No. 25-____

IN THE

Supreme Court of the United States

JACOB P. ZORN,

Petitioner,

v.

SHELA M. LINTON,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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September 11, 2025

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QUESTION PRESENTED

During a demonstration at the Vermont State House, State Police Sergeant Jacob Zorn used a common pain compliance technique called a wristlock to facilitate the removal of Shela Linton from the House chamber. Reviewing Ms. Linton's subsequent excessive force claim, the Second Circuit held that Sergeant Zorn's conduct was governed by *Amnesty America v. Town of West Hartford*, 361 F3.d 113 (2d Cir. 2004), where the court allowed an excessive force claim to proceed based on allegations that municipal police officers did things like kneeling on protesters' backs, stepping on their heads, pulling their hair, and slamming them face-first onto the ground and against walls.

The question presented is:

Whether the Second Circuit's qualified immunity analysis conflicts with this Court's repeated instruction that courts must define rights with specificity and look for close factual analogues in determining whether a Fourth Amendment right is clearly established.

PARTIES TO THE PROCEEDING

Petitioner is Vermont State Police Detective Sergeant Jacob Zorn, who was one of the defendants and the appellee below. The other defendants were Supervisor Paul White and Colonel Thomas L'Esperance of the Vermont State Police. Petitioner and the other defendants are individuals.

Respondent is Shela M. Linton, who was the plaintiff and appellant below. Respondent is also an individual.

RELATED PROCEEDINGS

There are no related proceedings.

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The Second Circuit panel's April 24, 2025 decision is reported at *Linton v. Zorn*, 135 F.4th 19 (2025), and is reproduced in the Appendix (App.). App. 1. The Second Circuit's order denying rehearing and rehearing *en banc* was issued on June 13, 2024. It is also reproduced in the Appendix. App. 77.

The district court's unreported memorandum opinion granting defendant's motion for summary judgment is reproduced in the Appendix. App. 40. It is also available at *Linton v. Zorn*, No. 5:18-cv-5, 2022 WL 17080324 (D. Vt. Oct. 19, 2022).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on April 24, 2025. It denied a timely petition for rehearing *en banc* on June 13, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE STATUTES AND CONSTITUTIONAL PROVISIONS

The claim at issue arises under the Fourth Amendment to the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Plaintiff's claim was brought pursuant to 42 U.S.C. § 1983 provides, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

STATEMENT OF THE CASE

I. Legal Background

Excessive force claims against law enforcement officers are examined under the Fourth Amendment's "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). When determining whether a particular use of force was "reasonable" under the Fourth Amendment, courts must pay "careful attention to the facts and circumstances of each particular case." *Id*. at 396.

An individual-capacity claim against a law enforcement officer must also overcome the officer's qualified immunity. Qualified immunity is a "demanding standard," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). For qualified immunity to apply, the right alleged to have been violated must be "'clearly established' . . . at the time of the officer's conduct" such that "every reasonable officer would understand" that the conduct is

unlawful. *Wesby*, 583 U.S. at 63. That is, "existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 577 U.S. 7, 11-12 (2015). This requirement ensures that officials are not exposed to the burdens of litigation or held liable for conduct without notice that the conduct is unlawful. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002).

II. Facts

On January 8, 2015, Ms. Linton took part in a demonstration inside the Vermont State House. She and others arrived at the State House around 12:00 p.m. and occupied the House chamber. App. 6. When the State House closed at 8:00 p.m., Vermont State Police officers advised the demonstrators that they were trespassing on state property and would be arrested if they remained. App. 6. Most of the demonstrators left, but Ms. Linton and 28 others stayed. App. 6. Ms. Linton and the other remaining demonstrators sat in a circle on the House chamber floor with their arms linked, singing and chanting. App. 6.

Officers then began arresting and removing the demonstrators who remained in the State House chamber. App. 7. Ms. Linton remained seated while sixteen of her fellow demonstrators were arrested and removed one-by-one. App. 7. Ms. Linton later testified that she did not intend to "voluntarily get up and walk out of the Statehouse" that night, and that she expected the police to physically remove her from the State House. App. 7.

Eventually, Sgt. Zorn and Trooper Seth Richardson approached Ms. Linton, who was seated in the circle with her arms linked to those of other demonstrators. App. 8. Ms. Linton remained seated and did not respond to the officers' presence. App. 8. The officers

tried to get Ms. Linton's attention, but she ignored the officers and instead continued to sing with her fellow demonstrators. App. 8. The officers then took hold of Ms. Linton's arms—Trooper Richardson on her right, Sgt. Zorn on her left—and, after a few tries, unlinked her arms from those of her fellow demonstrators. App. 9.

After Sgt. Zorn unlinked Ms. Linton's left arm, he attempted to gain control of the arm by forcing Ms. Linton's left hand down and to the rear. App. 9. With Ms. Linton's arm thus secured, Sgt. Zorn applied a compliance technique called a "rear wristlock" and instructed Ms. Linton several times to stand up. App. 10. Ms. Linton refused. App. 10. Sgt. Zorn asked Ms. Linton several more times to stand, but Ms. Linton continued to respond with verbal and nonverbal indications of refusal. App. 10. Ms. Linton then stated that Sgt. Zorn was hurting her. App. 10. Sgt. Zorn warned that he would use more pain compliance if Ms. Linton continued to refuse to stand, and asked her, "If we stop hurting you, will you stand up?" App. 10. Ms. Linton did not respond. App. 10.

After asking Ms. Linton once more to stand, Sgt. Zorn applied more pressure to Ms. Linton's wrist and tried to lift her up. App. 10. Ms. Linton contorted her face and began screaming. App. 10. Sgt. Zorn and Trooper Richardson then lifted Ms. Linton to her feet, whereupon she yelled out again. App. 10. Ms. Linton stood briefly, then gasped and fell to the floor. App. 11. After further efforts to persuade Ms. Linton to stay on her feet and leave the legislative chamber under her own power, Sgt. Zorn, Trooper Richardson, and a third officer carried her out. App. 11.

Outside the legislative chamber, Ms. Linton continued to argue with the officers, complaining that they had hurt her. App. 11. Ms. Linton then stood up with the

assistance of another officer and accepted an offer of medical treatment. App. 12.

Ms. Linton alleged that because of the incident, she suffered permanent damage to her left wrist and shoulder and has experienced post-traumatic stress disorder, depression, and anxiety. App. 12.

III. Proceedings Below

Ms. Linton sued Sgt. Zorn under 42 U.S.C. § 1983, alleging among other things that he used excessive force in violation of the Fourth Amendment. App. 12.

1. The district court initially rejected Sgt. Zorn's qualified immunity defense in a motion to dismiss at the pleadings stage. App. 40. But when Sgt. Zorn raised the qualified immunity defense again in support of his summary judgment motion, the Court reversed course, holding that Sgt. Zorn's alleged actions did not violate clearly established law. App. 70-72.

In its summary judgment decision, the district court rejected Ms. Linton's argument that the right at issue was clearly established by *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004). App. 72. In *Amnesty America*, the Second Circuit reversed a grant of summary judgment on a municipal excessive force claim. 361 F.3d. at 124. The plaintiffs there alleged that, over the course of two separate incidents, department officers: dragged protesters across the floor by their elbows; used choke holds; lifted protesters off the floor by their wrists; pinned a protestor's head to the floor with his foot; drove a knee into the small of one protester's back and "jerked his head back" by the hair; kicked a protester in the back "forcing her face down onto the pavement"; bent protesters' wrists, thumbs and fingers; caused second-degree burns on a protester's chest by dragging him

across the floor; and rammed a protester's head against the wall at high speed. *Id*. at 118, 120.

The district court held that *Amnesty America* did not clearly establish the contours of the Fourth Amendment right because it "established only that a use of force comparable to" the force at issue there was "sufficient to allow a reasonable factfinder to conclude that the force was excessive." App. 71. That holding fell "short of clearly establishing that such force used on a nonviolent suspect *was in fact* excessive." App. 71 (emphasis added). Surveying other decisions, the district court identified "no clearly established law [that] categorically prohibited Sgt. Zorn from using pain compliance to compel Ms. Linton to her feet." App. 65.

2. In a 2-1 decision, a panel of the Second Circuit reversed. App. 1-2.

a. First, the panel majority criticized the district court's reliance on *Amnesty America*'s procedural posture in declining to find that the case had clearly established a Fourth Amendment right. App. 22. The panel noted that "what matters" for purposes of qualified immunity "is whether we made clear what conduct . . . *would* be violative of the plaintiffs' constitutional rights." App. 22 (emphasis in original). And according to the panel majority *Amnesty America* "did that." App. 22.[1]

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[1] The *Amnesty America* court denied the police department's summary judgment motion, noted that "a reasonable jury could . . . find that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances," and sent the question of "the determination as to the objective reasonableness of the force used" to a jury. *Amnesty America*, 361 F.3d at 124.

The majority noted that the "relevant question" was "whether *Amnesty America* is on point vis-à-vis Sergeant Zorn's conduct." App. 24. But the court did not compare the facts of the two cases directly. Instead, it (1) characterized *Amnesty America* as having established a rule that "the gratuitous use of pain compliance techniques . . . on a protester who is passively resisting arrest constitutes excessive force," App. 30, and (2) determined that a jury would need to determine, among other things, whether Ms. Linton was "actively" resisting arrest and whether Sgt. Zorn's response was reasonable. App. 32. Thus, while the majority agreed that Ms. Linton was resisting arrest, and that Sgt. Zorn needed to use "*some* amount of force" to remove her from the State House, App. 30, it denied Sgt. Zorn summary judgment on qualified immunity.

b. Judge Cabranes concurred in part and dissented in part. App. 35. He agreed "that *Amnesty America* clearly established a right." App. 35. But he disagreed that Sgt. Zorn's conduct was covered by that case, remarking that the "facts in *Amnesty America* . . . do not at all resemble those before us." App. 36. Whereas *Amnesty America* was an "exceptional case[] with unusual circumstances where the techniques allegedly utilized by the officers did not constitute a proportionate response to the protesters," Ms. Linton's allegations evinced only a "routine arrest and removal" involving an officer who had "limited options at his disposal to safely navigate the situation." App. 37-38.

The dissent found significant the majority's conclusion that it was beyond dispute Ms. Linton was resisting arrest and therefore, that Sgt. Zorn had to use "*some* amount of force" to remove her. App. 38 (emphasis in original). Judge Cabranes also expressed concern that

in light of those circumstances, the majority's findings seemed inconsistent with this Court's admonition that the "Fourth Amendment allows for some mistakes on the part of government officials, giving them fair leeway for enforcing the law in the community's protection." App. 38 (citation modified). The dissent therefore would have concluded that Sgt. Zorn's conduct was not governed by *Amnesty America*. App. 38.

The dissent further lamented:

> We have lost our way if a police officer may be held liable for failing to understand a "rule" upon which *judges* disagree—with each other and with themselves. Such a result seems incompatible with the doctrine of qualified immunity, which limits liability to where "at the time of the officer's conduct, the law was 'sufficiently clear' that 'every reasonable official would [understand] that what he is doing' is unlawful."

App. 36 (quoting *Wesby*, 583 U.S. at 63).

REASONS FOR GRANTING THE PETITION

"Because of the importance of qualified immunity to society as a whole," this Court "often corrects lower courts when they wrongly subject individual officers to liability." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015). Specifically, the Court has periodically granted certiorari and summarily reversed lower courts' denials of qualified immunity to ensure that the courts of appeals remain faithful to the "clearly established" requirement. *E.g.*, *Rivas-Villegas v. Cortesluna*, 595 U.S. 1 (2021) (per curiam); *City of Escondido, Cal. v. Emmons*, 586 U.S. 38 (2019) (per curiam); *Kisela v. Hughes*, 584 U.S. 100 (2018)

(per curiam); *White v. Pauly*, 580 U.S. 73 (2017) (per curiam); *Mullenix v. Luna*, 577 U.S. 7 (2015) (per curiam); *Carroll v. Carman*, 574 U.S. 13 (2014) (per curiam).

The Court should do so again here, to correct what the dissent below characterized as "the growing daylight between [the Second] Circuit's holdings on qualified immunity and the clear teachings of" this Court. App. 35. The Second Circuit's analysis undermines the core purpose of the "clearly established" requirement, which is to ensure that officials "reasonably can anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984).

I. The Second Circuit's analysis undermines the core function of qualified immunity by failing to specifically define the right at issue.

The Court has stressed that a "clearly established right must be defined with specificity," and has "repeatedly told courts . . . not to define clearly established law at a high level of generality." *Emmons*, 586 U.S. at 42 (citations omitted). "Specificity is especially important in the Fourth Amendment context" because "[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case." *Id.* (citing *Kisela*, 584 U.S. at 104). Accordingly, a court's analysis should focus on identifying "precedent involving similar facts," which "can help move a case beyond the otherwise hazy border between excessive and acceptable force and thereby provide an officer notice that a specific use of force is unlawful." *Kisela*, 584 U.S. at 105 (citation modified).

As a result, "public officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." *Emmons*, 586 U.S. at 42 (citation modified). That is, an officer is immune from suit unless the plaintiff can "identify a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White*, 580 U.S. at 79. This requirement ensures that sovereign immunity serves its core aim: to protect public officials from the burdens of litigation and liability for conduct without notice that the conduct is unlawful. *Hope*, 536 U.S. at 739.

The Second Circuit's qualified immunity analysis departs from these controlling principles. The court did not meaningfully engage in a factual comparison of Sgt. Zorn's alleged conduct and prior precedent, as this court has instructed. Had the court done so, it would not have found the conduct at issue in *Amnesty America* factually analogous to Sgt. Zorn's.

In *Amnesty America*, a group of demonstrators at an abortion clinic alleged that over the course of two separate incidents, municipal police officers assaulted them while removing them from the premises. 361 F.3d at 118. Specifically, they alleged that officers violated the Fourth Amendment by, among other things:

> lifting and pulling plaintiffs . . . by pressing their wrists back against their forearms in a way that caused lasting damage; throwing [a plaintiff] face-down to the ground; dragging [a plaintiff] face-down by his legs, causing a second-degree burn on his chest; placing a knee on [a plaintiff's] neck in order to tighten his handcuffs while he was lying face-down; and ramming [a plaintiff's] head into a wall at a high speed.

Id. at 123. Reversing the district court's grant of summary judgment, the Second Circuit determined that plaintiffs' factual allegations were "sufficient to allow a reasonable factfinder to conclude that the force used was excessive." *Id.* at 124.

The panel majority also cited *Edrei v. Maguire*, 892 F.3d 525 (2018) for the proposition that *Amnesty America* "warned officers against gratuitously employing 'pain compliance techniques,' such as bending protesters' wrists, thumbs, and fingers backward." App. 24 (quoting *Edrei*, 892 F.3d at 541). Like *Amnesty America* itself, though, *Edrei* involved conduct that was far more unusual and severe than a simple wrist hold to move a noncompliant trespasser. There, protestors alleged that police officers attempted to disperse a crowd gathered outside on a public street—a far different setting than a state legislative chamber—by using "acoustic weapons developed for the U.S. military" that "send out sound at a dangerously high level" capable of causing pain or hearing damage. 892 F.3d at 529.

As the dissent below noted, the actions at issue in *Amnesty America* and *Edrei* "do not at all resemble" Sgt. Zorn's conduct here. App. 36. To be sure, *Amnesty America* involved the alleged use of a wristlock on a demonstrator, just as allegedly occurred here. *See* 361 F.3d. at 123. But *Amnesty America* contains no indication that the officers there did so after giving repeated warnings and progressing through lesser means of force, like Sgt. Zorn did. And in any event, the allegations in this case begin and end with Sgt. Zorn's measured use of a wristlock to compel compliance with his repeated instructions; the allegations of excessive force in *Amnesty America* barely begin there. *See id.* *Amnesty America* does not "squarely govern[]" the

"specific facts" here such that any reasonable official would have known that the use of a rear wristlock after repeated warnings *alone* violates the Fourth Amendment. *Emmons*, 586 U.S. at 42.

Indeed, at least one other circuit has held that conduct like Sgt. Zorn's is *not* excessive force. In *Forrester v. City of San Diego*, the Ninth Circuit held that "using pain compliance techniques to arrest . . . demonstrators" did not constitute excessive force. 25 F.3d 804, 807 (9th Cir. 1994). Like Sgt. Zorn, and unlike the defendant officers in *Amnesty America*, the defendants in *Forrester* "did not deliver physical blows," only "physical pressure administered on the demonstrators' limbs in increasing degrees, resulting in pain." *Id.* A reasonable officer reviewing both *Amnesty America* and *Forrester* would have even less reason to believe that (1) using a single compliance hold (2) after multiple warnings and attempts to use less force (3) to remove a resisting protester who (4) was trespassing in a state legislative chamber would violate the Fourth Amendment.[2]

To be sure, as the decision below held, *Amnesty America* and *Edrei* both give "fair warning that the prohibition on excessive force applies to protesters." *Edrei*, 892 F.3d at 542. Both cases also could be said to provide notice that, at least under some circumstances, the "gratuitous" use of "pain compliance techniques" may constitute excessive force. *Id*. at 541. But those rules are far too general to clearly establish the scope of the right at issue. The Court has made clear that

[2] It would be reasonable for a Vermont official to do so, because the Second Circuit has looked to out-of-circuit cases in determining whether a right is clearly established. *Cugini v. City of New York*, 941 F.3d 604, 615 (2d Cir. 2019).

"[i]t does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." *Kisela*, 584 U.S. at 105.

Yet that is precisely what the Second Circuit has done. It concluded that *Amnesty America* clearly established "that the gratuitous use of pain compliance techniques—such as a rear-wristlock—on a protestor who is passively resisting arrest constitutes excessive force," App. 24, and then sent the case to a jury to decide whether Sgt. Zorn's conduct offended that rule, App. 32. Simply substituting one adjective for another—force is "excessive" if it is "gratuitous"—does nothing to put the reasonable officer on notice. This Court has consistently rejected that style of reasoning in past qualified immunity cases. *See, e.g.*, *Emmons*, 586 U.S. at 43 (concluding that the "right to be free from the application of non-trivial force for engaging in mere passive resistance" was insufficiently specific for qualified immunity purposes). It should do so again here.

As Judge Cabranes noted, the sheer diversity of views among the majority, the dissent, and the district judge underscores just how opaque the ostensibly "clear" legal principles really are. *See* App. 36. Given those views, how could the Court conclude that the "constitution question [is] beyond debate"? *Mullenix*, 577 U.S. at 11-12. And if two experienced judges reviewing this case from the comfortable and omniscient perspective of chambers believed that Sgt. Zorn's use of force was reasonable, how can Sgt. Zorn be characterized as "plainly incompetent" or having "knowingly violate[d] the law" when making the same

determination in the heat of the moment? *Cf. Wesby*, 583 U.S. at 63 (2018).

II. *Amnesty America* did not squarely resolve any legal issues so cannot have clearly established any constitutional right.

The Court should also correct the Second Circuit's erroneous reasoning as to what types of judicial dispositions can clearly establish the scope of a constitutional right. Qualified immunity may be overcome only "where an officer acting under similar circumstances as [the defendant] was *held* to have" acted unlawfully. *White*, 580 U.S. at 79 (emphasis added). But *Amnesty America* did not hold that any of the defendant officers had violated any plaintiff's constitutional rights. Rather, *Amnesty America* reversed a grant of summary judgment due to a live factual dispute and then held that a jury *could* determine that the factual scenario outlined in that case was sufficiently unreasonable under the circumstances to constitute a Fourth Amendment violation. 361 F.3d at 124.

To be sure, it may be the case that a reversal of summary judgment can clearly establish a right for qualified immunity purposes if the court squarely resolves a legal issue defining the scope of a constitutional right. But where a court holds only that the plaintiff's allegations could be "sufficient to allow a reasonable factfinder to conclude that the force used was excessive," *Amnesty America*, 361 F.3d at 124, that is not enough to establish—let alone to *clearly* establish—that similar conduct *is* unlawful.[3] Therefore,

[3] Indeed, as the district court observed below, the jury in *Amnesty America* ultimately found that the defendants did *not* use excessive force against the plaintiffs. *See* Verdict Form,

Amnesty America establishes only that the use of force against protesters can, in some instances, violate the Fourth Amendment. This Court's precedents demand more before subjecting an officer to trial in an excessive force suit, and the Court should correct the Second Circuit's misunderstanding.

III. The Second Circuit's qualified immunity analysis threatens to disrupt day-to-day law enforcement operations.

The question presented is important, as the Second Circuit's qualified immunity analysis threatens to upset the "balance between vindication of constitutional rights and government officials' effective performance of their duties" that qualified immunity is designed to protect. *Reichle v. Howards*, 566 U.S. 658, 664 (2012). This Court has made clear that qualified immunity shields officers from suit unless the court "identif[ies] a case where an officer acting under similar circumstances" was "held to have violated the Fourth Amendment." *White*, 580 U.S. at 79.

The Second Circuit's analysis here vastly expands the universe of what circumstances may be considered "similar." What's more, the court's analysis is based on a single judicial determination that ostensibly similar facts *could* constitute excessive force. *See Amnesty America*, 361 F.3d at 124. Forcing officers to base critical public safety determinations on such vague guidelines would undermine the principle of fair notice at the heart of qualified immunity, *Hope*, 536 U.S. at 739, and would cause precisely the "excessive disruption of government" that this Court's qualified

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Amnesty Am. v. Town of W. Hartford, No. 2:92 cv 214 (PCD) (D. Conn. June 14, 2004), (ECF No. 167).

immunity doctrine seeks to avoid. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Indeed, the facts of this case make those practical implications all too clear. Facing a common-place situation, Sgt. Zorn responded with a common-place policing procedure. He offered multiple warnings to Ms. Linton and applied an escalating series of compliance techniques. App. 9-10. If an officer encountering such a "routine arrest and removal" must assess his conduct in light of "exceptional cases with unusual circumstances" to determine whether the law permits him to act, then we indeed "have lost our way." App. 37, App. 36.

This Court should help to correct course by granting the writ and summarily reversing the Second Circuit's decision.

CONCLUSION

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

Respectfully submitted,

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September 11, 2025

APPENDIX

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App. 1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 22-2954

SHELA M. LINTON,

Plaintiff–Appellant,

v.

JACOB P. ZORN, DETECTIVE,

Defendant–Appellee,

VERMONT STATE POLICE, PAUL WHITE, SUPERVISOR,
THOMAS L'ESPERANCE, COLONEL,

Defendants.

August Term, 2023

(Argued: October 25, 2023 Decided: April 24, 2025)

Before: CABRANES, SACK, AND PÉREZ, *Circuit Judges*.

In this police use-of-force case arising from a protest at the Vermont statehouse, Plaintiff-Appellant Shela M. Linton appeals from a judgment entered on October 19, 2022, in which the United States District Court of Vermont (Geoffrey W. Crawford, *Judge*) granted Defendant-Appellee Sergeant Jacob P. Zorn's motion for summary judgment. In relevant part, the district court granted Sergeant Zorn qualified immunity on Ms. Linton's Fourth Amendment excessive-force claim brought pursuant to 42 U.S.C. § 1983 because it

concluded that no clearly established law put Sergeant Zorn on notice that his actions may have violated Ms. Linton's rights. On appeal, Ms. Linton argues that (1) the district court erred when it decided that *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), did not clearly establish law applicable to the outcome of this case; and (2) the district court improperly failed to construe the facts in the light most favorable to Ms. Linton, the non-movant, and in so doing, wrongly resolved genuine disputes of material fact in favor of Sergeant Zorn. For the reasons set forth below, we agree, and therefore

VACATE the district court's judgment and REMAND for further proceedings consistent with this opinion.

Judge Cabranes concurs in part and dissents in part in a separate opinion.

KEEGAN STEPHAN, Beldock Levine & Hoffman, LLP, New York, NY (Eliza van Lennep, Langrock Sperry & Wool, LLP, Burlington, VT, *on the brief*), *for Plaintiff-Appellant Shela Linton;*

NEIL F.X. KELLY, Assistant Attorney General, *for* Charity R. Clark, Vermont Attorney General, *for Defendant-Appellee Sergeant Jacob Zorn.*

SACK, *Circuit Judge*:

Ms. Shela Linton attended a sit-in protest on January 8, 2015, at the Vermont statehouse (the "Statehouse"). She and approximately 200 other demonstrators were protesting what they thought to be the Vermont governor's failure to adequately support a movement toward universal healthcare. That evening at 8 p.m., when the Statehouse was scheduled to close, law enforcement officers advised

the remaining demonstrators that if they did not leave, they would be subject to arrest. Ms. Linton and some 28 other demonstrators nonetheless remained in the legislative chamber of the Statehouse, sitting in a circle on the floor with arms linked, singing songs that Ms. Linton characterized as expressive of their social justice ideals.

After delivering this warning to the remaining demonstrators, law enforcement officers began to arrest the demonstrators. Several videos that were filed in the district court contained remarkably clear footage of many of the arrests, including Ms. Linton's. Ms. Linton, who would later testify that she did not intend to leave the Statehouse voluntarily, remained seated while several of her fellow demonstrators were arrested. Some stood up and walked out voluntarily, escorted by law enforcement officers. Others were dragged or carried out by several officers. Only one of them complained of pain; he said it resulted from an officer fastening handcuffs too tightly.

Sergeant Jacob Zorn and Trooper Seth Richardson approached Ms. Linton. Sergeant Zorn asserts that he asked Ms. Linton to stand; she alleges that she heard no clear command. Nevertheless, Ms. Linton knew that the police would make her leave the Statehouse by physically removing her and witnessed multiple arrests before her own. Approximately five seconds after Sergeant Zorn asked Ms. Linton to stand, as indicated by videographic evidence, Trooper Richardson took hold of Ms. Linton's right arm and Sergeant Zorn of her left. Trooper Richardson tugged at Ms. Linton's right arm three times before successfully unlinking Ms. Linton's arm from the arm of the demonstrator to her right, gaining control over that arm. Sergeant Zorn attempted to unlink Ms. Linton's left arm from the

arm of the demonstrator to her left and applied pressure to that arm as part of his attempt to remove Ms. Linton from the Statehouse. At one point in doing so, and *after* unlinking Ms. Linton's left arm, Sergeant Zorn used a "rear wristlock"—a "pain compliance technique" in ejecting her from the Statehouse.

While Sergeant Zorn sought to remove Ms. Linton, she cried out in pain. Sergeant Zorn made repeated requests that Ms. Linton stand. Ms. Linton responded saying "I will not stand up." Sergeant Zorn stated, "I am not strong enough to pick you up, so please stand up." Ms. Linton shook her head side to side. Sergeant Zorn warned Ms. Linton that he would apply more pressure if she did not comply. She did not stand despite Sergeant Zorn's requests and orders; she asserts she could not do so because she was in too much pain, and any movement that Sergeant Zorn perceived as active resistance was an involuntary reflex to the force applied by Sergeant Zorn. Ms. Linton was eventually carried out of the Statehouse chamber by three officers. She continued to complain that she was in great pain. As a result of the events of the day, she suffered permanent damage to her left wrist and shoulder and alleges that she has consequently been diagnosed with post-traumatic stress disorder, depression, and anxiety, apparently resulting from these events.

Ms. Linton brought this action in the United States District Court for the District of Vermont alleging, in relevant part, that Sergeant Zorn, in his personal capacity, violated her Fourth Amendment rights when he used unreasonable excessive force to remove her from the Statehouse chamber. Sergeant Zorn moved for summary judgment based on his argument that he was entitled to qualified immunity with respect to his alleged excessive use of force. The district court agreed,

holding that there was no clearly established law that put Sergeant Zorn on notice that his conduct was unlawful, therefore rendering his actions as to Ms. Linton legally immune.

Ms. Linton now appeals this determination, arguing that the district court erred in concluding that no case law provided such sufficient notice to Sergeant Zorn. She also contends that the district court did not construe the facts of the case in the light most favorable to her as the non-movant, and in so doing made improper factual findings against her. The parties dispute the degree to which Ms. Linton was resisting arrest, whether the degree of force used by Sergeant Zorn was necessary and appropriate in response to the circumstances, and whether Sergeant Zorn acted in good faith when applying this force.

We conclude that our decision in *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004), did clearly establish law governing Sergeant Zorn's alleged behavior that is the subject of the case at bar, and that there exist genuine issues of material fact that must be resolved by a jury[1] prior to determining whether qualified immunity shields Sergeant Zorn from personal liability. For the reasons set forth in further detail below, we VACATE the district court's order granting Sergeant Zorn's motion for summary judgment and REMAND the matter for further proceedings consistent with this opinion.

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[1] Although we use the word "jury" throughout this opinion as shorthand when referring to findings of fact made or to be made by the district court, we recognize that a judge may properly act as a factfinder, as in a bench trial.

BACKGROUND

I. Factual History

On January 8, 2015, approximately 200 demonstrators, including Ms. Linton, attended a planned nonviolent protest at the Statehouse. The protest was in opposition to the Vermont governor's asserted failure to move forward with legislation that would ensure universal healthcare for all Vermonters. Ms. Linton encouraged community attendance in the days leading up to the protest. Many law enforcement officers were present at the Statehouse on the day of the protest, which coincided with the Vermont governor's inauguration ceremony.

Ms. Linton arrived at the Statehouse at around noon; she and all other demonstrators passed through Statehouse security checks, which ensured that they did not carry any weapons, and occupied the Statehouse legislative chamber. She testified that she did not intend to voluntarily walk out of the Statehouse chamber that day, describing the protest as a "sit-in." J. App'x at 152. Although Ms. Linton contends that she did not expect to be arrested at the start of the protest, she understood that she might be arrested or removed by law enforcement officers if she remained at the Statehouse once instructed to leave.

At approximately 8 p.m., law enforcement announced to the demonstrators that the Statehouse was closed, requested that they leave, and informed them that if they did not leave, they would be subject to arrest for trespassing. At the time, Ms. Linton and 28 other demonstrators sat in a circle on the Statehouse chamber floor, legs outstretched in front of them with arms linked at the elbows, "singing songs that expressed their social justice ideals." J. App'x at 132

¶ 4. Ms. Linton later testified in her deposition that, while at the time she decided she would not "voluntarily get up and walk out" of the sit-in, she expected that she would, at some point, "be asked to leave, and if [she] did not, [then she] would be lifted up in an appropriate way and physically be moved from the" Statehouse chamber floor by the police. J. App'x at 158–59.

Failing to eject the protestors from the Statehouse, the officers began to make arrests. They removed and arrested sixteen demonstrators of different genders and body types prior to approaching Ms. Linton, through techniques including placing the arms of protesters behind their backs, dragging the protesters by their wrists or arms, or lifting the protesters by their arms or armpits.[2] As noted above, there is video evidence in the record on appeal showing these arrests. They occurred anywhere between several seconds and several minutes apart. Officers tapped on some of the demonstrators' shoulders or spoke with them briefly prior to arresting them. Several demonstrators voluntarily stood up after officers approached them and walked out of the Statehouse chamber, escorted by officers who held one or both of their arms. Demonstrators who did not comply voluntarily were lifted and escorted, dragged, or carried out of the Statehouse chamber. According to Ms. Linton, those who were carried out of the Statehouse chamber were lifted with "[l]ike a scoop underneath the arms." J. App'x at 163. She asserts that officers did not use pain compliance techniques on any of the demon-

[2] Ms. Linton is a Black, 5'8" woman who weighed approximately 175 pounds at the time of her arrest. She had pre-existing knee and shoulder injuries; her knee injury made it necessary for her to use her arms to stand up from a prone or sitting position.

strators whose arrests she witnessed; she was present when only one demonstrator complained of discomfort because he felt his handcuffs were too tight.

Ms. Linton remained on the chamber floor in a partial circle facing inward with the demonstrators who had not yet been arrested. Her arms remained linked with the arms of demonstrators on either side of her, and, according to Sergeant Zorn's testimony, she continued to sing.[3] A state policeman, Trooper Seth Richardson, who participated in Ms. Linton's arrest, later stated in deposition testimony that he perceived the threat posed by the demonstrators at the time to be "[v]ery low." J. App'x at 220.

Sergeant Zorn, who was on special assignment at the Statehouse that day to help protect the governor's inauguration proceedings, approached Ms. Linton. He and Trooper Richardson stooped beside her, with Sergeant Zorn on Ms. Linton's left and Trooper Richardson on her right. Sergeant Zorn testified that he asked Ms. Linton to stand but she remained seated, continuing to sing. Video evidence of the protest and related arrests suggests that either Trooper Richardson or Sergeant Zorn said, "ma'am?" to Ms. Linton, but it is not otherwise clear from the videos of these events that were contained in the record on appeal what the officers said. *See* Video 2, 1:34. Ms. Linton stated that she did not receive a clear command from Sergeant Zorn at that juncture. Nevertheless, Ms. Linton knew that the police would make her leave the Statehouse

[3] The district court noted that the demonstrators, including Ms. Linton, sang "We Shall Not Be Moved," a song that had been utilized by civil rights activists most prominently in the civil rights movement. *See* David Spener, *We Shall Not Be Moved / No Nos Mover án: Biography of a Song of Struggle* 4–5 (2016) (describing the origins and popular usage of the song).

by physically removing her and witnessed multiple arrests before her own.

After approximately five seconds, as indicated by videographic evidence, Trooper Richardson took hold of Ms. Linton's right arm and Sergeant Zorn of her left. Trooper Richardson tugged at Ms. Linton's right arm three times before successfully unlinking Ms. Linton's arm from the arm of the demonstrator to her right, gaining control over that arm. Meanwhile, Sergeant Zorn attempted to gain control over Ms. Linton's left arm by using his hands to disconnect her left arm from the right arm of the demonstrator to her left. According to Sergeant Zorn, as summarized by his expert, Evan Eastman, at this point, Ms. Linton "tensed her arm, attempted to hug the person's arm to her right harder and pulled away." J. App'x at 112. Ms. Linton contends to the contrary that she neither tensed her arm nor tightened her links.

Sergeant Zorn then successfully unlinked Ms. Linton's left arm from the arm of the protestor to her left. Sergeant Zorn contends that Ms. Linton resisted his grip such that he "could not maintain control" of her arm. Dist. Ct. Dkt. 74, Ex. 3 at 11 7. Ms. Linton has said, to the contrary, that her "arm naturally returned back towards [her] body," and that Sergeant Zorn "had no trouble securing and maintaining control of [her] hand once [her] arm was unlinked" from the other protestor's arm. J. App'x at 145. Sergeant Zorn then "forced [Ms. Linton's left hand] down and to the rear" and placed her in a rear wristlock. Dist. Ct. Dkt. 74, Ex. 3 at 11 7. Ms. Linton cried out in pain, and Sergeant Zorn instructed her to stand up.

Ms. Linton did not stand up. She contends that she was in too much pain to do so. Sergeant Zorn then allegedly twisted Ms. Linton's arm behind her back;

Ms. Linton shouted, "don't twist my arm!" Video 3, 24:49–:52. Other demonstrators still present in the chamber shouted, "don't hurt her." *Id.* at 24:51–:56.

While maintaining her left arm behind her back, Sergeant Zorn then instructed Ms. Linton several times to stand up; Ms. Linton stated, "I will not stand up." Sergeant Zorn responded that "I am not strong enough to pick you up, so please stand up"; Ms. Linton shook her head "no." Sergeant Zorn continued to request that she stand up, and Ms. Linton replied that Sergeant Zorn was hurting her; in her complaint, she alleged that the pain she endured was equivalent to giving birth. Sergeant Zorn warned Ms. Linton that if she did not stand, he would use more pain compliance. He asked her, "If we stop hurting you, will you stand up?" Video 3, 25:13–:18. She did not respond. After asking her once more to stand, Sergeant Zorn applied more pressure and attempted to lift Ms. Linton up. She contorted her face and began to scream. According to Ms. Linton, Sergeant Zorn then told Ms. Linton that she should have called her legislator.[4] She allegedly perceived this statement as a threat.

Sergeant Zorn and Trooper Richardson lifted Ms. Linton. Ms. Linton contends that she was in "extreme pain" and yelled out accordingly. J. App'x at 137. Sergeant Zorn counters that Ms. Linton continued to struggle, while Ms. Linton contends that her arm moved involuntarily because of the pain. After he had lifted Ms. Linton to her feet, Sergeant Zorn instructed her to stop resisting. Ms. Linton replied that she was

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[4] When asked in his deposition "If I told you that Officer Zorn told [Ms. Linton] that she could have just called her legislators, what would you think about that?" Trooper Richardson responded, "That's accurate." J. App'x at 228:22–25.

not resisting. Sergeant Zorn told Ms. Linton to walk. Ms. Linton said that she was in pain; other demonstrators commented that Sergeant Zorn's actions were "not ok." Video 3, 25:38–:43. Ms. Linton then gasped and fell to the floor. She asserts that the pain caused her to fall involuntarily. After further expressions of pain from Ms. Linton and instructions from Sergeant Zorn to stand up and walk toward the chamber exit, Sergeant Zorn, Trooper Richardson, and a third officer lifted Ms. Linton by her arms and legs and carried her out of the Statehouse chamber.

The officers carried Ms. Linton toward a stairwell and asked her several times whether she would stand up. While officers held her limbs and stood over her, Ms. Linton shouted, "You guys hurt my arm! Get off me now! . . . I didn't do anything. Get off me. You broke my fucking arm!" *Id.* at 26:23–:32. The officers then lifted Ms. Linton and carried her toward the elevator, while she continued to tell the officers to "get off [of her]." *Id.* One officer suggested that she get up and walk downstairs to the exit, to which Ms. Linton responded, "You're not giving me that option, you're holding me upside down." *Id.* at 26:45–:49.

The officers set Ms. Linton on the floor and asked her whether she would like to stand. She breathed heavily, saying that she was in pain. "You need to wait. I'm hurt." She continued breathing heavily, and said, "You have no right to hurt me like this." *Id.* at 27:16–:36. An officer responded, "We asked you as nicely and as many times as we could." *Id.* at 27:36–:38. Ms. Linton replied, "No, you twisted my arm behind my back before you gave me any demands [sic]." *Id.* at 27:38–:42. Sergeant Zorn made repeated requests that Ms. Linton stand before his ultimate use of the pain compliance technique. Ms. Linton accepted the

assistance of another officer to stand up but reiterated that she could not use her left arm, exclaiming in pain when she was touched on her left side. Ms. Linton was helped to her feet and accepted an offer for medical attention. *Id.* at 27:44– 28:01.

Ms. Linton received first aid treatment at the Statehouse. She testified that following the demonstration she experienced "a period of physical pain and psychological symptoms" that were "so acute [that she] had difficulty seeking care." J. App'x at 147. She later sought medical care from her primary care physician, underwent physical therapy, took naturopathic medicines, and had her arm in a cast and a sling for four to five months.

Following the demonstration, Ms. Linton was diagnosed with acute post-traumatic stress disorder, major depression, and anxiety. She later testified that she "still experiences pain, stiffness, numbness, and other joint issues and dysfunction." *Id.* Her expert, Dr. Leonard Rudolf, completed an independent medical evaluation following the demonstration and concluded that Ms. Linton had suffered permanent injury to her wrist and shoulder as a result of the events of January 8.

Only two of the demonstrators who were arrested after Ms. Linton complained that the arresting officers caused them pain, including, in one case, by "grabb[ing] [his] arm and . . . twisting," and, in another, by "tr[ying] to break [her] wrist." Video 4, 1:19–:28, 3:26–4:02.

II. Procedural History

On January 5, 2018, Ms. Linton initiated the present suit in the United States District Court for the District of Vermont pursuant to 42 U.S.C. § 1983 against the Vermont State Police, then-Detective Zorn, retired

supervisor Paul White, and retired Colonel Thomas L'Esperance (collectively, the "Defendants"). The Defendants were named in their official capacities, and Sergeant Zorn was also named in his individual capacity. Ms. Linton alleged that Sergeant Zorn had violated her Fourth and Fourteenth Amendment rights by subjecting her to the unreasonable use of excessive force on account of her race.

The Defendants moved to dismiss the complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). On November 28, 2018, the district court (Geoffrey W. Crawford, *Judge*) granted the Defendants' motion as to Ms. Linton's claims against the Vermont State Police and the individual defendants in their official capacities. Order on Mot. to Dismiss, Dist. Ct. Dkt. 20 (Nov. 28, 2018). The district court denied the motion, however, as to Ms. Linton's claims against Sergeant Zorn in his personal capacity, reasoning that, taking all of Ms. Linton's well-pleaded allegations as true, she had stated plausible Fourth Amendment excessive force and Fourteenth Amendment equal protection claims brought pursuant to 42 U.S.C. § 1983. The district court further reasoned that Sergeant Zorn was not entitled to qualified immunity at this point in the proceedings because "*Amnesty America* [*v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004)] squarely governs this case, or at least supplied sufficient clarity or foreshadowing that Detective [now Sergeant] Zorn should have understood that his conduct (as portrayed in Plaintiff's allegations) was unlawful." J. App'x at 40.

On April 15, 2022, following discovery and submission of Mr. Eastman's[5] expert report, which opined that

[5] Mr. Eastman served as a law enforcement officer for 30 years. He was also an adjunct instructor at the Vermont Police Academy from 1998 to 2008. At the Police Academy, he provided non-lethal

Sergeant Zorn's use of force was reasonable, Sergeant Zorn moved for summary judgment on the grounds of qualified immunity. This time, the district court granted the motion as to both the equal protection and excessive force claims. *See Linton v. Zorn*, No. 5:18-cv-5, 2022 WL 17080324 (D. Vt. Oct. 19, 2022). With respect to equal protection, the court concluded that Ms. Linton had failed to produce sufficient evidence that the treatment she received was race-related to survive the motion for summary judgment. *Id.* at *16. As for the excessive force claim, the district court concluded that under the applicable test used to determine whether qualified immunity shields an official from personal liability, Sergeant Zorn had demonstrated that there was no clearly established law that put him on sufficient notice that the conduct of the sort he engaged in would violate Ms. Linton's Fourth Amendment rights. *Id.* at *14.

Ms. Linton appeals the district court's grant of summary judgment as to her Fourth Amendment excessive force claim only, asserting that Sergeant Zorn is not entitled to qualified immunity. She argues primarily that (1) the district court erred when it decided that *Amnesty America* did not clearly establish law applicable to the outcome of this case; and that (2) the district court improperly failed to construe the facts in the light most favorable to Ms. Linton, the non-movant, and in so doing, wrongly resolved genuine disputes of material fact in favor of Sergeant Zorn. For the following reasons, we agree and conclude that the district court did commit reversible error — Sergeant Zorn is not entitled to qualified immunity, at least at this stage of the proceedings because the appropriate

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use-of-force and baton training to Vermont law enforcement officers at the basic training level and instructor level.

fact-finder must make predicate factual findings before a determination of entitlement can be made.

DISCUSSION

I. Standard of Review

"We review *de novo* a district court's determination of qualified immunity insofar as it is a legal issue." *Vasquez v. Maloney*, 990 F.3d 232, 237 (2d Cir. 2021). "When considering qualified immunity at the summary judgment stage," as here, "courts must construe all evidence and draw all reasonable inferences in the non-moving party's favor." *Naumovski v. Norris*, 934 F.3d 200, 210 (2d Cir. 2019) (internal quotation marks and citation omitted). However, "[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." *Scott v. Harris*, 550 U.S. 372, 380 (2007). In short, courts should view "the facts in the light depicted by the videotape." *Id*. at 381. Inasmuch as this appeal stems from an order granting defendant's motion for summary judgment, the ordinary principles of summary judgment govern: "Summary judgment is appropriate only if 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Bey v. City of New York*, 999 F.3d 157, 164 (2d Cir. 2021) (quoting Fed. R. Civ. P. 56(a)). A genuine factual dispute exists, and summary judgment is therefore inappropriate, "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

II. Qualified Immunity Principles

Qualified immunity is an affirmative defense available to a person defending a suit brought under 42 U.S.C. § 1983, which shields public officials, including law enforcement officers, "from liability for civil damages [under that statute] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because qualified immunity is an affirmative defense, "[i]t is for the official to claim that his conduct was justified by an objectively reasonable belief that it was lawful." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In other words, "[i]t is incumbent upon the defendant to plead[] and adequately develop[] a qualified immunity defense." *Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007) (quoting *Blissett v. Coughlin*, 66 F.3d 531, 538 (2d Cir. 1995)).

In general, "[q]ualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The qualified immunity question is subject to a two-prong analysis to determine whether: (1) "the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right" and (2) "the right at issue was 'clearly established' at the time of the defendant's alleged misconduct." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194 (2001)).

III. Relevant Constitutional Law

"When a plaintiff alleges excessive force during an investigation or arrest," as Ms. Linton has here, "the federal right at issue is the Fourth Amendment right against unreasonable seizures." *Tolan v. Cotton*, 572

U.S. 650, 656 (2014) (per curiam). Whether an officer has violated that right "requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion.'" *Id.* (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). Courts must be "careful to evaluate the record from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2010) (internal quotation marks and citation omitted).

When "conducting that balancing" in the context of police conduct with respect to a plaintiff, we consider the following so-called *Graham* factors: "(1) the nature and severity of the crime leading to the arrest, (2) whether the suspect pose[d] an immediate threat to the safety of the officer or others, and (3) whether the suspect was actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Graham v. Connor*, 490 U.S. 386, 396 (1989)). We are also to consider the following so-called *Figueroa* factors: "[4] the need for the application of force, [5] the relationship between the need and the amount of force that was used, [6] the extent of the injury inflicted, and [7] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Figueroa v. Mazza*, 825 F.3d 89, 105 (2d Cir. 2016) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251–52 (2d Cir. 2001)). If this balancing exercise supports a conclusion that a reasonable jury could find that a defendant applied excessive force in a manner that was objectively unreasonable under the circumstances, after drawing inferences in the light most favorable to the plaintiff, the plaintiff has made out a constitutional violation for purposes of surviving the defendant's

motion for summary judgment. *See, e.g.*, *Tracy*, 623 F.3d at 98–99.

IV. Analysis

Of the two prongs of the qualified-immunity analysis — whether (1) the facts that the plaintiff has alleged or shown make out a violation of a constitutional right and (2) the right at issue was clearly established at the time of the challenged misconduct — "courts have discretion to decide which [] to tackle first." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). "But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment." *Tolan*, 572 U.S. at 656. Because the district court in the case at bar only considered the "clearly established" prong of the qualified immunity analysis in determining that Sergeant Zorn is entitled to qualified immunity, we review it first.

A. Amnesty America *Clearly Established the Relevant Right*

The "clearly established" prong of the qualified immunity defense requires that "officers are on notice that their conduct is unlawful" before they may be held personally liable for that conduct. *Hope v. Pelzer,* 536 U.S. 730, 739 (2002) (internal quotation marks and citation omitted). "A right is clearly established if the contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *McKinney v. City of Middletown*, 49 F.4th 730, 738 (2d Cir. 2022) (internal quotation marks and citation omitted). "This requires that controlling authority or a robust consensus of cases of persuasive authority have recognized the right at issue." *Id*. at 738–39 (internal quotation marks and citation omitted). A district court need not

determine that there is a case "directly on point to hold that a defendant's conduct violated a clearly established right," but "existing precedent must have placed the statutory or constitutional question beyond debate." *Id*. at 739 (quoting *White v. Pauly*, 580 U.S. 73, 79 (2017) (per curiam)) (internal quotation marks omitted). "This requires a high degree of specificity. . . . [C]ourts must not define clearly established law at a high level of generality . . . ." *District of Columbia v. Wesby*, 583 U.S. 48, 63–64 (2018) (internal quotation marks and citations omitted).

On appeal, Ms. Linton contends "that *Amnesty America* clearly established law for qualified immunity purposes." Appellant Br. at 30 n.8. She argues that the district court erred in concluding that *Amnesty America* "is silent as to the ['clearly established'] prong of the qualified immunity analysis." Reply Br. at 7 (quoting *Linton*, No. 5:18-cv-5, 2022 WL 17080324 at *14). The district court reasoned that *Amnesty America* was silent because (1) "[q]ualified immunity was not at issue in *Amnesty America*" inasmuch as there, the plaintiffs sued the town of West Hartford under *Monell v. Department of Social Services*, 436 U.S. 658 (1978),[6] rather than individual defendants in their personal capacities; and (2) "[t]he *Amnesty America* court did not resolve the Fourth Amendment issue because there were disputes of material fact." *Linton*, No. 5:18-cv-5, 2022 WL 17080324 at *14 (internal quotation marks and citation omitted). We agree with Ms. Linton's contrary view, however. Neither the fact

[6] In *Monell*, the Supreme Court held that local governments could be held liable for the unconstitutional actions of their employees under 42 U.S.C. § 1983 when the constitutional deprivation of the plaintiff arose from a governmental policy or custom. 436 U.S. at 690–91.

that *Amnesty America* did not concern qualified immunity nor that it involved disputes of material fact precludes a conclusion here that *Amnesty America* did clearly establish the relevant right.

In *Amnesty America*, anti-abortion protestors held two demonstrations at a women's health center in West Hartford, Connecticut. 361 F.3d at 118. Following the first demonstration, protestors gathered in the reception area of the clinic and "chained themselves together in order to block entry to the area in which medical services were provided." *Id.* When police attempted to remove the protestors, the protestors "employed 'passive resistance' techniques to impede their arrest, including going limp, refusing to identify themselves, and refusing to unlock the chains that they had used to bind themselves together." *Id.* The protestors did not dispute that the police needed to use some degree of force to remove them from the premises, but they alleged that the police had used more force than necessary, causing many of the protestors severe pain and lasting injuries. *Id.* at 118–19. Among the tactics alleged to have been used by the police included "throwing [one plaintiff] face-down to the ground, dragging [another plaintiff] face-down by his legs, causing a second-degree burn on his chest; placing a knee on [a third plaintiff]'s neck in order to tighten his handcuffs while he was lying face-down, ramming [that third plaintiff's] head into a wall at a high speed," and so-called "pain compliance techniques," including "pressing [the protestors'] wrists back against their forearms in a way that caused lasting damage." *Id.* at 119, 123.

Following allegations of similar excessive force employed by law enforcement at a second demonstration, several of the protestors brought suit against the

Town of West Hartford, alleging that the municipality was liable for the injuries inflicted by the use of excessive force by its police officers under *Monell*, *supra*, because it failed to adequately train and supervise those officers. This Court remanded the failure-to-supervise claim, holding in part that to decide that issue, a jury would be required to make a "determination as to the objective reasonableness of the force used." *Id.* at 124. We decided that the "[p]laintiffs' allegations [were] sufficient to create issues of fact as to the objective reasonableness of the degree of force used by the police officers." *Id.* at 123. But we observed that if plaintiffs' allegations were true, such conduct was "sufficient to allow a reasonable factfinder to conclude that the force used was excessive." *Id.* at 123–24 (citing *Robison v. Via*, 821 F.2d 913, 923–24 (2d Cir. 1987)). In other words, if a jury found that the officers engaged in the conduct the plaintiffs alleged they had against protestors who were only passively resisting, then those officers used excessive force. *Amnesty America* thus put officers on notice that engagement thereafter in such techniques under such conditions would violate an arrestee's Fourth Amendment rights.

As to the district court's decision here, a case need not involve qualified immunity to clearly establish that specific conduct is unconstitutional. When determining whether a right is "clearly established," the relevant question is whether engaging in that conduct would plainly violate a constitutional right. This Court has not required that for a right to be clearly established, a case must explicitly warn an officer that engaging in such conduct would deprive him of qualified immunity. We decline to impose such a requirement here; we have previously recognized "clearly established" rights from cases that did not

involve qualified immunity. In *Horn v. Stephenson*, for example, we held that "[i]t was clearly established [for qualified immunity purposes] . . . that police forensic examiners must disclose exculpatory information" or they will have violated their *Brady* obligations. 11 F.4th 163, 171 (2d Cir. 2021). It was clearly established, we explained, because *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992) —a § 1983 municipal liability case that did not concern qualified immunity— provided defendants with "fair warning that [their conduct] was unconstitutional." *Horn*, 11 F.4th at 171 (internal quotation marks and citation omitted).

Additionally, that our decision in *Amnesty America* was not a final decision as to a qualified immunity issue, but only a vacatur of a grant of summary judgment and a remand in light of the existence of genuine issues of material fact, does not bear on whether it "clearly established" a right. What matters is whether we made clear what conduct—irrespective of whether the particular defendant in that case engaged in it—*would* be violative of the plaintiff's constitutional rights. We did that in *Amnesty America*. And we have often held that cases in similar procedural postures clearly establish rights, independent of whether the defendant, on remand, was held to have violated that particular right. *See, e.g.*, *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (citing *Tracy*, 623 F.3d at 98–99, as a case that clearly established the relevant law despite its procedural posture); *Rogoz v. City of Hartford*, 796 F.3d 236, 250 (2d Cir. 2015) (citing, among other cases, *Robison*, 821 F.2d at 924, for the same despite its procedural posture); *Zahrey v. Coffey*, 221 F.3d 342, 355 (2d Cir. 2000) (citing *Ricciuti v. N.Y.C. Transit Authority*, 124 F.3d 123, 130 (2d Cir. 1997), for the same despite its procedural posture).

Tracy, *supra*, is instructive. There, we explained that "infliction of pepper spray . . . should not be used lightly or gratuitously against an arrestee who is complying with police commands or otherwise poses no immediate threat to the arresting officer." 623 F.3d at 98. We continued, employing language similar to that used in *Amnesty America*, that "a reasonable juror could find that [the defendant's conduct in the plaintiff's version of the events] constituted an unreasonable use of force." *Id*. at 98–99 ("Here, if a jury credited Tracy's version of the events . . . it might well conclude that the use of that pepper spray was unreasonable under the circumstances."). Because there existed genuine issues of material fact as to whether the plaintiff's version of the events was accurate, however, we vacated the district court's grant of summary judgment and remanded the case to allow the jury to determine whether it was. *Id.* at 104.

Despite *Tracy*'s procedural posture, we have consistently held that it clearly established that the use of gratuitous force, whether by pepper spray, taser, or similar significant force, against a non-resistant or handcuffed arrestee violates that arrestee's Fourth Amendment rights. *See, e.g.*, *Jones*, 963 F.3d at 226 ("It follows then that, after *Tracy*, any reasonable officer would understand that, because it violated clearly established law to use pepper spray against a non-resisting and non-threatening individual, the same would be true for the use of a taser."); *see also Lennox v. Miller*, 968 F.3d 150, 157 (2d Cir. 2020) ("On July 22, 2016, it was therefore clearly established by our Circuit caselaw that it is impermissible to use significant force against a restrained arrestee who is not actively resisting."); *Muschette ex rel. A.M. v. Gionfriddo*, 910 F.3d 65, 69 (2d Cir. 2018) ("It is clearly

established that officers may not use a taser against a compliant or non-threatening suspect.").

We likewise concluded that *Amnesty America* clearly established a relevant right in *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018). Although *Edrei* itself did not provide notice to Sergeant Zorn because we decided *Edrei* after Sergeant Zorn arrested Ms. Linton, "we have considered cases published after the conduct at issue that do not establish a right in the first instance, but rather address whether a right was clearly established by case authority *before* the time of such conduct." *Jones*, 963 F.3d at 227 (emphasis in original). And in *Edrei*, a case in which we determined that the prohibition of excessive force applies to protestors, we explained that *Amnesty America* "warned officers against gratuitously employing 'pain compliance techniques,' such as bending protestors' wrists, thumbs, and fingers backwards." *Edrei*, 892 F.3d at 541 (quoting *Amnesty Am.*, 361 F.3d at 119, 123–24). Consistent with our understanding in *Edrei*, therefore, we continue to read *Amnesty America* to provide government officials with the sort of notice required to satisfy the "clearly established" prong of the qualified immunity analysis.

Therefore, disagreeing with the district court's decision, we conclude that *Amnesty America* did clearly establish a right for qualified immunity purposes as Ms. Linton contends. Although the relevant question then becomes whether *Amnesty America* is on point vis-à-vis Sergeant Zorn's conduct, we conclude that *Amnesty America* did clearly establish that the gratuitous use of pain compliance techniques—such as a rear-wristlock—on a protestor who is passively resisting arrest constitutes excessive force and is therefore violative of that arrestee's Fourth Amendment

rights.[7] Police officers, including Sergeant Zorn, were or should have been on notice on January 8, 2015 that they could be held personally liable for such conduct.[8]

B. *Constitutional Violation*

Because the district court granted Sergeant Zorn's motion for summary judgment on the basis that the right allegedly violated was not clearly established, the district court did not fully consider the first prong of the qualified immunity analysis. *See Linton*, No. 5:18-cv-5, 2022 WL 17080324, at *9 ("The court need not decide that question here because, even assuming

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[7] We have also suggested that out-of-Circuit precedent puts police on notice that they "may violate clearly established law by *initiating* significant force against a suspect who is only passively resisting." *McKinney v. City of Middletown*, 49 F.4th 730, 742 (2d Cir. 2022) (citing *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1093 (9th Cir. 2013) ("The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established [at the time of the relevant conduct]."). "As a general rule, to determine whether a right is clearly established, we consider Supreme Court decisions, our own decisions, and decisions from other circuit courts." *Cugini v. City of New York*, 941 F.3d 604, 615 (2d Cir. 2019) (internal quotation marks and citation omitted).

[8] Ms. Linton also suggests that *Tracy*, *supra*, clearly establishes that the conduct she alleges Sergeant Zorn to have engaged in violated her Fourth Amendment rights. Although we have explained that *Tracy* did clearly establish that "an officer's significant use of force against an arrestee who was no longer resisting and who posed no threat to the safety of officers or others—whether such force was by pepper spray, taser, or any other similar use of significant force—violates the Fourth Amendment," we think *Amnesty America* clearly established the relevant right in identifying "the violative nature of [Sergeant Zorn's alleged] *particular* conduct . . . in light of the specific context of the case" before us. *Jones*, 963 F.3d at 226–27 (internal quotation marks and citation omitted).

that Sgt. Zorn violated Ms. Linton's Fourth Amendment right not to be subjected to excessive force during arrest, Sgt. Zorn is entitled to qualified immunity under the second prong for the reasons discussed below."). We consider that first prong here, however, because Sergeant Zorn is entitled to qualified immunity if Ms. Linton has not, at minimum, demonstrated that there exist genuine issues of material fact as to whether Sergeant Zorn utilized objectively unreasonable force in effecting her arrest.

In assessing whether Sergeant Zorn may have violated Ms. Linton's Fourth Amendment rights, we must examine whether the facts "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a constitutional right." *Saucier*, 533 U.S. at 201. We conclude that, prior to making this determination, a jury in the district court must resolve genuine issues of material fact. A grant of summary judgment is therefore inappropriate at this juncture. The resolution of these facts is material because if we are to credit Ms. Linton's version of the events, a reasonable juror could find that Sergeant Zorn's use of force—*i.e.,* his use of pain compliance techniques such as a rear wristlock—constituted an unreasonable use of force, consistent with the facts and our holding in *Amnesty America*.[9] We note, however, that a jury might alternatively

[9] Although the district court refrained here from opining on whether it could conclude, as a matter of law, that the force Sergeant Zorn used was reasonable under the circumstances, it later explained that "[o]n the issue of the objective reasonableness of the force used . . . *Amnesty America* suggests that the question might be one for a jury, not for a judge ruling on summary judgment." *Linton*, No. 5:18-cv-5, 2022 WL 17080324, at *14. We agree.

determine that Sergeant Zorn's use of force was reasonable under the circumstances, depending in large measure upon its resolution of these factual disputes.

As for the *Graham* and *Figueroa* factors,[10] the facts relevant to several of them are not in dispute: The crime for which Ms. Linton was arrested does not seem to be "particularly severe." *See Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 406 (D. Vt. 2009) (severity of unlawful trespass is "low"), *aff'd*, 400 F. App'x 592 (2d Cir. 2010) (summary order). Nor does the threat to safety posed by Ms. Linton and her fellow demonstrators appear to be particularly high. *See* J. App'x at 220 (deposition of Trooper Richardson stating that the level of safety threat was "[v]ery low"). The protestors had passed through security (and therefore must have been considered to be unarmed), did not significantly outnumber police, and are not accused of being volatile or violent. Finally, the record reflects, and neither party disputes, that Ms. Linton suffered permanent loss of motion in her left wrist and shoulder as a result of the incident.

The parties do dispute several facts material to our analysis of three of the remaining *Graham* and *Figueroa* factors, however. Ms. Linton contends that (1) she was, at worst, passively resisting arrest; (2) even if some degree of force was needed, Sergeant Zorn's use of force was not sufficiently related to that need; and (3) Sergeant Zorn did not apply the force in

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[10] The district court considered the *Graham* and *Figueroa* factors in analyzing the second prong of the qualified immunity analysis, and not the first. *See Linton*, No. 5:18-cv-5, 2022 WL 17080324, at *9–13.

good faith.[11] Sergeant Zorn counters that (1) Ms. Linton was actively resisting arrest; (2) his use of force was appropriate in light of the need for it; and (3) he acted in good faith.

As to the degree of resistance offered by Ms. Linton, Mr. Eastman defined "[p]assive [r]esistance" as "refusing to comply, but . . . not physically resist[ing] the officers." J. App'x at 112. Our case law suggests that passive resistance includes "going limp, refusing to identify themselves, and refusing to unlock the chains that they had used to bind themselves together." *Amnesty Am.*, 361 F.3d at 118. The record reflects that Ms. Linton's and Sergeant Zorn's dispute here is genuine.[12] During Ms. Linton's arrest, the two disputed whether she was actively resisting, and Ms. Linton asserted that she did not comply because she was in too much pain to do so.

Sergeant Zorn contends that the video of the arrest plainly demonstrates that his version of events is correct and therefore no genuine issue of material fact exists. Appellee Br. at 29. We disagree. Although video evidence may be credited over a non-movant's account if the video "blatantly contradict[s]" that account, *Scott v. Harris*, 550 U.S. 372, 380 (2007), we do not think that is the case here. In our view, a reasonable finder of fact could determine at trial that, based upon the video and

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[11] The relevant question concerns "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Johnson*, 239 F.3d at 252 (internal quotation marks and citation omitted).

[12] The district court also explained that "there now appears to be a dispute about the extent to which Ms. Linton might have resisted Sgt. Zorn's efforts to control her arm before lifting her to her feet." *Linton*, No. 5:18-cv-5, 2022 WL 17080324, at *11.

the remainder of the record, including Mr. Eastman's definition of passive resistance, she was not actively resisting arrest. We therefore leave the resolution of this question, if necessary, to the finder of fact at trial.

Even if we view the record in the manner that Ms. Linton does, however, we do not think that a reasonable juror could find that she was not resisting arrest at all when Sergeant Zorn first engaged pain compliance techniques. *See, e.g.*, Appellant Br. at 41. It is undisputed that Ms. Linton did not comply with the officers' commands, and the record reflects that she did not intend to leave the Statehouse willingly.[13] *See, e.g.*, J. App'x at 167:19–:22 (deposition of Shela Linton) ("Q. . . . So based on [your] understanding or definition of passive resistance, did you engage in passive resistance that night at the statehouse? A. Yes."); J. App'x at 112–13 (Mr. Eastman's expert report describing Ms. Linton's resistance throughout the arrest); J. App'x at 156–57 (describing Ms. Linton's intention to remain in the Statehouse after officers requested that she leave or be arrested); *see also generally* Video 3. Ms. Linton had also witnessed the arrest of fellow demonstrators prior to being approached by Sergeant Zorn such that it would be unreasonable to conclude that she did not know his purpose in approaching her. And we have held that "[t]he fact that a person whom a police officer attempts to arrest resists . . . no doubt justifies the officer's use of *some* degree of force." *Sullivan v. Gagnier*, 225 F.3d

[13] Ms. Linton claims that she did not hear any clear command from Sergeant Zorn or Trooper Richardson. Even if this is true, we think it reasonable for Sergeant Zorn to have believed that she had heard and disregarded his commands based upon the videographic evidence in the record, therein making his belief that he needed to use force to effect her arrest reasonable.

161, 165–66 (2d Cir. 2000) (emphasis in original). Accordingly, we do not think that the dispute between the parties as to "the need for the application of force," *Figueroa*, 825 F.3d at 105 (internal quotation marks and citation omitted), is a genuine one. An officer necessarily must use *some* amount of force to arrest an individual who is unwilling to comply with the officer's commands preceding the arrest. *See, e.g.*, *id.* ("The officers had need to push [the plaintiff] along because he lightly resisted by stiffening his legs.").

However, the jury will also be faced with the question of whether the force used was reasonably related to the need for force. We have held that a person's attempt to resist arrest "does not give the officer license to use force without limit." *Sullivan*, 225 F.3d at 165–66. "The force used by the officer must be reasonably related to the nature of the resistance and the force used . . . against the officer." *Id.* at 166.

Ms. Linton argues that Sergeant Zorn's use of pain compliance techniques was not reasonably related to any need to use force. To support this conclusion, she points to the fact that officers did not use pain compliance techniques in the arrests of her fellow protestors despite the refusal of some of those arrestees to stand and walk out of the chamber with the officers, and further suggests that the Vermont State Police use-of-force policy does not suggest that law enforcement personnel use pain compliance techniques in response to passive resistance. That Mr. Eastman stated that the general police practice in response to passive resistance is "low level physical contact . . . with little or no pain," J. App'x at 112, suggests that, depending upon the jury's determination as to the level of resistance offered by Ms. Linton, a jury may agree that Sergeant Zorn's use of force was

not called for. Sergeant Zorn, however, suggests that the force he utilized was compatible with the force required to effect Ms. Linton's arrest considering her resistance to Sergeant Zorn. "The assessment of a jury is needed" to resolve this factual dispute. *Brown v. City of New York*, 798 F.3d 94, 103 (2d Cir. 2015).

Finally, the parties dispute whether Sergeant Zorn acted in good faith. Sergeant Zorn argues that he used pain compliance "in a good faith effort to complete the arrest." Appellee Br. at 57. But Ms. Linton said that, after Sergeant Zorn applied the pain compliance technique, he told her, "you should have just called your legislator." J. App'x at 190:19–:20. As Sergeant Zorn's counsel conceded at oral argument, Trooper Richardson's deposition testimony,[14] when viewed in the light most favorable to Ms. Linton, could be reasonably understood to corroborate that Sergeant Zorn made such a statement. In light of the context in which this statement is alleged to have been made—following a political protest at the Statehouse—a reasonable jury might determine that such a statement, if made, evinces bad faith. It should therefore be left to a jury to make the predicate factual findings to determine whether Sergeant Zorn did or did not act in bad faith.

Viewing the record in the light most favorable to Ms. Linton, as we must, we conclude that summary judgment is inappropriate. A reasonable juror, after reviewing the evidence (including the clear and complete video recordings of the events), could draw

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[14] When posed with the question "If I told you that Officer Zorn told her that she could have just called her legislators, what would you think about that?" Trooper Richardson responded, "That's accurate." J. App'x at 228:22–:25.

inferences that support either Ms. Linton's or Sergeant Zorn's version of the events. If a jury were to adopt Ms. Linton's version as to those facts genuinely in dispute *in toto*, we conclude, as we did in *Amnesty America*, that it could determine that the defendant's use of force was objectively unreasonable. If, however, a jury resolves these facts in accordance with Sergeant Zorn's version of the events, it may determine that he did not violate Ms. Linton's Fourth Amendment rights, or that his conduct was not clearly unreasonable in light of the teaching of *Amnesty America*. Alternatively, if a jury determines that Ms. Linton only passively resisted arrest *but* Sergeant Zorn mistakenly believed that Ms. Linton was actively resisting arrest and his use of force would have been appropriate had Ms. Linton been so resisting, he might well be entitled to qualified immunity. *See Jones*, 963 F.3d at 230–31. "[Q]ualified immunity can apply in the event the mistaken belief was reasonable." *Saucier*, 533 U.S. at 206.

Thus, whether Sergeant Zorn is entitled to qualified immunity depends upon the answer to at least one "question upon which we have found there are genuine issues of material fact." *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 764 (2d Cir. 2003). We recognize that police have difficult jobs. They must often "make split-second judgments . . . about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 397. However, Sergeant Zorn "is not entitled to have the court, in lieu of the jury, make the needed factual finding" to determine whether he unreasonably used excessive force. *Zellner*, 494 F.3d at 368. Summary judgment in favor of Sergeant Zorn based on his entitlement to qualified immunity is therefore inappropriate at this juncture.

However, we understand that qualified immunity is "a question of law better left for the court to decide." *Estate of Cooper*, 352 F.3d at 764 (quoting *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)). On remand, we therefore recommend, as is our practice, "that interrogatories on the key factual disputes be presented to the jury" as part of the verdict form so that the district court can decide whether Sergeant Zorn is entitled to qualified immunity based upon the jury's answers to those interrogatories if the jury first determines that Sergeant Zorn in fact used excessive force. *Id.* (listing examples of questions to resolve key factual disputes); *see also Warren*, 906 F.2d at 76 (recommending the use of interrogatories to resolve the qualified immunity issue on remand). "If the jury returns a verdict of excessive force against [the law enforcement defendant], the court should then decide the issue of qualified immunity." *Stephenson v. Doe*, 332 F.3d 68, 80 (2d Cir. 2003); *see also Estate of Cooper*, 352 F.3d at 764 ("Thus, if the jury finds that [the law enforcement defendant] used excessive force against [the plaintiff], the court should then decide whether [the law enforcement defendant] is entitled to qualified immunity."). If the court decides, based on the jury's answer to the interrogatories, that (1) Sergeant Zorn's conduct did not violate a constitutional right of Ms. Linton *or* (2) "it would [not have been] clear to a reasonable officer that his conduct was unlawful in the situation he confronted," *Jones*, 963 F.3d at 224 (internal quotation marks and citation omitted), because his conduct did not violate the *clearly established* right identified in *Amnesty America*, or because he was reasonably mistaken in believing that it did not, Sergeant Zorn

will be entitled to qualified immunity, s*ee id.* at 230–31.[15]

Although we leave it to the district court to determine the scope of any such interrogatories, we note that "it is the responsibility of the defendant to request that the jury be asked the pertinent question." *Zellner*, 494 F.3d at 368.

CONCLUSION

Based on the foregoing, we conclude that Sergeant Zorn is not entitled to qualified immunity at his stage of the proceedings, inasmuch as there exist genuine issues of material fact which we cannot address—because a proper fact finder must—that preclude a grant of summary judgment. The judgment of the district court is therefore VACATED, and this case is REMANDED for further proceedings consistent with this opinion.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit

/s/ Catherine O'Hagan Wolfe

[SEAL United States Court of Appeals Second Circuit]

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[15] In other words, "if 'officers of reasonable competence could disagree on the legality of the action at issue in its particular factual context,' the officer is entitled to qualified immunity." *Dancy v. McGinley*, 843 F.3d 93, 106 (2d Cir. 2016) (quoting *Walczyk v. Rio*, 496 F.3d 139, 154 (2d Cir. 2007)) (internal quotation marks and citation omitted). But first, a jury must determine what that "particular factual context" is. *Id.*

Linton v. Zorn, No. 22-2954

JOSÉ A. CABRANES, Circuit Judge, concurring in part and dissenting in part:

"[Q]ualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'"[1] When it is asserted, courts ask two questions: whether the official violated a federal statutory or constitutional right, and whether that right was "clearly established" at the time.[2] Both prongs are necessary. "This demanding standard protects 'all but the plainly incompetent or those who knowingly violate the law.'"[3]

I concur in part. The three of us agree in Judge Sack's general restatements of the law of qualified immunity. I likewise concur that *Amnesty America v. Town of West Hartford* clearly established a right for qualified immunity purposes, consistent with our holding in *Edrei v. Maguire*.[4] I write separately to note my concern that there is growing daylight between our Circuit's holdings on qualified immunity and the clear teachings of the Supreme Court. Were it not for the confused state of our precedents, I would view this as a straightforward case. Instead, those muddled

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[1] *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

[2] *See, e.g.*, *Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020) (discussing the "two-step framework" for evaluating claims of qualified immunity articulated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001)).

[3] *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).

[4] *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004); *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018).

precedents complicate an otherwise clear matter. Nevertheless, I would still affirm the well-reasoned order of the District Court (Geoffrey W. Crawford, then *Chief Judge*) in favor of Sergeant Zorn.

The dispositive question here—whether *Amnesty America* clearly established law prohibiting Sergeant Zorn's challenged actions—is subtle enough that the District Court changed its own view as the case matured.[5] A third reading is now adopted in this appeal. We have lost our way if a police officer may be held liable for failing to understand a "rule" upon which *judges* disagree—with each other and with themselves. Such a result seems incompatible with the doctrine of qualified immunity, which limits liability to where "at the time of the officer's conduct, the law was 'sufficiently clear' that 'every reasonable official would [understand] that what he is doing' is unlawful."[6]

Critically, the facts in *Amnesty America* and *Edrei* do not at all resemble those before us. And the Supreme Court has "repeatedly told courts . . . not to define clearly established law at a high level of generality."[7] In *Amnesty America*, in addition to

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[5] JA335-38 ("[T]he Second Circuit's *Amnesty America* opinion established only that a use of force comparable to those used by the West Hartford police during the arrest of a nonviolent suspect are sufficient to allow a reasonable factfinder to conclude that the use of force was excessive. That falls short of clearly establishing that such force used on a nonviolent suspect was in fact excessive. To the extent that the court's November 28, 2018 Order concluded otherwise, it is corrected here." (quotation marks and citation omitted)).

[6] *Wesby*, 583 U.S. at 63 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

[7] *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *al-Kidd*, 563 U.S. at 742). And where the law is unclear, "qualified immunity protects actions in the 'hazy border between excessive and

applying rear wristlocks, officers were alleged to have "throw[n] [a protester] face-down to the ground; dragg[ed] [another protester] face-down by his legs, causing a second-degree burn on his chest; plac[ed] a knee on [a third protester's] neck in order to tighten his handcuffs while he was lying face-down; and ramm[ed] [that third protester's] head into a wall at a high speed."[8] In *Edrei*, officers used LRADs—"acoustic weapons developed for the U.S. military" that can be "used to send out sound at a dangerously high level . . . to cause pain/hearing damage"—on allegedly non-violent protesters.[9] These were exceptional cases with unusual circumstances where the techniques allegedly utilized by the officers did not constitute a proportionate response to the protesters.

The case before us is not an exceptional case. It was a routine arrest and removal.[10] There is no specter of disproportionality. Video evidence shows Ms. Linton adamantly refusing to leave and resisting arrest—at one point nearly striking Sergeant Zorn in the face.[11]

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acceptable force.'" *Id.* at 18 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)).

[8] *Amnesty America*, 361 F.3d at 123.

[9] *Edrei*, 892 F.3d at 529 (quotation marks omitted).

[10] Sergeant Zorn presented expert evidence, unrebutted below, establishing that he followed normal and accepted police practices in his arrest and removal of Ms. Linton; his use of force was objectively reasonable; and the average police officer would feel such force was lawful under the circumstances. *See* JA109-119.

[11] Evan M. Eastman, Sergeant Zorn's expert, opined that Ms. Linton "pulled her hand free or nearly free" in a "classic escape from a control hold" and "her elbow came up almost striking [Sergeant] Zorn in the face." Eastman did not suggest that Ms. Linton intended to hurt Sergeant Zorn, but noted "she was pulling away aggressively enough that [Sergeant Zorn] was

He had limited options at his disposal to safely navigate the situation. I agree with my colleagues, who "do not think that a reasonable juror could find that [Ms. Linton] was not resisting arrest at all when Sergeant Zorn first engaged pain compliance techniques" and acknowledge that "[a]n officer necessarily must use *some* amount of force to arrest an individual who is unwilling to comply with the officer's commands preceding the arrest."[12] I disagree with their subsequent decision to, nevertheless, send this case to a jury.

In sum, the Supreme Court has held that "[t]o be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.'"[13] It is nobody's place—not ours, and not a jury's—to hold Sergeant Zorn to perfection through searching, frame-by-frame analysis of his decisions.[14] While I concur in most of Judge Sack's description of the doctrine of qualified immunity and appreciate his painstaking

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almost hit" and warned "[s]uch a strike could easily break the nose or even the jaw." Her flailing arm was thus "[a]t the very least . . . a potentially dangerous distraction . . . [of] concern to a reasonable officer." *See* JA113.

[12] Op. at 37-39.

[13] *Heien v. North Carolina*, 574 U.S. 54, 60-61 (2014) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

[14] The Supreme Court has tightly limited post-hoc scrutiny of officers' actions, requiring courts to consider things "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," embodying "allowance for the fact that police officers are often forced to make split-second judgments" and recognizing that "not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," is a violation. *See Graham v. Connor*, 490 U.S. 386, 396-97 (1989) (cleaned up).

attempts to apply our precedents faithfully, I respectfully dissent from his reliance on *Amnesty America* and *Edrei* in the circumstances presented here.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

Case No.: 5:18-cv-5

SHELA M. LINTON,

Plaintiff,

v.

JACOB P. ZORN,

Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT
(Doc. 69)

Plaintiff Shela M. Linton filed her Complaint in this § 1983 police use-of-force case in January 2018. (Doc. 1.) She represented herself at that time and throughout the course of litigating the defense's motion to dismiss (Doc. 12), which culminated in an Order dated November 28, 2018 granting that motion in part and denying it in part. (Doc. 20.) That Order dismissed all claims against all defendants except for Ms. Linton's excessive-force and race-based equal protection claims against Vermont State Police Detective Sergeant Jacob P. Zorn in his personal capacity. At the Rule 12 stage, the court denied Sgt. Zorn's motion to dismiss, reasoning that it could not conclude that the force used was objectively reasonable under the circumstances, or that qualified immunity shielded Sgt. Zorn. (*See id.* at 15-23.) Similarly, the court denied Sgt. Zorn's motion to dismiss Ms. Linton's equal-protection claim, rejecting

Sgt. Zorn's contention that Ms. Linton could only prove she was "similarly situated" to the other white protesters by showing that those other protesters received better treatment from Sgt. Zorn himself. (*See id.* at 28.)

In the course of the discovery process, the court requested legal representation for Ms. Linton. (*See* Doc. 44.) Attorneys Lisa B. Shelkrot and Eliza H. van Lennep entered their appearances on Ms. Linton's behalf in 2020. (Does. 45, 48.) The court is grateful for their time and effort in this case.

Currently pending is Sgt. Zorn's motion for summary judgment under Fed. R. Civ. P. 56. (Doc. 69.) Ms. Linton opposes the motion, arguing that "the facts have not changed significantly" since discovery commenced in this case and that the result on summary judgment should be the same as the result at the Rule 12 stage. (Doc. 74 at 1.) The court heard argument on the motion on August 12, 2022. (Docs. 79, 80.)

Background[1]

The Sit-In Demonstration

Ms. Linton arrived at the Vermont statehouse at around noon on January 8, 2015—the date of Governor Peter Shumlin's inauguration—and participated in a planned nonviolent protest and "sit-in" demonstration to oppose the failure to proceed with universal healthcare in Vermont. (Doc. 74-4 at 124-126.) According to Ms. Linton, organizers of the demonstration "had communicated their plan to the Vermont State Police in advance to ensure that the effort was peaceful and would not surprise law enforcement." (Doc. 74-3 ¶ 5.) Numerous law enforcement officers were present in connection with the inauguration ceremony. (*Id.* ¶ 6.) Ms. Linton and approximately 200 other protesters passed through security at the statehouse. (*Id.* ¶ 7; Doc. 74-4 at 132:14.) Ms. Linton's intent was to not leave the statehouse chamber under her own power; as she explained: "That's the point of the sit-in part of the protest." (Doc. 74-4 at 127:14-22.)

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[1] The following facts are drawn from the record with reference to the parties' Rule 56 statements (Docs. 69-1, 74-1) and are undisputed except where noted. Ms. Linton has filed a Rule 56 statement that includes both "Disputed" and "Additional Undisputed" facts. (Doc. 74-1.) Although the Local Rules do not authorize a nonmoving party to file a statement of undisputed facts, the court has considered Ms. Linton's facts insofar as "it is clear from the parties' briefing that those facts are both material and undisputed." *Rotman v. Progressive Ins. Co.*, 955 F. Supp. 2d 272, 276 (D. Vt. 2013). The court is aided by the availability of multiple video recordings of the events in question. (*See* Doc. 69-6.) The court refers to these videos as Video 1 (53 seconds), Video 2 (12 minutes 46 seconds), Video 3 (39 minutes 45 seconds), and Video 4 (7 minutes 23 seconds). (*See id.*) Vermont State Police Lieutenant Gregory Campbell personally filmed Videos 3 and 4 as part of his duties on the evening of January 8, 2015. (Doc. 69-5.)

Ms. Linton knew that the statehouse closed at 8:00 p.m. on the day of the inauguration. (Doc. 69-3 ¶ 12.) At 8:00 p.m., Vermont State Police Lieutenant Matt Nally announced to the demonstrators that the statehouse was closed, and that if the demonstrators did not leave, they would be arrested for unlawful trespass. (*Id*. ¶ 17; *see also* Doc. 74-5 ¶ 2.) After hearing that announcement, Ms. Linton planned to "continue to sit on the floor of the well of the statehouse and to continue to be in collaboration with my peers in the sit-in." (Doc. 74-4 at 128:24-129:1.) She determined at that time that she would not "voluntarily get up and walk out." (*Id.* at 130:8.) She therefore knew that the police were going to make her leave; she expected that she would be asked to leave "and if I did not, that I would be lifted up in an appropriate way and physically be moved from the well." (*Id.* at 131:1-2.)

Arrests Preceding Ms. Linton's Arrest

Ms. Linton and 28 other demonstrators were in the House chamber when uniformed police officers approached them to begin the arrests. Ms. Linton and most of the other demonstrators were sitting on the floor in a circle in the well of the chamber.[2] They each faced the center of the circle, had their arms linked together, and were singing. (Doc. 69-3 ¶¶ 3-4; Doc. 74-4 at 139:24-140:13.) They represented a variety of ages; they included "[w]omen and men and nonbinary people" and their body types ranged "[a]nywhere from more petite to [Ms. Linton's] size to bigger." (Doc. 74-4 at 136:14-20.) Ms. Linton, who is a Black American,

[2] It appears from Video 3 that one of the demonstrators was seated in a wheelchair in the circle with the others, and another demonstrator was seated at one of the desks just outside the circle.

was 5' 8" and weighed about 175 pounds at the time. (Doc. 69-3 ¶ 21; Doc. 74-4 at 138:18-139:4.) She had a prior-existing right knee injury and had to use her arms and left leg to stand up off the ground. (Doc. 69-3 ¶ 40.) She also had a prior-existing left shoulder injury from a motor vehicle accident that was successfully treated with shoulder arthroscopy in 2009. (Doc. 74-11 at 3.)

Ms. Linton was present as law enforcement officers arrested more than a dozen of her fellow demonstrators. (Doc. 74-4 at 133.)[3] The officers arrested the demonstrators one at a time. (Doc. 69-3 ¶ 5.) The video evidence shows the officers tapping some of the demonstrators' shoulders or speaking briefly with them before the officers placed them under arrest. Some of the arrests occurred in quick succession; others were separated by several minutes. Some of the arrestees voluntarily stood up after officers approached them and walked out of the chamber with one or more escorting officers, who held one or both of the arrestee's arms loosely. (*See* Doc. 69-3 ¶ 6 (admission that "some protestors stood up to be arrested"); Video 3 and accompanying descriptions at Doc. 69-1 ¶¶ 22, 25, 26, 34.) Officers lifted the demonstrators who did not stand up voluntarily and escorted, dragged, or carried them out of the chamber. (*See* Video 3 and accompanying descriptions at Doc. 69-1 ¶¶ 23, 24, 27, 28, 29, 31,

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[3] Ms. Linton's Complaint, admissions, and her deposition testimony indicate that she was the 15th demonstrator to be arrested. (Doc. 1 at 7; Doc. 69-3 ¶ 10; Doc. 74-4 at 133:22-24.) Referring to video evidence from the evening in question, Sgt. Zorn identifies sixteen individuals who were arrested before Ms. Linton. (*See* Doc. 69-1 ¶¶ 19-34.) To the extent there is any dispute on this point, the court concludes that the precise number of individuals arrested before Ms. Linton is not material.

32, 33.) Consistent with the concept of a nonviolent sit-in protest, although some of the demonstrators refused to stand up voluntarily, none of them attacked the officers or used any form of violence.

In Ms. Linton's words, those who refused to stand voluntarily were lifted "Mike a scoop. Like a nice—like you would do for somebody who's elderly trying to get them into the bed. Like a scoop underneath the arms." (Doc. 74-4 at 134:8-11.) In some cases the officers put the arrestees' arms or hands behind their backs. According to Ms. Linton the officers "would just gently come over and put their arms behind their back or hands behind their back and then scoop them up by their shoulders and take them out." (*Id.* at 137:10-12.) With the exception of one demonstrator who complained of handcuffs being too tight, Ms. Linton was not aware of any of the demonstrators before her indicating that they were in pain or discomfort during the arrests. (*Id.* at 137:13-138:6.) All of the demonstrators who were arrested before Ms. Linton were white. (*Id.* at 136:7-9.)

Ms. Linton's Arrest

Sgt. Zorn is a white male. (Doc. 69-3 ¶ 22.) He was on special assignment at the statehouse on January 8,2015, providing security for the inauguration. (Doc. 74-5 ¶ 1.) Sgt. Zorn and Trooper Seth Richardson approached the circle of remaining demonstrators and stooped behind Ms. Linton with Trooper Richardson on Ms. Linton's right and Sgt. Zorn on her left. (Video 3,24:25-32.) A third uniformed officer was standing just behind Sgt. Zorn and Trooper Richardson. Trooper Richardson perceived the level of safety threat in the environment to be "[v]ery low." (Doc. 74-8 at 47:18.)

Ms. Linton was seated on the floor with her back to the officers. Her right arm was linked to the left arm

of the demonstrator to her right (whom she recalls is named Johnny) and with her left arm linked to the right arm of the demonstrator to her left (whom she recalls is named Ellen). (Doc. 74-4 at 140.) Her legs were in the middle of the small circle of remaining demonstrators.

According to Ms. Linton, Sgt. Zorn did not issue any "clear request or command" when he first approached her. (Doc. 74-3 ¶ 9.) According to Sgt. Zorn, he leaned over to speak with Ms. Linton and he asked her if she would stand up. (Doc. 74-5 ¶ 6.) Sgt. Zorn's testimony is that Ms. Linton did not respond but instead continued to sit on the floor and sing.[4] (*Id.*) The audio and video evidence appears to indicate that Trooper Richardson or Sgt. Zorn stated "ma'am?" at the moment they stooped or crouched behind her. (Video 2, 1:34, Video 3, 24:33.) The court otherwise cannot discern from the audio and video evidence in the record what, if anything, Sgt. Zorn said to Ms. Linton when he first approached her.

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[4] Consistent with the sit-in protest and Ms. Linton's intent not to leave the statehouse chamber under her own power, the demonstrators were singing the protest song "We Shall Not Be Moved."

> The exact origins of the song are unknown, but it appears to have begun as a religious revival song sung by rural whites and African slaves in the early nineteenth century in the U.S. South. A century later, it was taken up by U.S. labor activists in their successful drives to unionize major industries. Subsequently, African Americans reclaimed it for the civil rights movement, where it became one of the best-known songs in that freedom struggle.

David Spener, *We Shall Not Be Moved / No Nos Moverán* 4 (2016).

About five seconds after stooping or crouching behind Ms. Linton, Trooper Richardson took hold of Ms. Linton's right arm and Sgt. Zorn took hold of her left arm. (*See* Video 3, 24:38; *see also* Doc. 74-5 ¶ 6.) Trooper Richardson's intent was to restrain the right arm but not to put Ms. Linton in a rear wristlock. (Doc. 74-8 at 59:22-60:1.) According to Sgt. Zorn, Ms. Linton then "tensed her arms and attempted to hug the arms of fellow protestors tighter in order to prevent us from being able to dislodge her." (Doc. 74-5 ¶ 6.) Ms. Linton testified that she did not tense her arms or tighten the links with the two protestors sitting on either side of her. (Doc. 74-4 at 148:2-9; 150:7-14.)

It is undisputed that Sgt. Zorn unlinked Ms. Linton's left aim from the arm of the protestor to her left. (*See* Video 3, 24:39-42.) According to Sgt. Zorn, Ms. Linton then "hugged her hand close to her body and continued to tense her arm body [sic] so that I could not maintain control of it." (Doc. 74-5 ¶ 7.) Ms. Linton's testimony is that Sgt. Zorn's action unlinking her arm caused Ms. Linton "to move my arm away from my body to unlink my arm . . . and then my arm naturally returned back towards my body, which is where my arm had been before Zorn manually unlinked my arm." (Doc. 74-3 ¶ 11.)

Ms. Linton asserts that Sgt. Zorn "had no trouble securing and maintaining control of my hand once my arm was unlinked." (Doc. 74-3 ¶ 13.) Sgt. Zorn states that he "could not maintain control" of Ms. Linton's arm and that he "placed my hand over the top of her left hand and forced it down and to the rear, which allowed me to place her in a rear wrist lock." (Doc. 74-5 ¶ 7.) Ms. Linton exclaimed "ow, ow, ow!" (Video 2, 00:09; Video 3, 24:46.) Sgt. Zorn then instructed Ms.

Linton to "please stand up." (Video 1, 00:10; Video 3, 24:47.)

Ms. Linton did not stand up at that time. It appears that Sgt. Zorn then twisted or manipulated Ms. Linton's left arm behind her back, and Ms. Linton's face contorted in pain as she stated, "my arm!" or "don't twist my arm!" (Video 1, 00:12-15; Video 3, 24:49-52.) Several of the other demonstrators yelled or stated, "don't hurt her." (Video 1, 00:14-16; Video 3, 24:51-56.)

Sgt. Zorn instructed Ms. Linton to "stand up" several times while maintaining his hold on her left arm behind her back. (Video 1, 00:15-23.) Ms. Linton stated, "I will not stand up." (Video 3, 24:59.) Moments earlier, Trooper Richardson had succeeded in unlinking Ms. Linton's right arm from the arm of the protestor to her right. (Video 3, 24:57.) Sgt. Zorn replied: "I am not strong enough to pick you up, so please stand up." (Video 3, 25:00-03.) Ms. Linton shook her head side to side indicating that she was not going to stand up. (Video 3, 25:03-04.) At that moment, Ms. Linton thought that it did not make sense that a physically trained officer (Sgt. Zorn) plus his partner (Trooper Richardson) and other nearby officers might not be able to remove her safely. (Doc. 74-4 at 155:4-9.) She did not request that Sgt. Zorn ask for additional officers to assist him in picking her up. (*Id.* at 155:20-156:1.)

Sgt. Zorn then stated, "Ma'am, please stand up." (Video 3, 25:04-05.) Ms. Linton continued shaking her head, and then stated: "You're hurting me." (Video 3, 25:06-07.) Sgt. Zorn stated: "I'm going to ask you one more time . . ." (Video 3, 25:08.) Ms. Linton interjected: "You are hurting me." (Video 3, 25:09.) Sgt. Zorn completed his statement: ". . . and then I will use more pain compliance." (Video 3, 25:10-11.) Ms. Linton again

stated: "You are hurting me." (Video 3, 25:11-12.) Sgt. Zorn then asked Ms. Linton to "please stand up." (Video 3, 25:13.) Ms. Linton made no move to stand, and Sgt. Zorn stated: "If we stop hurting you, will you stand up?" (Video 3,25:13-15.) Ms. Linton did not respond or move to stand. Sgt. Zorn asked again: "Ma'am, will you stand up?" (Video 3, 25:17-18.) Ms. Linton again did not respond or move to stand.

Sgt. Zorn had his right arm behind Ms. Linton's back and his left arm in front of her left arm with his left hand approximately under her armpit. He then moved his right leg forward and dropped into a low crouch while holding Ms. Linton's left arm behind her back. (Video 3, 25:20-22.) According to Sgt. Zorn: "I then used my right hand to apply pressure to Shela's wrist and used my left arm to hook under her arm pit and lift upward." (Doc. 74-5 ¶ 11.)

Ms. Linton contorted her face in pain and then began to scream very loudly. (Video 3, 25:21-23.) According to Ms. Linton, before bringing her to her feet, Sgt. Zorn whispered to her that she should have called her legislator. (Doc. 74-3 ¶; Doc. 74-4 at 168:12-20.) She perceived that as a threat. (Doc. 74-3 ¶ 20; Doc. 74-4 at 168:21-23.)

Sgt. Zorn and Trooper Richardson lifted Ms. Linton upward. According to Sgt. Zorn, "[t]he combination of pain in her wrist and the upward lifting motion caused Shela to use her own legs to stand up." (Doc. 74-5 ¶ 11.) According to Ms. Linton, Sgt. Zorn "lifted me to my feet by wrenching and pulling up on my left arm." (Doc. 74-3 ¶ 21.) Ms. Linton was in "extreme pain" and "yelled out in pain." (*Id.* ¶¶ 21-22.) Many of the other demonstrators expressed concern; the demonstrator to Ms. Linton's left repeatedly exclaimed: "You don't need to hurt her!" (Video 3, 25:22-32.)

Sgt. Zorn states that once Ms. Linton was on her feet "she continued to struggle against both Trooper Richardson and [me] and was making every effort to get away from us." (Doc. 745 ¶ 11.) Ms. Linton asserts that she "felt frozen and like I could not move for a moment" due to the extreme pain. (Doc. 74-3 ¶ 21.) She states that her arms "twitch[ed] because of the position that was being held behind my back being excruciating after getting my wrist snapped and my arm being put in a certain position. I did not voluntarily use my body to remove, react or do anything. My body involuntarily was twitching because of the . . . position my arm was in." (Doc. 74-4 at 159:10-16.)

Moments after being lifted to her feet, Sgt. Zorn told Ms. Linton to "stop resisting." (Video 3, 25:33-34.) He repeated his instruction to "stop resisting." (*Id*., 25:34-35.) Ms. Linton responded: "I'm not resisting!" (*Id*., 25:36-37.) Sgt. Zorn asked Ms. Linton to "please walk." (*Id*., 25:38.) Ms. Linton exclaimed "ow" as she took a couple of halting steps with the officers holding her arms. (*Id.*, 25:39; 25:41.) One of the other demonstrators commented: "Brutal." (*Id.* 25:39-40.) Another observed: "It's hard to walk when you are in pain." (*Id.* 25:40-41.) Sgt. Zorn again stated: "please walk." (*Id.*, 25:41-42.) A different demonstrator asserts: "This is not ok. Stop hurting her." (*Id.*, 25:42-43.) Ms. Linton exclaimed "ow" again, gasped, and fell to the floor. (*Id.*, 25:42-43.) She asserts that she fell involuntarily due to pain and feeling weak. (Doc. 74-3 ¶¶ 25-26.) Other demonstrators repeated, overlapping: "This is not ok" and "Stop hurting her." (Video 3, 25:43-47.)

Sgt. Zorn and Trooper Richardson continued to hold Ms. Linton's arms. She again exclaimed "ow." (*Id.* 25:45.) Sgt. Zorn asked Ms. Linton to please stand up

and took another step toward the exit. (*Id.*, 25:46-48.) Ms. Linton pleaded, "Ow, ow! It hurts! Stop!" (*Id.*, 25:49-52.) At approximately the same time, other officers instructed the remaining demonstrators to stay back. (*Id*., 25:49-55.) One officer stated: "Don't make it worse than it is. We've asked her to stand up on her own. We're doing the best we can." (*Id.*, 25:55-59.) Sgt. Zorn, Trooper Richardson, and a third officer lifted Ms. Linton by her arms and legs and carried her out of the House chamber. (Doc. 69-3 ¶ ¶ 53.)

Outside the House Chamber

Once outside the chamber, the officers carried Ms. Linton a short distance to the top of a stairwell. (Video 3, 26:10-15.) An officer asked her, "Are you going to stand up? We're going down stairs" and "Do you want to stand up?" (*Id.* 26:15-19.) Ms. Linton did not reply to those questions. Another officer suggested using the elevator. (*Id.* 26:19.) Before carrying Ms. Linton toward the elevator, officers asked, "Do you want to stand up?" and "Do you want to stand up, ma'am?" (*Id.* 26:22-23.)

Ms. Linton was on her back at the top of the stairwell with officers holding her limbs and standing or bending over her. She responded angrily: "You guys hurt my arm! Get off me now! Get off me! Get off me! I didn't do anything. Get off me. You broke my fucking arm!" (*Id.* 26:23-32.) The officers lifted Ms. Linton and started carrying her toward the elevator. She protested, "Get off me." (*Id.* 26:34-35.) One of the officers carrying her responded: "If you stand up and walk, we'll walk down with you. We'd rather walk down with you. This is wholly unnecessary." (*Id.* 26:35-42.) Ms. Linton agreed "it is!" (*Id.* 26:42.) He replied: "Do you want to stand up and walk?" (*Id.* 26:43-44.) Ms. Linton stated: "Let go of me. You're not giving me that option you're holding me upside down!" (*Id.* 26:45-49.)

The officers put Ms. Linton down on her back and asked if she would like to stand up. (*Id.* 26:58-27:01.) She was breathing hard and saying "ow." One officer said, "Can we please stand up and walk down?" (*Id.* 27:03-05.) Ms. Linton replied, "I can't stand up with you holding my hands." (*Id.* 27:08-10.) The officers released Ms. Linton's hands and stood over her. They asked her if she would stand up. She advised: "You need to wait. I'm hurt." (*Id.* 27:16-18.) The officers waited while Ms. Linton caught her breath. (*Id.* 27:19-34.) She then said: "You have no right to hurt me like this." (*Id.* 27:34-36.)

The reply was: "We asked you as nicely and as many times as we could." (*Id.* 27:36-38.) Ms. Linton disagreed: "No, you twisted my arm behind my back before you gave me any demands." (*Id.* 27:38-42.) One officer offered Ms. Linton a hand to get up, which she accepted with her right hand, but she declined the hand of another officer who reached toward her left arm, stating: "No I can't use that arm." (*Id.* 27:44-45.) After getting to her feet, Ms. Linton accepted an offer for medical attention. (*Id.* 27:55-28:01.)

Inside the House Chamber After Ms. Linton's Arrest

The remaining demonstrators continued to sit in a circle after Ms. Linton was carried out of the chamber. They chanted "Black lives matter!" for about 30 seconds. (Video 2, 03:33–04:08.) Then they resumed singing. Officers resumed the process of arresting the demonstrators one by one. (Video 3, 29:15.) The officers carried or dragged some of the demonstrators. Other demonstrators walked under escort. None of the remaining arrestees complained of pain or discomfort with the following exceptions.

When a pair of officers approached the demonstrator that had been to Ms. Linton's right—whom the defense refers to as "Protester 24"—one officer asked, "Sir, would you come with us please?" and "Can you please stand up and come with us?" (Video 4, 00:45-47.) The demonstrator replied: "I'd prefer that you'd call the Speaker of the House." (*Id.* 00:47-49.) He repeated the same answer after being asked to stand up again. The officer to his right then took hold of his right forearm and moved it behind his back; the protestor simultaneously began to stand up. (*Id.* 00:57-58.) He walked toward the exit under escort. Protester 24 said to the officer holding his right arm: "I'm not resisting." (*Id.* 01:16-17.) The officer replied, "You're pulling back on me." (*Id.* 01:18-20.) But he insisted: "I'm not resisting. You grabbed my arm and started twisting it. I'm not resisting. I'm walking with you I'm not sure why you're using pain compliance." (*Id.* 01:19-28.) The officer responded: "I'm not using pain compliance." (*Id.* 01:28-30.)

The next demonstrator arrested—whom the defense refers to as "Protester 25"—complained of rug bum as officers dragged them along the carpeted aisle to the exit. (Video 4, 02:43-45.) An officer asked Protester 25 to stand up, to which the demonstrator responded "ok" before crossing their arms across their chest. (*Id.* 02:45-53.) Protester 25 announced "I am not resisting arrest" before officers lifted and carried them to the exit. (*Id.* 02:57-03:05.) Just outside the chamber, Protester 25 said: "All right, all right," apparently agreeing to stand up and walk. (*Id.* 03:13-15.) But after officers released Protester 25 to stand up, the protester folded their arms again, and the officers decided to flip Protester 25 onto their belly. (*Id.* 03:15-22.)

As the officers flipped Protester 25, the protester complained, "You're going to break my leg." (*Id.* 03:26-27.) The officers replied that Protester 25 should "let go," "turn over," and "relax." (*Id.* 03:28-29.) Protester 25 again announced, "I'm not resisting arrest." (*Id.* 03:29— 31.) One officer replied: "You are resisting." (*Id.* 03:31.) Protester 25 repeated: "I am not resisting arrest." (*Id.* 03:32-33.) An officer stated, "let go" and Protester 25 exclaimed, "You are hurting me!" (*Id.* 03:33-35.) Another officer suggested, "Turn over, then." (*Id.* 03:36.) Protester 25 again stated, "You are hurting me!" and then, "My wrist!" (*Id.* 03:37-38.) An officer directed Protester 25 to "let go" and Protester 25 replied, "You just tried to break my wrist." (*Id.* 03:39-41.) The response: "Stop resisting." (*Id.* 03:41.) Protester 25 insisted: "I am not resisting. I am laying here not moving." (*Id.* 03:42-45.) An officer instructed Protester 25 to "relax, please" as handcuffs were applied. (*Id.* 03:52.) Protester 25 complained, "You are hurting me. You are hurting my wrist. You are hurting my arm." (*Id.* 03:57-04:02.) Officers led Protester 25 away in handcuffs.

Ms. Linton's Injuries and Medical Treatment

Ms. Linton received emergency medical treatment at the statehouse. (Doc. 74-3 ¶ 29.) She asserts that she subsequently suffered "a period of physical pain and psychological symptoms" that was "so acute I had difficulty seeking care." (*Id.* ¶ 30.) She ultimately sought care from her primary care provider, received an MRI scan, underwent physical therapy, and took medicines. (*Id.*) She had her arm in a cast and a sling for four to five months. (Doc. 74-4 at 201:7-20.) She also received psychological care from two providers and was diagnosed with acute post traumatic stress disorder, major depression, and anxiety. (Doc. 74-3

¶ 31.) She states that she suffered a permanent wrist and shoulder injury and still experiences pain, stiffness, numbness, and other joint issues and dysfunction. (*Id*. ¶¶ 32-33.)

Ms. Linton's expert, Dr. Leonard Rudolf, completed an independent medical evaluation on November 11, 2021. (Doc. 74-11.) He assessed permanent loss of motion in the left shoulder "attributed to injury to the glenohumeral joint capsule and ligamentous support structures having been placed in an extreme position resulting in likely tear followed by scar tissue healing." (*Id.* at 5.) He also assessed permanent ongoing difficulties with the left wrist secondary to a triangular fibrocartilage complex (TFCC) tear and distal radioulnar joint (DRUJ) instability. (*Id.*) He opined that Ms. Linton sustained those injuries at the time of her arrest. (*Id.*)

Summary Judgment Standard

"The summary judgment standards are well established." *Lewis v. Siwicki*, 944 F.3d 427, 431 (2d Cir. 2019). Summary judgment may be granted only "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing a motion for summary judgment, a court must construe all facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. *See Davis-Garett v. Urban Outfitters*, *Inc.*, 921 F.3d 30, 45 (2d Cir. 2019). The role of the trial judge at the summary judgment stage is not to resolve issues of material fact, but rather to determine whether such issues exist to be decided at trial. *See id.* (citing *Anderson v. Liberty Lobby*, *Inc*., 477 U.S. 242, 249 (1986)). "In assessing whether there are triable issues of fact, the court may

rely on facts as depicted in an unaltered videotape and audio recording, even when such facts contradict those claimed by the nonmoving party." *MacLeod v. Town of Brattleboro*, No. 5:10-cv-286, 2012 WL 5949787, at *7 (D. Vt. Nov. 28, 2012) (citing *Scott v. Harris*, 550 U.S. 372, 379-81 (2007)).

Analysis

The two claims that remain in this case are Ms. Linton's claims against Sgt. Zorn in his individual capacity for excessive force and for denial of equal protection. The court considers both claims under 42 U.S.C. § 1983. Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Section 1983 does not confer any substantive rights but "merely provides a method for vindicating federal rights elsewhere conferred." *Vill. of Freeport v. Barrella*, 814 F.3d 594, 600 n.8 (2d Cir. 2016) (quoting *Patterson v. County of Oneida*, 375 F.3d 206, 225 (2d Cir. 2004)). To prevail on a § 1983 claim, a plaintiff must show: (1) the challenged conduct was attributable at least in part to a person who was acting under color of state law and (2) the conduct deprived the plaintiff of a right guaranteed under the Constitution of the United States." *Snider v. Dylag*, 188 F.3d 51, 53 (2d Cir. 1999).

Sgt. Zorn seeks summary judgment on both remaining claims. The court considers each claim in turn.

I. Excessive Force Claim—Qualified Immunity

The court begins with Sgt. Zorn's argument for summary judgment on the basis of qualified immunity. "Qualified immunity is an affirmative defense on which the defendant has the burden of proof." *Outlaw v. City of Hartford*, 884 F.3d 351, 367 (2d Cir. 2018). This defense protects "all but the plainly incompetent or those who knowingly violate the law." *Jones v. Treubig*, 963 F.3d 214, 224 (2d Cir. 2020) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

The court recognizes that the doctrine of qualified immunity has recently been the subject of intense public scrutiny and debate, especially as the doctrine relates to police conduct. Courts have also weighed in on the issue. *See*, *e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., statement respecting denial of certiorari) ("[O]ur qualified immunity jurisprudence stands on shaky ground."); *McKinney v. City of Middletown*, No. 19-1765-cv, 2022 WL 4454475, at *20 (2d Cir. Sept. 26, 2022) (Calabresi, J., dissenting) ("[T]he doctrine of qualified immunity—misbegotten and misguided—should go."); *Jamison v. McClendon*, 476 F. Supp. 3d 386, 391-92 (S.D. Miss. 2020) (asserting that qualified immunity "operates like absolute immunity" in real life, and that the doctrine "has served as a shield" for law enforcement officers who have failed to respect "the dignity and worth of black lives"). Still, "[t]his Court is required to apply the law as stated by the Supreme Court." *Jamison*, 476 F. Supp. 3d at 392.

The procedural posture of a case affects the qualified immunity analysis. *See Byrne v. Trudell*, No. 1:12-cv-

245-jgm-jmc, 2013 WL 2237820, at *11 (D. Vt. May 21, 2013) ("The stage of the litigation bears on the qualified immunity question."). The standard at the Rule 12(b)(6) stage is "stringent." *Walker v. Schult*, 717 F.3d 119, 126 (2d Cir. 2013) (quoting *McKenna v. Wright*, 386 F.3d 432, 436 (2d Cir. 2004)).[5] But a defendant relying upon a qualified immunity defense at the summary judgment stage has a lesser burden, and the plaintiff opposing summary judgment "cannot rely on allegations in the complaint" and, instead, "must counter the movant's affidavits with specific facts showing the existence of genuine issues warranting a trial." *McKenna*, 386 F.3d at 436.

Courts consider two questions in a qualified immunity analysis: (1) "whether the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right"; and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *see also McKinney*, 2022 WL 4454475, at *5. Courts have discretion to decide which of these two prongs to address first. *See Pearson*, 555 U.S. at 236 (receding from *Saucier's* mandatory two-step sequence).

Sgt. Zorn seeks to establish the qualified immunity defense under both prongs of the analysis. (*See* Doc. 69 at 8, 16.) Regarding the first prong, the court previously held at the Rule 12(b)(6) stage of this case

[5] The court implicitly applied this stringent standard in its November 2018 Order denying Sgt. Zom's Rule 12(b)(6) motion to dismiss. The court was also mindful at that time of the solicitude to which Ms. Linton was entitled as a self-represented litigant. *See Tracy v. Freshwater*, 623 F.3d 90, 101 (2d Cir. 2010) (describing "special solicitude" afforded to pro se litigants).

that it could not conclude "as a matter of law that the force used was objectively reasonable under the circumstances." (Doc. 20 at 15.) The court need not decide that question here because, even assuming that Sgt. Zorn violated Ms. Linton's Fourth Amendment right not to be subjected to excessive force during arrest, Sgt. Zorn is entitled to qualified immunity under the second prong for the reasons discussed below.

"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." *Rivas-Villegas v. Cortesluna*, 142 S. Ct. 4, 7 (2021) (per curiam) (quoting *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam)); *see also*, *e.g.*, *Hurd v. Fredenburgh*, 984 F.3d 1075, 1089 (2d Cir. 2021) ("Government actors are entitled to qualified immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (quoting *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577 F.3d 415, 432-33 (2d Cir. 2009))); *Lennox v. Miller*, 968 F.3d 150, 155 (2d Cir. 2020); *Outlaw*, 884 F.3d at 367 ("Where the right at issue in the circumstances confronting police officers was clearly established but was violated, the officer will still be entitled to qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights.").

The Supreme Court's decision in *Graham v. Connor*, 490 U.S. 386 (1989), "clearly establishes the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness." *Saucier*, 533 U.S. at 201-02. Proper application of that general proposition requires balancing the plaintiffs Fourth Amendment

interests against the countervailing governmental interests with "careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. In the context of force used to effect an arrest, courts also consider:

> [4] the need for the application of force, [5] the relationship between the need and the amount of force that was used, [6] the extent of injury inflicted, and [7] whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Figueroa v. Mazza, 825 F.3d 89, 105 (2d Cir. 2016) (quoting *Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 251-52 (2d Cir. 2001)).

In the qualified immunity context, it is "not enough" to consider only *Graham's* general standard; rather "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier*, 533 U.S. at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Thus "[c]ourts are cautioned not to define clearly established law at 'a high level of generality,' and 'police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue.'" *Lennox*, 968 F.3d at 156 (quoting *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018)). "That is not to say that there must be 'a case directly on point for a right to be clearly

established,' but 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *Id.* (quoting *Kisela*, 138 S. Ct. at 1152).

The court proceeds to analyze whether Sgt. Zorn violated a clearly established right—a question of law. The court considers the *Graham* and *Figueroa* factors in turn, examining Supreme Court and Second Circuit precedent existing on January 8, 2015.

A. Severity of the Crime

As described above, Ms. Linton and her fellow demonstrators were arrested for unlawful trespass. As the court previously noted, that is not a "particularly severe" crime. (Doc. 20 at 13.) *See also Crowell v. Kirkpatrick*, 667 F. Supp. 2d 391, 406 (D. Vt. 2009) (unlawful trespass is a "low" severity crime), *aff'd* 400 F. App'x 592 (2d Cir. 2010) (summary order).

B. Threat to Safety

The potential threat to safety was also relatively low. The evidence in the light most favorable to Ms. Linton is that law enforcement was aware in advance of the planned peaceful protest and demonstration, and that all of the demonstrators had passed through security and were therefore unarmed. By the time of Ms. Linton's arrest, only about a dozen demonstrators remained in the House chamber. It appears from the video that at least a dozen uniformed officers were also present or in the near vicinity. Unlike in *Crowell*, the remaining demonstrators did not inject volatility or create an exigency by calling for additional protestors to return to the scene. *Cf. Crowell*, 667 F. Supp. 2d at 409.

Sgt. Zorn's expert, retired Vermont State Game Warden and Vermont Police Academy instructor Evan

M. Eastman, notes that even if Ms. Linton never intended to attack or strike Sgt. Zorn, an attempt to get her hand away from Sgt. Zorn's hold could have resulted in an elbow strike to Sgt. Zorn's chin or face. (Doc. 69-8 at 6.) The court also recognizes that officers lifting or dragging demonstrators incurred some risk of strain or injury to their backs. Both of these safety concerns, while legitimate, are less significant than in many cases where suspects are armed or violent.

C. Resisting or Evading Arrest

The third *Graham* factor concerns whether the suspect was resisting arrest or attempting to evade arrest by flight. Here, as the court previously concluded, Ms. Linton was not attempting to evade arrest by flight, but she was resisting arrest. (Doc. 20 at 13.) As part of its review of all of the circumstances, the court considers *how* Ms. Linton was resisting arrest. *See Crowell*, 667 F. Supp. 2d at 407 ("Of course, it remains relevant whether suspects resist arrest with violence or threats . . .").[6]

Ms. Linton's resistance was substantially less confounding than the "bear claw" or "sleeping dragon" technique that the protesters used in *Crowell*.[7] But she did take some steps "beyond mere noncompliance with police orders." *Id.* at 407. By linking her arms with the

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[6] *Graham* mentions "actively" resisting arrest. To the extent that there is any distinction between "active" and "passive" resistance, the court considers the degree of resistance as part of its analysis of all of the circumstances. *See Crowell*, 667 F. Supp. 2d at 407.

[7] Protesters using that technique had wrapped a chain around their respective wrists inside a barrel, with a carabiner at the end of the chain clipped to a reinforcing steel bar that extended up from concrete poured into the base of the barrel. The barrel weighed at least 300 pounds. *Crowell*, 667 F. Supp. 2d at 398-99.

arms of the other demonstrators sitting in the circle with their backs facing outward, Ms. Linton "eliminat[ed] some less forceful options" for her removal. *Id.* The officers could not lift or carry Ms. Linton away until they had unlinked her arms from the two protestors on either side of her and removed her from the circle of demonstrators.

In *Bettis v. Bean*, No. 5:14-cv-113, 2015 WL 5725625 (D. Vt. Sept. 29, 2015), the court found no constitutional violation where an officer performed a "rear wrist lock" that resulted in a serious injury to a noncompliant and physically and verbally aggressive suspect. *Id.* at *13-14. The court also reasoned that even if the force was excessive, "qualified immunity would have been available because the right not to be handcuffed in the circumstances of this case was not clearly established." *Id.* at *14.

The court's November 28, 2018 Order denying Sgt. Zom's motion to dismiss distinguished *Bettis*, reasoning that "nothing in Ms. Linton's allegations suggests that she was resisting in any way other than nonviolent refusal to move or comply." (Doc. 20 at 23.) On the record at summary judgment, there now appears to be a dispute about the extent to which Ms. Linton might have resisted Sgt. Zorn's efforts to control her arm before lifting her to her feet. But while the court previously focused on the question of physical resistance, the court now concludes that *Betas* is no impediment to granting qualified immunity. Even granting that Ms. Linton was not physically or verbally aggressive, *Bettis* does not clearly establish

that Sgt. Zom's maneuver lifting Ms. Linton while applying wrist compression violated the law.[8]

D. Need for Application of Force

The parties disagree about what Sgt. Zorn should have done after advising Ms. Linton that he was not strong enough to pick her up and requesting that she stand up. In Ms. Linton's view, Sgt. Zorn could have requested the assistance of other officers to help lift her up. That might have been one possible way of moving Ms. Linton. But no clearly established law required officers to exhaust all possible alternatives before resorting to pain compliance.

Some commentators have argued that this should be the law. *See*, *e.g.*, Benjamin I. Whipple, Comment, *The Fourth Amendment and the Police Use of "Pain Compliance" Techniques on Nonviolent Arrestees*, 28 San Diego L. Rev. 177, 180 (1991) (asserting that "when alternative means of apprehension could be used on a passively-resisting arrestee which are less injurious and intrusive than the infliction of pain, the use of 'pain compliance' constitutes an unreasonable seizure"). But no Supreme Court or Second Circuit decision adopts that position. To the contrary, "police officers 'are not required to use the least intrusive degree of force possible' to effect an arrest." *Crowell*, 667 F. Supp. 2d at 410 (quoting *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994)). In short, no

[8] *Bettis* was also, obviously, a district court decision and thus could not create "clearly established" law. *Mudge v. Zugalla*, 939 F.3d 72, 79 (2d Cir. 2019). Nor does *Betas* form part of any "robust consensus of cases of persuasive authority" that might dictate the outcome in the particular circumstances of this case. *Liberian Cmty. Ass'n of Conn. v. Lamont*, 970 F.3d 174, 186 (2d Cir. 2020) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589-90 (2018)).

clearly established law categorically prohibited Sgt. Zorn from using pain compliance to compel Ms. Linton to her feet.

E. Relationship Between the Need and the Amount of Force Used

The parties disagree about how to characterize the amount of force used. As Sgt. Zorn's expert notes, "[t]he wrist compression or wristlock is not an all or nothing sort of technique. I liken it to a water faucet in that you turn it up as you need it and turn it down as you don't." (Doc. 69-8 at 8.) Ms. Linton contends that Sgt. Zorn applied an "extreme expression" of the rear wristlock and that he lifted her to her feet by "twisting and lifting" her left arm. (Doc. 74-1 ¶ 40.) Sgt. Zorn maintains that he used his left arm to lift Ms. Linton and his right arm to exert pressure on her wrist. (Doc. 74-5 ¶ 11.) Sgt. Zorn describes the pressure he exerted on Ms. Linton's wrist at that time as "moderate." (Doc. 69-8 at 9.)

The court recognizes that the record does not reveal the precise amount of force that Sgt. Zorn applied to Ms. Linton's wrist. Moreover, the record does not indicate how much of Ms. Linton's weight Sgt. Zorn bore with his left arm hooked under her armpit versus how much of her weight he bore with his right arm as that arm held Ms. Linton's left wrist. But Sgt. Zorn "was not required to perform the maneuver perfectly." *Bettis*, 2015 WL 5725625, at *13. He needed to complete the arrest, and no clearly established law put him on notice that his maneuver might have violated Ms. Linton's right not to be subjected to excessive force.

F. Extent of Injury Inflicted

Ms. Linton's case differs from *Crowell* because, unlike in that case, the pain compliance that Sgt. Zorn used after he told Ms. Linton that he was not strong enough to pick her up did result in lasting and significant injury. *Cf. Crowell*, 667 F. Supp. 2d at 409 ("The government's significant interests in effecting arrests expeditiously and enforcing lawful police orders are not outweighed in this case by the infliction of temporary pain that caused no lasting or significant physical injury."). As described above, Dr. Rudolf assessed permanent loss of motion in the left shoulder "attributed to injury to the glenohumeral joint capsule and ligamentous support structures having been placed in an extreme position resulting in likely tear followed by scar tissue healing." (Doc. 74-11 at 5.) He also assessed permanent ongoing difficulties with the left wrist secondary to a TFCC tear and DRUJ instability. These injuries, while significant, are not sufficient to defeat Sgt. Zorn's qualified immunity defense.

G. Purpose of Using Force

Notably, as in *Crowell*, Sgt. Zorn repeatedly verbally requested Ms. Linton's compliance and she could have easily complied with those requests. *See Crowell*, 667 F. Supp. 2d at 409. In addition, Sgt. Zorn warned Ms. Linton about pain compliance before attempting the lifting maneuver. These facts suggest that Sgt. Zorn's purpose was a good faith effort to complete the arrest.

The court accepts as true for present purposes that Ms. Linton did not hear any clear verbal request or command when Sgt. Zorn and Trooper Richardson first stooped or crouched behind her. But based seeing all of the previous arrests, she knew they were there to

remove her from the chamber. And based on her subsequent conduct it is clear that Ms. Linton would not have complied with a verbal command to stand up at that time even if she had heard it.

After Sgt. Zorn unlinked Ms. Linton's left arm, he applied force to her left wrist twice without gaining compliance. First, Ms. Linton uttered "ow ow ow" and then Sgt. Zorn asked her to stand up; she refused. Second, after Ms. Linton refused to comply with Sgt. Zorn's request to stand, he applied force to her wrist and she exclaimed "my arm!" Consistent with Sgt. Zorn's later statement about applying "more" pain compliance, these two instances were applications of pain compliance. Sgt. Zorn inflicted the pain in those instances without giving Ms. Linton any warning about pain. This was contrary to his training, which is to give a warning before using pain compliance techniques. (Doc. 74-9 at 38:2-4.)

But Ms. Linton enjoyed no clearly established right to be free from an officer applying such brief pain compliance without prior warning. Certainly if Ms. Linton had not been resisting at all, then pain compliance would have been unlawful. After the Second Circuit's decision in *Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. 2010), "it was clearly established that an officer's significant use of force against an arrestee who was no longer resisting and who posed no threat to the safety of officers or others . . . violates the Fourth Amendment." *Jones v. Treubig*, 963 F.3d 214, 226 (2d Cir. 2020). And pain compliance techniques fall "somewhere in the middle of the nonlethal-force spectrum" and constitute "significant force." *Id.* (citing *Abbott v. Sangamon County*, 705 F.3d 706, 726 (7th Cir. 2013)).

The law clearly established in *Tracy* does not apply here because Ms. Linton *was* resisting arrest by her noncompliance with requests to stand and by her position in a circle of demonstrators. The rear wrist lock, as applied in those initial moments of the arrest, was a "minimal" use of force that posed no "significant risk of injury." *Bettis v. Bean*, No. 5:14-cv113, 2015 WL 5725625, at *13 (D. Vt. Sept. 29, 2015). By the time Sgt. Zorn used more force in the lifting maneuver, he had already "progressed through varying degrees of lesser force," *Crowell*, 667 F. Supp. 2d at 408—including verbal commands, warnings, and the two earlier wristlocks.

H. Amnesty America

The court's qualified immunity analysis would not be complete without a discussion of *Amnesty America v. Town of West Hartford*, 361 F.3d 113 (2d Cir. 2004). In its November 28, 2018 Order, the court suggested that *Amnesty America* "squarely governs this case, or at least supplied sufficient clarity or foreshadowing that Detective Zorn should have understood that his conduct (as portrayed in Plaintiff's allegations) was unlawful." (Doc. 20 at 17.) Now, with the evidence before the court on summary judgment, the court concludes that *Amnesty America* does not clearly establish that Sgt. Zorn's maneuver lifting Ms. Linton while applying wrist compression was unlawful.

In *Amnesty America*, dozens of protestors staged anti-abortion demonstrations at a West Hartford clinic that performed abortions. The protesters "conducted their demonstration in a manner calculated to prevent patients and doctors from obtaining access to the clinic, positioning themselves not only in front of and around the Women's Center, but also in its waiting room, hallways, and examination rooms." *Amnesty*

America, 361 F.3d at 124. "Moreover, they purposefully made themselves more difficult to arrest or carry by chaining themselves together and covering their hands with maple syrup to impede the use of handcuffs." *Id.* When the police arrived and attempted to remove the demonstrators, the protesters employed "passive resistance" techniques that included "going limp, refusing to identify themselves, and refusing to unlock the chains that they had used to bind themselves together." *Id.* at 118.

The plaintiffs recognized that the police were "forced to employ some degree of physical coercion in order to arrest the protesters and remove them from the premises" but they alleged that the police used "far more force than was necessary, and inflicted severe pain on the demonstrators by dragging them out of the building by their elbows, using choke holds, and lifting them off the floor by their wrists." *Id.* The plaintiffs asserted that the officers' excessive uses of force included:

> [L]ifting and pulling plaintiffs [] by pressing their wrists back against their forearms in a way that caused lasting damage; throwing [a plaintiff] face-down to the ground; dragging [another plaintiff] face-down by his legs, causing a second-degree bum on his chest; placing a knee on [a third plaintiff's] neck in order to tighten his handcuffs while he was laying face-down; and ramming [the third plaintiff s] head into a wall at a high speed.

Id. at 123. The district court concluded on summary judgment that the plaintiffs had failed to produce evidence that the police used excessive force. *Id.*

The Second Circuit vacated and remanded, finding that the district court "improperly resolved issues of fact against the plaintiffs in reaching this conclusion." *Id.* On the question of excessive force, the court concluded that it was "entirely possible that a reasonable jury would fmd . that the police officers' use of force was objectively reasonable given the circumstances and the plaintiffs' resistance techniques" but also that a reasonable jury could find "that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances." *Id.* at 124. The court held that "the determination as to the objective reasonableness of the force used must be made by a jury following a trial." *Id.*

Uses of force "comparable" to those in *Amnesty America* "during the arrest of a nonviolent suspect are sufficient to allow a reasonable factfinder to conclude that the force used was excessive." *Id.* In the light most favorable to Ms. Linton, she was a nonviolent suspect and Sgt. Zorn used force that was comparable to at least some of the force used in *Amnesty America—i.e.*, lifting and pulling two suspects by pressing their wrists against their forearms in a way that caused lasting damage. On the issue of the objective reasonableness of the force used—the first prong of the qualified immunity analysis—Amnesty *America* suggests that the question might be one for a jury, not for a judge ruling on summary judgment.

But *Amnesty America* is silent as to the second prong of the qualified immunity analysis. Qualified immunity was not at issue in *Amnesty America* because the plaintiffs did not sue the individual officers, but instead brought suit against the town of West Hartford under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), seeking to hold the town liable for the

officers' actions. *See Lore v. City of Syracuse*, 670 F.3d 127, 164 (2d Cir. 2012) ("Qualified immunity is a defense available only to individuals sued in their individual capacity. Municipalities have no immunity from damages for liability flowing from their constitutional violations." (cleaned up)). In contrast, the qualified immunity defense is available to Sgt. Zorn—a critical distinction.

The *Amnesty America* court "did not resolve the Fourth Amendment issue" because there were disputes of material fact. *Crowell*, 667 F. Supp. 2d at 413. Thus, as relevant here, the Second Circuit's *Amnesty America* opinion established only that a use of force comparable to those used by the West Hartford police "during the arrest of a nonviolent suspect are sufficient to allow a reasonable factfinder to conclude that the force used was excessive." *Id.* That falls short of clearly establishing that such force used on a nonviolent suspect was in fact excessive.[9] To the extent that the court's November 28, 2018 Order concluded otherwise, it is corrected here.

Ms. Linton relies on *Burks v. Perrotta*, No. 13-CV-5879 (ER), 2015 WL 2340641 (S.D.N.Y. May 15, 2015), to argue that the principles of *Amnesty America* are "sufficiently controlling to prevent a grant of summary judgment on the basis of qualified immunity." (Doc. 74 at 22.) The *Burks* court apparently applied the so-called "same as the merits" rule for excessive-force cases. *See* 16A Eugene McQuillin, *The Law of Municipal Corporations §* 45:53 (3d ed.) ("Mt has been

[9] Notably, on remand, the case proceeded to trial and the jury rendered a verdict for the town. Judgment, *Amnesty Am. v. Town of W Hartford*, No. 2:92 cv 213 (PCD) (D. Conn. June 14, 2004), ECF No. 173.

held that in excessive-force cases, the court will measure an officer's qualified immunity by the same standard it measures the excessive force at issue—this is known as the 'same as the merits' rule."). But the Supreme Court has ruled that this is no longer the proper analysis to apply in qualified immunity cases. *See Saucier*, 533 U.S. at 200; *see also Nat'l Rifle Ass 'n of Am. v. Vullo*, No. 21-636-cv, 2022 WL 4372194, at *7 n.11 (2d Cir. Sept. 22, 2022) (district court's qualified immunity analysis was incomplete where it held that factual issues precluded dismissal but did not discuss whether, "even if the Complaint stated a First Amendment cause of action, the law was clearly established such that a reasonable officer would have known she was violating the law").

For all of the above reasons, the court concludes that Sgt. Zorn is entitled to qualified immunity on Ms. Linton's excessive-force claim. Neither *Amnesty America* nor any binding case or consensus of persuasive authority clearly established on January 8, 2015 that Sgt. Zorn's maneuver lifting Ms. Linton while applying wrist compression was unlawful.

II. Equal Protection Claim

The court and the parties have interpreted Ms. Linton's Complaint as including a race-based equal protection claim against Sgt. Zorn. The Equal Protection Clause requires "that the government treat all similarly situated people alike." *Progressive Credit Union v. City of New York*, 889 F.3d 40, 49 (2d Cir. 2018). "To state a race-based claim under the Equal Protection Clause, a plaintiff must allege that a government actor intentionally discriminated against [her] on the basis of [her] race." *Brown v. City of Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). "There are several ways for a plaintiff to plead intentional

discrimination that violates the Equal Protection Clause." *Id.*

Here, Ms. Linton's claim is based on the selective enforcement of the law. To prevail on such a claim, she must prove that:

> (1) [she], compared with others similarly situated, was selectively treated, and (2) the selective treatment was motivated by an intention to discriminate on the basis of impermissible considerations, such as race or religion, to punish or inhibit the exercise of constitutional rights, or by a malicious bad faith intent to injure the person.

Hu v. City of New York, 927 F.3d 81, 91 (2d Cir. 2019) (quoting *Zahra v. Town of Southold*, 48 F.3d 674, 683 (2d Cir. 1995)). Sgt. Zorn attacked both elements of the selective-enforcement claim at the motion to dismiss stage. The court rejected Sgt. Zorn's attacks at the Rule 12 stage and allowed Ms. Linton's equal protection claim to proceed. (*See* Doc. 20.) At the summary judgment stage, Sgt. Zorn again challenges both elements of Ms. Linton's selective-enforcement claim. (Doc. 69 at 20-25.) For the reasons below, the court concludes that Ms. Linton has failed to present evidence of impermissible motivation.

"[I]t is hornbook law that the mere fact that something bad happens to a member of a particular racial group does not, without more, establish that it happened because the person is a member of that racial group." *Burwell v. Peyton*, No. 5:12-cv-166, 2013 WL 1386290, at *6 (D. Vt. Apr. 4, 2013) (alteration in original) (quoting *Williams v. Calderoni*, No. 11 Civ. 3020(CM), 2012 WL 691832, at *7 (S.D.N.Y. Mar. 1, 2012)). In *Burwell*, this court stated that additional

facts that might be sufficient include "allegations of overtly racially-motivated misconduct, such as the use of racial slurs"; allegations "that other members of the protected class suffered similar mistreatment"; or "treatment less favorable than similarly situated persons who were not members of the protected class." *Id.* (cleaned up). The court considers these three potential avenues in turn.

First, the record still lacks any evidence of overtly racially-motivated misconduct or that Sgt. Zorn used any racist language. To the extent that Sgt. Zom's use of force was an "arguably excessive response," that conduct, coupled with his knowledge of Ms. Linton's race, is not sufficient to establish race-based animus. *Burwell*, 2013 WL 1386290, at *5 (citing cases).[10]

Second, it is undisputed that all of the other arrestees were white. Thus there is no evidence that any other Black demonstrators suffered similar mistreatment. As a result, Ms. Linton failed to produce any facts to support either of these theories.

Third, the court in *Burwell* suggested that facts supporting an inference of racial animus could include "treatment less favorable than similarly situated persons who were not members of the protected class." *Burwell*, 2013 WL 1386290, at *5 (cleaned up) (quoting *Jianjun Xie v. Oakland Unified Sch. Dist.*, No. C 12-02950 CRB, 2013 WL 812425, at *4 (N.D. Cal. Mar. 5, 2013)). In its November 28, 2018 Order, the court cited

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[10] According to Ms. Linton, Sgt. Zorn did whisper to her that she should have called her legislator. (Doc. 74-34 ¶ 20.) She perceived that as a threat. (*Id.*) But even if that statement could be interpreted as a threat or that Sgt. Zorn was frustrated, it was facially race-neutral and insufficient to constitute evidence of overtly racially-motivated misconduct.

Burwell and suggested that Ms. Linton could plausibly establish impermissible motivation on that basis. (*See* Doc. 20 at 25-26.) But even assuming that is true for the prima facie case at the motion to dismiss stage under the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), more evidence is required at the summary judgment stage.

"The burden shifting framework of *McDonnell Douglas* applies to equal protection claims." *Dotson v. City of Syracuse*, No. 5:04-CV-1388, 2009 WL 2176127, at *22 (N.D.N.Y. July 21, 2009) (citing *Annis v. County of Westchester*, 136 F.3d 239, 245 (2d Cir. 1998)). "At the first stage of *McDonnell Douglas*, a plaintiff 'bears the burden of establishing *a prima facie* case of discrimination,' which includes demonstrating that '[s]he suffered an adverse . . . action . . . under circumstances giving rise to an inference of discriminatory intent.' *Maraschiello v. City of Buffalo Police Dep't*, 709 F.3d 87, 92 (2d Cir. 2013) (third alteration in original) (quoting *Mathirampuzha v. Potter*, 548 F.3d 70, 78 (2d Cir. 2008)). A plaintiff who presents, among other things, "some minimal evidence suggesting an inference" of discriminatory motivation is entitled to a temporary "presumption" of discriminatory motivation, which shifts the burden to the defendant to come forward with a justification for the adverse action. *Littlejohn v. City of New York*, 795 F.3d 297, 307 (2d Cir. 2015).

A plaintiff who has "shown evidence of the factors entitling her to the presumption" can potentially defeat a summary judgment motion without having to produce "evidence sufficient to sustain her ultimate burden of showing discriminatory motivation." *Id.* at 311. But Ms. Linton has produced no such evidence and a plaintiff seeking to prove a selective-enforcement claim "cannot merely rest on 'a demonstration of

different treatment from persons similarly situated." *Hu*, 927 F.3d at 91 (quoting *Bizzarro v. Miranda*, 394 F.3d 82, 87 (2d Cir. 2005)). Thus, now at summary judgment, the court concludes that Ms. Linton has failed to come forward with any evidence other than the different treatment she received compared to the other arrestees. Sgt. Zorn is therefore entitled to summary judgment on the equal-protection claim.

Conclusion

Defendant Jacob Zorn's Motion for Summary Judgment (Doc. 69) is GRANTED. Dated at Burlington, in the District of Vermont, this 19th day of October, 2022.

/*s*/ Geoffrey W. Crawford
Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 22-2954

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of June, two thousand twenty-five.

SHELA M. LINTON,

Plaintiff-Appellant,

v.

JACOB P. ZORN, DETECTIVE,

Defendant-Appellee,

VERMONT STATE POLICE, PAUL WHITE, SUPERVISOR, THOMAS L'ESPERANCE, COLONEL,

Defendants.

ORDER

Appellee, Jacob P. Zorn, filed a petition for panel rehearing, or, in the alternative, for rehearing en banc. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing en banc.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

/s/ Catherine O'Hagan Wolfe

[SEAL United States Court of Appeals Second Circuit]