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**OPINION, U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(NOVEMBER 18, 2025)**

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 25a0312p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASHLY ROMERO, as personal representative
for the estate of Stephen Romero, deceased,

Plaintiff-Appellant,

v.

CITY OF LANSING, MICHIGAN, a Michigan
Municipal Corporation; DONOVAN MOORE and
JEFF KURTZ, Officers, individually,

Defendants-Appellees.

No. 24-1865

Appeal from the United States District Court for the
Western District of Michigan at Grand Rapids.

No. 1:23-cv-01322—Hala Y. Jarbou, District Judge.

Argued: July 30, 2025

Decided and Filed: November 18, 2025

Before: MOORE, GRIFFIN, and
RITZ, Circuit Judges.

OPINION

RITZ, Circuit Judge. Two Lansing, Michigan police officers fatally shot Stephen Romero while responding to a domestic disturbance call. Stephen's wife, Ashly Romero, now appeals the district court's dismissal of her lawsuit against the officers and the city. We reverse as to Ashly's excessive-force claim and affirm as to the remaining claims.

I.

At the motion-to-dismiss stage, we credit all well-pleaded factual allegations in Ashly's complaint and draw all reasonable inferences in her favor. *See Guertin v. Michigan*, 912 F.3d 907, 916 (6th Cir. 2019).

A.

On December 21, 2023, Ashly Romero called 911 to report a domestic disturbance in her driveway involving her husband Stephen Romero. Lansing police officers Donovan Moore and Jeff Kurtz responded to the dispatch. Although Ashly told the dispatcher that her husband was not armed and she had not been threatened with a weapon, a second caller claimed that a shooting occurred. A third caller clarified that no one was shot, but it is unclear whether the officers received this information.

Upon arrival, Officers Moore and Kurtz drew their weapons and approached the scene, where Stephen stood outside the open driver-side door of a car, with Ashly in the driver's seat. Officer Moore commanded Stephen to show his hands and get on the ground. Stephen, who was holding two cell phones,

placed his hands in the air then slowly placed the phones on the ground. As he did so, he said to the officers, “bro! bro!”

The officers commanded Stephen to the ground again, at which point he got on his knees and placed his hands in the air. Ashly remained in the driver’s seat a few feet away. The officers commanded Stephen to get “face down.” Stephen then slowly lowered his left hand across his body; said to the officers, “listen”; and raised his shirt to show the officers a holstered gun in his waistband, on his right hip. He then reached for the gun with his right hand, while raising his left hand in the air. Officers Moore and Kurtz opened fire on Stephen.

Stephen yelled in pain while falling face down to the ground, and the officers stopped shooting. Stephen, while lying on his stomach and elbows several feet away from the officers, then said—with his voice breaking—“I got you . . . I got you,” and again reached his right hand toward his waist. The officers resumed firing at Stephen, who was able to slide the gun several feet away from his body during this second round of shots.

Stephen died in his driveway. The encounter between the officers and Stephen, which lasted less than 40 seconds, was captured on the officers’ body-worn cameras.

B.

Ashly brought this suit on behalf of her husband under 42 U.S.C. § 1983. Her suit contained three claims: (1) that Officers Moore and Kurtz violated Stephen’s Fourth Amendment rights by using exces-

sive force (Count One of the complaint), (2) that each officer failed to intervene in the constitutional violations of the other (Count Two of the complaint), and (3) that the City of Lansing failed to properly train the officers on the use of deadly force under *Monell v. Dep't of Soc. Servs. of N.Y.C.*, 436 U.S. 658 (1978) (Count Three of the complaint).

Defendants moved to dismiss, arguing that the officers were entitled to qualified immunity. The district court granted the motion, holding that the officers' use of deadly force did not violate Stephen's clearly established constitutional rights. The court also dismissed Ashly's failure-to-intervene and municipal liability claims.

Ashly appealed. We have jurisdiction under 28 U.S.C. § 1291.

II.

A.

State officials are entitled to qualified immunity from a § 1983 suit unless a plaintiff can show (1) that an official violated a statutory or constitutional right, and (2) that right was clearly established when the events took place. *Cahoo v. SAS Analytics, Inc.*, 912 F.3d 887, 897 (6th Cir. 2019). We review de novo the dismissal of a claim on qualified immunity grounds. *Mitchell v. City of Benton Harbor*, 137 F.4th 420, 429-30 (6th Cir. 2025). The key question is whether, taking the plaintiff's well-pled factual allegations as true and drawing all inferences in her favor, the plaintiff has plausibly alleged facts that allow her to succeed on the

merits. *In re Flint Water Cases*, 960 F.3d 303, 322 (6th Cir. 2020).

Our circuit disfavors granting qualified immunity at the motion-to-dismiss stage. *See Wesley v. Campbell*, 779 F.3d 421, 433-34 (6th Cir. 2015). Without any “factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is obvious or squarely governed by precedent.” *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2015) (Sutton, J., concurring) (citation modified). Defendants therefore face an uphill battle. *See id.* “[S]o long as the plaintiff states a plausible claim for relief,” the case may proceed to discovery. *Marvaso v. Sanchez*, 971 F.3d 599, 605-06 (6th Cir. 2020).

B.

Before addressing the merits, we must also delineate the scope of the record. Generally, at the motion-to-dismiss stage, we are limited to the pleadings, attachments to the pleadings, documents that are referred to in the complaint and central to the plaintiff’s claim, and matters of public record. *Saalim v. Walmart, Inc.*, 97 F.4th 995, 1002 (6th Cir. 2024). Accordingly, our “use of [bodycam] videos is limited at this stage.” *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022). Even if available video evidence would make litigation more efficient, “we may not consider it at the motion-to-dismiss stage if it does not blatantly contradict or utterly undermine the complaint.” *Hodges v. City of Grand Rapids*, 139 F.4th 495, 510 (6th Cir. 2025). In cases of blatant contradiction, the videos render the complaint “implausible,” but “[o]therwise, we must accept the plaintiff’s version as true.” *Bell*, 37

F.4th at 364. The fact that videos will likely be dispositive evidence at summary judgment or trial does not mean we have the authority to conduct a detailed analysis now. *Saalim*, 97 F.4th at 1002 n.4.

Here, Ashly relied on facts from the bodycam footage in her complaint and response to the motion to dismiss, as did the district court in its order dismissing her claims. On appeal, the parties reference the videos extensively in their briefs, and they agreed at oral argument that we can consider the videos. We therefore reference the videos in describing the facts, drawing all necessary inferences in Ashly's favor. See *Lee v. Russ*, 33 F.4th 860, 865 (6th Cir. 2022) (explaining that "when facts shown in a video can be interpreted in multiple ways, those facts should be viewed in the light most favorable to the non-moving party") (citation modified).

That being said, we do not believe that "uncontroverted video evidence easily resolves [this] case." *Bell*, 37 F.4th at 364. Therefore, we limit our review of the bodycam footage to that necessary to determine whether Ashly's factual allegations are clearly false. Because the video footage in this case is inconclusive at the relevant instances, we are ultimately required to credit the facts as they are alleged in the pleadings. *Id.* at 366; *Hodges*, 139 F.4th at 507.

III.

We now move to the merits of Ashly's first claim, which alleges that the officers used excessive force. We hold that Ashly has successfully pled that Officers Moore and Kurtz violated Stephen's clearly estab-

lished rights when they fired a second, deadly round of shots at him while he lay on the ground.

A.

1.

To rebut the officers' qualified immunity defense, Ashly must first show that the officers violated her husband's constitutional rights. An officer's use of excessive force violates the Fourth Amendment's protection against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394-95 (1989). To determine whether a use of force was excessive, we ask whether the force was justified from "the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Wright v. City of Euclid*, 962 F.3d 852, 865 (6th Cir. 2020) (quoting *Goodwin v. City of Painesville*, 781 F.3d 314, 321 (6th Cir. 2015)). An officer's subjective intent is irrelevant. *Hart v. Michigan*, 138 F.4th 409, 417 (6th Cir. 2025).

Deadly force is objectively reasonable only "when there is probable cause to believe that the suspect poses an immediate threat to the officer or to others." *Raimey v. City of Niles*, 77 F.4th 441, 448 (6th Cir. 2023); see also *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (same). In evaluating probable cause, we look to the facts of each individual case, "including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest." *Raimey*, 77 F.4th at 449 (quoting *Graham*, 490 U.S. at 396). Ultimately, in cases involving deadly force, "the question of whether a suspect posed an immediate danger is dispositive." *Id.*

To evaluate whether a use of force was reasonable, the Supreme Court has long instructed us to look at the “totality of the circumstances.” *Garner*, 471 U.S. at 8-9 (1985). Until recently, our circuit would break incidents involving the use of force into “segments,” and “judge each on its own terms to see if the officer was reasonable at each stage.” *Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996) (quoting *Plakas v. Drinski*, 19 F.3d 1143, 1150 (7th Cir. 1994)). We would then “consider the officer’s reasonableness under the circumstances he faced at the time he decided to use force” for each individual segment. *Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017). By design, this segmented approach “instruct[ed] us to disregard” events in the hours and minutes leading up to a deadly shooting, and instead “focus on the ‘split-second judgments’ made immediately before” the use of force. *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406 (6th Cir. 2007) (quoting *Dickerson*, 101 F.3d at 1162).

However, to the extent that the segmented approach strictly limited the window of time we consider before a particular use of force, it has been abrogated. The Supreme Court recently struck down the Fifth Circuit’s “moment-of-threat” rule, which limited the reasonableness analysis to the seconds before a fatal shooting. *Barnes v. Felix*, 605 U.S. 73, 78-79 (2025). We subsequently held that *Barnes* abrogated the segmented approach to the extent that it required events to be “hermetically sealed” from the context in which they arose. *Hodges*, 139 F.4th at 517 (quoting *Barnes*, 605 U.S. at 80). Thus, following *Barnes*, we now consider “all of the events preceding” a use of deadly force when conducting the totality-of-

the-circumstances inquiry. *Id.* at 518. Put another way, “[w]e do not evaluate a particular use of force by considering just one tile in the reasonableness mosaic.” *Feagin v. Mansfield Police Dep’t*, 155 F.4th 595, 609 (6th Cir. 2025).

So, even if we divide an incident into distinct segments, we may consider all prior events, including Fourth Amendment violations, in determining whether a particular use of force was reasonable. *Hodges*, 139 F.4th at 518. One implication of this approach is that “we look comprehensively” at video evidence depicting a use of force, “rather than narrowly considering” a particular moment represented by a screenshot. *See Feagin*, 155 F.4th at 609. Another implication is that the reasonableness of an officer’s use of deadly force may decline as a situation progresses.

2.

Ashly points to three alleged instances of excessive force to support the Fourth Amendment claim brought in Count One of her complaint. She argues that the officers used excessive force by: (1) recklessly approaching the scene with their weapons drawn; (2) firing on Stephen initially; and (3) firing a second time after he was wounded. The district court, deciding this case before the Supreme Court issued *Barnes*, used this framework to segment the analysis and addressed each alleged use of excessive force individually. To reiterate, after *Barnes*, while we may divide the incident into segments, in analyzing each segment we may consider the entire sequence, including prior uses of force.

The district court found the officers were justified in drawing their guns during their initial approach on the scene, because based on the information they learned from dispatch, they had reason to believe there was a dangerous weapon involved in a domestic dispute. *See Romero v. City of Lansing*, No. 1:23-cv-1322, 2024 WL 4223961, at *5-6 (W.D. Mich. Sept. 18, 2024). The facts as pled by Ashly do not tend to undermine that conclusion. The first shooting presents a more difficult question. On one hand, Stephen largely complied with officer commands. On the other hand, as he reached for his holstered gun while facing the officers on his knees, there was a potential danger to both the officers and his wife, who sat only a few feet away within his sightline.

But we need not dwell on the first two stages of the encounter because the facts of the second shooting are well-pled enough that the excessive-force claim brought in Ashly's complaint survives a motion to dismiss. The circumstances of the second shooting were materially different from the first, and our precedent requires that we allow Ashly's claim to proceed to discovery.

First, a brief review of the facts. After Officers Moore and Kurtz initially fired on Stephen, he fell face down to his elbows, yelling in pain. Lying on his stomach, he said: "I got you . . . I got you." He again reached toward his waist. Officers Moore and Kurtz opened fire again. As he was being shot, Stephen managed to grasp his gun and slide it away from his body, out of his reach.

The district court reasoned that the circumstances surrounding the second shooting were "mostly the same" as the first. *Romero*, 2024 WL 4223961, at

*9. We disagree. When Officers Moore and Kurtz opened fire the second time, Stephen was already wounded and, by that point, lay on the ground, on his stomach and elbows. He was no longer a threat to Ashly, who was outside his reach or line of sight, and any effort to draw and point his gun at the officers would have required significant contortion of his body.

The surrounding circumstances compound these significant differences. The complaint alleges—and the video does not contradict—that prior to and after being shot the first time, Stephen was largely compliant and gave no clear indication that he intended to resist. The officers ordered him to the ground, then face down; he got to his knees, moved slowly, and made gestures of surrender. By the time he lay on the ground after a first round of fire that had clearly injured him, a reasonable officer would not have perceived Stephen as a threat.

Moreover, between the two rounds of fire, Stephen did his best to tell the officers he meant them no harm. While he lay on the ground, he said: “I got you . . . I got you!” Ashly alleges that her husband was telling officers that he was complying. Even if we believed these words to be inconclusive, we are required to accept Ashly’s characterization at this stage. *See Bell*, 37 F.4th at 364.

In any event, we find it hard to imagine how Stephen’s words could be reasonably interpreted as a threat. At this stage, nuanced interpretation of Stephen’s words is not appropriate, but it is worth noting that the most natural characterization of “I got you” is to indicate compliance. For example, “yes, I got you” often means “I understand.” *See, e.g., Gotcha*, Oxford English Dictionary, www.oed.com/dictionary/gotcha_

int (defining the interjection form of gotcha as “(I have) got you . . . usually with omission of ‘have’” and noting that the phrase is “used . . . to indicate understanding.”). However, even accepting that a reasonable officer might not understand the meaning of “I got you,” there were numerous other contextual clues that would have led an officer to understand the words were nonthreatening. For example, Stephen, who had just audibly reacted to being shot, did not shout the words in an aggressive manner. In fact, as he spoke, his voice broke. He was lying on the ground and did not move toward the officers or position himself in an offensive or provocative way. Through the entire encounter he made no sudden or aggressive gestures. On the contrary, the officers had seen Stephen put his hands in the air, place his cell phones on the ground, and move deliberately to his knees. Faced with many indicators that Stephen was trying to comply with their demands, a reasonable officer would not have interpreted Stephen’s words as a sign of danger.

In these circumstances, and under our precedent, Ashly has successfully pled an excessive-force claim. The cases in which an officer may use deadly force in response to a suspect holding a gun are highly fact-bound. We must treat the presence of the gun, and even the fact that the gun may have been “in [Stephen’s] hand” as “just one consideration in assessing the totality of the circumstances.” *Thomas*, 854 F.3d at 366. To be clear: an officer does not need to wait until a suspect points their weapon before firing. *Id.* But officers also may not fire simply because a suspect “has a weapon, even a gun, in hand.” *Chrestman ex rel. Wooden v. Metro. Gov’t of Nash. & Davidson Cnty.*, ___ F.4th ___, No. 24-6018, 2025 WL

2650582, at *6 (6th Cir. Sept. 16, 2025). There must be “additional indicia that the safety of the officer or others is at risk.” *Campbell v. Cheatham Cnty. Sheriff’s Dep’t*, 47 F.4th 468, 480 (6th Cir. 2022).

In fact, “[o]ur caselaw is replete with instances” where we have denied qualified immunity to officers who used force against someone possessing a weapon, because “the facts suggest—at least taking them in the light most favorable to the plaintiff—that the suspect did not pose a serious threat to the officer[s].” *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019). Consider *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011), in which an elderly man with poor eyesight and hearing pointed a gun at two officers attempting to arrest his son. *Id.* at 748. After the man refused to drop his gun, one officer fatally shot him. *Id.* On a motion for summary judgment, a posture far less favorable to plaintiffs than the motion-to-dismiss context, we denied qualified immunity to the officer who fired the shots. *Id.* at 754. In doing so, we credited testimony from the decedent’s son that the man began lowering his gun as he was shot. *Id.* at 752. Because the shooting occurred “while the [man] was complying with the officer’s command,” a rights violation occurred. *Id.*

We reached a similar conclusion in *Lee*. There, a man robbed a pharmacy at knifepoint, then brandished his knife at police when he was stopped. 33 F.4th at 862. The man was “belligerent” and waved his knife while shouting at the police from a distance of about 30 feet. *Id.* at 862-63. Though he “calmed down” and lowered his knife, when he took one more step, an

officer fatally shot him. *Id.* at 863-64.¹ We denied qualified immunity at the summary judgment stage, despite the fact that the officer “knew that [the decedent] had robbed a pharmacy” and “that [the decedent] had unsheathed a knife when the officers confronted him and disregarded commands to drop it.” *Id.*

The facts here parallel those of *Bletz* and *Lee*. First, in both cases we denied qualified immunity because a potentially dangerous situation was de-escalating when the officers used force. In *Bletz*, the decedent lowered his rifle. 641 F.3d at 748. In *Lee*, the decedent was physically distant from the officers and had an increasingly calm demeanor. 33 F.4th at 863-64. Similarly, when officers fired a second round at Stephen, he was already on the ground. By then, at the very least, the situation had become significantly less dangerous, especially because the wounded Stephen no longer posed a threat to Ashly and had given no explicit indication at any point during the encounter that he intended harm to the officers. After having already been shot, without any signal that Stephen intended harm, the sole fact that he again reached for his gun was not enough to justify firing again.

Further, in both *Bletz* and *Lee* we denied qualified immunity because decedents were compliant enough to allay a fear of immediate harm when they were shot. As a matter of fact, in both cases, the decedents seemed to be largely *uncompliant*. *See Bletz*,

¹ Note that the parties disputed whether the decedent had stepped forward (toward the officers) or sideways. The video evidence was “equivocal,” so we construed the video in the light most favorable to the plaintiff. *Lee*, 33 F.4th at 864-65.

641 F.3d at 748 (“[The decedent] did not promptly comply with [the officer’s] instructions to drop his weapon.”); *Lee*, 33 F.4th at 863 (describing testimony that the decedent was “belligerent”). In *Bletz*, the outcome hinged on the final moment in which the victim appeared to obey an officer command to lower his weapon in the seconds before he was shot. 641 F.3d at 752. The same was true in *Lee*, where the decedent ignored commands to drop his knife, but stopped waving it. 33 F.4th at 863.

So too here. Stephen was largely compliant with officer instructions. True, Stephen did not get “face down” when told to, instead remaining on his knees. But *Bletz* and *Lee* show that we do not require perfect compliance. And unlike both of those cases, Stephen did not disobey any commands explicitly related to his weapon, which he voluntarily showed to the officers. Additionally, by the time officers fired a second round, Stephen was on the ground in full compliance with their commands. Any orders Stephen ignored are far less indicative of a threat than those ignored by the decedents in *Bletz* and *Lee*. Under our case law, that means the use of deadly force was not justified.

Our cases granting qualified immunity do not sway us in a different direction. Where we have granted qualified immunity in suits alleging deadly force, the officers faced more immediately dangerous circumstances than those present here. For example, we have frequently granted qualified immunity when an officer used deadly force to stop an armed individual who was advancing quickly from a short distance or behaving aggressively. *See e.g., Thomas*, 854 F.3d at 362-63 (granting qualified immunity when an officer fatally shot a man, who the officer reasonably

believed was a burglar, running toward him down a narrow hallway holding a gun); *Chappell v. City of Cleveland*, 585 F.3d 901, 905, 916 (6th Cir. 2009) (granting qualified immunity when a fifteen-year-old suspected of armed robbery “lunged” towards officers in a small bedroom, while ignoring commands to drop his knife); *Thornton v. City of Columbus*, 727 F. App’x 829, 831-32 (6th Cir. 2018) (granting qualified immunity to officers who shot a man who threatened passerby with a shotgun, then ignored officer commands to drop his weapon while walking towards officers from short distance). Of course, when an armed individual advances on officers or acts erratically and offensively, deadly force can be justified even when a suspect does not point a gun.

But here, Stephen did not make any overtly hostile actions and never gave any indication that he would advance toward the officers. He heeded officers’ commands to raise his hands and get on the ground. After the officers shot him the first time, he dropped to his stomach, wounded. Our dissenting colleague believes that the video then depicts Stephen removing his weapon from his waistband before the officers fired their second round of shots. We interpret the video differently, and so, plausibly, could a trier of fact. Indeed, as Ashly alleges in her complaint, Stephen’s actions could reasonably be seen as an attempt to surrender the firearm. But even if the video is ambiguous as to the precise sequence of events or what Stephen intended, it does not blatantly contradict Ashly’s allegation that Stephen was incapacitated when the officers fired a second round of shots, so we must credit that allegation. The fact that Stephen had already been wounded prior to the second shooting and

showed no obvious resistance throughout the encounter distinguishes this case from those where we granted qualified immunity.

In short, *Bletz* and *Lee* govern the outcome here. Without more, Stephen's reaching towards his firearm was not enough to justify the continued shooting of a wounded man who was lying on his stomach and had been otherwise compliant. By the time Officers Moore and Kurtz fired a second round of shots, a reasonable officer would not have felt that Stephen presented an immediate threat. Therefore, Ashly has plausibly alleged that officers violated Stephen's Fourth Amendment rights.²

B.

Moreover, Stephen's rights to not be shot while (1) not posing a threat, (2) complying with officer instructions, and (3) being otherwise incapacitated were all clearly established at the time these events took place. Our case law provides abundant notice that "individuals have a right not to be shot unless they are perceived as posing a threat to officers or others." *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012) (internal quotation marks omitted); see also *Dickerson*, 101 F.3d at 1163 (same). Further, the "right to be free from deadly police force while complying with police com-

² Because we believe that Ashly has plausibly alleged a rights violation by the time of the second shooting, her excessive-force claim can proceed, and it is unnecessary for us to decide whether the officers violated Stephen's rights at an earlier point. See *Baker v. City of Hamilton*, 471 F.3d 601, 608-09 (6th Cir. 2006) (denying summary judgment on an excessive-force claim because the officer struck a suspect with a baton, when the single excessive-force claim also alleged tackling, choking and other injuries.).

mands to disarm [is] clearly established.” *Bletz*, 641 F.3d at 754. And by 2023, it was clearly established that even if a suspect is “armed and . . . disobeyed the officers’ commands, these facts do not alone amount to a threat of serious or deadly harm.” *Heeter v. Bowers*, 99 F.4th 900, 915 (6th Cir. 2024); *see also Leftwich v. Driscoll*, Nos. 22- 1572/1575, 2023 WL 3563207, at *4, (6th Cir. May 19, 2023) (“[W]e have repeatedly held that when a suspect possesses a weapon but does not have it pointed at anyone, qualified immunity is generally inappropriate.”). Lastly, “we have repeatedly held that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.” *Baker*, 471 F.3d at 607.

Our dissenting colleague agrees that these propositions were clearly established at the time the defendants shot and killed Stephen but maintains that Stephen remained a threat to the officers even after they shot him the first time. As described above, though, we draw all reasonable inferences and interpret the video in Ashly’s favor, and she has plausibly alleged that Stephen was neutralized and complying with the officers’ commands. Under these well-pleaded facts and our case law, Officers Moore and Kurtz were on notice that Stephen had a right not to be lethally shot. To be sure, the Supreme Court has cautioned that “police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue.” *Kisela v. Hughes*, 584 U.S. 100, 104 (2018) (quoting *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (per curiam)). But for that reason, and because the video in this case is inconclusive, it makes sense to conduct discovery here. Without the benefit of the full record, it is difficult to make definitive conclusions

about factual parallels. See *Chrestman*, ___ F.4th ___, 2025 WL 2650582, at *7; *Evans-Marshall*, 428 F.3d at 235 (Sutton, J., concurring).

We hold that Ashly has adequately pled that at least by the time of firing a second round of shots, Officers Moore and Kurtz violated Stephen's clearly established rights. We reverse the district court's dismissal of the excessive-force claim.

IV.

Ashly brings two other claims: (1) failure of each officer to intervene in the constitutional violations of the other; and (2) a municipal liability claim against the City of Lansing. We affirm the district court's dismissal of these claims.

A.

Ashly argues that each officer should have intervened in the other's use of excessive force. To succeed on this claim, a plaintiff must show that the officer (1) "observed or had reason to know that excessive force would be or was being used," and (2) "had both the opportunity and the means to prevent the harm from occurring." *Bard v. Brown County*, 970 F.3d 738, 752-53 (6th Cir. 2020) (quoting *Turner v. Scott*, 119 F.3d 425, 429 (6th Cir. 1997)).

Ashly cannot make this showing. Although the officers observed each other's use of excessive force, they did not have the opportunity to prevent it. To succeed on the second prong, Ashly must show that "the primary wrongdoer used the force for a 'long enough' time that the observing officer had a realistic chance to end it." *Chaney-Snell v. Young*, 98 F.4th

699, 722 (6th Cir. 2024) (quoting *Pelton v. Perdue*, 731 F. App'x 418, 426 (6th Cir. 2018)). The events in this case occurred in rapid succession, and the shootings took place over the course of less than ten seconds. Generally, we have held that an officer without forewarning cannot intervene in actions that continue for less than ten seconds. *Id.* Thus, there was no opportunity for either officer to intervene in the other's use of excessive force.

B.

We also affirm the district court's dismissal of Ashly's *Monell* claim against the City of Lansing. To succeed on a *Monell* claim, a plaintiff must demonstrate that the officers' illegal actions resulted from an official municipal policy or custom. 436 U.S. at 694-95. A municipality's illegal policy or custom can be shown by: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013).

Ashly argues that the City of Lansing failed to adequately train and supervise its officers as to the use of deadly force. To succeed, Ashly must show that "(1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury." *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 286-87 (6th Cir. 2020) (quoting *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006)).

According to Ashly, the City of Lansing was deliberately indifferent because it “fail[ed] to equip law enforcement officers with specific tools to handle recurring situations.” *Id.* at 287 (citations omitted).

Ashly has not plausibly pled a successful *Monell* claim. First, this theory of liability is narrow, and occurs only when “in light of the duties assigned to specific officers . . . the need for more or different training is . . . obvious.” *Id.* (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Ashly does not provide any concrete allegations about the city’s behavior, only speculation that Officers Moore and Kurtz would have behaved differently had they been properly trained. Even at the motion-to-dismiss stage, Ashly must plead specific facts beyond speculation and bare recitation of the standard for municipal liability. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). We agree with the district court that, without more concrete allegations, this claim cannot proceed to discovery.

V.

For these reasons, we affirm the district court as to Ashly’s failure to intervene and *Monell* claims. As to the excessive-force claim, we reverse.

**CONCURRING/DISSENTING OPINION OF
CIRCUIT JUDGE GRIFFIN**

CONCURRENCE / DISSENT

GRIFFIN, Circuit Judge, concurring in part and dissenting in part.

Today’s decision endangers the lives of all law enforcement officers in the Sixth Circuit. It egregiously misapplies the law of self-defense and qualified immunity to the extent that few, if any, police officers would voluntarily assume such a high level of personal risk and potential financial liability.

Because Officers Moore and Kurtz are entitled to qualified immunity, I would affirm the district court’s dismissal of plaintiff’s excessive-force claim. I therefore respectfully dissent. I concur, however, with affirming the district court’s dismissal of plaintiff’s other claims.

I.

At the motion-to-dismiss stage, we generally “construe the complaint in the light most favorable to plaintiffs, accept all well-pleaded factual allegations as true, and draw all reasonable inferences in plaintiffs’ favor.” *Guertin v. Michigan*, 912 F.3d 907, 916 (6th Cir. 2019). That said, when video evidence, such as body-cam footage, “blatantly contradicts or utterly discredits the plaintiff’s version of events,” we may rely on this evidence instead. *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022) (citation modified) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

The complaint alleges that “Mr. Romero submitted by getting on his knees,” “communicated his intent to

surrender the firearm and lay it to the ground,” and never “remove[d] a firearm from his waistband.” The officers’ body-cam footage blatantly contradicts these allegations, however, and therefore I will rely on the video evidence, which shows the following.

As Officers Moore and Kurtz responded to a domestic disturbance, dispatch informed them of a confirmed shooting of a woman. At the scene, Romero stood outside a vehicle with the driver-side door open and a woman inside. With his service weapon drawn, Officer Moore yelled, “Hey! Show your hands, show me your hands!” Romero turned towards the officers with his hands open. Officer Moore then commanded, “Get on the ground, get on the ground, now!” Romero showed two cellphones, one in each hand. Officer Moore again commanded, “Get on the ground or I will shoot you!” Romero slowly placed the cellphones on the ground, remained standing, and eventually kneeled down. Officer Kurtz ordered Romero to get “face down.” Instead, Romero lifted his shirt to reveal a gun at his waist. Romero then moved his right hand down and grabbed the gun.



Officer Moore fired his service weapon. After being struck, Romero fell on the ground and said “I got you” twice. Romero then reached for his gun, again.



Officer Moore yelled, “Stop!” Romero removed the gun from his waistband.



The officers fired their weapons several more times, and the gun slid down the driveway towards them while Romero lay motionless, fatally wounded.

In sum, the video evidence clearly establishes that Romero failed to comply with the officers' commands, reached for and grabbed his firearm twice, removed it from his waistband, and the officers used deadly force in response.

II.

Law enforcement officers are entitled to qualified immunity unless a plaintiff plausibly alleges that they “(1) violated a constitutional right (2) that was clearly established at the time of the wrongdoing.” *Bell*, 37 F.4th at 367 (citation modified). Here, plaintiff fails to show either and, thus, Officers Moore and Kurtz are entitled to immunity from suit.

A.

An officer's use of force violates the Fourth Amendment “when it is not ‘objectively reasonable’” under the “totality of the circumstances.” *Barnes v. Felix*, 605 U.S. 73, 76 (2025) (citation omitted). The totality of the circumstances accounts for “the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989). And we judge the officers' actions “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” *Goodwin v. City of Painesville*, 781 F.3d 314, 321 (6th Cir. 2015) (quoting *Graham*, 490 U.S. at 396). “The bottom-line inquiry is whether the totality of the circumstances justifies a particular level of force.” *Wright v. City of Euclid*, 962 F.3d 852, 865 (6th Cir. 2020) (citation modified).

When an incident involves several uses of force, we “segment the incident into its constituent parts and consider the officer’s entitlement to qualified immunity at each step along the way.” *Id.* (citation modified). Here, plaintiff alleges three uses of excessive force by the officers: (1) approaching Romero with weapons drawn when arriving on the scene; (2) shooting Romero after he grabbed a gun at his waist; and (3) shooting Romero when he removed the gun from his waistband.

The parties employed the segmented approach in briefing, as did the district court. The majority chooses to discuss only the last use of force, while also suggesting that *Barnes* precludes us from taking the segmented approach. At issue in *Barnes* was the Fifth Circuit’s “moment of threat” rule. Under that rule, a court reviewing whether a use of deadly force was excessive “could ask only about the situation existing ‘at the moment of the threat’ that sparked the fatal shooting.” 605 U.S. at 78 (citation omitted). The Court held that such a rule does not comply with the Fourth Amendment because it “constricts the proper inquiry into the ‘totality of the circumstances.’” *Id.* at 79. Our segmented analysis, however, is simply a method to sensibly analyze “each step along the way” in cases involving “multiple” alleged unlawful uses of force. *Wright*, 962 F.3d at 865. And “for each purported violation . . . we must consider all the ‘relevant circumstances’ leading up to the climactic moment.” *Feagin v. Mansfield Police Dep’t*, 155 F.4th 595, 611 (6th Cir. 2025) (quoting *Barnes*, 605 U.S. at 76). *Barnes* does not foreclose this approach, at least not when properly applied to avoid temporal extremes. *Id.* at 610–11.

Like the parties and the district court, I address each in turn.

1.

Officers Moore and Kurtz responded to a domestic-violence call. While en route, dispatch informed them that a weapon had been discharged and that a woman had been shot. Upon arrival, they sprang from their vehicles and rushed to the scene, weapons drawn. Plaintiff asserts that this was an unreasonable use of force because the officers did so “without a justifiable fear.” This assertion is unavailing.

An officer does not violate the Fourth Amendment by approaching with his weapon drawn when the officer reasonably fears for his safety or the safety of the public. *Wright*, 962 F.3d at 865–66. As the district court correctly found and the video evidence confirms, this was the case here: Officers Moore and Kurtz “had reason to believe that a firearm had been used and that Plaintiff had been a target,” which gave the officers ample “reason to approach Romero with a show of deadly force in order to dissuade him or anyone else from using a firearm again.”

Further, as the district court stated, the surrounding circumstances “amplified” the officers’ safety concerns: “two individuals (whom the officers would have reasonably assumed were Plaintiff and the shooter) arguing or yelling at one another,” which signaled that “the domestic dispute had not ended”; and “Plaintiff herself was not fully visible, so it would not have been clear whether she was unharmed.” As we have recently explained, “domestic abusers with firearms are dangerous not only to their direct victims, but also

to accompanying loved ones, bystanders, and responding law enforcement officers.” *United States v. Gailes*, 118 F.4th 822, 827 (6th Cir. 2024). Indeed, empirical evidence suggests “that domestic disputes were the most dangerous type of call for responding officers, causing more officer deaths with a firearm than any other type of call.” *United States v. Rahimi*, 602 U.S. 680, 706–07 (2024) (Sotomayor, J., concurring); *Stimmel v. Sessions*, 879 F.3d 198, 210 (6th Cir. 2018) (noting that as much as 10% of non-accidental officer fatalities had occurred while officers were responding to domestic disturbances). The fact that Officers Moore and Kurtz were responding to a domestic dispute further bolsters the reasonableness of approaching Romero with weapons drawn.

Accordingly, the officers did not violate the Fourth Amendment in this instance.

2.

After encountering Romero outside the vehicle, the officers instructed him to lie face down. Romero failed to fully comply, only kneeling, and then grabbed a gun on his waist. Officer Moore opened fire, striking Romero. Plaintiff asserts that Romero had to do more—put his finger on the trigger, rack the gun, aim it, or even fire it—before Officer Moore could have used deadly force. Again, however, plaintiff’s assertion is unavailing.

“To justify lethal force, an officer must have probable cause to believe the suspect presents an immediate threat of serious physical harm to the officer or others.” *Studdard v. Shelby Cnty.*, 934 F.3d 478, 481 (6th Cir. 2019) (citing *Tennessee v. Garner*, 471 U.S. 1,

11 (1985)). The “objective assessment of the danger a suspect poses” must be made “from the perspective of a reasonable officer in the defendant’s position.” *Jacobs v. Alam*, 915 F.3d 1028, 1040–41 (6th Cir. 2019) (quoting *Bougress v. Mattingly*, 482 F.3d 886, 889 (6th Cir. 2007)). When considering whether the use of deadly force was reasonable, we look to the totality of the circumstances that the officer faced at the time he decided to use force. *See Thomas v. City of Columbus*, 854 F.3d 361, 365 (6th Cir. 2017). Shooting a suspect is lawful when officers could reasonably conclude that he might fire a gun at them. *Puskas v. Delaware Cnty.*, 56 F.4th 1088, 1096 (6th Cir. 2023).

The district court aptly described—and the video evidence confirms—the circumstances surrounding the first shooting:

When [Officer Moore] shot Romero the first time, he had not fully complied with multiple orders to “get on the ground” . . . and he was not moving toward compliance. Instead, he had lifted his shirt and put his hand on a gun that he had apparently used earlier in the evening during a dispute with his wife. He did not explain his intentions or make gestures clearly indicating that he intended to turn his weapon over to the officers. Nor did he reach for his weapon slowly and gradually, which might have given the officers an opportunity to specifically warn him not to touch his weapon. And by the time he put his hand on his gun, he could have quickly and easily turned it on his wife nearby or the officers in front of him. In fact, Plaintiff was only a few feet away to his left and would

have been in a direct line of fire had he finished pulling the pistol out of his waistband with his right hand. Thus, not knowing Romero's intentions, but knowing the possibility that he might use his weapon again, [Officer Moore] had to make a split-second decision about how best to protect [the officers] and Plaintiff from the apparent threat [Romero] posed.

Further, as explained before, the officers were responding to a domestic disturbance purportedly involving a confirmed shooting. And the whole encounter, from when Officer Moore first commanded Romero to show his hands to when Romero reached for his gun, lasted only fifteen seconds.

Under these circumstances, Officer Moore had probable cause to believe that Romero posed an immediate threat of serious physical harm to the officers or others: The officers reasonably believed that a firearm had been discharged and a woman shot; they had ordered Romero to get face down on the ground and he never did; and Romero grabbed a gun on his waist, of his own accord and unexpectedly, mere feet away from the officers and plaintiff. Officer Moore was not required to wait for Romero to rack or point the gun before using deadly force. *See Jacobs*, 915 F.3d at 1040 (“[A]n officer need not face the business end of a gun to use deadly force.”); *Thomas*, 854 F.3d at 365–66; *Thornton v. City of Columbus*, 727 F. App'x 829, 838 (6th Cir. 2018). Moreover, Officer Moore had only a split second to protect himself, Officer Kurtz, and plaintiff from the imminent threat Romero posed after he placed his hand on the gun, and we “do not second

guess such split-second decisions.” *Puskas*, 56 F.4th at 1096.

In hindsight, plaintiff hypothesizes that Romero may have reached for his weapon intending to surrender it. But this is not the standard we employ. *Thomas*, 854 F.3d at 365. We ask whether the use of deadly force was reasonable from the perspective of an objective officer confronting the circumstances Officer Moore did. *Id.* (adding that we do so “mindful that police officers face tense, uncertain, and rapidly evolving situations” (citation modified)). Under this standard and these circumstances, Officer Moore’s use of deadly force was reasonable.

3.

After being shot by Officer Moore, Romero fell to the ground. He groaned in pain, said “I got you” twice, and then reached down and removed the gun from his waistband. Both officers fired, fatally striking Romero. Plaintiff argues that this shooting was excessive because Romeo was already incapacitated. Plaintiff is incorrect. Because Romero continued to threaten the safety of the officers, even while wounded, their use of deadly force was reasonable.

It is true that Romero was now on the ground—but this was not because he had finally complied with the officers’ orders; he was only there because he had just been shot by Officer Moore. And even as Officer Moore yelled “Stop,” Romero did not cease his movements. He reached for his gun, again, and this time removed it from his waistband. The officers had not ordered him to do this; in fact, reaching for the gun was the reason he had been shot the first time. Given

these circumstances, lasting mere seconds, the officers had probable cause to believe that Romero continued to present an immediate threat of serious physical harm and, thus, their use of deadly force was reasonable. See *Gambrel v. Knox Cnty.*, 25 F.4th 391, 405–06 (6th Cir. 2022) (collecting cases) (“[W]e have found that officers had the probable cause that made their shooting lawful when they could reasonably conclude that a suspect might fire a gun at them or use another dangerous weapon against them (even if they turned out to be wrong).”).

The majority claims that Romero was no longer a threat because “any effort to draw and point his gun at the officers would have required significant contortion of his body.” But Romero was obviously able to draw his weapon from his waistband and, again, “an officer need not face the business end of a gun to use deadly force,” *Jacobs*, 915 F.3d at 1040, so this argument falls flat.

Relying on *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011), and *Lee v. Russ*, 33 F.4th 860 (6th Cir. 2022), the majority also contends that shooting Romero a second time was unreasonable because the situation was deescalating. But the video evidence does not bear this out. To be sure, Romero was now lying on the ground. He continued to reach for his gun, however, and this time he brought it forth from his waistband (all the while, it must be remembered, having been ordered by the officers to stay still, not surrender his weapon). From the objective perspective of a reasonable officer—at that moment—this posed an escalated threat.

Additionally, the present case is distinguishable from lowering one’s weapon, as was the case in *Bletz*,

641 F.3d at 748, and *Lee*, 33 F.4th at 863. The more on-point case is *Mullins v. Cyraneck*, where the decedent “removed a previously concealed firearm without any direction from [the officer] to do so, threw the weapon over [the officer’s] shoulder after being commanded to drop it, and was then shot” by the officer. 805 F.3d 760, 767 (6th Cir. 2015). Even though the decedent was no longer a threat when he was shot, we concluded that the officer “was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a severe threat to himself and the public was reasonable.” *Id.* Officer Moore’s and Kurtz’s decision to use deadly force was equally reasonable given the severe threat that Romero posed by continuing to reach for his gun and then removing it from his waistband.

The mere fact that Romero said “I got you” before taking the gun from his waistband does not dispel this conclusion. The majority interprets these three words to demonstrate that Romero “did his best to tell the officers he meant no harm” and, drawing from the Oxford English Dictionary, posits that “the most natural characterization of ‘I got you’ is to indicate compliance.” But the officers had responded to a domestic disturbance purportedly involving a confirmed shooting, faced a suspect who continually reached for a firearm at his waist while being ordered to get face down and stop moving, and then saw a weapon being drawn—all in a matter of seconds. Officers Moore and Kurtz did not have the benefit of stopping time and contemplating the nuances of English vernacular. Nor is this the standard we hold them to when assessing the reasonableness of using deadly force under these circumstances. *See Thomas*, 854 F.3d at 365.

Moreover, even if everyone at the scene understood “I got you” to mean different things—which, of course, is entirely speculative—the Fourth Amendment requires officers only to act reasonably on the information they have, not to perceive a situation accurately. *Id.*; *Chappell v. City of Cleveland*, 585 F.3d 901, 916 (6th Cir. 2009). Here, the officers witnessed Romero continually reach for his firearm and then remove it from his waistband; and, based on this information, they reasonably concluded that Romero might fire a gun at them. Thus, despite Romero saying “I got you,” using deadly force was objectively reasonable. *Gambrel*, 25 F.4th at 405–06.

In sum, plaintiff fails to plausibly show that the officers violated the Fourth Amendment in any of the three instances.

B.

Even assuming plaintiff succeeded under the first prong of the qualified immunity test, she fails to plausibly allege that the officers violated a constitutional right that was clearly established at the time of the alleged wrongdoing. To make this showing, a plaintiff “must point to a case showing that reasonable officers would have known their actions were unconstitutional under the specific circumstances they encountered.” *Bell*, 37 F.4th at 367. “[W]hen it comes to excessive force, the Court has repeatedly told us that specific cases are ‘especially important.’” *Id.* (citing *City of Tahlequah v. Bond*, 595 U.S. 9, 12–13 (2021) (per curiam); *Kisela v. Hughes*, 584 U.S. 100, 104–05 (2018) (per curiam)). “The unlawfulness of the officer’s acts ‘must be so well defined’ that no reason-

able officer would doubt it.” *Id.* (quoting *Bond*, 595 U.S. at 12).

But plaintiff fails to cite a case showing that all reasonable officers would have known that shooting Romero under the specific circumstances faced by Officers Moore and Kurtz was unconstitutional.¹ She does cite cases for the proposition that an individual has a right not to be shot when complying with commands, but this is not in dispute. Nor is it relevant: Romero was not complying, as the video evidence clearly shows.

Lee does not help either—as already mentioned, the decedent in that case was lowering his weapon when he was shot, not grabbing for it or removing it from his waistband, and he stood thirty feet away, not mere feet from the officers. 33 F.4th at 862–63. Nor does *Jacobs*, where the plaintiff reached for a pistol still in its holster, and which was never unholstered, and was shot only after falling down the stairs, away from the officers. 915 F.3d at 1033. In contrast, Romero kept reaching for an unholstered gun and actually drew it, in close proximity to both plaintiff and the officers. Moreover, neither *Lee* nor *Jacobs* involved officers responding to a domestic-violence situation

¹ When discussing the second prong of the qualified immunity test, plaintiff focuses solely on the officers’ use of deadly force and does not cite a single case regarding whether a reasonable officer would have known that approaching this scene with weapon drawn was unconstitutional. Accordingly, I discuss only plaintiff’s assertion that the officers’ use of deadly force violated a constitutional right that was clearly established at the time. I also note that plaintiff has likely abandoned the issue of qualified immunity regarding the officers’ first use of force. *See Sommer v. Davis*, 317 F.3d 686, 691 (6th Cir. 2003).

involving an ongoing argument and what officers reasonably believed was a confirmed shooting—facts suggesting that the suspect had already resorted to violence and might do so again.

The cases cited by the majority fare no better. Some simply stand for the general proposition that an individual has a right not to be shot while “(1) not posing a threat, (2) complying with officer instructions, and (3) being otherwise incapacitated.” But, again, the video evidence clearly demonstrates that these were hardly the circumstances here: The officers reasonably believed that Romero had discharged his firearm and shot someone moments before their arrival; Romero reached for his gun while being ordered to do the opposite (lie still, face down); and even after being wounded by Officer Moore, Romero continued to reach for the gun and then removed it from his waistband. None of this demonstrates a non-threatening, compliant, or otherwise incapacitated individual.

Other cases cited by the majority fail to give the requisite “fair and clear warning” that the particular conduct alleged here violated the law. *Kisela*, 584 U.S. at 105. For example, in *King v. Taylor*, officers shot the decedent through a window while he was at home lying on the couch, not making any threatening gestures. 694 F.3d 650, 654, 663–64 (6th Cir. 2012). Similarly, in *Dickerson v. McClellan*, officers shot the decedent through a closed door when he went to answer it. 101 F.3d 1151, 1163 (6th Cir. 1996). And the plaintiffs in *Baker v. City of Hamilton* were unarmed and indisputably compliant. 471 F.3d 601, 607–09 (6th Cir. 2006). None “squarely governs the specific facts at issue” or provides notice to Officers Moore and Kurtz that shooting Romero was unlawful under the

circumstances they encountered. *Kisela*, 584 U.S. at 104–05 (citation modified).

More on-point is *Thomas*. There, an officer responded to a burglary in progress. 854 F.3d at 363. With his service weapon unholstered, he ran to the scene where he could hear a commotion. *Id.* He then saw two men exiting the apartment and running towards him, with the first man holding a gun. *Id.* When that person closed the distance to about ten feet, the officer fired two shots. *Id.* The person he had shot was the apartment’s owner, who had disarmed the burglar and was fleeing with the gun. *Id.* When deciding whether the officer was entitled to qualified immunity, we considered the circumstances that the officer faced in the moment. *Id.* at 365. He saw a suspect with a gun running toward him and quickly closing the gap, to a range at which “a suspect could raise and fire a gun with little or no time for an officer to react.” *Id.* at 365–66. “Given these facts, a reasonable officer would perceive a significant threat to his life,” even if the suspect had never actually raised his gun and was the victim, not the burglar. *Id.* at 366.

If it was objectively reasonable for an officer to use deadly force under those facts, then the law is not clearly established such that all reasonable officers would have known that shooting Romero was unconstitutional. Just as in *Thomas*, at a distance of mere feet, Romero could have raised and fired his gun “with little or no time for an officer to react.” *Id.* at 366. And here Romero could have done so not once but twice. Given those facts, in addition to the fact that the officers were responding to a domestic disturbance purportedly involving a confirmed shooting, “a reasonable officer would perceive a significant threat to his

life,” which makes Officers Moore’s and Kurtz’s use of deadly force “objectively reasonable.” *Id.*

In sum, existing precedent does not place beyond debate whether Officers Moore and Kurtz violated a constitutional right that was clearly established at the time of the alleged wrongdoing and, thus, the officers are entitled to qualified immunity. *Kisela*, 584 U.S. at 104.

III.

The district court dismissed plaintiff’s two other claims: a failure-to-intervene claim and a municipal liability claim. Regarding the first, I would affirm on the grounds provided by the district court, not those of the majority: neither officer violated the Fourth Amendment and, thus, neither had an obligation to intervene. Accordingly, I concur in the judgment only. Regarding the second, I join the majority’s analysis in full.

IV.

For the foregoing reasons, I would affirm the judgment of the district court. Accordingly, I respectfully concur in part and dissent in part.

**JUDGMENT, U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT
(NOVEMBER 18, 2025)**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASHLY ROMERO, as personal representative
for the estate of Stephen Romero, deceased,

Plaintiff-Appellant,

v.

CITY OF LANSING, MICHIGAN, a Michigan
Municipal Corporation; DONOVAN MOORE and
JEFF KURTZ, Officers, individually,

Defendants-Appellees.

No. 24-1865

On Appeal from the United States District Court for
the Western District of Michigan at Grand Rapids.

Before: MOORE, GRIFFIN, and
RITZ, Circuit Judges.

JUDGMENT

THIS CAUSE was heard on the record from the
district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED
that the judgment of the district court is

App.42a

AFFIRMED IN PART and REVERSED IN PART.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens

Clerk

**OPINION, U.S. DISTRICT COURT,
WESTERN DISTRICT OF MICHIGAN
(SEPTEMBER 18, 2024)**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ASHLY ROMERO, as Personal Representative
for the Estate of Stephen Romero,

Plaintiff,

v.

CITY OF LANSING, et al.,

Defendants.

Case No. 1:23-cv-1322

Before: Hon. Hala Y. JARBOU,
Chief United States District Judge

OPINION

This is a civil rights action under 42 U.S.C. § 1983 against the City of Lansing (the “City”), and Lansing Police Officers Donovan Moore and Jeff Kurtz. Plaintiff Ashly Romero claims that Defendants violated the constitutional rights of her husband, Stephen Romero.¹

¹ For simplicity’s sake, the Court will refer to Ashly Romero as “Plaintiff” and to Stephen Romero as “Romero.”

Before the Court is Defendants' motion to dismiss the complaint (ECF No. 20). For the reasons herein, the Court will grant the motion.

I. BACKGROUND

A. Summary

When responding to a 911 call from Plaintiff reporting domestic violence by Romero and subsequent calls from others reporting a shooting, Officers Moore and Kurtz confronted Romero at gunpoint in Plaintiff's driveway. Romero was standing near Plaintiff as she was seated in a vehicle. Moore and Kurtz commanded Romero to show his hands and to get on the ground. Romero first put two cell phones that he was holding onto the ground. He then got on his knees and lifted his shirt to show the officers a pistol at his waist. When Romero reached down and put his hand on the gun, Moore shot him. Seconds later, Romero grabbed his weapon again. Moore and Kurtz fired on him again. Romero died from his injuries. Plaintiff brings this action on behalf of Romero's estate.

B. Allegations

The following facts are taken from the amended complaint (ECF No. 13) and from videos of the incident taken by body cameras worn by Moore and Kurtz. The Court can consider the video recordings for reasons discussed below. The Court construes the facts and draws all reasonable inferences in favor of Plaintiff.

On the evening of December 1, 2023, Plaintiff called the Ingham County central dispatch to report a "domestic disturbance" in the driveway of Plaintiff

and Romero's residence.² (Am. Compl. ¶ 16.) Plaintiff told the dispatcher that Romero owned a gun but that the gun was inside an automobile with Plaintiff. (*Id.* ¶ 18.) At 11:19 pm, the dispatcher reported to officers that Plaintiff had not been threatened with a weapon, that she was inside a white Chevy parked in her driveway, and that the firearm was secured inside her car. (*Id.* ¶¶ 21-22.)

Officers Moore and Kurtz responded to the domestic disturbance report. Their bodycam videos show that, at 11:24 pm, while Defendants were on the way to the scene, the dispatcher reported over the radio that there had been a gunshot. At 11:25 pm, another caller allegedly told the dispatcher that she believed a shooting had occurred, though she did not observe it herself. (Am. Compl. ¶ 24.) The dispatcher reported some of that information to Moore and Kurtz, saying, "It sounds like a female has been shot. This is going to be a confirmed shooting." (Kurtz Video 23:25:43, ECF No. 9-1.)³

Moore and Kurtz arrived in separate vehicles near Plaintiff's house at about 11:26 pm, moments apart from one another. They saw Romero standing beside a white Chevy vehicle. (Am. Compl. ¶ 27.) Moore asked the dispatcher whether "that white car is supposed to be in the driveway"; the dispatcher responded, "As far as we know, she was out front."

² Plaintiff contends that she made the call because Romero had slapped her. (Pl.'s Resp. Br. 17, ECF No. 24.)

³ Time references in the videos refer to the "AXON" timestamps in the upper right corner of the videos. These timestamps ostensibly correspond to the times at which the events occurred. Thus, for instance, "23:25:43" refers to 11:25:43 pm.

(Moore Video 23:26:32, ECF No. 9-2.) Around that time, a third caller believed to be Romero's daughter told the dispatcher that her mother had *not* been shot. (Am. Compl. ¶ 25.) The dispatcher reported this information to Moore and Kurtz either "over the air or via computer." (*Id.* ¶ 26.)⁴

Moore and Kurtz exited their vehicles with guns drawn and ran toward Romero, who was standing by the open driver's side door of the Chevy, apparently arguing with Plaintiff, who was seated inside the vehicle.⁵ As Moore approached, he told Romero, "Hey! Show me your hands! Show me your hands!" (Moore Video 23:26:54.) Plaintiff briefly shouted or screamed. (*Id.* 23:26:55.) Romero turned and faced Moore with his hands visible. He was holding two cell phones, one in each hand. Moore, who was now about ten feet away from Romero, shouted, "Show me your hands! Get on the ground! Get on the ground now! Get on the ground, I'll shoot you!" Romero responded, "Bro, bro," and slowly placed the cell phones on the ground. (*Id.* 23:27:02.) By this time, Kurtz had positioned himself

⁴ Defendants dispute this allegation and reject it as implausible, but the Court must accept it as true. The video recordings do not blatantly contradict it. Although there is no audible evidence that the dispatcher reported this information over the radio, and although there was only a short window of time between the alleged call to the dispatcher and the moment the officers left their vehicles, it is plausible that they saw the dispatcher's report on the computer screens in their cruisers. On the other hand, Plaintiff's assertion that Defendants "were aware that *no one* had been shot" (Am. Compl. ¶ 26 (emphasis added)) is conclusory and unsupported.

⁵ The sound of yelling by a male and a female is audible in the video recording.

next to Moore and was pointing his own firearm at Romero.

Moore repeatedly told Romero to “Get on the ground!” while Kurtz said, “Face down!” (*Id.* 23:27:06.) Romero got on his knees and kept his hands in the air. Romero then reached to his waist and pulled up his shirt, revealing a pistol in his waistband. Plaintiff yelled “Stop!” (*Id.* 23:27:08.) Moore and Kurtz continued telling Romero to get on the ground and to put his face down. Instead, he reached down and put his hand on the handle of his pistol. (*Id.* 23:27:09.) At this point, Moore fired four rounds at Romero, wounding him and causing him to fall forward onto his elbows. (*Id.* 23:27:11.)

Almost immediately after landing on his elbows, and while saying “I got you, I got you!,” Romero grabbed his pistol again and pulled it out of his waistband, apparently in order to throw it toward the officers. (*Id.* 23:27:12.) But when his hand grasped his gun, Moore and Kurtz fired about ten more rounds at him. (*Id.* 23:27:13.) The entire incident from the moment Moore first spoke to Romero to the moment Moore and Kurtz shot him a second time lasted about 20 seconds.

When Kurtz questioned Plaintiff about a minute later and asked whether she was injured, she told him that Romero had “slapped” her and “shot outside,” but “he didn’t shoot anybody.” (Kurtz Video 23:28:20-27.)

C. Claims

Based on the foregoing facts, Plaintiff claims in Count I of her amended complaint that Moore and Kurtz used excessive force on Romero, in violation of the Fourth Amendment. In Count II, she claims that Moore and Kurtz are liable for failing to prevent the

other from using excessive force. In Count III, she claims that the City is liable for failing to adequately train and supervise its officers in the use of deadly force.

Defendants move to dismiss the complaint for failure to state a claim.

II. LEGAL STANDARDS

A. Motion to Dismiss

A complaint may be dismissed for failure to state a claim if it fails “to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint need not contain detailed factual allegations, a plaintiff’s allegations must include more than labels and conclusions. *Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (“Threadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice.”). The Court must determine whether the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 679. “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

B. Qualified Immunity

Defendants Moore and Kurtz argue they are entitled to qualified immunity. An officer is entitled to qualified immunity and is shielded from damages and the burdens of suit “if his conduct does not violate a clearly established statutory or constitutional right of which a reasonable official would have known.” *Smith v. City of Troy*, 874 F.3d 938, 943 (6th Cir. 2017) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). “The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Determining an officer’s entitlement to qualified immunity thus “involves a two-step inquiry.” *Smith*, 874 F.3d at 944. First, the Court must determine whether the facts alleged, judged in a light most favorable to the plaintiff, show that the officer’s conduct violated a constitutional right. *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). “If no constitutional right would have been violated on the facts alleged, the inquiry stops at that point and the officer is entitled to qualified immunity.” *Id.*

Second, “[i]f a violation can be made out . . . the court must determine whether the right at stake was clearly established.” *Id.* “In making this determination, the court must rely on decisions from the United States Supreme Court, the Sixth Circuit Court of Appeals, or finally, the decision of other circuit courts.” *Id.* (citing *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993)). “Although ‘a case directly on point’ is not necessary to overcome qualified immunity, ‘existing precedent must have placed the . . . constitutional question beyond debate.’” *Linden v. City of*

Southfield, 75 F.4th 597, 602 (6th Cir. 2023) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). “If either prong [of the test for qualified immunity] is not met, then the government officer is entitled to qualified immunity.” *Doe v. Miami Univ.*, 882 F.3d 579, 604 (6th Cir. 2018). The Court can consider the two prongs in any order. *Gambrel v. Knox Cnty.*, 25 F.4th 391, 401 (6th Cir. 2022).

Once the defense of qualified immunity is raised, the “plaintiff bears the burden of overcoming qualified immunity.” *Crawford v. Tilley*, 15 F.4th 752, 760 (6th Cir. 2021). That burden includes “pointing to legal authority that clearly shows that the constitutional question . . . should be resolved in [the plaintiff’s] favor.” *Linden*, 75 F.4th at 604.

III. ANALYSIS

A. Evidence

At the outset, the Court must determine what evidence it will consider. In support of their motion, Defendants rely upon body camera videos of the incident. When considering a motion to dismiss under Rule 12(b)(6), the Court’s decision “rests primarily upon the allegations of the complaint[.]” *Barany-Snyder v. Weiner*, 539 F.3d 327, 332 (6th Cir. 2008). However, the Court can also consider “exhibits attached to the complaint, public records, items appearing in the record of the case, and exhibits attached to defendant’s motion . . . so long as they are referred to in the complaint and are central to the claims contained therein, without converting the motion to one for summary judgment.” *Gavitt v. Born*, 835 F.3d 623, 640 (6th Cir. 2016).

The Court can also consider video evidence where the complaint relies on facts that “could only be known . . . by watching the video[.]” *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022). In such cases, “it makes little sense to waste time and effort by ignoring the video[s] contents.” *Id.* However, that use is limited; “[i]f there is a factual dispute between parties, [the Court] can only rely on the video[] over the complaint to the degree the video[] [is] clear and ‘blatantly contradict[s]’ or ‘utterly discredit[s]’ the plaintiff’s version of events.” *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)). The Court’s summary of the facts and evidence in Section I above conforms with these rules. The Court can consider the videos because they depict conduct and events that could only be known by watching them. Indeed, the amended complaint refers to events occurring at specific moments in time, down to the second they occurred (Am. Compl. ¶¶ 28, 43); those times could only be known by watching the videos. Accordingly, it makes little sense to ignore the contents of the videos at this stage. Regardless, the Court accepts the well-pleaded allegations of the complaint as true unless the videos blatantly contradict them.

B. Count I: Fourth Amendment – Excessive Force (Moore & Kurtz)

The Fourth Amendment protects against unreasonable searches and seizures. “A seizure is ‘unreasonable’ under the Fourth Amendment if officers used excessive force.” *Puskas v. Del. Cnty.*, 56 F.4th 1088, 1093 (6th Cir. 2023) (quoting *Gambrel*, 25 F.4th at 400). In determining whether an officer’s use of force was excessive, the Court “balances the government’s interest in preventing crime and protecting the public

and the officers against a suspect's interest in avoiding injury." *Gambrel*, 25 F.4th at 400. The Court considers whether the "officer[s] actions are objectively reasonable in light of the facts and circumstances confronting [him] without regards to [his] underlying intent or motivations." *Kent v. Oakland Cnty.*, 810 F.3d 384, 390 (6th Cir. 2016) (quoting *Graham v. Connor*, 490 U.S. 386, 397 (1989) (internal quotation marks omitted)).

The Court must evaluate each incident in its own context, considering factors such as "(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 [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Shreve v. Jessamine Cnty. Fiscal Ct.*, 453 F.3d 681, 687 (6th Cir. 2005) (quoting *Graham*, 490 U.S. at 396). This test evaluates the "reasonableness of 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." *Kent*, 810 F.3d at 390 (quoting *Goodwin v. City of Painesville*, 781 F.3d 314, 320 (6th Cir. 2015) (internal quotation marks omitted)). The Court must account for the fact that "police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. When "a plaintiff claims that excessive force was used multiple times, 'the court must segment the incident into its constituent parts and consider the officer's entitlement to qualified immunity at each step along the way.'" *Wright v. City of Euclid*, 962 F.3d 852, 865 (6th Cir. 2020) (quoting *Smith*, 874 F.3d at

944). “The ultimate question, however, is ‘whether the totality of the circumstances justifies a particular sort of seizure.’” *Kent*, 810 F.3d at 390 (quoting *St. John v. Hickey*, 411 F.3d 762, 768 (6th Cir. 2005)).

The Court will segment the incident into the following three uses of force: (1) pointing firearms at Romero; (2) shooting Romero when he initially grabbed his pistol; and (3) shooting Romero again after he grabbed his pistol a second time.

1. Pointing Firearms at Romero

As a general matter, “a police officer may approach a suspect with a weapon drawn during a . . . stop when the officer reasonably fears for his safety.” *Wright*, 962 F.3d at 865. But “[a]n officer’s decision to point a gun at an unarmed civilian who objectively poses no threat to the officer or the public can certainly sustain a claim of excessive force.” *Id.* at 866 (quoting *Croom v. Balkwill*, 645 F.3d 1240, 1252 n.17 (11th Cir. 2011) (collecting cases)). Here, Defendants reasonably feared for their own safety or the safety of others. Construing the allegations and evidence in the light most favorable to Plaintiff, they were confronting a domestic dispute involving the discharge of a firearm. While the officers were driving to the scene, the dispatcher reported a “gunshot” and then a “confirmed shooting” where it appeared a female had been shot. Even if Defendants learned seconds before leaving their cruisers that Plaintiff herself had not been shot, they had reason to believe that a firearm had been used and that Plaintiff had been a target or perhaps another woman nearby had been a victim. Those facts alone gave Defendants reason to approach Romero with a show of deadly force in order to dissuade him or anyone else from

using a firearm again. Furthermore, officers in such a situation would not necessarily know which information they were receiving within such a short span of time was the most accurate; thus, a report that Plaintiff had *not* been shot would not necessarily eliminate that possibility in their minds or remove all concerns about her safety. And such safety concerns would have been amplified by the circumstances they witnessed upon arrival: two individuals (whom the officers would have reasonably assumed were Plaintiff and the shooter) arguing or yelling at one another. In other words, the domestic dispute had not ended. And Plaintiff herself was not fully visible, so it would not have been clear whether she was unharmed.

When attempting to overcome qualified immunity, Plaintiff cites no case that “come[s] close to resembling the facts” at issue here, i.e., officers responding to an ongoing domestic dispute that involved the discharge of a firearm. See *Gambrel*, 25 F.4th at 401. In *Craighead v. Lee*, 399 F.3d 954 (8th Cir. 2005), an officer was not entitled to qualified immunity for firing a shotgun at two individuals wrestling over a gun without providing any warning to them beforehand. *Id.* at 962. That case is not applicable to the question here because it did not assess whether pointing a gun at the victims was an excessive use of force.

In *Reed v. Campbell County*, 80 F.4th 734 (6th Cir. 2023), police officers responding to a report of a domestic dispute taking place outside a home found no evidence of an altercation, so they knocked on the door to the home. *Id.* at 740. After the plaintiff answered the door, he spoke to the officers briefly and then tried to shut the door. One officer responded by forcing the door open and pointing a gun at the plain-

tiff's head. *Id.* at 741. The court concluded this officer was not entitled to qualified immunity for his conduct because there was no basis to think the plaintiff “committed a serious crime or posed a threat to [the plaintiff's] or others' safety.” *Id.* at 749.

In contrast, Officers Moore and Kurtz were responding to more than a simple domestic dispute because it involved the use of a dangerous weapon. And when they arrived at the scene, they could observe signs that the dispute was still in progress. As Plaintiff acknowledges, they “heard yelling consistent with a domestic dispute.” (Pl.'s Resp. Br. 19, ECF No. 24.) Thus, they had reason to believe that their own safety or the safety of others might be at risk by further use of the firearm.

Plaintiff notes that Defendants did not observe a visible weapon. Regardless, they were aware that one had been used; they could not have known where it was located when they arrived. They could have reasonably suspected that Romero was still carrying one on his person, as turned out to be the case. Thus, Plaintiff's cases are readily distinguishable. She has not met her burden of overcoming qualified immunity regarding Defendants' decision to point firearms at Romero at the start of their encounter with him.

2. Shooting Romero

It is clearly established that “individuals have a right not to be shot unless they are perceived as posing a threat to officers or others.” *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006). Officers need not wait until a suspect raises his weapon and points it at officers before using deadly force. *See Thornton v. City of Columbus*, 727 F. App'x 829, 838 (6th Cir. 2018).

The surrounding circumstances can elevate the threat, such as the suspect's manner of holding the weapon, a short distance between the suspect and the officers, and the suspect's recent use of the weapon to threaten another person. *Id.* at 837.

When Defendants shot Romero the first time, he had not fully complied with multiple orders to “get on the ground” and to put his “face down,” and he was not moving toward compliance.⁶ Instead, he had lifted his shirt and put his hand on a gun that he had apparently used earlier in the evening during a dispute with his wife. He did not explain his intentions or make gestures clearly indicating that he intended to turn his weapon over to the officers. Nor did he reach for his weapon slowly and gradually, which might have given the officers an opportunity to specifically warn him not to touch his weapon. And by the time he put his hand on his gun, he could have quickly and easily turned it on his wife nearby or the officers in front of him. In fact, Plaintiff was only a few feet away to his left and would have been in a direct line of fire had he finished pulling the pistol out of his waistband with his right hand. Thus, not knowing Romero's intentions, but knowing the possibility that he might use his weapon again, Defendants had to make a split-second decision about how best to protect themselves and Plaintiff from the apparent threat he posed.

⁶ Plaintiff contends that Romero did not immediately comply because Defendants' commands conflicted with one another, though there was nothing conflicting about directions to get on the ground and to put his head down.

This case is somewhat similar to *Thornton*, where the Court of Appeals found no Fourth Amendment violation for the use of deadly force by officers on a man holding a shotgun. There, the officers “reasonably believed that the man with the shotgun was the same man who had, only moments earlier, threatened another person with a gun” and where “[o]fficers repeatedly ordered [the suspect] to drop the shotgun but [he] failed to comply with the [o]fficers’ orders.” *Thornton*, 727 F. App’x at 837. “[B]ecause the deadly threat posed by [the suspect] could have easily and quickly transformed into deadly action in a split-second, any reasonable police officer in the [o]fficer’s position would know that a decision to use deadly force would need to be rendered quickly.” *Id.*

As in *Thornton*, Romero had apparently used his gun minutes earlier during a heated dispute that was still in progress when officers arrived. He did not fully comply with repeated orders to get on the ground and to put his face down; instead, he reached for his weapon. At the time, his position and proximity to Defendants and Plaintiff gave him the means to quickly transform his conduct into deadly action, leaving Defendants few alternatives to stop the threat. Thus, this case falls close to, if not within, the zone of circumstances where any reasonable officer would conclude that deadly force was necessary to avert an immediate threat to their own safety or to the safety of Plaintiff. At the very least, this is not a case where the officers using deadly force had no reason to believe the suspect was dangerous or presented an immediate threat of serious harm.

Plaintiff notes that “mere possession of a weapon is not sufficient to justify the use of deadly force”;

rather, “there must be additional indicia that the safety of the officer or others is at risk.” *Campbell v. Cheatham Cnty. Sheriff’s Dep’t*, 47 F.4th 468, 480 (6th Cir. 2022). As indicated above, additional indicia of a safety risk were present here, including: Romero’s recent use of a firearm during a dispute with his wife that was ongoing when officers arrived; his lack of full compliance with the officers’ orders; and his unexpected attempt to remove a pistol from his waistband while in close proximity to the officers and his wife, who suddenly yelled after he revealed his pistol. Thus, Defendants did not use deadly force on Romero merely because he possessed a weapon.

None of the cases cited by Plaintiff would have made clear to Defendants that their actions were unlawful. In *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989), officers attempted to serve a peace warrant on a suspect at his home. When the officers approached him, the suspect grabbed a rifle and then fired six shots into the air, telling the officers not to enter his property. *Id.* at 213. The officers then backed out of his property and he followed them to the gate. As the officers were crouched behind their police vehicles, they saw the suspect place his rifle by the gate and then close the gate. *Id.* They warned him not to pick up his rifle. When he did so, an officer fired his weapon and killed the suspect. *Id.* The court declined to grant qualified immunity because the reasonableness of a belief that there was a threat of serious physical harm depended on whether the suspect had pointed his weapon at the officers and whether he had his finger on the trigger, but there were genuine disputes of fact on those matters. *Id.* at 216.

Unlike the officers in *Brandenburg*, Defendants were only a few feet away from Romero and were not protected by police vehicles. Also, reaching for the handle of a pistol with his finger near the trigger, as Romero did, is not the same as picking up a rifle. Given the smaller size and greater maneuverability of a pistol compared to a rifle, Romero's actions presented a more immediate risk of injury than those of the suspect in *Brandenburg*. Also, unlike this case, there were no facts in *Brandenburg* from which a reasonable officer could believe that the suspect had recently used his weapon to injure or threaten injury to a specific person. Finally, the Court of Appeals has made clear that "an officer need not face the business end of a gun to use deadly force." *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019). Thus, the fact that Romero did not actually point his pistol at Defendants or anyone else is not dispositive.

In *Lee v. Russ*, 33 F.4th 860 (6th Cir. 2022), the officer shot a knife-wielding suspect who was 30 feet away, had stood still for 20 seconds, had lowered his knife to his waist, and then made a step sideways. *Id.* at 863. Given the weapon at issue and the distance between the suspect and the officer, the suspect did not pose an immediate threat. *Id.* 865-66. By contrast, Romero presented a much more serious threat because he was much closer to a potential victim and his weapon was more dangerous.

In *Bletz v. Gribble*, 641 F.3d 743 (6th Cir. 2011), the officer shot the suspect as the suspect was lowering his gun in response to the officer's command to do so. *Id.* at 752. By contrast, Romero was not moving toward compliance with Defendants' commands when they shot him. Instead, he was elevating

the perceived threat by reaching for a weapon that he had used earlier in the evening.

In *King v. Taylor*, 694 F.3d 650 (6th Cir. 2012), there was a dispute of fact about the circumstances in which the officers shot and killed the suspect. Construing the evidence in the light most favorable to the plaintiff, they shot the suspect in the head “while he was lying on his couch and not pointing a gun at the officers” or “making any threatening gestures toward the officers.” *Id.* at 663-64. Some evidence indicated that he was not even looking at the officers, let alone threatening them. *Id.* at 662-63. Under such circumstances, a jury could conclude that he did not pose a serious threat of harm. Those circumstances are different. Romero was not lying passively on a couch. Moreover, *King* did not involve an officer responding to domestic violence involving the discharge of a firearm by the suspect. Thus, that case is distinguishable.

Similarly, in *Jacobs*, there was a factual dispute about what occurred. According to the plaintiff’s version of the events, he entered his basement apartment not knowing that the police, who had already swept the whole house in order to arrest someone else, were on the main floor. *Jacobs*, 915 F.3d at 1033. The police were aware of the plaintiff’s presence. When the plaintiff saw that his living area had been ransacked, he ran up the stairs, shouting “who the f—went into my house?” *Id.* When he saw an “unidentified black male” who he thought was “not supposed to be there,” he spun around, reached for a pistol in its holster, and fell down the stairs. *Id.* As he did so, an officer shot him three times.

Critically, at no time did the police in *Jacobs* identify themselves or give the plaintiff a command

and an opportunity to comply; rather, they shot him without warning almost immediately after seeing him. Moreover, they did not possess any facts suggesting he had recently used his firearm on, or in an argument with, another person. Thus, unlike Defendants here, they had no reason to believe the plaintiff might resort to violence instead of following their orders. Accordingly, *Jacobs* is distinguishable and would not have made it clear to Defendants that their conduct was unconstitutional. The same reasoning applies to *Craighead* and to *Floyd v. City of Detroit*, 518 F.3d 398 (6th Cir. 2008), where officers shot suspects without warning almost immediately after seeing them. *Craighead*, 399 F.3d at 962; *Floyd*, 518 F.3d at 408. Defendants did not do that to Romero. They gave him ample opportunity to comply with their commands to get on the ground and put his head down before he reached for his weapon, and he was aware of their commands.

In *Dickerson v. McClellan*, 101 F.3d 1151 (6th Cir. 1996), an officer shot the suspect as he was walking with his hands at his side to answer his front door. *Id.* at 1163. At the time, the door was closed and the suspect was still inside the home. *Id.* In other words, unlike Romero, the suspect posed no threat to the officers.

Plaintiff argues that her case should go forward because a jury could reasonably conclude that Romero was attempting to turn his weapon over to Defendants rather than use it on them. For instance, Plaintiff insists that Defendants should have known through their experience that Romero was attempting to turn over his pistol because he put his index finger along the barrel of the weapon instead of on the trigger. “Yet, qualified immunity protects officers from liability

for mistakes of law and fact.” *Chappell v. City of Cleveland*, 585 F.3d 901, 916 (6th Cir. 2009). Here, there are no facts alleged in the complaint or apparent in the video indicating that Defendants, “in potentially misinterpreting [Romero’s] actions, where plainly incompetent or deliberately violated his rights[.]” *See id.* Even if a jury could conclude that Romero was attempting to turn over his weapon, Defendants were not plainly incompetent in perceiving his actions as threatening. After all, a finger on the barrel of a pistol is only inches from the trigger. And given the speed of Romero’s movements, the lack of forewarning about his intentions, and his failure to fully comply with orders, it would have been difficult for any reasonable officer in Defendants’ position to discern the difference between grabbing the gun to use it versus grabbing the gun to hand it over. Qualified immunity protects them for making a split-second decision to use force in these uncertain circumstances.

In short, considering the facts alleged and those clearly depicted in the videos, Plaintiff has failed to satisfy her burden of showing that the law was clearly established such that Defendants would have known that their use of deadly force was unconstitutional. Accordingly, Moore and Kurtz are entitled to qualified immunity for shooting Romero after he reached for and put his hand on his pistol.

3. Shooting Romero Again

Moore and Kurtz are also entitled to qualified immunity for shooting Romero again after he fell to the ground. The resolution of this issue generally follows from the reasoning in the previous section. The surrounding circumstances were mostly the same. And

as before, Romero made no clear indication that he was attempting to comply with Defendants' orders or that he wanted to turn over his weapon. He did say "I got you" two times but those statements could reasonably be interpreted as a threat rather than an acknowledgement that he understood what Defendants were asking. As discussed above, qualified immunity protects Defendants from a reasonable misunderstanding of Romero's intentions. *See Chappell*, 585 F.3d at 916. Indeed, the fact that Romero grabbed his pistol again after being shot for doing that the first time suggests he did *not* intend to comply with their commands.

True, "the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law." *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir. 2006). But while Romero had fallen forward and was not as much of an immediate threat to *Plaintiff*, he was not incapacitated. The video confirms that he was still very much capable of shooting Moore or Kurtz. After Moore shot him the first time, Romero grabbed his gun with his body turned toward Moore and Kurtz and, while being shot, tossed the weapon in their direction. Finally, he acted within seconds after falling on the ground, forcing Defendants to make a quick decision as to their response. Plaintiff has not met her burden of overcoming qualified immunity for their actions.

In summary, Defendants Moore and Kurtz are entitled to qualified immunity for Count I. Because Plaintiff appears to sue them in their individual capacities only, the Court will dismiss this claim.

C. Count II: Failure to Intervene

Plaintiff claims that Defendants Moore and Kurtz are each liable for the other's use of excessive force because they failed to intervene to stop the other's actions. Based on the reasoning above regarding Count I, Defendants are entitled to qualified immunity for this claim. If Defendants are entitled to qualified immunity for their own actions, it follows that they are entitled to qualified immunity for failing to prevent the actions of the other. If it was not clearly established that their own conduct violated Romero's constitutional rights, then it was not clearly established that they had to prevent the other's conduct. Therefore, the Court will dismiss Count II.

D. Count III: Municipal Liability

Plaintiff claims that the City is liable for the alleged violations of Romero's constitutional rights. A municipality like the City "may not be held liable under § 1983 on a *respondeat superior* theory—in other words, 'solely because it employs a tortfeasor.'" *D'Ambrosio v. Marino*, 747 F.3d 378, 388-89 (6th Cir. 2013) (quoting *Monell*, 436 U.S. at 691). "Instead, a plaintiff must show that 'through its deliberate conduct, the municipality was the "moving force" behind the injury alleged.'" *Wright*, 962 F.3d at 879-80 (quoting *Alman v. Reed*, 703 F.3d 887, 903 (6th Cir. 2013)). "A plaintiff does this by showing that the municipality had a 'policy or custom' that caused the violation of his rights." *Id.* at 880 (quoting *Monell*, 436 U.S. at 694).

Plaintiff claims that the City had a custom or policy of failing to adequately train and supervise officers with respect to the use of deadly force.

To succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.

Ouza v. City of Dearborn Heights, 969 F.3d 265, 286-87 (6th Cir. 2020) (quoting *Ellis v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006)). In other words, “the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact.” *Id.* at 287 (quoting *City of Canton v. Harris*, 489 U.S. 378, 388 (1989)).

“There are ‘at least two situations in which inadequate training [or supervision] could be found to be the result of deliberate indifference.’” *Id.* (quoting *Cherrington v. Skeeter*, 344 F.3d 631, 646 (6th Cir. 2003)). First, Plaintiff can show deliberate indifference by showing a failure to act “in response to repeated complaints of constitutional violations by its officers.” *Id.* (quoting *Cherrington*, 344 F.3d at 646). Under this approach, Plaintiff must allege facts from which to infer that the City's awareness of “*prior* instances of unconstitutional conduct” put it on notice that its training or supervision was “deficient and likely to cause injury.” *Id.* (quoting *Fisher v. Harden*, 398 F.3d 837, 849 (6th Cir. 2005) (emphasis added)).

Second, Plaintiff can show that the City was deliberately indifferent by “fail[ing] to equip law enforcement officers with specific tools to handle recurring

situations.” *Id.* (quoting *Bd. of Cnty. Comm’rs v. Brown*, 520 U.S. 397, 409 (1997)). In other words, the “need for more or different training” may be “so obvious, and the inadequacy so likely to result in the violation of constitutional rights,” that the City’s failure amounts to deliberate indifference. *Id.* (quoting *Harris*, 489 U.S. at 390). Under this approach, notice of a pattern of unconstitutional conduct is not necessary; deliberate indifference may be present because the “risk of the constitutional violation is so obvious or foreseeable” that the City should have prepared its officers for it. *Id.*

Even when drawing all reasonable inferences in her favor, Plaintiff’s allegations do not satisfy either approach. Plaintiff alleges no specific facts about the City’s training program. Instead, she contends that Moore and Kurtz would have taken different actions had they been properly trained. For instance, they would have taken a position of cover, used de-escalation techniques, or “refrained from initiating a rapid intervention with weapons drawn and aimed at [Romero].” (Am. Compl. ¶ 119.) These assertions are speculative and conclusory and do not plausibly show deliberate indifference by the City in its training program.

Moreover, there is no plausible connection between those alleged inadequacies in training and the harm suffered by Plaintiff. Officers Moore and Kurtz had to confront a potentially volatile and dangerous domestic dispute where one spouse possessed a gun, had used it, and had possibly injured the other. A strong show of force was reasonable to prevent further injury to Plaintiff and to check on her well-being. It is not clear how “de-escalation techniques” and taking a position

of cover would have helped the situation or prevented the outcome. Put another way, it is not so obvious that the lack of such training would likely result in a violation of constitutional rights.

Plaintiff argues that the Court should give her an opportunity for discovery in order to prove her claim. However, there is no relaxed pleading standard for claims based on facts or suspicions that a plaintiff cannot learn or confirm until after conducting discovery. In all cases, a plaintiff must present a complaint that pleads sufficient factual matter to state a “plausible” claim, rather than a merely “possible” one. *See Iqbal*, 556 U.S. at 679. “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss” and “unlock[s] the doors of discovery.” *Id.* at 678-79; *see Changizi v. Dep’t of Health & Hum. Servs.*, 82 F.4th 492, 498 (6th Cir. 2023) (“[F]ederal courts will not ‘unlock the doors of discovery’ for a fishing expedition based on a plaintiff’s speculative assertions.” (quoting *Iqbal*, 556 U.S. at 678-79)). Consequently, the Court will dismiss the City for failure to state a claim.

IV. CONCLUSION

For the reasons stated above, the Court will grant Defendants’ motion to dismiss. Defendants Moore and Kurtz are entitled to qualified immunity for Counts I and II. Plaintiff fails to state a claim against the City in Count III.

App.68a

The Court will enter an order consistent with this Opinion.

/s/ Hala Y. Jarbou
Chief United States District Judge

Dated: September 18, 2024

**ORDER DENYING PETITION FOR
REHEARING EN BANC, U.S. COURT OF
APPEALS FOR THE SIXTH CIRCUIT
(FEBRUARY 12, 2026)**

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 26a0039p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ASHLY ROMERO, as personal representative
for the estate of Stephen Romero, deceased,

Plaintiff-Appellant,

v.

CITY OF LANSING, MICHIGAN, a Michigan
Municipal Corporation; DONOVAN MOORE and
JEFF KURTZ, Officers, individually,

Defendants-Appellees.

No. 24-1865

On Petition for Rehearing En Banc
United States District Court for the
Western District of Michigan at Grand Rapids.
No. 1:23-cv-01322—Hala Y. Jarbou, District Judge.

Decided and Filed: February 12, 2026

Before: MOORE, GRIFFIN, and
RITZ, Circuit Judges.

ORDER

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. Judge Griffin would grant the petition for rehearing en banc for the reasons stated in his dissent to the court's opinion of November 18, 2025 and for those stated in his dissent appended to this order.

The petition was then circulated to the full court. Less than a majority of the judges voted in favor of rehearing en banc.

Therefore, the petition is denied.

CONCURRING OPINION OF JUDGE RITZ

CONCURRENCE

RITZ, Circuit Judge, concurring in the denial of rehearing en banc. The full court correctly denies en banc rehearing in this case. In support of rehearing, the defendants argued that the panel opinion conflicted with two cases: the Supreme Court’s decision in *Barnes v. Felix*, 605 U.S. 73 (2025), and our decision in *Eastep v. City of Nashville*, 156 F.4th 819 (6th Cir. 2025). Pet. for En Banc Reh’g, at 10-11, 14. The defendants are wrong on both counts.

Barnes made clear that “[t]o assess whether an officer acted reasonably in using force, a court must consider all the relevant circumstances, including facts and events leading up to the climactic moment.” 605 U.S. at 76. Here, the panel properly applied *Barnes* by examining not only the moment of Stephen Romero’s killing but also the totality of the circumstances, including what the officers saw and heard throughout the entire encounter. For example, the panel opinion accounted for what the officers knew based on the information from dispatch; what the officers saw when they arrived on the scene; and what the officers observed when Stephen reached for his weapon the first time, causing them to shoot him. *Romero v. City of Lansing*, 159 F.4th 1002, 1006-07, 1010-13 (6th Cir. 2025). And the panel did not use an artificially segmented perspective when examining the circumstances surrounding the officers’ second round of shots. It was in significant part *because of* what came before that fatal volley of shots—in particular, that the officers had already wounded and brought

Stephen to the ground with their first round of shots—that led the panel to hold that Ashly Romero’s excessive-force claim could proceed to discovery.

Eastep is likewise fully consistent with the panel opinion. *Eastep* involved a police shooting resulting in the death of a suspect who: “(1) consistently and repeatedly disobeyed [officers’] commands to drop his weapon; (2) took two steps towards [officers]; (3) quickly removed an object from his jacket pocket; and (4) using both hands, from a shoulder-level position, pointed the object at officers.” 156 F.4th at 829. The suspect had also attempted “to actively resist or evade arrest.” *Id.* at 830. Given these facts, we held that an excessive-force suit against most of the defendant officers should be dismissed. *Id.* But those facts are absent here—Stephen never actively resisted officers, never advanced towards them, and never pointed his gun at them. In fact, in *Eastep* we allowed the excessive-force suit to go forward against one officer who, a mere three seconds after the suspect had been incapacitated and brought to the ground by the first round of shots, fired another round of shots at the suspect. *Id.* at 830-31. The second shooting in this case is akin to the latter set of facts from *Eastep*—where the suspect, having been incapacitated, no longer posed a threat. If *Eastep* conflicted with the panel majority opinion, presumably the panel dissent would have pointed that out. But the dissent did not even cite *Eastep*.

Now, my dissenting colleagues air various grievances with the panel opinion and this area of the law generally. They mischaracterize the facts of this case, failing to take them in the light most favorable to Ashly. And they seek to augment the defendants’ re-

hearing petition with arguments the defendants did not make and cases they did not cite. The points made in these dissenting statements, though, do not represent governing law. The panel opinion does, and it binds district courts and future panels. I will not reproduce the panel opinion's analysis here.

But there is one allegation, first put forward by the panel dissent and amplified again here, that warrants a brief response. That is the idea that the decision in this case “gravely endangers our officers” by creating an “irresponsible and dangerous” risk of harm or potential financial liability that no rational person would voluntarily assume. *See infra* at 9 (Griffin, J., dissenting from the denial of rehearing en banc); *see Romero*, 159 F.4th at 1015 (Griffin, J., dissenting).

This allegation is false. Consider first the disconnect between this hyperbolic accusation and the narrowness of the panel's holding. The panel held only that Ashly's excessive-force claim can proceed to discovery, and we affirmed the dismissal of her other claims. The officers here may well defeat her remaining claim down the road. But at this stage, on the facts as alleged, and under our case law, we cannot dismiss Ashly's excessive-force claim as implausible. It also bears noting that the panel did not decide whether Ashly did enough to allege excessive force during the initial stages of the encounter. *See Romero*, 159 F.4th at 1010. So, the opinion does not preclude a finding in this case, or in cases with similar facts, that the officers were justified in approaching the scene with weapons drawn, or in firing when the armed individual first reached for his gun.

Next, note that the supposed danger posed by the narrow holding in this case has changed since the panel opinion was issued. When the panel issued its opinion, the dissent’s allegation was that the decision “endangers the lives of *all* law enforcement officers in the Sixth Circuit.” *Id.* at 1015 (Griffin, J., dissenting) (emphasis added). Now the alleged danger extends only to “local and state police officers in our Circuit.” *See infra* at 9 (Griffin, J., dissenting from the denial of rehearing en banc). This is apparently an effort to wall off federal law enforcement officers from the possibility of damages liability, even when they use deadly force unreasonably as the officers allegedly did here. *Cf. Egbert v. Boule*, 596 U.S. 482, 486, 495-96 (2022). In any event, the shifting rationale for the alleged danger posed by the panel opinion further demonstrates the allegation’s shaky foundations.

Finally, set aside that it is substantively incorrect to suggest that the holding in this case prevents police officers from using self-defense when appropriate. Set aside, also, the question of who pays when police officers are found liable for damages. *See Brown v. City of New York*, 798 F.3d 94, 103 n.15 (2d Cir. 2015) (noting the likelihood of indemnification); *see also Nieves v. Bartlett*, 587 U.S. 391, 426 & n.2 (2019) (Sotomayor, J., dissenting). Consider instead, more broadly, what underpins the allegation that allowing discovery on this particular claim, on these particular facts, puts police officers in the “impossible situation” of assuming “a high level of personal risk” or “substantial personal financial liability” if they use deadly force. *See infra* at 9 (Griffin, J., dissenting from the denial of rehearing en banc). Think about what that

allegation assumes about the motives or fortitude of those who choose law enforcement as a career.

Obviously, law enforcement officers have difficult, dangerous jobs. Nobody who becomes one is blind to that. And changes in the legal landscape governing how, when, and where civilians can carry firearms have made officers' jobs even more difficult and dangerous. In many places, for instance, it is perfectly legal for civilians to carry or display a gun, like Stephen was doing when officers shot and killed him. For good reason, our use-of-force law gives officers the latitude to make quick decisions to protect themselves and others in rapidly developing situations, including when they encounter armed civilians. This is shown by the legion of cases, many cited by my dissenting colleagues, granting qualified immunity to officers who have used deadly force.

But our use-of-force jurisprudence is not as monolithic as my dissenting colleagues suggest. Sometimes officers who use deadly force are not entitled to qualified immunity. As the panel opinion explains, our cases provide space for peaceful resolution of encounters between law enforcement and civilians (armed or not). One way is by recognizing that a rapidly developing situation, as circumstances change, can become *less* dangerous to officers. *See, e.g., Eastep*, 156 F.4th at 830-31; *Lee v. Russ*, 33 F.4th 860, 862-64 (6th Cir. 2022). Another way is by ensuring that officers allow a civilian who is not posing an imminent threat to comply with commands before they shoot that civilian. *See, e.g., Bletz v. Gribble*, 641 F.3d 743, 752-53 (6th Cir. 2011). After all, officers are not the only ones involved in police-civilian encounters. When officers use deadly force, a civilian dies. Sometimes that result

is justified under the law, due to the actions taken by that civilian. Sometimes, though, a police-civilian encounter leaves dead a member of the community who should not be dead. The stakes are high.

Well-trained officers (and their families) know and appreciate all of this, much more tangibly than we do. They are keenly aware that when faced with an immediate threat they can reasonably use deadly force to defend themselves and others. Our court's decision in this case does not change that. They also know that safe and effective policing requires trust from the community, and when an officer uses deadly force unreasonably, it breaks down that trust. These officers, knowing all of this, go to work each day to serve and protect the public, not to kill people who should not be killed. The leaders of professional law enforcement agencies know the stakes too, so they conduct training to help their officers manage difficult, dangerous situations. These agencies and officers further know that, as with most jobs, there can be consequences, financial and otherwise, if they fail to meet certain standards. (Federal judges can barely relate.)

They do not need us to tell them any of this. Nor do they need us to offer caricatures about what "our officers," *see infra* at 9 (Griffin, J., dissenting from the denial of rehearing en banc), think about this or any other decision of our court.

That is because officers who want to protect their communities, despite all the potential hazards and consequences, nonetheless make the weighty and courageous decision to take on their perilous responsibilities. They do so not to get rich, but out of a deep and enduring commitment to public service.

We should celebrate that commitment. We should not characterize an officer's decision to serve as a cold calculus about financial benefit. And we should not insinuate that officers are too fragile to accept that their jobs come with risk or they need to act reasonably when using deadly force.

DISSENTING OPINION OF JUDGE GRIFFIN

DISSENT

GRIFFIN, Circuit Judge, dissenting from the denial of rehearing en banc.

Once again, “the en banc Sixth Circuit [is] unwilling (or unable) to reconcile its precedents.” *CNH Indus. N.V. v. Reese*, 583 U.S. 133, 138 n.2 (2018) (per curiam).

Our abdication of responsibility to employ our en banc rehearing procedure has roused the ire of the Supreme Court. As Justice Thomas, joined by Justice Alito, has implored, “The Sixth Circuit can and must do more to correct its own errors.” *Davis v. Smith*, 145 S. Ct. 93, 97 (2025) (Thomas, J., dissenting from denial of certiorari). Moreover, “reluctance in deploying en banc review is understandable, but only to a point.” *Id.* (citation modified). We “are well past that point.” *Id.*

Time and again, Justice Thomas has chastised us (particularly in the AEDPA context) for not correcting our errors of exceptional importance:

The decision below is the latest in a long line of Sixth Circuit AEDPA errors. This Court has reversed the Sixth Circuit at least two dozen times for misapplying AEDPA. *See Shoop v. Twyford*, 596 U.S. 811 (2022); *Brown v. Davenport*, 596 U.S. 118, (2022); *Cassano v. Shoop*, 10 F.4th 695, 696–697 (6th Cir. 2021) (Griffin, J., dissenting from denial of rehearing en banc) (collecting 22 earlier cases in which this Court reversed the Sixth Circuit “for not applying the deference to state-court decisions mandated

by AEDPA”). And, these reversals only scratch the surface of the Sixth Circuit’s defiance. *See e.g., Shoop v. Cunningham*, 143 S. Ct. 37 (2022) (Thomas, J., dissenting from denial of certiorari); *Shoop v. Cassano*, 142 S. Ct. 2051 (2022) (Thomas, J., dissenting from denial of certiorari); *Rapelje v. Blackston*, 577 U.S. 1019 (2015) (Scalia, J., dissenting from denial of certiorari). “That court’s record of ‘plain and repetitive’ AEDPA error is an insult to Congress and a disservice to the people of Michigan, Ohio, Kentucky, and Tennessee.” *Cunningham*, 143 S. Ct. at 44. The Sixth Circuit can and must do more to correct its own errors. *See id.*

Some “reluctance in deploying en banc review is understandable,” but “only to a point.” *Id.* at 45. “The Sixth Circuit’s habeas problems are well past that point—as evidenced by the depressing regularity with which petitions like this one reach us.” *Id.* When wayward panels refuse to apply AEDPA, hopefully, the Sixth Circuit will correct its errors by rehearing the case en banc. *See* 28 U.S.C. § 46(c); Fed. Rule App. Proc. 40(c).

Id. at 97 (citation modified).

The “Federal Rules of Appellate Procedure provide an important and necessary remedy for courts of appeals to correct their conflicts and errors of exceptional importance.” *Cassano*, 10 F.4th at 697 (citing what is now Fed. R. App. P. 40(b)(2)). The majority opinion in this case clearly warrants en banc review so that we may fulfill our duty to “secure or maintain uniformity of the court’s decisions” and answer a

“question[] of exceptional importance.”¹ Fed. R. App. P. 40(b)(2).

This is a textbook case of self-defense entitling defendants to qualified immunity. Under the majority opinion, however, local and state law enforcement can no longer use deadly force when an armed and dangerous suspect repeatedly reaches for or even removes a firearm from his waist. Instead, they must now wait to see whether the suspect intends to surrender his weapon or use it against them before they may respond with deadly force.

But this holding stands in irreconcilable conflict with our past decisions, under which an officer need not face the business end of a gun to use deadly force, “even if facts beyond his knowledge meant that he actually faced no threat.” *Thomas v. City of Columbus*, 854 F.3d 361, 366–67 (6th Cir. 2017); *Mullins v. Cyranek*, 805 F.3d 760, 768 (6th Cir. 2015) (“[W]e do not think it is prudent to deny police officers qualified immunity in situations where they are faced with a threat of severe physical injury or death and must make split-second decisions, albeit ultimately mistaken decisions, about the amount of force necessary to subdue such a threat.”).

What matters—and has always mattered—is whether officers could reasonably conclude that a

¹ Despite our infamous reversal rate by the Supreme Court, see Mark Walsh, *A Sixth Sense: The 6th Circuit Has Surpassed the 9th as the Most Reversed Appeals Court*, A.B.A. J., Dec. 2012, at 15–16, our court has invoked our rehearing en banc procedure in only a handful of cases in recent years—by my count, twice in 2025, five times in 2024, four times in 2023, twice in 2022, three times in 2021, and three times in 2020.

suspect might fire a gun at them and therefore had probable cause that made their shooting lawful. *Puskas v. Delaware County*, 56 F.4th 1088, 1096 (6th Cir. 2023) (collecting cases); *see also Cunningham v. Shelby County*, 994 F.3d 761, 764, 766–67 (6th Cir. 2021). And, here, officers could certainly conclude that Stephen Romero might fire a gun at them and, thus, they were entitled to qualified immunity. *See generally Romero v. City of Lansing*, 159 F.4th 1002, 1016–17 (6th Cir. 2025) (Griffin, J., concurring in part and dissenting in part) (recounting the facts as demonstrated by video evidence, which, among other things, shows officers ordering Romero to get face down on the ground, which he never did; Romero grabbing for a gun in his waistband, of his own accord and unexpectedly, mere feet away from the officers; and Romero reaching for the gun a second time, even after being shot for doing so before, and this time removing it from his waistband).

Plaintiff bears the burden to show that defendants were not entitled to qualified immunity. *Cunningham*, 994 F.3d at 765. She must establish that the officers violated decedent’s constitutional right and that the right violated was clearly established to “all but the plainly incompetent.” *District of Columbia v. Wesby*, 583 U.S. 48, 62–63 (2018). She has not met her burden on either prong of qualified immunity. That she failed to do so at the motion-to-dismiss stage is of no consequence because all relevant evidence is chronicled in the body-camera videos. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (stressing that qualified immunity is to be decided at the “earliest possible” juncture); *see also Bell v. City of Southfield*, 37 F.4th 362, 364 (6th

Cir. 2022). By deciding otherwise, the majority opinion contravenes our precedent.

The irresponsible and dangerous majority opinion also raises an issue of exceptional importance, as it puts local and state police officers in our Circuit in an impossible situation: Going forward, they must voluntarily assume a high level of personal risk—of being shot by an armed and dangerous suspect who is grabbing for and then raising his firearm mere feet away. They also risk incurring substantial personal financial liability if they engage in self-defense under these circumstances. Rehearing en banc should have been granted to rectify the majority's exceptional, and alarming, error that gravely endangers our officers and our communities.

For these reasons, I would grant rehearing en banc and therefore respectfully, and regrettably, dissent.

**DISSENTING OPINION OF
JUDGES THAPAR AND HERMANDORFER**

DISSENT

THAPAR and HERMANDORFER, Circuit Judges, dissenting from the denial of rehearing en banc. If turning back the clock were possible, everyone involved in this case would. In a perfect world, no one would be threatened by domestic violence, no one would need to make a split-second decision whether to stave off deadly force by using deadly force, and no one would have to witness a loved one's shooting death. And in a perfect world, judges would generally agree on whether force was justified in a fast-moving situation.

But settled qualified-immunity rules reflect that instead, we live in the real world, where officers must respond to volatile and violent situations with little lead time and no margin for error. They do so by permitting suit only on a showing that officers violated clearly established law in the specific circumstances they faced. That essential limit, the Supreme Court has reiterated, ensures officers can faithfully perform in the field without fear of being second-guessed by courts wielding the benefit of hindsight.

The panel decision denying qualified immunity misapplied settled rules and repeated common errors. Our en banc court should have remedied that deviation from Supreme Court and this court's precedent. We respectfully dissent from the decision not to do so.

I.

The officers in this case faced dangers that most of us can't imagine. For starters, this was a domestic-

violence call—one of the most dangerous calls an officer can receive. See *United States v. Rahimi*, 602 U.S. 680, 707 (2024) (Sotomayor, J., concurring) (observing that domestic-violence calls “caus[e] more officer deaths with a firearm than any other type of call”); *Stimmel v. Sessions*, 879 F.3d 198, 210 (6th Cir. 2018) (“[R]esponding to family violence calls is among a police officer’s most risky duties.”).

This case was no exception. Stephen Romero’s wife, Ashly, had called 911 to report a domestic disturbance. A second caller said that a woman was shot at the residence, so the dispatcher told the officers, “It’s going to be a confirmed shooting.” Kurtz BWC 1:24. A third caller allegedly clarified there was no shooting, but it appears dispatch couldn’t tell the officers in time. Either way, this was a precarious situation with an armed suspect. So the officers approached with their guns drawn.

They arrived to find a suspect who refused to comply with their repeated orders to get on the ground. Indeed, the officers told Romero that if he didn’t get on the ground, they would shoot. After Romero went to his knees, he reached across his body for a firearm in his waistband. The officers shot him. Even after being shot, Romero continued to reach for his gun. The officers again ordered him to stop. But he didn’t, so they shot him again. The whole confrontation took place in less than 30 seconds.

Despite all that, the panel majority called Romero “largely compliant.” *Romero v. City of Lansing*, 159 F.4th 1002, 1010 (6th Cir. 2025). That’s because he said, “I got you.” *Id.* According to the majority, the Oxford English Dictionary tells us that means Romero was going to comply with the officers’ orders. *Id.* at 1011.

Yet against what Romero said, consider what he did: At the same time, he tried to pull a gun from his waistband, just a few feet away from the officers and his wife. Officers need not take an armed suspect at his word when his actions show the opposite. What's more, the officers had ordered Romero to "stop." No dictionary is needed to understand that command. Still, Romero didn't comply with it. So the officers reasonably perceived a serious threat to their lives (not to mention Ashly's) when Romero reached for his gun.

II.

A.

Qualified immunity exists to protect officers who must make these potentially deadly split-second decisions from liability. So our doctrine grants judges a narrow role. That role doesn't include second-guessing an officer's decisions with the "20/20 vision of hindsight." *Kisela v. Hughes*, 584 U.S. 100, 103 (2018) (per curiam) (quotation omitted). Instead, we ask whether an officer's conduct violated "clearly established" rules that "placed" the "constitutional question beyond debate." *Id.* at 104 (quotation omitted). That way, liability runs only to "the plainly incompetent or those who knowingly violate the law"—not to an officer who happens to fall on the wrong side of a fine line within a "hazy legal backdrop." *Mullenix v. Luna*, 577 U.S. 7, 12, 14 (2015) (per curiam) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). That "exacting standard gives government officials breathing room to make reasonable but mistaken judgments." *City & County of San Francisco v. Sheehan*, 575 U.S. 600, 611 (2015) (quotation omitted).

How should courts determine whether a constitutional rule is sufficiently “clear[]” such that the “constitutional question [is] beyond debate”? *Kisela*, 584 U.S. at 104. There, too, the Supreme Court’s directives are “settled.” *City of Tahlequah v. Bond*, 595 U.S. 9, 13 (2021) (per curiam). “It is not enough that a rule be suggested by then-existing precedent.” *Id.* at 12. Instead, “[t]he dispositive question is ‘whether the violative nature of *particular* conduct is clearly established.’” *Mullenix*, 577 U.S. at 12 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). That involves a high “degree of specificity” achieved only by looking to “the specific context of the case,” not assessing the right “as a broad general proposition.” *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam)).

In short, the “clearly established” standard “requires that the legal principle clearly prohibit the officer’s conduct *in the particular circumstances before him.*” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (emphasis added). And abiding by that rule is “particularly important in excessive force cases.” *City of Escondido v. Emmons*, 586 U.S. 38, 42 (2019) (per curiam). That’s because when officers must make split-second decisions in the field, they don’t have the luxury of time to study the penumbras of the caselaw, let alone apply it to the new facts unfolding in front of them. Freezing officers with fear of after-the-fact fault-finding “unduly inhibit[s]” their ability to respond in fluid and dangerous situations. *Ziglar v. Abbasi*, 582 U.S. 120, 150 (2017) (quotation omitted). So the “clearly established law” requirement grants officers essential protection that advances public safety.

B.

The command “not to define clearly established law at a high level of generality” may seem straightforward enough. *Emmons*, 586 U.S. at 42 (quotation omitted). But time after time, lower courts have disregarded it. These recurring level-of-generality errors have, in turn, prompted Supreme Court intervention. Indeed, other than “plain and repetitive” misapplication of habeas rules, *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (per curiam), it’s hard to identify an analytical misstep by circuits that has generated more uniform (and summary) rebuke.¹ Nor has the problem’s “repeated[]” nature escaped the Supreme Court’s notice. *al-Kidd*, 563 U.S. at 742 (collecting cases); see also, e.g., *Bond*, 595 U.S. at 12 (“We have repeatedly told courts not to define clearly established law at too high a level of generality.”); *Wesby*, 583 U.S. at 63 (“repeatedly stressed”); *Kisela*, 584 U.S. at 104 (“repeatedly told” (quotation omitted)); *Mullenix*, 577 U.S. at 12 (“repeatedly told” (quotation omitted)); *Sheehan*, 575 U.S. at 611 (“repeatedly told” (quotation omitted));

¹ See, e.g., *Bond*, 595 U.S. at 12–13 (summary reversal); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5–7 (2021) (per curiam) (summary reversal); *Emmons*, 586 U.S. at 43 (summary reversal); *Kisela*, 584 U.S. at 104 (summary reversal); *Wesby*, 583 U.S. at 63–65; *White v. Pauly*, 580 U.S. 73, 79–80 (2017) (per curiam) (summary reversal); *Mullenix*, 577 U.S. at 12 (summary reversal); *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam) (summary reversal); *Sheehan*, 575 U.S. at 611; *Carroll v. Carman*, 574 U.S. 13, 16–20 (2014) (per curiam) (summary reversal); *Wood v. Moss*, 572 U.S. 744, 759–61 (2014); *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014); *Stanton v. Sims*, 571 U.S. 3, 7–11 (2013) (per curiam) (summary reversal); *Reichle v. Howards*, 566 U.S. 658, 663–64 (2012); *al-Kidd*, 563 U.S. at 742; *Brosseau*, 543 U.S. at 198 (summary reversal).

Plumhoff, 572 U.S. at 779 (“repeatedly told” (quotation omitted)).

We believe the panel’s opinion commits the latest in a long line of level-of-generality fouls. Stepping through its analysis shows why. The opinion describes the officers’ bodycam footage and notes the need to draw all potentially disputed facts in the plaintiff’s favor. *Romero*, 159 F.4th at 1007–08. Then, citing those facts—and because more litigation *could* yield more hypothetical evidence about whether the officers’ use of force was reasonable—the panel concludes that the “inconclusive” video might reasonably be interpreted to show that *Romero* was attempting to surrender his weapon by reaching for it. *Id.* at 1013–14. From there, the opinion denies qualified immunity based on cases holding that “individuals have a right not to be shot unless they are perceived as posing a threat to officers or others.” *Id.* (quoting *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012)).

But viewing the encounter through the lens of “non-threatening suspect” raises the level of generality too high. As other use-of-force decisions show, it’s not enough to rest on the “general proposition that force must be justified.”² *Mullenix*, 577 U.S. at 16. To deny

² The Supreme Court has, in rare instances, denied qualified immunity when “a general constitutional rule . . . may apply with obvious clarity” to officers’ conduct, even if there’s no on-point precedent. *Taylor v. Riojas*, 592 U.S. 7, 9 (2020) (quotation omitted). Such cases are “extreme” and the violation must be “obvious[]” and “particularly egregious.” *Id.* at 8–9 & n.2. But this case is different. As Supreme Court and federal appellate precedent show, *see infra* pp. 7–8 & n.4, any violation is far from “obvious.” If anything, the “general constitutional rule” authorized the officers’ use of force here.

qualified immunity, we must instead conclude that “existing precedent squarely governs the specific facts at issue.” *Emmons*, 586 U.S. at 42 (quotation omitted). Here, those facts involved a suspect who officers knew was armed and believed had fired his weapon; was within ready striking distance of officers and a potential domestic-violence victim; provided at most mixed signals of intent to surrender; and at the same time repeatedly defied officers’ clear orders by reaching for his gun.

With those facts in mind, resolving this case in the officers’ favor is straightforward. No case comes close to establishing that the officers were “plainly incompetent” for doubting the intentions of a non-compliant suspect reaching for a firearm. *Malley*, 475 U.S. at 341. Certainly, a “reasonable officer could miss the connection” between the cases the panel cites—none of which involve a suspect actively reaching for a gun against officers’ clear orders³—“and this one.”

³ See *King*, 694 F.3d at 662–63 (denying qualified immunity to an officer who shot a man through his back door when the man was lying on his couch with a gun but evidence suggested that he never made “any threatening gestures” or even looked at the officer); *Bletz v. Gribble*, 641 F.3d 743, 753–54 (6th Cir. 2011) (same when an officer shot a man when “there was no imputation of past or potential future violence on the part of” the decedent, the officer had room to retreat, and the decedent was allegedly lowering his gun); *Heeter v. Bowers*, 99 F.4th 900, 913–15 (6th Cir. 2024) (same when officers shot a suicidal individual after he “moved slightly” and it was unclear whether a gun “was within reach”); *Leftwich v. Driscoll*, No. 22-1572, 2023 WL 3563207, at *3–4 (6th Cir. May 19, 2023) (same when officers, investigating a misdemeanor shot a man “only three seconds after he opened his front door while holding a pistol” even though the man “made no threatening remarks” and never “pointed his pistol at anyone”); *Baker v. City of Hamilton*, 471 F.3d 601, 607 (6th Cir.

Bond, 595 U.S. at 14. That is sufficient to grant the officers qualified immunity.

If more caselaw confirmation were needed, there is plenty. Start with Supreme Court decisions, which confirm the appropriateness of granting qualified immunity for the use of force in this case. *See, e.g., id.* at 11–14 (granting qualified immunity to officers who shot a suspect wielding a hammer who ignored commands to drop it); *Kisela*, 584 U.S. at 101–02, 107–08 (same, but for suspect with a knife); *Sheehan*, 575 U.S. at 605–06, 611 (same).

Our cases cut the same way. *See Romero*, 159 F.4th at 1023 (Griffin, J., concurring in part and dissenting in part); *see also, e.g., Eastep v. City of Nashville*, 156 F.4th 819, 829–30 (6th Cir. 2025) (granting qualified immunity when officers shot a suspect who “consistently and repeatedly disobeyed [officers’] commands to drop his weapon,” stepped toward them, and pointed an object at them); *Puskas v. Delaware County*, 56 F.4th 1088, 1096–99 (6th Cir. 2023) (same when officers responding to a domestic-violence call shot a suspect who had threatened his wife with guns and knives, had access to those weapons, repeatedly disobeyed officers’ orders, and appeared to pull out a gun); *Cunningham v. Shelby County*, 994 F.3d 761, 764–66 (6th Cir. 2021) (same when officers shot a

2006) (same when an officer struck a suspect’s head and knee with a baton after the suspect, who had no weapons, “came out from behind the bushes with his hands straight up in the ‘surrender’ position”); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996) (opining in dicta that officers wouldn’t be entitled to qualified immunity if they shot a man who “had simply walked slowly to the front door, with his hands at his side”).

woman who walked toward them and raised what looked like a .45-caliber pistol but turned out to be a BB handgun); *Jordan v. Howard*, 987 F.3d 537, 539 (6th Cir. 2021) (same when officers shot a man who was sleeping in his car with a gun on his lap, didn't comply "with their orders that he keep his hands up and away from the gun," and instead "grabbed the gun" and swung it towards the officers); *Hicks v. Scott*, 958 F.3d 421, 435–37 (6th Cir. 2020) (same when an officer shot a suspect who pointed a rifle at her face from five feet away); *Reich v. City of Elizabethtown*, 945 F.3d 968, 977–82 (6th Cir. 2019) (same when officers shot a mentally ill man with a knife who didn't put his knife down when the officers commanded him to and then took another step toward the officers); *Baker v. City of Trenton*, 936 F.3d 523, 528–29, 532–35 (6th Cir. 2019) (same when an officer shot a man whom the officer believed was holding his mother hostage and who struck the officer with a lawnmower blade); *Mitchell v. Schlabach*, 864 F.3d 416, 418–19 (6th Cir. 2017) (same when an officer shot a man who "appeared to be unarmed," but was "walking aggressively" and didn't obey the officer's commands to stop); *Thomas v. City of Columbus*, 854 F.3d 361, 363, 366–67 (6th Cir. 2017) (same when an officer shot an apparently armed fleeing suspect 10 feet away from him even though the suspect's gun was unloaded); *Mullins v. Cyranek*, 805 F.3d 760, 762, 765–69 (6th Cir. 2015) (same when an officer shot a suspect who resisted a stop-and-frisk, had a gun in his hand with his finger on the trigger, and threw the gun); *Simmonds v. Genesee County*, 682 F.3d 438, 441–42, 446 (6th Cir. 2012) (same when officers shot a suspect who yelled that he had a gun and appeared to point his gun at them from his car); *Untalan v. City of*

Lorain, 430 F.3d 312, 313–17 (6th Cir. 2005) (same when officers shot a suspect who grabbed a butcher knife, barricaded himself in his kitchen, lunged at officers, stabbed an officer, and wrestled with officers for control over the knife); *Boyd v. Baeppler*, 215 F.3d 594, 601–04 (6th Cir. 2000) (same when an officer shot a man who didn’t stop when ordered to and then pointed a gun at the officer, and when another officer continued shooting the man after he “went down” because the man refused to drop his gun despite the officers’ commands); *Rhodes v. McDannel*, 945 F.2d 117, 118, 120 (6th Cir. 1991) (per curiam) (same when an officer shot a domestic-violence suspect who ignored orders and approached the officer with a raised machete).

And the same is true for every other circuit’s precedent.⁴

⁴ See, e.g., *Bannon v. Godin*, 99 F.4th 63, 67 (1st Cir. 2024) (granting qualified immunity when officers shot an armed suspect who ignored repeated commands to show his hands and reached for his gun), *cert. denied*, 145 S. Ct. 1048 (2025), *reh’g denied*, 145 S. Ct. 1347 (2025); *Conlogue v. Hamilton*, 906 F.3d 150, 152–54 (1st Cir. 2018) (same when an officer shot a man who pointed a gun at officers after “continued warnings to put down his weapon and cooperate with the police”); *Rose v. City of Utica*, 777 F. App’x 575, 576 (2d Cir. 2019) (same when an officer shot a suspect who “did not react to an approaching officer’s command to drop his weapon” and “turned toward the officer while” holding a shotgun); *Est. of Jaquez ex rel. Pub. Adm’r of Bronx Cnty. v. City of New York*, 706 F. App’x 709, 712, 714–15 (2d Cir. 2017) (same when officers shot a domestic-violence suspect who “had easy access to a fillet knife” and “was refusing to obey the officers’ commands”); *James v. N.J. State Police*, 957 F.3d 165, 166–68 (3d Cir. 2020) (same when a state trooper shot a man holding a gun to his own head after the man twice refused to drop the gun and told officers to “stay away from [him]”); *Carswell v. Borough*

of Homestead, 381 F.3d 235, 237–38 (3d Cir. 2004) (same when an officer shot a domestic-violence suspect who ran toward the officer with empty hands); *Benton v. Layton*, 139 F.4th 281, 285–91 (4th Cir. 2025) (same when an officer shot a driver who ignored “six clear commands” and reached his hand toward what officers reasonably perceived to be a gun), *cert. denied*, 2026 WL 79874 (U.S. Jan. 12, 2026); *Caraway v. City of Pineville*, 111 F.4th 369, 373–75 (4th Cir. 2024) (same when officers shot a man who disobeyed their commands to put his hands up and reached into his jacket for a gun); *Batyukova v. Doege*, 994 F.3d 717, 721–23, 726 (5th Cir. 2021) (same when an officer shot an unarmed suspect who ignored repeated commands and “reached for her waistband” while walking toward the officer); *Garcia v. Blevins*, 957 F.3d 596, 602 (5th Cir. 2020) (same when an officer shot an armed suspect who “ignored [his] commands to drop the weapon” and walked toward other civilians); *Pam v. City of Evansville*, 154 F.4th 523, 527, 531–34 (7th Cir. 2025) (same when an officer shot an armed suspect who ignored repeated commands to get on the ground); *Doxtator v. O’Brien*, 39 F.4th 852, 858, 861–64 (7th Cir. 2022) (same when an officer shot an unarmed arrestee who pretended to have a gun under his shirt, tried to escape, and ignored repeated commands to put his hands up); *Klum v. City of Davenport*, 145 F.4th 907, 909, 912–14 (8th Cir. 2025) (same when an officer shot an armed man who wandered through a neighborhood while “evading arrest and ignoring officer commands to drop [his] weapon”); *Dimock ex rel. Dimock-Heisler v. City of Brooklyn Center*, 124 F.4th 544, 549, 554 (8th Cir. 2024) (same when officers shot a domestic-disturbance suspect who was holding a knife and ignored “multiple” orders to “drop the knife” and “[g]et down on the ground”); *Napouk v. L.V. Metro. Police Dep’t*, 123 F.4th 906, 912, 920 (9th Cir. 2024) (same when officers shot a man armed with a purported machete who “refused to follow the officers’ orders to stop moving towards them and to drop the weapon”); *Waid v. County of Lyon*, 87 F.4th 383, 386, 389 (9th Cir. 2023) (same when officers responding to a domestic-violence call shot a suspect who “used aggressive language with the officers, ignored an order from the officers, and rushed towards them in a small and confined space”); *Alcala v. Ortega*, 128 F.4th 1298, 1303–04 (10th Cir. 2025) (same when an officer shot an unarmed man who pretended to brandish a gun and “repeatedly . . . failed to comply” with police orders);

C.

Some cases present factual or procedural baggage that counsels against resolving qualified immunity early. This case isn't one of them.

The panel opinion's focus on the pleading-stage posture doesn't shield its analysis. *See Romero*, 159 F.4th at 1014 (“Without the benefit of the full record, it is difficult to make definitive conclusions about factual parallels.”). To be sure, our court has (perhaps incorrectly) expressed a “general[]” disfavor for granting a motion to dismiss based on qualified immunity. *See, e.g., Wesley v. Campbell*, 779 F.3d 421, 433 (6th Cir. 2015). *But see Crawford v. Tilley*, 15 F.4th 752, 765 (6th Cir. 2021) (questioning that precedent because the Supreme Court has “nowhere” “suggest[ed] that it [is] inappropriate to dismiss a complaint on qualified immunity or that there should be a presumption against it”). But “[q]ualified immunity is an *immunity from suit* rather than a mere defense to liability.”

Palacios v. Fortuna, 61 F.4th 1248, 1254–55, 1259 (10th Cir. 2023) (same when officers shot an armed suspect who reached for his gun multiple times after “at least eighteen” warnings to “drop it or show his hands”); *Franklin v. Popovich*, 111 F.4th 1188, 1191–92 (11th Cir. 2024) (same when an officer shot a prone, wounded suspect whom the officer believed to be armed and who “made a sudden movement” after the officer ordered him to “[r]emain still”); *Powell v. Snook*, 25 F.4th 912, 916–18 (11th Cir. 2022) (same when an officer responded to a domestic-violence call at the wrong home and shot a homeowner who “started to raise his” pistol and “got [it] hip-high”); *Fenwick v. Pudimott*, 778 F.3d 133, 135, 138–40 (D.C. Cir. 2015) (same when three federal marshals shot a man who was attempting to flee in his vehicle after he clipped a deputy and repeatedly ignored orders to stop but “posed no immediate threat to either officers or bystanders”).

Scott v. Harris, 550 U.S. 372, 376 n.2 (2007) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). So when a claim is destined to fail, we should say so “at the earliest possible stage.” *Id.* (quotation omitted). The Supreme Court seems to agree, having repeatedly granted qualified immunity in the motion-to-dismiss posture. *See, e.g., Wood*, 572 U.S. at 754–55, 759–61; *al-Kidd*, 563 U.S. at 734, 742.

Here, no amount of additional evidence or fact-finding would change the analysis of whether the officers violated clearly established law. The bodycam footage—relied on both by plaintiff and the panel majority—speaks for itself. And it shows that (i) Romero attempted to reach for his gun a second time despite the officers’ insistence that he show his hands and get face-down on the ground, and (ii) Romero, although wounded, was physically capable of accessing and gripping his gun. *Compare Romero*, 159 F.4th at 1007, *with id.* at 1016–17 (Griffin, J., concurring in part and dissenting in part) (agreeing on these facts). There’s no way to alter or erase those aspects of the encounter, “even if all the disputed facts are viewed in [plaintiff’s] favor.” *Sheehan*, 575 U.S. at 616. And as mentioned, no cases establish that using force against a suspect reaching for a gun against officers’ orders violates clearly established law.

None of that is to discount the additional problems with the panel’s qualified-immunity and excessive-force analysis—problems our dissenting colleagues detail well. *See Romero*, 159 F.4th at 1018–23 (Griffin, J., concurring in part and dissenting in part); *infra* at 21–24 (Bush, J., dissenting from the denial of rehearing en banc); *infra* at 27–31 (Readler, J., dissenting from the denial of rehearing en banc). But whatever else

might be said for or against the panel’s opinion, its level-of-generality failing is sufficient to entitle the officers to qualified immunity as a matter of law. That dispositive result follows even if this case carries other complexities seen fit to sidestep—an approach the Supreme Court has approved time and time again.⁵

III.

Accepting that the panel opinion gets the level of generality wrong, we must ask whether that error warrants en banc review. We think so. The panel’s misstep means a case that should end will go forward. And the repercussions will reverberate throughout our circuit. When we make mistakes in qualified-immunity

⁵ See, e.g., *Bond*, 595 U.S. at 12 (“We need not, and do not, decide whether the officers violated the Fourth Amendment in the first place [because] the officers plainly did not violate any clearly established law.”); *Rivas-Villegas*, 595 U.S. at 5–7 (addressing only the clearly established prong); *Emmons*, 586 U.S. at 43–44 (same); *Kisela*, 584 U.S. at 103–04 (“[T]he Court need not, and does not, decide whether [the officer] violated the Fourth Amendment [because the officer] was at least entitled to qualified immunity.”); *White*, 580 U.S. at 78–81 (addressing only the clearly established prong); *Mullenix*, 577 U.S. at 11 (“We address only the qualified immunity question, not whether there was a Fourth Amendment violation in the first place. . . .”); *Barkes*, 575 U.S. at 825 (addressing only the clearly established prong); *Sheehan*, 575 U.S. at 613 (same); *Carroll*, 574 U.S. at 20 (same); *Stanton*, 571 U.S. at 10–11 (“[W]hether or not the constitutional rule applied by the court below was correct, it was not beyond debate.” (quotation omitted)); *Reichle*, 566 U.S. at 669 n.6 (sidestepping the first qualified-immunity question because “[i]t suffices, for qualified immunity purposes, that the answer would not have been clear to a reasonable official”); *Brosseau*, 543 U.S. at 198 (expressing “no view as to the correctness of the Court of Appeals’ decision on the constitutional question itself” because no clearly established law governed the case).

cases from the comfort of our chambers, we make officers play roulette with their lives. So the stakes couldn't be higher for public safety. And the break from our precedent and Supreme Court precedent couldn't be clearer. The result? More confusion for officers.

En banc review is also appropriate given the recurring nature of the relevant error. A panel's failure to define rights at the proper level of specificity isn't some one-off misstep. It's among the legal errors most corrected—and called out—in recent Supreme Court history. *See supra* n.1 (collecting 16 cases).

* * *

The recent err-reverse-repeat cycle in qualified-immunity cases suggests that there's some chance (perhaps even a good one) that the Supreme Court will yet again see fit to intervene on the level-of-generality issue if asked. But we shouldn't offload the error-correction burden to a Court with more pressing business than telling us the same thing over and over again. Our circuit is responsible for following the law; sometimes, that means policing our own errors. With lives on the line, we owe the police and the public that much.

**DISSENTING OPINION OF
JUDGE JOHN K. BUSH**

DISSENT

JOHN K. BUSH, Circuit Judge, dissenting from the denial of rehearing en banc. The relevant indisputable facts, based on the complaint and video, bear repeating because they decide this case. Late one December night, plaintiff Ashly Romero called 911 over a domestic dispute that turned violent. *Romero v. City of Lansing*, 159 F.4th 1002, 1006 (6th Cir. 2025). Officers raced to the scene, having been told that shots were fired. *Id.* When they arrived, they found a male suspect standing by his car. *Id.* at 1007. The officers drew their weapons and ordered the suspect to the ground. *Id.* He refused. *Id.* Officers ordered the suspect to the ground once more. *Id.* He then dropped to his knees, but when officers told him to lay face down, he refused. *Id.* Instead, the suspect lifted his shirt, which exposed a holstered firearm. *Id.* As he reached for that gun, officers shot him. *Id.* Undeterred, the suspect reached for his gun once more, and officers shot again. *Id.* The encounter lasted less than a minute. *Id.* The suspect died at the scene. *Id.* Plaintiff then sued, claiming that the officers responding to her 911 call used excessive force. *See id.*

This should have been an easy case. Officers have “mere seconds to assess the potential danger” of an armed suspect, so qualified immunity protects them if they shoot someone whom a “competent officer would” reasonably believe poses a lethal threat. *Kisela v. Hughes*, 584 U.S. 100, 105–06 (2018) (per curiam). No case requires officers to sit idly by as they stare down

the barrel of a non-compliant suspect's gun. The majority should have granted qualified immunity.

But it did not, and the en banc court declines to step in. In so doing, we let stand a precedential opinion that seemed to apply an unsupported presumption against qualified immunity at the pleadings stage, defied the relevant circuit and Supreme Court precedent, and improperly second-guessed the officers' judgment from the peace of our chambers. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). Because we should have taken this case en banc, I respectfully dissent.

* * *

The majority's decision errs when it appears to apply an unwarranted presumption against dismissal based on qualified immunity. The majority's decision asserts that "[o]ur circuit disfavors granting qualified immunity at the motion-to-dismiss stage" because there is no "factual development beyond the allegations in [the] complaint. . . ." *Romero*, 159 F.4th at 1008 (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring)). It explains that even if "videos" recorded of the encounter "will likely be dispositive evidence at summary judgment or trial," they may not be at the pleadings stage. *Id.* And it reasons that "summary judgment" is "a posture far less favorable to plaintiffs than the motion-to-dismiss context" in qualified immunity cases. *Id.* at 1011. In short, the majority holds that an officer should have a harder time receiving qualified immunity at the pleadings stage than at other stages of the case, even when the facts are identical. This apparent presumption against qualified immunity is unsupported.

To begin with, the presumption appears to derive from a concurrence that did not squarely address the issue. It appears that the first case adopting the presumption, *Wesley v. Campbell*, 779 F.3d 421 (6th Cir. 2015), relied on a line from Chief Judge Sutton’s concurrence in *Evans-Marshall*, 428 F.3d at 235 (Sutton, J., concurring). See *Wesley*, 779 F.3d at 433–34. He observed that we are forced to rely on “the allegations in [the] complaint,” which can make it difficult to “fairly tell whether a case is ‘obvious’ or ‘squarely govern[ed]’ by precedent. . . .” *Evans-Marshall*, 428 F.3d at 235 (Sutton, J., concurring) (cited in *Wesley*, 779 F.3d at 434). But that statement just recognizes the reality that a plaintiff has an inherent advantage at the pleadings stage because we take the plaintiff at her word and view the case on her terms. It does not mean that we must put *an additional* thumb on the scale in her favor.

In addition, the presumption lacks theoretical support. At both the pleadings and summary judgment stages, we view the facts in the light most favorable to the non-moving party. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002); *Tolan v. Cotton*, 572 U.S. 650, 655–56 (2014) (per curiam). But in qualified immunity cases, we may reject a plaintiff’s story as implausible (at the pleadings stage) or incapable of persuading a reasonable jury (at the summary judgment stage) when “the videos are clear and blatantly contradict or utterly discredit the plaintiff’s version of events.” *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)) (cleaned up).¹ And all else being equal, a

¹ The Second, Fourth, Fifth, Seventh, and Eleventh Circuits also consider video evidence at the pleadings stage. See *Perdomo v.*

reasonable inference at the pleadings stage will remain reasonable at the summary judgment stage. *See Akima v. Peca*, 85 F.4th 416, 422 (6th Cir. 2023) (“[W]e continue to construe factual disputes . . . in the light most favorable to the plaintiff. . . .”). Therefore, assuming the facts are the same at both stages, if a video at the summary judgment stage is enough to grant judgment for the officer, it should be at the pleadings stage, too.²

To be clear, I am not suggesting that standards of review in qualified immunity cases should be the same at the pleadings and summary judgment stages. I am suggesting only that if the summary judgment evidence viewed in the light most favorable to the plaintiff is identical to the allegations in the complaint viewed, consistent with video footage, in the light most favorable to the plaintiff, then the analysis should come out the same way. The mere fact that we

City of League City, 163 F.4th 921, 923–24 (5th Cir. Jan. 2026); *Doriety ex rel. Est. of Crenshaw v. Sletten*, 109 F.4th 670, 679 (4th Cir. 2024); *Esco v. City of Chicago*, 107 F.4th 673, 678 (7th Cir. 2024); *Baker v. City of Madison*, 67 F.4th 1268, 1277–78 (11th Cir. 2023); *Kass v. City of New York*, 864 F.3d 200, 206 (2d Cir. 2017). The practice of considering video evidence that contradicts allegations in a complaint is analogous to the practice in commercial disputes of allowing a contract to trump allegations in the complaint when the two contradict each other. *Cates v. Crystal Clear Techs., LLC*, 874 F.3d 530, 537 (6th Cir. 2017). Also, the parties stipulated to use of the video to review the motion to dismiss. *See Romero v. City of Lansing*, 159 F.4th 1002, 1008 (6th Cir. 2025).

² Like Judge Readler, I find it almost inconceivable that any evidence developed on remand could overcome the unusually clear body cam footage in this case. *See Readler Dissent* at 26–29. And it is that unusual clarity that renders any contrary allegations in the complaint facially implausible.

are at the pleadings stage should not make it *harder* for the officers to get qualified immunity if, as the majority suggests, the “video[] will likely be dispositive evidence at summary judgment.” *Romero*, 159 F.4th at 1008.

Indeed, not only is the presumption unsupported, but it appears to be inapplicable to this case. Some of our cases have limited the apparent presumption against qualified immunity to the clearly established prong of qualified immunity. See *Hart v. Hillsdale Cnty.*, 973 F.3d 627, 635 (6th Cir. 2020). But “no such preference applies to the violation-of-a-constitutional-right prong.” *Crawford v. Tilley*, 15 F.4th 752, 764 (6th Cir. 2021). So even if the case law supported a presumption against qualified immunity, it would not have applied to the underlying question of whether the officers violated the decedent’s Fourth Amendment rights.

This apparent re-write of the rules governing motions to dismiss would have been reason enough to rehear this case en banc. But the majority goes even further astray when it analyzes the merits of the officers’ qualified immunity defense.

In *Cunningham v. Shelby County*, we faced a case that was fundamentally identical to this one—officers were called to respond to an armed and potentially violent person, the person was facing away from the officers, officers told her to drop the gun, she turned towards the officers and started to raise the gun, and the officers shot her. 994 F.3d 761, 763–64, 767 (6th Cir. 2021). This court granted qualified immunity. *Id.* But here, the majority denied qualified immunity. I find it hard to square that holding with *Cunningham*. Officers in this situation—dealing with someone

whom they thought was violent and who pointed a gun in the officers' general direction—are entitled to qualified immunity. *White v. Pauly*, 580 U.S. 73, 78 (2017) (per curiam); Thapar & Hermandorfer Dissent at 14–16 & n.4 (collecting over three dozen cases from every regional circuit supporting this proposition). And the Supreme Court has summarily reversed at least two courts for denying qualified immunity in similar circumstances. *See id.*; *Kisela*, 584 U.S. at 103–04.

The majority's cited cases do not undercut *Cunningham*. For example, in *Lee v. Russ*, we denied qualified immunity to officers who shot a man who was holding a knife while standing 30 feet away from the officers. 33 F.4th 860, 862–63 (6th Cir. 2022). But the use of force in *Lee* was plainly excessive because a knife's kill range is far shorter than 30 feet. And in *Bletz v. Gribble*, the decedent *lowered* his gun before the officers shot him. 641 F.3d 743, 748 (6th Cir. 2011). Here, the decedent *reached for* his gun before the officers shot him.

* * *

For decades, the Supreme Court has told us to be deferential to officers when reviewing excessive force claims. “Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.” *Graham*, 490 U.S. at 396 (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973)) (cleaned up). “[P]olice officers are often forced to make split-second judgments,” and their decisions may turn out to be “mistakes” “when[] judged with the benefit of hindsight. . . .” *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 612 (2015) (first quoting *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014); and then quoting *Heien v. North Carolina*, 574 U.S. 54, 61

(2014)). That does not, however, make their conduct unreasonable under the Fourth Amendment. “To be reasonable is not to be perfect,” and officers have “fair leeway for enforcing the law in the community’s protection.” *Heien*, 574 U.S. at 60– 61 (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

Regrettably, the majority ignored those commands and held the officers to an unreasonably high standard. For example, the majority focused intently on the decedent saying “I got you . . . I got you.” See *Romero*, 159 F.4th at 1010; Readler Dissent at 29. Not only is that statement barely audible on the body cam footage,³ but it is legally irrelevant. The Supreme Court has squarely held that officers are under no obligation to take the suspect at his word. *District of Columbia v. Wesby*, 583 U.S. 48, 61 (2018). So the fact that the suspect said “I got you . . . I got you” cannot turn the shooting into an unreasonable use of force.

More importantly, though, the majority spent an entire paragraph conducting the very “nuanced interpretation of [the decedent’s] words” that the majority argues “is not appropriate,” dissecting the decedent’s words line by line and explaining why saying “I got you . . . I got you” rendered everything the officers did after unreasonable. *Romero*, 159 F.4th at 1011. Then, the majority conducted a detailed vocal and behavioral analysis, asserting that the decedent’s “voice broke” during the encounter (something inaudible on the

³ This is itself a problem for the majority. In qualified immunity cases, we may “consider[] only the facts that were knowable to the defendant officers,” and it is far from clear that they could have heard the decedent say this. *White v. Pauly*, 580 U.S. 73, 77 (2017) (per curiam).

body cam footage), that he “had just audibly reacted to being shot” (another barely audible noise on the body cam footage), and that “any effort to draw and point his gun at the officers would have required significant contortion of his body” (something the body cam footage at least plausibly shows the decedent trying to do). *Id.* at 1010–11.

The panel painstakingly reviewed the body cam footage and decided this case based on nuances that I could barely detect in the comfort and solitude of my chambers, much less if I were a police officer responding in the heat of the moment. *Accord* Readler Dissent at 29–30. But even considering the factors unearthed by the majority’s close analysis, I do not see how the officers, running to the scene of a domestic violence call in the middle of a frigid winter night and watching a man reach for his firearm after defying their instructions, were *unreasonable* in concluding that deadly force was necessary. After all, the suspect’s “purported subjective intent to comply with the officers’ requests” is irrelevant: “we view his actions *objectively*, from the perspective of a reasonable officer at the scene.” *Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015); *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 428 (2017). The entire premise of the majority’s analysis, then, squarely and directly conflicts with the relevant use of force precedents from our court and the Supreme Court. *Accord* Griffin Dissent at 7–9.

The Second Amendment undeniably “protect[s] an individual’s right to carry a handgun for self-defense outside the home.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 10 (2022). And that right does not, of course, go away simply because the police are nearby. Moreover, every death is tragic,

no matter who it is or how it happens. *Accord* Readler Dissent at 26. Nobody wants the police to use deadly force, and the world would be a much better place if they did not need to. *Accord id.*

But officers responding to dangerous situations do not have time to conduct a textualist exegesis of a suspect's statements or frame-by-frame analysis of body language when the video undeniably shows the suspect reaching to unholster his firearm. Staring down the barrel of a gun less than 20 feet away from a non-compliant suspect, the officers reasonably believed they had two options: shoot or be shot. Plaintiff may well be right that the decedent was trying to communicate his compliance, but the officers did not violate the Fourth Amendment by choosing "shoot." *Accord* Readler Dissent at 31–33. The majority erred in second-guessing that split-second decision.

* * *

Judge Griffin's dissent from the panel's decision got it right, and this case satisfies the criteria for en banc review. I therefore respectfully dissent from the denial of rehearing en banc.

DISSENTING OPINION OF JUDGE READLER

DISSENT

READLER, Circuit Judge, dissenting from the denial of rehearing en banc. The facts here tell an all-too-common tale, one in which law enforcement faces uncertain and life-threatening circumstances. After receiving a domestic violence call and being told that a woman had been shot, two officers arrive at the scene of the incident. A woman's screams emanate from a car parked in the driveway. Standing beside the vehicle is Stephen Romero. Having already drawn their guns, officers command Romero to "get on the ground." They do so not once, but at least six times. Yet Romero refuses. Instead, he kneels and lifts his shirt, revealing a firearm in his waistband. Romero then reaches for the gun. Officers begin shooting. Romero falls to the ground. A second later, as he lies there, Romero again reaches for his gun. Officers shoot once more, killing Romero.

I agree with my many colleagues who understandably wince at the dramatic consequences the panel majority's holding invites for law enforcement. *See ante* at 8–9 (Griffin, J., dissenting from the denial of rehearing en banc); *ante* at 10–11 (Thapar & Hermandorfer, JJ., dissenting from the denial of rehearing en banc); *ante* at 23–25 (Bush, J., dissenting from the denial of rehearing en banc). No one celebrates the sudden loss of life the Romero family regrettably has now experienced. At the same time, we make the job of protecting the public all the more daunting by not awarding an officer qualified immunity when he acts to eliminate a mortal threat.

Yet just as problematic, from a legal perspective, is the panel majority's refusal to accept the conclusive nature of the video evidence here. There are no disputes of fact over the rapid manner of the escalating events the video captures, including that just two seconds passed between the moment the officers first shot Romero and the moment he again reached for his gun. The officers' decision to shoot Romero out of fear he was about to shoot them first is thus the quintessential "split-second judgment[]" officers must make on a routine basis, one for which we typically afford them qualified immunity. *See Graham v. Connor*, 490 U.S. 386, 396–97 (1989). The video likewise puts to rest any debate about the central thesis of the complaint: that Romero was "shot dead" merely for "possess[ing] a gun." *See Am. Comp.*, R. 13, PageID 131, 141, 143. The panel majority nonetheless sends this case ahead to discovery and, ultimately, for a "trier of fact" to determine whether the officers' actions were an unreasonable seizure in violation of the Fourth Amendment. *Romero v. City of Lansing*, 159 F.4th 1002, 1013 (6th Cir. 2025).

Two flawed premises seemingly drove that conclusion. One was the majority opinion's assessment that it had license to forgo "a detailed analysis" of the import of the video evidence because the panel was reviewing a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. *Id.* at 1008. Historically, in the mine-run excessive force case, a Rule 12(b)(6) motion may well have been a poor vehicle for resolving as a matter of law whether the facts as alleged fail to clearly establish a constitutional violation. *See Jones v. City of Cincinnati*, 521 F.3d 555, 559–61 (6th Cir. 2008). But the traditional benefit of the doubt we give

a plaintiff with respect to a dispositive motion carries far less weight when, as is now often the case, video evidence provides us with “sufficient clarity” as to the reasonableness of the officer’s conduct. *See Mendez v. City of Chicago*, 160 F.4th 888, 892 (7th Cir. 2025); *see also Scott v. Harris*, 550 U.S. 372, 380 (2007) (establishing the blatant contradiction standard when considering a Rule 56 motion); *Bell v. City of Southfield*, 37 F.4th 362, 364 (6th Cir. 2022) (extending *Scott’s* blatant contradiction standard to the 12(b)(6) setting); *ante* at 21–23 (Bush, J., dissenting from the denial of rehearing en banc). That well describes the video here, which reveals the entire scene from two camera angles, allowing us to view and hear in real time what the officers encountered. Looking more broadly, the growing number of officer-related cases from across the circuits that accept video evidence as a basis to award qualified immunity at the Rule 12(b)(6) stage are no surprise given the fact that most law enforcement encounters are now captured on video. *See Feagin v. Mansfield Police Dep’t*, 155 F.4th 595, 600 (6th Cir. 2025) (collecting sources on the ubiquity of body cams and other recording devices in modern police departments); *see also Winder v. Gallardo*, 118 F.4th 638, 643 (5th Cir. 2024) (per curiam) (considering video evidence under Rule 12(b)(6)); *Esco v. City of Chicago*, 107 F.4th 673, 678 (7th Cir. 2024) (same); *Baker v. City of Madison*, 67 F.4th 1268, 1277–78 (11th Cir. 2023) (same); *cf. Kass v. City of New York*, 864 F.3d 200, 212 (2d Cir. 2017) (considering video evidence under the Rule 12(c), which follows “the same standard as that applicable to a motion under Rule 12(b)(6),” *id.* at 206). So dated precedents reflexively denying a motion to dismiss in excessive force cases due to the absence of video evidence say little about modern day

jurisprudence in the body and dash cam era. *See Bell*, 37 F.4th at 364; *Brown v. Giles*, 95 F.4th 436, 440–41 (6th Cir. 2024) (plurality opinion).

Resisting that conclusion, the majority opinion conjectured that “[t]he fact that videos will likely be dispositive evidence at summary judgment or trial does not mean we have the authority to conduct a detailed analysis now.” *Romero*, 159 F.4th at 1008 (citing *Saalim v. Walmart, Inc.*, 97 F.4th 995, 1002 n.4 (6th Cir. 2024)). But why not? If the events reflected on a video pose a legal question, for instance, the permissibility of the force used by officers, our job is to provide an answer. *See Scott*, 550 U.S. at 381 n.8 (recognizing the question of the reasonableness of an officer’s actions is a “pure question of law”); *Brown*, 95 F.4th at 441 (deciding an officer’s use of force was reasonable as a matter of law in the Rule 12(b)(6) context). Take today’s case, where the majority opinion posits that discovery (and perhaps even a trial) may alter the supposed fact dispute the majority opinion identifies: whether *Romero*’s conduct was threatening in nature. How so? Nothing about the video will change during that time. Nor is there a fact witness who can alter the reality of what the video reveals or support the allegation that *Romero* was shot simply due to him exercising his Second Amendment rights. *See ante* at 17 (Thapar & Hermandorfer, JJ., dissenting from the denial of rehearing en banc). Put another way, all seem to agree that this case hinges on the video evidence, yet discovery and even a trial seem inevitable. That line of thinking all but nullifies Rule 12(b)(6) in this setting. After all, if the video here is insufficient to warrant judgment at the pleadings stage, will any video ever suffice?

Perhaps the panel majority simply rejected binding circuit precedent without saying as much. If so, it joins the Tenth Circuit as the lone members of the appellate courts to rule out resolving excessive force cases in a motion to dismiss posture even where video footage fairly describes the events at issue. *See Fuqua v. Santa Fe Cnty. Sheriff's Off.*, 157 F.4th 1288, 1299 (10th Cir. 2025). In *Fuqua*, the Tenth Circuit rejected the “Sixth Circuit rule allowing video evidence at the motion-to-dismiss stage when the video blatantly contradicts the complaint.” *Id.* That approach, one regrettably paralleled by the panel majority here, is difficult to rationalize. It asks our minds to reject what our eyes clearly see. And it forces courts to “rely ‘on such visible fiction’ crafted” by plaintiffs’ counsel when we ask whether plaintiffs have plausibly stated a claim. *Id.* at 1308 (Tymkovich, J., dissenting) (quoting *Scott*, 550 U.S. at 381). Given the ubiquity of excessive force cases that turn on body cam footage or the like, the Supreme Court seemingly would be wise to resolve this split of opinion in the very near future.

To the extent the panel majority appears willing to consider video evidence at this stage, it does so here in a particularly persnickety way, one that is similarly at odds with our precedents. *See Bell*, 37 F.4th at 364. For instance, the panel majority seems to believe it could not resolve the case now based on its assessment that Romero “did his best to tell the officers he meant them no harm” by mumbling the phrase “I got you” in the two seconds between the officers’ deployment of their weapons; and that Romero had not yet “point[ed] his gun at” or “advance[d] toward the officers” at the time of the final shots. *Romero*, 159 F.4th at 1010–11, 1013. To be sure, the majority opinion made the most

of these modest details, taking an unusually deep dive into both the understanding of the phrase “I got you” as well as Romero’s subtle intonations in those fleeting seconds, *see id.* at 1011, before attempting to determine the exact position of Romero’s gun at the time of the shooting, *id.* at 1013. Doing so, however, misunderstands the judicial role. As judges, we consider the reasonableness of an officer’s conduct through his perspective of the unfolding event, not through any “leisurely stop-action viewing.” *Cunningham v. Shelby County*, 994 F.3d 761, 767 (6th Cir. 2021); *Barnes v. Felix*, 145 S. Ct. 1353, 1362 (Kavanaugh, J., concurring) (emphasizing that courts do not “dissect and scrutinize an officer’s actions with 20/20 vision of hindsight in the peace of a judge’s chambers” (citation modified)). To borrow an analogy from the gridiron, we do not masquerade as football referees engaging in instant replay review—stopping, pausing, and listening a dozen times to capture the extreme nuances of the moment (for instance, did any part of the football cross the goal line?). We sit on the bench, not in the replay booth. In that role, we take the facts displayed in the video in the ordinary sense as would an officer facing the events at hand—no matter the stage of the litigation. *See Rudlaff v. Gillispie*, 791 F.3d 638, 642 (6th Cir. 2015).

A second misstep similarly leaps from the pages of the panel opinion. Preferring to divide the roughly 30-second incident into three separate instances of excessive force, the majority opinion chose to “not dwell on the first two stages of the encounter” and instead “review[ed] . . . the facts” concerning the last moment of the engagement in isolation when considering whether excessive force was employed. *Romero*,

159 F.4th at 1010. But segmenting the use of force analysis down to the final seconds of the encounter is yesterday's thinking. By all accounts, slicing the facts in such extreme fashion is in tension with at least two modern Supreme Court precedents. Start with *Plumhoff v. Rickard*, 572 U.S. 765 (2014), which refused to dice up a ten-second police encounter into distinct uses of force. 572 U.S. at 777. Because officers presented with a "severe threat . . . need not stop shooting until the threat has ended," the Supreme Court demands a fulsome assessment of the events at hand. *Id.* And if a 12-year-old precedent does not suffice, how about a seven-month-old one? Last year's unanimous opinion in *Barnes v. Felix*, 145 S. Ct. 1353 (2025), reinforced the holding in *Plumhoff*, reiterating that the reasonableness of an officer's conduct depends on the totality of circumstances of the entire encounter, not just a particular moment. 145 S. Ct. at 1358 ("[T]he 'totality of the circumstances' inquiry into a use of force has no time limit.").

Yet the panel majority's analysis rises and falls with the "climactic moment" of the encounter. *Id.* at 1356. Indeed, the panel majority does not hide the fact that it skipped over the "first two stages of the encounter" to address in detail only what happened in the fleeting moments between the final shots. *Romero*, 159 F.3d at 1010; *id.* ("First, a brief review of the facts. After Officers Moore and Kurtz initially fired on Stephen. . . ."); *id.* at 1011 (interpreting at length the words and tone *Romero* used during the two seconds "between the two rounds of fire"); *id.* at 1012 (focusing on "when officers fired a second round" and emphasizing "[b]y then . . . the situation had become significantly less dangerous"). Absent from the majority

opinion's analysis is any assessment of whether the first shots were justified by a "severe threat" that did not immediately and clearly dissipate (thereby justifying the shots that followed just seconds later). *See Plumhoff*, 572 U.S. at 777; *see also Jones v. Treubig*, 963 F.3d 214, 236 (2d Cir. 2020) (recognizing that when acts of force occur in "rapid succession where there was no reasonable opportunity to re-assess," courts should not artificially "isolate a particular use of force"). *But see Romero*, 159 F.4th at 1014 (asking only whether Romero "remained a threat to the officers" after the first shots).

True, the panel opinion made passing (and often quite generous) characterizations of earlier events in the encounter in responding to the contrary opinions espoused by both the district court and the dissent. *See, e.g., id.* at 1010, 1013 (asserting that Romero was "largely compliant" and "heeded" earlier officer commands). But it remains beyond dispute that the majority opinion failed to assess the totality of the circumstances the officers confronted when measuring the legality of their actions. Case in point, that the officers were attempting to secure the scene of a confirmed shooting and were dealing with a suspect who repeatedly reached for a firearm despite commands to do otherwise is nowhere mentioned in the majority opinion. Again, as *Barnes* and *Plumhoff* command, in excessive force cases we assess a given use of force by considering all relevant circumstances that directly and foreseeably led to an officer's conduct as opposed to "divvy[ing] up shots fired just seconds apart in the heat of a continuous confrontation," as does the majority opinion. *Feagin*, 155 F.4th at 610–12 (applying *Plumhoff* and *Barnes* and refusing to

distinguish between separate deployments of a taser, let alone home in on the final seconds of a confrontation); *see, e.g., Caraway v. City of Pineville*, 111 F.4th 369, 385 (4th Cir. 2024) (refusing to “parse [a] shooting” lasting only “three or four seconds” into “two distinct phases—the periods before and after he fell to the ground”—and rejecting plaintiff’s preferred “frame-by-frame, second-by-second, shot-by-shot” approach).

When viewed through the appropriate lens and with the benefit of the video evidence, this appeal strikes me as relatively simple and one ripe for resolution now. The officers had a blink of an eye to decide why Romero, undeterred by previous gunfire, was continuing to reach for his firearm; they did not have the luxury of waiting to see what Romero would do before firing, and it was not unreasonable for them to respond to Romero’s threat in kind. *Romero*, 159 F.4th at 1020 (Griffin, J., concurring in part and dissenting in part). At the very least, the officers were not on notice that their conduct was clearly out of bounds. Indeed, none of the cases the majority opinion cites comes close to describing a situation akin to what the officers were presented with here—two seconds to make a call on whether a suspect reaching for a firearm might use it. *See Lee v. Russ*, 33 F.4th 860, 863 (6th Cir. 2022) (describing a 20 second situation where officers fired on a suspect who had “de-escalate[d]” and was no longer waving a knife); *Bletz v. Gribble*, 641 F.3d 743, 752 (6th Cir. 2011) (recognizing that an officer acts unreasonably when shooting someone who fully complied with the officer’s command to lower his weapon). In other words, we have never held that officers who see a suspect reaching for a gun violate the Fourth Amendment by being quicker

to the draw. *See ante* at 11–16 (Thapar & Hermandorfer, JJ., dissenting from the denial of rehearing en banc). With no prior case with “facts like the ones at issue here,” the majority opinion erred in denying the officers qualified immunity. *See Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 8 (2021) (per curiam).

* * * * *

Given the sharp tension between the panel opinion and Supreme Court precedent (not to mention our own) over a familiar topic across our dockets, I regret that our evenly divided Court declined to rehear this case. *See Fed. R. App. P. 40(b)(2)*. After all, *Romero* appears to instruct that whenever two appellate judges “interpret the video differently” than how the defendants do—even as to entirely irrelevant facts such as “what [the plaintiff] intended”—the video fails the “blatant contradiction” test that governs dispositive motion review, *Romero*, 159 F.4th at 1013 (majority opinion), all but eliminating qualified immunity in this setting, *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (recognizing that qualified immunity is “effectively lost” if a case proceeds erroneously to discovery and trial (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985))); *see also Bell*, 37 F.4th at 364 (“If officers are entitled to qualified immunity and don’t receive it at the earliest possible stage, then they lose its protections for as long as they continue to litigate”). *Romero* also confirms that old habits die hard. In effect, the majority opinion attempts to resurrect prior precedents that would “hyper-segment” our analysis of excessive force claims bullet by bullet and second by second. *Cf. Feagin*, 155 F.4th at 610–11 (criticizing prior excessive force decisions in light of new Supreme Court precedent); *see also Hart v.*

Michigan, 138 F.4th 409, 428 (6th Cir. 2025) (Larsen, J., concurring in part and dissenting in part) (criticizing pre-*Barnes* majority opinion for denying qualified immunity by highlighting the “seconds directly before [the officer’s final] use of force” when earlier uses of force did not suffice); *Palma v. Johns*, 27 F.4th 419, 453 (6th Cir. 2022) (Readler, J., dissenting) (criticizing the majority opinion for considering only the “last shots” fired); *Hood v. City of Columbus*, 827 F. App’x 464, 472 (6th Cir. 2020) (Guy, J., concurring in part and dissenting in part) (rejecting majority opinion’s approach of segmenting an exchange of gunfire “within a period of approximately five seconds”). Again, the Supreme Court has repeatedly rejected that approach. See *Plumhoff*, 572 U.S. at 777; *Barnes*, 145 S. Ct. at 1358. Simply put, officers need not “perfectly calibrate the amount of force required to protect” themselves and the public. *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007).

I am likewise troubled by *Romero*’s implicit view that the officers erred simply by not waiting long enough to confirm that their target was not “incapacitated.” 159 F.4th at 1014. The resulting rule—to wait, say, three or four seconds while a suspect reaches for his gun—puts officers in impossible situations. See *id.* at 1015 (Griffin, J., concurring in part and dissenting in part); see also *Barnes*, 145 S. Ct. at 1362 (Kavanaugh, J., concurring) (recognizing the realities of policing mean there are often “no easy or risk-free answers” for officers as to when to use force in response to a threat). Embracing the panel majority’s “sporting-chance theory” of the Fourth Amendment, one in which suspects get an opportunity to arm themselves again before officers can use force, does a disservice to

law enforcement and the public more broadly, to say nothing of the Constitution. *Cf. Lafler v. Cooper*, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting).

In the end, this case can easily be resolved in line with the evidence reflected in the video. Especially when one recognizes that a suspect need not point a firearm at an officer before the officer may respond with deadly force, *Romero*, 159 F.4th at 1011 (majority opinion), the recordings here more than do the job in teeing up the legal question for resolution. So too in many other excessive force cases, with “most” law enforcement encounters now captured by body cams or other recording devices. *See Feagin*, 155 F.4th at 600. Despite today’s odd outcome, future panels and the district courts should take the majority opinion at its word, namely, that the video in this case was simply “ambiguous,” difficult to interpret, and tantamount to having no video at all, resulting in a case that warranted crediting the allegations that officers shot a plainly incapacitated individual who was merely possessing a firearm. *See Romero*, 159 F.4th at 1013. In the body cam era, this case thus amounts to the exception to the modern rule: In cases where video captures the relevant events, we must resolve those cases at the earliest possible stage rather than neglecting that duty in favor of unnecessary process and delay. *See Pearson*, 555 U.S. at 232 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam)); *Bell*, 37 F.4th at 364.

ENTERED BY ORDER OF THE COURT

/s/ Kelly L. Stephens

Clerk

App.119a

**VIDEO EXHIBIT:
OFFICER KURTZ'S BODY WORN CAMERA
(DECEMBER 1, 2023)**

The footage from Officer Kurtz's Body Worn Camera can be found at the following URL:

<https://tinyurl.com/3r3ahsdb>



App.120a

**VIDEO EXHIBIT:
OFFICER MOORE'S BODY WORN CAMERA
(DECEMBER 1, 2023)**

The footage from Officer Moore's Body Worn Camera can be found at the following URL:

<https://tinyurl.com/37w8ek3b>



App.121a

**VIDEO EXHIBIT:
SPLIT SCREEN OF OFFICERS'
BODY WORN CAMERA
(DECEMBER 1, 2023)**

The split screen synchronized footage from the
Officers' Body Worn Cameras
can be found at the following URL:

<https://tinyurl.com/tek4ykfj>

