No. 26-465

Supreme Court of the United States

JOSHUA HOLLAMON,
Petitioner,
v.
COUNTY OF WRIGHT, MINNESOTA, *et al.*,
Respondents.

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

BRIEF OF AMICUS CURIAE NATIONAL POLICE ASSOCIATION IN SUPPORT OF GRANTING THE PETITION FOR A WRIT OF CERTIORARI

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Interests of the Amicus[1]

The National Police Association ("NPA") is a nonprofit corporation organized under Indiana law. The NPA pursues a general mission of advancing law enforcement interests, including participating in cases as amicus curiae when the cases raise legal questions important to law enforcement. The NPA is a national association representing police officers across the country.

On the merits, NPA supports Respondents in this action, but supports granting the Petition as a vehicle to support and defend the discretion of police officers to respond to increasing and increasingly difficult circumstances when demonstrations and protests devolve into aggressive and illegal attacks on public or private operations. District court and many Circuit court decisions have expanded constitutional rights for participants in such mobs, leading to a de facto ban on the use of less-than-lethal munitions for crowd control (as opposed to specific targeting of particularly violent mob members). These developments threaten to paralyze police ability to adequately maintain public order.

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[1] No counsel for any party authored this brief in whole or in part, nor did parties or their counsel make any monetary contribution intended to fund its preparation or submission. Counsel of record received notice of the intent to file this brief more than ten calendar days before it was due.

The NPA therefore seeks to clarify, simplify and minimize constitutional constraints on the use of less-than-lethal force in this context. The Petition provides an appropriate vehicle for this Court to establish broad means of crowd control that are not subject to Fourth Amendment restrictions.

Summary of Argument

Petitioners ask this Court to determine whether "police may use significant force against a person engaged in nonviolent civil disobedience—who is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest—because he refuses to obey their commands". (Petition at i.) The appropriate question, actually presented on the facts below, is whether police presented with organized criminal attacks against private (or public) property must refrain from the use of less-than-lethal munitions to disperse or repel attackers. This Court should grant the Petition and confirm that that the only federal constitutional limitation applicable in such circumstances is imposed by *substantive* due process considerations, leaving a § 1983 remedy for only those extraordinarily rare cases in which police riot control conduct "shocks the conscience of the court".

This is an important question of federal constitutional law as to which the federal courts of appeals have divergent approaches. This Court

previously recognized the significance of the question now presented and expressly reserved it for further decision. *Torres v. Madrid*, 592 U.S. 306, 317 (2021) ("We do not accept the dissent's invitation to opine on matters not presented here—pepper spray, flash-bang grenades, lasers, and more"). In the context of rising public disorder and a sharp split among the federal circuit courts that threatens police ability to control violent mobs, the Petition now provides an appropriate vehicle for this Court to take up the issue.

Argument

I. THE PETITION PRESENTS A VITAL QUESTION OF FEDERAL CONSTITUTIONAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Rule 10(c) favors granting the Petition when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court". The question is vital, and this Court should stamp out efforts to misuse federal constitutional constraints to categorically bar use of less-than-lethal force to disperse crowds as lacking any historical or textual basis.

A. Rising Public Disorder Makes the Question Vital.

This Court can take judicial notice of rising public disorder in the United States that sees escalating and patently unlawful attempts to interfere with governmental and private activity opposed by organized groups. Modern protestors have long since abandoned the more passive and spiritually centered civil disobedience practiced by Martin Luther King, Jr.,[2] and his followers in favor of making disruption of traffic, commerce and emergency services their primary objectives—as well as actively resisting arrest.

More and more often, the Nation's police officers find themselves in situations they do not control, unable to make a Constitutional "seizure" of any particular person or persons, but facing emergent circumstances in which the preservation of public order requires the use of force. In the case below, in the words of the Court of Appeals, police faced "a deliberate attempt to overwhelm officers and gain access to private property for the purposes of causing chaos and disrupting construction". Pet. App. 9a.

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[2] For example, Martin Luther King, Jr., wrote in his *Letter from Birmingham Jail* that one who breaks an unjust law must do so "openly, lovingly, and with a willingness to accept the penalty" (available at https://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html (accessed 10/16/26)).

These protestors were utilizing "'sleeping dragons' or 'lock boxes'—devices used by more and more activists to locket themselves to machinery or equipment so that the machines cannot function". Pet. App. 17a-18a. Such devices are far more difficult to remove than mere padlocks and chains, being specifically constructed to defeat law enforcement efforts to remove the criminals.[3] Moreover, their successful deployment increases the risk of serious injuries to protestors in the removal process.[4]

Action to disperse mobs *before* such devices are successfully used minimizes these risks. Use of less-than-lethal munitions also prevents riot control from devolving into "hand-to-hand struggle during which, necessarily, the safety of the arresting officer was at risk". *Tenn. v. Garner*, 471 U.S. 1, 14-15 (1985).[5] Limiting the use of less-than-lethal munitions imposes serious risk on the Nation's police officers without any worthwhile risk

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[3] *See generally* R. Leverone, "'Sleeping dragons': An introduction to protestor lockdown devices," Police 1, Feb. 26, 2024 (available at https://www.police1.com/police-training/sleeping-dragons-an-introduction-to-protester-lockdown-devices (accessed 10/15/26)).

[4] *Ibid.*

[5] Recognizing the danger of mobs to those other than police, at least one federal case has denied qualified immunity to police officers for "exposing [plaintiffs] to the danger of an unruly mob". *Hernandez v. City of San Jose*, 897 F.3d 1125, 1133 (9th Cir. 2018).

reduction for the rioters—a blow from a nightstick can cause more damage than a pepperball.

Research (albeit not specific to the crowd control context) has confirmed that hand-to-hand struggle increases risk for both officer and suspects—in part because police use of weapons often ends a subject's resistance. *E.g.*, P. Bulman, *Police Use of Force: The Impact of Less-Lethal Weapons and Tactics*, National Inst. Justice J., No. 267 (Winter 2010) (combined agency analysis showed use of pepper spray and tasers decreased the likelihood of suspect injury by 65 and 70 percent).

More generally, criminal mobs impose enormous, increasing and largely unrecoverable costs upon the Nation's police departments, taxpayers and targeted private entities.[6] This includes not merely the direct costs of public order enforcement, but also the cost of law enforcement training to defeat "sleeping dragons" and other protest technology.[7] Other collateral harm may

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[6] Civil remedies are of course available, but individual rioters are frequently judgment-proof and the scale of damages from protests such as the one below can be enormous and almost certainly unrecoverable. *See, e.g., Energy Transfer LP v. Gion*, N.D. 93, 35 N.W.3d 179 (2026) (noting $666 million award from "coordinated, sometimes violent campaign against Energy Transfer's lawful pipeline operations").

[7] *See, e.g.,* FEMA Course FFE PER-202, "Field Force Extrication Tactics" (FEMA) (available at https://cdp.dhs.gov/training/course/PER-202 (accessed 10/15/26).

arise up to and including the death of innocent civilians when protestors block traffic—a 2014 protest blocking Interstate 93 leading into Boston involving the use of "sleeping dragons" produced "confirmed reports of ambulances being stuck while in route to local trauma centers".[8]

As Justice Felix Frankfurter long ago observed,

> "Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed."

Callanan v. United States, 364 U.S. 587, 593-94 (1961).

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[8] R. Leverone, "Poking the Sleeping Dragon," *Medium*, Oct. 21. 2015 (available at https://medium.com/homeland-security/poking-the-sleeping-dragon-fed7fffe4fc5 (accessed 10/15/26)).

More specifically, it has long been recognized that "group disorder" or "mob behavior" is more "dangerous and frightening" than "individual misconduct" and "poses special problems for the police". *People v. Barnes*, 2017 IL App. (1st) 142886, P56, 89 N.E.3d 969, 979 (Ill. App. 2017) (citing Model Penal Code § 250.1 commentary). Scientific literature confirms that "[s]erious assaults [on officers] typically occurred when police confronted or were surrounded by hostile gatherings, with the risk to officers increasing with the number of offenders present".[9]

B. This Court, Not Lower Courts, Should Make the Policy Choice as to Constitutional Constraints on Crowd Control.

Federal judicial decision making invoking the Fourth Amendment to protect an imagined right of criminal conspirators to misbehave in public is crippling the effectiveness of the Nation's police and fostering widespread public disorder. In substance, the federal judiciary is imposing an inalterable policy choice effectively forbidding police use of less-than-lethal munitions or gas to disperse mobs blocking public traffic or attacking private property. *See, e.g., Packard v. Budaj*, 86

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[9] T. Pritz & S. Chou, "External workplace violence toward police officers: a scoping review," *Aggression and Violent Behavior* (April 2025) (available at https://www.sciencedirect.com/science/article/pii/S1359178925000059?via%3Dihub (accessed 10/20/26)).

F.4th 859, 866 (10th Cir. 2023) (no immunity under *Graham* for use of less-than-lethal munitions on protestors in a crowd not identified with individual crimes, despite widespread riots and violation of emergency curfew).

The Fourth Amendment's protection of "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" (U.S. Const. Am. IV) was never intended to apply to police measures to defend public spaces and private property by dispersing criminal mobs.

Application of the Fourth Amendment invokes a test of reasonableness for the use of force that depends upon "the circumstances of each particular case, 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". *Graham v. Connor*, 490 U.S. 386, 396 (1989). These factors, though workable in the context of evaluating individual arrests, are not well suited for assessing constitutional limitations on crowd control.

Under the *Graham* approach, the federal judiciary is typically presented with an individual § 1983 plaintiff and the severity of his or her individual crime is treated with utter disregard for the threat posed by the organized criminal mob involved. *See, e.g., Budaj, supra*; *see also Zorn v. Linton*, 607 U.S. 568, 577 (2026) (Sotomayor,

Kagan & Jackson, JJ., dissenting). This approach all but ignores the greater dangers produced by mobs and mob action.

Tolerance of violent physical disorder as a Constitutionally mandated policy choice would be shocking to the Founders. Until passage of the Posse Comitatus Act of 1878, there was a very substantial use of the *military* for riot control.[10] For decades afterward, the federal judiciary supported the concept that even live ammunition was properly utilized to control violent mob behavior.[11]

While modern sensibilities are reluctant to characterize mob action as "insurrection," and certainly unwilling to authorize the use of deadly force to control it, the notion that the U.S. Constitution imposes substantive limits on the use of less-than-lethal force in this context lacks any basis in the history and meaning of the Fourteenth Amendment, much less the Fourth Amendment.

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[10] *See generally* R. Coakley, *The role of federal military forces in domestic disorders*, 1789-1878 (U.S. Army Center of Military History 2011).

[11] In the context of Colorado labor unrest, Justice Oliver Wendell Holmes wrote for this Court that

> ". . . no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment."

Moyer v. Peabody, 212 U.S. 78 (1909).

This Court can and should stop the misuse of the Fourth Amendment to limit crowd control. Absent this Court's intervention, efforts will likely continue to expand the Fourth Amendment to the point that "any intentional restriction on an individual's freedom of movement constitutes a seizure"—a goal explicitly sought in the "scholarly" literature. *E.g.,* S. Fields, *Protest Policing and the Fourth Amendment*, 55 U.C. Davis L. Rev. 347, 354 (2021).

II. FEDERAL CIRCUITS CONFLICT AS TO WHETHER FOURTH OR FOURTEENTH AMENDMENT STANDARDS CONTROL THE APPLICATION OF LESS-THAN-LETHAL FORCE TO DISPERSE CRIMINAL MOBS.

Rule 10(a) provides that a factor favoring grant of a writ of certiorari is that "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter". As set forth above, the matter is important, and the decision below conflicts with the approach taken in the First, Ninth and Tenth Circuits.

Here, the trial court correctly accepted defendants' primary argument that the use of force "which was intended to disperse a crowd rather than restrain, could not have been a Fourth Amendment seizure as a matter of law" (Pet. App. 27a), concluding that "no reasonable jury could

conclude that Sergeant Miller's use of the pepperball launcher constituted a seizure" Pet. App. 32a. The trial court carefully reviewed numerous cases in the protest context, noting that police did not apply force "to herd Plaintiffs into a certain location in way that protestors were unable to get away nor did they encircle them without a way out" Pet. App. 35a-36a (quoting *Dundon v. Kirchmeier*, 577 F. Supp. 3d 1007, 1040 (D.N.D. 2021).

Two members of the Court of Appeals below "assume[d], without deciding, that a seizure occurred," then upheld the trial court's dismissal on the basis that Sergeant Miller's use of force was reasonable under Fourth Amendment standards. Pet. App. 5a. Judge Kelly, concurring, adopted the trial court's view that there was no evidence that the plaintiff "was seized for purposes of his Fourth Amendment claim". Pet. App. 10a.

This Court's decision in *Pearson v. Callahan*, 555 U.S. 223 (2009), recognized it was "often beneficial" to first decide whether a particular federal constitutional right was invoked at all, but also permitted the procedure, utilized below, in which "a discussion of why the relevant facts do not violate clearly established law . . . make it apparent that in fact the relevant facts do not make out a constitutional violation at all". *Id.* at 236.

From the perspective of the NPA, resolving riot cases on the basis of qualified immunity avoids the more useful goal—which this Court can

achieve—of clearly establishing that police officers simply do not violate the Fourth Amendment in any context involving the dispersal of rioters, whether or not the less-than-lethal methods they use make physical contact with individual rioters.

Notwithstanding the *Pearson* avoidance in this case,[12] the rule is clear in the Eighth Circuit that use of less-than-lethal munitions to disperse mobs does not constitute a Fourth Amendment "seizure". In *Perkins v. City of Des Moines*, 168 F.4th 1100 (8th Cir. 2026), the Court squarely held that striking a protestor with a projectile in a riot situation did not constitute a "seizure" within the meaning of the Fourth Amendment. The Court correctly found no objective intent to restrain, but rather to clear the riot area. *Id.* at 1106; *see also Keup v. Sarpy Cnty.,* 159 F.4th 533, 538 (8th Cir. 2025).

The Ninth Circuit, by contrast, has insisted that an officer's intentional conduct in shooting pepperballs that incapacitated a protestor constituted a seizure without regard to any overall intent to detain or confine the crowd. *Nelson v. City of Davis*, 685 F.3d 867, 877 (9th Cir. 2012). More recently, the Ninth Circuit reiterated that rule where less-than-lethal munitions make

[12] *See also Darrah v. City of Oak Park*, 255 F.3d 301, 306 (6th Cir. 2001) (striking of protestor to repel interference in another arrest was reasonable under Fourth or Fourteen Amendment).

physical contact with protestors,[13] even where it was clear an individual protestor "was not being arrested". *Puente v. City of Phoenix*, 124 F.4th 1035, 1059 (9th Cir. 2024). While the Court provided qualified immunity to the officers in that case, its holding that mere firing of a projectile which strikes a protestor "constituted a seizure . . . [such] that there is a triable issue as to whether that use of force was objectively reasonable," *id.* at 1062, may well destroy qualified immunity in future cases.

The Tenth Circuit also invokes the Fourth Amendment to hold that "[t]he law is clearly established that an officer cannot shoot a protester with . . . less-lethal munitions when that protester is committing no crime more serious than a misdemeanor, not threatening anyone, and not attempting to flee." *Packard v. Budaj*, 86 F.4th 859, 863 (10th Cir. 2023) (quoting district court). That case involved, inter alia, a plaintiff who "kicked a gas canister between five and ten feet away," in the general direction of "officers . . . equipped with gas

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[13] In the *Puente* case, the Ninth Circuit was willing to declare that a class of those exposed to non-lethal munitions (without being hit by them) had excessive force claims governed by the Fourteenth Amendment's substantive due process coverage, not the Fourth Amendment, finding that the measures were "not objectively aimed at detaining or confining the class members". *Puente*, 124 F.4th at 1055. Permitting individual cases of those most affected by the munitions to proceed under the Fourth Amendment does not advance public order goals, though the *Puente* rule would protect officers from class-based Fourth Amendment claims by entire crowds.

masks that protected them from any gas from that canister". *Id.* at 867 (quoting district court). The Tenth Circuit equated intent to apply less-than-lethal munitions with intent to seize, stating that because "a reasonable jury could find Plaintiffs were subject to an intentional application of force, we find it difficult to imagine a circumstance in which Messrs. Packard and Duran would *not* be considered 'seized' for purposes of the Fourth Amendment". *Id.* at 865 n.7. The *Packard* case exemplifies how the individual plaintiff focus demanded by § 1983, coupled with Fourth Amendment standards, can cripple police ability to control hostile crowds; the Tenth Circuit denied the qualified immunity claims of the officers involved.

The First Circuit has also imposed Fourth Amendment standards without considering the "seizure" issue where a crowd invaded private property, refused to leave, and were "pushed, punched, hit by metal batons, and pepper sprayed in the face by federal agents". *Asociacion de Periodistas de P.R. v. Mueller,* 529 F.3d 52, 59 (1st Cir. 2008). It was clear the agents were not attempting arrests; the "the agents[] attempt[ed] to push the crowd through the narrow opening" out of the gated area they had entered. *Id.* at 56.

These Courts of Appeals are declining to give effect to this Court's longstanding requirement that "seizures" involve some attempt to "seize" the plaintiff, as is plain from the text of the Fourth Amendment. *E.g., County of Sacramento v. Lewis*, 523 U.S. 833, 865 (1986) (no seizure of individual

accidentally struck during high-speed chase). This principle was recently crystallized though this Court's statement in *Torres v. Madrid*, 592 U.S. 306 (2021), that "application of physical force to the body of a person *with intent to restrain* is a seizure, even if the force does not succeed in subduing the person". *Id.* at 309 (emphasis added).

Continuing confusion has also arisen from dicta in *California v. Hodari D.,* 499 U.S. 621 (1991), finding no "seizure" absent "a laying on of hands or application of physical force to restrain movement". *Id.* at 626. Advocates for a Fourth Amendment crowd control standard argue that "courts have repeatedly (and correctly) held that individuals directly targeted and hit with chemical agents like mace and pepper spray have been seized under *Hodari D.*'s *physical touching rule*". *Protest Policing*, *supra*, at 369 (emphasis added).

Where, as here, police seek to disperse a mob, physical contact with a member of the mob should not compel the conclusion that a Fourth Amendment seizure is involved. Police cannot effectively regain control of public property or defend private property without some physical contact with members of the crowd.

Granting the Petition and confirming that substantive due process standards, not Fourth Amendment standards, govern police use of non-lethal means to control crowds will help the Nation's police to preserve public order and avoiding the enormous and increasing costs of mob

action targeting public and private properties. Full constitutional protection under Fourteen Amendment standards will of course remain for use of force in bad faith, "maliciously and sadistically for the very purpose of causing harm". *See County of Sacramento v. Lewis*, 523 U.S. 833, 853 (1998) (citation omitted).

It should be also noted that the petitioner had ample opportunity to avoid the police action here but traveled in interstate commerce to seek the conflict (*see* Pet. App. 17a) and was told several times not to come over the fence—police employed "a variety of tactics, including shouting warnings not to enter, firing pepperball launchers, and spraying irritants at protestors to deter their advance". Pet. App. 16a-17a.

Physical attacks without warning may well run afoul of substantive due process standards—even ancient common law provided a reading of the riot act before quelling a riot forcibly. But nothing in the Constitution should foreclose the State from applying force, including less-than-lethal force that may cause pain or result in injuries, to rioters ignoring police commands to clear public ways and private property.

Conclusion

For the foregoing reasons, this Court should grant the Petition, and clarify the governing constitutional standard for crowd control where police take action to disperse a mob.

Respectfully submitted,

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