No. ____

IN THE

Supreme Court of the United States

DORIAN JOHNSON,
Petitioner,

v.

CITY OF FERGUSON MISSOURI, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A "seizure" occurs under the Fourth Amendment when, under the totality of the circumstances, "a reasonable person would believe he was not free to decline the officers' requests or otherwise terminate the encounter." Here, Officer Wilson delivered a harshly delivered "move on" order to Johnson and his friend, Michael Brown on a public street, blocked Johnson's path with his police cruiser, drew his sidearm, fired it, and killed Brown. The question presented is whether a person can be "seized" when he is not confined to a particular space.

PARTIES TO THE PROCEEDINGS AND RELATED PROCEEDINGS

The Petitioner in this case is Dorian Johnson, an individual. Petitioner was the plaintiff and appellee below.

The Respondents are the City of Ferguson, Missouri; Thomas Jackson and Darren Wilson, who are individuals. Respondents were the defendants and appellants below.

The related proceedings are:

1) Johnson v. City of Ferguson, No. 4:15-cv-003832 AGF (E.D. Mo.) – Judgment entered March 15, 2017; and

2) Johnson v. City of Ferguson, No. 16-1697 (8th Cir.) – Judgment entered June 17, 2019.

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INTRODUCTION

When Officer Wilson told Dorian Johnson and Michael Brown to "[g]et the f*ck on the sidewalk," parked his car in their path, and ultimately shot at them, Johnson held a reasonable belief that he was not free to completely disregard the officer—he was seized. The Eighth Circuit, sitting *en banc* overruled the panel decision and determined that Johnson was not seized because he was "free to go anywhere else." This case thus presents the question of whether a person can be seized when he is not confined to a specific place—particularly in the context of a move on order followed by a show of authority.

Three justices remarked in *City of Chicago* v. *Morales*, 527 U.S. 41, 53 (1999) (opinion by Stevens, J. joined by Souter and Ginsburg, J.J.), that "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement," and the Court has observed that in many situations a person "has no desire to leave" a place, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter," *Florida* v. *Bostick*, 501 U.S. 429, 435 (1991). Despite this foreshadowing, the Court has never squarely ruled that constraining a person's liberty by ordering him or her to move on constitutes a seizure. This Court should now make the logical implication explicit and confirm the Fourth Amendment seizure in a move on order to provide needed guidance to the lower courts.

Millions of people encounter police each year, and for many reasons, police officers tell them to move on from one place to another. *Kernats* v. *O'Sullivan*, 35

F.3d 1171, 1185 (7th Cir. 1994) (Crabb, J. dissenting). And "[t]he public at large grows ever more concerned with "the problem of police misconduct," John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 How. L.J. 621, 622 (2016). Without direction from this Court, the courts below have reached their own—widely differing—conclusions about whether people can seek redress under the Fourth Amendment for orders to "move on."

Furthermore, this case is an ideal vehicle to decide this matter because: (i) it squarely presents the issue of whether a move on order can ever constitute a seizure; (ii) it allows the Court to decide what show of authority in addition to a move on order will effectuate a seizure; and (iii) there are no preliminary disputed issues that would prevent a resolution of the question presented, as the seizure issue was squarely decided by the *en banc* panel below.

For these reasonable those that follow, the Court should grant the petition and reverse the judgment below.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Dorian Johnson respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Eighth Circuit's *en banc* opinion is reported at 926 F.3d 504, and is reproduced at page 1a of the appendix to this petition. ("App."). The Eighth Circuit's initial panel opinion is reported at 864 F.3d 866, and is reproduced at page 15a of the appendix to

this petition. The opinion of the District Court for the Eastern District of Missouri is currently unreported, but is reproduced at page 34a of the appendix to this petition.

JURISDICTION

The judgment of the Eighth Circuit was entered on June 17, 2019. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of the relevant statute is set forth in the appendix to this petition. App. 63a.

STATEMENT OF THE CASE

Factual Background: At noon on an April day in 2014, Johnson, along with his companion Michael Brown, Jr. "peacefully and lawfully" walked down Canfield Drive in Ferguson, Missouri. App. 34a. Officer Wilson passed them in his marked patrol car and ordered them to "[g]et the f*ck on the sidewalk" as he rolled past. App. 35a. Wilson continued a few yards but then threw his car into reverse and stopped his car at an angle in the road inches from Johnson and Brown, blocking their path. App. 35a, 46a. Wilson then thrust his door open, striking Brown in the process. App. 35a. At or about the same time, he reached through his window to grab Brown and threaten him with his handgun. *Id.* Brown struggled to break free and during the ensuing grapple Wilson fired his gun twice, striking Brown's arm. *Id.* Fearing for their lives, Johnson and Brown simultaneously turned and ran to escape from Wilson. *Id.* Without warning the two fleeing men, Wilson again drew his weapon and began firing at their backs. *Id.* Johnson was not hit but Brown was not so lucky; Wilson

continued to fire his weapon and killed Brown as a result. *Id.*

Procedural Background: Johnson sued Wilson, Police Chief Jackson and the City of Ferguson in the Saint Louis County Circuit Court. App. 16a. Johnson alleged, among other counts, that Wilson violated his Fourth Amendment rights against unreasonable seizure and excessive force. *Id.* He further alleged that the City of Ferguson and Chief Jackson engaged in policies that resulted in the violation of Johnson's civil rights, including failure to train and supervise officers and condoning unconstitutional law-enforcement practices. *Id.*

Defendants moved to dismiss Johnson's complaint, arguing, among other things, that Johnson failed to state a claim for excessive force because no seizure occurred under the Fourth Amendment. App. 16a, 47a. The district court rejected that argument and denied the motion, finding that the totality of the circumstances suggested a seizure occurred. App. 47a.

Defendants appealed, and the Eighth Circuit panel identified "[t]he crux of the motion to dismiss and th[e] resulting appeal centers on the issue of whether there was a seizure" of Johnson. App. 18a. The court decided that there was, citing Wilson's harsh command and subsequent blocking of Brown and Johnson's path coupled with Johnson lingering on the scene prior to fleeing gunfire. App. 18a–23a. As such, the panel affirmed the district court. App. 32a.

The Sixth Circuit later reversed the panel's decision *en banc* in a 7–4 decision. App. 1a. The *en banc* panel stated that Johnson could not have been seized because Wilson did not order him and Brown to

stop. App. 3a. According to the *en banc* panel "rather than complying" with Wilson's order, Johnson voluntarily remained in the road and his subsequent flight proves that neither officer Wilson nor his parked car prevented Johnson from doing so. *Id.* The panel thus reasoned that "absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied" means that "no seizure occurred." App. 4a.

The *en banc* dissenters explained that Wilson's command that Johnson remit to the sidewalk is known as a "move on" order, meaning that Johnson was "free to go anywhere else" but could not "remain where he [was]." App. 9a. Although this was an order to leave and not a command to remain, Wilson's actions conveyed that Johnson "was not at liberty to ignore the police presence and go about his business." App. 11a (quoting *Bostick*, 501 U.S. at 437). Because Johnson remained in place after Wilson's show of authority, the dissent concluded that Wilson seized Johnson.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DIVIDED ON WHETHER AND WHEN AN OFFICER'S ORDER TO LEAVE A PLACE CONSTITUTES A SEIZURE.

A. The Sixth Circuit Holds that "Move On" Orders Can Be Seizures, While the Second and Eighth Circuits Rule They Do Not.

The circuit courts cannot agree whether and when a police order to "move on" or leave an area constitutes a seizure. *See* Stephen E. Henderson, *"Move on" Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. Rev. 1, 22–30 (2008) (describing the "disparate

results" and inconsistent and reasoning when the federal courts confront "move on" orders). Although many have so far avoided the question, *id.*, the Sixth Circuit has come to one conclusion, while the Second Circuit—and with this case, the Eighth—disagree.

In *Bennett* v. *City of Eastpointe*, the Sixth Circuit held that "move on" order could be a Fourth Amendment seizure. 410 F.3d 810, 834 (6th Cir. 2005). There, a police officer in Eastpointe, Michigan encountered three black youths riding their bikes one evening behind closed businesses. *Id.* at 833. The officer drove by "making eye contact with the youths," and "continued on his way" but retuned "five minutes later" to "see the youths still riding in the same place." *Id.* After a cursory interrogation of the boys, the officer ordered them to return to nearby Detroit and thereafter watched them walk their bikes across a nearby street and leave the area. *Id.* The Sixth Circuit noted that officer did not "physically escort[]" the children across the street. *Id.* at 834. The court observed the inquiry for the seizure question is "whether a reasonable person would believe he was 'not free to decline the officers' requests or otherwise terminate the encounter.'" *Id.* (quoting *Bostick*, 501 U.S. at 439). Accordingly, the Sixth Circuit held that a person is seized "when a reasonable person would not feel free to *remain* somewhere, by virtue of some official action," not just when a person "would not feel free to leave an encounter with police." *Id.* (emphasis in original); *see also Youkhanna* v. *City of Sterling Heights*, 934 F.3d 508, 523 (6th Cir. 2019) (noting that it can be a seizure when police order a person to move from a public place).

In *Sheppard* v. *Beerman*, the Second Circuit ruled that that ordering someone to leave a public place did

not amount to a seizure. 18 F.3d 147, 153 (2d Cir. 1994). There, court officers directed a fired law clerk to leave the courthouse. *Id.* at 150. According to the Second Circuit, the salient inquiry was whether "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 153 (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980)). The court concluded that because the law clerk was "free to go anywhere else that he desired" outside of the courthouse, he was not seized. *Id.* The Second Circuit further explained its position in *Salmon* v. *Blesser*, 802 F.3d 249 (2d Cir. 2015). According to the court, "police may take a person by the elbow or employ comparable guiding force short of actual restraint to ensure obedience with a departure order." *Id.* "[A]s long as the person is otherwise free to go where he wishes" he is not seized. *Id.*

Although not citing *Sheppard*, the Eighth Circuit *en banc* majority adopted similar reasoning in this case. According to the court, Johnson could not have been seized, in part, because "neither he nor Brown was ordered to stop and to remain in place" and "he was able to leave the scene following the discharge of Wilson's weapon." App. 3a.

Other courts have so far dodged the question. "The Seventh Circuit has had several opportunities to decide whether a situation like this rises to the level of a Fourth Amendment seizure; but the issue remains unresolved." *Hebert* v. *Reynolds*, No. 207-CV-91, 2009 WL 3010510, at *5 (N.D. Ind. Sept. 15, 2009). In *Kernats*, a § 1983 action, a landlord sought to evict a family from their home. 35 F.3d at 1173. To that end, the landlord enlisted the help of a local police officer who entered the Kernats' home and ordered

them "in Wyatt Earp-like fashion" to leave. *Id.* at 1174. The court observed the Fourth Amendment implications, recognizing that "a person [can have] no desire to leave the scene of an encounter with police." 35 F.3d at 1177–78. However, the court sidestepped the question, calling the Kernats' argument a "novel theory" and affirming qualified immunity "[b]ecause the case law had not clearly established the unlawfulness of [the officer's] alleged actions." *Id.* at 1177–78, 1183. The court pointedly noted that it "need not and d[id] not" decide whether the Kernats' stated a Fourth Amendment claim. *Id.* at 1183. Later, in *White* v. *City of Markham.* a case with similar facts, the court again observed that "under [a] factual scenario, when the plaintiffs were free to leave and thereby terminate the encounter at any time it is unclear whether a seizure occurred." 310 F.3d 989, 995 (7th Cir. 2002) (concluding that officers' conduct was reasonable even if a seizure occurred); *see also Hamilton* v. *Vill. of Oak Lawn, Ill.*, 735 F.3d 967, 972 (7th Cir. 2013) ("[N]ot every expulsion is a confinement, let alone a seizure.").

The Tenth Circuit acknowledged the Sixth Circuit's rationale in *Bennett*, but decided a police order was not a seizure for other reasons—namely that the police gave their order over the phone. *See Silvan W.* v. *Briggs*, 309 F. App'x 216, 225 (10th Cir. 2009) ("[C]onclud[ing] that the lack of coercion typically inherent in a physical encounter with police dooms the instant Fourth Amendment seizure claims.").

B. The Sixth Circuit was Correct to Hold that a "Move On" Order can be a Seizure, and in this Case a Seizure Occurred.

A correct reading of the Fourth Amendment and this Court's precedent confirms that a "move on" order can constitute a seizure under the totality of the circumstances.

The Second and the Eighth Circuit's seizure analysis incorrectly focuses on whether a reasonable person would feel "free to leave" the encounter with police. *See Sheppard*, 18 F.3d at 153; *accord* App. 3a (arguing that Wilson did not seize Johnson because he was "was neither physically restrained nor prevented from proceeding to the sidewalk in compliance with Wilson's directive rather than fleeing"). *Sheppard* is illustrative where the Second Circuit relied on this Court's decision in *Mendenhall*. *See* 18 F.3d at 153. There, DEA agents approached Ms. Mendenhall at the Detroit airport concourse and questioned her. *Mendenhall*, 446 U.S. at 548–49. After a brief exchange, she accompanied the agents to a private room and was thereafter—with her consent—searched and arrested when the officers found narcotics. *Id.* at 549. This Court concluded that the officers *did not* seize Mendenhall because, in view of the totality of circumstances, the reasonable person would have felt free to leave the encounter with police. *Id.* at 554.

If *Mendenhall* were the end of this Court's precedent, the Second Circuit's view *may* have been correct. But hinging the seizure question on whether Johnson was "free to leave" ignores both the circumstantial nature of the Fourth Amendment inquiry and this Court's subsequent decisions. In

Bostick, police officers boarded a stopped bus on a highway and swept it for narcotics. 501 U.S. at 431–32. Understanding the nuances of the situation, the Court recognized that "when the person is seated on a bus" they will have "no desire to leave." *Id.* at 435. As such, it aptly ruled that "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* at 435–36. In light of *Bostick*, the Court has repeatedly reaffirmed its holding that that a seizure occurs when a reasonable person would not "feel free to decline the officers' requests or otherwise terminate the encounter." *United States* v. *Drayton*, 536 U.S. 194, 202 (2002) (quoting *Bostick*, 501 U.S. at 436). It is thus understood amongst the courts that the seizure "has been tweaked for those occasions when 'a person has no desire to leave for reasons unrelated to the police presence.'" *United States* v. *Roberson*, 864 F.3d 1118, 1129 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 2649, 201 L. Ed. 2d 1053 (2018); *see United States* v. *Smith*, 332 F. Supp. 2d 277, 284 n.14 (D. Mass. 2004) (noting that "*Bostick* clarified the Supreme Court's holding in *Mendenhall*"), *rev'd on other grounds*, 423 F.3d 25 (1st Cir. 2005).

Often a person "has no desire to leave" a given place. *Bostick*, 501 U.S. at 435. That place can be a bus, as in *Bostick*, *id.*, a public street, *Bennett*, 410 F.3d at 834, a retail store, *Joseph* v. *Dillard's, Inc.*, No. CV-08-1478 PHXNVW, 2009 WL 5185393, at *6–7 (D. Ariz. Dec. 24, 2009), a shopping mall, *Jones* v. *Ashford*, No. CV TDC-14-3639, 2017 WL 221783, at *4 (D. Md. Jan. 18, 2017), *aff'd*, 691 F. App'x 113 (4th Cir. 2017), in one's home, *Kernats*, 35 F.3d at 1177–78, in a courthouse, *Sheppard*, 18 F.3d at 153, at a public

library, *Tajalle* v. *City of Seattle*, No. C07-1509Z, 2008 WL 630061, at *4 (W.D. Wash. Mar. 7, 2008), or in a school, *Muhammad* v. *Chicago Bd. of Educ.*, No. 94 C 522, 1995 WL 89013, at *2 (N.D. Ill. Feb. 24, 1995). It thus makes sense that when a person "has no desire to leave" a place, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Bostick*, 501 U.S. at 435–36. The Sixth Circuit's position is the correct one because it draws on *Bostick*'s guidance and asked the right question: "whe[ther] a reasonable person would not feel free to *remain* somewhere, by virtue of some official action." *Bennett*, 410 F.3d at 834 (emphasis in original).

As with all other Fourth Amendment questions, this Court examines the totality of circumstances to assess whether a person felt free to refuse an officer. *Kaupp* v. *Texas*, 538 U.S. 626, 630 (2003). In particular, the Court considers "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* (quoting *Mendenhall*, 446 U.S. at 554) (noting these are "[e]xamples of circumstances that might indicate a seizure"). Here, Wilson displayed plain hostility with his "language [and] tone of voice," *see Mendenhall*, 446 U.S. at 554, when he told Johnson and Brown to "[g]et the f*ck on the sidewalk." App. 2a. Although he was one officer, his immediate reversal of his car and obstruction of the two men's paths bolstered his threatening presence. *See* App. 35a. Wilson further flaunted his authority when he pulled a gun on Johnson and Brown and fired it in close proximity to both. *Id.*

Under these circumstances, no reasonable person would believe they could refuse Wilson's command to "[g]et the f*ck on the sidewalk" and Johnson was therefore seized.

There is no doubt that "[t]here are innumerable reasons why it may be important for a constable to tell a pedestrian to 'move on.'" *Morales*, 527 U.S. at 87 (Scalia, J., dissenting); *see* Henderson, *"Move on" Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. Rev. at 43 (providing examples such as "directing traffic around an accident or other disturbance, protecting a public figure, separating angry and volatile persons, emptying a building subject to a terroristic threat or other danger, and preserving a crime scene"). Properly finding a "move on" order a seizure with the appropriate facts does not vitiate that necessary power. Instead, this will—as it should—require courts to determine if, under *Bostick*, a "move on" order is a seizure and then "evaluat[e] the reasonableness" of those orders under the Fourth Amendment. *Kernats*, 35 F.3d at 1185 (Crabb, J., dissenting); *see Mora* v. *The City of Gaithersburg, MD*, 519 F.3d 216, 222 (4th Cir. 2008) (explaining that the Fourth Amendment "protect[s] by insisting on judicial oversight, not by pressing inflexible rules").

II. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE

The case presents an important question concerning citizens' Fourth Amendment rights: does a police officer seize a citizen when the officer takes intimidating actions and orders that citizen to leave a given place?

This Court has never answered that question directly. It acknowledged the issue in *Morales* where

three justices recognized that "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement." 527 U.S. at 53–54 (1999) (opinion by Stevens, J. joined by Souter and Ginsburg, J.J.). They went on to explain "that an individual's decision to remain in a public place of his choice is as much a part of his liberty" as the "right to move 'to whatsoever place one's own inclination may direct.'" *Id.* (quoting 1 W. Blackstone, Commentaries on the Laws of England 130 (1765)); *id.* ("We have expressly identified this 'right to remove from one place to another' . . . 'an attribute of personal liberty" protected by the Constitution.'") (quoting *Williams* v. *Fears*, 179 U.S. 270, 274 (1900)). Indeed, as the Court has observed, "[p]ersons 'wandering or strolling' from place to place have been extolled by Walt Whitman and Vachel Lindsay." *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 164 (1972)

Although the Court touched this issue, it did not squarely answer it. It is imperative that the Court to do so in order to avoid further confusion or abuse of authority. Each year, many millions of people encounter and interact with the police. *See* Elizabeth Davis, et al., *Contacts Between Police and the Public, 2015*, U.S. Department of Justice, Bureau of Justice Statistics, Oct. 2018, at 2.[1] (finding that over 53 million people over the age of 16 interacted with police in 2015). Of that number, police initiated the encounter in a public place approximately 2.5 million times, *id.* at 4—police are certainly telling millions of citizens each year to leave places and "move on." Given the plethora of frequent contact between citizens and police, and the absence of precedent on

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[1] *available at* https://www.bjs.gov/content/pub/pdf/cpp15.pdf.

the matter from this court, the issue of whether a move on order constitutes a seizure continually reoccurs. *See, e.g.*, App. 9a; *O'Boyle* v. *Thrasher*, 638 F. App'x 873, 878 (11th Cir. 2016); *Salmon*, 802 F.3d at 253; *Silvan*, 309 F. App'x at 225; *Bennett*, 410 F.3d at 834; *United States* v. *Schettler*, 32 F. App'x 14, 15 (3d Cir. 2002); *Kernats*, 35 F.3d at 1177–78; *Dinan* v. *Multnomah Cty.*, No. 3:12-CV-00615-PK, 2013 WL 324059, at *5–6 (D. Or. Jan. 28, 2013); *Tajalle*, 2008 WL 630061, at *4.

As there is no guidance on whether police seize people with move on orders, different courts resolve this recurring question in disparate ways. The people of Tennessee, Ohio, Michigan and Kentucky can be ruled seized—and therefore seek redress—for move on orders. *See Bennett*, 410 F.3d at 834 (ruling someone seized "when a reasonable person would not feel free to *remain* somewhere"). The residents of New York, Connecticut and Vermont are not so fortunate. *See Salmon*, 802 F.3d at 253 (deciding that a person "has not been seized [if] the person remains free to go anywhere else that he wishes").

As noted, "[t]he Seventh Circuit has had several opportunities to decide whether a situation like this rises to the level of a Fourth Amendment seizure" but has not done so. *Hebert*, 2009 WL 3010510, at *5. As such, the people of Illinois, Indiana and Wisconsin also suffer from uncertain rights, although the confusion has allowed some Seventh Circuit courts to believe orders to leave a place can be seizures. *See, e.g.*, *id.* at *5 ("I find it hard to believe that forcibly removing someone from his home is not a Fourth Amendment seizure."); *Beverlin* v. *Grimm*, No. 94 C 2834, 1995 WL 470274, at *3 n.1 (N.D. Ill. Aug. 4, 1995) ("[W]e think the Terry rationale is applicable to

unlawful interference with freedom of movement whether it be exerted by preventing a person from leaving or by forcing her to leave.").

Similar to the Seventh circuit, "the Ninth Circuit ha[s] not addressed the issue" either, *Dinan*, 2013 WL 324059, at *6; *see Joseph* v. *Dillard's, Inc.*, No. CV-08-1478 PHXNVW, 2009 WL 5185393, at *7 (D. Ariz. Dec. 24, 2009) (concluding that "it is unclear whether an order to leave constitutes a seizure as a matter of law"), and its courts reached differing outcomes. In *Dinan*, sheriff's deputies directed an agitated man to leave a courthouse and not return that day. 2013 WL 324059, at *2, 6. The Oregon court was "persuaded by the Sixth Circuit's approach" that move on orders can be seizures. *Id.* at 6 (preferring the Sixth Circuit "particularly because the Second Circuit failed to appreciate that the Supreme Court refined its Fourth Amendment seizure jurisprudence in *Bostick*" and its progeny). The Western District of Washington reached a different decision in *Tajalle*. There, two security guards ordered the plaintiff to leave a public library and one then walked him to the exit. *Tajalle*, 2008 WL 630061, at *4. The court ruled that the plaintiff did not "allege[] any facts to support a finding that he was seized within the meaning of the Fourth Amendment." *Id.*

Other courts are similarly confounded. The Fourth Circuit offers little more clarity than the Ninth. In the District of Maryland, a police officer did not seize a man when ordering him to leave a shopping mall. *See Jones*, 2017 WL 221783, at *2. The court did not *rule out* that such an order could be a seizure but reasoned that this encounter was not because the defendant "was the only law enforcement officer present, he displayed no weapon, and he did not

physically touch" the plaintiff. *Id.* at 4. The District of South Carolina also implied that an order to leave one's property on threat of arrest could be a seizure. *Goodwater* v. *Cty. of Charleston*, No. 2:17-CV-00998, 2018 WL 827132, at *5 (D.S.C. Feb. 12, 2018) (calling the matter a "close question" but avoiding the issue upon concluding that the purported seizure would be "justified"). Finally, as previously noted, the Tenth Circuit seemingly approved the Sixth Circuit's rationale in *Bennett* but avoided adopting its holding by resolving the case on other grounds. *See Silvan*, 309 F. App'x at 225 (noting that a police order over the phone lacks the coercive effect of a physical encounter). In short, people's rights hinge not on clear dictates of the Fourth Amendment, but on vagaries of geography and the whims of individual judges

If the "innumerable reasons why" an officer might order a person to move from one place to another *Morales*, 527 U.S. at 87, were all legitimate, such as clearing crime scenes and steering people from dangerous situations, *see* Henderson, *"Move on" Orders as Fourth Amendment Seizures*, 2008 B.Y.U. L. Rev. at 43, perhaps "move on" orders would warrant scant attention. But from "Ferguson, Baltimore, New York, and Charleston"—and indeed, all over the country—"the problem of police misconduct has been surfacing . . . with troubling regularity." John Felipe Acevedo, *Restoring Community Dignity Following Police Misconduct*, 59 How. L.J. 621, 622 (2016). The issue of "over policing" is a pressing public concern, as "[a]cademics are not the only ones challenging broken windows' efficacy." Katherine E. Kinsey, *It Takes A Class: An Alternative Model of Public Defense*, 93 Tex. L. Rev. 219, 224 (2014) (noting that the New York Times' editorial board claims such tactics have

"pointlessly burdened thousands of young people, most of them Black and Hispanic, with criminal records"). This Court can and should decide whether people can seek redress for such issues when ordered to leave a place, particularly in this time of heightened concern over police activities. *See* Eric L. Adams, *More Scrutiny, Better Policing*, N.Y. Times, Nov. 14, 2015 at A23 ("Police departments have no choice but to embrace the notion not only that scrutiny is inevitable, but also that it will lead to better policing.").

III. THIS CASE IS AN EXCELLENT VEHICLE TO RESOLVE THE QUESTION PRESENTED.

This case presents a crucial certiorari-worthy question to the Court and is an excellent vehicle to resolve it.

First, this case squarely presents the issue of whether a seizure occurs when the police do not restrict a person to a place, but rather order a person *from* it. Wilson ordered Johnson and Brown to "[g]et the f*ck on the sidewalk" and blocked their path with his police cruiser. App. 2a. *In theory*, they could have complied and "remain[ed] free to go anywhere else" that they wished. *See Salmon*, 802 F.3d at 253 (citing *Sheppard*, 18 F.3d at 153). Even so, they were not "free to *remain*" on their chosen path "by virtue of" Wilson's actions. *Bennett*, 410 F.3d at 834 (emphasis in original). With this case, the Court can decide if only confinement can constitute a seizure or if people are seized by "move on" orders when they are "not free to decline the officers' requests or otherwise terminate the encounter." *Id.* (quoting *Bostick*, 501 U.S. at 439).

Second, if the Court rules a "move on" order can be a seizure, it can clarify what police behavior will

amount to a seizure. The Court frequently notes that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Bostick*, 501 U.S. at 434 (quoting *Terry* v. *Ohio*, 392 U.S. 1, 19, n. 16 (1968)). And similarly, there are many reasons why an officer could order someone to "move on" from one place to another. *See Salmon*, 802 F.3d at 253 (such as "crime scenes, accident sites, dangerous construction venues, anticipated flood or fire paths, parade routes, areas of public disorder, etc."). Wilson's directive to Johnson and Brown was undoubtably a "move on" order and the Court can consider whether that limitation on their freedom alone was a seizure. But Wilson's actions also allow the Court to decide what further show of police authority is necessary to seize someone. Wilson did much more than issue instructions to Johnson and Brown. In fact, he barked a stark profanity laced command, blocked their path with his motor vehicle, opened the vehicle door striking Brown, drew his gun and shot at the two men, killing Brown. App. 2a. The Court can assess, given these facts, whether a reasonable person would "feel free to decline" Wilson's "*request*[]," *Drayton*, 536 U.S. at 202 (quoting *Bostick*, 501 U.S. at 436) (emphasis added), to "[g]et the f*ck on the sidewalk," App. 2a.

Finally, there are no preliminary disputed issues that would prevent a resolution of the question presented, as the seizure issue was squarely decided by the *en banc* panel below.

CONCLUSION

For the foregoing reasons, the petition should be granted, the judgment below should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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APPENDICES

APPENDIX A

Case No. 16-1697

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DORIAN JOHNSON,
Plaintiff-Appellee

v.

CITY OF FERGUSON et al.,
Defendants-Appellees

FILED
June 17, 2019

OPINION

BEFORE: SMITH, Chief Judge, WOLLMAN, LOKE, MURPHY,[1] MELLOY, COLLOTON, GRUENDER, SHEPHERD, KELLY, and ERICKSON, Circuit Judges, En Banc.[2]

WOLLMAN, Circuit Judge. In *Johnson* v. *City of Ferguson*, 864 F.3d 866 (8th Cir. 2017), a panel of our court affirmed the district court's ruling that Dorian Johnson had alleged sufficient facts to state 42 U.S.C. § 1983 claims of unlawful seizure and the use of excessive force against former Ferguson Police Officer

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[1] The Honorable Diana E. Murphy participated in oral argument, but died on May 16, 2018.

[2] Judge Grasz, Judge Stras, and Judge Kobes did not participate in the consideration or decision of this matter.

Darren Wilson, as well as a claim of supervisory liability against former Ferguson Police Chief Thomas Jackson, and thus denied the defendants' motion for dismissal based upon qualified immunity. We granted their petition for rehearing en banc and vacated the panel's opinion. We now reverse the district court's order and remand with directions to dismiss the federal claims.

As alleged in Johnson's complaint, he and Michael Brown, Jr. were "peacefully and lawfully" walking down Canfield Drive in Ferguson, Missouri, at approximately 12:00 p.m. on August 9, 2014, when they were approached by Officer Darren Wilson in his marked police vehicle. As he approached the pair, Wilson slowed his vehicle and ordered them to "Get the f*ck on the sidewalk." Wilson continued to drive his vehicle several more yards, then abruptly put the vehicle in reverse and parked it at an angle so as to block the pair's path. After stopping his vehicle just inches from Brown, Wilson forcefully opened his door, striking Brown. Wilson reached through his window, grabbed Brown, and threatened to shoot his weapon. As Brown struggled to break free, Wilson discharged his weapon twice, striking Brown in the arm. Both Brown and Johnson ran away from Wilson, who at no time ordered either of them to "stop" or "freeze," but rather fired his weapon at the two men, with several of the shots striking and killing Brown.

We agree with the panel opinion's identification of the governing issue in this case: "The crux of the motion to dismiss and this resulting appeal centers on the issue of whether there was a seizure. Johnson concedes that if there was no seizure virtually all of his claims fall away." *Johnson*, 864 F.3d at 872. We disagree with the panel's ruling that a seizure

occurred, and thus we hold that the district court erred in not granting the defendants' motion to dismiss based upon their claim of qualified immunity.

Whatever one might say about Wilson's expletive-expressed directive that Brown and Johnson move from the street to the sidewalk, Johnson's complaint concedes that neither he nor Brown was ordered to stop and to remain in place. Johnson's decision to remain by Brown's side during Brown's altercation with Wilson rather than complying with Wilson's lawful command to return to the sidewalk was that of his own choosing. That he was able to leave the scene following the discharge of Wilson's weapon gives the lie to his argument that the placement of Wilson's vehicle prevented him from doing so. As was the case in *United States* v. *Hayden*, 759 F.3d 842, 847 (8th Cir. 2014), Wilson's police vehicle constituted no barrier to Johnson's ability to cross to the sidewalk. Any physical or weapon-related contact by Wilson was directed towards Brown alone in the first instance. In a word, then, because Johnson himself was neither physically restrained nor prevented from proceeding to the sidewalk in compliance with Wilson's directive rather than fleeing as he did, the question before us is alike to that presented in *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991):

> The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

Likewise, what the Court wrote in *Brendlin* v. *California*, 551 U.S. 249, 254 (2007), is equally applicable in this case: "[T]here is no seizure without

actual submission." Because there was no verbal or physical impediment to Johnson's freedom of movement, there was no submission to authority on his part even in a metaphysical sense of the meaning of that word. Accordingly, in the absence of any intentional acquisition of physical control terminating Johnson's freedom of movement through means intentionally applied, as occurred in both *Brower* v. *County of Inyo*, 489 U.S. 593, 596–99 (1989), and in *Tennessee* v. *Garner*, 471 U.S. 1, 4, 7 (1985), we conclude that no seizure occurred in this case. See also *United States* v. *Stover*, 808 F.3d 991, 995 (4th Cir. 2015); *United States* v. *Salazar*, 609 F.3d 1059, 1065–66 (10th Cir. 2010); *United States* v. *Waterman*, 569 F.3d 144, 145–46 (3rd Cir. 2009); *United States* v. *Baldwin*, 496 F.3d 215, 218–19 (2d Cir. 2007); *United States* v. *Letsinger*, 93 F.3d 140, 143–45 (4th Cir. 1996); *United States* v. *Hernandez*, 27 F.3d 1403, 1406–07 (9th Cir. 1994); *United States* v. *Washington*, 12 F.3d 1128, 1132 (D.C. Cir. 1994).

We turn then to the claim of supervisory liability against Police Chief Jackson. In addressing this issue, the panel opinion recognized that "Section 1983 liability cannot attach to a supervisor merely because a subordinate violated someone's constitutional rights." *Johnson*, 864 F.3d at 877 (quoting *Otey* v. *Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997)). As we held in *Moore* v. *City of Desloge*, 647 F.3d 841, 849 (8th Cir. 2011), "This circuit has consistently recognized a general rule that, in order for municipal liability to attach, individual liability first must be found on an underlying substantive claim." (quoting *McCoy* v. *City of Monticello*, 411 F.3d 920, 922 (8th Cir. 2005)). Further, "to maintain an action for training or supervisory liability, a plaintiff must show

the failure to train or supervise caused the injury. Because Moore failed to establish Officer Malady violated Moore's constitutional rights, Moore cannot maintain this action against either Chief Bullock or the city." *Id.* (internal citation omitted). In light of our holding that no seizure and thus no constitutional violation occurred in this case, Johnson's claim of supervisory liability against Chief Jackson necessarily fails, as perforce does any claim of municipal liability against the City of Ferguson. *Accord Mahn* v. *Jefferson Cty.*, 891 F.3d 1093, 1099–1100 (8th Cir. 2018).

The district court's order is reversed and the case is remanded with directions to dismiss the federal claims.

***

MELLOY, Circuit Judge, with whom SMITH, Chief Judge, KELLY and ERICKSON, Circuit Judges, join, dissenting. At this stage of the proceedings the majority has identified a single issue that must be addressed: Was there a Fourth Amendment seizure? On appeal, Officer Wilson argues that, under the Fourth Amendment, his actions neither qualified as a show of authority to stop nor did Johnson actually stop. The Court today holds that the facts alleged in Johnson's complaint—viewed in the light most favorable to Johnson—cannot establish a Fourth Amendment seizure. I respectfully disagree and therefore dissent.

I. Fourth Amendment Violation

In his § 1983 claim, Johnson asserts that Officer Wilson violated the Fourth Amendment by unreasonably seizing Johnson. The Fourth Amendment prohibits "unreasonable . . . seizures" of

persons. U.S. Const. amend. IV ("The right of the people to be secure in their persons . . . against unreasonable . . . seizures, shall not be violated . . . ."); *accord California* v. *Hodari D.*, 499 U.S. 621, 624 (1991). Thus, to show a Fourth Amendment violation, a claimant must show both that he was seized and that the seizure was unreasonable.

A. Seizure

"A person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer, 'by means of physical force or show of authority,' terminates or restrains his freedom of movement through means intentionally applied." *Brendlin* v. *California*, 551 U.S. 249, 254 (2007) (citations and emphasis omitted, emphasis added). In claiming a seizure through a show of authority (rather than through physical force), the claimant must demonstrate both (1) a show of authority and (2) actual submission to that show of authority. *Id.*

1. Show of Authority

To determine whether there was a show of authority, courts apply an objective test: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *Hodari D.*, 499 U.S. at 628; *accord Florida* v. *Bostick*, 501 U.S. 429, 437 (1991) (framing the analysis as whether the officer's conduct would "have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business" (citation omitted)). This analysis is based on "the totality of circumstances surrounding the incident." *United States* v. *Johnson*, 326 F.3d

1018, 1021 (8th Cir. 2003). Factors relevant to the analysis include "the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the 'use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *United States* v. *Flores–Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007) (quoting *United States* v. *Hathcock*, 103 F.3d 715, 719 (8th Cir. 1997)). Although this is an objective, reasonable-person standard (and although Fourth Amendment cases are necessarily fact specific), this Court has frequently set a high bar for police conduct to qualify as a Fourth Amendment show of authority. *See, e.g.*, *United States* v. *Cook*, 842 F.3d 597, 601 (8th Cir. 2016) (holding that the defendant was not seized when police officers parked their vehicle behind defendant's parked car, activated the patrol car's "wig wag" lights, and approached the defendant's vehicle); *United States* v. *Hayden*, 759 F.3d 842, 846 (8th Cir. 2014) (holding that the defendant was not seized when a police officer pulled his vehicle alongside the defendant, shined a flashlight on him, and yelled "Police!").

Here, I believe that Officer Wilson made a show of authority communicating that Johnson "was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437. As stated above, the only facts relevant at this procedural posture are those alleged in the complaint. And the Court must accept those facts as true and view them in the light most favorable to Johnson. To recap, Johnson's complaint alleged the following facts relevant to this issue:

- As Johnson and Brown walked peacefully and "lawfully" down the road,

> Officer Wilson, operating a marked police vehicle, approached Johnson and Brown, slowed his vehicle to a stop, and ordered them to "Get the f*ck on the sidewalk."
>
> - Officer Wilson continued to drive his vehicle several yards, then abruptly put his vehicle into reverse and parked his vehicle at an angle so as to block the paths of Johnson and Brown.
> - Officer Wilson stopped his vehicle just inches from Brown and forcefully opened his door, striking Brown. Officer Wilson then reached through his window and grabbed Brown, who was closer to Officer Wilson than Johnson. Officer Wilson thereafter threatened to shoot his weapon. As Brown struggled to break free, Officer Wilson discharged his weapon twice, striking Brown in the arm. Surprised by Officer Wilson's use of "excessive" force and fearing for his life, Plaintiff Johnson ran away from Officer Wilson simultaneously with Brown.

By crudely ordering Johnson to move and then abruptly reversing his vehicle and stopping it inches away and directly in Johnson's path, Officer Wilson communicated an intent to use a roadblock to stop Johnson's movement. Despite Defendants' (and amicus curiae's) argument that the roadblock did not foreclose all of Johnson's avenues of travel, a reasonable person would understand the roadblock's purpose was to serve as a "physical obstacle"

conveying an order to stop—not an order to go around the vehicle and continue on one's way. *Brower* v. *Cty. of Inyo*, 489 U.S. 593, 599 (1989) ("We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough here, therefore, that, according to the allegations of the complaint, Brower was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped."). Officer Wilson's actions thus would convey to the "reasonable person that he was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437.

On this issue, amicus curiae The National Police Association argues that Officer Wilson's order was nothing more than an order "simply for two pedestrians to get off the street and use the sidewalk" and that "[h]e did not order anything other than compliance with the law." Amicus Br. 8. This type of order is commonly referred to as a "move on" order and is meant to convey the message that a person is free to go anywhere else but cannot remain where he is. The parties have not cited, nor am I aware of, any Eighth Circuit precedent addressing whether move-on orders qualify as seizures under the Fourth Amendment. Other circuits have split on the issue, with the analysis frequently (but not always) turning on whether there was physical contact. *See, e.g.*, *Salmon* v. *Blesser*, 802 F.3d 249, 251 (2d Cir. 2015) (holding that the plaintiff, who was physically removed from a courthouse—after an officer ordered him to leave, grabbed his shirt collar, twisted his arm behind his back, and shoved him toward the door—pleaded sufficient facts to allege a Fourth Amendment violation); *id.* at 253 n.4 (stating that "nowhere in [any

case] has the Supreme Court suggested that police orders directing persons to move from particular public areas while leaving them free to go anywhere else they wish effect Fourth Amendment seizures of the persons"); *Bennett* v. *City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005) (holding that a "person is seized not only when a reasonable person would not feel free to leave an encounter with police, but also when a reasonable person would not feel free to remain somewhere, by virtue of some official action"); *Sheppard* v. *Beerman*, 18 F.3d 147, 153 (2d Cir. 1994) (holding that a fired law clerk—ordered to leave a courthouse, escorted off the premises, and free to go anywhere else, but who was not physically removed—was not seized for purposes of the Fourth Amendment).

The majority essentially agrees with this argument and asserts there was no seizure because Johnson could merely have complied with the police officer's directive and moved to the sidewalk. Were the facts as simple as the majority and amicus curiae present, then this would be a compelling argument as to why there was no Fourth Amendment seizure. Had Officer Wilson blocked Johnson's direction of travel but then permitted him to proceed to the sidewalk and continue on his way, a reasonable person likely would believe he was "at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437.

But the facts are not as simple as amicus curiae contends. Officer Wilson's initial command to get on the sidewalk merely began the encounter that then continued. As alleged, Officer Wilson next escalated the encounter by abruptly putting his vehicle into reverse and parking his car at an angle blocking Johnson's path and within inches of Brown and

Johnson. Officer Wilson then fought with Brown and threatened to fire his firearm. These events, viewed in a light most favorable to Johnson, would communicate to the reasonable person that Johnson "was not at liberty to ignore the police presence and go about his business." *Bostick*, 501 U.S. at 437. Officer Wilson's abrupt stopping of his vehicle inches away from Johnson, thereby creating a roadblock, coupled with the threat of using his service weapon, was a show of force communicating to a reasonable person the necessity to stop and not continue on one's way. Officer Wilson's actions were a "show of authority . . . at least partly directed at [Johnson], and [conveying] that he was thus not free to ignore the police presence and go about his business." *Brendlin*, 551 U.S. at 261.

2. Submission

Assuming there is a show of authority, Johnson still must demonstrate that he submitted to that show of authority. *See Hodari D.*, 499 U.S. at 626. Whereas fleeing or refusing to comply with a show of authority does not qualify as submission to authority, *id.*, stopping one's movement often qualifies as submission, see *Brendlin*, 551 U.S. at 255–56 (collecting cases). But temporarily stopping is not always sufficient to constitute a submission to authority. *See United States* v. *Baldwin*, 496 F.3d 215, 219 (2d Cir. 2007) (holding that, after a police vehicle with activated lights and sirens followed the defendant's vehicle, the defendant's "momentary stop did not constitute submission to police authority"). This analysis also depends, of course, on the facts of the case.

Here, I believe that Johnson submitted to Officer Wilson's show of authority. Johnson stopped walking when Officer Wilson placed his vehicle directly in Johnson's path. Based on the alleged facts, Johnson's stop was not a temporary, reactionary pause caused by the roadblock placed in his path. Johnson did not recommence walking and go around the vehicle. Instead, Johnson remained throughout the time that Officer Wilson reached through his window and grabbed Brown, threatened to shoot his weapon, wrestled with Brown who struggled to break free, and then twice fired his weapon.

The majority seems to imply that Officer Wilson's use of a weapon was directed at Brown only and that, while Brown may have been seized, Johnson was not. I do not believe the complaint can be parsed that finely. Both Brown and Johnson were walking together, Officer Wilson pulled his vehicle in front of both, both eventually fled, and Officer Wilson fired his weapon in the direction of both, striking and killing Brown but missing Johnson. In short, I do not believe that from the perspective of a reasonable person encountering Officer Wilson, it can be reasonably said Officer Wilson intended to seize Brown but not Johnson. If one of the two were seized, both were seized.

One difficulty surrounding this issue is whether Johnson's "submission to [the] show of governmental authority takes the form of passive acquiescence" that rises to the level of a submission to authority. *Brendlin*, 551 U.S. at 255. The Supreme Court in *Brendlin* held that "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may

submit to authority by not getting up to run away." *Id.* at 262. There, the Court considered "whether a traffic stop subjects a passenger," who merely remained in the car throughout the traffic stop, "to Fourth Amendment seizure." *Id.* at 254. The Court held that the passenger was seized. *Id.* at 263. In so holding, the Court adopted a test for determining whether a claimant's passive acquiescence to a show of authority qualifies as submission to that show of authority: "We resolve this question by asking whether a reasonable person in [the claimant's] position . . . would have believed himself free to 'terminate the encounter' between the police and himself." *Id.* at 256–57 (quoting *Bostick*, 501 U.S. at 436).

Johnson's stop was not passive acquiescence to a show of authority. For one, Johnson did take some action to actively acquiesce to Officer Wilson's show of authority: Johnson *stopped* walking. This is more than the passive acquiescence in *Brendlin* where the defendant, a passenger, merely remained in his seat as the driver pulled over the vehicle. *See* 551 U.S. at 252, 263. Also, even assuming Johnson passively acquiesced to the show of authority by merely remaining throughout the encounter, "a reasonable person in [Johnson's] position . . . would [not] have believed himself free to 'terminate the encounter' between the police and himself," *id.* at 256–57 (quoting *Bostick*, 501 U.S. at 436), for the reasons discussed above.

B. Objective Reasonableness

Johnson asserts that the alleged seizure was unreasonable and that Officer Wilson used excessive force, in violation of the Fourth Amendment. As

recognized in the panel opinion, Defendants do not appear to present any argument that, assuming there was a seizure, the seizure and use of deadly force were nevertheless reasonable. Accordingly, Defendants have abandoned any argument on this issue. *See Glasgow* v. *Nebraska*, 819 F.3d 436, 440 (8th Cir. 2016) (holding that claims not mentioned in an appeal brief are forfeited).

I would affirm the district court's denial of the appellants' motion to dismiss.

APPENDIX B

Case No. 16-1697

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DORIAN JOHNSON,
Plaintiff-Appellee

v.

CITY OF FERGUSON et al.,
Defendants-Appellees

FILED
July 25, 2017
CORRECTED
July 31, 2017

OPINION

BEFORE: WOLLMAN, MURPHY, and MELLOY, Circuit Judges.

MELLOY, Circuit Judge. Dorian Johnson sued Officer Darren Wilson, Police Chief Thomas Jackson, and the City of Ferguson, Missouri, for constitutional violations resulting from an encounter between Officer Wilson and Johnson. The district court[1] denied Defendants' motion to dismiss based on qualified immunity. Defendants appeal, and we affirm.

I.

Because this matter comes before us as an appeal from the denial of a motion to dismiss, we set forth the facts as alleged in the complaint. *Hager* v. *Ark. Dep't*

[1] The Honorable Audrey G. Fleissig, United States District Judge for the Eastern District of Missouri.

of Health, 735 F.3d 1009, 1013 (8th Cir. 2013). On August 9, 2014, Johnson and Michael Brown, Jr., were walking down Canfield Drive in Ferguson, Missouri. Officer Wilson approached both men in his police car and told them to "Get the f*ck on the sidewalk." Officer Wilson drove past the two men and then reversed his car, parking so as to block Johnson and Brown's path. Officer Wilson opened his door, striking Brown, and then grabbed Brown and threatened to shoot his gun. While Brown struggled to break free, Officer Wilson discharged his gun twice, striking Brown in the arm. At all times during this encounter, Johnson was standing next to Brown.

After Officer Wilson shot Brown in the arm, Brown and Johnson ran away from Officer Wilson. Officer Wilson did not order Brown and Johnson to "stop" or "freeze." Rather, Officer Wilson fired his service weapon at the two men, striking Brown several times and killing him.

Johnson filed this cause of action pursuant to 42 U.S.C. § 1983, naming Officer Wilson, the City of Ferguson, and Chief Jackson as defendants. Johnson alleges that Officer Wilson's actions constituted an unlawful seizure and use of excessive force, in violation of his rights under the Fourth and Fourteenth Amendments. Further, Johnson alleges that the City of Ferguson and Chief Jackson engaged in policies that resulted in the violation of Johnson's civil rights, including failure to train and supervise officers and condoning unconstitutional law-enforcement practices. Johnson also brought claims under Missouri state law for assault, intentional infliction of emotional distress, and, in the alternative, negligent infliction of emotional distress.

Defendants moved to dismiss Johnson's complaint for failure to state a claim. Officer Wilson and Chief Jackson claim they are entitled to qualified immunity. The City of Ferguson claims it cannot be liable because Johnson failed to show that a constitutional violation occurred. The district court denied qualified immunity to Officer Wilson and Chief Jackson. The district court also denied the motion to dismiss the claims against the City of Ferguson. Defendants appeal.

II.

A. Qualified Immunity

"[A] district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985). Defendants challenge the sufficiency of Johnson's pleadings to state a claim pursuant to § 1983. This is an issue of law over which we have jurisdiction. *See Hager*, 735 F.3d at 1013.

We review the denial of a motion to dismiss on the basis of qualified immunity de novo. *Id.* A complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). "Courts must accept a plaintiff's factual allegations as true but need not accept a plaintiff's legal conclusions." *Retro Television Network, Inc.* v. *Luken Commc'ns, LLC*, 696 F.3d 766, 768–69 (8th Cir. 2012). "[D]efendants seeking dismissal under Rule 12(b)(6) based on an assertion of qualified immunity 'must show that they are entitled to qualified immunity on the face of the complaint.'" *Carter* v. *Huterson*, 831 F.3d 1104, 1107

(8th Cir. 2016) (quoting *Bradford* v. *Huckabee*, 394 F.3d 1012, 1015 (8th Cir. 2005)).

Qualified immunity shields officers from liability when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982). "The determination of whether an officer is entitled to qualified immunity requires consideration of the 'objective legal reasonableness' of the officer's conduct in light of the information he possessed at the time of the alleged violation." *Winters* v. *Adams*, 254 F.3d 758, 766 (8th Cir. 2001) (quoting *Harlow*, 457 U.S. at 819). "Qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct." *Mitchell* v. *Shearrer*, 729 F.3d 1070, 1074 (8th Cir. 2013); see *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) (holding that courts have discretion to determine which prong to address first).

1. Constitutional Violation

a. Seizure

The crux of the motion to dismiss and this resulting appeal centers on the issue of whether there was a seizure. Johnson concedes that if there was no seizure virtually all of his claims fall away. Conversely, if there was a seizure, the Defendants make little argument that the force used was not unreasonable. Thus, we turn to that issue first.

The § 1983 claim against Officer Wilson alleges that Johnson was unlawfully detained and subjected

to excessive force in violation of the Fourth and Fourteenth Amendments. The Fourth Amendment prohibits unreasonable seizures of persons. U.S. Const. amend. IV. Whether a person has been seized turns on whether, "in view of the totality of circumstances surrounding the incident, a reasonable person would have believed he was free to leave." *United States* v. *Johnson*, 326 F.3d 1018, 1021 (8th Cir. 2003). Courts consider "the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the 'use of language or tone of voice indicating that compliance with the officer's request might be compelled.'" *United States* v. *Flores-Sandoval*, 474 F.3d 1142, 1145 (8th Cir. 2007) (quoting *United States* v. *Hathcock*, 103 F.3d 715, 718–19 (8th Cir. 1997)). Further, "[a] seizure occurs when the officer, 'by means of physical force or show of authority, has in some way restrained the liberty' of a suspect." *Id.* (quoting *United States* v. *Barry*, 394 F.3d 1070, 1074 (8th Cir. 2005)).

Johnson alleges he was seized when Officer Wilson yelled at Johnson and Brown to "Get the f*ck on the sidewalk" and then parked his police car so as to block their path. Johnson argues that this constitutes a show of authority. Courts apply an objective test to determine whether there was a show of authority: "not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991).

Officer Wilson argues that his actions did not constitute a show of authority because Johnson "did not allege he was blocked by the angle of the cruiser, just that the path in one direction on an open road was

blocked." However, the fact that Johnson could have walked around Officer Wilson's car is not dispositive as to whether there was a seizure. In *Brower* v. *County of Inyo*, the Supreme Court stated:

> We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result. It was enough . . . that, according to the allegations of the complaint, [the suspect] was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped.

489 U.S. 593, 599 (1989). The Court further stated: "[A] Fourth Amendment seizure . . . occur[s] . . . only when there is a governmental termination of freedom of movement through means intentionally applied." *Id.* at 596–97. Finally, the Court stated that "a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur." *Id.* at 598.

In this case, Johnson's complaint alleged that Officer Wilson stopped his car at an angle, directly in front of Johnson and Brown, so as to block their path after yelling at them to "Get the f*ck on the sidewalk." That is enough to constitute a show of authority for Fourth Amendment purposes.

Defendants argue that, even assuming Officer Wilson's actions constitute a show of authority, there was no seizure because Johnson did not submit to Officer Wilson's authority. To constitute a seizure, there must be "either physical force . . . or, where that is absent, submission to the assertion of authority." *Hodari D.*, 499 U.S. at 626. Defendants claim that, although Johnson stopped when Officer Wilson

parked in front of him, Johnson did not actually submit to Officer Wilson's authority before fleeing. Defendants characterize Johnson's stopping as "inaction" while Officer Wilson and Brown were involved in an altercation.

The fact that Johnson was not involved in the altercation does not affect our analysis of whether Johnson was seized. First, it is enough that Johnson actually stopped when Officer Wilson blocked his path. *See Brower*, 489 U.S. at 599. While Johnson was not involved in the altercation, Johnson's situation is similar to that of a passenger in a car that has been pulled over. In *Brendlin* v. *California*, the Supreme Court held that a passenger in a car that has been pulled over is seized for Fourth Amendment purposes. 551 U.S. 249, 256–57 (2007). The Court explained, "any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." *Id.* at 257. The Court reasoned that "[a] traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver." *Id.* Finally, the Court stated that "the issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was thus not free to ignore the police presence and go about his business." *Id.* at 261.

Just as a passenger would understand that no one in the car is free to leave during a traffic stop, one of two pedestrians stopped by a single police roadblock would understand that he was not free to leave, even if the officer only directly engaged with the other pedestrian. Officer Wilson's show of authority did not single out Brown as he walked alongside Johnson.

Further, as the Court noted, "what may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away." *Id.* at 262. While Johnson did not physically engage with Officer Wilson, he did stop walking when Officer Wilson parked in Johnson's path.

Defendants contend that Johnson did not submit to Officer Wilson's authority because he fled. Defendants argue that, though Johnson stopped, it was only momentary and thus "does not amount to a constitutionally actionable submission under the Fourth Amendment." To support their argument, Defendants rely on a Second Circuit case, *United States* v. *Baldwin*, 496 F.3d 215 (2d Cir. 2007). In *Baldwin*, the court held that there was no seizure when police pulled a car over but the driver refused to comply with the officers' commands and sped off when officers approached the car. *Id.* at 217–18. The court explained that its holding was "not predicated on the brevity of Baldwin's stop, but on the fact that the stop itself did not constitute submission. In other words, it is the nature of the interaction, and not its length, that matters." *Id.* at 219.

In this case, the nature of the stop supports a finding that Johnson was seized. Johnson's stop was more than a momentary pause before fleeing. Johnson stopped when Officer Wilson blocked his path and stayed throughout Officer Wilson's altercation with Brown. The fact that Johnson ran away after Officer Wilson shot Brown in the arm does not mean that Johnson did not first submit to Officer Wilson's authority. Rather, Johnson alleges that he stopped

when he was first blocked by Officer Wilson, thereby submitting to Officer Wilson's authority, and that he ran solely out of fear for his life after the first shots were fired. *Cf. United States* v. *Hayden*, 759 F.3d 842, 847 (8th Cir. 2014) (holding that there was no seizure when officers pulled up alongside the suspects, shined a flashlight, identified themselves as police, and approached the suspects but did not block the ability of the suspects to cross the street, did not touch the suspects, and did not display a weapon); *Baldwin*, 496 F.3d at 217–18. Thus, viewing the facts in a light most favorable to Johnson, Johnson has sufficiently alleged that he was seized.

b. Objective Reasonableness

"[A] seizure, standing alone, is not sufficient for section 1983 liability. The seizure must be unreasonable." *Moore* v. *Indehar*, 514 F.3d 756, 762 (8th Cir. 2008) (quoting *McCoy* v. *City of Monticello*, 342 F.3d 842, 847 (8th Cir. 2003)). Excessive force claims are analyzed under the Fourth Amendment reasonableness standard. *Schoettle* v. *Jefferson Cty.*, 788 F.3d 855, 859 (8th Cir. 2015); *Graham* v. *Connor*, 490 U.S. 386, 394 (1989). Courts "analyze this question from the perspective 'of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.'" *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014) (quoting *Graham*, 490 U.S. at 396). Courts "thus 'allo[w] for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.'" *Id.* (alteration in original) (quoting *Graham*, 490 U.S. at 396–97). This inquiry focuses on the totality of the circumstances, "including the severity of the crime at issue, whether the suspect

poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Schoettle*, 788 F.3d at 859 (quoting *Graham*, 490 U.S. at 396).

Johnson argues that Officer Wilson's use of his gun during the seizure constitutes excessive force. Defendants claim that, because, in their view, there was no seizure, Johnson cannot claim Officer Wilson's use of force was excessive. Thus, Defendants offer no arguments regarding the reasonableness of Officer Wilson's use of force.

"[F]orce is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Small* v. *McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013) (alteration in original) (quoting Brown v. City of Golden Valley, 574 F.3d 491, 499 (8th Cir. 2009)). Taking the allegations in Johnson's complaint as true, Officer Wilson stopped Johnson and Brown because they were walking in the middle of the street in violation of a municipal ordinance. Johnson and Brown were walking peacefully down Canfield Drive when Officer Wilson parked directly in their path. Johnson and Brown stopped walking when Officer Wilson parked his car and forcefully struck Brown with his car door. The facts, as alleged, show that Brown and Johnson did not flee from Officer Wilson and did not resist arrest. Based on these facts, it was unreasonable for Officer Wilson to draw his gun and shoot twice, striking Brown in the arm. Thus, Johnson has sufficiently alleged a violation of a constitutional right.

2. Clearly Established Law

Having determined that Johnson has sufficiently alleged a violation of a constitutional right, we move to our next inquiry: whether Officer Wilson's use of his gun against Johnson and Brown constituted a clearly established constitutional violation. Defendants offer no arguments regarding whether it was clearly established that Officer Wilson could not use deadly force in these circumstances. Again, Defendants only argue it was not clearly established that an officer could violate an individual's Fourth Amendment rights where no seizure has occurred.

"A right is clearly established when that right is so clear that a reasonable official would understand that what he is doing violates that right." *Craighead* v. *Lee*, 399 F.3d 954, 962 (8th Cir. 2005). "The right to be free from excessive force in the context of an arrest is clearly established under the Fourth Amendment." *Small*, 708 F.3d at 1005. In *Tennessee* v. *Garner*, the Supreme Court held that "[w]here the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so." 471 U.S. 1, 11 (1985). Later, in *Graham* v. *Connor*, the Supreme Court held that the use of force is unconstitutional if, under objective standards of reasonableness, the force is excessive. 490 U.S. 386, 396 (1989).

To be clearly established, however, the law "must be 'particularized' to the facts of the case." *White* v. *Pauly*, 137 S. Ct. 548, 552 (2017) (per curiam) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). While "general statements of the law are not inherently incapable of giving fair and clear warning

to officers, . . . in light of the pre-existing law the unlawfulness must be apparent." *Id.* (citations omitted). Thus, the general statements regarding the constitutionality of use of force in "*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'" *Id.* (quoting *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam)).

"At least since *Garner* was decided nearly 20 years ago, officers have been on notice that they may not use deadly force unless the suspect poses a significant threat of death or serious physical injury to the officer or others." *Craighead*, 399 F.3d at 962. Further, it is clearly established that "[f]orce is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public." *Small*, 708 F.3d at 1005 (quoting *Brown*, 574 F.3d at 499).

In *Brown* v. *City of Golden Valley*, this court held the use of a Taser on a passenger in a car pulled over for a misdemeanor, "who was not fleeing or resisting arrest, who posed little to no threat to anyone's safety, and whose only noncompliance with the officer's commands was to disobey two orders to end her phone call to a 911 operator" constituted excessive force. 574 F.3d at 499. And in *Shekleton* v. *Eichenberger*, this court again held that the use of a Taser against a suspected misdemeanant constituted excessive force. 677 F.3d 361 (8th Cir. 2012). In *Shekleton*, an officer approached a man outside a bar to ask about what the officer thought was an argument. *Id.* at 364. The suspect answered the officer's questions and followed the officer's direction to move away from the street corner. *Id.* After further questioning, the officer instructed the suspect to put his hands behind his

back and, when the officer attempted to handcuff the suspect, the officer and suspect fell to the ground. *Id.* at 365. The officer then deployed his Taser. *Id.* We held that "[u]nder these facts, [where the plaintiff] was an unarmed suspected misdemeanant, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him," the officer's use of the Taser constituted excessive force. *Id.* at 366–67.

In accordance with White, these cases are sufficiently particularized that a reasonable officer would be on notice that use of deadly force in the circumstances alleged in Johnson's complaint was unlawful. "While [the Supreme] Court's case law 'do[es] not require a case directly on point' for a right to be clearly established, 'existing precedent must have placed the statutory or constitutional question beyond debate.'" *White*, 137 S. Ct. at 551 (alteration in original) (quoting *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015)). Requiring a particularized case to show clearly established law does not require us to abandon logic. It is beyond dispute that a Taser involves less force and, generally, causes less harm than a gun. It follows that, if the use of a Taser in these circumstances constitutes excessive force, the use of a gun in these circumstances necessarily constitutes excessive force. This Circuit's previous cases "'giv[e] fair and clear warning' to officers" that the use of deadly force in these circumstances is unlawful. *Id.* at 552 (quoting *United States* v. *Lanier*, 520 U.S. 259, 271 (1997)).

At the time of the incident in this case, the law was sufficiently clear to inform a reasonable officer that it was unlawful to use deadly force against nonviolent, suspected misdemeanants who were not fleeing or

resisting arrest, posed little or no threat to the officer or public, did not receive verbal commands to stop, and whose only action was to stop walking when a police car blocked their path. As a result, a reasonable officer in Officer Wilson's position would not have shot his gun and the district court correctly denied qualified immunity to Officer Wilson at this stage in the proceedings.

B. Supervisory Liability

Johnson alleges that Chief Jackson has § 1983 liability due to his deliberate indifference to a pattern of constitutional violations committed by officers in his police department. Johnson claims that Chief Jackson failed to train, supervise, and discipline Ferguson police officers regarding unlawful seizures and use of excessive force. Chief Jackson argues he is entitled to qualified immunity and the district court erred in denying the motion to dismiss on that basis.

"Section 1983 liability cannot attach to a supervisor merely because a subordinate violated someone's constitutional rights." *Otey* v. *Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997). "Rather, Chief [Jackson] can be liable for Officer [Wilson's] constitutional violation only 'if he directly participated in the constitutional violation, or if his failure to train or supervise the offending actor caused the deprivation . . . .'" *Id.* (omission in original) (quoting *Tilson* v. *Forrest City Police Dep't*, 28 F.3d 802, 806 (8th Cir. 1994)). Further, where liability is premised on a supervisor's deliberate indifference to misconduct, "[t]he supervisor must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he or she] might see." *Kahle* v. *Leonard*, 477 F.3d 544, 551 (8th Cir. 2007)

(second alteration in original) (quoting *Ripson* v. *Alles*, 21 F.3d 805, 809 (8th Cir. 1994)).

Johnson alleges that the detention and use of force against Johnson and Brown was part of a pattern and practice of unlawful detentions and use of excessive force by the Ferguson Police Department. Further, Johnson alleges that Chief Jackson (1) failed to properly hire, train, discipline, and supervise officers; (2) failed to adopt and enforce polices, practices, and procedures regarding the Ferguson Police Department's internal affairs; and (3) condoned the practice of unlawful detentions and use of excessive force by not investigating and rarely reviewing claims of officer misconduct. To support the claims in his complaint, Johnson quotes the Department of Justice's ("DOJ") findings following its investigation of the Ferguson Police Department. The DOJ report notes that the Ferguson Police Department and court system work together to generate revenue. Further, the report notes that the Ferguson Police Department does not supervise its officers' conduct, particularly with regards to officer use of force. These allegations sufficiently state a claim for supervisory liability under § 1983.

"When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts." *S.M.* v. *Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015).

As discussed above, Johnson alleges that Chief Jackson condoned the unconstitutional acts by failing to investigate or review claims of officer misconduct. Specifically, Johnson alleges that "[w]hen reviewing use of force, Chief Thomas Jackson rarely reviews offense reports, and has never overturned a supervisor's determination of whether a use of force fell within [Ferguson Police Department] policy." The fact that Chief Jackson received reports involving use of force indicates that he knew about Ferguson police officers' conduct. Thus, Johnson has sufficiently alleged that Chief Jackson had notice of the unconstitutional acts committed by his officers. Further, by failing to review offense reports and hold officers accountable for excessive force, Chief Jackson was deliberately indifferent to the unconstitutional practices carried out by Ferguson police officers. As a result, the district court did not err by denying Chief Jackson qualified immunity.

C. Municipal Liability

Defendants claim that this court has pendent appellate jurisdiction to review the district court's denial of Defendants' motion to dismiss as to the City of Ferguson. "'[W]hen an interlocutory appeal is before us . . . as to the defense of qualified immunity, we have jurisdiction also to decide closely related issues of law,' i.e., pendent appellate claims." *Kincade* v. *City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995) (quoting *Drake* v. *Scott*, 812 F.2d 395, 399 (8th Cir. 1987)). "[A] pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal—that is, when the appellate resolution of the collateral

appeal necessarily resolves the pendent claim as well." *Id.* (alteration in original) (quoting *Moore* v. *City of Wynnewood*, 57 F.3d 924, 930 (10th Cir. 1995)).

Defendants argue that the question of municipal liability is inextricably intertwined with the question of qualified immunity. This argument rests on Defendants' claim that there was no seizure at all and, thus, no constitutional violation. Thus, Defendants argue, if Johnson's allegations do not sustain his § 1983 claim against Officer Wilson and Chief Jackson, the allegations cannot sustain the § 1983 claim against the City of Ferguson.

Our decision to uphold the district court's denial of qualified immunity to Officer Wilson and Chief Jackson at this stage in the proceedings does not resolve whether Johnson stated a claim for municipal liability. Whether Officer Wilson and Chief Jackson are entitled to qualified immunity turns on whether it was clearly established that Officer Wilson violated Johnson's Fourth Amendment rights. The City of Ferguson's municipal liability, however, turns on whether the constitutional violation was caused by the City "engaging in a widespread and persistent pattern of unconstitutional misconduct that municipal policymakers were either deliberately indifferent to or tacitly authorized." *Davis* v. *White*, 794 F.3d 1008, 1014 (8th Cir. 2015) (quoting *Russell* v. *Hennepin Cty.*, 420 F.3d 841, 849 (8th Cir. 2005)). Thus, these issues are not inextricably intertwined because they involve two separate questions. *See Veneklase* v. *City of Fargo*, 78 F.3d 1264, 1270 (8th Cir. 1996) (holding that the denial of summary judgment on a municipal liability claim was not inextricably intertwined with the underlying qualified immunity appeal because resolving the relevant

claims "require[d] entirely different analyses"). As a result, we do not have jurisdiction to review the City of Ferguson's liability. *See id.*

III.

For the foregoing reasons, we affirm the district court's denial of qualified immunity to Officer Wilson and Chief Thomas and dismiss the rest of the appeal for lack of jurisdiction.

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WOLLOMAN, Circuit Judge, dissenting. With all due respect, I disagree with the majority opinion's conclusion that Johnson was seized within the meaning of the Fourth Amendment when Officer Wilson crudely ordered him and his companion Brown to get back to the sidewalk, parked his vehicle in such a manner as to block their direct line of travel, and then engaged in an armed conflict with Brown.

Because Johnson himself was neither physically restrained nor prevented from proceeding to the sidewalk in compliance with the officer's command rather than fleeing as he did, I believe that the question before us is alike to that presented in *California* v. *Hodari D.*, 499 U.S. 621 (1991), and that our answer should be the same.

> The narrow question before us is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.

Id. at 626. Likewise, as the Court wrote in *Brendlin* v. *California*, 551 U.S. 249, 254 (2007), "[T]here is no seizure without actual submission."

An unconstitutional seizure in the circumstances presented by this case occurs only upon the intentional acquisition of physical control terminating freedom of movement through means intentionally applied. *Brower* v. *City of Inyo*, 489 U.S. 593, 596–97 (1989). Such a termination occurred in Brower as a result of Brower's fatal impact with the police-established roadblock, just as it did in Garner, in which Garner's flight was terminated by the officer's bullet. *Tennessee* v. *Garner*, 471 U.S. 1 (1985).

Here, however, Johnson's status during his flight from Officer Wilson was like that of the moonshine-carrying defendant's during the course of his flight in *Hester* v. *United States*, 265 U.S. 57, 58 (1924). *See Hodari D.*, 499 U.S. at 629; *Brower*, 489 U.S. at 597–98.

I would reverse the district court's judgment and remand with directions to dismiss the complaint.

APPENDIX C

Case No. 4:15-cv-003832 AGF

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DORIAN JOHNSON,
Plaintiff-Appellee

v.

FILED
Mar. 15, 2016

CITY OF FERGUSON et al.,
Defendants-Appellees

MEMORANDUM AND ORDER

This matter is before the Court on the joint motion of Defendants City of Ferguson, Missouri ("Ferguson"), Ferguson former Police Chief Thomas Jackson, and Ferguson former Police Officer Darren Wilson, to dismiss Plaintiff Dorian Johnson's complaint for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, this motion shall be granted in part and denied in part.

BACKGROUND

In reviewing the motion to dismiss, the Court must accept Plaintiff's allegations as true and construe them in Plaintiff's favor. The facts, as alleged in the complaint, are as follows. On August 9, 2014, at approximately 12:00 noon, Plaintiff and Michael Brown, Jr., both African-American males, were "peacefully and lawfully walking down Canfield Drive in Ferguson, Missouri." A marked police vehicle

driven by Wilson stopped next to Plaintiff and Brown, and Wilson ordered the pair to "Get the f*ck on the sidewalk."

Wilson continued to drive his vehicle several yards, put it into reverse, and parked it at an angle to block the path of Plaintiff and Brown, stopping the vehicle within inches of Brown. The complaint alleges that Wilson forcefully opened his door which struck Brown, and then reached through his open window and grabbed Brown who was closer to Wilson than was Plaintiff. Wilson threatened to shoot his weapon. As Brown struggled to break free, Wilson discharged his weapon twice, striking Brown in the arm. Fearing for his life, Plaintiff ran away from Wilson "simultaneously with Brown." Wilson did not order Plaintiff or Brown to stop or freeze, but withdrew his weapon and fired "at Plaintiff [and Brown]" as they fled, striking Brown several more times (and killing him). Plaintiff alleges that these events caused him to suffer "psychological injury, severe emotional distress, medical expenses, lost wages . . . and other loses to be proven at trial." (Doc. No. 8.)

Plaintiff alleges that he and Brown were stopped (within the meaning of the Fourth Amendment) by Wilson when his police car blocked their path, that this stop was "without reasonable suspicion of criminal activity," and that Wilson lacked "reasonable suspicion, or legal justification to detain Plaintiff." (Doc. No. 8 at 7-9.) The four-count complaint, filed in state court on April 29, 2015, brings claims pursuant to 42 U.S.C. § 1983, for unconstitutional detention and use of excessive force in violation of the Fourth and Fourteenth Amendments (Count I); and under Missouri state law, for assault (Count II), intentional infliction of emotional distress (Count III), and in the

alternative, negligent infliction of emotional distress (Count IV). Each claim is brought against all Defendants, with the § 1983 claims against Wilson and Jackson in both their official and individual capacities, and the state tort claims against Jackson and Ferguson under the theory of respondeat superior.

The complaint claims that Jackson and Ferguson are also liable for "fail[ing] to intervene" in the actions of Wilson, in light of their perpetration of a pattern and practice of unconstitutional and racially discriminatory policing which sanctioned police officers' use of unnecessary force and unlawful seizures, as well as Jackson's and Ferguson's prioritization of the collection of fines over ensuring public safety. In addition to claiming that he was the direct victim of assault by Wilson, Plaintiff also asserts a claim for "transferred intent" assault, based on Wilson's shooting at Brown.

The complaint requests compensatory damages, punitive damages, attorney's fees, and an injunction preventing Ferguson and the Ferguson Police Department from engaging in unlawful detainment, assault, and excessive use of force. The complaint further alleges that "Defendant City of Ferguson maintains a liability insurance policy and has thus waived sovereign immunity for tort liability." (Doc. No. 8 at 3.)

In the complaint, Plaintiff quotes extensively from a report by the Department of Justice ("DOJ"), attached as an exhibit to Plaintiff's memorandum in opposition to this motion to dismiss, disclosing the findings of the DOJ's investigation of the Ferguson Police Department following the shooting death of

Brown.[1] The report notes, in pertinent part, that the Ferguson Police Department and Ferguson court system work in concert to maximize fine collection to bolster Ferguson's revenue. *Id.* at 5–6. The report also found that the Ferguson Police Department routinely fails to supervise the conduct of its officers, particularly with regards to their use of force, which serves to condone officer misconduct. *Id.* at 6.

On May 26, 2015, Defendants removed the case to this Court under 28 U.S.C. § 1331, on the basis of federal question jurisdiction.

ARGUMENTS OF THE PARTIES

Defendants' Arguments

Defendants first argue that Count I should be dismissed as to Jackson and Wilson, in their individual capacities, on the basis of qualified immunity, because Plaintiff's allegation that he was seized by Wilson fails as he did not plead that he was struck by a bullet, and, in fact, he fled the scene after shots were fired. They assert that as a result, Plaintiff also failed adequately to plead an excessive force claim, because the Fourth Amendment only prohibits the use of excessive force during a seizure. Defendants assert that thus there was no underlying constitutional violation, and that even if there was one, "the law was not clearly established on August 9, 2014, that firing gunshots that fail to contact a suspect where the suspect flees the scene constituted a seizure for purposes of unlawful detention, excessive force, and failure to intervene." (Doc. No. 5 at 11.)

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[1] Plaintiff also attached the DOJ's separate investigation into the events surrounding the shooting death of Brown.

Defendants argue that Jackson cannot be held liable for failure to intervene for the further reason that there is no allegation that he was at or near the encounter at the time of the alleged seizure and use of excessive force by Wilson. Further, Defendants argue that Count I fails to state a claim against Ferguson, because municipalities may not be liable under § 1983 unless their officers committed a constitutional tort, and Plaintiff has failed to show that any underlying constitutional violation occurred in this case. Additionally, Defendants argue that the § 1983 claims against Jackson and Wilson in their official capacities should be dismissed, as they are essentially claims against Ferguson, and are therefore redundant to claims against Ferguson, and that Ferguson is immune from an award of punitive damages regarding Plaintiff's claim under § 1983.

Defendants argue that Plaintiff's request for injunctive relief should be dismissed because it is moot and/or not ripe, in that the alleged constitutional violations against Plaintiff have already occurred, and there are no allegations supporting a finding that Plaintiff will again be subject to the same actions and conditions which give rise to this action. Defendants contend that any future harms pleaded by Plaintiff are purely speculative.

With respect to the state law claims, Defendants argue that Count II for assault fails to state a claim under Missouri law, because Plaintiff only pleaded that Wilson attempted to, and did, shoot Brown rather than Plaintiff. Defendants argue that there can be no transferred intent in assault cases. Defendants contend that Counts III and IV for intentional and negligent infliction of emotional distress, respectively, should be dismissed because there is no factual

support in the complaint from which to infer that Plaintiff sustained "bodily harm," as required for Count III, or that his emotional distress was "medically significant," as required for Count IV. Moreover, Defendants argue that Ferguson is entitled to sovereign immunity with respect to the state law claims, under Missouri Revised Statute § 537.600, because Plaintiff has failed adequately to plead any exception to Missouri's sovereign immunity statute.

Finally, Defendants argue that under the "American Rule," litigants each bear their own attorneys' fees, and Plaintiff has not pleaded any exception to this rule which would allow for the recovery of attorney's fees on his state law claims.

Plaintiff's Response

With respect to his claims under § 1983, Plaintiff argues first that Wilson's conduct toward him constituted an unlawful seizure under the Fourth and Fourteenth Amendments. Plaintiff claims that Defendants' focus on the shots fired by Wilson as Brown and Plaintiff fled is misplaced. Plaintiff claims that the actual seizure occurred when Wilson used his vehicle to block Plaintiff's path, forcing him to stop, and brandished his firearm, which made Plaintiff reasonably feel that he was not free to leave. Plaintiff asserts that when he later fled from Wilson, it was not because he felt free to leave, but rather because he feared for his life. Moreover, because Wilson lacked the requisite reasonable suspicion to make such a stop, Plaintiff contends that the seizure was unlawful. Plaintiff notes that Defendants have not suggested that Wilson possessed a reasonable suspicion that Plaintiff was involved in criminal activity at the time he made the stop. Plaintiff argues that the facts as

pled show that Wilson used unreasonable force during the encounter, and that Defendants have not disputed this claim other than by arguing that there was no underlying wrongful seizure.

Plaintiff argues that Jackson "failed to intervene" in the sense that he and the Ferguson Police Department failed to "implement an intervention system to identify officers who tend to use excessive force or the need for more training."2 Plaintiff argues that, but for Jackson's failure to implement such a system, Wilson's unlawful acts may never have occurred.[2]

Plaintiff contests Defendants' assertion that Wilson and Jackson, in their individual capacities, are entitled to qualified immunity at the motion to dismiss stage. Plaintiff argues that he has stated a claim that Wilson's conduct violated his constitutional rights against unreasonable seizure and use of excessive force by the police. Moreover, Plaintiff contends that it was clearly established, at the time of his encounter with Wilson, that Wilson's conduct constituted a seizure which required reasonable suspicion that Plaintiff was involved in criminal activity, and that shooting at Plaintiff as he ran away was unconstitutional. According to Plaintiff, whether or not the force used by Wilson was actually excessive is a question for a jury to decide.

Plaintiff also argues that Jackson is not entitled to qualified immunity because Plaintiff has shown, through his use of the DOJ's investigation of the Ferguson Police Department, that such customs and

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[2] The Court interprets this as a failure to supervise claim which is discussed below.

practices existed in the Ferguson Police Department, and that Jackson was deliberately indifferent to them. Finally, because Plaintiff has stated a claim that Wilson violated Plaintiff's constitutional rights, and alleged that the violations occurred under a municipal policy and practice, Plaintiff argues that he has stated a § 1983 claim against Ferguson.

Plaintiff argues that he has stated a claim for state law assault in Count II of his complaint by alleging each element of an assault under Missouri law: that Wilson fired his weapon at Plaintiff and Brown in an attempt to cause imminent bodily harm, or apprehension of such, and that Wilson was successful in creating such apprehension in Plaintiff. With respect to Counts III and IV, Plaintiff maintains that the allegations in his complaint are sufficient to state claims for infliction of emotional distress, under Missouri law. Plaintiff cites cases for the proposition that no medical testimony is required to prove a claim for either negligent or intentional infliction of emotional distress, and that the allegations that he suffered "psychological injury" and "severe emotional distress" are enough to raise the inference that his emotional distress resulted in bodily injury and was medically significant. Plaintiff contends that evidence on these points will be introduced at trial and that dismissing these claims at this stage in the proceedings is improper.

Plaintiff also cites law for the proposition that he has stated a claim for negligent infliction of emotional distress in a bystander action, as he alleges that Wilson should have known that firing his weapon would endanger Plaintiff, Plaintiff was within the "zone of danger" of Wilson's shots, and Wilson's actions caused Plaintiff to fear for his life.

Plaintiff argues that redundancy is not a persuasive basis for a Rule 12(b)(6) dismissal, and that the Court should not dismiss his official capacity claims against Jackson and Wilson for this reason.

Plaintiff next argues that Ferguson is not entitled to dismissal of the state law claims against it on the grounds of sovereign immunity, because Missouri's sovereign immunity statute protects public entities from state tort claims only when they are involved in governmental functions, but not when they are involved in proprietary functions. Although police functions are generally governmental in nature, Plaintiff argues that the main focus of the Ferguson Police Department was not public safety, but generating revenue for Ferguson through aggressive fine enforcement. Plaintiff cites to the DOJ report for this proposition, and argues that he has at least stated a claim that the challenged actions of the Ferguson Police Department during the relevant time period were proprietary, not governmental.

Additionally, Plaintiff notes that he specifically pleaded in his complaint that Ferguson maintains a liability insurance policy, which operates as a waiver of sovereign immunity for tort liability.

With respect to the injunctive relief he requests, Plaintiff first argues that his request is not moot because there is an actual case or controversy, in that Ferguson is engaged in an ongoing pattern and practice of racial bias and unconstitutional policing, which was the driving force behind the deprivations of Plaintiff's rights. Plaintiff argues that it is Defendants who have the burden of proving mootness, and that in the light of Plaintiff's allegations of Ferguson's continuing constitutional violations, they

have not met this burden. Plaintiff also argues that his claim is ripe, in that it is based on events that are likely to continue to occur without judicial intervention.

Finally, Plaintiff argues that his claims for attorneys' fees and punitive damages should not be dismissed entirely. Plaintiff argues that 23 U.S.C. § 1988 authorizes the recovery of attorney's fees in § 1983 suits, and that his claims for fees are thus proper with respect to Count I. Plaintiff also asks the Court not to dismiss his requests for attorneys' fees in the remaining counts, as intentional misconduct or other special circumstances may be revealed during the course of litigation, entitling him to attorney's fees under Missouri law. Plaintiff admits that he is not entitled to punitive damages against Ferguson, and clarifies that his request for punitive damages is only against Wilson and Jackson in their individual capacities.

Defendants' Reply

In their reply, Defendants urge the Court to ignore the copies of the DOJ's reports on the investigations into the shooting death of Brown, and into the Ferguson Police Department generally. Defendants argue that courts must generally ignore materials outside the pleadings when considering a motion to dismiss under Rule 12(b)(6). Defendants argue that the Court could only consider these materials if it took judicial notice of them, something Defendants argue is improper because the investigations relied on unsworn hearsay statements of several unidentified individuals, were issued without any fact-finding hearing or opportunity for Ferguson or the Ferguson Police Department to respond, and were prepared in

anticipation of litigation surrounding the shooting death of Brown. Additionally, Defendants argue that even if the Court were to consider the DOJ reports, the documents do not support Plaintiff's allegations and arguments about what occurred during his encounter with Wilson.

Defendants also argue that Plaintiff has failed to plead an exception or waiver to the doctrine of sovereign immunity. Defendants contend that police conduct is governmental in nature, and that even aggressive enforcement of fines is within the realm of maintaining the public safety. Additionally, Defendants argue that Plaintiff's allegation that "Defendant City of Ferguson maintains a liability policy and has thus waived sovereign immunity for tort liability" is insufficient, as a municipality does not waive immunity by purchasing a policy which exempts coverage for liability barred by sovereign immunity. Defendants cite Missouri cases for the proposition that, because Plaintiff failed to allege that Ferguson's insurance policy covers the claims at issue in this case, he has not sufficiently pled a waiver to sovereign immunity. Therefore, Defendants argue that the state law claims against Ferguson should be dismissed.

DISCUSSION

To survive a motion to dismiss, a complaint must contain sufficient factual matter, which, when accepted as true, states "a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," will not pass muster. *Id.* The

reviewing court must accept the plaintiff's factual allegations as true and construe them in the plaintiff's favor, but is not required to accept the legal conclusions the plaintiff draws from the facts alleged. *Id.*; *Retro Television Network, Inc.* v. *Luken Comm'cns, LLC*, 696 F.3d 766, 768–69 (8th Cir. 2012).

Claims under § 1983

"Section 1983 imposes liability for certain actions taken under color of law that deprive a person of a right secured by the Constitution and laws of the United States." *Dossett* v. *First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005) (citation omitted).

1. Did a Seizure Occur?

The Fourth Amendment to the United States Constitution forbids the unreasonable seizure of persons. U.S. Const. Amend. IV. This prohibition applies to the states through the Fourteenth Amendment. "In determining whether a person has been seized for Fourth Amendment purposes, the relevant question is whether, in view of the totality of circumstances surrounding the incident, a reasonable person would have believed he was free to leave." *United States* v. *Johnson*, 326 F.3d 1018, 1021 (8th Cir. 2003). "So long as a reasonable person would feel free to disregard the police and go about his business, the encounter is consensual and no reasonable suspicion is required." *United States* v. *Hayden*, 759 F.3d 842, 846 (8th Cir.) (citation omitted), *cert. denied*, 135 S. Ct. 691 (2014). Factors considered by courts may include the presence of several officers, a display of a weapon by an officer, physical touching of the person, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *United States* v. *Flores-*

Sandoval, 474 F.3d 1142, 1145 (8th Cir. 2007). If an officer, "by means of physical force or show of authority" has in some way stopped or otherwise restrained the liberty of an individual, a seizure has occurred. *United States* v. *Vera*, 457 F.3d 831, 835 (8th Cir. 2006). "To be a violation of the Fourth Amendment, the restraint in liberty must be effectuated through means intentionally applied." *McCoy* v. *City of Monticello*, 342 F.3d 842, 847 (8th Cir. 2003) (citation omitted).

Here, upon consideration of the totality of the circumstances, the Court believes that a close question is presented as to whether a seizure occurred, especially given that Plaintiff fled from the scene. Much depends on the timeframe within which events unfolded. Taking the allegations in the complaint as true for the purposes of the present motion, Wilson reversed his marked police vehicle and stopped it inches from Plaintiff and Brown, blocking their path, after yelling at them to get on the sidewalk. Wilson drew his weapon, and shot out of his window, hitting Brown. Under these circumstances, depending on the timing of these events, the Court cannot say that as a matter of law, that Plaintiff was not seized. Thus, the Court concludes that Plaintiff has stated a claim that Wilson seized him, for Fourth Amendment purposes. *Cf. Hayden*, 759 F.3d at 846 (holding that the defendant was not seized, for Fourth Amendment purposes, when a police officer shined a flashlight on him and said "Police," the officer and another officer pulled their vehicle alongside defendant and his companion, who were standing near a vacant house; the officers did not block the ability of the defendant and his companion to cross the

street, did not touch the men, and did not display weapons).

2. Was the Seizure Unreasonable?

Even where a Fourth Amendment seizure has occurred, a plaintiff only states a claim under § 1983 if the seizure was unreasonable. A law enforcement officer may detain a person for investigation without probable cause for arrest if the officer "has a reasonable suspicion supported by articulable facts that criminal activity may be afoot." *United States* v. *Maltais*, 403 F.3d 550, 554 (8th Cir. 2005) (quoting *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968)). "Whether the particular facts known to the officer amount to an objective and particularized basis for a reasonable suspicion of criminal activity is determined in light of the totality of the circumstances." *Id.* (citations omitted).

At some later stage of the case, Defendants may be able to demonstrate the reasonableness of the seizure (assuming one occurred), however, in their motion to dismiss, Defendants did not dispute the reasonableness of the seizure, but merely assert that no seizure occurred. Construing all facts in favor of Plaintiff, Plaintiff has sufficiently alleged that the seizure by Wilson was unreasonable, and has thus stated a claim under § 1983. The Court will deny Defendants' motion to dismiss with respect to Plaintiff's claims for unconstitutional seizure.

3. Excessive Force

"A claim that law-enforcement officers used excessive force to effect a seizure is governed by the Fourth Amendment's reasonableness standard." *Plumhoff* v. *Rickard*, 134 S. Ct. 2012, 2020 (2014)

(citing *Graham* v. *Connor*, 490 U.S. 386, 395 (1989)). In determining whether the force used to effectuate a particular seizure is "reasonable" under the Fourth Amendment, courts consider the severity of the crime at issue, whether the suspect posed an immediate threat to the safety of the officer or others, and whether he was actively resisting arrest or attempting to evade arrest by flight. *Schoettle* v. *Jefferson Cnty.*, 788 F.3d 855, 859 (8th Cir. 2015).[3]

Whether an officer's use of force is reasonable is judged "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Plumhoff*, 134 S. Ct. at 2020 (citation omitted). Thus, courts must "allow for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Id.* (citation omitted); *see also Tennessee* v. *Garner*, 471 U.S. 1, 11 (1985) ("Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to

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[3] In addition, there may be a requirement of "actual injury" which results from the use of force, though this injury may be de minimus. *Davis* v. *White*, 794 F.3d 1008, 1012 (8th Cir. 2015); *Chambers* v. *Pennycook*, 641 F.3d 898, 905–06 (8th Cir. 2011). Courts do not equate "actual" injury" in this context with physical, as opposed to mental, injury. *See Vondrak* v. *City of Las Cruces*, 535 F.3d 1198, 1208 (10th Cir. 2008) ("We have consistently rejected a bright-line rule requiring plaintiffs to demonstrate physical injury when bringing excessive force claims."); *Anderson* v. *Willis*, 917 F. Supp. 2d 1190, 1198 (D. Kan. 2013). Although not directly addressing this matter, in *Dawkins* v. *Graham*, 50 F.3d 532, 535 (8th Cir. 1995), the Eighth Circuit held that one of the plaintiffs met the actual injury requirement due to experiencing post traumatic stress disorder.

others, it is not constitutionally unreasonable to prevent escape by using deadly force.").

Here, it is possible that, at a later stage in this case, Wilson will establish the reasonableness of his shooting at Plaintiff. However, for the purposes of this motion, and construing all facts in the light most favorable to Plaintiff, the Court finds that Plaintiff has stated a claim of use of excessive force by Wilson.

4. Supervisory Liability

Supervisory personnel are not liable under § 1983 for the actions of their subordinates, "absent a showing of direct responsibility for the improper action or personal involvement of the officer being sued." *Burke* v. *Mo. Dep't of Corr.*, No. 4:08CV2000 CDP, 2009 WL 1210625, at *1 (E.D. Mo. Apr. 30, 2009) (citations omitted). However, a supervisor may be found liable for failure to supervise or control his subordinates where the plaintiff shows the supervisor to have been deliberately indifferent or to have tacitly authorized the offensive acts by failing to take remedial steps following notice of a pattern of such acts by subordinates. *Id.* Mere negligence of the supervisor is insufficient; he "must know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what [he] might see." *Kahle* v. *Leonard*, 477 F.3d 544, 551 (8th Cir. 2007) (citation omitted); *see also Hahn* v. *McLey*, 737 F.2d 771, 773 (8th Cir. 1984) ("[A] supervisor may be liable for the acts of a subordinate if injury is inflicted upon the plaintiff as a result of a breach of the supervisor's duty to train, supervise, or control the actions of subordinates.").

Here, Plaintiff has alleged that Wilson's unreasonable detention of, and use of excessive force

against, Plaintiff (and Brown) was not an isolated incident, but one in a long string of similar actions by the Ferguson Police Department, largely against members of the African-American community in Ferguson. Plaintiff alleges that Jackson deliberately turned a blind eye to this pattern of constitutional violations by "do[ing] little to no investigation" and "rarely" reviewing reports on his officers' conduct. Plaintiff claims that Jackson's failure to properly train and supervise his officers condoned a pattern and practice of unlawful detainment and use of excessive force by the Ferguson Police Department, and had the effect of causing the deprivations of Plaintiff's constitutional rights.

These allegations, and the Court's finding above that Plaintiff stated claims for unreasonable seizure and excessive force, are sufficient to state a claim against Jackson for supervisor liability under § 1983. *See Rohrbough* v. *Hall*, No. 4:07CV00996 ERW, 2008 WL 4722742, at *13 (E.D. Mo. Oct. 23, 2008) (denying motion to dismiss § 1983 claim against a supervisory board, finding that the defendants' alleged failure to inquire into uses of excessive force were "tantamount to turning 'a blind eye,'" and stated a claim for deliberate indifference). Therefore, the Court will deny Defendants' motion to dismiss Plaintiff's § 1983 claims against Jackson, in his individual capacity.

5. Qualified Immunity

As noted above, Defendants argue that the § 1983 claims against Jackson and Wilson, in their individual capacities, should be dismissed on the basis of qualified immunity. Under the doctrine of qualified immunity, "a court must dismiss a complaint against a government official in his individual capacity that

fails to state a claim for violation of clearly established statutory or constitutional rights of which a reasonable person would have known." *Hager* v. *Ark. Dep't of Health*, 735 F.3d 1009, 1013 (8th Cir. 2013) (citation omitted). "A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix* v. *Luna*, 136 S. Ct. 305, 308 (2015) (citation omitted).

> When a supervising official who had no direct participation in an alleged constitutional violation is sued for failure to train or supervise the offending actor, the supervisor is entitled to qualified immunity unless plaintiff proves that the supervisor (1) received notice of a pattern of unconstitutional acts committed by a subordinate, and (2) was deliberately indifferent to or authorized those acts.

S.M. v. *Krigbaum*, 808 F.3d 335, 340 (8th Cir. 2015).

Because qualified immunity is an affirmative defense, in the context of a motion to dismiss under Rule 12(b)(6), the motion will only be granted when the immunity is established "on the face of the complaint." *Weaver* v. *Clarke*, 45 F.3d 1253, 1255 (8th Cir. 1995). At this stage of the proceedings, a court will consider whether the plaintiff has "stated a plausible claim for violation of a constitutional or statutory right and whether the right was clearly established at the time of the alleged infraction." Hager, 735 F.3d at 1013.

Here, as explained above, Plaintiff has stated a plausible claim that a constitutional violation occurred as a result of Wilson detaining him without

reasonable suspicion, and that Plaintiff was subjected to unconstitutional excessive force by Wilson. In addition, viewed in the light most favorable to Plaintiff, the facts alleged in the complaint support a plausible claim that a reasonable officer in the situation Wilson confronted would have known that his actions violated clearly established federal law. *See, e.g.*, *A.H.* v. *St. Louis Cnty.*, No. 4:14-CV-2069 CEJ, 2015 WL 4426234, at *3 (E.D. Mo. July 17, 2015) (denying motion to dismiss on qualified immunity grounds where facts alleged in the complaint supported a plausible claim that the defendants knew a detainee was suicidal and their actions in response to that known risk were unreasonable).

Finally, Plaintiff has stated a § 1983 claim that the constitutional deprivations he allegedly suffered were due, at least in part, to Jackson's failure to train and supervise Ferguson Police Department officers, and that a reasonable supervisor in Jackson's place would have known that his actions were unlawful in light of clearly established law and information possessed by Jackson at the time. *See Wever* v. *Lincoln Cnty.*, 388 F.3d 601, 608 (8th Cir. 2004) (affirming the denial of a supervisor's motion for summary judgment, on the basis of qualified immunity, with respect to a failure to train claim). Accordingly, Defendants' motion to dismiss the individual capacity § 1983 claims against Wilson and Jackson on the basis of qualified immunity will be denied.

6. Municipal Liability

A municipality may not be liable under § 1983 unless a constitutional violation has been committed pursuant to an official custom, policy, or practice. *Johnson* v. *Blaukat*, 453 F.3d 1108, 1114 (8th Cir.

2006). This custom, policy, or practice must have been the "moving force" behind the violation. *Luckert* v. *Dodge Cnty.*, 684 F.3d 808, 820 (8th Cir. 2012). Where a claim is based upon a municipality's failure to adopt or follow a needed policy or practice, the plaintiff "must show that his alleged injury was caused by municipal employees engaging in a widespread and persistent pattern of unconstitutional misconduct that municipal policymakers were either deliberately indifferent to or tacitly authorized." *Davis* v. *White*, 794 F.3d 1008, 1014 (8th Cir. 2015) (citation omitted).

As discussed above, Plaintiff has alleged that Ferguson had a custom of failing to train and supervise officers, and of failing to investigate claims of unconstitutional seizures and excessive force, which amounted to deliberate indifference. Plaintiff has pled that these customs and policies in turn caused him to suffer constitutional violations during his encounter with Wilson. The Court believes that Plaintiff's allegations in this regard are sufficient to withstand a motion to dismiss. Therefore, the Court will deny Defendants' motion to dismiss Plaintiff's § 1983 claims against Ferguson.

7. Redundant Claims

As Defendants correctly argue, a § 1983 suit against an officer in his official capacity is functionally equivalent to a suit against the employing governmental entity; thus, the Court will dismiss without prejudice the § 1983 claims against Jackson and Wilson, in their official capacities, as these claims are redundant to the § 1983 claims asserted against Ferguson. *See Veatch* v. *Bartels Lutheran Home*, 627 F.3d 1254, 1257 (8th Cir. 2010) (dismissing § 1983 claims against public officials in their official

capacities as redundant to § 1983 claims made against the governmental entity); *Brown* v. *City of Ferguson*, No. 4:15CV00831 ERW, 2015 WL 4393960, at *1 (E.D. Mo. July 16, 2015) (same).

State Tort Claims

When deciding state law claims, a federal court must attempt to predict what the state supreme court would decide if it were to address the issue; in pursuing such endeavor, the federal court may consider relevant state appellate court precedent, analogous decisions, considered dicta, and any other reliable data. *Raines* v. *Safeco Ins. Co. of Am.*, 637 F.3d 872, 875 (8th Cir. 2011).

1. Assault

Under Missouri law, an assault is "any unlawful offer or attempt to injure another with the apparent present ability to effectuate the attempt under circumstances creating a fear of imminent peril." *Devitre* v. *Orthopedic Ctr. of St. Louis, LLC*, 349 S.W.3d 327, 335 (Mo. 2011) (citation omitted). To state a claim, a plaintiff must allege: "(1) defendant's intent to cause bodily harm or offensive contact, or apprehension of either; (2) conduct of the defendant indicating such intent[;] and (3) apprehension of bodily harm or offensive contact on the part of the plaintiff caused by defendant's conduct." *Id.*

Defendants' only argument here is that Plaintiff failed to state a claim that he (as opposed to Brown) was assaulted by Wilson, and that Count II should therefore be dismissed. However, the Court concludes that Plaintiff's allegations satisfy the pleading requirement for all the elements of an assault against him.

2. Intentional Infliction of Emotional Distress

To state a claim for intentional infliction of emotional distress under Missouri law, a plaintiff must allege that "(1) the defendant acted in an intentional or reckless manner; (2) the defendant's conduct [was] extreme or outrageous; and (3) the defendant's conduct caused severe emotional distress that results in bodily harm." *Geran* v. *Xerox Educ. Servs., Inc.*, 469 S.W.3d 459, 468 (Mo. Ct. App. 2015). "Additionally, the plaintiff must demonstrate that the sole intent in acting was to cause emotional distress." *Id.* Defendants' only challenge to this claim is that the injury alleged by Plaintiff is not sufficient as a matter of law. The Court agrees with Plaintiff that he has alleged sufficient injury (psychological injury, severe emotional distress, and medical expenses) to survive a motion to dismiss this claim. *See State ex rel. Dean* v. *Cunningham*, 182 S.W.3d 561, 566 n.4 (Mo. 2006) (explaining that "medically documented damages need not be proven" for intentional infliction of emotional distress).

3. Negligent Infliction of Emotional Distress

In Missouri, the elements of a claim for negligent infliction of emotional distress are "(1) a legal duty of the defendant to protect the plaintiff from injury, (2) breach of the duty, (3) proximate cause, and (4) injury to the plaintiff." *Henson* v. *Greyhound Lines, Inc.*, 257 S.W.3d 627, 629 (Mo. Ct. App. 2008). In addition, to recover damages, a plaintiff must show "(1) that the defendant should have realized that his conduct involved an unreasonable risk of causing the distress, and (2) that the emotional distress or mental injury is medically diagnosable and of sufficient severity so as

to be medically significant." *Id.* Alternatively, a plaintiff may state a claim as a bystander for negligent infliction of emotional distress, by showing: (1) that the defendant should have realized that his conduct involved an unreasonable risk to the plaintiff, (2) plaintiff was present at the scene of an injury-producing, sudden event, (3) plaintiff was in the zone of danger, i.e., placed in reasonable fear of physical injury to her or his own person, and (4) the same emotional distress at in a direct-victim case. *Jarrett* v. *Jones*, 258 S.W.3d 442, 445–48 (Mo. 2008).

Here, the Court concludes that Plaintiff has failed to state a claim for negligent infliction of emotional distress as either a direct victim or bystander. Plaintiff has not alleged that he sought or received any medical treatment for his emotional distress, nor does he specify what medically diagnosable condition he suffered as a result of Wilson's actions. *See St. Anthony's Med. Ctr.* v. *H.S.H.*, 974 S.W.2d 606, 61012 (Mo. Ct. App. 1998) (holding that the plaintiff's allegations failed to plead an action for negligent infliction of emotional distress, where the plaintiff claimed he had suffered "severe emotional distress" and was "caused to incur expenses for psychiatric and psychological treatment, counseling, and medications," because they did not contain facts from which to infer medically diagnosable and medically significant emotional distress); *see also Brittingham* v. *McConnell*, No. 2:13CV00089 ERW, 2014 WL 4912184, at *7 (E.D. Mo. Sept. 30, 2014); *Franklin* v. *Pinnacle Ent., Inc.*, No. 4:12–CV–307 CAS, 2012 WL 6870447, at *13 (E.D. Mo. Aug. 9, 2012).

4. Sovereign Immunity

As noted above, Defendants invoke Missouri's sovereign immunity statute, arguing that it bars Plaintiff's state law tort claims against Ferguson and its officials. Missouri Revised Statute § 537.600 provides that public entities enjoy sovereign immunity as it existed at common law, unless immunity is waived, abrogated, or modified by statute. *Richardson* v. *City of St. Louis*, 293 S.W.3d 133, 136 (E.D. Mo. 2009). Under this doctrine, municipalities are entitled to sovereign immunity when they are engaged in "governmental" functions – ones performed for the common good of all – but not when engaged in "proprietary" functions – those performed for the special benefit or profit of the municipality acting as a corporate entity. *Jungerman* v. *City of Raytown*, 925 S.W.2d 202, 204 (Mo. 1996), abrogated on other grounds by *Southers* v. *City of Farmington*, 263 S.W.3d 603 (Mo. 2008). If sovereign immunity applies, it does not need to be pled as an affirmative defense, and it is the plaintiff's pleading burden to show that the defendant has waived such immunity, or that a statutory exception to immunity applies. *Richardson*, 293 S.W.3d at 137.

A public entity may waive sovereign immunity by purchasing an insurance policy covering tort claims. Mo. Rev. Stat. §§ 71.185 & 537.610.1. Whether sovereign immunity is waived in a particular case depends on whether the plaintiff's claim falls within the purposes covered by the defendant's policy. *Epps* v. *City of Pine Lawn*, 353 F.3d 588, 594 (8th Cir. 2003) (citing Casey v. Chung, 989 S.W.2d 592, 593 (Mo. Ct. App. 1998)).

While it is true, as Plaintiff argues, that municipalities are not entitled to sovereign immunity for their proprietary functions, the conduct of police officers is generally construed as governmental in nature. *See Jungerman*, 925 S.W.2d at 204–05; *St. John Bank & Tr. Co.* v. *City of St. John*, 679 S.W.2d 399, 401 (Mo. Ct. App. 1984) ("[T]he operation and supervision of a police department . . . constitute the exercise of a governmental function."). Plaintiff relies on the DOJ's report for the proposition that Ferguson and the Ferguson Police Department were more concerned with using officers as means to collect fines than as protectors of public safety, and argues that the actions of Wilson were thus proprietary in nature. However, even construing the facts in the light most favorable to Plaintiff, Plaintiff's allegations only speak to the general motivations of Ferguson and the Ferguson Police Department, and do nothing to show that the specific acts of Wilson on the date in question constituted a proprietary function.

Further, the Court finds that Plaintiff has failed to meet his pleading burden to show that Ferguson's liability insurance policy acts as a waiver of sovereign immunity in this case. While Plaintiff does plead that Ferguson purchased a liability insurance policy, he has failed to allege that this policy applies to the tort claims at issue in the case, which he must do. *See Epps*, 353 F.3d at 594 ("Because a public entity's liability for torts is the exception to the general rule of sovereign immunity, a plaintiff must specifically plead facts demonstrating that the claim is within this exception to sovereign immunity."); *Martin* v. *Bd. of Police Comm'rs of St. Louis City*, No. 4:07-CV-1831 JCH, 2008 WL 1732925, at *2 (E.D. Mo. Apr. 10, 2008) (same). However, rather than dismiss Plaintiff's state

law claims with respect to Ferguson, the Court will allow Plaintiff to amend his complaint to plead relevant facts, as appropriate, alleging that Ferguson's insurance policy covers Plaintiff's tort claims. Of course, Plaintiff must have a good faith basis under Federal Rule of Civil Procedure Rule 11 for any such amended allegations.

Injunctive Relief

A claim for injunctive relief is properly dismissed as moot "when the challenged conduct ceases and there is no reasonable expectation that the wrong will be repeated." *Roubideaux* v. *N.D. Dep't of Corr. & Rehab.*, 570 F.3d 966, 976 (8th Cir. 2009) (citation omitted). In *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 105 (1983), a case for damages and injunctive relief brought by a plaintiff who was choked into unconsciousness by the police, the Supreme Court explained as follows, in holding that the plaintiff did not present a justiciable claim for injunctive relief:

> That Lyons may have been illegally choked by the police on October 6, 1976, while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part.

Id. at 105.

The "heavy" burden of proving mootness falls on the party asserting that the case is moot. *Kennedy*

Building Assocs. v. *Viacom, Inc.*, 375 F.3d 731, 745 (8th Cir. 2004) (citation omitted); *see also Friends of the Earth, Inc.* v. *Laidlaw Environmental Servs., Inc.*, 528 U.S. 167, 189 (2000) (holding that a defendant claiming that a case is moot "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.") Here, however, the complaint is devoid of any allegations whatsoever that Plaintiff faces a real and immediate threat that he will again be detained by the police without justification or be subject to excessive force. Accordingly, his claim for injunctive relief will be denied.

Attorney's Fees and Punitive Damages

1. Attorney's Fees

If Plaintiff prevails on any of his § 1983 claims, he will be entitled to attorney's fees under 42 U.S.C. § 1988. With respect to his state tort claims, Missouri follows the American Rule, which provides that, "absent statutory authorization or contractual agreement, with few exceptions, each litigant must bear his own attorney's fee." *Henry* v. *Farmers Ins. Co.*, 444 S.W.3d 471, 478 (Mo. Ct. App. 2014). The special circumstances exception "is narrow and must be construed strictly." *Goralnik* v. *United Fire & Cas. Co.*, 240 S.W.3d 203, 210 (Mo. Ct. App. 2007). "Missouri courts have construed unusual circumstances to mean an unusual type of case or unusually complicated litigation." *Wyper* v. *Camden Cnty.*, 160 S.W.3d 850, 854 (Mo. Ct. App. 2005) (citation omitted). This Court does not believe that the Missouri Supreme Court would find that this case qualifies for abrogation of the American Rule.

Accordingly, Plaintiff's request for attorney's fees with respect to his state law claims will be stricken.

2. Punitive Damages

Municipalities are immune from awards of punitive damages regarding claims raised under § 1983. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 271 (1982). Accordingly, the Court will strike Plaintiff's requests for punitive damages with respect to Ferguson.

CONCLUSION

Accordingly,

IT IS HEREBY ORDERED that the joint motion (Doc. No. 4) of Defendants City of Ferguson, Missouri, Police Chief Thomas Jackson, and Officer Darren Wilson (Doc. No. 4) to dismiss Plaintiff Dorian Jackson's complaint is **DENIED** in part and **GRANTED** in part, as follows:

The motion is denied with respect to Counts I, II, and III of the complaint, except that the claims against Defendants Thomas Jackson and Darren Wilson in their official capacities, in Count I, are dismissed as redundant.

The motion is granted with respect to Count IV of the complaint.

The motion is granted with respect to Plaintiff's request for injunctive relief.

Plaintiff's request for attorneys' fees is stricken with respect to Counts II.

Plaintiff's request for punitive damages is stricken with respect to Defendant the City of Ferguson.

IT IS FURTHER ORDERED that on or before March 29, 2016, Plaintiff may amend his complaint to plead relevant facts, as appropriate, alleging that the City of Ferguson's insurance policy covers Plaintiff's state law tort claims. Failure to do so may result in the dismissal of Counts II and IV of the complaint against the City of Ferguson on the basis of sovereign immunity.

AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this a 15th day of March, 2016

APPENDIX D

STATUTORY AND REGULATORY PROVISIONS INVOVLVED

42 U.S.C. § 1983

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