

No. 26-58

IN THE
Supreme Court of the United States

JENNIFER KILNAPP,
Petitioner,

v.

BAILEY GANNON,
Respondent.

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

**BRIEF IN OPPOSITION FOR RESPONDENT
BAILEY GANNON**

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Respondent Officer Bailey Gannon returned fire from an armed suspect whom he and Petitioner Officer Jennifer Kilnapp encountered on duty as police officers. Respondent inadvertently struck Petitioner, his training officer, with an errant bullet during the rapidly evolving situation. Petitioner argued that this accidental shooting of an individual who was not the intended target of physical restraint gave rise to a Fourth Amendment claim under 42 U.S.C. § 1983. Only two members of the panel believed that these circumstances could give rise to a seizure. However, the panel did not analyze whether the use of force was objectively reasonable. The Sixth Circuit held that Respondent was entitled to qualified immunity on the Fourth Amendment claim because a seizure occurring under these particular circumstances was not clearly established at the time of the shooting. The question presented:

Is a police officer entitled to qualified immunity when there is no relevant precedent to put him on notice that his specific conduct would violate the Fourth Amendment?

PARTIES TO THE PROCEEDING

Petitioner is Jennifer Kilnapp. Respondent is Bailey Gannon. The City of Cleveland, Ohio is a party to the underlying case and a party to the appeal currently pending before the United States Court of Appeals for the Sixth Circuit. The City of Cleveland, Ohio is not a party to this Petition.

CORPORATE DISCLOSURE

Respondent Bailey Gannon does not need to complete a corporate disclosure. He is an individual. Respondent states that neither he nor any of the defendants below have a parent corporation or publicly held company owing 10% or more of any stock on any defendant.

RELATED PROCEEDINGS

Kilnapp v. City of Cleveland, No. 26-3718 (6th Cir.)
(pending since Aug. 8, 2026).

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 granting judgment in favor of Defendants on all claims entered July 17, 2026; Order granting City of Cleveland's motion for summary judgment entered May 13, 2025; Order denying Bailey Gannon's motion for summary judgment entered Feb. 13, 2025; Order denying and granting in part City of Cleveland's motion to dismiss and Order denying motion for judgment on the pleadings entered Dec. 9, 2022).

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTION PRESENTED.....	i
PARTIES TO THE PROCEEDING.....	ii
CORPORATE DISCLOSURE.....	iii
RELATED PROCEEDINGS.....	iv
TABLE OF AUTHORITIES.....	vi
INTRODUCTION.....	1
STATEMENT OF THE CASE.....	2
REASONS FOR DENYING THE PETITION.....	5
I. There Is No Circuit Split As To The Broad Issue Presented In The Petition That Justifies This Court’s Review.....	6
II. The Sixth Circuit Correctly Found There Was Not A Clearly Established Fourth Amendment Violation Consistently With This Court’s Decisions.....	11
III. This Case Is A Poor Vehicle For This Court To Address The Qualified Immunity Question Presented In The Petition.....	14
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases Cited	Page
<i>Abbot v. Veasey</i> , 580 U.S. 1104, 137 S.Ct. 612 (2017).....	14
<i>Arthur v. Krause</i> , --- F.4th ---- (6th Cir. 2026).....	14
<i>Childress v. City of Arapaho</i> , 210 F.3d 1154 (10th Cir. 2000).....	9
<i>City of Escondido v. Emmons</i> , 586 U.S. 38, 139 S.Ct. 1148 (2019).....	11, 12
<i>Claybrook v. Birchwell</i> , 199 F.3d 350 (6th Cir. 2000).....	5, 13
<i>Corbitt v. Vickers</i> , 929 F.3d 1304 (11th Cir. 2019).....	8
<i>District of Columbia v. Wesby</i> , 583 U.S. 48, 138 S. Ct. 577 (2018).....	11, 12
<i>Hawatmeh v. City of Henderson</i> , 159 F.4th 591 (9th Cir. 2025).....	6, 7
<i>Hernandez v. Mesa</i> , 582 U.S. 548, 137 S.Ct. 2003 (2017).....	8, 9
<i>Hernandez v. Mesa</i> , 589 U.S. 93, 140 S.Ct. 735 (2020).....	9

<i>Irish v. McNamara</i> , 108 F.4th 715 (8th Cir. 2024).....	8
<i>Kilnapp v. City of Cleveland</i> , 167 F.4th 909 (6th Cir. 2026).....	14
<i>Nat’l Football League v. Ninth Inning, Inc.</i> , 592 U.S. 1081, 141 S.Ct. 56 (2020).....	14
<i>Rodriguez v. Swartz</i> , 899 F.3d 719 (9th Cir. 2018).....	7
<i>Schukar v. Kenosha Cnty.</i> , 183 F.4th 508 (7th Cir. 2026).....	7, 8
<i>Torres v. Madrid</i> , 60 F.4th 596 (10th Cir. 2023).....	8, 9
<i>Zorn v. Linton</i> , 607 U.S. 568, 146 S.Ct. 926 (2026).....	2, 6, 12
Constitutional Provisions and Statutes Cited	
U.S. Const., amend. IV....	1, 4, 5, 7, 8, 9, 10, 11, 12, 16
U.S. Const., amend. XIV.....	4, 5, 13, 14, 15
42 U.S.C. § 1983.....	1

INTRODUCTION

In order to overcome qualified immunity in a §1983 action, a plaintiff must meet the burden of establishing facts to show the officer violated a constitutional right, and the violation was clearly established at the time of the challenged conduct. This Court has repeatedly told lower courts that they may not rely upon a high level of generality. Petitioner never produced any case law that could place a reasonable officer on notice that accidentally wounding a fellow police officer with an errant bullet in a situation like this is a firmly established violation of her constitutional rights. In contrast, the controlling law at the time and the robust consensus of authority is still that one seeking remuneration for physical injuries inadvertently inflicted - who is not the premeditated target but an entirely different person - cannot prove a clearly established violation of the Fourth Amendment.

There is no circuit split as to the broad issue petitioner seeks to pursue. Whether it is characterized as purely the objective manifestation of an intent to restrain toward the person errantly struck by a bullet, or with some considerations of subjective intent to seize even when force is willfully deployed, courts around the country found similar situations could not be clearly established violations. Given the uncertainty in the case law as to whether an unintended bystander in an officer's shootout with a different targeted suspect in fast-paced situations in 2020 could give rise to even an arguable claim under the Fourth Amendment, there is not a single

case that found similar conduct to be a clearly established violation. Lower courts have not decided the essential issue for this case any differently. The Seventh and Ninth Districts recently confirmed the robust consensus of authority is the reverse of the rule petitioner now seeks to establish.

Petitioner asks this Court to debunk a decision that it issued just last term. This Court's decision in *Zorn v. Linton*, 607 U.S. 568 (2026) answered the question presented by petitioner now in a fashion that is adverse to her. There is no need for this Court to further clarify for lower courts what is required for clearly established violations for qualified immunity purposes. The Sixth Circuit panel answered the clearly established prong correctly.

Finally, this case is not an appropriate vehicle for this Court to revisit its precedent from a few months ago. The interlocutory and incomplete nature of this case is a strong factor this Court should consider in denying the petition. Even if this Court were to consider similar issues as the ones involved in this case, factual scenarios arising after 2020 are more appropriate to do so. There is no need for this Court to address the broad qualified immunity question petitioner raises.

STATEMENT OF THE CASE

In August of 2017, Petitioner Officer Jennifer Kilnapp became a police officer with the Cleveland Division of Police ("CDP"). Pet. App. 55a. Respondent Officer Bailey Gannon became a Cleveland police

officer in May of 2020 and began his one-year probationary period with the CDP. *Id.* In the summer of 2020, Kilnapp was assigned to partner with Gannon as his training officer and, among other things, to teach him the right protocol for handling police calls. Pet. App. 56a. Kilnapp was Gannon's training officer and Gannon was a probationary rookie at the time of the incident. *Id.*

In the early morning hours of July 20, 2020, a female reported a man had shot a hole into the floorboards in a boarding house. Kilnapp and Gannon promptly responded. Pet. App. 56a. When they arrived, Kilnapp and Gannon met the female caller outside a two-story house, who relayed that a man, later identified as Darryl Borden and nicknamed "moose," was upstairs inside the boarding house. *Id.* The building was completely dark. *Id.* The officers entered with their weapons in hand. *Id.* Kilnapp's firearm had an attached flashlight. *Id.* Gannon had a flashlight in his right hand and his firearm in his dominant left hand. *Id.*

The staircase had two flights: a set of stairs going in one direction, a landing, and then a second set going in the opposite direction. Pet. App. 56a, 5a, n.1. Gannon went upstairs first. Pet. App. 56a. Kilnapp felt this was a "good training opportunity" for Gannon. *Id.* Kilnapp called out, "moose", on the way upstairs but heard no response. *Id.* Once upstairs, Kilnapp saw the door to Room 4 was ajar; she looked inside for the suspect. Pet. App. 56a-57a. The female caller downstairs shouted that Borden was in the bathroom. *Id.* Gannon pushed a door open,

not knowing which room was the bathroom, and then jumped back yelling. *Id.* Gannon saw Borden with a gun pointed directly at him in full presentation, in the “firing range position.” Pet. App. 57a. Gannon frantically retreated down the stairs. *Id.*

Both Kilnapp and Gannon heard gunshots. *Id.* Gannon fired in return in an effort to protect himself and his fellow officer. *Id.* First, Gannon turned and fired one round from his gun in Borden’s direction. *Id.* Then, Gannon ducked his head and inadvertently shot a second round that went into the molding of a door frame above the staircase. *Id.* Gannon’s first bullet inadvertently struck Kilnapp, who was trailing behind Gannon down the stairs and out of the building. Pet. App. 20a, 57a.

Kilnapp filed a Complaint against Gannon and the City of Cleveland on July 13, 2022, alleging Gannon used excessive force against her in violation of the Fourth and Fourteenth Amendments. *Id.*

After discovery concluded, Gannon and the City of Cleveland moved for summary judgment. Pet. App. 10a and Dkt. 62. The District Court denied Gannon’s motion but granted the City of Cleveland’s motion. Dkt.79, at 1-15. Gannon appealed the denial of qualified immunity. Pet. App. 10a. The district court denied Kilnapp’s motion to certify that there is no just reason for delay in order to permit a single consolidated appeal from the lower court’s summary judgment orders. Dkt. 82, at 1-4.

The Sixth Circuit vacated the decision of the lower court with instructions to grant judgment in favor of Gannon on the Fourth Amendment claim and remanded with instructions to address the Fourteenth Amendment claim. Pet. App. 37a. and 53a-54a. One member of the panel agreed that it was proper to vacate and remand for consideration of the Fourteenth Amendment claim. Pet. App. 38a. However, that member of the panel disagreed “with the majority that Gannon’s conduct violated the Fourth Amendment.” *Id.* “Future panels will need to determine whether the majority’s Fourth Amendment holding runs afoul of *Claybrook*. Pet. App. 51a (*citing Claybrook v. Birchwell*, 199 F.3d 350, 359 (6th Cir. 2000)).

The Sixth Circuit denied Kilnapp’s request for rehearing. Pet. App. 107a. “Judge Bush adheres to original disposition and his partial dissent.” *Id.*

On July 17, 2026, the district court granted judgment in favor of Gannon on Kilnapp’s Fourth Amendment claim per the mandate from the Sixth Circuit and granted judgment in favor of Gannon on Kilnapp’s Fourteenth Amendment claim. Dkt. 88 and 93. “There are no claims remaining against any Defendant for adjudication.” Dkt. 93. Kilnapp filed a notice of appeal on August 8, 2026. Dkt. 94.

REASONS FOR DENYING THE PETITION

The decision below does not create a split among the circuits relating to the clearly established prong of the qualified immunity analysis. The

decision is consistent with *Zorn* and subsequent decisions from other circuits. To find a right is clearly established, a plaintiff generally must identify a case where an officer acting under similar circumstances was held to have violated the applicable provision of the Constitution. That is something Kilnapp could never do. The relevant precedent must define the right with a high degree of specificity. Every reasonable officer must be able to interpret that precedent to establish the particular rule that the plaintiff seeks to apply. The Sixth Circuit's holding as to the clearly established question is correct and consistent with how this Court repeatedly instructed lower courts not to view the question with a high level of generality. This case presents a poor vehicle for addressing the issue of clearly established law. This Court should deny the petition for certiorari.

I. There Is No Circuit Split As To The Broad Issue Presented In The Petition That Justifies This Court's Review.

The decision in this case does not create a circuit split as to the clearly established prong for qualified immunity analysis. At least two circuits held similarly to the decision issued by the Sixth Circuit in this case.

The Ninth Circuit considered the issue of qualified immunity for officers who inadvertently struck a child with a bullet in November of 2020 that was intended for the boy's captor. *Hawatmeh v. City of Henderson*, 159 F.4th 591, 597-598 (9th Cir. 2025). The officers who inadvertently shot the boy did not

know that the suspect was incapacitated two seconds before the second volley of shots. *Id.* The plaintiffs in that case emphasized that the officer intended to shoot toward the vehicle where both the suspect and deceased child were located. *Id.*, at 600. The Ninth Circuit discussed that a case need not be directly on point, but the existing precedent must have placed the statutory or constitutional question beyond debate. *Id.*, at 601. The Ninth Circuit held that the proposition that officers may not shoot innocent individuals is far too general. *Id.* The plaintiffs in that case could not cite any decision where similar particularized facts were a Fourth Amendment violation. *Id.*, 602. Therefore, plaintiffs could not establish that decedent's Fourth Amendment right to be free of excessive force was clearly established at the time of the alleged violation. *Id.* Compare *Rodriguez v. Swartz*, 899 F.3d 719, 733 (9th Cir. 2018), *judgment vacated*, 589 U.S. 1248 (2020) (in a *Bivens* claim, the initial issue was whether it was clearly established that an officer on American soil could not use deadly force without justification against a person of unknown nationality on the other side of the border).

The Seventh Circuit analyzed a case where officers inadvertently struck two photojournalists in returning less-than-lethal measures against rowdy and volatile participants of a crowd in August of 2020. *Schukar v. Kenosha Cnty.*, 183 F.4th 508, 510 (7th Cir. 2026). The Seventh Circuit questioned whether the accidental nature of what transpired meant that the two were never seized within the meaning of the Fourth Amendment. *Id.*, at 514. If

there is a potential circuit split, it is only as to the question of whether an intentional use of force seizes an unintended target. *Id.*, at 514 (citing *Kilnapp v. City of Cleveland*, 167 F.4th 909 (6th Cir. 2026)). A resolution of that potential split is unnecessary to know that qualified immunity applies and does not affect the outcome of such cases. *Schukar*, at 515. “Given the uncertainty in the case law, much of which predates *Torres*, we can say with confidence that it was not clearly established in 2020 that an officer who intentionally deploys less-than-lethal munitions during a protest seizes an unintended target within the meaning of the Fourth Amendment.” *Id.* Thus, in these circumstances, the law entitles officers to qualified immunity. *Id.*

Other circuits have reached the same outcome. See *Irish v. McNamara*, 108 F.4th 715, 721 (8th Cir. 2024) (officer could not have read prior case law to mean that unintended force against a fellow officer was unlawful, let alone a Fourth Amendment violation, so as to not be clearly established at the time of the conduct); *Corbitt v. Vickers*, 929 F.3d 1304, 1320 (11th Cir. 2019) (“the law is not clearly established that there is a Fourth Amendment violation when an already-seized bystander, as in this instant case, is accidentally harmed as an unintended consequence of an officer’s intentional shot at something else entirely.”).

Kilnapp’s discussion of *Torres* and *Hernandez* does not establish the presence of a circuit split on the issue presented. Pet. at 10-11. In *Torres*, the officers all knew that they were shooting at the

plaintiff with a specific intention to seize her. *Torres v. Madrid*, 60 F.4th 596, 599 (10th Cir. 2023). She was the fleeing suspect. *Id.* The Tenth Circuit believed the issue upon which the trial court should maintain its focus was whether the alleged unreasonableness of the force was clearly established at the time the officers intentionally shot her. *Id.*, at 603. Compare *Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10th Cir. 2000) (in “keeping with our sister circuits,” court held there was no Fourth Amendment seizure when the officers intended to deliver plaintiffs from unlawful abduction).

The aspect of the *Hernandez* case that’s difficult to overlook is that it involved a potential *Bivens* claim. The most salient issue for this case was whether the claimant met the requirements for a *Bivens* claim, not the clearly established discussion. There, during its first iteration, this Court recognized that the Government argued that the official was entitled to qualified immunity even if the official was uncertain about Hernandez’s nationality and ties to the United States at the time of the shooting. *Hernandez v. Mesa*, 582 U.S. 548, 555, 137 S.Ct. 2003 (2017). Still, this Court declined to address those arguments and other issues in the first instance. *Id.* This Court remanded the case back to the circuit court. *Id.* Later, this Court determined the potential *Bivens* claim arose in a new context and multiple factors counseled hesitation about extending a claim. *Hernandez v. Mesa*, 589 U.S. 93, 113 (2020).

Kilnapp argues that Gannon is not entitled to qualified immunity because he “did not know when

he fired his gun – that the bullet would hit his partner....” Pet. 12. This is among the reasons why Gannon’s actions were not a seizure under the Fourth Amendment at all, according to Sixth Circuit precedent and most other circuits that have addressed the issue. Pet. App. 42a. If the unknowable fact is that an officer may not be acutely aware of the precise sequence of events as they unfold in split-second scenarios in the field, then those same unknowns are present in most cases involving law enforcement. The application of qualified immunity in this case is especially necessary because this was an intense, rapidly evolving, situation in the close quarters of the boarding house. The chaotic nature of the encounter is among the reasons why qualified immunity should be granted, not a reason for denial.

The salient point is that Kilnapp was not able to locate a prior case to put the violation beyond debate. Pet. App. 36a. What can a violation be other than running afoul of settled law? Nevertheless, Kilnapp now attempts to place the square peg of the undisputed fact that Gannon did not intend to shoot Kilnapp into the round hole that this is somehow violates clearly established law because it relates “to the plaintiff’s ability to sue.” Pet. 9. There is not support for this proposition from prior decisions. Qualified immunity protects the official when the specific conduct at issue was not previously decided to be a violation. There was no consensus from any court that any conduct similar to Gannon’s in 2020 would create liability. There still is none for actions taking place prior to 2021.

II. The Sixth Circuit Correctly Found There Was Not A Clearly Established Fourth Amendment Violation Consistently With This Court’s Decisions.

This Court instructed lower courts to examine the particular situation that the defendant officers confronted and identify “a controlling case or robust consensus of cases – finding a Fourth Amendment violation under similar circumstances.” *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018) A rule is not clearly established if it is not “settled law.” *Id.*, at 66. It is not enough for a court to simply pontificate that an officer may not use unreasonable and excessive force to deny qualified immunity and then set the matter for a trial on the reasonableness of the actions. *City of Escondido v. Emmons*, 586 U.S. 38, 43-44 (2019).

This Court just last term outlined the correct interpretation of the clearly established analysis for qualified immunity. “To find 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*, 607 U.S. 568, 572 (2026) (*as appearing in original quoting City of Escondido v. Emmons, supra.*, at 43). “The relevant precedent must define the right with a ‘high degree of specificity,’ so that ‘every reasonable official would interpret it to establish the particular rule the plaintiff seeks to apply.’” *Zorn*, at 572 (*quoting Wesby, supra.*, 583 U.S. 48, 63).

In *Zorn*, this Court again explained that reasonable officials must be able to read and interpret a prior case to mean that the specific action at issue would violate the Constitution. *Id.*, at 572. The officer upon reading that case would know it proscribed the specific conduct. *Id.* There, an officer could not interpret the closest prior case to mean that the specific conduct at issue was a violation. The prior case failed to specify which circumstances would make the actions at issue unlawful. *Id.*, 572-573. Thus, the plaintiff “failed to identify a case where an officer taking similar actions in similar circumstances ‘was held to have violated’ the Constitution.” *Id.* (quoting *Emmons*, at 43). The circuit court in *Zorn* contravened these principles when it used other cases that could “not clearly establish that Zorn’s specific conduct violated the Fourth Amendment.” *Id.*

The panel from the lower court agreed that the alleged rights violated by Gannon were not clearly established when Kilnapp was shot in 2020. Pet. App. 36a. Kilnapp complains that the Sixth Circuit’s 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.” Pet. 16. She argues “the Sixth Circuit’s rule creates a perverse anomaly where a suspect who caused the shooting in first place would have greater constitutional rights than the innocent bystander – or fellow officer.” Pet. 18.

This is not so. Gannon's conduct must be a constitutional violation in order for Kilnapp to meet her burden to overcome qualified immunity. The defined illegality of his actions is directly relevant for this case. If an officer read *Claybrook* prior to this incident, there is no sound argument that a reasonable officer would understand that an officer in this situation who accidentally shoots his training partner in a shootout with an armed suspect without time for contemplation would be a constitutional violation. The underlying presumption to Kilnapp's argument is that a bystander does not have remedies. An innocent bystander could have a potential remedy under state law. This is especially true of fellow officers who have the benefit of systems in most states for worker compensation, disability, and certain health and early retirement benefits. The potential constitutional remedy for innocent bystanders should be under the Fourteenth Amendment.

In essence, Kilnapp wants to displace the clear direction that this Court gave lower courts last term. Pet. 13-14. Her proposed rule would have courts decide what is clearly established at a high level of generality. The proposed rule would in practice hold officials liable for not having the benefit of 20/20 hindsight, i.e. Gannon would not be entitled to qualified immunity because he did not know at the time that one of his bullets struck Kilnapp. This is the opposite of how qualified immunity operates. The Sixth Circuit's decision on the clearly established prong was consistent with applicable law.

III. This Case Is A Poor Vehicle For This Court To Address The Qualified Immunity Question Presented In The Petition.

This case comes to the Court in a currently interlocutory posture. The Sixth Circuit has not finally determined whether Kilnapp will be entitled to seek any relief against either the City of Cleveland or Gannon. The proper procedure in this circumstance is to deny review. *Nat'l Football League v. Ninth Inning, Inc.*, 592 U.S. 1081, 1082 (2020) (KAVANAUGH, J., statement respecting denial of certiorari) (interlocutory posture is a factor counseling against review); *Abbot v. Veasey*, 580 U.S. 1104 (2017) (ROBERTS, C.J., statement respecting denial of certiorari).

Kilnapp is currently appealing the judgment issued in favor of the City of Cleveland and the judgment in favor of Gannon on her Fourteenth Amendment claim. It is possible the Sixth Circuit - either by another panel or future *en banc* consideration - could determine that a person in Kilnapp's position was not even seized at all. Pet. App. 51a. *See also Arthur v. Krause*, --- F.4th ---, No. 25-2123, 2026 WL 2322235, *4 (6th Cir. Aug. 11, 2026). In the alternative, the Sixth Circuit could hypothetically determine that Kilnapp could proceed to a trial with her Fourteenth Amendment claim against Gannon. The Sixth Circuit will yet determine the final status of the case against Gannon and the City of Cleveland. The current posture of this case is

a significant factor this Court should consider to deny the writ.

The question raised by Kilnapp is not fundamental to the doctrine of qualified immunity. The rule she proposes is the antithesis of the tenants of qualified immunity. There is no confusion as to what is meant by clearly established in the qualified immunity inquiry, or at least there should not be after this Court's recent decisions. The circuits are not split on the question of clearly established violations for the inadvertently struck innocent bystander. Such circumstances could only potentially be Fourteenth Amendment violations at this time instead of Fourth Amendment violations.

Kilnapp acknowledges that the clearly established analysis has temporal limitations for the assessment of what was known to the officers at the time. Pet. 17. The other reason why this case is a poor vehicle for determining questions relating to innocent bystanders is the conduct in question took place in 2020. The circuits have uniformly held that even if there could be a Fourth Amendment violation for an official who unintentionally seized an innocent bystander by an accidental shooting, it could only potentially occur in events that transpired after 2021 to be a clearly established one. Pet. App. 36a.

Kilnapp's petition is actually a request for this Court to second guess the result reached by the Sixth Circuit. There is nothing of general legal importance presented by the specific issue raised by her petition. The clearly established prong of the qualified

immunity analysis does not need further clarification at this time. The case at its current status is not an appropriate vehicle for this Court to review.

CONCLUSION

Respondent Officer Bailey Gannon submits this Court should deny the petition filed by Petitioner Jennifer Kilnapp, leaving the judgment in favor of Respondent on the Fourth Amendment claim as decided by the Sixth Circuit Court of Appeals. This Court should let the Sixth Circuit review the remaining claims against the City of Cleveland and Gannon without interference.

There is no circuit conflict as to the clearly established prong for these types of cases. The Sixth Circuit's decision that the alleged violation was not clearly established is consistent with case law. This case is not an appropriate vehicle to render a statement of law relating to qualified immunity at this point in time. Therefore, this Court should deny Kilnapp's petition.

Respectfully submitted,

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