No. 20-183

IN THE
Supreme Court of the United States

BILLY D. STAIR, individually, and in his official capacity with the Jacksonville Police Department,

Petitioner,

v.

CHARLES JACKSON,

Respondent.

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

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QUESTIONS PRESENTED

1. Whether the Eighth Circuit erred by analyzing each use of force in a sequence individually, just as this Court and every circuit command, and instead should have adopted Petitioner's novel approach—lumping multiple uses of force together for collective evaluation.

2. Whether clearly established law prohibits using a 50,000-volt Taser to shock "a misdemeanor suspect in Jackson's position at the time of the second tasing"—when he was "non-threatening, non-fleeing, non-resisting." Pet. App. 15.

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INTRODUCTION

Factbound and splitless, this case does not warrant review. At bottom, Petitioner disagrees with the Eighth Circuit's factual conclusion that at the time of the second tasing, "Jackson was reduced to the ground, unable to resist arrest or flee." Pet. App. 15. Petitioner offers no argument for qualified immunity that accepts these factual determinations made by the court of appeals.

Nor is there a split on any legal issue. Not even Petitioner claims as much. This Court has clearly stated that the Fourth Amendment reasonableness analysis must be "conducted separately for each search or seizure that is alleged to be unconstitutional." *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1547 (2017). Like the Eighth Circuit here, every court of appeals separately analyzes each use of force in a sequence, rather than lumping them together for collective consideration. The Court should deny the petition.

STATEMENT OF THE CASE

1. Designed to shoot up to 50,000 volts of electricity through the human body, a Taser "transmits powerful electrical pulses that temporarily override the Central Nervous System and directly control the skeletal muscles. This causes uncontrollable contraction of the muscle tissues." Supp. App. 27, 34.[1] The electric shock induces

[1] "Supp. App." refers to Appellees' Supplemental Appendix, filed in the Eighth Circuit on December 14, 2018.

"[n]euro-muscular incapacitation," creating "the risk of physical or other injury." *See* Supp. App. 27, 33.

In light of the powerful and potentially dire effects of electrocuting a person with a Taser, the Jacksonville, Arkansas Police Department requires its officers to sign a document and pass a test regarding Taser use. Supp. App. 25; 33. In signing the document, Officer Billy Stair, Petitioner here, acknowledged that "[Taser] users should use the lowest number of [Taser] exposures that are objectively reasonable to accomplish lawful objectives and should reassess the subject's behaviors, reactions, and resistance level before initiating *or continuing* the exposure." Supp. App. 32 (emphasis added). And on the certification test, Stair correctly answered that an officer should "[u]se the least number of [Taser] discharges to accomplish lawful objectives" and should not "[k]eep pulling the trigger until the subject submits." Supp. App. 25.

2. On July 23, 2013, Stair and Officer Kenneth Harness responded to a dispute in progress at Vaughn Tire, a local business. Pet. App. 2. Respondent Charles Jackson, the owner of a hauling company, was upset because Vaughn Tire employees had damaged a lug on his truck's wheel when attempting a repair. Pet. App. 2.

When Stair arrived, Jackson was walking with another man. Pet. App. 2–3. Stair asked them, "What's going on, guys?" *Id*. at 3. Jackson yelled in response, "I'm up here trying to get my tire fixed, and I've got to deal with this racist man." Aplt. App. 55.[2]

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[2] "Aplt. App." refers to Appellant's Appendix, filed in the Eighth Circuit on November 9, 2018.

Stair told Jackson to relax. Pet. App. 3. Pointing at another man, Jackson replied: "Get him, and I'm gonna relax." Pet. App. 3.

Stair directed Jackson to go stand by Stair's patrol car. *Id.* Jackson, agitated, began to do so. *Id.* Stair then instructed Jackson to keep his hands out of his pockets. Pet. App. 3. Jackson, on his way to the patrol car, stopped in front of Stair and yelled, reaching his left hand into his pocket, that he did not have anything in his pockets. *Id.* Stair ordered Jackson to turn around. *Id.* Jackson became louder and did not turn around. *Id.*

Stair pulled out his Taser and pointed it at Jackson. *Id.* Stair ordered Jackson to turn around, or be tased. *Id.* Jackson continued to yell and point, stating: "You tase me and see what happens." *Id.* Stair ordered Jackson to turn around five more times, and Jackson began to comply. *Id.* Stair then told Jackson to put his hands up; Jackson, still facing Stair, did so. *Id.* Stair again ordered Jackson to turn around. *Id.* Jackson, with his hands in the air, complied, and asked Stair for his badge number and threatened to file a complaint with Stair's supervisor. *Id.*

Officer Harness then approached Jackson. *Id.* at 4. Jackson put his hands behind his back and said, "Don't hurt my arm." *Id.* Harness attempted to handcuff Jackson. *Id.* Jackson turned around to face Harness and raised his right fist. *Id.* Stair immediately shot Jackson with his Taser. *Id.*

When the electric probes struck Jackson, *id.* at 12, he fell to the ground, kicking his legs, *see id.* at 4. The Taser's cycle lasted five seconds. Dkt. No. 33-2 at 1. Just over one second after the first deployment, *id.*,

and without another warning, Stair deployed his Taser a second time, Pet. App. 4. The Taser-mounted video showed that Jackson did not have time to react with compliance or continued resistance before the second tasing. *See* Dkt. 25-4.[3] He was still reeling physically from the first one. Pet. App. 12. Jackson was on the ground with the Taser prongs still lodged in his body just before Stair tased him the second time. *See* Dkt. 25-4.

After the second tasing, Stair ordered Jackson to turn on his stomach or be tased again. Pet. App. 4. Stair repeated the order. *Id*. When Jackson attempted to rise to one knee, Stair tased him a third time. *Id*. The Taser deployments spanned a full nineteen seconds. Pet. 5; Dkt. 25-4.

After the third tasing, Jackson lay on his stomach, and Harness handcuffed him. Pet. 5. Jackson was arrested for disorderly conduct. *Id*.

3. A Jacksonville Police Department use of force review concluded that Stair's second tasing of Jackson violated department policy. Dkt. No. 33-1; Dkt. No. 33-2. In its review, the Jacksonville Police Department assessed each of Stair's three deployments of the Taser separately. Dkt. No. 33-2 at 1—2. The review concluded that, although "the initial deployment and third application" of the Taser "were justified[,]" the second application was not. This was so for three reasons: "(1) no instructional verbal commands were issued to Jackson, (2) Jackson

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[3] A video from a camera affixed to Stair's Taser was submitted as exhibit 4 to defendants' Statement of Uncontested Material Facts in the district court (Dkt. No. 25), and referenced by the Eighth Circuit in its opinion (Pet. App. 3 n.1).

displayed no actions that could be construed by a reasonable officer as assaultive or attempting to disable the TASER leads prior to the second cycle, and (3) Jackson was given insufficient time to demonstrate compliance or non-compliance." Dkt. No. 33-1. The Jacksonville Police Department concluded that "[t]he second cycle was not a reasonable use of force." Dkt. No. 33-2 at 1. (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

Stair admitted his wrongdoing: "[A]fter review of both the in car video as well as the taser video, I observed that I did not give a verbal command or give adequate reaction time." Supp. App. 8.

4. Jackson brought suit against Stair in his individual and official capacity, the City of Jacksonville, and the Jacksonville Police Department in the United States District Court for the Eastern District of Arkansas, alleging a claim under 42 U.S.C. § 1983 for violation of his constitutional rights and claims under state law. Pet. App. 37. As relevant here, Jackson claimed that Stair used excessive force against him, in violation of the Fourth Amendment. *See* Pet. App. 4. The district court granted summary judgment in favor of the defendants. Pet. App. 46.

5. Jackson appealed. Initially, the court of appeals affirmed the district court in part, reversed in part, and remanded. *See* Pet. App. 29-30. Stair filed a petition for rehearing. The court of appeals granted panel rehearing and reissued its opinion in order to address two of its recently-issued decisions regarding excessive force and qualified immunity. *See* Pet. App. 2.

In its reissued opinion, the panel again held that the district court erred in granting summary

judgment as to Jackson's Fourth Amendment claim based on the second tasing, just as it had in the initial decision. *See* Pet. App. 13, 17. The court affirmed dismissal of the Fourth Amendment claim as to the other two tasings as well as the dismissal of all other claims. Pet. App. 1-2.

Based on its review of the Taser video, the Eighth Circuit concluded that at the time Stair activated his Taser for the second time, "Jackson was reduced to the ground, unable to resist arrest or flee." Pet. App. 15. The court of appeals rejected Stair's argument that Jackson was attempting to "kick his legs out and turn his body as if to confront the officers again." Pet. App. 12. On the contrary, the court found that the video footage showed that Jackson "was on his back, writhing on the ground." Pet. App. 12. From this supine position, "several feet away from the nearest officer," Jackson was plainly "unable to pose a threat[.]" Pet. App. 12.

Because Jackson was not resisting, not fleeing, and not posing a threat to anyone at the time of the second tasing, the court of appeals determined that Stair was not entitled to qualified immunity. Citing several cases, the court explained that "there was sufficient case law to establish that a misdemeanor suspect in Jackson's position at the time of the second tasing—non-threatening, non-fleeing, non-resisting—had a clearly established right to be free from excessive force." Pet. App. 15 (citing *Brown v. City of Golden Valley*, 574 F.3d 491, 496–97 (8th Cir. 2009); *Shannon v. Koehler*, 616 F.3d 855, 862–63 (8th Cir. 2010); *Montoya v. City of Flandreau*, 669 F.3d 867, 871–72 (8th Cir. 2012)). Stair therefore was not entitled to summary judgment on qualified immunity grounds. Pet. App. 13, 15, 17.

Judge Wollman dissented from the decision to remand for further proceedings, Pet. App. 17–18, objecting to the court of appeals' finding that there was a genuine issue of material fact as to whether the second tasing was objectively reasonable, *id*. at 18.

Stair filed a second petition for rehearing or rehearing en banc, which the court of appeals denied. Pet. App. 49. Judge Colloton, joined by Judge Loken, dissented from the denial of rehearing en banc. *Id*. According to the dissent, the panel opinion "cited no comparable decision involving application of a taser against a non-compliant subject who threatened use of force against a police officer" or a holding "that a subject's 'momentary post-tasered position on the ground' requires an officer to consider it 'a clearly punctuated interim of compliance.'" Pet. App. 53.

REASONS FOR DENYING THE PETITION

Rather than analyzing "each use of force" in a sequence "as subject to a separate constitutional inquiry," Petitioner believes that the court of appeals should have lumped them together for collective consideration. *See* Pet. App. 14. But this Court has already rejected that view, explaining that the Fourth Amendment reasonableness analysis must be "conducted separately for each search or seizure that is alleged to be unconstitutional." *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1547 (2017).

Consistent with *Mendez*, every court of appeals considers uses of force in a sequence individually, in Taser cases and non-Taser cases alike. No circuit applies the novel "lumping" approach that Petitioner favors. There is no split, and Petitioner does not—and could not—claim one.

The Jacksonville Police Department itself evaluated each tasing individually—and disciplined Stair accordingly. The court of appeals' routine decision to consider uses of force individually does not present any legal question that warrants this Court's review.

The petition therefore boils down to Petitioner's factbound disagreement with the outcome below. But his entire argument turns on the false premise that Jackson was "actively combative" for summary judgment purposes. *See* Pet. 9, 10; *see also id.* at 11, 18. On the contrary, Jackson did not demonstrate continued resistance at the time of the second tasing, as both the court of appeals and the police department concluded after reviewing the video. In light of these findings, of course—and at minimum—Jackson's resistance or non-resistance presents a genuine factual dispute. And clearly established law prohibits tasing a non-resisting, non-fleeing, non-threatening civilian. Qualified immunity therefore does not shield Stair from liability for the second tasing.

I. The Court of Appeals' Routine Analysis Followed This Court's Precedent and Involves No Division of Authority.

This Court has rejected Petitioner's view that uses of force in a sequence should be lumped together into a single analysis. On the contrary, the Fourth Amendment reasonableness analysis must be "conducted separately for each search or seizure that is alleged to be unconstitutional." *Cty. of Los Angeles, Calif. v. Mendez*, 137 S. Ct. 1539, 1547 (2017). Petitioner vaguely gestures at a divergence of authority but wisely does not—and could not—seriously claim a circuit split. In any event, courts are

in lockstep on this settled issue. Every circuit rejects Petitioner's proposal to merge a series of seizures into a single event. The Eighth Circuit's separate analysis of each tasing therefore reflects an ordinary and unremarkable application of this Court's precedent.

1. Rather than lumping successive uses of force together, every circuit analyzes them discretely, just at the Eighth Circuit did here.[4] As Petitioner himself

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[4]*See, e.g., McGrath v. Tavares*, 757 F.3d 20, 28–29 (1st Cir. 2014) (separately analyzing shots fired before and after a fleeing suspect ran his car into a wall); *Tracy v. Freshwater,* 623 F.3d 90, 95–100 (2d Cir. 2010) (separately analyzing each use of force used to detain a suspect); *Soto v. Gaudett*, 862 F.3d 148, 158–62 (2d Cir. 2017) (separately analyzing each use of force); *Williams v. City of York, Pennsylvania*, 967 F.3d 252, 259–60 (3d Cir. 2020) (same); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009) (separately analyzing force used before and after handcuffing); *Deville v. Marcantel*, 567 F.3d 156, 167–69 (5th Cir. 2009) (separately analyzing an officer's use of force in breaking a suspect's window and the officer's subsequent use of force in applying handcuffs); *Russo v. City of Cincinnati,* 953 F.2d 1036, 1044–45 (6th Cir. 1992) (separately analyzing the initial use of Taser, subsequent use of Taser, and use of deadly force); *Brown v. Weber*, 555 F. App'x 550, 554 (6th Cir. 2014) (considering second and third Taser discharges separately); *Dockery v. Blackburn,* 911 F.3d 458, 467–68 (7th Cir. 2018) (holding that segmented analysis was proper in a case involving an officer's multiple deployments of a Taser within a timespan of less than one minute); *Greathouse v. Couch*, 433 F. App'x 370, 372 (6th Cir. 2011) ("We apply a 'segmented approach' to excessive-force claims, in which we 'carve up' the events surrounding the challenged police action and evaluate the reasonableness of the force by looking only at the moments immediately preceding the officer's use of force."); *Abbott v. Sangamon Cty., Ill.*, 705 F.3d 706, 729–30 (7th Cir. 2013) (separately analyzing Taser deployments and finding that "[t]he totality of the circumstances, when viewed in a light favorable to [the plaintiff], demonstrates that [the] second application of the taser could be determined by a jury to have been unreasonable");

concedes, courts "routinely . . . assess each activation" of a Taser individually. Pet. 9. Indeed so.

2. The two cases that Petitioner believes deviate from the ordinary approach, *Yates v. Terry*, 817 F.3d 877 (4th Cir. 2016), and *Martin v. Malhoyt*, 830 F.2d 237 (D.C. Cir. 1987), *see* Pet. 15-16, predate this Court's clear statement in *Mendez* that the reasonableness analysis must be "conducted separately for each search or seizure that is alleged to be unconstitutional." *Mendez*, 137 S. Ct. at 1547. Tellingly, Petitioner fails to cite any post-*Mendez* authority in support of his position.

The Fourth and D.C. Circuits, like every other circuit, separately analyze uses of force in a sequence. *See Waterman v. Batton*, 393 F.3d 471, 481 (4th Cir. 2005) (stating that "force justified at the beginning of an encounter is not justified even seconds later if the justification for the initial force has been eliminated"); *Streater v. Wilson*, 565 F. App'x 208, 211 (4th Cir. 2014) (separately analyzing an officer's four shots and stating that a court may "separately consider non-continuous uses of force during a single incident to determine if all were constitutionally reasonable"); *Rogala v. District of Columbia*, 161 F.3d 44, 54 (D.C.

Blankenhorn v. Cty. of Orange, 485 F.3d 463, 478–80 (9th Cir. 2007) (separately analyzing officers' gang tackle, hobble restraints, and punches); *Emmett v. Armstrong*, 973 F.3d 1127, 1136–37 (10th Cir. 2020) (analyzing separately an officer's tasing a suspect from the officer's tackling the suspect); *Piazza v. Jefferson Cty., Alabama*, 923 F.3d 947, 954 (11th Cir. 2019) (separately analyzing an officer's two uses of a Taser and concluding that the officer "crossed the constitutional line"); *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009) ("[T]hough the initial use of force (a single Taser shock) may have been justified, [] repeated tasering . . . was grossly disproportionate to any threat posed.").

Cir. 1998) (individually analyzing each use of force in a sequence).

In any event, *Yates* and *Martin* do not depart from the approach of considering successive uses of force individually. In *Yates*, the Fourth Circuit reversed a lower court's grant of qualified immunity to an officer who deployed his Taser three times against a traffic violation suspect who was compliant and demonstrated no resistance to the officer. 817 F.3d at 885–86. The court found that the use of force against the plaintiff, who was law-abiding throughout the interaction, was never reasonable—not initially, nor in the subsequent two tasings. *Id.* at 886. *Yates* explicitly contemplates, and distinguishes, a scenario more like the present facts—where the use of force may have initially been appropriate but, because of changed circumstances, stops being reasonable. *Id.* at 887 (discussing *Meyers v. Baltimore Cty.*, 713 F.3d 723, 735 (4th Cir. 2013) (finding that although the initial Taser uses were justified, after "the suspect fell to the ground, was no longer armed, and was secured by several officers who sat on his back[,]" the additional Taser applications were "unnecessary, gratuitous, and disproportionate")). *Yates* merely represents a case where the court's initial assessment that the use of force was not objectively reasonable applied equally to all three tasings. *See* 817 F.3d at 885 ("This is not a case where the initial use of force was justifiable because the suspect had a weapon or was acting erratically, and the continued use of such force was unlawful because the threat was eliminated.").

In *Martin*, the D.C. Circuit analyzed an officer's uses of force when he slammed a driver's leg into a car door, then proceeded to grab him, push him against a

vehicle, and aggressively handcuff him. 830 F.2d at 240. The court's analysis focused on the use of force in the sequence that appeared closest to the constitutional line: "Slamming the car door on Martin's leg causes us to pause, for that action appears malicious." *Id.* at 262. The court considered that action individually and ultimately found it justified: "Even the door slamming, given the apparent need for instant action, does not appear to be an extraordinary response." *Id.* Having found the most egregious use of force in the sequence reasonable, the Court did not explicitly analyze the officer's other uses of force. *See id*. There was little need to dwell on the less-concerning uses of force because even the most questionable use of force passed constitutional muster.

II. Lumping Uses of Force Together Defies Precedent and Logic.

1. Petitioner misunderstands *Graham*'s "totality of the circumstances" analysis. That test requires a court to consider all of the circumstances accompanying a given use of force. It does not authorize, much less require, courts to lump multiple uses of force together.

In *Graham v. Connor*, 490 U.S. 386 (1989), the Court analyzed the circumstances just before an officer started using force during an investigatory stop. *See id.* at 396. Thus, a "totality of the circumstances" analysis looks to all the circumstances that pertained just before a given use of force. *See id. Mendez* removed any possible ambiguity on this point, stating that courts must conduct *Graham*'s inquiry "separately for each search or seizure that is alleged to be unconstitutional." *See Cty. of Los Angeles, Calif.*

v. Mendez, 137 S. Ct. 1539, 1547 (2017). Thus, the courts of appeal routinely consider the totality of circumstances obtaining before each use of force in a sequence.[5]

At bottom, Petitioner wants to replace *Graham*'s "totality of the circumstances" analysis with a less precise "totality of the force" analysis in which a court lumps multiple uses of force together and considers the general reasonableness of the entire agglomeration. That approach would pose dangers for officers and civilians alike. If a civilian initially resisted but then fully complied, an officer would not have to stop using force at that point—he could keep going until some ill-defined point when the total amount of force became unreasonable compared to the initial level of resistance.

That outcome would upend the settled, universally-recognized rule that police must not use force on non-resisting, subdued civilians.[6] Disturbing

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[5] *See, e.g.*, *McGrath v. Tavares*, 757 F.3d 20, 28–29 (1st Cir. 2014); *Tracy v. Freshwater,* 623 F.3d 90, 97–100 (2d Cir. 2010); *Williams v. City of York, Pennsylvania*, 967 F.3d 252, 259–60 (3d Cir. 2020); *Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005); *Peterson v. City of Fort Worth, Tex.*, 588 F.3d 838, 847 (5th Cir. 2009); *Russo v. City of Cincinnati,* 953 F.2d 1036, 1044–45 (6th Cir.1992); *Dockery v. Blackburn,* 911 F.3d 458, 467–68 (7th Cir. 2018); *Blankenhorn v. City of Orange*, 485 F.3d 463, 478 (9th Cir. 2007); *Emmett v. Armstrong*, 973 F.3d 1127, 1136–37 (10th Cir. 2020): *Oliver v. Fiorino*, 586 F.3d 898, 907 (11th Cir. 2009).

[6] *See Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 607 (6th Cir. 2006); *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2d Cir. 2018); *Yates v. Terry*, 817 F.3d 877, 887 (4th Cir. 2016); *Joseph on behalf of Estate of Joseph v. Bartlett*, No. 19-30014, 2020 WL 6817823, at *11 (5th Cir. Nov. 20, 2020); *Henderson v. Munn*, 439 F.3d 497, 502–03 (8th Cir. 2006); *Parker v. Gerrish*, 547 F.3d 1, 11 (1st Cir. 2008); *McCowan v. Morales*, 945 F.3d 1276, 1289

consequences could follow. There are reasons officers cannot hold down the Taser trigger and electrocute a person continuously. It would undermine the rationale for limiting the electric bursts in the first place if the officer were permitted to just keep pressing the trigger in rapid succession without a separate justification for each electrocution. In addition, incentives to comply with officers would decline: a civilian resisting an officer would have less reason to stop if the officer could keep hurting him either way.

2. Fortunately, the Jacksonville Police Department follows this logic and sensibly requires a justification for each use of force. That is why officers like Stair must sign an acknowledgement that "[Taser] users should use the lowest number of [Taser] exposures that are objectively reasonable to accomplish lawful objectives and should reassess the subject's behaviors, reactions, and resistance level before initiating *or continuing* the exposure." Supp. App. 32 (emphasis added). It is why Jacksonville police officers like Stair must learn to "[u]se the least number of [Taser] discharges to accomplish lawful objectives" and should not "[k]eep pulling the trigger until the subject submits." Supp. App. 25. And it is why the department analyzed each use of force individually and concluded that "[t]he second cycle was not a reasonable use of force." Dkt. No. 33-2 at 1 (citing *Graham v. Connor*, 490 U.S. 386 (1989)).

The police department had the good sense to require that each use of force be justified and to discipline Stair for his gratuitous and unreasonable

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(10th Cir. 2019); *Fils v. City of Aventura*, 647 F.3d 1272, 1289 (11th Cir. 2011).

second tasing of Jackson. That commonsense decision to discipline a rogue officer dovetails perfectly with the settled law of this Court. The Eighth Circuit's routine consideration of individual uses of force in a sequence does not warrant this Court's review.

III. The Court of Appeals Properly Denied Qualified Immunity For Stair's Second Tasing of Jackson.

The petition does not even present a meaningful factbound question. Stair's attempt to claim qualified immunity turns entirely on a false factual premise that he repeats several times—Jackson, he posits, was "actively combative." *See* Pet. 9, 10; *see also id.* at 11, 18. On the contrary, Jackson did not demonstrate continued resistance at the time of the second tasing, as both the court of appeals and the police department concluded after reviewing the video. In light of these findings, it borders on absurd to suggest that every rational juror would have to find Jackson "actively combative" for summary judgment purposes. Jackson's resistance or non-resistance presents a genuine factual dispute—at minimum.

Qualified immunity therefore does not shield Stair from liability for the second tasing. Clearly established law prohibits using force against a non-resisting, non-fleeing, non-threatening civilian.

A. For Summary Judgment Purposes, Jackson Posed No Threat and Was Not Resisting When Stair Tased Him A Second Time.

A reasonable juror could find that Jackson was not resisting or threatening anyone at the time of the second tasing. Video footage of the incident shows just

that: Jackson was on the ground and several feet away from the nearest officer, neither resisting nor posing an immediate threat to the officers present. *See* Pet. App. 12. Qualified immunity does not change the way courts approach the facts on summary judgment, *Tolan v. Cotton*, 572 U.S. 650, 656 (2014); *Taylor v. Riojas*, No. 19-1261, 2020 WL 6385693, at *1 n.1 (U.S. Nov. 2020), and here a genuine factual dispute exists as to whether Jackson showed resistance or posed a threat when Stair shocked him a second time.

To find otherwise, the Court would need to conclude that the findings of experienced officers at the Jacksonville Police Department were so irrational that no reasonable juror could agree with them. The department's internal review found that at the time of the second tasing, "[Jackson] took no action that could be perceived as preparing to continue the assault or disable the TASER leads." Aplt. App. 2, 65, 122; ECF No. 33-2 at 1–2.

The Eighth Circuit also viewed the video and reached the same conclusion as the police department's disciplinary process: "[O]nce Officer Stair deployed his Taser, Jackson was reduced to the ground, unable to resist arrest or flee." Pet. App. 15. The court of appeals rejected Stair's argument that Jackson was attempting to "kick his legs out and turn his body as if to confront the officers again." Pet. App. 12. On the contrary, the court found that the video footage showed that Jackson "was on his back, writhing on the ground." *Id*. From this supine position, "several feet away from the nearest officer," Jackson was plainly "unable to pose a threat[.]" *Id*.

Reasonable jurors quite obviously *could find* that that Jackson was not resisting or threatening anyone

when Stair tased him a second time. After all, both experienced police supervisors and the court of appeals *did find* as much. At minimum, then, a genuine factual dispute exists, and the Court must assume for summary judgment purposes that Jackson was not resisting or posing a threat when Stair tased him a second time.

B. Clearly Established Law Prohibits Force Against A Non-Resisting, Non-Fleeing, Non-Threatening Civilian.

Because a reasonable juror could find that Jackson was neither resisting nor posing a threat at the time of the second Tasing, and because there is no suggestion whatsoever that he attempted to flee, the Eighth Circuit correctly denied Stair qualified immunity. To reach this conclusion, the court of appeals did not apply general rules pertaining to use of force. Instead, the court defined the right at issue with specificity, narrowly considering the use of force on a "non-threatening, non-fleeing, [and] non-resisting" civilian. Pet. App. 15. Of course, the court did not need to identify a case "directly on point" to defeat qualified immunity, a rule this Court has underscored many times. *See Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (per curiam) (stating that "a case directly on point" is not necessary for a right to be clearly established").[7]

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[7] *See also Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) ("We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." (quoting *Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011))); *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (same); *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

The Eighth Circuit has clearly held that use of force—and specifically, use of a Taser—is unjustified on a non-resisting, non-threatening, non-fleeing civilian. In *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009), the Eighth Circuit ruled that it "was unlawful to Taser a nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety." *Id.* at 499. The *Brown* court found it "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." *Id.* (reasoning that the suspect's acts—refusing to hang up a 911 call—did not constitute a realistic threat). *See also Johnson v. McCarver*, 942 F.3d 405, 412 (8th Cir. 2019) (explaining that *Brown* clearly established that it is "unreasonable under the Fourth Amendment to apply a taser to a 'nonviolent, suspected misdemeanant who was not fleeing or resisting arrest, [and] who posed little to no threat to anyone's safety'" (quoting *Brown*, 574 F.3d at 499)).

Similarly, in *Shekleton v. Eichenberger,* 677 F.3d 361 (8th Cir. 2012), the Eighth Circuit held that clearly established law forbade an officer to deploy his Taser against a "nonviolent, nonfleeing misdemeanant" who could not place his arms behind his back to be handcuffed. *Id.* at 365, 367. *See id.* at 367.

In *Shannon v. Koehler*, 616 F.3d 855 (8th Cir. 2010), the court of appeals held that more than de minimis force amounted to excessive force against a drunk and belligerent suspect who was not suspected of a serious crime, was not resisting arrest, and posed

no danger to the officer or others. *Id.* at 862–63 (citing *Brown*, 574 F.3d at 499).

In *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012), the court of appeals found an officer used excessive force where he performed a "leg sweep" against a disorderly conduct suspect. *Id.* at 871–72. Noting that the suspect "was not actively resisting arrest, and was not attempting to flee[,]" the court of appeals also found that, although the suspect had lifted her hands above her head, she was 10-15 feet from law enforcement and did not pose a threat. *Id.* at 871. The court denied the officer qualified immunity, stating that "the contours of the right at issue were sufficiently clear to inform a reasonable officer [that] it was unlawful for him to . . . throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee." *Id.* at 873 (citing *Brown*, 574 F.3d at 499). *See also Blazek v. City of Iowa City*, 761 F.3d 920, 925 (8th Cir. 2014); *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009); *Gill v. Maciejewski*, 546 F.3d 557, 562 (8th Cir. 2008).

In light of these decisions, the Eighth Circuit correctly found that "there was sufficient case law to establish that a misdemeanor suspect in Jackson's position at the time of the second tasing—non-threatening, non-fleeing, non-resisting—had a clearly established right to be free from excessive force." Pet. App. 15. The court of appeals' correct disposition of this factbound issue does not require this Court's review.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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