

**In the
Supreme Court of the United States**

DONOVAN MOORE, ET AL.,

Petitioners,

v.

ASHLY ROMERO, 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**

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Ashly Romero’s (“Plaintiff’s”) Brief in Opposition (“BIO”) to Officer Moore and Officer Kurtz’s Petition for Certiorari does not demonstrate that this Court should deny the Petition. Indeed, this case provides the Court the opportunity to articulate how the *Barnes v. Felix*, 605 U.S. 73 (2025) “totality of the circumstances analysis” is applied in cases where multiple instances of force are used by a law enforcement officer. This Court can also use this case to clarify that when clear video of an incident is submitted to the record with a motion to dismiss based on the pleadings, the standard for a government official being entitled to qualified immunity is the same standard as it would be at the post-discovery, motion for summary judgment stage. Most importantly, this case is of exceptional importance to the nation because the Sixth Circuit’s Majority opinion places law enforcement officers in danger of being killed by requiring them to stare down the barrel of a gun before using deadly force. This will cause them to hesitate to use deadly force when necessary, which places the public’s safety at danger, as well.

Again, this case involves two officers responding to a domestic violence incident that dispatch reported was “a confirmed shooting.” (Amended Complaint – R.13, PageID.134-135; Kurtz BWC – R.9-2, 23:25:43). The officers arrived with guns drawn finding Stephen Romero in a driveway near a vehicle, but Romero did not immediately comply with the officers’ orders to show his hands, get on the ground, and get “face down.” (Moore BWC – R.9-3, 23:26:54-23:27:06). Instead, Romero lifted his shirt with his left hand, revealing a pistol on his

right-side waist, while keeping his right hand in the air, then quickly dropped his hand to the gun and grabbed it. (Kurtz BWC – R.9-2, 23:27:09-23:27:10). In response, Officer Moore backed away and fired four shots. (Moore BWC – R.9-3, 23:27:11). Romero fell to the ground, told the officers “I got you, I got you!”, then reached for the gun again. (Moore BWC – R.9-3, 23:27:12). Officer Moore yelled, “Stop!” but Romero proceeded to grab the gun and started to pull it from his waistband. (Moore BWC – R.9-3, 23:27:11-23:27:13). Officers Moore and Kurtz then fired about ten rounds at him, while backing away. (Moore BWC – R.9-3, 23:27:13). Five seconds elapsed between the first and last shots. (Moore BWC – R.9-3, 23:27:09-23:27:14).

Even though Officers Moore and Kurtz could have been killed if they did not protect themselves, the Sixth Circuit Majority analyzed this case only from the second round of shots fired. (App.10a). It stated, “we need not dwell on the first two stages of the encounter because the facts of the second shooting are well-pled enough.” (App.10a). The Majority similarly concluded the case required discovery, despite the record already containing clear video evidence of all the material facts of the incident. (App.10a). It also held that because the case was only being analyzed at the pleading stage of litigation, its analysis of qualified immunity was supposed to be more favorable to the plaintiff than at the summary judgment stage of litigation, following discovery. (App.6a). A dissenting opinion vehemently disagreed with the Majority’s legal analysis. (App.22a-40a). After receiving that opinion, Officers Moore and Kurtz moved for an en banc rehearing, but the Sixth Circuit denied the petition. However, many Sixth Circuit Judges dissented, noting the Majority’s analysis was

based on a misunderstanding of authority from this Court and that the Majority's opinion unnecessarily endangers law enforcement officers' lives. (App.78a-118a).

I. This Court Should Use this Case to Demonstrate that When the Lower Courts Analyze the Totality of the Circumstances in Cases Involving Multiple Instances of Force, the Analysis Requires Considering the Circumstances Progressively from Before the First Instance of Force is Used Through the Last Instance of Force Used

Plaintiff argues that this Court's review of cases is not intended to resolve intra-Circuit disagreements and that Officers Moore and Kurtz are simply asking that this Court correct an error. (BIO at 15-16). This is not accurate. The Sixth Circuit Majority did not merely make an error that should be corrected. Rather, (1) the dissents to the order denying en banc review demonstrate that the Sixth Circuit is deeply divided on the application of *Barnes* to this type of fact pattern and clarity is needed, (2) the Majority's analysis and conclusion conflicts with many opinions from other Circuits, and (3) providing guidance on how *Barnes* applies to fact patterns like this one is exceptionally important for law enforcement officer and public safety.

First, even though a Petition for En Banc review was denied, the denial led to numerous dissents opposing the denial. (App.78a-118a). This Court has deemed it important to resolve questions where a Circuit has denied en banc review, but the denial led to numerous dissents. For example, in *Ashcroft v. al-Kidd*, 563 U.S. 731, 734 (2011), this Court granted certiorari after the

Ninth Circuit, via a divided panel, affirmed the denial of a motion to dismiss based on qualified and absolute immunity, which led to the denial of an en banc rehearing with eight judges dissenting from that denial.

Here, *Barnes*, 605 U.S. at 76 explained that when the lower courts analyze a law enforcement officer's use-of-force, the courts do not exclusively look at the "moment-of-the-threat." They must consider all relevant circumstances, including facts and events leading up to the climactic moment. *Id.* Events prior to the use-of-force can show why a reasonable officer would have perceived otherwise ambiguous conduct of a suspect as threatening. *Id.* at 80. These teachings from *Barnes* have led to a fundamental disagreement within the Sixth Circuit regarding their application when there are multiple instances of force used on a suspect. This disagreement suggests that there is or will be uncertainty among all the lower courts as to how *Barnes* is applied in such situations. Accordingly, this Court should grant certiorari to provide guidance on this issue, so that *Barnes* can be applied uniformly by the lower courts when officers use multiple instances of force.

Second, Plaintiff incorrectly contends that Officers Moore and Kurtz "cite no split authority among the circuits" in support of the Petition. *See Microsoft Corp. v. Baker*, 582 U.S. 23, 36 (2017) (noting that this Court has deemed resolving a Circuit split as a compelling reason to grant certiorari). To the contrary, Officers Moore and Kurtz, as well as Sixth Circuit Judges Thapar and Hermandorfer, cited a plethora of cases from other Circuits that the Sixth Circuit's Majority opinion conflicts with. (*See* Petition at 20-21; *see also* App.92a-94a). There are more, as well. *See Anderson v. Russell*, 247 F.3d 125, 127 (4th Cir. 2001) (finding that officers

reasonably used deadly force when they seized a person who was suspected of having a gun, after that person got down on his knees with hands raised, but unexpectedly and without explanation reached toward his back pocket. The suspect was later determined to be unarmed); *Palacios v. Fortuna*, 61 F.4th 1248, 1261 (10th Cir. 2023) (finding that it was reasonable to use deadly force against a suspect with a gun, despite the suspect having fallen, because as the suspect rolled on the ground he moved his hand toward his waistband); *Winder v. Gallardo*, 118 F.4th 638, 646 (5th Cir. 2024), *cert. denied*, 145 S. Ct. 2816 (2025) (finding that an officer's use-of-deadly-force was reasonable when the decedent was holding a gun and when he did not put it down after being told "put it down man, put it down"). The Majority opinion very obviously conflicts with precedent from other Circuits regarding the reasonable use-of-force against a suspect when the suspect reaches for a gun. This supports the conclusion that this Court should grant certiorari to resolve this conflict.

Third, the Court should grant certiorari because this case will allow this Court to resolve an important question of constitutional law. *See Fla. v. Nixon*, 543 U.S. 175, 186 (2004) (noting that resolving important issues of constitutional law provides a compelling reason for granting certiorari). To ensure officer safety in the Sixth Circuit and nationwide, the Court should explain that law enforcement officers need not stare down the business-end of a gun's barrel in order to be permitted to use deadly force. *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019). Nevertheless, throughout her Brief in Opposition, Plaintiff suggests her husband was compliant with demands and was apparently only pulling his gun out to discard it or surrender. (BIO at 1,

4-5, 11, 17). However, this argument is illogical because in situations like this “[p]erhaps a suspect is just pulling out a weapon to discard it rather than to fire it. But waiting to find out what the suspect planned to do with the weapon could be suicidal.” *Palacios*, 61 F.4th at 1259; *See also* the International Municipal Attorney’s Association’s Amicus Brief at 7-8 (providing two examples of a cooperative suspect who ultimately turned aggressive, shooting and killing officers, as well as an example of a suspect feigning incapacitation, then shooting and killing an officer).

Plaintiff additionally argues that Romero was incapacitated. (BIO at 10). But when considering the facts progressively from the dispatch report to the last shot, it is clear this is incorrect. The officers were told this was a confirmed shooting, at the scene Romero did not immediately obey commands, he unexpectedly reached for a gun while kneeling on the ground, and after he was shot he unexpectedly reached for a gun while on the ground despite being told to “Stop!” Furthermore, as the National Police Association noted in its brief, scientific studies have demonstrated that it is incredibly difficult to quickly incapacitate a criminal suspect by shooting him or her. (National Association of Police Amicus Brief at 16). Based on these circumstances, waiting to see whether Romero was just discarding the weapon would have been suicidal if the officers guessed wrong.

Simply put, law enforcement officers need clarity for situations like this one. This Court should provide clarity so officers can be trained to adequately identify situations that could be deadly and what the Constitution allows officers to do to protect themselves from being killed by a suspect. The Court should grant

Certiorari to clarify how *Barnes* applies in situations where officers use multiple instances of force on a suspect. Permitting the Majority opinion to stand will cause law enforcement officers to lose their lives.

II. This Court Should Use this Case to Demonstrate that When the Video Evidence Entered into the Record at the Motion to Dismiss Stage Will Yield the Same Material Factual Record at the Summary Judgment Stage, Qualified Immunity at the Pleading Stage is Analyzed Using the Same Standard as at the Summary Judgment Stage

Plaintiff also opposes Officers Moore and Kurtz's request that this Court grant certiorari to clarify how qualified immunity is applied in cases where clear video of an incident is submitted and considered at the Rule 12(b)(6)/(c) stage of litigation, particularly whether qualified immunity should be analyzed at a higher level of generality than at later stages of litigation. However, Plaintiff's Brief in Opposition does not engage in any significant discussion regarding the Rule 12(b)(6)/(c) standards, nor the purpose of qualified immunity.

Cases brought through 42 U.S.C. § 1983, like this one, are intended to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158 (1992). Government officials have a qualified immunity from liability, a doctrine which "strikes a balance between compensating those who have been injured by official conduct and protecting government's ability to perform its traditional functions." *Id* at 167. This doctrine allows government officials to perform

their jobs by protecting them from liability from reasonable mistakes of law, fact, or mixed questions of law and fact. *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). This immunity is effectively lost if a case is erroneously permitted to go through the burdens of the discovery process or to trial. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). Whether a government official is entitled to qualified immunity is a two-pronged inquiry asking whether: (1) the facts show that the official violated the plaintiff's constitutional right and (2) the right was clearly established, and the conduct of the defendant clearly violated the established constitutional right. *Pearson*, 555 U.S. at 237. "To find that a right is clearly established, courts generally "need to identify a case where an officer acting under similar circumstances . . . was held to have violated the Constitution." *Zorn v. Linton*, 146 S. Ct. 926, 930 (2026)

Motions brought under Rule 12(b)(6)/(c) test the sufficiency of a complaint. Only a complaint that states a plausible claim for relief survives these types of motions. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The vast majority of the Circuits permit video to be considered when analyzing a motion brought under one of these Rules when the video is incorporated by reference by the complaint or blatantly contradicts the allegations in the complaint. *Bell v. City of Southfield, Michigan*, 37 F.4th 362, 364 (6th Cir. 2022); *Brown v. Giles*, 95 F.4th 436, 440 (6th Cir. 2024); *Perdomo v. 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).

On the other hand, a motion for summary judgment, brought under Rule 56, entitles a movant to judgment as a matter of law when the material facts are not genuinely in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Video may also be considered at this stage of litigation. *Scott v. Harris*, 550 U.S. 372, 380 (2007).

Given the purpose of qualified immunity and the fact that video can be considered at the Rule 12(b)(6)/(c) and the Rule 56 stage of litigation, it makes little sense to disregard blatant video evidence in favor of a governmental official's qualified immunity, even at the Rule 12(b)(6)/(c) stage. Plaintiff contends that Officer Moore, Officer Kurtz, and the Sixth Circuit Judges that dissented from the Majority are simply ignoring the blatantly contradicted standard for considering video at the Rule 12(b)(6)/(c) stage of litigation. (BIO at 16-19). This is not accurate. The body worn camera video shows everything the officers learned on their way to the scene, everything they saw at the scene, and everything they observed Romero doing at the scene. Indeed, as Judge Readler noted in his dissent of the order denying an en banc rehearing, nothing about this particular video will change from the pleading stage of litigation to the post-discovery stage of litigation (App.110a). Even though "all seem to agree that this case hinges on the video evidence . . . discovery and even a trial seem inevitable [under the Majority's analysis]. That line of thinking all but nullifies Rule 12(b)(6) in this setting." (App.110a). It also all but nullifies qualified immunity at the pleading stage of litigation.

Thus, this Court should use this case to demonstrate to the Sixth Circuit and the other Circuits that when video clearly captures all the material facts related to a law enforcement officer's use-of-force, the standard for analyzing qualified immunity at the Rule 12(b)(6)/(c) stage of litigation is the same as it would be at the Rule 56 stage of litigation. Given the plethora of cases analyzing similar situations and finding that in those situations it was reasonable for the officers to use deadly force, this is a case where Officers Moore and Kurtz should have, at a minimum, been entitled to qualified immunity. Instead, due to the Majority's opinion, law officers in the Sixth Circuit must now wait until they are staring down the barrel of a suspect's gun before they can use deadly force to protect themselves or the public at-large.

Plaintiff also seems to argue that this Court should deny Officers Moore and Kurtz's Petition because this case has not been through a jury trial. (BIO at 3) However, this Court routinely considers constitutional issues and issues relating to immunity prior to trial and even at the pleading stage of litigation. *See Al-Kidd, supra* (considering the case at the pleading stage); *Iqbal, supra* (considering the case at the pleading stage); *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 5 (2021); *Zorn, supra*. This case presents an issue of how qualified immunity is analyzed at the pleading stage of litigation when video of the entire incident in question is in the Court record. Given that qualified immunity is intended to provide immunity from the discovery process and trial, it makes little sense to not resolve this issue now. It makes even less sense when the Majority opinion from the Sixth Circuit places officers' lives in danger by requiring them to wait to see whether a

suspect points a gun at them, before engaging in self-defense or defense of others.



CONCLUSION

The Court should grant certiorari to: (1) demonstrate that when multiple instances of force are used during a confrontation between an officer and a suspect, *Barnes* requires the lower courts analyze each use-of-force progressively from before the first instance of force to the last instance of force from a reasonable officer's perspective, in the heat-of-the-moment; and (2) that when the lower courts analyze a Rule 12(b)(6) or 12(c) motion, in a use-of-force case where body camera video clearly depicts the entire lead-up to and application of force, the lower courts should analyze the clearly established law of qualified immunity under the same standard (not a more general standard) as they would at the motion for summary judgment stage of litigation. Law enforcement officers will lose their lives if the Majority opinion is permitted to stand.

Respectfully submitted,

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