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.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS AT FAYETTEVILLE

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant Casondra Pollreis challenges a district court's holding that qualified immunity shields an officer who threatened her with a taser, even though she presented no threat to the officer, was not a suspect in a crime, and was only trying to deescalate the situation by truthfully telling the officer that the boys he was holding under his gun were her innocent children. The district court reasoned that qualified immunity applies since "the Eighth Circuit has developed its case law regarding the threatened use of *firearms*, but there have been no such developments surrounding the threatened use of tasers." App. 244; R. Doc. 43, at 30 (emphasis in original).

This weapon-by weapon approach to the qualified immunity analysis conflicts with U.S. Supreme Court precedent as well as with this Court's own cases, which clearly establish that "an officer's 'use of force against a suspect who was not threatening and not resisting' is unreasonable," even in the context of a threatened use of force involving weapons other than firearms. *Wilson v. Lamp*, 901 F.3d 981, 990–91 (8th Cir. 2018) (providing a string cite of binding cases dating back to 1981).

Given the complex nature of qualified immunity's "clearly established" test, Plaintiff-Appellant requests 20 minutes of oral argument for each side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel for Casondra Pollreis hereby certifies that Casondra Pollreis is an individual.

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JURISDICTIONAL STATEMENT

Plaintiff-Appellant Casondra Pollreis ("Cassi") brought this action under 42 U.S.C. § 1983, alleging violations of her Fourth and Fourteenth Amendment rights. App. 7–18; R. Doc. 1. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). It entered a final judgment dismissing all claims on September 8, 2021. App. 215–49; R. Doc. 43; App. 251; R. Doc. 53. On October 6, 2021, Cassi timely appealed. App. 252; R. Doc. 54. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court erred in concluding that Officer Lamont Marzolf was entitled to qualified immunity on the claim of using excessive force against Cassi.

Wilson v. Lamp, 901 F.3d 981 (8th Cir. 2018)

Small v. McCrystal, 708 F.3d 997 (8th Cir. 2013)

Brown v. City of Golden Valley, 574 F.3d 491 (8th Cir. 2009)

Bauer v. Norris, 713 F.2d 408 (8th Cir. 1983)

STATEMENT OF THE CASE

I. Factual Background.

On the night of January 8, 2018, Cassi was enjoying dinner and a football game with her family at her parents' home in Springdale, Arkansas. At halftime, she drove home with her husband and their two daughters. But

because they lived only a few houses away, she allowed their two sons, aged 12 and 14, to walk home by themselves. It was around 9:30 pm.

Unbeknownst to Cassi and her family, Springdale Police that evening were engaged in a search. Earlier that day, Officer Josh Kirmer was trying to find a woman with outstanding arrest warrants. App. 216; R. Doc. 43, at 2. Based on a tip, Officer Kirmer believed she was staying with Tomas Silva, a Hispanic gang member. *Id.* Officer Kirmer surveilled Silva and saw him, an unidentified woman, and two other Hispanic men enter a Chevy Cobalt. *Id.*; App. 133; R. Doc. 31-1, at 5. One of the men was shorter and skinnier than the other, but both were wearing hooded sweatshirts and dark pants. App. 216; R. Doc. 43, at 2; App. 133; R. Doc. 31-1, at 5. Officer Kirmer relayed this information to other officers in the area, one of whom attempted to engage them in a traffic stop. App. 216; R. Doc. 43, at 2. Silva and the others instead fled, eventually wrecking the car. *Id.* The four occupants abandoned the car and split up, two running north and two running south. *Id.* Officer Kirmer radioed other officers requesting that they set up a search perimeter, and Officer Lamont Marzolf responded to this call. *Id.*

Police dispatch directed Officer Marzolf to the intersection of Luvene and Lynn Street, near where Cassi and her family lived. *Id.* (21:39:50).[1] As he turned onto Lynn Street and began his search, he knew three things: (1) Silva could be armed, given his past interactions with police, (2) of the other two Hispanic men, one was shorter and skinnier than the other, but both were wearing hooded sweatshirts and dark pants, and (3) the suspects were last seen running from police.

Officer Marzolf's blue squad car lights flashed prominently as his car crept down Lynn Street. App. 217; R. Doc. 43, at 3 (21:39:16). Seconds later, Officer Marzolf spotted Cassi's two boys. *Id.* (21:39:44). They were casually walking down the sidewalk in the direction of Officer Marzolf's patrol car wearing hooded sweatshirts and light colored pants. *Id.* (21:39:56). One boy was taller and larger than the other. *Id.* Aside from their difference in size and the hooded sweatshirts they were wearing, the two strolling boys in no way resembled the fleeing adult Hispanic suspects Officer Marzolf was searching for. But Officer Marzolf nonetheless turned on his high beams and angled his car toward them, stopping it in their path. *Id.* (21:40:09).

[1] Officer Marzolf's dashcam recorded the events that evening, and associated timestamps from that video are included parenthetically where applicable. The video is reproduced at the following link for the Court's convenience: https://ij.org/wp-content/uploads/2021/12/ECF%2023.mp4.

Officer Marzolf stepped out of his vehicle and asked the boys what they were doing. *Id.* (21:40:13). One of the boys responded, pointing behind Officer Marzolf in the direction of their home. *Id.* (21:40:15). Officer Marzolf panicked, yelling to the boys, "Hey, stop, stop, turn away, turn away from me." *Id.* (21:40:18). The boys obeyed Officer Marzolf's commands and turned away, holding their arms out to their sides. *Id.*

Officer Marzolf then advanced on them, drawing his firearm and pointing it at their backs. *Id.* He also pulled out his flashlight. *Id.* Officer Marzolf asked the boys, "What are your names?" *Id.* (21:40:21). One of the boys responded, but Officer Marzolf could not hear his soft, still immature voice and had him repeat his name several times. *Id.* After the boy repeated his name a third time, Officer Marzolf audibly confirmed the boy's name and holstered his flashlight, but he kept his firearm drawn and pointed at the boys' backs.

By this time, Cassi had arrived home and noticed the commotion down the street. Recognizing her boys, she calmly approached Officer Marzolf and asked, "Officer, officer, may I have a word with you?" App. 218; R. Doc. 43, at 4 (21:40:33). Officer Marzolf lowered his firearm and acknowledged her presence, but otherwise did not engage with her. *Id.* Instead, he confirmed the boys' general physical description over the radio with Officer Kirmer,

who instructed Officer Marzolf to detain them. *Id.* (21:40:57). Officer Marzolf complied, retraining his gun on the boys and ordering them onto the ground. *Id.* (21:41:14). The boys obeyed his commands.

Cassi, frustrated by Officer Marzolf's unwillingness to communicate with her, continued walking toward Officer Marzolf and asked him, "What happened?" *Id.* (21:41:23). Officer Marzolf responded, "Hey, step back." *Id.* (21:41:24). Cassi stepped sideways, explaining, "They're my boys." *Id.* (21:41:25). Unmoved, Officer Marzolf yelled at Cassi to "Get back!" and stepped toward her, his weapon still pointing at her boys lying on the ground. *Id.* (21:41:25). Incredulous, Cassi responded, "Are you serious?" Officer Marzolf drew his taser with his left hand and pointed it at Cassi, keeping his firearm trained on her boys with his other hand.[2] "I am serious, get back," he said. *Id.* (21:41:30). Cassi attempted to deescalate the situation, telling her sons, "It's okay, boys." *Id.* (21:41:36).

[2] In a subsequent deposition, Officer Marzolf justified drawing a taser on Cassi in part because "[s]he was disobeying [his] verbal commands." App. 144; R. Doc. 31-2, at 9.

This tense standoff lasted for several seconds. Eventually, Officer Marzolf holstered his taser, but again commanded Cassi to "Get back!" App. 219; R. Doc. 43, at 5 (21:41:38). Cassi asked Officer Marzolf, "Where do you want me to go?" *Id.* (21:41:38). Officer Marzolf responded, "I want you to go back to your house." *Id.* Cassi again attempted to reason with Officer Marzolf, imploring him, "Are you serious? They're 12 and 14 years old." *Id.* Officer Marzolf responded, falsely, "And I'm looking for two kids about this age right now, so get back in your house." *Id.* Understandably upset, Cassi again reassured her boys, "Oh, my God. You're okay guys, I promise," and ran back to her home a few houses down the street. *Id.*

Officer Marzolf continued to detain Cassi's 12- and 14-year-old boys at gunpoint until backup arrived, even as other Pollreis family members appeared to reassure him that the boys were not the suspects he was looking

for. App. 219-20; R. Doc. 43, at 5–6. At one point, Officer Marzolf placed both boys in handcuffs, where they remained lying on the ground as other officers questioned them. App. 220; R. Doc. 43, at 6. Eventually, cooler heads prevailed, and another officer ordered the boys be released after Officer Marzolf admitted to the other officer that the boys were probably not the wanted suspects. App. 221; R. Doc. 43, at 7. As he walked to the car, Officer Marzolf mumbled to himself: "Dumb." (21:47:28).

II. Procedural Background.

Cassi filed a lawsuit against Officers Kirmer and Marzolf in the Western District of Arkansas on October 17, 2018. App. 7-18; R. Doc. 1, at 1–12. In her complaint, Cassi alleged five claims for relief pursuant to 42 U.S.C. § 1983 on behalf of her sons and herself. App 13-17 (¶¶ 28-33); R. Doc. 1, at 7–11 (¶¶ 28-33). Only one claim—Cassi's Fourth Amendment excessive force claim against Officer Marzolf for threatening her with his taser—is relevant to this appeal.[3] The district court awarded summary judgment to Officer Marzolf on this claim, concluding that he was entitled to qualified immunity

[3] Cassi's claims brought on behalf of her sons were the subject of a separate interlocutory appeal. *See Pollreis v. Marzolf*, 9 F.4th 737 (8th Cir. 2021) (reversing the district court's denial of qualified immunity to Officer Marzolf). A petition for certiorari concerning that appeal was recently denied by the United States Supreme Court. *Pollreis v. Marzolf*, No. 21-901, __ S. Ct. __ (Jan. 24, 2022).

because, although "the Eighth Circuit has developed its case law regarding the threatened use of *firearms*, . . . there ha[s] been no such developments surrounding the threatened use of tasers" sufficient to put Officer Marzolf on notice that his conduct was unlawful. App. 244; R. Doc. 43, at 30 (emphasis in original).

This appeal follows.

SUMMARY OF THE ARGUMENT

The district court was wrong to grant qualified immunity to Officer Marzolf. By drawing a taser on Cassi, officer Marzolf violated Cassi's clearly established Fourth Amendment rights, and Cassi successfully met her burden to show this at the summary judgment stage.

For a plaintiff to overcome qualified immunity, two things must be true. First, the facts, viewed in the light most favorable to the plaintiff, must demonstrate the deprivation of a constitutional right. Second, it must be that, at the time of the deprivation, a reasonable officer would have been fairly warned that his actions would violate that right.

The facts indeed demonstrate a Fourth Amendment violation. By threatening her with a taser, Officer Marzolf forced Cassi to restrain her movement and made it clear that she was not free to ignore him. In other words, Officer Marzolf seized Cassi by the show of his authority, and she had

no choice but to submit to it by returning home. *See* Part IA, *infra*. Furthermore, this seizure was unreasonable. Cassi was not a suspect in any crime, she did not present a threat to the officer or anyone else, and, since she was never subjected to a lawful arrest, she could not have resisted or evaded it. At the very least, there was an alternative course of action available to the officer, who, instead of drawing a taser on Cassi, could have explained to her why he was holding the children at gunpoint. *See* Part IB, *infra*.

The facts also show that the Fourth Amendment violation committed by Officer Marzolf was clearly established. By the time Officer Marzolf drew his taser on Cassi, this Court had held that "force is least justified against those who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *See* Part II A, *infra* (citing *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009); *see also Wilson v. Lamp*, 901 F.3d 981, 989 (8th Cir. 2018)). Moreover, it was abundantly clear at the time of the violation that neither *using* the taser under such circumstances, *Brown*, 574 F.3d at 497, nor *threatening* a person with a flashlight, *Bauer v. Norris*, 713 F.2d 408, 413 (8th Cir. 1983), even when they are "argumentative, contentious, and vituperative," was constitutional. *Id.* *See* Part IIA, *infra*.

Moreover, qualified immunity cannot shield Officer Marzolf simply because the weapon that he drew was a taser and not a gun. Such parsing of facts is not only inconsistent with this Court's precedent, it also runs contrary to the caselaw in its sister circuits and to Supreme Court precedent, which teaches that weapon-by-weapon distinctions in situations involving the use of force on unthreatening bystanders will not do. *See* Part IIB, *infra* (citing *McCoy v. Alamu*, 141 S. Ct. 1364 (2021)).

Officer Marzolf violated Cassi's clearly established constitutional right to be free from an unreasonable seizure. This Court should reverse the district court, letting Cassi's Fourth Amendment claim proceed to trial.

STANDARD OF REVIEW

This Court reviews *de novo* decisions granting summary judgment based on qualified immunity. *Michael v. Trevena*, 899 F.3d 528, 531 (8th Cir. 2018). Summary judgment is only appropriate if "the evidence, viewed in the light most favorable to [Cassi] and giving [her] the benefit of all reasonable inferences, shows there is no genuine issue of material fact." *Morgan v. A.G. Edwards & Sons, Inc.*, 486 F.3d 1034, 1039 (8th Cir. 2007).

ARGUMENT

Qualified immunity "shields a government official from liability unless his conduct violates 'clearly established statutory or constitutional rights of

which a reasonable person would have known.'" *Burns v. Eaton*, 752 F.3d 1136, 1139 (8th Cir. 2014) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Defeating qualified immunity at the summary judgment stage, therefore, requires showing that "(1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) the right was clearly established at the time of the deprivation." *Howard v. Kansas City Police Dep't*, 570 F.3d 984, 988 (8th Cir. 2009). Cassi satisfies both showings.

I. Officer Marzolf Seized Cassi Using Excessive Force When He Threatened Her With His Taser.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. This includes protections against the use of excessive force by law enforcement. *See Graham v. Connor*, 490 U.S. 386, 395 (1989) ("[*A*]*ll* claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . .").

Successfully demonstrating a Fourth Amendment violation for the use of excessive force, therefore, requires showing both (1) that the plaintiff was seized under the meaning of the Fourth Amendment, and (2) that the officer

used unreasonable force in effecting the seizure. As explained below, Cassi met this burden.

A. Officer Marzolf seized Cassi when he threatened her with his taser.

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement through means intentionally applied." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (cleaned up). Where a show of authority is the cause of the alleged seizure, as is the case here, the claimant must also submit to the show of authority. *Id.* at 254. The length of the seizure is irrelevant for constitutional purposes; even "seizures that involve only a brief detention short of traditional arrest" implicate the Fourth Amendment. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

To determine whether an officer's conduct qualifies as a show of authority, courts ask "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California v. Hodari D.*, 499 U.S. 621, 628 (1991); *see also Florida v. Bostick*, 501 U.S. 429, 439 (1991) (existence of seizure depends upon whether a reasonable person would believe he was "not free to decline the officers' requests or otherwise

terminate the encounter"). In making this determination, courts consider "the totality of the circumstances," including factors such as "the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the 'use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *United States v. Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007) (citation omitted).

By drawing a taser on her, Officer Marzolf seized Cassi. His conduct constituted a show of authority, communicating to Cassi that she "was not at liberty to ignore the police presence and go about h[er] business." *Bostick*, 501 U.S. at 437. When Cassi approached Officer Marzolf to explain that he was holding her innocent, underage boys at gunpoint, he repeatedly and forcefully yelled at her to "Get back!" When she tried to deescalate the situation, Officer Marzolf responded by threatening her with his taser. All the while, Officer Marzolf intentionally positioned himself between Cassi and her boys, preventing her from reaching them and commanding her to return to her house, which she did.

It makes no difference that Officer Marzolf ordered Cassi to leave as opposed to detaining her in place. After all, the test is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. Officer Marzolf's conduct made it

clear that Cassi "was being ordered to restrict h[er] movement," *Hodari D.*, 499 U.S. at 628, and she submitted to his show of authority by returning to her home. This qualifies as a seizure for Fourth Amendment purposes.

B. Officer Marzolf's threatened use of a taser was unreasonable, excessive force.

Officer Marzolf's threat to tase Cassi during her seizure constitutes unreasonable, excessive force. Assessing the reasonableness of a seizure "requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). "[T]o comport with the Fourth Amendment, the force [used] must have been objectively reasonable in light of the facts and circumstances confronting the officers at the time it was used." *Schoettle v. Jefferson Cty*, 788 F.3d 855, 859 (8th Cir. 2015); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002).

"When determining whether unreasonable force was used, courts must give '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.'" *Schoettle*, 788 F.3d at 859 (quoting *Graham*, 490 U.S. at 396). Furthermore, "[f]orce

may be objectively unreasonable when a plaintiff does not resist, lacks an opportunity to comply with requests before force is exercised, or does not pose an immediate safety threat." *Wilson*, 901 F.3d at 989.

Here, none of the *Graham* factors support Officer Marzolf's decision to threaten Cassi with his taser:

1. At no point during Officer Marzolf's encounter with Cassi or her boys, did he suspect Cassi of committing a crime, even a misdemeanor. She was merely a concerned mother, trying to deescalate the situation by explaining to the officer that her teenage boys did nothing other than walk home from dinner.

2. Nor did Cassi pose a threat, let alone an immediate one, to Officer Marzolf's safety. As the video demonstrates, she calmly and audibly announced her presence, as well as the reason for her presence, to Officer Marzolf when she arrived on the scene; always positioned herself several steps away from his personal space; made no sudden or threatening movements toward him; and remained exceptionally calm throughout their entire encounter.

3. Since Cassi committed no crime, nor was she suspected of committing one, Cassi was never subjected to a lawful arrest and could not have resisted or evaded it. Indeed, "[h]er principal offense, it would appear,

was to disobey [Officer Marzolf's] commands" to immediately return to her home. *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009).

As *Brown* shows, the act of disobeying an officer's commands does not make an officer's actions reasonable. *Id.* In *Brown*, police attempted to pull over a married couple returning home from a late dinner. *Id.* at 493. Because of some confusion on behalf of the couple and highway construction on the right shoulder, the couple delayed pulling over before eventually stopping in the left shoulder. *Id.* at 494. Police quickly and aggressively pulled the husband driver out of the car, threw him against the side of the vehicle, and handcuffed him. *Id.* His wife, understandably frightened by the encounter, dialed 911. *Id.* When one of the arresting officers noticed this, he ripped open her door and ordered her to get off the phone. *Id.* When she refused, allegedly pulling her knees to her chest, he tased her and forcibly wrenched her from the vehicle. *Id.*

In the subsequent Section 1983 lawsuit for excessive force, the officer claimed that his use of the taser was justified because he feared she was going to kick him. The district court denied summary judgment to the officer, and this Court affirmed, stating that "we are not convinced that [the officer's] use of force was objectively reasonable as a matter of law." *Id.* at 496. Reasoning that there was "nothing to indicate that [the officer] was faced with the need

to make any split-second decisions" in the face of "a 'tense, uncertain, and rapidly evolving' situation," this Court affirmed the denial of summary judgment even in the face of the argument that plaintiff disobeyed the officer's commands. *Id.* at 497.

It makes no difference that Officer Marzolf did not actually deploy his taser, as the officer did in *Brown*. *See Wilson*, 901 F.3d at 989 (pointing a weapon without using it is unreasonable if "a plaintiff does not resist, lacks an opportunity to comply . . . or does not pose an immediate safety threat"). In *Wilson*, police officers were investigating a case involving child molestation. After stopping a suspicious truck, they searched it while holding two men at gunpoint. *Id.* at 985. The men sued for excessive force arguing that the threatened use of a weapon was unconstitutional, especially after the officers ascertained that the men were not who the officers were looking for. The district court denied summary judgment to the officers and this Court affirmed, reasoning that "on the facts here, the continuous drawing and pointing of weapons constitutes excessive-force," even in light of the officers "following standard police protocol." *Id.* at 990. Once it became clear that the plaintiffs did not pose a risk, the threatened use of the weapon became

excessive, despite the officers investigating a dangerous offense involving child molestation.[4]

Even the threat of less-than-lethal force can support an excessive force claim, including when the individual is "argumentative, contentious, and vituperative." *Bauer*, 713 F.2d at 412. In *Bauer*, a deputy sheriff accosted a married couple walking home late at night from a nearby restaurant. When they refused his request to present identification and attempted to enter their house, the deputy sheriff physically restrained the husband and "threateningly raised a flashlight above [his] head." *Id.* at 410. In the subsequent Section 1983 suit, the jury found for the plaintiffs and awarded modest damages. On appeal, this Court affirmed the district court's denial of the deputy sheriff's motion for a judgment notwithstanding the verdict, reasoning that even though "the force applied in the instant case was relatively minor," it nonetheless "does support a conclusion by the jury that

[4] The Sixth Circuit also has a case regarding the threatened use of a weapon that is remarkably similar. In *Saad v. Krause*, 472 F. App'x 403 (6th Cir. 2012), an officer pointed a gun at a mother in order to enter her house and arrest her son. The mother "was not suspected of any crime and posed no threat to anyone's safety." The Sixth Circuit affirmed the denial of summary judgment, holding that "point[ing] a weapon" in that case constituted excessive force. *Id.* at 403-04; *see also Jacobs v. City of Chicago*, 215 F.3d 758, 774 n.7 (7th Cir. 2000) ("[I]t is a reasonable inference . . . that the act of pointing a loaded weapon at a person . . . carries with it the implicit threat that the officer will use that weapon if the person at whom it is directed does not comply with the officer's wishes.")

either the use of *any* force by appellant in the course of his encounter and arrest of the [couple] was unreasonable or the [deputy sheriff] used force not to perform his lawful duty, but for some other improper purpose." *Id.* at 413.

Officer Marzolf's threat to tase Cassi falls squarely in line with *Brown*, *Wilson*, and *Bauer* and cannot be excused simply because Cassi did not immediately abandon her children by going home or because the officer ended up not firing the taser. And Officer Marzolf's force was all the more unreasonable because he had a simple alternative course of action available to him. Namely, he could have deescalated the situation by explaining his behavior to Cassi. *See Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014) (explaining that among the *Graham* factors that be considered is the availability of "alternative courses of action available at the time force was used"). Because Officer Marzolf had no legitimate reason to threaten Cassi with force, his use of the taser constitutes excessive force in violation of Cassi's Fourth Amendment rights.

II. Officer Marzolf's Fourth Amendment Violation Was Clearly Established.

Cassi's right to be free from Officer Marzolf's excessive use of force was clearly established long before Officer Marzolf pointed a dangerous weapon at Cassi. First, as early as 2014, a reasonable officer operating within the Eighth Circuit's jurisdiction would have known that a threat to use force,

when a person does not pose a threat and is not suspected of committing a crime, is unreasonable. Second, qualified immunity cannot shield Officer Marzolf simply because he happened to draw a taser instead of a gun. Such parsing of minute facts would be inconsistent with this Court's precedent as well as the caselaw in the U.S. Supreme Court and this Court's sister circuits.

A. The "clearly-established" inquiry focuses on the concept of fair warning.

A right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer,* 536 U.S. 730, 739 (2002). "The standard does not require that there be a case with materially or fundamentally similar facts." *Brown*, 574 F.3d at 499 (citing *Brown v. Fortner*, 518 F.3d 552, 561 (8th Cir. 2008)). The focus is on "whether the facts alleged support a claim of violation of [a] clearly established right such that a reasonable officer would have fair warning that his alleged conduct was unlawful." *Id.*

It is true that in cases involving excessive force "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (cleaned up). But "general statements of the law are not inherently incapable of giving fair and clear warning to the officers." *Kisela v. Hughes*, 138 S. Ct. 1148, 1153 (2018) (citing *White v. Pauly*, 137 S. Ct. 548, 552 (2017)).

It's just that "*Garner* and *Graham* do not by themselves create clearly established law outside an obvious case." *Id*. (cleaned up).

At the time Officer Marzolf pointed a taser at the non-threatening mother of the two boys held under his gun, the law in this circuit clearly established that such a use of excessive force was unconstitutional.

First, as a basic rule, "[t]he right to be free from excessive force in the context of an arrest is clearly established under the Fourth Amendment." *Small v. McCrystal*, 708 F. 3d 997, 1005 (8th Cir. 2013) (citing *Henderson v. Munn,* 439 F.3d 497, 503 (8th Cir. 2006)). Furthermore, "it is clearly established that force is least justified against those who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Brown*, 574 F.3d at 499. These two statements by themselves take this case beyond *Garner* and *Graham* and warn a reasonable officer that pointing a dangerous weapon at a non-threatening person, who is not even a suspect, is unlawful.

In addition, qualified immunity does not kick in simply because Officer Marzolf did not actually fire his taser. The focus instead is on whether his excessive force actions were constitutional in light of the circumstances that he faced. This Court's analysis of the applicability of the qualified immunity standard in *Wilson v. Lamp* is a perfect example. *Wilson* involved an incident

that took place in 2014. *See* Part IB, *supra*. There, police officers were investigating reports of child molestation. 901 F.3d at 985. They received a tip about a truck and that the suspect, whom the officers knew, was inside it. Guns drawn, the officers approached the truck, forced the driver and the passenger out, and searched it. *Id*. They continued pointing the gun at the unresisting plaintiffs even after it became clear that the suspect was not there. *Id*. This Court held that while the officers were justified in approaching the truck with weapons drawn, "the continuous drawing and pointing of weapons constitute[d] excessive-force." *Id*. at 990. According to the Court, the law in this circuit was clearly established that "an officer's use of force against a suspect who was not threatening and not resisting [was] unreasonable," even if the officer only *threatened* to use a weapon. *Id*. (cleaned up).[5]

Wilson thus confirms that, no later than 2014, it was clearly established in this circuit that pointing a dangerous weapon at a nonthreatening individual during the course of an arrest constituted excessive force in violation of the Fourth Amendment. *See Rochell v. City of Springdale Police*

[5] Importantly, this caselaw on the use of force was sufficient to notify a reasonable officer, despite all but one of the cases cited by *Wilson* involving the *actual* deployment of force, as opposed to a *threatened* deployment of force. *Id*. 990-91 (citing to *Kukla*, *Bauer*, and *Brown* among others).

Dep't, 768 F. App'x. 588, 591 (8th Cir. 2019) (Colloton, J., concurring) ("[T]he unreasonableness of [threatening to use a weapon] was clearly established as of September 2014.").

Moreover, it is clearly established in this Court that even threatening to use a non-lethal weapon can be unreasonable. In *Bauer*, *see* Part IB, *supra*, this Court found that "relatively minor" force, such as "threateningly rais[ing] a flashlight above" the plaintiff's head can constitute the use of excessive force, even if the plaintiff is "argumentative [and] vituperative" but there is "no evidence that [plaintiff] actually physically resisted or physically threatened" the officers at the time of arrest. 713 F.2d at 413.

As a result, since at least 2014, a reasonable officer in Officer Marzolf's shoes would have been fairly warned of the unconstitutionality of his actions, which included drawing a taser on a mother who was not accused of any crime, did not pose any kind of a threat, and was only calmly trying to explain to the officer that the 12- and 14-year-old boys he held under his gun were her innocent children.

B. The "clearly-established" inquiry does not deal with minute distinctions, such as the type of a weapon used.

The district court's grant of qualified immunity to the contrary was based on an inappropriately crabbed understanding of the clearly established test that exclusively distinguished between the specific weapons

used. But this Court, its sister circuits, and the Supreme Court have rejected the grant of qualified immunity based on such minute distinctions.

As discussed in Part IIA, *supra*, this Court relied on *Bauer* (a case involving a threat of a flashlight) to hold that qualified immunity did not apply in *Wilson* (a case involving the threat of a gun). This alone establishes that the district court's distinction between threats made at the point of a gun and a threat made at the point of a taser is insufficient in this circuit. *See also Brown*, 518 F.3d at 561 (refusing to distinguish between the different means of effectuating the same constitutional violation).

Similar distinctions have been rejected by a consensus of this Court's sister circuits as well. *See e.g., Terebesi v. Torreso,* 764 F.3d 217, 237 n.20. (2d Cir. 2014) (denying qualified immunity to the officers who used stun grenades to open the front door of a house and rejecting the "commonplace" 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) (denying qualified immunity to the officers who, when investigating a car theft, shot a sleeping suspect with rubber bullets and stating 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) (denying qualified immunity to the officers who broke up a party by firing "pepperball guns" into a crowd and reasoning 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").

Perhaps most importantly, just last year, the Supreme Court summarily reversed the Fifth Circuit's grant of qualified immunity that distinguished cases on a weapon-by-weapon basis. *McCoy v. Alamu*, 141 S. Ct. 1364 (2021). In *McCoy*, an inmate sued a prison guard for pepper-spraying him without a provocation—the inmate was merely a bystander who was sprayed by the guard "for no reason at all." *McCoy v. Alamu*, 950 F.3d 226, 229 (5th Cir. 2020) (citing to the prisoner's complaint). The Fifth Circuit granted summary judgment to the guard because of qualified immunity. *Id.* at 234. The court held that the violation was not clearly established at the time of the spraying because no caselaw specifically said that a "single use of spray" was unconstitutional. *Id.*

Relying on Judge Costa's dissent, which objected to the decision because the grant of immunity in the case "ultimately turn[ed] on the fact that the guard used pepper spray instead of a fist, taser, or baton," *id.* at 235 (Costa, J., dissenting), the prisoner petitioned for certiorari in the U.S. Supreme Court. The case was then summarily reversed "in light of *Taylor* v.

Riojas." *McCoy*, 141 S. Ct. at 1364. Importantly, in *Taylor v. Riojas*, the Supreme Court rejected the importance of minute distinctions—such as the number of days that a prisoner is subjected to grossly unsanitary conditions—for the purposes of the qualified immunity analysis. 141 S. Ct. 52, 54 n.2 (2020).[6] The same rule should apply in this case.

Specifically, it makes no difference in this case that Officer Marzolf used his taser rather than his gun (which was simultaneously being pointed at Cassi's innocent children). Qualified immunity does not turn on weapon-by-weapon distinctions and should not protect Officer Marzolf.

CONCLUSION

The district court erred when it concluded that qualified immunity shielded officer Marzolf from Cassi's excessive force claim. Its judgment on this claim should be reversed.

[6] *Taylor* is also a case about obvious violations of the Constitution. This is an alternative basis for denying qualified immunity here. It should have been obvious to a reasonable officer that drawing a dangerous weapon on a non-threatening individual who is not suspected of any crime is unreasonable. *Taylor*, 141 S. Ct. at 53–54 (citing *Hope*, 536 U.S. at 741, for the proposition that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question").

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I certify that this Brief of Appellant is proportionately spaced and contains 5,939 words, excluding parts of the document exempted by Fed. R. App. P. 32(f).

/s/ Anya Bidwell
Anya Bidwell

CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court and served via the Court's CM/ECF system upon all counsel of record.

I further certify that the foregoing Brief of Appellant and Addendum have been scanned for viruses and are virus-free pursuant to Eighth Circuit Rule 28A(h).

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