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

REPLY BRIEF FOR PETITIONER

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I. The Divided Opinion Fails to Comport with this Court's Precedent on Clearly Established Law.

A. Force

As Judge Stras' dissent makes clear, neither Marks nor the divided panel "identify a single case involving 'similar circumstances' that would have provided 'fair notice' that [Officer Bauer's] actions 'violated [a] Fourth Amendment' right." (App. 24a.) No case involving a protest. No case involving a less-lethal projectile. No case involving an assaultive plaintiff. The denial of qualified immunity based on an array of dissimilar cases seriously undermines this Court's precedent. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018)("police officers are entitled to qualified immunity unless existing precedent 'squarely governs' the specific facts at issue"). It improperly exposes officers to liability and compromises their capacity to respond to public safety threats. (App. 29a; IMLA Br. 7-21.) It must be reversed.

Marks equates the use of less-lethal projectiles with deadly force. But combing the Opposition, the Court will find no Eighth Circuit or Supreme Court precedent even involving less-lethal projectiles, let alone deeming their use deadly force. The opposite is true. In *White v. Jackson*, 865 F.3d 1064, 1070-1071, 1073, 1076, 1079 (8th Cir. 2017), the Eighth Circuit repeatedly described less-lethal projectiles as "nonlethal projectiles," even when a plaintiff was struck in the face. Marks tries to minimize *White*, claiming it did not set a categorical rule that use of less-lethal projectiles constitutes non-deadly force. At the least, *White* created a gray area in which officers could reasonably believe the Eighth Circuit would categorize

less-lethal projectiles as non-deadly force. Officers are entitled to qualified immunity if they act "within a gray area and transgressed no bright lines clearly established by existing case law." *Sessler v. City of Davenport, Iowa*, 102 F.4th 876, 879, 884 (8th Cir. 2024).

Deviating from caselaw, Marks contends that Officer Bauer's acknowledgment of department training on less-lethal projectiles is sufficient to deny qualified immunity. True, department training advised that striking the head has a greater "potential" to cause serious or fatal injury, as compared to striking the buttocks, thigh, calf, or abdominal area.[1] (Doc. 122 at 70-72.) But that training did not put Officer Bauer on notice that if a projectile struck a subject's head, it would constitute deadly force under the law. Nor does the training dictate the clearly established law. *Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021) ("judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received ... was irrelevant to the clearly-established-law inquiry.") Taking a novel approach, Marks asks the Court to substitute department training for the law established in *White*, as well as the guidance offered to Officer Bauer by state law. Minn. Stat. §609.066 (excluding less-lethal projectiles from definition of deadly force). But Marks does not cite any authority for the proposition that training determines the clearly established law when it conflicts with the actual law.

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1. Marks' Opposition does not contest that the video, aided with red arrows and tracking, shows Marks' head suddenly dropping into Officer Bauer's line of fire just .23 seconds before the projectile struck. (Pet. 8.)

The divided panel's non-deadly force analysis is also untethered from the clearly established law. Marks insists the divided panel focused on the proportionality of the force to the threat posed by Marks. But that analysis misapplies the clearly established law. The divided panel defined the clearly established law as prohibiting an officer from using more than *de minimis* force on a "non-threatening misdemeanant." (App. 21a.) Officer Bauer's force is not clearly unlawful under that standard.

Officer Bauer properly invokes *Scott v. Harris*, 550 U.S. 372, 380-381 (2007), compelling the Court to view the "facts in the light depicted by the videotape." Here, the video utterly discredits any contention that Marks was non-threatening:


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The video utterly discredits that Marks was a misdemeanant:

A reasonable officer could view Marks as attempting to disarm Officer Pobuda, a felony-level crime. Minn. Stat. §609.504.

Moreover, Marks offers no defense for the divided panel's failure to consider the totality of the circumstances, as this Court requires. *Cnty. of Los Angeles v. Mendez*, 581 U.S. 420, 427-428 (2017). Instead, he doubles-down on the singular contention that protestors closest to Officer Bauer's perimeter were compliant and not aggressive. But this is hardly dispositive. After all, Marks stood "idly" by until he suddenly yelled "Back up, Bitch!" and then assaulted and tried to disarm Officer Pobuda. (Opp. 7.) As shown in video, officers were surrounded by hundreds of other hostile protestors. Protestors assaulted officers

from afar by throwing objects and began building a barricade to block the officers' escape. The divided panel ignores all of these circumstances.

In the context of a chaotic protest, and a rapidly evolving incident lasting only four seconds, Officer Bauer's force against Marks did not violate clearly established law. Indeed, as Judge Stras notes, the clearly established law confirms that use of less-lethal projectiles under similar circumstances was objectively reasonable. (App. 25a-26a) (citing *White*, 865 F.3d at 1079 (less-lethal projectiles used against protestor advancing toward skirmish line); *Bernini v. St. Paul*, 665 F.3d 997 (8th Cir. 2012)(less-lethal projectiles used against protestor trying to break police line).) Officer Bauer is entitled to qualified immunity.

B. Seizure

Qualified immunity should be resolved at the earliest possible stage. *Pearson v. Callahan*, 555 U.S. 223, 232 (2009). Ignoring this well-settled principle, Marks asks the Court to forego considering whether Marks was seized under clearly established law, claiming this Petition is undesirable for review. However, the qualified immunity issue raised by this Petition is capable and worthy of resolution. Beyond Officer Bauer's case, the *amici* make clear that the Court's intervention is necessary to prevent the erosion of this Court's qualified immunity principles and to provide critical guidance to officers in the context of protest responses. (MPPOA Br. 2, 14-18; IMLA Br. 7-24.)

Whether Officer Bauer seized Marks under clearly established law is properly before the Court. Both parties presented argument about the alleged seizure and clearly

established prong of qualified immunity before the district court. (Doc. 153 at 23, 28 ("the issue is not only as a matter of law was there a seizure, but also whether or not the seizure exists is subject to qualified immunity"), 29.) Without opposition, both parties fully briefed and argued the clearly established law governing seizures before the Eighth Circuit. (Bauer's Br. at 21-34; Marks' Br. at 29-40; Bauer's Reply Br. at 16-21.)

Additionally, there are no material factual disputes to stymie the Court's review. Marks notes the lower courts found Officer Bauer objectively manifested an intent to restrain because he used a substantial degree of force, possibly even deadly force. (Opp. 29, 34). This would be material only if preexisting caselaw put Officer Bauer on fair notice that less-lethal projectiles necessarily effect a seizure, or they had been categorized as deadly force. Marks cites no Eighth Circuit or Supreme Court precedent supporting either proposition.

The caselaw advises the opposite. In *Dundon v. Kirchmeier*, 577 F.Supp.3d 1007, 1040 (D.N.D 2021), the district court held that no seizure occurred in 2016 when less-lethals were used to "move protestors away" because they were "free to leave" the area. The less-lethals included projectiles, bean bag rounds, rubber bullets, and a cannon-launched flaming tear gas canister that struck a plaintiff in the eye. *Id.* at 1016, 1025-1028, 1040-1041, 1054-1055. The Eighth Circuit held this force was not clearly established as a seizure. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255-1256 (8th Cir. 2023). The Eighth Circuit echoed the same ruling in *Wolk v. City of Brooklyn Center*, 107 F.4th 854, 858 (8th Cir. 2024), holding it was not clearly established in 2021 that use of less-lethal rubber bullets

at close range effected a seizure. And, the Eighth Circuit characterized every use of less-lethal projectiles, even when striking a protestor's face, as being "nonlethal" in *White v. Jackson*, 865 F.3d 1064, 1070-1071, 1073, 1076, 1079 (8th Cir. 2017).

Finding no support for his deadly force argument, Marks argues that Officer Bauer's force was intended to restrain because he only targeted Marks, no dispersal order was given, and members of the crowd closest to the perimeter were not hostile. (Opp. 29.) Marks proposes there can be no intent to repel one violent protestor unless there is an intent to repel every protestor. Again, Marks lacks any supportive Eighth Circuit or Supreme Court precedent. There are no cases putting Officer Bauer on notice that, unless he dispersed the entire crowd, he would have seized individual violent protestors he wanted to drive away. It is Marks' burden to "identify a case where an officer acting under similar circumstances ... was held to have violated the Fourth Amendment." *White v. Pauly*, 580 U.S. 73, 79 (2017). He has not met that burden.

II. The Divided Opinion Reflects a Widespread, Recurring Misapplication of this Court's Fourth Amendment Precedent that Must be Corrected.

There is a divide amongst lower courts about the holding in *Torres v. Madrid*, 592 U.S. 306, 317 (2021). *Torres* has spawned inconsistent Fourth Amendment rulings in the context of protest responses where officers only seek to repel, not arrest, members of a crowd. Officers have been left to navigate this "murk[y] landscape" from jurisdiction to jurisdiction. *Alsaada v. City of Columbus*, 536 F.Supp.3d 216, 261 (S.D.Ohio 2021). Accordingly, Marks mistakenly represents this Petition as presenting

a narrow issue without broad impact. Indeed, amici Minnesota Police and Peace Officers Association implores the Court to "end the confusion" for officers "nationwide" while the International Municipal Lawyers Association stresses the "need" for "clarity in this important and recurring area of the law." (MPPOA Br. 2; IMLA Br. at 5.)

Marks tries to persuade the Court that *Torres* is applied uniformly, claiming courts agree that targeting a person with substantial force is a Fourth Amendment seizure. (Opp. 17). Marks actually identifies a deeper misunderstanding of *Torres*. While *Torres* acknowledges the amount of force is "pertinent" to assessing the objective intent to restrain, it does not give dispositive weight to the level of force without regard for the totality of the circumstances. 592 U.S. at 317.

Citing only one case, Marks claims there is a "consistent body of caselaw" holding that a less-lethal projectile strike to the head or eye is "an extreme amount of force objectively manifesting an intent to restrain." (Opp. 20). His claim is undercut by the actual body of caselaw. *Ratlieff v. City of Fort Lauderdale, Fla.*, 2023 WL 3750581 (S.D. Fla. June 1, 2023)(protestor not seized by projectile strike to eye because force was used "for some other purpose," *i.e.* to disperse); *Dundon v. Kirchmeier*, 577 F.Supp.3d 1007, 1025, 1040 (D.N.D 2021) (protestor not seized by flaming cannon-launched tear-gas canister that struck her eye); *Keup v. Sarpy Cnty.*, 709 F.Supp.3d 770, 794 (D.Neb. 2023)(protestor not seized by pepperball shot into eye).

This Petition asks whether use of a *less-lethal projectile* to *repel* a violent protestor constitutes a seizure

under the Fourth Amendment. Marks' citations largely fail to address this inquiry. Marks cites only four cases involving less-lethal projectiles in the context of dispersal attempts.[2]

Two cases involve projectiles used as tactics to keep targets from leaving. *Nelson v. City of Davis*, 685 F.3d 867, 872, 874 (9th Cir. 2012)(projectiles fired at students trying to leave a college party while officers "blocked their means of egress" and refused to respond to questions about how they should leave); *Ciminillo v. Streicher*, 434 F.3d 461, 463 (6th Cir. 2006)(beanbag round fired at man after he attempted to leave the riot and then, while he laid on the ground, an officer approached him, told him to stay down, and then ordered him to report to another officer). This Petition has no issue with these cases because the circumstances manifest an intent to restrain.

This Petition, however, urges the Court to confront the neglect of *Torres*' "intent to restrain" requirement. *Packard v. Budaj*, 86 F.4th 859 (10th Cir. 2023) warrants reconsideration. *Packard* turned on whether the use of less-lethal projectiles against plaintiffs was intentional. *Id*. at 867. Officers claimed plaintiffs were "unintended victims of an effort to disperse protestors" and were not "intentionally targeted." *Id*. The Tenth Circuit held it was bound by the district court's conclusion that plaintiffs were

2. Marks cites two non-protest cases where less-lethal projectiles were used to apprehend, not repel. *Mercado v. City of Orlando*, 407 F.3d 1152 (11th Cir. 2005)(suicidal plaintiff struck with less-lethal projectile while surrounded by officers in his apartment); *Omdahl v. Lindholm*, 170 F.3d 730 (7th Cir. 1999) (armed suicidal plaintiff struck with less-lethal projectiles during stand-off).

intentionally targeted. *Id.* Without explanation, it then remarked, "we find it difficult to imagine a circumstance in which" plaintiffs "would *not* be considered 'seized' for the purpose of the Fourth Amendment[.]" *Id.* at 865, n.7. Although dicta, it left the impression of endorsing a *per se* rule that any targeted use of a less-lethal projectile, regardless of intent or circumstances, constitutes a seizure. While the Tenth Circuit cited *Torres*, it made no mention of the holding that force must be coupled with an *intent to restrain* to constitute a seizure. *Id.*

Sanderlin v. Dwyer, 116 F.4th 905 (9th Cir. 2024) is equally worthy of reconsideration. The defendant officer assisted with a skirmish line moving protestors away from an unlawfully occupied highway. *Id.* at 908-909. During this process, the officer claimed plaintiff was protecting protestors throwing objects and preparing to douse officers with paint. *Id.* at 909. Video captured the officer yelling at plaintiff, "I'm going to hit you, dude. You better move." *Id.* Plaintiff did not move and was struck with a less-lethal projectile. *Id.* The Ninth Circuit declined to consider the officer's argument that he used force to get the plaintiff to leave the area, dismissing it as the officer's subjective intent. *Id.* at 912-913. It concluded that the "method of force" used "by its nature" could "incapacitate" and, therefore, constituted a seizure. *Id.* at 913. In doing so, it established a *per se* rule in which *any* use of a less-lethal projectile is a seizure regardless of the totality of the circumstances negating an intent to restrain.

This Petition takes issue with those rulings as being inconsistent with *Torres*' "intent to restrain" requirement. The use of less-lethal projectiles to disperse crowds, or repel individual protestors, without more, does not

objectively manifest an intent to restrain. *E.g.*, *Wilansky v. Morton Cnty., North Dakota*, 2024 WL 1543020, at *6 (D.N.D. 2024)(less-lethals used to force protestor "to leave the area, not to seize her or stop her movement"); *Mitchell v. City of Charlotte*, 2024 WL 1509675, at *8 (W.D.N.C. 2024)(use of less-lethal and pepperball projectiles to disperse crowd not a seizure because protestors were "free to leave").

Marks and the divided panel claim Officer Bauer cannot rely on precedent governing seizures in the context of crowd dispersals. (Opp. 21; App. 8a-9a.) They draw an artificial distinction between force used to disperse a crowd and force used to repel a specific, violent protestor. But the precedent is equally applicable to both – force used to get people to *go away* does not manifest an intent to restrain and cannot constitute a seizure. The line-drawing is also confounding because the videos show a crowd-control situation from beginning to end. Officers arrive moving the hostile crowd back, Officer Bauer uses less-lethal projectiles to repel multiple assaultive crowd members, and Officer Bauer maintains the perimeter by repelling Marks when he assaults Officer Pobuda.

Marks contends a seizure occurred because Officer Bauer acknowledges department training stating that less-lethal projectiles can "incapacitate" a suspect, and Officer Bauer stated he has used less-lethal projectiles to arrest suspects. But determining whether Marks was seized depends on whether Officer Bauer objectively manifested an intent to restrain Marks at the scene. Here, Marks was neither immobilized nor arrested.

Marks fled the perimeter, unimpeded, in the direction of his choosing. Officer Bauer did not attempt to encircle, block, detain, arrest, or chase Marks. He did not issue commands to Marks. Instead, Officer Bauer maintained the perimeter. Marks contends that Officer Bauer's actions after the less-lethal projectile struck him are irrelevant, but they clearly demonstrate Officer Bauer's intent. Officer Bauer did not take any actions to restrain Marks *before* the repelling force either. Officer Bauer did not attempt to apprehend or restrain *any* of the assaultive protesters he targeted with less-lethal projectiles, confirming his force was used to repel, not restrain.

The use of the phrase "incapacitate" in department training does not transform repelling force into a seizure. The training allowed SWAT officers, in a crowd control situation, to use less-lethal projectiles in response to an assault in progress, serious property damage, or to protect officers from assault. (Doc. 122 at 81.) In context, incapacitate means no more than stopping Marks from assaulting Officer Pobuda.

Yet Marks contends that attempting to stop the assault, in and of itself, reflects an intent to restrain. Not so. It is only an intent to restrain *freedom of movement* that gives rise to a seizure, not merely causing cessation of criminal misconduct.[3] Marks quotes *Brower v. Cnty. of Inyo*, for the proposition that it is "enough for a seizure that a person be stopped by the very instrumentality set in

3. This principle is not disrupted by Marks' reliance on cases involving lethal gunfire to apprehend (Opp. 25-26), and force to effectuate an arrest, *Montoya v. City of Flandreau*, 669 F.3d 867, 869 (8th Cir. 2012)(amidst handcuffing officer kicked leg out from underneath subject and fell on top of her).

motion or put in place in order to achieve the result." 489 U.S. 593, 599 (1989). But "stopped" in *Brower* references a fatal roadblock that immobilized a fleeing suspect. Marks' reliance on *Tennessee v. Garner*, 471 U.S. 1 (1985) is equally misplaced as it too involved fatal force intended to prevent escape. When an assault is stopped by force intended only to repel the assailant, there is no seizure. *Pinto v. Collier Cnty.*, 2022 WL 2289171 (11th Cir. 2022).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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