No. 19-____

IN THE
Supreme Court of the United States

MELANIE KELSAY,

Petitioner,

v.

MATT ERNST,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

MARISA MALECK
KING & SPALDING
1700 Pennsylvania Avenue, NW
2nd Floor
Washington, D.C. 20006

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Petitioner

QUESTIONS PRESENTED

The circuit courts of appeals are split about a matter of exceptional importance involving excessive force and qualified immunity for police officers who assault non-threatening, non-fleeing individuals. The First, Fifth, Sixth, and Tenth Circuits have held that the case law is sufficiently clear to warn a reasonable officer that the Fourth Amendment forbids the use of substantial force against a non-threatening suspected misdemeanant who is not fleeing, resisting arrest, or posing any risk to the safety of others. *See Westfall v. Luna*, 903 F.3d 534, 549 (5th Cir. 2018); *Ciolino v. Gikas*, 861 F.3d 296, 306 (1st Cir. 2017); *Kent v. Oakland County*, 810 F.3d 384, 397 (6th Cir. 2016); *Casey v. City of Federal Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007). This is the case, these courts have held, even if the suspected misdemeanant fails to comply with a police officer's commands.

In this case, however, an 8–4 majority of the Eighth Circuit—sitting *en banc* and over two dissenting opinions—broke with the uniform approach of these decisions. It held that an officer who slammed a small, non-violent, non-threatening woman to the ground with such force that it broke her shoulder was entitled to qualified immunity as a matter of law. This was so even though the woman was suspected only of a misdemeanor and was not fleeing, resisting arrest, or posing any risk whatsoever to others. The majority reached that conclusion because the woman—Petitioner here—could not point to a prior Eighth Circuit case that involved a plaintiff who was not precisely compliant with a police officer's command to "get back here."

The question presented is:

Are police officers entitled to qualified immunity as a matter of law—even if they use substantial force against non-threatening suspected misdemeanants who are neither fleeing, nor resisting arrest, nor posing a safety risk to anyone—so long as no prior case involves a virtually identical fact pattern?

PARTIES TO THE PROCEEDING

Petitioner Melanie Kelsay was the Appellee in the Eighth Circuit. Respondent Matt Ernst was the Appellant in the Eighth Circuit. Jay Welch, Russell Kirkpatrick, Matthew Bornmeier, and the City of Wymore, Nebraska, were Defendants in the U.S. District Court for the District of Nebraska but were not parties in the appeal.

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Melanie Kelsay petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's panel opinion (Pet. App. 27a–39a) is published at 905 F.3d 1081. The Eighth Circuit's *en banc* opinion (Pet. App. 1a–24a) is published at 933 F.3d 975. The district court's opinion (Pet. App. 40a–63a) is unpublished.

JURISDICTION

The Eighth Circuit entered its judgment on August 13, 2019. On October 30, 2019, Justice Gorsuch granted a 30-day extension to file this petition, to December 11, 2019. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *

Title 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory * * * 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 * * *

STATEMENT OF THE CASE[1]

1. In the small town of Wymore, Nebraska, Petitioner Melanie Kelsay went swimming at a public pool with her children and her friend, Patrick Caslin. Pet. App. 41a. Someone called the police and incorrectly reported that Petitioner and Caslin were involved in a "domestic assault." *Id.* In fact, the two were "just playing around." *Id.* While Petitioner was taking pictures of her children by the side of the pool, Caslin came up behind her and pretended he was going to throw her in the pool, and she objected. *Id.*

Police Chief Russell Kirkpatrick and Officer Matthew Bornemeier were waiting for Petitioner and her companions when they exited the pool complex. Pet. App. 41a. Kirkpatrick and Bornemeier immediately confronted Caslin and instructed him to come with them to a police car. *Id.* After Petitioner and Caslin asked repeatedly for an explanation, Kirkpatrick stated that someone had reported a domestic assault. *Id.* Petitioner explained that nothing of the sort had happened; she and Caslin had just been playing around. *Id.*

---

[1] The facts recited in this section are drawn from the district court's summary judgment order (Pet. App. 40a–63a) and the Eighth Circuit's *en banc* opinion (Pet. App. 1a–24a). As stated in the Eighth Circuit panel opinion, on appeal Respondent "[did] not challenge any determination of the district court about which facts [Petitioner] could prove at trial." Pet. App. 31a.

Caslin agreed to accompany Kirkpatrick, and Petitioner could no longer hear them, but she saw that Caslin was being handcuffed. Pet. App. 42a. After Kirkpatrick went to speak to some other witnesses, Petitioner went to the window of the patrol car and asked Caslin, who was in the back, what to do. *Id.* Bornemeier warned Petitioner to back up, and she complied, backing up about fifteen feet. *Id.*

Deputies from the Gage County Sheriff's Office—Respondent Matt Ernst and Jay Welch—then arrived on the scene. Pet. App. 42a. Kirkpatrick told Respondent and Welch that Petitioner had interfered with Caslin's arrest. Pet. App. 3a.

While that conversation took place, Petitioner was still standing about fifteen feet from the patrol car containing Caslin. Pet. App. 3a. One of Petitioner's daughters was arguing with a woman whom the daughter assumed had called the police. Pet. App. 3a. Petitioner started to walk toward her daughter, with her back toward the police (including Respondent). Pet. App. 42a.

Respondent approached Petitioner quickly from behind. Pet. App. 42a. Respondent grabbed Petitioner's arm and told her "to get back here." *Id.* Petitioner stopped walking and turned around to face Respondent, at which point Respondent let go of Petitioner's arm. Pet. App. 3a. Petitioner told Respondent that "some bitch is talking shit to my kid and I want to know what she's saying," and continued walking toward her daughter and the woman. Pet. App. 4a.

Respondent then ran up behind Petitioner, grabbed her, and slammed her to the ground.

Respondent seized Petitioner in a bear hug and lifted her completely off the ground. Pet. App. 42a-43a. Petitioner—who is 5 feet tall and weighs about 130 pounds—remembers being up in the air and hitting the ground. *Id.* The impact of being slammed down knocked her unconscious and broke her collarbone. Pet. App. 43a.

2. Petitioner brought suit under 42 U.S.C. § 1983 against Respondent, the other officers involved, and the City of Wymore in the District Court of Gage County, Nebraska. Pet. App. 1a–2a. The defendants removed the case to the United States District Court for the District of Nebraska. There they moved for summary judgment, and the district court granted the motion as to all claims except a Fourth Amendment excessive force claim against Respondent. Pet. App. 40a.

In analyzing the summary judgment record, the district court found genuine issues of material fact as to whether Petitioner posed a threat or actively resisted arrest. *See* Pet. App. 49a. Viewing the record in the light most favorable to Petitioner, the district court concluded that she "was not using force or actively resisting arrest and posed no danger to anyone" when Respondent seized her and slammed her to the ground. *Id.* Instead, she "was walking away from police, and was not in a position to threaten witnesses or law enforcement." *Id.*

Because Respondent claimed an entitlement to qualified immunity, the district court inquired whether his use of force violated (1) the Fourth Amendment and (2) clearly established law. Pet. App. 46a; *see Pearson v. Callahan*, 555 U.S. 223 (2009). Petitioner's sworn account, the district court held,

created genuine issues of material fact that precluded summary judgment by showing that she was "not using force or actively resisting arrest, and posed no danger to anyone." Pet. App. 49a. The district court also reasoned that "[i]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." Pet. App. 52a (citing *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009)).[2]

3. Respondent filed an interlocutory appeal in the United States Court of Appeals for the Eighth Circuit, again asserting qualified immunity. Pet. App. 30a. In a divided decision accompanied by three separate opinions, the panel reversed the district court. Pet. App. 34a. Rather than addressing whether Respondent acted unlawfully, the panel majority proceeded directly to considering whether Respondent violated clearly established law. Pet. App. 32a. In light of the appeal's interlocutory posture, the panel majority acknowledged that it "lack[ed] jurisdiction to decide 'which facts a party may, or may not, be able to prove at trial.'" Pet. App. 30a. (quoting *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). The panel majority also underscored that "Ernst does not challenge any

[2] In addition to *Brown*, the court identified several other Eighth Circuit cases finding a Fourth Amendment violation where an officer used substantial force "against a person who poses no threat and is not actively resisting arrest or attempting to flee." Pet. App. 52a (citing *Shekleton v. Eichenberger*, 677 F.3d 361, 366–67 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867, 871–72 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 827 (8th Cir. 2011); *Shannon v. Koehler*, 616 F.3d 855, 864–65 (8th Cir. 2010); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002)).

determination of the district court about which facts [Petitioner] could prove at trial." Pet. App. 31a. Without disturbing the district court's factual assessment of the summary judgment record—including the conclusions that Petitioner "was not using force or actively resisting arrest, and posed no danger to anyone," *see* Pet. App. 32a—the panel majority concluded that Respondent was "entitled to qualified immunity" as a matter of law. Pet. App. 33a. Chief Judge Smith dissented. Pet. App. 36a. And Judge Beam concurred "somewhat advisedly" due to "the extant but confusing precedent available," while nonetheless concluding that "the slamming of this lady to the ground by the deputy with force sufficient to fracture her shoulder was uncalled for given the nature of the encounter underway." Pet. App. 35a.

4. The court of appeals granted rehearing *en banc*. Pet. App. 25a.

The *en banc* court split 8–4 in favor of reversal, with two separate dissents. Like the panel majority had done, the *en banc* majority focused on whether Petitioner's right to be free from excessive force being used against her was clearly established. The majority acknowledged that Eighth Circuit decisions generally establish that, when a "nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." Pet. App. 6a–7a. However, the majority held that these precedents were insufficiently specific because none of them involved a situation in which "a deputy * * * use[d] a takedown maneuver to arrest a suspect who ignored the deputy's instruction to 'get back here'

and continued to walk away from the officer." Pet. App. 7a. Because "[n]one of the decisions cited by the district court or [Petitioner] involved a suspect who ignored an officer's command and walked away," the majority concluded that "they could not clearly establish the unreasonableness of using force under the particular circumstances here." Pet. App. 7a. In other words, the *en banc* majority's conclusion that Respondent was entitled to qualified immunity as a matter of law turned on the fact that there was no case that presented the *same* fact pattern—*i.e.*, one that involved the same type of command by an officer and the same type of non-compliance by a non-violent, non-threatening, non-fleeing misdemeanant.

Chief Judge Smith again dissented, now joined by Judges Kelly, Erikson, and Grasz. Pet. App. 12a. The principal dissent reasoned "it is clearly established that force is least justified" against "nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." Pet. App. 13a (quoting *Brown*, 574 F.3d at 499). This dissent also called the majority out for characterizing the incident as one in which Petitioner ignored Respondent's commands: "[T]he facts construed in the light most favorable to [Petitioner] show that she did comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing." Pet. App. 22a. Indeed, "Deputy Ernst implicitly recognized her compliance," the dissent underscored, "by letting go of her arm and saying nothing in response to her explanation." *Id.*

Judge Grasz filed a separate dissent arguing that the court should have decided that Respondent

violated the Fourth Amendment before inquiring whether he violated clearly established law. Pet. App. 23a. The result of failing to settle the law for future cases, Judge Grasz asserted, is "a judicially created exception to a federal statute that effectively prevents claimants from vindicating their constitutional rights." Pet. App. 24a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision splits with four other circuits on a question of exceptional importance: whether an officer violates clearly established law by using substantial force against a non-threatening suspected misdemeanant who is neither fleeing nor resisting arrest. The First, Fifth, Sixth, and Tenth Circuits have uniformly held that such a use of force violates clearly established law even where the victim of that force does not comply entirely with a police officer's commands—and even if the plaintiff does not identify a prior case with virtually identical facts. *See Westfall v. Luna*, 903 F.3d 534, 549 (5th Cir. 2018); *Ciolino v. Gikas*, 861 F.3d 296, 306 (1st Cir. 2017); *Kent v. Oakland Cty.*, 810 F.3d 384, 397 (6th Cir. 2016); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1286 (10th Cir. 2007).

The *en banc* majority of the Eighth Circuit in this case, however, reached the opposite conclusion. It held that Respondent did not violate clearly established law when he slammed a five-foot, 130-pound woman to the ground, knocking her unconscious and breaking her collarbone, even though she was neither resisting arrest nor fleeing the scene. The court reached this conclusion because Petitioner did not furnish a case with virtually identical facts, one in which "a deputy * * * use[d] a takedown maneuver to arrest a suspect

who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." Pet. App. 7a.

This split—on its own—warrants the Court's intervention to clarify the contours of the qualified immunity doctrine. On the one hand, the Court has held that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018); *see also Mullenix v. Luna*, 136 S. Ct. 305, 309 (2015). But, on the other hand, it has repeatedly explained, even as recently as last year, that the application of certain factors identified in *Graham v. Connor*, 490 U.S. 386 (1989)—"[1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight," *id.* at 396—may defeat a qualified immunity defense "in an obvious case * * * even without a body of relevant case law," *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004); *see also Kisela*, 138 S. Ct. at 1153; *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018); *White v. Pauly*, 137 S. Ct. 548, 552 (2017).

The circuit split underscores that the Court should intervene to explain exactly when that is so. After all, if the obviousness principle means anything, it should mean that, with *none* of the factors identified in *Graham* supporting a use of force, Respondent's "blind body slam of a comparatively slightly built and nonviolent misdemeanant" was an obvious violation of the law. Pet. App. 37a (Smith, C.J., dissenting).

Even setting aside the circuit split, the Court should also grant certiorari because the question

presented is exceptionally important. If the Court does not take this case and establish some bounds for when the law is clearly established in excessive force cases, courts—and police officers—will "effectively treat[] qualified immunity as an absolute shield." *Kisela*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting).

That outcome would eviscerate Section 1983, which should not be understood to grant immunity to officers unless they would have had a defense in "an analogous situation at common law." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment) (internal quotation omitted); *see also Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). When Congress enacted Section 1983, the background common law of assault and battery would not have provided Respondent a defense against Petitioner's suit. The Court should grant certiorari to resolve the circuit split, clarify the contours of the qualified-immunity doctrine, and restore some semblance of the historical order, at least in obvious excessive force cases like this one.

I. The Court Should Grant Review To Decide The Question Presented.

A. The Circuits Are Split On This Question.

1. Even if Petitioner had ignored Respondent's instruction—and she did not (*see* Pet. App. 21a-22a (Smith, C.J., dissenting))—the result of this case would have been different in the First, Fifth, Sixth, and Tenth Circuits. These courts have held that the case law is sufficiently clear to warn a reasonable officer that the use of substantial force against a non-

threatening misdemeanant who is not fleeing, resisting arrest, or posing any risk to the safety of others violates the right to be free from excessive force, even if the individual disobeys an officer's commands.

a. In *Westfall v. Luna*, the Fifth Circuit reversed the grant of qualified immunity to a police officer who took the plaintiff to the ground for disobeying an order. 903 F.3d 534, 549 (5th Cir. 2018). There, the defendant officer instructed the plaintiff, a woman who was five-feet-five inches and of a "small build," not to follow her son into her home. *Id.* at 540–41. When the plaintiff disobeyed the instruction not to enter and instead reached for her door knob, the officer took the plaintiff to the ground. *Id.* at 540.

Although the plaintiff disobeyed police instructions, the Fifth Circuit held that the police officer was not entitled to qualified immunity for using excessive force based on the same factual circumstances present here. Like Petitioner, the plaintiff was arrested not for a serious crime but for "interference with public duties—a minor offense." *Id.* at 547 (citing Tex. Penal Code § 38.15(b) ("An offense under this section is a Class B misdemeanor.")). Like Petitioner, the plaintiff also did not pose a threat to the officers or anyone else. *Id.* at 548. And, as with this case, "it [was] clear that [the plaintiff] was not trying to flee" the scene. *Id.* at 548. Had this case been decided in the Fifth Circuit rather than the Eighth Circuit, it would have come out the other way.

b. The same is true with respect to the Sixth Circuit. In *Kent v. Oakland County*, the Sixth Circuit held that police officers who tased a plaintiff who disobeyed several commands was not entitled to

qualified immunity as a matter of law. 810 F.3d 384, 397 (6th Cir. 2016). The plaintiff was yelling and flailing his arms at police officers and emergency medical technicians. *Id.* at 388. The defendant officer commanded the plaintiff to calm down and to put his arms down, and asked the plaintiff to go to the downstairs area of the home. *Id.* Although the plaintiff "refused to comply with an officer's command," the Sixth Circuit concluded that the officer violated clearly established law because the plaintiff was not suspected of a serious crime, did not pose an "immediate safety threat," and did not attempt to flee the scene. *Id.* at 391–93. The outcome of this case would have turned out differently had it been decided in the Sixth Circuit.

c. The result would also have been different if Petitioner had been able to bring her claim in the Tenth Circuit. In *Casey v. City of Federal Heights*, that court reversed the grant of qualified immunity to a police officer who took a plaintiff to the ground for not following instructions and walking away. 509 F.3d 1278, 1285 (10th Cir. 2007). A clerk told the plaintiff not to take the court file for his traffic case out of the courthouse. *Id.* at 1279. The plaintiff removed the file from the building anyway, walking out of the courthouse and toward his truck to retrieve money to pay the traffic-ticket fine. *Id.* at 1279–80. The clerk alerted a police officer, who intercepted the plaintiff as he was heading back toward the courthouse. *Id.* at 1280. The officer "accosted" the plaintiff and ordered "him to return to his truck." *Id.* After the plaintiff explained that he needed to return the file to the courthouse, the officer asked the plaintiff for the file. *Id.* Rather than comply with the officer's instruction,

the plaintiff held out his briefcase to the officer with the file clearly visible. *Id.* When the officer did not take the file, the plaintiff walked around him and toward the courthouse. *Id.* The officer put the plaintiff in an arm lock, but the plaintiff continued walking toward the courthouse, at which point the officer grabbed and tackled him. *Id.*

The Tenth Circuit concluded that "a reasonable jury could find [the officer's] use of force to be excessive and therefore unconstitutional," and proceeded to determine that he violated clearly established law. *Id.* at 1283. As in this case, the plaintiff disobeyed an officer's instruction, but he did not pose "'an immediate threat to the safety' of anybody present." *Id.* at 1282 (quoting *Graham*, 490 U.S. at 396)). Also, like Petitioner, the plaintiff was walking away from the officer, but certainly was "not attempting to flee"—he was heading to the courthouse, just as Petitioner was heading toward her child. *See id.* Finally, like Petitioner, the plaintiff had not committed a severe offense. *Id.* at 1280. Leaving the building with the file "may have been a misdemeanor under Colorado law," but, as in this case, the plaintiff did not commit a "severe crime." *Id.* at 1280–81.

d. Petitioner would also have survived summary judgment had she been able to sue in the First Circuit. In *Ciolino v. Gikas*, the First Circuit denied qualified immunity to a police officer who took a plaintiff to the ground for disobeying instructions. 861 F.3d 296, 306 (1st Cir. 2017). Police officers ordered attendees of a street festival to disperse. *Id.* at 299. Rather than comply with the officers' instructions, the plaintiff paused in front of the officers and their police dogs,

taunted the police dogs, and turned his back on the officers. *Id.* The defendant officer then grabbed the plaintiff from behind and took him to the ground. *Id.* at 300.

Although the plaintiff disobeyed police instructions, the First Circuit concluded that "a reasonable officer in [the defendant]'s position would have understood" his actions violated the plaintiff's Fourth Amendment right. *Id.* at 303 (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (internal quotation omitted)). As with Petitioner, the plaintiff "disobeyed a police order but showed no inclination to resist arrest or to attempt to flee from arrest." *Id.* at 304. And the plaintiff, like Petitioner, "presented no indications of dangerousness." *Id.* (alterations and internal quotation omitted).

* * *

None of these decisions can be reconciled with the *en banc* majority decision in this case. Petitioner's ability to obtain damages from Respondent under federal law should not turn on which State she sued in.

2. The clear split on the question presented underscores an even deeper tension among the circuits over how to determine when the law is clearly established for qualified-immunity purposes in excessive force cases. "[C]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist * * * In day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in

part). For the Eighth Circuit majority, none of the decisions cited by the district court or Petitioner sufficed to clearly establish the unreasonableness of using substantial force here because none of those decisions involved the same fact pattern. *See supra* at 6–7.

In contrast, other circuits reject the notion that they need to "find qualified immunity wherever [they] have a new fact pattern." *Casey*, 509 F.3d at 1284; *see also, e.g.*, *Kent*, 810 F.3d at 395 (declining to limit consideration of cases capable of clearly establishing law to those involving the particular context at issue); *Ciolino*, 861 F.3d at 304 (considering "analogous" cases that "illustrate the application of *Graham*'s general excessive force principles"); *Westfall*, 903 F.3d at 549 (holding that it is "clearly established that the permissible degree of force depends on the *Graham* factors"); *Edrei v. Maguire* 892 F.3d 525, 540–544 (2d Cir. 2018) (denying qualified immunity as a matter of law to officers even though there was no case with the exact same facts), *cert. denied*, 139 S. Ct. 2614 (2019); *Yates v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016) (same); *Alicea v. Thomas*, 815 F.3d 283, 291–92 (7th Cir. 2016) (same).

The Court should grant certiorari, reject the Eighth Circuit's approach, and affirm that of the majority of courts instead. The infinite factual differences inherent in each police incident and the nature of excessive force jurisprudence—"an all-things-considered inquiry with 'careful attention to the facts and circumstances of each particular case'"—means that "there will almost never be a previously published opinion involving exactly the same circumstances." *Casey*, 509 F.3d at 1284 (quoting

Graham, 490 U.S. at 396). The Eighth Circuit's approach sounds the death knell for holding police officers accountable because the court will almost always be able to find some minor factual difference between a case presently before the court and a prior case. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L. Rev. 851, 858 (2010) ("When precisely applicable precedent cannot be found, qualified immunity expands beyond all sensible bounds.").

B. This Case Is The Ideal Vehicle To Decide The Question Presented.

1. This case provides a uniquely clean vehicle to decide the question presented as a pure issue of law. The question presented is focused on a narrow issue—a single claim against a single officer—which further streamlines and simplifies the issues before the Court.

These are no lurking factual issues that could make this case a poor vehicle for considering the question presented. Indeed, the record in this case and the interlocutory posture of Respondent's appeal establish that all the factors identified in *Graham*—and reaffirmed in *Kisela*—cut in favor of holding that Respondent should have been on notice that body slamming Petitioner violated her constitutional rights.

a. *Severity of the crime at issue.* The complaint filed against Petitioner charged her with two counts of obstructing government operations and one count of disturbing the peace, which are misdemeanors. Dist. Ct. Docket 17-5 at 17-18; *see* Neb. Rev. Stat. §§ 28-901 and 28-1322. She also pleaded no contest to

misdemeanors: one count of attempted obstruction of government operations and one count of disturbing the peace. Dist. Ct. Docket 17-5 at 4-6; *see* Neb. Rev. Stat. §§ 28-201(4)(f) and 28-1322.

b. *Whether the individual poses an immediate threat to the safety of the officers or others*. The district court concluded for summary judgment purposes that Petitioner "posed no danger to anyone" when Respondent seized her and slammed her to the ground. Pet. App. 49a. The district court reiterated that Petitioner was "not in a position to threaten witnesses or law enforcement." Pet. App. 49a. The district court's construction of the record neatly resolves this issue because Respondent did not "challenge any determination of the district court about which facts [Petitioner] could prove at trial," and in any case the court of appeals could not reconsider those facts on Respondent's interlocutory appeal. *See* Pet. App. 5a, 31a.

c. *Whether the suspect is actively resisting arrest or attempting to evade arrest by flight*. The district court concluded for summary judgment purposes that Petitioner "was not using force or actively resisting arrest" when Respondent seized her and slammed her to the ground. Pet. App. 49a. Here again, the district court's construction of the summary judgment record is binding. Pet. App. 5a, 31a. Finally, the district court stated that Petitioner was walking "toward her children," not running or trying to flee the scene. Pet. App. 42a.

2. In addition, in reviewing the question presented, the Court would have the benefit of six reasoned court of appeals decisions, which comprise two majority

opinions, three dissents, and one concurrence. There is no need to let the split percolate further.

C. Resolving The Question Presented Is Exceptionally Important.

The Court has consistently reaffirmed that "in an obvious case" the standards of *Graham* can clearly establish the law, "even without a body of relevant case law." *Brosseau*, 543 U.S. at 199; *see also Pauly*, 137 S. Ct at 552; *Kisela*, 138 S. Ct. at 1153. But the Court's precedents do not explain what makes a use of force obviously excessive. The Court should clarify the issue in this case by holding that a use of substantial force is obviously excessive when every one of the *Graham* factors cuts against the police officer using that force, *i.e.*, when force is used against a non-threatening suspected misdemeanant, who is neither fleeing, nor resisting arrest, nor posing a safety risk to anyone.

1. If the obviousness principle means anything, it must mean that a violation is obvious when all of the factors identified in this Court's jurisprudence cut against the use of substantial force but the officer uses such force anyway. The *Graham* factors would become all but meaningless—and establish no outer bound to immunity in excessive force cases—if officers could avoid liability regardless of whether some, all, or none of the factors support the use of substantial force. If there is ever an obvious case of excessive force, it is this case.

2. The opportunity to clarify when Fourth Amendment excessive force law *is* clearly established warrants special attention because the Court's recent cases uniformly address where the law in this area *is not* clearly established. Over the past five years, the

Court has decided five qualified-immunity cases involving an excessive force claim. In all these cases, the Court vacated or reversed courts of appeals' decisions ruling that the law was clearly established. *City of Escondido v. Emmons*, 139 S. Ct. 500 (2019); *Kisela v. Huges*, 138 S. Ct. 1148 (2018); *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015); *San Francisco v. Sheehan*, 135 S. Ct. 1765 (2015).

The Court has not been nearly as active in clarifying the circumstances in which a use of force goes beyond the pale and loses the protection of qualified immunity, which has led to the circuit split. The lack of precedent setting forth circumstances in which the use of force violates clearly established Fourth Amendment law has serious and negative effects. Without such decisions, the law remains perennially unsettled, in effect transforming qualified immunity into "an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting).

This case exemplifies this problem by illustrating how law enforcement can weaponize minor distinctions to defeat qualified immunity. Prior Eighth Circuit decisions had determined that a Fourth Amendment violation occurred where an officer used substantial force without any of the *Graham* factors to support it—*i.e.* in the case of "nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." Pet. App. 13a (Smith, C.J. dissenting) (quoting *Brown*, 574 F.3d at 499). But the majority thought it dispositive that the disobedient or

disrespectful individuals in prior cases did not disobey the same command in the same way. The majority deemed these cases irrelevant because they did not involve "a suspect who ignored the deputy's instruction to 'get back here' and continued to walk away from the officer." Pet. App. 7a.

3. A state of affairs that borders on *de facto* absolute immunity raises especially grave concerns in the excessive-force context because the analogous common law torts of assault and battery did not recognize *any* good-faith immunity for such claims. The current state of the law represents a radical departure from the common law rules that prevailed when Congress enacted Section 1983. If the Court does not wish to reconsider its qualified immunity jurisprudence at this time, as members of this Court have urged, it should at least take steps within the confines of current law to rein in the most extreme departures from the original meaning of Section 1983.

Section 1983 "on its face does not provide for *any* immunities." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Instead, qualified immunity jurisprudence is built on the proposition that good-faith immunity for government officers would have been so obvious to any nineteenth-century lawyer that Congress did not need to write it down in the text of Section 1983. *See Pierson v. Ray*, 386 U.S. 547, 556–57 (1967) (holding that Section 1983 should be read against the background of nineteenth-century tort law, which included "the defense of good faith"). *Pierson*'s creation of a subjective good faith defense later evolved into a purely objective inquiry into clearly established law. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815–16, 818 (1982).

But the foundation stone of these decisions turns out to be a fiction: qualified immunity is a modern innovation and finds no true ancestor in the common law. The doctrine "substitute[s]" the Court's "policy preferences for the mandates of Congress" and lacks grounding in the text and history of Section 1983. *Ziglar*, 137 S. Ct. at 1872 (Thomas, J., concurring). Current qualified immunity jurisprudence consists of "devising limitations to a remedial statute, enacted by the Congress, which 'on its face does not provide for *any* immunities.'" *Wyatt v. Cole*, 504 U.S. 158, 171–72 (1992) (Kennedy, J., concurring) (citing *Malley*, 475 U.S. at 432). This exercise "transform[s] what existed at common law based on [the Court's] notions of policy or efficiency," *id.* at 171–72, entangling the Court in "essentially legislative activity," *Crawford-El v. Britton*, 523 U.S. 574, 611–12 (1998) (Scalia, J., dissenting).[3]

From the early years of the Republic and through the end of the Nineteenth Century, American law rejected a generalized good faith defense for

[3] In recent years, an ever-growing chorus of federal judges has expressed concern about the rift between qualified immunity doctrine and the text and history of Section 1983. *See Morrow v. Meachum*, 917 F.3d 870, 874 n.4 (5th Cir. 2019) (Oldham, J.); *Jackson v. City of Cleveland*, 925 F.3d 793, 822–23 (6th Cir. 2019) (Bush, J.); *Dyal v. Adames*, No. 16-CV-2133, 2018 WL 2103202, at *4 (E.D.N.Y. May 7, 2018) (Weinstein, J.); *Thompson v. Cope*, 900 F.3d 414, 421 n.1 (7th Cir. 2018) (Hamilton, J.); *Rodriguez v. Swartz*, 899 F.3d 719, 732 n.40 (9th Cir. 2018) (Kleinfeld, J.); *Sok Kong Tr. for Map Kong v. City of Burnsville*, No. 16-CV-03634, 2018 WL 6591229, at *17 n.17 (D. Minn. Dec. 14, 2018) (Nelson, J).

government officers.[4] For example, in *Murray v. Schooner Charming Betsy*, a U.S. captain held "a conviction that he acted upon correct motives, from a sense of duty," when he unlawfully seized another ship. 6 U.S. 64, 124 (1804). But that was no defense to liability. *Id.* at 125.

Similarly, in 1851, the Court held that a U.S. Army colonel who had seized a citizen's property was liable for damages, whether or not he was following orders. *Mitchell v. Harmony*, 54 U.S. 115, 137 (1851). The court reasoned that if an officer "trespassed on private rights," he was liable for damages. *Id.* at 135. His subjective good faith was beside the point: it did not matter if he acted out of "zeal for the honor and interest of his country, and in the excitement of military operations." *Id.*

In 1915, this Court rejected good-faith immunity to liability in a Fifteenth Amendment voting rights suit against state officers—a case brought under Section 1983 itself. *See Myers v. Anderson*, 238 U.S. 368, 379 (1915). In *Myers*, the lower court had denied the state officers' attempt to read a bad faith element into the statute, holding that the state officers were "made liable to an action for damages by the simple act of enforcing a void law to the injury of the plaintiff in the suit, and *no allegation of malice need be alleged*

---

[4] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CAL. L. REV. 45, 55 (2018); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1914 (2010); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1801 (2018); David E. Engdahl, *Immunity and Accountability for Positive Governmental Wrongs*, 44 U. COLO. L. REV. 1, 14-21, 55 (1972).

or proved." *Anderson v. Myers*, 182 F. 223, 230 (C.C.D. Md. 1910) (emphasis added); *see also* Baude, *supra*, at 58. The state officers made the same argument in this Court, asserting that Section 1983 incorporated "traditional limits," including the common-law requirement "that malice be alleged." *See* Brief for Plaintiffs in Error at 23–45, *Myers v. Anderson*, 238 U.S. 368 (1915) (Nos. 8–10). But this Court affirmed the lower court, holding that the case was "fully disposed of" by considerations that did not include good faith or malice. *Myers*, 238 U.S. at 379; *see also* Baude, *supra*, at 57-58.

To be sure, good faith could spare an officer from liability in certain contexts in the Nineteenth Century—but not because of some generalized immunity. Rather, as is the case today, certain state common law torts required bad faith as an element or recognized good faith as a defense. Baude, *supra*, at 55.

But when it came to assault and battery by an officer, bad faith was not an element, nor good faith a defense. Thus, if one inquires "whether the common law in 1871 would have accorded immunity to an officer for a tort analogous to the plaintiff's claim under § 1983," *see Ziglar*, 137 S. Ct. at 1871 (Thomas J., concurring), the answer in this case is clear: no.

In fact, the Court said as much in *Beckwith v. Bean*, 98 U.S. 266, 275 (1878), a case decided just seven years after the enactment of Section 1983. In *Beckwith*, government officials had imprisoned the plaintiffs because the officials believed the plaintiffs were aiding Civil War deserters. *Id.* at 268. The plaintiffs sued the officials for assault, battery, and false imprisonment. *Id.* at 266. Good faith was not

available as a defense: "A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no such abuse of power, nor excuses such act[.]" *Id.* at 277 (citation omitted). Nor could the defendants' good faith reduce the plaintiffs' compensatory damages: "[C]ompensation cannot be diminished by reason of good motives upon the part of the wrong-doer." *Id.* at 276. Evidence of good faith was relevant *only* to the jury's consideration of punitive damages, *i.e.*, "whether punishment by exemplary damages should be inflicted." *Id.* at 275.

In 1871, an officer in Ernst's shoes would not have been heard to argue that good faith immunity, or even a good faith defense, would preclude an assault or battery claim against him. But absent this Court's intervention, Deputy Ernst will escape a trial 150 years later based on judge-made immunity policy in the most obvious type of case, one where none of the relevant factors supporting the use of force are present.

Resolving the circuit split on this issue would bring clarity to the law in obvious cases of excessive force and mitigate the schism between qualified immunity doctrine and the original meaning of Section 1983—all within the boundaries of stare decisis and current law. The Court should grant certiorari to do just that.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARISA MALECK
KING & SPALDING
1700 Pennsylvania Avenue, NW
2nd Floor
Washington, D.C. 20006

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Petitioner

NOVEMBER 2019