

No. 19A

IN THE SUPREME COURT OF THE UNITED STATES

MELANIE KELSAY,
Applicant,

v.

MATT ERNST,
Respondent.

**APPLICATION FOR AN EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI**

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October 30, 2019

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To the Honorable Neil M. Gorsuch, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Eighth Circuit:

Pursuant to this Court's Rules 13.5, 22, and 30.3, Applicant Melanie Kelsay requests a 30-day extension of time to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case to December 11, 2019.

As discussed herein, this case involves exceptionally important questions of federal law concerning qualified immunity. Applicant requests this extension because Counsel of Record David M. Shapiro has several proximate briefing deadlines and other obligations requires additional time to research the factual record and to conduct the level of analysis that aids this Court in determining whether to grant certiorari.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Eighth Circuit issued its opinion on August 13, 2019. *See Kelsay v. Ernst*, 933 F.3d 975 (8th Cir. Aug. 13 2019) (en banc) (attached hereto at Attachment A). The time for filing a petition would thus expire on November 11, 2019 absent an extension. Consistent with Rule 13.5, this application has been filed at least 10 days before that date. This Court has jurisdiction over the case under 28 U.S.C. § 1254(1).

2. This case arises from an encounter in the small town of Wymore, Nebraska between Petitioner Melanie Kelsay and local law enforcement officers. Respondent Matt Ernst, a Gage County Sheriff's Deputy, arrived outside a pool complex, where Ms. Kelsay had been swimming with her family. Kelsay's older daughter was near the pool exit doors yelling at a female patron whom the daughter assumed had contacted the police. Kelsay started to walk toward her daughter, but Ernst ran up behind Kelsay, grabbed her arm, and told her to "get back here." In response to Deputy Ernst grabbing Kelsay's arm and commanding her to "get back here," Kelsay "stopped, turned around, and . . . told him, someone is talking shit to my kid, I want to know what's going on." *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting).

3. At that time, Deputy Ernst "let go" of Kelsay's arm. Deputy Ernst said nothing in response to Kelsay's explanation. Because Deputy Ernst "didn't say anything" to Kelsay in response, she "turned around and started walking back." Nevertheless, Deputy Ernst "ran up behind [Kelsay] and he grabbed [her] and

slammed [her] to the ground.” The maneuver—“like, a bear hug”—lifted Kelsay “off the ground,” knocked her unconscious, and broke her collarbone. *Id.* at 986.

4. Kelsay brought suit against Ernst and others under 42 U.S.C. 1983. As to Kelsay’s Fourth Amendment excessive force claim as to Ernst, the district court denied Ernst’s motion for summary judgment based on qualified immunity. Viewing the facts in the light most favorable to Kelsay, the district court explicitly concluded that at the time Ernst slammed Kelsay to the ground, she “was walking away from police, and was not in a position to threaten witnesses or law enforcement.” *Kelsay v. Ernst*, No. 4:15-CV-3077, 2017 WL 5953112, at *4 (D. Neb. May 19, 2017).

5. Ernst noticed an interlocutory appeal to the United States Court of Appeals for the Eighth Circuit. *Kelsay v. Ernst*, 905 F.3d 1081, 1084 (8th Cir. Sept. 27, 2018). In a divided decision accompanied by three separate opinions, the panel reversed the district court as to Ernst, finding him entitled to qualified immunity as a matter of law. Judge Beam concurred “advisedly.” *Id.* at 1085 (Beam, J., concurring). He concluded that “the slamming of [Kelsay] to the ground by the deputy with force sufficient to fracture her shoulder was uncalled for given the nature of the encounter underway.” *Id.* at 1085-86. Chief Judge Smith dissented. While recognizing that police have a right to use “some” degree of force to effectuate a lawful arrest, the panel dissent found it “obvious” that “a blind body slam of a comparatively slightly built and nonviolent misdemeanant unreasonably increased the probability of injury . . . [and] [t]he amount of force applied was unreasonable.” *Id.* at 1086 (Smith, C.J., dissenting). The Chief Judge concluded that a “reasonable officer on the scene would

have known” that Ernst’s use of force was excessive in these circumstances. *Id.* at 1087.

6. The Eighth Circuit granted rehearing en banc, and split 10-4 in favor of reversal. The majority held that Ernst was entitled to qualified immunity. Chief Judge Smith dissented, joined by Judges Kelly, Erickson, and Grasz, Chief Judge Smith reasoned that the law was sufficiently clear “to have put a reasonable officer on notice that the use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates that individual’s right to be free from excessive force.” *Kelsay*, 933 F.3d at 982 (Smith, C.J., dissenting).

7. Judge Grasz also wrote a separate dissent from the en banc decision, arguing that the court should have decided whether a constitutional violation occurred before proceeding to the “clearly established law” prong of the qualified immunity analysis. *Id.* at 987 (Grasz, J., dissenting).

8. Applicant intends to file a petition for certiorari asking this Court to resolve important federal questions, including whether qualified immunity shields a police officer from liability when he slams to the ground an unarmed individual who poses no threat to police or anyone else. The circuits are divided on this question. *See Ciolino v. Gikas*, 861 F.3d 296 (1st Cir. 2017); *Westfall v. Luna*, 903 F.3d 534 (5th Cir. 2018); *McCaig v. Raber*, 515 F. Appx 551, 552-53 (6th Cir. 2013) (unpublished); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1282 (10th Cir. 2007). Moreover, the split results from a broader analytical inconsistency—whether a defendant can establish an entitlement to qualified immunity by showing minute factual differences between

the case presently being litigated and an earlier case where the relevant circuit found a constitutional violation.

9. The case also concerns the question whether qualified immunity should be narrowed or reconsidered. In recent years, a growing chorus of jurists and scholars have registered their “disquiet over the kudzu-like creep of the modern [qualified] immunity regime,” noting that it “smacks of unqualified impunity.” *Zadeh v. Robinson*, 902 F.3d 483, 498 (5th Cir. 2018) (Willett, J., concurring). Neither the text of 42 U.S.C. § 1983 nor the common law surrounding its enactment in 1871 recognized qualified immunity. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55-61 (2018); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1922-1929 (2010). Thus, Justice Thomas recently noted that qualified immunity analysis “is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act,” and has devolved into “freewheeling policy choice[s],” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring). Justice Sotomayor has written, “a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers.” *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

10. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. Counsel has had several other matters with proximate due dates:

- A reply brief in the U.S. Court of Appeals for the Second Circuit in *Hayes v. Dahkle*, No. 19-650, due September 12, 2019;
- A petition for rehearing en banc in the U.S. Court of Appeals for the Seventh Circuit in *Lockett v. Bonson*, No. 19-1012, due October 2, 2019;
- A reply brief in this Court in *Bell v. Mississippi*, No. 18-1500, filed October 11, 2019; and
- An opening brief in the U.S. Court of Appeals for the Seventh Circuit in *Reid v. Balota*, No. 19-1396, due October 31, 2019.

11. These litigation deadlines are in addition to counsel's teaching obligations as a full-time faculty member at Northwestern Pritzker School of Law. Counsel's final edits for an article forthcoming in the *Harvard Law Review* are due on October 30, 2019, and counsel is directing a full-day symposium of the *Northwestern University Law Review* to be held on November 8, 2019.

12. Applicant has not previously sought an extension of time from this Court.

13. For these reasons, Applicant respectfully requests that the time to file a petition for a writ of certiorari be extended to and including December 11, 2019.

Respectfully submitted,

s/ David M. Shapiro_____

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