

No. 25-1413

IN THE
Supreme Court of the United States

BENJAMIN M. BAUER,

Petitioner,

v.

ANNE ELIZABETH ALMA MARKS,

Respondent.

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

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioner Benjamin Bauer, a Minneapolis Police Department SWAT officer, shot Ethan Marks in the eye at close range with a 40-millimeter “less-lethal” launcher. The projectile penetrated Marks’s eye socket and exploded, destroying his eye, fracturing several facial bones, and causing brain damage. Petitioner justified the shooting based on a brief encounter between the unarmed Marks and another officer that had already ended without injury; that officer testified Marks no longer posed a threat when Petitioner fired.

Marks sued, alleging excessive force. The district court denied Petitioner qualified immunity because a host of disputed material facts precluded summary judgment, and the Eighth Circuit affirmed. After this Court granted Petitioner’s Writ for Certiorari, vacated the decision, and remanded for further consideration under *Barnes v. Felix*, 605 U.S. 73 (2025), the Eighth Circuit reaffirmed its decision, explaining that it had already applied a “totality-of-the-circumstances” test in its original opinion.

Petitioner now asks this Court to engage in purported error-correction by weighing the evidence afresh. The question presented is:

Whether the Eighth Circuit correctly applied *Barnes* and its own caselaw when it held that, under the totality of the circumstances and viewed in the light most favorable to Respondent, it was clearly established in May 2020 that shooting a non-threatening subject at close range with an exploding projectile constituted an unreasonable use of force under the Fourth Amendment.

PARTIES TO THE PROCEEDING

Petitioner is Benjamin Bauer, defendant and appellant below.

Respondent is Anne Elizabeth Alma Marks, Ethan Marks's mother. Ethan Marks was the plaintiff and appellee below until he passed away on March 10, 2026. D. Ct. ECF No. 204. The District of Minnesota substituted Anne Marks as plaintiff on May 20, 2026. D. Ct. ECF No. 229.

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STATEMENT OF THE CASE

A. Factual Background¹

On the afternoon of May 28, 2020, 19-year-old Ethan Daniel Marks (“Marks”) and his mother, Respondent Anne Marks—a registered nurse—attended a clean-up event in Minneapolis’s Longfellow neighborhood, which had been damaged during protests following George Floyd’s murder. Pet. App. 1a-2a. A number of people were already in the area when Marks and his mother arrived. *Id.* 2a.

At approximately 5:30 p.m., several Minneapolis Police Department officers arrived on scene, including Petitioner and his SWAT colleagues. *Id.* Petitioner was armed with a 40-millimeter “less-lethal” launcher. *Id.* 2a, 4a. The launcher fires “high energy munitions” intended to incapacitate the target while leaving the body intact. *Id.* 4a. While labelled “less-lethal,” the launcher is not *non-lethal*, and the manufacturer warns it “may cause serious injury or death.” *Id.*

When Petitioner first arrived, he exited the SWAT van and fired the launcher from a distance at people throwing objects. *Id.* 3a. Petitioner’s SWAT team later learned someone had been injured, and he joined a perimeter around the victim as other officers worked to remove the victim from the area. *Id.* Though the scene was initially chaotic, both the district court and the Eighth Circuit explicitly found that by the time Petitioner shot Marks,

1. This section reflects the Eighth Circuit’s statement of the facts, viewed—as required at the summary judgment stage—in the light most favorable to Marks.

the situation “was dramatically different than when the officers first arrived and encountered a hostile crowd.” *Id.* 15a; *see also id.* 87a. Indeed, officers were able to assist the injured person “without interference from the crowd[.]” *Id.* 15a. Video shows the remaining bystanders were “compliant” and “demonstrating no hostility towards the officers”—some were even “*assisting* law enforcement.” *Id.* 19a–20a (emphasis added).

Anne Marks was one of the individuals who volunteered their assistance. Body-worn camera footage shows Anne Marks approaching the officers, announcing she was a nurse, and offering to help, while Ethan Marks stood idly nearby. *Id.* 3a. Officer Jonathan Pobuda, another officer maintaining a perimeter around the victim, “blocked [Anne] with his arm and ordered her to stand back.” *Id.* After Officer Pobuda made contact with his mother, Marks walked over and shouted, “Back up, bitch!” at Officer Pobuda. *Id.* Marks struck at Pobuda a single time and grasped at his riot baton. *Id.* Officer Pobuda responded by forcefully shoving Marks with his baton, causing Marks to stumble backward over a corrugated pipe on the ground. *Id.* Reacting to the interaction, a bystander with outstretched arms stepped into the “several feet” wide gap between Marks and Officer Pobuda:



Id. 3a, 12a; C. A. App. 1044 at 17:40:36-17:40:37.

After pushing Marks away, Officer Pobuda did not perceive Marks as a threat and concluded no additional force was needed. Pet. App. 4a, 18a.

“Despite the apparent amelioration of the threat,” however, Petitioner turned, raised his launcher, and fired a 40-millimeter round directly into Marks’s right eye socket from approximately five to ten feet away. *Id.* 4a. Petitioner issued no warnings or commands before firing, nor had any officer asked him to intervene. *Id.*



C. A. App. 1043 at 17:40:36.

The munition Petitioner fired had an “exit muzzle velocity” of approximately 200 miles per hour and released an inflammatory chemical agent upon impact. Pet. App. 4a. The round traversed the “several feet” gap depicted below, penetrated Marks’s eye socket, and detonated, producing the plume of smoke visible below:



Id. 12a, 14a; C. A. App. 1011; C. A. App. 1044 at 17:40:37.

A bystander shouted at Petitioner, “Hey! Hey! Point blank?!” Pet. App. 6a. Petitioner yelled back, “Yes!” *Id.* Within three minutes of the shooting, Petitioner and the other officers “jumped in their vehicles” and “sped away from the scene.” *Id.* None of the officers rendered aid to Marks, nor was Marks arrested. *Id.* Marks suffered devastating injuries, including but not limited to a ruptured eyeball, a fractured eye socket, and a traumatic brain injury. *Id.* 4a.

Two separate prosecuting authorities considered whether Marks should be criminally charged for his conduct. *Id.* 6a. Each declined. *Id.* The first was asked to determine whether Marks could be charged with “assault or attempting to disarm a police officer,” but “[a]fter reviewing the materials . . . the county attorney declined to prosecute, concluding no felony charges were warranted.” *Id.* The matter was then forwarded to another office for a possible misdemeanor charge of obstructing legal process. *Id.* That office, too, declined to prosecute, both because there was “insufficient evidence” of a crime, and because the “facts/circumstances d[id] not support charges.” *Id.*

B. Procedural History

Marks sued in September 2020 under 42 U.S.C. § 1983, alleging that Petitioner violated his Fourth Amendment right to be free from excessive force. Pet. App. 2a; D. Ct. ECF Nos. 1, 6, and 50. Following discovery, Petitioner moved for summary judgment, seeking qualified immunity. Pet. App. 2a.

The district court denied Petitioner’s motion. Petitioner argued that Marks had not been seized, within the meaning

of the Fourth Amendment, when the Petitioner shot him in the eye. *Id.* 74a. The district court disagreed, finding Petitioner’s argument both “untimely” and erroneous, since Petitioner’s shot “objectively manifested an intent to restrain.” *Id.* 74a, 76a (citing *Torres v. Madrid*, 592 U.S. 306, 318 (2021)). Alternatively, Petitioner argued that he had not used excessive force. Again, the district court disagreed, concluding that disputed facts precluded summary judgment, including where Petitioner aimed, his distance from Marks when firing, whether Petitioner used deadly force, the seriousness of the scuffle between Marks and Pobuda, and whether Marks posed an immediate threat. Pet. App. 77a–88a. “[A] reasonable juror,” the court noted, could find the shot “amounted to deadly force” without justification, *id.* 78a–79a, and, even if less-than-deadly, the jury had to resolve a host of disputed facts to determine whether the force was reasonable. *Id.* 84a–88a. Lastly, the district court determined that—whether Petitioner used deadly force or not—when viewing the evidence most favorably to Marks, the shooting violated clearly established law. *Id.* 88a–91a.

Petitioner appealed, and the Eighth Circuit (Judges Erickson and Melloy) affirmed (“*Marks I*”). First, it concluded Petitioner’s “purposeful[] deploy[ment]” of the launcher against Marks was “physical force to restrain movement,” thus constituting a seizure. *Id.* 40a–43a. Next, the Eighth Circuit looked to both the “moment the seizure [was] effectuated,” as well as the “totality of the circumstances,” in agreeing with the district court that the shooting’s legality hinged upon disputed material facts. *Id.* 43. Importantly, the court “look[ed] primarily,” but not exclusively, “to the threat present at the time [Petitioner] deploy[ed] force,” and considered the severity

of Marks’s conduct before he was shot, the nature of the contact between Marks and Officer Pobuda, and where Petitioner aimed his launcher. *Id.* 43a–48a. Finally, the Eighth Circuit concluded that Petitioner violated clearly established law in that circuit, noting that when viewing the facts in Marks’s favor, “a reasonable jury could conclude that Marks was shot when he neither posed a threat to the officers or the public, nor was he fleeing or ignoring an officer’s commands.” *Id.* 54a. Under circuit precedent, the “high level of force” Petitioner used—a “shot . . . in the face at close range with a chemical projectile that he knew could cause serious injury or death”—was unjustified. *Id.* 54a–55a. The Eighth Circuit denied Petitioner’s request for en banc and panel rehearing. *Id.* 109a–10a.

Unsatisfied with the Eighth Circuit’s treatment of the facts, Petitioner sought a writ of certiorari from this Court on two questions presented concerning the “particular circumstances” of this case: (1) whether Petitioner seized Marks when he shot him in the eye at point-blank range, and (2) whether the law clearly established that Petitioner’s use of force constituted a seizure and was unreasonable under the Fourth Amendment. Petition for a Writ of Certiorari, *Officer Benjamin M. Bauer v. Ethan Daniel Marks*, No. 24-616 (U.S. filed Dec. 3, 2024). On May 27, 2025, this Court, without addressing Petitioner’s arguments, granted the petition, vacated the judgment, and remanded the case to the Eighth Circuit “for further consideration in light of *Barnes v. Felix*, 605 U.S. 73 (2025),” which rejected the “moment-of-threat” rule and held that courts must consider the totality of circumstances surrounding a use of force incident, including events leading up to the moment force was used. Pet. App. 31a; 605 U.S. at 76. *Barnes* also noted, however,

that the moment when force is used will continue to play a central role in the analysis—“Of course, the situation at the precise time of the shooting will often be what matters most; it is, after all, the officer’s choice in that moment that is under review.” *Id.* at 80.

On remand, the Eighth Circuit (Chief Judge Colloton and Judge Erickson) again affirmed the district court’s denial of summary judgment, noting that “[b]ecause this Court did not apply the ‘moment-of-threat’ rule in our original opinion,” *Barnes* had little impact on its decision (“*Marks II*”). Pet. App. 2a. As to the reasonableness of the seizure, the Eighth Circuit again considered the “totality of the circumstances”—including, among others, Marks’s actions prior to the shooting, the fact that Officer Pobuda has pushed Marks away and that Marks had stumbled back, that Officer Pobuda believed no additional force was needed, and that no officer sought Petitioner’s intervention—and again concluded that “the evidence, when viewed in the light most favorable to Marks[,] demonstrates a violation of Marks’ constitutional right to be free from excessive force[.]” *Id.* 16a.

Finally, the Eighth Circuit held that clearly established law prohibited Petitioner’s conduct. The court correctly held that, even if Petitioner’s use of force is characterized as less-than-deadly, longstanding circuit precedent clearly established that it is objectively unreasonable to use force disproportionate to the threat posed by a non-threatening subject who is not fleeing, resisting, or ignoring officer commands. *Id.* 22a. Viewing the facts in Marks’s favor, the Eighth Circuit properly relied on *Rohrbough v. Hall*, 586 F.3d 582, 587 (8th Cir. 2009) (finding an officer’s punch to the face unlawful where the suspect used *de minimis*

force); *Montoya v. City of Flandreau*, 669 F.3d 867, 869 (8th Cir. 2012) (holding that the excessive force claim was clearly established when a leg sweep maneuver was employed against a non-threatening, non-resisting, non-fleeing misdemeanor); and *Johnson v. Carroll*, 658 F.3d 819, 827–28 (8th Cir. 2011) (determining that macing and throwing to the ground an unarmed person who “posed at most a minimal safety threat to the officers” was not objectively reasonable) to determine that “a reasonable jury could conclude that Marks was shot when he neither posed a threat to the officers or the public, nor was he fleeing or ignoring an officer’s commands.” *Id.* 20a–22a; *see also id.* 4a (“After pushing Marks away, Officer Pobuda no longer perceived Marks as a threat and concluded no additional force was necessary.”) Under those circumstances, the court held, it was objectively unreasonable for Petitioner to shoot Marks in the face at close range with a chemical projectile. *Id.* 22a. The Eighth Circuit repeated that Petitioner is not entitled to qualified immunity “where disputed issues of material fact exist such that the issues of law cannot be decided without findings on the central fact issues[.]” *Id.* 23a.

Dissatisfied once more with the lower court’s treatment of the facts and its interpretation of its own precedent, Petitioner has now filed this second Petition for a Writ of Certiorari. Although cast as presenting a conflict with *Barnes*, the Petition simply asks this Court to revisit the Eighth Circuit’s fact-bound application of settled Fourth Amendment law and reweigh the summary judgment record. For the reasons below, the Court should reject Petitioner’s invitation to re-examine the facts in this interlocutory appeal and deny the Petition.

REASONS FOR DENYING THE PETITION

The Court should deny the Petition for multiple reasons.

First and foremost, the Eighth Circuit did exactly as this Court ordered in analyzing the constitutional questions in this case under the *Barnes* totality-of-the-circumstances framework. This Court should not re-run the Eighth Circuit's analysis simply because Petitioner is disappointed with the results.

Second, there is no error to rectify as the Eighth Circuit correctly applied *Barnes* and clearly established in-circuit precedent to determine that, viewing the evidence favorably to Marks, any reasonable officer in Petitioner's position would have known that shooting Marks in the eye at close range was vastly disproportionate to any threat Marks posed.

Third, there is no circuit split for the Court to address, and Petitioner's request to correct a purported error specific to the facts of this case is not an exceptionally important question demanding this Court's attention.

Finally, even if the Court were otherwise inclined to address Petitioner's questions, this interlocutory appeal does not present a reviewable legal question. The Eighth Circuit concluded that disputed material facts preclude qualified immunity, and this Court lacks jurisdiction to revisit that determination.

I. The Eighth Circuit Correctly Applied the *Barnes* Totality-of-the-Circumstances Framework When It Held That Petitioner Failed To Show His Use of Force Was Objectively Reasonable as a Matter of Law

The Fourth Amendment demands that courts evaluating an excessive force claim balance “the nature and quality of the intrusion” against the governmental interests at stake by considering the totality of the circumstances. *Graham v. Connor*, 490 U.S. 386, 396 (1989) (internal quotation omitted). That inquiry is objective and fact dependent, requiring consideration of factors such as the severity of the crime, the immediacy of any threat, whether the suspect was resisting or fleeing, the amount of force used, the officer’s efforts to limit the use of force, and the resulting injury. *Id.*; *Lombardo v. City of St. Louis*, 594 U.S. 464, 467 (2021).

In *Barnes*, this Court reaffirmed that framework and rejected the Fifth Circuit’s “moment-of-threat” rule, which confined the reasonableness inquiry to “the circumstances existing at the precise time an officer perceived the threat inducing him to shoot.” 605 U.S. at 76. The Court explained that such an approach “improperly narrow[s]” the Fourth Amendment inquiry because courts must instead “consider all the relevant circumstances, including facts and events leading up to the climactic moment.” *Id.* at 76, 82. At the same time, the Court recognized that “the situation at the precise time of the shooting will often be what matters most” because “it is, after all, the officer’s choice in that moment that is under review.” *Id.* at 80.

The Eighth Circuit’s decisions in both *Marks I* and *Marks II* faithfully applied that framework. As *Marks II* explained, *Marks I* “did not apply the ‘moment-of-threat’ rule” that *Barnes* later rejected. Pet. App. 2a. Instead, the court evaluated Petitioner’s use of force under the totality of the circumstances, considering both the events leading up to the shooting and the circumstances that existed when force was used. *See* Pet. App. 43a–48a.

Petitioner’s disagreement is therefore not with the legal framework the Eighth Circuit applied, but with its fact-bound application of that settled framework to the summary judgment record. That contention presents no question warranting this Court’s review.

A. *Marks II* Correctly Explained That *Marks I* Applied a Totality-of-the-Circumstances Analysis Consistent with *Barnes*

Petitioner argues that the Eighth Circuit’s statement in *Marks I* that it looked to “the precise moment the seizure [was] effectuated” is inconsistent with *Barnes*’s totality-of-the-circumstances framework. Pet. 18–19. It is not. As *Marks II* correctly explained, *Marks I* considered the circumstances at the time force was used as one part of a broader totality-of-the-circumstances analysis. Petitioner’s characterization of *Marks II* as “facially conclusory” and “ingenuous” simply reflects his disagreement with the Eighth Circuit’s reading of its own opinion. *Id.*

Marks I, and therefore *Marks II*, is entirely consistent with *Barnes*. The Eighth Circuit did not confine its analysis to the “precise moment” force was used; it evaluated that

moment within the totality of the circumstances. Pet. App. 43a (“We generally consider the totality of the circumstances[.]”). Both opinions examined the nature of the crime Petitioner claimed Marks had committed, the evolving nature of the encounter, the immediacy of any threat Marks posed, and the materially different circumstances that existed by the time Petitioner fired compared to when he first arrived and encountered a hostile crowd. *Id.* 13a–15a, 45a–47a. Although *Marks I* observed that it looked “primarily” to the threat present when force was deployed, *id.* 46a, it did not confine its analysis to that moment. Rather, consistent with *Barnes*, it considered the events leading up to the shooting while recognizing that “the situation at the precise time of the shooting will often be what matters most.” 605 U.S. at 80.

Petitioner’s criticism therefore rests on a false premise. *Marks II* did not reinterpret *Marks I* to conform to *Barnes* after the fact; it correctly recognized that *Marks I* had already applied the same totality-of-the-circumstances framework that *Barnes* later reaffirmed. Petitioner’s remaining arguments concern the Eighth Circuit’s application of that framework to the facts, not the legal standard it employed. *See infra* Section I(B).

B. *Marks II* Faithfully Applied *Barnes* by Considering the Entire Encounter While Giving Appropriate Weight to the Circumstances at the Time of the Shooting

Petitioner faults the Eighth Circuit in *Marks II* for giving “dispositive weight to the precise moment force was used,” alleging that such treatment “shows complete disregard for this Court’s ruling in *Barnes*.” Pet. 27.

Petitioner would instead have this Court set aside the Eighth Circuit’s account of the circumstances immediately surrounding the shooting in favor of a 500-foot view of the day’s events. But *Barnes* requires neither approach. Rather, it instructs courts to consider “all the relevant circumstances, including facts and events leading up to the climactic moment,” while recognizing that “the situation at the precise time of the shooting will often be what matters most.” 605 U.S. at 76, 80, 82.

The Eighth Circuit did exactly that here. Both *Marks I* and *Marks II* acknowledged that when Petitioner’s SWAT van arrived, “hundreds of people” had gathered and some were throwing objects at approaching officers. Pet. App. 2a–3a, 34a. Both opinions also recognized, however, that the situation was “dramatically different” by the time Petitioner fired. *Id.* 15a; *see also id.* 47a. By then, officers had established a perimeter, the crowd had calmed, and many individuals had become compliant, with some even assisting law enforcement. *Id.* 19a, 51a. The Eighth Circuit therefore evaluated Petitioner’s use of force against the circumstances that a jury could find existed when the shot was fired—not the “modern-day war zone” Petitioner describes. Pet. 2.

Petitioner’s criticism focuses primarily on the Eighth Circuit’s assessment of any immediate threat Marks posed before the shooting, characterizing the court’s decision to “downplay an assault and a felonious attempt to disarm an officer” as “baffling.” Pet. 22–23. But *Barnes* did not require the Eighth Circuit to assign equal weight to every event in the encounter. Rather, it required consideration of the entire encounter while recognizing that “the situation at the precise time of the shooting will often

be what matters most.” *Barnes*, 605 U.S. at 80. Because the circumstances at the time of the shooting differed materially from those that existed only moments earlier, the Eighth Circuit properly gave significant weight to the intervening events that changed the threat analysis before Petitioner fired. Pet. App. 12a, 14a.

For example, after Marks struck at Officer Pobuda, Officer Pobuda “successfully pushed an unarmed Marks away from him” with his baton, causing Marks to “stumble and fall backwards.” *Id.* 14a, 46a. That push also created enough space for “a bystander with outstretched arms to step into the space between” Marks and Officer Pobuda. *Id.* 12a, 14a, 35a. Viewing the evidence in Marks’s favor, the Eighth Circuit concluded that a reasonable jury could find that by the time Petitioner shot Marks in the eye, any potential threat had dissipated. *Id.* Officer Pobuda agreed:

Q: You did not perceive him to be a threat and didn’t go after him at that point.

Correct?

Officer Pobuda: Are you talking about at the point in which we separated?

Q: Yeah.

Officer Pobuda: Correct. I did not pursue—I did not pursue him after our interaction, sir.

Q: And you didn’t think that further use of force by you on him was necessary?

Officer Pobuda: No, sir.

Id. 18a, 50a. Thus, the Eighth Circuit did not place “chronological blinders” on its analysis, nor did it “hermetically seal” Marks’s earlier conduct from the use-of-force analysis. *See Barnes*, 605 U.S. at 82, 80. It considered the entire encounter and concluded that the intervening events altered the reasonableness inquiry by the time Petitioner fired.

Unable to show that the Eighth Circuit misapplied *Barnes*, Petitioner instead recasts the factual record. He argues the panel “ignore[d] that Marks was physically assaulting Officer Pobuda less than one second before Bauer protected his fellow officer” and failed to account for the threat Marks continued to pose. Pet. 23. Elsewhere, Petitioner similarly accuses the Eighth Circuit of ignoring Marks’s “violent, felony-level misconduct” when assessing the threat Marks posed. *Id.* 20, 22. As the Eighth Circuit recognized, however, these assertions “overstate the evidence in the record,” Pet. App. 13a, and resolve disputed facts in Petitioner’s favor. This Court should decline Petitioner’s invitation to reweigh the evidence and ignore the summary judgment standard.

The opinions themselves refute Petitioner’s characterization. Far from ignoring Marks’s conduct, the Eighth Circuit expressly addressed it. The court explained that “[i]t is for the jury to interpret the nature and extent of the contact between Marks and Officer Pobuda,” and observed that a jury could also consider the fact that “prosecutors in two different offices reviewed the evidence presented by the MPD and declined to charge Marks with either a felony or a misdemeanor.” Pet. App. 22a. The court further recognized that, although “a jury might accept [Petitioner’s] characterization of the

incident as a ‘bad assault,’” the record also contained “contrary evidence . . . such that a reasonable jury could find that the force Officer Bauer used in response to the brief altercation between Marks and Officer Pobuda was excessive.” *Id.* 13a–14a; *see also id.* (noting that any threat was “brief and extinguished quickly and effectively”). Rather than discounting Marks’s conduct, the Eighth Circuit treated it as an integral part of the totality-of-the-circumstances analysis before concluding that intervening events created a genuine factual dispute over whether any threat remained when Petitioner fired.

Petitioner also argues that “[a] reasonable officer could have believed that Marks intended to fight back” even after his interaction with Officer Pobuda had ended. Pet. 24. That argument again asks this Court to resolve disputed factual inferences in Petitioner’s favor. The question at summary judgment was not whether a reasonable jury could accept Petitioner’s interpretation of the evidence. It was whether, viewing the facts in Marks’s favor, a reasonable jury could instead conclude that any threat had already been addressed and that the use of force was therefore unreasonable. The Eighth Circuit correctly held that it could. Pet. App. 15a–16a.

Finally, invoking *Scott v. Harris*, 550 U.S. 372 (2007), Petitioner argues “this Court need not accept” the fact disputes identified by the courts below and should instead adopt his view of the evidence. Pet. 22, 29. But *Scott* neither authorizes judicial fact-finding whenever video exists nor overrides the jurisdictional limits recognized in *Johnson v. Jones*, 515 U.S. 304, 309–13 (1995). *Scott*’s narrow rule—that courts need not accept a version of events “so utterly discredited” by video that no reasonable

jury could believe it, 550 U.S. at 378–80—does not apply here. Unlike in *Scott*, the Eighth Circuit considered the video and concluded it supported Marks’s account, finding “[t]he video of the encounter lends little support to [Petitioner’s] characterization of Marks’ conduct” and depicted a “compliant” crowd “demonstrating no hostility towards officers” near where Petitioner shot Marks. Pet. App. 13a, 19a. Because the video presents “a triable issue of fact,” that determination is beyond the scope of this interlocutory appeal. *Johnson*, 515 U.S. at 316; see also *Jones v. Kulesa*, 178 F.4th 1179, 1183 (8th Cir. 2026) (dismissing interlocutory qualified-immunity appeal because the videos “do not blatantly contradict” the district court’s finding of factual disputes); *Raines v. Counseling Assocs., Inc.*, 883 F.3d 1071, 1075 (8th Cir. 2018), *as corrected* (Mar. 6, 2018) (holding the court lacked jurisdiction to interpret “inconclusive” video evidence to resolve whether the plaintiff posed a serious threat).

Petitioner’s disagreement with the fact-bound application of settled law presents no basis for certiorari. He remains free to present his competing view of the evidence to a jury, but he cannot ask this Court to reweigh disputed facts on interlocutory review. Having faithfully applied *Barnes*’s “fact-dependent and context-sensitive approach,” the Eighth Circuit correctly concluded that disputed facts precluded qualified immunity as a matter of law. This Court need not “slosh its way through” the same “factbound morass.” *Barnes*, 605 U.S. at 80 (quoting *Scott*, 550 U.S. at 383).

II. The Eighth Circuit Correctly Held That, Viewing the Evidence in a Light Most Favorable to Marks, Any Reasonable Officer in Petitioner’s Position Would Have Known Shooting Marks in the Eye at Close Range Was Unlawful

On remand, the Eighth Circuit found that Petitioner was not entitled to qualified immunity because, viewing the evidence in the light most favorable to Marks, it was clearly established in May 2020 that the force Petitioner used was unconstitutional, whether characterized as deadly or less-than-deadly. Pet. App. 16a–22a.

In arguing otherwise, Petitioner improperly injects disputed facts into the analysis and disregards the summary judgment standard. Pet. 30. The Eighth Circuit explicitly explained that “on this record . . . issues of law cannot be decided without findings on the central fact issues[.]” Pet. App. 23a. Viewing these “central fact issues” in Marks’s favor, and regardless of whether Petitioner used deadly or less-than-deadly force, the Eighth Circuit correctly applied clearly established Fourth Amendment circuit precedent to find that any reasonable officer would understand that shooting an unarmed Marks from close range in the eye socket with an exploding projectile was unlawful. *Id.*

A. Eighth Circuit Case Law Clearly Establishes That a Police Officer Is Not Permitted To Use Deadly Force on an Individual Who No Longer Poses an Immediate Threat

In addressing the “clearly established” prong of the qualified immunity analysis, the Eighth Circuit

determined that even nominally “less-lethal” weapons “can amount to deadly force depending on the situation,” and found, based on its own caselaw, “[t]o the extent that Officer Bauer used deadly force when he shot Marks, it was clearly established in May 2020 that the use of deadly force on a non-threatening suspect was objectively unreasonable.” Pet. App. 18a–19a. Petitioner argues, however, that because it was not “clearly established” that shooting Marks in the eye with his less-lethal launcher amounted to deadly force, the Eighth Circuit erred. This argument misstates the qualified immunity inquiry. Marks need not clearly establish that the use of a less-lethal weapon is deadly force. Instead, Marks need only show that *if* Petitioner’s force is considered deadly, it was clearly established that such force was objectively unreasonable.

Because the “intrusiveness” of force sufficient to cause serious bodily injury or death—“deadly force”—is “unmatched,” it is reasonable only when the subject poses an immediate, significant threat of serious physical harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985); *Ellison v. Lesher*, 796 F.3d 910, 916–17 (8th Cir. 2015). Where a person poses only a potential threat, deadly force is unreasonable unless he is poised to imminently cause serious harm or death. *Cole ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134 (8th Cir. 2020) (“[I]t [is] clearly established that a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force.”). Additionally, where a warning is “feasible,” the failure to provide one adds to the unreasonableness of deadly force. *Garner*, 471 U.S. at 11–12.

Each court below correctly concluded that, if considered deadly force, a reasonable officer would have understood that shooting an exploding projectile from close range and without warning into Marks's eye socket was unreasonable. *See* Pet. App. 17a–19a, 49a–51a, 79a. Indeed, even Petitioner concedes using deadly force against Marks was unreasonable. *Id.* 78a.² Petitioner also knew, based on his training, that shooting Marks in such fashion could kill him. *Id.* 4a–5a; *see also id.* 18a (“[O]fficer Bauer testified that he knew a 40 MM Tactical Single Launcher can be considered deadly force. He was aware the manufacturer warned the product could cause serious injury or death.”). Because qualified immunity does not protect “those who knowingly violate the law,” this alone is sufficient to deny his Petition. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Further, as the Eighth Circuit also noted, Marks need not identify a case involving a less-lethal firearm to establish that Petitioner shooting him in the eye socket with a high-speed, detonating projectile was potentially deadly. Pet. App. 17a; *see Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (explaining that a plaintiff need not show “the very action in question has previously been held unlawful”). Instead, the touchstone of qualified immunity is notice. *See, e.g., Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (per curiam); *Hope v. Pelzer*, 536 U.S. 730, 743 (2002). Moreover, the reasonableness inquiry has always turned on the circumstances, not the weapon used. There is no

2. Accordingly, Petitioner’s reliance (and the *Marks II* dissent’s focus) on the speed with which he made the purported “split-second decision” to fire, Pet. 29, is misplaced because the circumstances never justified shooting Marks in the eye, even during the brief interaction with Officer Pobuda.

novel-weapon exception to the Fourth Amendment, which “preserves personal security with respect to methods of apprehension old and new.” *Torres*, 592 U.S. at 316–17.

Nor does the Eighth Circuit’s opinion in *White v. Jackson*, 865 F.3d 1064 (8th Cir. 2017), establish, or even suggest, as Petitioner argues, that less-lethal munitions are categorically non-deadly force.³ Pet. 31. There, the Eighth Circuit held it was reasonable for officers to “fire rubber bullets and bean bags” at the lower body of a man in “a violent crowd of people” who was “proceeding directly toward the police skirmish line,” while ignoring commands to stop. *White*, 865 F.3d at 1079. The plaintiffs did not raise, and the court did not address, the issue of deadly force.⁴ *Laney v. City of St. Louis* is even further afield, as it involved pepper-spray and merely cites *White* as an example of reasonable force. 56 F.4th 1153, 1156 (8th Cir. 2023).

It is unsurprising, and consistent with clearly established law, that less-lethal munitions, just like a squad car, can be used in both deadly and non-deadly ways, depending on the circumstances. *See* Pet. 32 (conceding that striking a person with a squad car is clearly established “deadly force under certain circumstances”). As such, the Eighth Circuit rightly determined that Petitioner’s use of force could be considered deadly and

3. The same is true for Minnesota Statutes § 609.066, which simply provides that, unlike bullets, discharging less-lethal munitions is not *per se* deadly force. Pet. 32 n.3.

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

objectively unreasonable under its circuit precedent. Pet. App. 19a.

B. Eighth Circuit Case Law Clearly Establishes That It Is Objectively Unreasonable To Use More Than *De Minimis* Force To Seize a Non-Threatening Subject Who Is Not Fleeing, Resisting Arrest, or Ignoring Officer Commands

The Eighth Circuit also correctly concluded that, even if less than deadly, it “would have been clear to a reasonable officer in [Petitioner’s] position that [h]is high degree of force was disproportionate to the threat” Marks posed. Pet. App. 20a. Because force is evaluated on a spectrum, even where an officer is justified in using *some* force, it is clearly established that using an amount of force disproportionate to the threat confronted is constitutionally unreasonable. *See Lombardo*, 594 U.S. at 467 (noting “the relationship between the need for the use of force and the amount of force used”).

The Eighth Circuit rightly focused on the amount of force Petitioner used compared to the marginal threat Marks posed. Pet. App. 22a. Under clearly established law, a jury must evaluate the severity of that threat, if any. *Ludwig v. Anderson*, 54 F.3d 465, 473–74 (8th Cir. 1995) (denying summary judgment where jury must decide whether plaintiff, “even if dangerous, threatening, or aggressive,” posed a serious threat justifying the force used). In *Rohrbough v. Hall*, although the plaintiff “was causing a disturbance” and pushed an officer, the Eighth Circuit denied qualified immunity because a jury could conclude plaintiff’s push was “*de minimis*

or inconsequential” and the “severity of [the officer’s] reaction,” including punching the plaintiff, taking him to the ground, and causing serious injury, was disproportionate. 586 F.3d 582, 587 (8th Cir. 2009). Whereas Petitioner, parroting the dissent, claims a reasonable officer would believe Marks was attempting to disarm Officer Pobuda and readying for a fight, Pet. 34–37, a reasonable jury could disagree and determine the brief interaction was insufficient to justify Petitioner’s response, especially after Officer Pobuda forcefully shoved Marks back and a bystander stepped between them. Pet. App. 12a, 14a. Officer Pobuda certainly thought so; he determined that a shove with his baton was sufficient and perceived no threat thereafter. *Id.* 4a, 18a.

Petitioner argues that the cases on which the Eighth Circuit relied for its “clearly established” analysis are distinguishable and define the right at too high a level of generality to be instructive.⁵ Pet. 14. Petitioner’s framing of the issue, however, “imports genuinely disputed factual propositions,” *Tolan*, 572 U.S. at 657, that must be resolved by a jury. *See infra* Section IV. Construing these factual disputes in Marks’s favor, as the courts must at this stage of the proceeding, the decisions cited by the Eighth Circuit provide clear guidance as to what constitutes objectively

5. This Court routinely rejects the opportunity to address the “generality” issue in excessive force cases and should do the same here. *See, e.g., Pittman v. Harris*, No. 19-466 (cert. denied Mar. 9, 2020); *Jackson v. Dutra*, No. 23-514 (cert. denied Mar. 25, 2024); *Crockett v. Krueger*, No. 25-594 (cert. denied Mar. 23, 2026); *City of Los Angeles v. Estate of Hernandez*, No. 25-538 (cert. denied Jun. 22, 2026) (denying petitions where question presented alleges lower court defined clearly established law at too high a level of generality).

unreasonable force in this context. For example, in *Montoya v. City of Flandreau*, the Eighth Circuit found a “leg sweep” excessive where the plaintiff was a “non-threatening, non-resisting, non-fleeing misdemeanor who was merely waving her hands in frustration” at the time the officer used force. Pet. App. 20a.; 669 F.3d 867, 872–73 (8th Cir. 2012). The Eighth Circuit also pointed to its decision in *Johnson v. Carroll*, where it held that macing and throwing an unarmed person to the ground when he “posed at most a minimal safety threat to the officers” was also excessive. Pet. App. 20a; 658 F.3d 819, 827–28 (8th Cir. 2011). As the Eighth Circuit found here, there is ample evidence in the record that, when taken in the light most favorable to Marks, shows he too was a “non-threatening misdemeanor” when Petitioner shot him in the eye socket. Pet. App. 22a–23a. That Petitioner disagrees with this characterization is immaterial. Because a shot to the eye with an exploding projectile at point-blank range is objectively more serious than a leg sweep (*Montoya*), spraying mace (*Johnson*), or a punch to the face (*Rohrbough*), these cases remain instructive and put Petitioner on notice that his use of force against Marks was unlawful.

Finally, neither *Bernini* nor *White* can reasonably be interpreted to authorize Marks’s shooting. Pet. 35–37. In *Bernini v. City of St. Paul*, officers used reasonable force (causing no significant injuries) to disperse a large, “non-compliant” crowd of protesters they reasonably believed were “acting as a unit” to penetrate a police barrier. 665 F.3d 997, 1005–06 (8th Cir. 2021). Similarly, officers in *White v. Jackson* deployed less-lethal rounds at the lower body of a man violating dispersal orders and advancing on a skirmish line as “part of the violent crowd.” 865 F.3d

1064, 1073, 1079 (8th Cir. 2017). In contrast, Marks was not acting in concert with a hostile or violent crowd and was given no dispersal orders or commands before Petitioner targeted Marks with a single shot in the eye. Not only is this clearly distinguishable from a crowd-control effort, but the Eighth Circuit observed that the small group of “compliant” citizens in the area was “demonstrating no hostility towards the officers,” but was instead “assisting law enforcement” or watching from a distance when Petitioner fired. Pet. App. 19–20a. Although Petitioner frames the behavior of the crowd differently, the Eighth Circuit firmly disagreed and reserved such questions for the jury. Because this is not the forum for Petitioner to air his disagreement with the factual record, his Petition should be denied. *See Ellison*, 796 F.3d at 916 (affirming denial of qualified immunity because officer’s “framing of the abstract legal issue is premised on a set of facts that was not assumed by the district court”).

III. The Narrow Request for Individual Relief Does Not Demand This Court’s Intervention, Especially Where Courts Have Yet to Widely Apply *Barnes*

Petitioner does not identify a Circuit split with respect to the Eighth Circuit’s qualified immunity analysis. Pet. 18–37. Indeed, his argument relies almost exclusively on Eighth Circuit cases and largely rehashes the arguments considered and rejected by the courts below. *See id.* 29–37. For instance, the Eighth Circuit already considered and distinguished *White*, 865 F.3d at 1072, and *Bernini*, 665 F.3d at 1001, 1006, because Petitioner was not dispersing or controlling a hostile crowd when he shot Marks with a single “less-lethal” projectile. Pet. App. 19a–20a.

In lieu of a circuit split, Petitioner posits that his Petition “presents a question of exceptional importance.” Pet. 29. Just as he “overstate[s] the evidence in the record,” Pet. App. 13a, Petitioner also exaggerates the significance of the questions presented and the practical consequence of a decision in his favor. What Petitioner actually seeks is the correction of a purported error in the Eighth Circuit’s application of *its own* precedent in the “particular circumstances” of this case. Petition for a Writ of Certiorari, *Officer Benjamin M. Bauer v. Ethan Daniel Marks*, No. 24-616 (U.S. filed Dec. 3, 2024). According to Petitioner, the Court “should use this case as a vehicle to remind lower courts that they are bound by the instructions set forth by this Court governing qualified immunity.” Pet. 30. Petitioner’s request to make an example of the Eighth Circuit is not a question of exceptional importance. Nor is it obvious that lower courts need such guidance—this Court issued its decision in *Barnes* in May 2025, a mere 13 months before Petitioner filed this Petition. Since then, the decision has only been examined or discussed in a couple dozen circuit opinions. Other than disagreeing with the Eighth Circuit’s treatment of the facts here, Petitioner has failed to identify any broad error or conflict that needs correcting.

Moreover, the Eighth Circuit’s decision is limited, on its face, to the unique circumstances of “this case.” Pet. App. 9a, 10a, 19a, 20a. That the Eighth Circuit recently revisited *Barnes* in another excessive force matter involving a less-lethal launcher (occurring in the aftermath of George Floyd’s murder, no less) and found that the officer there *was* entitled to qualified immunity demonstrates that the Eighth Circuit understands the parameters of the analysis. See *Bartz v. City of Minneapolis*, 170 F.4th 682, 688 (8th

Cir. 2026) (distinguishing *Marks II* based primarily on the distance between the officer and the plaintiff at the time of the shooting, as well as the nature of the injuries suffered). Even if the Court were to decide, as Petitioner requests, “[i]t was not clearly established on May 28, 2020, that [Petitioner’s] use of a less-lethal projectile against Marks” was objectively unreasonable “under the circumstances,” such a narrow and individualized decision is unlikely to have broad impact. Pet. 30. Petitioner’s request for individual relief undermines his claims regarding the importance of the issues he raises, and the Court should decline to intervene. *See Boag v. MacDougall*, 454 U.S. 364, 366 (1982) (O’Connor, J., concurring) (“The effectiveness of this Court rests in part on its practice of deciding cases of broad significance and of declining to expend limited judicial resources on cases . . . whose significance is limited to the parties.”).

IV. This Interlocutory Appeal Does Not Present a Reviewable Legal Question

Even if a circuit split or exceptionally important question existed, this interlocutory appeal presents no reviewable legal question because it turns on disputed issues of material fact that are not subject to interlocutory review. Although public officials may appeal summary judgment orders denying qualified immunity despite the “final judgment” rule, such appeals are limited to questions of law. *Johnson*, 515 U.S. at 309. Appellate courts lack jurisdiction to review “‘evidence sufficiency,’ *i.e.*, which facts a party may, or may not, be able to prove at trial.” *Id.* at 313; *see also* Pet. App. 7a–8a (“The sufficiency of the evidence, meaning which facts a party may be able to prove at trial, is unreviewable.”). Here,

this Court may review “the purely legal issue [of] what law was ‘clearly established[,]’” but lacks jurisdiction to entertain Petitioner’s challenges to the underlying facts, and material fact disputes, identified by the courts below. *Id.* “[I]nstant appeal is not available” where, as here, the “court determines that factual issues genuinely in dispute preclude summary adjudication.” *Ortiz v. Jordan*, 562 U.S. 180, 188 (2011).

Here, the Eighth Circuit rightly found Petitioner is not entitled to qualified immunity because fact issues are entwined with the “clearly established” analysis. Pet. App. 23a (“On this record where disputed issues of material fact exist such that the issues of law cannot be decided without findings on the central fact issues, Officer Bauer is not entitled to qualified immunity.”). A jury must evaluate, for example, the degree and immediacy of any threat Marks posed, the nature and extent of the contact between Marks and Officer Pobuda, and where Petitioner aimed his launcher before shooting Marks in the eye. *Id.* 19a–22a. While a jury “might agree with [Petitioner’s] assessment of the situation,” Marks made “a compelling showing” that Petitioner used clearly disproportionate force when shooting an unarmed Marks in the eye socket after Officer Pobuda ended their brief scuffle by forcefully shoving him backwards. *Id.* 22a. This is enough to deny the Petition.

Petitioner’s attempt to recast his fact disputes as a legal issue by claiming the Eighth Circuit’s articulation of the right was insufficiently “particularized” rings hollow. Pet. 33–34. While “courts should define the ‘clearly established’ right” based on “the ‘specific context of the case,’” they “must take care not to define a case’s ‘context’ in a manner that imports genuinely disputed

factual propositions.” *Tolan*, 572 U.S. at 657. Disputed facts enmeshed with the qualified immunity analysis must be decided by a jury. *Id.* at 657–59. For example, a jury might reject the dissent’s portrayal of the scene as violent and chaotic, “nearing a flashpoint,” as did the Eighth Circuit majority. Pet. App. 14a–16a, 19a–20a. To accept Petitioner’s contentions that Marks was “not a mere misdemeanor,” attempted to disarm Officer Pobuda, was readying to fight, and posed an immediate threat would permit Petitioner to impermissibly manufacture appellate jurisdiction by using qualified immunity verbiage to cloak factual disputes as legal ones. *See Ortiz*, 562 U.S. at 190–91.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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