No. 19-682

IN THE
Supreme Court of the United States

MELANIE KELSAY,

Petitioner,

v.

MATT ERNST,

Respondent.

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

REPLY BRIEF FOR PETITIONER

JOY SHIFFERMILLER
SHIFFERMILLER LAW OFFICE PC LLO
1002 G Street
Lincoln, NE 68508

AMY R. UPSHAW
KING & SPALDING
1700 Pennsylvania Avenue, NW
2nd Floor
Washington, D.C. 20006

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Petitioner

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Respondent does not dispute the circuit split on the question presented in any coherent way. He does not—and cannot—deny that the lower court awarded him qualified immunity as a matter of law even though he used substantial force against Petitioner, a non-threatening suspected misdemeanant who was neither fleeing, nor resisting arrest, nor posing a safety risk. He does not contest that at least four circuits deny qualified immunity in these precise circumstances.

This split results from divergent methodologies among the courts of appeals. The Eighth Circuit fixated on a factual distinction unconnected to this Court's *Graham* factors—that Respondent yelled "get back here" as Petitioner walked toward her daughter.

For the appellate courts on the other side of the split, such minute factual differences do not brush aside clearly established law. Without instruction, lower courts will remain intractably divided on whether to disregard the *Graham* factors based on small and unrelated factual details that may appear in any given case. The Court should grant *certiorari* to clarify that overcoming qualified immunity does not require a prior case with nearly identical facts.

I. The Circuits Are Split On The Question Presented.

The First, Fifth, Sixth, and Tenth Circuits invoke *Graham v. Connor*, 490 U.S. 386 (1989), to hold that an officer violates clearly established law if he uses substantial force against a nonthreatening suspected misdemeanant who is neither fleeing nor resisting arrest, even if the victim of that force does not comply entirely with the officer's commands. *See Westfall v. Luna*, 903 F.3d 534, 547–49 (5th Cir. 2018); *Ciolino v. Gikas*, 861 F.3d 296, 302–03, 306 (1st Cir. 2017); *Kent v. Oakland Cty.*, 810 F.3d 384, 390–91, 397 (6th Cir. 2016); *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1281–82, 1286 (10th Cir. 2007).[1] The Eighth Circuit

[1] Since Petitioner filed her petition, another federal appellate court has followed suit. *See C.L. by and through Leibel v. Grossman*, 798 F. App'x 1015 (9th Cir. 2020). There, an officer brought to the ground a suspect who continued walking after the officer told him to "stop walking away." *See Leibel v. City of Buckeye*, 364 F. Supp. 3d 1027, 1033 (D. Ariz. 2019). The appellate court affirmed the denial of qualified immunity because "[n]one of [the *Graham*] factors favor [the officer]." *C.L.*, 798 F. App'x at 1015.

took the opposite position in this case, effectively disregarding *Graham*.

Respondent does not meaningfully contest the split on the question presented. Instead, he tries to distinguish the cases based on an issue unrelated to that question. He posits that all the decisions from other courts of appeals "involved individuals who were not subject to lawful arrest, were not resisting any officer commands, or both." BIO 12. That is simply incorrect:

- In *Ciolino*, the jury "found that [the plaintiff] failed to comply with police orders" and that the officer "had probable cause to arrest [plaintiff] on the night in question." 861 F.3d at 298.
- In *Casey*, the plaintiff disobeyed an officer's order to return to his truck and kept walking after the officer grabbed his arm. 509 F.3d at 1279–80. The plaintiff was charged with resisting arrest and obstructing a peace officer, *id.*, and the court even acknowledged that the officer "was faced with somebody who had committed a misdemeanor." *Id.* at 1281.
- In *Westfall*, the plaintiff interrupted officers despite repeated orders to stop talking, disobeyed an officer's order not to go anywhere, and was arrested for a misdemeanor. 903 F.3d at 539–40.
- The plaintiff in *Kent* repeatedly "failed to comply with commands" and admitted that he "did not fully comply with the deputies' orders." 810 F.3d at 391, 393.

In sum, Respondent's only attempt to distinguish these cases from the case at hand is simply wrong. His argument does not meaningfully address the split nor the question presented and is factually incorrect in any case.

II. The Split on the Question Presented Reflects Divergent Methodologies for Determining Clearly Established Law.

The Eighth Circuit deviated from other circuits in its methodology for determining clearly established law in two ways. *First*, the Eighth Circuit broke with other circuits by imposing what amounts to a same-fact test. *Second*—in contrast to other circuits, the district court, and the principal dissent—the majority opinion did not evaluate the *Graham* factors (or even mention *Graham*). The case therefore turns on rules of law that divide the circuits.

1. The Eighth Circuit reversed the denial of qualified immunity because Petitioner did not identify a prior Eighth Circuit case where an officer said "get back here" to someone walking away. Pet. App. 7a. This stringent same-fact test departs from other circuits and from this Court's precedent.

a. The Eighth Circuit discounted four of its prior cases, concluding that they did not govern the "specific facts" at issue because "[n]one of the decisions * * * involved a suspect who ignored an officer's command *and walked away*." Pet. App. 7a (emphasis added); *see also* Pet. App. 8a. In fact, as the principal dissent stated, each of these Eighth Circuit precedents "held under comparable circumstances that the use of force may be unwarranted against a person who poses no threat and is not actively resisting arrest or

attempting to flee, even if that person is interfering with police or behaving disrespectfully."[2]

To be clear, the prior Eighth Circuit decisions involve suspects who refused to follow officer commands, just not a command to stop walking. *See Brown v. City of Golden Valley*, 574 F.3d 491, 494 (8th Cir. 2009) (suspect ignored command to discontinue cell phone call); *Shekleton v. Eichenberger*, 677 F.3d 361, 364–65 (8th Cir. 2012) (suspect ignored command to place hands behind his back even though he was instructed to do so twice and broke away from the officer despite an order to "stop resisting"); *Montoya v. City of Flandreau*, 669 F.3d 867, 869 (8th Cir. 2012) (officer exerted force on a suspect after warning her to "quit or stop resisting"). Still, because Petitioner was walking, the Eighth Circuit concluded that "[t]he constitutionality of Ernst's takedown was not beyond debate." Pet. App. 10a.[3]

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[2] Pet. App. 52a (citing *Shekleton v. Eichenberger*, 677 F.3d 361, 366–67 (8th Cir. 2012); *Montoya v. City of Flandreau*, 669 F.3d 867, 871–72 (8th Cir. 2012); *Shannon v. Koehler*, 616 F.3d 855, 864–65 (8th Cir. 2010); and *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009)).

[3] *See also* Recent Case, Kelsay v. Ernst, *933 F.3d 975 (8th Cir. 2019) (en banc)*, 133 Harv. L. Rev. 1750, 1756 (2020). ("The court in *Kelsay* guaranteed a grant of qualified immunity when it homed in on the particularities of Kelsay's noncompliance: that she ignored one command and walked away. By deciding that the relevant fact was not just that Kelsay *was* noncompliant, but exactly *how* she was noncompliant, the court severely constrained the universe of relevant precedent." (footnote omitted)).

b. This same-fact inquiry breaks with the methodology used by other circuits. These courts arrived at a different answer to the question presented because they followed a different path in their legal analysis. These divergent approaches illustrate that "[c]ourts of appeals are divided—intractably—over precisely what degree of factual similarity must exist" for a case to "clearly establish[]" a rule of law. *Zadeh v. Robinson*, 928 F.3d 457, 479 (5th Cir. 2019) (Willet, J., concurring in part and dissenting in part).

In *Casey*, the Tenth Circuit correctly explained that, in excessive force cases, "there will almost never be a previously published opinion involving exactly the same circumstances" so "[w]e cannot find qualified immunity wherever we have a new fact pattern." 509 F.3d at 1284. In *Westfall*, the Fifth Circuit did not refer to any case involving identical or similar facts. 903 F.3d at 547–49. And the First Circuit found that the case "most closely on point" to the officer's decision to tackle a man who taunted the officer's dog was a case involving an officer pulling over a motorcyclist for driving without a helmet. *Ciolino*, 861 F.3d at 303–04.

c. These decisions implement this Court's doctrine more faithfully than the decision below. Clearly established law does "not require a case directly on point." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Just as lower courts can miss the mark by defining rights at too "high [a] level of generality," *see City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019), so too can they err by defining rights at too high a level of specificity, *see Sause v. Bauer*, 138 S. Ct. 2561, 2562–63 (2018) (reversing grant of qualified immunity, where the lower court faulted the plaintiff

for not identifying a case involving a similar factual scenario to defeat qualified immunity, *see Sause v. Bauer*, 859 F.3d 1270, 1275 (10th Cir. 2017)). After all, the crux of qualified immunity is whether a "reasonable official would have understood that what he is doing violates" an individual's rights, *al-Kidd*, 563 U.S. at 741, not whether a prior case involves the same facts.

Despite this Court's prior statements, the decision below went astray by requiring a virtually identical previous case. That error shows why review is necessary. The Court should clarify the appropriate level of factual similarity and shut down the immunity-by-minute-difference game.

2. The Eighth Circuit also charted a divergent course by ignoring (and not even mentioning) this Court's *Graham* factors. In stark contrast, in the cases cited above, other courts of appeals rightly used the *Graham* factors in their analysis.

The Fifth Circuit explained that it was "clearly established that the permissible degree of force depends on the *Graham* factors." *Westfall*, 903 F.3d at 549. The Tenth Circuit held that "when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." *Casey*, 509 F.3d at 1284; *see also Kent*, 810 F.3d at 396 (stating that an officer "cannot use force . . . on a detainee who has been subdued, is not told he is under arrest, and is not resisting arrest"); *C.L.*, 798 F. App'x at 1015 (denying qualified immunity because "[n]one of [the *Graham*] factors favor [the officer]").

III. This Is the Ideal Vehicle To Decide the Question Presented.

1. This case is an ideal vehicle because none of the factual predicates for the question presented are disputed—a rare virtue in excessive force appeals. In light of the interlocutory posture of the appeal and Respondent's decision not to challenge the district court's factual conclusions in the Eighth Circuit, it is conclusively established for purposes of this petition that Petitioner was charged only with misdemeanors, did not pose any threat to the safety of the officers or others, and did not resist arrest or attempt to evade arrest by flight. Respondent again concedes these points in the petition by declining to address them. Pet. 16-17.

2. Respondent does try to muddy the waters with new factual claims unrelated to the question presented. This attempt fails to take the facts in the light most favorable to Petitioner, the non-movant on summary judgment.

According to Respondent, he deserves immunity for breaking Petitioner's collar bone and knocking her unconscious because she "'tr[ied] to pull [police] officers off' an arrestee, and 'g[ot] in the way of the patrol vehicle door.'" BIO 18. But those self-serving facts are not before this Court. At summary judgment, a court must view the evidence in the light most favorable to the non-movant. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). In that light, the facts show Petitioner did not try to pull officers off an arrestee, Pet. App. 3a, 42a; she did not get in the way of a patrol vehicle door, *id.*; and she repeatedly complied with police orders, *id.* Respondent now suggests that he "released petitioner's arm" after Petitioner's

explanation "in order to retrieve his handcuffs." BIO 3. But this allegation appears nowhere in the district court, Eighth Circuit panel, or Eighth Circuit en banc opinions. *See* Pet. App. 3a; 29a; 42a–43a. Viewing the facts in the light most favorable to Petitioner show that after Respondent told Petitioner to "get back here," she did not ignore him but rather turned and explained that she was going to check on her child who was being harassed. BIO 3; *see also* Pet. App. 3a. And the opinions unanimously agree that Petitioner did not resist arrest. *See* Pet. App. 7a, 21a, 32a, 49a. With no warning, Respondent ran after her, grabbed her from behind, lifted her in the air, and slammed her to the ground, knocking her unconscious and breaking her collarbone. Pet. App. 42a–43a.

In further obfuscation, Respondent cites his expert's opinions on *ordinary* takedowns, but the district court rightly discounted the testimony on summary judgment because it relied "on factual assumptions that are inconsistent with [Petitioner's] account of the incident." Pet. App. 50a. And by implying that Petitioner did not in fact lose consciousness, *see* BIO 4, Respondent contradicts all three of the lower court opinions, *see* Pet. App. 4a, 30a, 43a.

IV. This Case Is Exceptionally Important.

The divide in legal analysis across circuits, *see supra* at 4–7, makes this Court's review exceptionally important. The application of *Graham* to assertions of qualified immunity recurs constantly in excessive

force cases.[4] And both the "obvious case" doctrine and the factual-similarity test extend to qualified immunity cases generally, not just excessive force claims. *See, e.g.*, *Michael C. v. Gresbach*, 526 F.3d 1008, 1017 (7th Cir. 2008).

Moreover, the en banc majority's same-fact test would approach an absolute immunity regime. Respondent's citation to *Robinson v. Hawkins*, 937 F.3d 1128, 1132–33, 36 (8th Cir. 2019), only amplifies the point. In *Robinson*, the Eighth Circuit granted qualified immunity on an excessive force claim to an officer who twice slammed a woman—a nonviolent misdemeanant who posed no danger or flight risk and did not resist arrest—against a trailer while performing a strip search. *Id.* at 1132–33, 1136; *id.* at 1139–40 (Smith, J., dissenting in part). Far from offering comfort, *Robinson* provides another example of the Eighth Circuit disregarding *Graham*'s factors.

The radically ahistorical of nature of the outcome below underscores the importance this Court's review. A regime approaching absolute immunity would be repugnant to the common law prevailing when

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[4] In March 2020 alone, five different circuit courts issued opinions on excessive force and qualified immunity in which the majority or dissent cited *Graham*'s factors. *See Kalbaugh v. Jones*, No. 18-6205, 2020 WL 1510054, *2 (10th Cir. Mar. 30, 2020); *C.L. v. Grossman*, 798 F. App'x 1015 (9th Cir. 2020); *Vicente-Abad v. Sonnenberg*, No. 19-13080, 2020 WL 1320879, *2–3 (11th Cir. Mar. 20, 2020); *Howse v. Hodous*, 953 F.3d 402, 414 (6th Cir. 2020) (Cole, C.J., dissenting); *Amador v. Vasquez*, 952 F.3d 624, 630 (5th Cir. 2020); *Cantrell v. McClure*, No. 18-12516, 2020 WL 1061333, *3 (11th Cir. Mar. 5, 2020).

Congress enacted 1983—and all the more so in excessive force cases like this one because the analogous common law torts did not recognize a good-faith defense. Pet. 20-24. Respondent misconstrues this argument as a call to overrule qualified immunity, but Petitioner asks this Court to act "within the confines of current law to rein in the most extreme departures from the original meaning of Section 1983." *Id.* at 20. The Court should grant review not to overrule qualified immunity but to resolve an intractable circuit split and correct a deviation from the original meaning of Section 1983 *and* the law of this Court.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

JOY SHIFFERMILLER
SHIFFERMILLER LAW OFFICE PC LLO
1002 G Street
Lincoln, NE 68508

AMY R. UPSHAW
KING & SPALDING
1700 Pennsylvania Avenue, NW
2nd Floor
Washington, D.C. 20006

DAVID M. SHAPIRO
Counsel of Record
RODERICK & SOLANGE MACARTHUR JUSTICE CENTER
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Avenue
Chicago, IL 60611
(312) 503-0711
david.shapiro@law.northwestern.edu

Counsel for Petitioner

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