

No. 26-58

IN THE
Supreme Court of the United States

JENNIFER KILNAPP,

Petitioner,

v.

BAILEY GANNON,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Sixth Circuit granted Gannon qualified immunity based on something that was unknowable to him when he fired his gun: that his bullet would hit his partner instead of his target. The Ninth and Tenth Circuits would have found this fact irrelevant. As the Petition establishes, this direct split of authority warrants this Court’s review.

Gannon’s only response to the split is to recast the question presented as a “broad issue” about what constitutes clearly established law more generally for qualified-immunity purposes. BIO 6. But the Petition does not ask whether every unintended target of police force was clearly seized under the Fourth Amendment in 2020. Nor does it ask the Court to dilute the specificity that qualified immunity requires. It asks a logically independent question: Does the clearly established prong of the qualified-immunity inquiry ever turn on facts the officer did not know and that relate only to the contours of the plaintiff’s cause of action, not the reasonableness of the officer’s conduct? That question is squarely presented here, where an officer intentionally and unreasonably fired his weapon but evaded liability based only on where it landed.

Gannon’s brief (at 6-10) only underscores the existence of the circuit split he tries to disclaim. In one case he cites—*Schukar v. Kenosha County*, decided after Kilnapp filed this Petition—the Seventh Circuit deepened the split by siding with the Sixth Circuit, citing the decision in this case. 183 F.4th 508 (7th Cir. 2026) (citing *Kilnapp v. City of Cleveland*, 167 F.4th

909, 928 (6th Cir. 2026)). None of the other cases that Gannon cites undermine the existence of the split between the Sixth (and now Seventh) Circuits on the one hand and the Ninth and Tenth Circuits on the other.

Gannon also doubles down on the Sixth Circuit’s faulty analysis, citing to this Court’s recent decision in *Zorn v. Linton*, 607 U.S. 568 (2026) (per curiam). BIO 11. Nothing in *Zorn*, nor in any of this Court’s other precedents, supports the Sixth Circuit’s decision. *Zorn* certainly does not alter this Court’s instruction in *Hernández v. Mesa*, 582 U.S. 548, 554 (2017) (per curiam), 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.” (citation omitted).

Finally, Gannon points to the interlocutory posture of the case as a reason to deny review. BIO 14. But interlocutory review is how qualified-immunity questions are supposed to reach this Court. That Kilnapp has a separate appeal pending on other claims is no reason to withhold review of the qualified-immunity question, which is fully resolved, outcome-determinative, and cleanly presented.

ARGUMENT

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 an officer at the time of the conduct that relate to a particular plaintiff's ability to sue. As discussed in the Petition (at 9-13), the Ninth and Tenth Circuits have rejected that proposition conclusively. *See Rodriguez v. Swartz*, 899 F.3d 719, 733 (9th Cir. 2018), *vacated on other grounds*, 589 U.S. 1248 (2020); *Torres v. Madrid*, 60 F.4th 596, 603 (10th Cir. 2023). The Sixth Circuit, by contrast, found those unknown facts decisive.

Gannon's response to this direct split of authority is to transform the question presented into a "broad issue" about what constitutes clearly established law generally for qualified-immunity purposes. BIO 6 (capitalization altered). The question presented does not turn on the level of specificity required for clearly established law. The Petition's actual question is independent: whether a court may even consider a fact the officer neither knew nor could have known (in this case, where his bullet would land) when that fact bears only on whether the plaintiff would have a cause of action, not on whether the officer's conduct was objectively unreasonable at the moment he acted.

In tandem, Gannon also strains to recast the facts below to make his conduct appear reasonable. He

claims, for example, that “[b]oth Kilnapp and Gannon heard gunshots” and that “Gannon fired in return.” BIO 4. But whether the suspect fired first is disputed, and Gannon forgets that, at this stage, a court must view the facts in the light most favorable to Kilnapp. *See* Pet. 5. In that light, Gannon’s conduct—firing at a suspect who had not threatened him—was unreasonable and unlawful. And Gannon does not dispute that, in 2020, it was clearly established that a suspect—even one carrying a gun—has a right not to be shot when posing no threat.¹

Gannon does not even attempt to address the split on this question given the actual facts. Most of the cases he cites (BIO at 6-8) are irrelevant. In *Hawatmeh v. City of Henderson*, for instance, the court held that there was insufficiently specific precedent “addressing the right to be free of excessive force in a hostage situation.” 159 F.4th 591, 602 (9th Cir. 2025). It did not turn on unknowable facts such as whether a bullet would hit the wrong target. The

¹ *See, e.g., Bletz v. Gribble*, 641 F.3d 743, 754 (6th Cir. 2011) (man who pointed a gun at officers entering his home without identifying themselves had a “right to be free from deadly police force while complying with police commands to disarm”); *King v. Taylor*, 694 F.3d 650, 664 (6th Cir. 2012) (man suspected of threatening his wife with a gun had a “right not to be shot unless ... perceived as posing a threat to officers or others”); *Dickerson v. McClellan*, 101 F.3d 1151, 1163 (6th Cir. 1996) (man with a gun who “walked slowly to the front door, with his hands at his side” had right not to be shot “inside his house before he opened his door”), *abrogated in other respects, Romero v. City of Lansing*, 159 F.4th 1002 (6th Cir. 2025); *Jacobs v. Alam*, 915 F.3d 1028, 1041 (6th Cir. 2019) (man who reached for his holstered gun while retreating from police officers, who had not identified themselves, had “a constitutional right not to be shot”).

same is true of *Irish v. McNamara*, 108 F.4th 715, 719 (8th Cir. 2024) (analyzing whether the importance of subjective versus objective intent to restrain was clearly established).

The two cases Gannon cites that even arguably implicate the question presented only underscore the existence of the split and the need for this Court’s review. Gannon argues that *Corbitt v. Vickers*, 929 F.3d 1304 (11th Cir. 2019), “reached the same outcome” as the panel did here. BIO 8. *Corbitt* involved a defendant who fired at a dog but accidentally hit the plaintiff’s child, who had already been seized. *Corbitt*, 929 F.3d at 1308. The Eleventh Circuit held it was not clearly established that an unintended, already-seized victim had a clearly established Fourth Amendment right. *Id.* at 1317, 1320-21. To the extent *Corbitt* supports the Sixth Circuit’s reasoning in this case by focusing on the unintended victim rather than the officer’s conduct, that only deepens the split. It certainly does not dispel it.

Schukar v. Kenosha County—which the Seventh Circuit decided after Kilnapp filed this Petition—also supports certiorari. Citing the Sixth Circuit’s decision here, the Seventh Circuit granted qualified immunity to officers accused of hitting bystanders with non-lethal rounds while firing on protestors. 183 F.4th at 510. The court found “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.* at 515 (citing *Kilnapp*, 167 F.4th at 928). In other words, like the Sixth Circuit here, the

Seventh Circuit granted qualified immunity based on later-learned facts—whether the round hits an unintended target—rather than the reasonableness of the conduct. That is diametrically opposed to the Ninth and Tenth Circuits’ approach in *Rodriguez* and *Torres*. In agreeing with the Sixth Circuit’s faulty reasoning, *Schukar* has deepened the split the Petition identified. That makes the need for this Court’s review more urgent in light of the confusion and error the Sixth Circuit’s decision has already proliferated.

Importantly, Gannon does not dispute that the Ninth and Tenth Circuits have rejected the Sixth Circuit’s approach. He correctly summarizes the Tenth Circuit as holding in *Torres* that “the issue upon which the trial court should ... focus was whether the alleged unreasonableness of the force was clearly established at the time the officers ... shot.” BIO 9. Indeed, focusing on the reasonableness of the officer’s use of force is precisely what the Sixth Circuit failed to do when it granted Gannon qualified immunity only because he missed his target. Pet. App. 35a-36a. Both here and in *Torres*, the defendant sought immunity based on an event that had not occurred when the officer pulled the trigger. The Tenth Circuit rejected that move; the Sixth Circuit accepted it.

The Tenth Circuit could not have been more explicit: “[T]he 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.’” *Torres*, 60 F.4th at 603 (cleaned up) (quoting *Hernández*, 582 U.S. at 554). As explained in

the Petition (at 10-11), the issue in *Torres* concerned whether the plaintiff's flight from officers after they opened fire entitled the officers to qualified immunity. The answer was no: "[T]he district court should not have considered in its qualified-immunity analysis that Ms. Torres eluded custody after Defendants shot at her." *Torres*, 60 F.4th at 603. By the Tenth Circuit's logic, the Sixth Circuit also should not have considered where Gannon's bullet landed.

In *Rodriguez*, which Gannon all but ignores, the Ninth Circuit held in no uncertain terms that "later-discovered facts" were "irrelevant" to qualified-immunity analysis. 899 F.3d at 733. Rather, the focus was on the officer's conduct: "[T]he question is not whether it was clearly established that [the victim] 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.* That cannot be reconciled with the Sixth Circuit's determination that uncertainty about Kilnapp's rights as an unintended target entitled Gannon to qualified immunity.

II. The Sixth Circuit's Rule Bucks This Court's Precedents.

In granting qualified immunity, the Sixth Circuit focused not on the lawfulness of Gannon's conduct, but on the nuances of Kilnapp's eventual cause of action. As the Petition established (at 13-17), this was wrong in two respects.

First, the panel’s qualified-immunity decision hinged on something Gannon could not know with certainty when he fired his weapon—that his bullet would hit his partner and not his target. This Court made clear in *Hernández* that the only relevant facts are those 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)). Unknowable facts—such as what happens *after* the conduct at issue—have no bearing. What matters is whether the officer’s conduct was clearly unlawful. And Gannon cannot seriously dispute that his conduct—firing wildly over his head, without looking, at a target who had not threatened him—was clearly unlawful. What happened next, after Gannon engaged in that conduct and could no longer conform it to the law, is irrelevant. Gannon’s brief fails to address this point. See BIO 11-13.

Second, the Sixth Circuit’s focus on whether Kilnapp’s *specific cause of action* was clearly established—rather than whether the conduct that gave rise to it was clearly established as unreasonable—also contravened this Court’s precedents. The pertinent question “is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Saucier v. Katz*, 533 U.S. 194, 202 (2001) (citation omitted). The panel should have asked “whether the officer had fair notice that [his] conduct was unlawful.” *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). Instead, it asked whether the officer knew that Kilnapp, in the event Gannon’s bullet struck her by mistake, would have a cause of action under the Fourth Amendment. Again,

that was the wrong question. And Gannon ignores this point too. *See* BIO 11-13.

Gannon's only response is to repeat the Sixth Circuit's flawed logic, arguing that his conduct should be excused because it was not clearly established in 2020 that an officer violates the Constitution by "accidentally shoot[ing] his training partner." BIO 13. But he cannot reconcile that with the rule that the locus of the qualified-immunity analysis is not where the officer's bullet lands or what cause of action the victim might have. It is whether the officer's "*conduct* was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202 (emphasis added) (citation omitted). Nor does he try to satisfy that rule by defending the lawfulness of his conduct, for there is no defense.

Instead, Gannon relies on *Zorn v. Linton*, a fact-bound summary reversal that applied the general proposition that an officer must be able to discern from applicable precedent whether certain conduct would be unlawful. BIO 12. There, a police officer used a wristlock maneuver on a passive protestor who refused to stand up after several requests. *Zorn*, 607 U.S. at 570-71. The only clearly established rule was a broad prohibition against "gratuitous use of pain compliance techniques ... on a protestor who is passively resisting arrest." *Id.* at 573-74. This Court held that a prohibition that broad was insufficiently specific notice that the officer's conduct was unlawful. *Id.*

But this case has nothing to do with that rule. Gannon did not lack clear legal guidance governing his conduct: Viewing the facts in Kilnapp's favor, there is no reasonable dispute that what he did was

clearly illegal. *Zorn* did not mention—let alone call into question—*Hernández*’s holding that unknowable facts cannot inform the qualified-immunity analysis. So it provides no support for the Sixth Circuit’s view that Gannon could enjoy immunity based on an unknowable future event—his bullet hitting Kilnapp—and on the contours of Kilnapp’s eventual cause of action.

The perverse upshot of the Sixth Circuit’s decision cannot be overlooked. If Gannon had shot Borden as he intended, Borden’s suit would have sailed to trial. But because Gannon missed and hit his partner instead, her suit—for the same injury, based on the same unlawful conduct—is barred at the threshold. That is not a tolerable outcome, nor is it one that follows logically from this Court’s precedents.

III. The Case Is An Excellent Vehicle To Decide The Actual Question Presented.

Gannon makes a last-ditch effort to argue that this case is a poor vehicle for the Court to decide the question presented. Gannon’s vehicle arguments are wrong several times over.

First, the Fourth Amendment qualified-immunity question—the only question before this Court—is finally resolved. The Sixth Circuit vacated the denial of qualified immunity and instructed the district court to enter judgment for Gannon on that claim. Pet. App. 37a, 53a-54a. The district court complied on July 17, 2026, and entered judgment on all remaining claims. BIO 5 (citing Dkts. 88, 93). Gannon cannot rely on that final judgment to describe the proceedings while

simultaneously portraying the Fourth Amendment ruling as tentative.

The separate appeal filed August 8, 2026, concerns the judgments on Kilnapp’s Fourteenth Amendment claim and claims involving the City. BIO 5, 14. It does not erase the Sixth Circuit’s judgment on the Fourth Amendment claim or make the question presented advisory. Qualified-immunity rulings are immediately appealable precisely because immunity is an entitlement not to stand trial—not merely a defense to liability. *Scott v. Harris*, 550 U.S. 372, 376 n.2 (2007). Interlocutory review is how qualified-immunity questions are supposed to reach this Court. Indeed, nearly every major qualified-immunity decision this Court has issued in recent years arrived in an interlocutory posture, including *Zorn*. That Kilnapp has a separate appeal pending on other claims is no reason to deny review of the fully resolved Fourth Amendment question. See *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996).

Second, Gannon speculates that a future Sixth Circuit panel might decide Kilnapp was never seized. BIO 14. But the majority below held that “when an officer intentionally shoots their firearm in circumstances that objectively manifest an intent to restrain, any individual struck by the bullet is thereby seized,” even if not the intended target. Pet. App. 2a. That holding governed the mandate and the judgment now presented. The dissent’s suggestion that “[f]uture panels” may revisit circuit law, Pet. App. 51a, is not a case-specific impediment to review.

Third, the 2020 date is no obstacle. Gannon says post-2020 incidents would be “more appropriate,” BIO 2, 15, but the question presented is a pure legal issue about the facts and legal considerations that may enter qualified-immunity analysis. The panel’s immunity ruling turned on the view that *Torres* had not yet “crystallized” seizure doctrine when Gannon fired. Pet. App. 36a. But the error in its analysis will proliferate well beyond *Torres*; it did not end with that case.

Fourth, the record cleanly frames the issue. The case was decided at summary judgment. Disputed facts must be viewed in Kilnapp’s favor. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam). In that posture, this Court must assume that Gannon fired blindly over his head while fleeing from a person who was not pursuing or threatening him—indeed, from a person who never left the bathroom where he was discovered. The district court and the first Sixth Circuit panel both found the alleged conduct unreasonable, Pet. App. 63a-64a, 78a, 83a, and the decision below granted immunity on the unintended-target ground without rejecting that assessment, Pet. App. 35a-36a. The legal issue is outcome-determinative, preserved, and presented without factual entanglement.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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