No. 16-

IN THE

Supreme Court of the United States

POLICE OFFICER MATTHEW NEEDHAM,
IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

Petitioner,

v.

CARMITA LEWIS, AS PERSONAL
REPRESENTATIVE OF DOMINIQUE
LEWIS, DECEASED,

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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QUESTIONS PRESENTED

In this use of force case, the entire incident is contained on the dashboard video/audio recording. While a driver and front-seat passenger of a car were being searched near a busy intersection, the decedent, Dominique Lewis ("Lewis"), a rear seat passenger, jumped into the front seat. Despite being directed to "hold-up" by another officer, Lewis started the car. At the same time, the Petitioner, Officer Matthew Needham ("Needham") ran across the front of the car toward the driver's side. While Needham was directly in front of the car, the car engine can be heard revving and the tires squealing as Lewis drove the car directly at Needham. As the car accelerated at him, Needham raised his gun. He then lowered the gun and dodged to the driver's side without shooting. Lewis then swerved the car at Needham. After this swerve toward Needham, Needham fired two shots into the driver's side window at Lewis. Lewis died as a result of the gunshot. The Sixth Circuit denied qualified immunity in a 2-1 decision (Batchelder, A., dissenting). This erroneous decision has eroded the protections of qualified immunity and is in direct conflict with numerous prior decisions of this Court and the Sixth Circuit. The specific questions presented are as follows:

I. Viewing the evidence from the officer's perspective at the time of the incident as shown in the dashboard video could a reasonable officer have believed that Lewis posed an imminent threat of serious harm to the officer or others in the vicinity?

II. At the time of the incident, did the law clearly establish in a particularized sense, considering the evidence available including the dashboard video, that the use of deadly force was unlawful in this situation?

LIST OF PARTIES

The parties to this case are those listed in the caption, that being the Petitioner, Police Officer Matthew Needham ("Needham"), and Respondent, Carmita Lewis, as Personal Representative of Dominique Lewis, Deceased ("Lewis"). The Charter Township of Flint is also a defendant, but is not a petitioner. No corporations are parties to the proceedings.

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On August 3, 2015, the United States District Court for the Eastern District of Michigan, Southern Division, issued a two-page order stating that it declined to rule on Petitioner, Police Officer Matthew Needham's motion for summary judgment based upon qualified immunity. This order is attached hereto as Appendix B.

On August 22, 2016, in a 2-1 decision (Batchelder, A., dissenting), the Sixth Circuit affirmed the District Court's denial of qualified immunity ruling that the dashboard video, alone, does not conclusively show whether Officer Needham is entitled to qualified immunity. This opinion is reported at *Lewis v. Charter Township of Flint,* 2016 Fed. App. 0488N and is attached hereto as Appendix A.

On October 12, 2016, the Sixth Circuit issued a one-page order denying Needham's petition for rehearing *en banc*. This order is attached hereto as Appendix C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). This petition is timely as it has been filed within ninety (90) days of the Sixth Circuit's opinion denying Needham's request for rehearing *en banc* [App. C].

For the reasons set out below, and pursuant to Sup. Ct. R. 10(a) & (c), Needham also respectfully states that there are compelling reasons why this Court should exercise its judicial discretion and grant this Petition for a Writ of Certiorari ("Petition").

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Against Needham, Respondent has alleged claims for excessive force under the Fourth Amendment to the United States Constitution, pursuant to 42 U.S.C. § 1983.

The Fourth Amendment provides in pertinent part that "[t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV.

Section 1983 provides in pertinent part as follows:

> 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.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

I. INTRODUCTION.

The decedent, Dominique Lewis ("Lewis") was a back-seat passenger in a vehicle that was stopped near a busy intersection. During the stop, and prior to the

search of Lewis or the vehicle, Lewis jumped from the backseat to the front seat, started the car, put it in drive, slammed the gas, squealed the tires, and drove directly at the Petitioner, Officer Matthew Needham ("Needham"). A dashboard recording capturing the entire incident establishes that Needham was crossing in front of the car toward the driver's side, when Lewis drove recklessly, directly at Needham. Needham avoided the first attempt by dodging to the right toward the driver's side when Lewis again swerved toward him. Only at this time did Needham deploy deadly force, firing two shots into the driver's side window at Lewis. Lewis died as a result of his injuries. Needham had less than one second to decide a course of action on this busy street once Lewis gunned the engine and began accelerating directly at him with tires squealing.[1]

In a 2-1 decision, the Sixth Circuit erred when it concluded that the dashboard video, which captures the audio and video of the entire incident, was insufficient to determine whether Needham's use of deadly force was objectively reasonable and/or whether it was clearly established on the date of the incident that Needham's actions violated the Fourth Amendment in this particularized circumstance. The dashboard video establishes that Needham's use of deadly force was objectively reasonable. Even if the Court were to conclude otherwise, there is no case decided by this Court, the Sixth Circuit, or any other circuit, that would have put Needham on notice that his actions violated the Fourth Amendment in this particularized context.

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1. From the moment Police Officer Janelle Stokes asks Ms. Williams to exit the vehicle, fifteen cars can be seen passing extremely close to the incident [App. D, at 10:30 – 11:48].

Binding precedent of both the Sixth Circuit and the United States Supreme Court establishes that, based solely on the video evidence provided, Needham is entitled to qualified immunity for his decision to use deadly force. *Williams v. City of Grosse Pointe Park*, 496 F.3d 482 (6th Cir. 2007); *Pennington v. Terry,* 644 F.3d 533, 538 (6th Cir. 2016); *Shreve v. Franklin County*, 743 F.3d 126 (6th Cir. 2014); *Marvin v. City of Taylor*, 509 F.3d 234 (6th Cir. 2007), *Brosseau v. Haugen*, 543 U.S. 194 (2004); *Scott v. Harris,* 550 U.S. 372 (2007); *Plumhoff v. Rickard*, -- U.S. --, 134 S. Ct. 2012 (2014); *Mullenix v. Luna*, -- U.S. --, 136 S. Ct. 305 (2015). These cases establish that a police officer is entitled to qualified immunity in cases similar to this situation, where the officer was directly in the line of flight of a decedent who showed no concern for the life of the officer or others in the vicinity. These cases have provided notice to police officers that deadly force is reasonable in this situation.

The Sixth Circuit completely disregarded this long line of decisions. Disagreeing with a very strong dissent by Judge Batchelder, the majority of this Sixth Circuit panel has determined that the singular case of *Smith v. Cupp*, 430 F.3d 766 (6th Cir. 2005), somehow overrules all of the decisions above and has clearly established that an officer is not entitled to use deadly force in this situation. In *Cupp*, there was no video evidence and the Sixth Circuit ruled that there was a genuine issue of material fact because "[t]he evidence would support a jury finding that [the officer] was never in the line of flight." In our case, the dashboard camera captured the entire incident and it is clear that Needham was directly in the line of flight of the vehicle when the roar of the engine is heard followed by the squealing of the tires and the car accelerating directly at

Needham. There is no question that Needham was directly in the line of flight, contrary to the *Cupp* determination. In fact, it is clear that Needham barely avoided being run over by Lewis, who showed no concern for Needham's life or the safety of the others in close proximity.

While the Sixth Circuit did not overrule all prior cases and certainly cannot overrule the United States Supreme Court, its decision will have the same effect as a reversal of those prior decisions on future cases within the circuit. The underlying decision, if allowed to stand, will "clearly establish" law for all subsequent deadly force decisions in the Sixth Circuit. Police officers in the same position as Needham, directly in the line of flight of an individual appearing intent on running them over, can now be denied qualified immunity based upon the underlying decision. This is despite the recent decisions of the United States Supreme Court and the Sixth Circuit finding that officer conduct was either justified or that a constitutional violation was not clearly established in a situation such as the one facing Needham. If this decision is allowed to stand, it will cause complete confusion among both police and jurists.

The Sixth Circuit also utilized four improper legal tests, which will significantly confuse and dilute the protections afforded by qualified immunity. First, in reviewing whether Needham's actions were objectively reasonable the Court below discussed and determined whether a reasonable officer **"would"** have believed that his actions were lawful as opposed to whether a reasonable officer **"could"** have believed that his actions were lawful. Second, the Court has misapplied the case law interpreting Fed. R. Civ. P. 56, requiring all facts to

be viewed in the light most favorable to the non-moving party. The majority created fictional factual scenarios. Third, the majority ruled that what should have been a question of law was a question of fact. Fourth, the Court failed to define the right at issue in a fact-specific manner, despite this Court's unequivocal mandates in *Plumhoff* and *Mullenix*.

The opinion below will result in a serious erosion of the protections provided to police officers by the doctrine of qualified immunity. If allowed to stand, it will have a long-lasting effect of confusion and uncertainty not only among the legal community, but more importantly among the police officers who are required to make split second decisions to save their own lives and the lives of those they are sworn to protect.

The flaws in the Sixth Circuit's reasoning conflict directly with this Court's precedent as well as cases from the Sixth Circuit and the sister circuits. Based on this conflict, Needham respectfully states that this Court's intervention is necessary to provide law enforcement officers with fair warning regarding the use of deadly force when confronted with an individual who is fleeing in a vehicle that is accelerating directly at him, and swerving toward him and into traffic on a busy street. *See* Sup. Ct. R. 10(a) and 10(c). These actions constituted an imminent danger to both Needham and others in the vicinity.

On occasions where there has been clear error, this Court has reversed the circuit court's judgment summarily, as it did in *Brosseau* and *Mullenix*. Needham recognizes that summary reversal on a petition is unusual but believes he should not be exposed to civil liability based

upon the clear precedent of this Court. Alternatively, Needham requests that this Court grant his petition to allow for plenary consideration of his qualified immunity defense.

II. STATEMENT OF FACTS.

The relevant facts are contained in the Amended Complaint and the dashboard recording from the patrol vehicle. At this stage, Needham accepts as true Respondent's version of the facts that are not blatantly contradicted by the dashboard video. The video shows the entire incident.

On July 16, 2014, at approximately 5:30 p.m., Lewis was the right rear passenger in a white Chevrolet Impala being driven by Kenisha Williams [Record 8, Amended Complaint, ¶¶ 8 & 9]. Near the busy intersection of Flushing and Eldorado Roads in the Charter Township of Flint, Officer Stokes of the Flint Township Police Department ("Stokes") stopped the white Chevrolet Impala [Record 8, Amended Complaint, ¶¶10-12]. When Stokes called for backup, Needham responded and arrived on the scene [Record 8, Amended Complaint, ¶¶16-18]. Ms. Williams turned off the vehicle [App. D, at 1:05]. Stokes and Needham approached the vehicle and asked the driver for permission to search the car [Record 8, Amended Complaint, ¶¶17-19].[2]

Lewis was seated in the backseat on the passenger's side. Ms. Williams and her baby exited the vehicle, and

2. The video shows only Stokes approaching the vehicle and asking to search [App. D, at 10:20].

Stokes frisked Ms. Williams [App. D, at 10:30]. Ms. Williams and her baby remained off to the side of the road. Stokes then approached the man seated in the front passenger seat, asked him for his identification, asked him to exit the vehicle, and frisked him [App. D, at 11:23].

Needham was off of the road on the passenger side of the vehicle [App. D, at 11:23]. While Stokes was patting down the passenger and before the vehicle or Lewis had been searched, Lewis jumped from the backseat to the driver's seat and started the car [App. D, at 11:38].[3] Stokes directed him to "hold up" [App. D, at 11:40].

Recognizing that Lewis was jumping into the front seat, Needham rushed across the front of the vehicle toward the driver's side. [App. D, at 11:41]. At this point, due to the rapidly evolving scenario, it is helpful to pause, slow and listen to the video. Before Needham could get across the front of the vehicle, Lewis started the car [App. D, at 11:42]. The engine can be heard revving (as if the gas pedal is being pressed hard) and the tires began squealing when Needham is directly in front of the vehicle [App. D, at 11:43]. The vehicle then rapidly accelerated directly at Needham [App. D, at 11:44]. This portion of the video, especially when viewed and heard second by second, leaves little doubt that Lewis drove directly at Needham with tires squealing, and that Lewis had no regard whatsoever for Needham's life or the safety of others in the vicinity [App. D, at 11:43-45].

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3. At this point, Needham and Stokes were unaware of Lewis' outstanding absconding warrant or the loaded, stolen handgun that was in the vehicle.

While in front of the car, it appears that Needham raised his gun and pointed it toward Lewis but did not shoot [App. D, at 11:44-45]. After the vehicle accelerated directly toward him with tires squealing, Needham was able to dodge quickly to the driver's side of the hood to avoid being run over [App. D, at 11:45-46]. Needham lowered his gun for a ½ second during this maneuver [App. D, at *Id.*]. Lewis then swerved the vehicle toward Needham [App. D, at *id.*]. Needham then raised his gun and fired two shots through the driver's side window. [App. D, at 11:45-47]. Lewis died as a result of the gunshots.

III. PROCEDURAL HISTORY

Carmita Lewis filed this lawsuit as Lewis' personal representative against Needham and Flint Township. Since the lawsuit sought recovery for alleged Fourth Amendment violations under 42 U.S.C. § 1983, the District Court had original jurisdiction, pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343 [Record 8, First Amended Complaint, Count I & II, ¶¶ 32-36].

Prior to discovery, Defendants twice moved for summary judgment before the District Court.[4] In seeking summary judgment, Defendants argued that Needham was entitled to qualified immunity based upon the dashboard video. The District Court declined to rule on Defendants' first summary motion, which was construed

4. Defendants filed two summary judgment motions. After the District Court issued its Order refusing to rule on the first summary motion, this Honorable Court issued its opinion in *Mullenix v. Luna,*-- U.S. --, 136 S. Ct. 305 (2015). At a Status Conference, the District Court invited Defendants to file a second summary judgment motion discussing the impact of *Mullenix.*

as a denial [App. B]. Defendants filed a timely Notice of Appeal to the Sixth Circuit.

The Sixth Circuit affirmed the District Court's denial of summary judgment and of qualified immunity, ruling that the dashboard video alone was insufficient [App. A]. The Sixth Circuit also denied Needham's motion for rehearing *en banc* [App. C].

After the Sixth Circuit issued its opinion, the District Court issued its order denying Defendants' second summary motion "in light of the Sixth Circuit's decision."

ARGUMENT

I. OFFICER NEEDHAM IS ENTITLED TO QUALIFIED IMMUNITY WHERE THE VIDEO OF THE ENTIRE INCIDENT ESTABLISHES THAT THE CAR ENGINE WAS REVVING, TIRES WERE SQUEALING AND THE CAR WAS SUDDENLY AND RECKLESSLY ACCELERATING DIRECTLY AT NEEDHAM, WHO BARELY DODGED THE ASSAULT, AND THEN SWERVED AT HIM A SECOND TIME, BEFORE NEEDHAM DEPLOYED DEADLY FORCE.

In reviewing qualified immunity in a Fourth Amendment use of force context, the Court is called upon to determine: (1) whether the officer's conduct was objectively reasonable, *Brosseau,* at 197; and (2) whether Respondent has shown that the right was clearly established in a "particularized sense," such that a reasonable officer confronted with the same situation would have known that using deadly force would violate that right. *Brosseau,* at 199-200.

The Sixth Circuit rendered an opinion that is in direct conflict with existing Sixth Circuit and United States Supreme Court precedent, as well as precedent of the majority of circuit courts throughout the country. The decision involves the important federal question of whether a police officer is entitled to qualified immunity for the decision to use deadly force. The grant of certiorari, therefore, is appropriate pursuant to Sup. Ct. R. 10(a) and 10(c).

A. The Sixth Circuit Ignored The Officer's Perspective, As Established By The Uncontroverted Video Evidence, And Improperly Ruled That Objective Reasonableness Was A Question Of Fact For The Jury.

In denying qualified immunity, the Sixth Circuit ruled that the video was inconclusive and that a reasonable jury could conclude that Needham was never in the line of flight and was not in imminent danger when he shot Lewis [App. 8a-9a, 12a]. Not only does such a ruling ignore the uncontroverted video, it fails to adhere to Supreme Court precedent regarding qualified immunity enunciated by this Court in *Scott*. By failing to apply the appropriate evidentiary and summary judgment value to the video, the Sixth Circuit mischaracterized the right allegedly violated by defining that right in broad, general terms, rather than in a fact-specific manner, in violation of this Court's holdings in *Brosseau* and *Mullenix*, and in conflict with the Sixth Circuit's own precedent, including *Williams*.

In *Scott,* this Court explained the standard for a qualified immunity motion at the summary judgment stage when strong video evidence is available: adopt the

plaintiff's version of events unless there exists the "added wrinkle" of a video capturing the events in question, in which case, adopt the video. *Id.,* at 380. As in *Scott,* the "added wrinkle" in this case is the existence of a video capturing the entire incident. As the Sixth Circuit recently ruled,

> "[A] court need draw only *reasonable* inferences in favor of the nonmoving party; it need not construe the record 'in such a manner that is wholly unsupportable—in the view of any reasonable jury—by the video recording.'"

Pennington, at 538 (quoting *Shreve,* at 132 and *Marvin,* at 239) (emphasis in original). *See also, Zellner v. Summerlin,* 494 F.3d 344, 371 (2d Cir. 2007); *Carnaby v. City of Houston*, 636 F.3d 183, 187 (5th Cir. 2011) ("Although we review evidence in the light most favorable to the nonmoving party, we assign greater weight, even at the summary judgment stage, to the facts evident from the video recordings taken at the scene."); *Sawyer v. Ashbury,* 537 Fed. Appx. 283 (4th Cir. 2013); *Valencia v. De Luca*, 612 Fed. Appx. 512, 514 (10th Cir. 2015) (quoting *Scott, supra,* at 381 (the district and appellate courts *must* "view[] the facts in the light depicted by the video[recording]"). Once a court determines the undisputed facts and reasonable inferences, the question of qualified immunity is purely a legal one.

> At the summary judgment stage, however, once we have determined the relevant set of facts and drawn all inferences in favor of the nonmoving party to the extent supportable by the record[], the reasonableness of Scott's

> actions--or, in Justice Stevens' parlance, "[w]hether [respondent's] actions have risen to a level warranting deadly force," *post*, at 395, 167 L. Ed. 2d, at 703—**is a pure question of law**.

Scott, at 381 n8 (emphasis added).

Below, the Sixth Circuit concluded that the determination of what was objectively reasonable was a factual dispute because a reasonable jury could conclude, based on the video alone, that Needham, Stokes, the motorists, and pedestrians in the area were not in imminent danger:

> At this juncture, the record—consisting only of the dash-cam video—presents a scenario where, as in *Cupp*, it would be possible for a jury to conclude that the officer shot at the decedent in self-defense, but a reasonable jury could also conclude that the decedent "was merely trying to flee . . . and [the officer] purposefully shot [him] under circumstances of no threat to [the officer] or others." *Cupp*, 430 F.3d at 770.

[App. 10a].

The Sixth Circuit ruled that the undisputed facts presented a jury question on what is reasonable. However, the reasonableness inquiry in the qualified immunity analysis is a question of law, not fact. Like in *Scott*, the dispute in this case is in the nature of "on the one hand X, on the other hand Y," where X is a fact that supports reasonableness of force and Y is one that seems to suggest otherwise – but X and Y are not facts that actually conflict.

For example, as depicted on the video, it is undisputed that Lewis started the engine and accelerated with tires squealing while Needham was in front of the vehicle (fact X). It is also undisputed that Needham was able to dodge the vehicle (fact Y), one fact upon which the Sixth Circuit relied in ruling that factual issues remain [App. 9a]. The conflict between X and Y is not which one happened, because they both happened. Rather, the "dispute" consists of determining the relative weights of fact X and fact Y – and of all of the other facts contained in the video – in deciding the objective reasonableness of deadly force under the Fourth Amendment and, ultimately, qualified immunity. This is the type of "dispute" identified by the Sixth Circuit [App. 9a, 12a-13a]. However, these are not factual disputes, but rather, disputes about the ultimate legal significance of the undisputed facts. They are questions of law for the court. *Scott,* at 381 n8.

In this case, the Sixth Circuit's "factual" dispute is premised on the Court ignoring the undisputed facts displayed on the recording. As discussed above, the video unequivocally contains the entire event – as Lewis jumped into the front seat and started the car, Needham crossed in front of the car and drew his weapon, Lewis revved the engine, squealed the tires and accelerated directly at Needham, Needham dodged the vehicle, Lewis swerved toward him, and Needham fired his weapon. Due to the existence of the video, these facts are not in dispute.

Rather than making the legal determination based on these undisputed facts, the Sixth Circuit ignored the video and impermissibly minimized Lewis' conduct as "merely trying to flee a traffic stop in a vehicle" and suggested that Needham was not in any danger and had time to consider a variety of alternatives [App. 8a-9a]. As Justice Batchelder explained in her dissent, the video unequivocally shows that Lewis' actions transformed a mere traffic stop into the commission of violent felonies, including: fleeing and eluding, M.C.L. 257.602a; and resisting and obstructing, M.C.L. 750.81d. The actions could also support the charge of attempted murder as Lewis clearly attempted to accelerate at Needham. Just as this Court stated in *Scott*, "The Court of Appeals should not have relied on such visible fiction; it should have viewed the facts in the light depicted by the videotape." *Scott*, at 380-81.

The Sixth Circuit's inference – that Lewis was merely trying to flee and that it was not objectively reasonable for Needham to believe that he and those in the general vicinity were in imminent danger – was fictional and unreasonable. Contrary to this Court's holding in *Scott* and the Sixth Circuit's own holdings in *Pennington, Shreve,* and *Marvin,* the Sixth Circuit refused to reasonably construe this video evidence and inferred a fictional, factual dispute where none exists. In short, because of the video, there are no genuine issues of material fact regarding the application of qualified immunity.

The Sixth Circuit also deviated from its own established precedent in *Williams* and from precedent set by this Court in *Scott,* both of which were decided two years after *Cupp.* As recognized by the dissent, *Williams* is very similar and is binding on the Sixth Circuit. In

Williams, the officers determined that a car was stolen and they pursued. The entire incident was captured on the officer's dashboard camera. Officer Hoshaw positioned his vehicle in front of Williams' car to block his exit. After his passenger exited on foot, Williams attempted to flee in the car. First, he tried to reverse, but Officer Miller had parked his vehicle behind Williams. After Williams backed into Officer Miller's car, Officer Hoshaw got out and stuck his weapon through the driver's side window, pointing it directly at Williams' head. Despite having a weapon pointed directly at him, Williams accelerated, driving around the police vehicles and over the curb and sidewalk. At this time, Officer Hoshaw fell to the ground as he released his grasp of the vehicle. Officer Miller fired several rounds as the car drove away, striking Williams in the back of the neck. *Williams,* at 484.

As Justice Batchelder explained in her dissent below, because there is a video capturing the entire incident, *Williams* is the appropriate standard:

> Unlike *Cupp* and *Godawa*, which both involved material disputes about what exactly happened at the critical moments, *see Cupp*, at 774; *Godawa* [*v. Byrd,* 798 F.3d 457, 466 (6th Cir. 2015)], there is nothing murky or indeterminate about the video that could be construed in the plaintiff's favor here. Unlike *Cupp*, this is not a case where a reasonable jury could conclude that the officer was "running towards the . . . car" at the time he opened fire. 430 F.3d at 774. Nor would anyone conclude that Officer Needham "was never in the line of flight" and, hence, was "never in any danger." *Id.*

[App. 21a].

The Sixth Circuit applied unreasonable and fictional inferences in favor of Lewis which are blatantly contradicted by the video. The Court then utilized these inferences to create questions of fact where there were none. It then went further and compounded its error by ruling that the legal issue, objective reasonableness, was a question for the jury. The result was a decision that contradicts the law of the Sixth Circuit and the United States Supreme Court, and improperly denied qualified immunity to Needham.

B. The Sixth Circuit Erred By Defining The Constitutional Right At Issue In Broad, General Terms, Rather Than In Terms Of The Specific Situation Confronting Needham And Others, As Depicted In The Video.

The Sixth Circuit failed to define the right at issue in fact-specific terms, despite the availability of video evidence. Instead the majority adopted a very broad right:

> However, where, as here, the facts viewed in the light most favorable to the plaintiff permit a finding that a reasonable officer would not have perceived *any* imminent threat to himself or others, the broader propositions of *Graham* [*v. Connor*, 490 U.S. 386 (1989)] and [*Tennessee v. Garner,* 471 U.S. 1 (1985)] suffice to clearly establish the right at issue.

[App. 16a (emphasis in original)].

The Sixth Circuit failed to define the right at issue with the specificity required by *Brosseau, Plumhoff,* and *Mullenix,* and in terms of the facts depicted on the video, as required by *Scott.* By improperly defining the right at issue, the Sixth Circuit ignored this Court's recent admonishment of the Fifth Circuit in *Mullenix* and instead reasoned that the broad requirements set forth in *Graham* and *Garner* were sufficient. Rather than defining the right in the particular context depicted on the video, the Sixth Circuit defined the right at issue as: "that [officers] may not use deadly force against a fleeing suspect where that person presents no imminent danger to the officer or others in the area." [App. 17a].[5] This ignores the reality presented in the video and the fact that Needham was nearly killed by Lewis' reckless attempts to drive through him, and ignores this Court's recent and express direction.

In *Mullenix*, this Court expressly rejected the same general Fourth Amendment test. There, the Fifth Circuit defined the right at issue: "that a police officer may not use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." This Court went on to explain that the holding in *Brosseau* established that the contours of the Fourth Amendment right at issue require more specificity.

While the facts in *Mullenix* certainly differ from those in this case, the rule of law remains binding and applicable. As the *Mullenix* Court held:

5. *See also,* App. 14a-15a ("[I]t is unreasonable for an officer to use deadly force against a suspect merely because he is fleeing arrest; rather, such force is only reasonable if the fleeing suspect presents an imminent danger to the officer or others in the vicinity.")

> This Court summarily reversed, holding that use of *Garner*'s "general" test for excessive force was "mistaken." *Brosseau,* 543 U. S., at 199, 125 S. Ct. 596, 160 L. Ed. 2d 583. **The correct inquiry, the Court explained, was whether it was clearly established that the Fourth Amendment prohibited the officer's conduct in the "'situation [she] confronted': whether to shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight."** *Id.,* at 199-200, 125 S. Ct. 596, 160 L. Ed. 2d 583.

Mullenix, at 309 (emphasis added).

Similarly, by generally defining the right, the Sixth Circuit failed to adhere to the requirements outlined in *Plumhoff.* 134 S. Ct. at 2016. The *Plumhoff* court stressed the impact of *Brosseau* and directed that the specific and particular facts of a case be considered when defining the constitutional right that is at issue.

The Sixth Circuit was required to consider the particularized facts. The actual facts, supported by the video, cannot be discounted and must factor into the definition of the right at issue. The Sixth Circuit's decision creates a fiction whereby a jury could conclude that Lewis was calmly and carefully trying to flee and presented no danger to Needham or others in the vicinity. There is no support whatsoever for this fiction, which can only be imagined if a court disregards both the video evidence and the law as set forth in *Brosseau, Plumhoff,* and *Mullenix.* The facts inferred and the constitutional right considered by the Court below, therefore, were legally improper.

C. It Was Not Clearly Established That Needham's Decision To Deploy Deadly Force Under These Circumstances Was Unjustified. To The Contrary, Numerous Decisions Of The Sixth Circuit And This Court Establish That Officers' Actions In Circumstances Very Similar To Needham's Are Objectively Reasonable.

In a Fourth Amendment use of force context, an officer is entitled to qualified immunity unless the Court determines that the officer's conduct was not objectively reasonable **and** that the right was clearly established in a "particularized sense" such that a reasonable officer confronted with the same situation would have known that using deadly force would violate that right. *Brosseau,* at 199-200. There is no case law in the Sixth Circuit or the United States Supreme Court where a police officer's actions, in a similar scenario, were found to be unlawful. Needham, therefore, is entitled to qualified immunity.

In *Brosseau*, this Court explained the fact-specific inquiry required when analyzing whether the right at issue was clearly established on the date of the underlying incident. Brosseau, a police officer, went to Haugen's mother's house because there were reports of men fighting in the yard. Upon Brosseau's arrival, Haugen fled. With Brosseau chasing on foot, Haugen got into a Jeep. When Haugen disobeyed Brosseau's orders to exit the vehicle, Brosseau smashed the driver's side window with her gun and then hit Haugen in the head with the butt of her gun. Despite Brosseau's efforts, Haugen was able to start the Jeep. As Haugen drove away, Brosseau jumped safely away from the vehicle and shot Haugen through the back window of the Jeep. *Id.,* at 195-97.

In ruling that the specific right at issue was not clearly established and, thus, that Brosseau was entitled to qualified immunity, this Court reiterated the rule that the inquiry is context specific, not a broad proposition:

> "[T]here is no doubt that *Graham v. Connor*, *supra*, clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness. Yet that is not enough. Rather, we emphasized in *Anderson* [*v. Creighton,*] 'that the right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' 483 U.S. [635,] 640 [(1987)]. 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."

Brosseau, at 198-99 (quoting *Saucier v. Katz,* 533 U.S. 194, 201-202 (2001)).

Following *Brosseau,* the *Plumhoff* Court laid out the test a plaintiff must surmount to prove that a right was clearly established:

> *Brosseau v. Haugen*, 543 U. S. 194, 201, 125 S. Ct. 596, 160 L. Ed. 2d 583, where an officer shot at a fleeing vehicle to prevent

> possible harm, makes plain that no clearly established law precluded the officer's conduct there. **Thus, to prevail, respondent must meaningfully distinguish *Brosseau* or point to any "controlling authority" or "robust 'consensus of cases of persuasive authority,'" [*Ashcroft v. al-Kidd*, 536 U.S. 731, 741-742 (2011)], that emerged between the events there and those here that would alter the qualified-immunity analysis.**

Plumhoff, at 2016 (emphasis added).[6]

In the instant case, the Sixth Circuit failed to meaningfully distinguish *Brosseau* or point to any controlling authority or consensus of cases of persuasive authority. If it had, it is likely that it would have realized that the two most analogous cases are *Brosseau* and *Williams*. While *Brosseau* does not involve a video, it is extremely similar to the case at hand. The officers were faced with suspects in vehicles who were attempting to flee and were undeterred when the officers pointed their weapons at them. Brosseau shot Haugen through the back window as Haugen drove away in the Jeep. Thus, *Brosseau* cannot be meaningfully distinguished and, pursuant to *Plumhoff*, the right is not clearly established unless there is controlling authority or a consensus of persuasive cases

6. This Court also noted that, when determining whether a right is clearly established, a court should not include cases decided after the date of the underlying incident "because they could not have given fair notice to [the officer]." *Plumhoff,* at 2023 (quoting *Brosseau,* at 200, n. 4). For this reason, *Godawa* cannot factor into the Court's decision of whether the right at issue was clearly established because it was decided after the subject incident.

decided after *Brosseau* (2004) which would provide fair warning to Needham.

Rather than adhering to this Court's holdings in *Brosseau, Plumhoff* and *Mullenix,* the Sixth Circuit relied on *Cupp* and the unpublished case of *Hermiz v. City of Southfield,* 484 Fed. Appx. 13 (6th Cir. 2012), neither of which had a video capturing the entire incident or a similar factual scenario. In *Cupp*, Officer Dunn arrested Smith for making harassing phone calls. Smith, who was impaired, was handcuffed and seated in the back of Officer Dunn's cruiser, which Officer Dunn left running to provide air conditioning while he spoke with the tow truck driver who was towing Smith's car. Officer Dunn's vehicle was not equipped with a partition. Smith slipped his handcuffs, hopped into the driver's seat and began to drive away. As the Sixth Circuit noted, "[t]he facts from this point forward are heavily disputed" and, as such, that court was obligated to take the facts in a light most favorable to the plaintiffs. *Id.,* at 769. According to the tow truck driver, Officer Dunn took 4-5 steps, running toward the moving vehicle, and then fired 4 shots as the vehicle passed Officer Dunn. The deadly shot struck Smith in the left ear, left to right, slightly back to front. *Id.* at 770.

Unlike in *Cupp,* there are no factual issues here because the entire incident was recorded on Stokes' dashboard camera. Moreover, as the dissent stated,

> Unlike *Cupp*, this is not a case where a reasonable jury could conclude that the officer was "running towards the . . . car" at the time he opened fire. 430 F.3d at 774. Nor would anyone conclude that Officer Needham "was never in

> the line of flight" and, hence, was "never in any danger." *Id.*

[App. 21a].

Moreover, the Sixth Circuit relied on *Cupp* to establish the sort of broad right that was expressly struck down in *Mullenix.* Thus, *Cupp* is not controlling authority. It does not clearly establish the right in the instant factual scenario and does not resolve the question of the objective reasonableness of Needham's conduct.

The Sixth Circuit also relied on the unpublished case of *Hermiz v. City of Southfield.* Not only is *Hermiz* unpublished, it has no factual similarity to the case at hand. *Hermiz* involved a traffic stop. The officer parked in front of Hermiz and exited the vehicle. Hermiz, however, stopped only for a second and rolled past the officer at 5-10 miles per hour. The officer fired four shots, the first three from 3-4 feet away and the fourth as the car rolled past. Never was the officer in the danger that Needham experienced.

The *Hermiz* court ruled that there was a factual dispute regarding whether the officer lacked justification for firing the fourth and final shot. *Id.,* at 16. Questions of fact remained in *Hermiz* because there was no video capturing the event. Unlike in *Hermiz,* there are no factual questions. Because Needham was in the "line of flight," an objectively reasonable officer in Needham's situation could have believed that he was in imminent danger. Even if *Hermiz* was published, it is neither controlling authority nor a consensus of persuasive cases. It fails to address, let alone clearly establish, the right at issue.

Williams, however, is binding precedent in the Sixth Circuit and was decided two years after *Cupp.* As described above, *Williams* involved a very similar set of facts to the instant case. Based on the dashboard video evidence, the Sixth Circuit ruled that the officer was entitled to qualified immunity because the use of force was objectively reasonable. *Id.,* at 483.

> According to the district court, "based on Williams' conduct, Officer Miller had probable cause to believe that Williams posed a threat of serious physical harm to Sgt. Hoshaw, himself, and to other citizens." The court continued, "[v]iewed objectively, Williams' conduct showed that he was not intimidated by the police presence, would not hesitate to deliberately use the vehicle as a weapon, and was intent on fleeing from the police, which in turn posed a threat to the public traveling on a major Detroit thoroughfare."
>
> Having reviewed the evidence, we are in agreement with the district court. At the point Miller fired his weapon, he was faced with a difficult choice: (1) use deadly force to apprehend a suspect who had demonstrated a willingness to risk the injury of others in order to escape; or (2) allow Williams to flee, give chase, and take the chance that Williams would further injure Sgt. Hoshaw or an innocent civilian in his efforts to avoid capture. Moreover, Miller had only an instant in which to settle on a course of action. Under the circumstances, we cannot say that Miller acted unreasonably, nor do we

> believe that a rational juror could conclude otherwise.
>
> The evidence fully supports the conclusion that Miller's conduct was "objectively reasonable" as a matter of law. Miller and Hoshaw attempted to apprehend a suspected car thief. Williams, intent on escape, collided with Miller's squad car. Then, in spite of the fact that Hoshaw's weapon was pointed at his head, Williams continued his attempted flight, driving onto a sidewalk and knocking Hoshaw to the ground.
>
> From Miller's perspective, Williams: (1) was undeterred by having a weapon pointed at his head; (2) acted without regard for Hoshaw's safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. Miller had no way of knowing whether Williams might reverse the Shadow, possibly backing over Hoshaw, or cause injury to other drivers or pedestrians in the area. As a consequence, Miller elected to fire his weapon in order to prevent Williams's potentially causing someone injury. That Williams may not have intended to injure Hoshaw or anyone else is immaterial. From Miller's viewpoint, Williams was a danger, and he acted accordingly.

Id., at 486-87.[7]

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7. Likewise, the Eleventh Circuit's recent decision in *Thomas v. Moody,* 653 Fed. Appx. 667 (11th Cir. 2016), demonstrates the split that has occurred. In *Thomas,* the Eleventh Circuit held that

The instant case is very similar to *Williams*. As in *Williams,* the video clearly depicts the split-second scenario facing Needham. When Lewis hopped into the front seat and started the Impala and accelerated, Needham was in front of the vehicle and pointed his weapon at Lewis. Undeterred and intent on escape, Lewis accelerated directly at Needham, then made a hard left toward Needham as Needham dodged out of the way, and was careening into traffic on the busy street. As in *Williams*, Lewis was: (1) undeterred by having a weapon pointed at him; (2) acted without regard for Needham's safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. He was certainly suspected of a violent crime after he tried to run over Needham, as well as fleeing and eluding, as noted by the dissent. And, as the *Williams* court ruled, it is completely irrelevant that the decedent may not have *intended* to injure the officer or anyone else. *Id.,* at 487. Faced with these indisputable actions, Needham's use of deadly force was objectively reasonable, pursuant to *Williams.*

Despite the presence of a video, the Sixth Circuit concluded that *Williams* was distinguishable because Williams collided with a squad car and drove onto the sidewalk. This conduct is similar to Lewis squealing his tires and driving directly at Needham. In contrast to *Williams*, the Sixth Circuit, however, concluded that,

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a police officer was entitled to qualified immunity when he shot the plaintiff who was fleeing in his vehicle based in large part on a dashboard video. *See also, Curry v. Cotton,* 639 Fed. Appx. 325, 332 (6th Cir. 2016) (affirming the denial of qualified immunity because dashboard video did not cover the timeframe when the officer allegedly deployed excessive force).

in deciding this question of law, Needham's particular situation was such that "a reasonable jury could conclude that no one was ever in danger." [App. 21a]. As Judge Batchelder explained in her dissent, these differences miss the point when determining qualified immunity:

> What matters, and what the majority fails to acknowledge, is that in both cases the officers faced "a rapidly unfolding situation [and] ha[d] probable cause to believe that [the] suspect pose[d] a serious physical threat either to the police or members of the public," a fact that categorically justifies the use of deadly force. [*Williams, supra,* at 484] (citing *Dudley v. Eden*, 260 F.3d 722, 726-27 (6th Cir. 2001); *Scott v. Clay County*, 205 F.3d 867, 871-73 (6th Cir. 2000)).
>
> And even if it were true that *Williams* is not on point, and even if a reasonable jury could conclude that any threat to those in the vicinity had dissipated by the time Officer Needham entered the comparative safety of being beside the swerving car rather than in its immediate path, the fact remains that he opened fire less than one second after he had escaped from what can only be described as mortal peril. There is thus no basis for the majority's conclusion that Officer Needham violated the Constitution because, even accepting this construction of the facts, the decision to shoot was not unreasonable…

[App. 20a]. Indeed, as the Sixth Circuit itself has held,

> Fourth Amendment law provides that an officer may shoot at a driver that appears to pose an immediate threat to the officer's safety or the safety of others—for example, a driver who objectively appears ready to drive into an officer or bystander with his car. *See Brosseau* [, at 197-200] (citations omitted).

Hermiz, supra, at 16.

Williams is controlling and clearly establishes that Needham's conduct in this specific set of facts was objectively reasonable. Even if this Court disagrees, the failure to meaningfully distinguish *Brosseau* and the fact that the Sixth Circuit itself decided *Cupp* (2005)*, Williams* (2007) and *Hermiz* (2012) demonstrates that the specific right at issue in this case was not clearly established in 2014 in the Sixth Circuit.

The Sixth Circuit failed to appropriately apply the standard enunciated by this Court in *Scott* when it reviewed the dashboard video. By failing to apply the appropriate evidentiary and summary judgment value to the video, the Sixth Circuit mischaracterized the right allegedly violated and failed to define it in a fact-specific context, in violation of this Court's holdings in *Brosseau, Plumhoff* and *Mullenix*, and in conflict with the Sixth Circuit's own jurisprudence in *Williams*. The video alone establishes that Needham's conduct was objectively reasonable, or at the very least, "in the hazy border between excessive and acceptable force," *Brosseau,* at 201. The Sixth Circuit opinion is in direct conflict with existing Sixth Circuit and United States Supreme Court precedent, as well as precedent of the majority of circuit

courts throughout the country. This error directly led to the Sixth Circuit's erroneous conclusion that it was clearly established that Needham's conduct violated the Fourth Amendment. The grant of certiorari, therefore is appropriate pursuant to Sup. Ct. R. 10(a) and 10(c).

D. The Sixth Circuit Utilized the Wrong Legal Standard of Whether a Reasonable Officer "Would" Have Believed That Deadly Force Was Authorized, as Opposed to the Proper Legal Standard of Whether A Reasonable "Could" Have Believed that Deadly Force Was Authorized.

It is well established that, "A law enforcement officer is entitled to qualified immunity if '**a** reasonable officer **could** have believed [his actions] to be lawful, in light of clearly established law and the information the . . . officer[] possessed.'" *Hensley v. Gassman*, 693 F.3d 681, 687 (6th Cir. 2012) (quoting *Anderson v. Creighton*, 483 U.S. 635, 641 (1987)) (emphasis added). In fact, the Sixth Circuit itself cited to the proper standard:

> A court should deny qualified immunity only "if, on an objective basis, it is obvious that no reasonably competent officer would have [acted in the same manner]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized."

[App. 14a quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)].

The majority in the Sixth Circuit below denied qualified immunity to Needham because "a reasonable jury could conclude from the video that a reasonable officer would not have believed he or anyone else was ever in danger." [App. 12a]. First, this is a question of law for the court, not a question of fact for the jury. Second, this is not the appropriate standard for analyzing qualified immunity. Instead, synthesizing *Brosseau, Scott, Mullenix,* and *Williams,* the operative question is: Even with all *reasonable* inferences construed in a light most favorable to Lewis, whether **an** objectively reasonable officer in Needham's position **could** have believed that Lewis posed an immediate and imminent threat such that the use of deadly force was justified.[8] Thus, if "officers of reasonable competence **could** disagree," *Malley,* at 341 (emphasis added), or if his conduct falls "in the hazy border between excessive and acceptable force," *Brosseau,* at 201, then Needham is entitled to qualified immunity. Indeed, Needham is entitled to the protection of qualified immunity because it cannot be said that his actions were "plainly incompetent" or a "knowing violation of the law." *Id.*

The Sixth Circuit misapplied this standard on at least three (3) occasions in its opinion:

- "The dash-cam video does not conclusively show that a reasonable officer would have believed Lewis posed an imminent threat of serious physical harm to Needham or others in the vicinity." [App. 8a].

8. The same question utilizing "would" is, whether **no** objectively reasonable officer in Needham's position **would** have believed that Lewis posed an immediate and imminent threat such that the use of deadly force was justified.

- "[I]t is not clear from the video that a reasonable officer would have perceived that Lewis was 'targeting' him." [App. 8a].

- "[I]t is not clear from the video in this case that Lewis was 'undeterred by having a weapon pointed at his head'—or that a reasonable officer would have perceived as much…" [App. 12a].

Because the Sixth Circuit misapplied the qualified immunity standard, its opinion conflicts with Sixth Circuit and Supreme Court decisions. Consequently, review by this Court is necessary to secure or maintain uniformity with Supreme Court and Sixth Circuit jurisprudence.

CONCLUSION

The Sixth Circuit refused to consider the unequivocal video/audio dashboard recording when analyzing the qualified immunity questions, as required by this Court's decisions in *Scott, Brosseau,* and *Mullenix,* and the Sixth Circuit's decision in *Williams.* The Sixth Circuit then improperly ruled that the legal significance of the undisputed evidence was a question of fact for the jury, rather than a question of law for the court. The Sixth Circuit also refused to follow the test laid out in *Plumhoff* regarding when and how a right is clearly established. Finally, the Sixth Circuit failed to follow precedent of this Court and the Sixth Circuit finding that conduct very similar to Needham's was objectively reasonable. The result of this rejection of binding precedent is not only confusion in the federal circuits, but complete confusion among police officers who are making these split second life saving decisions on a daily basis.

For the reasons set forth above, Petitioner, Officer Matthew Needham, respectfully requests that a writ of certiorari be granted. Alternatively, if this Court, in its discretion, chooses not to grant certiorari, Needham respectfully requests that this Court summarily reverse the decisions of the Sixth Circuit and the District Court, and rule that Needham is entitled to qualified immunity and summary judgment.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED AUGUST 22, 2016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1908

CARMITA LEWIS, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF DOMINIQUE LEWIS, DECEASED,

Plaintiff-Appellee,

v.

CHARTER TOWNSHIP OF FLINT,

Defendant,

MATTHEW NEEDHAM, POLICE OFFICER,

Defendant-Appellant.

BEFORE: BATCHELDER and WHITE, Circuit Judges; and LIPMAN, District Judge.*

HELENE N. WHITE, Circuit Judge. Dominique Lewis (Lewis) was killed after Flint Police Officer Matthew Needham (Needham) fired shots into a car

* The Honorable Sheryl H. Lipman, United States District Judge for the Western District of Tennessee, sitting by designation.

Lewis was driving as Lewis attempted to flee a traffic stop. Carmita Lewis, as personal representative of Lewis's estate (the Estate), brought the instant action against the Charter Township of Flint and Needham, alleging violations of 42 U.S.C. § 1983 and state law. Prior to discovery, Defendants sought summary judgment and qualified immunity, respectively, based on a dashboard-camera video of the incident. In an order following a status conference, the district court declined to rule on the motion at that time and provided the parties sixty days to conduct discovery. Needham appeals, and we **AFFIRM**.

I.

A.

When Flint Township Police Officer Janelle Stokes (Stokes) stopped Kenisha Williams (Williams) for speeding, Lewis was in the right rear passenger seat of Williams's vehicle. R. 8: First Am. Compl., PID 40-41; *see also* Video 00:23-00:32, 01:08-01:11. After asking for Williams's driver's license and returning to her cruiser, Stokes called for backup to search the vehicle based on her contention that she had smelled marijuana inside the vehicle. R. 8 at PID 41. Needham responded and arrived a few minutes later. *Id.* at PID 41-42. After Williams consented to a search, Stokes patted Williams down and allowed her to take her young daughter out of the back seat. *Id.* at PID 42; Video at 10:45-11:22. Stokes then conducted a pat down of the front passenger. Video at 11:20-11:38.

The dash-cam video then shows the following. As Stokes pats down the front passenger, who has his hands on the vehicle, Lewis climbs into the driver's seat; Stokes says, "Hey hold up," and Needham—coming into the video's view from the adjacent grass—approaches the car from the passenger side. Video at 11:38-11:41. Lewis then starts the car; at the same time, Needham runs towards then across the front of the vehicle, stopping directly in front of the driver's side and appearing to have his gun drawn and pointed at Lewis.[1] *Id.* at 11:41-11:45. Lewis accelerates the car forward; the wheels can be heard screeching. *Id.* at 11:45. When the vehicle accelerates, Needham appears to scurry a few steps to his right to get out of the vehicle's path, lowering his weapon and placing an arm on the car as he does so. *Id.* at 11:45-46. The car comes very close to Needham, but does not appear to hit him. *Id.* at 11:45-11:46. As the car passes Needham he shoots into the driver's side window. *Id.* at 11:46-47. Two shots can be heard on the video. *Id.* The car then veers sharply left. *Id.* at 11:47-11:48. Lewis died as a result of gunshot wounds. R. 8 at PID 43.

This incident occurred on a three-lane road with no buildings in sight and light to moderate traffic. *See generally* Video. The video shows approximately four to five other cars in the vicinity as Lewis attempts to drive away. *Id.* at 11:45-11:48.

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1. Although according to the First Amended Complaint, Needham yelled, "Stop! Police!" (PID 43), that cannot be heard on the video.

B.

The Estate filed an amended complaint on May 14, 2015. On June 30, 2015, prior to discovery, Defendants filed a motion for summary judgment and a motion to stay the proceedings pending resolution of the summary judgment motion. Defendants argued discovery was not necessary because the dash-cam video showed Needham was entitled to qualified immunity as a matter of law. The Estate did not respond to these motions. However, on July 21, 2015—the deadline for the Estate's response—the district court held a status conference. Following this conference, the district court issued an order declining to rule on Defendants' motion for summary judgment, denying the motion to stay without prejudice, and permitting the parties to conduct discovery for sixty days. Needham then filed this interlocutory appeal.[2]

II.

The denial of summary judgment generally is "not a 'final order'" that may be immediately appealed. *Chappell v. City of Cleveland*, 585 F.3d 901, 905 (6th Cir. 2009); *see also* 28 U.S.C. § 1291. However, "to the extent that it turns on an issue of law," a public official may immediately appeal the denial of qualified immunity. *Quigley v. Tuong Vinh Thai*, 707 F.3d 675, 679 (6th Cir. 2013) (quoting *Estate of Carter v. City of Detroit*, 408 F.3d 305, 309 (6th Cir. 2005)). "Because we do not have jurisdiction over factual issues,

2. On January 4, 2016, this court granted Defendants' motion to stay the proceedings pending appeal. Lewis *v. Charter Twp. of Flint*, No. 15-1908 (6th Cir. Jan. 4, 2016).

'a defendant must concede the most favorable view of the facts to the plaintiff for purposes of the appeal.'" *Id.* at 680 (quoting *Estate of Carter*, 408 F.3d at 309-10). Needham concedes the facts in the complaint for purposes of appeal to the extent they are not contradicted by the dash-cam video, and argues that based on the undisputed facts as shown in the video, he is entitled to qualified immunity. Thus, we have jurisdiction to consider this question of law.

Further, although the district court did not formally deny the motion, we have previously found that a "district court's refusal to address the merits of the defendant's motion asserting qualified immunity constitutes a conclusive determination for the purposes of allowing an interlocutory appeal." *Summers v. Leis*, 368 F.3d 881, 887 (6th Cir. 2004).

III.

We review de novo a district court's determination that a defendant is not entitled to qualified immunity. *Foster v. Patrick*, 806 F.3d 883, 886 (6th Cir. 2015). Although the plaintiff "bears the burden of demonstrating that [the defendant] is not entitled to qualified immunity," *id.*, "we view the facts and any inferences reasonably drawn from them in the light most favorable to" the plaintiff, *Martin v. City of Broadview Heights*, 712 F.3d 951, 957 (6th Cir. 2013) (internal quotation marks omitted) (quoting *Griffith v. Coburn*, 473 F.3d 650, 655 (6th Cir. 2007)).

IV.

Qualified immunity shields "government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). To demonstrate that an official is not entitled to qualified immunity, a plaintiff "must show both that, viewing the evidence in the light most favorable to her, a constitutional right was violated and that the right was clearly established at the time of the violation." *Chappell*, 585 F.3d at 907.

A. Constitutional Violation

An officer's use of deadly force during an arrest implicates an arrestee's Fourth Amendment right to be free from excessive force. *See Kirby v. Duva*, 530 F.3d 475, 477, 482 (6th Cir. 2008). We analyze excessive-force claims under the Fourth Amendment's objective reasonableness standard, *Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989), which requires us to balance "the nature and quality of the intrusion on [a plaintiff's] Fourth Amendment interests against the countervailing governmental interests at stake," *Burgess v. Fischer*, 735 F.3d 462, 472 (6th Cir. 2013) (alteration in original) (quoting *Ciminillo v. Streicher*, 434 F.3d 461, 466-67 (6th Cir. 2006)). In particular, we carefully consider "the facts and circumstances of each . . . case,

including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396; *see also Burgess*, 735 F.3d at 472-73. In addition, we judge the reasonableness of an officer's use of force "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight, . . . allow[ing] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97.

It has long been established that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). However, "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Brosseau v. Haugen*, 543 U.S. 194, 203, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (alteration in original) (quoting *Garner*, 471 U.S. at 11); *see also Pollard v. City of Columbus, Ohio*, 780 F.3d 395, 403 (6th Cir. 2015). Where a person attempts to flee in a vehicle, "police officers are 'justified in using deadly force against a driver who objectively appears ready to drive into an officer or bystander with his car," but "may not use deadly force once the car moves away, leaving the officer and bystanders in a position of safety.'" *Godawa v. Byrd*, 798 F.3d 457, 464

(6th Cir. 2015) (quoting *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014)). Thus, "where the car no longer 'presents an imminent danger,' an officer is not entitled to use deadly force to stop a fleeing suspect." *Id.* (quoting *Smith v. Cupp*, 430 F.3d 766, 775 (6th Cir. 2005)).

The dash-cam video does not conclusively show that a reasonable officer would have believed Lewis posed an imminent threat of serious physical harm to Needham or others in the vicinity. Rather, viewed in the light most favorable to the Estate, it shows that Lewis—who was not suspected of any violent crime—was merely trying to flee a traffic stop in a vehicle, which alone is not sufficient to justify the use of deadly force. *See Cupp*, 430 F.3d at 773 (reasoning, "[a]lthough there was some danger to the public from Smith's driving off in a stolen police car, the danger presented by Smith was not so grave as to justify the use of deadly force."). Further, the video does not clearly show that Lewis "targeted" Needham when he accelerated the vehicle and attempted to flee. Although Lewis's intent does not matter, the facts known to Needham at the time do. *See Dickerson v. McClellan*, 101 F.3d 1151, 1155 n.3 (6th Cir. 1996) ("[W]e must consider only the facts the officers knew at the time of the alleged Fourth Amendment violation.") (citing *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Because Needham ran in front of the vehicle after Lewis had started the ignition and less than a second before he accelerated forward, it is not clear from the video that a reasonable officer would have perceived that Lewis was "targeting" him.

Moreover, the video strongly suggests—and Needham appears to concede—that Needham fired into the driver's

side window. This fact and Needham's position at the side of the car suggest he was clear of the vehicle and not in danger when he fired his weapon. Needham contends he fired through the driver's side window only because at the time, he was "trying to dodge the vehicle." Needham Br. 21. Although that may be the case, the conclusion Needham asks the court to draw would require us to view the video in the light most favorable to Needham. However, a reasonable jury could reach a different conclusion, especially since the video appears to show Needham lowering his weapon as he jumps out of the vehicle's path, and then raising it again as the vehicle drives by him. *Cf. Hermiz v. City of Southfield*, 484 F. App'x 13, 14, 16-17 (6th Cir. 2012) (concluding "that [the officer] lacked justification to fire at least his final shot[,]" because "[e]ven if the car appeared to head toward [the officer] at one point, its single pass at five to ten miles per hour [did] not justify the inference that Hermiz posed an ongoing threat, especially considering that Hermiz's driving prior to the traffic stop presented no cause for concern.").

This court's decision in *Smith v. Cupp* is instructive. There, Smith—who was arrested for making harassing phone calls but earlier in the evening had been stopped for erratic driving by the same officer—was handcuffed in the back of a police cruiser in a parking lot. 430 F.3d at 768. While the officer was outside the car speaking with a tow-truck driver, Smith climbed into the front seat and tried to drive away in the vehicle. *Id.* at 769. The officer asserted that he and the tow-truck driver were "not more than a vehicle's length" from the cruiser, and that Smith "rapidly accelerated directly at" them; thus, he drew his

gun and fired four shots at Smith. *Id.* at 770. However, the plaintiffs contended that the officer had fired "at least the final, fatal shot" through the driver's side window; the officer "concede[d] that he fired while the patrol car was passing him, but claim[ed] he did so while jumping out of the direct path of the vehicle." *Id.* This court held that disputed facts precluded summary judgment because "a jury could conclude that [the officer] did not fire as the vehicle was bearing down on him in fear of his life," but rather that he "fired as he ran toward the driver side of the car after the car passed him." *Id.* at 774. Thus, the court found that "[t]he evidence would support a jury finding that [the officer] was never in the line of flight." *Id.*

At this juncture, the record—consisting only of the dash-cam video—presents a scenario where, as in *Cupp*, it would be possible for a jury to conclude that the officer shot at the decedent in self-defense, but a reasonable jury could also conclude that the decedent "was merely trying to flee . . . and [the officer] purposefully shot [him] under circumstances of no threat to [the officer] or others." *Cupp*, 430 F.3d at 770. That there was no video available in *Cupp* does not render it inapplicable because there are factual questions in the instant case bearing on the analysis that are not clearly depicted in the video. *See Godawa*, 798 F.3d at 463 (finding there were still disputes of fact even though video existed because "the video evidence in this case does not clearly contradict Plaintiffs' version of events, nor does it necessarily support Defendant's assertion that Godawa's vehicle 'target[ed]' him").

Needham contends, and the dissent agrees, that this court's decision in *Williams v. City of Grosse Pointe Park*,

496 F.3d 482 (6th Cir. 2007), establishes that his actions were objectively reasonable. In *Williams*, a dash-cam video showed that after an officer tried to block Williams's car with his cruiser in order to apprehend him, Williams reversed his car and hit the cruiser in an effort to flee. 496 F.3d at 484. One of the officers present then exited the cruiser, approached Williams's vehicle, "and stuck his gun in the driver's side window, pointing his weapon at Williams's head." *Id.* Still intent on fleeing, Williams then "accelerated in an effort to move around [the] cruiser," and in doing so, "drove [his vehicle] over the curb and onto the sidewalk." *Id.* The officer, who was still holding onto the car, "was knocked down as it accelerated." *Id.* At that point, the other officer present fired several rounds at the vehicle, leaving Williams paralyzed. *Id.* The court found the shooting officer's conduct objectively reasonable because from his perspective, Williams "(1) was undeterred by having a weapon pointed at his head; (2) acted without regard for [the first officer's] safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture." *Id.* at 487. Further, the court distinguished the case from *Cupp* because unlike in *Cupp*, no "rational trier of fact could conclude that [the officer] acted unreasonably" after viewing the dash-cam video. *Id.* at 487-88.

Despite some similarities, *Williams* is distinguishable. There, the officer had far more information indicating that Williams posed an imminent threat. Specifically, the court found relevant that in attempting to escape, Williams "collided with [a] squad car," and "in spite of

the fact that [an officer's] weapon was pointed at his head, . . . continued his attempted flight, driving onto a sidewalk and knocking [the officer] to the ground." *Id.* at 487. Further, the court noted that the officer knocked to the ground "was in immediate danger from" the fleeing vehicle. *Id.* Thus, unlike in the instant case, the video in *Williams* showed a situation where a reasonable jury could not have concluded that no one was ever in danger. And, unlike in *Williams*, it is not clear from the video in this case that Lewis was "undeterred by having a weapon pointed at his head"—or that a reasonable officer would have perceived as much—since Needham ran in front of the vehicle after Lewis had already started the ignition, and just before the vehicle accelerated.[3]

Further, this is not a situation where an officer's actions are justified because a dangerous situation turned quickly into a safe one before the officer had a chance to realize the fleeing suspect no longer posed a threat. Viewed in the light most favorable to Lewis, a jury could conclude from the video that a reasonable officer would not have believed he or anyone else was ever in danger. Moreover, "the fact that a situation is rapidly evolving 'does not, by itself, permit [an officer] to use deadly force,'" *Godawa*, 798 F.3d at 466 (quoting *Cupp*, 430 F.3d at 775), and although the events here occurred within a matter of

3. Contrary to the dissent's assertion, we do not contend that the fact that an officer puts himself in harm's way automatically renders his actions objectively unreasonable. *See* Dis. at 4. Rather, where a video does not conclusively establish that the driver targeted the officer or otherwise presented a threat, the officer's actions are not necessarily objectively reasonable.

seconds, the video suggests Needham was already out of the way, and indeed had already lowered his gun, when he fired into the driver's side window. *Cf. Cupp*, 430 F.3d at 773, 774-75 (noting that although the case was "close, given the very short period of time in which [the officer] had to react," qualified immunity was not appropriate because the jury could conclude that the officer was never in danger); *Hermiz*, 484 F. App'x at 17 (finding that the court "lack[ed] jurisdiction to review the factual question regarding whether an officer had sufficient time to perceive, at the time of the last shot through the driver's-side window, that the passing car no longer present[ed] an immediate threat").

Nor is this a case where "the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car." *See Cass*, 770 F.3d at 375 (quoting *Hermiz*, 484 F. App'x at 16). Needham barely enters the video's frame until Lewis jumps into the driver's seat; thus, the only "prior interaction" apparent from the record is that Lewis was in a car stopped for a traffic violation, and that Stokes claimed to have smelled marijuana. *Cf. Godawa*, 798 F.3d at 467 ("[A]lthough he was fleeing from police, Godawa was suspected of only minor offenses and posed no 'immediate threat' to Defendant or any member of the public."). There is no evidence that Needham had "a prolonged interaction with [Lewis] in which [Lewis] demonstrated a willingness to harm an officer or engage in reckless behavior." *Murray-Ruhl v. Passinault*, 246 F. App'x 338, 346 (6th Cir. 2007); *see also Cupp*, 430 F.3d at 773 (noting that the officer's "use of force was made even more unreasonable by the fact

that [the decedent] had been cooperative up to this point, and was arrested for the nonviolent offence of making harassing phone calls").

Thus, the dash-cam video, standing alone, does not establish that Needham is entitled to summary judgment on the basis that that his actions were objectively reasonable under the circumstances.

B. Clearly Established

We must now consider whether, at the time of the incident, Lewis's rights were clearly established. *See Chappell*, 585 F.3d at 907. "For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Binay v. Bettendorf*, 601 F.3d 640, 651 (6th Cir. 2010) (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003)). "In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023, 188 L. Ed. 2d 1056, (2014) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 131 S. Ct. 2074, 2083-84, 179 L. Ed. 2d 1149 (2011)). A court should deny qualified immunity only "if, on an objective basis, it is obvious that no reasonably competent officer would have [acted in the same manner]; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986).

There is longstanding precedent holding that it is unreasonable for an officer to use deadly force against a

suspect merely because he is fleeing arrest; rather, such force is only reasonable if the fleeing suspect presents an imminent danger to the officer or others in the vicinity. *See, e.g., Garner*, 471 U.S. at 11; *Kirby*, 530 F.3d at 477. This is the case even where the suspect flees in a vehicle. *See Foster*, 806 F.3d at 889 ("[T]he flight of a felon in a police cruiser, without more, does not justify the use of deadly force"); *Cass*, 770 F.3d at 375 ("Since *Garner*, we have applied a consistent framework in assessing deadly-force claims involving vehicular flight. . . . [T]he critical question is typically whether the officer has 'reason to believe that the [fleeing] car presents an imminent danger' to 'officers and members of the public in the area.'") (citation omitted); *Sigley v. City of Parma Heights*, 437 F.3d 527, 531, 537 (6th Cir. 2006); *Cupp*, 430 F.3d at 775.

Relying on the Supreme Court's recent decision in *Mullenix v. Luna*, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam), Needham contends that existing precedent did not place "the conclusion that [he] acted unreasonably in these circumstances 'beyond debate.'" Reply Br. 8 (quoting *Mullenix*, 136 S. Ct. at 309). Rather, he asserts that as in *Mullenix*, "the parties . . . argue[] cases on both sides of the issue," demonstrating that "no precedent squarely govern[s] the facts" of this case. Reply Br. 9. At most, Needham contends, his conduct falls in the "hazy border between excessive and acceptable force." *See* Reply Br. 9-10 (quoting *Mullenix*, 136 S. Ct. at 312).

In *Mullenix*, the Court held that the broad propositions articulated in *Garner* and *Graham*—that an officer may not use deadly force against a fleeing felon who does not

pose an imminent threat—were insufficiently specific to clearly establish whether it was objectively unreasonable for the officer in question to shoot at the fleeing suspect's vehicle from an overpass, notwithstanding that other officers had set up spikes nearby, and the officer had reportedly been told to "stand by." 136 S. Ct. at 306-07, 309. There, however, the officer had far more information about the imminent threat posed by the fleeing suspect, who led officers "on an 18-minute chase at speeds between 85 and 110 miles per hour," *id.* at 306, was reportedly intoxicated, "twice during his flight had threatened to shoot police officers, and who was moments away from encountering an officer," *id.* at 309. Thus, in that case, there was no question that a reasonable officer could have perceived an imminent threat of danger. However, where, as here, the facts viewed in the light most favorable to the plaintiff permit a finding that a reasonable officer would not have perceived *any* imminent threat to himself or others, the broader propositions of *Graham* and *Garner* suffice to clearly establish the right at issue. *See Cupp*, 430 F.3d at 776. Moreover, this circuit's decision in *Cupp* addressed similar factual circumstances, thereby clearly establishing the right at issue in this case.[4]

Further, although "qualified immunity protects actions in the 'hazy border between excessive and

4. Because we do not rely on *Godawa* to hold that the right at issue is clearly established in this case, we find unpersuasive Needham's argument that even if the court finds a constitutional violation, the contours of the right at issue were not established on July 16, 2014—when this incident took place—because *Godawa* was not decided until 2015.

acceptable force,'" *Mullenix*, 136 S. Ct. at 312 (quoting *Brosseau*, 125 S. Ct. at 596)), "[t]here need not be a case with the exact same fact pattern or even 'fundamentally similar' or 'materially similar' facts," in order to find an officer is not entitled to qualified immunity, *Binay*, 601 F.3d at 652 (quoting, inter alia, *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002)). Rather, "the *sine qua non* of the 'clearly established' inquiry is 'fair warning.'" *Baynes v. Cleland*, 799 F.3d 600, 612-13 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1381, 194 L. Ed. 2d 361 (2016) (quoting *Hope*, 536 U.S. at 741). Officers have fair warning that they may not use deadly force against a fleeing suspect where that person presents no imminent danger to the officer or others in the area. Because the video does not conclusively show whether that was the case here, Needham is not entitled to qualified immunity based on the video alone.[5]

V.

For these reasons, we **AFFIRM**.

5. Because we reject Needham's argument that he is entitled to qualified immunity, we similarly reject his contention that the Estate's remaining claims should be dismissed because they are "inextricably intertwined" with the qualified-immunity issue.

ALICE M. BATCHELDER, Circuit Judge, dissenting. At the heart of the majority's analysis is its conclusion that, "Viewed in the light most favorable to Lewis, a jury could conclude from the video that a reasonable officer would not have believed [that Officer Needham] or anyone else was ever in danger." Maj. Op. 10. *No one* was *ever* in danger? That is not the video I have reviewed.

To begin with, it is simply not true that, as majority puts it, "the video does not clearly show that Lewis 'targeted' Needham when he accelerated the vehicle and attempted to flee." Maj. Op. 6. What it actually shows is that, after he perceived that Lewis was clambering *over the seat back from the back seat into the driver's seat*, Officer Needham began to run in front of the car to stop Lewis from escaping, drawing his weapon. At the moment Lewis began driving forward, the road ahead of him was clear of obstacles and traffic with the exception of the presence of Officer Needham. Then, the video shows with a clarity that no reasonable juror could ignore that, as Lewis was accelerating, Needham was moving *out* of the car's path, eventually exiting it, at which point Lewis swerved *toward* him. If swerving a car at someone is not "targeting," I do not know what is.

Needham was of course no longer in front of the car when he opened fire, but this is far from dispositive. "An officer may . . . fire at a fleeing vehicle even when no one is in the vehicle's direct path when 'the officer's prior interactions with the driver suggest that the driver will continue to endanger others with his car.'" *Cass v. City of Dayton*, 770 F.3d 368, 375 (6th Cir. 2014) (quoting *Hermiz v. City of Southfield*, 484 F. App'x 13, 16 (6th Cir.

2012)). There is no dispute that there was traffic in the immediate vicinity. And though the underlying crime—marijuana possession—was not serious, Lewis's actions, including his deliberate and reckless operation of the vehicle (a violent felony under Michigan law, Mich. Comp. Laws § 750.81d), which Officer Needham had just barely escaped, provided ample reason for him to believe that Lewis posed an immediate and serious threat to his and others' safety, justifying the use of deadly force. As was the case in *Williams v. City of Grosse Pointe Park*, "there can be no question that [the driver's] reckless disregard for the safety of those around him in attempting to escape posed a threat to anyone within the vicinity." 496 F.3d 482, 487 (6th Cir. 2007). Indeed, like the suspect in *Williams*, Lewis was apparently undeterred by having a gun pointed at him, was hell-bent on escaping, and was willing to risk the safety of others in order to get away. *See Id.* at 486-87.

The majority contends that the timing and circumstances of this incident make it distinguishable from *Williams*. Of course, no two excessive force cases are exactly alike, and I grant that the situation in that case was in some ways more extreme. For instance, the underlying crime in *Williams*—auto theft—was more serious than marijuana possession, though, notably, both are non-violent offenses. Also, at the time of the shooting, the suspect in *Williams* had, in his attempt to escape, already collided with a police car and had left no doubt that having a gun pointed at him just inches from his head was not going to deter him from escaping. *See id.* at 484. But in other ways, the situation in that case was *less* serious. There were no pedestrians or civilian vehicles nearby, and the officer was *behind* the car when he opened fire, not beside it. *Id.* Moreover, unlike this case, the suspect

in *Williams* was, at the time he was shot, attempting to navigate around the officer's car with a view toward escaping, not toward running anyone down. *Id.*

What matters, and what the majority fails to acknowledge, is that in both cases the officers faced "a rapidly unfolding situation [and] ha[d] probable cause to believe that [the] suspect pose[d] a serious physical threat either to the police or members of the public," a fact that categorically justifies the use of deadly force. *Id.* (citing *Dudley v. Eden*, 260 F.3d 722, 726-27 (6th Cir. 2001); *Scott v. Clay County*, 205 F.3d 867, 871-73 (6th Cir. 2000)).

And even if it were true that *Williams* is not on point, and even if a reasonable jury could conclude that any threat to those in the vicinity had dissipated by the time Officer Needham entered the comparative safety of being beside the swerving car rather than in its immediate path, the fact remains that he opened fire less than *one second* after he had escaped from what can only be described as mortal peril. There is thus no basis for the majority's conclusion that Officer Needham violated the Constitution because, even accepting this construction of the facts, the decision to shoot was not unreasonable—it would be a quintessential example of "a dangerous situation [that] evolved quickly to a safe one before the police officer had a chance to realize the change." *Smith v. Cupp*, 430 F.3d 766, 774-75 (6th Cir. 2005). The majority stresses the fact that Needham lowered his gun as having some significance on this point. But they ignore the context: the video, again with indisputable clarity, reveals that Needham lowered his weapon and began moving out of the car's path as soon as Lewis began driving away and that he raised it again *only after* Lewis began to swerve toward him.

Unlike *Cupp* and *Godawa*, which both involved material disputes about what exactly happened at the critical moments, *see Cupp*, 430 F.3d at 774 (6th Cir. 2005); *Godawa v. Byrd*, 798 F.3d 457, 466 (6th Cir. 2015), there is nothing murky or indeterminate about the video that could be construed in the plaintiff's favor here. Unlike *Cupp*, this is not a case where a reasonable jury could conclude that the officer was "running towards the . . . car" at the time he opened fire. 430 F.3d at 774. Nor would anyone conclude that Officer Needham "was never in the line of flight" and, hence, was "never in any danger." *Id.* And unlike in *Godawa*, there is nothing in the record suggesting that Needham "initiated the contact" between himself and the car, that the car "did not drive in a manner that endangered [his] life," or that he "was effectively chasing" the car at the time he opened fire. 798 F.3d at 463-65.

These distinctions matter, and we are wrong to ignore them. Contrary to the majority's apparent preference here, the fact that an officer put himself in harm's way does not mean that his actions were therefore objectively unreasonable. *See Kirby v. Duva*, 530 F.3d 475, 482 (6th Cir. 2008). Indeed, all else being equal, the decision to stand with gun drawn in front of a stationary vehicle whose driver appears to be getting ready to flee is not a constitutional violation, much less a clearly established one. *See Estate of Starks v. Enyart*, 5 F.3d 230, 233-34 (7th Cir. 1993) ("[I]f Black had been in front of the vehicle before the car started forward, all three officers could have fired and would be protected by qualified immunity.").

Officer Needham's split-second decision to shoot did not violate Lewis's right to be free from excessive force. He—along with all except those who are "plainly

incompetent or . . . knowingly violate the law"—is therefore entitled to qualified immunity. *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986). In refusing to grant such immunity here, the majority adds confusion not only to law of this circuit, but also to the difficult task faced by law enforcement in applying what we say is clearly established law. How exactly we expect them to conform their actions to the rule purportedly applied in this case is beyond me. I suppose they will conclude that they must stand idly by, obstructing would-be escapees with nothing more than entreaties to stop. That is not the law, nor should it be. The district court's order denying summary judgment in Officer Needham's favor should therefore be reversed.[1] I dissent.

1. If my views had prevailed in this case, the normal course would have been for us to use our pendent appellate jurisdiction to also direct entry of summary judgment in the Charter Township of Flint's favor. *See Lane v. City of LaFollette, Tenn.*, 490 F.3d 410, 423 (6th Cir. 2007). But the notice of appeal mentions only Officer Needham in his individual capacity, and nothing in that document suggests that Flint intended to appeal. *See* Fed. R. App. P. 3(a)(2), (c)(1), (c)(4). We would thus not have jurisdiction to rule on that issue. Similarly, I also would not reach the Estate's remaining claims, but would leave them for the district court to decide in the first instance.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED OCTOBER 19, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 15-11430

CARMITA LEWIS, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DOMINQUE LEWIS,

Plaintiff,

vs.

CHARTER TOWNSHIP OF FLINT, FLINT POLICE OFFICER MATTHEW NEEDHAM,

Defendants.

October 19, 2015, Decided
October 19, 2015, Filed

HON. AVERN COHN

Appendix B

MEMORANDUM AND ORDER DENYING DEFENDANTS' MOTION FOR STAY OF PROCEEDINGS PENDING APPEAL (Doc. 28)

I. Introduction

This is a case under 42 U.S.C. § 1983 involving a fatal police shooting. Plaintiff Carmita Lewis, as personal representative of the Estate of Dominique Lewis, is suing the Charter Township of Flint and Flint Police Officer Matthew Needham. The complaint, as amended, asserts the following claims:

> Count I - excessive force under section 1983 under the 4th and 14th Amendments
>
> Count II - governmental liability of the Charter Township of Flint
>
> Count III - Gross Negligence, Willful and Wanton Misconduct, Assault and Battery
>
> Count IV - Negligent and/or Intentional Infliction of Emotional Distress
>
> Count V - Wrongful Death
>
> Count VI - Survival Action

As will be explained, defendants filed a motion for summary judgment arguing in part that Needham is entitled to qualified immunity. (Doc. 14). Defendants also

asked the Court to stay discovery pending a decision on their summary judgment motion. Following a status conference, the Court issued scheduling order which, among other things, denied their request to stay discovery and declined to address defendants' summary judgment motion until plaintiff had discovery and could file a response. (Doc. 20). Defendants took an appeal on the refusal to rule on Needham's qualified immunity defense and asked the Court of Appeals to stay proceedings pending resolution of the appeal. (Doc. 21). The Court of Appeals for the Sixth Circuit remanded the matter, noting that defendants did not ask the Court for a stay of proceedings pending appeal. *Lewis v. Charter Township of Flint*, 15-1908 (6th Cir. Sept. 1, 2015).

Consistent with the Sixth Circuit's order, now before the Court is defendants' motion to stay proceedings pending appeal. (Doc. 28). Plaintiff has responded. (Doc. 31). For the reasons that follow, the motion is DENIED.

II. Background

A.

This case arises out of the shooting death of decedent following a traffic stop. There is a video and audio recording of the incident. From a review of pleadings and the video, decedent was sitting in the rear passenger seat during the stop, which apparently was for exceeding the speed limit. The stopping officer apparently detected the smell of marijuana and called for back up. The stopping officer then ordered the driver out of the vehicle. The

driver exited the vehicle and then removed a minor child who was sitting in the rear driver seat. Decedent and the front passenger remained in the vehicle for a time. It is not clear when Needham, who was a back up officer, appeared on the scene. The stopping officer then asked the front passenger to exit the vehicle. While the front passenger was outside of the vehicle, decedent jumped over the front seat and into the driver seat and began driving away. At that point, Needham ran in front of the vehicle. The decedent continued driving, causing Needham to move out of the way to avoid being struck. Needham then moved to the driver side of the vehicle and fired shots at the vehicle as decedent continued drive away. It is not clear how many shots were fired or the location of the shots as the action is reflected in the video.

B.

The amended complaint (Doc. 8) was filed on May 14, 2015. On June 12, 2015, defendants filed an answer and affirmative defenses. (Doc. 11). That same day, the Court entered an order for a status conference set for July 21, 2015. (Doc. 12). On June 30, 2015, just over a month after the amended complaint was filed, defendants filed a motion for summary judgment, (Doc. 14), presenting the following arguments, as summarized from the headings in their brief: (1) there is no genuine issue of material fact, (2) Needham is entitled to qualified immunity, (3) plaintiff's *Monell* claim against the Charter Township of Flint fails as a matter of law, (4) plaintiff's state law claims must also be dismissed because there is no genuine issue of material fact, (5) defendants are protected by governmental

immunity, and (6) plaintiff's claim of gross negligence fails because she cannot transform elements of an intentional tort claim into a claim for gross negligence. In support of the motion for summary judgment, defendants attached (4) exhibits, identified as follows:

Exhibit 1 - Plaintiff's Complaint

Exhibit 2 - Plaintiff's Amended Complaint

Exhibit 3 - Defendants' Affirmative Defenses

Exhibit 4 - Police In Car Video of the Incident

Defendants also filed a motion to stay discovery pending resolution of the motion for summary judgment. (Doc. 17).

Following a status conference, on August 3, 2015, the Court entered an order, which both parties approved as to form, that (1) denied defendants' motion to stay discovery without prejudice, (2) ordered the parties to conduct discovery for 60 days, (3) directed plaintiff to file a response to the motion for summary judgment 20 days after the expiration of the 60 day discovery period. (Doc. 20). As noted above, defendants took an appeal and filed a motion to stay proceedings in the Sixth Circuit.

On September 1, 2015, the Sixth Circuit entered an order denying the motion to stay. It noted that the Court's "summary order" did not articulate a basis for denying a stay of discovery or declining to rule on defendants' summary judgment motion until after discovery. The

Sixth Circuit also noted that defendants did not move the Court for a stay pending appeal. The Sixth Circuit denied the motion to stay with leave for Needham to renew the motion "upon a decision from the district court regarding a request for a stay pending appeal." *Lewis v. Charter Township of Flint*, No. 15-1908 (6th Cir. Sept. 1, 2015). The Sixth Circuit also noted that any stay would apply only to Needham, not the Charter Township of Flint, as only Needham is able to raise the defense of qualified immunity.

III. Legal Standard

In determining whether to issue a stay of proceedings pending appeal, the Court must consider "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir.1991) (citation omitted). "All four factors are not prerequisites but are interconnected considerations that must be balanced together." *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 244 (6th Cir.2006) (citing *Griepentrog* 945 F.2d at 153).

IV. Discussion

In evaluating the first factor—the likelihood of success on the merits of the appeal—it is necessary to consider the immunity argument presented in defendants' motion for summary judgment. A fair reading of defendants'

motion and exhibits reveals that defendants contend that the video of the incident conclusively and undisputedly establishes that Needham was justified in using deadly force against the decedent or, at a minimum, is entitled to qualified immunity as a matter of law.[1] The Court has reviewed the video multiple times, including frame by frame upon the Court's direction to defendants' counsel to provide the video in a format to permit frame by frame viewing. The video does not provide all the answers; it also raises questions. It appears to show Needham shooting into the vehicle at a point in time in which he may have been out of harm's way and it is not clear if the vehicle was endangering others. The Court cannot say that the video, and nothing more, entitles Needham to qualified immunity as a matter of law. For example, missing from the record is deposition testimony of the stopping officer, Needham, and the other witnesses involved in the traffic stop. Each witness viewed the scene from a different angle other than the fixed camera. It is very likely that each witness has relevant information as to the events and Needham's use of deadly force. As a consequence, the Court is of the view that the record is in need of more factual development before a determination on whether

1. Indeed, defendants' statement of the issues on appeal reads in pertinent part: Individually named police officer, Matthew Needham, is appealing the refusal of the lower court to rule on his Motion for Summary Judgment based upon the qualified immunity defense. The event was completely captured on the police video and this video conclusively establishes that Officer Needham's use of deadly force in this case was justified and not a violation of the Fourth Amendment as it is clear that Plaintiff's decedent attempted to run Matthew Needham over with a motor vehicle immediately before the shooting.

Needham is entitled qualified immunity can be made.[2] This is why the Court has declined to rule on defendants' summary judgment motion, including the qualified immunity issue, until the parties conduct discovery. Thus, defendants have not shown a likelihood of success on the merits of their appeal based on the Court's decision to allow further fact discovery before ruling on defendants' summary judgment motion, particularly the qualified immunity issue. The Court is not declining altogether to rule on the legal issue of qualified immunity; rather, the Court finds that a decision on the legal issue of qualified immunity cannot be made at this time.

That said, the Court is mindful that:

> The entitlement to qualified immunity involves immunity from suit rather than a mere defense to liability. *Siegert v. Gilley*, 500 U.S. 226, 233, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727,

2. Although plaintiff did not file an affidavit under Fed. R. Civ. P. 56(f) stating that discovery is necessary to enable her to present facts to oppose the motion, plaintiff requested discovery during the status conference. The Court's order providing for discovery before plaintiff files a response to the summary judgment motion is essentially in lieu of plaintiff making a request under Rule 56(f).

73 L.Ed.2d 396 (1982). "Until this threshold immunity question is resolved, discovery should not be allowed." *Id.*

The philosophy behind the doctrine of qualified immunity "is a desire to avoid the substantial costs imposed on government, and society, by subjecting officials to the risks of trial." *Vaughn v. United States Small Bus. Admin.*, 65 F.3d 1322, 1326 (6th Cir.1995) (internal quotation marks omitted) (citing *Harlow*, 457 U.S. at 816, 102 S.Ct. 2727). Such burdens include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* Moreover, "[t]o avoid imposing needless discovery costs upon government officials, the determination of qualified immunity must be made at an early stage in the litigation." *Id.* And although there is no question that *Johnson v. Jones* curtailed to some extent the reach of *Mitchell v. Forsyth*, there is also no question that Mitchell's principle that "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery," *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806, still stands at the threshold of the qualified immunity analysis. *See, e.g., Turner v. Scott*, 119 F.3d 425, 428 (6th Cir.1997) ("The question whether the uncontested facts demonstrated a constitutional

> violation is a pure question of law—and one from which an immediate appeal can be taken where qualified immunity has been denied."); *Sanderfer v. Nichols*, 62 F.3d 151, 153 n. 2 (6th Cir.1995) ("the plaintiff's version of events, regardless of the sufficiency of the supporting evidence, does not state a claim"). Finally, it is clear that before addressing the substance of a claim of qualified immunity, the court must first determine whether the plaintiff has stated a claim of a constitutional violation at all. See *Wilson v. Layne*, 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999) (holding that the court evaluating a claim of qualified immunity must first determine whether the plaintiff states a claim of a constitutional violation at all, and then must determine whether the claimed right was clearly established, before proceeding to the qualified immunity question).

Skousen v. Brighton High School, 305 F.3d 520, 526-27 (6th Cir. 2002).

Here, the complaint states a claim for a constitutional violation. Decedent had the right to be free from deadly force unless Needham's actions were reasonable and he did not violate a clearly established right in using deadly force under the circumstances. However, the answer to the qualified immunity question, particularly as to the reasonableness of Needham's actions, cannot be resolved on the record as it currently stands. At the end of the day, Needham may be entitled to qualified immunity but that decision cannot be made solely on the video.

As to the remaining factors, plaintiff will be harmed by delaying the case. The public interest favors moving this matter forward to determine defendants' liability on a full record. Defendants have also not shown that they will be overwhelmingly and irreparably harmed absent a stay. Thus, on balance, the four factors weigh in favor of denying a stay.

V. Conclusion

For the reasons stated above, defendants' motion to stay proceedings pending appeal is DENIED. Discovery shall move forward in accordance with the Court's August 3, 2015 order.[3]

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

Dated: October 19, 2015
Detroit, Michigan

3. Plaintiff filed a motion for contempt, seeking sanctions for defendants' failure to participate in discovery. (Doc. 24). The motion is DENIED. Sanctions are not appropriate under the circumstances.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED OCTOBER 12, 2016

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 15-1908

CARMITA LEWIS, AS PERSONAL REPRESENTATIVE FOR THE ESTATE OF DOMINIQUE LEWIS, DECEASED,

Plaintiff-Appellee,

v.

CHARTER TOWNSHIP OF FLINT,

Defendant,

MATTHEW NEEDHAM, POLICE OFFICER,

Defendant-Appellant.

ORDER

BEFORE: BATCHELDER and WHITE, Circuit Judges; and LIPMAN, District Judge.*

* The Honorable Sheryl H. Lipman, United States District Judge for the Western District of Tennessee, sitting by designation.

Appendix C

The court received a petition for rehearing *en banc*. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing *en banc*.

Therefore, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER OF THE COURT

/s/_____
Deborah S. Hunt, Clerk

APPENDIX D — DVD
(DASHBOARD-CAMERA VIDEO)

DVD