No. _____

In the Supreme Court of the United States

Cheri Marie Hanson, as trustee
for the next of kin of Andrew Derek Layton,
Petitioner,

v.

Daniel Best; Audrey Burgess; Craig Frericks;
Kyley Groby; Matthew Huettl; Kenneth Baker,
individually and acting in their official capacities
as City of Mankato Department of Public Safety,
Respondents,

Gold Cross Ambulance; Michael Burt
and Thomas Drews,
Defendants.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Andrew Layton died after Respondents, six on duty police officers working as a team, kept him in maximum restraints on his stomach for thirty minutes after they handcuffed his wrists behind his back and hobble tied his ankles together, applying compressive force on his neck, shoulder blades, back, hips and legs. During this prolonged period, Respondents kept Layton "hogtied" for fifteen minutes to get "the energy out of him" before taking him to jail. The Questions Presented are:

1. Was it clearly established in 2013, it is objectively unreasonable for officers to keep an individual in maximum restraint on his stomach for a prolonged period while applying compressive force after the individual is controlled by the officers with his wrists handcuffed behind his back and his legs and ankles hobble-tied together?

2. Does a court of appeals have subject-matter jurisdiction to hear an interlocutory appeal of a district court's decision that there is a genuine dispute as to material facts?

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PARTIES TO THE PROCEEDING

The Petitioner is Cheri Marie Hanson, mother of Andrew Layton. She has sued Respondents on behalf of her son's next of kin for violation of Layton's Fourth Amendment Rights.

Respondents are six City of Mankato, Minnesota, on duty police officers, who, working as a team, kept Layton in maximum restraint on his stomach for an extended period with compressive force after he was controlled and was not a danger to anyone.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

Respondents moved for summary judgment on the ground of qualified immunity. The district court denied the motion, finding there are genuine issues of material fact, but the court of appeals reversed.

OPINIONS BELOW

The court of appeals denied rehearing en banc and by the panel on March 20, 2019, and reprinted at Appendix A-1. The opinion of the court of appeals is reported at 915 F.3d 543 and reprinted at Appendix A-2. The opinion of the district court is not reported in Fed. Supp., 2017 WL 5891697, and is reprinted in Appendix A-11.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment protects "[t]he right of the people to be secure in their persons … against unreasonable … seizures" U.S. Const. Amend. IV.

42 U.S.C. § 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State … 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 … shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

INTRODUCTION

The Petition alleges the court of appeals decision created an unnecessary circuit split. It has been clearly established for years in other circuits that applying compressive force on an individual, who is restrained on his stomach for a prolonged period after officers have controlled him constitutes excessive force. This manner of prolonged prone restraint after an individual has been handcuffed and restrained is dangerous and excessive, as it can deprive the individual of adequate oxygen, thereby precipitating respiratory failure and heart attack. That is precisely what Respondents did to Andrew Layton on January 1, 2013, and how he died.

Respondents claim they did not have fair notice that when they kept Layton on his stomach for thirty minutes with compressive force after he was handcuffed behind his back, legs and ankles hobble strapped together, under officers' control and thereby no longer a real threat to anyone, was unconstitutional. This has no basis in law or fact.

STATEMENT OF CASE

The first step in assessing the constitutionality of Respondents' actions is to determine the relevant facts. As this case was decided on summary judgment, there have not yet been factual findings by a jury, and Respondents' version of events differs substantially from Petitioners evidence. When things are in such a posture, courts are required to view the facts and draw all reasonable inferences in the light most favorable to the party opposing the summary judgment motion, *Scott v. Harris*, 550 U.S 372, 377 (2007), even when, as here, a panel decides on the clearly established prong

of the qualified immunity standard. *Tolan v. Cotton*, 572 U.S. 650, 655-56 (2014).

The district court below found a genuine issue of material fact as to whether Layton had been brought under control by the officers. However, the district court did not articulate the competing evidence that created this genuine issue of material fact. The court of appeals conflated the Respondents' version of events with Petitioner's version of the facts; particularly related to pre-restraint events, which has no bearing on Petitioners asserted right. In numerous instances, the panel relied upon Respondents' account of disputed facts. It is axiomatic when opposing parties' evidence tells a different story, a court must view the non-moving plaintiff's facts and draw reasonable inferences in the light most favorable to the party opposing summary judgment. *Adickes v. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

The court of appeals misapplied summary judgment law by ignoring the district court's finding of a genuine issue of material fact and resolving genuine fact issues in the moving parties' favor.

Because the district court found a genuine issue of material fact regarding whether Layton had been controlled by the officers, the court of appeals decision creates a split among the circuits as to whether the use of prolonged prone restraint with compressive force applied after an individual has been controlled violates a clearly established constitutional right.

If the court of appeals had applied the law correctly, the panel would have concluded that the facts presented by Petitioner make out a violation of Layton's constitutional right to be free from such post-restraint force; that this right was clearly established at the time of Respondents' actions; that Respondents were not entitled to qualified immunity, because a

reasonable jury could find that a reasonable officer would have known after Layton had been controlled by the six officers with maximum restraints, he did not, and could not, pose an immediate or significant threat to the officers, and that the use of prolonged maximal prone restraint with compressive force was excessive. Alternatively, the court of appeals would have affirmed the district court's finding there are genuine issues of material fact and summary judgment should not be granted.

The lower courts' imprecise account of the facts requires the specific nature of the allegations against the officers to be recounted. Petitioner fully sets forth the facts in the correct light below.

A. The Record Evidence Supporting the District Court's Order.

1. The Medical And Law Enforcement Communities Have Long Recognized The Risk Of Death Associated With Prolonged Prone Restraint.

"Prone restraint" means to restrain a person on his stomach. Police often use a technique referred to as "foot sweep" which consists of an officer placing a person on his stomach on the ground and then physically applying downward pressure with his hands, knees, or other body parts to the individual's shoulders, back, hips, and/or upper legs to control the person *for applying handcuffs*.

Since at least June 1995, the U.S. Department of Justice has warned police about dangers associated with prolonged prone restraint. The risk of positional asphyxia is compounded when a person with predisposing factors becomes involved in a vigorous

struggle with police, particularly when restraint includes behind-the-back handcuffing combined with placing the person in a prone position. (Appx479-80; *See generally* Appx484-526.)1 Police are trained to know that "[a]s soon as the suspect is handcuffed, get him off his stomach." (Appx480.)

Because of these well-established medical and legal principles, police nationwide have long been trained concerning severe risks associated with the application of prolonged prone restraint. (Appx574-75.) The danger to a person "hogtied" has been well known and trained to police for over two decades. (Appx574-75.) This danger is exacerbated if the person is left on his stomach. The danger of maximal restraints, such as hogtying is that breathing can be impaired; particularly where the person is left in a prone position. (Appx574-75.) Police are trained that persons, who are in an agitated state or exhibiting symptoms of excited delirium syndrome, mental health crisis, or substance or alcohol intoxication are at an even greater risk of sudden-in-custody death if not moved off of their stomach and kept in the maximal restraint for a prolonged period of time. (Appx574-75.) For years, police have been trained that once restraint is accomplished, officers shall immediately take pressure off the person's back by turning the person onto their side or into an upright position to facilitate breathing. (Appx574-75.) Police train this response because of their familiarity with the number of deaths which have resulted during prone restraint. (Appx574-75.)

2. The Mankato Department of Public

[1] Citiations to the Appendix below at the Eighth Circuit are noted by "Appx."

Safety Trained Officers On The Risks of Prolonged Prone Restraint.

According to Todd Miller ("Miller"), Director, Mankato Department of Public Safety ("MDPS"), his officers are trained to know, if they restrain a person with their wrists handcuffed behind their back and their legs hobble strapped together, the officer must ensure enough slack is left to allow the person to sit in an upright position, and once the person is secured the person should be placed in a seated or upright position and shall not be placed on his stomach for an extended period as this may reduce the person's ability to breathe. (Appx361, 125:18–128:5; Appx614, §306.5 (b)-(d).) The officer must ensure the person does not roll onto and remain on his stomach. (Appx614, §306.5(e); Appx361, 126:10-18.) The RIPP Hobble is the only hobble restraint approved by the MDPS. (Appx360, 124:11-16; Appx613, §306.3.) Miller explained, while policy 306 is dated "2013-02-20," policies take more than 40 - 50 days to have officers sign off, which led Miller to believe these policies were implemented in 2012. (Appx361, 125:13-17.) Miller testified MDPS officers are trained to understand a hobble restraint must never be used as punishment. (Appx359, 118:17-25.) In this case, officers used RIPP Hobble and were trained through supervisor guidance and demonstration in the proper use of RIPP Hobble. (Appx320.) Each RIPP Hobble is accompanied by written, safety material. (Appx616-18.) RIPP Hobble safety inserts trained the officers "NEVER HOGTIE ANYONE!" - "NEVER Hogtie A Prisoner." (Appx616, 618.)

3. The Officers Were Trained On Predisposing Factors That Increase

The Risk of Prone Restraint Related Asphyxiation.

The officers were trained to know persons displaying signs of "excited delirium syndrome," a recognized complicating factor for prone restraint related asphyxiation, is a serious medical concern. Officers were trained regarding signs typically associated with excited delirium syndrome. The policy listed them as:

- Bizarre and violent behavior . . .
- Aggression
- Hyperactivity …
- Incoherent speech or shouting
- Grunting or animal-like sounds
- Incredible strength or endurance (typically noticed during attempts to restrain the victim)
- Imperviousness to pain
- Hyperthermia (overheating / profuse sweating, even in cold weather)

(Appx619.)

The officers were trained that persons, who exhibit extreme agitation, violent irrational behavior accompanied by profuse sweating, extraordinary strength beyond physical characteristics, unusually high tolerance to pain or who require a protracted physical encounter with multiple officers to be brought under control, may be at an increased risk of sudden death. (Appx629, 300.4.2; Appx636, 309.6; Appx615, 306.7; *See also,* Appx638-39.)

Immediately following the paragraph describing the risk of sudden death, the use of force

policy explicitly states, "any individual exhibits signs of distress shall be medically cleared prior to being brought to the jail." (Appx628-29, 300.4.2.)

4. Petitioner Does Not Allege The Officers' Pre-Restraint Force – The Force Used By Respondents To Subdue and To Restrain Layton Is Objectively Unreasonable.

At 04:40 officer Daniel Best ("Best") and officer Kenneth Baker ("Baker") were initially dispatched by MDPS to Hy-Vee to check on a person passed out in the atrium. (Appx350; Appx045, 22:15-23.) When Best saw Layton, he was curled up in the fetal position and unresponsive. Best assumed Layton was intoxicated and asleep. (Appx048, 34:1-7.) Best tapped Layton with his hand. (Appx048, 34:11-13.) Layton began to move and slowly stand up. (Appx048, 35:2-8.) "He [Layton] was starting to flex up … and—my impression … was … he was trying to balance himself a little bit ... Because he was just laying on the floor." (Appx048, 36:6-13) (Emphasis added) In his report, Best said, Layton leaned into him and thereby attempted to push him toward the carts. Layton's eyes were not open. (Appx351.) At his deposition, Best changed his description and said, Layton "shoved" him into some shopping carts. (Appx048, 36:17-18.)

Best's immediate response was to leg-sweep Layton down on his stomach. (Appx049, 38:7-39:13; Appx351.) Best quickly mounted Layton's lower back, using his weight and strength to push down. (Appx049-50, 39:9-40:20, 44:4-5; Appx351.) Layton moaned, groaned, or made loud growling like sounds and never responded to any verbal commands. (Appx350.)

Six officers, who responded to the scene within a matter of a couple minutes, wrestled with Layton on the floor, overpowered him and controlled him. Once handcuffed, officers decided to further restrain Layton using a RIPP Hobble. (Appx057, 70:22-71:7.) Burgess testified, as soon as the handcuffing was accomplished, she "[brought the RIPP Hobble] inside, and we all assisted in applying them." (Appx218, 220, 45:1-9, 55:16-19.) When asked if Layton was "hogtied," Best responded: "That's a slang term for hobbling somebody." (Appx057-58, 72:23-73:1.)

Groby testified, Huettl and Baker were down by Layton when the hobble strap was applied. Specifically she said. "Not by his legs. So from the waist up, yes," one being on each side of Layton. (Appx118, 50:12-23.)

5. <u>Post Restraint Force</u> - The Basis Of Petitioner's Claim - After Layton was Controlled And Restrained, He Was Kept In Maximal Restraint On His Stomach For A Prolonged Period With Officers Applying Compressive Force.

By 04:54 A.M. the six officers had controlled Layton and had him "hogtied". (*See* Appx643; *see also* Appx179.) At his deposition, Best admitted that it was his voice on the audio indicating: "We got him hogtied." (Appx059-60, 80:18-82:1.) Then Best admitted to stating, "[w]e're getting the energy out of him first, then we're taking him to jail." (Appx060, 82:3-7.) Best acknowledged (1) Layton's wrists were handcuffed behind his back; (2) he was placed on his stomach; (3) the RIPP Hobble was around Layton's ankles; and (4) Layton's feet were brought toward his buttocks. (Appx058, 73:6-75:24.)

At his deposition, Huettl denied that he was holding Layton down, but he acknowledged he wrote in his report within twenty four hours of the event: "Baker and I ... positioned ourselves on either side of Layton, holding him down to prevent further injury to himself." (Appx144-45, 67:16-23, 72:13-16; Appx257.) Huettl admitted officers never placed Layton on his back or his side. (Appx144, 68:7-17.)

Commander Craig Frericks ("Frericks") testified Layton was never placed on his back and it was "too dangerous" to place him on his side. (Appx234, 33:14-19.) Frericks explained: "Well, it would have been dangerous for him, dangerous for us, and we're not trained in putting someone on their side and to hold them there." (Appx234, 36:5-7.) Frericks's testimony, the officers are not trained to place and hold someone on their side after they have been restrained is in direct contradiction of MDPS training and policies described by Chief Miller. (*See supra* A.2.)

Best was asked to detail how Layton was being combative and resistant after being controlled. Best acknowledged Layton, with his wrists handcuffed and his feet hobbled in the air, was unable to punch or kick and indicated the only resistance was Layton would lean left or he would lean right. (Appx062, 90:16-91:15.) When Layton would try to lean to a side, the officers' response was "[t]o move him opposite of the direction that he was trying to go against us." (Appx062, 91:14-15.)

Baker testified, he thought Layton was trying to get in a better position. (Appx083, 67:1-7.) Baker testified, by using force the officers were able to limit Layton's actions and keep him on his stomach. (Appx083, 67:1-7.) Baker testified he remained in contact with Layton as Layton would try to roll over

and Baker put weight on his shoulder to kept him positioned on his stomach while in maximum restraint. (Appx087-88, 84:4-86:23.) Baker testified, if Layton would move, he would use his hand on Layton's upper right shoulder to keep Layton in place. (Appx088, 85:24-86:2.) Baker believed Huettl remained at Layton's left side. (Appx088, 86:24-87:5.)

6. <u>Post Restraint</u> - After Layton Was Maximally Retrained On His Stomach, Respondents Recognized Layton Was Experiencing Symptoms of Excited Delirium Syndrome.

Huettl wrote in his report Layton displayed a fluctuation of moods by being calm at times but then display "raging behavior by tensing his muscle, yelling and groaning, pushing his body to the point of exhaustion, violently flexing and shaking. Layton had pushed his body to the point he was causing himself to sweat profusely … I could see steam coming from Layton's head and shoulder area." (Appx256.)

Layton was continually yelling or growling and his words were not intelligible. (Appx256; Appx051-52, 48:21:49:1.) He seemed to have "superhuman" strength. (Appx141, 49:12-24.) Huettl thought Layton did not respond to pain, and throughout the ordeal Layton's eyes were closed. (Appx141, 143, 52:20-21, 62:19-20.) Burgess acknowledged, Layton made "bizarre and animalistic sounds" throughout the whole incident. (Appx222, 61:19-62:3; Appx252.) Burgess understood a person, who is aggressive, has incoherent speech, grunts and makes animalistic sounds, exhibits incredible strength, is impervious to pain and is profusely sweating, exhibits signs of excited delirium syndrome. (Appx224, 70:23-71:21.)

Huettl testified he was trained on "excited delirium" before January 1, 2013. (Appx146 76:17-20.) Layton exhibited behaviors consistent with signs of excited delirium syndrome and Huettl was familiar with them. ((Appx146, 73:7-76:24 Huettl acknowledged the signs described in the MDPS policy on Use of Force were what he observed in Layton. (Appx147, 78:5-79:3; Appx628-29, 300.4.2.)

7. <u>Post Restraint</u> – The Officers Used An Ambulance To Transport Layton to Jail While Positioned On His Stomach In Maximal Four-Point Restraints.

Best acknowledged that around 04:58 A.M. Frericks contacted dispatch requesting an ambulance to transport Layton to jail. (Appx060, 84:15-19.) Best testified officers did *not c*onsider taking Layton to hospital. (Appx062-63, 92:22-93:1.) It was their intent to use an ambulance merely to transport Layton to jail. (Appx063, 93:3-94:6.)

Ambulance attendants Burt and Drews were dispatched to the call at 04:58 A.M. and arrived the scene at 05:05. (Appx267, 75:12-18.) Seven minutes later at 05:12, they were transporting Layton to jail. (Appx267, 76:5-14.) Burt said in his statement to MN BCA, once they placed Layton on the stretcher - " ... they released the strap they had him hog-tied." (Appx276, 125:2-7.) Layton was hogtied and kept on his stomach for at least fifteen minutes before being moved to his stomach on an ambulance cot.

Four officers put Layton on the stretcher in the same position he was in when he was on the floor. (Appx148, 83:17-19.) Huettl wrote in his report - "Gold Cross arrived on the scene, and Layton was placed on

the stretcher on his stomach" by Baker, Frericks, Groby, and Huettl. (Appx148, 83:20-84:1; Appx257.) Layton was "strapped facedown." (Appx222, 64:9-11; Appx252, ¶15.) While placing the stretcher belts over Layton's prone, restrained body, Baker got up on the stretcher and put his knee to Layton's left shoulder area, pressing down with his weight and strength. (Appx095, 117:21-119:7.) A witness, Joan Devens, testified, Layton had become less active and started to settle down when he was placed on the stretcher. (Appx205-06, 55:20-57:9.) Burt confirmed in addition to other restraints (handcuffs and hobble strap), defendants used three transport belts, one lashed across the lower legs, one across the midsection, and one across the upper body (back of chest area). (Appx274, 118:19-119:10.) In his statement to MN BCA, Burt said during transport Layton's legs were cuffed, so that one strap was enough to hold his legs; Layton was in a prone position on the stretcher; and his hands were still cuffed behind him. (Appx325-26.)

During the drive to the jail, Baker and Best rode in the ambulance with the attendants. (Appx255, ¶20.) At 05:21, nine minutes after leaving the Hy-Vee, they arrived at the jail. At 05:21 A.M. Layton was taken off his stomach and placed on his back on the floor of the jail. But by then,it was too late. Layton had flat lined. He was brain dead. (Appx268, 77:5-15.).

Layton was kept by officers in prolonged maximum restraint on his stomach after he was under the officers' control from approximately 4:55:00 when initially hog-tied to 5:25:07 when placed on his back at the jail. (Appx643-46.)

8. Police Practices Expert John Ryan's Conclusions.

Petitioner's police practices expert John Ryan concluded it cannot be disputed, Layton was placed in maximum (four point) restraint (on his stomach) for a prolonged period of time. (Appx573-74, ¶¶113, 114.) Two basic principles adopted by all police when a person is restrained include first, take pressure off the persons back and move the person off their stomach and second, monitor their physical stress, especially when the subject demonstrates signs of distress. (Appx573-75, ¶¶114, 116.) Ryan concluded any reasonable officer would have recognized continued pressure, even if intermittent is inconsistent with generally accepted policies, practices, and training. (Appx575, ¶117.) Ryan further concluded the manner in which officers kept pressure on Layton after he was handcuffed and hobbled was contrary to all generally accepted police policies and practices. (Appx575, ¶117.)

9. Layton Died Because Of Respondents Application Of Prolonged Maximal Prone Restraint With Compressive Force After He Was Controlled Resulting In Positional Asphyxia, Respiratory Failure, Hypoxic Brain Injury and Cardiac Arrest.

From the time the Respondents controlled Layton in maximal restraint on his stomach, they did not move him to a recovery position or his back. For fifteen minutes, the officers kept Layton "hogtied" on his stomach to punish him – "to get the energy out of him," because they erroneously assumed he was "on meth." When Respondents released Layton from being hogtied on his stomach, they immediately placed him

in maximum 4-point prone restraint tied down on his stomach to an ambulance stretcher for transport to jail. Respondents kept Layton on his stomach with his wrists handcuffed behind his back, his ankles hobble strapped together, and then in the ambulance lashed additional restraints: three belts across Layton's upper legs, lower and upper torso. Respondents kept Layton in maximum prone restraint with compressive force for thirty minutes, including fifteen minutes hogtied on his stomach, after he was handcuffed and controlled.

Because of well-established dangers associated with prolonged restraint on the stomach-related positional asphyxiation, Respondents were trained to avoid restraining arrestees in the prone position except for a short period of time to place handcuffs and/or leg restraints on an agitated or combative arrestee.

The medical and law enforcement communities have long-recognized certain people are more at risk for prone restraint related positional asphyxiation than others. Complicating or predisposing factors that increase the risk for prone restraint related asphyxiation include alcohol intoxication, drug overdose, extreme physical exertion or extended struggling before prone restraint, mental illness, or an extremely agitated mental state of psychiatric distress referred to by police as "excited delirium." All of these complicating factors were either present or suspected in this case, but none of the officers made an effort to intercede on Layton's behalf.

Petitioner's expert Dr. Robert Myerburg, MD, Diplomate, Board of Cardio Vascular Diseases; Diplomate, American Board of Internal Medicine; Professor, Department of Medicine, Division of Cardiology, University of Miami School of Medicine

determined to a reasonable degree of medical certainty Layton died as a direct consequence of defendants application of forceful, prolonged, maximum, prone restraint, which brought about cardiac arrest. (*See* Appx470.)

Petitioner's expert Dr. Michael Baden, M.D., Diplomate, National Board of Medical Examiners, Diplomate, American Board of Pathology, Forensic Pathologist, determined to a reasonable degree of medical certainty, Layton died as a direct result of the officers deliberate use of prolonged prone restraint with compressive force on the back, neck compression with fracture of the hyoid bone, which all interfered with Layton's ability to properly breathe and resulted in respiratory failure that caused hypoxic brain injury and cardiac arrest. Layton died because he could not properly breathe, and his death was due to positional asphyxiation brought about while being restrained on his stomach by the officers. The manner of death was homicide. Layton would not have died had he been placed in a recovery position and taken to hospital. (*See* Appx423-24.)

B. The Decisions Below

The district court held (a) there is a genuine dispute as to whether the officers used excessive force by keeping Layton on his stomach for a prolonged or extended period of time after the officers had placed him in restraints; (b) a jury could find the officers failed to intervene to prevent unconstitutional use of excessive force by another officer when they had a duty and opportunity to do so; (c) if it was not objectively reasonable to keep Layton restrained (handcuffed behind his back with legs hobble strapped together) on his stomach and officers could have intervened, it is

clearly established such conduct constitutes a constitutional violation, and the officers are not entitled to qualified immunity; and (d) fact questions exist as to whether Layton was suffering from an obvious medical emergency that required immediate medical attention. In sum, the district court determined there are unresolved genuine issues of material fact, which must be resolved by a jury, thus precluding summary judgment or finding qualified immunity.

The panel's decision fails to address the finding by the district court that there is a genuine dispute as to whether the officers used excessive force by keeping Layton in maximal restraint on his stomach applying compressive force after he was controlled, and no longer posed a threat to anyone.

By ignoring the district court's findings, the panel's decision creates a break from the axiom that in ruling on a motion for summary judgment "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Tolan v Cotton,* 572 U.S. 650, 655-56 (2014); *Anderson v. Liberty Lobby*, 477 U.S. 242, 253 (1986).

The panel's decision conflicts with numerous authoritative decisions of other courts of appeals that have found a clearly established constitutional right prohibiting the use of prolonged prone restraint of a suspect after police have gained control: *Hopper v. Phil Plummer*, 887 F.3d 744 (6th Cir. 2018); *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016); *Weigel v. Broad*, 544 F.3d 1143 (10th Cir. 2008); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893 (6th Cir. 2004); *Cruz v. City of Laramie*, 239 F.3d 1183 (10th Cir. 2001); *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998). The panel's decision creates circuit split without analyzing other circuit precedent.

REASONS FOR GRANTING THE PETITION

A. The Decision Below Creates A Circuit Split As To Whether The Use Of Prolonged Prone Restraint With Compressive Force Applied To An Individual's Neck, Shoulder Blades, Back, Legs and Thighs After The Individual Has Been Handcuffed, Hobbled Tied And Placed In Maximum Restraints Violated A Clearly Established Constitutional Right.

The district court stated –

> [V]iewing the facts in the light most favorable to plaintiff, and recognizing the defendants do not dispute that when a suspect is restrained, it is best to keep him on his side or in a recovery (sitting up) position, the jury could reasonably find that Layton could be safely moved off his stomach while waiting the ambulance. Accordingly, the district court held that there is a genuine issue of material fact as to whether defendants used excessive force by keeping him in a prone position for an extended period of time after he was placed in restraints.

(A-26.) This type of factual pattern has been held by numerous circuits to constitute excessive force. The district court properly stated that to overcome qualified immunity plaintiff must show a robust consensus of cases [of persuasive authority in the courts of appeals] to demonstrate that the particular

conduct at issue violated clearly established law. *See City and County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1779 (2015). The district court stated that a right is clearly established if, at the time of the challenged conduct, every reasonable official would have understood that what he was doing violated that right. See *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Hence, the question presented to the district court and the court of appeals regarding qualified immunity was this: was it clearly established that it was objectively unreasonable to keep Layton in maximal restraints on his stomach by compressive force after he was controlled by the officers, and no longer posed a threat to anyone.

The salient question to the court of appeals was whether the state of the law on January 1, 2013, gave the officers' fair notice that their alleged treatment of Layton was unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The panel erred when answering in the negative.

1. Officers Had Fair Notice Their Conduct Was Objectively Unreasonable.

The Court has explained, "Qualified immunity attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *City of Escondido v. Emmons*, 139 S.Ct. 500, 503 (2019); *Kisela v. Hughes,* 138 S.Ct. 1148, 1152 (2018) (*per curiam*) (internal quotation marks omitted); see *District of Columbia v. Wesby,* 138 S.Ct. 577, 593 (2018); *White v. Pauly,* 137 S.Ct. 548, 551 (2017) (*per curiam*).

"The focus is on whether the officers had fair notice their conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Kisela*, 138 S.Ct at1152 (quoting *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (*per curiam*).

The Eighth Circuit instructs district courts to look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in the circuit. *See Vaughn v. Ruoff,* 253 F.3d 1124, 1129 (8th Cir. 2001); *Atkinson v. City of Mountain View*, 709 F.3d 1201, 1211 (8th Cir. 2013); *Irving v. Dormire*, 519 F.3d 441, 451 (8th Cir. 2008); *Sexton v. Martin*, 210 F.3d 905, 911 (8th Cir. 2000). "There is no requirement that 'the very action in question [be] previously ... held unlawful.'" *Vaughn*, 253 F.3d at 1129. It is enough that "earlier cases must give officials 'fair warning that their alleged treatment of [the individual] was unconstitutional.'" *Meloy v. Bachmeier*, 302 F.3d 845, 848 (8th Cir. 2002) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

There are numerous published opinions that gave Respondents fair notice that keeping Layton in maximum restraints on his stomach with compressive force after he was controlled by officers, and no longer posed a real threat to anyone constituted excessive force under the Fourth Amendment.

2. Petitioner Identified Multiple Cases Of Persuasive Authority Such That A Reasonable Officer Could Not Have Believed Their Actions Were Lawful.

The *Hopper v. Phil Plummer,* 887 F.3d 744 (6th Cir. 2018), case arose out of a May 17, 2012, incident

involving an individual in jail, who may have suffered a seizure. Officers pulled him from his cell and placed him on his stomach to get him handcuffed behind his back. The individual actively resisted the officers' efforts to control him. Numerous officers overpowered the individual, handcuffed him behind his back and kept him prone on the floor applying compressive force to control his movements. After twenty-two minutes, the individual stopped breathing and died. Plaintiff's experts concluded the individual died because the manner of restraint impaired his ability to breathe, and he died as a result of restraint asphyxiation while he was restrained in a prone position with his hands cuffed behind his back. The Sixth Circuit stated

> the prohibition against placing weight on [a suspect's body] after he is handcuffed was clearly established in the Sixth Circuit in May 2012, because a suspects right to freedom from undue bodily restraint after he was subdued was clearly established as of 2008 in that circuit and therefor officials were not entitled to qualified immunity.

Id. at 754-55. The Sixth Circuit further held the application of asphyxiating force "by itself violated a clearly established right." *Id*. (quoting *Champion v. Outlook Nashville*, Inc., 380 F.3d. 893, 904 (6th Cir. 2004).

The *Champion v. Outlook Nashville, Inc*. 380 F.3d 893 (6th Cir. 2004) case arose out of an incident on April 30, 1999, involving an individual who died shortly after being restrained by police. Champion vigorously resisted officers, even after being handcuffed, so officers used a hobble device to restrain

his legs. After Champion was handcuffed behind his back and his legs were hobbled, officers used pepper spray and kept Champion restrained on his stomach applying compressive force to his shoulders and back to prevent him from moving. Addressing conduct that occurred in 1999, the *Champion* court held that it was clearly established that the officers' use of pepper spray against Champion after he was handcuffed and hobbled was excessive. The Sixth Circuit further held it was clearly established that putting significant pressure on a suspect's back while the suspect is kept in the prone position after being restrained was a constitutional violation. *Id*. at 904. Consequently, the 2004 *Champion* decision held the right to be free from the two types of excessive force exerted against Champion were both clearly established. *Id.*

In *McCue v. City of Bangor*, 838 F.3d 55 (1st Cir. 2016), the First Circuit held that as of September 12, 2012, it was clearly established exerting force on a person's back while the person is kept in a prone position after being subdued or incapacitated constitutes excessive force. *Id.* at 64. In *McCue,* witnesses observed McCue "ranting and raving, yelling and screaming, stomping and kicking at doors." *Id.* at 57. Police were summoned and learned McCue might be on bath salts. *Id*. Officers attempted to take McCue into "protective custody," but he vigorously resisted the officers' attempts to handcuff him. *Id*. at 58-59. Once additional officers arrived McCue was overpowered and handcuffed behind his back. *Id.* Officers put McCue on the ground to secure his legs and hogtied him while prone on the ground. *Id.* at 58-59. Throughout the incident, McCue growled and made unintelligible exclamations. *Id.* From the time the officers secured McCue's ankles (around 5:30 minute mark on a dash cam video) and when the

officers completed the hog-tie (around 7:05 minutes), at least two officers exerted compressive force on McCue's neck and upper back. When the officers lifted McCue from the ground at 7:08, his body was limp. McCue died shortly thereafter. *Id.* at 56, 59. McCue's father sued five officers alleging that the defendants used excessive force; specifically, by placing McCue in a prone position for a disputed period of time while two officers exerted weight on his back and shoulders. *Id.* The plaintiff's expert "attributed the likely cause of death to prolonged restraint in the prone position under the weight of multiple officers in the face of a hyperbolic state of excited delirium." *Id*. at 56. The officers moved for summary judgment asserting qualified immunity. *Id*. at 57. The district court denied the officers' qualified immunity as to excessive force after McCue ceased resisting. On appeal, the officers argued they were entitled to qualified immunity. Plaintiff countered that the court of appeals did not have jurisdiction over defendants' interlocutory appeal as there were material factual issues in dispute about the time at which McCue ceased resisting and the degree of force the officers continued to use against him at that point. The court of appeals agreed with plaintiff, the court lacked appellate jurisdiction citing *Johnson v. Jones,* 515 U.S. 304 (1995). The court dismissed the appeal. *McCue,* 838 F.3d at 57. Notwithstanding the factual dispute concerning the time for which officers exerted compressive force on McCue, the defendants argued they were entitled to qualified immunity because there were no "clearly established" First Circuit cases on point. *Id* at 63. After conducting an analysis of the clearly established prong for the qualified immunity standard, *McCue* rejected defendants' assertion citing decisions from at least four other circuits that had announced this

constitutional rule well before the incident in this case. *Id*. at 64-65. The facts of *McCue* are strikingly similar to the facts in this case, and the First Circuit found the right had been clearly established before September 12, 2012.

First, the *McCue* court cited *Weigel v. Broad* 544 F.3d 1143, 1155 (10th Cir. 2008). In *Weigel*, Bruce Weigel's estate brought suit after Weigel died in an altercation with the Wyoming Highway Patrol Troopers on December 20, 2002. *Weigel*, 544 F.3d at 1146-47. The estate alleged defendants had used excessive force by putting pressure on Weigel's upper torso for several minutes. *Id.* at 1152. This occurred after Weigel had collided into the defendants' police car on the highway. *Id.* at 1147. The defendants suspected Weigel of driving while inebriated. *Id.* at 1147-48. He agreed to submit to a sobriety test but then walked out in front of oncoming traffic. *Id.* at 1148. The defendants followed, tackled him to the ground, and put him in a "choke hold." *Id.* During this struggle, Weigel fought back "vigorously, attempting repeatedly to take the [officers'] weapons and evade handcuffing." *Id.* The officers managed to handcuff Weigel, but he continued to struggle, so a bystander assisted by lying across the back of his legs. *Id.* The defendants then kept Weigel on his stomach and applied pressure to his upper torso. *Id.* Another bystander found plastic tubing or cord and bound Weigel's feet. *Id.* The defendants continued to apply pressure to Weigel's upper torso for several minutes until it was determined that Weigel had gone into cardiac arrest. *Id.* at 1149, 1152-53. Applying the *Graham v. Connor* test, the Tenth Circuit held the plaintiff had sufficiently shown a Fourth Amendment violation to survive summary judgment. *Id.* at 1152-53 (*see Graham v. Connor*, 490 U.S. 386, 386 (1989)).

Weigel determined defendants' use of force after Weigel's hands and feet were bound was unreasonable. *Id.* The *Weigel* court offered two reasons in support of their conclusion. First, the defendants' training materials would have put a reasonable officer on notice that "the pressure placed on Weigel's upper back as he lay on his stomach created a significant risk of asphyxiation and death." *Id.* at 1152. Second, any threat posed by Weigel had passed "once … Weigel was handcuffed and his legs were bound," as evidenced by the fact that one officer returned to the police vehicle and called the dispatcher reporting that Weigel was under control. *Id.* at 1152-53.

In sum, *Weigel* stands for the proposition that police officers are not entitled to qualified immunity in post restraint excessive force claims because the post-restraint force violates the individual's clearly established right to be free from the continued use of force after he is effectively controlled. *Weigel* further determined a reasonable jury could find the alleged force was excessive once Weigel's hands and feet were bound, even though Weigel had previously put up significant resistance. *Id*. at 1152-53. *Weigel* held in 2002 that the law was clearly established applying pressure to Weigel's upper back, once he was handcuffed and his legs restrained, was unconstitutionally unreasonable due to the significant risk of positional asphyxiation associated with such action. *Id*.

Second, the *McCue* court relied on *Champion v. Outlook Nashville, Inc.*, 380 F. 893, 903 (6th Cir. 2004) discussed above. Third, *McCue* cited the 2005 Seventh Circuit decision in *Abdullahi v. City of Madison*, 423 F.3d 763, 765-71 (7th Cir. 2005), which arose out of an incident on November 20, 2002. In *Abdullahi,* the Seventh Circuit found it improper to grant qualified

immunity at summary judgment where an officer, for thirty to forty-five second, had placed his right knee and shin on the back of a person's shoulder area while the individual was on his stomach and applied weight to keep them from squirming or flailing. The defendant observed the arrestee had arched his back upwards as if he was trying to escape. However, the *Abdullahi* court observed that such movement might not have constituted resistance, but a futile attempt to breathe. Fourth, the *McCue* court cited Ninth Circuit decision in *Drummond v. City of Anaheim*, 343 F.3d 1052 (9th Cir. 2003). The *Drummond* case arose out of a welfare check incident on March 26, 1991. *Id.* at 1054. Drummond was found by officers "hallucinating and in an agitated state". Officers called an ambulance to transport him to a medical facility. Before the ambulance arrived, defendants decided to take Drummond into custody "for his own safety." *Id.* Defendants put Drummond on his stomach on the ground to cuff his hands behind his back. Defendants used their weight to apply downward force to Drummond's upper back and neck areas. *Id.* at 1054-55. Approximately twenty minutes after Drummond was taken down by officer, they also applied a hobble restraint to bind Drummond's ankles. *Id.* at 1055. Approximately one minute after defendants applied the hobble strap to his ankles, Drummond's body went limp and he lost consciousness. *Id.* Defendants then removed the handcuffs and hobble and turned Drummond over onto his back. *Id.* Drummond sustained severe brain damage due to a lack of oxygen and went into a "permanent vegetative state." *Id.* Drummond's expert concluded Drummond suffered a cardiopulmonary arrest caused by lack of oxygen to his heart caused by an inability to breathe "caused by mechanical

compression of his chest such that he could not inhale and exhale in a normal manner." *Id.* Plaintiff's expert concluded that occurred when Drummond was kept on his stomach and the police placed pressure on his back. *Id.* In denying the defendants qualified immunity, *Drummond* held the "officers allegedly crushed Drummond against the ground by pressing their weight on his neck and torso, and continuing to do so despite his repeated cries for air and despite the fact that his hands were cuffed behind his back... *Any* reasonable officer should have known that such conduct constituted the use of excessive force.") *Id.* at 1061 (emphasis in original).

The district court concluded plaintiff presented multiple published opinions, which provided defendants' fair warning that subjecting Layton to prolonged prone restraint when he no longer posed a danger constitutes excessive force under the Fourth Amendment. The district court also found that the circumstances of this case were analogous and controlled by *Cruz v. City of Laramie, Wyo.*, 239 F.3d 1183, 1188-89 (10th Cir. 2001) (*Cruz* held use of hog-tie restraint in the prone position constitutes excessive force when arrestee's diminished capacity is apparent and may be due to severe intoxication, the influences of controlled substances, a discernible mental condition or any other condition apparent to officers at the time), and *Gutierrez v. City of San Antonio*, 139 F.3d 441 (5th Cir. 1998) (*Gutierrez* held a 1992 San Diego Police Study presented sufficient evidence that hog-tying may create a substantial risk of death or serious bodily injury).

> The district court therefore held
> [i]f it is determined that it was not objectively reasonable to leave Layton in

> a prone position after he was maximally restrained, and that defendant officers could have intervened to prevent such use of excessive force, the Court finds that it is clearly established that such conduct would constitute a violation of Layton's constitutional rights. Accordingly, the defendant officers are not entitled to summary judgment based on qualified immunity.

(App. A-28.)

B. The Court Of Appeals Did Not Perform The Required Analysis For Jurisdiction And Qualified Immunity.

The fundamental starting point for any appeal is whether the Court has jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 84 (1998). In an interlocutory appeal from a district court's denial of qualified immunity, the Court has authority to decide the purely legal issue of whether the facts alleged by the plaintiff are a violation of a clearly established right. *Mitchell v. Forsyth,* 472 U.S. 511, 528 n.9 (1985). The Court does not have jurisdiction to conduct interlocutory review of the district court's summary judgment order to determine which facts a party may, or may not, be able to prove at trial. *Johnson v. Jones*, 515 U.S. 304, 313 (1995). Here, the panel's decision did not address the district court's finding that there was a genuine issue of fact regarding whether Layton continued to resist and whether he could have been safely moved off his stomach. The panel's decision did not address the district court's findings that it was unclear whether the paramedics conducted a medical

assessment prior to transporting Layton to the jail by ambulance. By not addressing these findings, the panel decision was not confined to purely legal issues and treaded into determining whether or not the pretrial record sets forth a genuine issue of fact for trial.

1. The Panel's Determination Concerning Jurisdiction And It's Qualified Immunity Analysis Are Based On A Misapprehension of The Facts.

The panel's recitation of facts omits keys factual findings of the summary judgment record. In large part, the panel recited facts that are not relevant to Petitioner's claim. The panel cited numerous pre-restraint facts which are not relevant to Petitioner's asserted constitutional right. As the district court correctly observed Petitioner does not claim that the force used by Respondents to over power, subdue and restrain Layton was objectively unreasonable. Rather, Petitioner's claim and the denial of qualified immunity was based upon the finding by the district court that a reasonable jury could find Layton was kept in maximal restraints on his stomach by force after he was controlled by Respondents, and no longer posed a threat to anyone.

2. Petitioner's Evidence That Respondents Use Of Maximum Prone Restrain For A Prolonged Period After Layton Was Placed In Maximum Restraints On His Stomach Creates A Genuine Issue Of

Material Fact.

The district court stated in relevant part –

> Plaintiff asserts she is not challenging the force used on Layton prior to him being handcuffed and hobbled. Rather, plaintiff challenges whether the defendant officers' conduct after Layton was restrained was objectively reasonable, because once Layton was restrained, the record demonstrates that he was subdued and controlled, and that he no longer posed a threat to defendant officers or anyone else. As such, it was objectively unreasonable for the defendant officers to keep him hobbled and on his stomach, or tied down to the stretcher with force or weight on his back for over thirty minutes, instead of moving him into a recovery position or on his back and transporting him to the hospital. See *Morrison v. Bd. of Trustees of Green T.P.*, 583 F.3d 394, 404–05 (6th Cir. 2009); *Henderson v. Munn,* 439 F.3d 497, 502–03 (8th Cir. 2006) (when viewing facts in light most favorable to plaintiff, after plaintiff was handcuffed and lying face down, a reasonable jury could decide plaintiff no longer posed a threat based on the record as a whole).

(App. A-22.) The district court further stated that –

> In support of her claim that keeping Layton in a prone position after he was

placed in a four point restraint constitutes excessive force, plaintiff has submitted an expert report from John Ryan. Ryan was a police officer for twenty years, and thereafter became a consultant regarding law enforcement practices. (Plaintiff Ex. G (Ryan Rpt at 1).) . . . Based on his specialized background, education, experience and training, Ryan has provided an opinion that once Layton was restrained, keeping him in a prone position for a prolonged period of time "was contrary to all generally accepted policies, practices, training and legal mandates." (Id. at 46.) Ryan noted that after Layton was handcuffed and hobbled:

> Officer Huettl and Officer Baker remained with Layton while awaiting the ambulance. It is also clear based on testimony and the various recordings that other officers left the immediate area. Officer Huettl testified that he stood up at points leaving just Baker down by Layton's side. Clearly any arguable danger with respect to moving Mr. Layton to his side, rather than leaving him on his stomach had passed.

(*Id*. at 47.)

> Ryan further noted that the record shows that Layton was taken to the floor and positioned on his stomach from 4:45 a.m to approximately 5:25 a.m. (*Id*. at 49.) He opined that officers are well-trained to recognize the need to move Layton to a position that facilitated breathing and to monitor his well being while in maximum restraint, and failure to do so "was contrary to all generally accepted policies, practices, training and legal mandates." (*Id*. at 51.)

(App. A-22-23.)

> The [district court] recognizes that the use of prone restraints is not, in and of itself, a constitutional deprivation. For example, in *Ryan v. Armstrong*, the court found the officers' use of prone restraints—including the shackling of the inmate's ankles with his legs crossed and bent back at the knees and applying body weight to his back, coupled with two Taser drive-stuns—to be objectively reasonable, given the inmate exhibited physical and aggressive resistance to the officers' attempts to restrain him. 850 F.3d at 427.
>
> In this case, however, the record demonstrates that once Layton was restrained by handcuffs and the hobble, he only sporadically resisted the restraints yet he was forced to remain on

> his stomach. Both witness testimony and the squad car videos demonstrate that at times, Layton was quiet and not resisting the restraints. At other times, he would have outbursts and resist his restraints. Viewing the facts in the light most favorable to Plaintiff, and recognizing that the defendant officers do not dispute that when a suspect is restrained, it is best to keep him on his side or in a recovery (sitting up) position, a jury could reasonably find that Layton could be safely moved off his stomach while awaiting the ambulance. Accordingly, the Court finds there is a genuine issue of material fact as to whether the officers used excessive force by keeping Layton in a prone position for an extended period of time after he was placed in restraints.

(App. A-25-26 (emphasis added).)

The panel decision did not address that the district court held despite the Respondent's contention, that the use of prolonged maximum prone restraint was reasonable under the circumstances, Petitioner presented evidence that created genuine issue of material fact as to whether the officers used excessive force by keeping Layton in a prone restraint for an extended time after he was placed in restraint and was not resisting the restraints. Instead, the panel decision framed the issue as whether prone restraint is permissible and did not analyze whether it is permissible after the suspect has been placed in maximum four-point restraints and is no longer a threat.

The panel decision cited *Ryan v Armstrong*, 850 F.3d 419, 427-28 (8th Cir. 2017) where the Court affirmed qualified immunity. The district court cited and distinguished *Ryan* from this case due to the relatively short period of time Ryan was maintained in a prone position. In *Ryan*, the entire encounter lasted under five minutes with only three minutes of officers applying body weight. In fact, defendants in *Ryan* took the action the officers here should have taken by rolling Ryan onto his side after getting him in a four-point restraint. *See Ryan v. Armstrong*, 154 F.Supp.3d 798, 805 (D. Minn. 2016).

The panel incorrectly cited and relied upon *Mayard v. Hopwood*, 105 F.3d 1226 (8th Cir. 1997). The panel decision incorrectly states that the *Mayard* court affirmed "the reasonableness of force used in placing a resisting, hobbled suspect in a prone position to transport her to jail." (A-8.) While the *Mayard* case did involve transport of a hobbled suspect to jail, that is where the similarities with this case end. In *Mayard*, the suspect was hobbled, but the police did not keep her prone - on her stomach for transport to jail. A careful review *Mayard* shows she was actually on her stomach while officers handcuffed and hobbled her and not prone when being transported to jail but was moved to a recovery position, sitting or on her back, when transported to jail.

The *Mayard* court stated that –

> The officers took Mayard by the arms and escorted her out of the store to a squad car. She began to struggle with them, attempting to pull away, and the officers handcuffed her. Because Mayard refused to get into the squad car, the officers picked her up and put her face down on

> the rear seat. Once in the car, she began kicking, hitting an officer. The officers responded by placing a hobble restraint on her. A hobble restraint is a nylon rope placed around the legs that tightens when the detainee struggles. Mayard was then transported by Officer Meyer to police headquarters. It is during this trip that Mayard alleges that Meyer slapped her in the face, punched her in the chest, and used a racial epithet. Mayard states in her affidavit: "[W]hile I was in the car alone with Officer Meyer [sic] he inflicted both physical and injury on me by slapping me in the face twice, by punching me in my upper chest and [by] telling me 'Shut up, nigger, I've got to drive.'"

Id. at 1227. A careful reading of *Mayard* shows had been kept on her stomach while handcuffed and hobbled in the back seat of the squad, the officer would not have been able to slap her in the face or punch her in the chest. A reasonable and logical interpretation of the language in *Mayard*, shows the officer moved her to a recovery position after applying a hobble restraint to her ankles.

In *Mayard*, the district court granted defendant qualified immunity. However, the Eighth Circuit reversed the district court reasoning "Mayard's account of her treatment by Officer Meyer while being transported to police headquarters, the force allegedly used against Mayard by Officer Meyer while she was handcuffed and hobbled in the rear of the squad car was not objectively reasonable. Thus, Mayard's and Officer Meyer's conflicting accounts of events result in

an issue of material fact making summary judgment inappropriate" *Id.* at 1228.

Finally, the court of appeals relied on *Henderson v. Munn*, 439 F.3d 497 (8th Cir. 2006). The panel's reliance on *Henderson* is misplaced. The *Henderson* decision is important because the Eighth Circuit recognized once a suspect is handcuffed and placed in a prone position they pose minimal threat. *Id.* at 505 ("... Henderson was under control lying face down on the ground with both hands behind his back. In this compromising positions, Henderson posed little or no threat to the safety of the officers or others." Further, the Eighth Circuit affirmed the district court's holding that genuine issues of facts precluded summary judgment and denial of qualified immunity.).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

Dated: June 17, 2019

By: s/_____

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