No. 21-1540

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Sixth Circuit err by granting Defendant qualified immunity for his use of force under the clearly established prong of qualified immunity?

2. Should this Court do away with the doctrine of qualified immunity which shields those in public service when they act within the bounds of what this Court has stated is constitutional?

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INTRODUCTION

This Court recently decided both issues in this petition, leaving nothing to consider. The Sixth Circuit properly applied that recent precedent to grant the defendant qualified immunity. Plaintiff presents only arguments that this Court has specifically and explicitly rejected (so much so that this petition straddles the frivolous threshold). Thus, this Court should deny the plaintiff's petition.

STATEMENT OF THE CASE

This incident was captured across multiple videos, beginning and ending with the defendant officer's in-car dash camera, with the middle captured by restaurant security footage. Plaintiff's statement of the case rejects the indisputable video evidence, including the heavy pedestrian and vehicle traffic surrounding the scene of the incident. The Sixth Circuit properly summarized the facts of this case, too many of which the District Court opinion glossed over in its misapplication of the qualified immunity doctrine. Defendant, therefore, directs this Court to the summary contained therein. [Petition App. B, 4a-9a]

ARGUMENT

This Court very recently addressed and rejected the two arguments advanced by the plaintiff. Plaintiff argues that: one, the Sixth Circuit required too much

factual specificity in applying the Fourth Amendment; and two, that this Court should abandon the doctrine of qualified immunity. The reason to deny this petition on both grounds merge for reasons found in this Court's 2021 opinions of *City of Tahlequah v. Bond*, 142 S. Ct. 9, 11 (2021), and *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021).

A. Qualified Immunity is a Necessary Doctrine

This Court made two important points in *Bond* and *Rivas-Villegas*. The first is that the doctrine of qualified immunity remains sound. By issuing the opinions per curiam, this Court sent a clear message. This Court has reaffirmed that principle since in *Thompson v. Clark*, 142 S. Ct. 1332 (2022). Moreover, the sanitized and purely academic perspective on qualified immunity advanced by the Plaintiff is naïve of the actual burdens of litigation for any governmental official, and ultimately, the taxpayer.

As Plaintiff cites, qualified immunity is intended to provide officials with the security to go about their constitutional duties, without the threat of burdensome litigation hanging over them with every move. [Pet., 28] And that liability shield only exists if this Court, or perhaps the relevant Circuit Court, has stated that the Constitution does not permit their action, i.e., the clearly established prong. The "clearly established" prong ensures that officials are provided fair notice of the often-complex constitutional bounds before they can face liability.

For the average police officer, the grace of qualified immunity recognizes that they too face these difficult constitutional questions. They, in fact, face such questions most frequently and in the most tense and dangerous scenarios of any government official. They do not have the luxury to evaluate these issues with a trained legal mind from the confines of ivy-covered walls or quiet court rooms. They are answering these questions in tense, uncertain, and rapidly evolving encounters. This Court has stated as much numerous times, including in *Bond* and *Rivas-Villegas*, wherein it recognized that "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Rivas-Villegas*, 142 S. Ct. at 8 (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)); *Bond*, 142 S. Ct. at 11-12 (also quoting *Mullenix*, 577 U.S. at 12).

B. The Sixth Circuit Properly Applied the Doctrine

The Sixth Circuit properly granted the defendant qualified immunity under the clearly established prong of qualified immunity because the singular *Latits* case was factually distinct. *See Latits v. Phillips*, 878 F.3d 541, 544 (6th Cir. 2017).

This Court provided guidance on the level of specificity required for a constitutional right to be clearly established in *Bond* and *Rivas-Villegas*. In both cases, this Court echoed its prior instruction to lower courts "not to define clearly established law at too high a level of generality." *Bond*, 142 S. Ct. at 11; *see also*

Rivas-Villegas, 142 S. Ct. at 8. Based on this instruction, this Court reiterated that "[s]pecificity is especially important in the Fourth Amendment context, where it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Rivas-Villegas*, 142 S. Ct. at 8; *Bond*, 142 S. Ct. at 11-12.

These opinions also explicitly rejected the argument advanced by Plaintiff regarding a circuit split on the application of the clearly established prong. Plaintiff argues that the Court should accept this case because it "exacerbates a division among the circuit courts on the degree of factual specificity required for law to be clearly established." [Pet., 12] Plaintiff argues that the Sixth Circuit (and Fifth and Eighth) applies the standard too stringently, and advocates for the approach taken by the Ninth and Tenth Circuits, which she argues is also followed by the First, Third, Fourth, Seventh and Eleventh Circuits. [Pet., 19-23] The approach of the Ninth and Tenth Circuits were rejected in *Rivas-Villegas* and *Bond*. Both Courts were told that their application did not require enough factual specificity. *Rivas-Villegas*, 142 S. Ct. at 8; *Bond*, 142 S. Ct. at 11-12.

In *Rivas-Villegas*, this Court was critical of the Ninth Circuit for finding the law clearly established based on one materially distinguishable case. *Rivas-Villegas*, 142 S. Ct. at 8-9. The plaintiff failed to put forth any case law with sufficiently similar facts that would have notified the officer that his specific conduct was unlawful and relied solely on the one case. *Id.*

Because of that, the officer was entitled to qualified immunity. *Id*.

While in *Bond*, this Court reviewed the four cases relied on by the Tenth Circuit and rejected each one as insufficient to provide notice of the particular right at issue. *Bond*, 142 S. Ct. at 12. *Bond* involved an intoxicated man that would not leave his ex-wife's garage. *Id.* at 10. When confronted by officers, the decedent grabbed a hammer, raised it "as if preparing to swing a baseball bat," ignored commands to drop the hammer, and instead stepped into a clear path to an officer and raised the hammer even higher while taking a stance to charge or throw at an officer. *Id.* at 10-11. It was then that he was shot. *Id.* at 11. In explaining why the next most analogous case was insufficient to provide notice, this Court wrote:

> The officers in *Allen* responded to a potential suicide call by sprinting toward a parked car, screaming at the suspect, and attempting to physically wrest a gun from his hands. Officers Girdner and Vick, by contrast, engaged in a conversation with Rollice, followed him into a garage at a distance of 6 to 10 feet, and did not yell until after he picked up a hammer.

Id. at 12. These points materially distinguished the reasonableness analysis in *Bond* from that in *Allen*.

The Sixth Circuit, citing to *Rivas-Villegas*, properly applied this analysis to find that the *Latits* case was insufficient to provided Defendant with notice that his conduct could be unconstitutional. [Pet. App., 10a] The

Sixth Circuit did not merely distinguish from *Latits* though, it considered its prior precedent in three other cases (*Hermiz*, *Sigley*, and *Cupp*) before concluding that none were factually "similar enough." [Pet. App., 12a] In rejecting *Latits*, the case pointed to by Plaintiff for being most factually similar, the Sixth Circuit held that *Latits*' holding regarding the imminent danger to the public was factually distinct from this case. [Pet. App., 13a] The Sixth Circuit properly outlined at least five different circumstances that materially altered the reasonableness analysis:

> (1) the *Latits* driver fled in the dark of night;
>
> (2) the *Latits* driver fled on a large, effectively empty highway;
>
> (3) the *Latits* driver fled in an area surrounded by non-populated areas;
>
> (4) there were no nearby pedestrians, cyclists, or motorists at risk; and,
>
> (5) the *Latits* driver did not display any intention or willingness to drive recklessly through residential neighborhoods.

[Pet. App., 14a-15a]

In advancing her argument on this issue, Plaintiff does not point to any true legal issues with the Sixth Circuit's application. Both of her "legal" arguments are without a foundation as demonstrated above, and merely serve as a cover for her real dispute with the Sixth Circuit's opinion: the factual findings. The only real issue raised by the plaintiff in her Petition is a

factual issue. This is seen most prominently in her reliance and advocacy for those facts as found by the District Court, as opposed to those in the Sixth Circuit's opinion. Plaintiff's attempt to cloak this factual dispute as a legal issue should be rejected by this Court and does not justify this Court's review of this matter.

CONCLUSION

Plaintiff's Petition does not present any new issues to this Court. Both of the legal issues Plaintiff raises have been addressed and rejected by this Court in two opinions issued in October 2021. The Sixth Circuit properly followed the directions in those cases when it granted Defendant qualified immunity. Thus, there are no grounds to justify this Court granting Plaintiff's Petition and the writ of certiorari should be denied.

Respectfully submitted,

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