No. 21-3267

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASONDRA POLLREIS, ON BEHALF OF HERSELF AND HER MINOR CHILDREN, ON BEHALF OF W.Y., ON BEHALF OF S.Y.,
Plaintiff-Appellant,

v.

LAMONT MARZOLF; JOSH KIRMER,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
CASE NO. 5:18-CV-05200
THE HONORABLE JUDGE TIMOTHY L. BROOKS

BRIEF OF THE RODERICK AND SOLANGE MACARTHUR JUSTICE CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae, the Roderick and Solange MacArthur Justice Center, does not have a parent corporation, and no publicly held corporation owns any portion of its stock.

Date: February 7, 2022

/s/ Devi M. Rao
Devi M. Rao

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Roderick and Solange MacArthur Justice Center (RSMJC) is a public interest law firm founded in 1985 by the family of J. Roderick MacArthur to advocate for human rights and social justice through litigation. RSMJC attorneys have taken part in civil rights battles in areas including police misconduct, the rights of the indigent in the criminal justice system, compensation for the wrongfully convicted, the treatment of incarcerated people, and qualified immunity. RSMJC has an interest in ensuring accountability for civil rights violations by preventing the unwarranted expansion of qualified immunity.

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. Amicus and its counsel have not represented any of the parties to the present appeal in another proceeding involving similar issues, nor have they been parties in a proceeding or legal transaction that is at issue in the present appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The judge-made doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Defendants who raise qualified immunity ask courts to decide two questions: (1) whether there is a violation of a constitutional right; and (2) whether the right at issue was clearly established at the time of the alleged misconduct. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Since 2009, federal courts have been authorized to skip the first question—whether conduct is constitutional—if they answer the second question in the negative. *Id*. at 236. The district court here did just that.

Qualified immunity has been the subject of harsh criticism from an ever-growing group of jurists, scholars, elected officials, and practitioners. And although the federal courts are, for now, stuck wading through this morass, this Court can apply the doctrine in a sound way. It can do so in two respects.

First, this Court should address both steps of the qualified immunity inquiry. Doing so is "beneficial in developing constitutional precedent in an area that courts typically consider in cases in which the defendant asserts a qualified immunity defense." *Plumhoff v. Rickard*, 572 U.S. 765, 774 (2014) (cleaned up). This approach

also has the benefit of employing the much-criticized clearly-established inquiry only when truly necessary.

Second, when this Court reaches that inquiry, it should make clear that "clearly established" means more than appellate precedent from cases presenting virtually identical facts.

By taking the steps in order, and by using an appropriate version of the clearly-established prong, this Court will prudently apply a defense that is increasingly criticized—in ever more strident terms—by jurists, scholars, elected officials, and everyday citizens spanning the ideological spectrum. Disdain for qualified immunity is that rare issue on which the American left, center, and right are largely in agreement.

ARGUMENT

I. Qualified Immunity Is Unworkable, Unjust, And Untethered To Any Statutory Or Historical Justification.

The adoption and application of qualified immunity has been the subject of withering criticism from an ever-growing number of jurists, scholars, elected officials, and practitioners. The consensus against qualified immunity is remarkable because it is "cross-ideological"—no small feat in "this hyperpartisan age." *Zadeh v. Robinson*, 928 F.3d 457, 480 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part). For instance, U.S. Supreme Court Justices on different sides of the ideological spectrum have expressed serious doubts about the doctrine. *See, e.g.*,

Baxter v. Bracey, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from the denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (The current "one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers," telling them that "they can shoot first and think later.").[2] The same is true of scholars and elected officials. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L.

[2] In addition to Justices Thomas and Sotomayor, judges across the country have strongly criticized qualified immunity. *See, e.g.*, *Cole v. Carson*, 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting) ("The real-world functioning of modern immunity practice—essentially 'heads government wins, tails plaintiff loses'—leaves many victims violated but not vindicated."); *Sampson v. Cnty. of Los Angeles by & through Los Angeles Cnty. Dep't of Child. & Fam. Servs.*, 974 F.3d 1012, 1025 (9th Cir. 2020) (Hurwitz, J., concurring in part and dissenting in part) (noting "struggle" to apply the "ill-conceived" and "judge-made doctrine of qualified immunity, which is found nowhere in the text of § 1983"); *Horvath v. City of Leander*, 946 F.3d 787, 801 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part) ("[T]here is no textualist or originalist basis to support a 'clearly established' requirement in § 1983 cases."); *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *6-7 (E.D.N.Y. June 26, 2018) (Weinstein, J.) ("The Court's expansion of immunity . . . is particularly troubling. . . . The law, it is suggested, must return to a state where some effective remedy is available for serious infringement of constitutional rights."); *Ventura v. Rutledge*, 398 F. Supp. 3d 682, 697 n.6 (E.D. Cal. 2019) (Drozd., J.) ("[T]his judge joins with those who have endorsed a complete reexamination of [qualified immunity] which, as it is currently applied, mandates illogical, unjust, and puzzling results in many cases."); *Estate of Smart v. City of Wichita*, No. 14-2111-JPO, 2018 WL 3744063, at *18 n.174 (D. Kan. Aug. 7, 2018) (O'Hara, M.J.) ("[T]he court is troubled by the continued march toward fully insulating police officers from trial—and thereby denying any relief to victims of excessive force—in contradiction to the plain language of the Fourth Amendment."), *aff'd in part and rev'd in part*, 951 F.3d 1161 (10th Cir. 2020).

REV. 45 (2018); Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797 (2018); Emma Tucker, *States Tackling "Qualified Immunity" for Police as Congress Squabbles Over the Issue*, CNN (April 23, 2021).[3] Even a majority of the general public supports ending qualified immunity for some state actors. *See* Emily Ekins, *Poll: 63% of Americans Favor Eliminating Qualified Immunity for Police*, Cato Institute (July 16, 2020).[4] Although much has been written about the multitude of ways in which qualified immunity has been an abject failure, a few of its failings warrant emphasis.

First, qualified immunity is unworkable. As one court recently lamented, "determining whether an officer violated 'clearly established' law has proved to be a mare's nest." *Vega v. Semple*, 963 F.3d 259, 275 (2d Cir. 2020) (quoting John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 FLA. L. REV. 851, 852 (2010)). It is a frequent source of "challenges," and defining the right at issue presents a "chronic difficulty" for courts. *Id.* For example, Judge Charles Wilson of the Eleventh Circuit described "[w]ading through the doctrine of qualified immunity" as "one of the most morally and conceptually challenging tasks federal appellate court judges routinely face." Charles R. Wilson, *"Location, Location,*

[3] https://www.cnn.com/2021/04/23/politics/qualified-immunity-police-reform/index.html

[4] https://www.cato.org/survey-reports/poll-63-americans-favor-eliminating-qualified-immunity-police

Location": Recent Developments in the Qualified Immunity Defense, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). Similarly, Judge Don Willett of the Fifth Circuit summed up the state of things by observing that "[i]n day-to-day practice, the 'clearly established' standard is neither clear nor established among our Nation's lower courts." *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part). One exasperated federal district judge put it more bluntly:

> Factually identical or highly similar factual cases are not, however, the way the real world works. Cases differ. Many cases have so many facts that are unlikely to ever occur again in a significantly similar way. The Supreme Court's obsession with the clearly established prong assumes that officers are routinely reading Supreme Court and Tenth Circuit opinions in their spare time, carefully comparing the facts in these qualified immunity cases with the circumstances they confront in their day-to-day police work. It is hard enough for the federal judiciary to embark on such an exercise, let alone likely that police officers are endeavoring to parse opinions. . . . It strains credulity to believe that a reasonable officer, as he is approaching a suspect to arrest, is thinking to himself: "Are the facts here anything like the facts in *York v. City of Las Cruces*?"

Manzanares v. Roosevelt Cnty. Adult Det. Ctr., 331 F. Supp. 3d 1260, 1294 n.10 (D.N.M. 2018) (cleaned up).

As it turns out, that skepticism is dead-on. Recent studies have shown that "officers are not actually educated about the facts and holdings of court decisions that"—theoretically—"clearly establish the law." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. CHI. L. REV. 605, 683 (2021). This is unsurprising. After all, "[t]here could never be sufficient time to train officers about the

hundreds—if not thousands—of court cases that could clearly establish the law for qualified immunity purposes." *Id.* at 611. Why, then, are courts and litigators alike forced to throw themselves into the mare's nest that is the clearly established inquiry, "plumb[ing] the depths of Westlaw for factually similar lower court decisions"? *Id.* at 612. No good answer exists.

Second, qualified immunity is unjust. As Justice Sotomayor explained, qualified immunity jurisprudence "sends an alarming signal . . . that palpably unreasonable conduct will go unpunished." *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting). The doctrine serves to "insulat[e] incaution," and "formalizes a rights-remedies gap through which untold constitutional violations slip unchecked." *Cole v. Carson*, 935 F.3d 444, 470-71 (5th Cir. 2019) (Willett, J., dissenting). State court judges applying the doctrine to federal claims have likewise critiqued "the collateral damage done by a qualified immunity doctrine." *Lacy v. Coughlin*, 100 Mass. App. Ct. 321, 2021 WL 4572105, at *12 (2021) (Sullivan, J., dissenting). Justice Appel of the Supreme Court of Iowa, for instance, explained how the "federal approach to statutory qualified immunity embraces a dynamic that has progressively chewed and choked potential remedies for constitutional violations." *Baldwin v. City of Estherville*, 915 N.W.2d 259, 290 (Iowa 2018) (Appel, J., dissenting). Justice Workman of the Supreme Court of Appeals of West Virginia echoed this point, noting how the doctrine awards government actors "near absolute immunity."

W. Virginia Div. of Corr. v. P.R., No. 18-0705, 2019 WL 6247748, at *11 (W. Va. Nov. 22, 2019) (cleaned up) (Workman, J. dissenting).

In particular, the vicious cycle created by *Pearson v. Callahan*, 555 U.S. 223 (2009)—allowing courts to decide the clearly established inquiry at prong two of the qualified immunity analysis without first deciding whether there was a constitutional violation—means that government officials can flagrantly violate the law in similar ways, over and over again, until and unless a court finally decides to intervene and decide whether the underlying conduct is unlawful. The growing frequency of this "Escherian Stairwell," *Zadeh*, 928 F.3d at 480 (Willett, J., concurring in part and dissenting in part), is supported by empirical research. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 6-7 (2015) (quantifying post-*Pearson* reduction in courts establishing constitutional violations at prong one).

In short, there is "growing concern" that "qualified immunity smacks of unqualified impunity." *Fogle v. Sokol*, 957 F.3d 148, 158 n.11 (3d Cir. 2020) (citing *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part)). The Framers meant for rights to have remedies, but qualified immunity threatens this fundamental precept by continually encroaching upon the theoretical availability of redress for violations of constitutional and statutory rights. *See Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically

termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.").

Finally, federal qualified immunity has no basis in the statutory text or common law. Justice Thomas has said as much several times in recent years. *See, e.g.*, *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2421 (2021) (Thomas, J., dissenting from denial of certiorari) ("As I have noted before, our qualified immunity jurisprudence . . . cannot be located in § 1983's text and may have little basis in history"); *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring) ("[W]e have diverged from the historical inquiry mandate by the statute . . . [and] completely reformulated qualified immunity along principles not at all embodied in the common law." (internal quotation marks omitted)). And the doctrine's departure from its historical roots has not escaped the attention of other federal and state court judges. *See*, *e.g.*, *Kisela*, 138 S. Ct. at 1162 (Sotomayor, J., dissenting); *Fogle*, 957 F.3d at 158 n.11; *Zadeh*, 928 F.3d at 479 (Willet, J., concurring in part and dissenting in part); *Baldwin*, 915 N.W.2d at 289 (Appel, J., dissenting) ("Robust qualified immunity for individuals committing constitutional wrongs is completely inconsistent with the wording, the legislative history, and the challenging historical purpose of the statute.").

Scholars agree. *See, e.g.*, *Baude*, *supra*, at 50-60 (explaining that neither the statutory text nor historical common law immunities provide support for qualified immunity); James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1863, 1928-29 (2010) (matters of indemnity and immunity were left to Congress, not the judiciary, in the founding era); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1506-07 (1987) (the lone historical defense against constitutional torts was legality). The doctrine's untethering from the statutory text and historical practice thus makes the "heads government wins, tails plaintiff loses" reality of modern qualified immunity particularly hard to swallow. *See Cole*, 935 F.3d at 471 (Willett, J., dissenting). Given the significant flaws of the doctrine, this Court should apply the doctrine judiciously.

II. This Court Should Answer The Steps Of The Qualified Immunity Test In Order.

Qualified immunity has two steps, and this Court should take those steps in order. Skipping straight to prong two—as the district court did here—deprives government officials, courts, and the general public alike of the notice necessary to comply with and apply the law.

Originally, the qualified immunity test *required* courts to consider whether a government official's conduct violated a constitutional right *before* deciding whether that right was clearly established at the time of the alleged conduct. *Saucier*

v. Katz, 533 U.S. 194, 201 (2001). As the Supreme Court explained, addressing the first prong permits "the law's elaboration from case to case" and is the mechanism by which courts describe and protect constitutional rights. *Id*. The Court further observed that "[t]he law might be deprived of this explanation were a court to simply skip ahead to the question [of] whether the law clearly established that the officer's conduct was unlawful." *Id*.

In *Pearson v. Callahan*, 555 U.S. 223 (2009), however, the Supreme Court upended the modern qualified immunity landscape by making optional the then-prevailing (and sensible) rights-first immunity-second order of operations for reviewing the defense. The Court abandoned the requirement that courts address the prongs of qualified immunity in order, and announced that lower courts were free to start and end with the "clearly established" prong of the qualified immunity analysis. *Id.* at 234-36. This decision was based in large part on a desire to save "scarce judicial resources" by skipping the first step. *Id.* at 236-37. As it turns out, however, *Pearson* may not have ushered in a golden age of efficiency. Authorized to "leave [constitutional] issue[s] for another day," courts may dodge the same questions again and again. *Camreta v. Greene*, 563 U.S. 692, 706 (2011); *see also*, *e.g.*, *Sims v. City of Madisonville*, 894 F.3d 632, 638 (5th Cir. 2018) (noting that it was the "fourth

time in three years that an appeal has presented the [same] question" only to "resolve the question at the clearly established step").

While *Pearson*'s efficiency is thus debatable, its distortion of the qualified immunity regime is not. First, *Pearson* has unquestionably stymied the development of constitutional guidance by "leav[ing] standards of official conduct permanently in limbo." *Camreta*, 563 U.S. at 706. This turn of events has prompted significant—and justified—consternation. State and federal judges from all corners of the country, including in this Circuit, have observed that overreliance on step 2 to resolve cases "stunt[s] the development of constitutional law" by encouraging "default[] to the 'not clearly established' mantra." *Kelsay v. Ernst*, 933 F.3d 975, 987 (8th Cir. 2019) (en banc) (Grasz, J., dissenting); *see also, e.g.*, *Zadeh*, 928 F.3d at 479 (Willett, J., concurring in part and dissenting in part) (decrying "the inexorable result" of *Pearson*: namely, the "constitutional stagnation" resulting from "fewer courts establishing law at all, much less clearly doing so"); *Lacy*, 2021 WL 4572105 at *11 (Sullivan, J. dissenting) (criticizing *Pearson* for its tendency to cause "the law [to] stagnate").

Likewise, judges have cogently explained how skipping the constitutional question "perpetuates the very state of affairs used to defeat" a plaintiff's "attempt to assert her constitutional rights." *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting). In doing so, it all but gives the government "carte blanche to violate constitutionally

protected privacy rights" by functioning as "a perpetual shield against the consequences of constitutional violations." *United States v. Warshak*, 631 F.3d 266, 282 n.13 (6th Cir. 2011). Or as one federal court of appeals judge memorably described the problem: "[n]o precedent = no clearly established law = no liability." *Zadeh*, 928 F.3d at 479 (Willet, J. concurring in part and dissenting in part). The flip side of the coin, of course, is that insulating officers from liability "effectively prevents claimants from vindicating their constitutional rights." *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting).

Finally, jumping ahead to the "clearly established" prong, without first adjudicating the constitutionality of a challenged practice, "deprive[s] conscientious officers of the guidance necessary to ensure that they execute their responsibilities in a manner compatible with the Constitution." *United States v. Garcia-Hernandez*, 659 F.3d 108, 116 (1st Cir. 2011) (Ripple, J., concurring); *see also Baldwin*, 915 N.W.2d at 291 (Appel, J. dissenting) (similar). Put another way, *Pearson* permits courts to abdicate their "essential function of explaining and securing the protections of the Constitution by failing to inform law officers, among others, which practices are constitutional and which are not." Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity*, 113 MICH. L. REV. 1219, 1249 (2015). In short, skipping the first prong of qualified immunity results in a regime where courts "fail to clarify uncertain questions, fail to address novel claims, [and] fail to

give guidance to officials about how to comply with legal requirements," thereby "frustrat[ing] . . . the promotion of law-abiding behavior." *Camreta*, 563 U.S. at 706 (internal quotation marks omitted).

But, as Judge Grasz has pointed out: "There is a better way." *Kelsay*, 933 F.3d at 987 (Grasz, J., dissenting). This Court "should exercise [its] discretion at every reasonable opportunity to address the constitutional violation prong of qualified immunity." *Id.* "The protection of civil rights and the preservation of the rule of law deserves no less." *Id.* at 988.

III. Qualified Immunity's Clearly Established Inquiry Is Fundamentally Concerned With Notice and Fair Warning, Which Can Be Provided By Sources Other Than Prior Appellate Decisions Considering Identical Facts.

When this Court reaches the second prong of the qualified immunity inquiry, it should make clear that, for the purposes of determining whether the law is "clearly established," sources beyond prior appellate decisions presenting nearly identical facts can provide officers with fair warning as to the lawfulness of their conduct. First, conduct can be obviously unlawful such that resort to parsing the precedent precedent is unnecessary. Second, prior precedent need not be factually identical to put state actors on notice that their actions are unlawful.

As an initial matter, an artificially cramped view of the qualified immunity inquiry cannot be squared with the Supreme Court's repeated admonitions that obviousness alone can provide fair warning to officials that their acts are unlawful.

See e.g., *Taylor v. Riojas*, 141 S. Ct. 52, 53-54 (2020); *Hope v. Pelzer*, 536 U.S. 730, 741-46 (2002); *see also* Appellant's Br. 26 n.6. After all, the clearly established inquiry boils down to notice, not whether a court has held that "the very action in question has previously been held unlawful." *Hope*, 536 U.S. at 739. A right is clearly established, for purposes of qualified immunity, if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* Thus in some instances, a "general statement[] of the law" in prior cases can provide fair warning, as long as it applies with "obvious clarity to the specific conduct in question." *Id.* at 741, 745-76. This obviousness exception is "vital" since "any willing judge or jurist may distinguish precedent as not 'clearly established' because of slightly differing facts." *Thompson v. Clark*, No. 14-CV-7349, 2018 WL 3128975, at *12 (E.D.N.Y. June 26, 2018) (Weinstein, J.).

In just the Supreme Court's last term, it *twice* underscored that obviousness is crucial to the clearly established inquiry. First, in *Taylor*, the Court summarily reversed the Fifth Circuit for its unduly narrow view of the clearly established inquiry. 141 S. Ct. at 53-54. The Supreme Court was untroubled by the absence of a prior case establishing that the specific prison conditions at issue in *Taylor* were unconstitutional. *Id*. Instead, the "obviousness of [the plaintiff's] right" was apparent from the "general constitutional rule" barring deliberate indifference under the Eighth Amendment. *Id*. at 53-54 & n.2 (quoting *Hope*, 536 U.S. at 741). Then,

several months later, the Supreme Court granted, vacated, and remanded in another qualified immunity case. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). *McCoy* instructed the Fifth Circuit to reconsider, in light of *Taylor*, the grant of qualified immunity to a correctional officer who pepper-sprayed a prisoner "for no reason." *Id*. Over a dissent, the Fifth Circuit had rejected the plaintiff's argument that the assault was an "obvious" violation of the general rule that prison officials cannot act "maliciously and sadistically to cause harm." *See McCoy v. Alamu*, 950 F.3d 226, 234 (5th Cir. 2020). And the petition for certiorari requested summary reversal on the basis that a concededly unjustified assault was an obvious violation of the Eighth Amendment. Pet. for Writ of Cert. at 16-18, *McCoy*, 141 S. Ct. 1364 (No. 20-31); Rep. in Supp. of Cert. at 10-12, *McCoy*, 141 S. Ct. 1364 (No. 20-31). In asking the Fifth Circuit to reconsider its grant of qualified immunity, the Supreme Court sent a clear signal that the obviousness inquiry discussed in *Taylor* governed the case.

Thus, this Court should not hesitate to rely on the obviousness doctrine in determining a right is clearly established here. It should have been obvious to a reasonable officer in Appellee Marzolf's position that drawing a dangerous weapon on a person who was neither suspected of a crime nor posed a safety threat to the officers or the public was prohibited by the Fourth Amendment. As then-Judge Gorsuch astutely pointed out, "the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing." *Browder v. City of Albuquerque*, 787

F.3d 1076, 1082-83 (10th Cir. 2015). Without the obviousness doctrine, the more "flagrantly unlawful" the action, the more likely an official is to escape liability. *See id*. Conduct so unreasonable that it is unlikely to ever be repeated by more than one defendant would enjoy immunity, while more mundane constitutional violations would be punished. That would be nothing short of perverse.

Even beyond obvious violations, decisions presenting nearly identical circumstances are not the only sources that clearly establish a right. As this Court has held, a judicial decision on the unlawfulness of one type of force can put officers on notice that a different type of force is unconstitutional. In *Wilson v. Lamp*, 901 F.3d 981 (8th Cir. 2018), for example, this Court rejected the defendant officers' argument that the law was not clearly established just because "this court has not recognized excessive force under similar facts." *Id*. at 990. Rather, this Court's analysis was agnostic as to the type of force used, relying on a wide variety of excessive force cases to hold that the force employed was unconstitutional (and clearly-so). *Id.* at 990-91. Indeed, the Court had no problem concluding that cases involving officers executing a "takedown" and rough handcuffing, *Shannon v. Koehler*, 616 F.3d 855, 858 (8th Cir. 2010), tackling, *Small v. McCrystal*, 708 F.3d 997, 1004 (8th Cir. 2013), tasing, *Brown v. City of Golden Valley*, 574 F.3d 491, 494 (8th Cir. 2009), threateningly raising a flashlight, *Bauer v. Norris*, 713 F.2d 408, 410 (8th Cir. 1983), applying a choke hold, *Henderson v. Munn*, 439 F.3d 497, 500 (8th

Cir. 2006), "manhandl[ing]," *Kukla v. Hulm*, 310 F.3d 1046, 1048 (8th Cir. 2002), and a beating, *Feemster v. Dehntjer*, 661 F.2d 87, 87 (8th Cir. 1981), were all relevant to the question of whether an officer's pointing a gun at a plaintiff was clearly established as unconstitutional.

A chorus of this Court's sister circuits have similarly rejected the notion that the form the force takes is relevant to whether the use of force was clearly unconstitutional. *See e.g., Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 102 (4th Cir. 2017) (explaining that the method of force "makes no difference" because "draw[ing] a line" between weapons "would encourage bad actors to invent creative and novel means" of violating the law); *Terebesi v. Torreso,* 764 F.3d 217, 237 n.20. (2d Cir. 2014) (rejecting the practice of "pointing to the absence of prior case law concerning the precise weapon, method, or technology employed by the police"); *Phillips v. Cmty. Ins. Corp*., 678 F.3d 513, 528 (7th Cir. 2012) (holding that "[e]ven where there are 'notable factual distinctions'" between weapons, "prior cases may give an officer reasonable warning that his conduct is unlawful"); *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) (recognizing that "[a]n officer is not entitled to qualified immunity on the ground[] that the law is not clearly established every time a novel method is used to inflict injury").

Here, this Court's prior cases involving excessive force in various forms would have put a reasonable office in Defendant Marzolf's position on notice that

there's no need to threaten someone with a weapon if they're not posing a threat to an officer or the public, and aren't suspected of a serious crime (or here, any crime at all).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of qualified immunity to Officer Marzolf.

Dated: February 7, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the 6,500 word type-volume limitation of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7)(B). This brief contains 4,323 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman style.

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Date: February 7, 2022

/s/ Devi M. Rao
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CERTIFICATE OF SERVICE

I hereby certify that on February 7, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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Date: February 7, 2022

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