No. 22-20341

In the United States Court of Appeals for the Fifth Circuit

SHAMARIAN AUSTIN, Dependent Administrator of the Estate of Jamal Ali Shaw, Deceased; DONNA THOMAS; CLIFF BENJAMIN MITCHELL,

Plaintiffs-Appellants,

v.

CITY OF PASADENA, TEXAS; MARTIN E. AGUIRRE; JOANNA S. MARROQUIN; DARLENE MCCAIN, also known as RITA M. MCCAIN; RYAN W. WHITEHEAD,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Texas

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, besides those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the party and *amicus* briefs filed in this case.

Dated: October 24, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring meaningful access to the courts, in accordance with constitutional text and history, and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2019, Jamal Shaw had an epileptic seizure while detained in the Pasadena city jail. ROA.3243-44. In response, Shaw's jailers held him down, straddled him, and repeatedly tased him, instead of cushioning his head as they had been trained to do. ROA.3247-49; ROA.2328-39. Shaw then suffered a heart attack as he was being transported out of the jail. He died the next day as a result. ROA.3249-50.

Shaw's estate subsequently filed suit under Section 1983, a landmark civil rights statute dating to the Reconstruction era, which provides a right to sue "[e]very person" who under color of state law or custom deprives another person of "any rights, privileges, or immunities secured by the Constitution." 42

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. All parties consent to the filing of this brief.

U.S.C. § 1983. Shaw's estate alleged, among other things, that the officers used excessive force in violation of Shaw's Fourteenth Amendment rights when they physically restrained and repeatedly tased him as he suffered an epileptic seizure.

The district court dismissed the suit because it determined that the officers were entitled to qualified immunity. ROA.3252-53. That decision is wrong, and it expands qualified immunity far beyond the boundaries prescribed by the Supreme Court.

Qualified immunity is a judicial creation of the late twentieth century that lacks any basis in Section 1983's text or history. As Justice Thomas has pointed out, the language of Section 1983 "ma[kes] no mention of defenses or immunities." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1870 (2017) (Thomas, J., concurring in part and concurring in the judgment). "Instead, it applies categorically to the deprivation of constitutional rights under color of state law." *Baxter v. Bracey*, 140 S. Ct. 1862, 1862-63 (2020) (Thomas, J., dissenting from denial of certiorari). Since the 1980s, however, qualified immunity has shielded government actors from civil liability under Section 1983 "so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quotation marks omitted). Because that standard immunizes "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S.

335, 341 (1986), qualified immunity has "gutt[ed] the deterrent effect" of Section 1983 and the Constitution's prohibition against excessive force, *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting), enabling the very abuses of government power that the statute was meant to prevent.

Given that qualified immunity is at odds with Section 1983's text and history, courts should be especially careful to respect the limits of the doctrine that the Supreme Court has prescribed. But the district court in this case ignored those limits, turning qualified immunity into an almost insuperable barrier to relief.

According to the district court, Plaintiffs could not seek redress for the violation of Shaw's constitutional rights because they could not identify "on point" case law establishing that tasing someone multiple times while they are having a seizure constitutes excessive force. ROA.3252. The district court was wrong twice over.

First, there is "on point" case law establishing that tasing someone who is not resisting constitutes excessive force under the Fourth Amendment. While pretrial detainees like Shaw are protected from excessive force by the Fourteenth Amendment, this Court has relied on clearly established rules from Fourth Amendment excessive-force cases in the Fourteenth Amendment context. *See Fairchild v. Coryell Cnty.*, 40 F.4th 359, 368 (5th Cir. 2022) (citing *Timpa v. Dillard*, 20 F.4th 1020, 1028-29 (5th Cir. 2021), *cert denied*, 142 S. Ct. 2755

(2022)). And at the time the officers in this case held Shaw down and repeatedly tased him, it was clearly established in this Circuit that "a constitutional violation occurs when an officer tases, strikes, or violently slams" a subject who "is not actively resisting." *Darden v. City of Fort Worth*, 880 F.3d 722, 731 (5th Cir. 2018).

Based on that clearly established rule, this Court has repeatedly denied qualified immunity at the summary judgment stage when the record does not resolve whether a plaintiff was resisting an officer's use of force or was struggling due to a medical condition. *See, e.g.*, *id.* at 730 (reversing grant of qualified immunity because "[a] jury could conclude that all reasonable officers on the scene would have believed that [the asthmatic arrestee] was merely trying to get into a position where he could breathe and was not resisting arrest"); *Timpa*, 20 F.4th at 1031 (same, for arrestee experiencing "excited delirium"). That case law is sufficient to preclude qualified immunity here, but the district court ignored it.

Second, even if there were not case law addressing closely similar facts, Defendants still would not be entitled to qualified immunity at this stage of the litigation, because all Plaintiffs needed to show was that "any reasonable officer should have realized" that Defendants' conduct violated Shaw's rights. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam); *see id.* at 53 (qualified immunity was inappropriate even without precedent addressing a factually similar scenario);

Hope v. Pelzer, 536 U.S. 730, 741 (2002) (cases involving "fundamentally similar facts" are not necessary to provide the "fair warning" that qualified immunity requires (quotation marks omitted)).

As the Supreme Court has emphasized, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Taylor*, 141 S. Ct. at 53-54 (quoting *Hope*, 536 U.S. at 741). In this case, the "general constitutional rule" governing Fourteenth Amendment excessive-force claims comes from *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), which provided more than enough fair warning to the officers that the force they used was excessive.

In *Kingsley*, the Supreme Court held that a pretrial detainee's excessive-force claim should be evaluated based on several factors:

> the relationship between the need for the use of force and the amount of force used; the extent of the plaintiff's injury; any effort made by the officer to temper or to limit the amount of force; the severity of the security problem at issue; the threat reasonably perceived by the officer; and whether the plaintiff was actively resisting.

Id. at 397. Here, where the only purported justification for the officers' use of force was the need to provide Shaw medical aid, *see* ROA.831-32, it should have been obvious that holding him down and repeatedly tasing him while he was suffering a seizure was unwarranted. Significantly, as the district court noted, the record does not resolve "when exactly Shaw's seizure end[ed]," whether he was

"in fact experiencing a series of seizures," or "the extent of his consciousness" throughout the five-minute incident, ROA.3248, meaning a jury could conclude that Shaw was suffering from a seizure throughout the incident and therefore never resisted the officers.

By concluding that existing case law did not give the officers notice that they were using excessive force—despite precedent barring the use of tasers when someone "is not actively resisting," *Darden*, 880 F.3d at 731, and despite the obviousness of that rule even without such precedent—the district court raised the bar for what a plaintiff must show to avoid dismissal on qualified immunity grounds. And in so doing, the court shielded from accountability conduct that "any reasonable officer should have realized . . . offended the Constitution." *Taylor*, 141 S. Ct. at 54. This Court should reverse.

ARGUMENT

I. Qualified Immunity Is at Odds with the Text and History of Section 1983, and this Court Should Not Expand It Further.

In the wake of the Civil War, amid the Southern states' continuing refusal to respect individual liberties, particularly of African Americans, a new generation of Framers crafted the Fourteenth Amendment to compel state officers "at all times to respect [the] great fundamental guarantees" of the Bill of Rights. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866). Congress was particularly concerned with the "maladministration of justice in the South," Donald H. Zeigler, *A Reassessment of*

the Younger Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L.J. 987, 989 (1983), including mistreatment by "sheriffs" and "jailors," *id.* at 1009 n.151. For example, one Representative during this period highlighted the "barbarity" of a South Carolina jailer who refused to open the doors to a jail that was on fire, resulting in the deaths of twenty-two Black citizens. Cong. Globe, 39th Cong., 2d Sess. 560 (1867) (Rep. Donnelly).

Despite its aims, the Fourteenth Amendment turned out to be insufficient to ensure the guarantee of fundamental rights in the states. Several years after the Amendment's ratification, Southern states were still "permit[ting] the rights of citizens to be systematically trampled upon." Cong. Globe, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe). Recognizing the need for a means of enforcing the rights newly guaranteed by the Constitution, Congress passed "An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes," ch. 22, 17 Stat. 13 (1871), the first section of which is codified as 42 U.S.C. § 1983.

Section 1983 was modeled on a criminal provision in the earlier Civil Rights Act of 1866, *see* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger), but provided a civil, not criminal, remedy. Congress added this civil remedy to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." *Id.* at 376 (Rep. Lowe). The

remedy that Section 1983 created "was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations." *Owen v. City of Independence*, 445 U.S. 622, 651 (1980). And the legislators who enacted Section 1983 understood that it would be interpreted broadly to promote its goals. *See* Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871) (Rep. Shellabarger) ("This act is . . . in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. . . . As has been again and again decided by your own Supreme Court of the United States, . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes . . . .").

Essential to the remedial goals of Section 1983 was the principle that exceptions to liability would be construed narrowly. The Congress that enacted Section 1983 insisted that "whoever interferes with the rights and immunities granted to the citizens by the Constitution of the United States, though it may be done under State law or State regulation, shall not be exempt from responsibility to the party injured when he brings suit for redress." *Id.* at App. 310 (Rep. Maynard). In this manner, Section 1983 paralleled its 1866 predecessor: in debates preceding the Civil Rights Act of 1866, legislators repeatedly debated and rejected exemptions for law enforcement officers, such as constables and sheriffs. *See, e.g.*,

Cong. Globe, 39th Cong., 1st Sess. 1758 (1866) (Sen. Trumbull) (arguing that exempting officials from punishment for actions taken under color of law improperly "places officials above the law").

Because arguments for such sweeping exemptions had already been rejected in the criminal context of the 1866 Act, the broad reach of what would become Section 1983 was comparatively uncontroversial. *See Briscoe v. LaHue*, 460 U.S. 325, 361 (1983) (Marshall, J., dissenting) ("Of all the measures in the Ku Klux Klan Act, § 1 [codified at § 1983] generated the least controversy since it merely provided a civil counterpart to the far more controversial criminal provision in the 1866 Act."). For these reasons, the text of Section 1983 "on its face admits of no defense of official immunity," but rather "subjects to liability '[e]very person' who, acting under color of state law, commits the prohibited acts." *Buckley v. Fitzsimmons*, 509 U.S. 259, 268 (1993) (quoting 42 U.S.C. § 1983).

Nevertheless, in many areas, "where a common-law principle is well established, . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). Applying that principle in *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Supreme Court "held that Congress did not intend § 1983 to abrogate . . . [c]ertain immunities [that] were so well established in 1871, when § 1983 was enacted, that we presume that Congress would have

specifically so provided had it wished to abolish them." *Buckley*, 509 U.S. at 268 (quotation marks omitted). The Supreme Court has held that legislative and judicial immunity were so firmly established in American law by 1871 that if Congress had meant to abolish those immunities in Section 1983, it "would have specifically so provided." *Pierson v. Ray*, 386 U.S. 547, 555 (1967); *see Tenney*, 341 U.S. at 372.

Central to these decisions were historical findings that these immunities were so well established in the common law and so important to the functioning of government that Section 1983's authors could not have meant to abrogate them by implication. But the Supreme Court departed from this historically grounded approach when it addressed immunity for police officers in *Pierson v. Ray*, initiating a trajectory that soon led to modern qualified immunity.

At common law, police officers did not enjoy broad immunity from suit, and "constitutional restrictions on the scope of [their] authority w[ere] routinely applied throughout the nineteenth century" in damages actions. James E. Pfander, *Zones of Discretion at Common Law*, 116 Nw. U. L. Rev. 148, 167 (2021). Indeed, throughout that century, courts treated law enforcement as a "ministerial" activity that was not shielded from liability by the "quasi-judicial" immunity that offered limited protection for certain discretionary government actions. William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 Stan. L. Rev. Online

115, 118 (2022). As a result, police officers enjoyed no general immunity based on a good-faith belief in the legality of their actions. Thus, "[i]f [a] plaintiff was assaulted and beaten" by a police officer "without authority of law," the plaintiff was "entitled to recover, whatever may have been the defendant's motives." *Shanley v. Wells*, 71 Ill. 78, 81 (1873).

Instead of concluding from this history that there was no common law immunity for police officers that Congress needed to abrogate in 1871, *Pierson* held that officers sued for constitutional violations under Section 1983 could assert defenses that are available in the face of analogous state common law torts. *See* 386 U.S. at 557 (because police officers sued in tort for false arrest may assert "the defense of good faith and probable cause," that defense "is also available to them in the action under [Section] 1983"). The Court did not explain how that result squared with the text of Section 1983, which provides for no such defenses and was enacted to impose liability "notwithstanding" any "law, statute, ordinance, regulation, custom, or usage of the State to the contrary." 17 Stat. at 13.

Despite its shortcomings, *Pierson*'s holding was at least tethered to "limitations existing in the common law." *Wyatt v. Cole*, 504 U.S. 158, 170 (1992) (Kennedy, J., concurring). What soon followed, however, was a transformation of qualified immunity into a doctrine based primarily on "the Justices' individual views of sound public policy," with no connection to statutory text and history.

David Achtenberg, *Immunity Under 42 U.S.C. § 1983: Interpretive Approach and the Search for the Legislative Will*, 86 Nw. U. L. Rev. 497, 501 (1992).

Tellingly, "it was in the context of *Bivens* that matters of policy took the reins completely and the Court abandoned any common law underpinnings to immunity doctrine." Ilan Wurman, *Qualified Immunity and Statutory Interpretation*, 37 Seattle U. L. Rev. 939, 955 (2014). In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)—a *Bivens* action against federal officials—the Court announced a new formulation of qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Even though *Harlow*'s new formulation of qualified immunity arose in a *Bivens* action, with no statute to interpret, the Court later "made nothing of that distinction," *Burns v. Reed*, 500 U.S. 478, 498 n.1 (1991) (Scalia, J., dissenting), and applied *Harlow*'s novel standard to Section 1983, *see Wyatt*, 504 U.S. at 165-67. The end result is a doctrine that "lacks any common-law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights." *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998).

Given that modern qualified immunity is at odds with the text and history of Section 1983, this Court should be especially vigilant in safeguarding the limits that the Supreme Court has placed on its application. Because the district court's order does the opposite—ignoring Supreme Court precedent that constrains the breadth of the doctrine—this Court should reverse, as the next Section discusses.

II. The Officers in this Case Are Not Entitled to Qualified Immunity.

A. Cases Presenting Close Factual Analogues Establish that It Is Unconstitutional to Use Force Against a Detainee Who Is Not Resisting.

As discussed above, there is no basis in the text, history, or common law backdrop of Section 1983 for the modern formulation of qualified immunity that the Supreme Court adopted in *Harlow v. Fitzgerald*. But as much as *Harlow* and the decisions following it departed from a proper interpretation of Section 1983, they still contain important limits: qualified immunity is not appropriate when "any reasonable officer should have realized" that his or her conduct "offended the Constitution," *Taylor*, 141 S. Ct. at 54, and cases involving "fundamentally similar facts" are not always necessary to provide the "fair warning" that officers require, *Hope*, 536 U.S. at 740-41 (quotation marks omitted).

The district court faulted Plaintiffs for failing to "identify . . . case law on point" establishing that repeatedly tasing someone who is experiencing a seizure is unconstitutional. ROA.3252. But the district court's analysis is wrong because

there is "case law on point." It is well established in this Circuit that using force on a subject who is not resisting is unconstitutional. And, construing the record in the light most favorable to Shaw's estate, as required at the summary judgment stage, that is exactly what occurred here.

In *Kingsley v. Hendrickson*, the Supreme Court held that the Fourteenth Amendment prohibits the use of "objectively unreasonable force" against pretrial detainees. 576 U.S. at 407. *Kingsley* addressed the excessive-force claim of a pretrial detainee who was handcuffed, held down, and tased after he refused to remove a paper from the light fixture in his cell. *Id.* at 398-99. The officers argued that only force applied "maliciously and sadistically to cause harm" could violate the Fourteenth Amendment. *Id.* at 400 (quotation marks omitted).

The Court rejected that argument, emphasizing that a subjective standard, which is used for Eighth Amendment claims, is inappropriate for pretrial detainees, who, "(unlike convicted prisoners) cannot be punished *at all*, much less 'maliciously and sadistically.'" *Id.* (emphasis added). In explaining its decision, the Court pointed to its precedents going back decades, which establish that pretrial detainees cannot be subject to "excessive force that amounts to punishment." *Id.* at 397-98 (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)); *see id.* at 398 (noting that a pretrial detainee can prevail on a Fourteenth Amendment claim by showing that an officer's actions "are not 'rationally related to a legitimate

nonpunitive governmental purpose' or that the actions 'appear excessive in relation to that purpose'" (quoting *Bell v. Wolfish*, 441 U.S. 520, 561 (1979))). Consistent with those precedents, *Kingsley* held that a pretrial detainee's excessive-force claim should be evaluated based on "the relationship between the need for the use of force and the amount of force used," "the extent of the plaintiff's injury," "any effort made by the officer to temper or to limit the amount of force," "the severity of the security problem at issue," "the threat reasonably perceived by the officer," and "whether the plaintiff was actively resisting." *Id.* at 397.

Significantly, the Supreme Court explained that the factors governing the "objective reasonableness" of an officer's force for Fourteenth Amendment purposes are the same factors that apply in the Fourth Amendment context. *See id.* (citing *Graham*, 490 U.S. at 396). Consistent with that precedent, this Court has treated the standards for Fourth and Fourteenth Amendment excessive-force claims as interchangeable. *See, e.g.*, *Timpa*, 20 F.4th at 1029 (quoting *Kingsley* in analysis of Fourth Amendment excessive-force claim); *Cole v. Carson*, 935 F.3d 444, 456 (5th Cir. 2019) (en banc) (same); *see also Crocker v. Beatty*, 995 F.3d 1232, 1248 (11th Cir. 2021), *cert denied*, 142 S. Ct. 845 (2022) (noting that after *Kingsley*, "our Fourteenth Amendment excessive-force analysis now tracks the Fourth Amendment's 'objective-reasonableness' standard"). And the standard governing excessive force under the Fourth Amendment has been clearly

established since at least 1989 when the Supreme Court decided *Graham v. Connor*. *See* 490 U.S. at 396-97.

Because the *Graham* and *Kingsley* standards are effectively interchangeable, this Court has denied qualified immunity in the Fourteenth Amendment excessive-force context based on Fourth Amendment excessive-force case law. For instance, *Fairchild v. Coryell County* concerned an excessive-force claim brought by the parents of a pretrial detainee who died after jailers "continued to apply pressure to [the detainee's] neck, back, and legs for more than two minutes after she was subdued." 40 F.4th at 368. This Court relied primarily on Fourth Amendment cases to hold that "the law has long been clearly established that an officer's continued use of force on a restrained and subdued subject is objectively unreasonable." *Id.* (quoting *Timpa*, 20 F.4th at 1034).

Numerous other circuits have similarly relied on Fourth Amendment excessive-force cases to deny qualified immunity in Fourteenth Amendment cases. For example, in an excessive-force case involving a pretrial detainee who died after a jailer tased him twice, the Eleventh Circuit relied on "analogous Fourth Amendment" precedents to reject the argument that only case law addressing "the particular weapon deployed" could preclude qualified immunity. *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 956 (11th Cir. 2019).

In *Hopper v. Plummer*, 887 F.3d 744, 745 (6th Cir. 2018), the Sixth Circuit addressed an excessive-force claim brought by the estate of a civil contemnor who died when corrections officers restrained him in a prone position after he suffered a seizure. In affirming the denial of qualified immunity to the officers, the Sixth Circuit relied primarily on a Fourth Amendment case concerning a "claim brought by the family of a severely autistic man who died after several arresting officers restrained him." *Id.* at 754 (citing *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 897 (6th Cir. 2004)).

And in a case concerning an arrestee who died after officers physically forced him into a police car and then a holding cell, the First Circuit rejected the contention that ambiguity as to whether the Fourth or Fourteenth Amendment governed the excessive-force claim was a ground for qualified immunity. *See Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 72-73 (1st Cir. 2016). Because "both the Fourth and Fourteenth Amendments are concerned with whether an officer's actions depart from what a reasonable officer would do," the First Circuit explained that the officers in that case should "have known that using more force than necessary violated both of these standards and therefore a clearly established constitutional rule." *Id.*

Plaintiffs in this case pointed to a number of "on point" Fourth Amendment excessive-force cases—none of which are cited in the district court's opinion. *See*

ROA.3252-53. In *Darden v. City of Fort Worth*, this Court reversed the grant of qualified immunity to officers who physically restrained and repeatedly tased a man they suspected of dealing cocaine. 880 F.3d at 725. While the officers claimed the arrestee was not complying with their commands and struggled against their restraint, this Court determined that a factual dispute remained as to whether the arrestee, who was asthmatic and told the officers he could not breathe, was "merely trying to get into a position where he could breathe and was not resisting arrest." *Id.* at 730. Because it was clearly established at the time of the conduct at issue that "a constitutional violation occurs when an officer tases, strikes, or violently slams an arrestee who is not actively resisting arrest," the officers in that case were denied qualified immunity. *Id.* at 731.

Likewise, in *Bush v. Strain*, 513 F.3d 492 (5th Cir. 2008), this Court held that an officer who slammed an arrestee's face into a car after she was "handcuffed and subdued," *id.* at 501, was not entitled to qualified immunity. Notably, in that case the officer claimed that the arrestee "continued resisting arrest while he attempted to cuff her," *id.* at 496, but the Court determined that the duration of the arrestee's resistance was a disputed fact which precluded qualified immunity at the summary judgment stage, *id.* at 502.

This Court recently relied on these cases, among others, when it reversed a grant of qualified immunity to officers who held a man experiencing a mental

health episode known as "excited delirium" in a prone restraint for nearly fifteen minutes, leading to his death. *Timpa*, 20 F.4th at 1025. *Timpa*, like this case, involved officers responding to a medical emergency, which this Court emphasized only "sharpen[ed] the excessiveness" of the use of force in light of precedents involving arrestees "suspected of serious crimes." *Id.* at 1036. And in *Timpa*, as here, the defendant claimed that his use of force was reasonable because the subject continued to struggle against him. *See id.* at 1031. But this Court rejected that argument based on record evidence showing that "an objectively reasonable officer with [the defendant's] training would have concluded" that someone experiencing excited delirium was prone to asphyxiation and would be "struggling to breathe, not resisting arrest." *Id.*

Based on this line of Fourth Amendment cases, this Court recently held that by at least 2017 the use of force on a non-resisting pretrial detainee was a "violation of clearly established law." *Fairchild*, 40 F.4th at 368. In *Fairchild*, this Court addressed a Fourteenth Amendment excessive-force claim brought by the parents of a pretrial detainee who died after jailers held her down in the prone position and applied weight to her "neck, back, and legs for more than two minutes" after she stopped resisting. *Id.* at 367. Notably, it was undisputed that the detainee actively resisted the jailers at the beginning of the encounter, including grabbing their handcuffs and "kick[ing] and bit[ing]" one of the jailers. *Id* at 363.

But relying on *Timpa* and *Darden*, among other Fourth Amendment cases, this Court held that the "unreasonableness" of "continued use of bodyweight force to hold [a detainee] in the prone restraint position after [she] was subdued" was clearly established. *Id.* at 368 (quoting *Timpa*, 20 F.4th at 1036).

The same reasoning applies here. It is undisputed that, just as in *Timpa*, the officers in this case were responding only to the medical emergency that Shaw was experiencing, not to any purported disturbance or danger to others. ROA.3246-47. The officers knew that Shaw was experiencing an epileptic seizure, and at least one of them was aware that after someone experiences a seizure, they enter a "postictal state," during which they remain disoriented and confused, which can lead them to "lash[]-out out of fear, anxiety, confusion, and agitation." ROA.3253. As the district court noted, there remain genuine factual disputes as to "when exactly Shaw's seizure end[ed] and when his postictal state [began], whether Shaw [was] in fact experiencing a series of seizures, and the extent of his consciousness" throughout the five-minute incident. ROA.3248. Therefore, viewing the record in the light most favorable to Plaintiffs, as required at the summary judgment stage, *see Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam) (vacating Fifth Circuit's grant of qualified immunity at the summary judgment stage when it "improperly . . . resolved disputed issues in favor of the moving party"), a reasonable officer would have concluded that Shaw was continuing to experience a

seizure or was in a postictal state, not resisting the officers, and that therefore physical restraint of any kind, and especially tasing Shaw multiple times, was objectively unreasonable and a violation of clearly established law.

Making matters worse, Plaintiffs also presented evidence showing that the officers were trained to aid a detainee experiencing a seizure by cushioning that person's head, and that they had been instructed not to restrain such detainees in a prone position due to the risk of asphyxiation. *See* ROA.2328-39. Plaintiffs also presented evidence that Defendants knew Shaw to be generally "respectful and . . . not aggressive," ROA.2328, which only strengthens Plaintiffs' case that reasonable officers in Defendants' position would not have believed Shaw needed to be restrained as if he were resisting.

B. Even Absent a Close Factual Analogue, Any Reasonable Officer Should Have Realized that Repeatedly Tasing a Seizure Victim Was an Excessive Use of Force.

Even setting aside the numerous cases specifically recognizing that it is unconstitutional to use force on an individual who is not resisting, the constitutional violation in this case was obvious: "any reasonable officer should have realized" that pinning Shaw down and tasing him multiple times as he was having a seizure violated the prohibition against excessive force. *Taylor*, 141 S. Ct. at 54. The Supreme Court has long been clear that close factual analogues are not required to provide government officials with "notice that their conduct

violates established law." *Hope*, 536 U.S. at 741. It is not necessary to show that "the very action in question has previously been held unlawful," only that "in the light of pre-existing law the unlawfulness [is] apparent." *Id.* at 739 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "[G]eneral statements" are capable of giving "fair and clear warning," *id.* at 741 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)), ensuring that "officials can still be on notice that their conduct violates established law even in novel factual circumstances," *id.*

Indeed, the Supreme Court recently corrected this Court's over-emphasis on close factual analogues when it reversed a grant of qualified immunity to correctional officers in a case concerning unsafe conditions of confinement. *Taylor*, 141 S. Ct. at 53. The Court made clear that assessments of whether qualified immunity is appropriate should not focus on minute factual distinctions, but instead on whether the defendants "reasonably misapprehend[ed] the law governing the circumstances [they] confronted." *Id.* at 53 (quotation marks omitted). In *Taylor*, the absence of a close factual analogue did not entitle the defendants to qualified immunity, because "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question." *Id.* at 53-54 (quoting *Hope*, 536 U.S. at 741). And where that is so, qualified immunity does not exempt "the plainly incompetent or those who knowingly violate the law" from liability. *Malley*, 475 U.S. at 341.

Here it is particularly clear that no close factual analogue was necessary, because this Court has already recognized that "'in an obvious case,'" the "excessive-force factors themselves can 'clearly establish' the [law], even without a body of relevant case law." *Newman v. Guedry*, 703 F.3d 757, 764 (5th Cir. 2012) (quoting *Brousseau v. Haugen*, 543 U.S. 194, 199 (2004)). In *Newman*, this Court dismissed an appeal by officers who were denied qualified immunity after they "shoved, hit, and tased" the subject of a protective pat-down search who was, in the officers' view, "struggl[ing] and . . . noncompliant." *Id.* at 762. Relying solely on *Graham*, this Court rejected the officers' argument that they "had no reasonable warning that tasing [the plaintiff] multiple times violated [his] constitutional rights." *Id.* at 763. Instead, this Court held that the fact that "[n]one of the *Graham* factors" justified the tasing was sufficient "warning" to preclude qualified immunity. *Id.* at 764. Similarly, in *Bush*, this Court denied qualified immunity on the basis that *Graham* itself "clearly established" that "the permissible degree of force depends on the severity of the crime at issue, whether the suspect posed a threat to the officer's safety, and whether the suspect was resisting arrest or attempting to flee." *Bush*, 513 F.3d at 502.

Here, just as in *Newman*, none of the excessive-force factors favor Defendants. The "extent of the plaintiff's injury," *Kingsley*, 576 U.S. at 397,

weighs against the officers, given that Shaw died following this incident.[2] And there does not appear to be any contention that Shaw presented a "threat" or a "security problem." *Id.*

Nor does the "relationship between the need for the use of force and the amount of force used" weigh in Defendants' favor, given that the sole justification Defendants proffer for their use of force was the need to "secure Shaw to prevent[] him from injuring himself and to get medical aid." ROA.831-32. While Defendants claim that this made their use of force "[e]ven more compelling" than cases involving threats to officers themselves, ROA.836, that gets it exactly backwards. The fact that the officers' only legitimate justification for their actions was to *help* Shaw makes their use of force *against* Shaw less reasonable, not more. After all, "where a seizure's sole justification is preventing harm to the subject of the seizure, the government has little interest in using force to effect that seizure. Rather, using force likely to harm the subject is manifestly *contrary* to the government's interest in initiating that seizure." *Pena v. City of Rio Grande*, 816 Fed. App'x 966, 972 n.9 (5th Cir. 2020) (quoting *Estate of Armstrong v. Vill. of Pinehurst*, 810 F.3d 892, 910 (4th Cir. 2016)); *see Drummond ex rel. Drummond v.*

[2] Defendants asserted that there is "no evidence that any force used caused Shaw's death," ROA.831, but that ignores Plaintiffs' expert report, which concluded that Shaw died as a result of the officers' use of force. *See* ROA.2488-89.

City of Anaheim, 343 F.3d 1052, 1059 (9th Cir. 2003) (noting that when an individual is taken "into custody to prevent injury to himself," "[d]irectly causing him grievous injury does not serve that object in any respect").

Defendants also claim that the fact that they attempted "hands-on techniques before employing a Taser" weighs in their favor. ROA.831. But that is wrong for a number of reasons. First, it assumes that the "hands-on techniques" themselves were objectively reasonable. As discussed above, a reasonable officer in Defendants' position would have done little more than cushion Shaw's head. *See* ROA.841-42. Second, only three minutes elapsed between when two of the officers initially "place[d] their hands on" Shaw and when they first attempted to tase him, *see* ROA.3247-48—a rapid escalation given that the only justification for using force at all was to help Shaw, who had just experienced (or was still experiencing) a seizure. *See Brothers v. Zoss*, 837 F.3d 513, 520 (5th Cir. 2016) ("[W]e have placed weight on the quickness with which law enforcement personnel have escalated from negotiation to force." (citing *Newman*, 703 F.3d at 763)).

Finally, and most importantly, even if some level of force to restrain Shaw were justified, at no point would tasing him have been reasonable. As the Eleventh Circuit recently put it in a case where police officers repeatedly tased a young woman while she was experiencing a seizure, "[t]asing an individual once (let

alone three times) when the individual poses no threat to the officers or others and is experiencing a medical emergency" is so "patently excessive that the constitutional violation was clearly established," "even in the absence of case law." *Helm v. Rainbow City*, 989 F.3d 1265, 1276 (11th Cir. 2021).

* * *

Section 1983 was passed to "throw[] open the doors of the United States courts to those whose rights under the Constitution are denied or impaired." Cong. Globe, 42d Cong., 1st Sess. 376 (1871) (Rep. Lowe). Qualified immunity undermines the effectiveness of that law even when properly applied. Here, the district court improperly expanded qualified immunity, failing to respect precedent of both the Supreme Court and this Court. That decision should be reversed.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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Dated: October 24, 2022

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on October 24, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 24th day of October, 2022.

/s/ Brianne J. Gorod
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,165 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amicus* 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 it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

Executed this 24th day of October, 2022.

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