NO. 25-179

In the Supreme Court of the United States

PHILLIP REININK,
IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Petitioner,

v.

SEAN HART, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

Hart's Brief in Opposition ("BIO") demonstrates that there are compelling reasons for why this Court should grant Certiorari as to both issues raised in Officer Reinink's Petition. *See* U.S. Sup. Ct. Rule 10. By way of example, this Court has found that resolving a conflict in the Circuit Courts amounts to a compelling reason to grant certiorari. *Microsoft Corp. v. Baker*, 582 U.S. 23, 36 (2017). This Court has also found that granting certiorari is appropriate to resolve an important question of constitutional or other federal law. *Fla. v. Nixon*, 543 U.S. 175, 186 (2004); *Nat'l Cable & Telecommunications Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). As demonstrated in Officer Reinink's Petition, and below, there are compelling reasons for this Court to: (1) articulate a test that differentiates between general use-of-force and deadly-force, and (2) explain that an officer is entitled to qualified immunity when the officer mistakenly uses force higher than what the officer intended, so long as the mistake is reasonable under the circumstances.

I. The Court Should Provide the Lower Courts Guidance as to What Amounts to Deadly Force and What Amounts to General Use-of-Force Under the Fourth Amendment and Resolve Conflicting Published Authority on the Issue from the Sixth Circuit.

Hart's BIO asserts "[t]here is no need in general in the legal community for the proposed test [which assesses what amounts to deadly force versus general force] where [Officer Reinink] has not shown any cases in which courts or litigants express confusion on the

subject." (BIO at 14). Hart's BIO, however, belies this assertion.

Hart's BIO notably fails to identify any authority from this Court or any Circuit Court which explains how the lower courts are supposed to identify what amounts to deadly force versus general use-of-force. Having a test that differentiates between the two is highly important because the courts – the Sixth Circuit in particular – have identified different tests for the reasonableness of general use-of-force versus deadly force. General use-of-force cases consider "the facts and circumstances of each particular 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 or attempting to evade arrest by flight." *Rivas-Villegas v. Cortesluna*, 595 U.S. 1, 6 (2021). On the other hand, to use deadly force, an officer should have probable cause to believe that the suspect poses a threat of serious physical harm to the officer or others. *Palma v. Johns*, 27 F.4th 419, 432 (6th Cir. 2022). The Sixth Circuit considers the following when making that assessment: (1) why the officer was called to the scene; (2) whether the officer knew or reasonably believed that the person was armed; (3) whether the person verbally or physically threatened the officer or disobeyed the officer; (4) how far the officer was from the person; (5) the duration of the entire encounter; (6) whether the officer knew of any ongoing mental or physical health conditions that may have affected the person's response to the officer; and (7) whether the officer could have diffused the situation with less forceful tactics. *Id*. Given that there is no guidance as to how to differentiate whether an officer's use-of-force

is analyzed under the general use-of-force standard or deadly force standard, this Court should resolve this important constitutional issue to ensure uniformity of results throughout all thirteen Circuits. *Nixon*, *supra*. This case is the perfect vessel for this Court to use to articulate a test that the Circuits can use to determine what amounts to general use of force and what amounts to deadly use of force.

Hart's BIO argues that there is no split in the Circuits regarding this issue, but Hart fails to acknowledge that there is now conflicting published authority in the Sixth Circuit as to what is general use-of-force as opposed to deadly force. As noted in the Petition for Certiorari, prior to the Sixth Circuit issuing its opinion in this case, *Robinette v. Barnes*, 854 F.2d 909, 910 (6th Cir. 1988) controlled what use-of-force amounted to deadly use-of-force. That opinion noted that whether an officer's use-of-force was deadly force considered: (1) the intent of the officer to inflict death or serious bodily harm, and (2) the probability, known to the officer but regardless of the officer's intent, that the law enforcement tool, when employed to facilitate an arrest, creates a substantial risk of causing death or serious bodily harm. *Id* at 912. In *Robinette*, using a police dog, who ultimately killed the plaintiff, did not amount to deadly force because using a police dog to apprehend a suspect typically does not carry with it a substantial risk of causing death or serious bodily harm. *Id*. The Sixth Circuit's published *Hart* opinion, however, did not use that test. Rather, it created a different test which considered whether it was possible that a particular use-of-force *could* be deadly, regardless of the intent of the officer, and found that if so, the force was deadly force. *Hart*

v. Michigan, 138 F.4th 409, 420 (6th Cir. 2025). Based on the different tests used, the Sixth Circuit now has a logical inconsistency regarding what amounts to deadly force. Somehow, the use of a dog that unintentionally killed a suspect does not amount to deadly force, while the mistaken firing of a tear gas canister (where the officer thought it was powdered tear gas) at a suspect which only caused minor injuries, amounts to deadly force. Given that this Court found in *Microsoft Corp*, *supra* that conflicts between multiple Circuits amount to a compelling reason to grant Certiorari, it stands to reason that an inter-Circuit conflict would also amount to a compelling reason to grant Certiorari.[1]

Hart additionally contends that this Court should deny Officer Reinink's Petition because, in Hart's view, the Court should not adopt the Petitioner's proposed three-factor test for assessing what amounts to deadly use-of-force versus general use-of-force. (BIO at 14-15). This argument, however, does not mean that there is no compelling reason to grant Certiorari. Regardless of whether the Court adopts the Petitioner's proposed test or comes up with another test, there still should be a test that differentiates between deadly force and general use-of-force. It is clear from this case's procedural history that the District Court and the Circuit Court lacked guidance on how to identify what is deadly force as opposed to

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[1] The Sixth Circuit even recently recognized in *Feagin v. Mansfield Police Dep't*, 155 F.4th 595, 610 (6th Cir. 2025) that it has struggled to uniformly apply general use-of-force standards. This acknowledgment should weigh in favor of this Court granting Certiorari in this case, to provide the Sixth Circuit guidance in use-of-force cases.

general use-of-force. This emphasizes that there is a compelling reason to grant certiorari.

Indeed, Hart's hypothetical where an officer with poor aim grazes a suspect with a bullet highlights this compelling need. (BIO at 14). As noted in Officer Reinink's Petition, some Circuits consider the severity of the plaintiff's injury when assessing whether an officer's use of force was reasonable. *See Hopson v. Alexander*, 71 F.4th 692, 698 (9th Cir. 2023); *Jones v. Buchanan*, 325 F.3d 520, 527–28 (4th Cir. 2003); *Koger v. Carson*, 853 F. App'x 341, 345 (11th Cir. 2021). Thus, under the governing law in those Circuits, it is possible that the hypothetical defendant-officer's actions would be analyzed under a general use-of-force standard. However, the analysis set forth by the Sixth Circuit's *Hart* panel would result in the hypothetical officer's actions being analyzed under a deadly use-of-force standard. The fact that Hart's hypothetical could have different analyses and conclusions based on which Circuit the case was filed in means this Court should grant Certiorari to create a test differentiating between general use-of-force and deadly force. The test proposed in Officer Reinink's Petition is reasonable, logical, and would result in uniform conclusions throughout the Circuits, for the reasons articulated in it.

In another effort to dissuade this Court from granting Officer Reinink's petition, Hart claims that "[Officer] Reinink admits that the force he used rose to the level of deadly force, admits that such force was not permitted under the circumstances, and admits that force violated Mr. Hart's constitutional rights." (BIO at 1). This argument is incorrect. Hart's argument appears to be referring to when his counsel questioned Officer Reinink in a manner where Officer Reinink

would have been required to provide a legal conclusion on whether shooting someone intentionally with Spede-Heat would be unreasonable under the circumstances. (Officer Reinink Dep – R. 109-9, PageID. 772). Officer Reinink testified that he knew on the date of the incident that an officer would never want to hit someone more than five feet away with Spede-Heat. (Officer Reinink Dep – R. 109-9, PageID. 760). There, Officer Reinink acknowledged that it is possible that Spede Heat could be deadly and that intentionally shooting someone with Spede-Heat could be excessive force or not reasonable. (Officer Reinink Dep – R. 109-9, PageID. 760-761, 780). However, Officer Reinink specifically denied that shooting Hart with Spede-Heat amounted to excessive force because, as he explained, "[it] was not intentional." (Officer Reinink Dep – R. 109-9, PageID. 772). Hart's argument does not address the issue raised in Officer Reinink's Petition, which is whether the Court should establish a legal test that differentiates between general use-of-force and deadly force.

Nevertheless, assuming a witness had opined that Officer Reinink's actions rose to deadly force, that his actions were not permitted under the circumstances, or that Officer Reinink violated Hart's constitutional rights, Hart's reliance on such testimony to establish that there is no need to create a test that distinguishes between deadly force and general use-of-force is improper. It makes little sense that a single police officer's testimony or opinions in a use-of-force case could establish, as a matter of law, what actions amount to a violation of the Fourth Amendment. Indeed, it is the judiciary's job – not a testifying witness's job or testifying party's job – to establish legal

standards, such as what legal test to use to distinguish between general use-of-force and deadly force.[2]

Hart also claims that *Graham v. Connor*, 490 U.S. 386 (1989) would be abandoned if the Court granted Certiorari and ruled in Officer Reinink's favor. (BIO at 2). This is not accurate. The general totality-of-the-circumstances analysis set forth by *Graham* would be untouched. Rather, creating a test that differentiates between general use-of-force versus deadly force, two concepts which have different analyses, would be a logical extension to the concepts outlined in *Graham*.

Finally, Hart cites *Barnes v. Felix*, 605 U.S. 73 (2025), but *Barnes* provides no guidance on the issue of what type of force amounts to deadly force versus general use-of-force. In *Barnes*, an officer stopped a suspect who was driving a car and during the interaction, after the suspect turned off the vehicle and was told to exit, the suspect turned the vehicle back on. *Id.* The officer jumped on the doorsill and two seconds

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[2] The concept that a witness cannot opine as to legal standards is so well-established that the Rules of Evidence preclude witnesses from providing testimony as to legal conclusions. *See* 1972 Committee Notes for Fed. R. Evid. 704 (explaining that witnesses may not provide opinions that explore "legal criteria"); *Andrews v. Metro N. Commuter R. Co.*, 882 F.2d 705, 709 (2d Cir. 1989) (finding that a witness could not opine that a railroad was negligent); *Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994) (finding that an expert witness could not provide a legal conclusion as part of his opinion); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993) (holding that opinion testimony regarding probable cause was inadmissible because the opinion was a legal conclusion); *Nat'l Oilwell Varco, L.P. v. Auto-Dril, Inc.*, 68 F.4th 206, 221 (5th Cir. 2023) (finding that a lay witness's opinions that a settlement agreement was fraudulently induced and, therefore, was an inadmissible legal conclusion).

later fired two quick shots. *Id*. In analyzing whether the officer's actions violated the Fourth Amendment, the Fifth Circuit applied the "moment of the threat" test, which limited whether the use of force was reasonable to analyzing the two seconds before the shooting. *Id* at 74. This Court rejected that test, explaining that such a test fails to account for the totality of the circumstances leading up to the shooting. *Id*. *Barnes* simply does not help answer what type of force amounts to general use-of-force versus deadly force.

In sum, the lower courts lack guidance on differentiating between claims related to general use-of-force and deadly force. This Court should grant Certiorari to answer this important constitutional question. It should also grant Certiorari to resolve the conflict in the Sixth Circuit created between the Sixth Circuit's opinion in this case and *Robinette* about how to determine what type of force is deadly force.

II. This Case Provides the Perfect Vessel for This Court to Answer the Important Federal Question of What Amounts to a "Mistake of Fact" in a Use-of-Force Case for the Purposes of Qualified Immunity

Hart also fails to demonstrate why this Court should not use this case to provide guidance as to what amounts to a "mistake of fact" for the purpose of qualified immunity in a use-of-force case. Hart's BIO fails to cite any case from this Court or any Circuit Court which describes what amounts to "mistake of fact," much less what type of "mistake of fact" entitled a police officer using force to seize a person to qualified immunity. As demonstrated in Officer Reinink's Petition, there is no authority from this Court and a

lack of authority from the Circuit Courts which articulates what amounts to a "mistake of fact" in such cases. Hart's failure to cite any authority demonstrating that this issue has been resolved in at least one Circuit highlights that this Court should grant Certiorari to resolve this important federal question.

Furthermore, this case is the perfect vessel to take the general "mistake of fact" concept, articulated in *Heien v. North Carolina*, 574 U.S. 54, 61 (2014) (i.e., that a reasonable mistaken belief about a fact), and apply that concept in the use-of-force context. This case involves an officer believing that he was about to fire Muzzle Blast (a powdered tear gas) at Hart, but the officer accidentally fired Spede Heat (a canister that releases tear gas) at him due to the canisters for both looking nearly identical. Using this fact pattern to establish what a reasonable factual mistake looks like will allow the lower courts to easily compare other fact patterns to this case in order to assess whether officers in other use-of-force cases are entitled to qualified immunity due to a "mistake of fact."

In what appears to be an effort to avoid the fact that the Circuit Courts and District Courts lack guidance regarding what type of "mistake of fact" entitles an officer to qualified immunity in a use-of-force case, Hart argues that there is a dispute of fact as to whether Officer Reinink intentionally used Spede Heat as opposed to whether he made a mistake. However, even the Majority from the Sixth Circuit rejected this premise, finding that "the record contains some support for the inference that Officer Reinink had intended to deploy Muzzel Blast and mistakenly fired the Spede-Heat canister." *Hart*, 138 F.4th at 420. Further, as the District Court noted, there was more

evidence than just Officer Reinink's testimony which supported the conclusion that he made a factual mistake. (Opinion & Order – R. 132, PageID.1560). It explained,

> [t]he record also contains testimony from other GRPD officers that the training for discharging Spede Heat required an upward-angled trajectory, launched over a crowd, and from a significant distance away, e.g., "150 yards," whereas the training for discharging a Muzzle Blast required an officer to point the launcher in the direction of the subject's chest from a relatively short distance, e.g., two to five feet. The record also contains video evidence showing that Officer Reinink discharged the launcher consistent with the training for Muzzle Blast rather than the training for Spede Heat. In contrast, Plaintiff Hart has presented no evidence to contradict Officer Reinink's claimed mistake. Plaintiff Hart cannot merely announce that a genuine issue of material fact exists.

(App.72a, internal record citations omitted); *See also Mission Integrated Techs., LLC v. Clemente*, 158 F.4th 554, 567 (4th Cir. 2025) ("a party cannot defeat summary judgment simply by declaring in its briefing that a factual issue still exists"). That there is direct and circumstantial evidence that Officer Reinink made a factual mistake when he fired Spede Heat instead of Muzzle Blast only adds to the reason why this Court should use this case to explain what must be established for an officer to be entitled to qualified immunity due to a mistake of fact in a use-of-force case.

Simply put, this Court should grant Certiorari as to this issue as well. This is an important federal question that this Court should provide the lower courts guidance on. The fact that the District Court judge and one Circuit Court judge believed that Officer Reinink was entitled to qualified immunity due to a mistake of fact, while two Circuit Court Judge's disagreed, demonstrates that there is a lack of clarity as to this concept.

CONCLUSION

As demonstrated in Officer Reinink's Petition for Certiorari and in this Reply Brief, this Court should grant Officer Reinink's petition in full and answer: (1) what test should be used to differentiate between general use-of-force and deadly-force, and (2) whether an officer is entitled to qualified immunity when the officer mistakenly uses force higher than what the officer intended, so long as the mistake is reasonable under the circumstances.

Respectfully submitted,

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