No. _____

In The
Supreme Court of the United States

BRANDON HOLTAN, DANA WINGERT, AND THE CITY OF DES MOINES, IOWA

Petitioners,

v.

MARK EDWARD NIETERS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In the aftermath of the 2020 killing of George Floyd, civil unrest broke out across the country, including in Des Moines, Iowa. Mark Nieters, a freelance photographer, was in the immediate proximity of a traveling unlawful assembly. Law enforcement was receiving moment-to-moment updates on the whereabouts of this group of traveling unlawful assemblers. Des Moines Police Officer Brandon Holtan actually saw Nieters among people running from the scene of the unlawful assembly. Holtan saw that Nieters was wearing a helmet, goggles and a gas mask, similar to others who attended the unlawful assembly. He was taken to the ground and arrested for unlawful assembly. Nieters's criminal charges were eventually dismissed. He sued City Defendants.

The following questions are presented:

1. Whether probable cause existed, from the officer's perspective, to arrest a person for failure to disperse from an unlawful assembly when an individual was in immediate proximity of a group of unlawful assemblers, was located where police had information unlawful assemblers were, and was dressed like an unlawful assembler with a helmet, gas mask, and goggles, meaning there was evidence of proximity to a crime and similar appearance to those committing the crime.

QUESTIONS PRESENTED-- CONTINUED

2. Whether, unable to cite one case finding a Fourth Amendment violation under similar circumstances, the U.S. Court of Appeals for the Eighth Circuit erred in its split decision to reject qualified immunity based on "clearly established" law in stating, "At the time of Nieters's arrest, "it [was] clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment."

3. Whether, unable to cite one case finding a Fourth Amendment violation under similar circumstances of a mobile riot/unlawful assembly, the U.S. Court of Appeals for the Eighth Circuit erred in denying qualified immunity for the force used in arresting Nieters.

LIST OF PARTIES

Petitioners are Brandon Holtan and the City of Des Moines. Petitioners were the defendants in district court and the appellees in the Eighth Circuit.

Respondent is Mark Edward Nieters. Respondent was the plaintiff in district court and the appellant in the Eighth Circuit.

CORPORATE DISCLOSURE STATEMENT

Not applicable. This document is filed by a governmental entity.

RELATED CASES

Mark Edward Nieters v. Brandon Holtan, Dana Wingert, and the City of Des Moines, U.S. District Court for the Southern District of Iowa. Judgment entered on July 20, 2022.

Mark Edward Nieters v. Brandon Holtan, Dana Wingert, and the City of Des Moines, U.S. Court of Appeals for the Eighth Circuit. Judgment entered on October 11, 2023, *en banc* application denied November 14, 2023.

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PETITION FOR WRIT OF CERTIORARI

Brandon Holtan and the City of Des Moines (hereinafter all Petitioners will be referred to as "the City") petition the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. First, the Eighth Circuit eviscerated probable cause standards by placing an impossible burden on law enforcement. Second, this case is an ideal opportunity for the Court to reiterate the position, yet again, that so many lower courts ignore when deciding qualified immunity; "clearly established" must be demonstrated with a high level of specificity from the perspective of a reasonable officer. Further, it is timely in this era of civil unrest to guide law enforcement officers about how to respond to protests that evolve into unlawful crowds.

OPINIONS BELOW

The U.S. Court of Appeals for the Eighth Circuit's decision is found at *Nieters v. Holtan*, 83 F.4th 1099 (8th Cir. 2023). It is attached as Appendix 1 to this petition. The Order denying *en banc* review is attached at Appendix 2. The district court's order granting summary judgment to the City is attached as Appendix 3.

JURISDICTION

The Eighth Circuit granted Nieters's appeal on October 11, 2023, overturning summary judgment in favor of the City and denied en banc review on November 14, 2023. See Appendices 1 and 2. This petition is timely filed pursuant to Supreme Court

Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves a 42 U.S.C. §1983 claim of a violation of Nieters's Fourth Amendment rights under the United States Constitution. The text of this statute and the amendment are contained in Appendix 4 and 5.

I. STATEMENT OF THE CASE

A. Factual Background

On the night of June 1 into the morning of June 2, 2020, the City of Des Moines experienced a fourth consecutive night of rioting that followed protests related to the killing of George Floyd in Minneapolis. Over the course of these four nights, officers were assaulted and there was substantial damage to businesses. An emergency curfew order was put in place on May 31, 2020, and was in effect on the night of June 1 to June 2, 2020. Brandon Holtan was called in to work in his capacity as a member of a multi-agency tactical squad called Metro STAR.

Nieters learned of these protests and attended to photograph the event. Nieters was wearing a blue helmet, goggles, and a painter's mask. Nieters was not displaying press credentials or any markings announcing that he was a member of the media. The formal event ended at approximately 8:15 P.M. After that time, several hundred individuals remained on the Capitol grounds.

Eventually, the remaining group left the Capitol grounds, marched downtown, then back to the Capitol arriving around 10:45 p.m. Nieters followed this movement from the Capitol to downtown and back to the Capitol placing him at the Capitol building between 10:45 and 11:45 P.M. This roving assembly engaged in property damage, obstruction of public roads, and violence.

Five dispersal orders were read at the Capitol between 11:30 and 11:45 p.m. Despite dispersal orders, a large group remained—this act of remaining after lawful dispersal orders was a crime. So, all who chose to remain in contravention of the dispersal orders were unlawfully assembled; they had failed to disperse. Members of this group also engaged in assaultive conduct, intimidation, and destruction of property. Some unlawful assemblers were throwing fireworks, water bottles and other objects at officers. Tear gas was deployed at approximately 11:46 P.M. Some arrests were made at the Capitol grounds. Many who weren't arrested at the Capitol grounds moved west again in groups. Nieters left the Capitol grounds by around 11:45 P.M.

Nieters was moving west with this group when he observed a "tussle" during which undercover officers were "caught" by unlawful assemblers and the rioters began "wrestling" with these officers. Nieters recalled the "tussle" including about 12 unlawful assemblers and two officers; the unlawful assemblers had one of the officers taken down to the ground. Many police officers were in that area with a mobile crowd from 11:49-12:02 p.m.; officers were repeatedly telling people to leave and go home. Large crowds can be heard in the background continuing to confront officers and remain in the area; vehicles were stopping, blocking, and turning around in the road.

Nieters was following the group that was on Locust Street headed west between 11:45 P.M. and when he was arrested around two minutes after midnight. When he approached Embassy Suites, at the intersection of East Locust and Robert D. Ray Drive, Nieters observed people running along the west side of the hotel in response to tear gas deployment. He observed approximately 6 to 12 of these individuals running.

DMPD dispatchers were providing information to Holtan, and other officers, that a group of unlawful assemblers was moving westward on Locust. Dispatch advised that several windows had been broken along this path. Officers in Holtan's team were in a cube van driving west attempting to move parallel to the mobile group. Officers were getting real-time tracking of large groups of unlawful assemblers from dispatchers, including reports that the group was running north on Robert D. Ray Drive. Holtan's orders were to arrest people remaining in the area. Holtan exited the cube van and ran toward a group of unlawful assemblers he could see fleeing north on Robert D. Ray Drive.

It was chaotic as people were running everywhere. At this time, Nieters observed riot police running toward the Embassy Suites. Holtan had learned that people were in the parking ramp to the east of Robert D Ray Drive, so he was being mindful of the danger of people throwing things off the ramp at officers. Holtan observed Nieters and believed he was part of the group of unlawful assemblers in the immediate area that had been running from police. Holtan perceived Nieters to be an antagonist ready to confront police. Holtan did not observe Nieters' cameras; rather he believed the straps on Nieters' shoulders to be that of a backpack. The perceived backpack and the actual gas mask worn by Nieters

reminded Holtan of a previous encounter with a rioter. Nieters acknowledged that one reason to wear his helmet is to protect against items thrown by rioters. Holtan understood this group of people engaged in unlawful assembly at the Capitol was continuing to be mobile as an unlawful assembly.

When Holtan caught up with Nieters, Holtan was by himself. Holtan gave a command for Nieters to get on the ground. Then Nieters turned away from him. Holtan perceived that as being a sign that Nieters intended to flee. As Holtan approached Nieters, the latter appeared to move in one direction then abruptly changed course.

Nieters put his hands up and turned away so when Holtan got to him, Nieters had his back to Holtan. Holtan reached around Nieters, grabbed him around the chest, sprayed him with OC spray, and took him to the ground. Holtan applied zip ties to Nieters' wrists.

Nieters indicated to Holtan that he was a member of the press, after he had been arrested. Holtan reviewed Nieters's press credentials from his back pocket. Holtan continued with the arrest because he did not want to be perceived as treating Nieters more favorably or preferentially than any other citizen who was arrested. Holtan left Nieters with approximately seven other arrestees under the supervision of another officer; this occurred at approximately 12:08 a.m. on June 2, 2020. After this, Holtan had no contact or interaction with Nieters.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit issued a decision in this case that is in conflict with decisions of other United States courts of appeal on the same important matter; and far afield from the accepted and usual course of judicial proceedings, requiring this Court's supervisory power. Specifically, the Eighth Circuit failed to follow this Court's standards for probable cause and ignored this Court's direction to apply the "clearly established" prong of qualified immunity analysis with any level of specificity.

I. There was probable cause for Nieters's arrest.

The first part of the qualified immunity test answers the question of whether there has been a violation of the Fourth Amendment to the United States Constitution and the Eighth Circuit answered this question incorrectly. When the answer is no, then, no further analysis is needed as to immunity.

> Whether [an] arrest was constitutionally valid depends ... upon whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person arrested] had committed ... an offense.

Beck v. Ohio, 379 U.S. 89, 91 (1964). "Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be …useful as evidence of a crime; it does not require a showing that a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983)[internal citations omitted]. "Probable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians act." *Bell v. Neukirch*, 979 F.3d 594, 603 (8th Cir. 2020). "In a case involving an arrest without probable cause, officers have qualified immunity if they reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Id*. at 607.

Officer Holtan had probable cause to arrest and charge Nieters with failure to disperse. The charge is defined below.

> Iowa Code § 723.3 Failure to Disperse: A peace officer may order the participants in a riot or unlawful assembly or persons in the immediate vicinity of a riot or unlawful assembly to disperse. Any person within hearing distance of such command, who refuses to obey, commits a simple misdemeanor.

Case law instructs that the issues in this case should be analyzed based on what Officer Holtan knew and how he viewed the situation at the time he arrested Mr. Nieters. Considering the totality of information available, the Court should examine whether there were enough facts for a reasonable officer to believe there was evidence of a crime.

Brown, 460 U.S. at 742. When analyzed in this way, it is apparent there was probable cause for the arrest of Mr. Nieters and that the force used against him was reasonable. Officer Holtan had many pieces of information indicating Mr. Nieters had participated in the unlawful assembly at the Iowa State Capitol.

Looking at Iowa Code § 723.3, it is apparent that many people were guilty of failure to disperse the night of June 1 into June 2, 2020. An unlawful assembly, and likely a riot, took place just west of the Iowa State Capitol. There was a crowd of more than 3 people assembled together using unlawful force by hurling projectiles at law enforcement officers. Iowa Code § 723.1.

Over the course of fifteen minutes, law enforcement issued multiple dispersal orders to the crowd, and many members of the crowd failed to disperse. These facts demonstrate that there was a riot and unlawful assembly near the Iowa State Capitol, police issued lawful dispersal orders, and a large crowd refused to obey the order to disperse. Everyone in the crowd near the Capitol when the tear gas was deployed was guilty of failure to disperse.

Probable cause to arrest Mr. Nieters for failure to disperse exists from the information Officer Holtan had linking him to the unlawful assembly at the Capitol. Officer Holtan was aware of all of the information in the previous paragraph because he had been near the Capitol when dispersal orders were read and tear gas was deployed. Knowing that everyone near the Capitol when tear gas was deployed had failed to disperse, only one question remains: was there information available to Officer Holtan to indicate that Mr. Nieters had been at the Capitol. There was. Here it is important to remember

that probable cause does not require certainty that a crime has been committed. It "is a flexible, common-sense standard." *Brown*, 460 U.S. at 742. The facts must be sufficient for a reasonable person to believe there is evidence of a crime; officers' belief need not be even "more likely true than false." *Id.*

- Officer Holtan was receiving real-time information that unlawful assemblers were moving westward on East Locust and then north on Robert D. Ray Drive. This placed unlawful assemblers directly in front of the Embassy Suites at the intersection of Locust and Robert D. Ray Drive.
- Unlawful assemblers were engaging in property destruction.
- Based on radio reports, Officer Holtan understood unlawful assemblers to be gathered in front of the Embassy Suites.
- Arriving near the Embassy Suites, Officer Holtan observed people running everywhere.
- While he was chasing unlawful assemblers, Officer Holtan observed Mr. Nieters in front of Embassy Suites, and he reasonably believed Mr. Nieters was part of the group of unlawful assemblers.
- When Officer Holtan observed Mr. Nieters, the straps on Mr. Nieters appeared to be backpack straps. Backpacks were consistent with the attire of the unlawful assemblers.
- Based on the backpack and body posture, Officer Holtan perceived Mr.

Nieters as an antagonist ready to confront police.7

- Officer Holtan believed Mr. Nieters was an unlawful assembler because his helmet, mask, and apparent backpack reminded him of a prior individual who had thrown bricks.
- Officer Holtan commanded Mr. Nieters to get to the ground.
- Officer Holtan observed Mr. Nieters turn around and perceived this as an attempt to flee just as others in the area were doing.

Based on these facts, there was probable cause to arrest Mr. Nieters. He was in the immediate vicinity of unlawful assemblers Officer Holtan had received contemporaneous intelligence had come from the Capitol. Mr. Nieters was right where unlawful assemblers were reported to be. On top of that, his attire and gear were consistent with that of other unlawful assemblers Officer Holtan had encountered. Then, Mr. Nieters appeared to flee despite a command to get on the ground. The act of fleeing the immediate area of a crime provides probable cause for arrest. *U.S. v. Reed*, 733 F.2d 492 (8th Cir. 1984); *Thompson v. Hubbard*, 257 F. 3d 896 (8th Cir. 2001); *U.S. v. Smith*, 990 F. 3d 607 (8th Cir. 2021); *U.S. v. Flores-Lagonas*, 993 F.3d 550 (8th Cir. 2021). Based on the totality of this information, there was ample information to support probable cause for an arrest.

The United States District Court agreed:

> The totality of the circumstances supports finding Holtan reasonably

> believed Nieters was in the immediate vicinity of an unlawful assembly, heard dispersal orders, and failed to comply with such orders in violation of Iowa Code § 723.3. Viewing the record in the light most favorable to Nieters, even if Holtan was mistaken in believing Nieters heard the dispersal orders and was following an unlawful assembly, such a mistake was objectively reasonable given the information Holtan received about a "large" group traveling on Locust Street. Dispatchers indicated individuals from the group were moving to various parts of Locust Street and the surrounding area, Nieters followed the "large" group from the Capitol grounds, and Nieters was not displaying his press credentials.

Nieters v. City of Des Moines, Iowa, No. 4:21-cv-00042-RGE-HCA, 2022 WL 3044656, at *10- 11 (S.D. Iowa July 19, 2022). The Eighth Circuit reached a different conclusion but did so based on improperly viewing the facts from Nieters's perspective and examining information Officer Holtan didn't have rather than the information he did have. This is one extremely important reason for granting a writ.

II. The Eighth Circuit's statement that "it [was] clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment" lacked the requisite amount of specificity for both the arrest and force analysis.

Yet again, a Circuit of the Court of Appeals chose to generalize the "clearly established" prong of qualified immunity analysis beyond any permissible bounds. The majority opinion stated the standard as follows: "At the time of Nieters's arrest, 'it [was] clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment.'" *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478 (8th Cir. 2010)."

This would be an unacceptable standard in any case but the protests and riots over the past several years have created an extraordinary circumstance to which officers had to respond. Not only did the majority use a too-general-standard, it provided no caselaw whatsoever that was similar in nature to the circumstances faced by officers in the wake of George Floyd's killing. There was unprecedented civil unrest, the likes of which Des Moines had not seen in more than a generation. In that time, technology and social media came to be, which changed the fundamentals of crowd management and control. Further, the Eighth Circuit shifted the perspective to one of hindsight from the bench, not from the perspective of a reasonable officer at that time, with the information available at the time.

It appears that this Court, every two to three years, has to remind the lower courts about the doctrine of qualified immunity. Now is the time to do that again.

> We have repeatedly told courts not to define clearly established law at too high a level of generality.

See, *e.g.*, *Ashcroft v. al-Kidd*, 563 U.S.

> 731, 742, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). It is not enough that a rule be suggested by then-existing precedent; the "rule's contours must be so well defined that it is 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Wesby*, 583 U. S., at ——, 138 S.Ct., at 590 (quoting *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001)). Such specificity is "especially important in the Fourth Amendment context," where it is "sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." *Mullenix v. Luna*, 577 U.S. 7, 12, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (*per curiam*) (internal quotation marks omitted).

City of Tahlequah, Oklahoma v. Bond, 595 U.S. 9, 12, 142 S. Ct. 9, 11, 211 L. Ed. 2d 170 (2021). "The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." *al-Kidd*, 563 U.S. at 742. When a lower court defies the directive of this Court, it is incumbent upon this Court to correct the misuse of

precedent and clearly established law. As stated in the dissent from this case:

> [N]either the panel majority nor [Nieters] have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances." *See Wesby*, 583 U.S. at 65. Nor do they assert that this is the "obvious case where a body of relevant case law is not needed." *See id.* (internal quotation marks omitted). In fact, no controlling decision prior to the court's opinion here had prohibited an arrest for failure to disperse under Iowa law under the "particular circumstances" before Officer Holtan. *See id.* at 63. Instead, the court masks its incomplete analysis by doing what the Supreme Court has repeatedly told us not to do: define the putative clearly established right at a high level of generality. *See ante* at 5 ("At the time of Nieters's arrest, it was clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment." (internal quotation marks omitted)). (App. at 20).

Other Circuits have gotten the analysis right, in the context of protests and riots. In California, the

district court found a lack of clarity in the case law for a reasonable officer to know that he would violate Plaintiffs' rights "to declare an unlawful assembly under section 407 based on: (1) a clear threat of gun violence, and an apparent attempt to retrieve a gun, by an agitated individual in or around the area of a demonstration of this particular size and geographical scope; (2) some form of physical altercation between two or more persons as several people restrained one of them; and (3) the apparent lack of knowledge by police as to the man's whereabouts following the altercation." [Emphasis added]. *Bidwell v. Cnty. of San Diego*, 607 F. Supp. 3d 1084, 1096 (S.D. Cal. 2022), aff'd, No. 22-55680, 2023 WL 7381462 (9th Cir. Nov. 8, 2023).

In the Second Circuit, "It cannot be said that the officers here disregarded known facts clearly establishing a defense. In the confused and boisterous situation confronting the officers, the police were aware that the demonstrators were blocking the roadway in violation of § 240.20(5)." *Garcia v. Does*, 779 F.3d 84, 93 (2d Cir. 2015)[emphasis added]. In the District of Columbia Circuit, "A requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a large riot, particularly when it is on the move—at night. To satisfy appellees' suggested standard of proof would require virtually as many officers as rioters—and even then it is doubtful that it could be met." *Carr v. D.C.*, 587 F.3d 401, 408 (D.C. Cir. 2009)[emphasis added].

Notably, the Eighth Circuit had applied this correct standard previously, but, in the Nieters case, the court has created a conflict with itself. Related to pipeline protests, the Eighth Circuit recognized that

the presence of a crowd must be considered as part of the analysis, "The protestors have not shown that it was clearly established as of November 2016 that a use of force designed to disperse a crowd constituted a seizure." *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). "What is reasonable in the context of a potential large-scale urban riot may be different from what is reasonable in the relative calm of a tavern with a dozen patrons." *Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012).

So, even though the Eighth Circuit has gotten this right previously, in this instance, it is now conflicted with its own decisions and with those of United States courts of appeal on the same important matter. In doing so, it has departed from the accepted and usual course of judicial proceedings related to probable cause and "clearly established" qualified immunity analysis. It is not the first time; "The court reaches a different conclusion, but only by defining the constitutional right in question at a high degree of generality. The Supreme Court has told us over and over again that any 'general[ized]' right, such as the right to be free from the unreasonable 'us[e of] deadly force,' must be 'clearly established' in a 'particularized ... sense' to overcome qualified immunity. *Brosseau v. Haugen*, 543 U.S. 194, 197–99, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) (quotation marks omitted)." It is not here. *Banks v. Hawkins*, 999 F.3d 521, 531–32 (8th Cir. 2021, dissent).

In sum, this case matters because we are living in times of ongoing civil unrest. It has never been more important to give law enforcement a roadmap for addressing large groups of protesters that turn to violence against other citizens, officers,

and property. The decision of the Eighth Circuit is untenable and it does not comport with the law.

CONCLUSION AND PRAYER FOR RELIEF

The City of Des Moines and Officer Brandon Holtan respectfully request the Supreme Court of the United States grant this application for writ of certiorari, and ultimately, reverse the majority opinion from the Eighth Circuit, and remand with a directive to render a decision finding probable cause was present for Nieters's arrest and that applying the proper "clearly established" analysis, Holtan's arrest of Nieters and his use of force fall within the bounds of qualified immunity.

Respectfully Submitted,

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United States Court of Appeals
For the Eighth Circuit

No. 22-2600

Mark Edward Nieters

Plaintiff - Appellant
v.
Brandon Holtan; Dana Wingert; City of Des Moines, Iowa
Defendants - Appellees

Appeal from United States District Court for the Southern District of Iowa

Submitted: June 15, 2023
Filed: October 11, 2023

Before GRUENDER, KELLY, and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

Mark Nieters sued under 42 U.S.C. § 1983 after he was pepper-sprayed and tackled by Des Moines Police Officer Brandon Holtan while photographing a protest. Nieters, who was covering the protest as a journalist, claimed Officer Holtan and other city officials violated his First and Fourth Amendment rights. The district court granted the city officials' motion for summary judgment after

concluding Officer Holtan was entitled to qualified immunity. We affirm in part and reverse in part.

I. Background

Consistent with our standard of review, we present the facts in the light most favorable to Nieters, the non-moving party. Malone v. Hinman, 847 F.3d 949, 951 (8th Cir. 2017). Following the death of George Floyd, protests occurred around Des Moines, Iowa. During four consecutive nights of protests, certain protestors damaged property and threw objects at police officers. On the fourth night of protests, Nieters attended an event at the Iowa Capitol Building to take photographs. Nieters wore a painter's mask and light-colored clothing. He also wore a blue helmet, which he believed was the international norm for journalists. Though he had press credentials on his person, they were not displayed. Officer Holtan was at the same protest as part of the Special Tactics and Response Unit.

After the organized protest ended around 8:15 p.m., Nieters followed a group of protestors who marched downtown and then returned to the Capitol around 10:45 p.m. The city officials argue that this group was violent and caused property damage, which led to law enforcement reading five dispersal orders at the Capitol between 11:30 p.m. and 11:43 p.m. After officers read the fifth order, they began arresting protestors who failed to disperse. Nieters denies hearing any dispersal orders.

At 11:46 p.m., officers deployed tear gas at the Capitol grounds. Nieters had already left the Capitol grounds before the tear gas was deployed to follow a

group of protestors moving away from the Capitol. Simultaneously, dispatchers provided information about this group's movements to Officer Holtan and other officers in the area. Dispatch informed officers that windows had been broken in the area. While pursuing this group, Officer Holtan saw Nieters and believed Nieters was a rioter. Officer Holtan began running towards Nieters and told Nieters to get on the ground. Nieters put his hands up but, at some point, turned his body away to brace himself from the charging Officer Holtan. Officer Holtan, believing Nieters intended to flee, "reached around Nieters, grabbed him around the chest, sprayed him with [pepper] spray, and took him to the ground." According to Officer Holtan, these events happened "almost simultaneously." After Officer Holtan zip-tied Nieters's wrists, Nieters informed Officer Holtan he was a member of the press. Officer Holtan then retrieved Nieters's press credentials out of his pocket. Because Officer Holtan did not want to be perceived as giving a journalist special treatment, he proceeded with Nieters's arrest. Other journalists near Nieters were not arrested.

Nieters was booked into the Polk County Jail and charged with one count of failure to disperse in violation of Iowa Code § 723.3, but the charge was later dropped as the State was "unable to sufficiently document [Nieters's] actions for charges to go forward at th[at] time." Nieters experienced sore ribs for seventeen days following his arrest and sought medical attention for pain in his right wrist.

Nieters sued Officer Holtan, Chief of Police Dana Wingert, and the City of Des Moines for a myriad of claims, including illegal seizure, excessive force, and First Amendment retaliation. The district

court granted Officer Holtan summary judgment based on qualified immunity, holding: (1) Officer Holtan had at least arguable probable cause to believe Nieters violated the law; (2) Officer Holtan's use of force was objectively reasonable; and (3) Nieters's First Amendment activity was not a substantial factor in Officer Holtan's decision to use force. Nieters timely appealed.

II. Analysis

We review a district court's grant of summary judgment based on qualified immunity de novo. Dooley v. Tharp, 856 F.3d 1177, 1181 (8th Cir. 2017). "Summary judgment is proper if, after viewing the evidence and drawing all reasonable inferences in the light most favorable to the nonmovant, no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law." Ryno v. City of Waynesville, 58 F.4th 995, 1004 (8th Cir. 2023) (quoting Libel v. Adventure Lands of Am., Inc., 482 F.3d 1028, 1033 (8th Cir. 2007)).

"To decide whether an official is entitled to qualified immunity, we conduct a two-step inquiry: (1) whether the facts, viewed in the light most favorable to the plaintiff, demonstrate a constitutional or statutory deprivation; and (2) whether the right was clearly established at the time." Webster v. Westlake, 41 F.4th 1004, 1009– 10 (8th Cir. 2022).

A. Unlawful Seizure Claim

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses,

papers, and effects, against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. A warrantless arrest is unreasonable and "violates the Fourth Amendment unless it is supported by probable cause." Webster, 41 F.4th at 1010. "Probable cause exists to make a warrantless arrest 'when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense.'" Ehlers v. City of Rapid City, 846 F.3d 1002, 1009 (8th Cir. 2017) (internal quotation marks omitted) (quoting Borgman v. Kedley, 646 F.3d 518, 523 (8th Cir. 2011)). To determine if there is probable cause, courts must "examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." Maryland v. Pringle, 540 U.S. 366, 371 (2003) (quoting Ornelas v. United States, 517 U.S. 690, 696 (1996)).

"[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Illinois v. Gates, 462 U.S. 213, 243 n.13 (1983). Officers are given "substantial latitude in interpreting and drawing inferences from factual circumstances." Bell v. Neukirch, 979 F.3d 594, 603 (8th Cir. 2020) (quoting Kuehl v. Burtis, 173 F.3d 646, 650 (8th Cir. 1999)). Even without probable cause, an officer will be "entitled to qualified immunity if there is at least 'arguable probable cause.'" White v. Jackson, 865 F.3d 1064, 1074 (8th Cir. 2017) (quoting Borgman, 646 F.3d at 522–23). Arguable probable cause exists when "an officer mistakenly arrests a suspect believing [the arrest] is

based in probable cause if the mistake is 'objectively reasonable.'" Ehlers, 846 F.3d at 1009 (quoting Borgman, 646 F.3d at 523).

At the time of Nieters's arrest, "it [was] clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment." Baribeau v. City of Minneapolis, 596 F.3d 465, 478 (8th Cir. 2010). Therefore, we must determine whether his warrantless arrest was supported by either probable cause or arguable probable cause. Officer Holtan argues he had probable cause to arrest and charge Nieters with failure to disperse in violation of Iowa Code § 723.3, which states, "[a] peace officer may order the participants in a riot or unlawful assembly or persons in the immediate vicinity of a riot or unlawful assembly to disperse. Any person within hearing distance of such command, who refuses to obey, commits a simple misdemeanor."[1]

Viewing the evidence in the light most favorable to Nieters, the record demonstrates there are genuine issues of material fact that preclude summary

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[1]Under Iowa Code § 723.1 "[a] riot is three or more persons assembled together in a violent and disturbing manner, and with any use of unlawful force or violence by them or any of them against another person, or causing property damage." Under Iowa Code § 723.2 "[a]n unlawful assembly is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense."

judgment on the unlawful seizure claim. To violate the Iowa statute for failure to disperse, the individual must (1) be a participant in or in the immediate vicinity of a riot or unlawful assembly; (2) be within hearing distance of a command to disperse; and (3) refuse to disperse. See Iowa Code § 723.3. On the evening of the protest, even if there were members of the crowd who participated in riots or formed unlawful assemblies, there is no evidence Nieters joined any of these groups. "A person can join 'an unlawful assembly by not disassociating himself from the group assembled and by knowingly joining or remaining with the group assembled after it has become unlawful." White, 865 F.3d at 1075 (quoting State v. Mast, 713 S.W.2d 601, 604 (Mo. Ct. App. 1986)). But Officer Holtan admitted Nieters was not part of the group of rioters he was chasing, and that Nieters was at least fifty to seventy-five feet away from the group. In staying apart from the group of protestors he was photographing, Nieters disassociated from the group. Additionally, Nieters was not running away as others were. Rather, he was standing outside a hotel wearing two cameras and taking photographs of a gas canister and fleeing protestors just prior to Officer Holtan tackling him.

Nor is there evidence in the record that Nieters was in hearing distance when any of the dispersal orders were read at the Capitol. While Nieters was at the Capitol earlier that evening, he left prior to the dispersal orders being read and was no longer in hearing distance. Officer Holtan first saw Nieters standing still five blocks away from where the dispersal orders were given. Officer Holtan never gave Nieters a personal order to disperse, nor did he ask if Nieters was in the process

of dispersing; instead, he "simultaneously" ordered Nieters to "get on the ground" while pepper- spraying and charging him. A reasonable jury could conclude there was no probable cause to believe Nieters violated Iowa's dispersal statute since under the facts favorable to Nieters, he was not participating or within the immediate vicinity of a riot or unlawful assembly, was not within hearing distance of the dispersal command, and did not refuse to disperse. Furthermore, as Nieters was standing by himself five blocks away from the Capitol, a jury could conclude that Nieters did in fact disperse.

Of course, this does not end our analysis. Officer Holtan would still be "entitled to qualified immunity if there [was] at least 'arguable probable cause.'" White, 865 F.3d at 1074 (quoting Borgman, 646 F.3d at 522–23). To hold arguable probable cause existed, we would need to conclude Officer Holtan mistakenly arrested Nieters believing the arrest was based in probable cause, and the mistake was objectively reasonable. See Ehlers, 846 F.3d at 1009. We cannot do so under the summary judgment standard. When considering the clearly-established prong, we must not resolve genuine disputes of fact in favor of Officer Holtan. See Tolan v. Cotton, 572 U.S. 650, 656–57 (2020). And we may not disregard exculpatory evidence when considering the totality of the circumstances to determine if arguable probable cause existed. Bell, 979 F.3d at 603. We must instead view all the disputed facts in the light most favorable to Nieters, including those exculpatory facts that showed he did not hear the dispersal order and stood by himself, apart from the group of rioters, taking photographs. Viewed in this light, Officer Holtan lacked arguable probable cause to arrest Nieters for

failure to disperse. See Baude v. Leyshock, 23 F.4th 1065, 1073 (8th Cir. 2022) (holding that while "[p]olice may be entitled to qualified immunity protections if they arrest individual offenders with at least probable cause . . . , officers cannot enjoy such protections by alleging that 'the unlawful acts of a small group' justify the arrest of the mass") (quoting Bernini v. St. Paul, 665 F.3d 997, 1005 (8th Cir. 2012))).[2]

Even if we concluded Officer Holtan made a reasonable mistake about probable cause when he first tackled Nieters to the ground, Nieters immediately informed Officer Holtan that he was a journalist and he provided press credentials. Yet Officer Holtan still arrested Nieters because he did not want to be perceived as giving a journalist special treatment. Once Officer Holtan was aware Nieters was a member of the press, and had no reason to believe Nieters had been within hearing distance of the orders to disperse, it certainly was not an "objectively reasonable" mistake to believe probable cause existed for the arrest. "The

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[2]We recognize "[a] mass arrest may satisfy the Fourth Amendment's protections if the police have 'grounds to believe all arrested persons were a part of the unit observed violating the law.'" Baude, 66 F.3d at 1072 (quoting Bernini, 665 F.3d at 1003. But this was not a mass arrest. Police did not arrest other nearby reporters, but instead gave them an order to disperse. And, as discussed above, Officer Holtan admitted Nieters, who was at least fifty to seventy-five feet away from the group, was not part of the group of rioters he was chasing.

continuation of even a lawful arrest violates the Fourth Amendment when the police discover additional facts dissipating their earlier probable cause." BeVier v. Hucal, 806 F.2d 123, 128 (7th Cir. 1986); accord Barnett v. MacArthur, 956F.3d 1291, 1297 (11th Cir. 2020); Nicholson v. City of Los Angeles, 935 F.3d 685, 691 (9th Cir. 2019); see also Haynes v. Minnehan, 14 F.4th 830, 835, 836 (8th Cir. 2021) (explaining, in the context of an investigatory stop, that "as new information flows in, a reasonable belief can dissolve into an unreasonable one"). This is particularly true when there is a "clearly established right to watch police-citizen interactions at a distance and without interfering." Chestnut v. Wallace, 947 F.3d 1085, 1090 (8th Cir. 2020). Because material factual disputes preclude awarding qualified immunity, we reverse the district court's grant of summary judgment on Nieters's unlawful seizure claim.

B. Excessive Force Claim

We next turn to Nieters's claim for excessive force. "[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 . . . ." Graham v. Connor, 490 U.S. 386, 395 (1989) (emphasis omitted). Therefore, to succeed on the first prong of a claim of excessive force, a plaintiff must show that (1) the plaintiff was seized, and (2) the officer used unreasonable force under the totality of the circumstances. Pollreis v. Marzolf, 66 F.4th 726,

730 (8th Cir. 2023). In explaining reasonableness, this court has said:

> The reasonableness of a use of force turns on whether the officer's actions were objectively reasonable in light of the facts and circumstances confronting him, without regard to his subjective intent or motivation. We must consider the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether the suspect is actively fleeing or resisting arrest.

Zubrod v. Hoch, 907 F.3d 568, 575 (8th Cir. 2018) (quoting Loch v. City of Litchfield, 689 F.3d 961, 965 (8th Cir. 2012)). Thus, "[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 v. Lamp, 901 F.3d 981, 989 (8th Cir. 2018).

Because officers have the right to make arrests and investigatory stops, they are permitted to use some degree of physical coercion or threats to facilitate an arrest or stop. Id. at 989–90. Threats to officer safety can also justify the use of force, even if the suspect is not actively resisting. Brown v. City of Golden Valley, 574 F.3d 491, 497 (8th Cir. 2009). But an officer's "use of force against a suspect who was not threatening and not resisting may be unlawful." Shannon v. Koehler, 616 F.3d 855, 864 (8th Cir. 2010). See, e.g., Small v. McCrystal, 708 F.3d 997, 1005 (8th Cir. 2013) (holding the use of force

excessive in part because the suspect was not in flight or resisting arrest), abrogated on other grounds by Laney v. City of St. Louis, 56 F.4th 1153, 1157 n.2 (8th Cir. 2023).

Viewing the totality of the circumstances in the light most favorable to Nieters, there are genuine issues of material fact on whether there was an excessive use of force. To begin, Officer Holtan arrested Nieters for failure to disperse—a misdemeanor. Second, while Officer Holtan focuses on the fact there had been "hours of criminal activity occurring" and that he was "under constant threat of harm from active rioters," he cannot point to any facts suggesting an immediate threat to his safety or the safety of others. Zubrod, 907 F.3d at 575.

Instead, Officer Holtan hangs his hat on the third factor, whether the suspect was actively fleeing or resisting, arguing a reasonable officer would view Nieters turning away as an attempt to flee. The problem is with the timing of Officer Holtan's actions. He testified he "almost simultaneously" gave Nieters the order to get on the ground, while charging and pepper-spraying him. Nieters was a non- violent alleged misdemeanant who was not given time to comply with the order to get on the ground prior to Officer Holtan's use of force. See Wilson, 901 F.3d at 989. When Officer Holtan began charging, Nieters had his hands in the air and stood still but, at some point, Nieters turned his body away from Officer Holtan. Taking this fact in the light most favorable to Nieters, a jury could conclude a reasonable officer would have interpreted Nieters's action in turning his body as an attempt to shield himself or the two cameras he wore from the

impending impact of Officer Holtan running at him rather than an attempt to flee. See Smith v. Kan. City, Mo. Police Dep't, 586 F.3d 576, 581 (8th Cir. 2009).

Next, we must determine whether Nieters's rights were clearly established in this scenario. "Broadly speaking, [t]he right to be free from excessive force in the context of an arrest is clearly established under the Fourth Amendment." Peterson v. Kopp, 754 F.3d 594, 600 (8th Cir. 2014) (alteration in original) (quoting Small, 708 F.3d at 1005), abrogated on other grounds by Laney, 56 F.4th at 1157 n.2. While we are not to define the issue "at a high level of generality," Ashcroft v. al- Kidd, 563 U.S. 731, 742 (2011), "[a] general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." Winslow v. Smith, 696 F.3d 716, 738 (8th Cir. 2012) (quoting Shekleton v. Eichenberger, 677 F.3d 361, 367 (8th Cir. 2012)). "[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 741 (2002); accord Glover v. Paul, 78 F.4th 1019, 1024–25 (8th Cir. 2023).

Numerous cases show that the identified general constitutional rule applies with obvious clarity to the conduct in question. In Rokusek v. Jansen, we stated "every reasonable official would have understood that he could not throw [the plaintiff]—a nonviolent, nonthreatening misdemeanant who was not actively resisting—face-first to the ground" even though the plaintiff failed to comply with certain orders. 899

F.3d 544, 546, 548 (8th Cir. 2018). In Bauer v. Norris, we concluded that even verbal abuse by a nonthreatening misdemeanant does not justify the use of force. 713 F.2d 408, 412–13 (8th Cir. 1983). Finally, in Smith v. Kansas City, Missouri Police Department, we held it was clearly established that an officer violates a citizen's rights by "knocking a non-resisting suspect to the ground " 586 F.3d at 582. Thus, Nieters had a clearly established right to be free from excessive force. See Westwater v. Church, 60 F.4th 1124, 1131 (8th Cir. 2023).

C. First Amendment Retaliation Claim

Finally, we turn to Nieters's First Amendment retaliation claim. "The First Amendment prohibits laws 'abridging the freedom of speech.'" Houston Cmty. Coll. Sys. v. Wilson, 142 S. Ct. 1253, 1259 (2022) (quoting U.S. Const. amend. I). Thus, "as a general matter," it "prohibits government officials from subjecting individuals to retaliatory actions after the fact for having engaged in protected speech." Id. (cleaned up) (quoting Nieves v. Bartlett, 139 S. Ct. 1715, 1722 (2019)). To succeed on a First Amendment retaliation claim Nieters must demonstrate: (1) he engaged in protected First Amendment activity; (2) Officer Holtan took an adverse action that would chill a person of ordinary firmness from continuing in that protected activity; and (3) there was a but-for causal connection between Nieters's injury and Officer Holtan's retaliatory animus. Quraishi v. St. Charles Cnty., Mo., 986 F.3d 831, 837 (8th Cir. 2021) (setting forth the elements generally); Laney, 56 F.4th at 1157 (holding but-for causation is required to satisfy the

third element). For a retaliatory arrest claim there is an additional element: the defendant lacked probable cause or arguable probable cause to arrest. Just, 7 F.4th at 768. However, "the no-probable- cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." Nieves, 139 S. Ct. at 1727.

Nieters argues Officer Holtan committed two acts of retaliation: the use of force and the arrest. There is no debate whether the First Amendment protected Nieters's activity at the protest. Nor do the parties question whether Officer Holtan's actions would chill a person of ordinary firmness from continuing in the activity. The dispute centers on whether Nieters can establish but-for causation and the lack of probable cause for the retaliatory arrest claim.

"Even viewing the facts in a light most favorable to [Nieters], causation is missing." Laney, 56 F.4th at 1157. Nieters must show he was "singled out because of [his] exercise of constitutional rights." Peterson, 754 F.3d at 602 (alteration in original) (quoting Baribeau, 596 F.3d at 481). "The causal connection is generally a jury question unless the question is so free from doubt as to justify taking it from the jury." Id. at 603 (cleaned up) (quoting Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)). Nieters fails to point to any evidence in the record to show that Nieters's First Amendment expression was the but-for cause of Officer Holtan's decision to arrest Nieters or to use force. Though Nieters points to Officer Holtan's admission that he believed Nieters

was a protestor, this statement is insufficient to show that Officer Holtan singled out Nieters from other protestors. Because Nieters failed to show the causal connection between his protected expression and Officer Holtan's adverse action, we affirm the district court's grant of summary judgment.

III. Conclusion

We reverse the district court's order granting summary judgment on the unlawful seizure and excessive force claims but affirm the district court's order granting summary judgment dismissing the retaliation claim.

GRUENDER, Circuit Judge, concurring in part and dissenting in part.

In my view, the district court correctly granted Officer Holtan's motion for summary judgment on Nieters's unlawful-arrest claim. Thus, I respectfully dissent from Part II-A of the court's opinion.

As the court recognizes, even if a police officer violates a federal right, he is still entitled to qualified immunity unless the unlawfulness of his conduct was clearly established. District of Columbia v. Wesby, 583 U.S. 48, 62-63 (2018). To be clearly established, the plaintiff must show that the legal principle was "settled law" dictated by controlling authority or a robust consensus of cases. Id. at 63; see also Martin v. Turner, 73 F.4th 1007, 1009-10 (8th Cir. 2023). The clearly established standard "requires that the legal principle clearly prohibit the officer's conduct in the particular circumstances before him." Wesby, 583 U.S. at 63. In the unlawful-arrest context, we also

consider as a part of the clearly established analysis whether the officer "reasonably but mistakenly concluded that probable cause was present." Brown v. City of St. Louis, 40 F.4th 895, 900-01, 903 (8th Cir. 2022). If the officer made such a reasonable mistake, he had arguable probable cause and is entitled to qualified immunity. Id. at 900-01. These "demanding" principles protect all but the plainly incompetent or those who knowingly violate the law. Wesby, 583 U.S. at 63. Applying them, I would hold that Officer Holtan had at least arguable probable cause to arrest Nieters for failure to disperse.

Under Iowa law: "A peace officer may order . . . persons in the immediate vicinity of a riot or unlawful assembly to disperse. Any person within hearing distance of such command, who refuses to obey, commits a simple misdemeanor." Iowa Code § 723.3. Before Nieters's arrest, dispersal orders were given to an unlawful assembly at the Iowa Capitol grounds. Despite these orders, a "large" group of people at the Capitol remained together and began travelling westward down Locust Street. Nieters, a journalist, though not displaying press credentials, chose to follow this group. Dispatchers provided real-time information to Officer Holtan and other officers about this group's movements through Des Moines. Dispatchers notified officers of the group's continued presence on Locust Street and that some members of the group were running north on a side street.

As Officer Holtan chased those running on the side street back towards Locust, he encountered Nieters, who wore a helmet and respirator. Officer Holtan placed him under arrest. Given Nieters's appearance and the information previously relayed

by dispatch, a reasonable officer could have concluded that he had probable cause to believe that Nieters was in the immediate vicinity of an unlawful assembly, heard dispersal orders, and failed to comply with the order. See Iowa Code § 723.3; cf. White v. Jackson, 865 F.3d 1064, 1075-76 (8th Cir. 2017) ("The officers arrested [plaintiff] while he was standing with a group of people in an area that officers had been attempting to clear. . . . [Officers] could have reasonably concluded that [plaintiff] . . . chose not to disperse."). As the district court held, the totality of the circumstances confirms that Officer Holtan had arguable probable cause to believe that Nieters failed to disperse. The court now reverses this decision because Nieters claims never to have heard the dispersal orders and because Nieters was fifty to seventy-five feet away from the nearest person Officer Holtan had previously been chasing. See ante at 6-7. To my mind, these two facts, the first of which Officer Holtan could not have known, do not show that Officer Holtan's actions were objectively unreasonable given Nieters's appearance, position on Locust Street, and the information relayed to Officer Holtan by dispatch.

The court then assumes that, even if Officer Holtan had arguable probable cause when he seized Nieters, it was extinguished when "Nieters immediately informed Officer Holtan that he was a journalist and he provided press credentials." Ante at 7. The court mentions that Officer Holtan did not want to be seen as giving a journalist special treatment and that this somehow further disproves (or at least creates a dispute of fact about) Officer Holtan's arguable probable cause. Ante at 7.

The court does not explain how these post-seizure revelations negate the facts that it previously assumed established arguable probable cause—perhaps because we have previously rejected the court's implied logic. First, the court cannot consider Nieters's post-arrest conduct to determine whether Officer Holtan had arguable probable cause at the time of the seizure. See Amrine v. Brooks, 522 F.3d 823, 832 (8th Cir. 2008) ("As probable cause is determined at the moment the arrest was made, any later developed facts are irrelevant to the probable cause analysis for an arrest." (internal quotation marks omitted)); Lambert v. City of Dumas, 187 F.3d 931, 935 n.6 (8th Cir. 1999) ("The relevant inquiry is whether the arresting officers had probable cause to arrest [plaintiff] at the time of the arrest, not whether the officers' decision to arrest [plaintiff] can be justified by information learned after the arrest."); see also Torres v. Madrid, 592 U.S. ---, 141 S. Ct. 989, 995, 998 (2021) (noting that an arrest is a "seizure of the person" that occurs when an officer uses force with intent to restrain).

Second, even if the court could consider the post-arrest conduct, to the extent that Nieters's claimed status as a member of the press tended to show that he did not fail to disperse, Officer Holtan was free to disregard Nieters's claim in light of the facts known to him. Cf. Borgman v. Kedley, 646 F.3d 518, 524 (8th Cir. 2011) (explaining that officers "need not rely on an explanation given by the suspect"); Wesby, 583 U.S. at 67-68 (noting broad agreement "that innocent explanations— even uncontradicted ones—do not have any automatic, probable-cause-vitiating effect"). Third, the court's analysis apparently turns in part on Officer Holtan's

stated desire not to be seen as giving a journalist special treatment, despite the Supreme Court's admonition that an arresting officer's "state of mind" or "subjective reason for making the arrest" is "irrelevant to the existence of probable cause." Devenpeck v. Alford, 543 U.S. 146, 153 (2004).

Demonstrating the reasonableness of Officer Holtan's decision and further proving that he was not plainly incompetent when making it, "neither the panel majority nor [Nieters] have identified a single precedent—much less a controlling case or robust consensus of cases—finding a Fourth Amendment violation under similar circumstances." See Wesby, 583 U.S. at 65. Nor do they assert that this is the "obvious case where a body of relevant case law is not needed." See id. (internal quotation marks omitted). In fact, no controlling decision prior to the court's opinion here had prohibited an arrest for failure to disperse under Iowa law under the "particular circumstances" before Officer Holtan. See id. at 63. Instead, the court masks its incomplete analysis by doing what the Supreme Court has repeatedly told us not to do: define the putative clearly established right at a high level of generality. See ante at 5 ("At the time of Nieters's arrest, it was clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment." (internal quotation marks omitted)).

For these reasons, I conclude that Nieters failed to show a clearly established right to be free from arrest for failure to disperse. I therefore would affirm the district court's grant of qualified immunity and summary judgment to Officer Holtan on Nieters's unlawful-arrest claim.

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT
No: 22-2600

Mark Edward Nieters

Appellant

v.
Brandon Holtan, et al.

Appellees

Appeal from U.S. District Court for the Southern District of Iowa - Central (4:21-cv-00042-RGE)

ORDER

The petition for rehearing en bane is denied. The petition for rehearing by the panel is also denied.

November 14, 2023

Order Entered at the Direction of the Court: Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK EDWARD NIETERS, Plaintiff, v. BRANDON HOLTAN, DANA WINGERT, CITY OF DES MOINES, Defendants.	CASE NO. 4:21-CV-0042 ORDER RE: PENDING MOTIONS

I. INTRODUCTION

Plaintiff Mark Edward Nieters sues Defendants Brandon Holtan, Dana Wingert, and the City of Des Moines, Iowa, for violations of his rights under the United States Constitution and the Iowa Constitution, and for related claims under Iowa law. Nieters's claims arise from events following a June 1, 2020 protest related to the death of George Floyd. Defendants move for summary judgment on Nieters's claims. Nieters moves to strike Defendants' expert report.

For the reasons set forth below the Court grants in part Defendants' motion for summary judgment and remands Nieters's remaining claims. The Court denies Nieters's motion to strike as moot.

II. BACKGROUND

The following facts are either uncontested or, if contested, viewed in the light most favorable to Nieters for purposes of Defendants' motion for summary judgment. See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986).

In late May and early June of 2020, protests related to the death of George Floyd occurred in Des Moines, Iowa. See Pl.'s Resp. Defs.' Statement of Facts ¶¶ 1, 5, ECF No. 42. Rioting followed some of the protests. Id. ¶¶ 1–2. During the riots, crowds damaged businesses and buildings and threw objects at law enforcement officers. Id. ¶¶ 2–3. The events related to Nieters's claims occurred on June 1, 2020, which marked the fourth night of rioting following protests. See id. ¶¶ 1–2. That night, Des Moines Police Officer Brandon Holtan worked in his capacity as a member of the "multi-agency tactical squad called Metro STAR," which stands for "Special Tactics and Response Unit." Id. ¶¶ 6–8. The Metro STAR team is tasked with "provid[ing] the public with a prepared and professional emergency response and defensive capability to manmade and naturally occurring critical incidents." Id. ¶ 10.

Nieters attended the June 1, 2020 protest at the Iowa Capitol Building to photograph the event. See id. ¶¶ 5, 11, 14. Nieters had press credentials on his person, but was not displaying them. Id. ¶ 13. Nieters was wearing a blue helmet, a painter's mask, and nonblack clothing. Id. ¶ 12. Following the organized protest, several hundred individuals remained on the Capitol grounds. See id. ¶¶ 14–15. The group marched downtown and then back to the Capitol grounds, returning at 10:45 p.m. Id. ¶ 16. Nieters followed the group. Nieters Dep. 26:10–21, Defs.' App. Supp. Mot. Summ. J. 234, ECF No. 33-2. Defendants contend the group engaged in property

damage, obstruction of public roads, and violence. ECF No. 42 ¶ 19; Case Summary Report, Defs.' App. Supp. Mot. Summ. J. 11, ECF No. 33-2 (generally describing remaining protest participants engaging in "violent, intimidating[,] and destructive behavior [i]n the evening hours" of June 1, 2020 (citing ECF No. 33-2 at 11)). Between 11:30 p.m. and 11:43 p.m., law enforcement officers read five dispersal orders at the Capitol grounds. See ECF No. 42 ¶¶ 20–22. Law enforcement officers had been notified to effect arrests after the fifth and final dispersal order was given. See Holtan Dep. 56: 9–13, ECF No. 33-2 at 92. Nieters denies hearing any dispersal orders and is uncertain if he was present when the orders were read. ECF No. 42 ¶ 22.

At 11:46 p.m., law enforcement officers deployed tear gas at the Capitol grounds. Id. ¶ 25. Groups moved west, away from the Capitol grounds. Id. ¶ 27. Nieters left the Capitol grounds before any tear gas was deployed. See id. ¶¶ 25, 28. Nieters followed a group headed west on Locust Street. Id. ¶ 35. While following the group, Nieters witnessed a physical altercation between twelve individuals and two law enforcement officers. Id. ¶¶ 31–32. While the group moved along Locust Street, dispatchers were providing information about the group to Holtan and other law enforcement officers who were traveling parallel to the group. Id. ¶¶ 41, 43–44. Dispatch informed law enforcement officers that windows had been broken at a business. Id. ¶ 42. When Nieters approached the Embassy Suites hotel on Locust Street, he observed individuals running along the west side of the hotel in response to tear gas. Id. ¶ 39. Dispatchers informed law enforcement officers of the group's movements, including that members of the group were in the parking garage on East 2nd

Street and Locust Street and members of the group were running north on Robert D. Ray Drive. ECF No. 42 ¶ 44; see Armstrong Body Camera 11:50–12:35, ECF No. 33-2 at 467. Holtan ran toward a group traveling north on Robert D. Ray Drive. Id. ¶ 46. While pursuing these individuals, Holtan observed Nieters and believed he was a part of the larger group of "unlawful assemblers." Id. ¶ 50; see also Holtan Dep. 74:7–8, 75:3–12, ECF No. 32-2 at 110–11. Holtan perceived the straps on Nieters's shoulders as backpack straps rather than straps to Nieters's cameras. ECF No. 42 ¶ 52. Holtan testified that Nieters's attire of a helmet, mask, and what appeared to be a backpack reminded him of a previous encounter with a rioter. Holtan Dep. 76:20–23, ECF No. 32-2 at 112. At some point, Nieters turned away from Holtan. ECF No. 42 ¶ 55. Holtan told Nieters to get on the ground. Id. ¶ 54. Holtan testified he believed Nieters intended to flee. Id. ¶ 56. Nieters put his hands up. Id. ¶ 60; see also Pl.'s App. Supp. Resist. Defs.' Mot. Summ. J 7, ECF No. 42-2. "Holtan reached around Nieters, grabbed him around the chest, sprayed him with OC spray, and took him to the ground." ECF No. 42 ¶ 61. Holtan testified these events—Nieters turning to run, Holtan's command, and Holtan's use of pepper spray—happened "almost simultaneously." Holtan Dep. 84:11–24, ECF No. 32-2 at 120. Holtan zip tied Nieters's wrists. ECF No. 42 ¶ 68. Nieters informed Holtan he was a member of the press and Holtan reviewed the press credentials located in Nieters's back pocket. Id. ¶¶ 69–70. Holtan testified he continued with Nieters's arrest because he did not want to be perceived as treating Nieters more favorably than any other citizen who was arrested. Id. ¶ 71. Nieters complained to other law

enforcement officers about the tightness of the zip ties. Id. ¶ 74. He was in zip ties for approximately twenty minutes. Id. ¶ 78. For ten of the twenty minutes, law enforcement officers were attempting to remove the zip ties. Id. Other journalists in the same immediate area as Nieters were not arrested. Id. ¶¶ 79–81.

Nieters was booked into the Polk County Jail. Pl.'s Statement Facts Supp. Resist. Defs.' Mot. Summ. J. ¶ 85, ECF No. 42-1. Nieters was charged with one count of failure to disperse in violation of Iowa Code § 723.3. Id. ¶ 86. On August 13, 2022, the State of Iowa filed a motion to dismiss Nieters's charge, stating it was "unable to sufficiently document [Nieters's] actions for charges to go forward at th[at] time." Id. ¶ 97; ECF No. 42-2 at 39 (Notice of Intent Not to Prosecute). The Iowa District Court for Polk County granted the State's motion. ECF No. 42-1 ¶ 98; ECF No. 42-2 at 40–41 (Order of Dismissal).

For seventeen days after his arrest, Nieters experienced sore ribs from being taken to the ground. ECF No. 42 ¶ 105. More than two months after his arrest, Nieters sought medical attention for pain to his right wrist. Id. ¶¶ 97–99. Nieters missed one day of work. Id. ¶ 102. Nieters's arrest brought up traumatic incidents from his international photography work. See id. ¶¶ 103, 106.

Nieters filed a twelve-count complaint against Defendants in the Iowa District Court for Polk County. Compl., ECF No. 1-1. Defendants removed to this Court. Notice Removal, ECF No. 1. Nieters alleges claims against Holtan for: illegal seizure and excessive force in violation of his Fourth Amendment rights and his rights under Article I, section 8 of the Iowa Constitution (Counts 1 through 4); retaliation

in violation of his First Amendment rights and his rights under Article I, section 7 of the Iowa (Counts 5 and 6); malicious prosecution in violation of Iowa law(Count 9); false imprisonment in violation of Iowa law (Count 10); assault and battery in violation of Iowa law (Count 11); and libel in violation of Iowa law (Count 12). ECF No. 1-1 ¶¶ 73–115, 136–57. Nieters alleges claims against Wingert and the City of Des Moines for deliberately indifferent policies, practices, customs, training, and supervision in violation of the First, Fourth, Fifth, and Fourteen Amendments to the United States Constitution (Count 7) and in violation of Article I, sections 6, 7, and 8 of the Iowa Constitution (Count 8). Id. ¶¶ 116–35.

Defendants move for summary judgment. ECF No. 33. Nieters resists as to all counts except Nieters's claims for deliberately indifferent policies, practices, customs, training, and supervision in Counts 7 and 8. ECF No. 45. Nieters moves to strike Defendants' expert report. ECF No. 46. Defendants resist. ECF No. 47. Neither party requests a hearing on the motions. The Court decides the motions without oral argument, finding the parties' briefing and exhibits adequately present the issues. See LR 7(c); Fed. R. Civ. P. 78(b). Additional facts are set forth below as necessary.

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, the Court must grant a party's motion for summary judgment if no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986). A genuine issue of material fact exists where the issue "may

reasonably be resolved in favor of either party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

When analyzing whether a party is entitled to summary judgment, a court "may consider only the portion of the submitted materials that is admissible or useable at trial." Moore v. Indehar, 514 F.3d 756, 758 (8th Cir. 2008) (internal quotation marks omitted) (quoting Walker v. Wayne Cnty., 850 F.2d 433, 434 (8th Cir. 1988)). The nonmoving party "receives the benefit of all reasonable inferences supported by the evidence, but has 'the obligation to come forward with specific facts showing that there is a genuine issue for trial.'" Atkinson v. City of Mt. View, 709 F.3d 1201, 1207 (8th Cir. 2013) (quoting Dahl v. Rice Cnty., 621 F.3d 740, 743 (8th Cir. 2010)). "In order to establish the existence of a genuine issue of material fact, a plaintiff may not merely point to unsupported self-serving allegations." Anda v. Wickes Furniture Co., Inc., 517 F.3d 526, 531 (8th Cir. 2008) (cleaned up). "The plaintiff must substantiate [the] allegations with sufficient probative evidence that would permit a finding in [plaintiff's] favor." Smith v. Int'l Paper Co., 523 F.3d 845, 848 (8th Cir. 2008) (internal quotation marks and citation omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial," and the moving party is entitled to judgment as a matter of law. Torgerson v. City of Rochester, 643 F.3d 1031, 1042–43 (8th Cir.

2011) (en banc) (internal quotation marks omitted) (quoting Ricci, 557 U.S. at 586).

IV. DISCUSSION

First, the Court analyzes Defendants' motion for summary judgment on Nieters's federal law claims. Next, the Court addresses Nieters's state law claims. Finally, the Court addresses Nieters's motion to strike.

A. Defendants' Motion for Summary Judgment—Federal Law Claims

Defendants move for summary judgment on Nieters's claims under 42 U.S.C. § 1983 for deliberately indifferent policies, practices, customs, training, and supervision (Count 7), unlawful arrest (Count 1), excessive force (Count 3), and retaliation (Count 5). ECF No. 1-1 ¶¶ 73–77, 84– 89, 96–105. Defendants argue, in part, they are entitled to qualified immunity on Nieters's claims in Counts 1, 3, and 5. See ECF No. 36-1 at 11–13, 29–35. First, the Court addresses Defendants' unresisted motion for summary judgment on Count 7. Then, the Court addresses Nieters's remaining federal law claims. The Court sets forth the law regarding qualified immunity. Finally, the Court considers whether Defendants are entitled to qualified immunity on Nieters's § 1983 claims for unlawful arrest, excessive force, and retaliation in Counts 1, 3, and 5.

1. Deliberately indifferent policies, practices, customs, training, and supervision (Count 7)

Defendants move for summary judgment on Nieters's claim for deliberately indifferent policies, practices, customs, training, and supervision under federal law in Count 7. ECF No. 36- 1 at 36–39.

Nieters does not resist Defendants' motion as to Count 7. ECF No. 45 at 2. Because Nieters does not resist Defendants' motion as to this claim, it follows that Nieters does not generate a genuine issue of material fact on his deliberate indifference claim.

The Court grants this unresisted portion of Defendants' motion for summary judgment on Count 7.

2. Qualified immunity

Title 42 United States Code section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law.

42 U.S.C. § 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." West v. Atkins, 487 U.S. 42, 48 (1988).

State actors sued under § 1983 may assert qualified immunity. See Goffin v. Ashcraft, 957 F.3d 858, 861 (8th Cir. 2020). Under this doctrine, "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." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The party asserting qualified immunity has

"the burden to establish the relevant predicate facts, and at the summary judgment stage, the nonmoving party is given the benefit of all reasonable inferences. If there is a genuine dispute concerning predicate facts material to the qualified immunity issue, the defendant is not entitled to summary judgment." White v. McKinley, 519 F.3d 806, 813 (8th Cir. 2008) (internal citations omitted).

Qualified immunity analysis has two steps. One: a court must decide whether the facts alleged "make out a violation of a constitutional right." Pearson v. Callahan, 555 U.S. 223, 232 (2009). Two: "the court must decide whether the right at issue was clearly established at the time of defendant's alleged misconduct." Id. (internal quotation marks and citation omitted). "Although the defendant bears the burden of proof for this affirmative defense, the plaintiff must demonstrate that the law was clearly established." Monroe v. Ark. State Univ., 495 F.3d 591, 594 (8th Cir. 2007). "If either [inquiry] is answered in the negative, the public official is entitled to qualified immunity." Norris v. Engles, 494 F.3d 634, 637 (8th Cir. 2007) (internal quotation marks and citation omitted). The steps need not be addressed in the order identified. Pearson, 555 U.S. at 236.

A right is clearly established if, "at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would [have understood] that what he is doing violates that right.'" Ashcroft v. al-Kidd, 563 U.S. 731, 741 (2011) (alterations in original) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)). This requires "controlling authority" or "a robust 'consensus of cases of persuasive authority'" establishing the right. Id. at 741–42 (quoting Wilson

v. Layne, 526 U.S. 603, 617 (1999)). Rights may not be defined "at a high level of generality." Id. at 742. The inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Brosseau v. Haugen, 543 U.S. 194, 198 (2004) (internal quotation marks and citation omitted).

3. Unlawful arrest (Count 1)

In Count 1, Nieters alleges Holtan violated his rights under the Fourth Amendment by arresting him without reasonable suspicion or probable cause. See ECF No. 1-1 ¶¶ 73–77. Defendants move for summary judgment on Count 1, arguing Holtan is entitled to qualified immunity. ECF No. 36-1 at 13–18. Defendants contend Holtan had probable cause to arrest Nieters and thus did not violate Nieters's constitutional rights. Id. at 13–16. Defendants also argue the right to be in the immediate proximity of a riot or unlawful assembly was not a clearly established right. Id. at 16–18. Nieters resists, arguing questions of fact as to whether probable cause existed to arrest him preclude summary judgment on his unlawful arrest claim. ECF No. 45 at 15–25.

"A warrantless arrest does not violate 'the Fourth Amendment if it is supported by probable cause, and an officer is entitled to qualified immunity if there is at least 'arguable probable cause.'" White v. Jackson, 865 F.3d. 1064, 1074 (8th Cir. 2017) (quoting Borgman v. Kedley, 646 F.3d 518, 522–23 (8th Cir. 2011)). "Probable cause exists to make a warrantless arrest when the totality of the circumstances at the time of the arrest are sufficient to lead a reasonable person to believe that the defendant has committed or is committing an offense." Ehlers v. City of Rapid City, 846 F.3d 1002,

1009 (8th Cir. 2017) (internal quotation marks and citation omitted). "Probable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians act." Bell v. Neukirch, 979 F.3d 594, 603 (8th Cir. 2020) (omission in original) (internal quotation marks omitted) (quoting Kaley v. United States, 571 U.S. 320, 338 (2014)). "In a case involving an arrest without probable cause, officers have qualified immunity if they reasonably but mistakenly conclude[d] that probable cause [wa]s present. Th[e] [Eighth Circuit] often refers to this standard using the shorthand arguable probable cause." Id. at 607 (first and second alterations in original) (internal quotation marks and citations omitted). "Arguable probable cause exists even where an officer mistakenly arrests a suspect believing it is based in probable cause if the mistake is objectively reasonable." Ehlers, 846 F.3d at 1009 (internal quotation marks and citation omitted). "In other words, [the Court] must determine whether it was 'objectively legally reasonable' for an officer to conclude that the arrest was supported by probable cause." Bell, 979 F.3d at 608.

Nieters was arrested for failure to disperse in violation of Iowa Code § 723.3. ECF No. 42-2 at 33, 36. Section 723.3 provides: "A peace officer may order the participants in a riot or unlawful assembly or persons in the immediate vicinity of a riot or unlawful assembly to disperse. Any person within hearing distance of such command, who refuses to obey, commits a simple misdemeanor." Iowa Code § 723.3. Nieters argues there is a question of fact as to whether Holtan had probable cause to believe Nieters was part of or in the immediate vicinity of an unlawful assembly because Nieters left space

between himself and the group and was not one of the individuals Holtan was initially chasing. ECF No. 45 at 18. Nieters also argues Holtan lacked probable cause to believe Nieters heard the dispersal orders at the Capitol grounds and refused to obey them when he encountered Nieters five blocks away from where the dispersal orders were given. See id.

The record demonstrates Holtan had arguable probable cause to arrest Nieters for failure to disperse. Dispersal orders were given at the Capitol grounds. Despite these orders, groups began traveling westward, including a "large" group that traveled westward on Locust Street. Nieters followed the group traveling on Locust Street. See Armstrong Body Camera 11:50–12:05, ECF No. 33-2 at 467. Dispatchers provided real time information to Holtan and other law enforcement officers about the "large" group's movements on Locust Street. Id. Dispatch informed law enforcement officers that individuals were in the parking garage on Locust Street and that individuals were running northbound on Robert D. Ray Drive. Id. at 12:10–24. When Holtan chased a group of individuals on Robert D. Ray Drive, Holtan encountered Nieters. Holtan Dep. 74:7–8, ECF No. 33-2 at 110. Nieters was not displaying his press credentials. Though Nieters was not a part of the group Holtan was chasing, Holtan testified he understood there were individuals on Locust Street that were part of the larger group that moved westward after dispersal orders were read at the Capitol grounds. Id. at 75:3–12; cf. Bernini v. City of St. Paul, 665 F.3d 997, 1003 (8th Cir. 2012) ("[T]he Fourth Amendment is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law." (internal quotation marks and citations omitted)). This

testimony reflects the information dispatch provided regarding the size of the group and its various movements along Locust Street.

The totality of the circumstances supports finding Holtan reasonably believed Nieters was in the immediate vicinity of an unlawful assembly, heard dispersal orders, and failed to comply with such orders in violation of Iowa Code § 723.3. Viewing the record in the light most favorable to Nieters, even if Holtan was mistaken in believing Nieters heard the dispersal orders and was following an unlawful assembly, such a mistake was objectively reasonable given the information Holtan received about a "large" group traveling on Locust Street. Dispatchers indicated individuals from the group were moving to various parts of Locust Street and the surrounding area, Nieters followed the "large" group from the Capitol grounds, and Nieters was not displaying his press credentials. Cf. White, 865 F.3d at 1075–76 ("The officers arrested [plaintiff] while he was standing with a group of people in an area that officers had been attempting to clear. On these facts, [the officers] could have reasonably concluded that [plaintiff] . . . chose not to disassociate himself from the assembly, had heard the dispersal orders, and chose not to disperse."). Nieters points to no evidence from which a reasonable jury could find Holtan lacked arguable probable cause to arrest him for failure to disperse.

Because the record demonstrates Holtan had at least arguable probable cause to believe Nieters violated Iowa Code § 723.3, the Court need not consider the clearly established prong of the qualified immunity analysis. Holtan is entitled to qualified immunity on Nieters's § 1983 claim for unlawful arrest. Summary judgment is warranted on Count 1.

4. Excessive force (Count 3)

In Count 3, Nieters alleges Holtan used excessive force against him in violation of Nieters's Fourth Amendment rights. ECF No. 1-1 ¶¶ 84–89. Defendants move for summary judgment on Count 3, arguing Holtan used objectively reasonable force when arresting Nieters. ECF No. 36-1 at 23–29. Defendants also argue no clearly established law prohibited Holtan from using pepper spray and taking individuals to the ground to gain compliance "in the midst of an unlawful assembly." Id. at 29–31. Nieters resists, arguing questions of fact as to whether Holtan's use of force was objectively reasonable preclude summary judgment on Count 3. ECF No. 45 at 29–33.

"The Supreme Court has explained that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Peterson v. Kopp, 754 F.3d 594, 600 (8th Cir. 2014) (internal quotation marks omitted) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)). The test for a violation of a Fourth Amendment right to be free from excessive force is "whether the amount of force used was objectively reasonable under the particular circumstances." Fischer v. Hoven, 925 F.3d 986, 988 (8th Cir. 2019) (internal quotation marks and citation omitted)). The test "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." White, 865 F.3d at 1074. "Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—the reasonableness of a particular use of force must be

judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." Peterson, 754 F.3d at 600 (internal quotation marks omitted) (quoting Graham, 490 U.S. at 396–97). "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." Id. (internal quotation marks omitted) (quoting Graham, 490 U.S. at 396). "Objective reasonableness is judged from the perspective of a reasonable officer on the scene, in light of 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." Fischer, 925 F.3d at 988 (internal quotation marks omitted) (quoting Graham, 490 U.S. at 396 (1989)). The degree of injury suffered may also be relevant to show the amount and type of force used. Id.

The first two Graham factors weigh in favor of finding excessive use of force. Nieters was arrested for failure to disperse—a simple misdemeanor. Defendants highlight the vandalism occurring in the preceding nights. The record demonstrates Nieters witnessed violence between individuals and law enforcement officers while following the group from the Capitol grounds westward on Locust Street. However, Defendants point to no facts suggesting Nieters posed an immediate threat to the safety of officers or others. Holtan testified Nieters was "standing there" and was "still." Holtan Dep. 75:24, 76:15–17, ECF No. 33-2 at 111–12. As such, Nieters was a non-violent misdemeanant.

The third Graham factor weighs against finding excessive use of force. The encounter between Nieters and Holtan lasted a matter of seconds.

During that time, Holtan observed Nieters while pursuing fleeing suspects. As discussed above, Holtan had arguable probable cause to believe Nieters was in the immediate vicinity of an unlawful assembly and failed to disperse. After Holtan observed Nieters, at some point, Nieters turned away from Holtan. Holtan simultaneously commanded Nieters to get on the ground, pulled out his pepper spray, reached around Nieters and pepper sprayed him, and took him to the ground. The record supports finding Nieters turned away from Holtan before Holtan pepper sprayed Nieters. Considering Holtan was pursuing fleeing individuals when he observed Nieters, and Nieters turned away from him, a reasonable officer in Holtan's position would have—in the seconds leading up to the uses of force at issue—interpreted Nieters's conduct as an attempt to flee. See Graham, 490 U.S. at 396–97 ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

The parties dispute whether Nieters moved away from Holtan. Nieters argues he did not move away from Holtan, but concedes he did turn away from Holtan. See ECF No. 45 at 31. Nieters argues he did not have the opportunity to comply with Holtan's command to get on the ground and therefore the jury must decide whether Nieters's conduct in turning away "meaningfully impacts Holtan's decision to use force." Id. Even accepting as true that Nieters did not move away from Holtan, a reasonable jury could find Holtan's actions in pepper spraying Nieters and taking him to the ground to arrest him

for a failure to disperse violation were objectively reasonable when judged from the perspective of a reasonable officer on the scene. Cf. Crumley v. City of St. Paul, Minn., 324 F.3d 1003, 1008 (8th Cir. 2003) ("Crumley contends she defensively moved away from the officer to keep him from getting hold of her once he pushed her. While Crumley's reaction may have been entirely natural, it nonetheless constituted resistance. Resistance may justify the use of greater force."); Ehlers v. City of Rapid City, 846 F.3d 1002, 1011 (8th Cir. 2017) ("[Plaintiff's] argument that no force was appropriate because he was being arrested for a nonviolent misdemeanor and was not resisting is inapplicable because he at least appeared to be resisting."). The dispute about whether Nieters moved away from Holtan does not diminish his act of turning away from Holtan. Such a factual dispute is insufficient to create a genuine issue for the jury as to whether Holtan used excessive force in arresting Nieters.

Even if there was a genuine issue of material fact as to whether a constitutional violation occurred, "[t]o defeat the defense of qualified immunity in a Fourth Amendment excessive force context, [p]laintiff[ ] must demonstrate that [his] right to be free from [d]efendants' particular use of force was clearly established at the time of the incident." Molina v. City of St. Louis, 2021 WL 1222432, at *10 (E.D. Mo. Mar. 31, 2021) (citing Shelton v. Stevens, 964 F.3d 747, 753 (8th Cir. 2020)). "Broadly speaking, [t]he right to be free from excessive force in the context of an arrest is clearly established under the Fourth Amendment." Peterson, 754 F.3d at 600 (alteration in original) (internal quotation marks and citation omitted). "That said, [w]hile there is no requirement that the very action in question has

previously been held unlawful, [plaintiff] can succeed only if earlier cases give [defendant] fair warning that his alleged treatment of [plaintiff] was unconstitutional." Id. (first alteration in original) (internal quotation marks and citation omitted).

In his resistance, Nieters does not address the clearly established prong of the qualified immunity analysis. See ECF No. 45 at 29–33. A review of cases provides it is "clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." Laird v. City of Saint Louis, 564 F. Supp. 3d 788, 800 (E.D. Mo. 2021) (internal quotation marks omitted) (quoting Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009)). "It was also clearly established that it is unreasonable to use pepper spray on a non-resisting, non-fleeing individual suspected of a non-violent misdemeanor." Id. at 800–01 (citing Tatum v. Robinson, 858 F.3d 544, 548-550 (8th Cir. 2017)). However, the Court did not locate any cases in which the use of pepper spray, a takedown, and zip ties is not objectively reasonable where a suspect, though a nonviolent misdemeanant, turns away from an officer where a reasonable officer would believe the suspect was attempting to flee. As such, Nieters fails to show Holtan violated his clearly established right to be free from the use of pepper spray, a takedown, and zip ties under the circumstances.

The record demonstrates Holtan's use of force was objectively reasonable under the circumstances. The fact dispute about whether Nieters moved away from Holtan is insufficient to create a genuine issue of material fact where the undisputed record shows Holtan was pursuing fleeing suspects of a "large"

group of unlawful assemblers, Holtan observed Nieters and commanded him to get on the ground, and Nieters turned away from Holtan. Even if this disputed fact were material, Nieters fails to show he had a clearly established right to be free from the use of pepper spray, a takedown, and zip ties when the circumstances would lead a reasonable officer to believe a suspect—though a nonviolent misdemeanant—is attempting to flee at the time of the incident. Holtan is entitled to qualified immunity on Nieters's § 1983 claim for excessive force. Summary judgment is warranted on Count 3.

5. Retaliation (Count 5)

In Count 5, Nieters alleges Holtan "tackl[ed] him, pepper-spray[ed] him, and arrest[ed] him in retaliation for his exercise of his First Amendment rights." ECF No. 1-1 ¶¶ 96–115. Defendants argue Holtan's conduct was not in retaliation for Nieters's press-related activity. ECF No. 36-1 at 31–36. Defendants also argue Holtan is entitled to qualified immunity on Count 5. Id. Nieters resists, arguing genuine issues of material fact preclude summary judgment on his First Amendment retaliation claim. ECF No. 45 at 34–39.

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." Hartman v. Moore, 547 U.S. 250, 256 (2006). "To establish a First Amendment retaliation claim under 42 U.S.C. § 1983, the plaintiff must show (1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." Peterson v. Kopp, 754 F.3d

594, 602 (8th Cir. 2014) (internal quotation marks and citation omitted). "Under the third prong, a plaintiff must show that the retaliatory motive was a substantial factor or but-for cause of the adverse action. In other words, the plaintiff must show he was singled out because of [his] exercise of constitutional rights." Id. (alteration in original) (internal quotation marks and citations omitted). The Eighth Circuit has identified a fourth prong in retaliatory arrest cases: "lack of probable cause or arguable probable cause." Id.; see also Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012) ("Lack of probable cause is a necessary element of a First Amendment retaliatory arrest claim." (internal quotation marks and citation omitted)).

Nieters alleges both retaliatory arrest and retaliatory use of force. The Eighth Circuit has considered First Amendment retaliation claims wherein the plaintiff alleged the defendant engaged in multiple forms of retaliation. See Peterson, 754 F.3d at 601–03. In Peterson v. Kopp, the plaintiff was arrested and cited for misdemeanor trespass after the police officer-defendant directed him and other individuals to leave a bus stop. Id. at 597. During the course of the parties' encounter, the plaintiff asked the officer for his badge number and made other comments. Id. The officer pepper sprayed the plaintiff, handcuffed him, and issued him a citation for misdemeanor trespass. Id. The plaintiff alleged, in part, the officer arrested and pepper sprayed him in retaliation for exercising his First Amendment rights. See id. at 601–02. The court upheld the district court's grant of qualified immunity on the plaintiff's retaliatory arrest claim because the officer had "at least arguable probable cause for the arrest." Id. at 602. As to the plaintiff's

retaliatory force claim, the court determined the plaintiff easily met the first two elements of a retaliation claim: the plaintiff's criticism of a public official constituted protected speech and that pepper spraying someone in the face "would chill a person of ordinary firmness." Id. As to the third element, the court determined the plaintiff presented affirmative evidence from which a reasonable jury could find the officer pepper sprayed the plaintiff in retaliation for asking for his badge number. Id. at 603. The court noted the plaintiff had asked the officer for his badge number and engaged him in conversation regarding his badge number "moments" before the defendant pepper sprayed him. Id. The court rejected the officer's argument that plaintiff's "defiance" of the officer's order to disperse justified the use of pepper spray because the officer did not pepper spray the other present individuals for similar acts of "defiance." Id. The court concluded a reasonable jury could find the officer pepper sprayed the plaintiff in retaliation for his protected speech. Id.

Like in Peterson, Nieters alleges multiple acts of retaliation. Defendants are entitled to qualified immunity on Nieters's retaliatory arrest claim because, as discussed above, Holtan had at least arguable probable cause to believe Nieters violated Iowa Code § 723.3. Cf. Peterson, 754 F.3d at 602. As to Nieters's retaliatory use of force claim, Nieters's claim meets the first two elements: protesting and press-related activities are protected First Amendment activities and pepper spraying individuals and taking them to the ground for engaging in such activities would chill a person of ordinary firmness from continuing in such activities. Cf. id. However, Nieters fails to generate a genuine issue of material fact as to whether a retaliatory

motive was the but-for cause of Holtan's decision to pepper spray him and take him to the ground.

Nieters points to no evidence showing Holtan singled him out because he perceived him to be a member of the press or because he was a protestor generally. Cf. Baribeau v. City of Minneapolis, 596 F.3d 465, 481 (8th Cir. 2010) ("[T]he plaintiffs must show that the retaliatory motive was a 'but-for' cause of the [use of force]—i.e., that the plaintiffs were 'singled out' because of their exercise of constitutional rights."). The record demonstrates law enforcement officers were instructed to arrest protestors who failed to disperse. Holtan and other law enforcement officers received information from dispatchers about a "large" group of protestors traveling westward on Locust Street after receiving dispersal orders at the Capitol grounds. The undisputed record shows Holtan was pursuing fleeing individuals directly prior to observing Nieters in front of Embassy Suites on Locust Street. Nieters was not displaying his press credentials. Nieters does not dispute he turned away from Holtan. Such circumstances support finding Holtan acted in anticipation of Nieters fleeing. As to Nieters's status as a member of the press, Nieters does not point to anything showing Holtan used force against Nieters because he was a member of the press. The undisputed record shows two other nearby members of the press were not pepper sprayed. See ECF No. 42 ¶¶ 79–81. Nieters was not displaying his press credentials and Holtan believed his camera straps were backpack straps. The parties dispute whether it was reasonable for Holtan to believe Nieters's camera straps were backpack straps. See ECF No. 45 at 38. Even if Holtan's belief was unreasonable, it is insufficient to generate a genuine issue of material

fact where the undisputed record shows two other nearby members of the press were not pepper sprayed.

Nieters fails to point to anything on the record from which a reasonable jury could find Nieters's First Amendment activity was a substantial factor in Holtan's decision to use force against Nieters. As such, the Court need not consider the clearly established prong of the qualified immunity analysis. Holtan is entitled to qualified immunity on Nieters's § 1983 claim for First Amendment retaliation. Summary judgment is warranted on Count 5.

B. Defendants' Motion for Summary Judgment—State Law Claims

Having determined summary judgment is warranted on Nieters's deliberate indifference claims in Count 7 and Nieters's claims under 42 U.S.C. § 1983 in Counts 1, 3, and 5, the Court now considers Nieters's claims under Iowa law. Deliberately indifferent policies, practices, customs, training, and supervision (Count 8) Defendants move for summary judgment on Nieters' claim in Count 8 for deliberately indifferent policies, practices, customs, training, and supervision in violation of Article I, sections 6, 7, and 8 of the Iowa Constitution. ECF No. 36-1 at 36–39. Similarly to Count 7, Nieters does not resist Defendants' motion as to Count 8. ECF No. 45 at 2. As discussed above, Nieters does not resist Defendants' motion as to this claim and thus it follows that Nieters does not generate a genuine issue of material fact on this deliberate indifference claim.

The Court grants this unresisted portion of Defendants' motion for summary judgment on Count 8.

1. Remaining state law claims

"Federal courts are courts of limited jurisdiction." Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). As discussed above, Defendants are entitled to summary judgment on Nieters's federal law claims—the only claims over which the Court has original jurisdiction. The Court can preside over state law claims ancillary to the federal claims. 28 U.S.C. § 1367(a). Because the Court grants summary judgment to Defendants on Nieters's federal claims, the Court has discretion as to whether to exercise supplemental jurisdiction over Nieters's remaining state law claims, which include: claims for violations of Article I, sections 7 and 8 of the Iowa Constitution (Counts 2, 4, and 6); and, claims under Iowa common law for malicious prosecution, false imprisonment, assault and battery, and libel (Counts 9, 10, 11, and 12). See Zubrod v. Hoch, 907 F.3d 568, 580 (8th Cir. 2018) ("A district court [that] has dismissed all claims over which it has original jurisdiction may decline to exercise supplemental jurisdiction." (alteration in original) (internal quotation marks omitted) (quoting 28 U.S.C. § 1367(c)(3))). In determining how to exercise its discretion, the Court considers "the stage at which the federal claims were disposed of, 'the difficulty of the state claim, the amount of judicial time and energy already invested in it, the amount of additional time and energy necessary for its resolution, and the availability of a state forum.'" Marshall v. Green Giant Co., 942 F.2d 539, 549 (8th Cir. 1991) (quoting Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340, 1346 (8th Cir. 1980)). "In the 'usual case' where all federal claims are dismissed on a motion for summary judgment, 'the balance of factors to be considered under the [supplemental]

jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.'" Starkey v. Amber Enterprises, Inc., 987 F.3d 758, 765 (8th Cir. 2021) (alteration in original) (quoting Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)). The Court declines to exercise supplemental jurisdiction. The remaining Iowa constitutional claims implicate uncharted areas of Iowa law over which the parties significantly disagree. See ECF No. 36-1 at 18–25, 39– 42; ECF No. 45 at 15–38; see also Baldwin v. Estherville, 915 N.W.2d 259, 277 (Iowa 2018) (establishing the availability of "all due care" immunity to direct constitutional tort claims); Venckus v. City of Iowa City, 930 N.W.2d 792, 808 (Iowa 2019) (determining direct constitutional tort claims are subject to the Iowa Municipal Tort Claims Act); Iowa Code § 670.4A (setting forth a qualified immunity standard similar to federal qualified immunity effective as of June 17, 2021). Nieters's claims under Iowa common law implicate the same facts and circumstances as his state constitutional claims. Further, there is nothing to indicate a state forum is unavailable. For these reasons, the Court declines to exercise supplemental jurisdiction over Nieters's remaining claims under Iowa law in Counts 2, 4, 6, 9, 10, 11, and 12. The Court remands them to state court.]

C. Nieters's Motion to Strike

Nieters moves to strike an expert report by Anthony DiCara, which Defendants rely upon in their motion for summary judgment. ECF No. 46. Nieters argues the expert report should be excluded because it does not contain "expert" testimony, invades the province of the jury to decide the facts, and invades the province of the Court to instruct the

jury as to the law. Id. ¶ 2. Defendants resist, arguing DiCara's testimony "will assist the jury in understanding the case . . . and any risks of [the] testimony being overbroad can be mitigated through limine rulings, cross examination, presentation of contrary evidence, and jury instructions." ECF No. 47 at 1.

The Court notes Defendants primarily rely on DiCara's expert report in their arguments regarding Nieters's excessive force claim. See ECF No. 36-1 at 25–28. The Court does not consider DiCara's expert report in analyzing Defendants' motion as to Nieters's excessive force claim. See supra Part IV.A.2.c. Nor does the Court consider the expert report in analyzing any of the other § 1983 claims discussed above. Because the Court grants in part Defendants' motion and remands the remaining claims without considering DiCara's expert report, it denies Nieters's motion to strike as moot.

V. CONCLUSION

Nieters's does not resist Defendants' motion for summary judgment on his deliberate indifference claims under federal law in Count 7. Because Nieters does not point to any evidence demonstrating a genuine issue for trial on this deliberate indifference claim, the Court grants Defendants' motion for summary judgment on Count 7. Because the Court finds Holtan is entitled to qualified immunity on Nieters's remaining federal law claims under § 1983, Defendants are entitled to summary judgment on Counts 1, 3, and 5. As to Nieters's state law claims, the Court similarly grants Defendants' unresisted motion for summary judgment on Nieters's deliberate indifference claim under Iowa law in Count 8. Having disposed of Nieters's federal claims,

the Court declines to exercise supplemental jurisdiction over Nieters's remaining claims under the Iowa Constitution and Iowa common law. Because this case was removed, the Court remands Counts 2, 4, 6, 9, 10, 11, and 12 back to the Iowa District Court for Polk County.

As to Nieters's motion to strike, the Court did not rely on the expert report at issue in Nieters's motion in analyzing Defendants' motion for summary judgment and remanding Nieters's remaining claims. For these reasons, Nieters's motion to strike is moot.

For the foregoing reasons, **IT IS ORDERED** that Defendants Brandon Holtan, Dana Wingert, and the City of Des Moines's Motion for Summary Judgment, ECF No. 33, is **GRANTED IN PART AND REMANDED IN PART.**

IT IS FURTHER ORDERED that Plaintiff Mark Edward Nieters's Motion to Strike Expert Report, ECF No. 46, is **DENIED AS MOOT.**
IT IS SO ORDERED.

Dated this 19th day of July, 2022.

REBECCA GOODGAME EBINGER
UNITED STATES DISTRICT JUDGE

42 U.S.C.A. § 1983
§ 1983. Civil action for deprivation of rights
[Statutory Text & Notes of Decisions subdivisions I to IX]
Effective: October 19, 1996
Currentness

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer1s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia,

U.S.C.A, Const. Amend, IV-Search and Seizure; Warrants
Amendment IV. Searches and Seizures; Warrants Currentness

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.