KELSAY V. ERNST: IN A TIME OF NATIONAL PUBLIC OUTRAGE OVER A LACK OF POLICE ACCOUNTABILITY, THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT'S BOTCHED QUALIFIED IMMUNITY ANALYSIS HIGHLIGHTS SERIOUS PROBLEMS WITH THE DOCTRINE AS A WHOLE

"*Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence*."

- Justice Tom C. Clark (1961)[1]

I. INTRODUCTION

Across the United States during the summer of 2020, millions of Americans protested in the streets to demand law enforcement accountability for unconstitutional conduct under the color of law.[2] In

1. Mapp v. Ohio, 81 S. Ct. 1684, 1694 (1961).

2. *See All Things Considered: Protests Across the U.S. Escalate Amid Calls for Police Accountability*, NPR (May 31, 2020), https://www.npr.org/2020/05/31/866426149/protests-across-the-u-s-escalate-amid-calls-for-police-accountability (stating that there were "thousands of protesters in just about every major city . . . many people coming out to express outrage after another police killing of a person of color," in reference to the murder of George Floyd; that the protests "spread to many smaller cities, too;" and that the protesters interviewed "say they're especially upset with the lack of change in police departments not just here but elsewhere because there have been promises of police reforms, the department changing policies and training. But racial biasing continues"); Larry Buchanan, Quoctrung Bul, & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html (stating that polls suggested "about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks," and that "[a] majority [of protesters polled] said that they watched a video of police violence toward protesters or the Black community within the last year. And of those people, half said that it made them more supportive of the Black Lives Matter movement"); Lisa Shumaker, *U.S. Saw Summer of Black Lives Matter Protests Demanding Change*, U.S. NEWS & WORLD REPORT (Dec. 7, 2020, 8:04 AM), https://www.usnews.com/news/top-news/articles/2020-12-07/us-saw-summer-of-black-lives-matter-protests-demanding-change (stating that "[u]nder pressure from the protests, some U.S. police departments banned the use of chokeholds and no-knock warrants. A few school districts, . . . canceled contracts with police departments. A few cities . . . proposed redirecting some of the police budget to other community priorities. But nationwide reform remains elusive"); Evan Pfeifer, *Qualified Immunity or Unlimited Impunity: Murder of George Floyd Demands Gutting the Doctrine of Qualified Immunity for Law Enforcement*, SYRACUSE L. REV. (June 4, 2020), https://lawreview.syr.edu/qualified-immunity-or-unlimited-impunity-murder-of-george-floyd-demands-gutting-the-doctrine-of-qualified-immunity-for-law-enforcement/ ("The murder of George Floyd in Minneapolis, MN, by a white police officer captured on cellphone video, which has led to protests nationwide, is the

August of 2019, the United States Court of Appeals for the Eighth Circuit granted qualified immunity to a law enforcement officer who broke the collarbone of a non-threatening, suspected misdemeanant who was not fleeing or resisting arrest.[3] That Eighth Circuit decision, along with twelve other federal appellate court cases involving qualified immunity, were recently denied certiorari review by the United States Supreme Court.[4] Moreover, while proposed legislation to end qualified immunity was recently considered by the United States Congress, Senate Republicans appear unwilling to support the bill.[5]

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latest casualty of the near zero-accountability policy for law enforcement known as the doctrine of Qualified Immunity."); Brianne McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, OPINIO JURIS (May 6, 2020), http://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/ (stating that "[m]ore often than not, the application of 'qualified immunity', which protects government officials from lawsuits alleging rights violations, has resulted in victims not being able to get justice," and that "[a]s slogans of 'No Justice, No Peace' spread across the country, there is hope that real change can occur").

3. Kelsay v. Ernst, 933 F.3d 975, 977-79 (8th Cir. 2019) (en banc).

4. *Compare* Ryan D. Dreveskracht, *Will the U.S. Supreme Court Soon Reconsider Qualified Immunity for Cops?*, GALANDA BROADMAN (May 1, 2020), https://www.galandabroadman.com/blog/2020/5/supreme-court-will-soon-decide-whether-to-reconsider-qualified-immunity (stating that "[o]n Tuesday, the U.S. Supreme Court distributed thirteen different qualified immunity Petitions for Certiorari for its May 15, 2020, conference," including Melanie Kelsay's, and "that by the morning of Monday, May 18th, we will know whether the High Court is willing to revisit the doctrine"), *with* Ian Millhiser, *The Supreme Court Turned away Several Cases Seeking to Rein in Police Violence*, VOX MEDIA (June 16, 2020, 12:50 PM), https://www.vox.com/2020/6/16/21292102/supreme-court-qualified-immunity-police-violence-clarence-thomas (stating that "[a]fter months of pondering whether to hear one of several cases challenging qualified immunity, . . . the justices announced on Monday that the Court will not hear any of a raft of qualified immunity cases that have been sitting for months on its docket"); *see also* Baxter v. Bracey, 140 S. Ct. 1862, 1862, 1864 (2020) (Thomas, J., dissenting) (stating that "[b]ecause our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition," and that "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe," following the Court's announcement that it would not hear any cases regarding qualified immunity in its October 2020 term).

5. *See* Eric Boehm, *Senate Republican Police 'Reforms' Won't Touch Qualified Immunity*, REASON (June 10, 2020, 5:30 PM), https://reason.com/2020/06/10/senate-republican-police-reforms-wont-touch-qualified-immunity/ (stating that no Republicans had co-sponsored "a bill to end qualified immunity" introduced by Rep. Justin Amash (L-Mich.), and that "Senate Republicans plan to introduce police reform legislation focused on training and reporting requirements, but the bill will not eliminate legal protections for police officers who kill or injure civilians"); Jordain Carney, *Republican Rift Opens Up over Qualified Immunity for Police*, THE HILL (June 19, 2020, 6:00 AM), https://thehill.com/homenews/senate/503496-republican-rift-opens-up-over-qualified-immunity-for-police (stating that a Democratic bill scaling back the legal protections of the qualified immunity doctrine was viewed by "the White House and some GOP senators . . . as a 'poison pill,'" and that "[g]etting rid of qualified immunity altogether is viewed as a nonstarter for Senate Republicans, but there are ongoing conversations among senators about the doctrine that has been thrust into the national spotlight following the killing of George Floyd").

In *Kelsay v. Ernst*,[6] the United States District Court for the District of Nebraska denied qualified immunity to Gage County Sheriff Deputy Matt Ernst from an excessive force claim filed by Melanie Kelsay.[7] On appeal, the Eighth Circuit reversed the district court's denial, finding Deputy Ernst was entitled to qualified immunity.[8] The Eighth Circuit reasoned, at the time of the encounter between Deputy Ernst and Kelsay, Deputy Ernst's use of force against Kelsay was not clearly established as unreasonable under the circumstances.[9] Kelsay filed a petition for a writ of certiorari on November 26, 2019, which the United States Supreme Court denied on May 18, 2020.[10]

This Note will first recount the pertinent facts and holding in *Kelsay*.[11] This Note will then review the development of qualified immunity through United States Supreme Court precedent and review Eighth Circuit and other United States Court of Appeals precedent regarding qualified immunity from claims of excessive force.[12] Next, this Note will argue the Eighth Circuit's analysis in *Kelsay* violated the applicable standard of review by failing to grant Kelsay all reasonable inferences and by assuming facts blatantly contradicted by undisputed facts in the record.[13] This Note will then demonstrate that, by violating the standard of review, the Eighth Circuit failed to properly determine the contours of the constitutional right allegedly violated and consequently misapplied Eighth Circuit precedent in determining Deputy Ernst's conduct was not clearly established as unconstitutional.[14] This Note will then argue the Eighth Circuit's analysis contradicted assurances provided by the Court in *Pearson v. Callahan*[15] by failing to answer whether or not Deputy Ernst's conduct was unconstitutional.[16] Next, this Note will demonstrate the Court failed to resolve a circuit split by denying Kelsay's petition for a writ of certiorari.[17] Finally, this Note will conclude the Eighth Circuit erred in determining Deputy Ernst was entitled to qualified immunity and will provide suggestions to the Court for potential reform of the qualified immunity doctrine.[18]

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6. 933 F.3d 975 (8th Cir. 2019) (en banc).
7. *Kelsay*, 933 F.3d at 977-79.
8. *Id.* at 981-82.
9. *Id.* at 980.
10. Petition for Writ of Certiorari, Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (No. 19-682); Kelsay v. Ernst, 140 S. Ct. 2760 (2020).
11. *See infra* notes 19-69 and accompanying text.
12. *See infra* notes 70-222 and accompanying text.
13. *See infra* notes 243-289 and accompanying text.
14. *See infra* notes 290-315 and accompanying text.
15. 129 S. Ct. 808 (2009).
16. *See infra* notes 316-331 and accompanying text.
17. *See infra* notes 332-348 and accompanying text.
18. *See infra* notes 349-370 and accompanying text.

II. FACTS AND HOLDING

On May 29, 2014, a public pool employee called the police under the belief that Patrick Caslin was abusing Melanie Kelsay when the two were playing around at the public pool with Kelsay's three children in Wymore, Nebraska.[19] As Kelsay and Caslin exited the pool with Kelsay's children, Wymore Police Chief Russell Kirkpatrick and Officer Matthew Bornmeier arrested Caslin for domestic assault and placed Caslin in a patrol vehicle.[20] When Gage County Sheriff Deputy Matt Ernst and Sergeant Jay Welch arrived, Kelsay was standing approximately five yards away from the patrol vehicle and seven-to-ten yards away from the pool exit.[21] Kelsay was about five feet tall and weighed 130 pounds.[22]

Upon informing Deputy Ernst and Sergeant Welch that Kelsay attempted to obstruct Caslin's arrest, Chief Kirkpatrick decided Kelsay should be placed under arrest.[23] Meanwhile, one of Kelsay's daughters was yelling with another person at the pool exit.[24] When Kelsay walked toward her daughter, Deputy Ernst ran to Kelsay, took Kelsay by the arm, and said "get back here."[25] In response, Kelsay stopped, turned to face Deputy Ernst, and explained to him that she wanted to know what was happening between the other person and her daughter.[26] Deputy Ernst then let go of Kelsay's arm and said nothing further to Kelsay.[27] Kelsay turned away from Deputy Ernst

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19. Kelsay v. Ernst, 933 F.3d 975, 977-78 (8th Cir. 2019) (en banc). Kelsay objected after Caslin ran up behind Kelsay as if to throw Kelsay into the pool, and onlookers believed Caslin was assaulting Kelsay. *Id.*

20. *Id.* at 978.

21. *See id.* (noting that Kelsay was "about fifteen feet from the patrol car where Caslin was detained, and twenty to thirty feet from the pool's exit doors").

22. *Id.*

23. *Id.* From Sergeant Welch's account, Chief Kirkpatrick told Deputy Ernst and Sergeant Welch "that Kelsay tried to prevent Caslin's arrest by 'trying to pull the officers off and getting in the way of the patrol vehicle door.'" *Id.*

24. *Id.* Kelsay's daughter was "yelling at a female patron who the daughter assumed had contacted the police." *Id.*

25. *See id.* (stating Deputy Ernst "told her to 'get back here'"). According to the Merriam-Webster Unabridged Dictionary, the phrase, "get back," is defined as, "to come or go again to a person, place, or condition," and the word, "here," is defined as, "to this place." *Get back*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/get%20back (last visited Mar. 22, 2021); *Here*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/here (last visited Mar. 22, 2021).

26. *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 43, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8) ("Kelsay 'stopped, turned around, and . . . told him, someone is talking shit to my kid, I want to know what's going on.'"). The woman referred to by Kelsay testified that, in the particular moment when Kelsay was walking in her direction, "she did not feel threatened," and only later discovered that Kelsay was approaching her. *Id.* at 978 (majority opinion).

27. *Id.* at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 47, 54, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No.

and proceeded to walk a few feet toward her daughter and the other person.[28] At that time, Deputy Ernst ran up to Kelsay from behind, wrapped her in his arms, picked her up off the ground, and threw her to the ground, knocking Kelsay unconscious and breaking her collarbone.[29] Deputy Ernst then handcuffed Kelsay and, after Kelsay regained consciousness, drove Kelsay to jail.[30]

Kelsay pled no contest to two misdemeanor offenses.[31] Pursuant to 42 U.S.C. § 1983 ("§ 1983"), Kelsay sued Deputy Ernst in his individual capacity, alleging Deputy Ernst's takedown maneuver infringed upon Kelsay's Fourth Amendment right to be free from unreasonable force.[32] The United States District Court for the District of Nebraska denied Deputy Ernst's motion for summary judgment, ruling that Deputy Ernst was not entitled to qualified immunity.[33] The district court reasoned that a factfinder could determine Deputy Ernst used unreasonable force on Kelsay, violating her

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53-8); *see also* Brief of Appellant, Matt Ernst at *27-28, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181) ("Deputy Ernst's undisputed actions toward Kelsay prior to the takedown, constituted an arrest, or, at a minimum, an attempt to arrest. . . . Here, by directing Kelsay to 'get back here' while grabbing her arm and stopping her forward movement, Deputy Ernst could reasonably believe that Kelsay knew she was then under arrest and not free to keep moving away, even if he momentarily released her arm to retrieve his handcuffs."). At oral argument before the Eighth Circuit en banc panel on April 19, 2019, when addressing the question of whether Deputy Ernst disputed releasing Kelsay's arm, counsel for Deputy Ernst stated, "[w]hat his testimony was is that he did so in order to reach for his handcuffs," but "Kelsay testified that she was not resisting arrest or stopping Deputy Ernst from handcuffing her," and "[s]he also testified that she did not know that Chief Kirkpatrick wanted Deputy Ernst to arrest her." Oral Argument at 11:53, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181), http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/172181eb.mp3; *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting).

28. *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 54, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8); *id.* at 978 (majority opinion).

29. *Id.* at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 51, 98-99, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8).

30. *Id.* at 978-79 (majority opinion). Upon arrival at the jail for Gage County, "a corrections officer recommended that Kelsay be examined by a doctor," and Chief Kirkpatrick drove "Kelsay to a hospital, where she was diagnosed with a fractured collarbone." *Id.* at 978-79.

31. *Id.* at 979. Kelsay was convicted of "attempted obstruction of government operations and disturbing the peace." *Id.*

32. *Id.* at 977, 979 (citing 42 U.S.C. § 1983 (1996)). Kelsay initially filed suit against all four officers, "in their individual and official capacities," and the City of Waymore, "alleging wrongful arrest, excessive force, and deliberate indifference to medical needs," but "[t]he district court granted summary judgment in favor of all defendants on all claims" except Kelsay's claim of excessive force against Deputy Ernst in his individual capacity. *Id.* at 979.

33. *Id.*

clearly established Fourth Amendment rights.[34] Ernst appealed the denial to the United States Court of Appeals for the Eighth Circuit, claiming entitlement to qualified immunity because he did not violate Kelsay's clearly established rights.[35]

In *Kelsay v. Ernst*,[36] the Eighth Circuit determined it had jurisdiction to hear Ernst's appeal and resolve the legal question of whether Ernst's actions violated Kelsay's clearly established Fourth Amendment rights.[37] The court began its analysis by outlining the judicial standard for determining whether a right violated by a law enforcement officer in a § 1983 claim was clearly established in case law at the time of the alleged violation.[38] The court stated that a plaintiff alleging excessive force must point to either controlling precedent or a significant consensus of persuasive case law, which squarely governs the facts under consideration, to prove the defendant-officer should not be granted qualified immunity.[39]

Applying the above judicial standard, the court determined Eighth Circuit precedent did not clearly establish that, at the time of the encounter between Deputy Ernst and Kelsay, Deputy Ernst's use of force against Kelsay was unreasonable under the circumstances.[40] The Eighth Circuit reasoned that none of the cases the district court relied upon governed a situation in which a suspect ignored the com-

34. *Id.* According to the United States Court of Appeals for the Eighth Circuit, the district court determined "where a nonviolent misdemeanant poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully." *Id.* at 980 (first citing Shekleton v. Eichenberger, 677 F.3d 361, 366-67 (8th Cir. 2012); then citing Montoya v. City of Flandreau, 669 F.3d 867, 871-72 (8th Cir. 2012); then citing Johnson v. Carroll, 658 F.3d 819, 827 (8th Cir. 2011); then citing Shannon v. Koehler, 616 F.3d 855, 864-65 (8th Cir. 2010); then citing Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009); and then citing Kukla v. Hulm, 310 F.3d 1046, 1050 (8th Cir. 2002)).

35. *Id.* at 977, 979.

36. 933 F.3d 975 (8th Cir. 2019) (en banc).

37. *Kelsay*, 933 F.3d at 979 (citing *Shannon*, 616 F.3d at 861). The Eighth Circuit noted that it had jurisdiction to review "a purely legal issue," but that it would not review "the district court's determination about which facts Kelsay could prove at trial," unless facts assumed by the district court "blatantly contradicted by incontrovertible evidence." *Id.* (citing Wallace v. City of Alexander, 843 F.3d 763, 766-67 (8th Cir. 2016)).

38. *See id.* (elaborating on the "clearly established" standard a qualified immunity analysis).

39. *Id.* at 979-80 (first quoting Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011); and then quoting Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (per curiam)). The Eighth Circuit also explained that the status of the law when the alleged violation occurred "must have given the officers 'fair warning' that their conduct was unconstitutional." *Id.* at 979 (quoting Hope v. Pelzer, 122 S. Ct. 2508, 2516 (2002)).

40. *Id.* at 980.

mand of an officer then walked in the opposite direction.[41] The Eighth Circuit noted that case law concerning suspects who were passively resisting or compliant in response to an officer's commands would not govern a situation like Kelsay's.[42]

The Eighth Circuit explained that, considering what a reasonable officer might expect Kelsay to comprehend from the command given, Deputy Ernst's conclusion that Kelsay was noncompliant was objectively reasonable.[43] The Eighth Circuit noted that whether Kelsay complied with Deputy Ernst's command as a factual matter was irrelevant, and that the reasonableness of an officer's conclusion under the circumstances was a question of law to be determined by the court, as opposed to a jury.[44]

The Eighth Circuit then noted that its most analogous precedent case, *Ehlers v. City of Rapid City*,[45] supported granting Deputy Ernst qualified immunity.[46] The Eighth Circuit stated that, although there could be a constitutionally significant difference between a nonviolent misdemeanant ignoring one command versus ignoring two commands, such a distinction was not clearly established at the time of Kelsay's arrest.[47] Thus, the Eighth Circuit decided that, because Deputy Ernst's takedown was constitutionally debatable under governing pre-

41. *Id.* The court relied on district court language in finding that Kelsay "ignored" Deputy Ernst's command, pointing to language in the district court's opinion stating that "Kelsay 'was not precisely "compliant"—that is, she had been told to stop but kept walking instead . . . .'" *Id.* (quoting Kelsay v. Ernst, No. 4:15-CV-3077, 2017 U.S. Dist. LEXIS 221933, at *12 (D. Neb. May 19, 2017)).

42. *See id.* (stating that case law cited by the district court concerning suspects who were passively resisting or compliant "did not clearly establish that Ernst was forbidden to perform a takedown when Kelsay walked away"). The Eighth Circuit supported its position, citing a recent United States Supreme Court case, noting that the "Court recently vacated the denial of qualified immunity" to an officer who performed a takedown on a man who ignored an officer's order "and then 'tried to brush past' the officer," and that the United States Court of Appeals for the Ninth Circuit determined on remand that case law concerning "force employed in response to passive resistance was not sufficiently on point to constitute clearly established law that governed the takedown." *Id.* at 980-81 (quoting City of Escondido v. Emmons, 139 S. Ct. 500, 503-04 (2019) (per curiam)) (citing Emmons v. City of Escondido, 921 F.3d 1172, 1175 (9th Cir. 2019) (per curiam)).

43. *Id.* at 981. The Eighth Circuit reasoned that "[a] reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again." *Id.*

44. *Id.* (quoting Anderson v. Creighton, 107 S. Ct. 3034, 3041 (1987)).

45. 846 F.3d 1002 (8th Cir. 2017).

46. *Kelsay*, 933 F.3d at 981. The Eighth Circuit reasoned that, in *Ehlers*, a nonviolent misdemeanant who walked away from an officer after being told twice "to place his hands behind his back," entitled the officer "to use the force necessary to effect the arrest" and execute a takedown maneuver on the suspect, because the suspect "'at least appeared to be resisting' when he continued to walk away" and "a reasonable officer would interpret the subject's behavior as 'noncompliant.'" *Id.* (quoting Ehlers v. City of Rapid City, 846 F.3d 1002, 1011 (8th Cir. 2017)).

47. *Id.*

cedent at the time, granting Deputy Ernst qualified immunity was warranted.[48] The Eighth Circuit then reversed the district court's order denying Deputy Ernst qualified immunity.[49]

Eighth Circuit Chief Judge Lavenski Smith, joined by Judge Jane Kelly, Judge Ralph Erickson, and Judge Steven Grasz, filed an extensive dissenting opinion.[50] At the outset, Chief Judge Smith stated that, when Kelsay was arrested, Eighth Circuit precedent was sufficiently clear to put officers on notice that using force against a suspected misdemeanant who was non-threatening, not resisting arrest, not fleeing, and not ignoring commands would violate that suspect's Fourth Amendment rights.[51] Chief Judge Smith noted that the United States Supreme Court does not require the lower courts to cite precedent directly on point in order to satisfy the clearly-established prong of the qualified immunity analysis.[52] Rather, the Court has stated a collection of relevant precedent can demonstrate that a reasonable officer would have been on notice that the challenged action was unconstitutional when it occurred.[53] Chief Judge Smith then recounted the facts of Kelsay's arrest, viewed most favorably to Kelsay's version thereof, and applied governing Eighth Circuit precedent.[54] First, Chief Judge Smith determined Kelsay was a suspected misdemeanant, and neither of the two misdemeanors she plead no contest to were violent or severe.[55] Second, Chief Judge Smith determined Kelsay was verbally and physically non-threatening.[56] Third, Chief Judge Smith determined Kelsay was not resisting arrest, not fleeing,

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48. *Id.* at 982.

49. *Id.*

50. *Id.* at 982 (Smith, C.J., dissenting).

51. *Id.* Chief Judge Smith discussed the facts and holding of four Eighth Circuit cases "that made it sufficiently clear at the time of the incident to warn a reasonable officer that the use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates that individual's right to be free from excessive force." *See id.* at 982-985 (first citing *Brown*, 574 F.3d at 493-99; then citing *Shannon*, 616 F.3d at 858-65; then citing *Montoya*, 669 F.3d at 869-73; and then citing *Shekleton*, 677 F.3d at 363-67) (discussing the pertinent facts and the holdings of Eighth Circuit precedent relied upon in the district court's opinion).

52. *Id.* at 982 (quoting *Ashcroft*, 131 S. Ct. at 2083).

53. *See id.* at 982 (quoting *Emmons*, 139 S. Ct. at 504) ("[A] body of relevant case law is usually necessary to clearly establish the answer." (internal quotation marks omitted)). Chief Judge Smith also noted that "[t]he Supreme Court has '[a]ssum[ed] for the sake of argument that a controlling circuit precedent could constitute clearly established federal law.'" *Id.* at 982 n.2 (quoting Carroll v. Carman, 135 S. Ct. 348, 350 (2014) (per curiam)).

54. *Id.* at 985-87 (first citing *Brown*, 574 F.3d at 496-97; then citing *Shannon*, 616 F.3d at 863 n.4; then citing *Montoya*, 669 F.3d at 871; then citing *Shekleton*, 677 F.3d at 365; and then citing *Ehlers*, 846 F.3d at 1011).

55. *Id.* at 985 (citing *Brown*, 574 F.3d at 496).

56. *Id.* at 986 (citing *Brown*, 574 F.3d at 497).

and not ignoring the commands of Deputy Ernst.[57] Chief Judge Smith also noted that Kelsay suffered a broken collarbone and briefly lost consciousness due to the force of Deputy Ernst's takedown and her impact on the ground.[58]

Chief Judge Smith recognized the majority deemed Kelsay's actions as noncompliant.[59] However, he argued that the facts, viewed most favorably to Kelsay, established that Kelsay complied with Deputy Ernst's order to return to his location before she turned and walked away.[60] Chief Judge Smith further argued, contrary to the majority's opinion, that the facts in *Ehlers* were distinguishable from the facts surrounding Kelsay's arrest, because the plaintiff in *Ehlers* clearly ignored two unambiguous commands from an officer.[61] Thus, Chief Judge Smith determined that a reasonable officer, under the alleged circumstances and state of the law as they were, would have known that Deputy Ernst's takedown of Kelsay was unreasonably excessive.[62]

Judge Steven Grasz also filed a separate dissenting opinion to bring attention to an overarching jurisprudential issue implicated by the majority's disposition of Kelsay's case.[63] Judge Grasz noted that the majority relied solely upon the clearly-established prong to reach its determination, failing to confront the basic question of whether Deputy Ernst violated Kelsay's constitutional rights in the first place.[64] Judge Grasz argued that, while United States Supreme Court precedent condoned the majority's method of settling Deputy Ernst's appeal, that method was not appropriate for Kelsay's case because the lack of precedent governing Kelsay's situation was the very reason she was stopped from asserting her constitutional rights.[65] Judge Grasz further explained that the practice of focusing only on the clearly-established prong when disposing of qualified immunity cases leads to a reoccurring cycle of blocking claimants from holding individual public officers accountable for excessive force violations, because

57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* ("[T]he facts construed in the light most favorable to Kelsay show that she did comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing.").
61. *Id.* (citing *Ehlers*, 846 F.3d at 1011) ("The plaintiff in *Ehlers* twice ignored the officer's command to put his hands behind his back and continued walking as he passed the officer.").
62. *Id.* at 987.
63. *Id.* at 987 (Grasz, J., dissenting).
64. *Id.*
65. *Id.* (first citing Pearson v. Callahan, 129 S. Ct. 808, 818 (2009); and then citing Zadeh v. Robinson, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willet, J., concurring in part, dissenting in part)).

the case law on official actions deemed excessive never changes.[66] Judge Grasz then suggested the Eighth Circuit should utilize its discretionary authority to confront the Fourth Amendment reasonableness prong of the qualified immunity analysis whenever doing so would not constitute a mere academic exercise, and whenever determining the precise constitutional right at issue would ease the task of determining whether the right is clearly established.[67]

After the Eighth Circuit's decision, Kelsay filed a petition for a writ of certiorari on November 26, 2019.[68] The United States Supreme Court denied Kelsay's petition on May 18, 2020.[69]

III. BACKGROUND

A. 42 U.S.C. § 1983: Excessive Force Claims and the Creation and Evolution of Qualified Immunity Jurisprudence

42 U.S.C. § 1983 (hereinafter, "§ 1983") provides a means for redress in civil action against persons who, acting under the color of law, cause a United States citizen to be deprived of any rights conferred unto them by the United States Constitution or laws established pursuant thereto.[70] Under nineteenth-century common law, public officers who were granted discretion by law were not historically held liable for actions taken in good faith which fell within the bounds of that discretion.[71] However, for injurious actions taken which passed beyond the bounds of the officer's discretion, regardless of the good-faith intentions of the officer, liability followed.[72] Nonetheless, in the

66. *Id.* (citing 42 U.S.C. § 1983 (1996)).

67. *Id.* (quoting *Pearson*, 129 S. Ct. at 818). Judge Grasz concluded, stating that, "[w]hile implementation of this approach may or may not have brought relief to Ms. Kelsay in this court, it would help ensure this sad situation is not repeated. The protection of civil rights and the preservation of the rule of law deserves no less." *Id.* at 987-88.

68. Petition for Writ of Certiorari, Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (No. 19-682).

69. Kelsay v. Ernst, 140 S. Ct. 2760 (2020).

70. 42 U.S.C. § 1983 (1996); *see also* Graham v. Connor, 109 S. Ct. 1865, 1870 (1989) (quoting Baker v. McCollan, 99 S. Ct. 2689, 2694 n.3 (1979)) (reiterating that "§ 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred'").

71. *See, e.g.*, Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 130 (1849) ("[T]he acts of a public officer on public matters, within his jurisdiction, and where he has a discretion, are to be presumed legal, till shown by others to be unjustifiable.").

72. *See, e.g.*, Miller v. Horton, 26 N.E. 100, 101 (1891) (quoting Taylor v. Plymouth, 49 Mass. 462, 465 (1844)) ("It is said that if the destruction is necessary he is not liable. But by the common law as understood in this Commonwealth, 'if there be no necessity, then the individuals who do the act shall be responsible.'"); Ely v. Thompson, 10 Ky. 70, 76 (1820) ("[A] judicial officer cannot be punished for errors in judgment, on subjects within the scope of his authority, and over which he has jurisdiction. But this does not hold good when he attempts to exercise authority where he has none, and assumes jurisdiction without any power.").

1967 case, *Pierson v. Ray*,[73] the United States Supreme Court decided that any law enforcement officer who caused the depravation of another person's federal rights, but did so with probable cause to make an arrest and in good faith, would be entitled to immunity from suit under § 1983.[74] This potential immunity for law enforcement officers from lawsuits alleging civil rights violations is now referred to as "qualified immunity."[75]

1. Harlow v. Fitzgerald*: The Objective Reasonableness Test and the Clearly-Established Standard*

After the Court's holding in *Pierson v. Ray*,[76] qualified immunity jurisprudence developed significantly with a qualified immunity case involving neither a § 1983 suit nor law enforcement: *Harlow v. Fitzgerald*.[77] In *Harlow*, the Court considered a federal civil rights action against presidential aides on the basis of conspiracy to infringe upon the constitutional and statutory rights of an employee of the Department of the Air Force.[78] In its holding, the Court departed from the subjective, good-faith qualified immunity analysis *across the board*.[79] The Court explained that certain issues arise when a court attempts to conduct a subjective inquiry and uncover the subjective intent or motivations behind a person's conduct.[80] Additionally, the Court noted that the standard of review governing motions for summary judgment ordinarily bars factual disputes from being decided at that stage and that an individual's subjective intent was considered a ques-

73. 87 S. Ct. 1213 (1967).

74. Pierson v. Ray, 87 S. Ct. 1213, 1219 (1967) ("We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.").

75. *Pierson v. Ray*, BALLOTPEDIA, https://ballotpedia.org/Pierson_v._Ray (last visited Mar. 22, 2021).

76. 87 S. Ct. 1213 (1967).

77. Harlow v. Fitzgerald 102 S. Ct. 2727, 2738 n.30 (1982).

78. *Harlow*, 102 S. Ct. at 2729-31.

79. *See id.* at 2738 n.30 (quoting Butz v. Economou, 98 S. Ct. 2894, 2909 (1978)) (stating in a footnote after a recitation of the Court's holding that, although "[t]his case involves no issue concerning the elements of the immunity available to state officials sued for constitutional violations under 42 U. S. C. § 1983," the Court had previously found "that it would be 'untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials'").

80. *See id.* at 2737-38, 2738 n.29 (quoting Halperin v. Kissinger, 606 F.2d 1192, 1214 (1979) (Gesell, J., concurring), *aff'd in pertinent part by an equally divided Court*, 452 U.S. 713 (1981)) (explaining "why questions of subjective intent so rarely can be decided by summary judgment," recognizing that "the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experiences, values, and emotions," and that "[i]t is not difficult . . . to create a material issue of fact on some element of the immunity defense where subtle questions of constitutional law and a decisionmaker's mental processes are involved." (internal quotation marks omitted)).

tion of fact to be regarded as a jury question.[81] Thus, instead, the Court held that public officers performing discretionary functions would be entitled to qualified immunity from claims for civil damages so long as their actions did not infringe upon clearly established constitutional or statutory rights that an objectively reasonable individual would have known.[82]

Significantly, the Court in *Harlow* also explained the public policy justifications for qualified immunity and the balance that the Court sought to strike in creating the doctrine.[83] On the one hand, the Court recognized that when public officers violate the rights of citizens through the use of their official titles, the only realistic path for those citizens to vindicate their constitutional guarantees is to bring claims for damages.[84] On the other hand, the Court recognized that frequent and frivolous suits against public officers incur societal costs, including the monetary expenses of defense, the diversion of energy from demanding public issues, and the discouragement of capable citizens from interest in public service.[85] Additionally, the Court noted the danger that the threat of suit could unduly cause public officers to hesitate in discharging their duties.[86] Thus, the Court stated that the doctrine of qualified immunity constituted the most beneficial accommodation of the two competing considerations.[87]

As a point of clarification, the Court stated that by drawing the parameters for qualified immunity in objective terms, it did not intend to provide public officers a license for unconstitutional action.[88] The Court insisted that the public interest in deterring unlawful actions by public officers, and in victim compensation, would still be protected

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81. *Id.* at 2737 (citing FED R. CIV. P. 56). The Court also noted that "[i]n determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Id.* at 2737 n.26 (citing Poller v. Columbia Broad. Sys., Inc., 82 S. Ct. 486, 491 (1962)).

82. *Id.* at 2738.

83. *See id.* at 2736 (discussing the competing policy considerations surrounding the qualified immunity doctrine and stating that "[t]he resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative").

84. *Id.* (citing *Butz*, 98 S. Ct. at 2910).

85. *Id.*

86. *See id.* (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)) ("[T]here is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" (alteration in original)).

87. *Id.*

88. *Id.* at 2738-39.

by the objective reasonableness test and the clearly-established standard.[89]

2. Graham v. Connor*: Excessive Force and the Graham Factors*

Seven years after *Harlow v. Fitzgerald*,[90] the Court in *Graham v. Connor*[91] determined lower courts should utilize the Fourth Amendment objective reasonableness test in deciding any § 1983 claims alleging that a police officer used excessive force during an arrest or while otherwise seizing a free citizen.[92] The Court explained that, in deciding such claims, lower courts must objectively consider, from a reasonable officer's perspective and without considering the subjective intent or motivation of the defendant-officer in question, whether the force used on the claimant was reasonable under the circumstances.[93] The Court further explained that a proper review would be fact-specific, weighing such factors as: (1) the suspected severity of the claimant's offense at the time, (2) the existence of an immediate threat posed to the officer's or another's safety by the claimant at the time, and (3) whether the claimant was attempting to escape arrest by fleeing or otherwise actively resisting arrest at the time (hereinafter, collectively, "the *Graham* factors").[94] The Court articulated that the objective reasonableness assessment should allow officers in rapidly-evolving, tense, and uncertain circumstances to make quick judgment calls about the use of force necessary in situations before them, as officers are often required to do.[95]

3. Saucier v. Katz*: The Sequential, Two-Prong Qualified Immunity Analysis*

Another sixteen years after the Court's decision in *Graham v. Connor*,[96] the Court decided *Saucier v. Katz*,[97] another federal civil

89. *Id.* at 2739. The Court added the following hypotheticals to elaborate its expectations for qualified immunity standards:

> Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences."

Id. (quoting Pierson v. Ray, 87 S. Ct. 1213, 1218 (1967)).

90. 102 S. Ct. 2727 (1982).

91. 109 S. Ct. 1865 (1989).

92. Graham v. Connor, 109 S. Ct. 1865, 1871 (1989).

93. *Graham*, 109 S. Ct. at 1871.

94. *Id.* at 1872 (citing Tennessee v. Garner, 105 S. Ct. 1694, 1700 (1985)).

95. *Id.*

96. 109 S. Ct. 1865 (1989).

97. 121 S. Ct. 2151 (2001).

rights action which was brought against a military police officer on the basis of excessive force used during an arrest.[98] In *Saucier*, the Court mandated that, in determining whether an officer would be entitled to qualified immunity from suit alleging excessive force, the lower courts had to engage in a *sequential* two-prong inquiry (hereinafter, "the immunity analysis").[99] First, lower courts had to determine whether the alleged facts, viewed in the light most favorable to the plaintiff, demonstrated that the force used by the defendant-officer infringed upon the plaintiff's constitutional rights (hereinafter, "prong one").[100] Second, if prong one was answered in the affirmative, lower courts then had to determine whether force used by the defendant-officer infringed upon a clearly established constitutional right under United States Supreme Court and/or United States Court of Appeals precedent (hereinafter, "prong two").[101]

In *Saucier*, Elliot Katz brought a § 1983 excessive force claim against Officer Donald Saucier in the United States District Court for the Northern District of California.[102] Officer Saucier filed a motion for summary judgment on the basis of qualified immunity, but the district court denied Officer Saucier's motion.[103] Officer Saucier then filed an interlocutory appeal of that denial to the United States Court of Appeals for the Ninth Circuit, but the Ninth Circuit affirmed.[104] The Ninth Circuit did not address the constitutional inquiry but denied qualified immunity to Officer Saucier solely because it found the right at issue was clearly established under precedent at the time of Katz's arrest.[105] The Ninth Circuit reasoned that—because the constitutional inquiry prong of the immunity analysis, judged on the parties' pleadings, was the same inquiry that the jury would be charged with at trial on the merits—the constitutional inquiry prong of the immunity analysis was redundant.[106]

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98. *See* Saucier v. Katz, 121 S. Ct. 2151, 2155 (2001) (citing Bivens v. Six Unknown Fed. Narcotics Agents, 91 S. Ct. 1999 (1971)) ("Respondent brought this action . . . alleging, inter alia, that defendants had violated respondent's Fourth Amendment rights by using excessive force to arrest him."); *see generally* Graham v. Connor, 109 S. Ct. 1865 (1989).

99. *Saucier*, 121 S. Ct. at 2156.

100. *Id.*

101. *Id.*

102. *Id.* at 2155.

103. *Id.*

104. *Id.*

105. *See id.* (discussing the Ninth Circuit's analysis of the case and why it constituted reversible error).

106. *See id.* (stating that the Ninth Circuit "concluded that the second step of the qualified immunity inquiry and the merits of the Fourth Amendment excessive force claim are identical, since both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced on the scene").

The Court in *Saucier* disagreed with the Ninth Circuit's analysis for two reasons.[107] The first reason was that qualified immunity provides public officers acting under the color of law a vehicle to evade the burdens of suit, which should not be confused with a mere defense to liability.[108] Therefore, the Court stated, because the purpose of the qualified immunity vehicle would be void if a claim against a public officer were erroneously allowed to go to trial, the importance of resolving immunity questions at the earliest possible stage in a lawsuit (i.e., on the parties' pleadings as opposed to at trial) was high.[109] The second reason for the Court's disagreement was that the Ninth Circuit's analysis failed to consider the two prongs of the immunity analysis in the order which they should have been considered.[110] The Court stated that, in the process of determining whether the facts alleged constitute a violation of a constitutional right, a lower court may deem it necessary to establish contextual principles to provide the basis for a finding that a right claimed to be violated is clearly established.[111] That process, the Court continued, is how qualified immunity jurisprudence would develop from one case to the next.[112] Thus, the constitutional inquiry had to be the first inquiry.[113] Otherwise, if lower courts simply jumped straight to the question of whether an officer's conduct was clearly established as unlawful under the alleged circumstances of a case, the law governing qualified immunity could be deprived of development.[114]

The Court initially explained that the *Graham* factors were primarily germane to determining the merits of an excessive force claim.[115] However, the Court also implied that, in some cases, the *Graham* factors may provide a clear answer to whether a use of force would be deemed unreasonable by the courts.[116] The Court then explained that prong two of the immunity analysis would be determined by the notice provided to the officer regarding the constitutionality of

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107. *Id.* at 2155-56.
108. *Id.* at 2156.
109. *Id.*
110. *Id.*
111. *Id.* The Court specifically stated that its "instruction to the [lower courts] to concentrate *at the outset* on the definition of the constitutional right and to determine whether, on the facts alleged, a constitutional violation could be found is important," and that "the procedure permits courts in appropriate cases *to elaborate the constitutional right* with greater degrees of specificity." *Id.* at 2159 (emphasis added).
112. *Id.* at 2156.
113. *Id.*
114. *See id.* (discussing the reasoning for "insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry").
115. *See id.* at 2158 (citing *Graham*, 109 S. Ct. at 1872).
116. *See id.* (citing *Graham*, 109 S. Ct. at 1872) ("*Graham* does not *always* give a clear answer as to whether a particular application of force will be deemed excessive by the courts." (emphasis added)).

the officer's alleged actions under factually similar excessive force case law at the time of the incident in question.[117]

In *Saucier*, Justice Ruth Bader Ginsburg wrote a concurring opinion, which was joined by Justice John Stevens and Justice Stephen Breyer.[118] In that opinion, Justice Ginsburg posited that the Court's two-part immunity analysis was unnecessary and injected the potential for confusion into qualified immunity jurisprudence.[119] Justice Ginsburg reasoned that both inquiries essentially asked the same question: considering the particular alleged circumstances faced by the defendant-officer, viewed in the light most favorable to the plaintiff and without consideration of the defendant-officer's underlying motivations or intent, could an identically-situated and objectively-reasonable officer have believed the force used was lawful?[120] Justice Ginsburg noted that this was practically the same question as the Court directed lower courts to answer in *Graham*.[121] Moreover, Justice Ginsburg noted that, in answering that question and considering whether the particular force used by an officer fell inside a range of reasonable choices, the lower courts would also necessarily answer whether it could have been believed by an objectively reasonable officer that the force used was *lawful*.[122]

4. Pearson v. Callahan*: Relaxing the Strict Mandate of* Saucier v. Katz

Eight years after the Court's opinion in *Saucier v. Katz*,[123] the Court again revisited the qualified immunity doctrine in *Pearson v. Callahan*.[124] In *Pearson*, the Court declared the two-prong, sequential mandate from its decision in *Saucier* would no longer be required of lower courts resolving qualified immunity claims.[125] Instead, upon

117. *See id.* at 2158 (stating that "[a]n officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances," and that an officer's objectively reasonable "mistake as to what the law requires" would also entitle an officer to qualified immunity against excessive force claims).

118. *Id.* at 2160 (Ginsburg, J., concurring).

119. *Id.* at 2160-61.

120. *See id.* at 2160-62 (quoting *Graham*, 109 S. Ct. at 1872) ("[P]aradigmatically, the determination of police misconduct in excessive force cases and the availability of qualified immunity both hinge on the same question: Taking into account the particular circumstances confronting the defendant officer, could a reasonable officer, identically situated, have believed the force employed was lawful?").

121. *Id.* at 2161.

122. *Id.* at 2163 (citing Anderson v. Creighton, 107 S. Ct. 3034, 3038 (1987)).

123. 121 S. Ct. 2151 (2001).

124. Pearson v. Callahan, 129 S. Ct. 808, 813 (2009); *see generally* Saucier v. Katz, 121 S. Ct. 2151 (2001).

125. *Pearson*, 129 S. Ct. at 817. In *Pearson*, the Court also determined that "[p]olice officers are entitled to rely on existing lower court cases without facing personal liability

considering the circumstances of each case, lower courts would be permitted to use discretion in deciding whether to address or skip prong one of the immunity analysis.[126] The Court reasoned that issues presented by the inflexible, sequential mandate supported its determination.[127] Specifically, the issues identified by the Court included the following: the additional cost to judicial and individual party resources of addressing prong one; the questionable value of a lower court addressing prong one when the constitutional question appeared to be up for decision at a higher court; the concern that the lower courts may incorrectly decide the constitutional question in cases where either the parties' presentation of the question is inadequate or the judges pre-determine that prong two of the analysis would support finding in favor of granting qualified immunity; and the fact that the mandatory sequence conflicts with the judicial doctrine of constitutional avoidance.[128] The Court then explained that, while no longer mandatory, the lower courts' adherence to the two-prong, sequential immunity analysis *would often be appropriate* due to the benefits of addressing prong one at the outset of a qualified immunity analysis.[129] In defense of its holding, the Court stated that any doubts about its departure from the sequential mandate were undeserved and the development of unconstitutional conduct under § 1983 lawsuits did not hinge upon cases involving a defendant seeking qualified immunity.[130]

5. Recent United States Supreme Court Cases

Over the past decade, United States Supreme Court cases involving officers claiming qualified immunity from § 1983 excessive force

for their actions," including case law established outside of the Federal Circuit with jurisdiction over the case, reasoning that "[t]he principles of qualified immunity shield an officer from personal liability when an officer reasonably believes that his or her conduct complies with the law." *Id.* at 823.

126. *Id.* at 818.

127. *Id.*

128. *Id.* at 818-21.

129. *Id.* at 818. The Court recognized that following the sequential immunity analysis "is often beneficial," noting benefits such as the possible difficulty of determining "whether a right is clearly established without deciding precisely what the existing constitutional right happens to be," and the fact that "the two-step procedure promotes the development of constitutional precedent and is especially valuable with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Id.* (internal quotation marks omitted) (quoting Lyons v. City of Xenia, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)).

130. *Id.* at 821-22. The Court reasoned that a majority of the issues shaping development of unconstitutional conduct under § 1983 suits for damages "also arise in cases in which that defense is not available, such as criminal cases and § 1983 cases against a municipality, as well as § 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages." *Id.* at 822 (citing County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 n.5 (1998)).

suits have repeatedly focused on clarifying the standard of review and the scope of prong two of the immunity analysis.[131] Regarding the standard of review, the Court recently warned the lower courts not to neglect the *fundamental principle* that all reasonable inferences must be drawn to the benefit of the nonmoving party at the summary judgment stage.[132] Regarding the scope of prong two, the Court has consistently reiterated that, typically, a body of factually and authoritatively relevant precedent would be required to deem a constitutional right clearly established.[133] However, the Court also recently implied that precedent outlining general reasonableness tests, such as the *Graham* factors, may suffice to demonstrate a violation of a § 1983 claimant's clearly established rights in cases where the force used by an officer was *obviously unreasonable*.[134]

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131. *See* City of Escondido v. Emmons, 139 S. Ct. 500, 503 (2019) (per curiam) (stating that "the clearly established right must be defined with specificity" referring to the scope of prong two of the immunity analysis where an officer claimed qualified immunity from § 1983 suit alleging excessive force); Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015)) (stating that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" and "[p]recedent involving similar facts can . . . provide an officer notice that a specific use of force is unlawful," referring to the scope of prong two of the immunity analysis where an officer claimed qualified immunity from § 1983 suit alleging excessive force); Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (quoting Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001)) ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard. In cases alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.' . . . Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual propositions."); *Mullenix*, 136 S. Ct. at 308 (quoting Malley v. Briggs, 106 S. Ct. 1092, 1096 (1986)) (stating that, "specificity is especially important in the Fourth Amendment context," and "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law,'" in reference to the scope of prong two of the immunity analysis where an officer claimed qualified immunity from § 1983 suit alleging excessive force); *see also* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (stating the Court would "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate," referring to the scope of prong two of the immunity analysis where an Attorney General claimed qualified immunity from a federal civil rights suit alleging that the Attorney General's authorization for federal prosecutors to obtain a material-witness warrant for the detention of a suspect violated claimant's Fourth Amendment rights).

132. *E.g.*, *Tolan*, 134 S. Ct. at 1868 (admonishing the lower court for "neglect[ing] to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party").

133. *See, e.g.*, *Emmons*, 139 S. Ct. at 504 (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 581 (2018)) (stating that "a body of relevant case law is usually necessary to clearly establish" a Fourth Amendment right claimed to be violated by an officer's actions (internal quotation marks omitted)).

134. *See, e.g.*, *Kisela*, 138 S. Ct. at 1153 (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017)) ("'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers.' . . . But the general rules set forth in '*Garner* and *Graham* do not by themselves create clearly established law outside "an obvious case."'").

B. Established Precedent Discussed by the United States Court of Appeals for the Eighth Circuit in *Kelsay v. Ernst*

1. Shekleton v. Eichenberger

In *Shekleton v. Eichenberger*,[135] the United States Court of Appeals for the Eighth Circuit determined that an officer who tased a nonviolent, compliant, suspected misdemeanant who was not fleeing or actively resisting arrest and posed trivial-to-no threat to the public's or arresting officers' security was not entitled to qualified immunity from suit claiming excessive force.[136] In *Shekleton*, Justin Shekleton was seen by Deputy Ryan Eichenberger outside a bar speaking with another patron with whom Deputy Eichenberger believed Shekleton was arguing.[137] When the other patron went inside, Deputy Eichenberger approached Shekleton and inquired about the encounter, which Shekleton persistently denied was confrontational.[138] Two other officers then arrived and were directed by Deputy Eichenberger to find the other patron and discuss the encounter.[139] Believing Shekleton to be intoxicated, Deputy Eichenberger directed Shekleton to move back from the street, and Shekleton moved to lean against a store next to the bar with his arms folded.[140] When Deputy Eichenberger continued to question Shekleton, Shekleton requested an apology, unfolded his arms, stood upright, and faced Deputy Eichenberger, who perceived Shekleton's conduct as threatening.[141] Deputy Eichenberger then asked Shekleton to "place his hands behind his back" twice.[142] When Shekleton stated he could not physically comply with Deputy Eichenberger's requests, which Deputy Eichenberger verbally acknowledged, Deputy Eichenberger tried to handcuff Shekleton.[143] At that time, Deputy Eichenberger lost control of Shekleton's arm, the

135. 677 F.3d 361 (8th Cir. 2012).

136. *See* Shekleton v. Eichenberger, 677 F.3d 361, 363-65 (8th Cir. 2012) (discussing the factual and procedural background of Deputy Eichenberger's appeal and affirming the district court's refusal to grant summary judgment on the basis of qualified immunity).

137. *Shekleton*, 677 F.3d at 363-64. Shekleton and three witnesses "stated under oath that the conversation between Shekleton and [the other patron] was a friendly one." *Id.* at 364.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* Deputy Eichenberger testified Shekleteon "demanded that Deputy Eichenberger 'fucking apologize' to him," but Shekleton and three affiant witnesses denied that Shekleton used obscenity, and Shekleton also "stated under oath that he did not behave aggressively towards Deputy Eichenberger." *Id.*

142. *Id.*

143. *Id.* at 364-65. The court noted that many in the community knew that Shekleton "suffered from left-side dystonia, a condition that causes his left arm to shake beyond his control," and also noted that "Deputy Eichenberger responded 'I know' after

two fell down, and the other officers walked outside to assist with the arrest.[144] As the officers were attempting to restrain Shekleton, Deputy Eichenberger yelled "taser" three times and tased Shekleton, causing Shekleton to faceplant on the ground, which resulted in minor head injuries.[145] All charges were ultimately dropped against Shekleton.[146]

Shekleton sued Deputy Eichenberger under § 1983, claiming Deputy Eichenberger's tasing of Shekleton infringed upon Shekleton's Fourth Amendment rights.[147] The United States District Court for the Northern District of Iowa denied Deputy Eichenberger's motion for summary judgment, reasoning that the facts, after resolving any discrepancies in favor of Shekleton, would constitute an infringement of Shekleton's clearly established constitutional rights.[148] Deputy Eichenberger then appealed to the Eighth Circuit, claiming qualified immunity should have shielded him from Shekleton's excessive force claim.[149]

Upon de novo review, accepting facts as true which were either deemed adequately supported or assumed by the district court, the Eighth Circuit affirmed the district court's ruling.[150] Utilizing the immunity analysis to support its finding, the Eighth Circuit first determined that, under the circumstances alleged by Shekleton, Deputy Eichenberger tasing Shekleton was unreasonable and infringed upon Shekleton's Fourth Amendment rights.[151] Proceeding to prong two of

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Shekleton told him he could not control his arm." *Id.* at 365 (quoting J. Brummond Aff. ¶ 13).

144. *Id.* Deputy Eichenberger testified that "Shekleton broke away from him in an attempt to resist arrest," but Shekleton testified that "Deputy Eichenberger lost his grip on Shekleton as the two accidentally fell in Deputy Eichenberger's attempt to handcuff him." *Id.*

145. *Id.* The United States Court of Appeals for the Eighth Circuit noted that "[o]ne of the two officers then attempted to help restrain Shekleton by grabbing his arm but was unable to do so," and that the officer claimed "Shekleton forcefully attempted to resist him and break free from his grip." *Id.* at 365, 365 n.6.

146. *Id.* at 365.

147. *Id.* at 363.

148. Shekleton v. Eichenberger, No. C10-2051, 2011 U.S. Dist. LEXIS 45038, at *36-37 (N.D. Iowa Apr. 26, 2011). The United States District Court for the Northern District of Iowa noted that "there were three law enforcement officers at the scene and Eichenberger provided no warning to Shekleton that he would use his taser on him if he did not cooperate" which made Shekleton's case distinguishable "from other cases in the Eighth Circuit" at the time. *Shekleton*, No. C10-2051, 2011 U.S. Dist. LEXIS 45038, at *37, *37 n.20 (first citing McKenney v. Harrison, 635 F.3d 354 (8th Cir. 2011); then citing Cook v. City of Bella Villa, 582 F.3d 840 (8th Cir. 2009); and then citing Schumacher v. Halverson, 467 F. Supp. 2d 939 (D. Minn. 2006)).

149. *Shekleton*, 677 F.3d at 363.

150. *Id.* at 363, 365 (quoting Brown v. City of Golden Valley, 574 F.3d 491, 495-96 (8th Cir. 2009)).

151. *See id.* at 365-366 (first quoting Johnson v. Carroll, 658 F.3d 819, 824, 826-28 (8th Cir. 2011); and then quoting Smith v. Kansas City, Mo. Police Dep't, 586 F.3d 576,

the immunity analysis, the Eighth Circuit recognized it had not yet addressed officer taser use in an excessive force claim when Shekleton's arrest occurred.[152] Nonetheless, by utilizing the *Graham* factors, the Eighth Circuit determined that tasing a nonviolent, compliant, suspected misdemeanant who was not fleeing was a clearly established violation of the plaintiff's Fourth Amendment rights at the time of Shekleton's arrest.[153]

2. Montoya v. City of Flandreau

In *Montoya v. City of Flandreau*,[154] the United States Court of Appeals for the Eighth Circuit determined that an officer who took to the ground with more than de minimis force, using a takedown maneuver novel to the court's excessive force review, a misdemeanant who was nonviolent, non-threatening, and not fleeing or actively resisting arrest would not be granted qualified immunity from suit claiming excessive force.[155] In *Montoya*, Officers Gaalswyk and Hooper responded to a call, for the second time that day, from Robert Cournoyer who sought assistance with resolving a domestic dispute between Cournoyer's ex-girlfriend, Shaylene Montoya, and himself.[156]

581 (8th Cir. 2009)) (completing prong one of the immunity analysis and applying the facts to Eighth Circuit precedent to determine "Shekleton ha[d] established that a violation of a constitutional right occurred"). In determining that "a reasonable officer would not have deployed his taser under the circumstances as presented by Shekleton," the Eighth Circuit established that "viewing the facts in the light most favorable to Shekleton . . . . Shekleton was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him." *Id.* at 366 (citing *Johnson*, 658 F.3d at 827-28).

152. *Id.* at 367.

153. *See id.* at 366-67 (first quoting Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001); then quoting Hope v. Pelzer, 122 S. Ct. 2508, 2516 (2002); then quoting McGruder v. Heagwood, 197 F.3d 918, 919 (8th Cir. 1999); and then quoting Graham v. Connor, 109 S. Ct. 1865, 1872 (1989)) (first citing Norman v. Schuetzle, 585 F.3d 1097, 1109 (8th Cir. 2009), overruled on other grounds by Pearson v. Callahan, 129 S. Ct. 808 (2009); and then citing *Brown*, 574 F.3d at 491) (completing prong two of the immunity analysis and applying its legal findings implicated by the facts "to the state of the law at the time of the incident" in determining that "general constitutional principles against excessive force that were clearly established at the time of the incident . . . were such as to put a reasonable officer on notice that tasering Shekleton under the circumstances as presented by Shekleton was excessive force in violation of the clearly established law"). The Eighth Circuit noted that "[f]orce is 'least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public.'" *Id.* at 366 (quoting *Johnson*, 658 F.3d at 827-28).

154. 669 F.3d 867 (8th Cir. 2012).

155. *See* Montoya v. City of Flandreau, 669 F.3d 867, 869-70 (8th Cir. 2012) (announcing its decision to reverse the lower court's grant of summary judgment and discussing the factual and procedural background of Montoya's appeal).

156. *Montoya*, 669 F.3d at 869. The United States Court of Appeals for the Eighth Circuit noted that Montoya and Cournoyer "had recently ended their relationship and, after moving to Utah, Montoya came back to take their son with her and to retrieve her belongings from Cournoyer's residence," and according to Montoya, "the argument arose

Upon arrival, the officers found Cournoyer and Montoya arguing outside Cournoyer's residence.[157] By Montoya's account, she was standing opposite Cournoyer and the two officers were standing about ten-to-fifteen feet away.[158] While Montoya and Cournoyer were talking, Montoya raised her hand in an expressive motion and took a step toward Cournoyer.[159] Officer Hooper then grabbed Montoya's left arm, placed it behind her back, and cuffed her wrist.[160] Officer Gaalswyk attempted to place Montoya's right arm behind her back and told Montoya to stop resisting.[161] Without warning, Officer Hooper then swept Montoya's left leg, causing Montoya to faceplant on the ground and causing Officer Hooper to fall on top of Montoya.[162] Montoya was arrested and charged with resisting arrest and simple assault or, alternatively, disorderly conduct, and she suffered a serious fracture on her left knee.[163] Montoya was found guilty of disorderly conduct; however, due to the actual inability of Montoya to cause any physical harm to Cournoyer considering the distance between them, Montoya was found not guilty of simple assault and resisting arrest.[164]

Montoya sued Officer Hooper under § 1983 claiming Officer Hooper's use of force to take down and arrest Montoya infringed upon Montoya's Fourth Amendment rights.[165] Reviewing Officer Hooper's motion for summary judgment on the basis of qualified immunity, the United States District Court for the District of South Dakota found

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because Cournoyer threatened to take their son to the Yankton Sioux Reservation where she would be unable to contact him." *Id.*

157. *Id.*

158. *Id.*

159. *See id.* (noting Montoya testified that the officers "stated that I took a step forward and raised my fist," and continued, "I would like to say that when I do talk, I use my hands in motion to express myself"). Officer Hooper testified that "as Montoya and Cournoyer were arguing, Montoya raised her right hand in a fist and took a step forward toward Cournoyer." *Id.* at 870.

160. *Id.* at 869. Officer Hooper testified that he was "[c]oncerned about Cournoyer's safety," and when he "grabbed Montoya's left arm, put it behind her back, and placed a handcuff on her left wrist," Montoya then "resisted and tucked her right arm under her stomach." *Id.* at 870.

161. *Id.* at 869.

162. *Id.* Officer Hooper testified that when Montoya "continued to resist, Officer Hooper performed the so-called 'leg sweep,' sweeping her left leg with his right leg, and causing her to fall to the ground," and that he "then placed the other handcuff on her right wrist." *Id.* at 870.

163. *Id.* Montoya suffered "a tibial plateau fracture on the left knee," which required surgery, and "[f]or four to five months following the surgery, . . . could only walk with the help of crutches, after which she also had to undergo weeks of physical therapy." *Id.*

164. *Id.* The Eighth Circuit noted that "the [state] court found Montoya guilty of disorderly conduct," because "Montoya's overall actions amounted to serious public inconvenience and annoyance to Cournoyer." *Id.*

165. *See id.* (discussing the procedural history of Montoya's suit).

that Officer Hooper's force used for Montoya's takedown was objectively reasonable and granted the motion.[166] Montoya then appealed to the Eighth Circuit, claiming the lower court erred in granting Officer Hooper's motion, as qualified immunity should not have applied to her suit against Officer Hooper.[167]

Upon de novo review and viewing the facts in the light most favorable to Montoya, the Eighth Circuit reversed the district court's ruling.[168] Considering Eighth Circuit precedent and the seriousness of the injury resulting from the force used, the court first determined it could not conclude, as a matter of law, that the force Officer Hooper used to takedown Montoya during the arrest was objectively reasonable under the Fourth Amendment.[169] The Eighth Circuit noted that, while a jury could believe Officer Hooper's testimony over Montoya's at trial, it was not the function of the Eighth Circuit to take the credibility assessment away from the jury.[170] Proceeding to prong two of the immunity analysis, the Eighth Circuit found that, at the time of Montoya's arrest, precedent provided clear notice to a reasonable officer that it was unconstitutional to use more than de minimis force in taking down a suspected misdemeanant who was nonviolent, nonthreatening, and not fleeing or actively resisting arrest.[171]

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166. *Id.*

167. *Id.* at 870, 872.

168. *Id.* at 870, 873 (quoting Chambers v. Pennycook, 641 F.3d 898, 904 (8th Cir. 2011)).

169. *See id.* at 870-72 (first quoting *Chambers*, 641 F.3d at 904, 906 (8th Cir. 2011); then quoting Brown v. City of Golden Valley, 574 F.3d 491, 496, 499 (8th Cir. 2009); and then quoting Shannon v. Koehler, 616 F.3d 855, 863 (8th Cir. 2010)) (citing Rohrbough v. Hall, 586 F.3d 582, 586 (8th Cir. 2009)) (discussing the standard of review and applying Eighth Circuit precedent and state law to the facts of Montoya's claim in completing prong one of the immunity analysis). The Eighth Circuit reasoned that, "[v]iewing the record and drawing all reasonable inferences in the light most favorable to Montoya, while simultaneously viewing the facts from the perspective of 'a reasonable officer on the scene,'" and "consider[ing] 'the totality of the circumstances, including the severity of the crime, the danger the suspect pose[d] to the officer or others, and whether the suspect [was] actively resisting arrest or attempting to flee,'" as well as "[t]he degree of injury suffered, to the extent 'it tends to show the amount and type of force used,'" when "Officer Hooper performed the 'leg sweep,' Montoya was not threatening anyone, was not actively resisting arrest, and was not attempting to flee," she was at most a misdemeanant, and, as a result of the takedown, she suffered "a broken leg." *Id.* at 871-72 (first quoting *Shannon*, 616 F.3d at 863; then quoting *Cook*, 582 F.3d at 849; and then quoting *Chambers*, 641 F.3d at 906) (first citing S.D. Codified Laws §§ 22-18-35 and 22-6-2(2); and then citing *Brown*, 574 F.3d at 496).

170. *Id.* at 872 (quoting Henderson v. Munn, 439 F.3d 497, 504 (8th Cir. 2006)).

171. *Id.* at 872-873 (first citing Copeland v. Locke, 613 F.3d 875, 881 (8th Cir. 2010); then citing *Shannon*, 616 F.3d at 864; and then citing *Brown*, 574 F.3d at 499).

3. Ehlers v. City of Rapid City

In *Ehlers v. City of Rapid City*,[172] the United States Court of Appeals for the Eighth Circuit determined that an officer who, using a spin takedown maneuver, brought a nonviolent, noncompliant, suspected misdemeanant to the ground was entitled to do so and did not infringe upon the suspect's constitutional rights.[173] In *Ehlers*, Randall Ehlers was attending a hockey game with his family when he was informed that several of his adult children were involved in an altercation with security personnel and were being confronted by officers from the Rapid City Police Department outside the stadium.[174] When Ehlers walked outside, his son was being arrested by Officer Jim Hansen who was in the process of placing Ehlers' son in the patrol car.[175] Ehlers walked up to Officer Hansen and inquired about the arrest.[176] In response, Officer Hansen pointed to the stadium and directed Ehlers to walk back to the sidewalk.[177] Ehlers did not step back, but rather stepped closer to Officer Hansen and continued inquiring about his son.[178] Officer Hansen again pointed to the stadium and stated that Ehlers should get on the sidewalk before Officer Hansen's count to three.[179] Just then, Officer Scott Dirkes arrived on scene, and Officer Hansen directed him to place Ehlers under arrest because Ehlers was not listening.[180] At that time, Ehlers began walking to the sidewalk.[181] Officer Dirkes walked toward Ehlers and, two separate

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172. 846 F.3d 1002 (8th Cir. 2017).

173. *See* Ehlers v. City of Rapid City, 846 F.3d 1002, 1007-08 (8th Cir. 2017) (announcing its decision to reverse the lower court's denial of summary judgment and discussing the factual and procedural background of Ehlers' appeal).

174. *Ehlers*, 846 F.3d at 1007. The United States Court of Appeals for the Eighth Circuit recounted the facts leading up to Ehlers awareness of the altercation as follows:

> On December 21, 2010, Randall Ehlers ("Ehlers") and his wife, three adult children, and several friends attended a Rush hockey game at Rushmore Plaza Civic Center in Rapid City, South Dakota. Mrs. Ehlers and her son Derrik Ehlers were at a table in the hospitality area when the table was jostled and beer spilled on Mrs. Ehlers. Some confusion ensued, and Civic Center staff asked Mrs. Ehlers to leave and escorted her out of the area. The Ehlers children began to yell profanities at the staff, and they were also instructed to leave. An altercation between the children and security personnel occurred shortly thereafter. Rapid City Police responded, and officers ultimately arrested several of the Ehlers children and a family friend.

Id.

175. *Id.*

176. *Id.*

177. *Id.* Specifically, "Officer Hansen told Ehlers to step back to the curb." *Id.*

178. *Id.*

179. *Id.*

180. *Id.* The Eighth Circuit noted that "[Officer] Dirkes testified that Officer Hansen instructed him to arrest Ehlers, and [Officer] Dirkes's dash camera picked up audio of [Officer] Hansen saying, 'Take this guy, he's not listening.'" *Id.*

181. *Id.* The United States District Court for the District of South Dakota noted that "Officer Dirkes testified that as Mr. Ehlers walked past him from the area of Of-

times, directed Ehlers to "put his hands behind his back."[182] Without pausing, Ehlers ignored both commands and continued walking to the sidewalk.[183] Officer Dirkes then grabbed Ehlers by his shoulder and neck, and performed a spin takedown maneuver to bring Ehlers to the ground.[184] From that point, the officers turned Ehlers over onto his knees and hands, pushed his head down to the ground, placed him in an arm-bar hold, and tased him.[185] By the end of the confrontation, Ehlers had sustained knee and shoulder injuries, including damage to his rotator cuff, and he was arrested for obstructing an officer and resisting arrest.[186]

Ehlers sued Officer Dirkes and two other officers under § 1983 claiming, inter alia, Officer Dirkes' use of force to bring Ehlers to the ground via the spin takedown maneuver infringed upon Ehlers' Fourth Amendment rights.[187] Reviewing Officer Dirkes' motion for summary judgment on the basis of qualified immunity, a United States Magistrate Judge for the United States District Court for the District of South Dakota, Western Division, recommended the motion be denied.[188] The magistrate reasoned the force Officer Dirkes used in performing the takedown maneuver on Ehlers could be deemed clearly established as objectively unreasonable, as it inflicted more than a minor injury upon Ehlers.[189] Upon review of Officer Dirkes'

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ficer Hansen's patrol car that Mr. Ehlers said '[f]uck you, I'm not going to jail,'" but because Ehlers denied making that any statement at that time, the district court was bound to "conclude these statements were not made by" Ehlers. Ehlers v. City of Rapid City, 2016 U.S. Dist. LEXIS 29271, at *7 (D.S.D. Mar. 8, 2016) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1356 (1986)), *rev'd*, 846 F.3d 1002 (8th Cir. 2017).

182. *Ehlers*, 846 F.3d at 1007.

183. *Id.* The Eighth Circuit noted that Ehlers testified "that he did not hear [Officer] Dirkes's instructions," but that "an arrestee's subjective motive does not bear on how reasonable officers would have interpreted his behavior." *Id.* at 1011 (citing Carpenter v. Gage, 686 F.3d 644, 650 (8th Cir. 2012)).

184. *Id.* at 1007. The Eighth Circuit noted that "Ehlers landed on his back with his arms in the air." *Id.*

185. *Id.* at 1007-08, 1008 n.1. For purposes of this Note, only the facts that took place prior to Ehlers being turned over are relevant.

186. *Id.* at 1008.

187. *See id.* at 1008, 1010-11 (noting that Ehlers brought a claim of excessive force against Officer Dirkes for his use of the spin takedown maneuver on Ehlers). The Eighth Circuit noted that "Ehlers brought unlawful arrest and excessive force claims against [Officers] Hansen, Dirkes, and Rybak under 42 U.S.C. § 1983," however, for purposes of this Note, only Ehlers' excessive force claim against Officer Dirkes for his use of the spin takedown maneuver on Ehlers will be discussed. *Id.* at 1008.

188. Ehlers v. City of Rapid City, No. 5:12-CV-05093-JLV, 2015 U.S. Dist. LEXIS 176781, at *1-2, *17 (D.S.D. Sep. 5, 2015).

189. *See Ehlers*, 2015 U.S. Dist. LEXIS 176781, at *15-17 (first citing Rohrbough v. Hall, 586 F.3d 582, 585-86 (8th Cir. 2009); and then citing Chambers v. Pennycook, 641 F.3d 898 (8th Cir. 2011)) (discussing the procedural history and analyzing Ehlers' claim of excessive force against Officer Dirkes). The magistrate judge noted that, while "*Chambers* was decided after th[e] incident," and "Officer Dirkes did not have fair warn-

objection to the recommendation, the Chief United States District Judge for the district court stated that, because a question for the jury existed regarding the reasonableness of Officer Dirkes' conduct, the magistrate judge was correct in applying the law and recommending that Officer Dirkes' motion be denied.[190] Officer Dirkes then appealed to the Eighth Circuit, claiming the district court erred in denying his motion because qualified immunity should have shielded him from Ehlers' excessive force claim.[191]

Upon de novo review and viewing the facts in the light most favorable to Ehlers, the Eighth Circuit determined that Officer Dirkes' takedown of Ehlers did not infringe upon Ehlers' constitutional rights.[192] The Eighth Circuit reasoned that Ehlers in no way complied with Dirkes' two separate orders to "put his hands behind his back," so a reasonable officer would have interpreted Ehlers' behavior as noncompliant.[193] Consequently, the Eighth Circuit stated that Ehlers' argument, that use of force was inappropriate because he was not resisting arrest, was inapplicable because Ehlers at least seemed to be resisting arrest.[194] The Eighth Circuit further reasoned that, because Officer Dirkes gave Ehlers two warnings prior to performing the takedown maneuver, precedent deeming an officer's unannounced tackling of a nonviolent, suspected misdemeanant excessive was also inapplicable.[195] Disposing of the question solely on prong one of the immunity analysis, the Eighth Circuit reversed the district court's de-

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ing that causing *de minimis* injury to an individual could support an excessive force claim," the damage to Ehlers' rotator cuff "amount[ed] to more than a *de minimis* injury" and there was "a genuine issue of material fact as to the reasonableness of Officer Dirkes' actions and the cause of Mr. Ehlers' shoulder injury." *Id.* at *16-17 (emphasis in original); *see also Chambers*, 641 F.3d at 906 (quoting Graham v. Connor, 109 S. Ct. 1865, 1871 (1989)) (establishing that it was "logically possible to prove an excessive use of *force* that caused only a minor *injury*," and "[t]he appropriate inquiry is 'whether *the force used* to effect a particular seizure is "reasonable"'" (emphasis in original)).

190. *Ehlers*, 2016 U.S. Dist. LEXIS 29271, at *21. The district court judge noted that *Small* "is also factually similar to Mr. Ehlers' conduct," as "Mr. Small 'did not pose an immediate threat to the safety of the officers or others. . . . was walking away from them . . . He was not in flight or resisting arrest'" and the officer "had not advised him he was under arrest," and that "[i]t was unreasonable for McCrystal to use more than de minimis force against Small by running and tackling him from behind without warning." *Id.* at *20-21 (internal quotation marks omitted) (quoting Small v. McCrystal, 708 F.3d 997, 1005 (8th Cir. 2013)).

191. *Ehlers*, 846 F.3d at 1008.

192. *Id.* at 1008, 1011 (quoting Shannon v. Koehler, 616 F.3d 855, 861-62 (8th Cir. 2010)).

193. *Id.* at 1011.

194. *Id.* (citing *Small*, 708 F.3d at 1005).

195. *Id.* (citing *Small*, 708 F.3d at 991-1005).

nial of qualified immunity for Officer Dirkes on Ehlers' excessive force claim.[196]

C. *Morris v. Noe*: The Tenth Circuit's Sliding Scale

In *Morris v. Noe*,[197] the United States Court of Appeals for the Tenth Circuit determined that an officer who, without warning, executed a forceful throw-down on a non-threatening, not-fleeing, not-resisting, suspected misdemeanant, which by itself caused more than a de minimis injury, was not entitled to qualified immunity, regardless of the absence of case law factually on point.[198] In *Morris*, upon notice of a domestic disturbance, Officer Jaime Noe of the Sapulpa Police Department drove to a local residence where he encountered three persons yelling at one another outside: Misty Rowell, Donna Morris (hereinafter, "Mrs. Morris"), and Quinton Bell.[199] After learning more about the matter from the three individuals, Officer Noe calmed everyone down, and two other officers came to the scene to assist Officer Noe in taking statements.[200] Twenty minutes later, William Morris III (hereinafter, "Mr. Morris"), the six-foot-four-inch tall, 250-pound husband of Mrs. Morris, arrived at the residence.[201] According to Mrs. Morris, Mr. Morris spoke with Mrs. Morris first, then approached Bell and asked why Bell was talking to Mrs. Morris in a cer-

196. *Id.* at 1008, 1011, 1013 (quoting Jones v. McNeese, 675 F.3d 1158, 1161 (8th Cir. 2012)).

197. 672 F.3d 1185 (10th Cir. 2012).

198. Morris v. Noe, 672 F.3d 1185, 1196-98 (10th Cir. 2012) (first citing Mecham v. Frazier, 500 F.3d 1200, 1204-05 (10th Cir. 2007) (for comparison); and then citing Graham v. Connor, 109 S. Ct. 1865 (1989)).

199. *Morris*, 672 F.3d at 1189. The United States Court of Appeals for the Tenth Circuit provided the following background as to the nature of the matter when Officer Noe arrived at the residence:

> Bell was Rowell's former boyfriend and the father of her child. Rowell's then-current boyfriend was William Morris IV ("William"), [Mrs. Morris]'s son. Officer Noe learned Bell and William had engaged in an altercation that resulted in William ransacking the Muskogee Street residence, burning some of Bell's clothing in the front yard, and damaging Rowell's vehicle with a tire iron. [Mrs. Morris] heard of the incident and went to the Muskogee Street residence. After [Mrs. Morris] arrived, Bell parked his truck behind [Mrs. Morris]'s vehicle, preventing her from leaving.
>
> By the time Noe arrived, William was gone, but [Mrs. Morris], Rowell, and Bell were in the front yard, yelling at each other. Rowell's vehicle showed signs of significant body damage. Glass lay on the ground. A pile of clothing was smoldering in the front yard.

Id.

200. *Id.*

201. *Id.* at 1189-90. The Tenth Circuit noted that Mr. Morris "suffered from multiple health problems including heart problems, seizures, and emphysema," and that, while Mr. Morris "was instructed to use supplemental oxygen, no evidence suggests he was using oxygen during the incident." *Id.* at 1190.

tain manner.[202] Mr. Morris never came within eight-to-ten feet of Bell.[203] In response, Bell approached Mr. Morris.[204] Mr. Morris then placed his hands in the air and began to back away from Bell toward the officers.[205] At that time, Officer Noe lunged forward, grabbed Mr. Morris from behind by his shoulders, and threw him down into some bushes on the ground.[206] Mr. Morris was then handcuffed, given a public intoxication citation, and taken to a hospital to treat hip injuries caused by the throw-down, where Mr. Morris remained for approximately thirty days.[207]

Three years later, Mr. Morris passed away and Mrs. Morris sued Officer Noe on behalf of Mr. Morris under § 1983 alleging excessive force.[208] The United States District Court for the Northern District of Oklahoma denied Officer Noe's motion for summary judgment on the basis of qualified immunity.[209] The district court reasoned that the facts, viewed resolving any discrepancies in favor of Mrs. Morris, could constitute an infringement of Mr. Morris's clearly established consti-

202. *Id.* The Tenth Circuit noted that "[t]he situation was 'calm and under control' when [Mr.] Morris arrived," and that, according to Mrs. Morris, "[Mr.] Morris first spoke with [Mrs. Morris], and she assured him she was not hurt," then, upon approaching Bell, "[Mr.] Morris asked Bell 'Why was you talking to Mama that way?'" and told Bell that Mrs. Morris "had been feeding Bell's kids." *Id.*

203. *Id.*

204. *Id.*

205. *Id.* According to Mrs. Morris, upon Bell approaching Mr. Morris, "[Mr.] Morris put his hands up and started backing toward the police officers, 'for help, I guess.'" *Id.* (quoting Morris v. City of Sapulpa, No. 10-CV-0376-CVE-TLW, 2011 U.S. Dist. LEXIS 46266, at *18 (N.D. Okla. Apr. 28, 2011), *aff'd sub nom.* Morris v. Noe, 672 F.3d 1185 (10th Cir. 2012) [hereinafter *City of Sapulpa*]).

206. *See id.* at 1190-98 (quoting *City of Sapulpa*, 2011 U.S. Dist. LEXIS 46266, at *18) (noting that two officers allegedly threw Mr. Morris down according to Mrs. Morris's and Mr. Morris's testimonies, but attributing the throw-down only to Officer Noe throughout the opinion). The Tenth Circuit noted that Mrs. Morris claimed, "two of the police officers lunge[d] towards [Mr.] [Morris] and put their hands on his shoulders, twisted him around and ran him into the bushes . . . throwing him to the ground." *Id.* at 1190 (internal quotation marks omitted) (first, third, and fourth alterations in original) (quoting *City of Sapulpa*, 2011 U.S. Dist. LEXIS 46266, at *18).

207. *Id.* The Tenth Circuit noted that "Noe, after handcuffing [Mr.] Morris, noticed [Mr.] Morris smelled of alcohol and exhibited signs of intoxication, such as slurred speech;" that "[Mr.] Morris admitted to consuming 'a couple of drinks' two hours earlier;" and that, because Mr. Morris was hospitalized, Mrs. Morris appeared on his behalf at the public intoxication citation hearing "and paid the fine, although she could not remember whether she entered a guilty plea," though "[t]he court records reflect a guilty plea being entered on [Mr.] Morris's behalf." *Id.*

208. *Id.* The Tenth Circuit noted that Mrs. Morris claimed "unlawful arrest and excessive force on behalf of her deceased husband, William Morris III, against Defendants, Officer Jaime Noe and the City of Sapulpa, Oklahoma," and that, "[o]n Defendants' motion, the district court granted summary judgment for Defendants on all claims except those against Noe individually;" however, for purposes of this Note, only the Tenth Circuit's discussion regarding Mrs. Morris's excessive force claim against Officer Noe will be discussed. *Id.* at 1188, 1190.

209. *Id.* at 1190.

tutional rights.[210] Officer Noe then appealed to the Tenth Circuit, claiming the district court erred in denying his motion because qualified immunity should have shielded him from Mrs. Morris's excessive force claim.[211]

Upon de novo review, and viewing the facts in the light most favorable to Mrs. Norris, the Tenth Circuit affirmed the district court's ruling.[212] In first addressing prong one of the immunity analysis, the Tenth Circuit utilized the *Graham* factors to determine that, based on the district court's assumed facts, Mrs. Morris could prove that Officer Noe violated Mr. Morris's constitutional rights.[213] The Tenth Circuit reasoned that—because Mr. Morris was suspected of a misdemeanor, posed little threat to bystander and officer safety, was given no warning before being thrown down, was neither attempting to flee nor resisting arrest, and did not struggle before being thrown down—the *Graham* factors strongly supported finding Officer Noe's use of force against Mr. Morris objectively unreasonable.[214] Proceeding to prong two of the immunity analysis, the Tenth Circuit recognized it had no case law addressing a forceful throw-down which alone caused serious injury.[215] Nonetheless, the Tenth Circuit determined that the United States Supreme Court's opinion in *Graham v. Connor*[216] clearly established Mr. Morris's constitutional right to be free of a forceful throw-down under the district court's assumed facts.[217]

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210. *See id.* (noting that "[t]he district court held that, construing the facts in the light most favorable to [Mrs. Morris], [Officer] Noe was not entitled to qualified immunity on" Mrs. Morris's § 1983 claims).

211. *See id.* at 1190-91 (noting Officer Noe's objections to the district court's decisions regarding qualified immunity for Officer Noe).

212. *Id.* at 1189, 1198 (quoting Dodds v. Richardson, 614 F.3d 1185, 1192 (10th Cir. 2010) (citing *City of Sapulpa*, 2011 U.S. Dist. LEXIS 46266, at *13-14)).

213. *Id.* at 1191, 1195-96 (first quoting Pearson v. Callahan, 129 S. Ct. 808, 815 (2009); and then quoting Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009)) (citing *Graham*, 109 S. Ct. at 1872).

214. *See id.* at 1195-96 (first quoting Fogarty v. Gallegos, 523 F.3d 1147, 1160 (10th Cir. 2008), and then quoting *Graham*, 109 S. Ct. at 1872) (first citing *Graham*, 109 S. Ct. at 1872; then citing Cortez v. McCauley, 478 F.3d 1108, 1128 (10th Cir. 2007) (en banc); then citing Cavanaugh v. Woods Cross City, 625 F.3d 661, 665 (10th Cir. 2010); then citing *Mecham*, 500 F.3d at 1204-05 (for comparison); and then citing Casey v. City of Fed. Heights, 509 F.3d 1278, 1282 (10th Cir. 2007)) (discussing the standard of review for prong one of the immunity analysis and the *Graham* factors, applying case law to the "facts assumed by the district court," and determining that Mrs. Morris could "meet her burden on the first qualified immunity prong"). In analyzing the district court's assumed facts under prong one of the immunity analysis, the Tenth Circuit determined that "[a]t least two of the *Graham* factors weigh[ed] strongly in [Mrs. Morris]'s favor, while one weigh[ed] slightly in [Officer Noe]'s favor." *Id.* at 1195 (citing *Graham*, 109 S. Ct. 1865).

215. *Id.* at 1197.

216. 109 S. Ct. 1865 (1989).

217. *Morris*, 672 F.3d at 1198 (citing *Graham*, 109 S. Ct. 1865). Having no Tenth Circuit cases directly on point, the court utilized two sister circuit cases, which also

The Tenth Circuit noted that, because of the fact-specific nature of the immunity analysis, case law involving precisely the same circumstances as a case being reviewed would almost never be available.[218] Thus, the Tenth Circuit adopted what it referred to as a "sliding scale."[219] Under this "sliding scale" analysis, the Tenth Circuit did not mechanically require case law directly on point when an officer's Fourth Amendment infringement was notably clear under the Court's opinion in *Graham*.[220] Applying the "sliding scale" analysis to Officer Noe's use of force, the Tenth Circuit determined the first *Graham* factor slightly supported use of force against Mr. Morris but the remaining two factors heavily weighed against it.[221] Consequently, the Tenth Circuit reasoned that, because the *Graham* factors primarily weighed heavily against Officer Noe using force against Mr. Morris, an objectively reasonable officer would have known the force used against Mr. Morris was not justified.[222]

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primarily relied on the *Graham* factors to find uses of force clearly established as unconstitutional, to support the court's determination that the right Mrs. Morris claimed to be violated "was clearly established under *Graham*." *Id.* (first quoting Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010), and then quoting Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998)) (citing *Graham*, 109 S. Ct. 1865).

218. *Id.* at 1196 (quoting *Casey*, 509 F.3d at 1284). The Tenth Circuit noted that, while, "[o]rdinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains," due to the reality that "the existence of excessive force is a fact-specific inquiry, however, 'there will almost never be a previously published opinion involving exactly the same circumstances.'" *Id.* (first internal quotation marks omitted) (first quoting Klen v. City of Loveland, Colo. 661 F.3d 498, 511 (10th Cir. 2011); and then quoting *Casey*, 509 F.3d at 1284).

219. *Id.*

220. *Id.* at 1196-97 (first quoting Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004); and then quoting *Casey*, 509 F.3d at 1284). After recognizing that case law involving precisely the same circumstances as a case being reviewed would almost never be available, the Tenth Circuit stated the following:

> Thus, we have adopted a sliding scale: "The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." In fact, we do not always require case law on point. "[W]hen 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."

Id. (alteration in original) (citations omitted).

221. *Id.* at 1198 (citing *Graham*, 109 S. Ct. 1865). The Tenth Circuit found that "the first *Graham* factor only marginally supported using force against [Mr.] Morris" because Officer Noe claimed he "had probable cause to arrest [Mr.] Morris for assault," and the court had to "assume the arrest was valid"; however, because Oklahoma law treated assault as a misdemeanor, the court stated, "the amount of force should [be] reduced accordingly." *Id.* at 1195, 1198 (internal quotation marks omitted) (alteration in original) (quoting *Fogarty*, 523 F.3d at 1160) (citing OKLA. STAT. ANN. tit. 21, § 644(A) (West 2011)).

222. *Id.* at 1198 (citing *Graham*, 109 S. Ct. 1865). In considering the *Graham* factors, Tenth Circuit further reasoned that "*Graham* establishes that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest." *Id.*

IV. ANALYSIS

In *Kelsay v. Ernst*,[223] the United States Court of Appeals for the Eighth Circuit misapplied its own precedent and abdicated its responsibility to the development of excessive force qualified immunity jurisprudence.[224] In *Kelsay*, at the scene of the arrest of a third party, Gage County Sheriff Deputy Matt Ernst grabbed Melanie Kelsay by the arm as she was walking toward her daughter, and commanded Kelsay to "get back here."[225] In response, Kelsay stopped walking and turned to face Deputy Ernst.[226] Kelsay explained to Deputy Ernst that she wanted to hear a conversation between her daughter and another individual occurring around twenty-to-thirty feet away.[227] Deputy Ernst released Kelsay's arm and said nothing in response to Kelsay's statement, failing to ever inform Kelsay that she was to be placed under arrest.[228] Kelsey then turned away from Deputy Ernst and walked a few feet toward her daughter.[229] At that time, Kelsay—

(internal quotation marks omitted) (quoting *Casey*, 509 F.3d at 1285) (first citing *Graham*, 109 S. Ct. 1865; and then citing *Thornton*, 132 F.3d at 1400).

223. 933 F.3d 975 (8th Cir. 2019) (en banc).

224. *Compare* Kelsay v. Ernst, 933 F.3d 975, 980, 982 (8th Cir. 2019) (en banc) (reversing the lower court's denial of qualified immunity to Deputy Ernst without determining whether or not Deputy Ernst's actions constituted a constitutional violation, even though Kelsay was "a nonviolent misdemeanant [who] pose[d] no threat to officers and [was] not actively resisting arrest or attempting to flee," stating that "[a] reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again," and that "[n]one of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here"), *with* Tolan v. Cotton, 572 U.S. 650, 657 ("Our qualified-immunity cases illustrate the importance of drawing inferences in favor of the nonmovant, even when, as here, a court decides only the clearly-established prong of the standard."), *and* Pearson v. Callahan, 129 S. Ct. 808, 821-22 (2009) (stating that "[a]ny misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted," and that "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity"), *and* Shekleton v. Eichenberger, 677 F.3d 361, 363-65 (8th Cir. 2012) (determining that an officer who tased a nonviolent, compliant, suspected misdemeanant, who was not fleeing, was not actively resisting arrest, and posed trivial-to-no threat to the public's or arresting officers' security, was not entitled to qualified immunity from suit claiming excessive force), *and* Montoya v. City of Flandreau, 669 F.3d 867, 869-70, 873 (8th Cir. 2012) (determining that an officer who took to the ground with more than de minimis force, using a takedown maneuver novel to the court's excessive force review, a misdemeanant who was nonviolent, non-threatening, and not fleeing or actively resisting arrest, would not be granted qualified immunity from suit claiming excessive force).

225. *Kelsay*, 933 F.3d at 978.

226. *Id.*

227. *Id.*

228. *Id.* at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 47, 54, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8).

229. *Id.* at 978 (majority opinion).

a nonviolent, non-threatening, suspected misdemeanant who was not fleeing or actively resisting arrest—was, without warning, placed in a bear hug, lifted up into the air, and thrown down to the ground by Deputy Ernst.[230] The force of Kelsay's impact with the ground resulted in Kelsay's brief loss of consciousness and broken collarbone.[231]

Upon Kelsay's filing of a § 1983 excessive force claim against Deputy Ernst, the United States District Court for the District of Nebraska denied Deputy Ernst's motion for summary judgment.[232] On appeal, the Eighth Circuit reversed the district court's decision.[233] Relying on inferences granted from the pleaded facts, as well as assumed facts from the district court's opinion, the court determined that a reasonable officer could believe Kelsay ignored Deputy Ernst's command by walking away without verbal permission.[234] The court then determined no Eighth Circuit or United States Supreme Court precedent deemed an officer's use of a takedown maneuver on a plaintiff-suspect who ignored a defendant-officer's command unconstitutional.[235] Further, because the most factually-analogous Eighth Circuit precedent supported granting qualified immunity to Deputy Ernst, the court concluded Deputy Ernst was entitled to qualified immunity from Kelsay's § 1983 claim.[236] In its disposition of the case, the court declined to answer whether Deputy Ernst's takedown violated Kelsay's Fourth Amendment rights.[237]

First, this Note will argue the Eighth Circuit's analysis violated the standard of review governing appellate review of a district court's denial of a defendant-officer's motion for summary judgment on the basis of qualified immunity by granting the inference and determining the contextual principle that a reasonable officer could view Kelsay's actions as noncompliant.[238] Then, this Note will argue that the Eighth Circuit committed reversible error in reversing the district court's denial of Deputy Ernst's motion for summary judgment on the

230. *Id.* at 985-86 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 51, 98, 99, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8).

231. *Id.* at 986.

232. *Id.* at 979 (majority opinion).

233. *Id.* at 982.

234. *See id.* at 981-82 (stating that "[a] reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again," and that "the district court correctly acknowledged that Kelsay 'had been told to stop but kept walking instead,'" in support of the court's determination that "Ernst's conclusion that Kelsay failed to comply was objectively reasonable").

235. *Id.* at 980.

236. *Id.* at 981-82 (citing Ehlers v. City of Rapid City, 846 F.3d 1002 (8th Cir. 2017)).

237. *Id.* at 987 (Grasz, J., dissenting).

238. *See infra* notes 243-289 and accompanying text.

basis of qualified immunity by failing to properly determine the contextual principles comprising the contours of the constitutional right claimed to be violated, and, consequently, by misapplying Eighth Circuit precedent in the court's determination of prong two of the immunity analysis.[239] Then, this Note will demonstrate how the Eighth Circuit's analysis fell short of the United States Supreme Court's expressed assurances in *Pearson v. Callahan*[240] by skipping prong one of the immunity analysis and stunting the development of excessive force qualified immunity jurisprudence in the Eighth Circuit.[241] Finally, this Note will show that the Eighth Circuit's analysis presented the Court with an opportunity to resolve a circuit split among the United State Courts of Appeals as to what constitutes an *obvious case* in which the *Graham* factors may be determinative of whether an officer's alleged Fourth Amendment infringement is clearly established under prong two of the immunity analysis, regardless of an absence of a factually on-point case.[242]

A. Standard of Review Violated: In *Kelsay v. Ernst*, The Eighth Circuit Erred in Reaching Its Determination that a Reasonable Officer Could Conclude Kelsay Did Not Comply with Deputy Ernst's Order to "Get Back Here"

The standard of review governing a party's pretrial motion for summary judgment requires courts to resolve any factual discrepancies in favor of the nonmoving party and grant the nonmoving party *all reasonable inferences*.[243] Moreover, particular to the standard of review governing a motion for summary judgment on the basis of qualified immunity, courts must view those facts and inferences from the perspective of an objectively reasonable officer.[244] However, in considering the objectively reasonable officer's perspective, courts must not consider the underlying subjective intentions or beliefs of the defendant-officer in question.[245] Upon appellate review of a motion

239. *See infra* notes 290-315 and accompanying text.
240. 129 S. Ct. 808 (2009).
241. *See infra* notes 316-331 and accompanying text.
242. *See infra* notes 332-348 and accompanying text.
243. Kisela v. Hughes, 138 S. Ct. 1148, 1155 (2018) (Sotomayor, J., dissenting); Tolan v. Cotton, 134 S. Ct. 1861, 1866 (2014) (per curiam); Harlow v. Fitzgerald, 102 S. Ct. 2727, 2737 n.26 (1982); Ehlers v. City of Rapid City, 846 F.3d 1002, 1008 (8th Cir. 2017) (quoting Shannon v. Koehler, 616 F.3d 855, 861 (8th Cir. 2010)); Montoya v. City of Flandreau, 669 F.3d 867, 870 (8th Cir. 2012) (quoting Chambers v. Pennycook, 641 F.3d 898, 904 (8th Cir. 2011)).
244. Saucier v. Katz, 121 S. Ct. 2151, 2160-62 (2001) (Ginsburg, J., concurring) (quoting Graham v. Connor, 109 S. Ct. 1865, 1872 (1989)); Anderson v. Creighton, 107 S. Ct. 3034, 3040 (1987); *Harlow*, 102 S. Ct. at 2737-38; *Ehlers*, 846 F.3d at 1012 n.4.
245. *Saucier*, 121 S. Ct. at 2160-62 (quoting *Graham*, 109 S. Ct. at 1872); *Anderson*, 107 S. Ct. at 3040; *Harlow*, 102 S. Ct. at 2737-38; *Ehlers*, 846 F.3d at 1012 n.4.

for summary judgment on the basis of qualified immunity, appellate courts are required to accept as true facts which the lower court deemed adequately supported and facts which the lower court likely assumed.[246] However, appellate courts may not accept as true facts assumed by the lower court that are blatantly contradicted by the record.[247]

In *Kelsay v. Ernst*,[248] the United States Court of Appeals for the Eighth Circuit reversed the district court's denial of Gage County Sheriff Deputy Matt Ernst's motion for summary judgment regarding Melanie Kelsay's § 1983 excessive force claim against Deputy Ernst, on the basis that Deputy Ernst was entitled to qualified immunity.[249] The Eighth Circuit's holding turned on its finding that, under the facts and granted inferences, an objectively reasonable officer could conclude Kelsay ignored the command made by Deputy Ernst to "get back here" immediately prior to Deputy Ernst's takedown of Kelsay.[250] The relevant facts leading up to Deputy Ernst's takedown of Kelsay are as follows: Deputy Ernst arrived on the scene; Kelsay stood approximately twenty-to-thirty feet away from the pool exit doors; Waymore Police Chief Russell Kirkpatrick told Deputy Ernst that Kelsay should be arrested; Kelsay, unaware that she was to be arrested, started to walk in the direction of her daughter who was standing by the pool exit doors; Deputy Ernst ran to Kelsay, grabbed Kelsay by the arm, and commanded Kelsay to "get back here"; Kelsay stopped walking and turned to face Deputy Ernst; Kelsay explained to Deputy Ernst that she wanted to hear what a third party was saying to her daughter; Deputy Ernst released Kelsay's arm, saying nothing to Kelsay in response to Kelsay's statement; and Kelsay turned away from Deputy Ernst and walked three feet in the direction of her daughter.[251]

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246. *See* Kelsay v. Ernst, 933 F.3d 975, 979 (8th Cir. 2019) (en banc) ("Unless the district court's assumed facts are blatantly contradicted by incontrovertible evidence of a sort that is not present here, we cannot entertain a contention by Ernst disputing the district court's determination about which facts Kelsay could prove at trial . . . ."); Shekleton v. Eichenberger, 677 F.3d 361, 365 (8th Cir. 2012) (quoting Brown v. City of Golden Valley, 574 F.3d 491, 496 (8th Cir. 2009)) ("We view the facts in the light most favorable to the plaintiff, accepting as true the facts that the district court found were adequately supported, as well as the facts the district court likely assumed." (internal quotation marks omitted)).

247. *Kelsay*, 933 F.3d at 979 (citing Wallace v. City of Alexander, 843 F.3d 763, 767 (8th Cir. 2016)); *Ehlers*, 846 F.3d at 1010 (quoting Scott v. Harris, 127 S. Ct. 1769, 1776 (2007)).

248. 933 F.3d 975 (8th Cir. 2019) (en banc).

249. *Kelsay*, 933 F.3d at 981-82.

250. *Id.*

251. *Id.* at 978; *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 43, 47, 54 Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8); Oral Argument at 11:53, Kelsay v. Ernst, 933 F.3d

Under these facts, the precise *directive conveyed* by Deputy Ernst's command is not an undisputed fact but an *inference* to be drawn from the facts.[252] The Eighth Circuit took an interpretive step between hearing the express language of Deputy Ernst's command and discerning what message an objectively reasonable officer under similar circumstances could find that express language to convey.[253] Additionally, Kelsay's *compliance* with Deputy Ernst's command is not an undisputed fact but another *inference*.[254] The court took another interpretive step between reviewing the facts and inferences regarding Deputy Ernst's command and Kelsay's actions in response and determining whether an objectively reasonable officer could view Kelsay's actions as conforming to Deputy Ernst's command.[255] The court's determination of the compliance inference also doubled as the

975 (8th Cir. 2019) (en banc) (No. 17-2181), http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/172181eb.mp3.

252. *Compare Kelsay*, 933 F.3d at 981 (drawing the inference that Deputy Ernst's command, "get back here," could be interpreted by a reasonable officer as conveying the directive, "stop and remain"), *with Tolan*, 134 S. Ct. at 1867 (stating that objective evidence in the record could have allowed a jury to infer that reasonable officer would have interpreted the plaintiff-suspect's statement to the defendant-officer, "[g]et your fucking hands off my mom," as "a son's plea not to continue any assault of his mother," rather than a verbal threat), *and Ehlers*, 846 F.3d at 1011 (drawing the inference that a reasonable officer could not interpret Officer Scott Dirkes' unambiguous command, "put [your] hands behind [your] back," be understood by Randall Ehlers to mean, "continue[ ] walking towards the Civic Center").

253. *See Kelsay*, 933 F.3d at 981 (drawing the inference that Deputy Ernst's command, "get back here," could be interpreted by a reasonable officer as conveying the directive, "stop and remain"); *id.* at 986 (Smith, C.J., dissenting) ("Kelsay complied with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing . . . .").

254. *Compare Kelsay*, 933 F.3d at 981 (majority opinion) (drawing the inference that Kelsay was noncompliant from the fact that Kelsay eventually walked away from Deputy Ernst), *with Kisela*, 138 S. Ct. at 1159-60 (Sotomayor, J., dissenting) (explaining where testimonial evidence could have allowed a reasonable jury to conclude that the plaintiff-suspect did not hear the defendant-officer's commands, and that the defendant-officer should have recognized it as his fellow officers did, the inference drawn should not have been that the suspect simply ignored the commands), *and Tolan*, 134 S. Ct. at 1867 (condemning the lower court's determination of the contextual principle that the plaintiff-suspect was "'verbally threatening' the officer," when objective evidence in the record could have allowed a jury to infer that a reasonable officer would have interpreted the plaintiff-suspect's statement as non-threatening), *and Ehlers*, 846 F.3d at 1011 (drawing the inference that "[a] reasonable officer in Dirkes's position would interpret [Ehlers'] behavior as noncompliant," and consequently that Ehlers "at least appeared to be resisting," from the facts that "Officer Dirkes's dash camera video show[ed] Dirkes approach Ehlers, point to him, and twice order him to put his hands behind his back" and "Ehlers continued walking towards the Civic Center").

255. *See Kelsay*, 933 F.3d at 981 ("The issue is whether a reasonable officer could have believed that Kelsay was not compliant."); *id.* at 986-87 (Smith, C.J., dissenting) ("[T]he facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized her compliance by letting go of her arm and saying nothing in response to her explanation.").

court's determination of a *contextual principle*, drawn from the facts and granted inferences in order to define the contours of the constitutional right claimed to be violated.[256] The compliance inference doubled as a contextual principle because, as with the three contextual principles comprising the *Graham* factors, the Eighth Circuit included the compliance inference as one of the contours of the right Kelsay claimed Deputy Ernst violated.[257]

As to the directive conveyed by the express language of Deputy Ernst's command, "get back here," two significantly different inferences purportedly could have be drawn by a reasonable officer.[258] One inference, which the majority stated could have been drawn by a reasonable officer, was that Deputy Ernst's command conveyed a directive to Kelsay to "stop and remain" (ostensibly for an indefinite period of time).[259] That inference was supported by the majority's apparently purely speculative statement that a reasonable officer

256. *Compare Kelsay*, 933 F.3d at 980 (majority opinion) ("None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here."), *with Tolan*, 134 S. Ct. at 1866 (quoting *Saucier*, 121 S. Ct. at 2156) ("In cases alleging unreasonable searches or seizures, we have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific *context* of the case.' . . . Accordingly, courts must take care not to define a case's '*context*' in a manner that imports genuinely disputed factual propositions." (emphasis added)), *and Saucier*, 121 S. Ct. at 2156 ("In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth *principles* which will become the basis for a holding that a right is clearly established." (emphasis added)).

257. *Compare Kelsay*, 933 F.3d at 980 (majority opinion) ("None of the decisions cited by the district court or Kelsay involved a suspect who ignored an officer's command and walked away, so they could not clearly establish the unreasonableness of using force under the particular circumstances here."), *and id.* at 982 (Smith, C.J., dissenting) ("[T]he use of force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring other commands violates that individual's right to be free from excessive force."), *with Graham*, 109 S. Ct. at 1872 (announcing the three basic contextual principles to consider in "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment," which included "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight").

258. *Compare Kelsay*, 933 F.3d at 981 ("A reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again."), *with id.* at 986 (Smith, C.J., dissenting) ("[C]rediting Kelsay's account of the events, Kelsay complied with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing; in response, Deputy Ernst let go of Kelsay's arm and said nothing further.").

259. *See Kelsay*, 933 F.3d at 981 (majority opinion) (stating that "[a] reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain," without stating how long the court expected Kelsay to wait for Deputy Ernst to respond to Kelsay's statement before the supposed impression of detention would fade).

could assume Kelsay would understand the command, "get back here," without more, as a directive to "stop and remain."[260] This support appears to be purely speculative because the majority did not point to any uncontroverted facts or authoritative sources to support the temporal aspect of the majority's determination of the directive conveyed by Deputy Ernst's express language.[261] Notably, however, the majority prefaced its determination of Kelsay's failure to comply by stating that *Deputy Ernst's conclusion* was objectively reasonable.[262] In doing so, the majority appeared to show deference to Deputy Ernst's subjective intent regarding the directive conveyed by his command.[263] Granted, on its face, that preface does not appear to evidence a subjective inquiry.[264] However, viewed in combination with the majority's failure to provide any objective basis for the temporal aspect of its interpretation of the directive conveyed by Deputy Ernst's express language, that preface raises the question of where else the majority might have looked to guide its interpretation.[265] This is important because, again, the subjective intent or belief of a defendant-officer is not to be considered when determining whether qualified immunity should be granted to the defendant-officer.[266]

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260. *See id.* (providing no objective facts in support).

261. *See id.* (providing no objective facts from the record, or other objective, persuasive sources, to support the majority's determination that a reasonable officer could infer the express language of Deputy Ernst's command, "get back here," conveyed the directive, "stop and *remain*" to Kelsay (emphasis added)).

262. *Id.*

263. *Compare id.* ("The issue is whether a reasonable officer could have believed that Kelsay was not compliant."), *with id.* ("*Ernst's* conclusion that Kelsay failed to comply was objectively reasonable." (emphasis added)); *see also Montoya*, 669 F.3d at 871 ("The district court appears to have credited Officer Hooper's account of the incident in concluding the force used against Montoya was objectively reasonable under the circumstances.").

264. *Compare Kelsay*, 933 F.3d at 981 ("Ernst's conclusion that Kelsay failed to comply was objectively reasonable."), *with Shekleton*, 677 F.3d at 364 n.4 ("[B]ecause an officer's actions in an excessive force case are evaluated under an objective standard, [the defendant-officer's] belief as to what was happening is irrelevant. Instead, what is relevant is whether a reasonable officer would have believed the facts to be as [the defendant-officer] believed them to be.").

265. *Compare Kelsay*, 933 F.3d at 981 (providing no objective facts from the record, or other objective, persuasive sources, to support the majority's determination that a reasonable officer could infer the express language of Deputy Ernst's command, "get back here," conveyed the directive, "stop and *remain*" to Kelsay (emphasis added)), *with id.* ("*Ernst's* conclusion that Kelsay failed to comply . . . ." (emphasis added)).

266. *See Saucier*, 121 S. Ct. at 2159 ("Excessive force claims, . . . are evaluated for objective reasonableness based upon *the information* the officers had when the conduct occurred." (emphasis added)); *Graham*, 109 S. Ct. at 1872 ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." (emphasis added)); *Harlow*, 102 S. Ct. at 2737 (stating that "an official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury" at trial on the merits); *Anderson*, 107 S. Ct. at 3040 (stating

The other inference, which the dissent argued would have been drawn by a reasonable officer, is that Deputy Ernst's command "get back here," without more, was merely a directive to Kelsay to return to Deputy Ernst's location in that moment.[267] That latter inference was supported by Deputy Ernst's release of Kelsay's arm and Deputy Ernst's silence after Kelsay's explanation for her movement, which were two undisputed, objective facts in the record.[268] Deputy Ernst's release of Kelsay's arm supported the latter inference because, viewed objectively, a reasonable officer could infer from the facts that the release signified the purpose of his grab (i.e., to return Kelsay to his location) was satisfied.[269] Deputy Ernst's silence following Kelsay's explanation reinforces that support because, viewed objectively, a reasonable officer could infer that if a reasonable officer did not accept Kelsay's explanation and wanted Kelsay to remain in the directed location longer, a reasonable officer would have said something to that effect in response to Kelsay's explanation.[270]

Additionally, the latter inference is further supported by the Merriam-Webster Dictionary definitions of "get back" and "here."[271] Merriam-Webster defines "get back" as "to come or go again to a person, place, or condition."[272] It defines "here" as "to this place."[273] Together, the phrase, "get back here," indicates that Deputy Ernst was saying he wanted Kelsay to return to his location, without contemplating any temporal qualifier.[274] This is the same meaning ascribed by

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that the defendant-officer's "subjective beliefs . . . are irrelevant" when considering whether to grant qualified immunity at the summary judgment stage).

267. *See Kelsay*, 933 F.3d at 986-87 (Smith, C.J., dissenting) ("[T]he facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing.").

268. *See id.* at 987 ("Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation.").

269. *See id.* at 986-87 ("[Kelsay] *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm . . . .").

270. *See id.* at 986-87 ("[Kelsay] *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized [Kelsay's] compliance by . . . saying nothing in response to her explanation.").

271. *See Get back*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/get%20back (last visited Mar. 22, 2021) (defining the phrase, "get back," as, "to come or go again to a person, place, or condition"); *Here*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/here (last visited Mar. 22, 2021) (defining the word, "here," as "to this place").

272. *Get back*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/get%20back (last visited Mar. 22, 2021).

273. *Here*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/here (last visited Mar. 22, 2021).

274. *Compare Get back*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/get%20back (last visited Mar. 22, 2021) (defining the phrase, "get

the dissent to the phrase when it determined the phrase merely conveyed the directive to return to Deputy Ernst's location.[275]

Thus, considering the unfounded and likely subjective nature of the support for the former inference identified by the majority (which the majority did not attempt to ground in objective fact), the Fourth Amendment *objective* reasonableness test does not support the majority's reliance upon the former inference.[276] Conversely, considering the objective nature of the support for the latter inference identified by the dissent, the Fourth Amendment objective reasonableness test would support finding the latter inference to be the inference which an objectively reasonable officer would have drawn.[277]

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back," as, "to come or go again to a person, place, or condition"), *and Here*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/here (last visited Mar. 22, 2021) (defining the word, "here," as "to this place"), *with Kelsay*, 933 F.3d at 981 (majority opinion) (determining that a reasonable officer could infer the express language of Deputy Ernst's command, "get back here," conveyed the directive, "stop and *remain*" to Kelsay (emphasis added)).

275. *Cf. Kelsay*, 933 F.3d at 986-87 (Smith, C.J., dissenting) (inferring the command "get back here" conveyed the direction to Kelsay to return to Deputy Ernst's location in that moment by stating that Kelsay "did comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing").

276. *Compare Kelsay*, 933 F.3d at 981 (majority opinion) (stating that, "Ernst's conclusion that Kelsay failed to comply was objectively reasonable," and that a reasonable officer could infer the express language of Deputy Ernst's command, "get back here," conveyed the directive, "stop and remain" to Kelsay, without providing any objective facts from the record, or other objective, persuasive sources, to support that inference), *with Tolan*, 134 S. Ct. at 1867 (condemning the lower court's determination of the contextual principle that the plaintiff-suspect was "'verbally threatening' the officer," when objective evidence in the record could have allowed a jury to infer that a reasonable officer would have interpreted the plaintiff-suspect's statement as non-threatening), *and Saucier*, 121 S. Ct. at 2159 ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information the officers had when the conduct occurred."), *and Graham*, 109 S. Ct. at 1872 ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."), *and Harlow*, 102 S. Ct. at 2737 ("[A]n official's subjective good faith has been considered to be a question of fact that some courts have regarded as inherently requiring resolution by a jury."), *and Montoya*, 669 F.3d at 871 (implicitly acknowledging that reasonable inferences must be drawn from objective support by stating that, "district court appears to have credited Officer Hooper's account of the incident in concluding the force used against Montoya was objectively reasonable under the circumstances," and that, "*nothing in the record indicates* Montoya threatened or posed any threat to the safety of the officers" (emphasis added)).

277. *Compare Kelsay*, 933 F.3d at 986-87 (Smith, C.J., dissenting) ("[T]he facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation."), *and Get back*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/get%20back (last visited Mar. 22, 2021) (defining the phrase, "get back," as, "to come or go again to a person, place, or condition"), *and Here*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/here (last visited Mar. 22, 2021) (defining the word, "here," as "to this place"), *with Tolan*, 134 S. Ct. at 1867 (stating that objective evidence in the record

Moreover, the inferred directive conveyed by Deputy Ernst's command was ultimately determinative of the inference and contextual principle that Kelsay was noncompliant.[278] Under the majority's view that the inferred directive conveyed by Deputy Ernst's command was "stop and remain," when Kelsay eventually continued walking toward her daughter, a reasonable officer would likely conclude that Kelsay failed to comply with Deputy Ernst's command.[279] Thus, the majority's interpretation of the inferred directive favored Deputy Ernst's position.[280] Conversely, under the dissent's view that the inferred directive conveyed by Deputy Ernst's command was merely a directive to return to his location, when Kelsay stopped walking, turned to face Deputy Ernst at his location, and explained the motivation for her movement, an objectively reasonable officer could not conclude that Kelsay failed to comply with Deputy Ernst's command.[281] Thus, the dissent's interpretation of the inferred directive favored Kelsay's position.[282] By drawing an outcome-determinative and unsupported inference in favor of the moving party, when a reasonable inference could have been drawn in favor of the nonmoving party, the majority failed to grant all reasonable inferences in favor of Kelsay.[283] Conse-

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could have allowed "[a] jury [to conclude] that a reasonable officer would have heard Tolan's words not as a threat, but as a son's plea not to continue any assault of his mother"), *and Graham*, 109 S. Ct. at 1872 ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" *in light of the facts and circumstances confronting them*, without regard to their underlying intent or motivation." (emphasis added)), *and Ehlers*, 846 F.3d at 1011 (drawing the inference that Officer Scott Dirkes' unambiguous command, "put [your] hands behind [your] back," could not be interpreted by a reasonable officer to mean, "continue[ ] walking towards the Civic Center").

278. *See Kelsay*, 933 F.3d at 981 (majority opinion) ("Ernst's conclusion that Kelsay failed to comply was objectively reasonable. A reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again.").

279. *See id.* at 980-82 (stating that Kelsay was "a suspect who ignored the deputy's instruction," because of the majority's granted inference that "[a] reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain," and the fact that Kelsay eventually walked away from Deputy Ernst after hearing Deputy Ernst's command).

280. *See id.* at 981-82 (determining that "[t]he constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity," because of the majority's determination that "Kelsay 'had been told to stop but kept walking instead'").

281. *See Kelsay*, 933 F.3d at 986-87 (Smith, C.J., dissenting) (determining that "a reasonable officer would have known . . . that a full-body takedown of a small, nonviolent misdemeanant was not attempting to flee, resisting arrest, or ignoring other commands was excessive under the circumstances," because of Chief Judge Smith's determination that Kelsay "*did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing").

282. *See id.* (arguing that because Kelsay should have been deemed compliant, Deputy Ernst should not have been granted qualified immunity).

283. *Compare Kelsay*, 933 F.3d at 981-82 (majority opinion) (determining that "[t]he constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity," because of the majority's determination that "Kelsay 'had been

quently, the Eighth Circuit committed reversible error in violating the standard of review in its disposition of Deputy Ernst's appeal.[284]

The majority further attempted to support the inference and contextual principle that Kelsay was noncompliant by relying upon a carved-out portion of a sentence in the district court's opinion.[285] In that opinion, while explaining its determination that Kelsay was nonthreatening and not actively resisting arrest, the district court posited that Kelsay kept walking after being told to stop.[286] However, according to the undisputed facts argued by both Kelsay and Deputy Ernst, after Deputy Ernst grabbed Kelsay's arm and commanded her to "get back here," Kelsay stopped walking, turned to face Deputy Ernst, and explained to Deputy Ernst the motivation for her movement, after which Deputy Ernst let go of Kelsay's arm.[287] Thus, the district court blatantly contradicted the undisputed facts in the record by assuming

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told to stop but kept walking instead'"), *with Kisela*, 138 S. Ct. at 1159-60 (Sotomayor, J., dissenting) (explaining that, where testimonial evidence could have allowed a reasonable jury to conclude that the plaintiff-suspect did not hear the defendant-officer's commands, and that the defendant-officer should have recognized it as his fellow officers did, the inference to be drawn should not have been that the suspect simply *ignored* the commands), *and Tolan*, 134 S. Ct. at 1868 (stating that the lower court "neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party"), *and Kelsay*, 933 F.3d at 987 (Smith, C.J., dissenting) ("[T]he facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation.").

284. *Compare Kelsay*, 933 F.3d at 980-82 (majority opinion) (failing to grant all reasonable inferences to Kelsay), *with Kisela*, 138 S. Ct. at 1155 (Sotomayor, J., dissenting) (stating that, on summary judgment, the appropriate standard of review requires "[v]iewing the facts in the light most favorable to" the nonmoving party), *and Harlow*, 102 S. Ct. at 2737 n.26 ("In determining whether summary judgment is proper, a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party."), *and Montoya*, 669 F.3d at 870 (quoting *Chambers*, 641 F.3d at 904) ("We review de novo the district court's grant of summary judgment, 'viewing the record in the light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor.'").

285. *Kelsay*, 933 F.3d at 981-82 (majority opinion) (quoting Kelsay v. Ernst, No. 4:15-CV-3077, 2017 U.S. Dist. LEXIS 221933, at *12 (D. Neb. May 19, 2017), *rev'd on reh'g en banc*, 933 F.3d 975 (8th Cir. 2019)) ("Where the district court correctly acknowledged that Kelsay 'had been told to stop but kept walking instead,' . . . .'").

286. *Kelsay*, 2017 U.S. Dist. LEXIS 221933, at *12 ("While [Kelsay] was not precisely 'compliant'—that is, she had been told to stop but kept walking instead—she was not using force or actively resisting arrest, and posed no danger to anyone.").

287. *Kelsay*, 933 F.3d at 978; *Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 43, 47, 54 Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8); Brief of Appellant, Matt Ernst at *27-28, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181); Oral Argument at 11:53, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181), http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/172181eb.mp3.

the fact that Kelsay merely kept walking after being told to stop.[288] Consequently, the Eighth Circuit violated the standard of review by relying upon those blatantly-contradicted assumed facts in the district court's opinion to support its determination of the inference and contextual principle that Kelsay was noncompliant.[289]

B. Misapplication of Prong Two of the Immunity Analysis: In *Kelsay v. Ernst*, Because the Eighth Circuit Erred in Determining the Contours of the Right Allegedly Violated, the Eighth Circuit Erred in Granting Deputy Ernst Qualified Immunity

1. The Contextual Principles Defining the Contours of the Right Allegedly Violated in Ehlers v. City of Rapid City *were Distinguishable from Those in* Kelsay v. Ernst

In *Kelsay v. Ernst*,[290] the United States Court of Appeals for the Eighth Circuit reversed the lower court's denial of qualified immunity to Deputy Ernst because it determined the § 1983 claim in *Ehlers v. City of Rapid City*[291] involved analogous contextual principles comprising the right allegedly violated.[292] In *Ehlers*, the Eighth Circuit determined that an officer who used a spin takedown maneuver on a nonviolent, *noncompliant*, suspected misdemeanant who was not fleeing was entitled to qualified immunity from suit claiming excessive

288. *Compare Kelsay*, 933 F.3d at 981-82 (majority opinion) (quoting *Kelsay*, 2017 U.S. Dist. LEXIS 221933, at *12) (relying on the lower court's assumed facts that "Kelsay 'had been told to stop but kept walking instead'"), *with Kelsay*, 933 F.3d at 978 (stating that "Kelsay stopped walking and turned around to face Ernst, at which point Ernst let go of Kelsay's arm), *and Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 43, 54, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8) (stating that "[i]n response to Deputy Ernst grabbing Kelsay's arm and commanding her to 'get back here,' Kelsay 'stopped, turned around, and . . . told him, someone is talking shit to my kid, I want to know what's going on,'" and that "[a]t that time, Deputy Ernst 'let go' of Kelsay's arm"), *and* Brief of Appellant, Matt Ernst at *27-28, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181) (same), *and* Oral Argument at 11:53, Kelsay v. Ernst, 933 F.3d 975 (8th Cir. 2019) (en banc) (No. 17-2181), http://media-oa.ca8.uscourts.gov/OAaudio/2019/4/172181eb.mp3 (same).

289. *Compare Kelsay*, 933 F.3d at 981-82 (majority opinion) (quoting *Kelsay*, 2017 U.S. Dist. LEXIS 221933, at *12) (relying on the lower court's assumed facts, which were blatantly contradicted by the undisputed record, in reaching its determination that Deputy Ernst was entitled to qualified immunity), *with Kelsay*, 933 F.3d at 979 (citing *Wallace*, 843 F.3d at 767) (stating that the court would not review "the district court's determination about which facts Kelsay could prove at trial," unless facts assumed by the district court were "blatantly contradicted by incontrovertible evidence").

290. 933 F.3d 975 (8th Cir. 2019) (en banc).

291. 846 F.3d 1002 (8th Cir. 2017).

292. Kelsay v. Ernst, 933 F.3d 975, 981 (8th Cir. 2019) (en banc).

force.[293] However, that case involved a dash-cam recording of the plaintiff-suspect who did not, in any way, acknowledge two commands from the defendant-officer who twice commanded the plaintiff-suspect to "put his hands behind his back."[294] Thus, because those commands were in no way ambiguous, and because of the incontrovertible dash-camera footage capturing the event, the court properly determined that an objectively reasonable officer would believe that the plaintiff-suspect was noncompliant.[295] In *Kelsay*, by contrast, under the appropriate standard of review, an objectively reasonable officer could not conclude that Melanie Kelsay ignored, or did not comply with, Deputy Matt Ernst's command to "get back here."[296] Thus, the contextual principles which defined the contours of the right allegedly violated in *Ehlers* are distinguishable from those in *Kelsay* because *Kelsay* did not

293. *See* Ehlers v. City of Rapid City, 846 F.3d 1002, 1007-08 (8th Cir. 2017) (announcing its decision to reverse the lower court's denial of summary judgment and discussing the factual and procedural background of Ehlers' appeal).

294. *Ehlers*, 846 F.3d at 1011.

295. *Compare id.* (relying on incontrovertible, objective facts in drawing the inference, which was unfavorable to Ehlers, that an objectively reasonable officer would know Ehlers did not comply with two commands), *with* Wallace v. City of Alexander, 843 F.3d 763, 767 (8th Cir. 2016) (quoting Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014)) ("[W]e may reject the district court's factual findings to the extent that they are 'blatantly contradicted by the record.'"), *and* Shekleton v. Eichenberger, 677 F.3d 361, 364 n.4 (8th Cir. 2012) ("[B]ecause an officer's actions in an excessive force case are evaluated under an objective standard, [the defendant-officer's] belief as to what was happening is irrelevant. Instead, what is relevant is whether a reasonable officer would have believed the facts to be as [the defendant-officer] believed them to be.").

296. *Compare Kelsay*, 933 F.3d at 981 (drawing the inference in Deputy Ernst's favor that a reasonable officer could have viewed Kelsay as noncompliant, without basing that conclusion in objective fact, and relying on assumed facts from the district court which were blatantly contradicted by the record), *with Wallace*, 843 F.3d at 767 (quoting *Walton*, 752 F.3d at 1116) ("[W]e may reject the district court's factual findings to the extent that they are 'blatantly contradicted by the record.'"), *and* Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) ("By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."), *and* Saucier v. Katz, 121 S. Ct. 2151, 2159 (2001) ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for *objective reasonableness* based upon the information the officers had when the conduct occurred." (emphasis added)), *and* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989) ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." (emphasis added)), *and* Montoya v. City of Flandreau, 669 F.3d 867, 871 (8th Cir. 2012) (implicitly acknowledging that, on summary judgment in the case of a defendant-officer seeking qualified immunity, reasonable inferences must be drawn from objective facts in the record), *and Kelsay*, 933 F.3d at 987 (Smith, C.J., dissenting) (stating that "the facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing," and "Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation" (emphasis in original)).

involve a suspect who was noncompliant.[297] Consequently, the Eighth Circuit erred in determining that *Ehlers* involved analogous contextual principles comprising the right allegedly violated.[298] For these reasons, the court erred in reversing the district court's denial of qualified immunity for Deputy Ernst on that basis.[299]

2. *The Contextual Principles Defining the Contours of the Right Allegedly Violated in* Montoya v. City of Flandreau *and* Shekleton v. Eichenberger *Were Analogous to Those in* Kelsay v. Ernst

In *Kelsay v. Ernst*,[300] the United States Court of Appeals for the Eighth Circuit determined that the contextual principles which comprised the contours of the rights allegedly violated in *Montoya v. City of Flandreau*[301] and *Shekleton v. Eichenberger*[302] were distinguishable from those in *Kelsay*.[303] In both *Montoya* and *Shekleton*, the Eighth Circuit determined that the plaintiffs were suspected misdemeanants who were nonviolent, non-threatening, and not fleeing or actively resisting arrest at the time the defendant-officers arresting the plaintiffs used more than de minimis force to effectuate their arrests.[304] In *Montoya*, the court further determined that the defendant-officer's use of more than de minimis force was apparent from

297. *Compare Kelsay*, 933 F.3d at 987 (Smith, C.J., dissenting) (stating that "the facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing," and "Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation" (emphasis in original)), *with Ehlers*, 846 F.3d at 1011 (stating that "[a] reasonable officer in Dirkes's position would interpret this behavior as noncompliant," because "Officer Dirkes's dash camera video show[ed] Dirkes approach Ehlers, point to him, and twice order him to put his hands behind his back," and "[i]nstead of complying, Ehlers continued walking towards the Civic Center, passing Dirkes closely as Dirkes gave the instruction a second time").

298. *Compare Kelsay*, 933 F.3d at 986 (Smith, C.J., dissenting) ("[V]iewing the facts in the light most favorable to Kelsay, she was not attempting to flee, resisting arrest, or ignoring Deputy Ernst's commands."), *with Ehlers*, 846 F.3d at 1011 (stating that Ehlers was "noncompliant" and "at least appeared to be resisting [arrest]," regardless of the court's acceptance of "Ehlers's account that he did not hear Dirkes's instructions").

299. *Compare Kelsay*, 933 F.3d at 981 (majority opinion) (stating that the Eighth Circuit's opinion in *Ehlers* supported granting qualified immunity to Deputy Ernst, even though Kelsay in fact complied with the one command given by Deputy Ernst before he took her down), *with Ehlers*, 846 F.3d at 1011 (stating that video evidence established Ehlers ignored two unambiguous commands to "put his hands behind his back" before being taken down).

300. 933 F.3d 975 (8th Cir. 2019) (en banc).

301. 669 F.3d 867 (8th Cir. 2012).

302. 677 F.3d 361 (8th Cir. 2012).

303. Kelsay v. Ernst, 933 F.3d 975, 980 (8th Cir. 2019) (en banc).

304. Shekleton v. Eichenberger, 677 F.3d 361, 366 (8th Cir. 2012); Montoya v. City of Flandreau, 669 F.3d 867, 871-73 (8th Cir. 2012).

the seriousness of the injury suffered by the plaintiff as a result of the defendant-officer's takedown.[305] In *Shekleton*, the court implied that a reasonable officer could not have concluded the plaintiff was noncompliant at the time the defendant-officer used a taser (i.e., more than de minimis force) to effectuate the plaintiff's arrest.[306]

In *Kelsay*, Kelsay was a suspected misdemeanant who was nonviolent, non-threatening, and not fleeing or actively resisting arrest at the time Deputy Ernst performed the challenged takedown on Kelsay to effectuate her arrest.[307] As to the level of force used by Deputy Ernst, his use of more than de minimis force was apparent from the seriousness of the injury suffered by Kelsay as a result of his takedown.[308] Therefore, the Eighth Circuit failed to identify the additional contextual principle of the right allegedly violated that Deputy Ernst used more than de minimis force to effectuate Kelsay's arrest.[309] Further, due to the objectively reasonable inference to be drawn from Deputy Ernst's command "get back here" and Deputy Ernst's actions after giving that command, an objectively reasonable

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305. *See Montoya*, 669 F.3d at 872 (stating that, "although not dispositive, the severity of the injuries [Montoya] sustained," including a broken leg, "is a relevant factor in determining the reasonableness of the force used, . . . and we cannot agree with the district court" in its determination that "a broken leg is simply an 'unfortunate' and 'unintended' consequence of what the [district] court described as objectively reasonable use of force by" the defendant-officer (first citing Rohrbough v. Hall, 586 F.3d 582, 586 (8th Cir. 2009); and then citing Shannon v. Koehler, 616 F.3d 855, 863 (8th Cir. 2010)); *see also Shannon*, 616 F.3d at 863 ("Assuming, then, that [plaintiff-suspect's] story is true—i.e., assuming he was not threatening anyone, not resisting arrest, and so on—it was not reasonable for [the defendant-officer] to use more than de minimis force against him.").

306. *See Shekleton*, 677 F.3d at 366 (implying that Shekleton could not have been objectively viewed as noncompliant when the defendant-officer tased Shekleton, because, "[w]hen [the defendant-officer] told Shekleton to place his arms behind his back, Shekleton told [the defendant-officer] repeatedly that he could not physically do so" and the defendant-officer "verbally acknowledged he was aware" of Shekleton's disability).

307. *Kelsay*, 933 F.3d at 985-86 (Smith, C.J., dissenting).

308. *Cf. id.* at 986 (quoting Br. in Support of Mot. for Summ. J., Ex. C, at 51, 98, 99, Kelsay v. Ernst, No. 4:15-cv-3077 (D. Neb. Feb. 2, 2017), ECF No. 53-8) (stating that "Deputy Ernst 'ran up behind [Kelsay] and he grabbed [her] and slammed [her] to the ground,'"; that "[t]he maneuver—'like, a bear hug'—lifted Kelsay 'off the ground'"; that "[d]ue to the ground impact, Kelsay briefly lost consciousness"; and that the "takedown maneuver broke Kelsay's collarbone" (alterations in original)).

309. *Compare Kelsay*, 933 F.3d at 978-82 (majority opinion) (noting that Kelsay suffered a broken collarbone as a result of Deputy Ernst's use of force in the court's recitation of the facts, but failing to mention and consider that additional contextual principle at all in the court's immunity analysis), *with Montoya*, 669 F.3d at 872 (stating that, "although not dispositive, the severity of the injuries [Montoya] sustained," including a broken leg, "is a relevant factor in determining the reasonableness of the force used, . . . and we cannot agree . . . a broken leg is simply an 'unfortunate' and 'unintended' consequence of what the [district] court described as objectively reasonable use of force by" the defendant-officer (first citing *Shannon*, 616 F.3d at 863; and then citing *Rohrbough*, 586 F.3d at 586)), *and Kelsay*, 933 F.3d at 981 ("[R]easonableness depends on the totality of the circumstances.").

officer could not conclude that Kelsay failed to comply with Deputy Ernst's command.[310] Therefore, by determining in error that a reasonable officer could have concluded that Kelsay was noncompliant, the court misidentified the compliance contextual principle of the right allegedly violated.[311]

Considering the foregoing, in *Kelsay*, the Eighth Circuit erred by incorrectly determining the contextual principles which comprised the contours of the right allegedly violated.[312] Because of that error, the

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310. *Compare Kelsay*, 933 F.3d at 981 (drawing the inference in Deputy Ernst's favor that a reasonable officer could have viewed Kelsay as noncompliant, without basing that conclusion in objective fact, and relying on assumed facts from the district court which were blatantly contradicted by the record), *with* Wallace v. City of Alexander, 843 F.3d 763, 767 (8th Cir. 2016) (quoting Walton v. Dawson, 752 F.3d 1109, 1116 (8th Cir. 2014)) ("[W]e may reject the district court's factual findings to the extent that they are 'blatantly contradicted by the record.'"), *and* Tolan v. Cotton, 134 S. Ct. 1861, 1868 (2014) ("By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party."), *and* Saucier v. Katz, 121 S. Ct. 2151, 2159 (2001) ("Excessive force claims, like most other Fourth Amendment issues, are evaluated for *objective reasonableness* based upon the information the officers had when the conduct occurred." (emphasis added)), *and* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989) ("[T]he 'reasonableness' inquiry in an excessive force case is an objective one: the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." (emphasis added)), *and Montoya*, 669 F.3d at 871 (implicitly acknowledging that, on summary judgment in the case of a defendant-officer seeking qualified immunity, reasonable inferences must be drawn from objective facts in the record), *and Kelsay*, 933 F.3d at 987 (Smith, C.J., dissenting) (stating that "the facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing," and "Deputy Ernst implicitly recognized [Kelsay's] compliance by letting go of her arm and saying nothing in response to her explanation").

311. *Compare Kelsay*, 933 F.3d at 981 (determining in error that a reasonable officer could have viewed Kelsay as noncompliant), *with Shekleton*, 677 F.3d at 366 (implying that Shekleton could not have been objectively viewed as noncompliant when the defendant-officer tased Shekleton, because, "[w]hen [the defendant-officer] told Shekleton to place his arms behind his back, Shekleton told [the defendant-officer] repeatedly that he could not physically do so" and the defendant-officer "verbally acknowledged he was aware" of Shekleton's disability), *and Kelsay*, 933 F.3d at 986-987 (Smith, C.J., dissenting) ("[T]he facts construed in the light most favorable to Kelsay show that she *did* comply with Deputy Ernst's command to 'get back here' by stopping, turning around, and explaining what she was doing. Deputy Ernst implicitly recognized her compliance by letting go of her arm and saying nothing in response to her explanation." (emphasis in original)), *and Kelsay*, 933 F.3d at 981 (majority opinion) ("[R]easonableness depends on the totality of the circumstances.").

312. *Compare Kelsay*, 933 F.3d at 979-82 (determining that a reasonable officer could have concluded that Kelsay was noncompliant, and failing to determine that Deputy Ernst used more than de minimis force to effectuate Kelsay's arrest, in enunciating the contextual principles comprising the right claimed to be violated for the court's immunity analysis), *with Tolan*, 134 S. Ct. at 1866 (quoting *Saucier*, 121 S. Ct. at 2156) ("[W]e have instructed that courts should define the 'clearly established' right at issue on the basis of the 'specific context of the case.' . . . Accordingly, courts must take care not to define a case's 'context' in a manner that imports genuinely disputed factual pro-

court subsequently erred in determining that the contextual principles which comprised the contours of the rights allegedly violated in *Montoya* and *Shekleton* were distinguishable from the contextual principles which comprised the right allegedly violated in *Kelsay*.[313] Consequently, the court misapplied prong two of the immunity analysis in determining that the right allegedly violated was not clearly established in precedent at the time Deputy Ernst executed the challenged takedown on Kelsay.[314] Therefore, the court erred in reversing the district court's denial of qualified immunity for Deputy Ernst.[315]

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positions."), *and Kelsay*, 933 F.3d at 981 ("[R]easonableness depends on the totality of the circumstances.").

313. *Compare Kelsay*, 933 F.3d at 980 (stating that the contextual principles in *Shekleton* and *Montoya* did not squarely govern the contextual principles present in Kelsay's situation), *with Kelsay*, 933 F.3d at 977-79 (plaintiff-suspect was compliant; plaintiff-suspect was non-threatening; plaintiff-suspect was a suspected misdemeanant; plaintiff-suspect was neither actively resisting arrest nor attempting to flee; and defendant-officer used more than de minimis force to effectuate the arrest, evidenced by severity of plaintiff-suspect's resulting injury from defendant-officer's takedown maneuver), *and Shekleton*, 677 F.3d at 366 (plaintiff-suspect was compliant; plaintiff-suspect was non-threatening; plaintiff-suspect was a suspected misdemeanant; plaintiff-suspect was neither actively resisting arrest nor attempting to flee; and defendant-officer used more than de minimis force to effectuate the arrest, evidenced by defendant-officer's use of taser), *and Montoya*, 669 F.3d at 871-72 (plaintiff-suspect was non-threatening; plaintiff-suspect was a suspected misdemeanant; plaintiff-suspect was neither actively resisting arrest nor attempting to flee; and defendant-officer used more than de minimis force to effectuate the arrest, evidenced by severity of plaintiff-suspect's resulting injury from defendant-officer's takedown maneuver).

314. *Compare Kelsay*, 933 F.3d at 980 (quoting Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018)) (determining that the right claimed to be violated was not clearly established because "[n]one of Kelsay's authorities 'squarely govern[ed] the specific facts at issue'"), *with Kisela*, 138 S. Ct. at 1153 (quoting Mullenix v. Luna, 136 S. Ct. 305, 309 (2015)) (stating that "police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue" and "[p]recedent involving similar facts can . . . provide an officer notice that a specific use of force is unlawful"), *and* Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (stating the Court would "not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate").

315. *Compare Kelsay*, 933 F.3d at 982 ("The constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity."), *with Shekleton*, 677 F.3d at 365-67, *and Montoya*, 669 F.3d at 870-73, *and* Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009) ("[I]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public.").

C. Abuse of Discretion Permitted by the United States Supreme Court's Holding in *Pearson v. Callahan*: In *Kelsay v. Ernst*, The United States Court of Appeals for the Eighth Circuit Abdicated Its Responsibility to the Development of Excessive Force Jurisprudence by Skipping Prong One of the Immunity Analysis

In *Kelsay v. Ernst*,[316] the United States Court of Appeals for the Eighth Circuit refused to address prong one of the immunity analysis and answer the question of whether the alleged actions of Gage County Sheriff Deputy Matt Ernst constituted a violation of Melanie Kelsay's Fourth Amendment rights.[317] Judge Steven Grasz noted as much in his dissenting opinion in *Kelsay*.[318] In that opinion, Judge Grasz correctly noted that the United States Supreme Court holding in *Pearson v. Callahan*[319] allowed the Eighth Circuit to skip prong one of the immunity analysis and dispose of Kelsay's claim against Deputy Ernst solely on the basis of prong two.[320]

Judge Grasz also noted that the Eighth Circuit's holding in *Kelsay* contradicted the assurance expressed by the Court in *Pearson*.[321] In *Pearson*, the Court overruled its mandate in *Saucier v. Katz*[322] by holding that, in reviewing a claim of qualified immunity, lower courts would no longer be required to first determine whether the defendant-officer's alleged conduct comprises a constitutional violation.[323] In *Saucier*, the Court defended that requirement by stating that if lower courts skipped prong one, the law governing qualified immunity could be deprived of development.[324] The Court in *Saucier* also stated that in the process of determining prong one, lower courts would define the contours of the alleged violation using contextual principles to establish a basis for a determination that a right is clearly established

316. 933 F.3d 975 (8th Cir. 2019) (en banc).

317. Kelsay v. Ernst, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting).

318. *Kelsay*, 933 F.3d at 987.

319. 129 S. Ct. 808 (2009).

320. *Compare Kelsay*, 933 F.3d at 987 (citing Pearson v. Callahan, 129 S. Ct. 808, 818 (2009)) ("[T]he court now declines to address whether the maneuver used on Ms. Kelsay violated her constitutional rights. Instead, the court relies solely on the second ('clearly established') prong of qualified immunity analysis. . . . this is allowed by governing precedent."), *with Pearson*, 129 S. Ct. at 818 ("The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.").

321. *Kelsay*, 933 F.3d at 987 (citing *Pearson*, 129 S. Ct. at 821-22).

322. 121 S. Ct. 2151 (2001).

323. *Pearson*, 129 S. Ct. at 818 (citing Saucier v. Katz, 121 S. Ct. 2151 (2001)).

324. *See Saucier*, 121 S. Ct. at 2156 (discussing the Court's reasoning for "insisting upon turning to the existence or nonexistence of a constitutional right as the first inquiry").

under prong two.[325] However, in *Pearson*, the Court made the assurance that any misgivings about its parting with the sequential mandate in *Saucier* were unwarranted, as doing so would not necessarily hinder the development of qualified immunity jurisprudence.[326]

In *Kelsay*, the Eighth Circuit attempted to downplay the importance of declaring whether there is a constitutional significance between a suspect failing to comply with one command or two for excessive force qualified immunity purposes.[327] However, by choosing not to clearly establish that such a significance exists, the court provided future officers with a license to use bone-breaking force to effectuate the arrest of a non-threatening, suspected misdemeanant who is not fleeing or resisting arrest but who fails to comply with just *one command*.[328] Thus, because the court was able to skip prong one, the development of excessive force qualified immunity jurisprudence was stunted in the Eighth Circuit.[329] And, the burden of that decision falls not only on Melanie Kelsay (who was deprived of even the smallest vindication of knowing whether Deputy Ernst's conduct violated

325. *Id.*

326. *Pearson*, 129 S. Ct. 808, 821-22.

327. *See Kelsay*, 933 F.3d at 981 (majority opinion) ("Ernst told Kelsay only once to 'get back here' before she continued to walk away, but even if there might be a constitutionally significant distinction between one command and two, no such rule was clearly established when Ernst made his arrest.").

328. *Compare id.* at 977-82 (determining that the right to be free from a forceful and injurious takedown by a police officer, used to effectuate the arrest of a non-threatening, suspected misdemeanant, who was not fleeing or resisting arrest, but who did not comply with one command, was not clearly established as violative of the Fourth Amendment, without determining whether such right is protected under the Fourth Amendment to begin with), *with* City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (per curiam) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 581 (2018)) ("[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." (internal quotation marks omitted)), *and* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2738-39 (1982) ("By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective legal reasonableness of an official's acts."), *and Kelsay*, 933 F.3d at 982 ("The constitutionality of Ernst's takedown was not beyond debate, and he is thus entitled to qualified immunity.").

329. *Compare Kelsay*, 933 F.3d at 977-82 (determining that the right to be free from a forceful and injurious takedown by a police officer, used to effectuate the arrest of a non-threatening, suspected misdemeanant, who was not fleeing or resisting arrest, but who did not comply with one command, was not clearly established as violative of the Fourth Amendment, without determining whether such right is protected under the Fourth Amendment to begin with), *with Emmons*, 139 S. Ct. at 504 (quoting *Wesby*, 138 S. Ct. at 581) ("[W]e have stressed the need to identify a case where an officer acting under similar circumstances was held to have violated the Fourth Amendment." (internal quotation marks omitted)), *and Kelsay*, 933 F.3d at 987-88 (Grasz, J., dissenting) (stating that, while determining whether Deputy Ernst's actions constituted a constitutional violation "may or may not have brought relief to Ms. Kelsay in this court, it would help ensure this sad situation is not repeated").

her rights and would not go unpunished moving forward) but also on any future claimant who may experience similar treatment under similar circumstances.[330] Therefore, because the court unjustifiably decided to leave excessive force qualified immunity precedent unchanged in the Eighth Circuit, Judge Grasz was also correct in his determination that the court's holding in *Kelsay* contradicted the assurance expressed by the Court in *Pearson*.[331]

D. Circuit Split: The Obvious Case and the Sliding Scale Analysis

The United States Supreme Court recently implied that precedent outlining general reasonableness tests, such as the *Graham* factors outlined in the Court's holding in *Graham v. Connor*,[332] may suffice to demonstrate that an officer infringed upon a § 1983 claimant's clearly established constitutional rights in cases where the alleged force used by an officer was *obviously unreasonable*.[333] In *Morris v. Noe*,[334] the United States Court of Appeals for the Tenth Circuit determined that an officer who, without warning, executed a forceful throw-down on a non-threatening, suspected misdemeanant who was not resisting arrest or attempting to flee and caused serious injury to the suspect was not entitled to qualified immunity regardless

330. *Kelsay*, 933 F.3d at 987-88 (Grasz, J., dissenting).

331. Compare *id.* at 987 (citing *Pearson*, 129 S. Ct. at 821-22) ("The Supreme Court indicated in *Pearson* that the option for courts to skip to the second prong of analysis would not necessarily stunt the development of constitutional law. The court's opinion belies that expectation, at least in the context of excessive force claims." (citation omitted)), *with Pearson*, 129 S. Ct. at 821-22 ("Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted. . . . the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity."), *and Kelsay*, 933 F.3d at 977-82 (majority opinion) (determining that the right to be free from a forceful and seriously injurious takedown by a police officer, used to effectuate the arrest of a non-threatening, suspected misdemeanant, who was not fleeing or resisting arrest, but who did not comply with one command, was not clearly established as violative of the Fourth Amendment, without determining whether such right is protected under the Fourth Amendment to begin with).

332. 109 S. Ct. 1865 (1989).

333. *See* Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (quoting White v. Pauly, 137 S. Ct. 548, 552 (2017)) ("'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning to officers.' . . . But the general rules set forth in '*Garner* and *Graham* do not by themselves create clearly established law *outside "an obvious case*.'"" (emphasis added)); City of Escondido v. Emmons, 139 S. Ct. 500, 504 (2019) (per curiam) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 581 (2018)) ("[E]xisting precedent must place the lawfulness of the particular [action] beyond debate. . . . Of course, there can be the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances. . . ." (second alteration in original) (internal quotation marks omitted)).

334. 672 F.3d 1185 (10th Cir. 2012).

of the absence of case law factually on point.[335] In addressing prong two of the immunity analysis, the Tenth Circuit determined that, although it had no case law that addressed a forceful throw-down which alone caused serious injury, the Court's opinion in *Graham* clearly established Mr. Morris's constitutional right to be free of a forceful throw-down under the lower court's assumed facts.[336] The Tenth Circuit defended its determination by stating that case law involving precisely the same circumstances as a case being reviewed would almost never be available.[337] Thus, the Tenth Circuit adopted what it referred to as a "sliding scale," and it did not mechanically require case law directly on point when an officer's Fourth Amendment infringement was notably clear under the Court's opinion in *Graham*.[338] The Tenth Circuit explained that the Court's opinion in *Graham* established that an officer's use of force is least justifiable against suspects who are (1) suspected misdemeanants, (2) non-threatening, and (3) not actively resisting arrest or attempting to flee.[339] Thus, in *Morris*, because the *Graham* factors primarily weighed heavily against the defendant-officer's use of force, the Tenth Circuit determined that the defendant-officer's conduct constituted a clearly established Fourth Amendment infringement under the Court's opinion in *Graham*.[340] The Tenth Circuit also quoted two of its sister circuits, the United

335. Morris v. Noe, 672 F.3d 1185, 1196-98 (10th Cir. 2012) (first citing Mecham v. Frazier, 500 F.3d 1200, 1204-05 (10th Cir. 2007) (for comparison); and then citing Graham v. Connor, 109 S. Ct. 1865 (1989)).

336. *Morris*, 672 F.3d at 1196-98 (citing *Graham*, 109 S. Ct. 1865).

337. *Id.* at 1196-97 (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007)) ("Because the existence of excessive force is a fact-specific inquiry, however, 'there will almost never be a previously published opinion involving exactly the same circumstances.'").

338. *Id.* at 1196-97 (quoting Pierce v. Gilchrist, 359 F.3d 1279, 1298 (10th Cir. 2004)) ("Thus, we have adopted a sliding scale: 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'").

339. *Id.* at 1198 (quoting *Casey*, 509 F.3d at 1285); *see also Graham*, 109 S. Ct. at 1872 (stating that "proper application" of the Fourth Amendment objective reasonableness test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). The Tenth Circuit noted an Eleventh Circuit opinion in which the Eleventh Circuit stated, "where arrestees had not committed a serious crime, posed no immediate threat, and did not actively resist arrest, 'the officers were not justified in using any force, and a reasonable officer thus would have recognized that the force used was excessive.'" *Morris*, 672 F.3d at 1198 (quoting Thornton v. City of Macon, 132 F.3d 1395, 1400 (11th Cir. 1998)).

340. *See Morris*, 672 F.3d at 1198 ("Noe had reason to believe [Mr.] Morris was, at most, a misdemeanant. But [Mr.] Morris posed no threat to Noe or others, nor did he resist or flee. Thus, . . . [Mr.] Morris's right to be free from a forceful takedown was clearly established under *Graham*.").

States Courts of Appeals for the First and Eleventh Circuits, in support of its rationale.[341]

In *Kelsay v. Ernst*,[342] the United States Court of Appeals for the Eighth Circuit determined that an officer who, without warning, executed a forceful throw-down on a non-threatening, suspected misdemeanant who was not resisting arrest or attempting to flee and caused serious injury to the suspect was entitled to qualified immunity.[343] In *Kelsay*, the Eighth Circuit stated that it did not consider Gage County Sheriff Deputy Matt Ernst's use of force a sufficiently clear Fourth Amendment infringement qualifying as an obvious case not requiring precedent addressing similar circumstances.[344] However, in *Kelsay*, *all* of the three *Graham* factors weighed heavily against Deputy Ernst using force against Melanie Kelsay.[345] Thus, the Eighth Circuit's holding in *Kelsay* highlighted a split among the circuits about what constitutes an *obvious case* in which the *Graham* factors alone may be determinative of whether an officer's alleged Fourth Amendment infringement is clearly established.[346] Consequently, the Eighth Cir-

341. *Id.* (first quoting Raiche v. Pietroski, 623 F.3d 30, 39 (1st Cir. 2010), and then quoting *Thornton*, 132 F.3d at 1400) (noting that the United States Court of Appeals for the First Circuit recently concluded that, "[a] reasonable officer . . . would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped . . . and who presents no indications of dangerousness" and that "[s]uch conduct is a major departure from reasonable behavior under both the *Graham* factors and the officer's training" (internal quotation marks omitted)).

342. 933 F.3d 975 (8th Cir. 2019) (en banc).

343. *Compare* Kelsay v. Ernst, 933 F.3d 975, 977-79 (8th Cir. 2019) (en banc) (stating the court's conclusion and the facts of the case), *with id.* at 985-86 (Smith, C.J., dissenting) (determining Kelsay was a non-threatening suspected misdemeanant, who was not resisting arrest or attempting to flee at the time Deputy Ernst broke Kelsay's collarbone by relying on objective facts from the record, "viewing the facts in the light most favorable to Kelsay," and granting Kelsay all reasonable inferences).

344. *Id.* at 981-82 (majority opinion).

345. *Compare id.* at 985-86 (Smith, C.J., dissenting) (determining Kelsay was a non-threatening suspected misdemeanant, who was not resisting arrest or attempting to flee at the time Deputy Ernst broke Kelsay's collarbone by relying on objective facts from the record, "viewing the facts in the light most favorable to Kelsay," and granting Kelsay all reasonable inferences), *with* Graham v. Connor, 109 S. Ct. 1865, 1872 (1989) (citing Tennessee v. Garner, 105 S. Ct. 1694, 1700 (1985)) (identifying "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight," as three contextual principles lower courts should consider when conducting the Fourth Amendment reasonableness analysis to determine whether the force used by a law enforcement officer was reasonable in an excessive force case), *and* Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009) ("[I]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public.").

346. *Compare Kelsay*, 933 F.3d at 977-79, 981-82 (majority opinion) (Eighth Circuit determining that an officer executing a forceful throw-down on a non-threatening suspected misdemeanant, who was not resisting arrest or attempting to flee, causing serious injury to the suspect, did *not* constitute the *obvious case* in which the officer's Fourth Amendment violation was clearly established by the Court's holding in *Gra-*

cuit's holding in *Kelsay*, and Kelsay's subsequent petition for a writ of certiorari, presented the Court with an opportunity to resolve a circuit split regarding excessive force qualified immunity jurisprudence.[347] However, even though the Court acknowledged its responsibility for the qualified immunity doctrine as a judge-made rule, the Court failed to resolve the circuit split by denying Kelsay's petition for certiorari.[348]

V. CONCLUSION

In *Kelsay v. Ernst*,[349] after the United States District Court for the District of Nebraska denied qualified immunity to Gage County Sheriff Deputy Matt Ernst from an excessive force claim filed by Melanie Kelsay, the Eighth Circuit considered Deputy Ernst's appeal.[350] Upon review, the Eighth Circuit reversed the district court's denial,

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ham), *with Morris*, 672 F.3d at 1198 (Tenth Circuit determining that an officer executing a forceful throw-down on a non-threatening suspected misdemeanant, who was not resisting arrest or attempting to flee, causing serious injury to the suspect, *did* constitute the *obvious case* in which the officer's Fourth Amendment violation was clearly established by the Court's holding in *Graham*), *and Raiche*, 623 F.3d at 39 (First Circuit stating that "[a] reasonable officer . . . would not have needed prior case law on point to recognize that it is unconstitutional to tackle a person who has already stopped in response to the officer's command to stop and who presents no indications of dangerousness," and that "[s]uch conduct is a major departure from reasonable behavior under both the *Graham* factors and the officer's training"), *and Thornton*, 132 F.3d at 1400 (quoting *Graham*, 109 S. Ct. at 1872) (Eleventh Circuit reiterating the *Graham* factors and stating that "the [defendant] officers were not justified in using *any* force, and a reasonable officer thus would have recognized that the force used was excessive" in circumstances where neither of the plaintiff-suspects were "suspected of having committed a serious crime, neither posed an immediate threat to anyone, and neither actively resisted arrest" (emphasis in original)).

347. *See Kelsay*, 933 F.3d at 977-79, 981-82 (Eighth Circuit determining that an officer executing a forceful throw-down on a non-threatening suspected misdemeanant, who was not resisting arrest or attempting to flee, causing serious injury to the suspect, did *not* constitute the *obvious case* in which the officer's Fourth Amendment violation was clearly established by the Court's holding in *Graham*); Petition for Writ of Certiorari, Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (No. 19-682), 2019 WL 6465022, at *ii ("Are police officers entitled to qualified immunity as a matter of law - even if they use substantial force against non-threatening suspected misdemeanants who are neither fleeing, nor resisting arrest, nor posing a safety risk to anyone - so long as no prior case involves a virtually identical fact pattern?").

348. *Compare* Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (denying Kelsay's Petition for Writ of Certiorari), *with* Pearson v. Callahan, 129 S. Ct. 808, 817 (2009) ("[T]he *Saucier* rule is judge made and implicates an important matter involving internal Judicial Branch operations. Any change should come from this Court, not Congress."); *see also* Baxter v. Bracey, 140 S. Ct. 1862, 1862, 1864 (2020) (Thomas, J., dissenting) (stating that "[b]ecause our §1983 qualified immunity doctrine appears to stray from the statutory text, I would grant this petition," and that "[t]here likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe," upon the Court's announcement that it would not hear any cases regarding qualified immunity in its October 2020 term).

349. 933 F.3d 975 (8th Cir. 2019) (en banc).

350. Kelsay v. Ernst, 933 F.3d 975, 977-79 (8th Cir. 2019) (en banc).

finding that Deputy Ernst was entitled to qualified immunity.[351] The Eighth Circuit reasoned that, at the time of the encounter between Deputy Ernst and Kelsay, Deputy Ernst's use of force against Kelsay was not clearly established as unreasonable under the circumstances.[352] After the Eighth Circuit's decision, Kelsay filed a petition for a writ of certiorari on November 26, 2019, which the United States Supreme Court denied on May 18, 2020.[353]

The Eighth Circuit erred in finding that Deputy Ernst was entitled to qualified immunity.[354] The court's analysis in *Kelsay* violated the applicable standard of review by failing to grant Kelsay all reasonable inferences and assuming facts blatantly contradicted by the record.[355] Consequently, the Eighth Circuit failed to properly determine the contextual principles comprising the contours of the constitutional right allegedly violated and misapplied Eighth Circuit precedent in determining whether Deputy Ernst's conduct was clearly established as unconstitutional.[356] Moreover, the Eighth Circuit's analysis contradicted assurances provided by the Court in *Pearson v. Callahan*[357] by failing to answer whether or not Deputy Ernst's conduct was unconstitutional.[358] Subsequently, the Court failed to correct the Eighth Circuit's error and failed to resolve the circuit split among the circuits about what constitutes an *obvious case* by denying Kelsay's petition for a writ of certiorari.[359]

Americans across the nation recently protested and made clear that law enforcement accountability is a public interest priority.[360] In

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351. *Kelsay*, 933 F.3d at 981-82.

352. *Id.* at 980.

353. Petition for Writ of Certiorari, Kelsay v. Ernst, 140 S. Ct. 2760 (2020) (No. 19-682); Kelsay v. Ernst, 140 S. Ct. 2760 (2020).

354. *See supra* notes 243-315 and accompanying text.

355. *See supra* notes 243-289 and accompanying text.

356. *See supra* notes 290-315 and accompanying text.

357. 129 S. Ct. 808 (2009).

358. *See supra* notes 316-331 and accompanying text.

359. *See supra* notes 332-348 and accompanying text.

360. *See All Things Considered: Protests Across The U.S. Escalate Amid Calls For Police Accountability*, *supra* note 2 (stating that there were "thousands of protesters at just about every major city . . . coming out to express outrage after another police killing of a person of color," in reference to the murder of George Floyd; that the protests "spread to many smaller cities, too"; and that the protesters interviewed "say they're especially upset with the lack of change in police departments not just here but elsewhere because there have been promises of police reforms, the department changing policies and training. But racial biasing continues"); Buchanan, Bul & Patel, *supra* note 2 (stating that polls suggested "about 15 million to 26 million people in the United States have participated in demonstrations over the death of George Floyd and others in recent weeks," and that "[a] majority [of protesters polled] said that they watched a video of police violence toward protesters or the Black community within the last year. And of those people, half said that it made them more supportive of the Black Lives Matter movement"); Shumaker, *supra* note 2 (stating that "[u]nder pressure from the protests, some U.S. police departments banned the use of chokeholds and no-knock war-

Kelsay, the Eighth Circuit's failure to adhere to the standard of review and to develop excessive force qualified immunity jurisprudence by skipping prong one of the immunity analysis are serious faults which cut against the strong public interest in holding law enforcement officers accountable for civil rights violations.[361] At this contentious time in our county, it is critical to the general welfare that such faults are not repeated. As the Court stated in *Pearson*, the judicial branch should be responsible for correcting issues presented by the qualified immunity doctrine.[362] Thus, moving forward, the Court should grant certiorari to cases like *Kelsay* and consider the following changes to the qualified immunity analysis.

First, the cause of the Eighth Circuit's failure to adhere to the appropriate standard of review in *Kelsay* appears to be a product of confusion regarding the requirement that courts view the pleaded facts from a reasonable *officer's perspective* while simultaneously viewing the pleaded facts in a *light most favorable to the nonmoving party*.[363] As the reasonable officer's perspective requirement appears to hinder the ability of lower courts to view the pleaded facts objectively and in a light most favorable to the nonmoving party, the Court should seriously consider clarifying the requirement that lower courts view the pleaded facts from a reasonable officer's perspective. Specifically, the Court should consider requiring the lower courts to *first* establish a summary of the facts of the case from the pleaded facts viewed in a light most favorable to the nonmoving party and—once

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rants. A few school districts, . . . canceled contracts with police departments. A few cities . . . proposed redirecting some of the police budget to other community priorities. But nationwide reform remains elusive"); Pfeifer, *supra* note 2 ("The murder of George Floyd in Minneapolis, MN, by a white police officer captured on cellphone video, which has led to protests nationwide, is the latest casualty of the near zero-accountability policy for law enforcement known as the doctrine of Qualified Immunity.").

361. *Compare Kelsay*, 933 F.3d at 977-82 (violating the applicable standard of review and determining Deputy Ernst was entitled to qualified immunity from Kelsay's § 1983 excessive force suit without stating whether or not Deputy Ernst violated Kelsay's Fourth Amendment rights), *with* Harlow v. Fitzgerald, 102 S. Ct. 2727, 2736, 2739 (1982) ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees. . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.").

362. *See* Pearson v. Callahan, 129 S. Ct. 808, 817 (2009) ("Any change should come from this Court, not Congress.").

363. *Compare Kelsay*, 933 F.3d at 981 ("Ernst's conclusion that Kelsay failed to comply was objectively reasonable. A reasonable police officer could expect Kelsay to understand his command to 'get back here' as an order to stop and remain, not as a directive merely to touch base before walking away again."), *with id.* at 986 (Smith, C.J., dissenting) ("But crediting Kelsay's account of the events, Kelsay complied with Deputy Ernst's command to 'get back here' . . . . If there is a dispute of fact on this question, it is material and should be resolved by a jury.").

that summary is complete—to *then* view that summary from an objectively reasonable officer's perspective. Additionally, requiring lower courts to explicitly ground their determinations of inferences doubling as contextual principles (e.g., whether a suspect was "compliant" or "threatening") in objective facts from the record could also help lower court judges avoid allowing their own life experiences and subconscious biases to distort their interpretation of the objectively reasonable officer's perspective. These requirements are much more than unnecessary micro-managing. They could assist lower courts by highlighting the nuances of the standard of review for motions for summary judgment on the basis of qualified immunity in excessive force cases, and, more importantly, they could prevent future lower courts from violating that standard of review.

Second, the ability for lower courts to dispose of an excessive force claim solely because the right allegedly violated is not clearly established impermissibly allows the lower courts discretion to stunt the development of qualified immunity jurisprudence and cuts against the strong public interest in law enforcement accountability for unconstitutional conduct.[364] Thus, the Court should consider either (1) returning to the mandatory, sequential two-prong immunity analysis announced by the Court in *Saucier v. Katz*[365] or (2) removing prong two from the immunity analysis entirely. The mandatory, sequential two-prong immunity analysis ensures the development of qualified immunity jurisprudence with every novel situation. Thus, concerns presented by the mandate, identified by the Court in *Pearson*, pale in comparison to its value to the public interest in deterring unconstitutional conduct under the color of law and victim compensation. However, if the Court does not wish to move backwards, Justice Clarence Thomas recently expressed skepticism in the basis of support for

364. *Compare Pearson*, 129 S. Ct. at 821 ("Any misgivings concerning our decision to withdraw from the mandate set forth in *Saucier* are unwarranted."), *and Kelsay*, 933 F.3d at 982 (concluding that Deputy Ernst was entitled to qualified immunity on the basis that "[t]he constitutionality of Ernst's takedown was not beyond debate," without holding whether or not Deputy Ernst's conduct violated the Fourth Amendment), *with* Saucier v. Katz, 121 S. Ct. 2151, 2156 (2001) ("This is the process for the law's elaboration from case to case, ... The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case."), *and Harlow*, 102 S. Ct. at 2736 ("In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees."), *and Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting) ("The law is never made clear enough to hold individual officials liable for constitutional violations involving excessive force as Congress authorized in 42 U.S.C. § 1983.").

365. 121 S. Ct. 2151 (2001).

prong two of the immunity analysis.[366] And if the Court were to do away with prong two of the immunity analysis entirely, the threat of stagnation to qualified immunity jurisprudence would be relieved.

Finally, if the Court does not wish to do away with prong two, the Court should resolve the circuit split by clarifying how lower courts may identify an *obvious case* in which the *Graham* factors may be determinative of whether an officer's alleged Fourth Amendment infringement is clearly established without having additional case law factually on point. In doing so, the Court should consider the Tenth Circuit's "sliding scale" analysis, utilized in *Morris v. Noe*,[367] as the Tenth Circuit's analysis rationally considers the improbability of factually indistinguishable cases.[368]

Demonstrated in *Kelsay*, the qualified immunity doctrine as it stands produces unjust results by inappropriately failing to hold law enforcement officers accountable for unconstitutional conduct. At the time of this Note's publication, two states, New Mexico and Colorado, have legislatively barred use of the qualified immunity doctrine to evade suit in *state* courts for a public officer's alleged civil rights violations under the states' respective *state* constitutions.[369] However, because § 1983 created a federal cause of action to be litigated in federal courts, those state Acts will have no bearing on claims alleging a public officer's violation of an individual's rights under the United States Constitution.[370] Thus, with the political parties in Congress unwilling to cooperate, peace across the United States appears to be up to

366. Baxter v. Bracey, 140 S. Ct. 1862, 1864 (2020) (Thomas, J., dissenting) ("There likely is no basis for the objective inquiry into clearly established law that our modern cases prescribe.").

367. 672 F.3d 1185 (10th Cir. 2012).

368. *See* Morris v. Noe, 672 F.3d 1185, 1196 (10th Cir. 2012) (quoting Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007)) ("Because the existence of excessive force is a fact-specific inquiry, however, 'there will almost never be a previously published opinion involving exactly the same circumstances.' . . . Thus, we have adopted a sliding scale . . . .").

369. H.B. 4, 55th Leg., Reg. Sess. (NM 2021) (enacting the New Mexico Civil Rights Act); S.B. 20-217, 73d Gen. Assemb., Reg. Sess. (Co. 2020) (enacting the Enhance Law Enforcement Integrity Act).

370. *See* Nick Sibilla, *New Mexico Prohibits Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021, 4:00 PM) https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=1862bc3d79ad ("Since qualified immunity is a federal doctrine, it can only be fully abolished by Congress or the Supreme Court. . . . Under HB 4, if a state or local government employee infringes someone's rights within their scope of employment, the victim can sue the government *employer* for damages under the *state* constitution." (emphasis in original)); Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020, 7:36 PM) https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=469459f6378a ("To be clear, the new Colorado law doesn't end the doctrine of qualified immunity; Section 1983 claims filed by Coloradans in federal court would still be

the Court for now.[371] After all, the People made their message clear last summer: *No justice? No peace*.[372]

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subject to qualified immunity. Only the U.S. Supreme Court or Congress has the power to alter or abolish qualified immunity, though prospects are mixed at the moment.").

371. *See* Boehm, *supra* note 5 ("'I think there's going to be a Republican proposal and a Democrat proposal. The only thing that bothers me about that, is what usually happens when there's a Republican proposal and a Democrat proposal?' Sen. Rand Paul (R–Ky.) told NPR. 'An impasse and nothing.'").

372. *See* McGonigle Leyh, *supra* note 2 (stating that "[m]ore often than not, the application of 'qualified immunity', which protects government officials from lawsuits alleging rights violations, has resulted in victims not being able to get justice," and that "[a]s slogans of 'No Justice, No Peace' spread across the country, there is hope that real change can occur").

† This Note is dedicated to my parents who raised me to keep an open mind and ask questions, Craig and Kelly McCauley; to my brothers who have my back through any success or failure, Seth and Keenan McCauley; and, to the strong wind who fostered my ambition to become a compassionate "player," Dr. Michael P. Roche. This year, Dr. Roche announced his retirement after forty-seven years of teaching in the University of South Dakota Department of Criminal Justice. I am forever grateful for all the wisdom, guidance, and friendship he has offered me since I first entered his classroom five years ago, and I wish him the very best in his well-deserved retirement.