

No. 26-69

IN THE
Supreme Court of the United States

JASON GREEN,

Petitioner,

v.

KENNY PERKINS and JOEY KEITH,
Individually as Deputy Sheriffs for the
Adair County Sheriff's Department,

Respondents.

**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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REPLY BRIEF FOR PETITIONER

The panel accepted three facts that control this case. First, the panel accepted that Green did not possess a lighter. Second, the panel described the on-scene facts as Green dropping the gasoline container when ordered, holding his empty hands in the air, standing stationary, and his mother stepping out of the way. Pet. App. 5a–6a. Third, the panel found that thirty (30) seconds passed between the deputies' arrival on scene and their deployment of tasers. Pet. App. 6a. These are the panel's own findings, and every argument follows these facts. Based on these facts, Green was not a threat to himself, his mother, or the deputies and qualified immunity should have been denied.

Respondents argue that Petitioner failed to cite any cases establishing a clear constitutional right. This is not true. Petitioner cited three Sixth Circuit cases and several sister-circuit cases showing the established right to be free from being tased when the subject is not a threat. The panel did not hold that Petitioner failed to cite a case; the panel held the cases are distinguishable because Green was in fact a threat.

The threat distinction fails on the accepted facts, which show that Green was clearly not a threat after the deputies' arrival. Admittedly, the deputies were told that Green had a lighter and a gas can. However, once they arrived, Green dropped the gas can, placed his hands in the air, complied with all instructions, and his mother moved out of the way. The panel accepted that Green had no lighter but decided that dispatch information alone justified the threat. This holding conflicts with how courts applied this framework in the Fourth, Ninth, and Tenth Circuits. The panel's own factual findings compel reversal. This Court should grant the petition, or at minimum,

vacate and remand for the Sixth Circuit to apply *Barnes v. Felix*, 605 U.S. 73 (2025), and *Graham v. Connor*, 490 U.S. 386 (1989), to the panel’s own accepted facts.

I. THE RIGHT GREEN ASSERTS WAS CLEARLY ESTABLISHED.

Respondents incorrectly argue that Green failed to cite any clearly established law that would have put the deputies on notice their conduct was unlawful. Green cited three Sixth Circuit decisions: *Browning v. Edmonson Cnty.*, 18 F.4th 516 (6th Cir. 2021); *Kijowski v. City of Niles*, 372 F. App’x 595 (6th Cir. 2010); and *Landis v. Baker*, 297 F. App’x 453 (6th Cir. 2008). Each case holds that qualified immunity is not available when an officer tases a non-resisting, non-threatening person. The panel did not write that these cases don’t apply; the panel distinguished them by stating that in those cases the plaintiffs, “were not reasonably viewed as a threat – an assumption that does not fit these facts.” Pet. App. 11a–12a. In sum, the panel’s decision was based on the characterization of Green as a threat and not on the absence of case law.

Browning, the most recent example, confirms that the governing rule was established before the August 2021 encounter since *Browning* held that “[c]ertainly by 2018” it was clearly established in the Sixth Circuit that officers may not tase a person who is not actively resisting. 18 F.4th at 525. In *Browning*, an officer tased a man in the back of a crashed vehicle who “was not resisting and expressed no verbal or physical behavior that was hostile or threatening.” *Id.* at 529. Before the tasing, there was a car chase and an officer radioed that ammunition had been found on the roadside where objects had been thrown from the car. After the vehicle being pursued crashed, an officer

ordered a backseat passenger to raise his hands. The passenger was unconscious and could not comply. The officer tased him anyway. The Sixth Circuit held that the plaintiff had a clearly established right not to be tased despite the officer's belief that he might be hiding a weapon. *Id.* Here, Green, like the subject in *Browning*, did not have a lighter despite earlier reports to the contrary. Unlike *Browning*, Green was actually complying with the officers' directives when he dropped the gasoline can and put his hands in the air. Nevertheless, the officers tased him and set him on fire. The panel cited *Browning's* definition that active resistance includes "erratic or irrational behavior" when ruling against Green, implying that Green dousing himself in gasoline fits that label. Pet. App. 13a. However, gasoline, without a lighter, made the consequences of using a taser significantly more dangerous but did not make Green hostile or threatening. And *Browning* itself rejected treating non-hostile, non-resisting persons as a threat. *Id.* at 526–27.

The Sixth Circuit's recent decision in *Phelps v. City of Saginaw*, No. 25-2092 (6th Cir. Aug. 13, 2026) (unpublished), confirms that this rule was clearly established before the deputies tased Green. Relying on *Goodwin v. City of Painesville*, 781 F.3d 314, 323–28 (6th Cir. 2015), and *Kent v. Oakland County*, 810 F.3d 384, 391–97 (6th Cir. 2016), *Phelps* held that "by July 2020 it was absolutely beyond debate that an officer's tasing of an individual who does not pose a threat to anyone's safety and is not actively resisting arrest constitutes excessive force." Slip op. at 20. The court also reaffirmed that "noncompliance alone does not indicate active resistance" and that raised hands indicate submission and little threat. Slip op. at 13–14

(quoting *Shumate v. City of Adrian*, 44 F.4th 427, 446 (6th Cir. 2022), and *Kent*, 810 F.3d at 391).

That describes Green under the facts controlling this appeal. Green was not resisting or fleeing and did not threaten or move toward anyone. He dropped the gasoline container, stood still, complied with the deputies' commands, and displayed his empty hands. Green was more compliant than the plaintiff in *Phelps* and displayed the empty hands the plaintiff in *Browning* failed to show. Judge Thapar dissented, but his dissent turned on Phelps's physical struggle with the officers and the loose handcuff on his wrist. Slip op. at 24–25, 29–30 (Thapar, J., dissenting). Here, Green did not struggle with anyone and complied with all orders.

Respondents argue that Green must define the constitutional 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.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoted in Respondents' Brief 6). But officials “can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Green holding a Bible and a gas can and pouring gasoline on himself makes the encounter unusual, but those unusual facts do not change the clearly established right to be free from the unlawful use of a taser. Green was compliant and non-threatening when the deputies tased him and set him on fire.

Zorn v. Linton, 607 U.S. 568 (2026), does not overturn the Sixth Circuit decisions. In *Zorn*, the officers used a routine wristlock on a protester who refused to comply after being warned. Prior to *Zorn* there were no cases where using a wristlock was

considered an unlawful use of force. This contrasts with Green where the force was a taser, which the Sixth Circuit has repeatedly held is a weapon that persons have a constitutionally protected right to be free from its unlawful use. Recently, the Sixth Circuit decided *Phelps* five months after *Zorn*, cited *Zorn* for the governing standard, and still held that the prohibition on tasing a non-threatening, non-resisting person remained beyond debate. Slip op. at 19–20, 22.

The panel distinguished previous Sixth Circuit taser cases with one conclusory sentence that labeled Green a threat. When considering the totality of the circumstances as *Barnes v. Felix*, 605 U.S. 73 (2025), requires, the facts show that Green was not a threat once the deputies arrived. As a result, the panel’s threat label rests entirely on pre-arrival information.

II. PRE-ARRIVAL INFORMATION IS NOT A SUBSTITUTE FOR ON-SCENE REALITY.

Respondents devote large portions of their response brief to what dispatch relayed to the deputies about Green having a lighter. Respondents’ Brief 1–4. But this dispute does not answer what threat remained at the time of taser deployment. Respondents are correct that dispatch reported the presence of a lighter to the deputies before their arrival. Vickie testified that she never saw a lighter. Whether the dispatch report originated with the 911 call or elsewhere, the panel accepted for purposes of this appeal that Green did not possess a lighter. Pet. App. 8a. The panel explained that, “accepting Green’s version of events, we can review the purely legal question of whether Keith and Perkins are entitled to qualified immunity under federal law.” Pet. App. 8a. Green’s version of the events therefore controls this Court’s review.

Respondents cite *Scott v. Harris*, 550 U.S. 372, 380 (2007), to argue that the 911 call overrides Green's version of events. Respondents' Brief 7. It does not. *Scott* involved a dashcam video that showed the plaintiff's account of what occurred on the scene was incorrect. The 911 recording here does not contradict Green's account of what occurred after the deputies arrived and Green himself took no part in the 911 call or the call to dispatch. The 911 call establishes that the deputies were told through dispatch that Green had a lighter before arrival; the call does not relieve the deputies of their duty to observe the on-scene reality and avoid tasing an unarmed non-threatening man who is covered in gasoline.

Cavanaugh v. Woods Cross City, 625 F.3d 661 (10th Cir. 2010), establishes the correct framework for distinguishing pre-arrival and post-arrival information. Pre-arrival information lets officers know the risk they may be facing, but on-scene observations determine whether the situation remains dangerous. An officer may not "ignore specific facts as they develop" when those facts contradict the need for force. *Id.* at 665. The Sixth Circuit recently reached the same conclusion in *Phelps* by applying *Barnes* the same way. The officer in *Phelps* argued that focusing on the ninety seconds before the tasing misapplied *Barnes*. The court disagreed. It had not "put on chronological blinders," it explained; it had considered the whole encounter and concluded that what happened before the plaintiff was on the ground with a taser pointed at him was "not particularly relevant" to whether he posed a threat when the taser was fired. Slip op. at 17 (quoting *Barnes*, 605 U.S. at 82). The same is true here. *Barnes* requires the deputies' knowledge of the dispatch report to be considered and weighed, but weighing it

is not the same as letting it override what they saw when they arrived.

Here, the panel took the opposite approach. The panel concluded that the deputies reasonably believed Green had a lighter because dispatch said so. While the panel accepted that Green had no lighter, it identified no fact on the scene that made Green a danger or an immediate threat. Green had dropped the gasoline container, raised his empty hands, stood still, and complied. The 911 call and dispatch report justified caution but could not displace what the deputies observed and encountered on the scene when they deployed their tasers.

III. RESPONDENTS CONFUSE RECITING FACTS WITH ANALYZING THE TOTALITY OF THE CIRCUMSTANCES.

Respondents argue that *Barnes* and *Graham* bolster their argument but do not apply the holding of either case to the facts in this matter. *Barnes* requires a court to analyze the “totality of the circumstances,” which includes both pre-arrival and post-arrival information. *Graham* held that the “reasonableness of a particular use of force must be judged from the perspective of a reasonable officer **on the scene**.” 490 U.S. at 396. Thus, *Graham* holds that pre-arrival information alone does not justify force since *Graham* requires analysis of “**the scene**.” The panel found it was reasonable for the deputies to believe Green had a lighter because dispatch reported a lighter. This omits the post-arrival information the deputies were required to take into account.

Respondents contend that the panel did consider post-arrival information by repeating the panel’s enumeration of the facts. Specifically, they write that

“the panel likewise considered the actions of Green after arrival of the Deputies, i.e., Green attempting to flee, his mother grabbing his shirt and stepping between Green and the Deputies, and Green pouring gasoline.” Respondents’ Brief 8. The panel’s recitation of facts, however, does not show *how* those facts reveal that Green was a threat. Green’s attempt at fleeing was stopped by his mother, not by the deputies. Pet. App. 5a–6a. Thirty seconds passed between the deputies’ arrival and the deployment of their tasers. Pet. App. 6a. In those thirty seconds, when ordered to drop the gasoline can, Green complied and showed his empty hands while his mother stepped aside. The panel recited the timeline but never analyzed what a reasonable officer could have seen and what steps should have been taken to avoid using force. Neither Respondents nor the panel’s narration describes Green as a threat to his mother or to the deputies. The only danger arose when the deputies deployed their tasers against Green. He was compliant and unarmed, with his empty hands visible, and was neither fleeing, threatening himself or anyone else, nor engaged in criminal activity.

The panel found that Green identified no contemporaneous facts that would have dispelled the deputies’ belief that Green was a threat. Pet. App. 12a. Green’s contemporaneous facts are the dropped gasoline can, the empty hands raised, his compliance with the deputies’ orders, his mother stepping aside, and the absence of any lighter. This should have dispelled the deputies’ belief that Green was a threat. By assigning those facts no significance, the panel treated pre-arrival dispatch information as the sole basis for finding that Green was a threat.

IV. THE PANEL'S DECISION CONFLICTS WITH THE FOURTH, NINTH, AND TENTH CIRCUITS.

The Tenth Circuit denied qualified immunity on materially similar facts in *Cavanaugh v. Woods Cross City*, 625 F.3d 661 (10th Cir. 2010). There, a woman left her home during a domestic dispute carrying a knife. She had also been drinking and taking pain medication. Her husband called the police. When she returned, she no longer had the knife and was approaching the front door. An officer tased her in the back. The Tenth Circuit acknowledged that its role was not to second-guess with the benefit of 20/20 hindsight and recognized that the officers had been told she had a knife and had consumed pills and alcohol. Nevertheless, the court held that it “is not objectively reasonable to ignore specific facts as they develop (which contradict the need for this amount of force).” 625 F.3d at 665.

Green's case is identical. The deputies believed Green had a lighter which is like the knife in *Cavanaugh*. Green had consumed methamphetamines just as the wife had consumed pills and alcohol. Pet. App. 4a. But when the deputies arrived, the facts developed on scene showed no lighter, a dropped gasoline can, visible empty hands raised, and compliance. The mere presence of gasoline does not distinguish Green from *Cavanaugh* because, for purposes of this appeal, Respondents concede that Green did not possess a lighter. Here, the presence of gasoline made deploying a taser more lethal, but it did not somehow reshape the constitutional analysis set forth by *Barnes* and *Graham*. The panel granted qualified immunity anyway, based on what the deputies had been told before their arrival. *Barnes*

requires consideration of the totality of the circumstances, while *Graham* requires an objective assessment of facts confronting deputies when force was used. Green had no lighter, had dropped the gasoline container, showed empty hands, stood still, and complied, demonstrating no threat.

Respondents argue that the facts resemble *Ramirez v. Guadarrama*, 3 F.4th 129 (5th Cir. 2021). The panel rejected this comparison, noting that unlike the plaintiff in *Ramirez*, there was no indication that Green was suicidal, the encounter occurred outdoors rather than inside an occupied structure, and there was no dispute that Ramirez was holding a lighter. Pet. App. 10a–11a. The only similarity is that both cases involved a person covered in gasoline being tased and set on fire. Declaring that any person covered in gasoline lacks the right to be free from being tased and set on fire defies all logic. Respondents’ attempt to revive *Ramirez*, a case the panel already distinguished, should be denied.

Respondents do not address the Fourth or Ninth Circuit holdings raised in the Petition for Certiorari and thus concede those authorities. The Fourth and Ninth Circuits each require an objectively identifiable, on-scene immediate threat before taser deployment, and neither circuit permits taser use based on noncompliance or irrational behavior alone. *See Estate of Armstrong v. Village of Pinehurst*, 810 F.3d 892, 906–08 (4th Cir. 2016); *Mattos v. Agarano*, 661 F.3d 433, 445 (9th Cir. 2011) (en banc); *Bryan v. MacPherson*, 630 F.3d 805, 829–32 (9th Cir. 2010). By resting the reasonableness of force on pre-arrival information and Green’s “erratic behavior” alone, the panel deviated heavily from the framework its sister circuits apply.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court should grant the petition, vacate the judgment, and remand for the Sixth Circuit to apply *Barnes* and *Graham* to the accepted facts.

Respectfully submitted,

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