

No. 25-1295

IN THE
Supreme Court of the United States

DONOVAN MOORE, *et al.*,

Petitioners,

v.

ASHLY ROMERO, AS PERSONAL REPRESENTATIVE
FOR THE ESTATE OF STEPHEN ROMERO,
DECEASED, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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**COUNTER-STATEMENT OF THE
QUESTIONS PRESENTED**

1. Whether the Sixth Circuit Majority Opinion properly applied *Barnes v. Felix* by examining all of the circumstances surrounding the Officers' second round of shots, which in turn justifies denial of this Court's review?
2. Whether disagreement on application of the "blatantly contradict" video/audio rule warrants Supreme Court review?

TABLE OF CONTENTS

	<i>Page</i>
COUNTER-STATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF CONTENTS.....	ii
TABLE OF CITED AUTHORITIES	iv
INTRODUCTION.....	1
STATEMENT OF THE CASE	4
I. Summary Of The Facts And Proceedings.....	4
II. Material Facts As Alleged.....	6
REASONS FOR DENYING THE PETITION	11
I. The Sixth Circuit Majority Opinion Properly Applied <i>Barnes v. Felix</i> By Examining All Of The Circumstances Surrounding The Officers' Second Round Of Shots, Which In Turn Justifies Denial Of This Court's Review	12
A. The Sixth Circuit's Application of <i>Barnes v. Felix</i>	12
B. Application of <i>Barnes v. Felix</i> to the Factual Allegations of this Case Does Not Warrant Supreme Court Review.....	15

Table of Contents

	<i>Page</i>
II. Disagreement On Application Of The “Blatantly Contradict” Video/Audio Rule Does Not Warrant Supreme Court Review	16
CONCLUSION	19

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>American Constr. Co. v. Jacksonville, T. & K.W.R. Co.</i> , 148 U.S. 372 (1893)	3
<i>Barnes v. Felix</i> , 605 U.S. 73 (2025).	1, 2, 3, 12, 13, 14, 15, 16, 17
<i>Eastep v. City of Nashville, Tenn.</i> , 156 F.4th 819 (6th Cir. 2025)	13, 14
<i>Layne & Bowler Corp. v. Western Well Works</i> , 261 U.S. 387 (1923)	15
<i>Locomotive Firemen v. Bangor & Aroostook R. Co.</i> , 389 U.S. 327 (1967)	3
<i>N.L.R.B. v. Pittsburgh S.S. Co.</i> , 340 U.S. 498 (1951)	15
<i>Romero v. City of Lansing, Mich.</i> , 159 F.4th 1002 (6th Cir. 2025)	2, 4, 13, 14
<i>Ross v. Moffitt</i> , 417 U.S. 600 (1974)	12
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985)	19
<i>Virginia Military Institute v. United States</i> , 508 U.S. 946 (1993)	3

*Cited Authorities**Page***Statutes and Rules**

42 U.S.C. §1983	2
Fed. R. Civ. P. 12(b)(6).....	1, 2, 6
Sup. Ct. R. 10	11, 15, 16

Other Authorities

Kahan, Hoffman & Braman, <i>Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism</i> , 122 Harv. L. Rev. 837 (2009)	18
R. Stern, E. Gressman, & S. Shapiro, <i>Supreme Court Practice</i> §4.187, pp. 224-226 (6th ed. 1986)...	3
Stempel, <i>Taking Cognitive Illiberalism Seriously</i> , 43 Loy. U. Chi. L.J. 627 (2012)	18

INTRODUCTION

With rifles drawn and having already wounded Stephen Romero, Petitioner Officers Moore and Kurt unleashed a second fatal volley of shots while Romero lay visibly bleeding on the ground. Romero had never actively resisted the Officers, never advanced toward them, and never pointed his gun at them. The Sixth Circuit ruled this second stage of Respondent's excessive-force claim could proceed to discovery given Respondent's factual allegations and the video and audio footage. Even though the Sixth Circuit did not decide whether Respondent sufficiently allege excessive force during the initial stages of the encounter, Petitioners take issue with the finding of Rule 12(b)(6) plausibility during the second stage of the encounter. The video and audio footage is graphic and shows without contradiction that Romero exhibited all the classic signs of surrender throughout the entire encounter. There was no threat to the Officers or others once Romero was wounded, bleeding, and on the ground. Indeed, the Officers' rifles remained pointed at Romero from two different directions throughout the entire encounter.

Petitioners seek certiorari for two reasons: (1) the Sixth Circuit Majority Opinion improperly applied *Barnes v. Felix*, 605 U.S. 73 (2025) by examining only the circumstances surrounding the Officers' second round of shots; and (2) the video and audio footage blatantly contradicted Respondent's factual allegations, defeating the need for further discovery and justifying the grant of the Officers' motion to dismiss on the basis of qualified immunity. Neither argument has merit. More importantly, neither argument satisfies criteria for Supreme Court review, instead presenting only a disagreement on the

application of the facts to the governing legal standard for an excessive/deadly force case brought under 42 U.S.C. §1983.

The Majority Opinion follows *Barnes* by analyzing the entire event timeline, reasoning there were “numerous other contextual clues” that would have led a reasonable officer to understand Romero’s speech was non-threatening (he did not shout the words in an aggressive manner, they were not accompanied by any sudden or aggressive gestures, and as he spoke, his voice broke). 159 F.4th at 1101 (*Id.*). The Majority Opinion explained that through the “entire encounter” (a phrase which rejects the notion the Majority Opinion was premised solely on the “moment-of-threat”), Romero made no sudden or aggressive gestures, but instead put his hands in the air, placed his cell phone on the ground, move deliberately to his knees, all of which were considered “indicators” that Romero was trying to comply with the Officers’ demands. (R.E.32, PageID.389, App.12a).

This Court’s review is not intended to resolve an intra-Sixth Circuit disagreement on whether Respondent’s factual allegations plausibly stated a claim for relief. Nor is this Court’s review necessary to “clarify” application of the standard for the use of deadly force under §1983 or to “explain” when video evidence is deemed dispositive to offset a plaintiff’s well-pled factual allegation as plausibly stated to grant a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Both the Majority Opinion of the Sixth Circuit and the Order denying Petition for Rehearing En Banc are properly understood as resolving a pedestrian disagreement on whether the facts as alleged and video/audio evidence as considered are sufficient to allow the

case to proceed to discovery. Such factual disputes are of little importance outside the four corners of this case.

Try as they might to shoehorn fact-bound findings into grounds for certiorari, Petitioners cite no split of authority among the circuits nor demonstrate a departure from applying precedent of this Court. Certiorari is particularly inappropriate with respect to the application of qualified immunity to the messy facts set forth in Respondent's Complaint (factual allegations that may or may not be supported through the course of discovery and trial).

Additionally, this Court generally awaits final judgment in the lower courts before exercising certiorari jurisdiction. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993); *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893); *Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967); *see generally* R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* §4.187, pp. 224-226 (6th ed. 1986). Given the interlocutory posture of this case, the issues Petitioners deem to be decisive may be unnecessary to the ultimate resolution of this case because both summary judgment and trial are available avenues for defense vindication.

On the merits, Petitioners argue the Majority Opinion relied on the “moment-of-threat” limitation to the exclusion of the totality of the circumstances test, contrary to *Barnes v. Felix*, 605 U.S. 73 (2025). This is incorrect. The Majority Opinion specifically considers “‘all of the events preceding’ a use of deadly force when conducting the totality-of-the-circumstances inquiry” which allows for an “implication . . . that the reasonableness of the

officers' use of deadly force may decline as a situation progresses." *Romero v. City of Lansing, Mich.*, 159 F.4th 1002, 1009-1010 (6th Cir. 2025)(App.8-9a). Recognizing the law allows consideration of prior events to show both why an officer's use of force was reasonable, or why use of such force was unreasonable, the Majority Opinion chose the latter, explaining in significant detail the surrounding circumstances demonstrate that Romero was "largely compliant," "gave no clear indication he intended to resist," and by the time the Officers had ordered Romero to the ground, he was not only face down, he was on 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." *Id.* at 1010-1011 (R.E.32, PageID.388, App.11a). The Majority Opinion continues that, between the two rounds of fire, Romero "did his best to tell the officers he meant them no harm" stating, "I got you . . . I got you!," together with the allegation that his wife indicated such speech was telling the Officers that Romero was indeed complying. *Id.* at 1011 (R.E.32, PageID.386-387, App.11a).

STATEMENT OF THE CASE

I. Summary Of The Facts And Proceedings.

Stephen Romero ("Romero") was shot multiple times through two different volleys by City of Lansing Officers Donovan Moore ("Moore") and Jeff Kurtz ("Kurtz") (collectively, "Officers" or "Petitioners"), the initial volley wounding Romero and the second volley killing him. The Officers arrived at Romero's driveway with rifles drawn and pointed at Romero, commanding him three times to

show his hands. Romero was standing next to a car, facing the Officers, and he had both arms and hands in front of his body, palms up, with cell phones in them. The Officers command Romero to get on the ground, times two, and state specifically, "*Get on the ground now or I'll shoot you.*" Inquiring "*Bro*" several times, Romero slowly leans down to place the cell phones on the ground, his arms away from his body, saying "*Okay.*" Commanded again to "*Get on the ground now.*" Romero goes to his knees, arms up, assuming the universally recognized position of surrender, again inquiring, "*Bro,*" and was again instructed to go face down on the ground.

While on his knees, hands above his head, Romero slowly lifts his t-shirt with his left hand saying "*Listen, Listen*" to reveal a holstered handgun on his right hip. When his shirt falls down from his left hand, Romero reaches with his right hand to pull up his shirt, to again show the holstered handgun. Romero then uses his right hand to touch or almost touch his holster/gun, with his left arm still in the air and while still kneeling. Once he states, "*I,*" after just saying "*Listen, Listen,*" the initial gunshots are taken. The handgun has not been drawn, let alone pointed at the Officers. Romero starts to go down on the ground toward his vehicle, saying "*Ahhhh,*" as he is then wounded. He next states, "*I got you*" twice while he is using his right arm to reach for his gun which Romero contends demonstrates he was seeking to slide the weapon across the ground toward the Officers as he had done with the cell phones when slowly placing them on the ground. A second round of shooting kills Romero while he is face down on the ground by the car.

The district court granted Petitioners' motion to dismiss reasoning that the use of force after Romero had been wounded and was on the ground was objectively reasonable because Romero was not incapacitated and his actions forced the Officers to make a quick decision as to their response. (R.E.27, Opinion, PageID.344, App.63a). The Sixth Circuit reversed with respect to the Officers' second round of shots, finding the circumstances of the second shooting were materially different from the first. "By the time he [Romero] 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." (R.E.32, Opinion, PageID.388, App.11a).

A majority of the Sixth Circuit Judges failed to vote in favor of granting rehearing en banc, with a concurring opinion by Circuit Judge Ritz (R.E.36, PageID.473-476, App.71-77a), and four dissenting opinions from different Sixth Circuit Judges. (*Id.*, PageID.477-503, App.78-118a).

II. Material Facts As Alleged.

Respondent alleges Romero was unlawfully seized by the Officers on December 1, 2023, at approximately 11:27 p.m. (R.E.13, Plaintiff's First Amended Complaint, ¶¶14-15, PageID.134). The Officers approached in response to a domestic disturbance call arising out of an incident occurring in the driveway of Romero's residence. (*Id.*, ¶16, PageID.134). The caller, Respondent Ashly Romero, denied being assaulted with a weapon. (*Id.*, ¶18, PageID.135) and there was no *confirmed* shooting involving Romero, as found by the District Court, for purposes of a 12(b)(6) analysis, when viewing the camera footage. (R.E.27, PageID.330, n. 4, App.46a). The videos

and audio show Romero standing next to a parked car, holding no weapon, arguing with a woman seated inside, as alleged in ¶27 of the FAC. (R.E.13, PageID.136). The videos and audio show the Officers observed what they were originally told to expect by Central Dispatch: a domestic disturbance involving spouses, with the woman seated inside of her automobile. (R.E.16-2, Split Screen Video, 0:15-0:19, Apx.121a). The Officers charged up Romero's driveway with guns pointed at him (R.E.13, ¶42 of the FAC, PageID.138), with the Officers giving commands to Romero, his resulting compliance, and the lack of resistance (R.E.16-2, 0:15-0:33, Apx.121a), as so alleged in the FAC (*see* ¶47, Romero did not attempt to flee, ¶48, did not make verbal threats, ¶49, and made no threats). (R.E.13, PageID.138-139).

Romero is startled, shocked and traumatized by two police Officers aiming guns at him, confused by the screaming coming from two authoritative bodies. He is complying with what he is told to do, but not at the pace which Moore desired. *See* R.E.16-2, Split Screen Video, App.121a. Another video, R.E.9-3, Moore BWC 2:40-2:42, App.120a, depicts Moore ordering Romero to show him his hands multiple times, in repeated succession. Romero immediately submits and is already showing his hands throughout the entirety of the repetitive commands, rendering those commands redundant and creating more confusion, as Moore continues to order Romero to do what was already done. (R.E.16-2, 0:15-0:33, App.121a). Romero inquires, "*Bro? Bro?*" while Moore instructs him to get on the ground (R.E.9-3, Moore BWC, 2:44-2:47, App.120a; R.E.16-2, 0:20-0:23, App.121a), statements reasonably interpreted as Romero communicating that none of what was happening was necessary.

The videos and audio show Romero's continued substantial compliance with repeated commands, with little to no time to comply before the next instruction. Moore commands Romero to get on the ground after Romero has complied with "*show me your hands.*" (R.E.16-2, 0:18-28, App.121a). Romero sets phones from his hands on the ground in response to the command "*get on the ground.*" (R.E.16-2, 0:19-0:24, App.121a). He slowly and methodically lays the phones on the ground in a manner which Respondent alleges conveys Romero is no threat to the Officers. (*Id.*; R.E.9-3, Moore BWC, 2:48, App.120a; R.E.9-2, Kurtz BWC, 2:47, App.119a).

Moore continues to order Romero to the ground, saying, "*get on the ground now, or I will shoot you.*" (R.E.9-3, Moore BWC, 2:47-2:49, App.120a; R.E.16-2, 0:18-0:22, App.121a). Romero has done nothing but comply, has not made a threat, has not advanced toward an Officer, has not exhibited belligerence and has been polite. Romero is not holding a weapon and there is no visible weapon. Respondent contends no reasonable officer would believe he could use deadly force to kill when he thinks the suspect is, *at most*, passively resisting commands.

Immediately after he hears Moore say, "*get on the ground or I will shoot you,*" Romero kneels in a submissive, surrender position, still holding his hands over his head. (R.E.9-3, Moore BWC, 2:50-2:53, App.120a; R.E.16-2, 0:25-0:26, App.121a; R.E.9-2, Kurtz BWC, 2:49-2:53, App.119a).

Romero then exclaims: "*Bro*" as Moore is continuing to scream, "*get on the ground,*" something Romero has just done; and as Kurtz is simultaneously yelling "*face*

down.” (R.E.9-2, Kurtz BWC, 2:51-2:54, App.119a; Moore BWC, 2:53-2:54, App.120a; R.E.16-2, 0:25-0:30, App.121a).

Moore is about to shoot Romero even though Kurtz continues with commands. Kurtz says “*face down*” twice during the confusion.¹ While saying “*Listen, Listen,*” – he is on his knees, hands above his head – Romero slowly lifts his shirt with his left hand crossing his body to reveal his holstered handgun. He does not grasp the weapon. (R.E.9-2, Kurtz BWC, 2:52-2:53, App.119a).

Romero uses his right hand to touch, or almost touch his holster/gun on his right waist. (R.E.9-2, Kurtz BWC, 2:54, App.119a).

His left arm is back in the air, he is on his knees. Romero continues, “. . . I,” and does not finish his statement because then he is shot with the first 4 rounds volley. (R.E.9-2, Kurtz BWC, 2:54-2:55, App.119a; R.E.27, PageID.331, App.47a).

The second “face down” command is pending as Moore opens fire. (R.E.9-2, Kurtz BWC, 2:50-2:54, App.119a; R.E.16-2, 0:28-0:30, App.121a). There is a brief pause in the shooting by Moore when both Officers opened fire a second time. (R.E.16-2, 0:33-0:36, App.121a). After shot with the first volley, Romero flings his gun from his

1. The Split Screen Video with audio (R.E.19, App.121a) demonstrates the confusing and conflicting nature of the commands yelled at Romero, as alleged in ¶46 and ¶50 of the FAC. (R.E.13, PageID.138-139). As one Officer commands get down, which Romero is, another commands him face down. (R.E.19, 0:22-0:30, App.121a).

waistband as he is laying on the ground, wounded,² thus communicating his belief the Officers want him disarmed, saying “*I got you*,” reasonably interpreted as meaning, “I understand, I am not a threat.” (R.E.9-2, Kurtz BWC, 2:57-2:58, App.119a; R.E.16-2, 0:31-0:33, App.121a).

Moore and Kurtz continued shooting Romero with 10 more rounds as he was lying incapacitated on the ground, with the gun nowhere near his reach. (R.E.16-2, 0:33-0:36, App.121a; R.E.27, PageID.331, App.47a). Romero was shot dead in his driveway right next to his wife. (R.E.16-2, 0:33-0:36, App.121a).

These critical moments show Romero slowly and methodically lifted his shirt with his left hand, slowly reaching across his body, as Kurtz said, “face down,” just as he had slowly and methodically displayed and laid down his phones, while Moore was exclaiming, “on the ground.” (R.E.16-2, 0:27-0:30, App.121a). Romero is in the process of showing the Officers there was a handgun holstered in his right side waistband and, according to Respondent, showed what a reasonable officer would interpret as an offer to voluntarily disarm. His handgun is visible on his right hip, holstered, clearly disclosed. Romero makes no attempt to grab let alone aim his handgun. (R.E.16-2, 0:27-0:28, App.121a). Instead, when Romero’s shirt slips down after he had initially raised it with his left hand, he reaches down again, this time with his right hand, to lift his shirt and places his hand near or on the holstered pistol. (R.E.16-2, 0:27-0:29, App.121a).

2. Blood is visible on Romero’s right arm from the Officers’ first volley of gun shots, as well as all over the ground. (R.E.9-2, Kurtz BWC, 2:55-2:57, App.119a).

The combined audio and visual footage is reasonably interpreted as showing Romero gesturing his intent to lay down the weapon. He places his hand on the gun to disarm himself. (R.E.16-2, 0:29, App.121a). Combined with his preceding behavior demonstrating he posed no threat, did not intend to use the gun, and was disarming himself, Respondent contends: (1) a reasonably well-trained officer would have known Romero, on his knees and in the universally recognized position of surrender, was not in a shooting posture; and (2) any reasonably well-trained officer would know the proper method of removing a weapon from a holster when there is no intent to shoot is to extend the index finger parallel to the barrel so the trigger is not touched. That is exactly what Romero was doing as his hand slowly moved toward where his weapon was stowed, all while confusing commands continued. (R.E.16-2, 0:29-33, App.121a). Most importantly under Rule 12, the foregoing facts are entirely consistent with ¶¶50-58 of the FAC. (R.E.13, PageID.139-140).

REASONS FOR DENYING THE PETITION

Petitioners acknowledge the Court has discretion to grant a petition for writ of certiorari and will only do so “for a compelling reason.” Sup. Ct. R. 10. Petitioners do not assert a conflict between the Sixth Circuit Majority Opinion and another United States Court of Appeals Opinion on the same matter. Instead, they argue that the Majority Opinion departs from the precedent of this Court. As previewed in the Introduction, the Sixth Circuit Majority Opinion reflects a mere disagreement on the application of precedent to the facts of this case, specifically Respondent’s factual allegations and the video and audio evidence. Petitioners cannot escape that

the Majority Opinion simply allows this case to proceed through discovery, subject to further review by the district court and the Sixth Circuit, as needed, at the summary disposition and trial stages. The appellate posture of this case bodes against Supreme Court review.

As explained in the following pages, the Majority Opinion does not contradict but rather embraces and then properly applies precedent from this Court. Whether the factual allegations and video/audio evidence are sufficient to plausibly state a claim for excessive force are not questions worthy of Supreme Court review.

I. The Sixth Circuit Majority Opinion Properly Applied *Barnes v. Felix* By Examining All Of The Circumstances Surrounding The Officers' Second Round Of Shots, Which In Turn Justifies Denial Of This Court's Review.

This Court's review is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review. *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). Petitioners claim there is a need for this Court to "clarify" when and how *Barnes* is properly applied to cases involving multiple instances of force.

A. The Sixth Circuit's Application of *Barnes v. Felix*.

Barnes v. Felix was released by this Court on May 15, 2025, after briefing in this case was completed at the Sixth Circuit level. Nonetheless, the Sixth Circuit applied *Barnes* by examining not only the moment of

Romero’s killing by the second round of shots but also the totality of the circumstances, including what the Officers saw and, importantly, what they heard, throughout the entire encounter. (R.E.32, PageID.386-387, App.8-9a). Petitioners insist the Majority Opinion employed the Fifth Circuit’s “moment-of-threat” rule to the exclusion of applying the totality of the circumstances test, and thus violated the holding of *Barnes*. This accusation lacks merit given the Majority Opinion’s direct citation to and extensive application of *Barnes*. See *Romero v. City of Lansing, Mich.*, 159 F.4th 1002, 1009-1010 (6th Cir. 2025) (R.E.32, PageID.386-387, App.8-9a) (“[F]ollowing *Barnes*, we now consider ‘all of the events preceding’ a use of deadly force when conducting the totality-of-the-circumstances inquiry” which allows for an “implication . . . that the reasonableness of the officers’ use of deadly force may *decline as a situation progresses*.”) *Id.* (emphasis supplied). This analysis defeats the assertion that the Majority Opinion employed the Fifth Circuit moment-of-threat analysis contrary to *Barnes* in lieu of the totality of the circumstances test (“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 1009) (R.E.32, PageID.386-387, App.8-9a).

Petitioners argue consideration of the events preceding the use of deadly force are limited to those supporting a finding of reasonableness of the officer’s use of deadly force, citing *Barnes* and the case which Petitioners claim conflict with the Majority Opinion, *Eastepp v. City of Nashville, Tenn.*, 156 F.4th 819 (6th Cir. 2025). In each of these cases, consideration of the events preceding the use of deadly force *supported* the reasonableness of the respective Officers’ use of such force. *Barnes*, 605 U.S.

at 77 (decident refused to exit vehicle, instead restarted vehicle and moved forward in the vehicle, resisting police instructions not to move, with officers smelling marijuana and decident “digging around” the vehicle); *Easte*, 156 F.4th at 823-824 (decident takes out and uses box cutter in a threatening manner, ignores commands of police, never answers inquiries about whether decident had another weapon in his pocket, takes two quick steps toward officer and pulls an object from his jacket). Here, consideration of the events preceding the use of deadly force *defeat* the reasonableness of the Officers’ use of force. That consideration of the events preceding the use of deadly force may defeat rather than support a finding of reasonable officer conduct does not mean consideration of those events did not occur. Indeed, in each of the cases, *Romero*, *Barnes*, and *Easte*, the respective court did consider the complete timeline of events, in compliance with the totality of the circumstances test for excessive force.

Barnes recognizes the history of the interaction, as well as other past circumstances known to the officer, may inform the reasonableness of the use of force. *Barnes*, 605 U.S. at 80-81. Consideration of the “other past circumstances known to the officer” is not limited to those circumstances justifying the use of deadly force. “Prior events may show . . . why such an officer would have perceived the same conduct as innocuous.” *Id.* Here, the Majority Opinion reasons prior events lessened the reasonableness of the Officers’ use of deadly force as the situation progressed, rendering meritless Petitioners’ argument the Majority Opinion ignored prior events leading to the second round of shooting, contrary to this Court’s precedent, instead focusing only on the moment-of-threat.

B. Application of *Barnes v. Felix* to the Factual Allegations of this Case Does Not Warrant Supreme Court Review.

Sup. Ct. R. 10 provides that “[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.” Instead, certiorari is granted only “in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.” *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923), quoted in *N.L.R.B. v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). This exclusionary criterion aptly describes the pending petition. Petitioners’ true complaint is the Majority Opinion’s application of *Barnes* to the facts of this case. The Majority Opinion properly examined not only the moment of Romero’s killing by the second round of shots but also the totality of the circumstances, including what the Officers saw and heard throughout the entire encounter. Notably, the Majority Opinion reasoned that Respondent’s excessive force claim could proceed to discovery because of what had occurred before the fatal volley of shots, including that the Officers had already wounded and brought Romero to the ground with their first round of shots, and that Romero never actively resisted the Officers, never advanced towards them, and never pointed his gun at them.

To the extent Petitioners conflate the Majority Opinion with the *Barnes* defective moment-of-threat rule of the Fifth Circuit, limiting the reasonableness analysis to the

seconds before the shooting, they are mistaken for the very reason that all of the circumstances before the second round of shots were considered by the Majority Opinion.

Petitioners simply disagree with the Majority Opinion's application of *Barnes* to the factual allegations and the video/audio evidence in this case. Not only is this fact-laden disagreement inappropriate for Supreme Court review, it is flawed on the merits: the reasonableness of the Officers' use of deadly force actually declined as the situation progressed.

II. Disagreement On Application Of The “Blatantly Contradict” Video/Audio Rule Does Not Warrant Supreme Court Review.

In their second argument, the Officers assert that this Court should “explain” when video evidence is dispositive at the motion to dismiss stage of the proceedings. The underlying assumptions for this argument are that the video and audio evidence in this case is not subject to reasonable differences of opinion and the footage blatantly contradicts the factual allegations of Respondent's Complaint. In turn, this presupposes that the video and audio footage is so clear that it supports only one outcome, with no relevant gaps or uncertainties left upon viewing (which in turn must be viewed in the light most favorable to Respondent).

As with the previous argument, the particulars of the video and audio evidence presented to the Sixth Circuit are fact-laden and does not satisfy Rule 10. Petitioners do not demonstrate how the disagreements of the events revealed by the video and audio evidence are likely to

reoccur, even under the “clearly established” prong of an excessive force case. Ironically and incorrectly, when classifying the video and audio evidence as blatantly contradicting Respondent’s factual allegations, it is Petitioners who deviate from *Barnes* and fail to take into account the events before the second round of shooting. Romero never actively resisted the Officers, never advanced towards them, never pointed his gun at them, leading to the time of the second round of shooting. Then, at that time when the Officers opened fire for the second time, Romero was already wounded, lying on the ground, on his stomach and elbows, and could not reasonably be determined to be a threat to anyone. These conclusions by the Sixth Circuit, Doc. 32, PageID.388, App.11a, are reasonably drawn from the video and audio evidence, such that Respondent’s factual allegations are not “blatantly contradicted.”

Petitioners devote minimal attention to the audio evidence demonstrating that Romero’s words were non-threatening and that the content of his comments were inquiring in nature and otherwise indicating that he understood and was complying with the Officers’ rapid fire commands. It is the confluence of the video and audio evidence which destroys any claim that this evidence “blatantly contradicts” Respondent’s allegations. Petitioners excise context from such evidence when reaching for the “blatantly contradicted” apex, violating the standard of viewing such evidence in the light most favorable to Respondent, as Plaintiff. The context includes that Romero’s words were non-threatening (he did not shout the words in an aggressive manner and, when he spoke, his voice broke), that he was lying on the ground and did not move toward the Officers or position himself

in an offensive or provocative way, that through the entire encounter, Romero never made any sudden or aggressive gestures, and that the Officers had full view that Romero has put his hands in the air, places his cell phones on the ground, and moves deliberately to his knees. As reasoned by the Majority Opinion, “[f]aced 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.” (R.E.32, PageID.389, App.12a).

Petitioners’ contention that the video and audio evidence contradicts Respondent’s allegations is unsupported by the record. In turn, any concern that the Majority Opinion acts as a bellwether for other Sixth Circuit excessive force decisions, whether based on constitutional violation of clearly established, is unwarranted. *See* Kahan, Hoffman & Braman, *Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 Harv. L. Rev. 837, 879 (2009) (demonstrating with a sample of 1,350 respondents that 8 of 9 Supreme Court Justices were, *as purely factual matter*, mistaken about the degree of public consensus that video of the plaintiff fleeing from the police showed enough risk to public safety to justify deadly force); *see also*, Stempel, *Taking Cognitive Illiberalism Seriously*, 43 Loy. U. Chi. L.J. 627, 650 (2012) (discussing studies showing that summary judgment decisions ostensibly based on a consensus between all reasonable minds are reversed between 20% and 40% of the time).

Petitioners’ concern that the Majority Opinion will contaminate Sixth Circuit jurisprudence by acting as “clearly established” authority for future cases is misplaced. The concern is premised on the defense-friendly version of the video and audio evidence. When such

evidence is taken in context with the remaining evidence of the case, just described, drawing all reasonable inferences and interpretation in Respondent's favor, this case simply falls in the category of finding that deadly force is objectively unreasonable where there is no probable cause to believe that the suspect poses an immediate threat to the Officers or others. *See Tennessee v. Garner*, 471 U.S. 1, 11 (1985). Restated, this case falls neatly into the category of those cases where it is clearly established that the use of deadly force requires probable cause to believe that the suspect poses an immediate threat to the officers or others – missing here when viewing the evidence in the light most favorable to Respondent. In turn, no outlier “clearly established” precedent is presented by this case.

CONCLUSION

For all of the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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