

No. 25-1413

IN THE SUPREME COURT OF THE UNITED STATES

BENJAMIN M. BAUER,
Petitioner,

v.

ANNE ELIZABETH ALMA MARKS,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

By vacating and remanding *Marks I* for further consideration in light of *Barnes v. Felix*, 605 U.S 73, 79 (2025), this Court unanimously questioned whether the Eighth Circuit had employed the moment-of-threat rule repudiated in *Barnes*, and instructed the Eighth Circuit to analyze Officer Bauer’s use of force under the totality of the circumstances. In response to this explicit instruction, a divided panel of the Eighth Circuit declared it had not employed the moment-of-threat rule in *Marks I* at all, despite its explicit statements in that opinion that it was analyzing the force “at the precise moment” the seizure was effected and that it would not focus “on the events leading up” to the seizure. (App.43a, App.46a.) The divided panel merely deleted all explicit references to the moment-of-threat rule but otherwise issued a decision in *Marks II* denying qualified immunity to Officer Bauer still clearly employing the moment-of-threat analysis held impermissible in *Barnes*.

Respondent argues that a circuit court’s disregard for an Order of this Court is unimportant and unworthy of review. (Opp. 26-28) But this Court’s instructions and precedent are binding on lower courts, not optional. This Court should require the Eighth Circuit to faithfully adhere to, and not ignore, this Court’s directives in this case.

Moreover, this Petition presents an exceptionally important issue for review. This Court has long recognized that qualified immunity is a matter of public importance, *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 611 n.3 (2015), as a lower court’s improper

denial of qualified immunity raises the real risk that an official, fearing liability and harassing litigation, will be unduly inhibited from discharging their governmental duties. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987).

Judge Stras’ dissent makes clear that denying Officer Bauer qualified immunity imposes those societal costs, “Today’s message is unmistakable: ‘even in the absence of a clearly controlling legal rule, *think twice before acting*, regardless of whether your own life [or another’s] is at stake, because a court may step in later and second-guess your decision.’” (App.61a)(emphasis added). Moreover, this Petition presents a particularly good vehicle to reaffirm this Court’s precedent affording deference to an officer’s split-second decision making, *Graham v. Connor*, 490 U.S. 386, 396-397 (1989), and requiring courts to apply the facts as depicted in video evidence, *Scott v. Harris*, 550 U.S. 372, 381 (2007).

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

As Judge Stras’ dissent makes clear, the divided panel does not “identify a single case involving ‘similar circumstances’ that would have provided ‘fair notice’ that [Officer Bauer’s] actions ‘violated [a] Fourth Amendment’ right.” (App.25a.) No case involving a protest. No case involving a less-lethal projectile. No case involving an assaultive plaintiff. The denial of qualified immunity here seriously undermines this Court’s instruction that “police officers are entitled to qualified immunity unless existing precedent ‘squarely governs’ the specific facts at issue”. *Kisela v. Hughes*, 584 U.S. 100, 104 (2018).

**A. The Divided Panel Does Not Identify Any
Caselaw Providing Fair Notice That Use Of
A Less-Lethal Projectile Would Constitute
Unreasonable Deadly Force.**

The divided panel improperly denied Officer Bauer qualified immunity because it found he conceivably used deadly force and analyzed the force at a high level of generality finding “it was clearly established that it is unlawful to shoot an unarmed man who was falling and posing no imminent threat to officers or to anyone else.” (App.17a.) Such a high-level “rule” has been rejected by this Court. *Mullenix v. Luna*, 577 U.S. 7, 12 (2015)(rejecting as too high-level the proposition “that a police officer may not ‘use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others’”). The problem with such a “rule” is compounded not only by the absence of any Supreme Court or Eighth Circuit precedent prior to May 28, 2020, holding that shooting *less-lethal* projectiles in a *riotous* protest is unreasonable deadly force, but also that caselaw on the subject points to the opposite conclusion.

In *White v. Jackson*, 865 F.3d 1064, 1070-1071, 1073, 1076, 1079 (8th Cir. 2017), the Eighth Circuit found that use of less-lethal projectiles in a protest was reasonable and nonlethal force. Respondent tries to minimize *White*, claiming it did not set a “categorical” rule that use of less-lethal projectiles constitutes non-deadly force. (Opp. 22.) But whether *White* sets a categorical rule is immaterial. *White* created a gray area in which officers could reasonably believe the Eighth Circuit found

that less-lethal projectiles used in a protest are reasonable force, and the Eighth Circuit even described projectiles to the face as “nonlethal” projectiles. *White*, 865 F.3d at 1071 (“police officer shot him in the face with a nonlethal projectile”). Officers are entitled to qualified immunity if they act “within a gray area and transgressed no bright lines clearly established by existing case law.” *Sessler v. City of Davenport, Iowa*, 102 F.4th 876, 879, 884 (8th Cir. 2024).

Respondent concedes that the “touchstone of qualified immunity is notice.” (Opp. 21.) This Court holds that precedent must not only involve “similar facts” but must “provide an officer notice that a specific use of force is unlawful.” *Kisela*, 584 U.S. at 105. Respondent does not identify any controlling caselaw that analyzed when the use of a less-lethal projectile could be considered unreasonable force in the situation faced by Officer Bauer.¹ Instead, the divided panel relied only on inapposite cases involving a lethal firearm against a “visibly retreating” subject and a squad car during a welfare check call. (Pet. 11 (citing App.48a-49a.)) Those did not provide fair notice to Officer Bauer that his use of force was clearly unlawful.

¹ Contrary to Respondent’s suggestion, this Petition does not advance a novel-weapon exception. (Opp. 22.) As of May 28, 2020, the Eighth Circuit had addressed less-lethal projectiles but never intimated that use of less-lethal projectiles could constitute deadly force. *E.g. Bernini v. St. Paul*, 665 F.3d 997 (8th Cir. 2012); *White*, 865 F.3d 1064.

Deviating from caselaw, Respondent contends that Officer Bauer’s acknowledgment of department training or manufacturer warnings on less-lethal projectiles is sufficient to deny qualified immunity. (Opp. 21.) But that did not put Officer Bauer on notice that his particular use of a less-lethal projectile would constitute unreasonable deadly force under the law. Department training or manufacturer warnings cannot substitute for clearly established law for Fourth Amendment purposes. *City and Cnty. of San Francisco v. Sheehan*, 575 U.S. at 616; *Frasier v. Evans*, 992 F.3d 1003, 1015 (10th Cir. 2021)(“judicial decisions are the only valid interpretive source of the content of clearly established law, and, consequently, whatever training the officers received ... was irrelevant to the clearly-established-law inquiry.”).

B. The Divided Panel Impermissibly Relied On Factually Inapposite Cases For Its Force Analysis.

The divided panel defined the clearly established law as prohibiting an officer from using more than *de minimis* force on a “non-threatening misdemeanor.” (App.21a.) Even using this too high-level standard, Officer Bauer’s force was not clearly unlawful because, from the perspective of a reasonable officer and the video, Officer Bauer faced someone who was (1) behaving threateningly, and (2) was not a mere misdemeanor.

Respondent incorrectly asserts that this Petition asks the Court to “revisit” or “reweigh” the “summary judgment record,” “evidence,” or “disputed facts.” (Opp. 9, 10, 16, 18, 24, 26.) Not so. Respondent conceded, and both lower courts found, that Marks engaged in

threatening conduct. Respondent has conceded that Marks yelled, “Back up, bitch!” and “shov[ed]” Officer Pobuda. (Doc. 119 at 13.) The district court found that Marks “shouted, ‘Back up, bitch!’” and the “BWC video shows that Marks hit Officer Pobuda[.]” (App.66a, App.85a.) The divided panel found that Marks “shouted with one of his hands clenched in a fist, ‘Back up, bitch!’” and Officer Bauer observed “Marks strike Officer Pobuda.” (App.3a.) All describe Marks physically (and verbally) threatening Officer Pobuda.²

Despite these facts, the divided panel decided it is for a “jury to interpret the nature and extent of the contact between Marks and Officer Pobuda.” (App.22a.) The divided panel’s decision is plainly contrary to this Court’s instruction in *Scott v. Harris*, 550 U.S. at 380-381 (2007), which compelled courts to view the “facts in the light depicted by the videotape.”

Respondent suggests the video is off-limits to this Court, claiming a jurisdictional bar to review the video and the Petition at large. (Opp. 17-18, 28-30.) The cases Respondent cites, *Johnson v. Jones*, 515 U.S. 304, 316 (1995) or *Ortiz v. Jordan*, 562 U.S. 180 (2011), do not address this Court’s appellate jurisdiction over factual assertions utterly discredited by video evidence, which

² Respondent makes much of Officer Pobuda’s comment that he saw no need to personally use force against Marks after they separated. (Opp. 3, 8, 9, 15, 24.) But *Barnes* confirms that the totality-of-the-circumstances analysis involves the facts and circumstances as “then known to the officer.” 605 U.S. at 80. As Judge Stras explained, “All that matters here is whether ‘a reasonable officer in [*Officer Bauer’s*] position could have believed’ he needed to use force to subdue Marks, not whether everyone on the scene thought so.” (App.27a, n.3.)

did not exist in those cases. *Scott* controls with respect to such video evidence. And, unlike *Raines v. Counseling Assoc., Inc.*, 883 F.3d 1071 (8th Cir. 2018), Respondent does not urge that the video here is “inconclusive.” At summary judgment, Respondent conceded, “The reality” is “shown . . . in the relevant videos.” (Doc. 119 at 13.)

Pursuant to *Scott*, the video controls here, and that video “utterly discredits” any suggestion that Officer Bauer faced a non-threatening individual:





Additionally, Marks would not have been viewed as a misdemeanor to a reasonable officer on scene.³ At

³ Respondent remarks that prosecutors declined to press charges against Marks. (Opp. 5, 16.) That is irrelevant to the legal issue before this Court. While a prosecutor must prove *Marks*' intent

summary judgment, Marks acknowledged that he “grabbed at [Officer] Pobuda’s baton[.]” (Doc. 119 at 13.) The district court made the factual finding that Marks “grasped [Officer Pobuda’s] riot baton.” (App.66a.) The divided panel also found that Marks tried to “grasp [Officer Pobuda’s] riot baton.” (App.3a.) The video shows the same thing:



A reasonable officer certainly could have viewed Marks’ grabbing or grasping at the baton as an attempt to disarm Officer Pobuda, a felony-level crime. Minn. Stat. § 609.504.

Accordingly, the caselaw relied upon by the divided panel, which involved non-threatening misdemeanants, “lack[s] factually ‘similar

in grabbing the weapon beyond a reasonable doubt, qualified immunity only looks at how an *officer* might reasonably see the conduct. *Barnes*, 605 U.S. at 79.

circumstances” and cannot be the basis for denying Officer Bauer qualified immunity. *District of Columbia v. Wesby*, 583 U.S. 48, 64 (2018).

II. The Divided Panel Blatantly Disregarded This Court’s Instruction.

As Respondent notes, “*Barnes* had little impact on [the divided panel’s] decision” in *Marks II*. (Opp. 8.) That is because the divided panel clearly disregarded *Barnes*. The only way the divided panel could have reached the conclusion it did was to disregard the events leading up to Officer Bauer’s use of force and apply dispositive weight to the circumstances existing at the precise moment force was used, the exact approach repudiated by this Court in *Barnes*.

According to Respondent, the divided panel’s decision in *Marks II* “correctly explained” that *Marks I* considered the “circumstances at the time force was used as one part of a broader totality-of-the-circumstances analysis.” (Opp. 12.) Respondent can only cite to *Marks I*’s single, passing comment that it will “*generally* consider the totality of the circumstances” in evaluating an officer’s use of force. (Opp. 13)(emphasis added). That reference, however, is immediately preceded by the divided panel’s declaration that it “evaluate[s] objective reasonableness from the point of view of the officer at the *precise moment* that the seizure is effectuated.” (App.43a)(emphasis added).

The factual concessions, court findings, and video evidence demonstrate that the divided panel improperly disregarded Marks’ serious assault and felony attempt to

disarm Officer Pobuda occurring in the second before Officer Bauer fires, as well as the fact that the officers were in the midst of a riot. Respondent excuses this, claiming “*Barnes* did not require the Eighth Circuit to assign equal weight to every event in the encounter” and the divided panel “properly gave significant weight to the intervening events that changed the threat analysis before” Officer Bauer used force. (Opp. 14-15, 17.) But it is *undisputed* and *indisputable* given the video footage that the “event” – Marks’ assault and felony-level attempt to disarm Officer Pobuda – occurred *less than a fraction of a single second* before Officer Bauer used force. (Pet. 7.) It is objectively reasonable for Officer Bauer to consider a threat still active, especially during a riot directing anger at officers, when the source of the threat has merely been pushed a few feet away but is otherwise fully capable of resuming his prior attack. Respondent’s argument is that, in this dangerous situation, Officer Bauer should have changed course and given Marks another chance to attack a police officer rather than attempting to neutralize the threat by firing his less-lethal launcher. However, as in *Mullenix*, Respondent can cite no caselaw denying qualified immunity to an officer in Officer Bauer’s situation who made a split-second decision trying to minimize a threat to other officers. 577 U.S. at 15-16. This Court’s precedent does not hold officers to the unreasonable demand of reevaluating and changing course in less than a fraction of a single second.

Moreover, the divided panel failed to consider the totality of the circumstances transpiring within that fraction of a second. Though Marks had been separated from Officer Pobuda, he continued to clench his hand in a

ready-to-fight fist, objectively suggesting an intent to resume the fight. Respondent urges the Court not to consider this fact because it purportedly seeks to “resolve disputed inferences” in Officer Bauer’s favor. (Opp. 17.) But to be a “disputed” matter, there has to be a factual dispute.

Respondent never disputed that Marks’ hand remained clenched in a fist when Officer Bauer used force – not at summary judgment, not at the Eighth Circuit, not to this Court on the first petition, not even now. After all, the video depicts Marks continuing to clench his hand in a fist. The law in the Eighth Circuit offers relief to Officer Bauer if a reasonable officer could believe that Marks continued to clench his fist because he was likely to fight back. *Kohorst v. Smith*, 968 F.3d 871, 879 (8th Cir. 2020)(when a suspect who had previously been physically resistant “began twisting his hands” it “could lead to an objectively reasonable belief that [plaintiff] would resist or fight back.”).

That the divided panel wholly ignored Marks’ clenched fist at the time force was used does not create a “disputed” fact; it reflects the divided panel’s failure to “consider all the relevant circumstances” as *Barnes* requires. 605 U.S. at 76. In contrast, the obvious possibility of a continued fight was not lost on Judge Stras, whose dissent remarks, “Think of the split-second decision [Officer Bauer] faced: give a six-foot-tall, 200-pound man who had just attacked a fellow officer a second chance or neutralize him with a chemical round.” (App.25a.) Judge Stras continued, “During the chaos, Officer Bauer made a ‘split-second judgment[]’ to use his

less-lethal launcher rather than giving an angry six-foot-tall man another chance to attack a fellow officer.” (App.29a.)

Beyond its disregard for Marks’ threatening conduct, the divided panel’s focus on the precise moment and location where force was used discounts the totality-of-the-circumstances inquiry. Respondent argues that the Court should reject the Petition’s description of the scene as a “modern-day war zone.” (Opp. 14.) To be clear, it was the live, on-scene news reporter that described the scene as a “modern-day war zone.” (Doc. 103-2 (9 News).) That description accords with the news video showing a hostile crowd numbering over 500 people, assaultive individuals throwing rocks and bricks at officers, and medical emergencies arising from separate stabbing and baseball bat attacks. (*Id.*) The same reporter declared that officers were “not safe” amongst the large, hostile crowd at the exact moment Marks approached Officer Pobuda. (Doc. 103-2, 08:57.) The live news video, which records Officer Bauer’s arrival and emergent exit with an incapacitated protestor, is less than nine minutes long. (*Id.*)

Respondent reiterates that the divided panel described the protestors closest to Officer Bauer to be compliant and non-threatening at the precise moment force was used. Even if this were so, that assessment discounts the totality-of-the-circumstances analysis required under *Barnes*. The author of the divided opinion described assaults, terror, and a limited ability to move creating a “completely chaotic,” “hazardous,” “really dangerous situation” for officers a mere ninety seconds

before the use of force at issue here. (Pet. 27, n.2.) *Barnes* required the divided panel to give proper weight to these “facts and circumstances leading up to the climactic moment” force was used, but the divided panel artificially segmented the incident without regard for how those “earlier facts and circumstances may bear on how a reasonable officer would have understood and responded” to Marks’ conduct. 605 U.S. at 76, 80. Additionally, the divided panel ignored that, to a reasonable officer, the scene remained chaotic, hazardous, and dangerous because officers remained surrounded by a large, hostile crowd, including armed protestors, and some members of the crowd were building a barricade to prevent the officers’ escape. As this Court instructed in *Barnes*, all these “relevant circumstances” must be included in a court’s assessment of whether Officer Bauer’s decision to fire his launcher, stopping the threat presented by Marks to the officers, was reasonable. *Id.* at 76. That the divided panel failed to fully account for these relevant circumstances shows they have disregarded this Court’s instruction and such disregard must not be overlooked.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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