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 RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

Petitioner Benjamin Bauer, a Minneapolis Police Department (MPD) SWAT officer, shot respondent Ethan Daniel Marks with a high-speed, exploding projectile from a 40-millimeter "less-lethal" firearm at close-range, directly into Marks's eye socket. The munition penetrated the socket and detonated, deflating Marks's eyeball, detaching his retina, fracturing numerous facial bones, and causing a traumatic brain injury, among other injuries. Petitioner's justification for this extreme degree of force was a brief scuffle between an unarmed Marks and MPD Officer Jonathan Pobuda, which Pobuda ended quickly and without injury by shoving Marks forcefully backward with a baton. The questions presented are:

1. Whether the Eighth Circuit correctly applied longstanding Fourth Amendment precedent to determine that petitioner seized Marks when he used significant, injury-causing force a jury could conclude objectively manifested an intent to restrain Marks's movement.

2. Whether the Eighth Circuit correctly applied established precedent to deny petitioner qualified immunity because, based on the unreviewable facts on this interlocutory appeal, a reasonable officer would understand that shooting Marks in the eye at close range with an exploding projectile was an unreasonable seizure under the Fourth Amendment.

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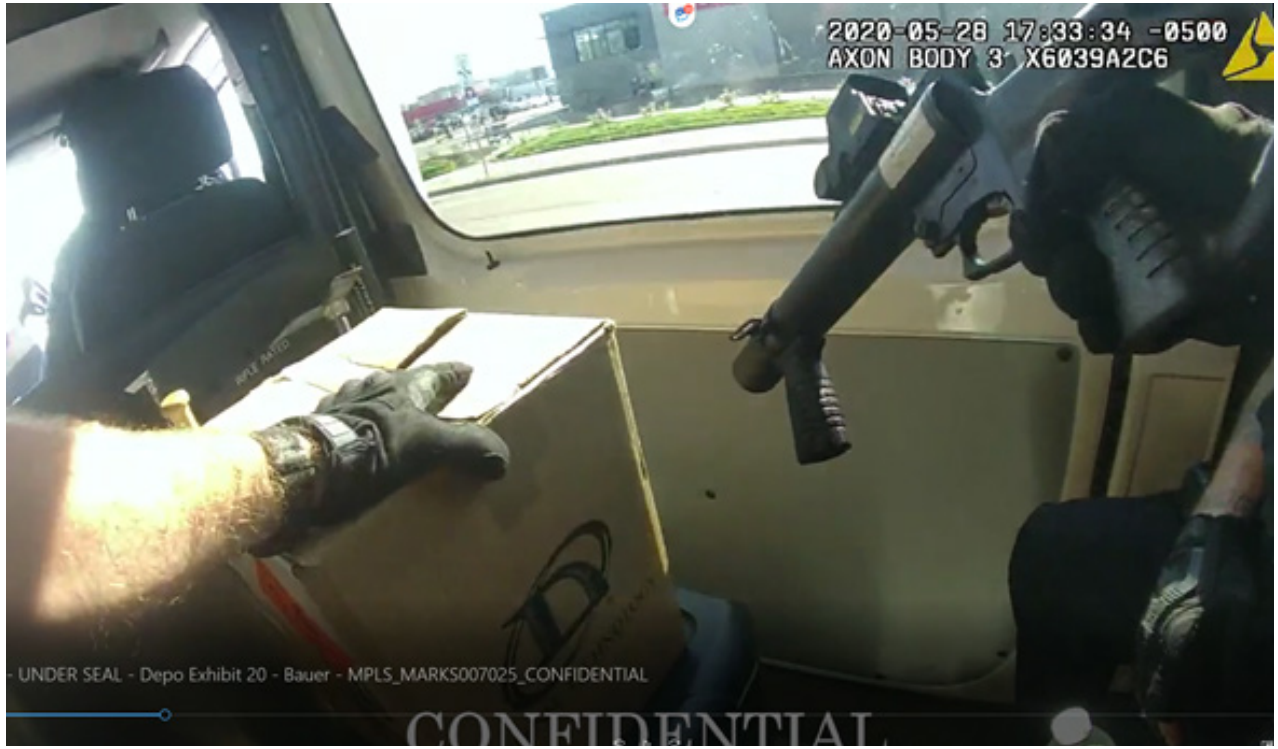
STATEMENT OF THE CASE

A. Factual Background

The shooting in question occurred on May 28, 2020. That afternoon, nineteen-year-old Marks and his mother, Anne—a registered nurse—attended a clean-up event in Minneapolis's Longfellow neighborhood, which had seen damage from protests following George Floyd's murder. Pet.App. 1a-2a. Numerous people were in the area when Marks and his mother arrived. *Id.* 2a.

At approximately 5:30 p.m., several MPD vehicles and officers arrived in response to a reported stabbing. C.A.App. 1009. Petitioner, along with eight SWAT colleagues in a van, was among them, armed with a 40-millimeter "less-lethal" launcher. *Ibid.*; Pet.App. 2a, 4a. The launcher resembles a rifle—25 inches long, with a foregrip for stability to "make shots more accurate"—as seen on petitioner's body-worn camera (BWC) video. C.A.App. 1012, 1043:


2020-05-28 17:33:34 -0500
AXON BODY 3 X6039A2C6
- UNDER SEAL - Depo Exhibit 20 - Bauer - MPLS_MARKS007025_CONFIDENTIAL
CONFIDENTIAL

Petitioner admits the launcher is an accurate weapon, and he was accurate shooting it. Pet.App. 5a. Indeed, MPD SWAT members received extensive annual training on the launcher to ensure their proficiency. *Ibid.*

The launcher fires "high-energy" munitions designed to cause injury and pain, when "energy is transferred from the munition to the fluid mass of the body." C.A.App. 1012-13, 1165. The "desired effect" of these munitions is to "cause[] sufficient injury to incapacitate the subject." C.A.App. 1166. But like a bullet, the munitions can penetrate the body surface and cause serious injury or death, particularly when fired into areas with "less muscle mass and body fat," such as the head and neck, which "should be avoided if possible." C.A.App. 1174-75. Penetration is the "most undesirable" outcome. C.A.App. 1167. "Target area," therefore, "is critical to reduce injury potential." C.A.App. 1166.

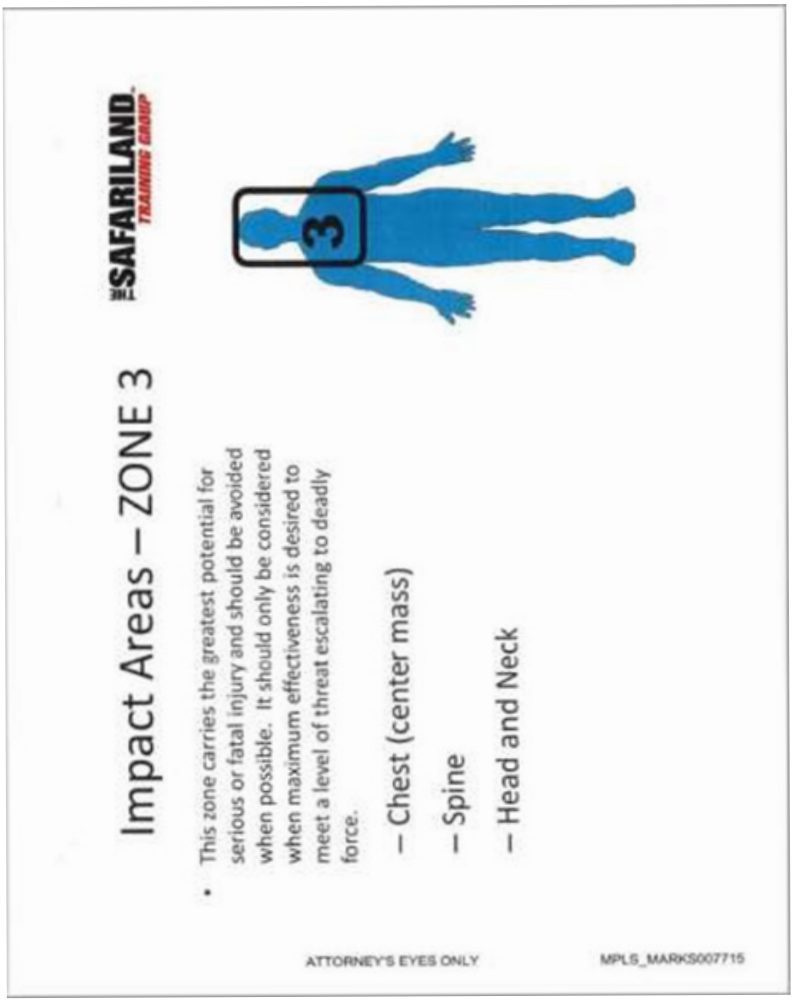
For these reasons, while denominated "less-lethal," the launcher is not *non*-lethal, and the manufacturer warns it "may cause serious injury or death." Pet.App. 4a. MPD training likewise instructs that the launcher "can be considered a deadly force." C.A.App. 1013. Hence, MPD trains officers to consider three impact "Zones" when firing. Zone 1, consisting of the lower body's large muscle groups (buttocks, thighs, calves), should be targeted first. Pet.App. 4a-5a. Zone 2, immediately above Zone 1, comprises medium muscle groups in the abdomen. *Id.* 5a. Zone 3, above Zone 2, includes the chest ("center mass"), spine, neck, and head. It "carries the greatest risk for serious injury or death," and thus officers should consider it only "when maximum effectiveness is desired to meet a level of threat escalating to deadly force." *Ibid.* MPD training slides depict these areas:

Impact Areas – ZONE 1

THE SAFARILAND TRAINING GROUP

- Consists of large muscle groups. Where the threat level is appropriate and this zone is viable, it should be considered first
  - Buttocks
  - Thigh
  - Calf
  - The groin area should not be intentionally targeted

THE SAFARILAND TRAINING GROUP
Impact Areas – ZONE 2
• Consists of medium muscle groups
– Abdominal area
2
ATTORNEY'S EYES ONLY
MPLS_MARKS007714

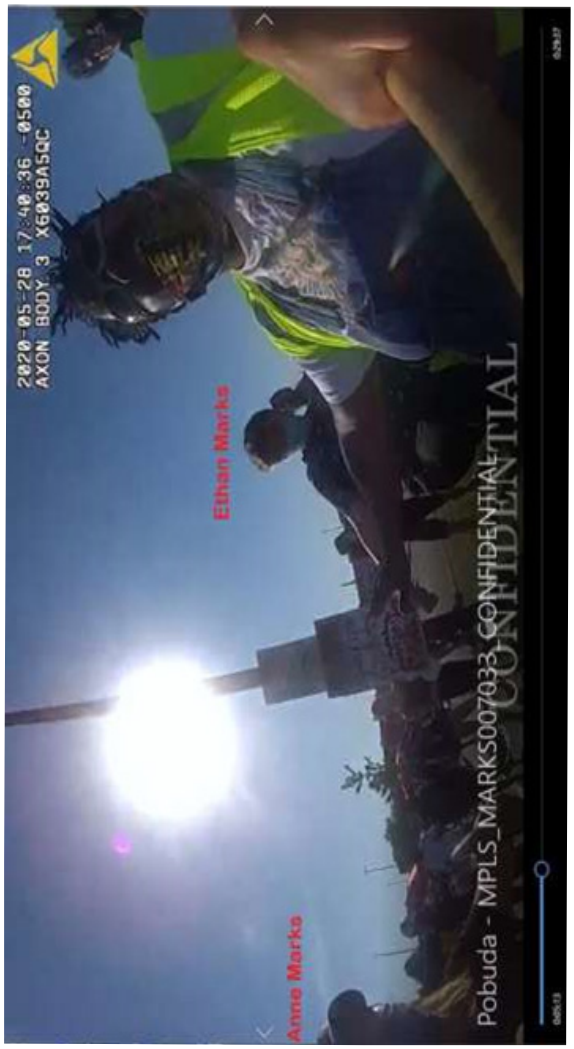


C.A.App. 1176-78.

When petitioner responded to the reported stabbing, he exited the SWAT van and fired the launcher from a distance at persons throwing objects. Pet.App. 2a; C.A.App. 1043 at 17:34:38-17:39:09. He assisted as officers removed the stabbing victim, and then returned to the van.

Pet.App. 2a-3a. Thereafter, petitioner learned another person had been injured, and he joined a perimeter around the victim being manned by officers and bystanders. *Id.* 3a. MPD Officer Jonathan Pobuda, who stands six feet tall and weighs 265 pounds, was one of those officers. *Ibid.* "The video evidence shows the situation at th[is] time ... was dramatically different than when the officers first arrived and encountered a hostile crowd." *Id.* 15a. "By this time, most of the crowd had retreated and only a couple dozen individuals remained around" the injured person, and officers were able to work, "without interference from the crowd, on assisting [this] second injured individual." *Id.* 9a, 15a. Video shows the remaining persons were "compliant" and "demonstrating no hostility towards the officers"—some were even "*assisting* law enforcement." *Id.* 19a (emphasis added).

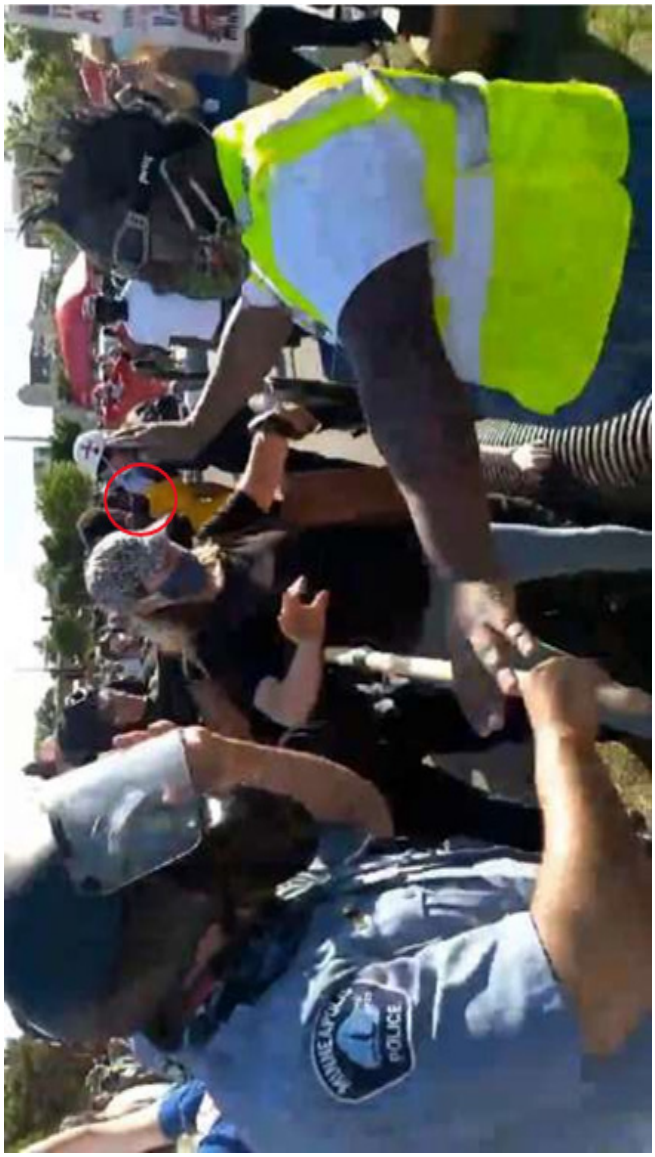
Petitioner positioned himself with his back to Pobuda and the injured woman, who officers were working to remove on a flat-bed cart. C.A.App. 1010. Pobuda's BWC video shows Marks's mother approaching, announcing she was a nurse, and offering to help, while Marks stood idly nearby. Pet.App. 3a. Pobuda, however, "blocked [Anne] with his arm and ordered her to stand back." *Ibid.* After Pobuda made contact with his mother, Marks walked over and shouted, "back up, bitch!" at Pobuda. A scuffle ensued, during which Marks struck Pobuda and grasped at his riot baton. *Ibid.* Pobuda responded by forcefully shoving Marks with his baton, causing him to stumble backward over a corrugated pipe on the ground. *Ibid.* A bystander with outstretched arms stepped into the "several feet" wide gap between Marks and Pobuda:



Id. 3a, 12a; C.A.App. 1044 at 17:40:36-17:40:37. After pushing Marks away, Pobuda did not perceive Marks as a threat and concluded no additional force was needed. Pet. App. 3a. Nor did Pobuda believe Marks's actions merited his arrest. C.A.App. 1011, 1025. The entire tussle between the two lasted approximately three seconds. C.A.App. 1025; C.A.App. 1044 at 17:40:34-17:40:37.

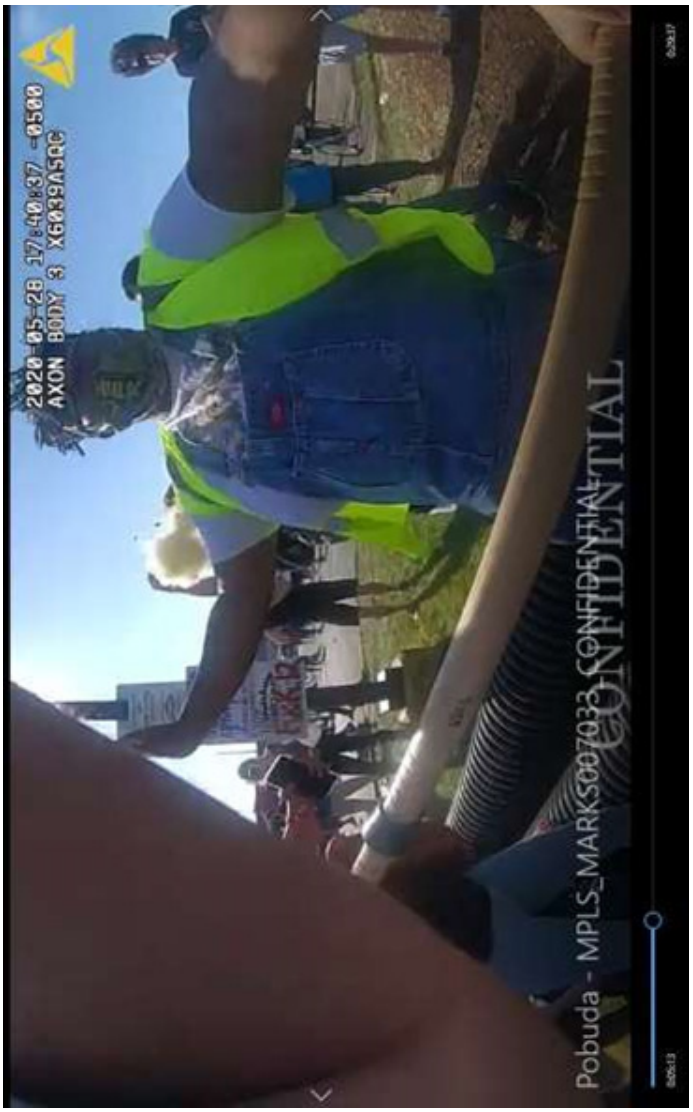
Nevertheless, petitioner turned, raised his launcher to deadly-force Zone 3, and fired a 40-millimeter round directly into Marks's right eye socket from just beyond five feet away. Pet.App. 3a-4a; C.A.App. 1011, 1014-15, 1024 n.3. Petitioner issued no warnings or commands before firing. Pet.App. 3a; C.A.App. 1043 at 17:40:34-17:40:37. "Two of [petitioner's] own experts testified that the video footage does not show [him] aiming at Zone 1 or Zone 2 before he fired the launcher." C.A.App. 1022. As seen on petitioner's BWC, the launcher was pointed at Marks's head:

C.A.App. 1043 at 17:40:36. Another video reflects the significant space between Pobuda and Marks and shows the muzzle of the launcher pointing upward (above parallel to the ground) when petitioner fired:



C.A.App. 1363.

The munition petitioner fired travels 295 feet per second (approximately 200 miles per hour) out of the launcher and contained OC (oleoresin capsicum), an inflammatory agent released when the round fragments upon impact. Pet.App. 4a; C.A.App. 1009, 1013. The round penetrated Marks's eye socket and detonated:



C.A.App. 1011; C.A.App. 1044 at 17:40:37. A bystander shouted at petitioner, "Hey! Hey! Point blank?!" Pet.App. 6a. He yelled back, "Yes!" *Ibid.* The only round petitioner fired while part of the second perimeter was at Marks. C.A.App. 1043 at 17:39:33-17:41:33.

Marks crumpled to the ground from the impact of the point-blank shot. He then managed to stumble away, holding his mangled eye. C.A.App. 1011. The round penetrated and fractured his eye socket, allowing air to enter his brain cavity (pneumocephalus). R.Doc. 121-27 at 1. It also caused other devastating injuries, including a ruptured right eyeball, detached retina, and traumatic brain injury. C.A.App. 1011. Marks remains legally blind in his right eye, suffers from "headaches, decreased visual motor skills and depth perception, balance problems, and nerve damage that causes inflammation and pain," and experiences severe emotional distress and PTSD. Pet. App. 4a; C.A.App. 1012. Petitioner did not pursue Marks to render aid or arrest him after shooting him. C.A.App. 1011.

In his post-incident report, petitioner claimed Marks "began to punch at officers" (plural) and was "clear[ly] trying to assault officers" (plural), C.A.App. 55, despite Marks never contacting anyone besides Pobuda. The report omitted that petitioner fired from point-blank range and that the round detonated in Marks's eye socket, seriously injuring him. *Ibid.* Likewise, the report nowhere claimed petitioner was aiming someplace other than Marks's eye but missed because Marks moved. *Ibid.* Pobuda wrote several reports about the incident. In the first, he stated only that he was "struck in the head by a protester. The protester used an open hand strike to the

left side of my head and fled." C.A.App. 1395. He did not claim in this report, nor a second report days later, that Marks grabbed his baton or purportedly attempted to disarm him. *Ibid.*; C.A.App. 1397-1398.

Many months later, MPD Internal Affairs (IA) interviewed petitioner about the shooting. C.A.App. 1017-18, 1024 & n.3, 1099. There, he claimed for the first time that he was "aiming more towards [Marks's] torso area, um, and he was kind of falling" when he fired. C.A.App. 1105. Later, in his deposition in this case, petitioner testified he aimed for "center mass," which he claimed included the "whole torso area" and was "[p]robably around like ... Zone 2-ish." C.A.App. 1022. As noted above, MPD's training explains that Zone 2 comprises the abdominal area, whereas "center mass" means the chest, in Zone 3. *Ibid.*; *see* Pet.App. 12a ("[T]he district court noted that [Petitioner] provided unclear deposition testimony about where he was aiming."). Petitioner admitted to IA that the rules of engagement on May 28, 2020, were that the launcher could be used only to stop assaults or serious property damage, not for dispersal, and that the OC round he fired was to be used to "incapacitate[] suspects so they can be arrested." C.A.App. 1102.

Two separate prosecuting authorities considered whether Marks should be criminally charged for his conduct. Each declined. Pet.App. 6a. The first was asked to determine whether Marks could be charged with "assault or attempting to disarm a police officer," but "[a]fter review of the evidence, the County Attorney declined to prosecute, concluding no felony charges were warranted." *Ibid.*; C.A.App. 1012. The matter was then forwarded to another office for a possible misdemeanor charge of

obstructing legal process. C.A.App. 1012. That office, too, declined to prosecute this low-level misdemeanor due to "insufficient evidence." Pet.App. 6a.

B. Procedural History

Marks sued in September 2020. His one-count Second Amended Complaint alleged that petitioner violated his Fourth Amendment rights. C.A.App. 869-91. Following discovery, petitioner moved for summary judgment, seeking qualified immunity. C.A.App. 913-54. Nowhere did he argue that he hadn't seized Marks by shooting him—indeed, he argued Marks's claim "*should be* analyzed under the Fourth Amendment's 'reasonableness' standard," which wouldn't apply absent a seizure. C.A.App. 935 n.7 (emphasis added); *accord id.* 936-50. Not until his summary-judgment reply did petitioner first argue Marks hadn't been seized. C.A.App. 1219-20; Pet.App. 42a.

The district court denied petitioner's motion. As to seizure, it found petitioner's argument "untimely," Pet. App. 42a, and alternatively rejected it on the merits, concluding petitioner's shot "objectively manifested an intent to restrain," *id.* 44a (citing *Torres v. Madrid*, 592 U.S. 306, 318 (2021)). As to the force, the district court concluded fact issues precluded summary judgment, including where petitioner aimed, his distance from Marks when firing, whether petitioner used deadly force, the seriousness of the scuffle between Marks and Pobuda, and whether Marks posed an immediate threat. "[A] reasonable juror," the court noted, could find the shot "amounted to deadly force" without justification, and even if non-deadly, jury resolution of disputed facts was necessary to determine whether the force was reasonable.

Pet.App. 45a-56a. Lastly, the district court determined that, viewing the evidence most favorably to Marks, the shooting violated clearly established law, whether deadly force or not. *Id.* 56a-59a.

Petitioner appealed, in the process changing his seizure argument. Although he argued to the district court only that he hadn't seized Marks, at the Eighth Circuit petitioner argued it wasn't *clearly established* shooting Marks was a seizure. Pet.C.A. Br. 21-26.

The Eighth Circuit affirmed. First, it concluded petitioner's "purposeful[] deploy[ment]" of the launcher against Marks was "physical force to restrain movement," thus constituting a seizure. Pet.App. 8a-11a. Next, the Eighth Circuit agreed with the district court that the shooting's legality hinged upon material fact disputes, including the severity of Marks's conduct, the extent and immediacy of the threat he posed after Pobuda shoved him backwards, the nature of the contact between Marks and Pobuda, and where petitioner aimed. *Id.* 11a-16a. Finally, the Eighth Circuit concluded that petitioner violated clearly established law, noting that when viewing the facts in Marks's favor, "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." Under the caselaw, the "high level of force" petitioner used—a "shot ... in the face at close range with a chemical projectile that he knew could cause serious injury or death"—was unjustified. *Id.* 20a-22a.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for multiple reasons.

First, there is no Circuit conflict, let alone one worthy of this Court's review. This Court and the Circuits, including the Eighth Circuit here, have consistently applied Fourth Amendment principles to conclude that subjecting an individual to significant, injury-causing force objectively manifests an intent to restrain—and therefore seizes—the person.

Second, petitioner's request to correct a purported error specific to the facts of this case is not an exceptionally important question demanding this Court's attention.

Third, even were there a Circuit split or substantial question, this interlocutory qualified-immunity appeal presents a poor vehicle to address it. The Eighth Circuit determined fact issues preclude qualified immunity, and those determinations are beyond the jurisdiction of this appeal. Moreover, petitioner waived the seizure question central to his Petition.

Finally, there is nothing to review because the Eighth Circuit correctly applied clearly-established law to determine that, viewing the evidence favorably to Marks, a reasonable officer in petitioner's position would have known that shooting Marks in the eye at close range was both a seizure and vastly disproportionate to any threat Marks posed.

I. Courts Agree that Targeting a Person with Substantial Force is a Fourth Amendment Seizure.

A. Petitioner fails to identify any Circuit split on the seizure question.

This Court has long explained that the Fourth Amendment term "seizure" draws its meaning from the common law. *California v. Hodari D.*, 499 U.S. 621, 626-26 & n.2 (1991). The common-law concept of arrest "defines the limits of a seizure of a person," even though the terms "seizure" and "arrest" historically were not identical. *Id.* at 623-24, 627 n.3. At common law, "the mere grasping or application of physical force with lawful authority, whether or not it succeeded in subduing the arrestee, was sufficient" to constitute an arrest and, thus, a seizure. *Id.* at 624; *accord Torres*, 592 U.S. at 314.

That said, not *every* touch by a police officer constitutes a seizure. Personal interactions between citizens and police officers occur daily, yet no one would suggest a handshake or shoulder tap would suffice. *See Torres*, 592 U.S. at 317; *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). What makes a touching a seizure is an objective intent to restrain, that is, restrict freedom of movement. *Torres*, 592 U.S. at 317; *Brendlin v. California*, 551 U.S. 249, 254 (2007).

The Circuits have had no difficulty applying these principles in connection with targeted uses of significant force. For example, time and again the Circuits have correctly recognized that police seize a person shot with bullets. *See*, *e.g.*, *Jefferson v. Lias*, 24 F.4th 74, 78 (3d Cir.

2021); *Hensley ex rel. N.C. v. Price*, 876 F.3d 573, 582 (4th Cir. 2017); *DeLuna v. City of Rockford*, 447 F.3d 1008, 1010 (7th Cir. 2006); *Carr v. Tatangelo*, 338 F.3d 1259, 1267-68 (11th Cir. 2003). This, of course, dovetails with the Court's seminal seizure-by-shooting case, *Tennessee v. Garner*, which held "there can be no question" that "the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." 471 U.S. 1, 7 (1985).

Yet a bullet is not required, and the Circuits have just as easily recognized other types of targeted, significant force as seizures. Punching someone violently in the face, *Vardeman v. City of Houston*, 55 F.4th 1045, 1052 (5th Cir. 2022); *Acevedo v. Canterbury*, 457 F.3d 721, 724-25 (7th Cir. 2006), performing a high-speed "PIT" maneuver resulting in death, *Cheeks v. Belmar*, 80 F.4th 872, 877 (8th Cir. 2023), a powerful punch to a visibly pregnant woman's stomach, *Gross v. Cairo*, No. 22-2920, 2023 WL 8646265, at *2 (3d Cir. Dec. 14, 2023), and siccing a police dog on a suspect, *Cuevas v. City of Tulare*, 107 F.4th 894, 899 (9th Cir. 2024), all have been held seizures under the Fourth Amendment, for good reason. As *Torres* explained, the amount of force used by an officer is "pertinent in assessing" his "objective intent to restrain." 592 U.S. at 317. It would be difficult to conclude that a targeted use of force sufficient to kill or seriously injure did not manifest the officer's intent to restrict the subject's freedom of movement.

Modern police weapons have not altered this paradigm. The Circuits routinely conclude that officers' use of Tasers, shotgun-fired beanbag rounds, and foam-baton rounds shot from less-lethal launchers amount to

seizures, particularly when targeting individuals in areas likely to cause significant injury. *E.g.*, *Ducksworth v. Landrum*, 62 F.4th 209, 217 (5th Cir. 2023) (Oldham, J., concurring & dissenting) (Taser); *Packard v. Budaj*, 86 F.4th 859, 865 n.7 (10th Cir. 2023) (beanbag to the head); *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012) (pepperball to the eye); *Ciminillo v. Streicher*, 434 F.3d 461, 465-66 (6th Cir. 2006) (beanbag to the chest and chin); *Mercado v. City of Orlando*, 407 F.3d 1152, 1156-58 (11th Cir. 2005) (polyurethane baton to the head); *Omdahl v. Lindholm*, 170 F.3d 730, 732-33 (7th Cir. 1995) (beanbag to the chest). The Fourth Amendment, after all, "preserves personal security with respect to methods of apprehension old and new." *Torres*, 592 U.S. at 317.

That said, lesser uses of force—pushes and shoves, arm holds, etc.—often present closer calls. *Garner* recognized "it is not always clear just when minimal police interference becomes a seizure." 471 U.S. at 7. No surprise, as "minimal" interference is unlikely to cause injury, rendering it more difficult to discern, objectively, an officer's intent to restrain. *Acevedo*, 457 F.3d at 725 ("Certain types of non-restraining physical contact ... are just too minor to constitute a 'seizure' for Fourth Amendment purposes without doing violence to that word."). On the opposite end of the spectrum, targeted uses of substantial force have received near-uniform treatment—just as the Eighth Circuit held here when concluding Marks was seized by petitioner's eye-shot. Tellingly, not even the dissenting Judge below accepted petitioner's no-seizure argument. Pet.App. 23a-29a.

Petitioner latches onto a lone, unreported Eleventh Circuit decision, *Pinto v. Collier County*, No. 21-13064, 2022 WL 2289171 (11th Cir. June 24, 2022) (*per curiam*),

see Pet. 20-22, but one unreported decision does not a Circuit-split make. Regardless, a quick review of *Pinto* reveals why no discord exists. There, an officer pushed the plaintiff to separate him from a bar manager, with whom he was having a verbal altercation. The Eleventh Circuit, in a footnote, concluded no seizure had occurred. *Id.* at *4 n.7. But this is a far cry from an officer firing a high-speed, fragmenting projectile into someone's eye socket from point-blank range. Whatever *Pinto* says about minor pushes and shoves vis-à-vis seizures, it does nothing to undermine the consistent body of caselaw recognizing that firing a projectile—even a "less-lethal" one—into someone's eye or head is an extreme amount of force objectively manifesting an intent to restrain. Indeed, the Eleventh Circuit itself has found a seizure under similar circumstances. *Mercado*, 407 F.3d at 1156-58.

Citing two *district court* decisions, petitioner also asks this Court to intervene because "lower courts have wrestled with" a distinction noted in *Torres*: force to restrain is a seizure, but force "for some other purpose" is not. Pet. 16-18 (citing *Alsaada v. City of Columbus*, 536 F. Supp. 3d 216 (S.D. Ohio 2021), and *Ferris v. D.C.*, No. 1:23-cv-481, 2023 WL 8697854 (D.D.C. Dec. 15, 2023)). A smattering of district court decisions, however, is not of "the character" this Court typically deems sufficient to warrant *certiorari*. Sup. Ct. R. 10. Regardless, these cases reveal no tension with the Eighth Circuit here.

Ferris alleged officers violated the plaintiffs' Fourth Amendment rights by deploying projectiles "indiscriminate[ly]" at crowds to "forceful[ly] dispers[e]" them at protests, 2023 WL 8697854, at *1-3, *9, while *Alsaada* alleged officers' "use of non-lethal, or less-lethal,

crowd-control tactics violated their Fourth Amendment right to be free from excessive force," 536 F. Supp. 3d at 259. Whatever "wrestling" these courts may have done, this case simply is not the vehicle for resolving the issue because petitioner "was not dispersing a crowd [at] the moment he aimed and shot Marks." Pet.App. 8a-9a. Hence, his reliance on crowd-dispersal cases, including three from the Eighth Circuit—*Dundon v. Kirchmeier*, 85 F.4th 1250 (8th Cir. 2023); *Wolk v. City of Brooklyn Center*, 107 F.4th 854 (8th Cir. 2024); and *Quraishi v. St. Charles Cnty.*, 37 F.4th 506 (8th Cir. 2022)—misses the mark entirely.[1]

Try as he might to frame his conduct as "dispersal," petitioner admitted the launcher *was not a dispersal tool* on the day in question. C.A.App. 1102; *see also* C.A. Oral Arg. Hr'g 30:49-32:00 (conceding petitioner did not use launcher for dispersal). Likewise, he admitted the OC round he fired was to "incapacitate[] suspects so they can be arrested." C.A.App. 1102. "[T]here can be no reasonable dispute that 'incapacitating' an individual by firing a projectile at them is an act that 'meaningful[ly] interfere[es]' with their freedom of movement." *Sanderlin v. Dwyer*, 116 F.4th 905, 913 (9th Cir. 2024) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 n.5 (1984)). Incapacitation is the exact opposite of dispersal. Further, petitioner informed IA that Marks was "fleeing the scene" after being shot, C.A.App. 1105; as the district court noted, such a description is inconsistent with someone being "dispersed," Pet.App. 44a.

1. So too *amicus curiae* Minnesota Police and Peace Officers Association, which argues disagreement exists "whether the use of less lethal projectiles to dispurse [*sic*] or repel in crowd control situations constitutes a seizure."

Yet, the Court needn't rely on petitioner's own words to conclude this was no dispersal. *See* Pet. 20 (criticizing the Eighth Circuit for relying on petitioner's admissions). The video evidence reveals that while a large crowd was nearby when petitioner first exited the SWAT van, the situation had changed by the time he shot Marks. At that point, "most of the crowd had retreated and only a couple dozen individuals" remained near the officers, and they were "compliant" and "demonstrating no hostility," allowing the officers to work "without interference"—hardly a situation in which officers might *disperse* people. Pet.App. 9a, 15a, 19a. No "dispersal" order (or any other order) was given before the shot, and petitioner fired only once while standing at the second perimeter—at Marks's eye, only after Marks engaged with Pobuda. MPD trains that the launcher is to be *used* for incapacitation, and officers are to evaluate the *need* for incapacitation when firing. C.A.App. 1166, 1175. Thus, "[t]he method of force [petitioner] used is, by its nature, intended to incapacitate its target," necessarily interfering with freedom of movement. *Sanderlin*, 116 F.4th at 913. This is driven home by the manner petitioner used the launcher: aiming for deadly-force Zone 3, in direct contravention of his training on how to avoid a severe, *penetrating* injury. *See ibid.* (noting where the plaintiff was shot "is considered an area of particularly high risk of injury"). By aiming for an area all but guaranteeing, and ultimately *causing*, penetration, petitioner used the launcher just like a rifle firing a bullet. Thus, far from ignoring *Torres*, the Eighth Circuit hewed faithfully to it, as the circumstances *objectively* manifested petitioner's intent to restrain. *See* Pet.App. 8a.

Petitioner has failed to show the Eighth Circuit's decision conflicts "with the decision of another United

States court of appeals on the same important matter." Sup. Ct. R. 10(a).

B. The Eighth Circuit was not "wrong" in concluding petitioner seized Marks.

Unable to show a Circuit split, petitioner argues the Eighth Circuit was "wrong." Pet. 16. He asserts he couldn't have manifested an intent to seize Marks because he "did not try to detain" him or "do anything to prevent [his] departure." *Id.* 19. That is belied by the very nature of the weapon and munition used, the manner petitioner fired it, and Marks's injuries, but it is also irrelevant.

A seizure occurred the moment Marks was struck by the projectile petitioner aimed and fired at him. *See Torres*, 592 U.S. at 318 (plaintiff seized when shot, despite driving away). What happened thereafter does not alter that conclusion; "brief seizures are seizures all the same." *Ibid.* Freedom to walk away is relevant to seizures by *show of authority*, which are analytically different than seizures by force. *Id.* at 322-23. Indeed, "[i]t would make little sense to ask whether a person felt free to leave" after the application of substantial force, "because the force itself necessarily—if only briefly—restrained [the person's] liberty." *Atkinson v. City of Mtn. View*, 709 F.3d 1201, 1209 (8th Cir. 2013) (cleaned up). This is why petitioner errs in arguing "restrain" means "apprehend," Pet. 18; this Court and the Circuits speak in unison when holding a seizure by force does not require apprehension. *E.g.*, *Torres*, 592 U.S. at 323 (rejecting argument that seizure means "a taking of possession"); *Terry*, 392 U.S. at 16 ("the Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station

house and prosecution for crime—'arrests' in traditional terminology"); *Sanderlin*, 116 F.4th at 912 (collecting cases that a seizure occurs "when an officer uses physical force in any way that restricts or otherwise limits" movement, even if fleeting and not "for the purpose of effectuating an arrest"); *Vardeman*, 55 F.4th at 1050 ("an arrest need not be the officer's purpose" for a seizure to occur); *West v. Davis*, 767 F.3d 1063, 1067-70 (11th Cir. 2014) (seizure where officer wrenched plaintiff's arm without arresting her); *Acevedo*, 457 F.3d at 724 ("A blow by a police officer that immobilizes the recipient easily meets th[e] definition of a seizure. The fact that the restraint on the individual's freedom of movement is brief makes no difference.").[2]

Petitioner attempts to shoehorn his conduct into *Torres's* exception for force *other than* to restrain, claiming he fired to "repel" Marks from Pobuda. Pet. 19. But the weapon and munition he used indicate he was trying to incapacitate Marks, not "repel" him. Regardless, petitioner's argument is mere wordplay, as the Petition makes clear what he means by *repel*: "stop the attack" on Pobuda. Pet. 20; *accord id.* 22 ("stop Marks from assaulting and re-engaging"), *id.* 25 ("stop Marks' assault on a fellow officer"). Shooting to "stop" an assault easily equates with acting to restrain. The word "restrain" means "[t]o stop (someone) from doing something, as by physical force; ... to restrict freedom of movement or action using some means of restraint." *Restrain*, Black's

2. Regardless, petitioner ascribes far too much significance to Marks fleeing the area. Petitioner admitted to IA that (1) the round he fired was intended to "incapacitate[ ] suspects *so they can be arrested*," C.A.App. 1102 (emphasis added), and (2) the only reason Marks *wasn't* arrested is "there were not enough officers" to chase him, C.A.App. 1017.

Law Dictionary (12th ed. 2024). By arguing he fired "to stop the attack" on Pobuda, with a weapon and munition designed to incapacitate and aimed at an area that could easily kill him, the Petition itself concedes petitioner's intent to restrain. *See also*, *e.g.*, *Brower v. Cnty. of Inyo*, 489 U.S. 593, 599 (1989) (it is "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"); *Brendlin*, 551 U.S. at 261.[3]

Petitioner retorts that shooting to stop Marks did not restrain his "freedom" of movement, because "an assault on an officer is not an expression of freedom of movement." Pet. 20 (emphasis deleted). This argument runs headlong into *Garner*. There the victim was amid criminal conduct (a fleeing felon) when the officer's bullet killed him, but this Court readily concluded the bullet seized him. 471 U.S. at 7. The Circuits regularly hold that officers employing force to stop assaultive behavior, whether against the officer or someone else, constitutes a seizure. *See*, *e.g.*, *Hayek v. City of St. Paul*, 488 F.3d 1049, 1053-55 (8th Cir. 2007) (seizure where officer shot man advancing on him with bladed weapon); *Romero v. Bd. of Cnty. Comm'rs of Cnty. of Lake*, 60 F.3d 702, 704 (10th Cir. 1995) (same); *Untalan*

3. Petitioner criticizes the Eighth Circuit for relying on *Brower* and *Brendlin* because they concerned seizures by *show of authority*, *see Torres*, 592 U.S. at 322, but those cases remain instructive on seizures by *force*. *See*, *e,g.*, *Brower*, 489 U.S. at 597 (recognizing seizure would occur if police officer intentionally crashed into suspect's car); *id.* at 599 (person would be seized "by a bullet in the heart that was meant only for the leg"). Indeed, petitioner parrots *Brower*'s heart/leg hypothetical by contending he meant to shoot Marks in the torso, Pet. 7-8, despite contrary evidence sufficient to create a jury question, Pet.App. 12a.

v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005) (officer seized man by shooting him while he attacked another officer); *Carr v. Tatangelo*, 338 F.3d 1259, 1265 (11th Cir. 2003) (same); *Rockwell v. Brown*, 664 F.3d 985, 991-92 (5th Cir. 2011) (same); *Montoya v. City of Flandreau*, 669 F.3d 867, 870-72 (8th Cir. 2012) (seizure when officer broke individual's leg to prevent assault on bystander); *Scott v. Edinburg*, 346 F.3d 752, 755, 758-59 (7th Cir. 2003) (seizure where officer shot individual driving recklessly near persons in parking lot). The officers in these cases easily could have been deemed "repelling" assailants, but they effected seizures all the same.

Petitioner's contrary rule would lead to absurd results. Under his logic, if an officer uses force to stop a crime in progress, the Fourth Amendment is not implicated because the officer would not restrain "free" movement. An officer confronting a low-level misdemeanant could use whatever force he chose—live ammunition, a grenade, a flamethrower—and escape scrutiny, because the suspect would not have been seized. Such a rule would make a mockery of the Fourth Amendment and its guarantees against abuses of government power. *See Elkins v. United States*, 364 U.S. 206, 209 (1960) ("The effect of the 4th Amendment is to put [officers], in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people ... against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted ... with the enforcement of the laws.") (citation omitted).

II. The Narrow Request for Individual Relief Does Not Demand This Court's Intervention.

Petitioner does not identify a Circuit split with respect to the Eighth Circuit's qualified-immunity analysis. Pet. 22-40. Indeed, his argument relies almost exclusively on Eighth Circuit cases and largely rehashes the arguments considered and rejected by the courts below. *See id.* 24-39. For instance, the Eighth Circuit already considered and distinguished *Dundon*, *White v, Jackson*, 865 F.3d 1064 (8th Cir. 2017), and *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2021), because petitioner was not dispersing or controlling a hostile crowd when he targeted just Marks with a single "less-lethal" projectile. Pet.App. 8a-9a, 19a-20a.

In lieu of a Circuit split, petitioner posits that his Petition "presents a question of exceptional importance." Pet. 22. Yet he overstates the significance of the questions presented and the practical consequence of a decision in his favor. What petitioner seeks is the correction of a perceived error in the Eighth Circuit's application of *its own* precedent to the particularized facts of his case. According to petitioner, the 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." Pet. 28. Petitioner's request to make an example of the Eighth Circuit is not a question of exceptional importance.

Petitioner's request for individual relief, tailored to his case, undermines the importance of the issues he raises. *See Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O'Connor, J., concurring) ("The effectiveness

of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases ... whose significance is limited to the parties."). Indeed, petitioner asks the Court to determine whether his use of force "*under these particular circumstances* constitutes a seizure," and whether it was "clearly established that [his] use of a less-lethal projectile *under these particular circumstances* constituted a seizure or an unreasonable use of force under the Fourth Amendment." Pet. i (emphases added). Not only does his framing of the issues impermissibly inject disputed facts into the Petition, *see infra* at 29-32, it also highlights the individualized nature of petitioner's request for relief. Even if the Court were to decide, as petitioner requests, "[i]t was not clearly established in May 2020 that [Petitioner's] use of a less-lethal projectile against Marks, under the circumstances of this case, would be considered objectively unreasonable," such a narrow and individualized decision is unlikely to have broad impact. Pet. 28.

III. This Interlocutory Appeal Presents a Poor Vehicle to Address the Questions Presented.

A. Unresolved fact disputes render this interlocutory appeal a poor vehicle for certiorari.

Even if a Circuit split or exceptionally important issue existed, this case would be a poor vehicle to address it because of a myriad of disputed facts that are not subject to interlocutory review. Although public officials may appeal summary-judgment orders denying qualified immunity despite the "final judgment" rule, such appeals

are limited to questions of law. *Johnson v. Jones*, 515 U.S. 304, 309 (1995). Appellate courts lack jurisdiction to review "'evidence sufficiency', *i.e.*, which facts a party may, or may not, be able to prove at trial." *Id.* at 313. Here, this Court may review "the purely legal issue what law was 'clearly established[,]'" but lacks jurisdiction to entertain petitioner's challenges to the underlying facts, and fact disputes, identified by the courts below. *Ibid.* "[I]nstant appeal is not available" where, as here, the "court determines that factual issues genuinely in dispute preclude summary adjudication." *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011).

The issues presented are unripe until a jury has resolved the disputed facts at the heart of the questions presented. As for the seizure issue, both courts below found the record supports a conclusion that petitioner objectively manifested an intent to restrain Marks when he targeted him with a substantial degree of injury-causing force. *See* Pet.App. 10a ("the record demonstrates that Officer Bauer applied force to restrain and stop Marks"); *id.* 43a (record "sufficient to establish that a seizure occurred" when petitioner "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"). There is ample evidence for a jury to conclude petitioner manifested an intent to restrain Marks, not disperse protesters as in *Dundon* and *Wolk*. Petitioner targeted just Marks; he fired one round; the powerful munition was designed to incapacitate and caused serious injury; the small crowd around the injured person was not hostile or interfering with officers; no dispersal order was given; and petitioner conceded he did not use the launcher

as a dispersal tool.[4] Petitioner's contrary claim that he merely intended to "repel" or "disperse" Marks, even if supported by the record, is a jury question not subject to interlocutory appeal.

Likewise, the Eighth Circuit rightly found petitioner is not entitled to qualified immunity regarding the reasonableness of his force because fact issues are entwined with the "clearly established" analysis. Pet. App. 23a (no qualified immunity because "disputed issues of material fact exist such that the issues of law cannot be decided without findings on the central fact issues"). A jury must evaluate, *e.g.*, the degree and immediacy of threat posed by Marks, the nature and extent of the contact between Marks and Pobuda, and where petitioner aimed. Pet.App. 19-22a. While a jury "might agree with [petitioner's] assessment of the situation," Marks made "a compelling showing" that petitioner used clearly disproportionate force when shooting an unarmed Marks in the eye socket after Pobuda ended their brief scuffle by forcefully shoving him backwards. Pet.App. 22a. This is enough to deny the Petition.

Petitioner's attempt to recast his fact disputes as a legal issue by claiming the Eighth Circuit's articulation of the right was insufficiently "particularized" rings hollow. While "courts should define the 'clearly established' right" based on "the 'specific context of the case,'" they "must take care not to define a case's 'context' in a manner that

4. Considering petitioner's own testimony about how and why he used the launcher does not transform the objective seizure inquiry into a subjective one, as petitioner suggests. Pet. 19-20. It is simply a piece of the evidentiary puzzle that could lead a jury to conclude petitioner objectively manifested an intent to restrain.

imports genuinely disputed factual propositions." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (*per curiam*). Disputed facts enmeshed with the qualified-immunity analysis must be decided by a jury. *Id.* at 657-59. For example, a jury might reject the dissent's portrayal of the scene as violent and chaotic, "nearing a flashpoint," as did the Eighth Circuit majority. Pet.App. 14a-15a, 19a-20a. To accept petitioner's contentions that Marks was "not a mere misdemeanant," attempted to disarm Pobuda, was readying to fight, and posed an immediate threat would permit petitioner to manufacture appellate jurisdiction by using qualified-immunity verbiage to cloak factual disputes as legal ones. *See Ortiz*, 562 U.S. at 190-91.

Finally, invoking *Scott v. Harris*, 550 U.S. 372 (2007), petitioner suggests "this Court need not accept" the fact disputes identified below and should instead reassess the facts based on *his* view of the video evidence. Pet. 33, 39. But *Scott* did not pave the way for judicial fact-finding whenever there is video, nor remove the jurisdictional guardrails placed by *Johnson*. *Scott*'s narrow rule—that a court needn't adopt at summary judgment a version of events "so utterly discredited" by video evidence that no reasonable jury could accept it—has no application here. 550 U.S. at 378-80. Unlike *Scott*, where the Court of Appeals ignored an uncontested videotape that "clearly contradict[ed]" the plaintiff's account of a car chase, the Eighth Circuit considered the video evidence and determined it could support Marks's version of events. *See* Pet.App. 13a, 19a (concluding "[t]he video of the encounter lends little support to [petitioner's] characterization of Marks' conduct" and depicted a "compliant" crowd "demonstrating no hostility towards officers" near where petitioner shot Marks). Assessing competing versions

of ambiguous video remains the province of the jury, and the Eighth Circuit's determination that the video presents "a triable issue of fact" is beyond the reach of this interlocutory appeal. *Johnson*, 515 U.S. at 316; *see also Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1075 (8th Cir. 2018), *as corrected* (Mar. 6, 2018) (unlike *Scott*, where "irrefutable video evidence resolved any factual disputes," the court lacked jurisdiction to interpret "inconclusive" video evidence to determine whether plaintiff "posed a threat of serious physical harm to an officer").

B. The seizure question was not fully briefed below.

Petitioner's seizure argument has been one of moving goalposts. When seeking summary judgment, he did not argue he hadn't seized Marks; he first raised that issue only in his reply. The district court, applying its local rules, found the argument "untimely" and then rejected it on the merits in the alternative. Then, at the Eighth Circuit, petitioner changed tacks and argued not only that he hadn't seized Marks, but also that it wasn't *clearly established* the shooting constituted a seizure. While the Court of Appeals applied clearly-established law in holding Marks had been seized, it did not directly address the seizure issue in the "clearly-established" portion of its analysis. Pet.App. 16a-23a.

The adversarial litigation system "assigns both sides responsibility for framing the issues in a case," and this Court routinely turns away questions "that the district court and court of appeals did not have an opportunity to consider." *Granite Rock Co. v. Int'l B'hd of Teamsters*, 561 U.S. 287, 306 n.14 (2010). Here, the district court

was never asked to consider whether the shooting was a clearly-established seizure. And though that issue was briefed in the Eighth Circuit, that court did not directly opine on it—likely because the district court hadn't, either. Pet.App. 6a. Moreover, while the predicate question of seizure was raised in the district court, it received only limited, one-sided briefing because petitioner asserted it for the first time with his reply.

The Court should decline petitioner's invitation to intervene on such a stunted record. As noted in *Maslenjak v. United States*, "the crucible of adversarial testing on which [the Court] usually depend[s], along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring); *accord, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 531 n.13 (1979) (declining to address issues not "presented to or passed on by the lower courts"). Petitioner offers no explanation for his failure to raise these issues earlier. Indeed, he primarily relies upon *Torres*, decided over a year before he moved for summary judgment.

IV. Certiorari is Unwarranted Because the Eighth Circuit Correctly Applied Settled Qualified Immunity Principles to this Case.

There is no error for this Court to fix because the courts below correctly applied the summary-judgment standard and qualified-immunity jurisprudence.

A. It was clearly established petitioner seized Marks.

Petitioner argues the Eighth Circuit fumbled the second step of the qualified-immunity analysis because it was not clearly established the shooting was a seizure. Pet. 23-27. But as noted above, the Circuits have consistently concluded that targeted uses of significant force, particularly those rising to the level of deadly force (as here), objectively manifest an intent to restrain and thus constitute seizures. A contrary rule would mark a seismic shift in Fourth Amendment jurisprudence and allowed police officers to evade constitutional liability for using extreme levels of force.

The Eighth Circuit correctly noted there is evidence in the record from which a jury could conclude petitioner used deadly force when shooting Marks. Pet.App. 12a. *Garner* recognized four decades ago that "the use of deadly force is a seizure," 471 U.S. at 7, and the numerous shooting cases already discussed highlight that the Circuits faithfully apply this principle. It does not matter that petitioner shot Marks with a "less-lethal" projectile. The launcher admittedly could be used in a deadly way, Pet.App. 4a.; C.A.App. 1013, and ample caselaw would have warned petitioner—the touchstone of being "clearly established," *Tolan*, 572 U.S. at 656 (citation omitted)—that deadly force did not require a bullet. *See*, *e.g.*, *Brower*, 489 U.S. at 600-01 (Stevens, J., concurring) (roadblock designed to produce crash deadly force); *Ludwig v. Anderson*, 54 F.3d 465, 473 (8th Cir. 1995) (attempt to hit plaintiff with squad car deadly force); *United States v. Aceves-Rosales*, 832 F.2d 1155, 1157 (9th Cir. 1987) ("It is indisputable that an automobile can inflict deadly force

on a person and that it can be used as a deadly weapon."); *Donovan v. City of Milwaukee*, 17 F.3d 944, 949-50 (7th Cir. 1994) (driving squad car into path of motorcycle deadly force); *Mercado*, 407 F.3d at 1157 (baton launcher could be considered deadly-force weapon when fired at head); *Omdahl*, 170 F.3d at 733 (shotgun-fired beanbag rounds could be considered deadly force); *Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008) (significant pressure to upper back of prone, restrained individual constituted deadly force). Similarly, even if petitioner had used something less than deadly force, the Courts of Appeals have consistently recognized that an individual is seized when an officer employs substantial force to stop an assault on himself, another officer, or a bystander. *See supra* at 25-26.

Petitioner builds his clearly-established-seizure argument on a trio of Eighth Circuit cases, *Dundon*, *Quraishi*, and *Wolk*. But his reliance on these *protest-dispersal* cases founders for reasons already discussed. "[D]issimilar" decisions cannot "create any doubt about" the clearly-established nature of the law. *Taylor v. Riojas*, 592 U.S. 7, 9 n.2 (2020) (*per curiam*). Petitioner even labels *Wolk* a "concerning turn of events," since it was issued by the Eighth Circuit on the same day as the opinion here, authored by the same Judge. Pet. 26. Actually, *Wolk* demonstrates the Eighth Circuit understood the distinction between this case and those involving crowd dispersal.

Petitioner also claims the Eighth Circuit contravened its decision in *Martinez v. Sasse*, 37 F.4th 506 (8th Cir. 2022). But *Martinez* is even farther afield. There, an officer pushed the plaintiff, knocking her to the ground. *Id.* at 508. That case says nothing about a shot to the eye, a targeted use of force aptly labeled "deadly."

B. Petitioner's extreme degree of force was clearly unreasonable.

Petitioner also wrongly asserts that the Eighth Circuit misapplied its precedent in denying qualified immunity regarding the reasonableness of the force. Viewing disputed facts Marks's favor, the Eighth Circuit correctly applied clearly-established Fourth Amendment principles to find a reasonable officer would understand that shooting an unarmed Marks from close range in the eye socket with an exploding projectile was disproportionate to any minimal threat he posed.

When it comes to excessive-force claims, the Fourth Amendment requires balancing "the nature and quality of the intrusion" on the individual "against the countervailing governmental interests at stake." *Graham v. Connor*, 490 U.S. 386, 396 (1989) (cleaned up). Whether force is reasonable is assessed under the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the officer or others, whether the suspect is actively fleeing or resisting arrest, the amount of force used, the officer's efforts to temper or limit force, and the extent of injuries inflicted. *Ibid.*; *Lombardo v. City of St. Louis*, 594 U.S. 464, 467 (2021).

Because the "intrusiveness" of force sufficient to cause serious bodily injury or death—"deadly force"—is "unmatched," it is reasonable only when the subject poses an immediate, significant threat of serious physical harm to the officer or others. *Garner*, 471 U.S. at 9; *Ellison v. Lesher*, 796 F.3d 910, 916-17 (8th Cir. 2015). Where a person poses only a potential threat, deadly force is unreasonable

unless he is poised to imminently cause serious harm or death. *See Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir.2020) ("[I]t was clearly established that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion."). Additionally, where a warning is "feasible," the failure to provide one adds to the unreasonableness of deadly force. *Garner*, 471 U.S. at 11-12.

Applying these principles, each court below concluded a reasonable officer would have understood that shooting an exploding projectile from close range and without warning into Marks's eye socket was unreasonable deadly force. *See* Pet.App. 17a-19a, 46a-47a, 57a. And rightly so; even petitioner concedes using deadly force on Marks was unreasonable. Pet.App. 47a; C.A.App. 787; C.A. Oral Arg. Hr'g 9:30-9:55. This renders null petitioner's reliance (and the dissent's focus) on the speed with which he made the purported "split-second decision" to fire, Pet. 35, as the circumstances *never* justified shooting Marks in the eye, even during the short-lived tussle with Pobuda.

Petitioner's sole argument regarding deadly force is that it was not "clearly established" shooting Marks in the eye with his less-lethal launcher amounted to deadly force. But petitioner testified he knew and was trained that shooting Marks in such fashion could kill him, and he lacked the deadly-force authorization needed to take such a shot. C.A.App. 85, 138-39. His stark concession is readily supported by his supervisors, experts, MPD training, and the weapon's manufacturer—all concur that shooting a person in the face with a less-lethal projectile carries a

substantial risk of serious injury or death. Pet.App. 4a-5a, 18a-19a; CA.App. 1013. Because qualified immunity does not protect "those who knowingly violate the law," this alone is sufficient to deny his Petition. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Marks needn't identify a case involving a less-lethal firearm to establish that shooting him in the eye socket—a delicate area likely to be penetrated—with a high-speed, detonating projectile was potentially deadly. The touchstone of qualified immunity is notice. *E.g.*, *Tolan*, 572 U.S. at 656; *Hope v. Pelzer*, 536 U.S. 730, 743 (2002). Not only has petitioner conceded he was on notice, but the reasonableness inquiry has always turned on the circumstances, not the weapon used. There is no novel-weapon exception to the Fourth Amendment, which as already noted "preserves personal security with respect to methods of apprehension old and new." *Torres*, 592 U.S. at 316-17.

Nor does *White v. Jackson* establish, or even suggest, that less-lethal munitions are categorically non-deadly force.[5] Pet. 28-29. There, the Eighth Circuit held it reasonable for officers to "fire rubber bullets and bean bags" at the lower body of a man in "a violent crowd of people and proceeding directly toward the police skirmish line," ignoring commands to stop. 865 F.3d at 1079. The plaintiffs did not raise, and the court did not address, the issue of deadly force.[6] The only other case on which

5. The same goes for Minnesota Statutes § 609.066, which simply provides that, unlike bullets, discharging less-lethal munitions is not *per se* deadly force. Pet. 29.

6. Although one plaintiff claimed he was shot in the head from an undisclosed distance, the court did not reach that individual's waived excessive-force claim. 865 F.3d at 1071, 1077.

petitioner relies is even further afield; *Laney v. City of St. Louis*, 56 F.4th 1153, 1156 (8th Cir. 2023), involved pepper-spray and merely cites *White* as an example of reasonable force.

It is unsurprising, and consistent with clearly-established law, that less-lethal munitions, just like a squad car, can be used in both deadly and non-deadly ways, depending on the circumstances. *See supra* at 34-35; *see also* Pet. 30 (conceding that striking a person with squad car is clearly established "deadly force under certain circumstances"). As such, the Eighth Circuit rightly determined that even nominally "less-lethal" weapons "can amount to deadly force depending on the situation." Pet.App. 18a.

The Eighth Circuit also correctly concluded that, even if less than deadly, it "would have been clear to a reasonable officer in [petitioner's] position that this high degree of force was disproportionate to the threat" Marks posed. Pet.App. 20a. Force is evaluated on a spectrum. Even where an officer is justified in using *some* force, it is clearly established that using an amount of force disproportionate to the threat confronted is constitutionally unreasonable. *See Lombardo*, 594 U.S. at 467 (noting "the relationship between the need for the use of force and the amount of force used" and "the extent of the plaintiff's injury" are factors in the reasonableness inquiry). Petitioner makes no attempt to defend shooting Marks in the *eye socket*, causing a penetrating injury that deflated his eyeball, detached his retina, fractured facial bones, and caused a traumatic brain injury, leaving him partially blinded and in daily pain. Nor could he, as such force was obviously disproportionate to Marks's fleeting altercation with Pobuda.

The Eighth Circuit rightly focused on the degree of force petitioner used compared to the marginal threat Marks posed. Pet.App. 21a. Under clearly established law, a jury must evaluate the severity of that threat, if any. *Ludwig*, 54 F.3d at 473-74 (jury must decide whether plaintiff, "even if dangerous, threatening, or aggressive," posed a serious threat justifying deadly force) (cleaned up). In *Rohrbough*, although the plaintiff "was causing a disturbance" and pushed an officer, the Eighth Circuit denied qualified immunity because a jury could conclude the push was "*de minimis* or inconsequential" and the "severity of [the officer's] reaction," including punching the plaintiff, taking him to the ground, and causing serious injury, was disproportionate. 586 F.3d at 587. Whereas petitioner claims a reasonable officer would believe Marks was attempting to disarm Pobuda and readying for a fight, Pet. 32-35, a reasonable jury could disagree and determine the brief scuffle was insufficient to justify the severity of petitioner's reaction, especially after Pobuda forcefully shoved Marks back enough that a bystander stepped between them. Pet.App. 21-22a. Pobuda certainly thought so; he determined that a shove with his baton was sufficient and perceived no threat thereafter. Pet. App. 4a, 18a. And the decision of another nearby officer, MPD Officer Logan Johansson, to pepper-spray Marks only highlights the disproportionate nature of petitioner's decision to shoot Marks in the eye socket with a high-speed, exploding projectile. Pet. 34.

Finally, neither *Bernini* nor *White* can reasonably be interpreted to authorize Marks's shooting under the circumstances. Pet. 36-39. In *Bernini*, officers used reasonable force (causing no significant injuries) to disperse a large, "non-compliant" crowd of protesters

they reasonably believed were "acting as a unit" to penetrate a police barrier. 665 F.3d at 1005-06. Similarly, officers in *White* deployed less-lethal rounds at the lower body of a man violating dispersal orders and advancing on a skirmish line as "part of the violent crowd." 865 F.3d at 1073, 1079. In contrast, Marks was not acting in concert with a hostile or violent crowd and was given no dispersal orders or commands before petitioner targeted just Marks with a single shot in the eye. Not only is this clearly distinguishable from a crowd-control effort, but the Eighth Circuit observed that the small group of "compliant" citizens in the area was "demonstrating no hostility towards the officers," and instead "assisting law enforcement" or watching from a distance, when petitioner fired. Pet.App. 19-20a. Although petitioner frames the behavior of the crowd differently, the Eighth Circuit firmly disagreed and reserved such questions for the jury. Because this is not the forum for petitioner to air his disagreement with the factual record, his Petition should be denied. *See Ellison*, 796 F.3d at 916 (affirming denial of qualified immunity because officer's "framing of the abstract legal issue is premised on a set of facts that was not assumed by the district court").

CONCLUSION

The Petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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