

No.

IN THE
Supreme Court of the United States

JENNIFER KILNAPP,

Petitioner,

v.

BAILEY GANNON, in his official and personal capacity,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In panicked flight from a suspect who was neither chasing nor threatening him, Respondent Officer Bailey Gannon recklessly fired his gun without looking, let alone aiming. Instead of hitting the suspect, he shot his partner, Petitioner Officer Jennifer Kilnapp. Kilnapp sued under 42 U.S.C. § 1983, alleging that Gannon used excessive force. The Sixth Circuit held that Gannon was entitled to qualified immunity regardless of whether his conduct was objectively unreasonable. It reasoned that even if it was clearly established that the shooting was unreasonable, it was not “clearly established” at the time of the shooting that Kilnapp, as an unintended target, could file a Fourth Amendment claim against Gannon.

The question presented is:

Did the Court of Appeals err in granting qualified immunity based on facts that the officer could not have known at the time of the conduct and that related only to whether the eventual plaintiff could assert a specific cause of action, not whether the officer’s own conduct was objectively unreasonable?

PARTIES TO THE PROCEEDING

Petitioner is Jennifer Kilnapp. Bailey Gannon is respondent. The City of Cleveland, Ohio was not a party in the 6th Circuit proceeding and is not a party to this Petition.

RELATED PROCEEDINGS

Kilnapp v. City of Cleveland, No. 25-3149 (6th Cir. judgment entered Feb. 18, 2026).

Kilnapp v. City of Cleveland, No. 22-4059 (6th Cir.) (judgment entered July 21, 2023).

Kilnapp v. City of Cleveland, No. 1:22-cv-01225 (N.D. Ohio) (Order denying Summary Judgment entered Feb. 13, 2025; Order denying Judgment on the pleadings entered Dec. 9, 2022).

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INTRODUCTION

The Sixth Circuit issued an opinion that creates a circuit conflict, breaks with this Court's precedents, and yields a bewildering anomaly that increases danger to officers and civilians alike.

While running down a flight of stairs from a suspect, rookie Officer Bailey Gannon raised his gun above his head in a panic and began blindly firing without looking where he was shooting. The suspect had not fired any weapon at the officers and was neither chasing nor otherwise threatening Gannon. Had Gannon somehow hit the suspect, who never left the bathroom where the officers found him and was outside the line of fire, the suspect would have an excessive-force claim: The law is clearly established that such a reckless shooting violates the Fourth Amendment. But because Gannon's bullet ended up hitting his own partner, a panel of the Sixth Circuit dismissed the case. It reasoned that Gannon enjoyed qualified immunity merely because, at the time of the shooting, this Court had not yet clearly established that an unintended victim of an intentionally fired bullet has been subject to a Fourth Amendment seizure allowing them to bring an excessive force claim. The critical fact on which that qualified-immunity ruling turned—that Gannon's bullet would end up striking his partner—was not a fact Gannon knew when he pulled the trigger.

That ruling created a split with the Ninth and Tenth Circuits, which both have held that later-discovered facts, specifically those that relate only to what specific claim a plaintiff can later assert, are

irrelevant to qualified immunity. All that matters in those circuits is that the officer's force was unreasonable based on the facts known at the time.

The ruling also flouts this Court's repeated instructions as to the focus of the qualified-immunity inquiry. First, qualified immunity depends entirely on facts known to an officer at the time of his conduct. For example, this Court recently held when an officer fatally fires a shot across the border, qualified immunity does not depend on the victim's citizenship status—because the officer did not know the victim's citizenship status when he fired. *Hernández v. Mesa*, 582 U.S. 548, 555 (2017) (per curiam). Because officers cannot assess the constitutional limits of their behavior against facts they do not know, such facts are irrelevant. Second, this Court's longstanding precedents similarly make clear that the qualified-immunity inquiry asks whether the law clearly establishes the unreasonableness of the officer's conduct, not the details of the future plaintiff's claims. Contrary to this Court's dictates, the Sixth Circuit's analysis transforms the dispositive question from the officer's legal certainty concerning his own conduct to his legal certainty concerning the precise legal claim he might face.

This Court should resolve the split to clarify for the lower courts exactly what law has to be “clearly established” for qualified-immunity purposes, and to clarify for both police and civilians the facts that officers may reasonably rely on in law enforcement encounters.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 167 F.4th 909 and is reproduced at Pet. App. 1a-54a. The order of the district court denying summary judgment is not officially reported but may be found at 2025 WL 488616 and is reproduced at Pet. App. 55a-68a. The unpublished order of the Court of Appeals denying panel rehearing may be found at 2026 WL 1002229 and is reproduced at Pet. App. 107a-108a.

JURISDICTION

The Sixth Circuit entered its judgment on February 18, 2026. Pet. App. 53a-54a. A timely petition for panel rehearing was denied on March 9, 2026. Pet. App. 107a-108a. On April 7, 2026, Petitioner submitted an application to extend the time to file a petition for a writ of certiorari from June 7, 2026, to July 9, 2026. *Kilnapp v. Gannon*, No. 25A1123. Justice Kavanaugh granted the application on April 14, 2026.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or

affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

STATEMENT OF THE CASE¹

Officer Gannon Shoots His Partner, Officer Kilnapp, By Firing Blindly Over His Head

Just after midnight on July 20, 2020, a woman called 911 to report that an emotionally disturbed man, later identified as Darryl Borden, had fired his gun through the floorboards at a boarding house in Cleveland. Pet. App. 3a. Respondent Officer Bailey Gannon, a rookie with two months on the force,

¹ These facts are drawn primarily from the decision below and the district court's order denying summary judgment. Because the claim at issue was resolved on Gannon's motion for summary judgment, the facts are viewed in the light most favorable to Kilnapp. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam).

responded to the scene with his partner, Petitioner Officer Jennifer Kilnapp. Pet. App. 70a.

The officers entered the premises with weapons drawn, but without announcing themselves as police officers. Pet. App. 3a-4a. Gannon ascended a staircase to the second floor and Kilnapp followed. Pet. App. 4a. When they reached the second floor, the 911 caller yelled out that Borden was in the second-floor bathroom, which was behind the officers. Pet. App. 4a. Without knocking or instructing Borden to come out, Gannon opened the bathroom door. Pet. App. 4a; Dkt. 59-1 at 63, 73-74, 106-07 (Deposition of Bailey Gannon).²

Gannon and Kilnapp disagree on what happened next, but this much is undisputed: Gannon opened the door to the bathroom and saw Borden. Gannon claimed Borden was holding a gun in both hands at a shoulder-high firing position from about eight feet away. Pet. App. 4a. But viewing the evidence in the light most favorable to Kilnapp, Borden was, if he was holding a gun at all, merely holding it at his side angled towards the ground when Gannon opened the door. *See* Pet. App. 4a-5a n.1, 70a-71a & n.1.

In any case, Gannon never identified himself as a police officer. Pet. App. 71a. He did not command Borden to get on the floor or to drop his weapon. Instead, Gannon panicked and fled past Kilnapp down the stairs. *See* Pet. App. 5a, 7a, 57a. Screaming as he ran, Gannon began shooting without bothering to look (let

² “Dkt. #” refers to pleadings filed in *Kilnapp v. City of Cleveland*, No. 22-cv-01225 (N.D. Ohio).

alone aim) where he was firing. Pet. App. 5a-6a. Forensic modeling reflects that “[b]ecause Gannon was running down the stairs when he fired ... Gannon must have been holding his gun above his head when he fired.” Pet. App. 72a (citation omitted). Firing in this manner violated “one of the four cardinal ... firearm safety rules”: officers must “look at their surroundings before discharging their firearm.” Dkt. 69-2 at 88-89 (Deposition of Cleveland Safety Director Dornat Drummond). Gannon fired two shots, the first of which ripped through Kilnapp’s forearm and bicep, re-entered near her right armpit, and lodged in her back. Pet. App. 7a-8a.

Gannon testified that he fired that shot intentionally, with the “objective ... to stop the threat of Mr. Borden.” Pet. App. 8a (citation omitted). But Borden was still in the bathroom—not chasing Gannon—when Gannon opened fire. Dkt. 69-2 at 179 (Deposition of Dornat Drummond). And Kilnapp was behind Gannon on the stairs, and therefore in the line of fire. Pet. App. Dkt. 60-1 at 43-45 (Deposition of Jennifer Kilnapp); Dkt. 59-1 at 128-29 (Deposition of Bailey Gannon).

Gannon’s shot severely damaged the nerves in Kilnapp’s dominant arm, and she needed “many sessions of physical therapy” and nerve blocks to manage the pain. Dkt. 60-1 at 92, 103, 156 (Deposition of Jennifer Kilnapp). Kilnapp has been diagnosed with PTSD, *id.* at 92, and still suffers from nightmares and paranoia, *id.* at 101. As a result, she is unable to return to work as a police officer. *Id.*

Officer Kilnapp Sues, and Both the District Court and Sixth Circuit Deny Gannon Qualified Immunity

Kilnapp sued Gannon, the City of Cleveland, and the Cleveland Chief of police, alleging excessive force under the Fourth and Fourteenth Amendments, Pet. App. 9a, though only the claims against Gannon remain. Gannon moved for judgment on the pleadings based on qualified immunity. *Id.* The district court denied Gannon qualified immunity at the pleading stage, holding that Kilnapp had met her burden in plausibly alleging both Fourth and Fourteenth Amendment violations. *See* Pet. App. 95a-99a.

A Sixth Circuit panel affirmed. The panel held that “Gannon acted unreasonably by blindly deploying a firearm over his head when no suspect was in pursuit of him.” Pet. App. 83a. It found “unpersuasive” Gannon’s argument “that he is entitled to qualified immunity because he did not violate a clearly established constitutional right.” Pet. App. 78a.

A Different Sixth Circuit Panel Reverses Course and Grants Gannon Immunity

After discovery, Gannon moved for summary judgment, reasserting qualified immunity. The district court again denied his motion. The court found that Gannon “fired his gun intentionally” although the “individual impacted by the bullet ... was unintended,” so therefore Kilnapp “was seized and is protected under the Fourth Amendment.” Pet. App. 62a. The court then held that “[i]t has been clearly established in this circuit for some time that individuals

have a right not to be shot unless they are perceived as posing a threat to officers or others.” Pet. App. 64a (quoting *Jacobs v. Alam*, 915 F.3d 1028, 1040 (6th Cir. 2019)).

On appeal, a different Sixth Circuit panel reversed course. It agreed with the district court that Kilnapp was seized under the Fourth Amendment: “[W]hen an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain, any individual struck by the bullet is thereby seized, regardless of whether that individual was the officer’s specific intended target.” Pet. App. 2a.

But the new panel concluded that Gannon was nonetheless entitled to qualified immunity because his bullet ultimately struck an unintended target. The panel did not address the district court’s conclusion that it was clearly established by the time of the shooting that an individual has a right “not to be shot unless they are perceived as posing a threat to officers or others.” Pet. App. 63a-64a (citation omitted). Instead, the panel held that what mattered was whether it was clearly established at the time of the shooting that an unintended target could bring a Fourth Amendment claim based on a shooting. Pet. App. 36a. It considered that not clearly established until “the Court’s decision in *Torres [v. Madrid]*, 592 U.S. 306 (2021)”, crystallized them” in 2021, a year after the shooting. *Id.*

REASONS FOR GRANTING THE WRIT

The decision below creates an untenable split among the circuits. The Ninth and Tenth Circuits have held on similar facts that the qualified-immunity inquiry does not permit consideration of facts not known to the officer at the time of the conduct and instead focuses solely on whether the law clearly established that the officer's conduct was objectively unreasonable. In stark contrast, the Sixth Circuit's holding turns on a fact Gannon did not know when he decided to shoot—where his bullet would land—which does not relate to the objective reasonableness of his conduct. It reorients the qualified-immunity inquiry on whether the law was clearly established as to the specific claim a plaintiff could ultimately assert, rather than as to the officer's actual conduct. The Sixth Circuit's position is fundamentally wrong and reflects confusion over the proper reading of this Court's qualified-immunity precedents. This case presents an ideal vehicle for resolving the issue, and this Court should grant certiorari to resolve the split over this question of profound legal and practical importance.

I. The Circuits Are Split As To Whether Qualified Immunity Permits Consideration Of Unknown Facts Affecting The Plaintiff's Ability To Sue.

The decision below creates a circuit split over whether courts can grant qualified immunity based on facts unknown to the officer at the time of the conduct that relate to the plaintiff's ability to sue. The Ninth and Tenth Circuits have both rejected that proposition for two separate reasons. Both lines of

reasoning are inconsistent with the Sixth Circuit’s decision here.

The Tenth Circuit’s opinion rested on this Court’s general prohibition on consideration of later-discovered facts. That decision came on the remand of *Torres v. Madrid*, the case in which this Court first held that a “seizure” occurs under the Fourth Amendment when an officer uses physical force against a person “with intent to restrain” them “even if the force does not succeed in subduing the person.” 592 U.S. at 309. *Torres* is the same case the Sixth Circuit held rendered the law not “clearly established” here. Pet. App. 36a. And the defendant officers on remand in *Torres* made the same argument that Gannon made here: “that they could not have violated clearly established law when they shot at [the plaintiff] because it was not clearly established at th[e] time (indeed, it was established by the Supreme Court only on its review of this very case) that the Fourth Amendment ... protect[ed]” the plaintiff. *Torres v. Madrid*, 60 F.4th 596, 603 (10th Cir. 2023).

Like the Sixth Circuit, the Tenth Circuit acknowledged that before this Court’s decision in *Torres*, this Court had not “clearly established” that the plaintiff could state a claim for a Fourth Amendment seizure. *Id.* But the Tenth Circuit held that this was not dispositive. “The point overlooked by Defendants is that the factual basis for qualified-immunity analysis is ‘limited to the facts that were knowable to Defendants at the time they engaged in the conduct in question.’” *Id.* (cleaned up) (quoting *Hernández*, 582 U.S. at 554). The court quoted *Hernández* (which is discussed below, *infra* 13-14) for the proposition that “[f]acts

Defendants ‘learned after the incident ends—whether those facts would support granting immunity or denying it—are not relevant.’” *Id.* (cleaned up) (quoting 582 U.S. at 554). Specifically, “the district court should not have considered in its qualified-immunity analysis that Ms. Torres eluded custody after Defendants shot at her.” *Id.* The Tenth Circuit did not identify it as relevant that this particular later-discovered fact created legal uncertainty as to the plaintiff’s ability to state a claim. Because it was a later-discovered fact, it was automatically foreclosed from consideration.

The Ninth Circuit reached the same conclusion on the ground that qualified immunity requires a plaintiff to show only that the law concerning the officer’s conduct, not their own ability to sue, was “clearly established” at the time of the incident. In *Rodriguez v. Swartz*, as in *Torres* and this case, the defendant officer argued that he was entitled to qualified immunity for a shooting because it was unclear whether the plaintiff could assert Fourth Amendment rights given facts about the plaintiff the officer was unaware of at the time of the shooting: there, the plaintiff’s citizenship and connection to the United States. *Rodriguez v. Swartz*, 899 F.3d 719, 729 (9th Cir. 2018), *vacated on other grounds*, 589 U.S. 1248 (2020) (vacating for lack of a *Bivens* remedy on these facts). The Ninth Circuit held that these “later-discovered facts” were simply “irrelevant” to qualified immunity. *Id.* at 733. For qualified-immunity purposes, the court explained that: “[T]he question is not whether it was clearly established that [child] ha[d] Fourth Amendment rights” as a Mexican citizen, but “whether it was clearly established that it was unconstitutional for an

officer on American soil to use deadly force” given the officer’s contemporaneous knowledge. *Id.*; *see also P.B. v. Koch*, 96 F.3d 1298, 1303 n.4 (9th Cir. 1996) (holding it unnecessary for purposes of qualified immunity to resolve whether Fourth Amendment or Due Process Clause properly supplied plaintiffs’ cause of action because “[r]egardless of the appropriate ‘home’ for plaintiffs’ right to be free from excessive force, there was [such] a clearly established right”).

These decisions are directly at odds with the Sixth Circuit’s decision below. All three cases concern facts an officer did not know at the time of a shooting. In each case, that unknown fact created legal uncertainty as to what, if any, cause of action the eventual plaintiff would have against the officer. But, while the Ninth and Tenth Circuits held these facts (and the uncertainty they created concerning contours of the plaintiffs’ claims) legally irrelevant to the “clearly established” prong, the Sixth Circuit treated them as dispositive. Gannon received qualified immunity because a fact he did not know when he fired his gun—that the bullet would hit his partner—created legal uncertainty as to what type of legal claim could be brought against him.

As a result, in the Ninth and Tenth Circuits, a plaintiff may defeat qualified immunity by demonstrating that the officer’s conduct was clearly established as objectively unreasonable at the time of the conduct in question, based on what the officer knew at that time. In the Sixth Circuit, that same plaintiff could not proceed without also showing that their individual right to bring a specific legal claim against the officer was also established at the time of the

incident, regardless of whether the officer knew the facts that would put the plaintiff's claims into question. This Court should grant certiorari to resolve this untenable division of authority.

II. The Sixth Circuit's Rule Is Wrong.

The Sixth Circuit's decision is wrong twice over. First, facts unknown to officers when they decide to shoot a weapon—like exactly where their bullet will land—are irrelevant to qualified-immunity analysis, even if they implicate the nature of a potential future lawsuit. This Court acknowledged as much in *Hernández*, explaining that “[t]he qualified immunity analysis ... is limited to ‘the facts that were knowable to the defendant officers’ *at the time* they engaged in the conduct in question.” 582 U.S. at 554 (quoting *White v. Pauly*, 580 U.S. 73, 77 (2017) (per curiam) (emphasis added)). Second, facts that implicate only whether the plaintiff can bring a specific claim in a potential future lawsuit, but which are irrelevant to the objective reasonableness of a police officer's conduct, are not part of the qualified-immunity analysis at all.

A. This Court's decision in *Hernández v. Mesa* directly forecloses consideration of later-discovered facts—without exception. *Hernández* concerned a situation almost identical to the one the Ninth Circuit addressed in *Rodriguez*: a cross-border shooting “in which a United States Border Patrol agent standing on United States soil shot and killed a Mexican national standing on Mexican soil.” *Id.* at 550. It was “undisputed” that the officer did not know the victim's “nationality and the extent of his ties to the United

States ... at the time of the shooting.” *Id.* at 554. The en banc Fifth Circuit nonetheless “grant[ed] qualified immunity based on those facts.” *Id.* The Fifth Circuit found it dispositive that it was not “clearly established” that the Fifth Amendment’s “prohibition of excessive force applies where the person injured ... is an alien who ha[s] no significant voluntary connection to” the United States. *Hernández v. Mesa*, 785 F.3d 117, 120 (5th Cir. 2015), *vacated and remanded*, 582 U.S. 548 (2017).

This Court decisively rejected that reasoning. It held that the Fifth Circuit had “erred in granting qualified immunity based on” facts “unknown to [the officer] at the time of the shooting.” 582 U.S. at 554. Facts “learn[ed] after [an] incident ends” and not “knowable” “at the time” of the conduct cannot inform an officer’s contemporaneous assessment of the lawfulness of his conduct. *Id.* (citation omitted). They accordingly have no bearing on “whether it would be clear to a reasonable officer that his conduct”—shooting the victim—“was unlawful in the situation he confronted.” *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). And they therefore “are not relevant” to the qualified-immunity inquiry, “whether [they] would support granting immunity or denying it.” *Id.*

In so holding, *Hernández* built on a long line of qualified-immunity precedent that confirms the irrelevance of facts unknown to officers at the time of the conduct, without exception or limitation. *See, e.g., Hernández*, 582 U.S. at 554; *White*, 580 U.S. at 76-77 (“Because this case concerns the defense of qualified immunity, however, the Court considers only the facts that were knowable to the defendant officers.”);

Wilson v. Layne, 526 U.S. 603, 615 (1999) (qualified immunity requires an “objective inquiry” into what a reasonable officer could have believed “in light of clearly established law and the information the officers possessed”).

Yet the Sixth Circuit decision below violates this basic dictate. Just like the Fifth Circuit in *Hernández*, the Sixth Circuit granted qualified immunity based on a fact the defendant learned after the incident. Summary reversal is warranted on that basis alone.

B. This Court’s precedent also forecloses the Sixth Circuit’s requirement that the plaintiff show their ability to state a cause of action, as opposed to the legality of defendant’s conduct, be “clearly established.”

A long line of precedent instructs that the focus of the qualified-immunity inquiry is on the level of legal certainty an officer could have known about their own conduct—not the specific label affixed to a future plaintiff’s claims. For instance, in *Saucier v. Katz*, this Court stated unambiguously: “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” 533 U.S. at 202 (citation omitted). Many other cases confirm the same. “[C]learly established’ for purposes of qualified immunity means that ‘[t]he contours of the right must be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right.’” *Wilson*, 526 U.S. at 614-15 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). The “focus” of the inquiry is on the officer and specifically “on whether the

officer had fair notice that her conduct was unlawful.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004); *see also Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (similar). *Hernández* reaffirmed the same. It emphasized that the “dispositive inquiry” in whether a right is “clearly established” is what is clear to an officer about his “conduct.” 582 U.S. at 554 (quoting *Saucier*, 533 U.S. at 202).

In erroneously privileging the legal certainty concerning the plaintiff’s claim over the defendant officer’s conduct, the Sixth Circuit improperly shifted the entire focus of the qualified-immunity analysis from that “dispositive inquiry” to a legally irrelevant one. Rather than ask whether Gannon had fair warning that his *conduct* was unlawful, the Sixth Circuit asked whether it was clearly established that Kilnapp had a cognizable claim under the Fourth Amendment specifically. Pet. App. 35a-36a (acknowledging that Kilnapp might have a Fourteenth Amendment claim based on the same conduct).

This analysis transforms the dispositive question for qualified immunity from the officer’s legal certainty concerning his own conduct to his legal certainty regarding the precise contours of a legal claim he might face. In other words, it instructs officers to consider not, “Is it reasonable to pull the trigger in this circumstance?,” but “If I pull the trigger, is it clear whether I will face a Fourth Amendment claim specifically, no matter how events subsequently unfold?” Any uncertainty over the precise form of what constitutional claims might result is simply not relevant to an official’s assessment of the lawfulness of *their own* conduct. Nor could the unknowable results

of the defendant's decision to fire his weapon have influenced his decision to pull the trigger.

These considerations accordingly should have been irrelevant under well-settled qualified-immunity precedent, not the entire basis for extending qualified immunity to Gannon.

III. The Question Presented Is Important And This Case Is An Ideal Vehicle To Resolve It.

This question is fundamental to the doctrine of qualified immunity. Without clarity from this Court, confusion will persist over what exactly must be “clearly established” in the qualified-immunity inquiry and what facts should inform officers’ assessments of the legality of their conduct. And this confusion comes at direct cost to both citizens and police officers. By definition, neither can know or assess either the constitutional limits on their behavior or the scope of their constitutional rights against facts they do not know. That is the very reason precedent generally imposes a temporal limitation on the qualified-immunity assessment to what was known to the officers at the time.

As the Ninth Circuit has explained, this limitation is a neutral rule that accrues to the benefit of both law enforcement and the public. It “usually applies to protect an officer from being judged with 20/20 hindsight” without “tak[ing] into account what an officer reasonably knew when he or she acted.” *Rodriguez*, 899 F.3d at 732. “But the timing factor also applies when later-discovered facts arguably justify an officer’s actions even though the officer could not

have known those facts when he or she acted. For example, if a police officer shot a suspect before perceiving any threat, the officer would lack qualified immunity—even if the suspect actually had a gun nearby and likely would have harmed the officer.” *Id.* at 733.

The Sixth Circuit’s ruling disturbs this important balance. If facts an officer did not know cannot *defeat* qualified immunity (i.e., it was not a gun in the decedent’s hand, it was a cellphone), then it is logically inconsistent—and deeply unfair—for similar facts to be admissible to *support* qualified immunity. Indeed, the Sixth Circuit’s rule creates a perverse anomaly where a suspect who caused the shooting in the first place would have greater constitutional rights than the innocent bystander—or fellow officer. The Sixth Circuit’s decision introduces significant confusion into the temporal limitations on qualified immunity, and, if applied across cases, risks sweeping in police officers who, in fact, acted reasonably based on what they knew at the time, not to mention failing to protect innocent bystanders directly injured by an officer’s unreasonable conduct.

And the confusion the Sixth Circuit decision introduces concerning the focus of the qualified-immunity inquiry comes at a broader cost. Piecemeal litigation of the relevance of unknown facts affecting plaintiffs’ claims will inevitably lead to further fracturing across jurisdictions and factual contexts. Such fracturing frustrates the core goals of qualified immunity—to give government officials “fair warning” about the limits on their authority in encounters with the public, *see Hope*, 536 U.S. at 741, and to free

public officials from the costs of anticipating and participating in litigation, *see Ashcroft v. Iqbal*, 556 U.S. 662, 671-72, 685 (2009).

This case presents an ideal vehicle for clarifying the rules across qualified-immunity cases. The question presented was properly preserved and is squarely posed. Ms. Kilnapp expressly urged below that Gannon was not entitled to qualified immunity under the “clearly established” prong because Gannon’s actions—firing a gun without looking where he was shooting or who was in the line of fire, or even ascertaining whether he was actually being pursued—were clearly unlawful. And, after the Sixth Circuit’s decision, Ms. Kilnapp filed for rehearing specifically identifying the problems with the Sixth Circuit’s analysis raised in this petition.

The Sixth Circuit’s decision turns on its resolution of the question presented. That resolution is in direct conflict with the Ninth and Tenth Circuits and in tension with other circuits, and it misapprehends this Court’s precedents. In sum, this case presents a clean opportunity to resolve a critical question concerning the focus of the qualified-immunity analysis. This Court should grant certiorari and reverse.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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