No. 20-202

IN THE

Supreme Court of the United States

ROBERT MASSIE,

Petitioner,

v.

BASILEA MENA,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do this Court's and the Ninth Circuit's precedents clearly establish that Basilea Mena had a right against being thrust face first into a tree during an arrest for a minor misdemeanor offense when she, at most, only passively resisted?

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INTRODUCTION

Officer Robert Massie and two other police officers intervened when they saw a couple walking in a wide street median and arguing with each other. Massie claims that he was concerned Respondent Basilea Mena had been drinking alcohol underage (she had reached legal drinking age) or that there may have been domestic violence between the couple (there was not). When Mena hesitated in showing Officer Massie her identification, opening her wallet, but then closing it to ask why he demanded identification, he decided to arrest her. But it was not enough to simply take her into custody. Instead, Massie turned her around, handcuffed her with another officer's assistance, and pushed her face-first into a tree, causing lacerations and abrasions on her face and shoulders.

The petition pays lip service to the settled rule that on Massie's motion for summary judgment, the court had to take the facts in the light most favorable to the non-movant Mena. But then the petition spins a tale unmoored from that standard, complete with doomsday predictions that police officers will never be able to effectuate an arrest again. This is consistent with Officer Massie's inability in the courts below to hew to the facts taken in the light most favorable to the non-movant, Basilea Mena.

When taking the facts in the light most favorable to Mena, as required, a police officer thrust a compliant arrestee's face and upper body into a tree, thereby injuring her. This Court and the Ninth Circuit already had ruled in published opinions that an officer could not impose non-trivial force on a compliant and non-violent arrestee. That clearly establishes a right that already should be clearly

established in any event for its obviousness: a non-violent and, at most, passively resisting arrestee has a right against an officer thrusting her face into a hard surface. Thus, in an unpublished disposition, the panel easily dispatched this appeal, affirming the district court's correct ruling that Officer Massie had not established an entitlement to qualified immunity. That correct ruling, unremarkable in its simple application of precedent, does not warrant review by this Court.

COUNTERSTATEMENT

A. Officers approach Mena and her boyfriend as they stand in a road median.

On an evening in June 2016, Mena and her boyfriend, Jacob Tellez, decided to play pool at a local bar. Pet. App. 15a. At the bar, Mena and Tellez shared two small pitchers of beer over the course of nearly two hours. *Id.*; ER100.[1] After leaving the bar, the couple spent about another hour sitting on a bench outside. ECF No. 31 (Pl.'s Stmn't of Facts) ¶ 3. Around midnight, they began walking toward Tellez's apartment. ER94.

As they were walking, Tellez saw a text message on Mena's phone. ECF No. 31 (Pl.'s Stmn't of Facts) ¶ 4. Although the message was from Mena's sister, Tellez did not recognize the number and he became jealous, believing that the message might have been from another man. *Id.* Tellez and Mena began to

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[1] "ER" refers to the Excerpts of Record filed in the Ninth Circuit in *Mena* v. *Massie*, No. 19-15214, Doc. 13-1 (9th Cir. June 5, 2019); "ECF" refers to documents filed in the United States District Court for the District of Nevada via the Electronic Case Filings system in *Mena* v. *Massie*, No. 4:17-cv-00368 (D. Ariz.).

argue with raised voices. Pet. App. 15a. As Tellez crossed the street, he stopped in the median and Mena quickly caught up to him. *Id.*, ER94. Their argument eventually drew the attention of Sergeant Lauren Pettey, Officer Christopher Little, and Massie, of the Tucson Police Department, who were parked in their squad cars in a nearby parking lot. Pet. App. 15a. The officers activated their emergency lights and drove toward Tellez and Mena. *Id.*

B. Officer Massie uses excessive force against Mena.

When the officers arrived on the scene, Tellez "chose to sit down because [he] know[s] cops" and wished not to provoke an altercation. ER44–45, 94, 106. The officers then ordered Mena to produce her identification. Pet. App. 15a. The officers never asked Mena for her name nor did Mena refuse to provide her name. ER105; ECF No. 29-3 (Massie Dep.) at 36:20–25, 37:4–16. As she began to open her wallet, she asked the officers "what she and her boyfriend did wrong." ER5. When the officers refused to answer her, she closed her wallet without presenting her identification. *Id.* 3–4. Massie admits that an individual may question an officer's investigation, ECF 29-3 (Massie Dep.) at 18:2–12, and that an officer has the responsibility to answer these inquiries, *Id.* at 18:13–17. Massie further concedes that, under Arizona law, Mena "d[id] not have to provide the identification." *Id.* at 36:23; *see also id.* at 37:8–11.

According to Mena, Officer Massie—without warning—then grabbed and wrenched her around to handcuff her, causing Mena's arm to naturally jerk. Pet. App. 16a, ER103. Officer Little assisted with the arrest. ECF No. 31-1, Exh. 5 (Little Dep.) at 22:6-8.

One handcuff pinched Massie's hand as he closed it, and he immediately shoved Mena's face and shoulder against the rough bark of a palm tree. Pet. App. 16a. Officer Massie admits Mena did not assault him. Pet. App. 16a, 53. This all occurred within three minutes of arriving on scene. ER103. At the time of the incident, Mena stood five-feet and five-inches tall and weighed 120 pounds. Pet. App. 18a. Massie stood six feet and two inches tall and weighed 225 pounds. *Id.* Little was six feet tall and weighed 205 pounds. ECF No. 31-1, Exh. 5 (Little Dep.) at 9:18-20.

Mena's face and shoulder were gashed as a result of her contact with the palm tree and she bled from her forehead, cheek, nose and shoulder. Pet. App. 16a, 40–41. Mena sought medical treatment after the arrest and has residual scarring on her shoulders and face. ECF No. 31 (Pl.'s Stmnt of Facts) ¶¶ 31–32. Moreover, she has suffered from anxiety, stomach pain, nausea, and depression resulting from her injuries and arrest. *Id.* ¶ 32.

C. Mena sues Officer Massie for violating her Fourth Amendment rights.

In June 2017, Mena filed this suit against Officer Massie under 42 U.S.C. § 1983, alleging that she was seized in violation of the Fourth Amendment, and that Massie used excessive force during her arrest. ER135–36. Massie moved for summary judgment, claiming that he was entitled to qualified immunity. ECF No. 28 (Def.'s Mot. Summ. J.) at 1, 8. The district court granted Massie's motion regarding Mena's claims of illegal seizure and false arrest. Pet. App. 18a. The district court denied Massie's motion for summary judgement for Mena's excessive force claim, concluding that a genuine dispute of material fact

precluded summary judgment based on qualified immunity. Pet. App. 19a. noting that clearly established law prohibited Officer Massie's conduct, the district court denied his motion for reconsideration regarding Mena's excessive force claim. Pet. App. 11a.

Massie filed an interlocutory appeal to the Ninth Circuit under the collateral order doctrine. Pet App. 1a. In an unpublished disposition after oral argument, the Ninth Circuit affirmed. Pet. App. 3a. The court defined the clearly established right here as a right to be free from an officer inflicting

> more than de minimis amounts of pain and injury against an arrestee where the crime is a non-violent misdemeanor and the arrestee (1) was not a threat to the officers or anyone else, (2) was not a flight risk, (3) did not resist (or at most passively resisted) being handcuffed, and (4) was not warned that the officer was going to use violent force before it was applied.

Pet App. 3a. The court ruled that, under the facts taken in the light most favorable to Mena, the district court correctly denied summary judgment. *Id*. Massie petitioned for rehearing *en banc*, and not a single judge requested a vote on whether to rehear the appeal. Pet. App. 22a.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT DID NOT ERR.

Massie does not assert a conflict with other circuits or any other precedential issue, nor can he—this decision is unpublished and relies on settled Ninth Circuit case law that has not been subject to

controversy or other indicia of conflict or confusion. Rather, Massie apparently asserts that this Court should grant the writ with the goal of error correction. See Pet. 16. But putting aside the Court's rule stating that simple error correction rarely is an appropriate ground for granting a petition, S. Ct. R. 10, Massie's premise is false—there is no error here.

Clearly established Ninth Circuit precedent has long condemned an officer's use of "significant force against a suspect who was suspected of a minor crime, posed no apparent threat to officer safety, and could be found not to have resisted arrest." *Young* v. *Cty. of Los Angeles*, 655 F.3d 1156, 1168 (9th Cir. 2011). Relying on *Graham* v. *Connor*, 490 U.S. 386, 397 (1989) and its predecessors, the Ninth Circuit, in 2001, clearly articulated it is unreasonable for an officer to use non-trivial force when every *Graham* factor favors the individual. *Blankenhorn* v. *City of Orange*, 485 F.3d 463, 478-79 (9th Cir. 2007). Those factors include (1) "the severity of the crime at issue," (2) "whether the suspect pose[d] an immediate threat to the safety of the officers or others," and (3) whether the suspect was "actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Accordingly, any reasonable officer would know "that force is only justified when there is a need for force." *Blankenhorn*, 485 F.3d at 481. No reasonable officer would think force is justified because he is angry he pinched his own wrist in a handcuff.

Even if the court had determined that Mena passively resisted arrest—although under her Mena's binding version of the record, she did not resist at all— "[t]he right to be free from the application of non-trivial force for engaging in mere passive resistance

was clearly established prior" to Massie's actions. *Gravelet-Blondin* v. *Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) (noting that the Ninth Circuit has "held that 'the law regarding a police officer's use of force against a passive individual was sufficiently clear' in 1997 to put officers on notice that such force was excessive" (quoting *Headwaters Forest Def.* v. *Cty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002)).

Massie tries to evade this plain statement of law by mischaracterizing the *Emmons* v. *City of Escondido* line of cases. AOB22–23. There, the Ninth Circuit ruled that officers did not enjoy qualified immunity because Emmons was passively resisting the officers who used force on him. *Emmons* v. *City of Escondido*, 716 F. App'x 724, 726 (9th Cir. 2018) (*citing Gravelet-Blondin* noting that Emmons was not belligerent with officers). This Court vacated, ruling that that that the Ninth Circuit "made no effort to explain how that case law prohibited [the officer's] actions." *City of Escondido* v. *Emmons*, 139 S. Ct. 500, 503–04 (2019). On remand, the Ninth Circuit recognized that, far from rejecting Ninth Circuit precedent concerning passive resistance, this Court "concluded implicitly that [Emmons's] actions involved more than passive resistance" which is why there was no case "so precisely on point." *Emmons* v. *City of Escondido*, 921 F.3d 1172, 1175 (9th Cir. 2019) (noting that "[o]therwise, the Court *would not* have vacated our decision in the face of our citation to *Gravelet-Blondin*") (emphasis added). The Court did not purport to overturn its own prior rulings establishing that a precedent involving the exact same factual scenario is not required to defeat qualified immunity.

The law was clear the night of Mena's arrest and remains so now: the Fourth Amendment prohibits using non-trivial force on a non-violent passive resister, and particularly on a non-violent detainee who is not resisting at all. The facts, as Mena presents them, prove no force was necessary: she was unarmed; she did not attempt to flee; she posed no threat to anyone's safety; she was only purportedly suspected of (but *did not* commit) a misdemeanor; Massie did not warn her he planned to use force; and, because she was already handcuffed, Massie did not need to use any force to restrain her. ER16–19. Massie spends five pages of his petition attempting to engineer new facts and refusing to accept that he relies on facts and inferences that are in dispute. Pet. 34-39. But each of his quibbles takes the facts and inferences in the light most favorable to himself.

First, Massie asserts that his ignorance of *any* crime committed by Mena excuses his choice to shove her face into a tree. Pet. 35. According to Massie, the Ninth Circuit was wrong to consider Mena an arrestee who was arrested for a non-violent misdemeanor because "[p]rior to Massie's decision to use force to detain Mena, the officers had not yet determined what, if any, crimes had been committed." Pet. 35. While that may be true—and a jury can resolve that dispute—it does not absolve Massie.[2] It further inculpates him. That an officer, without *any* evidence dubs a scene "a potential domestic violence crime" does not somehow imbue him with authority to batter arrestees, particularly when he asserts that he only

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[2] Sergeant Pettey testified in her deposition that Mena was arrested because she refused to identify herself. ECF No. 31-1, Exh. 3 (Pettey Dep.) at 23:18-20.

wanted to "separate the parties to facilitate . . . an investigation."

Second, Massie attempts to create danger by asserting, without citation to the record, that they were on a large, "busy" street in the middle of the night. Mena does not agree that the street was busy, nor does Mena agree that the median was narrow. Photographs indicate that the median was as wide as two traffic lanes, ER113, and they also indicate a lack of traffic (which is unsurprising late on a Wednesday night), See ER35-41. The lack of traffic is most evident in the picture of Officer Massie, which shows the street past the next stop light without a single car on the road. ER35. In any event, the speculative concern that a "drunk or inattentive driver" would jump the curb and hit them cannot possibly justify the violence Massie inflicted on Mena, and it is a risk that is equally significant (not significant at all, really) on any sidewalk. Nor does a concern that a scuffle could cause a person to fall into (non-existent) traffic or that a person might run into the (non-existent) traffic justification to *escalate* things by spinning Mena around, handcuffing her, and pushing her into a tree. Common sense dictates that such actions greatly increase the risk that someone might fall or run into the street.

Third, Massie disputes the Ninth Circuit's recognition that Mena, at most, passively resisted arrest. The testimony Massie relies on shows that when Massie grabbed Mena and spun her around, the motion jerked her body and arm, causing the cuffs to pinch Massie. Pet. 38-39, see also ER 17, 107. This is not resisting arrest at all, and it suggests that Massie thrust Mena forward into that tree as a reaction to having hurt himself with his own handcuffs.

A reasonable officer would have known in the moment that he used excessive force because the law gave him "fair warning" that his actions were "a textbook violation of [Mena's] Fourth Amendment rights." *See Young*, 655 F.3d at 1170 (holding that using force on a docile person suspected of a misdemeanor posing no threat to public safety violates the Fourth Amendment). He thrust an arrestee face first into a tree when she was not reasonably suspected of violent crime, was not a threat to officer safety, and had not resisted arrest. And the fact that Massie cannot accept the facts and inferences taken in the light most reasonable to Mena and challenge the ruling based on those facts is further proof that the district court and Ninth Circuit did not err.

II. THIS CASE DOES NOT PRESENT A QUESTION OF EXCEPTIONAL IMPORTANCE.

This case does not present a controversy on the level of specificity at which a right must be defined to be "clearly established" because the Ninth Circuit defined the right here at a granular level. This Court has previously explained that "the contours of a right [must be] sufficiently clear that every reasonable official would have understood that what he is doing violates that right," *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 741 (2011), as "the unlawfulness must be apparent" "in light of the pre-existing law." *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987). This Court "does not require a case directly on point . . . but existing precedent must have placed the statutory or constitutional question beyond debate." *White* v. *Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix* v. *Luna*, 577 U.S. 7, 12 (2015) (brackets omitted). This Court has also reiterated that "'clearly established

law' should not be defined at a high level of generality.'" *Id.* at 552 (quoting *al-Kidd*, 563 U.S. at 742). Yet, "[o]f course, general statements of the law are not inherently incapable of giving fair and clear warning to officers." *Id.* (quoting *United States* v. *Lanier*, 520 U.S. 259, 271 (1997)).

The continuing tension between requiring "existing precedent" to place the "question beyond debate" and having "general statements of the law" give a "fair and clear warning" has produced vast differences in the circuits' approaches. All of the circuits rely on this Court's precedents when beginning their "clearly established law" analysis. However, they continue to apply their own developed standards based on differing interpretations of these cases.

This case is not an appropriate vehicle to address the Court's lack of guidance regarding the appropriate level of generality at which to define a right because even the most restrictive circuits would recognize that Massie violated Mena's clearly established right against excessive force here. The Ninth Circuit went to an incredible level of specificity and this does not present a case on the margins. Specifically, the Ninth Circuit defined the right as a right to be free from an officer inflicting

> more than de minimis amounts of pain and injury against an arrestee where the crime is a non-violent misdemeanor and the arrestee (1) was not a threat to the officers or anyone else, (2) was not a flight risk, (3) did not resist (or at most passively resisted) being handcuffed, and (4) was not warned that the officer was going to use violent force before it was applied.

Pet App. 3a. That is an incredibly low level of generality that rules out any discretion.

Massie asserts that there is no case factually on-point that possibly could have put him on notice that driving an already-handcuffed non-violent arrestee's face into a tree is excessive force, but this Court repeatedly has stated that although courts must not "define clearly established law at a high level of generality," they also need not find "a case directly on point." *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 590 (2018) (internal quotation marks and citations omitted). If that statement has any meaning, it must apply when the applicable courts have clearly defined the bounds of force as the Ninth Circuit described here, but there are no cases specifically involving pushing an arrestee's face into a palm tree in particular.

Any factual distinction between the cases the Ninth Circuit cites and this case lack legal signify-cance. Thus, the cases certainly were enough to put Massie on notice that his actions amounted to excessive force. Massie's primary distinction is that three of the four cases the Ninth Circuit relied on involved "bystanders," Pet. 23-25, as opposed to people involved in a "'volatile situation,'" Pet. 25. But the facts here, as agreed by both parties, establish that there was nothing volatile about the situation where Massie arrested Mena. At the very least, it was not volatile under the facts taken in the light most favorable to Mena. The most Massie asserts is that officers speculated that there was "potential" domestic violence involved. Pet. 25. He even acknowledges that, at the time Massie handcuffed Mena and thrust her face-first into a tree, "the officers had not yet determined what, if any, crimes had been committed."

Pet. 35. Neither officer saw any violence, and neither officer experienced any violence. Indeed, Tellez sat down and was completely passive. ER44–45, 94, 106. And Mena also offered no indicia of potential violence or volatility. For the purposes of determining whether more than trivial force was needed—whether the officers were in any danger—they were exactly the same as bystanders.

As Massie acknowledges, *Young* did not involve a bystander. Pet. 26. To distinguish *Young*, the petition tautologically states that, purportedly unlike *Young*, "[t]his case does not involve such a minimal failure to obey in a relatively safe, calm incident location; such a lack of threat to officers or the public; or such an intermediate level of force." *Id*. That simply is not true when taking the facts in the light most favorable to Mena, or even when simply relying on the agreed-upon facts. This case involves a minimal failure to obey and *unlawful* command—refusing to provide identification. It involves a relatively safe, calm incident location—a wide median of a desolate street where the parties were calm when officers arrived. There was no threat to officers or the public. And smashing a person's face into a tree is a non-trivial level of force, as established by the bruising, abrasions, and lacerations on Mena's face and shoulders.

Massie further attempts to distinguish *Young* by referring to the Ninth Circuit's statement that the officer could have simply handcuffed the victim and arrested him. Pet. 26. But that is true here as well. Massie could have simply handcuffed Mena, which would have been overdoing it under the circumstances, but not necessarily a constitutional violation. Massie went much farther than that. Thus, the only way to distinguish *Young* is to assert the fiction that

simple handcuffing "is exactly the lower level of force Massie used here." Pet. 26.

Massie's assertion that he used "the most basic, routine, lowest possible level of force he could to enforce his arrest" is simply untrue under the facts taken in the light most favorable to Mena (and even the facts taken in the light most favorable to Massie).[3] The lowest possible level of force he could have used was none at all. As the district court recognized, there is at least a question of fact as to whether Massie could have told Mena to turn around to be handcuffed. Pet. App. 19a. And to the extent force was required, he could have settled for just handcuffing Mena, instead of shoving her face first into a tree. There are many other ways he could have handled an arrestee whose greatest level of lack of cooperation was asking why the officer wanted her identification, which, under Arizona law, she was under no duty to provide.

Massie's assertion, without citation, that officers regularly shove arrestees' faces into hard surfaces

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[3] Massie also attempts to minimize his actions by repeatedly referring to the medical records noted "superficial" injuries. Pet 10, 29, 33. But the pictures of her injuries indicate they were still painful, and given the situation, they were wholly unnecessary. ER 40-41. In any event, excessive force claims are not judged by the amount of injury. Rather, they are judged by "the nature of the force—specifically, whether it was nontrivial and 'was applied . . . maliciously and sadistically to cause harm." *Wilkins* v. *Gaddy*, 559 U.S. 34, 37 (2010) (per curiam). Indeed, gunshot wounds can be deemed medically superficial. See, e.g., *Shirley* v. *Dittmann*, No. 14-CV-1346, 2018 U.S. Dist. LEXIS 33094 at *21 (E.D. Wisc. March 1, 2018); *Lynch* v. *Bitter*, No. 13-cv-01439-JD, 2015 U.S. Dist. LEXIS 131716 at *10 (N.D. Cal. Sept. 29, 2015). And had Massie shot Mena, there would be no question it was excessive force, even if he only shot her in a way that resulted in superficial wounds.

without warning when they do not pose any threat to the officer or others is plain false.[4] Pet. 17 ("This is also the basic level of force that the overwhelming majority of officers will apply in the overwhelming majority of their cases as they carry out their day-to-day police work."). Thus, his assertion that the Ninth Circuit's decision here will burden police officers and subject them to baseless suits is similarly false. Indeed, if "routine arrests," Pet. 20, in Tucson often involve shoving non-violent, non-resisting arrestee's faces into hard surfaces, resulting in gashes and scars on the face and arms, then that suggests the problem is not with potential liability, but rather a lack of accountability. Unlike Officer Massie, Mena does not paint the entire Tucson police department with such a broad brush of malice. This was an unusual arrest, given the force applied when compared with the circumstances precipitating arrest.

Under the facts taken in the light most favorable to Mena, *no* force beyond handcuffing was reasonable, and it is at least debatable whether handcuffing was reasonable. At bottom, Massie quibbles with the Ninth Circuit "using its own incorrect version of the 'facts,' which were not supported by the record." Pet.

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[4] Massie asserts that the Ninth Circuit inserted a warning requirement before using force. Pet 27-28, but that mischaracterizes the holding. Consistent with this Court's requirement that the right at issue be narrowly defined, the Ninth Circuit added lack of a warning to the defined right and further narrowed it. Pet. App. 3. Thus, a warning was not a require-ment—it was a path to absolution Massie did not take. Ultimately, given Mena's failure to do anything violent, it likely still would have violated her right against excessive force if Massie told her "give me your ID, or I will slam your face into a tree." But given the lack of adequate provocation, the lack of a warning further establishes how unreasonable Massie's conduct was.

14. But the Ninth Circuit correctly recognized that it does not get to ignore the facts hewing in Mena's favor, as Massie does in his petition. Nor does the Ninth Circuit (or the District Court) get to credit Massie's view of the facts when deciding Massie's motion for summary judgment. Massie's inability to adhere to the facts in the light most favorable to Mena in his petition only underscores that Massie is not entitled to summary judgment, the Ninth Circuit did not err, and the petition should be denied. It is thus no surprise that the panel in the Ninth Circuit admonished Massie's waste of judicial resources. See Pet. 18. This is a case where the law is settled and the facts are not. It should go to trial so that a jury can determine the truth.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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