No. 25-297

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

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. LEGAL STANDARD

The legal standards for all of the issues in this case—qualified immunity, summary judgment, and excessive force—are summed up in this Court's decision in *Tolan v. Cotton*:

> In resolving questions of qualified immunity at summary judgment, courts engage in a two-pronged inquiry. The first asks whether the facts, "taken in the light most favorable to the party asserting the injury, show the officer's conduct violated a federal right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). When a plaintiff alleges excessive force during an investigation or arrest, the federal right at issue is the Fourth Amendment right against unreasonable seizures. *Graham v. Connor*, 490 U.S. 386, 394 (1989). The inquiry into whether this right was violated 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.'" *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *see Graham*, *supra*, at 396.
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> The second prong of the qualified immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Governmental actors are "shielded

> from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Ibid.* "The salient question is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged conduct was unconstitutional." *Id.* at 741.
>
> Courts have discretion to decide the order in which to engage these two prongs. *Pearson v. Callahan*, 555 U.S. 223, 236. But under either prong, courts may not resolve genuine disputes of fact in favor of the party seeking summary judgment. *See Brosseau v. Haugen*, 543 U.S. 194, 195, n. 2 (2004) (per curiam); *Saucier*, *supra*, at 201; *Hope*, *supra*, at 733, n. 1. This is not a rule specific to qualified immunity; it is simply an application of the more general rule that a "judge's function" at summary judgment is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S., at 249. Summary judgment is appropriate only if "the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. Rule Civ. Proc. 56(a). In making that determination, a court must view the evidence "in the light most favorable to the opposing party." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); see also *Anderson*, *supra*, at 255.

572 U.S. 650, 656 (brackets and ellipses omitted).

II. FACTS

On January 8, 2015, Respondent Shela Linton went to the Vermont Statehouse to join a planned nonviolent demonstration protesting the Governor's failure to act on health care legislation. App. 6.[1] Ms. Linton arrived at around noon. App. 6. She and all other demonstrators passed through security checks to ensure they were not carrying any weapons and then occupied the legislative chamber as their form of protest. App. 6.

At approximately 8:00 p.m., officers told the demonstrators that the Statehouse was closed and that anyone who stayed would be arrested. App. 6. Twenty-nine demonstrators, including Ms. Linton, stayed, sat in a circle, linked arms, and began singing songs expressing their social justice ideals. App. 6.

A short time later, officers began to make arrests. App. 7. Before arresting Ms. Linton, the officers arrested sixteen other protesters of different genders and body types. App. 7. There is video of all of the arrests, including Ms. Linton's. App. 7. To affect the first sixteen arrests, officers tapped some of the protesters on their shoulders and spoke with them before initiating contact. App. 7. Some protesters stood up and voluntarily walked out with officers holding their arms. App. 7. Others did not voluntarily stand up. App. 7. For those, officers used various tactics to remove them from the chamber, including placing their hands under the protesters' armpits to lift them, dragging them by their arms, and carrying them by their arms and legs. App. 7.

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1. "App." refers to the Appendix attached to Petitioner's petition for certiorari ("Pet.").

After the first sixteen were arrested, Petitioner Sergeant Jacob P. Zorn and Trooper Seth Richardson approached Ms. Linton. App. 8. Ms. Linton was still seated in a small circle of other protests with her arms linked to the demonstrators next to her, singing. App. 8. Trooper Richardson later stated in a deposition that the threat posed by the demonstrators at that time was "very low." App. 8.

Sergeant Zorn and Trooper Richardson stooped next to Ms. Linton, with Sergeant Zorn on her left and Trooper Richardson on her right. App. 8. Sergeant Zorn testified that he told Ms. Linton to stand. App. 8. Ms. Linton says that she did not receive a clear command to stand. App. 8. The only word audible on the video is "ma'am?" App. 9.

After approximately five seconds, the officers took hold of Ms. Linton's arms. App. 9. Trooper Richardson successfully unlinked Ms. Linton's right arm from the protester next to her and maintained control of it without issue. App. 9. Sergeant Zorn also unlinked Ms. Linton's left arm from the demonstrator next to her but he claims that Ms. Linton struggled against his control of her arm both before and after it was unlinked by Sergeant Zorn. App. 9. Ms. Linton disagrees with both of those claims and states that Sergeant Zorn had no trouble unlinking and controlling her arm and that she was not resisting him. App. 9.

Sergeant Zorn then "forced Ms. Linton's left hand down and to the rear and placed her in a rear wristlock," causing Ms. Linton to cry out in pain while Sergeant Zorn ordered her to stand up. App. 9. Ms. Linton did not stand at that time because she was in too much pain to

do so. App. 9. Sergeant Zorn then twisted Ms. Linton's arm behind her back, causing Ms. Linton to shout, "don't twist my arm." App. 9–10.

While continuing to twist Ms. Linton's arms behind her back, Sergeant Zorn told Ms. Linton to stand several times. App. 10. Ms. Linton shook her head in response. App. 10. Sergeant Zorn said, "I am not strong enough to pick you up, so please stand." App. 10. Ms. Linton said, "no." App. 10. Sergeant Zorn continued to ask Ms. Linton to stand, while Ms. Linton pleaded that Sergeant Zorn was hurting her. App. 10. Ms. Linton, a mother, later compared the pain to giving birth. App. 10. Sergeant Zorn ignored Ms. Linton's pleas and told her that if she did not stand, he would use "more" pain compliance. App. 10. He also asked, "If we stop hurting you, will you stand up?" App. 10. She did not reply. App. 10. After asking her to stand once more, Sergeant Zorn twisted Ms. Linton's arm behind her back even harder. App. 10. Her face contorted and she screamed out in pain. App. 10. Sergeant Zorn then told Ms. Linton that she "should have called her legislator," a statement that both Ms. Linton and Trooper Richardson testified to remembering Sergeant Zorn make. App. 10 & n.4.

Sergeant Zorn and Trooper Richardson then lifted Ms. Linton. App. 10. Sergeant Zorn told Ms. Linton to stop resisting. App. 10. Ms. Linton said that she was not resisting and collapsed in pain. App. 10–11. Other demonstrators called out that Sergeant Zorn's actions were "not ok." App. 11. The officers then carried Ms. Linton to a stairwell, where she continued to complain about how badly Sergeant Zorn had injured her. App. 11. Ultimately, the officers put her down, and another officer helped her to her feet, though she stated that her left

arm was too injured to support her as she stood. App. 12. She then exited the Statehouse and received care from Emergency Services for her injury. App. 12.

After the incident, Ms. Linton suffered so acutely from her physical and psychological injuries that she was unable to seek care for herself. App. 12. After some months of recovery, she saw her primary care physician, who put her in a cast and sling for four to five months to treat the injuries to her left arm and shoulder. App. 12. She also attended physical therapy for these injuries. App. 12. After conducting an independent medical examination, the State's own expert, Dr. Leonard Rudolf, concluded that Sergeant Zorn's use of force permanently injured Ms. Linton's wrist and shoulder. App. 12.[2]

III. PROCEDURAL HISTORY

On January 8, 2018, proceeding *pro se*, Ms. Linton sued Sergeant Zorn—as well as the State police department and certain supervisors—for violations of her constitutional rights. App. 12. The Defendants filed a motion to dismiss, which the district court decided on November 28, 2018. App. 13. The court granted the motion as to the State police department and supervisors but denied the motion as to Sergeant (then Detective) Zorn. App. 13. The court held that "*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

2. The Second Circuit decision states that Dr. Rudolf was Ms. Linton's expert, but that is incorrect. *See* Joint Appendix, *Linton v. Zorn*, No. 22-2954 (2d Cir.), ECF No. 38, at 246–50.

that his conduct (as portrayed in Plaintiff's allegations) was unlawful." App. 13 (quoting App. 68).

After discovery, Sergeant Zorn moved for summary judgment based on qualified immunity. App. 13–14. This time, the district court granted Sergeant Zorn qualified immunity, holding that *Amnesty America* did not clearly establish law for purposes of qualified immunity because, "[t]he *Amnesty America* court did not resolve the Fourth Amendment issue because there were disputes of material fact." App. 19 (quoting App. 71).[3]

Ms. Linton appealed to the United States Court of Appeals for the Second Circuit, which vacated and remanded. App. 2. The court held that genuine issues of material fact existed that precluded granting summary judgment based on qualified immunity because, if those facts were construed in the light most favorable to the Plaintiffs—as they must be on a motion for summary judgment—*Amnesty America* had clearly established that Sergeant Zorn's conduct violated the Fourth Amendment and was objectively unreasonable. App. 5, 24–25, 32. The Second Circuit noted that it had already held in a previous case that *Amnesty America* clearly established law for purpose of qualified immunity, specifically, "that the gratuitous use of pain compliance techniques—such as a rear wristlock—on a protester who is passively resisting arrest constitutes excessive force and is therefore violative of that arrestee's Fourth Amendment rights." App. 24–25.

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3. The district court also held that *Amnesty America* could not clearly establish law because it did not itself address qualified immunity (because it involved *Monell* liability). App. 19 (quoting App. 70). That is a plainly incorrect proposition of law, App. 21–22, which Petitioner did not rely on before the Second Circuit and does not rely on here, so Respondent also does not address.

The court also noted that denials of motions for summary judgment are regularly held to clearly establish law for purposes of qualified immunity, even where material disputes of fact still exist that must be decided by a jury. App. 22–24. The court noted that the Second Circuit had previously held, in *Edrei v. Maguire*, 892 F.3d 525 (2d Cir. 2018), that *Amnesty America* itself clearly established law for purpose of qualified immunity. App. 24. As to genuine disputes of material facts in this case relevant to *Amnesty America*, the court noted that there were such disputes with respect to the amount Ms. Linton resisted arrest, whether the degree of force used was necessary and appropriate under the circumstances, and whether Sergeant Zorn acted in good faith or maliciously and sadistically. App. 5, 28, n.11. The court noted that, under this Court's precedent in *Tolan v. Cotton*, 572 U.S. 650 (2014), a court must not decide genuine issues of material fact relevant to either prong of the qualified immunity doctrine but instead send those questions to the jury to decide on special interrogatories. App. 18, 33.[4]

4. One judge from the three-judge panel, Judge Jose A. Cabranes, concurred in part and dissented in part. Judge Cabranes "concur[red] that *Amnesty America v. Town of West Hartford* clearly established a right for qualified immunity purposes, consistent with our holding in *Edrei v. Maguire*." App. 35. Judge Cabranes also "concur[red] in most of [the majority's] description of the doctrine of qualified immunity and appreciate[d] [the majority's] painstaking attempts to apply our precedent faithfully." App. 38–39. Ultimately, however, Judge Cabranes did not think the facts of *Amnesty America* were similar enough to the facts of this case to put Sergeant Zorn on sufficient notice that his conduct was unconstitutional—pointing to additional uses of force described in the case that were not used against the relevant plaintiffs. App. 36–37.

ARGUMENT

Petitioner now asks this Court to grant certiorari and summarily reverse the Second Circuit's denial of qualified immunity, arguing that *Amnesty America* did not clearly establish that Sergeant Zorn's conduct—viewed in the light most favorable to plaintiff—violated the Fourth Amendment. Pet. 8. Petitioner is incorrect and certiorari should be denied.

I. *AMNESTY AMERICA*

In *Amnesty America*, anti-abortion protesters staged two demonstrations in a health care clinic. 361 F.3d at 118. The plaintiffs chained themselves together to prevent people from accessing medical care. *Id.* at 118, 123. When the town's police attempted to remove the protesters, the plaintiffs refused to unlock their chains and went limp. *Id.* The plaintiffs also covered their hands in maple syrup to impede the use of handcuffs. *Id.* at 123. According to the plaintiffs, the police inflicted severe pain by dragging them by their elbows, using choke holds, and "lifting them off the floor by their wrists." *Id.* at 119. Two of the plaintiffs, in particular, had their "wrists [pulled] back against their forearms in a way that caused lasting damage." *Id.* at 123.[5]

The town, on the other hand, claimed that, after failing to verbally convince the protesters to leave without force, the police used only "pain compliance techniques," such

5. Other uses of force are described in the opinion, as well, but not against these two plaintiffs, and some not against any of the plaintiffs, at all.

as "come-along holds," in which "[t]he amount of pain is directly correlated to the amount of resistance." *Id.* at 119.

The Second Circuit asserted that it was "undisputed that the police were forced to employ some degree of physical coercion in order to arrest the protesters and remove them from the premises." *Id.* The Court observed that the police were "forced 'to make split-second judgments,' in 'tense, uncertain, and rapidly evolving' circumstances, as to how to remove the demonstrators and restore access to the clinic in the most humane and efficient way possible." *Id.* at 124 (citation omitted). With respect to the Fourth Amendment claim, the Court concluded as follows:

> It is entirely possible that a reasonable jury would find, as the district court intimated, that the police officers' use of force was objectively reasonable given the circumstances and the plaintiffs' resistance techniques. Because a reasonable jury could also find that the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances, however, the determination as to the objective reasonableness of the force used must be made by a jury following a trial.

Id. (internal citation omitted).

After the *Amnesty America* decision, any reasonable officer would understand that gratuitously twisting a passively resisting protester's wrist behind her back—as Sergeant Zorn did here—would violate the Fourth Amendment. *See id.* at 123. Petitioner makes numerous

arguments to the contrary, generally trying to call into question the Second Circuit's analysis in this case, but none are availing.

II. THE RIGHT AT ISSUE

First, Petitioner argues that the Second Circuit's analysis in this case "fail[s] to define the right at issue." Pet. 9. That is incorrect. Under a section titled, "Amnesty America *Clearly Established the Relevant Right*," the Second Circuit walks through the facts and posture of *Amnesty America* and concludes that "*Amnesty America* did clearly establish that the gratuitous use of pain compliance techniques—such as a rear wristlock—on a protester who is passively resisting arrest constitutes excessive force and is therefore violative of that arrestee's Fourth Amendment rights." App. 24–25.

III. FACTUAL COMPARISON

Petitioner next argues that the Second Circuit "did not meaningfully engage in a factual comparison of Sgt. Zorn's alleged conduct and prior precedent." Pet. 10. That is also incorrect. At the end of the section titled "Amnesty America *Clearly Established the Relevant Right*," the court notes that "the relevant question then becomes whether *Amnesty America* is on point vis-à-vis Sergeant Zorn's conduct." App. 24. In the following section, "Constitutional Violation," the court then painstakingly goes through all of the material facts relevant to whether Sergeant Zorn violated Ms. Linton's rights and then compares those material facts to the same material facts in *Amnesty America*. App. 25–34.

The Court notes that some material facts are not in dispute, such as the facts that "[t]he crime for which Ms. Linton was arrested does not seem to be 'particularly severe' . . . [n]or does the threat to safety posed by Ms. Linton and her fellow demonstrators," and that "Ms. Linton suffered permanent loss of motion in her left wrist and shoulder as a result of the incident." App. 27.

As to other material facts—like the degree of resistance, relationship between degree of force used and need for force, and whether the force was used in good faith or maliciously and sadistically to cause harm—the court notes that there are genuine disputes. App. 27–28. The Court notes that, consistent with this Court's decision in *Tolan v. Cotton*, 572 U.S. 650, courts may not resolve genuine disputes of facts relevant to either prong of the qualified immunity, and that those questions must go to a jury. App. 18, 26. Accordingly, the Court concluded that it would be inappropriate to grant Sergeant Zorn qualified immunity, directly pointing to the factual similarities between this case and *Amnesty America*: "[I]f 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*." App. 26 (emphasis added).

IV. VARIOUS USES OF FORCE IN *AMNESTY AMERICA*

Next, in an attempt to characterize the conduct in *Amnesty America* as significantly different than the

conduct in this case, Petitioner quotes a passage from *Amnesty America* that describes all of the force used against all of the protesters present at the demonstration, suggesting that *Amnesty America* only clearly established that the force used against all of the protesters combined was excessive. Pet. 10–11. That, of course, is incorrect. To survive summary judgment, each of the plaintiffs had to demonstrate that—under the facts viewed in the light most favorable to them—the force used against each of them individually was excessive. Each of the plaintiffs did that, as all of the plaintiffs survived summary judgment. 361 F.3d at 134. And, as to two of the plaintiffs, the only force used against them was having their "wrists [pulled back] against their forearms in a way that caused lasting damage." 361 F.3d at 123. As the Second Circuit noted in this case, *Amnesty America* thus put officers on notice "that the gratuitous use of pain compliance techniques—such as a rear wristlock—on a protester who is passively resisting arrest constitutes excessive force and is therefore violative of that arrestee's Fourth Amendment rights." App. 24–25.

V. *EDREI V. MCGUIRE*

Petitioner also takes issue with the Second Circuit citing *Edrei v. Maguire* "for the proposition that *Amnesty America* 'warned officers against gratuitously employing "pain compliance techniques," such as bending protesters' wrists, thumbs, and fingers backward.'" Pet. 11 (quoting App. 24 (quoting 892 F.3d at 541)). To the extent that Petitioner is suggesting that the Second Circuit held that *Edrei* put Sergeant Zorn on notice that his conduct violated the constitution, that is incorrect. In this case,

the Second Circuit clearly stated that "*Edrei* itself did not provide notice to Sergeant Zorn because we decided *Edrei* after Sergeant Zorn arrested Ms. Linton." App. 24. The court noted, however, that "cases published after the conduct at issue" can help "address whether a right was clearly established by case authority *before* the time of such conduct." App. 24. And *Edrei* squarely stated 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 America*, 361 F3d at 119, 123–24).

Petitioner attempts to distinguish *Edrei* from the present case by noting that it "involved conduct that was far more unusual and severe than a simple wrist hold," Pet. 11, but that is besides the point. *Edrei* did not rely on *Amnesty America* to establish that the more unusual and severe conduct involved in that case violated clearly established law—it relied on other cases for that. 892 F.3d at 542. The *Edrei* court took the clearly established analysis one step at a time. *Id.* First, it held that *Amnesty America* and another case "gave the defendant fair warning that the prohibition on excessive force applies to protesters." (In doing so, the court noted that *Amnesty America* clearly established a more specific right—indeed, it "warned officers" that they would violate the Fourth Amendment by "gratuitously employing 'pain compliance techniques,' such as bending protesters' wrists, thumbs, and fingers backward." *Id.* (quoting *Amnesty America*, 361 F.3d at 119, 123-24).) After establishing that, the *Edrei* court "[s]hift[ed] attention from the protesters to the technology at issue" and relied on other cases to find

that the use of Long-Range Acoustic Devices in that case violated clearly established law. *Id.* at 542–44.

In this case, the Second Circuit did not hold that the facts of *Edrei* put Sergeant Zorn on notice that his conducted violated the constitution. App. 24. Rather, the court agreed with the *Edrei* court that *Amnesty America* "warned officers against gratuitously employing 'pain compliance techniques,' such as bending protesters' wrists, thumbs, and fingers backwards," and thus *Amnesty America* had clearly put Sergeant Zorn on notice that his conduct would violate the Fourth Amendment. App. 24 (quoting *Edrei*, 892 F.3d at 542 (quoting *Amnesty America*, 361 F.3d at 119, 123-24)).

VI. WARNINGS AND LESSER MEANS OF FORCE

Petitioner concedes that "*Amnesty America* involved the alleged use of a wristlock on a demonstrator, just as allegedly occurred here." Pet. 11. But Petitioner then asserts that "*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 here." Pet. 11. Both of these arguments are beside the point. If the gratuitous use of pain compliance—such as a rear wristlock—against a passively resisting protester is excessive force, it is excessive whether or not a warning was given or lesser force was used first—just like shooting an unarmed, compliant suspect would be excessive force regardless of whether an officer warned the suspect that he was going to shoot the suspect and struck him with a baton first. In this case, the Second Circuit painstakingly went through the facts relevant to

whether a use of force is excessive or materially different than those in prior cases, pet. 25–34, and warning and lesser force were not two of them.[6]

VII. NINTH CIRCUIT CASES

Petitioner also argues the Ninth Circuit's decision in *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994), conflicts with *Amnesty America* on whether the use of pain compliance against a passively resisting protester constitutes excessive force, and that conflicting precedent would make it unclear to an officer in Sergeant Zorn's shoes whether his conduct violated the Fourth Amendment. Pet. 12.

Forrester, like *Amnesty America*, involved officers using pain compliance holds against passively resisting protesters blocking access to abortion clinics. *Id.* at 805–6. Unlike *Amnesty America*, however, *Forrester* involved a video capturing all of the arrests. *Id.* at 806. Despite that—and more critically—the district court in *Forrester* did exactly what the Second Circuit reversed the district court for not doing in *Amnesty America*: it denied summary judgment and "allowed the case to proceed to the jury in order to determine whether any particular uses of force were unconstitutional." *Id.* In *Forrester*, the Ninth Circuit was thus faced with reviewing a jury verdict, which it must affirm if it is "supported by substantial evidence." *Id.* The Ninth Circuit found

6. Furthermore, the *Amnesty America* decision actually notes that the officers used wristlocks "only after they were unsuccessful in verbally convincing protesters to move." *Amnesty America*, 361 F.3d at 119.

substantial evidence to support the jury verdict in the video, which it described as showing that "the officers used minimal and controlled force in a manner designed to limit injuries to all involved." *Id.* at 808.

That is far cry from *Amnesty America*, decided on summary judgment, where the facts needed to be viewed in the light most favorable to the plaintiffs, and—under those facts—the Second Circuit determined that a reasonable jury could find that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances." 361 F.3d at 124.

Indeed, there is another case out of the Ninth Circuit, *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1092 (9th Cir. 2013), which was decided after *Forrester*, which was mentioned in the Second Circuit's decision in this case, and is far more on point as to the rights at issue in *Amnesty America* and this case than is the *Forrester* decision. *See* App. 25 n.7. *Gravelet-Blondin* noted that, "The right to be free from the application of non-trivial force for engaging in mere passive resistance was clearly established prior to [the incident in question]." 728 F.3d at 1093.[7] Indeed, the Ninth Circuit noted that it had

7. Petitioner erroneously asserts that this Court held, in *City of Escondido v. Emmons*, 586 U.S. 38, 43 (2019), that this formulation "was insufficiently specific for qualified immunity purposes." Pet. 13. That is incorrect. In *Emmons*, this Court held that defining the right as simply "the right to be free of excessive force"—as the Ninth Circuit had done in its *Emmons* decision—was insufficient for qualified immunity purposes. *Emmons*, 586 U.S. at 43. In contrast to that, the Court actually noted that *Gravelet-Blondin*'s formulation of the "right to be free from the application of non-trivial force for engaging in mere

"denied qualified immunity" for such conduct as early as 2001, "concluding that every police officer should have known that it was objectively unreasonable to use such force under those circumstances." *Id.* Accordingly, the Ninth Circuit precedent actually put Sergeant Zorn on additional notice that his conduct violated Ms. Linton's Fourth Amendment right. App. 25 n.7.

VIII. LEVEL OF GENERALITY AND GRATUITOUSNESS

Petitioner argues that the Second Circuit defined the right at issue at too high a level of generality. Pet. 12–13. Petitioner asserts that what the Second Circuit did was "state that an officer may not use unreasonable force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness." Pet. 13. But that is not what the Second Circuit did. It defined the right at an appropriate level of generality, discussing 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. As discussed, that is nearly parallel to Ninth Circuit's formulation of the right to be "free from the application of non-trivial force for engaging in mere passive resistance," which this Court acknowledged was specific enough to provide notice in the proper case. *Emmons*, 586 U.S. at 43 (quoting *Gravelet-Blondin*, 728 F.3d at 1093). The similarity between these

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passive resistance," was sufficiently specific for qualified immunity purposes. *Id.* The Court simply held that, in the Ninth Circuit's *Emmons* decision, "[the Ninth Circuit made no effort to explain how [*Gravelet-Blondin*] prohibited [the officer in *Emmons*'s] actions." *Id.*

statements of law from the Second and Ninth Circuit make it even more evident that the relevant law was established at the time, putting Sergeant Zorn on notice.

Petitioner takes issue with the word "gratuitous," arguing that it is simply a substitute adjective for "excessive," and—like stating that the right at issue is the right to be free of excessive force—is too general a formulation for qualified immunity purposes. Pet. 13. In doing so, however, Petitioner minimizes other details of the Second Circuit's broader formulation—"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. The gratuitousness arises from the material facts surrounding the use of force, which were breathtakingly similar in *Amnesty America* and this case—police officers using pain compliance techniques on passively resisting protests to such a degree that it could—and did—cause lasting damage. App. 27; *Amnesty America*, 361 F.3d at 118

Indeed, in this case, the Second Circuit took great pains to make sure that it was not defining the right at too high of a level of generality. It noted that the qualified immunity analysis "requires a high degree of specificity" and that "courts must not define clearly established law at a high level of generality." App. 19 (quoting *District of Columbia v. Wesby*, 583 U.S. 48, 63–64 (2018) (alteration omitted)). The court rejected another case proffered by Respondent as clearly establishing the right at issue, noting that it involved a right that was similar—but not similar enough—but that *Amnesty America*, by contrast, "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." App. 25 n.8 (internal quotation marks omitted).

IX. DIVERSITY OF JUDICIAL VIEWS

Petitioner argues that "the sheer diversity of views among the majority, dissent, and the district judge underscores just how opaque the ostensibly 'clear' legal principles really are." Pet. 14. That, however, overstates the differences of opinions between the various judges. As noted, on a motion to dismiss, the district judge originally found that "*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." App. 13 (quoting App. 68). Indeed, even on the motion for summary judgment, the district judge observed that, "on 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." App. 26 n.9 (quoting App. 70.) Indeed, the district court only granted summary judgment because of its erroneous belief that denials of summary judgment could not clearly establish law for purposes of qualified immunity as a matter of law. App. 70–71. One only need to look to this Court's decision in *Taylor v. Rojas*, 592 U.S. 7 (2020), which relied on *Hope v. Pelzer*, 536 U.S. 730 (2002)—a denial of summary judgment—to realize that this proposition of law is incorrect. Absent that error, the district court would have agreed with the majority in this case—as it did on the motion to dismiss—that, under the facts viewed in the light most favorable to the plaintiff, Sergeant Zorn violated law clearly established

in *Amnesty America*, and thus the question must go to a jury to determine if the facts still materially disputed were similar enough to *Amnesty America* to preclude summary judgment. *See* App. 70–71.

Accordingly, Judge Cabranes is actually the only judge out of four to review this case who believes that, under the facts most favorable to the plaintiff, *Amnesty America* clearly proscribed Sergeant Zorn's conduct, and Judge Cabranes's dissent makes one of the same errors made by Petitioner and discussed above. In finding that the facts of *Amnesty America* were similar enough to the facts of this case to put Sergeant Zorn on sufficient notice that his conduct was unconstitutional, Judge Cabranes points to the additional uses of force described in the case that were not used against the relevant plaintiffs. App. 36–37.[8]

8. In addition, Judge Cabranes seems to simply believe, based on his view of the video, that Ms. Linton was actively resisting, and thus the use of force was objectively reasonable. App. 37–38. Of the four judges who have reviewed this case, however, that too is a view held only by Judge Cabranes. App. 31 ("A reasonable juror, after reviewing the evidence (including the clear and complete video recordings of the events), could draw inferences that support either Ms. Linton's or Sergeant Zorn's versions of the events. If the 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.") Accordingly, since reasonable minds could come to different conclusions on what they see in the video, the question must be left for the jury, as this Court instructed in *Tolan*, 572 U.S. at 656.

X. DENIALS OF SUMMARY JUDGMENT AND CLEARLY ESTABLISHED LAW

Petitioner also argues that denials of summary judgment cannot clearly establish law for purposes of qualified immunity, at least "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.'" Pet. 14 (quoting *Amnesty America*, 261 F.3d at 124).

First off, this is not a case resting on plaintiff's "allegations," but *evidence* creating genuine issues of material fact. App. 15. And *every* denial of summary judgement on the issue of excessive force is a case "where a court holds only" that a reasonable factfinder could resolve all of the issues of material fact in the plaintiff's favor, and if they do so, the facts would be "sufficient to conclude that the force used was excessive." Pet. 14. If there were no disputes of fact to resolve as to whether an officer used excessive force, the case would not go to a jury. And, as discussed above, to see that it is incorrect to assert that denials of summary judgment are categorically insufficient to clearly establish law for purposes of qualified immunity, one need merely look to this Court's decision in *Taylor v. Rojas*, 592 U.S. 7, which relied on *Hope v. Pelzer*, 536 U.S. 730—a denial of summary judgment.

Petitioner seems to place some relevance on the fact that the jury in *Amnesty America* ultimately found that the officers did not use excessive force. Pet. 14 n.3. That, however, is irrelevant as to whether *Amnesty America* clearly established that, under the facts viewed in the light most favorable to the plaintiff, the officers' conduct

violated the Fourth Amendment. App. 22. Published decisions denying summary judgment based on genuine disputes of material fact relevant to excessive force clearly put officers on notice that if they engage in the conduct described in the decision—as viewed in the light most favorable to the plaintiff—they will violate the Fourth Amendment. App. 22. Indeed, even the dissenting Judge Cabranes agreed that *Amnesty America* clearly established law for purposes of qualified immunity. App. 35. Accordingly, Petitioner's view that denials of summary judgment cannot clearly establish law for purposes of qualified immunity is clearly incorrect.

XI. DAY-TO-DAY LAW ENFORCEMENT OPERATIONS

Petitioner's final argument is closely related to his previous one. Petitioner argues that the Second Circuit's decision in this case will disrupt day-to-day law enforcement operations by "vastly expand[ing] the universe of what circumstances may be considered 'similar,'" again leaning on the language of denials of summary judgment—that a jury "could" find that the officers conduct violated the constitution. App. 15. As discussed above, this argument is erroneous, as denials of summary judgment already do clearly establish law for purposes of qualified immunity. *Taylor*, 592 U.S. 7.

CONCLUSION

The Second Circuit correctly decided that *Amnesty America* clearly established that—under the facts viewed in the light most favorable to Ms. Linton—Sergeant Zorn's conduct violated the constitution, and thus the case must go to a jury. Accordingly, the Court should deny the pending petition for certiorari.

Respectfully submitted,

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