No. 20-1324

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES MCMANEMY,

Petitioner,

vs.

BRUCE TIERNEY, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MATTHEW J. HAINDFIELD
Counsel of Record
JASON C. PALMER
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
(515) 243-4191
haindfield.matthew@bradshawlaw.com
palmer.jason@bradshawlaw.com

Counsel for Respondents
Bruce Tierney and Curt Lubben

QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in concluding the respondents are entitled to qualified immunity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

INTRODUCTION

This case concerns a straightforward application of settled principles of qualified immunity. Under that doctrine, a law enforcement officer is entitled to qualified immunity unless his or her particular conduct undoubtedly violates a person's statutory or constitutional rights. In this case, the respondents – law enforcement officers in Iowa – engaged in a physical struggle with the petitioner while attempting to subdue and handcuff him after he led law enforcement officers on a high-speed car chase. The Eighth Circuit concluded the unique circumstances of this case did not give rise to a violation of any clearly established Fourth Amendment right, and it accordingly granted Respondents qualified immunity. The Eighth Circuit's fact-intensive analysis supporting its decision is correct, and it does not conflict with any decision from this Court, a court of appeals, or a state high court. Therefore, this Court should deny the petition.

Petitioner's contrary view lacks merit. Petitioner suggests uncertainty exists within the Eighth Circuit as to how the law should be applied. However, close analysis of the Eighth Circuit's qualified immunity jurisprudence instead reveals that court's decisions turn solely upon the specific facts presented in each case, which naturally govern the ultimate outcome of each particular case. Petitioner does not suggest that the Eighth Circuit's judges dispute the operative legal standards. In short, Petitioner identifies no reason why this case merits this Court's review.

STATEMENT OF THE CASE

I. Factual Background

On the evening of March 18, 2015, Grundy County Deputy Kirk Dolleslager attempted to make a traffic stop of the petitioner, Charles McManemy. [Pet. App. 23a]. In the weeks leading up to the traffic stop, Grundy County and Butler County law enforcement officers had been investigating McManemy for narcotics offenses. [Pet. App. 23a]. Intelligence had been obtained by law enforcement that McManemy had been using the particular pickup truck he was spotted driving to make deliveries of controlled substances. [Pet. App. 23a]. They seized the opportunity to arrest him when he was observed committing a traffic violation. [Pet. App. 4a].

Despite the flashing lights and sirens behind him, McManemy refused to stop the pickup truck he was driving; rather, he took off and led law enforcement officers on a high-speed chase. [Pet. App. 4a]. For the next 10 minutes, he led deputies on a high-speed chase through rural highways, gravel roads, and a private farm field. [Pet. App. 4a]. The ensuing chase reached speeds of 80 to 90 miles per hour and resulted in McManemy's vehicle being rammed twice. [Pet. App. 23a]. When the chase finally came to an end, McManemy exited his vehicle and laid face down on the shoulder of the gravel road. [Pet. App. 24a]. Even with McManemy lying on the ground, the deputies had difficulty arresting him due to McManemy's continued resistance. [Pet. App. 4a]. In the end, subduing McManemy took two interlocked sets of handcuffs and six deputies. [Pet. App. 4a].

This case is all about what happened during the scuffle. [Pet. App. 4a]. McManemy claims one deputy shocked him with a taser up to five times. [Pet. App. 4a]. He initially claimed another deputy had also repeatedly kicked him in the face. [Pet. App. 30a]. When it became clear to his lawyers that allegation was false after it was roundly rejected by the district court, McManemy changed his story to suggest the deputy had instead used his knee to repeatedly strike him in the face. [Pet. App. 30a]. In any event, McManemy's allegations are unsupported by the objective video evidence of the event[1]. [Pet. App. 7a and 30a].

II. Proceedings Below

On March 16, 2017, McManemy filed a Complaint alleging violations of his constitutional rights, pursuant to 42 U.S.C. § 1983, and related state law claims. [Pet. App. 3]. All named defendants sought summary judgment, which McManemy

---

[1] Although the district court and Eighth Circuit appropriately gave Petitioner the benefit of the doubt as to the validity of certain aspects of Petitioner's story as is required at the summary judgment stage of the case, other aspects of the Petitioner's story were roundly rejected as being blatantly contradicted by the objective video evidence. For example, the district court and Eighth Circuit rejected Petitioner's claim that he was tased after being handcuffed because that claim was demonstrably inconsistent with the Taser's log and the objective video evidence of Petitioner's arrest. [Pet. App. 7a, 30a]. Additionally, the district court rejected Petitioner's claim that he had been kicked in the face, since that claim was likewise totally inconsistent with the objective video evidence of Petitioner's arrest. [Pet. App. 30a]. Moreover, the district court correctly rejected Petitioner's contention that he had been repeatedly struck in the face by Deputy Tierney's knee, as that claim is likewise unsupported by the video evidence of Petitioner's arrest. [Pet. App. 30a]. Instead, the district court concluded the objective video evidence could conceivably support a claim that Deputy Tierney placed his knee on McManemy's face while kneeling next to him during Petitioner's arrest sufficient to cause Petitioner to sustain a black eye. [Pet. App. 30a]. *See generally, Scott v. Harris*, 550 U.S. 372, 380 (2007) (In qualified immunity cases, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

resisted. [Pet. App. 3]. On October 23, 2018, the district court granted summary judgment on all of Petitioner's federal claims. [Pet. App. 30a]. McManemy appealed the dismissal of his federal claims to the Eighth Circuit Court of Appeals. [Pet. App. 3]. In a 2-1 decision, the Eighth Circuit affirmed. [Pet. App. 1a – 13a]. McManemy was denied an en banc rehearing. [Pet. App. 18a].

REASONS FOR DENYING THE PETITION

The district court and the Eighth Circuit Court of Appeals correctly applied this Court's longstanding qualified immunity precepts. All criteria supporting the application of qualified immunity are satisfied. Petitioner failed to meet the burden of showing (1) Deputy Tierney violated a constitutional right, and (2) that right was clearly established at the time of the incident. Concerning the first prong of this analysis, the conduct of Deputy Tierney in assisting his fellow deputies in handcuffing a noncompliant McManemy following an exceedingly dangerous high-speed chase led by McManemy was objectively reasonable. Additionally, Petitioner has wholly failed to establish that any purported constitutional violation by Deputy Tierney was "clearly established" at the time of this incident. No "clearly established law" mandated the law enforcement officers should have acted any differently during the situation they confronted.

As to the allegations of failure to intervene made against Deputy Lubben, the law is well-established there can be no liability on a claim of failure to intervene when, as here, there was no underlying constitutional violation or tort.

Simply put, 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. Petitioner's principal contention at this stage of the case is that a split exists within the Eighth Circuit as to the correct application of this Court's qualified immunity jurisprudence, with different results occurring based upon the composition of the particular Eighth Circuit panel assigned to decide a given case. [Pet. App. 2, 6-10]. In reality, the Eighth Circuit has consistently applied the same long-settled principles from this Court's qualified-immunity doctrine. To the extent different panels have reached different outcomes while applying the same legal principles, it is because they are considering materially different facts in different cases. Accordingly, there is no compelling basis for this Court to intervene.

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

Petitioner principally contends the Eighth Circuit's decision suggests a "split exists within the Eighth Circuit" on the question of how this Court's qualified immunity jurisprudence should be applied. [Pet. 6]. Petitioner does not contend, however, that the Eighth Circuit is divided over the *legal* standards governing this question. As this Court recently observed, 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 the Eighth Circuit *misapplied* the operative standards and reached an allegedly incorrect result due to a perceived *misapplication* of the "proper analytical scope of clearly established law." [Pet. 10]. But this Court's function is not to address instances in which the lower courts have

reached different outcomes in cases involving different factual findings. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Further, the pair of decisions upon which Petitioner relies are distinguishable on their facts from the decision below, which negates any suggestion of an "internal split" within the Eighth Circuit regarding the applicable legal standards, even under Petitioner's distorted view of that term. [Pet. 6]. This case concerns a grant of qualified immunity in a context in which a suspect led deputies on a reckless high-speed car chase and resisted officers as they attempted to place handcuffs on him. [Pet. App. 4a, 23a]. None of the decisions discussed in the petition is remotely similar. [*See* Pet. 6-24]. For example, *Kelsay v. Ernst* involved an officer's use of a "takedown maneuver" against a nonviolent misdemeanant. *Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. 2019). That case is a far cry from the Petitioner's conduct in leading law enforcement on a high-speed car chase and resisting law enforcement's efforts to place handcuffs on him.

Petitioner's reliance upon *Jackson v. Stair* is equally misplaced, as that case involved an analysis of the reasonableness of law enforcement's use of multiple successive Taser deployments. *Jackson v. Stair*, 944 F.3d 704, 710 (8th Cir. 2019). The district court and Eighth Circuit unanimously concluded there was no constitutional violation associated with the Taser deployments at issue in this case. Thus, the unanimous view of the Taser deployments at issue demonstrates there is

no "intra-circuit split" pertaining to that aspect of the case, so Petitioner's reliance upon *Jackson* likewise misses the mark.

Petitioner would have this Honorable Court believe these two decisions somehow demonstrate a "deep, recurring intra-Circuit split" within the Eighth Circuit regarding the pertinent legal standards. [Pet. 6-10]. However, close analysis of these cases merely reveals "disagreement with the majority on the ***application*** of precedent." *Kelsay*, 933 F.3d at 987 (Judge Grasz, dissenting) (emphasis added) (disagreeing with the majority's reliance on the "clearly established" prong of the qualified immunity analysis as authorized by this Court in *Pearson v. Callahan* while conceding "*Pearson* authorizes this analytical approach, [but]…does not require it."). *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

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 v. Hughes,* 138 S. Ct. 1148, 1153 (2018). As the descriptions of the two cases involved in Petitioner's purported "intra-Circuit split" demonstrate, they are nothing like this one.

Unable to identify a true intra-Circuit conflict (or an inter-Circuit conflict, for that matter), Petitioner retreats to the claim that the Eighth Circuit has applied this Court's "squarely governed" aspect of the analysis "out of its original context." [Pet. 10]. However, as is discussed in detail below, the Eighth Circuit has 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. [Pet. App. 9a-10a].

II. The Eighth Circuit's Fact-Intensive Analysis Appropriately Applied the Correct Legal Standard.

The case for certiorari is doubly weak because the Eighth Circuit's decision correctly applied the pertinent legal standard at issue. As noted above, 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." *Dist. of Columbia v. Wesby,* 138 S. Ct. 577, 589 (2018). 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.'" *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 v. Luna*, 577 U.S. 7, 11 (2015). 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 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.

"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." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quotation marks and citations omitted). While the law "do[es] not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question ***beyond debate***." *Id.* (emphasis added). Thus, even if the measures taken by officers "contained the shortcoming that respondents allege," if "no precedents on the books" when the action was taken "would have made it clear to petitioners that" what they were doing "violated the Constitution," qualified immunity must be granted. *Taylor v. Barkes*, 575 U.S. 822, 825-26 (2015). Stated otherwise, "immunity protects all but the plainly incompetent or those who knowingly violate the law." *White*, 137 S. Ct. at 551 (2017).

In recent cases, this Honorable Court has routinely reversed lower federal court decisions denying qualified immunity because the court applied the clearly established analysis at level of broad generality—without regard to particular facts and prior case law. *See id.*; *see also City & County of San Francisco v. Sheehan*, 575 U.S. 600, 610 n.3 (2015) (collecting cases). This Honorable Court has "repeatedly told courts … not to define clearly established law at a high level of generality." *Kisela*, 138 S. Ct. at 1152. The Court has "found this necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." *White*, 137 S. Ct. at 551–52 (citations and quotes omitted).

"[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." *Kisela*, 138 S. Ct. at 1152. Rather than a "high level of generality," the clearly established law must be "particularized" to the facts of the case. *Id.* When the circumstances fall somewhere between the cases in which qualified immunity has been granted and those in which it has not, this "hazy border between excessive and acceptable force" falls under the protections of qualified immunity. *Mullenix*, 577 U.S. at 18. Absent such handling, "[p]laintiffs would be able to convert the rule of qualified immunity ... into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *White*, 137 S. Ct. at 552. Ultimately, government officials "are entitled to qualified

immunity unless existing precedent 'squarely governs' the specific facts at issue." *Kisela*, 138 S. Ct. at 1153.

In *Wilson v. Layne*, this Honorable Court suggested the law to be analyzed to determine if a right is clearly established is: decisions of the Supreme Court, controlling authority from the jurisdiction, including the highest court of the state, and law of other jurisdictions when there is a consensus of persuasive authority. *Wilson v. Layne*, 526 U.S. 615, 616 (1999). This Court has reserved judgment on whether decisions of federal courts of appeals are a source of clearly established law. *See Taylor*, 135 S. Ct. at 2045.

The focal question before this Court is whether, as of March 18, 2015, it was clearly established the actions of Deputy Tierney of purportedly kneeling on an arrestee's face (or even kneeing him in the eye) during a struggle to handcuff the arrestee violated the arrestee's constitutional rights. Despite owing the burden to do so, McManemy has not and cannot point to any Supreme Court precedent, Supreme Court of Iowa precedent, or even Eighth Circuit precedent to establish Deputy Tierney's conduct was in violation of McManemy's clearly established constitutional rights.

The precedent of the Eighth Circuit existing as of this date makes evident no clearly established right was violated. For example, in *Ehlers* the Eighth Circuit held that use of an arm bar to secure handcuffs on a suspect who was resisting by keeping his arms away from officers did not violate clearly established law. *Ehlers v. City of Rapid City* 846 F.3d 1002, 1012 (2017). The *Ehlers* court further noted it

has previously "held that officers may use force to handcuff a suspect who is resisting, even if that force causes pain." *Id.* The only clearly established law precluding the use of force in handcuffing a suspect is that "force is least justified against nonviolent misdemeanants who do not flee or actively resist." *Id.* Here, McManemy was not a nonviolent misdemeanant; rather, he was a suspected narcotics dealer who led law enforcement on a dangerous high-speed chase over highways, off-road, and across private property. Nor was McManemy compliant, as McManemy himself admitted he was screaming, thrashing, and pulling his left arm into his body. While McManemy claims he was doing so because he lacked range of motion to be cuffed with a single set of handcuffs, the deputies cannot be charged with knowing his subjective intent. *Id.* at 1011. Plainly, if a similar use of physical force was approved of in *Ehlers*, the use of force by Deputy Tierney in this instance was not a violation of clearly established law.

The Eighth Circuit did not err in applying these principles. As it explained, "McManemy must point to a case that squarely governs the specific facts at issue." *Kelsay*, 933 F.3d at 980 (internal quotations omitted). In the proceedings below, McManemy cited two cases he believes "squarely govern" the facts at issue. Those cases are *Gill v. Maciejewski*, 546 F.3d 557 (8th Cir. 2008), and *Krout v. Goemmer* 583 F.3d 557 (8th Cir. 2009). As is discussed below, neither of those cases "squarely governs" this case.

In his Brief submitted to the Eighth Circuit below, Petitioner relied almost exclusively on *Gill*; however, that case is readily distinguishable. In *Gill*, the

relevant undisputed facts established that Gill was ejected from a bar and attempted to re-enter. *Gill*, 546 F.3d at 561. Bar security struggled with Gill, but he was brought under control. *Id.* Police arrived and intervened and "Gill ***offered no resistance*** as officers forced him to the pavement." *Id.* (emphasis added). While fully restrained by other officers and compliant on the pavement, Officer Maciejewski approached. *Id.* Gill saw Officer Maciejewski take three steps toward him then drop a knee onto his head. *Id.* Three of Gill's friends witnessed and confirmed Maciejewski performed a knee drop on Gill's head while he was fully restrained. *Id.* Gill suffered massive injuries and the physician at the hospital who treated him testified the injuries were consistent with a knee drop. *Id.* This Court affirmed the jury's verdict on the finding that the officer "smashed his knee into the hapless suspect's head" while he was fully restrained by and compliant with other officers. *Id.* at 562.

The present case is drastically different from *Gill*. There are no facts, or even an allegation, that any knee contact to McManemy was delivered while he was both restrained and complaint. The video evidence, audio evidence, deposition testimony of the deputies, and even McManemy's own testimony indicate Petitioner was resisting restraint and was noncompliant by keeping his left arm pulled into or under his body in contravention of the orders and efforts of the deputies who McManemy had led on dangerous high-speed chase moments before. [Pet. App. 25a – 26a]. Further, McManemy admitted he was thrashing and screaming at the deputies throughout the encounter. [Pet. App. 36a]. This is not a situation like

Gill where a restrained, compliant, and "hapless" suspect was smashed in the head by an officer's knee for no reason.

The second case relied upon by Petitioner below was *Krout*. [Pet. App. 10a]. That case misses the mark even more than *Gill*. Specifically, the *Krout* case involved extreme levels of "gratuitous" force against a "fully subdued," non-resisting arrestee who eventually died. 583 F.3d at 563, 566. An officer "hip toss[ed]" him to the ground, and then, together with other officers, beat him. *Id.* at 561. The use of force in this case, by contrast, falls well short of *Krout.* Most importantly, McManemy admits that he suffered his injuries during a struggle to handcuff him, not when he was "fully subdued." *Id. at 566; see also*, *Kelsay*, 933 F.3d at 980 (drawing a similar distinction).

As a matter of law, the conduct of Deputy Tierney was not proscribed by clearly established law as of March 18, 2015 and, therefore, Deputy Tierney was entitled to qualified immunity protection. This Court need not grant certiorari to confirm correctness of the Eighth Circuit's application of the law to the facts of this straightforward case.

III. This Case Is A Poor Vehicle in Which to Explore Petitioner's Broader Arguments.

Petitioner dedicates a substantial portion of his Petition to arguing this Court's qualified-immunity jurisprudence was "taken out of its original context" by the Eighth Circuit. [Pet. 10-18]. There are multiple problems with this assertion.

To start, this Court has recently taken great pains to *reaffirm* its qualified immunity jurisprudence to ensure 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,* 137 S. Ct. 548 (per curiam); *Mullenix,* 577 U.S. 7 (2015); *Sheehan,* 135 S. Ct. 1765. That makes now an especially unusual moment for Petitioner to ask this Honorable Court to revisit that jurisprudence wholesale and scale back on all of the admonitions contained in those cases. Petitioner did not press his "original-meaning" arguments in the lower courts; none of the briefing below addressed it, and neither the district court nor the Eighth Circuit debated it. 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 this Court should jettison its longstanding qualified-immunity jurisprudence.

In any event, even assuming the Court were inclined to reconsider its qualified immunity jurisprudence, surely there are more suitable cases in which to do so than this one. 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,* this case would fail to support a viable claim even under the test enunciated by this Court in *Graham*. *Graham v. Connor*, 490 U.S. 386 (1989).

Finally, Petitioner's broader arguments are ultimately premised on the proposition that, if this Court fails to act, police officers will allegedly enjoy "pure

immunity from suit." [Pet. 15]. Experience in the Eighth Circuit proves otherwise. The Eighth Circuit routinely denies qualified immunity to officers in all manner of contexts—including cases decided after the district court's ruling on Respondents' motion for summary judgment. *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); *Katels 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 this case falls on the latter side of the dividing line. Simply put, if this Honorable Court were interested in revisiting its approach to qualified immunity cases, a writ of certiorari would more appropriately be granted in a different case free from the considerable defects associated with this particular case.

IV. Deputy Tierney's Conduct Was Objectively Reasonable.

Review of the video, and of Deputy Tierney's conduct therein, and as described in the factual background section *supra*, conclusively demonstrates

Deputy Tierney's conduct was objectively reasonable. Ultimately, taking the evidence in the light most favorable to McManemy, the record evidence, at best, supports the conclusion that during the struggle to handcuff McManemy, Deputy Tierney knelt next to McManemy contacting the area around his left eye. And as the district court concluded, again taking the evidence in the light most favorable to Petitioner, this contact was applied "with at least as much force necessary to cause the black eye that was documented during McManemy's first week at the Butler County Jail." [Pet. App. 30a]. After evaluating the objective video evidence in the light most favorable to McManemy, the district court correctly concluded the level of force alleged to have been used by Deputy Tierney was objectively reasonable and not excessive or in violation of McManemy's constitutional rights. This conclusion must be affirmed on appeal.

"To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012). In resolving a claim of excessive force, this Court pays "careful attention to the facts and circumstances of each particular case" with particular focus on three major factors:

(1) The severity of the crime at issue;

(2) Whether the suspect poses an immediate threat to the safety of the officer or others; and

(3) Whether the suspect is resisting arrest or attempting to evade arrest by flight.

Hosea v. City of St. Paul, 867 F.3d 949, 957 (8th Cir. 2017) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)); *see also Shekleton*, 677 F.3d at 367 ("The level of force used must be justified in light of the severity of the crime at issue, the suspect's flight risk, and the immediacy of the risk posed by the suspect to the safety of officers and others.").

The reasonableness of a particular use of force must be judged from the objective "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight [because] police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97. Thus, reviewing courts "should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation." *Ryburn v. Huff*, 565 U.S. 469, 477 (2012). Because the inquiry is objective, a mistaken—but objectively reasonable—belief by the official that a certain situation requires the use of force will not expose the official to liability. *Hosea*, 867 F.3d at 959.

Similarly, an "arrestee's subjective motive does not bear on how reasonable officers would have interpreted his behavior." *Ehlers*, 846 F.3d at 1011. Thus, even if the active or passive resistance put up by an arrestee was for an innocent reason, the subjective reason for such resistance does not affect whether the officer's use of force was objectively reasonable. *See id.*; *see also Crumley v. City of St. Paul, Minn.*, 324 F.3d 1003, 1007-08 (8th Cir. 2003) (holding arrestee's claim of

defensively moving away from officer after being pushed may have been true and a natural reaction, "it nonetheless constituted resistance").

When law enforcement officers are justified in using force to subdue a suspect, they can continue to use force until the threat has been neutralized. *Plumhoff v. Rickard*, 572 U.S. 765, 778 (2014). Parsing down a struggle between officers and a suspect into "distinct and separate segments" is inappropriate when the situation was tense and rapidly evolving. *Nelson v. Cnty. of Wright*, 162 F.3d 986, 991 (8th Cir. 1998). Importantly, "if the officer warned the offender that he would employ force, but the suspect refused to comply, the government has an increased interest in the use of force." *Marquez v. City of Phoenix*, 693 F.3d 1167, 1175 (9th Cir. 2012); *see also Estate of Morgan v. Cook*, 686 F.3d 494, 498 (8th Cir. 2012) (holding warning puts suspect on notice continued resistance is at suspect's peril).

The case law is replete with examples of federal courts concluding similar actions by law enforcement officers in deploying force in making an arrest was objectively reasonable. By way of extreme example, the plaintiff in *Williams v. Sandel*, 433 Fed. Appx. 353, 362-63 (6th Cir. 2011) was stopped for suspected non-violent offenses of public intoxication, indecent exposure, and disorderly conduct while he was jogging naked along the side of the highway. The suspect did not flee, but *due to his resistance to being handcuffed* by three responding officers, the officers struck him with batons numerous times, tasered him thirty-eight times, and used pepper spray. *Williams*, 433 Fed. Appx. at 362. Nonetheless, the Sixth Circuit

Court of Appeals determined the officers' actions were objectively reasonable because the suspect "remained unsecured and unwilling to comply with the officers' attempts to secure him for his own safety as well as the officers and motorists." *Id.* This Court declined the invitation to issue a writ of certiorari in that case. *Williams v. Sandel*, 565 U.S. 1197 (2012).

Numerous decisions of the Eighth Circuit are more closely analogous to the minimal level of force used by Deputy Tierney and are highly instructive and compel a conclusion that the use of force was objectively reasonable in this instance. For example, the case of *Wertish v. Krueger*, 433 F.3d 1062, 1066–67 (8th Cir. 2006) holds a level of force similar to what was deployed in the present case was objectively reasonable when the arrestee passively resisted—regardless of the motivation or reason for the arrestee's resistance. In *Wertish*, the plaintiff was observed driving erratically and failed to pull over after police initiated a traffic stop. *Id.* at 1064-65. When the vehicle finally did stop, officers ordered the driver out of the vehicle but he did not respond. *Id.* at 1065. The vehicle's door was locked but the plaintiff eventually unlocked it, at which time the officers pulled the plaintiff from the vehicle to the ground, climbed on top of him, and struggled to handcuff him. *Id.* During this struggle, one officer "struck the [plaintiff] in the back of the head with his elbow and hit him in the ribs with his knee." *Id.* The plaintiff alerted the officers he suffered from Type 1 diabetes and was having a diabetic reaction. *Id.* The plaintiff was taken to the hospital, which confirmed his condition and treated him. *Id.* From the struggle, the plaintiff suffered bruised

ribs, a sore shoulder, and multiple abrasions. *Id.* at 1065-66. Even though the plaintiff's resistance could be characterized as mere passive resistance and it was due to a medical condition, this Court held the use of force was objectively reasonable. *Id.* at 1066-67. The Court generally observed, that "[w]hen a suspect is passively resistant, somewhat more force may reasonably be required" than would be reasonable with a compliant suspect. Thus, the Court held that "[w]hen [the arrestee] persisted in lying on his hands, it was reasonable to pull them forcibly behind his back." *Id.* at 1067.

Consistent with *Wertish*, the Eighth Circuit has repeatedly held that no matter the reason for a suspect's failure to comply with law enforcement orders—whether innocent, medical, or other—noncompliance with commands and/or passive resistance makes the use of force by law enforcement objectively reasonable: "Law enforcement officers are not required to read a suspect's motivations in failing to obey commands—it is enough that the officer reasonably perceived that the suspect is not following orders as given." *Moore-Jones v. Quick*, 909 F.3d 983, 985-86 (8th Cir. 2018) (emphasis added); *see also Crumley*, 324 F.3d at 1007-08 (holding arrestee's claim of defensively moving away from officer after being pushed may have been true and a natural reaction, "it nonetheless constituted resistance").

The Eighth Circuit's opinion in *Carpenter v. Gage*, 686 F.3d 644 (8th Cir. 2012) is also instructive as to the use of force when an arrestee's apparent noncompliance with orders or passive resistance was for an innocent reason. In *Carpenter*, multiple deputies responded to a call that first responders had been

threatened with baseball bat on a medical call. *Carpenter*, 686 F.3d at 647. The suspect resisted arrest and refused to comply with deputies' orders by keeping his arms away from them and under his body. *Id.* at 649. The deputies physically struggled with the suspect and warned they would use their Taser, but the suspect still did not comply. *Id.* at 649-50. The suspect "characterize[d] his struggles merely as an effort to breathe." *Id.* at 650. However, the Court concluded that "[e]ven if [the suspect's] motive was innocent, the deputies on the scene reasonably could have interpreted [his] actions as resistance and responded with an amount of force that was reasonable to effect the arrest." *Id.* The Court held the use of force was objectively reasonable and the deputies were entitled to qualified immunity. *Id.* The Court stated: "Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing." *Id.* Because the deputies could reasonably have interpreted the suspect's actions as resistance it was objectively reasonable to use the amount of force necessary to subdue and handcuff him. *Id.*

The decision in *Ehlers* is also instructive. *Ehlers*, 846 F.3d 1002. In *Ehlers*, law enforcement officers responded to an altercation between adult members of the plaintiff's family and security personnel at a hockey game. *Ehlers*, 846 F.3d at 1007. An officer was in the process of arresting the plaintiff's son for his role in the altercation when the plaintiff, who was not involved or present during the initial altercation, came to the scene and approached the officer and failed to obey commands to move back. *Id.* Another officer arrived to assist, and the first officer

told him to arrest the plaintiff for failing to comply. *Id.* The plaintiff ignored two orders to put his hands behind his back. *Id.* The assisting officer then executed a takedown and brought the plaintiff to the ground on his back. *Id.* The first officer turned the arrestee over onto his hands and knees, pushed his head down, and shouted for him to put his hands behind his back because he was laying on them with his body. *Id.* Another officer arrived and put his knee on the arrestee's left shoulder, grabbed his left arm, and placed the arrestee face down on the ground. *Id.* A third officer took control of the arrestee's legs. *Id.* A fourth officer then pulled the arrestee's arm from underneath his body. *Id.* One of the officer's then deployed his Taser, after which handcuffing was completed. *Id.* The arrestee sued alleging a claim of excessive force under Section 1983. *Id.* at 1008. The court held the force used by the officers in effectuating the arrest was entitled to qualified immunity on the claim of excessive force because the officers "reasonably could have interpreted [the plaintiff's] behavior of continuing to lay on his hands and refusing to comply with instructions as resistance and reasonably responded …, regardless of whether [the plaintiff] actually intended to resist." *Id.* at 1011.

Also relevant to the present case, numerous federal circuit courts have recognized the inherent objective reasonableness of using force to subdue an arrestee following a high-speed vehicle chase. In *Teal v. Campbell*, 603 F. Appx. 820, 821 (11th Cir. 2015), a driver led officer on a high-speed chase, "driving at times 85-90 miles per hour." After the driver lost control of the vehicle and crashed, he exited the vehicle and ran a short distance before falling to the ground. *Teal*,

603 F. Appx. 821. The driver claimed he stopped resisting at that point, while officers contended the driver continued to ignore their commands. *Id.* The driver claimed that officers then kicked, beat, and Tasered him while he was on the ground. *Id.* On appeal, the Sixth Circuit Court of Appeals held the officers' conduct was objectively reasonable and they were entitled to qualified immunity. *Id.* at 822-23. Applying the *Graham* factors, the court concluded the high-speed chase was a "severe, serious crime," and because the driver was not immediately compliant with orders it could not conclude that a reasonable officer under these circumstances would perceive the driver was no longer resisting or no longer a threat. *Id.* at 823; *see also MacLeod v. Town of Brattleboro*, 548 F. Appx. 6, 8 (2nd Cir. 2013) (holding use of Taser on suspect following high-speed chase was objectively reasonable even though suspect had apparently surrendered by exiting vehicle, facing officers, and putting hands in the air, in part due to seriousness of preceding crime—i.e. high-speed chase).

Moreover, Courts have repeatedly recognized, no matter whether the arrestee is resisting or not, some use of force is necessary to handcuff an arrestee. "The right to make an arrest 'necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'" *White v. Jackson*, 865 F.3d 1064, 1080 (8th Cir. 2017); *see also Cavataio v. City of Bella Villa*, 570 F.3d 1015, 1019 (8th Cir. 2009) ("[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); *Mobley v. Palm Beach Cty. Sheriff Dep't*, 783 F.3d 1347,

1355 (11th Cir. 2015) ("the typical arrest involves some force and injury"). The *White* case is particularly relevant to the present case, as correctly summarized and applied by district court below:

> *White* is closer to the scenario presented in this case. In that case, the Eighth Circuit held that an officer did not use excessive force when he pushed the plaintiff to the ground and placed a knee on his back while he was being handcuffed, because "[t]he right to make an arrest necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." 865 F.3d at 1080 (citation omitted). Although the knee in *White* was placed on the suspect's back rather than his face, the purpose of the officer using his knee was the same: to restrain the subject for the purpose of arrest. Further, unlike the plaintiff in *White*, who was not resisting handcuffs at the time he was taken to the ground for arrest, the undisputed evidence in this case indicates that a reasonable officer would believe that McManemy was resisting. McManemy agreed that he was thrashing and screaming, and that he did not give his left arm for cuffing because he wanted the officers to use two sets of handcuffs and because his shoulder was in pain. As discussed above, McManemy's subjective motive in withholding his arm is not relevant, as I must observe his actions from the point of view of a reasonable officer.

[Pet. App. 36a].

The applicable case law is abundantly clear that when an arrestee is not immediately compliant with law enforcement orders during handcuffing, using physical force to effectuate handcuffing and securement of the arrestee is objectively reasonable. In *Brossart v. Janke*, the court stated even when an arrestee is on the ground, if he resists being handcuffed: "Law enforcement officers may use physical force to subdue an arrestee when he fails to comply with orders to lie still during handcuffing." *Brossart v. Janke*, 859 F.3d 616, 625 (8th Cir. 2017). In *Mann v. Yarnell*, the court concluded the delivery of a series of forearm and elbow blows by an officer to an arrestee's neck was objectively reasonable where the arrestee was

attempting to resist handcuffing. *Mann v. Yarnell*, 497 F.3d 822, 826-27 (8th Cir. 2007).

Based on the above legal doctrine and the exemplar case law, it is clear Deputy Tierney's use of force under the facts and circumstances of this case was objectively reasonable. This is especially true when the matter is evaluated as to the three primary factors generally used in the analysis of an excessive force claims: (1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officer or others; and (3) whether the suspect was resisting arrest or attempting to evade arrest by flight. *Hosea v*, 867 F.3d at 957; *Shekleton*, 677 F.3d at 367.

On appeal, McManemy contends the reason for his resistance was that a prior right shoulder injury limited his range of motion. Even if this was the true reason for McManemy's resistance, Deputy Tierney was unaware of it and had no reason to be; thus, Deputy Tierney reasonably interpreted McManemy's conduct as resistance to being arrested. The law holds that a suspect's subjective reasons for resisting have no bearing on whether an officer reasonably perceives the conduct as resistance and deploys force to obtain compliance and complete the arrest. *See Wertish*, 433 F.3d at 1066-67; *Ehlers* 846 F.3d at 1011; *Crumley*, 324 F.3d at 1007-08; *Carpenter*, 686 F.3d at 650.

In sum, the facts and circumstances demonstrate the use of force, including the purported knee contact delivered by Deputy Tierney, was objectively reasonable and not excessive. Therefore, Deputy Tierney is entitled to qualified immunity.

Further appellate review by this Honorable Court is unnecessary to confirm correctness of the Eighth Circuit's application of the law to the facts of this straightforward case.

V. Petitioner's Claim of Disputed Material Facts is Unfounded.

McManemy's Petition is premised on a contrived assertion that Deputy Tierney repeatedly kneed Petitioner in the face ***after*** he was fully subdued and no longer resisting. This assertion is concocted out of thin air. There is simply no support for it whatsoever in the record. Indeed, throughout this case, Petitioner has never argued that Deputy Tierney kneed him in the face *after* he was subdued and no longer resisting. In fact, the entirety of Petitioner's briefing below (at summary judgment, on appeal, and in requesting a rehearing) fails to identify any facts to support this allegation. Nevertheless, the dissenting opinion in the Eighth Circuit's opinion inexplicably stated: "the facts establish Deputy Tierney repeatedly – twenty to thirty times – kneed McManemy in the eye area *after* he was subdued and restrained." [Pet. App. 12a]. (emphasis in original)). This conclusion is not only unsupported by the facts, but it is inconsistent with the Petitioner's own recitation of the facts, where he noted that Deputy Tierney's force was only in the context of subduing McManemy, *not* after he was subdued, as follows: "Deputy Bruce Tierney's numerous knee strikes to Charles' face while Charles was pinned underneath four officers *in the process of handcuffing him*." (Petition for Rehearing submitted to Eighth Circuit Court of Appeals at p. 2 (emphasis added)).

McManemy's Petition for a Writ of Certiorari is premised on a false "fact" in the Dissenting Opinion which erroneously suggested Deputy Tierney continued with force "*after* he [McManemy] was subdued and restrained." [Pet. App. 12a]. (emphasis in original)). Knowing there is no factual support for this allegation, Petitioner dances carefully around it. Indeed, rather than arguing this point directly, Petitioner instead contends this Court should disregard his counsel's clear admissions on this point during the appellate briefing and oral arguments below. [Pet. 24]. To be sure, McManemy's Petition is nothing more than an opportunistic attempt to exploit an erroneous, unsupported factual finding in the dissenting opinion. Put simply, even assuming Deputy Tierney struck McManemy with his knee while attempting to subdue him, there is no evidence in the record whatsoever that such force continued after McManemy was restrained, subdued, and no longer resisting.

VI. Petitioner's "Failure to Intervene" Claims Were Correctly Decided Below.

To be liable under a theory of failure to intervene, the evidence must show "the officer is aware of the abuse and the duration of the episode is sufficient to permit an inference of tacit collaboration." *Krout v. Goemmer*, 583 F.3d 557, 565 (8th Cir. 2009). Because Deputy Tierney did not violate the constitutional rights of McManemy there is no basis to impose liability on Deputy Lubben for failure to intervene. *See Hollingsworth v. City of St. Ann*, 800 F.3d 985, 991 (8th Cir. 2015).

Even assuming there is some basis to conclude Deputy Tierney used excessive force, there is still no basis to find Deputy Lubben improperly failed to

intervene. Several deputies were in the midst of a hands-on struggle with McManemy following a dangerous high-speed chase. McManemey was uncompliant with clear and direct orders to stop resisting and provide his arms for handcuffing. Thus, as a matter of law, under these facts Deputy Lubben owed no duty to intervene. *Robinson v. Payton*, 791 F.3d 824, 830 (8th Cir. 2015) (rejecting claim that a trooper had a duty to intervene when the trooper was himself engaged with the suspect and not simply standing back and observing the actions of another officer). Further, Petitioner cites to no authority establishing Deputy Lubben's failure to intervene violated "clearly established" law.

In short, this case was correctly decided by the district court and the Eighth Circuit below. As such, for all of the reasons set forth above, this case simply does not warrant further review by this Honorable Court.

CONCLUSION

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

Respectfully submitted,

MATTHEW J. HAINDFIELD
Counsel of Record
JASON C. PALMER
BRADSHAW, FOWLER, PROCTOR & FAIRGRAVE, P.C.
801 Grand Avenue, Suite 3700
Des Moines, IA 50309-8004
(515) 243-4191
haindfield.matthew@bradshawlaw.com
palmer.jason@bradshawlaw.com

Counsel for Respondents
Bruce Tierney and Curt Lubben