No. 24-

IN THE

Supreme Court of the United States

OFFICER BENJAMIN M. BAUER,

Petitioner,

v.

ETHAN DANIEL MARKS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

During an emergency medical evacuation amidst a large, violent protest that had become a riot, a six-foot, two-hundred pound man assaulted an officer and grabbed the officer's riot baton in an apparent attempt to disarm him. Witnessing this, and believing the attack would escalate in violence and impede the medical evacuation of an incapacitated civilian, the officer at issue used a less-lethal projectile to repel the attacker and stop the assault on his fellow officer. No officers attempted to encircle, block, chase, detain, or arrest the assailant as he fled in the direction of his choosing. The questions presented are:

1. Whether the officer's use of a less-lethal projectile to repel the attacker, to stop an assault on a fellow officer and protect an incapacitated civilian, under these particular circumstances constitutes a seizure under the Fourth Amendment.

2. Whether the law clearly established that the officer's use of a less-lethal projectile under these particular circumstances constituted a seizure or an unreasonable use of force under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Benjamin Bauer, defendant and appellant below.

Respondent is Ethan Daniel Marks, plaintiff and appellee below.

RELATED PROCEEDINGS

- *Ethan Daniel Marks v. Benjamin M. Bauer*, No. 20-cv-1913, U.S. District Court for the District of Minnesota. Order entered Feb. 2, 2023.

- *Ethan Daniel Marks v. Benjamin M. Bauer*, No. 23-1420, U.S. Court of Appeals for the Eighth Circuit. Judgment entered July 12, 2024. Order denying rehearing entered Sept. 4, 2024.

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JURISDICTION

The judgment of the Eighth Circuit was entered on July 12, 2024. The Eighth Circuit denied the timely petition for rehearing on September 4, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the U.S. Constitution states:

> 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 and affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Factual Background

The death of George Floyd sparked unprecedented civil unrest in Minneapolis. The area near the Minneapolis Police Department's Third Precinct building was the epicenter of protests, with buildings looted, damaged, and burned. (Doc. 51, at 4 ¶¶19, 21; Doc. 103-1, at 93-95, 184, 203.) During a large protest-turned-riot on May 28, 2020, across the street from the besieged Third Precinct building, one protestor was stabbed, another held at gunpoint, and a third was incapacitated on the ground from a baseball bat strike to her head. (Doc. 103-2 (9 News), at 00:10-1:17, 07:55-08:57; Doc. 112 (Meath BWC), at 17:40:15-17:40:27; Doc. 103-3.)[1]

Due to the demands on police resources, Officer Benjamin Bauer responded with only a small contingent of officers in police vehicles as rocks and objects were hurled by a hostile crowd numbering over 500 people. (Doc. 103-2 (9 News), at 02:04-03:46, 04:50-05:10; Doc. 112 (Bauer BWC), at 17:31:55-17:31:59, 17:33:40-17:34:26.) Amidst the violent activity, live on-scene news reported that officers were "heavily outnumbered" and "under real threat" at the scene described as a "modern-day war zone." (Doc. 103-2 (9 News), at 7:59-8:01; 8:25-8:29, 9:36-9:45, 11:32-11:50.) Police radio communicated that protestors were trying to barricade the end of the street to prevent officers from escaping. (Doc. 112 (Bauer BWC), at 17:36:59-17:37:11; R. Doc. 103-5, at 3.)

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1. Each body worn camera ("BWC") video is identified with the last name of the officer equipped with the BWC. "9 News" refers to video of live news coverage of the incident.

Officer Bauer and his fellow SWAT team members arrived at the scene to provide security for the other responding officers. (Doc. 103-3.) Seeing a man throw a large rock at other officers, Officer Bauer exited the SWAT van and fired a less-lethal projectile at the man, who ran from the area. (Doc. 112 (Bauer BWC), at 17:34:25-17:34:40.) Officer Bauer deployed additional less-lethal projectiles at individuals who were throwing objects at officers as they evacuated the stabbing victim. (Doc. 112 (Bauer BWC), at 17:34:40-17:39:19.) Officer Bauer and his team did not attempt to encircle, block, chase, detain, or arrest any of these assaultive individuals. (*Id.*)

Once the stabbing victim was evacuated, the SWAT team was ordered to find the protestor injured from a baseball bat strike. (Doc. 112 (Bauer BWC), at 17:39:27-17:39:31.) The incapacitated protestor needed to be evacuated:

(Doc. 112 (Meath BWC), at 17:40:42.)

Officer Bauer helped form a protective perimeter around the incapacitated protestor and the officers attempting to evacuate her. (Doc. 112 (Bauer BWC), at 17:39:47-17:40:20.) Protestors continued to throw objects at the officers on and inside the perimeter. (Doc. 112 (Meath BWC), at 17:39:56-17:39:57; Doc. 103-13, at 104:14-18); Doc. 103-3.)

Unbeknownst to Officer Bauer, Respondent Ethan Marks ("Marks"), an adult 19-year-old man who stood 6 feet tall and weighed approximately 205 pounds (Doc. 51, at 1 ¶4), began aggressively striding toward another perimeter officer, Officer Jonathan Pobuda:

(Doc. 103-2 (9 News), at 08:57; App. 3a, 34a (Officer Pobuda "was helping [to] form a perimeter around the victim").) At that moment, the on-scene reporter observed, it is "not safe for [officers] to be around." (*Id.*)

From behind, Officer Bauer heard Marks yell, "Back up, bitch!" (Doc. 112 (Bauer BWC), at 17:40:32-17:40:34.) Officer Bauer turned to see Marks shoving and punching Officer Pobuda, while lunging and grabbing the officer's riot baton in an apparent attempt to disarm the officer:

(Doc. 112 (Bauer BWC), at 17:40:35.)

(Doc. 112 (Pobuda BWC), at 17:40:36.)

(Doc. 112 (Pobuda BWC), at 17:40:36.)

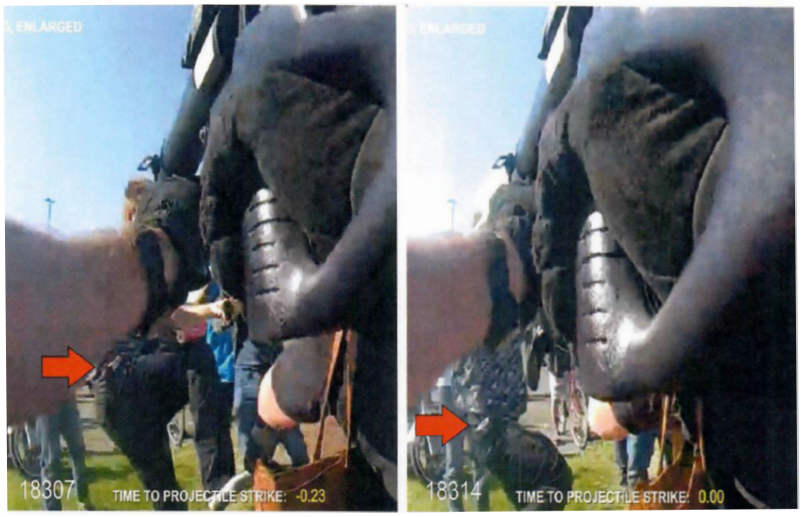
(Doc. 112 (Pobuda BWC), at 17:40:36.)

Officer Bauer believed Marks committed a serious assault and "if it kept going, then it would get worse" and delay officers' rescue of the incapacitated protestor. (Doc. 103-13, at 154:2-10; Doc. 103-3.) Although Officer Pobuda defensively used the riot baton to push Marks back a little, Marks continued to clench his hand in the same fist he used to shove and punch Officer Pobuda:

(Doc. 112 (Pobuda BWC), at 17:40:37.)

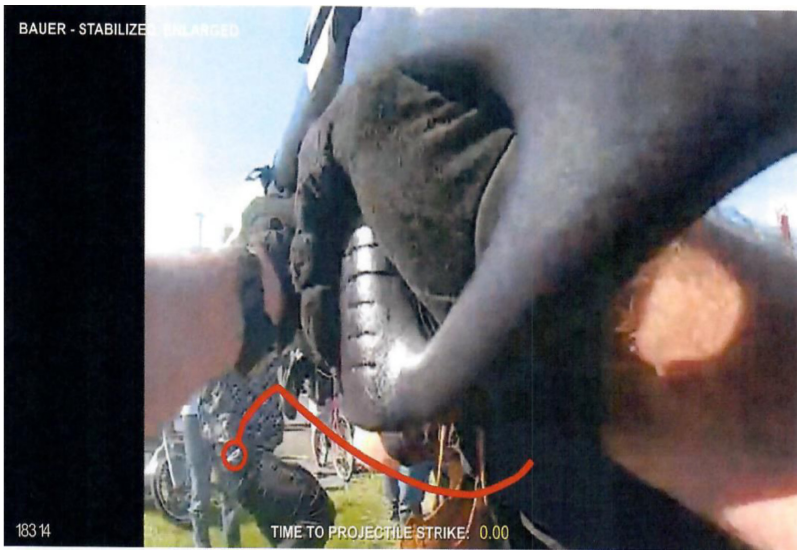
Only a fraction of a second from when Officer Pobuda broke Marks' contact with his riot baton, Officer Bauer deployed a less-lethal projectile aimed at Marks' torso. (Doc. 103-13, at 143:13-14, 149:6-15, 162:6-15.) It took half a second for Officer Bauer to raise the less-lethal launcher and fire. (App. 5; Doc. 114-2, at 10.) But just 0.23 seconds before the projectile struck, Marks' body position changed significantly as he stumbled up and down over large, corrugated pipes that were lying on the ground. (Doc. 114-2, at 10.)

The red arrows below show the elevation drop in Marks' body position occurring only 0.23 seconds before he was struck:



(Doc. 114-2, at 9.)

The red line below, which can be seen in video, tracks Marks' movement up and then down just 0.23 seconds before Marks was struck in the face rather than the torso:



(Doc. 114-2, at 9-10; Doc. 112 (video tracking movement, labeled Ex. M1).) From the time Marks yelled "Back up, bitch!" to the time Officer Bauer fired, less than 4 seconds elapsed. (Doc. 112 (Pobuda BWC), at 17:40:33-17:40:37.)

Officer Bauer fired the less-lethal projectile from 5 to 10 feet away from Marks. (App. 2a; Doc. 103-13, at 143:13-14, 149:6-15, 162:6-15.) The minimum safe range for the use of a less-lethal projectile is 5 feet and the optimal range begins at 10 feet. (R. Doc. 114-3, at 52.)

Another officer, Officer Logan Johansson, also saw Marks assaulting Officer Pobuda and attempting to disarm the officer of his riot baton. (Doc. 103-5, at 3.) At the same time Officer Bauer deployed the less-lethal projectile, Officer Johansson responded by spraying Marks with chemical irritant from an MK9 canister. (Doc. 103-5, at 3; Doc. 103-2 (9 News), at 9:02-9:03.)

Marks ran from the perimeter, unimpeded, in the direction of his choosing. (Doc. 112 (Bauer BWC), at 17:40:30-17:40:45.) No officer attempted to encircle, block, detain, arrest, or chase Marks, and no officer issued commands to Marks. (*Id.*) Having repelled Marks, Officer Bauer ordered other protestors to "back up" as he continued to maintain the perimeter until the incapacitated protestor could be moved toward the SWAT van. (Doc. 112 (Bauer BWC), at 17:40:41-17:41:15; Doc. 103-2 (9 News), at 9:37-9:47.)

As the officers began to leave the scene, live news reported that officers were defending themselves from three different angles because they were boxed-in and surrounded by people hurling large projectiles. (Doc. 103-2 (9 News), at 9:43-11:37.) Witnessing this, a reporter

remarks, "This is not Lebanon in civil war. This is the heart of America and its war on the streets. . . . That is frightening." (*Id*. at 11:32-11:50.)

II. District Court Proceedings

Marks alleged a single claim of unreasonable force under the Fourth Amendment against Officer Bauer. (Doc. 50, at 21.) He invoked the jurisdiction of 42 U.S.C. § 1983. (*Id*.) Officer Bauer moved for summary judgment, arguing entitlement to qualified immunity as to the existence of a seizure and the reasonableness of his force. (Docs. 100, 105, 138, 153 at 5:5-17:3, 22:21-29:2.)

The district court denied the motion. (App. 30a-59a.) Drawing on *Torres v. Madrid*, 592 U.S. 306 (2021), the court held that Officer Bauer seized Marks because he applied physical force "to stop him from re-engaging with Officer Pobuda." (App. 42a.) As to the force, the court held a jury could conclude that Officer Bauer used deadly force because the less-lethal projectile struck Marks' face rather than his torso. (App. 45a-52a.) The court held that clearly established law required a showing of an immediate threat of death or serious bodily injury to use deadly force and, according to the court, Marks presented neither. (App. 57a.) If the force was considered non-deadly force, however, the court cited to three Eighth Circuit cases involving a leg sweep, takedowns, macing, and a face punch to conclude that it "would have been clear" that Officer Bauer's force was a disproportionate response to the threat before him. (App. 58a)(citing to *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819 (8th Cir. 2011); *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir. 2009).)

The district court subsequently issued an order of recusal pursuant to 28 U.S.C. § 455. (Doc. 174.)

III. Court of Appeals Proceedings

A divided panel of the Eighth Circuit affirmed the district court judgment. Analyzing the existence of a seizure, the divided panel focused on Officer Bauer's testimony about why he deployed the less-lethal projectile. (App. 9a.) Officer Bauer explained that he saw Marks committing a bad assault on Officer Pobuda and was concerned the assault would get worse if it kept going. (*Id.*) The divided panel considered this to be an admission that Officer Bauer "used force to restrain Marks' movement[.]" (App. 9a.) Because the less-lethal projectile "stopped Marks" from assaulting Officer Pobuda and "achieved the result Officer Bauer intended," the divided panel concluded that Officer Bauer seized Marks. (App. 10a.)

As to whether Officer Bauer's force was unreasonable under clearly established law, the divided panel opined that Officer Bauer's force could be considered deadly force, because the less-lethal projectile struck Marks' face rather than his torso. (App. 18a-19a.) And, "[t]o the extent that Officer Bauer used deadly force when he shot Marks [with the less-lethal projectile], it was clearly established in May 2020 that the use of deadly force on a non-threatening suspect was objectively unreasonable." (App. 19a.) In the event that Officer Bauer used non-deadly force, the divided panel relied on the same cases advanced by the district court. (App. 20a) (citing *Montoya, Johnson*, and *Rohrbough*). The divided panel defined the clearly established law as follows: it is "objectively unreasonable to use more than *de minimis* force to seize

a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring commands." (App. 21a.) The divided panel decided a jury could conclude that Officer Bauer's use of the less-lethal projectile occurred when Marks was not a threat, not fleeing, and not ignoring officer commands. (App. 22a.)

Judge Stras dissented. (App. 23a.) Citing to *Kisela v. Hughes*, 584 U.S. 100 (2018), Judge Stras reminded that "[u]se of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (App. 24a.) Judge Stras recounted that Officer Bauer "encountered a large, out-of-control crowd" that threw water bottles and rocks at officers. (App 23a.) Within that, Officer Bauer formed a "protective perimeter" around one of the injured protestors. (*Id.*) Judge Stras accurately describes a "violent situation that only grew more precarious by the second." (App. 28a.)

Judge Stras explained, it was within this context that Officer Bauer encountered Marks, "an angry six-foot-tall man" that "attack[ed] a fellow officer." (App. 29a.) Marks "screamed '[b]ack up, bitch,' pushed the officer with both hands, and tried to grab his riot baton." (App. 24a.) Officer Bauer fired his "less-lethal launcher" in response. (*Id.*) Judge Stras adeptly noted that "context matters." (*Id.*) And, "given the chaos and violence quickly enveloping the officers, there is no way to conclude that Officer Bauer's action *clearly* violated Marks's rights." (*Id.*)

In fact, Judge Stras concluded that "two cases suggest just the opposite." (App. 25a.) The case of *White*

v. Jackson, 865 F.3d 1064 (8th Cir. 2017) was described by Judge Stras as being "strikingly similar" to the instant matter. (App. 25a.) It involved a protest that had grown violent in the wake of a police shooting. (*Id.*)(citing 865 F.3d at 1069). A bystander who had not threatened or attacked anyone but ignored commands to stop approaching a police skirmish line, was shot by "five bean bag rounds and four rubber bullets." (*Id.*)(citing 865 F.3d at 1072-1073.) The Eighth Circuit held that, "under those circumstances, 'a reasonable officer could have concluded that [the bystander] had been part of the violent crowd [and] that his advances toward the skirmish line posed a threat to officer safety.'" (*Id.*) (citing 865 F.3d at 1079.) Just as in *White*, Judge Stras observed that Officer Bauer and his fellow officers were "caught in the middle of race-related protests that were nearing a flashpoint." (App. 25a.)

Judge Stras explained that a "similar situation arose" in *Bernini v. St. Paul*, 665 F.3d 997 (8th Cir. 2012) as well. (App. 25a.) Officers fired munitions containing "rubber pellets" to keep a group of approximately 100 people from marching toward the Republican National Convention. (*Id.*) (citing 665 F.3d at 1001.) The Eighth Circuit again held the use of force was reasonable because the crowd was acting as a unit and "intended to break through [a] police line." (*Id.*) (citing 665 F.3d at 1004, 1006.) Judge Stras recognized that, just as in *Bernini*, Officer Bauer and his fellow officers "formed a perimeter to protect a sensitive target." (*Id.*)

According to Judge Stras, "If anything, Officer Bauer and the SWAT team faced even more danger" than was present in *White* and *Bernini.* (App. 25a.) He explained, "Marks was neither a bystander in the wrong place at

the wrong time, nor a member of a larger group trying to breach a police line. But by attacking an officer, he had broken the law and become a danger." (App. 25a-26a) (internal citations omitted). Judge Stras noted, "'[A] reasonable officer, looking at the legal landscape at the time . . . , could have interpreted [*White* and *Bernini*] as *permitting* the' use of force rather than clearly prohibiting it." (App. 26a)(citing *D.C. v. Wesby*, 583 U.S. 48, 68 (2018).) "At a minimum, 'the constitutional question' was not 'beyond debate.'" (*Id.*) (citing *Ashcroft v. Al-Kidd*, 563 U.S. 731 (2011).)

Judge Stras rejected the cases advanced by the divided panel and Marks to set forth the clearly established law, admonishing they "defin[e] the right at a high level of generality" and "lack factually 'similar circumstances.'" (App. 26a)(citing *Wesby*, 583 U.S. at 64 (2018).) Addressing the facts in *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012), Judge Stras observed that "no one attacked an officer. . . . [t]here was no push, no struggle, no threat, not even a single word of profanity" before an officer conducted a takedown of a woman with a leg sweep. (App. 27a.) Regarding *Johnson v. Carroll*, 658 F.3d 819 (8th Cir. 2011), Judge Stras noted there was "no evidence that [the woman] *actively pushed* the officers . . . , *threatened* them, or took any *other* action against them" before she was pushed to the ground. (App. 27a-28a.) It did not go unnoticed by Judge Stras that "Marks, by contrast, did each of those things." (App. 28a.) Judge Stras described *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir. 2009) as being "even further afield" because "[n]o one in that case . . . 'pose[d] an immediate threat to the [officer's] safety" before the officer punched a man, took him to the ground, and landed on top of him. (App. 28a.) Moreover, none of the

cases cited by the divided panel involved a "violent crowd." (App. 27a.) With respect to the cases cited by Marks, Judge Stras concluded "none gets him any closer to identifying a clearly established right" because each case involved officers using lethal firearms to shoot subjects that "were alone and posed no threat" or, in one instance, resulted in the shooting of a carjacking *victim*. (App. 28a.)

Judge Stras concluded, "no one can identify a single case involving 'similar circumstances' that would have provided 'fair notice' that [Officer Bauer's] actions 'violated [a] Fourth Amendment' right. Not one." (App. 24a) (internal citations omitted). In the absence of case law providing fair notice to Officer Bauer, Judge Stras declared that the divided opinion left officers with the untenable dilemma of choosing between protecting life or avoiding legal liability. "Today's message is unmistakable: 'even in the absence of a clearly controlling legal rule, think twice before acting, regardless of whether your own life [or another's] is at stake, because a court may step in later and second-guess your decision.'" (App. 29a) (citations omitted).

Officer Bauer's petition for rehearing was denied. (App. 76a.) The order provided, "Judge Loken, Judge Gruender, Judge Shepherd, and Judge Stras would grant the petition for rehearing en banc. Judge Stras would grant the petition for panel rehearing." (App. 76a-77a.)

REASONS FOR GRANTING THE PETITION

I. The Decision of the Divided Panel is Wrong on a Constitutional Issue that is Recurring and Important.

The divided panel ignored this Court's holding in *Torres v. Madrid*, 592 U.S. 306 (2021) to conclude Officer Bauer seized Marks. This Court should grant review to resolve the important and recurring constitutional issue raised in this case.

In *Torres*, this Court stressed that not "every physical contact between a government employee and a member of the public [is transformed] into a Fourth Amendment seizure." *Id*. at 317. When a seizure claim is premised on a use of physical force, rather than a show of authority, the Fourth Amendment "requires the use of force *with intent to restrain*." *Id.* The intent to restrain is indispensable, because "force intentionally applied for some other purpose" is not a seizure. *Id*. In considering whether an officer had an intent to restrain, a court does not examine "the subjective motivations of police officers" or the "subjective perceptions of the seized person." *Id*. at 998-99. "The appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain." *Id.* at 307.

In the years since *Torres* was decided, lower courts have wrestled with applying the holding that force used "for some other purpose" than to restrain is not a seizure. Nowhere has this issue been more central and divided than in cases involving force used by law enforcement to repel individuals and disperse crowds at protests. In

fact, in briefing to the Eighth Circuit, Marks cited to *Alsaada v. City of Columbus*, where the court described the "murk[y] landscape" of cases addressing whether a seizure occurs under these circumstances. 536 F.Supp.3d 216, 261 (S.D. Ohio 2021) (granting injunctive relief). In that case, the court questioned, is there a seizure "when the police used less-lethal force," including chemical irritants and less-lethal projectiles, "to disperse—rather than detain—activists, protestors, and congregants?" *Id.* at 261, 263. Looking for guidance, it observed "[s]ome courts answer this question in the affirmative and others in the negative" while "[o]thers do not answer it at all and instead assume the Fourth Amendment applies." *Id.* (citing to cases in California, Florida, Illinois, Michigan, New York, North Dakota, Oregon, Second Circuit, Sixth Circuit, and Eighth Circuit).

The various rulings not only dictate whether officers and their government employers are exposed to monetary liability, but they also control possible injunctive relief, often in moments of great peril and historical importance. Such injunctions can limit the capacity of law enforcement to effectively respond to civil disturbances that not only pose a threat to community safety but to the officers responsible for restoring order. These cases have not risen to this Court for consideration, but they involve an important and recurring issue. This case presents a good vehicle for the Court to review this pressing constitutional question.

Though there is a divide amongst the lower courts, the "better argument" advises that force used to disperse, redirect, or keep protestors away from an area does not effect a seizure. *Ferris v. D.C.*, No. 1:23-cv-481-RCL,

2023 WL 8697854, at *8 (D.D.C. 2023). In *Ferris*, the court dismissed protestors' Fourth Amendment claims because they failed to allege a seizure where officers intended to expel rather than restrain protestors with less-lethal munitions and launched projectiles. *Id.* at *2-3, 8-9. Applying *Torres*, the court held that an "intent to restrain" is a "prerequisite" for a seizure. *Id.* at *8. Thus, the question before the court was "whether intent to *disperse* counts as intent to restrain." *Id.* at *9. The court concluded that "an intent to 'keep out or to redirect' is different from an intent to 'restrain' or to 'apprehend.'" *Id.* at *10 (internal citations omitted). This ruling, the court explained, held true to *Torres* and Supreme Court precedent. *Id.* at *10 (citing *Terry v. Ohio*, 392 U.S. 1, 16 (1968) questioning whether police conduct restrains a subject's "freedom to walk away"). Placing "restrain" in the same category as "apprehend" is consistent with *Torres*' statement that the Court was not considering force used for "some other purpose" but that "[i]n this opinion, we consider only force used to apprehend." *Torres*, at 592 U.S. at 317. *Torres* indicates that the "intent to restrain" is associated with the goal of apprehension, detention, or arrest. *See id.* at 312 ("a 'seizure' was the 'act of . . . laying hold on suddenly'—for example, when an 'officer seizes a thief.'")

Here, although Officer Bauer identified this controlling precedent, the divided panel ignored *Torres*. In a stark omission, the divided panel does not cite or analyze *Torres* anywhere in its opinion. (App. 1a-23a.) Instead, the divided panel found the "guidance" in *Brower v. Cnty. of Inyo*, 486 U.S. 593 (1989) to be "helpful" in deciding whether Officer Bauer seized Marks. (App. 9a.) But *Brower* is a "prime example" of a seizure by a "show of authority"

rather than a seizure by force. 592 U.S. at 322. Marks only claims seizure by force. Marks did not submit to Officer Bauer as would be required to constitute a seizure from a show of authority. *Id.* at 11. To the contrary, Marks ran away unimpeded.

California v. Hodari D., 499 U.S. 621 (1991) does not help, as the divided panel appeared to believe. (App. 8a.) *Hodari D.* is also a case principally concerning a show of authority, *Torres*, 592 U.S. at 312, holding that a juvenile was not seized during the time when an officer gave chase because the juvenile did not submit by halting or yielding to the officer. 499 U.S. at 623. Admittedly, *Hodari D.* did comment that the word "seizure" encompasses physical force to restrain movement, even when it is ultimately unsuccessful. *Id.* at 626. However, *Torres* made clear that the use of physical force "to apprehend" gives way to a seizure only if the force was used with an "*intent*" to restrain rather than "some other purpose", and is judged by an "objective test" rather than the subjective motivations of the officer. 592 U.S. at 317.

Here, there was no force to apprehend Marks. And, there was no intent to restrain Marks' freedom of movement. Apparent from the video, there is no objective manifestation of an intent to restrain, *i.e.*, apprehend, detain, or arrest by force. Officer Bauer did not try to detain Marks or do anything to prevent Marks' departure. He did not chase, pursue, or arrest Marks. He used a less-lethal projectile to repel Marks from Officer Pobuda, while defending the perimeter around the incapacitated protestor. After the use of the less-lethal projectile, Marks was allowed to run away in any direction of his choosing.

Rather than relying on these objective manifestations, the divided panel relied on Officer Bauer's subjective intent to find a seizure occurred. The divided panel block-quoted Officer Bauer's testimony explaining that he used the less-lethal projectile because he believed Marks was committing a bad assault on Officer Pobuda and, if it kept going, then it would only get worse. (App. 9a.) The divided panel concluded the projectile "stopped Marks and achieved the result Officer Bauer intended." (App. 10a.) Similarly, the district court decided Officer Bauer seized Marks because he used the projectile "to stop [Marks] from re-engaging with Officer Pobuda." (App. 43a.)

But Officer Bauer's use of force to stop the attack or prevent Marks from re-engaging with Officer Pobuda does not constitute an "intent to restrain" as that term is used in *Torres*. Stopping Marks' assault with force intended to drive him away is distinct from attempting to apprehend Marks for that assault and keep him at the scene.

The opinion of the divided panel is premised on the legal conclusion that using force to keep a subject away, to stop an assault or prevent a subject from re-engaging, constitutes a restraint on a subject's freedom of movement. *An assault on an officer is not an expression of freedom of movement.* Marks was not engaged in anything even resembling freedom of movement—he was not walking, running, driving, or traveling. He was shoving, punching, and attempting to disarm an officer.

Additionally, the conclusion of the divided panel presents a conflict with caselaw from the Eleventh Circuit. In *Pinto v. Collier Cnty.*, the Eleventh Circuit held that force used by a sheriff's deputy to separate individuals engaged in an altercation and to prevent further escalation

of the altercation did not effect a seizure. No. 21-13064, 2022 WL 2289171 (11th Cir. 2022). In that case, a sheriff 's deputy saw the plaintiff having an altercation with a bar manager at an outdoor shopping area. *Id.* at *1. The deputy approached and pushed the plaintiff to keep the two men apart. *Id.* The plaintiff sued the deputy under the Fourth Amendment for that push and other events transpiring after. *Id.* The Eleventh Circuit held that the "push was not a seizure under the Fourth Amendment." *Id.* at *4 n.7.

The Eleventh Circuit explained that a person is seized under the Fourth Amendment when an officer, by force or show of authority, terminates or restrains a person's "freedom of movement through means intentionally applied." *Id.* (quoting *Brendlin v. California*, 551 U.S. 249, 254 (2007)). A Fourth Amendment seizure requires an "objective manifestation of 'an intent to restrain'" a person's freedom of movement. *Id.* "Critically," the Eleventh Circuit explained, "'force intentionally applied for some other purpose' is not a seizure." *Id.* (citing *Torres*, 592 U.S. at 317.) Although the push was intentionally applied, "it was not done to restrain [plaintiff] or terminate his movements but 'for some other purpose'—*i.e.*, to separate him from the manager to prevent an escalation of the altercation between the two men." *Id.* It bears repeating, so the Eleventh Circuit reiterated, the "push was not a seizure under the Fourth Amendment because it was not done with 'an intent to restrain,' but rather for some other purpose'—namely to separate two men engaged in an altercation outside of a crowded bar." *Id.* at *6.

Like the deputy in *Pinto*, Officer Bauer's force was not used with an intent to restrain but for "some other

purpose." Namely, to stop Marks from assaulting and re-engaging with Officer Pobuda. That is not a seizure under *Torres*, or any other authority from this Court.

II. The Divided Panel of the Court of Appeals Contravenes this Court's Precedent on Qualified Immunity Requiring that the Law Be Clearly Established in a Particularized Sense.

This Petition presents a question of exceptional importance. This Court recognizes that qualified immunity is a matter of "importance" to "society as a whole." *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015); *see also White v. Pauly*, 580 U.S. 73, 79 (2017). "Because qualified immunity is 'an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). When lower courts improperly allow suits to proceed, it "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). Mindful of these risks, this "Court often corrects lower courts when they wrongly subject individual officers to liability" by denying qualified immunity. 575 U.S. at 611 n.3 (collecting case reversals); *see also Kisela v. Hughes*, 584 U.S. 100, 105 (2018); *City of Escondido v. Emmons*, 586 U.S. 38 (2019). Such reversals are necessary to "reiterate the longstanding principle[s]" associated with qualified immunity. 580 U.S. at 79.

Officers are entitled to qualified immunity "unless (1) they violated a federal statutory or constitutional right,

and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *D.C. v. Wesby*, 583 U.S. 48, 62-63 (2018). For conduct to violate a "clearly established" right, "existing precedent must have placed the statutory or constitutional question beyond debate." 580 U.S. at 79. "An officer 'cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.'" 584 U.S. at 105. The Court has stressed that such "specificity is especially important in the Fourth Amendment context[.]" *Mullenix v. Luna*, 577 U.S. 7, 12 (2015); 584 U.S. at 104 (same); *Wesby*, 583 U.S. at 64 (same). The standard for clearly established law is "demanding" and "protects all but the plainly incompetent or those who knowingly violate the law." 583 U.S. at 63.

A. Seizure

Even if the Court deems that Officer Bauer's force effected a seizure, this Court should still review the important question of whether the law clearly established the existence of a seizure in May 2020, before *Torres* was decided. Both parties briefed Officer Bauer's claim that he was entitled to qualified immunity based on the clearly established law governing seizures. (Petitioner Bauer's Br. at 21-34; Respondent Marks Br. at 29-40; Petitioner Bauer's Reply Br. at 16-21.) But the divided panel is virtually silent on this subject. (App. 1a-23a.) Except for a brief remark attempting to distinguish *one* of the cases relied on by Officer Bauer, the divided panel offers no explanation for denying Officer Bauer qualified immunity. (App. 8a-9a)(referencing *Dundon v. Kirchmeier*, 85 F.4th 1250 (8th Cir. 2023).) That cannot be countenanced

with this Court's repeated reminders "stress[ing] the importance of resolving immunity at the earliest possible stage in litigation." *Pearson*, 555 U.S. at 232.

Officer Bauer is entitled to qualified immunity under Eighth Circuit precedent. In *Dundon v. Kirchmeier*, a district court denied a preliminary injunction sought by Dakota Access Pipeline protestors asserting their Fourth Amendment rights were violated when law enforcement used less-lethal projectiles, including rubber bullets, direct impact sponge rounds, and bean bag rounds, to keep protestors back from a police line and barricade. No. 1:16-cv-406, 2017 WL 5894552, *3-7, *10-11 (D.N.D. Feb. 7, 2017). The district court commented that although "the majority of the protesters [were] non-violent" it was clear that there was a "sizeable minority of protesters" who were committing "acts of violence." *Id.* at *8. In assessing the protestor's probability of success on the merits, the district court reasoned the protestors had not been seized by the force because they were not arrested, detained, or commanded to stay, and they could have removed themselves by disengaging and dispersing. *Id.* at *16, 18. On appeal, the Eighth Circuit affirmed the "well-reasoned" opinion. 701 Fed.Appx 538 (8th Cir. 2017) (per curiam). This was the state of the law as of May 2020.

The Eighth Circuit later examined a summary judgement order in the same case and held that law enforcement officials were entitled to qualified immunity, because it was not clearly established that use of less-lethal projectiles to disperse the crowd was a seizure. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1254, 1257 (8th Cir. 2023). The protestors maintained that the officers' use of less-lethal projectiles constituted a seizure because the

force "knocked most of the Appellants and many of the assembled persons off their feet or otherwise restricted their freedom of movement by stopping them in their tracks." *Id.* at 1255-1256. The protestors claimed *Torres* supported their Fourth Amendment claim. *Id.* at 1256. The Eighth Circuit rejected that argument, explaining "*Torres* involved force used to *apprehend* a suspect and did not address whether force used only to compel departure from an area constitutes a seizure." *Id.* (internal citation omitted). The Eighth Circuit declared, this "court has recognized that the law is not clearly established in this area." *Id.* (citing to *Quraishi v. St. Charles Cnty.*, 986 F.3d 831 (8th Cir. 2021) and *Martinez v. Sasse*, 37 F.4th 506 (8th Cir. 2022).)[2]

Officer Bauer is entitled to qualified immunity under *Dundon*. Similar to the officers protecting a police line in *Dundon*, Officer Bauer and Officer Pobuda were helping to "establish a perimeter for the officers who were trying to evacuate" the incapacitated protestor struck with a baseball bat. (App. 3a.) As Judge Stras' dissent describes, the "officers formed a perimeter to protect a sensitive target." (App. 25a.) Officer Bauer used a less-lethal projectile to stop Marks' assault on a fellow officer on the perimeter. Just like the protestors in *Dundon*, Marks was

2. *Quraishi v. St. Charles Cnty.* held that reporters subjected to tear gas while covering protests were not seized even though they "could not stay in their chosen location" because the "reporters' freedom to move was not terminated or restricted. They were dispersed." 986 F.3d 831, 840 (8th Cir. 2021)(internal citation omitted). *Martinez v. Sasse* held that an officer's push to repel an attorney from entering an Immigration and Customs Enforcement facility was not clearly established to constitute a seizure. 37 F.4th 506, 510 (8th Cir. 2022)

not ordered to stay, was not arrested or detained, and he remained free to disengage from the officers and leave in the direction of his choosing.

Returning to the divided panel's brief remark to distinguish *Dundon*, they stated, "Officer Bauer was not dispersing a crowd the moment he aimed and shot Marks." (App. 8a-9a.) Although Officer Bauer was not continuously deploying less-lethal projectiles, the video shows that Officer Bauer was compelled on multiple occasions to repel assaultive protestors with less-lethal projectiles. Indeed, the divided panel observed, "Officer Bauer exited the SWAT van, moved toward the area where people were throwing objects, and deployed his launcher at the individuals from a distance." (App. 2a-3a.) That Officer Bauer only used force on protestors when they engaged in violent acts towards officers—as did Marks—does not undermine the fact that the intent was to repel those protestors and does not materially distinguish this case from *Dundon*.

In a concerning turn of events, the Eighth Circuit issued an opinion—from the *same* authoring judge on the *same* day Officer Bauer was denied qualified immunity—reaching the opposite result for other law enforcement officials. In *Wolk v. City of Brooklyn Center*, 107 F.4th 854, 859 (8th Cir. 2024), the Eighth Circuit held that law enforcement officials were entitled to qualified immunity because it was not clearly established in April 2021 that using force to disperse protestors was a seizure. The force included an officer striking the plaintiff with a rubber bullet from less than 10 feet away. *Id*. at 858. The Eighth Circuit concluded that law enforcement was entitled to qualified immunity even though "some protestors were thrown to the ground for arrest, which tends to show

an intent to apprehend rather than disperse." *Id.* at 859. Officer Bauer's use of the projectile on Marks was not in concert with any additional force intended to apprehend. Officer Bauer has a stronger case for qualified immunity yet he was denied relief.

Even if the divided panel did not think *Dundon, Quraishi*, and *Martinez* set the clearly established law applicable to Officer Bauer, it was required to at least identify caselaw that would have put Officer Bauer on fair notice that his use of a less-lethal projectile was unlawful under these particular circumstances. *Kisela*, 584 U.S. at 104. Yet the divided panel did not conduct an analysis of the clearly established law as of May 2020. Instead, the divided panel reached the separate legal conclusion that a seizure had actually occurred. Still, reviewing the cases relied on by the divided panel to reach that decision does not reveal any cases involving similar circumstances. Indeed, none of the cases cited by the panel involve the same use of force (less-lethal projectile), the same circumstances (assaultive conduct by plaintiff amidst a large-scale protest), or an unrestrained plaintiff (leaving in the direction of their choosing). (App. 8a-11a) (citing *Hodari D., Brower, Pollreis v. Marzolf*, 66 F.4th 726 (8th Cir. 2023)(show of authority, woman seized when officer stepped toward her, pointed his taser, and ordered her to go to her house, and woman complied), and *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995)(man seized when officer attempted to hit him with squad car and again when he was shot with lethal firearm as he tried to escape). Given the materially different circumstances, these cases did not provide fair notice to Officer Bauer that his force would be deemed a seizure and did not place the constitutional issue beyond debate. *White*, 580 U.S. at 79.

B. Force

This Court should use this case as a vehicle to remind lower courts that they are bound by the instructions set forth by this Court governing qualified immunity. It was not clearly established in May 2020 that Officer Bauer's use of a less-lethal projectile against Marks, under the circumstances of this case, would be considered objectively unreasonable.

The divided panel's analysis of clearly established law was flawed at its inception. It began by entertaining the notion that Officer Bauer's use of a less-lethal projectile amounted to deadly force. The divided panel relied on department training and manufacturer warnings to decide the use of a less-lethal projectile could possibly be considered deadly force. (App. 4a-5a.) But neither of those sources set clearly established law, at least this Court has not advised as much. *See City and Cnty. of San Francisco*, 575 U.S. at 616 ("Even if an officer acts contrary to her training, however . . . that does not itself negate qualified immunity where it would otherwise be warranted.")

Considering the less-lethal launcher as deadly force contravenes the Eighth Circuit's own precedent categorizing the use of less-lethal projectiles as nonlethal force. In 2017, the Eighth Circuit decided *White v. Jackson*, 865 F.3d 1064 (8th Cir. 2017), a case described by dissenting Judge Stras as being "striking similar" to the instant matter. (App. 25a.) In *White*, the Eighth Circuit repeatedly and consistently described less-lethal projectiles as being "nonlethal" even when a projectile struck a protestor's face. 865 F.3d 1064, 1070, 1071, 1073,

1076, 1079 (referring five times to "nonlethal projectiles" and explaining a "police officer shot him in the *face* with a *nonlethal* projectile") (emphasis added). Six years later, the Eighth Circuit confirmed that *White* involved "non-lethal force." *Laney v. City of St. Louis, Missouri*, 56 F.4th 1153, 1156 (8th Cir. 2023).

Officer Bauer was entitled to rely on the Eighth Circuit's affirmative representations that use of less-lethal projectiles constitutes nonlethal force, even if the projectile strikes a subject's face. *Pearson*, 555 U.S. at 244-245 ("Police officers are entitled to rely on existing lower court cases without facing personal liability for their actions.") Indeed, it would not have been "apparent" in "light of [this] pre-existing law" that the use of a less-lethal projectile would be treated as deadly force by the court. *Anderson*, 483 U.S. at 640. The divided panel's about-face from *White* and *Laney* is particularly troubling for officers in Minnesota, where state statute advises officers that the use of less-lethal projectiles does not constitute deadly force.[3]

To justify the deadly force analysis, the divided panel relied on decisions involving either a lethal firearm or use of a squad car under materially different factual scenarios. (App. 17a) (citing *Banks v. Hawkins*, 999 F.3d 521, 526 (8th Cir. 2021) where officer "instantaneously" shot a lethal gun when the front door opened at the site of a potential domestic disturbance)), App. 17a (citing *Cole Estate of*

3. Minn. Stat. § 609.066 states, "The intentional discharge of a firearm, *other than a firearm loaded with less lethal munitions* and used by a peace officer within the scope of official duties, in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force." (emphasis added).

Richards v. Hutchins, 959 F.3d 1127, 1133 (8th Cir. 2020) where officer shot armed man with a lethal firearm as he was "visibly retreating" from uncle's home, after a dispute with the family member, and while the man's back was to the officer), App. 18a (citing *Ludwig*, 54 F.3d at 468-469 where officer attempted to hit man with squad car and then shot the man with a lethal firearm during welfare check call).)

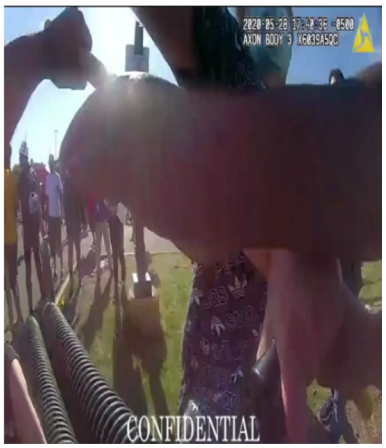
This Petition does not contest that caselaw as of May 2020 clearly established that firing a lethal firearm loaded with lethal bullets at a subject amounts to deadly force. Nor does this Petition contest that, at that time, caselaw clearly established that intentionally striking a subject with a police squad car could amount to deadly force under certain circumstances. Instead, this Petition seriously questions how cases involving such disparate types of force and circumstances placed the purported lethality of a less-lethal projectile "beyond debate," *White*, 580 U.S. at 79 (2017), or provided "fair notice" to Officer Bauer for the purpose of denying him qualified immunity. *Kisela*, 584 U.S. at 104, 107. This Petition poses those important questions because the opinion of the divided panel offers no attempt at an explanation. Only this Court can remind the divided panel that caselaw must approximate the specific circumstances and type of force used to justify denying qualified immunity.

The cases advanced by the divided panel which involve non-deadly force similarly fail to set forth clearly established law governing Officer Bauer's force. As Judge Stras points out in the dissent, the divided panel does not identify a single case involving similar circumstances that would have provided "fair notice" that Officer Bauer's

actions violated the Fourth Amendment—"Not one." (App. 24a.) Indeed, Judge Stras' dissent readily distinguishes *Montoya*, *Johnson*, and *Rohrbough* based on the type of force, setting, circumstances, level of physical resistance, and the absence of a violent crowd. (App. 26a-29a.) None of those cases involve the use of a less-lethal projectile. None involve officers surrounded by a violent crowd or tending to an emergency medical evacuation. And none involve a subject displaying more that *de minimis* resistance. Notably, for each case, the divided panel acknowledges that the plaintiff posed "no threat to the officer" or "posed at most a minimal safety threat" or acted in a "*de minimis* or inconsequential" manner. (App. 20a-21a.) These cases do not "'squarely govern' the specific facts at issue" and cannot be the basis for denying Officer Bauer qualified immunity. 584 U.S. at 104.

The divided panel advances these non-deadly force cases for the broad proposition that "[o]ur cases clearly established that it was objectively unreasonable to use more than *de minimis* force to seize a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring officer commands." (App. 21a.) For this general proposition to govern Officer Bauer's force, it is incumbent that Marks would be viewed as a non-threatening misdemeanant by a reasonable officer on the scene.

Marks was objectively threatening. He yelled "Back up, bitch!" shoved, punched, and grabbed Officer Pobuda's riot baton:



Yet the divided panel abrogated its responsibility to grant qualified immunity, claiming that it "must view the evidence in the light most favorable to Marks" and it "is for a jury to interpret the nature and extent of the contact between Marks and Officer Pobuda." (App. 22a.)

That, of course, is not the rule of law where video evidence blatantly contradicts Marks' version of events. *Scott v. Harris*, 550 U.S. 372, 380-381 (2007). The divided panel conspicuously failed to apply this Court's instruction that it "should have viewed the facts in the light depicted by the videotape." (*Id.*) And, with the video, this Court need not accept the divided panel's baffling decision to downplay an assault and a felonious attempt to disarm an officer as a mere "scuffle." (App. 22a.)

Marks was not a mere misdemeanant. A reasonable officer could have viewed Marks as attempting to disarm Officer Pobuda, a felony-level offense that would have exposed others to grave danger. Minn. Stat. § 609.504. The divided panel responds to the indisputable video showing Marks grabbed Officer Pobuda's riot baton by concocting an immaterial fact dispute. According to the divided panel, the video does not resolve whether "Marks was grasping at the baton to maintain his balance or attempting to disarm Officer Pobuda" and that dispute must be resolved by the "trier of fact." (App. 13a.) But Marks' reason for grabbing the riot baton is not relevant to the legal issue before the Court. This Court's most basic instruction governing the "'reasonableness' of a particular use of force" is that it "must be judged from the perspective of a reasonable officer on the scene[.]" *Graham v. Connor*, 490 U.S. 386, 396 (1989). The divided panel violated this cardinal rule by considering Marks' perspective rather than that of a reasonable officer in Officer Bauer's position on-scene. Indeed, the divided opinion rests on the dubious conclusion that a reasonable officer on scene could not have viewed this as Marks attempting to disarm Officer Pobuda:

But, of course, another officer on scene did believe that Marks was attempting to disarm Officer Pobuda. The divided panel makes no mention of that fact that Officer Johanson, witnessing this very same conduct, believed Marks was trying to disarm Officer Pobuda, and he too responded by using force against Marks.

Notwithstanding the assault and felony attempt to disarm, the divided panel decided that the threat posed by Marks had arguably passed when Officer Pobuda defensively pushed Marks back slightly. But it was not clearly established that such minimal distance would negate the threat posed by Marks. Rather, this Court instructs, "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Judge Stras' dissent properly recognized that Officer Bauer was forced to weigh the very real risk that Marks intended to fight back. Judge Stras questioned, "Think of the split-second decision [Officer Bauer] faced: give a six-foot-tall, 200-pound man who had just attacked a fellow officer a second chance or neutralize him with a chemical round." (App. 24a.) Judge Stras continued, "During the chaos, Officer Bauer made a 'split-second judgment[ ]' to use his less-lethal launcher rather than giving an angry six-foot-tall man another chance to attack a fellow officer." (App. 29a.)

Consistent with *Saucier*, Judge Stras' dissent, and the video, a reasonable officer could have believed that Marks intended to fight back. The video does not depict Marks in a state of submission at the time Officer Bauer used force. Rather, Marks continued to clench his hand in a ready-to-fight fist (left) just like the fist he used to shove and punch Officer Pobuda before (right):

As Judge Stras' dissent reminds, "context matters." (App. 24a.) So, consider the context in which Marks kept his hand in a clenched fist. He aggressively yelled, "Back up, bitch!" Then he shoved and punched Officer Pobuda with a clenched fist. He also grabbed Officer Pobuda's riot baton. Under these circumstances, a reasonable officer could have believed that Marks continued to clench his fist because he was likely to fight back. *See Kohorst v. Smith*, 968 F.3d 871, 879 (8th Cir. 2020) (when a suspect who had previously been physically resistant "began twisting his hands" it "could lead to an objectively reasonable belief that [plaintiff] would resist or fight back".) Even if that were a mistaken belief, it does not defeat Officer Bauer's right to qualified immunity.

Simply put, Officer Bauer's use of the projectile "did not come at a time after which a reasonable officer would think the threat had passed." *Mullins v. Cyranek*, 805 F.3d 760, 768 (6th Cir. 2015). The entire incident took only four seconds, and Officer Bauer was forced to make a split-second decision amidst a chaotic, dangerous incident. This Court advises that 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." *Graham*, 490 U.S. at 396-97.

A deeply problematic part of the divided panel's analysis is that it discarded the Eighth Circuit's "strikingly similar" precedent in *White v. Jackson*, 865 F.3d 1064 (8th Cir. 2017) and *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012) to deny Officer Bauer qualified immunity. (App. 25a.) According to Judge Stras' dissent, a reasonable

officer could have interpreted these cases as "*permitting*" Officer Bauer's use of force. (App. 26a.)

The events in *White v. Jackson* arose out of protests to a fatal officer-involved shooting. 865 F.3d at 1069. During a protest, the crowd grew violent. *Id.* at 1072. The police gave orders and formed a skirmish line to get the crowd to disperse. *Id.* One plaintiff claimed that he encountered the protest and skirmish line while walking home from his bus stop. *Id.* An officer yelled orders for that plaintiff to turn around, but he kept walking toward the police line. *Id.* at 1072-1073. The officer fired nine "less-lethal" projectiles, described as "nonlethal projectiles" by the Eighth Circuit, at the plaintiff. *Id.* at 1073. He was struck by "five bean bag rounds and four rubber bullets." *Id.* The Eighth Circuit held the use of the less-lethal projectiles was reasonable under the circumstances and the officer was entitled to qualified immunity because the plaintiff was "in the vicinity of a violent crowd" and a reasonable officer could have believed that his "advances toward the skirmish line posed a threat to officer safety[.]" *Id.* at 1079.

Bernini v. City of St. Paul, 665 F.3d 997 (8th Cir. 2012) involves the use of less-lethal munitions during protests near the Republican National Convention. To reestablish control following a day of property damage, a police commander ordered that no one be allowed to enter downtown. *Id.* at 1001. Officers positioned themselves to block a group of protestors, who threw rocks and other items, from marching into downtown. *Id.* Protestors advanced toward the officers despite orders to "back up!" *Id.* Officers responded by deploying "stinger blast balls" which "contain rubber pellets." *Id.* The group initially retreated but then moved to enter downtown from

another direction. *Id.* The officers continued to deploy blast balls and other "non-lethal munitions" to keep the group away from downtown. *Id.* at 1002. The group was encircled in an adjacent park and arrested. *Id.* Multiple members of that group sued alleging, in part, that the use of the non-lethal munitions was unreasonable. *Id.* at 1006. The Eighth Circuit held "the use of force was reasonable under the Fourth Amendment" because the "circumstances led officers to reasonably believe that a growing crowd intended to penetrate a police line" and that it was reasonable for officers to continue to "deploy non-lethal munitions to keep all members of the crowd moving" away from downtown. *Id.*

From the peace of their chambers, the divided panel distinguished *White* and *Bernini* because they decided the segment of the crowd closest to Officer Bauer was compliant and not hostile. (App. 19a-20a.) This myopic view fails to account for the threat posed by the hundreds of other protestors *surrounding* the officers. That riotous crowd demonstrated the ability and willingness to *inflict harm from a distance*, as in *White* and *Bernini*, by throwing large rocks and objects at officers. In that crowd, there were individuals brandishing weapons (knife, gun, baseball bat). And, that crowd was trying to barricade the end of the street to prevent officers from escaping, a fact entirely omitted from the divided opinion, but which necessitated a speedy evacuation. With this context in mind, Judge Stras' dissent aptly concludes that Officer Bauer "faced even more danger" than was present in *White* and *Bernini.* (App. 26a.)

By assessing only a segment of the crowd, the divided panel failed to take heed of this Court's instruction that

the "operative question in excessive force cases is 'whether the totality of the circumstances justifie[s] a particular sort of search or seizure.'" *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 427-428 (2017) (citing *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985)). And, by assessing only a segment of the crowd, the divided panel again loses sight of Marks' own conduct. Unlike *White* and *Bernini*, Officer Bauer did not use force merely because he anticipated that a protestor would breach a police line, he used force after Marks had already physically attacked an officer on the perimeter.

This Court need not accept the divided panel's account of the incident. This would not be the first case where the Court decided the "videotape tells a quite different story" from the one adopted by the court of appeals. *Scott*, 550 U.S. at 379. Indeed, watching the same video, Judge Stras' dissent describes "chaos and violence quickly enveloping the officers" and a protest that was "nearing a flashpoint." (App. 24a, 25a.) And, the on-scene news reporter declared that officers were "not safe" amongst the large, hostile crowd at the *exact same moment* that Marks can be seen stomping toward the perimeter. (Doc. 103-2 (9 News), at 08:57.)

The divided panel contravened this Court's precedent governing clearly established law, and wrongfully denied Officer Bauer qualified immunity. This Court has summarily reversed or granted plenary review with respect to other judgments that circumvented this Court's qualified immunity precedent, and the Court's intervention is warranted again.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 3, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 12, 2024

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1420

ETHAN DANIEL MARKS,

Plaintiff-Appellee,

v.

BENJAMIN M. BAUER, ACTING IN HIS INDIVIDUAL CAPACITY AS A MINNEAPOLIS POLICE OFFICER,

Defendant-Appellant.

Filed July 12, 2024

OPINION

Before ERICKSON, MELLOY, and STRAS, Circuit Judges. STRAS, Circuit Judge, dissenting.

ERICKSON, Circuit Judge.

Ethan Marks, who was 19 years old at the time, sustained a ruptured eyeball, a fractured eye socket, and a traumatic brain injury when Minneapolis Police Officer Benjamin Bauer shot him with a chemical-filled

projectile from approximately five to ten feet away. Marks sued Officer Bauer under 42 U.S.C. § 1983, alleging violations of the Fourth and Fourteenth Amendments. The district court[1] denied Officer Bauer's motion for summary judgment on Marks' excessive force claim, finding that genuine issues of material fact precluded a grant of qualified immunity. This interlocutory appeal followed. We affirm.

I. BACKGROUND

On May 28, 2020, three days after protests had erupted in response to the death of George Floyd, Marks and his mother went to an area near the Minneapolis Police Department's ("MPD") Third Precinct building to help clean up damage caused by rioting and looting. When Marks arrived, hundreds of people, including protestors, were in the area. At approximately 5:30 p.m., Officer Bauer as well as other SWAT team officers responded to the area on a report that an individual in the crowd had been stabbed. As the SWAT team drove toward the scene, the officers were informed of the presence of a large crowd in the area with some people throwing rocks at approaching officers. When the SWAT van entered the area, it was hit with frozen water bottles, a rock, and other objects.

Officer Bauer exited the SWAT van, moved toward the area where people were throwing objects, and deployed his launcher at the individuals from a distance. Officer Bauer

1. The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

then provided protection for the other officers loading the stabbing victim into the back of a police SUV. When he returned to the SWAT van, Officer Bauer learned of a report that there was an injured person who had been struck by a baseball bat. Officer Bauer ran toward the area of the injured woman and positioned himself to help establish a perimeter for the officers who were trying to evacuate her from the area.

Marks' mother, a registered nurse, tried to approach the injured woman to offer medical assistance. MPD Officer Jonathan Pobuda, who was also helping form a perimeter around the victim, blocked Marks' mother with his arm and ordered her to stand back. After this interaction, Marks stepped over a large, corrugated pipe laying on the ground, walked over to Officer Pobuda, who is six feet tall and weighs 265 pounds, and shouted with one of his hands clenched in a fist, "Back up, bitch!" Marks' shouting drew the attention of Officer Bauer, who turned and saw Marks strike Officer Pobuda and try to grasp his riot baton. Officer Pobuda pushed Marks back with his baton, causing him to lose his balance and stumble backwards over the corrugated pipe. A bystander with outstretched arms stepped into the space between Marks and Officer Pobuda.

After pushing Marks away, Officer Pobuda no longer perceived Marks as a threat and concluded no additional force was necessary. Despite the apparent amelioration of the threat, Officer Bauer believed a "bad assault" was occurring. Without warning, Officer Bauer shot Marks

in the face from approximately five to ten feet[2] away with a projectile. From the time Officer Bauer raised the launcher to when he fired it, only a half a second had transpired. The projectile used by Officer Bauer has an exit muzzle velocity of approximately 200 miles per hour and releases an inflammatory chemical agent upon impact. The chemical-filled projectile hit Marks' right eye and exploded, rupturing his right eyeball, fracturing his eye socket, and causing a traumatic brain injury. Marks is now legally blind in that eye.

The launcher used by Officer Bauer fires 40-millimeter "high energy munitions." In the best-case scenario, the projectile leaves the target's body surface intact while causing enough injury to incapacitate the target. Under the worst-case scenario, the weapon can cause serious injury or death. Although the launcher is categorized as a "less lethal" weapon, it is not non-lethal, as the manufacturer's warning expressly states: "This product may cause serious injury or death to you or others."

Given the risk of serious injury or death, MPD SWAT officers are trained to consider which "zone" of the body to target when deciding where to shoot. Zone 1 is the area

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2. There is varying evidence in the record as to the distance between Marks and Officer Bauer at the time Officer Bauer aimed and fired at Marks. The district court stated the distance was five to ten feet, noting that Officer Bauer during an interview about the incident stated he shot from just beyond the minimum safe standoff range of five feet. A forensic video specialist estimated the distance between the launcher's muzzle and Marks' head was between 70 and 80 inches.

officers are trained to consider first and consists of large muscle groups, such as the buttocks, thighs, and calves. Zone 2 of the body consists of medium muscle groups and encompasses the abdominal area. Zone 3 includes the chest (the "center mass"), spine, neck, and head. Because Zone 3 carries the greatest risk for serious injury or death, MPD training instructs officers to shoot at Zone 3 only when "maximum effectiveness is desired to meet a level of threat escalating to deadly force." The MPD also provides training on the optimal deployment range for firing projectiles, with 10 to 90 feet being the optimal range for most projectiles.

Officer Bauer was trained and qualified to carry the launcher at issue approximately six years before he shot Marks. To be qualified to carry and use the launcher, Officer Bauer was required to undergo annual training and written tests in addition to field testing that involves firing the launcher at designated targets. The goal of the training is to ensure that SWAT members are "more proficient" with their weapons than regular MPD officers. During the George Floyd protests, Officer Bauer estimated that he personally fired approximately 500 projectiles using the 40 MM Tactical launcher. Officer Bauer admitted as part of this litigation that the launcher is an accurate weapon. The district court found that Officer Bauer had established himself as an accurate shooter.

The level of force used by Officer Bauer against Marks caused the crowd to react. Almost immediately after Marks was shot in the eye, individuals screamed at Officer Bauer and the crowd began to inch closer to the perimeter.

One bystander shouted, "Hey! Hey! Point blank?" Officer Bauer yelled back, "Yes!" Within 30 seconds of shooting Marks, the officers successfully evacuated the injured person and began to retreat. Within three minutes of the shooting, the officers jumped in their vehicles and sped away from the scene. Neither Officer Bauer nor Officer Pobuda rendered aid to Marks and he was not arrested.

The MPD referred Marks encounter with Officer Pobuda to the Hennepin County Attorney's office for possible criminal charges, including assault or attempting to disarm a police officer. After reviewing the materials, which included the MPD body camera footage and Officer Pobuda's report of the incident, the county attorney declined to prosecute, concluding no felony charges were warranted. The MPD then sent the materials to the Minneapolis City Attorney's Office for consideration of misdemeanor charges. An independent prosecutor in the St. Paul Office reviewed the matter and declined to charge Marks, concluding there was "insufficient evidence" and the "facts/circumstances do not support charges."

After Marks commenced this action, Officer Bauer moved for summary judgment asserting he was entitled to qualified immunity because he intended to hit Marks in the torso, not the face. It was not until Officer Bauer's reply brief that he claimed there was no seizure under the Fourth Amendment. The district court found Officer Bauer's argument not only untimely but also that it failed on the merits. The district court denied Officer Bauer's motion, determining that, regardless of his subjective intent or motivation, Officer Bauer used force that was not

objectively reasonable under the circumstances. And even if subjective intent was relevant in the analysis as Officer Bauer argued, the district court found there was a genuine dispute of material fact concerning whether Officer Bauer intended to use deadly force when he shot Marks in the face. In addition, the district court found that even if the force used by Officer Bauer was considered non-deadly, the force used on Marks was unreasonable given the facts and circumstances confronting Officer Bauer. Lastly, the district court pointed to existing precedent that put Officer Bauer on notice that deadly force is appropriate only in response to a significant threat of death or serious physical injury to the officer or others, which was not present when Officer Bauer shot Marks, and it would have been clear to a reasonable officer in Officer Bauer's position that the high degree of force used by Officer Bauer was disproportionate to the threat before him.

Officer Bauer appeals, contending his deployment of the projectile did not result in a seizure and the force used was objectively reasonable because the crimes Marks was suspected of committing were "severe," Marks posed an immediate threat to the safety of Officer Pobuda, and it was a "tense, uncertain, and rapidly evolving situation."

II. DISCUSSION

The Eighth Circuit reviews a district court's qualified immunity determination *de novo*. *Burbridge v. City of St. Louis*, 2 F.4th 774, 779 (8th Cir. 2021). Qualified immunity shields government officials from § 1983 lawsuits and liability unless the official's conduct violates

a clearly established constitutional or statutory right of which a reasonable person would have known. *See Davitt v. Spindler-Krage*, 96 F.4th 1068, 1071 (8th Cir. 2024). Marks bears the burden of showing Officer Bauer violated a constitutional right and the unlawfulness of his conduct was clearly established at the time. *Martinez v. Sasse*, 37 F.4th 506, 509 (8th Cir. 2022). A right is "clearly established" when the law is "sufficiently clear" at the time of the challenged conduct "that every reasonable official would understand that what he is doing is unlawful." *D.C. v. Wesby*, 583 U.S. 48, 63, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (cleaned up).

A. Seizure

Officer Bauer contends deploying a projectile against an "assaultive protestor" is insufficient force to constitute a seizure under the Fourth Amendment. To establish a Fourth Amendment violation, Marks must show both that a seizure occurred and the seizure was unreasonable. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to *restrain movement*, even when it is ultimately unsuccessful." *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991) (emphasis added).

While we have noted that "[prior] decisions did not place officers on notice that the existence of a seizure depends on the type of force applied for the purpose of dispersing a crowd," *Dundon*, 85 F.4th at 1256, Officer Bauer was not dispersing a crowd the moment he aimed

and shot Marks. The video footage shows that, before Marks was shot, Officer Bauer's general deployment of projectiles allowed officers to form a perimeter and evacuate the stabbing victim. It also shows the officers were able to form a second perimeter around another injured individual. By this time, most of the crowd had retreated and only a couple dozen individuals remained around the second individual who needed medical attention.

As to his actions directed at Marks, Officer Bauer expressly testified he used force to restrain Marks' movement, stating:

> Well, with the—the way he was acting, how he jumped on—into the—with—like I said, with the officer—I believe it was Officer Pobuda, so I'll refer to that—and punching Officer Pobuda, he was on top of him, I thought there was a bad assault going on. And that's when I reacted to it. And I thought that if it kept going, then it would get worse. So I—that's why I decided—this is a fast-action thing, and I deployed the 40 at him, sir.

In analyzing Officer Bauer's claim that his actions did not amount to a seizure, we find the Supreme Court's guidance in *Brower* on whether a seizure has occurred helpful:

> [I]n determining whether there has been a seizure in a case such as this, to distinguish

> between a roadblock that is designed to give the oncoming driver the option of a voluntary stop (e.g., one at the end of a long straightaway), and a roadblock that is designed precisely to produce a collision (e.g., one located just around a bend). In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Brower v. Cnty. of Inyo, 489 U.S. 593, 598-99, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). The projectile aimed and purposefully deployed at Marks by Officer Bauer stopped Marks and achieved the result Officer Bauer intended. The record demonstrates that Officer Bauer applied force to restrain and stop Marks.

That Marks was not arrested does not change the analysis. *See Pollreis v. Marzolf*, 66 F.4th 726, 731 (8th Cir. 2023) (concluding the plaintiff, while not arrested or detained, was seized, even if only for a moment). In *Ludwig v. Anderson*, 54 F.3d 465, 469 (8th Cir. 1995), Ludwig was never arrested, but instead died after an officer shot him to stop him from attempting to get across the street. The

Court determined that Ludwig was seized twice during the encounter in a potentially unreasonable manner: (1) when an officer attempted to hit Ludwig with his police car, and (2) when Ludwig was shot. *Id.* at 471. Under the facts and circumstances of this case, Marks was seized when Officer Bauer shot him with a projectile. *See id.*; *see also Hodari D.*, 499 U.S. at 625 (explaining a seizure can be "effected by the slightest application of physical force").

B. *Reasonableness of Seizure*

Officer Bauer next contends his actions were objectively reasonable. The parties disagree over whether Officer Bauer used deadly force. In the district court, Officer Bauer did not argue that the use of deadly force would have been objectively reasonable in this situation. Rather, he contended that he did not use deadly force because he intended to hit Marks in the torso, not the face. According to Officer Bauer, the projectile struck Marks in the face because Marks' body dropped suddenly before the launcher was deployed.

We evaluate objective reasonableness from the point of view of the officer at the precise moment that the seizure is effectuated. *Banks v. Hawkins*, 999 F.3d 521, 525-26 (8th Cir. 2021). We generally consider the totality of the circumstances, but "it is well-established that absent probable cause for an officer to believe the suspect poses an immediate threat of death or serious bodily injury to others, use of deadly force is not objectively reasonable." *Id.* at 525 (cleaned up). "Where the record does not conclusively establish the lawfulness of an officer's use

of force, summary judgment on the basis of qualified immunity is inappropriate." *Id.*

Here, the force used by Officer Bauer consisted of a projectile shot from a less lethal launcher at close range at Marks' face—an area of the body that MPD training instructed its officers has the greatest potential for serious or fatal injury. Officer Bauer claims he aimed at Marks' torso; therefore, he did not deploy deadly force. On this record, a genuine issue of material fact exists concerning whether Officer Bauer intended to use deadly force when he shot Marks in the face. In contrast to Officer Bauer's claim, Marks notes Officer Bauer's training and skill as a marksman. He also points to the videos, which he contends show Officer Bauer tracking Marks' head, and his expert who opined that at the time of discharge, the gun was elevated at Zone 3 on Marks' body, not Zone 2. In addition, the district court noted that Officer Bauer provided unclear deposition testimony about where he was aiming. Regardless of Officer Bauer's intent, the evidence in the record supports a conclusion that Officer Bauer used force capable of causing serious or fatal injury to Marks, who at the time he was shot with the chemical projectile was unarmed, had been pushed several feet away from Officer Pobuda, and was stumbling backwards.

Nonetheless, whether Officer Bauer used deadly or non-deadly force need not be conclusively resolved at this stage because viewing the record in the light most favorable to Marks and drawing all reasonable inferences in his favor, while also viewing the facts from the perspective of a reasonable officer on the scene, Officer Bauer has

failed to show his use of force was objectively reasonable as a matter of law. Officer Bauer asserts shooting Marks was objectively reasonable because a reasonable officer would have suspected Marks had committed "multiple serious and violent crimes," he posed an immediate threat to Officer Pobuda's safety, and the incident was a tense, uncertain, and rapidly evolving situation. Officer Bauer's assertions overstate the evidence in the record at the moment he decided to pull the trigger and shoot Marks in the face.

We first consider the nature of the crimes Officer Bauer purports Marks had committed in the moments preceding the shooting. The video of the encounter lends little support to Officer Bauer's characterization of Marks' conduct. It shows that at one point, Marks appeared to strike Officer Pobuda and that Marks grabbed at Officer Pobuda's baton. Whether Marks was grasping at the baton to maintain his balance or attempting to disarm Officer Pobuda is a dispute not resolved by the video and is a material factual dispute for the trier of fact. In addition, the record contains evidence that the MPD referred Marks' conduct toward Officer Pobuda initially to the County Attorney's Office for felony charges and subsequently to the City Attorney's Office for consideration of misdemeanor charges. Each office independently reviewed the materials provided by the MPD, including the video footage, and each declined to press charges against Marks. While a jury might accept Officer Bauer's characterization of the incident as a "bad assault," contrary evidence exists in the record such that a reasonable jury could find that the force Officer Bauer

used in response to the brief altercation between Marks and Officer Pobuda was excessive.

Next, when considering the evolving nature of the situation and the immediacy of the threat posed by Marks, it is important to note that we assess the reasonableness of the response to the threat by looking primarily at the threat present at the time an officer deploys the force. *See id*. at 525-26 ("[W]e focus on the seizure itself—here, the shooting—and not on the events leading up to it."). On this record, a reasonable jury could find that at the time Marks was shot, he did not pose an immediate threat to Officer Pobuda or to anyone else at the scene because Officer Pobuda had successfully pushed an unarmed Marks away from him, causing him to stumble and fall backwards. The push created several feet of space between the two men—sufficient space for a bystander with outstretched arms to step into the space between them. After the separation, Officer Pobuda did not believe further use of force was necessary. Resolving factual disputes in Marks' favor, as we are required to do at this stage of the proceedings, Officer Bauer has failed to demonstrate that when he aimed and shot a falling and unarmed Marks in the face, a reasonable officer could have believed that Marks posed an immediate threat to the safety of the officers or others. *See Rusness v. Becker Cnty.*, 31 F.4th 606, 614 (8th Cir. 2022) ("The party asserting immunity always 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.").

While Officer Bauer asserts that this was a tense and rapidly changing situation such that he was compelled to

make a split-second decision to shoot, the video evidence shows that the situation at the time of the shooting was dramatically different than when the officers first arrived and encountered a hostile crowd. When the officers first arrived, they were outnumbered with some individuals shouting and throwing things. Even so, the officers were able to establish a perimeter quickly and the crowd calmed down. The officers were then able to successfully evacuate the first injured individual without incident. They were then working, without interference from the crowd, on assisting a second injured individual. The situation escalated when Marks reacted after he observed Officer Pobuda push his mother, who, as a registered nurse, was merely volunteering to help provide medical assistance to the injured person. That threat, however, was brief and extinguished quickly and effectively, as Officer Pobuda was able to push Marks back, causing him to stumble backwards. *See Banks*, 999 F.3d at 530 n.8 ("Even when making 'split-second judgments' in 'tense, uncertain, and rapidly evolving' circumstances, *Graham*, 490 U.S. at 397, officers cannot ignore what they know.").

Based on the evidence in the record, a reasonable officer could have observed there was no need to rush to Officer Pobuda's aid by firing a projectile at close range because Marks was no longer engaged with Officer Pobuda or threatening anyone else. *See id.* at 527 (concluding an officer who either (a) fires instinctively, without a warning or a split-second pause to assess the situation, or (b) after ascertaining the suspect was no longer acting in an aggressive or threatening manner does not act in an objectively reasonable manner under the Fourth

Amendment). Although a jury might agree with Officer Bauer's assessment of the situation and find his use of force was objectively reasonable, the evidence when viewed in the light most favorable to Marks demonstrates a violation of Marks' constitutional right to be free from excessive force when, under these circumstances, Officer Bauer shot Marks in the face at close range with a chemical projectile.

C. *Clearly Established*

Officer Bauer also argues that it was not clearly established on May 28, 2020, that deploying a projectile against an "assaultive protestor" would constitute excessive force under the Fourth Amendment. To be clearly established, the contours of the constitutional right at issue must be sufficiently clear such that every reasonable officer would have understood that what he is doing violates that right. *Boudoin v. Harsson,* 962 F.3d 1034, 1039 (8th Cir. 2020). A plaintiff may establish a right is clearly established by pointing to existing circuit precedent that would put a reasonable officer on notice that his specific use of force in a particular circumstance would violate the plaintiff's right not to be seized by excessive force. *Banks*, 999 F.3d at 528. Officers are held liable for "transgressing bright lines," not for "bad guesses in gray areas." *Boudoin*, 962 F.3d at 1040. "[W]hether the constitutional right at issue was 'clearly established' is a question of law for the court to decide." *Rohrbough v. Hall*, 586 F.3d 582, 586 (8th Cir. 2009).

Marks does not need to identify an identical case to show that Officer Bauer's conduct was previously held

to be unlawful. *Banks*, 999 F.3d at 528; *see also Glover v. Paul*, 78 F.4th 1019, 1024-25 (8th Cir. 2023) (noting "[t]here is no requirement [] that [a] [plaintiff] marshal a case in which 'the very action in question has previously been held unlawful,' so long as the unlawfulness of the action is apparent in light of preexisting law") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)); *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.").

Our cases clearly establish that a police officer is not permitted to use deadly force on an individual, who previously posed a threat to others, but no longer presents an immediate threat. *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020) (stating "it was clearly established that a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force"). This is neither a situation where Officer Bauer was under attack nor a situation where he received a blow to the head in a rapidly evolving situation. Instead, he saw a 6-foot, 205-pound, 19-year-old unarmed Marks squaring off against a 6-foot, 265-pound, 37-year-old armed Officer Pobuda. Within 4 seconds, Officer Pobuda had forced Marks away with such force that he was "kind of falling" when Officer Bauer fired his shot. At the time of this incident, it was clearly established that it is unlawful to shoot an unarmed man who was falling and posing no imminent threat to officers or to anyone else.

Officer Pobuda testified that after effectively using his baton on Marks, Marks was no longer an immediate threat:

> **Q**: You did not perceive him to be a threat and didn't go after him at that point. Correct?
>
> **Officer Pobuda**: Are you talking about at the point in which we separated?
>
> **Q**: Yeah.
>
> **Officer Pobuda**: Correct. I did not pursue—I did not pursue him after our interaction, sir.
>
> **Q**: And you didn't think that further use of force by you on him was necessary?
>
> **Officer Pobuda**: No, sir.

While Officer Bauer challenges the characterization of his use of force as deadly, we have previously noted that less-lethal force can amount to deadly force depending on the situation. *See, e.g., Ludwig*, 54 F.3d at 473 (acknowledging that "an attempt to hit an individual with a moving squad car is an attempt to apprehend by use of deadly force"). Here, Officer Bauer testified that he knew a 40 MM Tactical Single Launcher can be considered deadly force. He was aware the manufacturer warned the product could cause serious injury or death. And he noted that he was trained using materials explaining that targeting was crucial to reduce injury potential. The

evidence related to Officer Bauer's training reflects that the munitions were not described as non-lethal, but as less-lethal munitions, which if misused could cause death. To the extent that Officer Bauer used deadly force when he shot Marks, it was clearly established in May 2020 that the use of deadly force on a non-threatening suspect was objectively unreasonable.

The outcome would be the same even if Officer Bauer used less than deadly force by purportedly aiming for Marks' torso. After establishing a perimeter and evacuating the victim who was the subject of the dispatch, Officer Bauer, Officer Pobuda, and others successfully formed a new perimeter around a second injured victim. The video evidence shows that the crowd at this moment was compliant. Some members were assisting law enforcement. Another part of the crowd watched from a distance and recorded the events on their phones. Unlike the individuals in *White v. Jackson*, 865 F.3d 1064, 1072 (8th Cir. 2017), who were ordered to disperse and who saw police forming a skirmish line to disperse them, the crowd present at this scene had never been given a dispersal order. This case is also unlike the crowd in *Bernini v. City of St. Paul*, 665 F.3d 997, 1001, 1006 (8th Cir. 2012), where officers suspected the individuals intended on penetrating the police line.

The video evidence in this case documents that the crowd was demonstrating no hostility toward the officers when Officer Bauer shot Marks in the face, who was unarmed and stumbling backwards to the ground away from Officer Pobuda. It was only after Officer Bauer

shot Marks in the face that the crowd's hostility toward the officers began to escalate again. Given the compliant nature of the crowd at the moment of the shooting, which distinguishes this case from the ones cited by Officer Bauer, viewing the record in the light most favorable to Marks, Officer Bauer shot Marks at close range with a weapon that he knew could amount to deadly force. It would have been clear to a reasonable officer in Officer Bauer's position that this high degree of force was disproportionate to the threat before him.

In *Montoya v. City of Flandreau*, the Court held that a question of fact existed for the trier of fact where the plaintiff, though acting aggressively, was 10 to 15 feet away from the officer, and posed no threat to the officer at the time the officer engaged in a leg sweep causing the plaintiff to suffer a broken leg. 669 F.3d 867, 871 (8th Cir. 2012). The *Montoya* court further held that the excessive force claim was clearly established when the leg sweep maneuver was employed against a non-threatening, non-resisting, non-fleeing misdemeanant who was merely waving her hands in frustration. *Id.* 872-73. Similarly, in *Johnson v. Carroll*, the Court determined that macing and throwing to the ground an unarmed person who "posed at most a minimal safety threat to the officers" was not objectively reasonable as a matter of law, notwithstanding that the suspect was resistant as evidenced by her being charged with obstructing legal process. 658 F.3d 819, 827-28 (8th Cir. 2011).

In another case, *Rohrbough*, 586 F.3d 582, an officer confronted a suspect, who had raised his arms but had

not assumed a fighting stance, and the officer pushed the suspect causing the suspect to resist and push back, which led the officer to punch the suspect in the face and take him down forcefully. The officer provided a different accounting of what happened. *Id.* at 587. The Court determined the severity of the suspect's reaction is a matter for the jury to decide. *Id.* The Court noted that a jury could conclude that the suspect's push was *de minimis* or inconsequential such that a reasonable officer would have known that a response that included punching the suspect in the face, taking him to ground face first, landing on top of him, and causing serious injury was unlawful. *Id.*

Our cases establish that the critical factor in an excessive force case involving less than lethal force is whether the suspect "posed a realistic threat to the safety of [the officer] or a risk of flight that justified the degree of force used." *Westwater v. Church*, 60 F.4th 1124, 1129 (8th Cir. 2023). The Court noted the following:

> [C]ontrolling Supreme Court and Eighth Circuit precedents prior to May 2018 drew fine lines in determining when police officers' use of non-deadly force was objectively reasonable in making an arrest or other seizure. Our cases clearly established that it was objectively unreasonable to use more than *de minimis* force to seize a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring officer commands.

Id. at 1130-31 (citations omitted).

While Officer Bauer highlights the scuffle that occurred between Marks and Officer Pobuda as the reason for the degree of force used, we must view the evidence in the light most favorable to Marks with respect to the central facts of the case. It is for a jury to interpret the nature and extent of the contact between Marks and Officer Pobuda. *See Rohrbough*, 586 F.3d at 587 (explaining the severity of the suspect's reaction to the officer's conduct is a matter for the jury to decide). While Marks could have potentially faced a number of different charges for his conduct, while not dispositive but a fact for the jury to consider, prosecutors in two different offices reviewed the evidence presented by the MPD and declined to charge Marks with either a felony or a misdemeanor. The record also shows that Officer Pobuda who was engaging with Marks did not believe additional force beyond the push with his riot baton was necessary.

On this record, a reasonable jury could conclude that Marks was shot when he neither posed a threat to the officers or the public, nor was he fleeing or ignoring an officer's commands. On the other hand, a jury might agree with Officer Bauer's assessment of the situation and find his use of force was objectively reasonable. Marks has made a compelling showing that Officer Bauer used more than *de minimis* force when he shot him in the face at close range with a chemical projectile that he knew could cause serious injury or death while Marks was no longer resisting but instead falling backwards to the ground. He used a high level of force despite being given fair notice that at the time of this incident it was objectively unreasonable to use more than *de minimis* force to seize

a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring officer commands. *Westwater*, 60 F.4th at 1131. On this record where disputed issues of material fact exist such that the issues of law cannot be decided without findings on the central fact issues, Officer Bauer is not entitled to qualified immunity.

III. CONCLUSION

For the foregoing reasons, we affirm the district court's decision.

STRAS, Circuit Judge, dissenting.

No Minnesotan can forget the violence in the wake of George Floyd's death. At the epicenter was Minneapolis's Third Precinct police station, which rioters burned to the ground. This case is about the chaos that came before.

I.

On the third day of rioting and property destruction in Minneapolis, Officer Benjamin Bauer and his fellow SWAT team members were called to the scene for a stabbing and encountered a large, out-of-control crowd. Almost immediately, they had water bottles and rocks thrown at them. As the officers helped the stabbing victim, they heard about another attack nearby, this time using a baseball bat. They formed a protective perimeter around the victim.

At that point, the situation turned from bad to worse. A woman tried to get through the perimeter, but an

officer blocked her with his arm and ordered her to step back. The officer's actions angered her son, Ethan Marks, who screamed "[b]ack up, bitch," pushed the officer with both hands, and tried to grab his baton. After the officer regained control of it, he used it to push Marks. As Marks stumbled backwards, Officer Bauer fired a chemical round from his less-lethal launcher. The round struck Marks in the face, causing a traumatic brain injury and serious eye damage.

II.

Although this case is tragic, context matters. And here, given the chaos and violence quickly enveloping the officers, there is no way to conclude that Officer Bauer's actions *clearly* violated Marks's rights. *See Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (en banc). Think of the split-second decision he faced: give a six-foot-tall, 200-pound man who had just attacked a fellow officer a second chance or neutralize him with a chemical round. With the benefit of hindsight, we now know that Officer Bauer may have made the wrong choice, but no one can identify a single case involving "similar circumstances" that would have provided "fair notice" that his actions "violated [a] Fourth Amendment" right. *White v. Pauly*, 580 U.S. 73, 79, 137 S. Ct. 548, 196 L. Ed. 2d 463 (2017) (per curiam); *see Kisela v. Hughes*, 584 U.S. 100, 104, 138 S. Ct. 1148, 200 L. Ed. 2d 449 (2018) ("Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent squarely governs the specific facts at issue." (internal quotation marks omitted)). Not one.

Indeed, two cases suggest just the opposite. Consider the strikingly similar case of *White v. Jackson*. 865 F.3d 1064 (8th Cir. 2017). In the wake of a police shooting in Ferguson, Missouri, protestors grew violent. *See id.* at 1069. The officers fired smoke and tear-gas canisters and established a "skirmish line" to disperse the crowd. *Id.* at 1072. A bystander, however, ignored commands to stop and continued to walk toward the officers. *Id.* at 1072-73. Even though he had not threatened or attacked anyone, they shot him with "five bean bag rounds and four rubber bullets." *Id.* at 1073. We held that, under those circumstances, "a reasonable officer could have concluded that [he] had been a part of the violent crowd [and] that his advances toward the skirmish line posed a threat to officer safety." *Id.* at 1079.

A similar situation arose in *Bernini v. St. Paul*. 665 F.3d 997 (8th Cir. 2012). The officers there confronted a crowd of "approximately 100 people" who threw "rocks and bags containing feces." *Id.* at 1001. To keep the group from marching toward the Republican National Convention, the officers fired munitions "contain[ing] rubber pellets." *Id.* In reasoning resembling *White*, we concluded that the use of force was reasonable because the crowd was "acting as a unit" and "intended to break through [a] police line." *Id.* at 1004, 1006.

If anything, Officer Bauer and the SWAT team faced even more danger. Like *White*, the officers were caught in the middle of race-related protests that were nearing a flashpoint. And as in *Bernini*, the officers formed a perimeter to protect a sensitive target. To be sure, Marks

was neither a bystander in the wrong place at the wrong time, *see White*, 865 F.3d at 1072-73, nor a member of a larger group trying to breach a police line, *see Bernini*, 665 F.3d at 1006. But by attacking an officer, he had broken the law and become a danger. "[A] reasonable officer, looking at the legal landscape at the time . . . , could have interpreted [*White* and *Bernini*] as *permitting* the" use of force, rather than clearly prohibiting it.[3] *District of Columbia v. Wesby*, 583 U.S. 48, 68, 138 S. Ct. 577, 199 L. Ed. 2d 453 (2018) (emphasis added). At a minimum, "the constitutional question" was not "beyond debate." *Ashcroft v. Al-Kidd*, 563 U.S. 731, 741, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011).

III.

The court concludes otherwise, but only by defining the right at a high level of generality. *See ante* at 13 ("[A] police officer is not permitted to use deadly force on an individual, who previously posed a threat to others, but no longer presents an immediate threat."); *see also Banks v. Hawkins*, 999 F.3d 521, 532 (8th Cir. 2021) (Stras, J., dissenting) (describing a "formulation so broad that it

3. Qualified immunity is an objective standard, so it makes no difference that the officer who pushed Marks thought no further force was necessary. *See Pearson v. Callahan*, 555 U.S. 223, 244, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). Besides, he was viewing the threat from a different vantage point. All that matters here is whether "a reasonable officer in *[Officer Bauer's]* position *could* have believed" he needed to use force to subdue Marks, not whether *everyone* on the scene thought so. *Kelsay*, 933 F.3d at 981 (emphasis added).

lack[ed] clarity [and] risk[ed] sweeping too broadly"). Yet "controlling authority or a robust consensus of cases . . . [must] clearly prohibit the officer's conduct in the *particular circumstances* before him." *Wesby*, 583 U.S. at 63 (internal quotation marks and citation omitted); *see id.* (explaining that "specificity" is "especially important in the Fourth Amendment context" (quoting *Mullenix v. Luna*, 577 U.S. 7, 13, 136 S. Ct. 305, 193 L. Ed. 2d 255 (2015) (per curiam)). The court relies on three cases, but they lack factually "similar circumstances." *Id.* at 64 (citation omitted).

The first one is *Montoya v. City of Flandreau*, but no one attacked an officer in that case. 669 F.3d 867, 869 (8th Cir. 2012). Rather, in response to a woman arguing with her ex-boyfriend from "ten to fifteen feet away" with "her hands above her head," an officer tackled her with a "leg sweep." *Id.* at 871. We held that the force used may have been excessive because "nothing in the record indicate[d] [that] [she] threatened or posed a danger to the safety of the officers." *Id.* There was no push, no struggle, no threat, not even a single word of profanity, before the takedown. Not to mention the absence of a violent crowd.

Johnson v. Carroll is also distinguishable. 658 F.3d 819 (8th Cir. 2011). It involved a woman who tried to prevent the arrest of her nephew by "interjecting her body between him and the officers." *Id.* at 827. The officers responded by "push[ing] her to the ground." *Id.* Viewing the facts in her favor, we concluded that the use of force was unreasonable because "[t]here [wa]s no evidence that [she] *actively pushed* the officers . . . , *threatened* them, or

took any *other* action against them." *Id.* (emphasis added). Marks, by contrast, did each of those things.

Rohrbough v. Hall is even further afield. 586 F.3d 582 (8th Cir. 2009). An officer there pushed an individual who may have created a "disturbance in [an] optometry shop." *Id.* at 585. When the suspect "returned the push," the officer "punched [him] in the face . . . , took him to the ground face down, [and] landed on top of him." *Id.* We left it to a jury to decide whether the officer's reaction to the "*de minimis* or inconsequential" push was excessive. *Id.* at 587. No one in that case—not the suspect or anyone else—"pose[d] an immediate threat to the [officer's] safety." *Id.* at 586.

Marks relies on his own cases, but none gets him any closer to identifying a clearly established right. In two of them, officers shot men who were alone and posed no threat. *See Cole ex rel. Richards v. Hutchins*, 959 F.3d 1127, 1133 (8th Cir. 2020) (shooting a man who was holding a gun "either toward the ground or the sky" and "visibly retreating" from another man's home); *Ellison v. Lesher*, 796 F.3d 910, 917 (8th Cir. 2015) (firing at an unarmed man in his home). And in the other, an officer shot the *victim* of a carjacking. *See Craighead v. Lee*, 399 F.3d 954, 959 (8th Cir. 2005).

Officer Bauer, by contrast, confronted a violent situation that only grew more precarious by the second. Along with his fellow SWAT team members, he faced a frenzied crowd and had to deal with multiple injured bystanders, one stabbed and another hit with a baseball

bat. During the chaos, Officer Bauer made a "split-second judgment[]" to use his less-lethal launcher rather than giving an angry six-foot-tall man another chance to attack a fellow officer. *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). Despite the difficult choice he faced, the court allows this lawsuit to proceed. Today's message is unmistakable: "even in the absence of a clearly controlling legal rule, think twice before acting, regardless of whether your own life [or another's] is at stake, because a court may step in later and second-guess your decision." *Banks*, 999 F.3d at 534 (Stras, J., dissenting). I respectfully dissent.

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FILED FEBRUARY 2, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Civil No. 20-1913 ADM/JFD

ETHAN DANIEL MARKS,

Plaintiff,

v.

BENJAMIN BAUER, ACTING IN HIS INDIVIDUAL CAPACITY AS A MINNEAPOLIS POLICE OFFICER,

Defendant.

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On November 16, 2022, the undersigned United States District Judge heard oral argument on Defendant Benjamin Bauer's ("Officer Bauer") Motion for Summary Judgment [Docket No 100] and Motion to Exclude the Report and Testimony of Thomas Martin ("Martin") [Docket No. 97]. The Court also heard oral argument on Plaintiff Ethan Daniel Marks' ("Marks") Motion to Exclude the Testimony of Defense Expert Christopher Gard ("Gard") [Docket No. 81] and Motion to Exclude the Testimony of Defense Experts Parris Ward ("Ward")

and Matthew Noedel ("Noedel") [Docket No. 85]. For the reasons set forth below, the motion for summary judgment is denied, the motion to exclude Martin's expert report and testimony is granted in part and denied in part, the motion to exclude Gard's expert testimony is granted in part and denied in part, and the motion to exclude Ward and Noedel's expert testimony is denied.

II. BACKGROUND

This action arises from Officer Bauer's firing a less-lethal projectile at Plaintiff Ethan Marks from close range. The chemical-filled projectile ruptured Marks' right eyeball, causing him to become legally blind in that eye. Marks filed this 42 U.S.C. § 1983 lawsuit against Officer Bauer alleging a single claim of excessive force in violation of his Fourth and Fourteenth Amendment rights. Second Am. Compl. [Docket No. 50] ¶¶ 133-38.

A. The Incident

The incident occurred in Minneapolis on May 28, 2020, three days after George Floyd was murdered by former Minneapolis police officer Derek Chauvin in the presence of additional Minneapolis police officers. Floyd's death was captured on video and sparked protests throughout the city, state, and nation. The protests caused extensive property destruction in Minneapolis. *Id.* ¶ 12; Answer [Docket No. 55] ¶ 12; K. Bennett Decl. [Docket No. 121][1] Ex. 8 (Ethan Marks Dep.) at 93-96, 182, 203.

1. Unless otherwise noted, all exhibits to the K. Bennett Declaration are in Docket No. 121.

Appendix B

On the afternoon of May 28, 2020, Marks and his mother attended a clean-up event in Minneapolis' Longfellow neighborhood, which had been damaged by rioting and looting. K. Bennett Decl. Ex. 7 (Anne Marks Dep.) at 155-59. Marks was 19 years old at the time and was six feet tall and approximately 200 pounds. Ethan Marks Dep. at 15, 19-20. Marks' mother is a registered nurse. Anne Marks Dep. at 23.

The area where Marks and his mother were cleaning was located near the Minneapolis Police Department's ("MPD") Third Precinct building, which was the "epicenter of protests over the death of George Floyd." Second Am. Compl. ¶ 19. When Marks arrived in the area, he saw a building that had been burned down, another that was still burning, and rubble from property destruction. Ethan Marks Dep. at 93-95, 182. Hundreds of people, including protesters, were in the area. *Id.* at 188-89, 197.

At approximately 5:30 p.m., several MPD vehicles arrived in the area in response to a report that a person in the crowd had been stabbed. K. Bennett Decl. Ex. 10 (Bauer BWC) (filed under seal) at 17:30:57-17:31:30; *id.* Ex. 11 (Pobuda BWC) (filed under seal); Sarff Decl. [Docket No. 103] Ex. C at 2:04-2:26, 3:53-3:39. Officer Bauer, who had been a member of MPD's SWAT team since 2014, arrived in a white SWAT van along with seven other SWAT officers and MPD Sergeant Ryan McCann. *See generally* Bauer BWC; K. Bennet Decl. Ex. 1 (Bauer Dep.) at 92-93; K. Bennett Decl. Ex. 6 (McCann Dep.) at 4, 24;. Officer Bauer was equipped with a 40-millimeter direct impact less-lethal launcher that was loaded with oleoresin capsicum ("OC"), an inflammatory chemical

agent that is released when the round hits its target and breaks apart. K. Bennett Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007666-67; Bauer Dep. at 18-19, 113.

As the SWAT team drove toward the scene, they were informed that a large crowd was in the area and that people were throwing rocks at officers as they approached. Bauer Dep. at 150. When the SWAT van entered the area, Officer Bauer observed people throwing items, including a glass bottle. Bauer BWC at 17:31:56-17:31:59. The SWAT van was hit with frozen water bottles, a rock, and other objects. *Id.* at 17:33:42-17:34:05; Bauer Dep. at 151.

After exiting the SWAT van, Officer Bauer moved toward the area where people were throwing objects at officers and deployed his launcher at the individuals from a distance. Bauer BWC at 17:34:40-17:38:48; Sarff Decl. Ex. E (Police Report Suppl.). Officer Bauer then offered protection as officers loaded the stabbing victim into the back of a police SUV. Bauer BWC at 17:38:52-17:39:01; Police Report Suppl.

When Officer Bauer returned to the SWAT van, he learned that another victim had reportedly been struck by a baseball bat. Police Report Suppl. Officer Bauer ran toward the area where the injured woman was on the ground and positioned himself to establish a perimeter around the victim and the officers who were trying to evacuate her from the area. Bauer BWC 17:39:35-17:39:45. Officer Bauer was facing the crowd with his back to the injured woman and the other assisting officers. *Id.* at 17:39:45-17:40:30.

Marks' mother tried to approach the injured woman to offer medical assistance while Marks stood nearby. Pobuda BWC 17:40:24-17:40:28. MPD Officer Jonathan Pobuda ("Officer Pobuda"), who was helping to form a perimeter around the victim, blocked Marks' mother with his arm and ordered her to stand back. *Id.* at 17:40:28-32. After Officer Pobuda's interaction with Marks' mother, Marks walked over to Officer Pobuda and shouted, "Back up, bitch!" *Id.* at 17:40:33-34; Ethan Marks Dep. at 232. One of Marks' hands was clenched in a fist. Sarff Decl. Ex. G at 27-28.

Officer Bauer did not see the interaction between Officer Pobuda and Marks' mother because he was facing a different direction from them. Bauer BWC at 17:40:31-17:40:32. However, at the sound of Marks' shouting, Officer Bauer turned and saw Marks strike Officer Pobuda. Bauer Dep. at 139. Marks shoved Officer Pobuda and briefly grasped his riot baton. Sarff Decl. Ex. G at 27-32, 38-39; Bauer BWC at 17:40:33-36. Marks' actions knocked Officer Pobuda's police radio off his chest and disturbed his riot helmet. K. Bennett Decl. Ex. 31 (Ward Report) at 6 (Figure 6) (falling police radio); *id.* Ex. G at 35-36 (officer readjusting his riot helmet).

Officer Pobuda, who is six feet tall and weighs 265 pounds, retained control of the baton and pushed Marks backwards with it, creating several feet of space between himself and Marks. Bauer BWC at 17:40:36; K. Bennett Decl. Ex. 9 (Pobuda Dep) at 4; Sarff Decl. Ex. G at 47-52. Marks stumbled backwards over a large corrugated pipe that was on the ground behind him. Sarff Decl. Ex.

G at 51. A bystander with outstretched arms stepped into the space between Marks and Officer Pobuda. *Id.* at 52; Pobuda BWC 17:40:36-17:40:40; Bauer BWC at 17:40:35. After pushing Marks away, Officer Pobuda did not perceive Marks as a threat and determined that no additional force was needed. Pobuda Dep. at 41-42.

Officer Bauer, however, thought a "bad assault" was occurring. Bauer Dep. at 154. As Marks was "kind of falling," Officer Bauer deployed the launcher without warning and shot Marks in the face from close range. Bauer BWC at 17:40:36-37; Bauer Dep. at 202. The chemical-filled projectile hit Marks' right eye and exploded. Bauer BWC at 17:40:37; Bauer Dep. at 202.

From the time Marks yelled "Back up, bitch!" to the time Officer Bauer fired the launcher, less than 4 seconds had elapsed. Pobuda BWC at 17:40:33-17:40:37. Officer Bauer's decision to shoot Marks occurred even more quickly---only half a second transpired from the time Officer Bauer raised the launcher to firing it. Ward Report at 10.

Immediately after the shooting, a bystander shouted, "Hey! Hey! Point blank?" Bauer BWC at 17:40:37-17:40:42. Officer Bauer yelled back "Yes!" *Id.* at 17:40:42. Marks fell to the ground and stumbled away, holding his face. Bauer Dep. at 185; Pobuda BWC 17:40:36-17:40:40. Neither Officer Bauer nor Officer Pobuda pursued Marks to render aid or to arrest him. Poduba Dep. at 42; Answer [Docket No. 55] ¶ 87.

The OC round caused serious injury to Marks, including a ruptured right eyeball, detached retina, fractured eye socket, and a traumatic brain injury. K. Bennett Decl. Ex. 28 (Koozekanani Report) at 2-10; *id.* Ex. 29 (Weingarden Report) at 1-2; *id.* Ex. 34 (Mokhtarzadeh Report) at 1-2. Marks has undergone multiple surgeries to repair some of the damage and restore his vision, with limited success. He remains legally blind in his right eye and suffers from headaches, decreased visual motor skills and depth perception, balance problems, and nerve damage that causes inflammation and pain. Weingarden Report at 5; Mokhtarzadeh Report at 2; K. Bennett Decl. Ex. 36 (Weingarden Addendum) at 3; *id.* Ex. 37 (Glass Report) at 4-7; Ethan Marks Dep. at 314-33. Marks has also suffered emotional distress, mental pain and anguish, anxiety, depression, and PTSD. Ethan Marks Dep. at 314-33.

In 2021, the MPD provided body-camera footage and Officer Pobuda's police report of the incident to the Hennepin County Attorney's Office to determine whether Marks should be criminally charged with assault or attempting to disarm a police officer. K. Bennett Decl. Ex. 19 (Robinson Dep.) at 11-16, 30. After review of the evidence, the County Attorney declined to prosecute, concluding no felony charges were warranted. *Id.* at 38-39; R. Bennett Decl. Ex. K [Docket No. 91-5]. The MPD then sent the materials to the Minneapolis City Attorney's Office for consideration of misdemeanor charges. Robinson Dep. at 39. Due to a conflict of interest, that office then forwarded the matter to the St. Paul City Attorney's Office for review. *Id.* An independent prosecutor there

declined to charge Marks with obstructing legal process, concluding there was "insufficient evidence" and that the "facts/circumstances do not support charges." R. Bennett Decl. Ex. J [Docket No. 91-4].

B. The Less Lethal Weapon and Zones of Impact

The weapon used by Bauer was a LTMS 40-millimeter "less-lethal" launcher, which is 25 inches long and includes a front grip below the barrel to aid in stability and make shots more accurate. K. Bennett Decl. Ex. 3; Bauer Dep. at 9, 61-63, 108-22, 175. The launcher fires 40-millimeter "high energy" munitions designed to cause pain when the munition's "energy is transferred . . . to the fluid mass of the body." K. Bennet Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007652, 007700-08. The munitions are intended to "leave[] the body surface intact, but cause[] sufficient injury to incapacitate the subject." *Id.* at MPLS_MARKS007703. Officer Bauer's launcher was loaded with a Direct Impact #6320 OC round, which is a chemical-filled projectile that travels 295 feet per second out of the launcher's barrel. *Id.* at MPLS_MARKS007707; K. Bennett Decl. Ex. 5 at 24, 40.

Although the launcher is categorized as a "less lethal" weapon, it is not *non*-lethal. The manufacturer's warning expressly states that "This product may cause serious injury or death to you or others." Bauer Dep. at 23. The training provided by the MPD similarly instructs that the less lethal launcher "can be considered a deadly force." *Id.* at 24. As a result, the MPD trains its SWAT officers to consider three impact areas or "Zones" on the body

when deciding where to shoot. *See* K. Bennet Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007712-15.

Zone 1 consists of large muscle groups and encompasses the buttocks, thigh, and calf. *Id.* at MPLS_MARKS007713. This training instructs that "[w]here the threat level is appropriate and this zone is viable, [Zone 1] should be considered first." *Id.* Zone 2 consists of medium muscle groups and encompasses the abdominal area. *Id.* at MPLS_MARKS007714. Zone 3 encompasses the chest (also referred to as "center mass" in the training materials), spine, head and neck. *Id.* at MPLS_MARKS007715. This Zone "carries the greatest potential for serious or fatal injury" and "should only be considered when maximum effectiveness is desired to meet a level of threat escalating to deadly force." *Id.*

The minimum safe standoff range for the OC round is 5 feet, and the optimal deployment range is between 10 and 90 feet. *Id.* at MPLS_MARKS007707. If Zone 3 is targeted, the minimum safe range is irrelevant. K. Bennett Decl. Ex. Ex. 5 (Angerhofer Dep.) at 77.

C. Officer Bauer's Training and Proficiency with the Less Lethal Weapon

To be qualified to carry and use the launcher, Officer Bauer was required to undergo annual training and written tests as well as field testing where officers fire the launcher at designated targets. Bauer Dep. at 62-64, 74; K. Bennett Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007653-55. In some qualifying field exercises,

officers are not permitted to miss; others require hitting small targets from more than 50 feet away. Bauer Dep. at 98-99. The goal of the training is to ensure that SWAT members are "more proficient" with their weapons than regular MPD officers. *Id.* at 89.

Officer Bauer had been qualified to carry and use the launcher for approximately six years when he shot Marks. *Id.* at 12. He admits that the launcher is an accurate weapon. *Id.* at 14. Officer Bauer has established himself as an accurate shooter. Before becoming a police officer, Officer Bauer served in the military and was rated as a Marksman with his M4 rifle. *Id.* at 90. Months after he shot Marks, Officer Bauer fired his launcher from 50 feet away at a suspect who was scaling a fence at night and hit the suspect where intended, in the buttocks. *Id.* at 16, 65-66.

Officer Bauer contends that when he fired the launcher at Marks he was aiming for "center mass . . . [i]n the torso area," which he describes as "Zone 2-ish," but that he hit Marks in the face instead because Marks was "kind of falling." *Id.* at 118, 143, 154-55, 194.

Marks disagrees and argues that the BWC video and a twitter video show that Officer Bauer tracked Marks' head with the launcher before firing. Marks further notes that Officer Bauer's own shooting reconstruction expert testified in his deposition that Officer Bauer raised the launcher from a "low-ready position, and elevate[d] the gun, ultimately ending in Zone 3." K. Bennett Decl. Ex. 18 (Noedel Dep.) at 40. The expert also testified that videos do not show Officer Bauer aiming at Zone 1 or Zone 2, and that "at the time of discharge, [the gun] ha[d] been

elevated into Zone 3." *Id.* at 41. Officer Bauer's forensic video expert similarly testified in his deposition that Officer Bauer was not pointing at Zone 1 or Zone 2 at the time he fired. K. Bennett Decl. Ex. 12 (Ward Dep.) at 49.

III. DISCUSSION

A. Summary Judgment Motion

1. Standard of Review

Federal Rule of Civil Procedure 56 provides that summary judgment shall issue "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). On a motion for summary judgment, the Court views the evidence in the light most favorable to the nonmoving party and draws all justifiable inferences in its favor. *Ludwig v. Anderson*, 54 F.3d 465, 470 (8th Cir. 1995). The nonmoving party may not "rest on mere allegations or denials, but must demonstrate on the record the existence of specific facts which create a genuine issue for trial." *Krenik v. Cnty. of Le Sueur*, 47 F.3d 953, 957 (8th Cir. 1995) (internal quotation omitted). If evidence sufficient to permit a reasonable jury to return a verdict in favor of the nonmoving party has been presented, summary judgment is inappropriate. *Id.*

2. Qualified Immunity

Bauer's summary judgment motion is premised upon his argument that he is entitled to qualified immunity against Marks' claim of excessive force. Qualified immunity shields government officials from § 1983 lawsuits and liability "unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known." *LaCross v. City of Duluth*, 713 F.3d 1155, 1157 (8th Cir. 2013). A summary judgment motion based on qualified immunity must be denied if: "(1) the evidence, viewed in the light most favorable to [Marks], establishes a violation of a constitutional or statutory right, and (2) the right was clearly established at the time of the violation, such that a reasonable officer would have known that his actions were unlawful." *Banks v. Hawkins*, 999 F.3d 521, 524 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2674, 212 L. Ed. 2d 762 (2022). Conversely, if either of those two prongs cannot be established, qualified immunity applies and summary judgment should be granted.

a. Violation of a Constitutional Right

The constitutional right at issue here is Marks' Fourth Amendment right to be free from unreasonable seizure. "To establish a Fourth Amendment violation, the claimant must demonstrate a seizure occurred and the seizure was unreasonable." *Quraishi v. St. Charles Cnty., Missouri*, 986 F.3d 831, 839 (8th Cir. 2021) (internal quotation marks omitted).

i. Seizure

As an initial matter, Officer Bauer argues for the first time in his reply brief that a Fourth Amendment seizure did not occur. Officer Bauer contends that Marks was not seized because Officer Bauer did not tell Marks he could not leave the scene, did not attempt to detain Marks, and did not limit his path to leave. As such, Officer Bauer argues that he merely used force to repel Marks away from Officer Pobuda, and that such force does not constitute a seizure under the Fourth Amendment.

Not only is the argument untimely,[2] it fails on the merits. "A seizure is an 'application of physical force to restrain movement, even when it is ultimately unsuccessful.'" *Quraishi v. St. Charles Cnty., Mo.*, 986 F.3d 831, 839 (8th Cir. 2021) (quoting *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991)); *see also Torres v. Madrid*, 141 S. Ct. 989, 1003, 209 L. Ed. 2d 190 (2021) ("[T]he application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued."). "[A] person has been "seized" within the

2. Local Rule 7.1(c)(3)(B) provides: "A reply memorandum must not raise new grounds for relief or present matters that do not relate to the opposing party's response." D. Minn. LR 7.1(c)(3)(B); *see also Barham v. Reliance Standard Life Ins. Co.*, 441 F.3d 581, 584 (8th Cir. 2006) ("As a general rule, we will not consider arguments raised for the first time in a reply brief."); *Torspo Hockey Int'l, Inc. v. Kor Hockey Ltd.*, 491 F. Supp. 2d 871, 878 (D. Minn. 2007) ("[F]ederal courts do not, as a rule, entertain arguments made by a party for the first time in a reply brief.").

meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). When an officer restrains a person's freedom of movement through physical force, it "would make little sense to ask whether [that] person felt free to leave . . . because the force itself necessarily---if only briefly---restrained the person's liberty." *Atkinson v. City of Mt. View Mo.*, 709 F.3d 1201, 1209 (8th Cir. 2013) (quotation marks and alterations omitted).

Here, Officer Bauer applied physical force to restrain Marks' movement by shooting him in the face with a projectile at close range to stop him from re-engaging with Officer Pobuda. Bauer Dep. at 154. The force applied by Officer Bauer knocked Marks to the ground on impact, causing his freedom of movement to be restrained, even if only briefly. Bauer Dep. at 162, 185. When interviewed about the incident, Officer Bauer stated that there were not enough officers to arrest Marks because he was fleeing the scene. K. Bennett Decl. Ex. 16 [Docket No. 122, Attach. 1] at MPLS_MARKS007338. These facts, viewed in the light most favorable to Marks, are sufficient to establish that a seizure occurred the moment Officer Bauer shot Marks in the face.

The cases cited by Officer Bauer do not compel a different result because all involve force used to disperse or repel individuals from restricted areas rather than force used to restrain movement. *See Dundon v. Kirchmeier*, 2017 U.S. Dist. LEXIS 222696, 2017 WL 5894552, at *3,

*18 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701. F. App'x 538 (8th Cir. 2017) (holding officers' use of rubber bullets and projectiles to disperse a crowd of protesters was not a seizure); *Martinez v. Sasse*, 37 F.4th 506, 509-10 (8th Cir. 2022) (holding officer's push of plaintiff to prevent her from entering a building was not a seizure because the alleged push did not "restrain" plaintiff but instead "repelled" plaintiff from entering the building). Officer Bauer has stated that he did not use the 40-millimeter launcher as a dispersal tool. *See* K. Bennett Decl. Ex. 16 [Docket No. 122, Attach. 1] at MPLS_MARKS007335. He also described Marks as "fleeing," rather than dispersing, which further shows that Officer Bauer used force to restrain Marks and not to repel him. *Id.* at MPLS_MARKS007338. A person who is free to leave or who is complying with an officer's dispersal efforts is typically not described as "fleeing the scene." *Id.*

The context and circumstances establish that Officer Bauer restrained Marks' movement by freezing him in place through physical force, and that there were not sufficient officers to pursue a fleeing suspect in an unruly crowd. In *Torres v. Madrid*, the Supreme Court found that officers' shooting at Torres was "physical force [applied] to her body [which] objectively manifested an intent to restrain her" and was therefore a seizure "for the instant that the bullets struck her." *Torres*, 141 S. Ct. at 999. Similarly, Marks was "seized" by Officer Bauer when the less-lethal projectile toppled him to the ground. Accordingly, Marks was seized within the meaning of the Fourth Amendment.

ii. Reasonableness of Seizure

Having determined a Fourth Amendment seizure occurred, the Court next examines whether the seizure was reasonable. Excessive force claims are analyzed under the Fourth Amendment's "objective reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 388, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id.* at 397.

The reasonableness of an officer's 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 . . . . 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." *Graham*, 490 U.S. at 396-97.

A. Deadly Force

In framing their use-of-force arguments, the parties disagree over whether Officer Bauer used deadly force. "[D]eadly force is "such force that creates a substantial risk of causing death or serious bodily harm." *Anderson v. Avond*, F. Supp. 3d , No. 20-CV-1147 (KMM/LIB), 2022 U.S. Dist. LEXIS 175626, 2022 WL 4540125, at *5 (D. Minn. Sept. 28, 2022) (quoting *Church v. Anderson*, 249 F. Supp. 3d 963, 968 (N.D. Iowa 2017), *aff'd* 898 F.3d

830 (8th Cir. 2018)). Unless an officer has "probable cause . . . to believe the suspect poses an immediate threat of death or serious bodily injury to others, use of deadly force is not objectively reasonable." *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020). On a motion for summary judgment, if disputed facts could lead a reasonable juror to find that an officer's conduct amounted to deadly force, the issue must be decided by the jury. *Anderson*, 2022 U.S. Dist. LEXIS 175626, 2022 WL 4540125, at *6; *see also Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (denying summary judgment because issues of material fact precluded the court from determining whether an officer's attempt to hit an individual with a moving squad car amounted to deadly force).

Significantly, Officer Bauer does not argue that the use of deadly force would have been objectively reasonable under the circumstances of this case. Indeed, Officer Bauer's own defense witnesses concede that deadly force was not justified. Pobuda Dep. at 33-34; Angerhofer Dep. at 63; Gard Dep. at 80.

Rather than arguing that the use of deadly force was objectively reasonable, Officer Bauer insists that he did not use deadly force because he intended to hit Marks in the torso, but that Marks' body dropped suddenly before the launcher was deployed, causing the projectile to hit Marks in the face. This argument is unconvincing because the force that Officer Bauer *intended* to apply is not relevant to the reasonableness inquiry. The Supreme Court has long made clear that "the question is whether the officers'

actions are 'objectively reasonable' in light of the facts and circumstances confronting them, *without regard to their underlying intent or motivation*." *Graham*, 490 U.S. at 397 (emphasis added). As such, "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Id.* Stated differently, "consideration of whether the individual officers acted in 'good faith' or 'maliciously and sadistically for the very purpose of causing harm,' is incompatible with a proper Fourth Amendment analysis." *Id.*

Here, the actual force used by Officer Bauer consisted of shooting a less lethal launcher from close range into Marks' face---an area which "carries the greatest potential for serious or fatal injury." K. Bennett Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007715. Thus, regardless of Officer Bauer's subjective intent or motivation, he used force capable of causing serious or fatal injury on Marks, who was unarmed, had been pushed several feet away from Officer Pobuda, and was stumbling backwards when he was shot. Under these circumstances, the Court cannot conclude that Officer Bauer's use of force was objectively reasonable.

Officer Bauer argues that his "mistaken placement of a less-lethal weapon" was objectively reasonable and does not give rise to a constitutional violation. Def. Mem. Opp'n Summ. J. [Docket No. 105] at 38. However, this argument is simply another way of saying that he *intended* to aim his weapon elsewhere. Officer Bauer's intent and motivation are not relevant to the Fourth Amendment analysis.

Even if Officer Bauer's subjective intent were relevant, a genuine dispute of material fact exists concerning whether Officer Bauer intended to use deadly force when he shot Marks in the face. Marks argues that Officer Bauer intentionally aimed for Zone 3, whereas Officer Bauer argues that he was aiming for Marks' torso but unintentionally hit Marks in the face because Marks was falling as the weapon discharged.

Viewing the record in the light most favorable to Marks, sufficient evidence exists from which a reasonable jury could find that Marks aimed for Zone 3. Significantly, Officer Bauer is an experienced military marksman and was trained to be accurate and proficient with the less lethal launcher. Days after the incident with Marks, Officer Bauer succeeded in hitting his intended moving target---the buttocks of a man scaling a wall---from 50 yards away in the dark of night. Bauer Dep. at 16, 65-66. Here, Officer Bauer was five to 10 feet away when he shot Marks in the face in broad daylight.

Officer Bauer also provided unclear deposition testimony about where he was aiming that would allow a reasonable juror to resolve this factual disagreement in Marks' favor. For example, Officer Bauer testified that he aimed for "center mass," which he described as the "whole torso area," and which he believed was "[p]robably around like . . . Zone 2-ish." Bauer Dep. at 118-119, 154, 194. However, the SWAT training that Officer Bauer was required to complete on a yearly basis instructs that Zone 2 encompasses the abdominal area, and that "center mass" is the chest and is located in Zone 3. K. Bennett Decl. Ex. 4 [Docket No. 122] at MPLS_MARKS007715. Thus, a

reasonable jury could find that Officer Bauer was aiming for an area on Marks' body that carried the potential for serious injury or death.

A review of the video footage of the incident also permits a reasonable inference that Officer Bauer was aiming the launcher at Zone 3 when he deployed the launcher. Two of Officer Bauer's' own experts testified that the video footage does not show Officer Bauer aiming at Zone 1 or Zone 2 before he fired the launcher. *See* Ward Dep. at 49; Noedel Dep. at 41. The Court has repeatedly viewed the video footage and photo images of the incident, including the angle of the launcher and Marks' body position, and whether or not Officer Bauer was aiming for Zone 3 when he shot Marks remains uncertain.

In an effort to show he was not aiming for Zone 3, Officer Bauer relies on an expert report from forensic video specialist Paris Ward ("Ward"). *See* K. Bennett Decl. Ex. 31 (Ward Report). Ward stabilized and enlarged certain frames of Officer Bauer's body-worn camera and determined that the stabilized video shows that Marks' hip rose in elevation and then dropped down several inches in the fraction of a second before Marks was shot. *Id.* at 9. Ward concludes that the sudden downward movement occurred 0.23 seconds before Marks was shot, and "could explain why he was hit in the head instead of the upper torso." *Id.* at 13. Ward's report does not quantify the distance that Marks' body dropped, but Ward testified in his deposition that Marks' body "may have dropped as much as 10 inches, even 10 to 12 inches." *Id.* at 62.

Even if a reasonable jury were to credit Ward's report and testimony about the sudden drop in Marks' body position, the jury could still conclude that Officer Bauer was aiming in Zone 3 to begin with, and that Marks' fall simply caused Officer Bauer to hit Marks higher in Zone 3 than intended. According to the estimations of Officer Bauer's own shooting reconstruction expert, Matthew Noedel ("Noedel"), the area located 10 inches below Marks' eyes is his *chest*. *See* R. Bennet Decl. Ex. F (Noedel Report) [Docket No. 91-1] at 6 (Figure 3) (stating the approximate 10-inch height difference "shows the height differential in hitting the *chest* versus the right eye of Mr. Marks") (emphasis added). As Bauer acknowledges and the MPD training materials instruct, the chest is located in Zone 3. *See* Bauer Dep. at 65 ("Zone 3 would be from the chest up, sir.").

In further arguing that he did not aim at Marks' head, Officer Bauer relies on calculations performed by Noedel showing that to hit Marks in the eye instead of the "upper torso area," the launcher would only need to be rotated approximately 5 degrees upward. Noedel Report at 2, 6 (Figure 3), 7 (Figure 4). Officer Bauer urges that this minor difference in rotation is nearly imperceptible and could explain why he hit Marks in the eye even though he was not aiming at Marks' head.

This proffered explanation is not sufficient to resolve the fact issue of whether or not Officer Bauer was aiming for Zone 3 when he shot Marks. To begin, a reasonable jury could find that Officer Bauer---an experienced marksman---was capable of adjusting for minor rotations

in the launcher that would otherwise cause him to miss a close-range target by 10 inches or more. Additionally, as already stated, Noedel considers the "upper torso area" to be the chest, which is in Zone 3. Further, when Noedel calculated the rotational changes to the angle of the launcher, he used a shooting distance of 10 feet. *Id.* at 2. However, the record includes evidence from which a reasonable jury could find that the shooting distance between Officer Bauer and Marks was a shorter distance, which would require a greater degree of rotation needed to hit Marks in the eye instead of the torso. For example, a statement made by Officer Bauer during an interview about the incident suggests that he shot from just beyond the minimum safe standoff range of five feet.[3] Additionally, forensic video specialist Ward estimates that the distance between the launcher's muzzle and Marks' head was between 70 and 80 inches.[4] Adding 25 inches to Ward's figures to account for the length of the launcher results in an estimated shooting distance ranging from 7 feet, two inches to eight feet, nine inches.

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3. When questioning Officer Bauer about the details concerning his deployment of the launcher, the interviewer asked: "Okay, uh, and based on your training, distance and everything?" Officer Bauer responded: "Yep so the, the minimum standoff is 5 feet and just, uh, beyond 5 feet." K. Bennett Decl. Ex. 16 [Docket No. 122-1] at MPLS_MARKS007338. Officer Bauer contends that he was simply stating the minimum standoff when giving this answer. Bauer Dep. at 142. However, a reasonable jury could interpret the answer to mean that the minimum standoff is five feet and that Officer Bauer was just beyond five feet when he deployed the launcher.

4. Ward multiplied a 28-to-32-inch range by 2.5, resulting in 70 to 80 inches. Ward Report at 11.

In sum, to the extent if any that Officer Bauer's intended point of aim is relevant to the deadly force analysis, a reasonable jury could conclude that Officer Bauer intended to use deadly force based on his proficiency with the less lethal launcher, his varied testimony about where he was aiming, the shot placement to the eye (near the top of Zone 3), and the close firing distance.[5]

B. Non-deadly Force

Even if the force used by Officer Bauer was found not to be deadly force, the evidence viewed in the light most favorable to Marks supports a conclusion that the force

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5. Officer Bauer argues that Minnesota's statutory definition of deadly force expressly excludes the firearms loaded with less lethal munitions. The statute provides in relevant part:

> [D]eadly force" means force which the actor uses with the purpose of causing, or which the actor should reasonably know creates a substantial risk of causing, death or great bodily harm. The intentional discharge of a firearm, other than a firearm loaded with less lethal munitions and used by a peace officer within the scope of official duties, in the direction of another person, or at a vehicle in which another person is believed to be, constitutes deadly force.

Minn. Stat. § 609.066. This statute merely specifies that, unlike lethal firearms, the intentional discharge of a less lethal firearm is not *per se* deadly force. Accordingly, the statute does not preclude a jury from finding that Officer Bauer used deadly force when he struck Marks in the face with the less lethal firearm by using force which he knew creates a substantial risk of causing death or great bodily harm.

used on Marks was unreasonable in light of the facts and circumstances confronting Officer Bauer. In evaluating the reasonableness of the force, a court "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." *Loch v. City of Litchfield*, 689 F.3d 961, 965 (8th Cir. 2012) (citing *Graham*, 490 U.S. at 396).

With respect to the severity of the crime, Officer Bauer argues that Marks was committing the serious crimes of assaulting and attempting to disarm a police officer. Although the BWC video shows that Marks hit Officer Pobuda and briefly grasped his baton, it took Officer Pobuda no more than three seconds to push the unarmed Marks away and send him stumbling backwards several feet. Officer Pobuda, who was the recipient of Marks' aggression, did not think that Mark's actions warranted an arrest. Pobuda Dep. at 42. Two independent prosecutors who viewed the video footage similarly determined that Marks' conduct was insufficient to support even misdemeanor charges. *See* R. Bennett Decl. Exs. J, K [Docket No. 91, Attachs. 4, 5]. While a jury may endorse Officer Bauer's characterization of the incident as a "bad assault," evidence exists to the contrary, and a reasonable jury could find that the force Officer Bauer used in response to the brief altercation was excessive. *See Rohrbough v. Hall*, 586 F.3d 582, 586 (8th Cir. 2009) (holding that a jury could conclude that an officer's use of force was excessive, even where the plaintiff pushed the officer, because the plaintiff's push may have been inconsequential).

As to whether Marks posed an immediate threat, a reasonable jury could find that at the time Marks was shot he no longer posed an immediate threat to Officer Pobuda or to the injured person the officers were trying to evacuate. Although frames from the BWC video show that Marks' fist remained clenched after Officer Pobuda had pushed him away, the push had created several feet of space between Marks and Officer Pobuda, and an individual had stepped into the space between them. After this separation, Officer Pobuda did not think that further use of force on Marks was necessary. Pobuda Dep. at 42. Marks was not holding a weapon and was stumbling backwards at the time he was shot. Given these circumstances, a reasonably jury could conclude that the threat had been extinguished. *See Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020) ("[T]he requirement that the threat be reasonably perceived as 'immediate' means that if the threat has passed, so too has the justification for the use of deadly force."). To the extent that Officer Bauer was concerned that Marks might try to re-engage with Officer Pobuda, "[a] future hypothetical—plausible or not—is not a justification for the use of significant force because a threat cannot be immediate when it has not yet materialized." *Anderson*, 2022 U.S. Dist. LEXIS 175626, 2022 WL 4540125, at *12.

Regarding the final factor, Marks was not actively resisting arrest at the time Officer Bauer fired and did not flee the scene until after he had been shot.

In addition to these factors, the severity of injuries sustained by a plaintiff is a relevant, though not dispositive,

factor in determining the reasonableness of the force used. *Montoya v. City of Flandreau*, 669 F.3d 867, 872 (8th Cir. 2012). Here, the high degree of force employed by Officer Bauer---shooting a chemical-filled projectile into Marks' face from 5 to 10 feet away---caused severe injuries to Marks, including a shattered eye socket, ruptured eye globe, traumatic brain injury, and permanent blindness in his right eye.

Officer Bauer argues he was facing a tense, uncertain, and rapidly evolving situation because the officers were heavily outnumbered by a hostile crowd and were engaged in a chaotic medical rescue. According to Officer Bauer, he made a split-second decision to shoot because an immediate response was necessary, and waiting could have been disastrous. However, Officer Pobuda was experiencing the same circumstances and did not believe further force was necessary. *See Duy Ngo v. Storlie*, No. 03-3376 (RHK/JJG), 2006 U.S. Dist. LEXIS 36474, 2006 WL 1579873, at *5 (D. Minn. June 2, 2006) (denying qualified immunity where two officers "reacted differently under identical circumstances"), *aff'd sub nom. Ngo v. Storlie*, 495 F.3d 597 (8th Cir. 2007). Additionally, there was no need to rush to Officer Pobuda's aid, because Officer Bauer could see that Marks was no longer engaged with Officer Pobuda and was stumbling away from him as a result of Officer Pobuda's effective push. *See Banks v. Hawkins*, 999 F.3d 521, 530 n.8 (8th Cir. 2021), *cert. denied*, 142 S. Ct. 2674, 212 L. Ed. 2d 762 (2022) ("Even when making 'split-second judgments' in 'tense, uncertain, and rapidly evolving' circumstances, . . . officers cannot ignore what they know.") (quoting *Graham*, 490 U.S. at 397).

Viewing the record in the light most favorable to Marks and drawing all justifiable inferences in his favor, while also viewing the facts from the perspective of a reasonable officer on the scene, the Court cannot conclude that Officer Bauer's use of force was objectively reasonable as a matter of law. Although a jury may agree with Officer Bauer's assessment of the incident at trial, the evidence viewed in the light most favorable to Marks shows that Officer Bauer violated Marks' constitutional right to be free from excessive force.

2. Clearly Established Right

To overcome qualified immunity, Marks must also establish that the right in question was clearly established. To be "clearly established," the contours of the constitutional right "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739-40, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (quotation marks omitted). Stated differently, "existing law must have placed the constitutionality of the officer's conduct beyond debate." *D.C. v. Wesby*, 199 L. Ed. 2d 453, 138 S. Ct. 577, 589 (2018) (quotation marks omitted).

To show that a right was clearly established, a plaintiff can: (1) "point to existing circuit precedent that involves sufficiently similar facts to squarely govern the officer's actions such that the officer had notice that his specific use of force was unlawful;" (2) "present a robust consensus of cases of persuasive authority doing the same;" or (3) "demonstrate that a general constitutional rule applied

with obvious clarity to the facts at issue." *Boudoin v. Harsson*, 962 F.3d 1034, 1040 (8th Cir. 2020) (internal quotation marks, alterations, and citations omitted).

Here, it would have been clear to a reasonable officer on May 28, 2020, that shooting a high velocity projectile from close range and without warning into the face of an unarmed individual who did not present an immediate threat of death or serious injury amounted to unconstitutional excessive force. Existing precedent has long recognized that deadly force is appropriate only in response to "a significant threat of death or serious physical injury to the officer or others." *Ellison v. Lesher*, 796 F.3d 910, 917 (8th Cir. 2015) (quoting *Craighead v. Lee*, 399 F.3d 954, 962 (8th Cir.2005)). This is true even where a suspect had previously been fighting with officers. *See id.* (holding officers did not have reasonable grounds to believe suspect posed a threat of death or serious injury where he was "empty-handed," despite earlier fighting with officers). There was no basis to conclude that the unarmed Marks posed a significant threat of death or seriously bodily injury to Officer Pobuda or others, and even if there were, the threat had extinguished by the time Officer Bauer fired.

The outcome would be the same even if Officer Bauer could arguably be considered to have used less than deadly force by supposedly aiming for Marks' torso. The evidence, when viewed in the light most favorable to Marks, shows that Marks no longer posed a threat to the officers or others at the time he was shot because he was unarmed, had been pushed several feet away by Officer Pobuda, and was stumbling backwards. Officer Bauer knew from his

training that a shotgun-propelled round fired from close range, even if not aimed at the face, would cause significant blunt-force trauma and thus requires substantial justification to be reasonable. It would have been clear to a reasonable officer in Officer Bauer's position that such a high degree of force was disproportionate to the threat before him. *See Montoya*, 669 F.3d at 869-72 (holding leg sweep improper where plaintiff acted aggressively but was ten to fifteen feet away from officer); *Johnson v. Carroll*, 658 F.3d 819, 827-28 (8th Cir. 2011) (holding that macing and throwing suspect to ground was excessive where plaintiff was unarmed and "posed at most a minimal safety threat to the officers"); *Rohrbough v. Hall*, 586 F.3d 582, 586-87 (8th Cir. 2009) (holding a reasonable officer would have known that a forceful takedown was unlawful despite plaintiff having pushed officer).

Resisting this conclusion, Officer Bauer argues that pre-existing caselaw holds that officers may use less-lethal projectiles on a person who presents a threat to officer safety "without any stated limitation about where the projectile strikes the subject." Def. Mem. Spp. Summ. J. at 39-40 (citing *White v. Jackson*, 865 F.3d 1064, 1073, 1079-80 (8th Cir. 2017); *Bernini v. City of St. Paul*, 665 F.3d 997, 1001 (8th Cir. 2012)). This argument fails for at least two reasons. First, this broad proposition ignores clear and longstanding precedent instructing that the "proper application" of the test for reasonableness "requires careful attention to the facts and circumstances of *each particular case*." *Graham*, 490 U.S. at 396 (emphasis added). Additionally, the facts and circumstances of this case, when viewed in the light most favorable to Marks, show that he no longer presented a

threat at the time Officer Bauer directly used substantial force on him. As such, the cases relied on by Officer Bauer are distinguishable. *See White*, 865 F.3d at 1073, 1079-80 (holding use of projectiles was reasonable where protester continued approaching skirmish line after officers commanded him to stop); *Bernini*, 665 F.3d at 1006 (affirming qualified immunity where the record did "not show that any of the defendants directly used force against any of the plaintiffs"). Regardless of whether substantially similar factual precedent existed at the time of this incident, Officer Bauer would not have needed to "consult a casebook to recognize the unreasonableness of using [such] force . . . against a man" who posed no threat at the time of the shot. *Atkinson*, 709 F.3d at 1212 (internal quotation marks, citation, and alteration omitted).

Accordingly, Officer Bauer's motion for summary judgment based on his qualified immunity defense is denied.

B. Daubert Motions

Both parties have filed motions to exclude expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

1. Legal Standard

The admission of expert testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

When evaluating the admissibility of expert testimony, a trial court serves as the gatekeeper to ensure that the proffered testimony is reliable and relevant. *Daubert*, 509 U.S. at 589; *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). A trial court has broad discretion in fulfilling its gatekeeping role. *Wagner v. Hesston Corp.*, 450 F.3d 756, 758 (8th Cir. 2006). The proffered testimony must be useful to the fact-finder, the expert must be qualified, and the proposed evidence must be reliable. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001). The proponent of the expert testimony bears the burden of showing by a preponderance of the evidence that the testimony is admissible. *Id.*

"[R]ejection of expert testimony is the exception rather than the rule," and expert testimony should be admitted if it "advances the trier of fact's understanding

to any degree." *Robinson v. GEICO Gen. Ins. Co.*, 447 F.3d 1096, 1100 (8th Cir. 2006). "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *United States v. Finch*, 630 F.3d 1057, 1062 (8th Cir. 2011) (internal quotations and alterations omitted). "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 929-30 (8th Cir. 2001). Doubts about the usefulness of an expert's testimony should generally be resolved in favor of admissibility. *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 758 (8th Cir. 2006).

2. Expert Report and Testimony of Christopher Gard

Marks moves to exclude the expert report and testimony of Christopher Gard ("Gard") pertaining to Officer Bauer's use of force. Marks argues that Gard's opinion is flawed because (1) his opinions include bare legal conclusions; (2) he purports to resolve disputed factual issues and make credibility determinations that are the province of the jury; and (3) his police-practice standards are unsupported and unreliable.

Gard has a 25-year career in law enforcement and currently serves as the chief of police for the city of Orting, Washington police department. R. Bennett Decl. Ex. D

(Gard Report) [Docket No. 89-4] at 3, 12.[6] He begins his report with five "Professional Conclusions":

- Ofc. Bauer reported seeing a man punching at police officers who were providing security for officers attempting to load and remove a woman in apparent need of emergency medical attention. Video recordings confirmed Ofc. Bauer's perception as a man later identified as Ethan Marks was recorded quickly approaching Ofc. Pobuda ordering Ofc. Pobuda to "back up bitch," reaching toward Ofc. Pobuda, grabbing Ofc. Pobuda's riot baton, and punching Ofc. Pobuda. It would have been reasonable for an officer witnessing this conduct to believe that Mr. Marks posed an immediate threat of bodily injury to Ofc. Pobuda.

- It would have been reasonable for an officer witnessing Mr. Marks' conduct to believe that Mr. Marks was interfering with the time-sensitive rescue efforts of the police officers involved.

- *It would have been reasonable* for an officer witnessing Mr. Marks' conduct *to believe that force was necessary* to decisively stop the threat and overcome the resistance posed by Mr. Marks.

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6. Page citations to the Gard Report are to the page number in the CM/ECF banner at the top of the page.

- There was nothing depicted in the video evidence to indicate that Mr. Marks has affirmatively surrendered, was incapacitated, or was compliant prior to the discharge of the impact weapon.

- A *reasonable officer could have believed* that the use of the 40mm impact round was a *reasonable response* to immediately and decisively stop the threat posed by Mr. Marks.

Gard Report at 4 (emphases added). The report also includes a section titled "Utilization of Weapon was Reasonable and Authorized" in which Gard states: "*Ofc. Bauer's use of the impact round* to stop Mr. Marks' apparent assault and to prevent him from reinitiating that assault *was reasonable* and consistent with generally accepted law enforcement practices." *Id.* at 7 (emphasis added).

Marks argues that the third and fifth Professional Conclusions and the statement in the Utilization of Weapon section constitute bare legal conclusions on the reasonableness of Officer Bauer's force in light of the Fourth Amendment. Officer Bauer responds that Gard's use of the phrase "reasonable" or "necessary" is merely "short hand" for saying that the officers acted in a manner consistent with generally accepted police principles. Def. Mem. Opp'n Mot. Exclude [Docket No. 130] at 32. Officer Bauer contends that "Gard is not making purely legal conclusions, he is simply expressing his fact-based opinions using the language that police officers use---language that happens to mirror legal language." *Id.*

Appendix B

An expert's opinion on the reasonableness of police conduct in light of Fourth Amendment standards is an impermissible legal conclusion and is not admissible. *Schmidt v. City of Bella Villa*, 557 F.3d 564, 570 (8th Cir.2009); *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995); *Redd v. Abla-Reyes*, Civ. No. 12-465, 2013 U.S. Dist. LEXIS 162300, 2013 WL 6036697, at *2 (D. Minn. Nov. 14, 2013). The Court finds that Gard's conclusions about the reasonableness of Officer Bauer's force constitute bare legal conclusions. As a result, they must be excluded from Gard's report and from his testimony at trial.

Marks also argues that Gard purports to resolve factual disputes and make credibility determinations, thereby usurping the role of the jury. Regarding factual disputes, Marks contends that Gard's interpretation of the video evidence directly contradicts the record by: (1) characterizing the brief altercation between Marks and Officer Pobuda as a violent and aggressive assault, Gard Report at 6; (2) speculating that Marks intended to "assault" Officer Pobuda again after Marks had been pushed away, *id.*; and (3) stating that the BWC video footage shows that Marks' backwards motion caused his "head to dip." *Id.* Marks' first two concerns can be properly addressed by cross examining Gard as to these characterizations and conclusions. The third interpretation is unsupported by the record because Marks' head is not depicted in Officer Bauer's BWC video footage. As such, this statement must be excluded.

Marks also argues that Gard should be precluded from testifying as he did in his deposition that Officer Bauer

did not intend to shoot Marks in the eye. *See* K. Bennett Decl. Ex. 14 (Gard Dep.) at 15-17, 47, 55-56, 69, 78, 92, 97. Any testimony by Gard about where Officer Bauer intended to strike Marks is impermissible and will not be allowed at trial. The probative value of such testimony is also strongly outweighed by its possible prejudice given the "very real danger that the proffered expert testimony could either confuse the jury or cause it to substitute the expert's credibility assessment for its own." *United States v. Kime*, 99 F.3d 870, 884 (8th Cir. 1996). As such, Gard is precluded from testifying about Officer Bauer's subjective intent.

Marks further argues that Gard's testimony is unreliable because Gard does not cite a source for the generally accepted police-practice standards he uses in his opinions, and Gard has stated that the standards come from his own personal experience. Officer Bauer responds that Gard's opinions are based on a reliable methodology because Gard cites to cases and scholarly publications for some of the generally accepted police-practice standards, and the other standards are based on Gard's research and years of experience. The Court concludes that Gard does include some support for his testimony regarding police-practice standards. And, his methodology is not so fundamentally unsupported that it can offer no assistance to the jury. However, many of Gard's "conclusions" and assertions of "generally accepted standards" rest on shaky foundation which may result in objections being sustained at trial.

Accordingly, Marks' motion to exclude Gard's expert opinion and testimony is granted in part and denied in part.

3. Expert Testimony of Parris Ward

Marks also moves to exclude the expert testimony of Parris Ward ("Ward"). Ward is a forensic video specialist with decades of experience in the forensic analysis of video recordings, forensic enhancement of video images, and development of scientific visualizations for injury events such as shooting incidents. *See* Ward Report at Attach. A. Although Marks does not challenge Ward's qualifications, he argues that Ward's proffered opinions must be excluded because they would not aid the jury and are unreliable. Marks further argues that even if Ward's proffered opinions pass muster under Rule 702, they must be excluded under Federal Rule of Evidence 403 because their probative value is substantially outweighed by the danger of confusing or misleading the jury.

In preparing his report, Ward was given four videos (a twitter video and the body worn camera ("BWC") videos of Officer Bauer, Officer Pobuda, and a third MPD officer) and was asked "to analyze the videos to determine what information could be derived from them" regarding Marks' shooting. Ward Report at 3. Ward enhanced the videos by brightening and stabilizing them, preparing slow motion versions, breaking the videos down by frame number, and synchronizing them. *Id.* at 3-4, 7-11. Marks does not object to these enhancements.

Ward's report includes analyzing Marks' movements as he stumbled backward. *Id.* at 8-10. In his analysis, Ward compared frames from the stabilized video and noted that "the elevation of Mr. Marks' body dropped

several inches just prior to the launcher being fired." *Id.* at 9. Ward illustrated the changing elevation by focusing on a reference point on Marks' hip and tracking that point over time. *Id.* at 9-10. Ward concluded that "Marks' body initially dropped down, rose up, then dropped again a fraction of a second before he was struck." *Id.* at 13. Ward states that Marks' "sudden drop could explain why he was hit in the head instead of the upper torso." *Id.*

Ward also analyzed a still-frame photo of Officer Pobuda's BWC video that shows the muzzle of the launcher and Marks the moment immediately before the launcher was deployed. Ward determined from the photo that the distance between the muzzle tip and Marks' head was more than five feet. *Id.* at 11-12. Ward reached this conclusion by estimating the length of Marks' outstretched arm in the photo to be 28 to 32 inches, and determining that the distance between the muzzle tip and Marks' head "is about two and a half times that." *Id.* at 11.

Marks argues that Ward's report would not aid the jury because the jury is capable of watching the videos and drawing their own conclusions about what the videos show. Marks also argues that Ward's opinion that Marks was struck in the head because he was falling is unreliable because the only support for it comes from tracking Marks' hip, and the video does not show Marks' head. Marks contends that the drop of Marks' hip does not necessarily equate to a drop of Marks' head. Marks further argues that Ward's distance calculation is unreliable because Ward was using imprecise estimates of how many arm-lengths Marks was from the muzzle and how long Marks' arm is.

The Court finds that Ward's video enhancements and analysis would be helpful in assisting the jury with considering time-sensitive inquiries such as how rapidly the events were unfolding. The video analysis also helps the jury to understand the totality of the circumstances at the time Marks was shot. While Marks' challenges to Ward's conclusions about Marks' body movement and the estimated distance between Marks and the launcher are appropriate subjects for cross examination, the Court finds that Ward's opinion is not so fundamentally unsupported that it can offer no assistance to the jury.

Marks also argues that references in Ward's report to Officer Bauer purportedly "intend[ing]" to aim for Marks' "upper torso" are not admissible because Ward does not know where Officer Bauer was aiming, and because Officer Bauer's intent is not relevant to whether his actions were objectively reasonable. Marks contends that these references must be excluded under Federal Rule of Evidence 403 because their danger of misleading or confusing the jury substantially outweighs their probative value. Officer Bauer responds that his intent is relevant to any claim for punitive damages that Marks may attempt to make. Marks' concerns can be addressed through a pretrial motion *in limine* [7] or objections during trial, but are not a basis to exclude Ward's expert opinions and testimony in their entirety.

Accordingly, Marks' motion to exclude Ward's expert testimony is denied.

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7. Marks intends to bring a motion *in limine* on this issue before trial. *See* Mem. Supp. Mot. Exclude [Docket No. 87] at 22 n.5.

4. Expert Testimony of Matthew Noedel

Marks also moves to exclude the expert testimony of Matthew Noedel (Noedel). Noedel is a forensic scientist with over 20 years of experience performing shooting scene reconstruction. Noedel Report at Curriculum Vitae. Marks does not challenge Noedel's qualifications, but argues that Noedel's proffered opinions must be excluded because they would not aid the jury and are unreliable. Marks further argues that even if Noedel's proffered opinions are admissible under Rule 702, they must be excluded under Federal Rule of Evidence 403 because their probative value is substantially outweighed by the danger of confusing or misleading the jury.

In preparing his report, Noedel relied on documentation including police reports, expert testimony, police body worn camera video, scene photographs, and other data connected to the incident. Noedel Report at 1. Noedel's shooting reconstruction analysis included consideration of the "point of aim difference required to hit the eye rather than the upper torso area of Mr. Marks." *Id.* at 2. To calculate the point of aim difference, Noedel relied on the following measurements: an estimated distance of 10 inches between Marks' right eye and his "upper torso area," a distance of 10 feet between Officer Bauer and Marks, and a gun length of 25 inches. *Id.* at 2. Noedel then used right triangle trigonometry to calculate degree to which the gun needed to be rotated to hit Marks' eye instead of upper torso, and concluded that the gun would need to be rotated approximately 5 degrees upward. *Id.* at 2-3.

Marks argues that Noedel's opinion is not helpful to the jury because several of his conclusions are simply recitations of matters in the record, such as the length of the launcher, the level nature of the terrain where the shot was delivered, that the projectile struck Marks in his right eye, and that Officer Bauer reported that he intended to shoot Marks' torso. Marks also argues that it is common sense that when a shooter changes the point of aim with a firearm he can strike a different spot with his projectile. However, the Court finds that Noedel's opinion will aid the jury in understanding and assessing how the degree of rotation affects the trajectory of a projectile.

Marks also argues that Noedel's trigonometry calculations are unreliable because they are based on speculative measurements such as the distance between Officer Bauer and Marks, and the distance from Marks' upper torso to his eye. For example, Marks' other expert, Ward, estimated that the distance from the muzzle to Mark was only 70 to 80 inches. After adding 25 inches for the length of the launcher, the total distance is still less than the 10-foot distance relied on by Noedel. Additionally, the 10-inch distance between Marks' eye and his upper torso is merely an estimate that Noedel arrived at by measuring his own body. Marks thus contends that Noedel's opinions are simply vague theorizing disguised as precise math.

Marks' complaints about the approximations of Noedel's data points go to the weight of the testimony rather than the methodology used. As such, while Marks is free to cross-examine Noedel on the factual basis for

his conclusions, Noedel's expert report and testimony are not so fundamentally unsupported that they can offer no assistance to the jury.

Marks also argues that Noedel's opinions must be excluded under Rule 403 because their probative value is substantially outweighed by their danger of confusing or misleading the jury. Marks contends that Noedel's opinions about Officer Bauer's "unintentional" rotation of the launcher are speculative, legally irrelevant, and contradictory to Noedel's deposition testimony in which he admitted that the only place Officer Bauer ever pointed was to Zone 3. These concerns can be addressed through a pretrial motion *in limine* or objections during trial, but are not a basis to exclude Noedel's expert report and testimony in their entirety.

Accordingly, Marks' motion to exclude Noedel's expert testimony is denied.

5. Expert Rebuttal Report and Testimony of Thomas Martin

Officer Bauer moves to exclude the expert rebuttal report and any related testimony by Thomas Martin ("Martin"). K. Bennett Decl. Ex. 17 (Martin Report) [Docket No. 122, Attach. 2]. Martin is a shooting reconstructionist with over 30 years of training and experience, and was engaged by Marks as a rebuttal expert to review and evaluate the opinions of Ward and Noedel. *Id.* at 1.

Appendix B

To rebut Noedel's opinions regarding the point-of-aim difference that would arguably account for striking Marks in the eye instead of his upper torso, Martin applies the same right-angle methodology but uses different measurements from the record. For example, instead of the 10-foot shooting distance used by Noedel to calculate the point-of-aim difference, Martin performed the calculations using 70 inches (Ward's low-end estimate of the shooting distance) and 80 inches (Ward's high-end estimate). Martin Report at 10. In doing so, Martin demonstrates that Noedel's model will produce substantially different results depending on what estimate is used to represent the distance between Officer Bauer and Marks at the time of the shot. *Id.* at 10-11.

Officer Bauer argues that Martin's methodology is flawed because he did not include the 25-inch length of the launcher when performing his calculations. Officer Bauer contends that including the length of the launcher is necessary because the pivot point is at the butt of the launcher, and thus the launcher itself is part of the right triangle calculation. These concerns go to the weight of Martin's testimony rather than its admissibility. Martin's opinions will aid the jury in understanding how different measurements and estimates can impact the point-of-aim differentials. As such, his opinions and testimony on this topic is admissible.

Martin's rebuttal report includes a conclusion that the preferred area for Officer Bauer to have targeted was Zone 1, and that Officer Bauer's BWC video shows that Zone 1 was available to be targeted. *Id.* at 5-7, 10, 12-13.

Officer Bauer argues that Martin is not qualified to give this opinion because he has never used or been trained on a less-lethal launcher and has never had any training on when an officer should aim at Zones 1, 2, or 3 with a less-lethal launcher. Officer Bauer thus contends that Martin lacks expertise in this area and is no more knowledgeable about point of aim decisions for less-lethal launchers than a prospective juror. Officer Bauer further argues that the topic of Zones 1 through 3 was not addressed by Ward or Noedel in their expert reports, and thus Martin's opinions constitute new arguments and legal theories which are improper rebuttal material.

Marks concedes that Martin has no knowledge, education, training, experience, or expertise with respect to point of aim decisions involving less-lethal projectiles and Zones 1 through 3 prior to his involvement in this litigation. However, he argues that Martin's incorporation of target zones into his testimony is an appropriate application of his expertise in reconstructing officer-involved shootings to the facts of the case.

Although gaps in an expert's qualifications or knowledge generally go to the weight of the witness's testimony rather than its admissibility, "Rule 702 does require that the area of the witness's competence matches the subject matter of the witness's testimony." *Robinson*, 447 F.3d at 1101 (quotations omitted). That Martin is qualified to determine angles and trajectories as a shooting reconstructionist is not sufficient to allow him to testify as an expert on the wholly distinct topic of which Zone an officer should or must aim at when deploying a less lethal projectile. Additionally, because

MPD training and Zones 1 through 3 are not addressed by experts Ward or Noedel, Martin's opinions on these topics are not proper rebuttal material. For these reasons, Martin is precluded from offering opinions and testimony on point-of-aim decisions involving less-lethal projectiles and Zones 1 through 3.

Martin's report also offers a colloquial definition of "point blank range," which Martin defines as "can't miss distance." *Id.* at 13. This definition is provided in response to Noedel's report, which specifies the technical definition of the term. *See* Noedel Report at 3. Officer Bauer argues that Martin should not be allowed to opine on the colloquial definition of "point blank" because it is equally within the knowledge of the jury, and because Martin does not offer any basis for how he determined that the colloquial meaning is "can't miss distance." The Court will not exclude this portion of Martin's opinion at this juncture, but Officer Bauer may renew the argument in a motion *in limine* before the trial or through an objection at trial.

Accordingly, Officer Bauer's motion to exclude Martin's expert opinion and rebuttal testimony is granted in part and denied in part.

IV. CONCLUSION

Based upon all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that:

1. Defendant Benjamin Bauer's Motion for Summary Judgment [Docket No 100] is **DENIED**;

2. Bauer's Motion to Exclude the Report and Testimony of Thomas Martin [Docket No. 97] is **GRANTED IN PART and DENIED IN PART**;

3. Plaintiff Ethan Daniel Mark's Motion to Exclude the Testimony of Defense Expert Christopher Gard [Docket No. 81] is **GRANTED IN PART and DENIED IN PART**; and

4. Marks' Motion to Exclude the Testimony of Defense Experts Parris Ward and Matthew Noedel [Docket No. 85] is **DENIED**.

Dated: February 1, 2022

BY THE COURT:

/s/ Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT COURT

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED SEPTEMBER 4, 2024

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 23-1420

ETHAN DANIEL MARKS,

Appellee,

v.

BENJAMIN M. BAUER, ACTING IN HIS INDIVIDUAL CAPACITY AS A MINNEAPOLIS POLICE OFFICER,

Appellant.

Filed September 4, 2024

Appeal from U.S. District Court
for the District of Minnesota
(0:20-cv-01913-ADM)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Judge Loken, Judge Gruender, Judge Shepherd, and Judge Stras would grant the petition for rehearing

en banc. Judge Stras would grant the petition for panel rehearing.

September 04, 2024

Order Entered at the Direction of the Court:

Acting Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Maureewn W. Gornik
Maureen W. Gornik