

No. 26-58

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**In the Supreme Court of the United States**

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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*

\_\_\_\_\_  
**BRIEF OF THE CATO INSTITUTE AS *AMICUS*  
CURIAE IN SUPPORT OF PETITIONER**

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### **QUESTION PRESENTED**

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?

## TABLE OF CONTENTS

|                                                                                                                         |     |
|-------------------------------------------------------------------------------------------------------------------------|-----|
| QUESTION PRESENTED .....                                                                                                | i   |
| TABLE OF CONTENTS.....                                                                                                  | ii  |
| TABLE OF AUTHORITIES .....                                                                                              | iii |
| INTEREST OF <i>AMICUS CURIAE</i> .....                                                                                  | 1   |
| INTRODUCTION AND SUMMARY OF<br>ARGUMENT.....                                                                            | 2   |
| ARGUMENT.....                                                                                                           | 3   |
| I. THE LAW CAN BE “CLEARLY<br>ESTABLISHED” WITHOUT BEING<br>“CRYSTALLIZED” AS TO ALL<br>CONCEIVABLE FACT PATTERNS. .... | 3   |
| II. THE LAW WAS CLEAR WHEN<br>GANNON SHOT KILNAPP THAT<br>SHE WAS SEIZED.....                                           | 6   |
| A. Shooting an unintended target<br>was a seizure when Gannon shot<br>Kilnapp. ....                                     | 6   |
| B. <i>Torres</i> did not change the law that<br>governed Gannon’s conduct at<br>the time he opened fire .....           | 9   |
| CONCLUSION .....                                                                                                        | 9   |

## TABLE OF AUTHORITIES

### Cases

|                                                                                  |            |
|----------------------------------------------------------------------------------|------------|
| <i>Anderson v. Creighton</i> , 483 U.S. 635 (1987) .....                         | 4, 9       |
| <i>Baxter v. Bracey</i> , 590 U.S. 1011 (2020) .....                             | 3          |
| <i>Brendlin v. California</i> , 551 U.S. 249 (2007) .....                        | 2, 7       |
| <i>Brosseau v. Haugen</i> , 543 U.S. 194 (2004) .....                            | 5          |
| <i>Brower v. County of Inyo</i> , 489 U.S. 593 (1989) .....                      | 2, 6       |
| <i>California v. Hodari D.</i> , 499 U.S. 621 (1991) .....                       | 8          |
| <i>District of Columbia v. Wesby</i> , 583 U.S. 48<br>(2018) .....               | 5          |
| <i>GEO Grp., Inc. v. Menocal</i> , 607 U.S. 438<br>(2026) .....                  | 3          |
| <i>Hope v. Pelzer</i> , 536 U.S. 730 (2002) .....                                | 4, 5       |
| <i>Kilnapp v. City of Cleveland</i> , 167 F.4th 909<br>(6th Cir. 2026) .....     | 2, 3, 6, 7 |
| <i>Smith v. Kind</i> , No. 25-943, 2026 U.S. LEXIS<br>2875 (June 29, 2026) ..... | 5          |
| <i>Taylor v. Riojas</i> , 592 U.S. 7 (2020) .....                                | 4, 5       |
| <i>Torres v. Madrid</i> , 592 U.S. 306 (2021) .....                              | 2, 7, 8    |
| <i>United States v. Lanier</i> , 520 U.S. 259 (1997) .....                       | 5          |
| <i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017) .....                              | 3          |

### Other Authorities

|                                                                                                                         |   |
|-------------------------------------------------------------------------------------------------------------------------|---|
| Br. of Cato Inst. as Amicus Curiae, Benning<br>v. Comm’r, Ga. Dep’t of Corrs., No. 23-664<br>(U.S. Jan. 19, 2024) ..... | 3 |
|-------------------------------------------------------------------------------------------------------------------------|---|

**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

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<sup>1</sup> Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Officers Bailey Gannon and Jennifer Kilnapp responded to a 911 report of a disturbed man with a firearm. Pet. at 4. Entering a boarding house, they were told by the caller that the man was in a bathroom on the second floor. *Id.* at 4–5. Gannon opened the bathroom door and, upon seeing the man, fled and fired blindly. *Id.* at 5–6. One of Gannon’s shots tore through Kilnapp’s arm and lodged in her back, causing lasting physical and psychological damage that ended her police career. *Id.* at 6.

Kilnapp sued Gannon, alleging excessive force. *Id.* at 7. The district court denied Gannon’s motion for judgment on the pleadings based on qualified immunity and a Sixth Circuit panel affirmed. *Id.* However, a later Sixth Circuit panel vacated and remanded the district court’s denial of summary judgment to Gannon based on qualified immunity. *Kilnapp v. City of Cleveland*, 167 F.4th 909, 916, 928 (6th Cir. 2026). It queried not reasonableness, but only “whether a police officer ‘seizes’ an individual when the officer intentionally fires their gun with an intent to restrain and the bullet hits an individual if that individual was not the particular target of their firing.” *Id.* at 918. As “Gannon intentionally (not accidentally) fired his weapon in circumstances that objectively manifested an intent to restrain, Kilnapp was seized when that bullet struck her.” *Id.* at 927. However, the court described this holding as only “largely established” by *Brower v. County of Inyo*, 489 U.S. 593 (1989) and *Brendlin v. California*, 551 U.S. 249 (2007)—but not “crystallized” until *Torres v. Madrid*, 592 U.S. 306 (2021). *Kilnapp*, 167 F.4th at 928. Because *Torres* was decided after

Gannon shot Kilnapp, the court held that the right at issue had not been clearly established, so Gannon was entitled to qualified immunity. *Id.*

This decision erred. A legal principle can always be “crystallized” further—but *Brower* and *Brendlin* clearly established that the shooting of someone other than the target is a seizure. The mere contingency of this Court’s later decision recognizing that a plaintiff like Kilnapp could seek relief does not change that: when Gannon pulled the trigger, the law was clearly established. This Court should grant certiorari and reverse the decision below.

## ARGUMENT

### I. THE LAW CAN BE “CLEARLY ESTABLISHED” WITHOUT BEING “CRYSTALLIZED” AS TO ALL CONCEIVABLE FACT PATTERNS.

While questions abound regarding the legitimacy of qualified immunity per se,<sup>2</sup> under current jurisprudence it is unavailable if (1) an official violated a federally protected right and (2) the unlawfulness of his conduct was “clearly established.” *GEO Grp., Inc. v. Menocal*, 607 U.S. 438, 445 n.2 (2026). This rule “depends substantially upon the level of generality at which the relevant ‘legal rule’ is to be identified.”

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<sup>2</sup> See, e.g., *Baxter v. Bracey*, 590 U.S. 1011, 1013 (2020) (Thomas, J., dissenting from denial of certiorari) (“There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.”); *Ziglar v. Abbasi*, 582 U.S. 120, 159–60 (2017) (Thomas, J., concurring in part and concurring in the judgment) (“Our qualified immunity precedents . . . represent precisely the sort of freewheeling policy choices that we have previously disclaimed the power to make.”) (quotation marks and brackets omitted); Br. of Cato Inst. as Amicus Curiae, *Benning v. Comm’r, Ga. Dep’t of Corrs.*, No. 23-664 (U.S. Jan. 19, 2024).

*Anderson v. Creighton*, 483 U.S. 635, 639 (1987). Actions are not protected “unless the very action in question has previously been held unlawful”—an official cannot rely on qualified immunity if “in the light of pre-existing law the unlawfulness [is] apparent.” *Id.* at 640.

This doctrine does not require plaintiffs to search for materially identical facts, but simply to raise straightforwardly applicable legal standards. For example, in this Court’s decision in *Hope v. Pelzer*, 536 U.S. 730 (2002), Alabama prison officers lashed a shirtless inmate to a hitching post for seven hours with just one or two drinks of water and no bathroom access. *Id.* at 735. When he sued, the district court granted the officers qualified immunity. *Id.* The Eleventh Circuit affirmed, holding that while the guards inflicted cruel and unusual punishment, they had done so using means that were merely “analogous” to previously recognized violations—not “materially similar” to them. *Id.* But this Court rejected such a “rigid gloss” on qualified immunity. *Id.* at 739. Officials can “be on notice that their conduct violates established law even in novel factual circumstances.” *Id.* at 741.

This Court further explained the “clearly established” standard in *Taylor v. Riojas*, 592 U.S. 7 (2020) (per curiam). There, an inmate was held in “shockingly” unsanitary conditions. *Id.* at 7. The Fifth Circuit granted qualified immunity, finding that no “clearly established” law said “prisoners couldn’t be housed in cells teeming with human waste for only six days.” *Id.* at 8 (quotation marks and citation omitted). This Court reversed. *Id.* at 8. It cited *Hope* for the principle that “a general constitutional rule already identified in the decisional law may apply with obvious clarity to

the specific conduct in question”—in which case, qualified immunity is unavailable. *Id.* at 9 (quoting *Hope*, 536 U.S. at 741).

Qualified immunity is not meant to shield every official who blazes a unique path to a constitutional violation, as the Sixth Circuit’s search for finely “crystallized” law implies. “[G]eneral statements of the law are not inherently incapable of giving fair and clear warning” and so removing qualified immunity. *United States v. Lanier*, 520 U.S. 259, 271 (1997). As Justice Sotomayor recently noted, qualified immunity “does not permit discarding every case that presents any factual variation.” *Smith v. Kind*, No. 25-943, 2026 U.S. LEXIS 2875, at \*8–9 (June 29, 2026) (Sotomayor, J., dissenting from denial of certiorari). An official can be liable if the “contours of the right” are “sufficiently clear that a reasonable official would understand that what he is doing violates that right.” *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citation omitted). “A ‘body of relevant case law’ may clearly establish those contours even if no single case, on its own, presents identical facts.” *Smith*, 2026 U.S. LEXIS 2875, at \*8 (Sotomayor, J., dissenting from denial of certiorari) (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018)).

The “crystallization” described by the Sixth Circuit is a potentially unending process. But at some point well shy of infinity, the law becomes translucent enough to put officers on notice regarding what conduct is allowed. It was abundantly clear when Gannon shot Kilnapp that he seized her for Fourth Amendment purposes—notwithstanding *Torres*’s later clarification that anyone struck by a bullet had standing to bring suit in a court of law.

## II. THE LAW WAS CLEAR WHEN GANNON SHOT KILNAPP THAT SHE WAS SEIZED.

### A. Shooting an unintended target was a seizure when Gannon shot Kilnapp.

The Sixth Circuit correctly held that Gannon seized Kilnapp when he shot her. *Kilnapp*, 167 F.4th at 927. It further correctly held that “the principles that guided” its decision “were largely established” decades before by this Court’s decisions in *Brower* and *Brendlin*. *Id.* at 928. That was all the court needed to consider to deny qualified immunity.

*Brower* concerned a man who crashed a stolen vehicle into a police roadblock. *Brower*, 489 U.S. at 594. The appellate court affirmed the district court’s dismissal of the case. *Id.* This Court reversed, holding that a seizure is “an intentional acquisition of physical control. A seizure occurs even when an unintended person . . . is the object of the detention or taking,” so long as the detention or taking is willful. *Id.* at 596, 599. A seizure is simply “a governmental termination of freedom of movement through means intentionally applied.” *Id.* at 597 (emphasis omitted).

The Sixth Circuit was right that *Brower* shows that Gannon seized Kilnapp by shooting her. He intentionally opened fire to acquire physical control over the man in the bathroom. Under *Brower*, Gannon in fact seized Kilnapp even though she was not the intended target. He terminated her freedom of movement by intentionally firing his gun.

*Brendlin* expanded upon—or as the Sixth Circuit might say, further “crystallized”—*Brower*. *Brendlin* decided “whether a traffic stop subjects a passenger, as well as the driver, to Fourth Amendment seizure.”

*Brendlin*, 551 U.S. at 254. It relied on *Brower*'s definition of a seizure. *Id.* It considered what the Fourth Amendment means when an officer does not "show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence." *Id.* at 255. Finding precedent "settled" as to drivers under such conditions, and no "distinction between driver and passenger that would affect the Fourth Amendment analysis," *id.* at 255–56, the Court held that the passenger had indeed been seized. *Id.* at 263.

*Brendlin* is relevant to the present case. It held that a passenger is seized even though the officer intends to stop only the driver. Here, Gannon seized Kilnapp when he shot her even though he "objectively manifested an intent to restrain" the man in the bathroom. *Kilnapp*, 167 F.4th at 926. Yet what is remarkable is how little it understood itself to be developing the law. *Brendlin* followed *Brower* and thought the relevant standards well-settled by precedent, basing its decision on an absence of a relevant factual distinction rather than the presence of virtually identical fact patterns.

The Sixth Circuit conceded that *Brower* and *Brendlin* "largely established" the law relevant to this case but argued that it was somehow determinatively "crystallized" in *Torres*. *Kilnapp*, 167 F.4th at 928. Yet *Torres* was a similarly modest decision. In that case, police officers shot a woman who fled when they tried to execute an arrest warrant on someone else. *Torres*, 592 U.S. at 309–10. Though struck repeatedly, the woman evaded the officers and escaped. *Id.* at 310. This Court held that she was seized by being shot despite this failing to stop her. *Id.* at 311. The unique

aspect of *Torres*—an escapee not stopped by being shot—is simply absent here.

And as in *Brendlin*, the *Torres* Court wrote that it had “largely covered” the law relevant to its holding in previous decisions. *Id.* It had already explained in *California v. Hodari D.*, 499 U.S. 621 (1991), that a common law arrest is a Fourth Amendment seizure while—consistent with *Brower*—“the application of force to the body of a person with intent to restrain” is an arrest. *Torres*, 592 U.S. at 311. *Hodari D.* had already observed that “the common law treated ‘the mere grasping or application of physical force with lawful authority’ as an arrest, ‘whether or not it succeeded in subduing the arrestee.’” *Id.* (quoting *Hodari D.*, 499 U.S. at 625). Historical “cases and commentary [spoke] with virtual unanimity on the question” at hand. *Id.* at 313 (citing consistent precedent and other authorities dating back to the 1600s). As in *Brendlin*, the Court did not strain to find factual distinction, seeing “no basis for drawing an artificial line” between precedent concerning “laying hands” and modern “officers’ use of bullets.” *Id.* at 315–16.

The *Torres* Court understood itself to be recapitulating well-established case law pre-dating it—as well as Gannon’s shooting of Kilnapp a year earlier—by centuries. While every decision of this Court “clarifies” the law on some level (and *Torres* did so regarding successful escapees), it was already well established that an intentional shooting of an unintended target was a seizure when Gannon shot Kilnapp.

**B. *Torres* did not change the law that governed Gannon’s conduct at the time he opened fire.**

Treating the day *Torres* was announced as the moment when jurisprudence finally achieved adequate lucidity mistakes what *Torres* decided for the state of the law governing Gannon’s conduct when he opened fire. *Torres* settled only whether a person struck by a bullet is seized, and so can bring suit, *even if she escapes after being shot*. That fact comes into existence only after an officer pulls the trigger. But qualified immunity asks whether officers “act in ways they reasonably believe to be lawful” given the information they possess. *Anderson*, 483 U.S. at 641. Whether Gannon’s decision to fire blindly was reasonable did not depend on who his bullets ultimately struck—and *Torres* altered nothing, one way or the other, about the standards governing his decision. A doctrine meant to protect officers’ reasonable judgments cannot turn on facts no officer could know until after he acted.

**CONCLUSION**

The law can be clearly established despite the never-ending potential for further “crystallization.” *Brower* and *Brendlin* provided more than adequate clarity for Kilnapp to overcome qualified immunity. This Court should grant certiorari and reverse the decision below.

Respectfully submitted,

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