No. 24-616

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

BRIEF OF MINNESOTA POLICE AND PEACE OFFICERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CHRISTOPHER W. MADEL
Counsel of Record
MADEL PA
800 Hennepin Avenue
Suite 800
Minneapolis, MN 55403
(612) 605-0630
cmadel@madellaw.com

Counsel for Amicus Curiae

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The Minnesota Police and Peace Officers Association ("MPPOA") submits this brief in support of Petitioner Officer Benjamin M. Bauer, and urges reversal of the decision below in *Ethan Daniel Marks v. Benjamin M. Bauer*, No. 23-1420.

STATEMENT OF INTEREST OF AMICUS CURIAE

Founded in 1922, the Minnesota Police and Peace Officers Association ("MPPOA") is the largest association representing licensed peace officers in the State of Minnesota.[1] As the legislative voice for public safety professionals, the MPPOA seeks to promote laws and policies that support public safety and the working conditions and retirement benefits for the professionals that uphold it, while opposing those laws and policies that do not. The MPPOA provides training and promotes high ethical standards in policing across the state of Minnesota. It also provides legal representation to member officers acting in their official capacities for, *inter alia,* critical incidents that might expose the officer to criminal liability.

The MPPOA has a strong interest in this case because it bears directly on how Courts will review its members actions when attempting to disperse unruly and riotous crowds—situations that have only become more common in recent years.

The MPPOA respectfully submits this brief to emphasize the significant negative impact that the

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[1] Pursuant to this Court's Rule 37.6, counsel for the MPPOA states that no part of this brief was authored by counsel for any party, and no person or entity other than the MPPOA or its members made any monetary contribution to the preparation or submission of the brief. The Parties, through their counsel of record, received timely notice of the MPPOA's intent to file this brief.

decision below will have on the ability of peace officers, not just in Minnesota but nationwide, to protect themselves and others while attempting to disperse crowds and respond to riotous behavior, and to demonstrate the need for this Court to grant certiorari and end the confusion surrounding when uses of force constitute seizures, the role of subject intent in making that determination, and the level of specificity needed for conduct to violate a "clearly established" right.

SUMMARY OF THE ARGUMENT

In the hours and days following the death of George Floyd during his attempted arrest by Minneapolis police officers, violent riots engulfed the "Twin Cities" of Minneapolis and Saint Paul, Minnesota. The scale and intensity of the unrest was unprecedented. Nightly riots spanned nearly a week, resulting in multiple deaths, innumerable injuries, as well as hundreds of millions of dollars in property damage—including the complete destruction of a Minneapolis police precinct.

Mere hours before that police precinct was overtaken and destroyed by rioters, Officer Bauer's team was ordered to go into the very heart of the crowd—within approximately one block of the besieged precinct—to evacuate a stabbing victim to whom the ambulances refused to travel due to the risk. The crowd hurled bottles and other objects at Officer Bauer's marked police vehicle as he entered, and he fired "less lethal" projectiles from his 40 mm projectile launcher to establish a perimeter to evacuate the victim. Officer Bauer was then ordered to evacuate another victim of violence in the crowd—a woman believed to have been attacked with a baseball bat.

Officer Bauer worked with other police, including Officer Jonathan Pobuda, to establish a perimeter

around the woman among the crowd. Appellee Ethan Marks ("Marks") attempting to force Officer Pobuda back, shouting, "Back up, bitch!" at him. The shouting drew Officer Bauer's attention, who turned to see Marks grasping at Officer Pobuda's riot baton. Officer Pobuda pushed Marks back and Officer Bauer fired his less lethal launcher at him. As Marks stumbled over a corrugated pipe, the 40mm less lethal projectile struck Marks in the face, who promptly ran away without any officer ordering him to stop or attempting to pursue.

Marks then brought this lawsuit, claiming that Officer Bauer violated his Fourth Amendment right against unreasonable seizure and excessive force. Both the District Court and the Eighth Circuit held that Officer Bauer's use of the less lethal projectile constituted a seizure, was objectively unreasonable under the circumstances, and violated clearly established rights.

Under this Court's recent precedent, in particular *Torres v. Madrid*, the lower courts should have found that Officer Bauer objectively manifested an intent to repel or disperse Marks, not to restrain him, and so did not "seize" him within the meaning of the Fourth Amendment. But reflecting the confusion that has divided multiple circuits on how to apply *Torres* to less lethal projectiles in crowd control situations, both the District Court and the Eighth Circuit (1) engaged in a *subjective* analysis to (2) wrongly find that Officer Bauer intended to restrain Marks, (3) incorrectly held that the unlawfulness of Officer Bauer's conduct was clearly established despite its own precedent to the contrary, and (4) relied on assumptions blatantly contradicted by the video evidence to make these findings.

Less lethal tools like the projectile launcher used by Officer Bauer here are increasingly critical tools for law enforcement—particularly, though not

exclusively, in the context of crowd control. As police departments around the country move towards finding gentler means of responding to unruly crowds while protecting themselves and others—and move away from mass detention and arrest tactics like "kettling"—officers require ways to persuade individuals and groups to stay back or disperse short of restraining them. But in the wake of *Torres*, lower courts are in conflict regarding how to analyze the use of these vital tools in the context of the Fourth Amendment, as demonstrated by the Eighth Circuit's failure to objectively analyze Officer Bauer's intent and its inability to resolve whether force used with the intent to disperse or repel—rather than to restrain—constitutes a seizure. As a result, police officers in Minnesota and around the country are left with no clear guidance—or worse, conflicting guidance—on how they are to use these crucial tools within constitutional limits.

This Court should grant the petition and take this opportunity to clarify that a police officer's use of less lethal projectiles, if it objectively manifests an intent to disperse or repel rather than restrain, is not a seizure under *Torres*. The Court should further explain that contrary to the conclusions of at least one circuit—the use of such non-lethal projectiles does not automatically establish an objective intent to restrain. Finally, the Court should clarify that these issues were not clearly established in May 2020, and find Officer Bauer entitled to qualified immunity as a result.

ARGUMENT

I. THE COURT SHOULD RESOLVE THE QUESTIONS EXPRESSLY LEFT UNANSWERED IN *TORRES* REGARDING WHAT CONSTITUTES A SEIZURE

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The "seizure" of a "person" can take the form of either "physical force" or a "show of authority" that "in some way restrain[s] the liberty" of a person. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In *California v. Hodari D.*, 499 U.S. 621 (1991), this Court set out the "mere touch" rule, under which an officer's application of physical force to the body of another person—*i.e.*, a "mere touch"—with the purpose of arresting that person is enough to constitute an arrest even if the person does not submit. *Id.* at 624-25.

This Court revisited the topic in the context of excessive force—specifically the use of a firearm--in *Torres v. Madrid*, 592 U.S. 306 (2021). In *Torres*, this Court explained that "[a] seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. . . . Nor will force intentionally apply applied for some other purpose satisfy this rule." *Id.* at 317 (internal citation omitted). And this Court further explained that "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Id.* (emphasis in original). *See also id.* ("Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'" (quoting *Michigan v.*

Chesternut, 486 U.S. 567, 574 (1988))). This Court further noted that "[w]hile a mere touch can be enough for a seizure, the amount of force remains pertinent in assessing the objective intent to restrain." *Id.* The Court held that shooting a fleeing suspect with a firearm constituted a seizure even if the suspect temporarily eludes custody, but expressly declined "to opine on matters not presented" in *Torres*, such as "pepper spray, flash-bang grenades, lasers, and more." *Id.*

This case represents an important opportunity for the Court to address one of those matters it reserved judgment on in *Torres*—the use of less lethal projectiles with the intent to repel or disperse, rather than to restrain. The Court should take this opportunity to clarify the appropriate analysis for the lower courts and explain that an intent to repel is not an intent to seize. At a minimum, the Court should take this case to recognize that it was not clearly established that a use of force to repel a member of an unruly crowd from a police officer or protected area was not clearly established to be a seizure in May 2020, and reaffirm the proper standard for Courts undertaking this inquiry.

A. THE LOWER COURTS ARE SPLIT REGARDING WHETHER THE USE OF LESS LETHAL PROJECTILES TO DISPURSE OR REPEL IN CROWD CONTROL SITUATIONS CONSTITUTES A SEIZURE UNDER THE FOURTH AMENDMENT

In *Torres*, the Court emphasized that "[a] seizure requires the use of force *with intent to restrain*." *Torres*, 592 U.S. at 317 (emphasis in original). Since *Torres*, Courts have split over whether an intent to disperse or repel—to make a person or group back off or

leave an area—is distinct from an intent to restrain such that a use of force with the intent to disperse or repel constitutes a seizure—particularly in the context of less lethal projectiles like 40mm projectiles, bean bag rounds, and pepperballs—and whether such a rule is clearly established.[2]

For instance, in *Dundon v. Kirchmeier*, 85 F.4th 1250 (8th Cir. 2023), the Eighth Circuit held that it was not clearly established whether "a use of force designed to disperse a crowd" constitutes a seizure. *Id.* at 1255. *Dundon* concerned the use of force by officers (*e.g.*, tear gas canisters, rubber bullets, and a firehose) against protestors of the Dakota Access Pipeline to, among other things, "prevent protesters from breaching" a barricade erected by the officers. *Id.* at 1254-55. The Eighth Circuit held that precedent recognized "a potential distinction between force used with intent to apprehend and force used with intent to disperse *or repel*." *Id.* at 1256 (emphasis added). Similarly, in *Martinez v. Sasse*, 37 F.4th 506 (8th Cir. 2022), the Eighth Circuit held that it was not clearly established whether an Immigration and Customs Enforcement officer seized an immigration attorney when the officer pushed the attorney to the ground to "repel" her from entering a government facility. *Id.* at 510. And the Eighth Circuit reiterated in *Wolk v. City of Brooklyn Center*, 107 F.4th 854 (8th Cir. 2024), in a decision

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[2] To overcome an assertion of qualified immunity, a plaintiff alleging excessive force must establish that the officers' conduct (1) violated the plaintiff's constitutional rights and (2) that the right at issue was "clearly established" at the time of the violation. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Courts have discretion with respect to the order to answer these two questions—and, if they determine that an asserted right was not "clearly established," whether they wish to address the first prong at all. *Id.* at 236.

issued on the same day and by the same author as the decision below, that it was not clearly established as of April of 2021 "that officers effect a seizure when they use force to disperse protesters"—including with "rubber bullets." *Id.* at 859. Notably, in *none* of these cases did the Eighth Circuit go so far as to determine whether or not such uses of force constitute seizures—leaving this recurring question in legal limbo and suggesting an inability by that Court to muster an answer without this Court's guidance.

The Ninth Circuit also recently considered an officer's use of a similar 40mm launcher on a protestor during a late May 2020 protest at the San Jose City Hall. *See Sanderlin v. Dwyer*, 116 F.4th 905, 908-09 (9th Cir. 2024). The officer argued that he fired the projectile—which struck the plaintiff in the groin—to "force [the plaintiff] to leave the area, not to restrain [the plaintiff] or apprehend him." *Id.* at 912. Citing *Torres*, the 9th Circuit brushed aside this argument as improperly invoking the officer's subjective intent. *Id.* at 913. Instead, the Ninth Circuit held that "[t]he method of force [the officer] used [i.e., the 40mm launcher] is, by its nature, intended to incapacitate its target, thereby making it difficult to freely walk away." *Id.* In other words, in contrast to the Eighth Circuit's repeated holdings that it is not clearly established that use of such a 40mm launcher with the intent to disperse or repel constitutes a seizure, the 9th Circuit has read *Torres* to establish that *any use of such a launcher*, regardless of the other circumstances at play, is automatically a seizure. Going further, the Ninth Circuit in *Sanderlin* expressly reaffirmed its pre-*Torres* holding in *Nelson v. City of Davis*, in which it held that it had been clearly established since at least 2004 that an officer seized protestors "firing projectile pepperballs into the crowd, knowing that there

was a significantly high risk that one such projectile could strike and incapacitate a member of the group."). *See Sanderlin*, 116 F.4th at 917 n.2 (discussing *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012)); *but see Meggs v. City of Berkeley*, 246 Fed. App'x 402, 403 (9th Cir. 2007) (affirming district court holding that force used to repel protestor from police skirmish line was not a seizure, so was not analyzed under the Fourth Amendment).

And in *Packard v. Budaj*, the Tenth Circuit rejected the argument that the less lethal "bean-bag" round that struck the plaintiff in the head was not a seizure because the projectile is a "tool to disperse crowds," holding that this argument was defeated by the district court's finding that the plaintiffs were not "unintended victims of an effort to disperse protestors" but were shot intentionally—a holding that suggests the Tenth Circuit believes that aiming at specific targets within the crowd rather than firing indiscriminately is what creates a seizure. *See Packard v. Budaj*, 86 F.4th 859, 867 (10th Cir. 2023). *See also id.* at 868-69 (finding it is clearly established that officers may not use less lethal munitions against a protestor who is committing no crime more serious than a misdemeanor, not threatening, and not attempting to flee).

Given this split among the circuit courts, it should come as no surprise that district courts have similarly struggled in the wake of *Torres*. Like the Eighth Circuit, at least one other lower court has held that uses of force to disperse or repel are not *clearly established* to be seizures, without deciding the underlying issue. *See, e.g.*, *Black Lives Matter D.C. v. Trump*, 544 F. Supp.3d 15, 49 (D.D.C. 2021) (holding that it was not clearly established "whether the use of tear gas to move members of a crowd can constitute a seizure" in light of *Torres*), *aff'd sub nom. Buchanan v.*

Barr, 71 F.4th 1003 (D.C. Cir. 2023). A separate judge in the same district did not rely solely on the "clearly established" analysis, instead finding that "an intent to 'keep out or redirect[]' . . . is different from an intent to restrain" and so the use of less lethal projectiles to disperse protestors was not a seizure. *Ferris v. D.C.*, No. 1:23-CV-481-RCL, 2023 WL 8697854, at *10 (D.D.C. Dec. 15, 2023). And at least two other lower courts have held that the use of 40mm less lethal projectiles which struck individuals in the face or head did not constitute seizures when used to disburse or repel. *See Perkins v. City of Des Moines, Iowa*, 712 F. Supp. 3d 1159, 1172 (S.D. Iowa 2024) ("Under *Torres* and [*Quraishi v. St. Charles Cnty., Missouri*, 986 F.3d 831 (8th Cir. 2021)], an individual is not seized under the Fourth Amendment when an officer objectively manifests an intent to disperse rather than restrain."); *Ratlieff v. City of Fort Lauderdale*, No. 22-CV-61029-RAR, 2024 WL 4039849, at *20 (S.D. Fla. Sept. 4, 2024) (holding that Fort Lauderdale Police Department's use of tear gas and 40mm less lethal round that struck plaintiff in the head was used to disperse the crowd, not to restrain plaintiff, despite allegedly "incapacitating" her). But other district courts have rejected the argument that the use of less lethal projectiles like beanbags or 40mm rounds are not seizures, or that the law is not clearly established in the area. *See, e.g.*, *TYREE TALLEY, Plaintiff, v. CITY OF AUSTIN, et al., Defendants. Additional Party Names: Benjamin Lynch, Darrell Cantu-Harkless, Gadiel Alas, Gregory Cherne, Joseph Hethershaw, Justin Wright, Timothy Cobaugh*, No. 1:21-CV-249-RP, 2024 WL 5159912, at *6 (W.D. Tex. Dec. 17, 2024) ("Because beanbags are used to 'control, restrain or arrest' subjects under APD's own policy, the Court finds a genuine dispute of material fact as to whether the Officer Defendants

objectively meant to restrain or disperse."); *Epps v. City & Cnty. of Denver*, 588 F. Supp.3d 1164, 1177 (D. Colo. 2022) (finding it clearly established that shooting nonviolent, nonfleeing protestor with pepperball was a seizure); *Hall v. Warren*, No. 21-CV-06296-FPG, 2022 WL 2356700, at *11 (W.D.N.Y. June 30, 2022) ("Courts have routinely concluded that the use of such [less lethal] weapons against protestors constitutes a seizure for purposes of the Fourth Amendment."); *Bjelland v. City & Cnty. of Denver*, No. 1:22-CV-01338-SKC-SBP, 2024 WL 4165428, at *5 (D. Colo. Sept. 12, 2024) ("The Court is persuaded that even absent an arrest, the use of chemical spray and less-lethal projectiles can [ ] amount to a cognizable restraint under the Fourth Amendment where the clear effect of officers' use of pepper spray was to control plaintiffs' movement.") (internal quotation marks omitted).

B. THE COURT SHOULD REAFFIRM THAT COURTS MUST LOOK TO OBJECTIVE INTENT IN DETERMINING WHETHER A SEIZURE OCCURRED

In this case, the lower courts concluded that Officer Bauer intended to restrain Marks, not to disperse a crowd or repel Marks from the area. (App. 8a-9a, 43a-44a.) Given this finding, the Court may question whether this case presents the best opportunity to resolve the confusion in the lower courts regarding how to determine whether the use of less lethal projectiles for reasons other than restraint amounts to a seizure. But this provides the Court with the ability to resolve another conflict and correct *how* the lower courts are to determine whether force is used to *restrain* or for some other purpose.

In *Torres*, the Court emphasized that, in determining whether a use of force constitutes a seizure,

"the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Torres*, 592 U.S. at 317 (emphasis in original). This reliance on objective indicia is important: "Only an objective test 'allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment.'" *Id.* (quoting *Michigan v. Chesternut*, 486 U.S. 567, 574 (1988)).

And again, the lower courts are not aligned on how to carry out this analysis. Here, both the Eighth Circuit and the District Court failed to follow this Court's command to look to *objective* manifestations rather than *subjective* intent. Specifically, the Eighth Circuit attempts to distinguish its holding in *Dundon*—that it was not clearly established that use of force to disperse or repel was clearly established in May 2020—from this case by asserting that "Officer Bauer as not dispersing a crowd the moment he aimed at and shot Marks[.]" (App. 8a-9a.) To support this finding, the Eighth Circuit points to a quotation from Officer Bauer's deposition, in which he states that he "thought there was a bad assault going on" and "though that if it kept going, then it would get worse." (App. 9a.) The District Court similarly relied on Officer Bauer's statements to establish his subjective intent to seize, arrest, or restrain rather than to repel Marks. (*See* App. 43a-44a.)

In *Torres*—which the Eighth Circuit's majority opinion does not address—this Court expressly held that this manner of probing into Officer Bauer's subjective intent is improper, because "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth

Amendment context." *Torres*, 592 U.S. at 317 (emphasis in original). And the Eighth Circuit provides virtually no analysis of *objective* manifestations of intent to apprehend or restrain verses intent to disperse or repel. Indeed, the Eighth Circuit says only that Officer Bauer "was not dispersing a crowd at the moment he aimed and shot Marks" because "[b]y this time, most of the crowd had retreated and only a couple dozen individuals remained around the second individual who needed medical attention." (App. 8a-9a.) But it is unclear how a "couple dozen individuals" around a person in urgent need of medical attention from being struck with a bat during a prolonged and ongoing riot does not constitute a "crowd." And, in any event, the mere number of people in the area is not relevant to Officer Bauer's objective manifestation of intent to repel *Marks*—as demonstrated by the fact that Officer Bauer made no attempt to arrest, incapacitate, or otherwise restrain Marks and Marks immediately left the area.

Again, the Ninth Circuit's understanding of the Court's instruction to analyze the "objective" manifestations of intent contradicts the Eighth Circuit. As discussed above, in *Sanderlin v. Dwyer*, the Ninth Circuit disregarded the officer's argument that he used the less lethal projectiles from the 40 mm launcher to "compel [the plaintiff] to leave the area] as an improper attempt to introduce subjectivity into the analysis, and held that the use of the 40 mm launcher necessarily manifests an objective intent to restrain. *Sanderlin*, 116 F.4th at 912-13. In essence, the Ninth Circuit considered *only* the degree of force used in analyzing the intent, rendering the use of the launcher essentially always a seizure. And while this Court, in *Torres*, explained that the degree of force used is "pertinent in assessing the objective intent to restrain[,]"

Torres, 592 U.S. at 317, nowhere did the Court suggest that it is the *only* consideration. Other lower courts have considered factors such as the ability of the plaintiff to walk away despite the use of force, *e.g.*, *Ratlieff*, No. 22-CV-61029-RAR, 2024 WL 4039849, at *20; the presence of large crowds, prior use of tear gas, and dispersal orders, *e.g.*, *Perkins*, 712 F. Supp.3d 1159 at 1173; and whether the plaintiff was already leaving the scene when struck by the projectile, *e.g.*, *Johnson v. City of San Jose*, 591 F. Supp. 3d 649, 659 (N.D. Cal. 2022).

The Court should resolve this confusion in the lower Courts regarding how to determine whether a use of force objectively manifests an intent to restrain—and reiterate that the Eighth Circuit's subjective approach here is manifestly contrary to *Torres* and must be reversed.

C. THE COURT SHOULD REAFFIRM THE DEGREE OF SPECIFICITY REQUIRED CONDUCT TO BE "CLEARLY ESTABLISHED" AS WRONGFUL

This Court has "repeatedly told [the lower courts] . . . not to define clearly established law at a high level of generality." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Id.* (quoting *al-Kidd*, 563 U.S. at 742) (emphasis original to *Mullenix*). And the specificity is "especially important in the Fourth Amendment context, where the Court has recognized that '[i]t is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts.'" *Id.* (quoting

Saucier v. Katz, 533 U.S. 194, 205 (2001)) (alteration original to *Mullenix*).

In the decision below, the divided Eighth Circuit panel's majority opinion held that relevant precedent "clearly establish[ed] 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." (App. 17a (citing *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020)). The Eighth Circuit's divided panel further held that even if it did not find that Officer Bauer's use of the launcher constituted deadly force, it would still find that Officer Bauer violated Marks's clearly established rights by using "more than *de minimis* force to seize a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring an officer's commands." (App. 23a (citing *Westwater v. Church*, 60 F.4th 1124, 1131 (8th Cir. 2023)). These holdings are wrong and should be reversed by this Court for at least three reasons.

First, the Eighth Circuit panel majority relies on supposedly "clearly established" rights that are defined at too high a level of generality. In his dissent below, the Hon. David Stras correctly and cogently highlighted the generality of the supposed "clearly established" law relied upon by the majority. (App. 26a.) It is difficult to see how a law can be clearly established such that it is easily understood by police officer in a tense moment requiring a split-second decision if highly educated jurists with the benefit of extensive briefing and months to consider the question cannot agree. Setting that question aside, Judge Stras's dissent adeptly and concisely distinguishes those opinions relied upon by the majority to support the assertion that Officer Bauer had fair notice of the supposed illegality of his conduct. (*See* App. 27a-29a

distinguishing *Montoya v. City of Flandreau*, 669 F.3d 867 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819 (8th Cir. 2011); and *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir. 2009)).) The Court should grant the Petition, adopt Judge Stras's sound reasoning, and reaffirm the importance of a similar prior case where the question of legality is not obvious.

Second, as discussed in greater detail above, the Eighth Circuit's divided panel did not properly analyze whether Officer Bauer's use of force *objectively* manifested an intent to disperse or repel Marks rather than to restrain him. As discussed above, had the Eighth Circuit properly analyzed this issue objectively as required by *Torres*, it would necessarily conclude that it was *not* clearly established in May 2020 that such use of force to disperse or repel could be considered a seizure. *See Wolk*, 107 F.4th at 859 (holding that it is not clearly established as of April 2021 whether use of force to disperse a crowd could constitute a seizure under the Fourth Amendment). Thus, even were this Court to hold that a use of force to disperse or repel *can* constitute a seizure, it should still grant the Petition and find Officer Bauer entitled to qualified immunity because this law was not clearly established at the time under the Eighth Circuit's own precedent.

Third, the Eighth Circuit's divided panel did not properly consider whether it was clearly established that the use of a less lethal projectile launcher would be considered deadly force. While it is undoubtably true that some uses of force that are ordinarily "less lethal" than using a knife or a firearm "can amount to deadly force depending on the situation[,]" (App. at 18a citing *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (finding apprehending suspect by striking him with squad car could constitute deadly force)), the Eighth Circuit's own precedent holds that "[t]he mere

recognition that a law enforcement tool is dangerous does not suffice as proof that the tool is an instrument of deadly force." *Kuha v. City of Minnetonka*, 365 F.3d 590, 598 (8th Cir. 2003) (quoting *Robinette v. Barnes*, 854 F.2d 909, 912 (6th Cir. 1988) and holding that the use of a properly trained police dog in apprehending a suspect does not constitute deadly force as a matter of law) *abrogated in part on other grounds by Szabla v. City of Brooklyn Park, Minnesota*, 486 F.3d 385 (8th Cir. 2007).

The Eighth Circuit panel's majority did not point to a single prior decision finding that the use of such a less lethal projectile launcher could constitute lethal force. To the contrary, as discussed in both the Petition and Judge Stras's well-reasoned dissent, Eighth Circuit precedent suggested exactly the opposite. (*See* Pet. 28-31; App. 24a-25a.) In particular, in what Judge Stras described as a "strikingly similar case" (App. at 25a), the Eighth Circuit held that firing multiple rubber bullets and bean bag rounds at an individual "in the vicinity of violent crowd of people" who was "proceeding directly toward the police skirmish line" and did not obey a direction to stop approaching the line was not only not "lethal force"—but was objectively reasonable under the circumstances. *White v. Jackson*, 865 F.3d at 1064, 1073 & 1079 (8th Cir. 2017). In its opinion, the Eighth Circuit repeatedly described the use of these projectiles as "nonlethal"—even though one of the plaintiffs was struck in the face. *See id.* at 1064, 1070, 7071, 1073, 1076, 1079). Similarly, in *Bernini v. City of St. Paul*, 665 F.3d 997, 1006 (8th Cir. 2012), the Eighth Circuit held that it was objectively reasonable for officers to fire "non-lethal munitions when it appeared "a growing crowd intended to penetrate a police line" and was not complying with officers' efforts at crowd control during unruly

protests. Indeed, a court within the Eighth Circuit recently concluded that it was not clearly established that the use of a similar less lethal projectile (a pepperball) could constitute deadly force even when the projectile struck a protestor in the head. *See Hollamon v. Cnty. of Wright*, No. 22-CV-2246 (KMM/LIB), 2024 WL 3653092, at *17 (D. Minn. Aug. 5, 2024) ("For less-lethal munitions in particular, the law is simply far from settled on when their use might constitute deadly force and, therefore, necessarily constitute a seizure for purposes of the Fourth Amendment.").

II. THE COURT SHOULD DRAW ITS OWN CONCLUSIONS FROM THE VIDEO EVIDENCE AND CLARIFY THE IMPORTANT ROLE SUCH EVIDENCE CAN AND SHOULD PLAY IN FOURTH AMENDMENT CASES

Finally, in an apparent attempt to escape the issues around whether Officer Bauer used deadly force, the Eighth Circuit panel majority wrongly held that his conduct violated Marks's clearly established rights even absent deadly force. Specifically, the Eighth Circuit panel majority held that Officer Bauer could not use more than *de minimis* force against a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring officer commands." (App. 22a-23a.) But the Eighth Circuit's conclusions blatantly contradict the publicly available video evidence, as described in greater detail in the Petition, and this Court is not bound by such determinations. *Scott v. Harris*, 550 U.S. 372, 379 (2007). These include, but are not limited to: (1) the Eighth Circuit's description of the large crowd as merely a "couple of dozen individuals"—even though they had just been throwing bottles at Officer Bauer's marked police vehicle and surrounded the

officers trying to evacuate a woman attacked with a baseball bat (an evacuation necessitated by the ambulances unwillingness to risk going into that same crowd); (2) the Eighth Circuit's inexplicable dismissal of the tense, rapidly unfolding nature of witnessing a fellow officer be assaulted by an obscenity-hurling member of that crowd who was attempting to break the police line you established around that injured woman; and (3) the Eighth Circuit's conclusion that Marks was not "ignoring officer commands" despite recognizing Officer Poduba ordered Marks's mother to stand back—which apparently provoked his attack. (App. 3a ("Officer [Pobuda] . . . blocked Marks' mother with his arm and ordered her to stand back. After this interaction, Marks . . . walked over to Officer Poduba . . . and shouted with one of his hands clenched in a fist, 'Back up, Bitch!'").)

Particularly troubling is the Eighth Circuit's willingness to use the prosecutors' decision not to charge Marks for his assault on Officer Pobuda as evidence that Marks was a mere "non-threatening misdemeanant" (App. 22a) when the video shows Marks shoving and apparently attempting to disarm Officer Pobuda. This Court need not, and should not, accept this version of the facts—and should take this opportunity to emphasize the important role video evidence can and should play in these types of case.

CONCLUSION

Since *Torres*, the lower courts have split on (1) whether using less lethal projectiles crowd control projectiles—*e.g.*, 40 mm projectiles, pepperballs, and "rubber bullets"—constitutes a seizure in all circumstances; (2) if not, how to determine when such a seizure occurs; and (3) whether such law was clearly established at the time historic and widespread riots

engulfed the nation. As a result, officers using similar crowd control tools in similar circumstances are presently subjected to contradictory rules. More troubling, current and future officers are left with no guidance on how they are allowed to respond to increasingly common unrest in cities across the country. It is imperative that the Court seize this opportunity to provide badly needed clarity. In addition, the Court should correct the Eighth Circuit's conclusions from the video evidence and emphasize the role such video should play in these cases.

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

CHRISTOPHER W. MADEL
Counsel of Record
MADEL PA
800 Hennepin Ave., Suite 800
Minneapolis, MN 55403
(612) 605-0630
cmadel@madellaw.com

Counsel of Record for Amicus Curiae

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