 25a. According to another, "it [didn't] look like [Respondent] was trying to shoot in defense." Pet. App. 25a. By all accounts, Mr. Gordon was "just trying to leave." Pet. App. 26a.

Ultimately, one of Respondent's gunshots hit Mr. Gordon's right arm and another gunshot hit both his left arm and his chest. Pet. App. 24a. After Respondent shot Mr. Gordon, Mr. Gordon managed to continue

to drive away. Pet. App. 24a-25a. Shortly thereafter, however, Respondent's gunshots caused Mr. Gordon to lose consciousness and drift into oncoming traffic. Pet. App. 25a. Respondent's gunshot proved to be fatal, and Mr. Gordon succumbed to the injuries inflicted by Respondent, dying after being taken to the hospital. Pet. App. 25a.

B. Procedural History

1. *The District Court Holds That Respondent Violated Mr. Gordon's Fourth Amendment Rights And Was Not Entitled to Qualified Immunity*

Petitioner Nita Gordon, as the representative of Mr. Gordon's estate, brought an excessive force claim against Respondent under 42 U.S.C. § 1983, alleging that Respondent violated Mr. Gordon's Fourth Amendment rights when he fatally shot Mr. Gordon after Respondent attempted to stop him at a White Castle drive-through. Pet. App. 4a-5a, 18a-19a. Petitioner also brought a claim of municipal liability against the City of Royal Oak, Michigan, which the district court dismissed in June 2019. Pet. App. 4a-5a, 18a-19a.

In December 2019, Respondent filed a motion for summary judgment with respect to Mr. Gordon's Fourth Amendment claim under § 1983, raising the defense of qualified immunity. Pet. App. 9a, 18a-19a. Relying primarily on audio-visual footage of the incident underlying this action, supplemented by other facts on the record, the district court denied Respondent's motion for summary judgment. Pet. App. 19a. In

doing so, the district court determined both that Petitioner made an adequate showing that Respondent violated Mr. Gordon's Fourth Amendment right to be free from excessive force when he shot Mr. Gordon *and* that such a right was clearly established for purposes of qualified immunity. Pet. App. 18a-19a

With respect to Respondent's violation of Mr. Gordon's Fourth Amendment rights, the district court noted the general rule that "the Fourth Amendment prohibits the use of deadly force to prevent the escape of fleeing suspects unless the officer has probable cause to believe that the suspect poses a threat of serious harm, either to the officer or others." Pet. App. 29a (quoting *Latits*, 878 F.3d at 547). Applying this rule and drawing all factual inferences in favor of Plaintiff—as it was required to at that stage—the district court concluded that "objective evidence and three eyewitness accounts demonstrate[d] that neither [Respondent], nor any bystander, [were] in imminent danger at the time of the shooting." Pet. App. 35a. Specifically, the district court found that it was not clear that Mr. Gordon "'demonstrated . . . that he was willing to injure an officer'" or that "Gordon's driving was so 'extremely reckless' that it 'threatened the lives of [] those around'" such that Respondent's use of deadly force was constitutionally permissible. Pet. App. 34a (quoting *Latits*, 878 F.3d at 548). The court further noted that Mr. Gordon posed only "a moderate risk to other drivers" and "the Sixth Circuit has discounted far more dangerous driving behavior when conducting an excessive force assessment." Pet. App. 40a.

The district court also determined that Mr. Gordon's right to be free from deadly force under these circumstances was clearly established, putting Respondent was on notice that his conduct was unlawful. Pet. App. 47a-48a. The court acknowledged that "clearly established law 'does not require a case directly on point,'" but nonetheless extensively explained that there was Sixth Circuit precedent "directly on point." Pet. App. 47a. Therefore, Respondent was not entitled to qualified immunity's protection in the face of such Sixth Circuit precedent. Pet. App. 47a. The district court also found this Court's precedent regarding deadly force in response to vehicular flight to be unhelpful in resolving the issues here because that precedent involved conduct far more egregious and threatening than that exhibited by Mr. Gordon. Pet. App. 47a-49a. For these reasons, the court denied Respondent's motion for summary judgment with respect to Mr. Gordon's Fourth Amendment claims under § 1983. Pet. App. 50a.[4]

2. *The Sixth Circuit Reverses The District Court's Decision And Concludes That Respondent Is Entitled To Qualified Immunity Without Addressing the Constitutionality of Respondent's Conduct*

On appeal, the Sixth Circuit reversed the district court's denial of summary judgment with respect to Respondent's violation of Mr. Gordon's Fourth

[4] The district court also found Petitioner's § 1983 claim to be properly articulated under Michigan's Wrongful Death Act. Pet. App. 49a-50a.

Amendment rights and dismissed Petitioner's § 1983 claims. Pet. App. 4a. In reviewing the district court's decision, the Sixth Circuit did not address the constitutionality of Respondent's use of deadly force against Mr. Gordon but concluded that any potential violation of Mr. Gordon's rights by Respondent was not clearly established. Pet. App. 4a. Therefore, according to the court, the law could not hold Respondent liable for Mr. Gordon's death. Pet. App. 17a.

In making its decision, the court acknowledged that Mr. Gordon's behavior "did not demonstrate an obvious willingness to endanger the public by leading the police on chases at very high speeds through active traffic." Pet. App. 16a (internal citation and quotation marks omitted). Nonetheless, it thought Mr. Gordon's driving "posed a materially higher risk" than the driving in precedent from the Sixth Circuit and this Court, purportedly making this case a "close call." Pet. App. 11a. Although the court acknowledged that the precedent on which the district court relied was "similar in some ways" to the facts of this case, it was not "similar enough" to define clearly established law. Pet. App. 4a. Namely, because prior law did not specifically involve conduct that the court characterized as "reckless flight from a traffic stop in a crowded area prior to the shooting, or the striking of both civilian and police vehicles in an attempt to flee," Pet. App. 16a, it did not meet "the requisite level of 'specificity' to clearly establish that it was unlawful for Bierenga to shoot Gordon in *this* factual scenario," Pet. App. 17a (emphasis added).

Petitioner timely filed a petition for rehearing en banc with respect to Respondent's shooting of Mr.

Gordon. The Sixth Circuit denied the petition on January 21, 2022. Pet. App. 1a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW EXACERBATES A DIVISION AMONG THE CIRCUIT COURTS ON THE DEGREE OF FACTUAL SPECIFICITY REQUIRED FOR LAW TO BE CLEARLY ESTABLISHED

Qualified immunity shields police officers engaged in potential misconduct from civil liability unless plaintiffs can show that an officer violated statutory or constitutional rights that were clearly established at the time of the challenged conduct. *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). The purpose of the "clearly established" requirement is to ensure that officers and other government officials "are on notice that their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206 (2001). This requires only a "fair warning" that improper conduct by a government official is violative of the Constitution's protections. *Hope v. Pelzer*, 536 U.S. 730, 740 (2002).

This Court has explained that, to provide fair warning to a police officer or other government official, "the clearly established law must be 'particularized' to the facts of the case." *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Such warning, however, "do[es] not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Instead, the law requires only that "existing precedent must have placed

the statutory or constitutional question beyond debate." *Id.* While "cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Hope*, 536 U.S. at 741. Courts are only constrained from defining clearly established law "at a high level of generality." *White*, 137 S. Ct. at 552 (citing *al-Kidd*, 563 U.S. at 742).

In the face of this Court's varying and—at times—competing directives—federal courts of appeals have employed drastically different approaches in determining whether the law is clearly established. Indeed, "[f]ew issues related to qualified immunity have caused more ink to be spilled." *Golodner v. Berliner*, 770 F.3d 196, 205 (2d Cir. 2014). The result has been "courts of appeals [] divided intractably over precisely what degree of factual similarity must exist" to find a clearly established constitutional violation. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part); *see also* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010) ("[D]etermining whether an officer violated 'clearly established' law has proved to be a mare's nest of complexity and confusion. The circuits vary widely in approach, which is not surprising given the conflicting signals from the Supreme Court."). The Sixth Circuit's decision below adds to this widespread division and confusion among lower courts regarding the precise degree of mandated factual specificity that plaintiffs must identify to demonstrate that their constitutional rights are clearly established.

Here, the Sixth Circuit's decision fits squarely within the cadre of courts that require a level of factual specificity in prior precedent that virtually ensures any government official can take advantage of qualified immunity regardless how paltry the distinction of the misconduct of a particular case. And the Sixth Circuit's myopic focus on supposedly distinctive facts placing Officer Bierenga's conduct under the protection of qualified immunity reflects the "'freewheeling policy choice[s]'" that [this Court has] previously disclaimed the power to make." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in judgment). Mr. Gordon was not driving *extremely* recklessly making it clearly unreasonable under the precedent of either this Court or the Sixth Circuit for Officer Bierenga to shoot him. He, *at most*, committed non-violent traffic violations and made minor contact with an officer's patrol car and another motorist's vehicle as he attempted to drive away from Officer Bierenga's bullets. Whether the officer's use of deadly force against Mr. Gordon was clearly established was not a "close call" as the majority characterizes it, Pet. App. 11a. Thus, it was wholly insufficient and wrong to place this case beyond the "hazy border[] between excessive and acceptable force." Pet. App. 17a (quoting *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7–9 (2021) (per curiam)). This is true even if the court of appeals would have opted to protect an officer who used deadly force against a person under the circumstances of this case. Only an unduly narrow application of qualified immunity precedent would allow such a result.[5]

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[5] The Sixth Circuit also failed to address the constitutionality of Officer Bierenga's conduct, instead resolving the case only

In a line of cases involving the use of deadly force by police against fleeing drivers, this Court has affirmed the principle that it is unconstitutional to use deadly force against a nonviolent fleeing motorist who does not pose an extreme or imminent risk to an officer or the public. *See Brosseau v. Haugen*, 543 U.S. 194 (2004); *see also Scott v. Harris*, 550 U.S. 372 (2007); *Plumhoff v. Rickard*, 572 U.S. 765 (2012); *Mullenix*, 577 U.S. 7. In each of these cases, this Court granted qualified immunity *only* because the plaintiffs "posed a *high likelihood* of serious injury or death" to an officer or the public. *Scott*, 550 U.S. at 384. Unlike the officers in those cases, however, Officer Bierenga was not justified in "perceiving grave danger" to public safety based on Mr. Gordon's conduct prior to shooting him. *See Mullenix*, 577 U.S. at 17; *see also Plumhoff*, 572 U.S. at 777. This materially distinguishes the present case from this Court's precedent and made the grant of qualified immunity by the court below wholly inappropriate. *Plumhoff*, 572 U.S. at 779–80 ("To defeat qualified immunity here, . . . respondent must show at a minimum . . . that the

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on the clearly established prong of the qualified immunity analysis. Pet. App. 4a-5a.. Although courts are not required to address the constitutionality of an officer's conduct when deciding whether qualified immunity applies, *see Pearson v. Callahan*, 555 U.S. 223, 223–24 (2009), failure to do so inhibits the development of clearly established law, particularly in cases like Mr. Gordon's. *See*, *e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1816 (2018) ("[T]he Court's qualified immunity decisions have created a vicious cycle . . . reducing the frequency with which lower courts announce clearly established law.").

officers' conduct in this case was materially different from the conduct in [this Court's precedent].").

The Sixth Circuit applied these cases to a scenario very similar to the facts at hand and established that an officer's fatal shooting of a fleeing driver after only nonviolent traffic violations, a collision with a police cruiser, and without the intent to injure an office or bystander while fleeing was objectively unreasonable under the Fourth Amendment. *See Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017); *see also* Pet. App. 31a-34a. The Sixth Circuit here, however, found the several cars in the parking lot, the patrons and employees inside the restaurant, and the adjacent traffic sufficient to distinguish this case from *Latits* for the purposes of qualified immunity. Pet. App. 12a-14a. But Mr. Gordon's actions did "evince[] an objective intent to flee rather than injure," Pet. App. 34a, and his quick left turn causing traffic to *at most* brake quickly in consideration with minor contact with two vehicles as he attempted to drive away simply do not amount to a "materially higher risk" than that in *Latits*, Pet. App. 17a, such that a reasonable officer would not know that his conduct was unreasonable.

Other courts have also expounded on the contours of the particular right identified in the precedent of this Court, establishing that force is unconstitutional in situations like that faced by Officer Bierenga and even in situations where drivers posed a higher risk of harm to officers or the public than Mr. Gordon. *See, e.g.*, *Lytle v. Bexar County*, 560 F.3d 404 (5th Cir. 2009), *cert. denied*, 559 U.S. 1007 (2010) (finding the use of deadly force against a fleeing motorist who collided with another vehicle during a chase and was on

bond for felony theft and unlawful possession of a firearm to violate clearly established law); *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005) (denying qualified immunity to an officer who shot an intoxicated arrestee who took control of an officer's cruiser where a reasonable jury could have concluded the arrestee's flight did not immediately threaten bystanders); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003) (denying qualified immunity where the only danger presented by the plaintiffs was the risk of accident during the pursuit).[6]

Mr. Gordon's constitutional rights should not avoid vindication simply because the court below could identify trivial differences between this case and the Sixth Circuit's precedents. Indeed, the court below itself acknowledged that Mr. Gordon's driving "did not demonstrate an 'obvious willingness to endanger the public by leading the police on chases at very high speeds and through active traffic.'" Pet. App. 16a (quoting *Latits*, 878 F.3d at 551). Under the Sixth Circuit's application of qualified immunity, because Mr. Gordon could not meet the requisite level of "specificity" that the doctrine purportedly demands, the appellate court reversed the district court's denial of qualified immunity to Officer Bierenga. Pet. App. 17a. This categorically incorrect decision deprived Mr. Gordon of *any* redress for the constitutional violation that the district court determined he had adequately shown. It did so in the face of prior precedent within the circuit and from this Court—both of which have made clear

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[6] *See also Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2d Cir. 2003); *Krein v. Price*, 596 Fed. App'x 184 (4th Cir. 2014); *Sigley v. City of Parma Heights*, 437 F.3d 537 (6th Cir. 2006).

that using deadly force against a fleeing driver who posed no risk of imminent harm to the officer or others in the vicinity is unconstitutional. *See* Pet. App. 29a-34a.

Ironically, the Sixth Circuit's cramped approach in this case mirrored its approach in *Latits*, 878 F.3d 541, the very case the district court held clearly established Mr. Gordon's right to be free from deadly force under the circumstances of this case. In *Latits*, "the majority markedly rais[ed] the legal barrier posed by the qualified immunity defense beyond any existing legal standard, making it virtually impossible for plaintiffs to overcome the defense even under circumstances where their rights have obviously been violated." *Id.* at 556 (Clay, J., concurring in part, dissenting in part). It did so after "spend[ing] the bulk of its opinion explaining how [the officer's] use of deadly force was objectively unreasonable" and after "citing case upon case" establishing as much. *Id.* at 554But, as "it is a truism that every case can be distinguished from every other," *id.* at 578, the officer in *Latits* escaped liability for his acknowledged misconduct, *id.* at 553. *Latits* and the present case demonstrate the Sixth Circuit's remarkably limited manner of applying clearly established law.

The Fifth Circuit imposes a similarly constrained review by requiring plaintiffs to identify clearly established law with a "specificity and granularity" representative of the harshest end of the factual specificity spectrum among the federal circuit courts. *See Morrow v. Meachum*, 917 F.3d 870, 874-75 (5th Cir. 2019). This approach requires plaintiffs to put forth an "extraordinary showing," *id.* at 877—a heightened level

of particularity that this Court's precedent does not require—which serves to gratuitously shirk the lower courts' responsibility to uphold the guarantees of the Constitution. Still, the Fifth Circuit requires this level of specificity as a matter of routine, resulting in the application of qualified immunity even in circumstances where government officials have caused serious constitutional violations. *See*, *e.g.*, *Zadeh v.* 3d *Robinson*, 928 F. 457, 468 (5th Cir. 2019); *see also Taylor v. Stevens*, 946 F.3d 211, 222 (5th Cir. 2020); *McCoy v. Alamu*, 950 F.3d 226, 232 (5th Cir. 2020).

Finally, the Eighth Circuit acts in accordance with the Fifth and Sixth Circuits by applying an uncompromising standard with respect to clearly established law. For example, in *Goffin v. Ashcroft* the Eighth Circuit granted qualified immunity to a police officer who shot a fleeing arrestee *even though* another officer had frisked the victim in her presence and determined that the arrestee was unarmed. 977 F.3d 687 (8th Cir. 2020) In cloaking the responsible officer in qualified immunity, the court reasoned that the plaintiff had not previously determined that "the violative nature of [the] *particular* conduct [was] clearly established." *Id.* at 691 (citing *Mullenix*, 577 U.S. at 12). Despite the existence of precedent establishing that "the use of deadly force against a fleeing suspect who does not pose a significant threat of death or serious physical injury to the officer or others is not permitted," *id.* at 696 (citing *Moore v. Indehar*, 514 F.3d 756, 763 (8th Cir. 2008) (Kelly, J., dissenting), because the plaintiff could not "provide a case clearly establishing that a pat down that recovered nothing eliminated [an officer's] objectively reasonable believe that he was armed and dangerous," the court found the

precedent cited by the plaintiff insufficient under the somewhat novel circumstances of the case, *id.* at 692. As in the Fifth and Sixth Circuits, the Eighth Circuit required a level of impossible exactitude regarding clearly established law.[7]

On the other hand, courts of appeals have reached opposite conclusions applying a less exacting standard than that imposed by the Fifth, Sixth, and Eighth Circuits. This is true even in cases involving facts similar to those in Mr. Gordon's case. In these cases, circuits have correctly concluded—unlike the Sixth Circuit here and on similar facts—that clearly established precedent does not permit an officer to use deadly force as a means of stopping a fleeing vehicle unless there is an immediate threat of danger to himself or to others rising to the level of threat repeatedly identified by this Court. *See*, *e.g.*, *Orn v. City of Tacoma*, 949 F.3d 1167, 1179–80 (9th Cir. 2020) (comparing to *Brosseau*, 543 U.S. 194, and *Plumhoff*, 572 U.S. 765; *see also Reavis Estate of Coale v. Frost*, 967 F.3d 978, 993 (10th Cir. 2020).

Like this case, the fatal incident underlying *Orn* involved a car pursuit that ended with an officer's unauthorized use of deadly force against the driver of a vehicle. 949 F.3d 1167. Unlike this case, however, the Ninth Circuit upheld the lower court's denial of

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[7] *See Kelsay v. Ernst*, 933 F.3d 975, 978–80 (8th Cir. 2019) (refusing to impose liability upon an officer—despite the plaintiff's showing that he had placed her, a nonviolent misdemeanant, in a bear hug and forcefully threw her to the ground—because it was not clearly established that such conduct was forbidden when a suspect ignores an officer's commands and walks away).

qualified immunity, acknowledging this Court's mandate that "precedent in existence at the time of the officer's action must render the unlawfulness of his conduct beyond debate." *Id.* at 1178. The court explained "[t]hat [the standard] does not mean a plaintiff must identify prior cases that are directly on point." *Id.* (citing *al-Kidd*, 563 U.S. at 741). Instead, in applying the standard, the court distinguished the level of potential risk posed by the plaintiff's conduct from cases decided by this Court and others that have upheld officers' use of deadly force to protect officers and the public from fleeing motorists. *Id.* at 1180. The Ninth Circuit also noted that such cases "typically involved suspects who drove at extremely high speeds, endangered other motorists on the road, or intentionally targeted police officers with their vehicles." *Id.* Because the plaintiff engaged in no such conduct, the court found that "this [was] not a case in which the legality of the officer's conduct [fell] within the 'hazy border between excessive and acceptable force.'" *Id.* at 1181 (citing *Saucier*, 533 U.S. at 206). *This is precisely the reasoning that the Sixth Circuit rejected in this case.*

The Tenth Circuit followed a similar approach in *Frost*, finding that qualified immunity analysis "is not a scavenger hunt for prior cases with precisely the same facts, and the prior conduct need not be exactly parallel" to provide officers notice of clearly established law. 967 F.3d at 992 (cleaned up). Without identifying a precisely analogous case, the court found that clearly established law authorizes "an officer [to] use[] deadly force to stop a fleeing vehicle [only] based on an immediate threat to himself or a threat to others." *Id.* at 994. The court further concluded that deadly force is clearly unreasonable when "the only threat is

one posed by reckless driving." *Id.* Again*, the Sixth Circuit rejected this very reasoning*, finding instead that Mr. Gordon's reckless driving "posed a materially higher risk to the public" than in the precedent Mr. Gordon argued clearly established his constitutional rights. Pet. App. 17a.

In both cases, the appellate courts applied a clearly established law standard that was less stringent than the Sixth Circuit's. And in both cases the courts refused to allow the officers to benefit from qualified immunity because prior precedent provided the fair notice required by this Court, *Orn*, 949 F.3d at 1181; *Frost*, 967 F.3d at 995, as opposed to arbitrarily requiring the underlying facts to perfectly align with previous cases. To be sure, this mode of analysis is a common practice in these circuits. *See Ioane v. Hodges*, 939 F.3d 945, 956 (9th Cir. 2018) (explaining that a court "need not identify a prior identical action to conclude that the right is clearly established."); *see also Davis v. Clifford*, 825 F.3d 1131, 1136 (10th Cir. 2016) ("The facts of previous decisions need not correlate exactly with those of the case at issue, as long as there is 'some factual correspondence' between the two.").

Under other circumstances beyond the specific context of this case, the First, Third, Fourth, Seventh, and Eleventh Circuits have similarly held that plaintiffs need not identify cases in exact alignment with the facts at hand. *See*, *e.g.*, *Suboh v. Dist. Attorney's Office of Suffolk Dist.*, 298 F.3d 81, 94 (1st Cir. 2002) ("We have no doubt that there is a clearly established constitutional right at stake, although we have found no case exactly on all fours with the facts of this case.

The difference in contexts in which the right is discussed . . . does not mean such a right does not exist."); *Kane v. Barger*, 902 F.3d 185, 195 (3d Cir. 2018) ("[W]e do not require a case directly mirroring the facts at hand, so long as there are sufficiently analogous cases that should have placed a reasonable official on notice that his actions were unlawful."; *Dean ex rel. Harkness v. McKinney*, 976 F.3d 407, 419 (4th Cir. 2020) ("[W]hile the courts have yet to consider a case where an officer engaged in the same conduct as [this officer], he is not absolved of liability solely because the court has not adjudicated the exact circumstances of this case."); *Lopez v. Sheriff of Cook Cty.*, 993 F.3d 981, 988 (7th Cir. 2021) ("The prong-two clearly-established-law assessment does not require a case with identical factual circumstances, lest qualified immunity become absolute immunity."); *Brooks v. Warden*, 800 F.3d 1295, 1306 (11th Cir. 2015) ("Exact factual identity with a previously decided case is not required, but the unlawfulness of the conduct must be apparent from pre-existing law."). Nothing about these cases suggests that the application of qualified immunity espoused in them should not apply here.

The lack of uniformity and conflicting outcomes among the federal circuit courts demonstrates the critical need for this Court's intervention. Without further guidance from this Court regarding the appropriate application of the doctrine of qualified immunity—or elimination of the doctrine altogether—lower courts will remain "hopelessly conflicted both within and among themselves" with respect to whether constitutional rights are clearly established. Karen Blum, *Section 1983 Litigation: The Maze, the Mud, and the Madness*, 23 WM. & MARY BILL RTS. J. 913, 925 (2015).

The alternative result is, at best, continued confusion regarding the doctrine's application amidst an already perplexing legal landscape, or, at worst, the widespread nullification of the remedies Congress intended to provide when it enacted § 1983.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI TO ABOLISH QUALIFIED IMMUNITY OR RETURN IT TO ITS PROPER DOCTRINAL LIMITS

Qualified Immunity has become a limitless "get out of jail free" card for government officials who violate the constitutional rights of their constituents. This is so even though the doctrine is unmoored from the text of any congressional enactment, the text or history of any constitutional provision, the doctrine-creating precedent of this Court, and any policy objectives the doctrine was originally intended to fulfill. Accordingly, this Court should reconsider the propriety of this doctrine and this case—where the only relevant question is the application or existence of qualified immunity—is a perfect vehicle for this reconsideration.

A. There is no textual support for qualified immunity

No provision of the United States Constitution or statute, including 42 U.S.C. § 1983, provide any textual support for qualified immunity. This Court has never attempted to deduce qualified immunity doctrine from the Constitution, instead it has relied on an interpretive fiction that § 1983—although unstated—

incorporates the common law of 1871. *See Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

Section 1983 provides in relevant part that

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, suit in equity, or other proper proceeding for redress,

42 U.S.C. § 1983. Notably absent from this clear text is any notion that a constitutional violation need be "clearly established" to support liability. As this Court explained in *Owen v. City of Independence*, § 1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." 445 U.S. 622, 635 (1980)*; see also Baxter v. Bracey*, 140 S. Ct. 1862, 1862 (2020) ("The text of § 1983 makes no mention of defenses or immunities.") (cleaned up) (Thomas, J. dissenting from denial of certiorari)

Despite the lack of textual or historical foundation for the doctrine, at its genesis, the Court determined that qualified immunity purportedly finds its roots in the common-law defense of good faith. *Pierson v. Ray*, 386 U.S. 547, 556-57 (1967). And, while the Court has at times reaffirmed its commitment to that

understanding of the doctrine's foundation, *see Filarsky v. Delia*, 566 U.S. 377, 389 (2012), members of the Court have also criticized such supposed underpinnings, highlighting that the Court's "treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume," *Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting). And, as members of this Court have also noted, "[b]ecause [the Court's] analysis is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act, [it] is no longer engaged in interpreting the intent of Congress in enacting the Act." *Ziglar*, 137 S. Ct. at 1871 (Thomas, J., concurring in part).

Accordingly, this Court should take a fresh look at qualified immunity doctrine under § 1983 and "[a]s with any other question of statutory interpretation, . . . begin with the text." *Nebraska v. Parker*, 577 U.S. 481, 488 (2016).

B. Qualified immunity today is unmoored from judge-made origins

Even if qualified immunity doctrine had some historical basis in the common law as it existed in 1871, the doctrine as applied today shows no resemblance to it humbler origins. In *Pierson*, this Court explained that "[t]he common law has never granted police officers an absolute and unqualified immunity." 386 U.S. at 555. Although in practice, officers today experience an immunity much closer to that reality than the one envisioned by the Court then. *See Kisela v. Hughes*,

138 S. Ct. 1148, 1162 (2018) (noting that the Court's rulings are transforming qualified immunity "into an absolute shield for law enforcement officers") (Sotomayor, J., dissenting). Indeed, the *Pierson* court went on to explain that what it believed the common law excused officers from was "liability for acting under a statute that he reasonable believed to be valid but that was later held unconstitutional on its face or as applied." *Id.*

Such a narrow exception to liability under § 1983—although still atextual—may very well be understandable. However, under such a narrow exception, Respondent here would have been tried and held liable, not excused from needing to stand trial at all for his unconstitutional acts.

In recent years, both the academic[8] and judicial[9] critiques of modern qualified immunity doctrine have reached a fever pitch. This Court should hear that chorus and at least re-tether qualified immunity doctrine to its narrow origins.

C. No policy rationale supports qualified immunity as it exists today

This Court has stated that qualified immunity exists to balance "two important interests—the need to hold public officials accountable when they exercise

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[8] *See, e.g.*, Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1802 (2018); William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 1 (2018); John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851 (2010); Joanna C. Schwartz, *How qualified Immunity Fails*, 127 Yale L.J. 2 (2017).

[9] *See* Petition for a Writ of Certiorari at 29 n.9, *Taylor v. Riojas*, 141 S. Ct. 52 (2020) (collecting cases).

power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 555 U.S. at 231 (2009). Qualified immunity is therefore supposedly justified because "policeman's lot [should] not [be] so unhappy that he must be charged with dereliction of duty if he does not arrest when he had probable cause, and being mulcted in damages if he does." *Pierson,* 386 U.S. at 549. In other words, "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation" that "exacts heavy costs in terms of expenditure of valuable time and resources." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

In recent years, empirical evidence has demonstrated how the "freewheeling policy choice[s]" imposed by this Court with respect to qualified immunity provide insufficient justification for its widespread use. *See Ziglar v. Abbasi*, 137 S.Ct. 1843, 1871 (2017) (Thomas, J., concurring in part). For example, a study conducted by Professor Joanna Schwartz regarding the financial responsibility of law enforcement under § 1983 revealed that police officers charged with misconduct are almost always indemnified by their employers. *See* Joanna Schwartz, *Police Indemnification*, 89 N.Y.U. L. Rev. 885 (2014).

In a survey of cases between 2006 and 2011, Professor Schwartz's study showed that officers contributed financially to settlements or judgments in only .41% of cases. *Id.* at 912. Despite this Court's policy concerns, the comprehensive study showed that official liability for police officers is, at best, "exceedingly remote." *Id.* at 914. Even more, when officers did face

liability, they were almost always provided defense counsel at the expense of their employers, with many statutes requiring the government to provide officers with legal representation. *Id.* at 915. The net effect is a relatively minor—if any—cost to officers charged with official misconduct.

Data has also shown that any concern regarding "the costs of trial or the burdens of broad-reaching discovery," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), are overblown. In another comprehensive study conducted by Professor Schwartz, she found that "qualified immunity is rarely the formal reason that Section 1983 cases are dismissed." Joanna Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 46 (2017). According to the study, qualified immunity resulted in the dismissal of only .6% of cases prior to discovery and only 3.2% of cases before trial. *Id.* at 60. Such a minimal effect, then, greatly suggests that any concern with preserving the time and resources of government actors is not served by protecting bad actors with the shield of qualified immunity. This is largely because that goal, as the data shows, is already served by a number of other factors with a far greater effect than qualified immunity.

What all of this data clearly show is that the policy underpinnings of qualified immunity do not hold weight. And, even more troubling, such weak justifications for the doctrine "put[] a heavy thumb on the scale in favor of government interests, and disregard[] the interests of individuals whose rights have been violated." *Id.* at 58. When such government interests are empirically slight, it is increasingly concerning that they diminish the ability of individuals to seek

congressionally mandated redress even when law enforcement has violated their constitutional rights. Because qualified immunity fails to justify even its foundational policy justifications, any minimal purpose it does serve should not supersede the rights embedded in the Constitution. This Court should correct that course.

III. THIS CASE IS AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

This case squarely turns on the questions presented and does not require any additional factual excavation to resolve the important legal questions.

The Sixth Circuit reversed the district court's finding that Officer Bierenga is not entitled to qualified immunity solely because in the Sixth Circuit's view prior precedent must be on all fours with the case at bar in order to satisfy the clearly established prong. Pet. App. 11a-12a. The Fifth and Eighth Circuits are in accord with the Sixth's interpretation of the clearly established prong. *See supra* at __. However, the Third, Fourth, Seventh, Ninth, Tenth, and Eleventh Circuits have concluded that some factual variation with prior precedent does not bar a finding that an unconstitutional act is clearly established. This deeply entrenched circuit split is the result of difficult to parse guidance from this Court and this case presents a clean vehicle for resolving the split and providing proper guidance to the lower courts.

In addition, this case offers an unencumbered opportunity for the Court to consider the continuing propriety of qualified immunity doctrine as it exists today. If the atextual, ahistorical version of qualified immunity that courts are currently bound to apply in

cases like the one at bar was abandoned or reformed back to its narrow origins, the district court would have been able to proceed—as it had intended—to merits of the case and Respondent would not be able to escape liability for violating Mr. Gordon's constitutional rights.

Alternatively, this Court should summarily reverse the Sixth Circuit's holding because it is inconsistent with this Court's clear holding that it is unconstitutional to use deadly force against a nonviolent fleeing motorist who does not pose an extreme or imminent risk to an officer or the public. *See Brosseau*, 543 U.S. 194; *see also Scott*, 550 U.S. 372; *Plumhoff*, 572 U.S. 765; *Mullenix*, 577 U.S. 7.

CONCLUSION

The petition for a writ of certiorari should be granted or the Sixth Circuit's decision below should summarily reversed because it conflicts with this Court's precedent.

Respectfully Submitted,

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June 6, 2022

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-2013
[Stamp:] FILED
Jan. 21, 2022
DEBORAH S. HUNT, Clerk

NITA GORDON, Personal Representative of the Estate
of
Antonio Gordon
Petitioner-Appellant,

v.

KEITH BIERENGA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR EASTERN
DISTRICT OF MICHIGAN

Before: McKEAGUE, NALBANDIAN, and MURPHY, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc. Therefore, the petition is denied.

Entered by Order of the Court
[Seal/Electronic Signature]
Deborah S. Hunt, Clerk

APPENDIX B

RECOMMENDED FOR PUBLICATION
File Name: 21a0282p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 20-2013
[Stamp:] FILED
Dec. 14, 2021
DEBORAH S. HUNT, Clerk

NITA GORDON, Personal Representative of the Estate
of
Antonio Gordon
Petitioner-Appellant,

v.

KEITH BIERENGA,
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR EASTERN
DISTRICT OF MICHIGAN

Before: McKEAGUE, NALBANDIAN, and MURPHY, Circuit Judges.

OPINION

McKEAGUE, Circuit Judge. This case arises out of the fatal police shooting of Antonino[1] Gordon in a drive-thru line as Gordon attempted to flee from Defendant Police Officer Keith Bierenga. Gordon's estate brought this action under 42 U.S.C. § 1983 against Bierenga alleging excessive use of force. Bierenga moved for summary judgment, asserting the defense of qualified immunity. The district court denied qualified immunity at summary judgment, holding that Bierenga violated Gordon's Fourth Amendment rights when viewing the facts in the light most favorable to the estate, and that the violation was "clearly established" by our decision in *Latits* v. *Phillips*, 878 F.3d 541 (6th Cir. 2017). While *Latits* is similar in some ways, we do not think *Latits* is similar enough to the facts of this case to pass muster under the controlling standards for defining "clearly established" law. Because the estate is unable to point to a case that would place every reasonable officer in Bierenga's position on notice that his use of force in this specific situation was unlawful, we must reverse the district court's denial of qualified immunity.

I.

A. Facts

The pertinent events here were recorded by the dash cam of Defendant Police Officer Keith Bierenga's police vehicle and the surveillance system at the White Castle where the fatal shooting occurred. When video evidence exists on an appeal in a qualified immunity case, we view the facts "in the light depicted

[1] Although listed on the case caption as "Antonio," records show that the decedent's name is spelled "Antonino."

by the videos." *Latits*, 878 F.3d at 547(citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)). If the facts shown on video "can be interpreted in multiple ways or if [the] videos do not show all relevant facts," we view those facts in the light most favorable to the non-moving party. *Id.* (citing *Godawa* v. *Byrd*, 798 F.3d 457, 463 (6th Cir. 2015)).

1. Initial Traffic Stop and Vehicular Flight

Around 6:00 p.m. on April 10, 2018, Bierenga turned left onto 13 Mile Road out of a residential neighborhood in Royal Oak, Michigan. He then witnessed a BMW driven by decedent Antonino Gordon merge quickly from the center turn lane into a westbound lane, forcing an oncoming car in this lane to quickly slow to avoid a collision. Bierenga then attempted to initiate a traffic stop. He pursued Gordon for a couple of blocks with police lights activated. Dash cam video shows many cars traveling down 13 Mile Road as Bierenga and Gordon drove by houses and apartment buildings on either side of the road. After failing to pull over for several blocks, Gordon came upon a red light at a busy intersection surrounded by businesses and restaurants. He stopped his car behind several cars waiting at the light, with Bierenga directly behind him. Bierenga then exited his cruiser, approached Gordon's car, and began speaking to him through the driver's window. Bierenga testified that, through Gordon's partially open window, he perceived that Gordon's skin was pale, his eyes were glassy, and that he was exhibiting signs of being under the influence of something.

Bierenga spoke to Gordon for approximately ten seconds at the driver's side of Gordon's vehicle while

the traffic light remained red. When the light turned green and the traffic ahead of him moved forward, Gordon accelerated away from Bierenga. Bierenga then ran back to his car and told dispatch that the driver fled. Dash cam video shows Gordon turning from the westbound lane into the center turn lane and braking. From the turn lane, Gordon then made a sharp left turn in front of oncoming traffic into a White Castle parking lot, causing the oncoming vehicles to brake. On the dash cam, Gordon can be seen turning left into the parking lot, opposite the designated flow of the drive-thru, and accelerating out of frame as if to drive the wrong way around the parking lot. Bierenga, at this point back in his police car, followed Gordon into the White Castle parking lot. Bierenga circled the parking lot once but could not find Gordon. He then drove through the streets immediately surrounding the White Castle. Bierenga's dash cam showed heavy traffic on either side of the White Castle parking lot. He did not immediately locate Gordon.

2. Shooting at White Castle

After losing track of Gordon, Bierenga provided dispatch with a physical description of Gordon and a description of the make and color of Gordon's car. Approximately fifteen minutes later, Bierenga spotted a BMW in line at the White Castle drive-thru that looked like Gordon's. At this time, Gordon was at the drive-thru window paying for his order. Another car was parked in line about three feet behind him.

The following events are visible on the White Castle drive-thru surveillance camera located inside the kitchen pointing toward the window. At approximately 6:24 p.m., Gordon can be seen pulling into the

White Castle drive-thru window. During this time, Gordon engaged in a transaction with the cashier and appeared to be acting normally. The video is not clear enough to see whether Gordon is exhibiting signs of intoxication.

A few seconds after Gordon handed money to the cashier, Bierenga pulled into the White Castle and parked at a diagonal angle directly in front of Gordon's BMW, leaving a few feet between the two cars. The angle at which Bierenga pulled in effectively blocked Gordon's car in between Bierenga's car and the car behind Gordon in the drive-thru line. Bierenga exited his vehicle and walked toward the passenger side of Gordon's vehicle, with Gordon watching him. Bierenga then walked back around to the front of Gordon's car with his weapon drawn, in the few feet of space between his vehicle and Gordon's car. As Bierenga walked back directly in front of Gordon's car, Gordon looked back over his right shoulder and reversed his car quickly. Gordon's car jolted as it bumped the car behind him in the drive thru. Bierenga positioned himself between the front of Gordon's car and the driverside rear door of his police vehicle. Gordon then began to accelerate forward with his wheels turned toward the rear of Bierenga's vehicle. As Gordon started driving forward toward Bierenga, Bierenga moved to his right and out of the direct path of Gordon's vehicle. Bierenga can be heard repeatedly yelling, "stop!" as Gordon moved forward. The front of Gordon's car then crashed into the back left wheel of Bierenga's car while Bierenga stood to the driver's side of Gordon's car—stuck between Gordon's car, his police car, and the White Castle wall.

Gordon then began to back up again as if to complete a three-point turn to maneuver around Bierenga's vehicle. He positioned the front of his car toward the opening behind Bierenga's vehicle. Bierenga then walked directly up to Gordon's rolled-down driver window, his left foot level with the driver door, pointing his gun directly at Gordon. Gordon backed up several feet more and turned his wheels to the right, away from Bierenga. As Gordon backed up, Bierenga stayed to the side of the vehicle and walked closer to Gordon's driver's side window with his gun pointed. Gordon then pulled forward, heading away from the White Castle and toward the opening behind Bierenga's vehicle to flee around it. As Gordon accelerated forward, Bierenga yelled "stop" and fired four shots at Gordon through the driver's side of the car.

Bierenga's dash cam captured Gordon's car driving around the White Castle and toward the street after he was shot. Once Gordon drove around Bierenga's car, Bierenga got back in his vehicle and followed Gordon out of the White Castle and onto the street, headed back toward the direction of the original traffic stop. As Bierenga followed, Gordon picked up speed and then began to slow down after a block. Gordon then presumably began to lose consciousness, drifted across the center lane, and crashed into a car travelling the opposite direction. Gordon was subsequently transported to the hospital, where he died. Gordon suffered two gunshot wounds, one to his left arm and chest and another to his right arm. Gordon's toxicology report indicated that he had a blood alcohol content of .27 at the time of death. Bierenga testified that he shot Gordon "to stop [him] from hitting and killing me or hurting me," and that he believed he was "in

direct line of harm at the time that [Bierenga] discharged [his] gun." R. 58-3, PageID 848.

B. Procedural Background

Plaintiff Nita Gordon, Personal Representative of the Estate of Antonino Gordon, brought a claim for excessive use of force against Bierenga under 42 U.S.C. § 1983. The estate also brought a claim of municipal liability against the City of Royal Oak, which the district court dismissed in May of 2019. Bierenga moved for summary judgment asserting the defense of qualified immunity. The district court denied Bierenga's motion. The district court held that Bierenga's use of deadly force violated Gordon's right to be free from excessive force during his vehicular flight, and that this right was clearly established through our decision in *Latits*. Bierenga now appeals.

II.

A.

We have jurisdiction to review a district court's denial of qualified immunity. 28 U.S.C. § 1291; *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But our review is limited to "only purely legal questions." *McGrew v. Duncan*, 937 F.3d 664, 669 (6th Cir. 2019). Because this appeal turns on the legal question of whether the law was clearly established, we have jurisdiction over the appeal.

B.

We review a district court's denial of summary judgment based on qualified immunity de novo, viewing the facts in the light most favorable to the nonmovant. *Foster v. Patrick*, 806 F.3d 883, 886 (6th Cir. 2015). Under the familiar test for qualified immunity,

a public official is immune from suit unless the plaintiff establishes: (1) a constitutional violation; and (2) that the right at issue was "clearly established" when the event occurred. *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (quoting *Pearson v. Callahan*, 555 U.S. 223, 232 (2009)). Both prongs must be met "for the case to go to a factfinder to decide if [the] officer's conduct in the particular circumstances violated a plaintiff's clearly established constitutional rights. If either one is not satisfied, qualified immunity will shield the officer from civil damages." *Id.* (citing *Pearson*, 555 U.S. at 236).

Here, we begin and end with the second prong. Even when a defendant violates a plaintiff's constitutional rights, the defendant is entitled to qualified immunity unless the right at issue was "clearly established[.]" *Id.* (citing *Pearson*, 555 U.S. at 232). "A right is clearly established when it is 'sufficiently clear that every reasonable official would have understood that what he is doing violates that right.'" *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam)). A case "directly on point" is not required, but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017)). The inquiry depends on the specific facts of the case and their similarity to caselaw in existence at the time of the alleged violation. *Id.* Such specificity is "especially important" in the Fourth Amendment. excessive force context, because "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Id.* (quoting *Mullenix*, 577 U.S. at 12).

Supreme Court precedent sets out general standards governing the bounds of excessive force. Under *Tennessee v. Garner*, 471 U.S. 1, 11 (1985), deadly force may not be used unless an "officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others[.]" Under *Graham v. Connor*, 490 U.S. 386, 396 (1989), whether an officer has used excessive force depends on "the facts and circumstances of each particular case, including [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."

However, outside of the "obvious case," general principles established in Garner and *Graham* cannot clearly establish the law. *Rivas-Villegas*, 142 S. Ct. at 8 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004)). "[P]olice officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (quoting *Mullenix*, 577 U.S. at 13).

In this case, although it is a close call, no existing precedent "'squarely governs' the specific facts at issue." *Id.* (citation omitted). The "critical question" in cases involving use of deadly force during vehicular flight is "whether the officer has 'reason to believe that the [fleeing] car presents an imminent danger' to 'officers and members of the public in the area.'" *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014) (quoting *Smith v. Cupp*, 430 F.3d 766, 775 (6th Cir. 2005)). Deadly force is justified against "a driver who objectively appears ready to drive into an officer or bystander with his car." *Id.* (quoting *Hermiz v. City of*

Southfield, 484 F. App'x 13, 16 (6th Cir. 2012) (citing *Brosseau*, 543 U.S. at 197–200)). Deadly force is generally not justified "once the car moves away, leaving the officer and bystanders in a position of safety[,]" but an officer may "continue to fire at a fleeing vehicle even when no one is in the vehicle's direct path when 'the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.'" *Id.* (quoting *Hermiz*, 484 F. App'x at 16); *Scott v. Clay County*, 205 F.3d 867, 877 (6th Cir. 2000); *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir. 1992). Thus, in evaluating the reasonableness of deadly force in the context of a fleeing driver, we must look both to whether anyone was in the car's immediate path at the time of the shooting and to the officer's prior interactions with the driver that show potential for "imminent danger to other officers or members of the public in the area" if the driver is permitted to continue fleeing. *Latits*, 878 F.3d at 549.

We have held, in several cases, "that deadly force was objectively unreasonable when the officer was to the side of the moving car or the car had already passed by him—taking the officer out of harm's way—when the officer shot the driver." *Id.* (citing *Godawa*, 798 F.3d at 466–67; *Hermiz*, 484 F. App'x at 16; *Sigley v. City of Parma Heights*, 437 F.3d 527, 531, 537 (6th Cir. 2006); *Cupp*, 430 F.3d at 774–75). However, none of those cases contained facts similar enough to this case such that "*every* reasonable official" in Bierenga's position would have been on notice that his conduct violated Gordon's Fourth Amendment rights. *Mullenix*, 577 U.S. at 11 (emphasis added) (citation omitted).

The estate relies primarily on our decision in *Latits*. In that case, an officer pulled over a driver after midnight for turning the wrong way onto a road. 878 F.3d at 544. When the officer approached the car and asked the suspect for his license and registration, he saw the driver attempt to hide bags of suspected narcotics. *Id.* After the officer asked the driver to step out of the car, the driver fled. *Id.* He then led officers on a chase travelling at about 60 miles per hour on a ten-lane divided highway with no other vehicles around. *Id.* at 544–45, 549. Eventually, the defendant officer rammed the driver's vehicle off the road and into the grass. *Id.* at 545–46. When the driver's car stopped in the grass, he began to drive slowly toward an opening between two officers' cars and collided head on with another officer's car at low speed. *Id.* at 546. The driver then reversed away from the car past the defendant officer, who was now on foot. *Id.* As the car passed, the officer shot the driver three times, killing him. *Id.*

For at least two reasons, we held that the driver "did not present an imminent or ongoing danger and therefore that the shooting was not objectively reasonable." *Id.* at 552. First, because the officer had fired at the driver's car "after [the] car had passed the point where it could harm him," so the officer "had time to realize he was no longer in immediate danger." *Id.* at 548. And second, because permitting the driver "to continue to flee instead of shooting him would not have put the public in imminent danger either." *Id.* at 550. The second reason materially distinguishes this case from *Latits*.

Here, like in *Latits*, the video from the White Castle drive-thru permits an interpretation that Bierenga

fired four shots at Gordon after Gordon's car "had passed the point where it could harm him," such that Bierenga "had time to realize he was no longer in immediate danger." *Id.* at 548. But the driver's conduct prior to the moments of the shooting in *Latits* are not close enough to the facts here such that every reasonable officer in Bierenga's position would be on notice that shooting Gordon, rather than permitting Gordon to continue to flee and potentially endanger the public, would violate Gordon's Fourth Amendment rights. *See id.* at 552.

Crucial to our analysis in *Latits* was that the "chase occurred under circumstances in which risk to the public was relatively low." *Id.* at 550. The driver fled, in the dead of night, on "a large, effectively empty highway surrounded by non-populated areas (a cemetery and vacant state fairgrounds), passing no pedestrians, cyclists, or motorists besides the police trailing him." *Id.* Furthermore, the driver in *Latits* "had shown no intention or willingness to drive recklessly through residential neighborhoods." *Id.*

The circumstances of Gordon's flight are different. Gordon fled from Bierenga during rush hour in the middle of a major road in a populated Detroit suburb, adjacent to residential neighborhoods and businesses. Bierenga observed Gordon make a reckless left turn in the face of oncoming traffic near a busy intersection to escape from Bierenga, causing oncoming cars to brake to avoid colliding with Gordon as he turned into the White Castle parking lot. Several cars were parked in the parking lot. Multiple patrons and employees were inside. What's more, after Bierenga later blocked in Gordon at the drive-thru window, Gordon reversed into the occupied vehicle behind him before

accelerating forward and hitting Bierenga's police vehicle. Although Gordon's contact with those vehicles occurred at a relatively low speed, his conduct showed a willingness to strike both police and civilian vehicles to effectuate his escape from police. Given the time and place at which it occurred, Gordon's reckless driving posed a materially higher risk of harm to the surrounding public than the reckless driving in *Latits*. *See id.* at 552. Thus, *Latits* did not "clearly establish" that using lethal force in the specific scenario Bierenga confronted was unconstitutional.

Our earlier cases do not suffice to clearly establish the law either. In *Cupp*, an officer arrested a seemingly intoxicated man for making harassing phone calls and placed him in the back of a cruiser in a parking lot at night. 430 F.3d at 769. The officer then went to speak to a tow truck driver about towing the man's vehicle. *Id.* The man then moved to the front seat of the officer's cruiser and began to drive the cruiser away. *Id.* The officer moved out of the way of the vehicle and fired four shots as the vehicle was passing him, killing the man. *Id.* at 770.

In *Sigley*, officers arranged a controlled buy from a suspected high-level ecstasy dealer in the parking lot of a restaurant. 437 F.3d at 529–30. After the man exchanged drugs with a confidential informant in the parking lot, two unmarked police cars blocked his vehicle in from the front and the back. *Id.* at 530. The officers then exited their vehicles and approached. *Id.* One officer positioned himself at the passenger side, and the other positioned himself in between the front of the man's vehicle and the officer's vehicle. *Id.* The man attempted to flee. *Id.* He backed up far enough to free himself from the block, hitting an officer's hand

in the process. *Id.* The man then positioned his vehicle so that he could drive forward and around the officer and the vehicle blocking him in, and did so. *Id.* at 531. The officer shot the suspect in the back through the open driver's side window as the car drove forward. *Id.*

We denied qualified immunity in both cases. *Id.* at 537; *Cupp*, 430 F.3d at 777. We later recognized that *Cupp* and *Sigley* "would inform a reasonable officer that shooting a driver while positioned to the side of his fleeing car violates the Fourth Amendment*, absent some indication suggesting that the driver poses more than a fleeting threat*." *Hermiz*, 484 F. App'x at 17 (emphasis added). In this case, unlike in *Cupp* or *Sigley*, a reasonable officer in Bierenga's position had at least some suggestion that Gordon "pose[d] more than a fleeting threat" to the surrounding public. *Id.* While *Cupp* in *Sigley* are similar to this case in that they "involved officers confronting a car in a parking lot and shooting the non-violent driver as he attempted to initiate flight[,]" *Latits*, 878 F.3d at 553 (emphasis omitted), neither case involved reckless flight from a traffic stop in a crowded area prior to the shooting, or the striking of both civilian and police vehicles in an attempt to flee.

To be sure, Gordon's reckless driving did not demonstrate an "obvious willingness to endanger the public by leading the police on chases at very high speeds and through active traffic." *Latits*, 878 F.3d at 551; cf. *Plumhoff v. Rickard*, 572 U.S. 765, 769–70 (2014) (driver swerved through traffic at over 100 miles per hour, passing more than two dozen vehicles); *Freland*, 954 F.2d at 344 (driver fled at over 90 miles per hour and crashed into a police car). But that is what makes this such a close case. On one hand,

Gordon's reckless flight did not rise to level of that in cases like *Plumhoff* and *Freland*. On the other hand, Gordon's reckless flight posed a materially higher risk to the public than the driver in *Latits*. Thus, stuck on this "hazy border[] between excessive and acceptable force," we cannot say that "existing precedent . . . placed the . . . constitutional question beyond debate." Rivas-*Villegas*, 142 S. Ct. at 7–9 (citations omitted).

In sum, the estate cannot point to a case that meets the requisite level of "specificity" to clearly establish that it was unlawful for Bierenga to shoot Gordon in this factual scenario. *Id.* at 8 (quoting *Mullenix*, 577 U.S. at 12). Thus, Bierenga is entitled to qualified immunity.

III.

We REVERSE the district court's denial of qualified immunity at summary judgment and REMAND to the district court with instructions to enter judgment in favor of Defendant Keith Bierenga.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

NITA GORDON, Personal Representative of the Estate of
Antonio Gordon

Petitioner,

v.

KEITH BIERENGA,

Respondent.

CIVIL ACTION NO. 18-13834
Filed December 11, 2018

OPINION AND ORDER DENYING DEFENDANT BIERENGA'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

On December 11, 2018, Plaintiff brought this civil rights action pursuant to 42 U.S.C. § 1983 based upon Defendant Royal Oak Police Officer Keith Bierenga's use of deadly force in an altercation with decedent Antonino Gordon[1] in the drive-through window of a White Castle restaurant. (ECF No. 1.) Plaintiff Nita

[1] Though the deceased's name is listed in the caption as "Antonio," obituaries for Mr. Gordon confirm that his name is "Antonino." Out of respect for the deceased, the Court will refer to him by the correct spelling of his name in the body of this opinion.

Gordon, Personal Representative of the Estate of Antonino Gordon, brought one count of excessive force against Defendant Bierenga through 18 U.S.C. § 1983.[2] Plaintiff requested medical and hospital expenses, compensation for pain and suffering, compensation for emotional/mental distress, punitive and exemplary damages, reasonable attorney fees, and all additional damages permitted to Gordon's estate pursuant to the Michigan Wrongful Death Act. (ECF No. 1, PageID.7-8.)

On December 23, 2019, Defendant moved for summary judgment on Plaintiff's sole remaining claim, arguing that he is entitled to qualified immunity from liability for the claim of excessive force. (ECF No. 58.) Defendant also argued that the Court must deny Plaintiff's requested relief for emotional distress, loss of a loved one, or other collateral injuries suffered by Gordon's family as improperly brought under § 1983. (*Id.* at PageID.627.) Plaintiff responded on February 12, 2020, and Defendant replied on February 26, 2020. (ECF Nos. 68, 73.) On July 30, 2020, the Court heard oral argument on this motion through audio-visual technology. For the following reasons, Defendant's summary judgment motion is DENIED. Additionally, the Court finds that Plaintiff's § 1983 damages claim is properly articulated through the Michigan Wrongful Death Act.

II. CASE SUMMARY AND BACKGROUND

[2] Plaintiff also brought one count of municipal liability against Defendant City Royal Oak for failure to supervise/train, but the Court dismissed this count in June 2019. (ECF No. 28.)

As a preliminary matter, many of these factual proceedings were captured on audio-video footage from both the White Castle surveillance system and Defendant Bierenga's police dash camera. In cases such as these, when a video captures the events underlying the summary judgment motion, courts must "rely mainly on undisputed video footage from . . . the scene." *Ashford v. Raby*, 951 F.3d 798, 799 (6th Cir. 2020); *see also Lang v. City of Kalamazoo*, No. 17-2199, 2018 WL 3737981, at *3 (6th Cir. Aug. 6, 2018)). On summary judgment, wherever possible, courts must "adopt the plaintiff's version of any facts not caught on film." *Id.* Additionally, "[t]o the extent that facts shown in videos can be interpreted in multiple ways or if videos do not show all relevant facts, such facts should be viewed in the light most favorable to the non-moving party." *Latits* v. *Phillips*, 878 F.3d 541, 547 (6th Cir. 2017).

Accordingly, the facts in this opinion are taken primarily from the video evidence, supplemented with facts from elsewhere in the record.[3]

A. First Traffic Stop

On April 10, 2018, Defendant Royal Oak Police Officer Keith Bierenga pulled over decedent Antonino Gordon. (ECF No. 58-4.) Defendant pulled over Gordon after watching Gordon's car cut off another car by

[3] The Court considers the audio-video recordings of the underlying facts to be essential in understanding the background of this case. The Court attempted to embed this media into the opinion, but court technology is currently unable to accommodate a mixed-media filing. In the event that the Court becomes able to include the mixed media, it will issue an amended opinion and order.

merging quickly from the turn lane into the center lane, forcing the car behind him to quickly slow to avoid a collision. (*Id.* at .44; see also ECF No. 58-3, PageID.763.) Defendant pursued Gordon for a couple of blocks with police lights activated before additionally activating his siren. (*Id.*) After another block or so, Gordon stopped his car in the center lane at a red light. (*Id.* at 1:45.) From the police dash camera, Defendant can be seen approaching Gordon's car and speaking through the driver's window. (*Id.* at 2:00.) Defendant testified that, through Gordon's partially open window, he perceived Gordon's skin to be pale, his eyes to be glassy, and his face to be sweating as if "under the influence of something." (ECF No. 58-3, PageID.770.) Defendant later testified that he could not see or smell drugs in the car, and he did not perceive any evidence of a firearm. (*Id.* at PageID.775, 778.) Defendant also testified that, while he was speaking to Gordon, he did not inform Gordon of the reason for the stop and he did not advise Gordon that he was under arrest. (*Id.* at PageID.779.)

In the dash cam, Defendant can be seen speaking through Gordon's window for approximately ten seconds (the camera does not capture audio), but then Gordon drives off as soon as the traffic light turns green. (ECF No. 58-4, 1:50-2:02.) Immediately after Gordon drives away, Defendant can be seen running back to his car, where he then tells dispatch over the radio that the driver fled. (*Id.*; ECF No. 58-3, PageID. 786.) From the dash cam, Gordon can be seen turning from the center lane into the left lane, and then from the left lane he makes a rapid left turn in front of oncoming traffic into a White Castle parking lot. (*Id.* at 2:02-2:04.) Defendant, who is now back in the police

car, follows Gordon into the White Castle Parking lot. (*Id.* at 2:15.) He circles the parking lot once but, seeing no sign of Gordon, exits and begins driving through the streets immediately surrounding the White Castle. (*Id.* at 2:30-3:30.)

B. Second Stop and Shooting at White Castle

Defendant testified that, after losing track of Gordon, he provided dispatch with a physical description of Gordon and a description of the make and model of Gordon's car.[4] (ECF No. 58-3, PageID.795.) Approximately twenty minutes later, as Defendant was driving near the White Castle, he spotted a BMW in the White Castle drive-through that "looked very similar to the BMW that had just fled from [him]." (*Id.* at PageID.797.) Defendant pulled into the White Castle and observed Gordon's BMW at the drive-through line. At this time, Gordon was at the drive-through window paying for his order and another car was parked in line about three feet behind him. (ECF No. 5, :1.) Apparently intending to preemptively block Gordon's exit, Defendant pulled into the White Castle and parked at a diagonal angle directly in front of Gordon's BMW, leaving a couple of feet between the two

[4] Defendant testified that, at some point, dispatch informed him that "the registered owner of the vehicle was . . . an older gentleman who did not match the description of the driver that I encountered . . . [and that] when dispatch ran [the vehicle owner's address] they found an individual who [] had the same last name [as the vehicle owner and who had] the approximate same age as the description of the driver I had given and that that individual also had a handgun registered to them." (ECF No. 58-3, PageID.811.) The record is unclear as to when Defendant received this information about the handgun.

cars. (*Id.* at :10; ECF No. 58-7- DRIVE THROUGH REGISTER ("DTR"), 6:24:56.)

Meanwhile, Gordon's interaction with the White Castle staff—as well as the subsequent shooting—is clearly visible in the White Castle drive-through camera, and the following facts are taken from that footage. At approximately 6:24 p.m., Gordon can be seen pulling into the White Castle drive-through window. (ECF No. 58-7-DTR, 6:24:28.) The White Castle cashier audibly welcomes Gordon and Gordon's lips move in response, though his voice cannot be heard on the recording. (*Id.* at 6:24:43.) Gordon hands money to the cashier and she opens the register to make change. (*Id.* at 6:24:45-6:24:56.) During this time, Gordon appears to be engaging normally and responsively with the cashier. (*See Id.*) Contrary to Defendant's testimony, Gordon does not appear sweaty or pale, and the Court cannot discern any "glassiness" in his eyes. Gordon appears to be making eye contact and he waits calmly in the car while the cashier makes change. (*Id.*)

A few seconds after Gordon hands money to the cashier, Defendant's car can be seen pulling in at an angle in front of Gordon's car. (*Id.* at 6:24:57.) Having exited his vehicle and drawn his gun offscreen, Defendant can be seen walking from the front to the passenger side of Gordon's car. (*Id.* at 6:25:05.) Gordon's head follows Defendant's movements. (*Id.*) Defendant then can be seen walking back around the front of Gordon's car. He disappears offscreen but is clearly now sandwiched between the police car and Gordon's car. (*Id.*) As Defendant walks back directly in front of Gordon's car, Gordon looks back over his right shoulder, puts his car in reverse, and begins to back up. (*Id.* at

6:25:09.) As Gordon reverses the car, Defendant steps forward into the frame with his gun outstretched and pointing directly at Gordon. (*Id.* at 6:25:09.) Gordon quickly reverses his car and it jolts, still in frame, as it backs up about three feet and bumps the car behind it. (*Id.* at 6:25:10.) While Defendant is still in front of Gordon's car, Gordon quickly pulls forward and to the right, with wheels turned sharply toward the right. (*Id.* at 6:25:10-14.) Defendant, who is in front of Gordon and to his left at this time, moves his foot out of the way of the car and can be heard repeatedly yelling "stop!" (*Id.*) The front of Gordon's car bumps into the back wheel of Defendant's car in what appears to be Gordon attempting to maneuver away from the two cars boxing him in. (*Id.* at 6:25:14.) As Gordon begins to back up again to finish the three-point turn, Defendant enters the frame from the left and stands directly outside of Gordon's rolled-down driver window with his gun pointed at Gordon. (*Id.* at 6:25:17.) Though Defendant was previously in front of Gordon's car, he is now to the side of it and almost flush with Gordon's driver door and window. Gordon backs up several feet more and turns his wheels to the right—away from the White Castle, the police car, and Defendant. (*Id.* at 6:25:19.) As Gordon does this, Defendant can be seen following alongside the driver's side of Gordon's car. (*Id.*) As Gordon begins to pull forward and away from the White Castle, Defendant yells "stop" and fires four audible shots at the fleeing vehicle. (*Id.* at 6:25:18-6:25:20.) Subsequent investigation revealed that Gordon received one gunshot wound to the right arm, and one fatal shot to his left arm and chest. (ECF No. 58-8, PageID.886.)

Defendant's dash camera captures Gordon's car driving around the White Castle and toward the street. (ECF No. 58-6, :36.) Defendant, now back in his own car, follows Gordon out of the White Castle and into the street, where Gordon picks up speed in the center lane and then begins to slow down after a few blocks. (*Id.* at 1:09.) As Gordon presumably begins to lose consciousness, Gordon's car eventually drifts toward the center lane, crosses the median, and slowly crashes into a car in the opposite lane. (*Id.* at 1:20-1:30.) Gordon was subsequently transported to Beaumont Hospital in Royal Oak, where he passed away from the gunshot wounds.[5] (ECF No. 58-8, PageID.883.)

Defendant testified that he shot Gordon "to stop [him] from hitting and killing me or hurting me," and that he believed he was "in direct line of harm at the time [Bierenga] discharged [his] gun." (ECF No. 58-3, PageID.843.) However, in addition to video evidence, three eyewitnesses contradict this account. David Feldman, who was a patron in the restaurant observing the shooting, testified that, "[m]y observation was that [Gordon] was only attempting to flee the scene. His vehicle wasn't in a position to cause the officer harm." (ECF No. 68-13, PageID.1430.) Eyewitness Linda Feldman testified that, "[i]t appeared that the driver was trying to steer away from the officer, trying to get away . . . it doesn't look like [Defendant] was trying to shoot in defense." (ECF No. 68-14, PageID.1452.) Finally, cashier Brianna Washington

[5] Gordon's toxicology report indicated that he had a BAC of .27 at the time of death and had cannabinoids in his system. (ECF No. 58-8, PageID.892.) This specific lab information would not have been apparent to Defendant, however, at the time of the shooting.

testified that Gordon "was trying to escape . . . he was trying to leave. [He]e was backing up and trying to get out." (ECF No. 68-17, PageID.1527.)

III. LAW AND ANALYSIS

A. Summary Judgment Standard

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court may not grant summary judgment if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). While it is Defendant's burden to identify those portions of the pleadings "which [he] believes demonstrate the absence of a genuine issue of material fact," the burden then shifts to Plaintiff to "set forth specific facts showing that there is a genuine issue for trial," even "go[ing] beyond the pleadings" if necessary. *Pearce v. Faurecia Exhaust Sys.*, 529 Fed. App'x. 454, 457 (6th Cir. 2013) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The Court "views the evidence, all facts, and any inferences that may be drawn from the facts in the light most favorable to the nonmoving party." *Pure Tech Sys., Inc. v. Mt. Hawley Ins. Co.*, 95 F. App'x 132, 135 (6th Cir. 2004) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520, 526 (6th Cir. 2002)).

Finally, a court in this circuit has noted that "[d]eadly force cases pose a particularly difficult problem . . . because the officer defendant is often the only surviving eyewitness, and the judge must ensure that the officer is not taking advantage of the fact that the

witness most likely to contradict his story—the person shot dead—is unable to testify." *Eibel v. Melton*, 904 F. Supp. 2d 785, 805 (M.D. Tenn. Oct. 23, 2012) (quoting *Scott v. Henrich*, 49 F.3d 912, 915 (9th Cir. 1994)). Thus, "the court may not simply accept what may be a self-serving account by the police officer, but must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." *Id.* (citing *Jefferson v. Lewis*, 594 F.3d 454, 462 (6th Cir. 2010)).

B. Qualified Immunity Standard

Qualified immunity protects government officials "from liability where [they] reasonably misjudged the legal standard." *Ashford*, 951 F.3d at 801 (quoting *Weinmann v. McClone,* 787 F.3d 444, 340 (7th Cir. 2015)). Courts analyze whether officers are entitled to qualified immunity using two steps: 1) whether the defendant violated a constitutional right; and 2) whether that constitutional right was clearly established at the time of the alleged violation. *Wright v. City of Euclid, Ohio*, 962 F.3d 852, 864 (6th Cir. 2020).

"For this [second] prong of the qualified immunity analysis, [courts] are not to define clearly established law at a high level of generality." *Id.* at 869, citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). However, courts must still examine "whether the contours of the plaintiff's constitutional rights were sufficiently defined to give a reasonable officer fair warning that the conduct at issue was unconstitutional." *Id.* at 869 (citing *Brown v. Chapman*, 814 F.3d 447, 461 (6th Cir. 2016)). "Fair warning" does not mean that "an official action is protected by qualified immunity unless the very action in question has previously been held

unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Id.*

When, as here, a government official raises the defense of qualified immunity, the plaintiff has the burden of demonstrating that the defendant is not entitled to that defense. *Livermore v. Lubelan*, 476 F.3d 397, 403 (6th Cir. 2007).

1. Qualified Immunity as Applied to Excessive Force

Under the Fourth Amendment, "[w]hen making an arrest or investigatory stop, the police have 'the right to use some degree of physical coercion or threat thereof to effect it.'" *Wright*, 962 F.3d at 865 (quoting *Graham v. Connor*, 590 U.S. 386, 396 (1989)). However, individuals are still entitled to the Fourth Amendment's protection against unreasonable searches and seizures. Claims of excessive force are therefore analyzed under the Fourth Amendment's "reasonableness" standard. *Graham*, 490 U.S. at 396. To determine whether the force was unconstitutionally excessive, courts make an "objective" inquiry, "considered from the perspective of a hypothetical reasonable officer in the defendant's position and with his knowledge at the time, but without regard to the actual defendant's subjective intent when taking his actions." *Latits*, 878 F.3d at 547. This inquiry evaluates "reasonableness *at the moment of the use of force*, as judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Wright*, 962 F.3d at 865 (quoting *Goodwin v.*

City of Painesville, 781 F.3d 314, 321 (6th Cir. 2015)) (emphasis added).

When reviewing excessive force cases, the Sixth Circuit considers three non-exclusive factors—the "*Graham* factors"—to be considered under "the totality of the circumstances":

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.

Wright, 962 F.3d. at 865.

2. Deadly Force to Prevent Fleeing Suspects

Deadly force is a "seizure" within the meaning of the Fourth Amendment and is subject to the reasonableness analysis set forth above. *Bullock v. City of Detroit*, No. 19-1287, 2020 WL 2500640, at *6 (6th Cir. 2020). "As a general rule, the Fourth Amendment prohibits the use of deadly force to prevent the escape of fleeing suspects unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Latits*, 878 F.3d at 547 (quoting *Tennessee v. Garner*, 471 U.S. 1 (1985)). "Of the three non-exclusive factors listed in *Graham*, the threat factor is a *minimum* requirement for the use of deadly force." *Id.* at 548 (internal quotations omitted). As the Sixth Circuit recently explained, it

> has developed "a consistent framework in assessing deadlyforce claims involving vehicular flight." *Cass v. City of Dayton*, 770 F.3d 363, 375 (6th Cir. 2014). *The "critical question" is whether the officer had objective "reason to believe that the [fleeing] car presents an imminent danger" to "officers and members of the public in the area." Id.* (quoting *Smith* v. *Cupp*, 430 F.3d 766, 775 (6th Cir. 2005)). Deadly force is justified against "a driver who objectively appears ready to drive into an officer or bystander with his car," but generally not "once the car moves away, leaving the officer and bystanders in a position of safety," unless "the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car." *Id.* (citations omitted). The Sixth Circuit has found deadly force justified by prior interactions demonstrating continuing dangerousness only when the "suspect demonstrated multiple times that he was willing to injure an officer that got in the way of escape or was willing to persist in extremely reckless behavior that threatened the lives of all those around." *Cupp*, 430 F.3d at 775.
>
> *Latits*, 878 F.3d at 548 (emphasis added).

The Sixth Circuit has reiterated many times that, "[a]lthough the fact that a situation unfolds quickly does not, by itself, permit officers to use deadly force, we must afford a built-in measurement of deference to an officer's on-the-spot judgment." *Id.* (citing *Smith* v. *Cupp*, 430 F.3d 766, 775 (6th Cir. 2005). Additionally, officers are not constitutionally required to use the "least intrusive means available" to effectuate a

lawful seizure: the only requirement is that the chosen force be itself reasonable under the totality of the circumstances. *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008). Accordingly, it is irrelevant in this case whether Defendant could or should have chosen to use less force against Gordon; rather, the only question is whether the Fourth Amendment permitted lethal force at the time that Defendant shot. *See Id.*

Both parties agree that *Latits* v. *Phillips*—a 2017 Sixth Circuit case which involved the use of deadly force after a high-speed vehicular police chase—is relevant, binding precedent that informs the qualified immunity analysis. The Court agrees and concludes that *Latits* decides this case. Because the *Latits* facts and legal findings are critical to resolution of this case, the Court summarizes them below.

3. *Latits* v. *Phillips*, 878 F.3d 541 (6th Cir. 2017)

In *Latits*, Officer Jaklic stopped Plaintiff Latits' vehicle for making an illegal turn into a neighborhood. 878 F.3d 541, 544 (6th Cir. 2017). When Officer Jaklic pulled over Latits, he saw "one or more bags that he suspected to contain marijuana and a pill bottle, all of which Latits attempted to move under the passenger seat." *Id.* After ignoring Officer Jaklic's instructions to exit the car, Latits drove away. Officer Jaklic pursued him in his vehicle. *Id.* After Officer Jaklic followed Latits into an empty parking lot and drove into the path of Latits' car, *Latits* steered away from the officer in what the Sixth Circuit determined was an attempt "to avoid colliding." *Id.* Nevertheless, Officer Jaklic broadcast that Latits had "tried to ram [his] vehicle." *Id.* at 545.

Two additional officers responded to the call, and the three officers pursued Latits by car as Latits drove out of the parking lot and down a highway at sixty miles an hour. *Id.* Through a series of quick turns, one of the officers accidentally collided twice with the back of Latits' car. *Id.* Latits lost control of his car and swerved across the highway, though no pedestrians or other cars were visible on the highway during this chase. *Id.* Another officer intentionally rammed the back of Latits' car, causing Latits to spin out and stop on the grass next to the highway. *Id.* at 546.

As Latits regained control of his car and began to drive forward, apparently intending to continue fleeing, Officer Phillips jumped out of his car and ran on foot toward Latits from behind, ultimately running up beside Latits' front passenger-side door. *Id.* Simultaneously, Officer Jaklic pulled up in front of Latits' car, apparently trying to block him, and the two cars "had a very low-speed head-on collision." *Id.* Latits then attempted to back his car away from Officer Jaklic's. From the front passenger-side door, Officer Phillips fired seven shots at Latits, three of which hit and ultimately killed him. *Id.* Video footage showed that, when Officer Phillips shot Latits, he "could see that no one was in Latits' direct path." *Id.*

When considering qualified immunity as applied to Latits' case, the Sixth Circuit held that a reasonable jury could find that, "because Officer Phillips fired after Latits' car had passed the point where it could harm him, Phillips had time to realize he was no longer in immediate danger. The evidence also shows that Officer Phillips could see that no other officers or other persons were in Latits' path." *Id.* The court cited

several other cases in concluding that "deadly force [is] objectively unreasonable when the officer [is] to the side of the moving car or the car had already passed by him—taking the officer out of harm's way—when the officer shot the driver." *Id.*

When evaluating whether Phillips and Latits' prior interactions justified the shooting, the Court took into consideration: 1) it was "undisputed that Latits was fleeing to avoid arrest"; 2) Officer Phillips knew from Officer Jaklic's broadcast that Latits was "originally suspected of possessing narcotics—not a violent crime"; 3) Officer Phillips could see that Latits did not try to ram Officer Jaklic's car; 4) Latits fled at "no more than sixty miles per hour down an almost entirely empty tenlane divided highway at night"; 5) Latits had shown "no intent to injure the officers"; and 6) "[t]hough Latits did briefly lose control and swerve after [an officer] hit him twice, [] there were no members of the public nearby to be endangered and Latits appeared to regain control of his car." *Id.* at 549. Ultimately, the Court concluded that "[p]ermitting Latits to continue to flee instead of shooting him would not have put the public in imminent danger" because Latits drove "at a maximum of sixty miles" on a "large, effectively empty highway" and because he had

> shown no intention or willingness to drive recklessly through residential neighborhoods. Altogether, Latits' conduct prior to being shot, when viewed in the light most favorable to the Plaintiff, showed a persistent intent to flee but not an intent to injure, and never placed the public or the officers at imminent risk.

Id. Even with deference to the officers' right to make quick decisions in a "tense, uncertain, and rapidly evolving situation," the court found that Officer Phillips' use of deadly force was unreasonable. *Id.*

C. Application

Defendant is not entitled to qualified immunity for his use of deadly force against Gordon. Defendant argues that the rapidly evolving events in this case render the application of qualified immunity, at worst for him, a legal gray area. And "when the Court is in a legal gray area, the proper course is to grant summary judgment to the officers, even if the court would hold the officers' conduct unconstitutional in hindsight." *Stevens-Rucker v. City of Columbus, Ohio*, 739 Fed. Appx. 834, 841 (6th Cir. 2018) (citing *Rudlaff v. Gillispie*, 791 F.3d 638, 644 (6th Cir. 2015)).

However, the events clearly captured on video were not so gray as to warrant granting Defendant the broad deference of qualified immunity. Though Defendant was on high alert at the time of the shooting and had just witnessed Gordon driving recklessly, under Plaintiff's version of the facts, it is not clear that Gordon "demonstrated multiple times that he was willing to injure an officer that got in the way of escape," or that Gordon's driving was so "extremely reckless" that it "threatened the lives of [] those around." *See Latits*, 878 F.3d at 548 (quoting *Cupp*, 430 F.3d at 775). To the contrary, when viewed in the light most favorable to Plaintiff, Gordon's actions evinced an objective intent to flee rather than injure, as Defendant fired only after Gordon began to "move[] away, leaving the officer and bystanders in a position of safety." *See Id.*

Drawing all factual inferences in Plaintiff's favor, the Court concludes that objective video evidence and three eyewitness accounts demonstrate that neither Defendant, nor any bystander, was in imminent or serious danger at the time of the shooting. Accordingly, Defendant Bierenga is not entitled to qualified immunity because Defendant's use of force violated Gordon's Fourth Amendment right against unreasonable seizures—a right that was clearly established in the Sixth Circuit through *Latits*.[6]

1. Defendant Bierenga Violated Gordon's Fourth Amendment Rights

To determine the reasonableness of use of force, the *Graham* test requires the Court consider whether the amount of force was objectively reasonable under the totality of the circumstances by analyzing: 1) whether the suspect is actively resisting arrest or attempting to evade arrest by flight; 2) whether the suspect posed an immediate threat to the safety of the officers or others; and 3) the severity of the crime at issue. *Latits*, 878 F.3d at 547 (citing *Graham*, 490 U.S. at 396.) Because the Fourth Amendment generally "prohibits the use of deadly force to prevent the escape of fleeing suspects unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others

[6] Plaintiff also argues that the unconstitutionality of Defendant's actions was clearly established in four other cases: *Smith v. Cupp*, 430 F.3d 775 (6th Cir. 2005); *Sigley v. City of Parma Heights*, 437 F.3d 537 (6th Cir. 2006); *Kirby v. Duna*, 530 F.3d 475, 482 (6th Cir. 2008); and *Hermiz v. City of Southfield*, 484 Fed. Appx. 13 (6th Cir. 2012). Because the Court finds that the unconstitutionality was clearly established under *Latits*, the Court need not consider these other cases.

. . . the threat factor is a minimum requirement [in the *Graham* test] for the use of deadly force." *Id.* at 547-48 (citing Tennessee *v. Garner*, 471 U.S. 1, 1 (1985) and *Mullins*, 805 F.3d at 766).

For the reasons below, the Court finds that Defendant cannot prevail on his qualified immunity argument at the summary judgment stage because, under Plaintiff's version of the facts, Defendant violated Gordon's Fourth Amendment rights against unreasonable seizure through deadly force. Though Defendant observed Gordon behaving in a reckless way that created some potential for danger to the community, it is clear when viewing the facts in the light most favorable to Plaintiff that this danger did not rise to the level of "serious" and "immediate" that is a requisite for deadly force. Additionally, Gordon's underlying traffic infractions and flight from police did not justify seizure through deadly force under the totality of the circumstances. Finally, Defendant violated clear precedent warning against shooting fleeing suspects who no longer pose an immediate danger to the police officer or the surrounding community.

i. Whether Gordon was actively resisting arrest or attempting to evade arrest and whether Gordon posed a threat of serious and immediate physical harm

The Court will consider together the first two *Graham* factors: whether Gordon was actively resisting arrest and whether Gordon posed a threat of serious and physical harm. As to the first factor, while a suspect's flight increases the reasonableness of force in "typical" excessive force cases, deadly force cases are treated differently. "As a general rule, the Fourth

Amendment prohibits the use of deadly force to prevent the escape of fleeing suspects unless the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Latits*, 878 F.3d at 547 (quoting *Tennessee v. Garner*, 471 U.S. 1 (1985)). Thus, in deadly force flight cases, the arrest evasion *Graham* factor is inextricably interrelated with the "serious and imminent threat" inquiry. (*See Id.* at 549 ("Because it is undisputed that *Latits* was fleeing to avoid arrest, we turn to the *Graham* factor that analyzes the severity of the crime at issue").)

As to the second factor, deadly force analysis includes a "minimum requirement" that Defendant have probable cause to believe that Gordon posed a threat of "serious" harm to himself or to the public. *Latits*, 878 F.3d at 547-48. Additionally, the general excessive force test requires an evaluation of whether the officer reasonably believed that the victim posed a threat of imminent harm to himself or the public. *Id.* Thus, the compounded question in this deadly force case is whether, when viewing the facts in the light most favorable to Plaintiff, Gordon posed a threat of serious and imminent harm to anyone at the time that he was shot. *See Id.* For the reasons below, Defendant has not made this showing.

Defendant argues that he had:

> objective reason to believe that the fleeing BMW presented an imminent danger to himself, other officers, and members of the public in the area [because Gordon] objectively appeared ready to drive into an officer or bystander with his car and because he had already done so by hitting the car

> behind him in the drive-thru and Ofc. Bierenga's vehicle. Moreover, [Gordon's] reckless flight across busy rush-hour traffic and driving the wrong way through a parking lot further demonstrated his readiness . . . Gordon demonstrated multiple times that he was willing to injure an officer that got in the way of escape and was willing to persist in extremely reckless behavior that threatened the lives of all those around.
>
> (ECF No. 58, PageID.625-626.)

While it is true that Gordon drove recklessly in a prior interaction with Defendant, it is not clear that Gordon demonstrated that he was "willing to injure an officer." When considering whether a reasonable officer could believe that Gordon's behavior demonstrated a serious threat to officers or bystanders, the Court must consider Defendant's prior interactions with Gordon. *Latits*, 878 F.3d at 549. In this case, Defendant Bierenga observed Gordon 1) appear pale and sweaty while ignoring police instructions; 2) cut off a car ahead of him; 3) drive away from Defendant during the first stop; 4) swerve quickly in front of oncoming traffic when turning left into the White Castle; 5) bump into the car behind him while trying to back away from Defendant and his gun; 6) bump into Defendant's car while attempting to flee at the White Castle; and 7) attempt to drive away from Defendant and the White Castle. While it is true that Gordon drove recklessly when he sped in front of oncoming traffic and when he executed the three-point turn with Defendant sandwiched in between the police cruiser and the BMW, the question is whether these acts, in conjunction with Gordon's prior actions and with all

reasonable facts and inferences weighed in Plaintiff's favor, indicated a threat of serious and imminent physical harm such that deadly force was justified. The answer to this question is no.

Latits addressed similar concerns. With regard to Gordon bumping the car behind him and in front of him at the White Castle, it is apparent from the video—as well as from three eyewitnesses—that Gordon was not attempting to attack, but was instead attempting to escape confinement by executing a common three-point turn. When "the video permits the reasonable interpretation that [a] collision was accidental, [there] is less justification for deadly force." *Id.* at 549. Additionally, "[w]hether a fleeing suspect showed objective intent to injure officers is relevant to whether the suspect presented sufficient danger to justify deadly force." *Id.* at 550. Accordingly, while the Court must give deference to Defendant's split-second decisions in the "rapidly-evolving" situation wherein he shot soon after the collisions took place, "the fact that this was a rapidly evolving situation does not, by itself, permit him to use deadly force." *Id.* at 551 (citing *Cupp*, 430 F.3d at 775.) Indeed, the *Latits* court noted that "the short time between the collision with an officer's vehicle and the shooting does not, by itself, justify deadly force . . . it [is] unreasonable for the officer to shoot at the driver two seconds after the officer had contact with the driver's car, even though the officer subjectively believed the driver had just targeted and assaulted him with his car." *Id.* (citing *Godawa* v. *Byrd*, 798 F.3d 457, 466 (6th Cir. 2015)).

In this case, there was about three seconds' pause in between Gordon bumping Defendant's car and the

subsequent shooting. (See ECF No. 58-7-DTR, 6:25:15 (the first pull forward); 6:25:18 (the first shot).) The Court must credit the fact that Defendant observed Gordon's prior traffic infractions, including watching Gordon speed away from him and then execute a quick left in front of oncoming traffic. This behavior was certainly risky and would increase a reasonable officer's agitation. However, as with the underlying crimes in *Latits*—making an illegal turn, fleeing from officers, ignoring officer instructions, and (unlike here) the possession of narcotics—none of Gordon's prior actions had been violent, and the traffic infractions were mere misdemeanors. Having seen clear video footage of both underlying traffic infractions, the Court agrees with Defendant that such driving behavior warranted ticketing and posed a moderate risk to other drivers in the city traffic. However, cutting off other cars and executing careless left turns do not rise to the level of excessive risk under Sixth Circuit precedent. Indeed, the Sixth Circuit has discounted far more dangerous driving behavior when conducting an excessive force risk assessment. (*See Id.* at 549 (finding insufficient justification for deadly force when *Latits* led three police cars through a 60-mph chase and had "briefly los[t] control" of his car).)

Finally, the Court must consider Defendant's testimony that he observed Gordon appearing pale and sweaty, as if "under the influence of something." (ECF No. 58-3, PageID.770.) The Court would afford more weight to this assessment if Defendant's deposition were the only evidence of Gordon's condition. However, approximately twenty minutes after Defendant allegedly made this observation, the White Castle surveillance system clearly captured an interaction

between Gordon and the White Castle cashier. To an objective observer, Gordon appears to be interacting normally. His face is neither pale nor sweaty, and his eyes do not appear to be glossy. He is responsive and maintains eye contact. The Court is mindful of its obligation to "rely mainly on undisputed video footage from . . . the scene." *Ashford*, 951 F.3d at 799. The Court is also mindful that, in lethal force cases, "the court may not simply accept what may be a self-serving account by the police officer, but must look at the circumstantial evidence that, if believed, would tend to discredit the police officer's story." *See Eibel*, 904 F. Supp. at 805. To this point, the Court notes that, though Defendant testified as to the alleged paleness/sweatiness observation in subsequent officer interviews and in his deposition, he did not report it contemporaneously to dispatch. The record reflects Defendant reporting only his encounter, the infractions, the make/model of Gordon's car, and Defendant's intent to pursue. (See, e.g. ECF Nos. 58-2, PageID.666; 58-3, Page*I*D.766.)

While it is theoretically possible that Gordon's appearance and condition could have shaped up in the twenty minutes between Defendant's subjective observation and the objective video footage, the Court is unwilling to make that leap in the face of countervailing evidence. The clear video footage, coupled with Defendant's testimony that he neither smelled nor saw alcohol or narcotics in Gordon's car and Defendant's failure to report a suspected intoxicated driver, casts sufficient doubt on Defendant's self-serving observation that Gordon may have been under the influence at the time of the shooting. The Court will accordingly

not consider this observation to be an aggravating factor in this analysis.[7]

Accordingly, taking all of the above factors into consideration— giving deference to Defendant's split-second judgments but viewing the facts in the light most favorable to Plaintiff—the Court cannot conclude that a reasonable officer would have perceived a "serious" or "imminent" threat from Gordon's behavior. Defendant's strongest argument is that, prior to pulling away from the White Castle, Gordon at one point drove his car forward and to the right of Defendant. (See ECF No. 58-7-DTR, 6:25:10-14.) Though it is clear from the video footage that Gordon was executing a three-point turn in order to get out of the box in which Defendant had trapped him, such a quick motion would have understandably placed Defendant on high alert. If Defendant had shot Gordon at this high-stakes moment, this case would be much closer to the "gray legal area" in which the Court must afford officers broad deference under qualified immunity. See Stevens-Rucker v. City of Columbus, 739 Fed. Appx. at 841.

But Defendant did not shoot at this high-stakes moment. He instead shot about three seconds later, after he had charged forward to the safety of Gordon's driver-side window and Gordon had begun to drive away from Defendant and the White Castle. Citing *Mullins v. Cyranek*, Defendant argues that the Court should defer to the heat of the moment, in recognition

[7] Nor it is it relevant to this analysis that Gordon's autopsy revealed the presence of alcohol and narcotics in his bloodstream, as the Court may only consider what was apparent to a reasonable officer in Defendant's position. *Latits*, 878 F.3d at 547.

that officers sometimes "d[o] not have a chance to realize that a potentially dangerous situation ha[s] evolved into a safe one," and that officers may use deadly force within a few seconds of "reasonably perceiving a sufficient danger . . . even if in hindsight the facts show that the persons threatened could have escaped unharmed." *Mullins*, 805 F.3d at 766. However, Defendant's argument and caselaw were rejected by the *Latits* court for the same reason that the undersigned rejects them now:

> We must undertake an objective analysis, viewing the evidence in the light most favorable to [the defendant] . . . *Mullins* [] is distinguishable. There officers were engaged in physical, hand-to-hand confrontations with a suspect who moments before being shot had held a gun or knife. Here, [the officer]'s life was never in imminent danger, and, under the objective analysis of Latits's slow collision with [the officer]'s car, no other [] life was endangered in the moments before [the officer] fired. Furthermore, the short time between the collision with an officer's vehicle and the shooting does not, by itself, justify deadly force. [We previously] held that it was unreasonable for [an] officer to shoot at the driver two seconds after the officer had contact with the driver's car, even though the officer subjectively believed the driver had just targeted and assaulted him with his car.

Latits, 878 F.3d at 550-51. The case to which *Latits* refers is *Godawa v. Byrd*, in which the Sixth Circuit recognized that qualified immunity was inappropriate on summary judgment when, under facts similar to this case, video evidence showed a delay of

"less than two seconds" between an officer's perception that he had been intentionally rammed by a vehicle and his subsequent shooting of the driver. See *Godawa*, 798 F.3d at 466 ("Defendant was not in front of the car, but instead was positioned near the rear passenger side, at the time that he fired his weapon. From that position, Defendant would have had no reason to fear being struck by the car as it continued to advance. Defendant emphasizes how fast the events transpired, noting that he had 'less than two seconds to process being physically assaulted by a vehicle.' Under Plaintiff's version of the facts, however, Defendant was not in danger.")

As in *Latits* and *Godawa*, the objective video evidence in this case demonstrates that Defendant's life was similarly never in imminent danger, though his deposition testimony suggests that he subjectively believed otherwise. Moreover, less than a second after he believed himself to have been attacked, Defendant moved himself to a position of objective safety by running alongside Gordon's driver-side window. If Defendant had stayed toward the front of the car rather than moving alongside it, the Court would be more likely to find that a reasonable officer could have feared being run over by another forward motion. But the precedent does not support extending such credit to an officer who moves to safety and then shoots a fleeing suspect.

Accordingly, when viewed in the light most favorable to Plaintiff, no reasonable officer could conclude that Gordon's driving created a "serious" or "imminent" threat of danger to the public. While it would be reasonable for an officer to assume that Gordon's prior

conduct presented some risk to the general public, in that he was clearly willing to quickly swerve in traffic in order to escape Defendant, such conduct does not rise to the level of a "serious" or "imminent" threat justifying deadly force. Additionally, the objective evidence demonstrates that Plaintiff's actions "showed a persistent intent to flee but not an intent to injure," *Id.* at 550, which further weakens any justification for deadly force. *See Id.*

The Court therefore finds that Defendant has not satisfied the "minimum requirement" for demonstrating justification for deadly force. While it is therefore unnecessary to reach the remaining *Graham* factor, the final factor also supports denial of Defendant's motion.

ii. The severity of the underlying crime(s)

The Court must also analyze "the severity of the crime at issue," considered "from the perspective of a hypothetical reasonable officer in the defendant's position and with his knowledge at the time, but without regard to the actual defendant's subjective intent when taking his actions." *Latits*, 878 F.3d at 547. Because a reasonable officer could not have believed that Gordon committed anything other than the non- violent offenses of traffic infractions, reckless driving, and fleeing an officer, this factor also weighs in favor of Gordon.

Defendant summarily argues that the severity of Gordon's underlying crimes supported lethal force because "Mr. Gordon was guilty of multiple dangerous misdemeanors and felonies when Ofc. Bierenga fired, from driving while intoxicated to fleeing and eluding,

resisting and obstructing, malicious destruction of police property, assault with the attempt to murder, reckless driving." (ECF No. 58, PageID.625.) However, this argument is unsupported by the record. In *Latits*, the Court considered the fact that *Latits* was originally suspected of possessing narcotics, though the Court cautioned that this was "not a violent crime." *Latits*, 878 F.3d at 549. The Court also disagreed with the government that *Latits*' car collisions constituted "crimes": "The videos additionally reveal that *Latits* did not commit felonious assault, which is also relevant to the *Graham* factor addressing the severity of the crime." *Id.* at 550.

At most, Defendant witnessed Gordon committing two misdemeanors and a felony. The traffic infractions were reckless driving and—for lack of a better legal phrase—cutting someone off. Both of these offenses are misdemeanors in the state of Michigan. M.C.L. § 257.626. Reckless driving does not become a felony in Michigan unless someone gets hurt, and Gordon did not injure anybody. *Id.* Defendant also witnessed Gordon fleeing from and refusing to obey the lawful order of a police officer, which is a felony. M.C.L. § 750.749a. As previously discussed, the Court will not credit Defendant's testimony suggesting an additional known charge of driving under the influence because it is contradicted by clear video evidence.

As to the charges of "malicious destruction of police property" and "assault with the attempt to murder," these charges are like those in *Latits* in that they are blatantly contradicted by the video, which does not demonstrate a *mens rea* requisite to malicious destruction or assault.

Ultimately, in considering Gordon's underlying offenses, the Court is left with two traffic misdemeanors and felonious fleeing from police. These offenses are less serious than the combined traffic, narcotics, and police-ignoring offenses considered in *Latits*, and the *Latits* court dismissed them in less than a full sentence: "not a violent crime." *Latits*, 878 F.3d at 549. Accordingly, because all the crimes that Defendant observed were non-violent, *Latits* counsels that this factor weighs heavily against the reasonableness of deadly force.

2. Defendant Bierenga violated clearly established law

"Once, qualified immunity protected officers who acted in good faith. The doctrine now protects all officers, no matter how egregious their conduct, if the law broke was not 'clearly established.'" *Jamison v. McClendon*, No. 16-595, 2020 WL 4497723, at *13 (S.D. Miss. Aug. 4, 2020). Clearly established law "does not require a case directly on point." *Latits*, 878 F.3d at 552 (quoting *White v. Pauly*, 137 S. Ct. 548, 551-52 (2017)). However, as discussed extensively in the previous section, *Latits* is directly on point and held that that a police officer's fatal shooting of a fleeing driver—after observing traffic and non-violent narcotic crimes and after several collisions with police vehicles where it was clear that the suspect was fleeing and had no intent to injure—"was objectively unreasonable and in violation of *Latits*' constitutional rights." 878 F.3d at 552. For the reasons previously and extensively stated, the Court finds that the facts in this case are similar enough to those in *Latits* that Defendant was on notice that his conduct was

unlawful. Defendant's violation is therefore clearly established under *Latits* alone.

Defendant highlights two Supreme Court cases, *Plumhoff* and *Mullenix*, as helpful precedent in his favor. Both cases involve a grant of qualified immunity in high-speed chases. *Plumhoff* involved a 100-mph highway chase during which the suspect "passed more than two dozen other vehicles, several of which were forced to alter course." *Plumhoff v. Rickard*, 572 U.S. 765, 776 (2014). *Mullenix* involved an intoxicated driver who engaged in a "high-speed vehicular flight" and who "twice during his flight had threatened to shoot police officers." *Mullenix v. Luna*, 136 S. Ct. 405, 309 (2015). The Supreme Court gave the officers in these cases great deference based on the officers' reasonable beliefs about the danger posed by the fleeing suspects based on their prior interactions. *See Id.* However, these cases involved vehicular chases under much more reckless circumstances than did Gordon's, and they involved actions on the part of the decedents that were far more overt and threatening than anything Gordon did in December 2018. See *Plumhoff*, 572 U.S. at 769- 770 (decedent sped away at more than 100 mph before colliding into two police vehicles); *Mullenix*, 136 S.Ct. at 309 (decedent was intoxicated, sped away between 85 and 110mph, and twice threatened to shoot police officers if they did not abandon their pursuit).

For these reasons, the Court finds that *Plumhoff* and *Mullenix* can both be distinguished and are therefore not helpful to deciding this case. Defendant's use of deadly force violated Plaintiff's right to be free from excessive force during his vehicular flight, and this

right was clearly established through the Sixth Circuit's 2017 decision *Latits v. Phillips*.

D. Wrongful Death Limitations

Defendant also argues that the Court must deny Plaintiff's requested relief for emotional distress, loss of a loved one, or other collateral injuries suffered by Gordon's family. (ECF No. 58, PageID.627.) However, for the reasons below, Defendant's caselaw is outdated and Plaintiff's damage claims may proceed as articulated through the Michigan Wrongful Death Act.

Relying on *Jaco v. Bloechle* and *Claybrook v. Birchwell*, Defendant argues that § 1983 "is a personal action cognizable only by the party whose civil rights had been violated . . . no cause of action may lie under section 1983 for emotional distress, loss of a loved one, or any other consequent collateral inquiries allegedly suffered personally by the victim's family members." (*Id.*, quoting *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000).)

However, Defendant's cases have since been reconstrued by the Sixth Circuit. While it is true that § 1983 does not contain its own cause of action for familial and hedonic damages, Plaintiff correctly points out that the Sixth Circuit has allowed such claims to go forward where, as here, a plaintiff ties her § 1983 claims to the Michigan Wrongful Death Act. *Frontier Ins. Co. v. Blaty*, 454 F.3d 590, 601 (6th Cir. 2006) ("To the extent that damages stemming from the death itself might be needed to fulfill the deterrent purpose of section 1983 (there being no compensation from the death as such), we see no reason to think that damages for injuries suffered before death would not be

sufficient in most cases. Michigan's wrongful death act, to repeat, authorizes an award of damages for survivors' losses of support, society, and companionship.")

Plaintiff brings one claim under § 1983 and requests "all damages permitted to the deceased's estate pursuant to the Michigan Wrongful Death Act." (ECF No. 1, PageID.7.) The Michigan Wrongful Death Act applies to damages claims brought by a personal representative where "the death of a person . . . shall be caused by wrongful act, neglect, or fault of another" and where, "if death had not ensued, [] the party injured [could have] maintain[ed] an action and recover damages." M.C.L. § 600.2922(1).

Plaintiff's damages claim under § 1983 are properly articulated through Michigan's Wrongful Death Act. Accordingly, Plaintiff's claim may proceed.

III. CONCLUSION

For the reasons set forth above, the Court DENIES Defendant Bierenga's motion for summary judgment.

[Seal/electronic signature]
Judith E. Levy, Judge
United States District Court
September 9, 2020