NO. 19-682

In the Supreme Court of the United States

MELANIE KELSAY,

Petitioner,

v.

MATT ERNST,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

For more than 30 years, the Court has repeatedly emphasized that the objective reasonableness of a particular use of force by law enforcement must consider the totality of the facts within the perception of the officer at the scene.

The question presented is:

Whether the Eighth Circuit erred in concluding that respondent is entitled to qualified immunity because his particular conduct did not violate clearly established law.

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INTRODUCTION

This case concerns a straightforward and fact-bound application of settled principles of qualified immunity. Under that doctrine, a police officer is entitled to qualified immunity unless his particular conduct undoubtedly violates a person's statutory or constitutional rights. In this case, respondent—a law enforcement officer in Nebraska—seized petitioner in a "bear hug" and brought her to the grass after she physically obstructed police operations, proceeded to move toward a person involved in a heated altercation with one of her family members, and ignored respondent's verbal instruction to return. The *en banc* Eighth Circuit concluded that the unique circumstances of this case did not give rise to a violation of any clearly established Fourth Amendment right, and it accordingly granted respondent qualified immunity. That extraordinarily factbound decision is correct, and it does not conflict with any decision from this Court, a court of appeals, or a state high court. This Court should therefore deny the petition.

Petitioner's contrary view lacks merit. Petitioner insists that a circuit split exists, but she does not suggest that the courts disagree about the operative legal standards. She argues that this case is the exceedingly rare case that involves a violation of clearly established law despite the absence of any relevant precedent, but not even the judges below who sided with her embraced that theory. She warns that police officers will now enjoy absolute immunity in the Eighth Circuit absent this Court's intervention, but that court regularly denies qualified immunity in appropriate circumstances. And she asserts that this Court should

discard its qualified-immunity precedent as inconsistent with the original meaning of Section 1983, but she never made such an argument below, and she offers no serious justification for such a sweeping doctrinal shift. In short, petitioner identifies no reason why this case merits this Court's review.

STATEMENT OF THE CASE

A. Factual Background[1]

1. In May 2014, an employee at a public swimming pool in Wymore, Nebraska called 911 to report that a male patron had assaulted a female patron. Pet. App. 2a. Wymore Police Chief Russell Kirkpatrick and Officer Matthew Bornemeier responded to the incident first, and they later received backup from two officers from the Gage County Sheriff's Office: Deputy Matt Ernst (respondent here) and his supervisor, Sergeant Jay Welch. Pet. App. 2a-3a. When respondent arrived at the scene with Sergeant Welch, Chief Kirkpatrick informed them that he and Officer Bornemeier had already arrested Patrick Caslin on suspicion of domestic assault against petitioner Melanie Kelsay and other crimes. Pet. App. 3a; Dist. Ct. Dkt. No. 53-6 at 18. Chief Kirkpatrick further advised them that petitioner had physically interfered with Caslin's arrest by "trying to pull the officers off and getting in the way of the patrol vehicle door." Pet.

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[1] This case arises in a summary-judgment posture, so the facts are construed in the light most favorable to petitioner. *See, e.g.*, *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1769 (2015). This Court analyzes Fourth Amendment-based claims of excessive force "from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Plumhoff v. Rickard*, 572 U.S. 765, 775 (2014).

App. 3a. Chief Kirkpatrick therefore explained that he had decided that petitioner "should be arrested" too. Pet. App. 3a; Dist. Ct. Dkt. No. 17-3 at 2; Dist. Ct. Dkt. 53-6 at 15, 19, 24.

At the beginning of this discussion, petitioner stood approximately 15 feet from the patrol vehicle containing Caslin, and 20-30 feet from the pool exit. Pet. App. 3a. As the officers conferred, several pool patrons emerged from the pool exit, and one female patron—as it turned out, one of petitioner's daughters—began loudly "yelling" at another. Pet. App. 3a; Dist. Ct. Dkt. No. 53-9 at 5. Petitioner began advancing toward them. Pet. App. 3a. At that time, Sergeant Welch signaled to respondent that he should take petitioner into custody, *see* Dist. Ct. Dkt. No. 53-6 at 15, 19, and respondent accordingly ran up behind petitioner, grabbed her arm, and told her to "get back here," Pet. App. 3a. Petitioner turned around and responded that "some bitch is talking shit to my kid and I want to know what she's saying." Pet. App. 4a. Respondent released petitioner's arm in order to retrieve his handcuffs, Pet. App. 3a; Dist. Ct. Dkt. No. 53-6 at 19, but petitioner continued to proceed toward the verbal altercation involving her daughter, Pet. App. 4a.

After petitioner "walked a few feet away … on the grass," respondent seized petitioner in a "bear hug," took her to the grass, and placed her in handcuffs. Pet. App. 4a; Dist. Ct. Dkt. No. 53-6 at 20. Following the arrest, respondent drove petitioner to the county jail, and Chief Kirkpatrick later took her to see a doctor, who diagnosed petitioner with a fractured collarbone. Pet. App. 4a. Petitioner eventually testified that she momentarily felt "knocked out" because she had a

brief gap in her memory between the time when she hit the ground and when respondent handcuffed her, *see* Pet. App. 4a; Dist. Ct. Dkt. No. 53-8 at 52-53, 140, but petitioner's medical records reflect "negative" for loss of consciousness, and she denied any head injury, Dist. Ct. Dkt. No. 53-8 at 53, 178. The sole expert witness involved in these proceedings testified that "taking suspects to the ground … generally does not" "cause injury," but rather "is a way to … minimize[] injury and risk of injury." Dist. Ct. Dkt. No. 53-2 at 3.

2. State authorities later charged petitioner with two counts of obstructing government operations—the most serious misdemeanor classification available under Nebraska law—and one count of disturbing the peace. Dist. Ct. Dkt. No. 17-5 at 17-18; *see* Neb. Rev. Stat. §§28-106, 28-901. Petitioner subsequently pleaded no contest to attempted obstruction of government operations and disturbing the peace. Dist. Ct. Dkt. No. 17-5 at 4-6.

B. Proceedings Below

1. In June 2015, petitioner filed suit in Nebraska state court under 43 U.S.C. §1983 against the City of Wymore and all four officers involved in her arrest, alleging wrongful arrest, excessive force, and deliberate indifference to medical needs. Pet. App. 4a. The defendants removed the case to federal court and sought summary judgment. Pet. App. 4a. The district court ruled in favor of all defendants on all claims except petitioner's excessive-force claim against respondent. Pet. App. 4a.

In doing so, the district court explained that, because respondent had asserted a defense of qualified

immunity, petitioner's excessive-force claim could survive summary judgment only if respondent (1) violated a constitutional right (2) that was "clearly established" at the time of her arrest in May 2014. Pet. App. 46a. At step one, the district court reasoned that, although petitioner "was not precisely 'compliant'" prior to her arrest, a jury could conclude that respondent's use of force violated the Fourth Amendment. Pet. App. 49a. Turning to step two, the district court stated that, based on its review of Eighth Circuit precedent, "[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. The district court therefore denied qualified immunity. Pet. App. 49a, 52a-53a.

2. The Eighth Circuit reversed. Writing for the majority, Judge Colloton explained that the court need not consider step one of the qualified-immunity analysis because, at step two, respondent's conduct did not violate any clearly established Fourth Amendment right.[2] Pet. App. 32a-34a. Judge Beam wrote a separate concurrence, in which he emphasized the "confusing precedent available to the district court." Pet. App. 35a. In dissent, Judge Smith conceded that the majority "rightfully conclude[d] that in May 2014, case law did not clearly establish 'that a deputy was forbidden to use 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. 36a. Judge Smith would have held, however,

[2] The majority also rejected petitioner's contention that the court lacked jurisdiction over the appeal. *See* Pet. App. 30a-31a.

that this was "an obvious case" in which "the clearly-established prong can be met 'even without a body of relevant case law.'" Pet. App. 36a.

3. The Eighth Circuit granted rehearing *en banc*, and again reversed the district court's decision by the same 2-1 margin. Writing for himself and seven other judges, Judge Colloton once again explained that respondent did not violate clearly established law, as "[n]one of the decisions cited by the district court or [petitioner] involved a suspect who ignored an officer's command and walked away."[3] Pet. App. 7a (discussing *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012); *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010); *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009)). As a result, those authorities did not "squarely govern[] the specific facts at issue" in this case. Pet. App. 7a (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). Nor was this "'the rare obvious case' in which 'the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances.'" Pet. App. 10a (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)). As the majority observed, the Eighth Circuit had recently concluded that an officer could reasonably "perform a takedown of a suspect who disobeyed two commands and walked away," meaning that "[t]he constitutionality of [respondent's] takedown was not beyond debate." Pet. App. 10a.

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[3] The majority once again rejected petitioner's argument that the court lacked jurisdiction over the appeal. *See* Pet. App. 5a.

Judge Smith again dissented, with three judges joining him. Although Judge Smith had explained at the panel stage that no "[p]rior case law" informed this dispute, Pet. App. 36a, he now concluded that four separate Eighth Circuit decisions clearly established the unreasonableness of respondent's conduct all along, *see* Pet. App. 19a; *see also* Pet. App. 22a (explaining that respondent's conduct violated clearly established law "based on our body of precedent"). Judge Smith therefore did not invoke his earlier theory that respondent "did not need to be put on notice by a prior case with the instant facts to know that his conduct could be challenged as unreasonable." Pet. App. 39a.

Judge Grasz joined Judge Smith's dissent, but issued a separate dissent in which he explained that courts should not rely solely on the "clearly established" prong in qualified-immunity cases, although he acknowledged that "this is allowed by governing precedent." Pet. App. 23a (citing *Pearson v. Callahan*, 555 U.S. 223, 226 (2009)). In his view, a court "should exercise [its] discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity analysis." Pet. App. 24a. *But see Wesby*, 138 S. Ct. at 589 n.7 ("We continue to stress that lower courts 'should think hard, and then think hard again,' before addressing both qualified immunity and the merits of an underlying constitutional claim.").

REASONS FOR DENYING THE PETITION

The Eighth Circuit's decision is correct and does not conflict with any decision from this Court, another court of appeals, or a state court of last resort. Peti-

tioner's principal submission is that a circuit split exists, but she identifies no question of law over which the courts of appeals are divided. In reality, the lower courts are all applying the same long-settled principles from this Court's qualified-immunity doctrine. To the extent that different courts are reaching different outcomes while applying the same principles, it is because they are considering materially different facts. And although petitioner asserts that a qualified-immunity plaintiff should not bear the burden of producing a precedent with an identical fact pattern in order to prevail, the Eighth Circuit did not suggest otherwise.

On the merits, petitioner barely engages with any of the case law that the Eighth Circuit debated. She instead claims that this is the rare obvious case in which an officer's conduct violated clearly established law even without a body of relevant case law. Not a single member of the court below—including the four judges who sided with petitioner—accepted that dubious theory. Were the constitutional violation as obvious as petitioner claims, it stands to reason that at least one member of the twelve-member court below would have come to that conclusion.

Finally, petitioner claims that this Court's qualified-immunity doctrine is inconsistent with originalist understandings of Section 1983 and asserts that the current state of affairs borders on *de facto* absolute immunity. Petitioner did not make this argument below, and this Court should not accept her belated invitation to radically rewrite qualified-immunity doctrine. Nor would this be an appropriate case in which to consider whether courts have gone too far in the direction of

granting qualified immunity, as the Eighth Circuit regularly denies qualified immunity—including in cases after the decision below—and officers within that circuit do not enjoy anything resembling absolute immunity. There is accordingly no basis, legal or otherwise, for this Court to intervene.

I. Petitioner Identifies No Question That Warrants This Court's Review.

Petitioner principally contends that the Eighth Circuit's decision "splits with four other circuits" on the question of qualified immunity that she has presented. Pet. 8. Petitioner does not contend, however, that the courts of appeals are divided over the *legal* standards that govern this question—nor could she. As this Court observed last Term, the legal standards that apply in qualified-immunity cases are "settled." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019). Instead, petitioner asserts that the Eighth Circuit *misapplied* the operative standards and therefore reached an incorrect "result" as compared to the First, Fifth, Sixth, and Tenth Circuits. Pet. 10. But this Court's function is not to review "conflicts" in which the lower courts—while applying the same correct legal standards—reached different outcomes in cases involving some similar facts. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law.").

At any rate, the four decisions upon which petitioner relies are distinguishable on their facts from the decision below, which negates any suggestion of a "circuit split" even under petitioner's broad view of that term. Pet. 10. This case concerns a claim of qualified

immunity in a context in which a suspect physically interfered with a lawful arrest, "ignored [an officer's] instruction to 'get back here,'" and "continued to walk away" toward "some bitch … talking shit to [her] kid" outside a public swimming pool, creating a "situation" that "a reasonable officer … could have believed … was important to control … to prevent a confrontation … that could escalate." Pet. App. 7a, 9a. None of the four decisions discussed in the petition is remotely similar. *See* Pet. 10-14.

In the earliest of those decisions, *see* Pet. 12-13, the Tenth Circuit addressed a claim of qualified immunity in a context in which an individual on his way to pay a parking ticket at a local courthouse had "been tackled, Tasered, knocked to the ground by a bevy of police officers, beaten, and Tasered again, all without warning or explanation." *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1285 (10th Cir. 2007). The Tenth Circuit concluded that, "on the facts … before [it]," this particular conduct violated clearly established law. *Id.* (citing *Holldand ex. rel. Overdorff v. Harrington*, 268 F.3d 1179, 1197 (10th Cir. 2001)).

In *Kent v. Oakland County*, 810 F.3d 384 (6th Cir. 2016), the Sixth Circuit considered whether officers violated clearly established law when they Tasered a physician in his own home notwithstanding that the physician stood "with his hands raised in the air" and with "his back to the wall" at the time—thereby "indicating submission." *Id.* at 388-89, 395. The Sixth Circuit emphasized the "unique facts" and concluded that the officers had violated clearly established law, pointing to prior Sixth Circuit decisions that confirmed that

"'the use of a Taser on a non-resistant suspect' constitutes excessive force." *Id.* at 395-96.

In *Ciolino v. Gikas*, 861 F.3d 296 (1st Cir. 2017), an individual attending a street festival approached a K-9 dog and "said something along the lines of 'Look, the dogs got … muzzle[s] in their mouths'" and "'can't do anything.'" *Id.* As he began to leave after making that statement, an officer "walked up to [him], grabb[ed] [him] from behind by at least his shirt collar, and yank[ed] [him] forcibly backward and downward, off the sidewalk and onto the pavement in the street." *Id.* at 300. The individual consequently tore his rotator cuff. *Id.* The First Circuit performed a "highly fact specific" analysis as to whether the officer violated clearly established law, and it concluded that he did in light of the holdings of three earlier First Circuit decisions. *Id.* at 303-04. In reaching that conclusion, the court noted that the officer did not have "to make split-second judgment[s]" and that "the atmosphere" was not "highly combustible." *Id.* at 304.

Finally, in *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018), the Fifth Circuit addressed whether an officer violated clearly established law when he "body-slammed" a woman "onto her brick porch" as she attempted "to enter her own residence." *Id.* at 547-49. The Fifth Circuit observed that "no reasonable officer could [have] conclude[d]" that this woman "posed a threat" to anyone, and further underscored that the woman had sought to "do[] the opposite" of "trying to flee." *Id.* at 548. It also noted that no evidence indicated that the woman "physically resisted" any officer. *Id.* at 549. Citing prior Fifth Circuit precedent, the

court concluded—in a single sentence—that the officer's conduct had violated clearly established law.[4] *Id.*

This Court has repeatedly emphasized that "[u]se of excessive force is an area of the law 'in which the result depends very much on the facts of each case.'" *Kisela*, 138 S. Ct. at 1153. As the descriptions of the four cases involved in petitioner's purported circuit split demonstrate, they are nothing like this one, as they involved individuals who were not subject to lawful arrest, were not resisting any officer commands, or both. Petitioner reaches the opposite conclusion only by framing the facts of this case at an exceedingly high level of generality (as well as in ways that are not substantiated by the record). *See, e.g.*, Pet. ii, 8, 10-11. But this Court has "repeatedly told courts ... not to define clearly established law at a high level of generality. The dispositive question is 'whether the violative nature of *particular* conduct is clearly established." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted); *see also, e.g.*, *Kisela*, 138 S. Ct. at 1153 ("it does not suffice for a court simply to

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[4] In concluding that the officer violated clearly established law, the Fifth Circuit cited its own precedent for the proposition that the woman "had a clearly established right to be free from excessive force." *Westfall*, 903 F.3d at 549. This Court has since clarified, however, that it is error to define clearly established law at such a level of generality. *See Emmons*, 139 S. Ct. at 503 ("The Court of Appeals should have asked whether clearly established law prohibited the officers from stopping and taking down a man in these circumstances. Instead, the Court of Appeals defined the clearly established right at a high level of generality by saying only that the 'right to be free of excessive force' was clearly established.").

state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness."). As petitioner's own cases confirm, it is not.

Unable to identify a circuit conflict, petitioner retreats to the claim that there is "deep[] tension" in the lower courts "over how to determine when the law is clearly established for qualified-immunity purposes in excessive force cases." Pet. 14. In petitioner's view, the Eighth Circuit has now concluded that an officer violates clearly established law only if there is a prior case involving the exact "same fact pattern," an "approach" that petitioner says will "sound[] the death knell for holding police officers accountable." Pet. 15, 16. But the Eighth Circuit never purported to establish an exact "same fact pattern" test; it instead faithfully applied this Court's precedent admonishing against considering the question at too high a level of generality, and concluded that no case involved sufficiently similar facts to put an officer on notice that the conduct at issue here was unlawful. *See* Pet. App. 5a-6a. In doing so, the Eighth Circuit did not overturn its longstanding rule that an excessive-force plaintiff "need not show" a "prior case involving [the] precise factual scenario." *Blazek v. City of Iowa City*, 761 F.3d 920, 926 (8th Cir. 2014).

II. The Eighth Circuit's Factbound Decision Is Correct.

The case for certiorari is doubly weak because the Eighth Circuit's decision is correct. As noted, the legal standards that apply in this context are familiar.

"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." *Emmons*, 139 S. Ct. at 503. To be "clearly established," a rule "must have a sufficiently clear foundation in then-existing precedent." *Wesby*, 138 S. Ct. at 589. That is, the law must be "settled law," *Hunter v. Bryant*, 502 U.S. 224, 228 (1991), and it must emanate either from "controlling authority" or "a robust 'consensus of cases of persuasive authority,'"[5] *Ashcroft v. al-Kidd*, 563 U.S. 731, 741-42 (2011). "It is not enough that the rule is *suggested* by then-existing precedent." *Wesby*, 138 S. Ct. at 590 (emphasis added).

The "clearly established" standard further demands that the law be defined with "[s]pecificity," not "at a high level of generality." *Kisela*, 138 S. Ct. at 1152. Accordingly, "[t]he dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix*, 136 S. Ct. at 308. Such "[s]pecificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Emmons*, 139 S. Ct. at 503. Indeed, "[u]se of excessive force is an area of the law 'in which the

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[5] This Court has "not yet decided what precedents—other than [its] own—qualify as controlling authority for purposes of qualified immunity." *Wesby*, 138 S. Ct. at 591 n.8. But this case would be a poor vehicle for exploring that question since *no* circuit has clearly established the rule that respondent tries to cobble together here.

result depends very much on the facts of each case,' and thus police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153. To be sure, there need not be "a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *al-Kidd*, 563 U.S. at 741. And although there may be an "'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances," such a case is "rare." *Wesby*, 138 S. Ct. at 590.

The Eighth Circuit did not err in applying these principles. As it explained, the relevant question here is whether "[i]t was … clearly established in May 2014 that a deputy was forbidden to use 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" in circumstances in which "a reasonable officer … could have believed that it was important to control the situation and to prevent a confrontation … that could escalate." Pet. App. 7a, 9a. Neither the majority opinion nor either of the two dissenting opinions identified any "controlling authority" from this Court that informed the relevant question; nor did they discover "a robust 'consensus of cases of persuasive authority'" that resolved the inquiry. *al-Kidd*, 563 U.S. at 741-42. Furthermore, no dissenting judge disputed the majority's conclusion that this case is not "'the rare obvious case' in which 'the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." Pet. App. 10a. Instead, as Judge Grasz recognized in his lone dissent, this case "simply"

involves the question whether Eighth Circuit precedent "clearly established" that respondent's conduct violated the Fourth Amendment. Pet. App. 23a. The majority correctly determined that the four relevant circuit decisions did not. *See* Pet. App. 7a-8a.

In the first of those decisions—*Shekleton v. Eichenberger*—the Eighth Circuit concluded that an officer who "deployed [a] taser" against an individual who "complied" with an officer's commands and who neither fled nor resisted arrest violated the Fourth Amendment. 677 F.3d at 366-67. In the second decision—*Brown v. City of Golden Valley*—the Eighth Circuit held that an officer violated the Fourth Amendment when he used a Taser against a seated individual during a traffic stop whose only noncompliance was to refuse an officer's instructions to end her phone call to a 911 operator while stating that she was frightened. 574 F.3d at 494-99. In the third decision—*Shannon v. Koehler*—the Eighth Circuit found that an officer who used force against a bar owner (in his own bar) sufficient to cause "a partially collapsed lung, multiple fractured ribs, a laceration to the head, and various contusions" violated the Fourth Amendment given that "it [was] not clear … whether [the bar owner] could reasonably have been suspected of committing *any* crime" and "did not attempt to flee or actively resist arrest, and … posed little or no threat." 616 F.3d at 862-63 & n.3. And in the fourth decision—*Montoya v. City of Flandreau*—the Eighth Circuit concluded that an officer violated the Fourth Amendment when he broke the leg of "a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee," all because the suspect "raised her hands above

her head in frustration" while standing "at a distance of about ten to fifteen feet" from the officer. 669 F.3d at 869, 871-73. Quite obviously, none of those holdings "'squarely govern[]' the specific facts at issue" in this case. *Kisela*, 138 S. Ct. at 1153.

Petitioner barely disputes that conclusion. Indeed, aside from erroneously claiming that the majority below adopted a "same fact pattern" test for qualified-immunity cases, Pet. 15; *see also* Pet. 20—presumably to suggest that one or more of the four aforementioned cases sufficed to clearly establish that respondent's conduct violated the Fourth Amendment—she does not engage with any of the decisions discussed at length in either the majority or the dissenting *en banc* opinions. Instead, she places her chips on the argument that this case—like *Graham v. Connor*, 490 U.S. 386 (1989)—is the exceedingly rare "obvious case" in which an officer's conduct violated clearly established law "even without a body of relevant case law."[6] Pet. 18.

To that end, petitioner asserts, with considerable hyperbole, that "[i]f there is ever an obvious case of excessive force, it is this case." *Id.* That claim suffers from any number of problems, not the least of which is that the purported "obviousness" of the constitutional

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[6] It is therefore unclear whether petitioner actually believes that prior Eighth Circuit case law controls this case. Petitioner asserts, for instance, that the Court should use this case as a vehicle to "clarify" the "obvious case" doctrine. *See* Pet. 18. But if petitioners were to persuade the Court that prior Eighth Circuit precedent clearly established that respondent's conduct violated the Fourth Amendment, the Court would have no need to engage in such an exercise.

violation managed to escape the attention of every active judge on the Eighth Circuit (as well as one senior judge)—including, most notably, all four judges who voted *in favor of petitioner*. Indeed, throughout all of the proceedings below, only Judge Smith (in dissent at the panel stage) ever invoked the "obvious case" theory, *see* Pet. App. 36a, and even he promptly abandoned it at the *en banc* stage, *see* Pet. App. 12a-22a.

For good reason, as "[e]ven a cursory glance at the facts of *Graham* confirms just how different that case is from this one." *Sheehan*, 135 S. Ct. at 1776. It is one thing to "needlessly withhold[] sugar from an innocent person who is suffering from an insulin reaction." *Id.* (citing *Graham*, 490 U.S. at 388-89). It is another thing entirely to make a split-second judgment to seize someone in a "bear hug" and bring her to the grass after she "tr[ies] to pull [police] officers off" an arrestee, "get[s] in the way of the patrol vehicle door," "ignore[s] [an officer's] instruction to 'get back here,'" and "continue[s] to walk away" toward a heated verbal altercation involving a family member. Pet. App. 3a, 7a, 9a. Put simply, "*Graham* is a nonstarter." *Sheehan*, 135 S. Ct. at 1776. This Court need not grant certiorari to confirm that conclusion.

III. This Case Is A Poor Vehicle In Which To Explore Petitioner's Broader Arguments.

Petitioner dedicates a substantial portion of her petition to arguing that this Court's qualified-immunity jurisprudence it is out of step with "the original meaning of Section 1983." Pet. 20-24. Amicus joins her in that effort too. *See* Cato Amicus Br. 4-16. There are multiple problems with that submission.

To start, as petitioner recognizes, *see* Pet. 19, this Court has recently taken great pains to *reaffirm* its qualified-immunity jurisprudence—sometimes even in an extraordinary summary-reversal posture—and to ensure that the lower courts are properly applying it. *See, e.g.*, *Emmons*, 139 S. Ct. 500; *Wesby*, 138 S. Ct. 577; *Kisela*, 138 S. Ct. 1148; *White v. Pauly*, 137 S. Ct. 548 (2017) (per curiam); *Mullenix*, 136 S. Ct. 305; *Sheehan*, 135 S. Ct. 1765. That makes now an especially unusual moment for petitioner to ask the Court to revisit that jurisprudence wholesale and scale back on all of those admonitions. In any event, petitioner did not press her original-meaning argument in the lower courts; none of the briefing below addressed it, and neither the district court nor the Eighth Circuit debated it. *Cf.* Pet. 21 n.3 (describing several recent cases where lower courts have actually addressed such arguments). This Court's ordinary practice "precludes a grant of certiorari … when 'the question presented was not pressed or passed upon below.'" *United States v. Williams*, 504 U.S. 36, 41 (1992). Petitioner identifies no compelling reason to depart from that traditional rule when it comes to suggestions that this Court should jettison its qualified-immunity doctrine jurisprudence because it has "no true ancestor in the common law." Pet. 21.

In any event, even assuming the Court were inclined to "reconsider its qualified immunity jurisprudence," even petitioner seems to recognize that this case is not an appropriate vehicle to do so, for she suggests that the Court could act "within the confines of current law to rein in the most extreme departures from the original meaning of Section 1983." Pet. 20. In petitioner's view, this approach will "restore some

semblance of the historical order, at least in obvious excessive force cases like this one." Pet. 10. But vehicle problems exist even with respect to that more modest claim. As just explained, after a dozen court of appeals judges reviewed this case, eight resoundingly rejected the notion that this is an "obvious" case of excessive force, *see* Pet. App. 10a, and even the four judges who thought that petitioner should have prevailed did not so much as drop a footnote disputing the majority's conclusion on this point, *see* Pet. App. 12a-24a. Accordingly, even were this Court interested in exploring petitioner's argument that an original understanding of Section 1983 would have endorsed the view that police officers must be held liable so long as a plaintiff can satisfy the three non-exhaustive factors identified in this Court's 1989 decision in *Graham v. Connor*, *see* Pet. 24, surely there are more suitable cases in which to do so than this one.

Finally, petitioner's broader argument is ultimately premised on the proposition that, if this Court fails to act, police officers will enjoy "*de facto* absolute immunity." Pet. 20. Experience in the Eighth Circuit proves otherwise. The Eighth Circuit routinely denies qualified immunity to officers in all manner of contexts—including in cases decided after the decision below. *See, e.g.*, *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020); *Robinson v. Hawkins*, 937 F.3d 1128 (8th Cir. 2019); *Z.J. ex. rel. Jones v. Kan. City Bd. of Police Comm'rs*, 931 F.3d 672 (8th Cir. 2019); *Partridge v. City of Benton*, 929 F.3d 562 (8th Cir. 2019); *Rochell v. City of Springdale Police Dep't*, 768 F. App'x 588 (8th Cir. 2019); *Karels v. Storz*, 906 F.3d 740 (8th Cir. 2018); *Henderson as Tr. for Henderson v. City of Woodbury*, 909 F.3d 933 (8th Cir. 2018); *Barton v. Taber*,

908 F.3d 1119 (8th Cir. 2018); *Johnson v. City of Minneapolis*, 901 F.3d 963 (8th Cir. 2018); *Rokusek v. Jansen*, 899 F.3d 544 (8th Cir. 2018); *Michael v. Trevena*, 899 F.3d 528 (8th Cir. 2018); *Thompson v. City of Monticello*, 894 F.3d 993 (8th Cir. 2018); *Burnikel v. Fong*, 886 F.3d 706 (8th Cir. 2018). As these decisions reflect, the reality is that the facts of some cases give rise to violations of clearly established law and others do not. The Eighth Circuit correctly determined that this case falls on the latter side of the dividing line.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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