No. 26-____

IN THE

Supreme Court of the United States

SOPHIA WILANSKY,
Petitioner,

v.

MORTON COUNTY, NORTH DAKOTA, *et al.*,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner permanently lost all use of her left arm when a law enforcement officer shot her with an explosive munition while she was unarmed and retreating. She brought a Section 1983 lawsuit against that officer under the Fourth and Fourteenth Amendments, alleging that he violated her civil rights by using excessive force. The Eighth Circuit affirmed dismissal of Petitioner's Fourth Amendment claim, holding that no seizure had occurred because, in the Court's view, the officer's goal was to disperse, rather than to detain, her. The Eighth Circuit held that Petitioner's claim under the Fourteenth Amendment failed because the officer's conduct did not "shock the conscience."

The questions presented are:

1. Whether the standard for Fourteenth Amendment excessive force claims by unseized civilians is "shocks the conscience," as the Eighth and Ninth Circuits have held, or the "objective reasonableness" standard that applies to pretrial detainees under *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), as the Second and Eleventh Circuits have held.
2. Whether a crowd-control device intentionally deployed at a civilian always constitutes a seizure when it stops the civilian's movement, as the Second, Ninth, and Tenth Circuits have held, or only when the officer's intent was to detain the civilian, as the Eighth and Sixth Circuits have held.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Sophia Wilansky.

Respondents (defendants-appellees below) are Morton County, North Dakota; Kyle Kirchmeier; Adam J. Dvorak; and Jonathan R. Moll.

Thomas Iverson was a defendant in the district court below.

RELATED PROCEEDINGS

The following proceedings are directly related to this proceeding, as defined by S. Ct. R. 14(1)(b)(iii):

Wilansky v. Bakke, No. 24-1919 (8th Cir.). The final order in this case was entered on June 24, 2026.

Wilansky v. Bakke, No. 3:23-cv-00142 (D.N.D.). The final order in this case was entered on April 3, 2024.

Wilansky v. Morton County, North Dakota, No. 24-3132 (8th Cir.). The final order in this case was entered on October 5, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sophia Wilansky respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 179 F.4th 633 (2026). Pet. App. 1a. The opinion of the United States District Court for the District of North Dakota is not reported but is available on Westlaw at 2024 WL 1543020 (D.N.D. Apr. 5, 2024). Pet. App. 15a.

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on June 24, 2026. Pursuant to this Court's order of August 19, 2026, the deadline for filing a petition for a writ of certiorari was extended to November 21, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides in pertinent part:

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

was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case presents the important and frequently recurring issue of how to analyze excessive force claims brought by civilians injured by crowd-control devices deployed at them by law enforcement officers. Crowd-control devices—also called "less lethal" or "less than lethal" weapons—include munitions such as flashbangs, stinger ball grenades, rubber bullets, foam batons, and beanbags munitions. Because these devices are often deployed in the context of protests, where the ultimate goal of law enforcement is to disperse rather than detain people, the circuit courts have struggled with whether and when civilians knocked down and injured by these devices have been "seized" under the Fourth Amendment. And when civilians injured by these devices are not seized, the circuit courts disagree on what standard to apply to those civilians' excessive force claims under the Due Process clause of the Fourteenth Amendment.

This case—with its straightforward facts adjudicated as a matter of law on a motion to dismiss—presents the ideal vehicle for resolving these circuit splits and clarifying the law on excessive force in non-arrest circumstances. Petitioner's left arm was almost completely severed when a law enforcement officer intentionally shot her with an explosive less-lethal munition while she was unarmed and fleeing. The officer claimed to be trying to disperse, rather than detain, her. Petitioner brought excessive force claims under both the Fourth and Fourteenth Amendments.

The Eighth Circuit granted the officer qualified immunity on Petitioner's Fourth Amendment claim on the grounds that the officer's intent to disperse meant there was no "clearly established" seizure. In so holding, the Eighth Circuit departed from the Second, Ninth, and Tenth Circuits, which all would have concluded that Petitioner was, in fact, seized and therefore had a viable Fourth Amendment claim.

The Eighth Circuit then denied Petitioner's Fourteenth Amendment claim after applying a "shocks the conscience" standard to the officer's conduct. The Eighth Circuit expressly declared that it disagreed with the Second Circuit, which had previously held that excessive force claims brought under the Fourteenth Amendment must be analyzed under the same "objective reasonableness" standard that applies to Fourth Amendment claims. The Eighth Circuit also expressly declined to follow this Court's decision in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), which held that Fourteenth Amendment excessive force claims brought by pretrial detainees must be analyzed under the "objective reasonableness" standard. With no explanation or plausible justification, the Eighth Circuit declared that the Fourteenth Amendment excessive force standard this Court articulated in *Kingsley* applies only to pretrial detainees and not to unseized civilians like Petitioner.

The Eighth Circuit's decision deepens two different circuit splits. It also undermines *Kingsley* and allows law enforcement officers to use excessive force with impunity in the crowd-control context. This Court should step in and resolve the circuit splits on the appropriate standard for unseized civilians' Fourteenth Amendment excessive force claims and the appropriate way to analyze whether civilians injured by crowd-

control devices in the context of protests have been seized. This is a pressing issue because of the increasingly frequent use of crowd-control devices by law enforcement. Both law enforcement officers and protesters deserve clear guidance on the Constitutionally appropriate use of these devices.

A. Statutory Background: The Applicable Excessive Force Standard Depends on the Constitutional Amendment at Issue.

In 1871, Congress created a private right of action against state and local government officials who violate constitutional and statutory rights under the color of law. 42 U.S.C. § 1983. Section 1983 is the statute under which individuals wrongfully injured by law enforcement bring excessive force claims. But while Section 1983 is a vehicle for excessive force claims, it is not itself the source of any substantive rights. *Graham v. Connor*, 490 U.S. 386, 393–94 (1989). As a result, anyone asserting an excessive force claim under Section 1983 must identify a constitutional or statutory right that has been violated by the force.

This Court has recognized that excessive force by state and local law enforcement officers can violate three different Constitutional provisions: the Seizure clause of the Fourth Amendment, the Due Process clause of the Fourteenth Amendment, and the Cruel and Unusual Punishment clause of the Eighth Amendment. Traditionally, the applicable clause depends on the status of the injured party. Force against civilians usually results in (or is applied pursuant to) an arrest, so civilians typically bring excessive force claims under the Fourth Amendment, arguing that the force used created an unreasonable seizure. Pretrial detainees have, by definition, already been detained and therefore cannot invoke the Fourth

Amendment, so they typically bring excessive force claims under the Fourteenth Amendment instead. Civilians who are not seized by excessive force also bring their claims under the Fourteenth Amendment. Prisoners are properly subject to some punishment, so they must bring their excessive force claims under the Eighth Amendment by arguing that the force used against them was cruel and unusual.

Historically, each of these three Constitutional provisions had a different standard for excessive force. Under the Eighth Amendment, force against a prisoner is excessive only if it is applied "maliciously and sadistically to cause harm." *Hudon v. McMillian*, 503 U.S. 1, 7 (1992). This Court recently confirmed that under the Fourth Amendment, force used pursuant to a seizure is excessive if it is "objectively unreasonable" under a "totality of the circumstances." *Barnes v. Felix*, 605 U.S. 73, 76–77 (2025) (citing *Graham*, 490 U.S. at 397). And, until 2015, courts often considered force to be excessive under the Fourteenth Amendment only if it "shocked the conscience," which involved both an objective and subjective assessment. *See, e.g., Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998).

This Court simplified this matrix of standards in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), when it held that the excessive force standard applicable to pretrial detainees under the Fourteenth Amendment was the same "objectively unreasonable" standard that applied to excessive force claims under the Fourth Amendment. 576 U.S. at 397–402. *Kingsley* thereby harmonized the excessive force standards under the Fourth and Fourteenth Amendments. This should have streamlined the excessive force analysis for courts by eliminating the question of whether a claim

was properly brought under the Fourth or Fourteenth Amendment.

But no good deed goes unpunished. Rather than simplifying the excessive force analysis, the circuit courts made it more complicated by diverging on the question of whether *Kingsley* applied to all Fourteenth Amendment claims or only those brought by pretrial detainees. *Compare Edrei v. Maguire*, 892 F.3d 525, 535–37 (2d Cir. 2018) (applying *Kingsley*'s "objective reasonableness" standard to excessive force claims brought by unseized civilians under Fourteenth Amendment), *with Puente v. City of Phoenix*, 123 F.4th 1035, 1050–53 (9th Cir. 2024) (applying "shocks the conscience" standard to excessive force claims brought by unseized civilians under Fourteenth Amendment).

The question of the applicable standard for Fourteenth Amendment excessive force claims by unseized civilians took on increased importance after this Court's decision in *Torres v. Madrid*, 592 U.S. 306 (2021). In *Torres*, this Court distinguished between two types of seizures: seizure by force and seizure by control. 592 U.S. at 322. This Court held that a seizure by force occurred even if the subject was never detained as long as the officer intentionally applied force with objectively manifested intent to restrain. *Id.* at 317–18. But this Court expressly declined to opine on whether and when the deployment of crowd-control devices can constitute a seizure. *Id.*

After *Torres,* the circuit courts have employed different—and incompatible—approaches to analyzing when the use of crowd-control devices constitutes a seizure. The Sixth, Seventh, and Eighth Circuits have held that there is no clearly established law on the issue, so officers are entitled to qualified immunity as a matter of course whenever they use force—no matter

how egregiously—in the context of dispersing people. *Arthur v. Krause*, 186 F.4th 405, 411 (6th Cir. 2026); *Schukar v. Kenosha Cnty.*, 183 F.4th 508, 515 (7th Cir. 2026); Pet. App. 9a–10a. The Ninth Circuit concluded that deploying physical crowd-control devices directly at civilians objectively manifests an intent to detain and therefore constitutes a seizure. *Puente*, 123 F.4th at 1051–52. The Second Circuit has taken a more nuanced approach that analyzes whether the force was used to control the movement of the target. *Salmon v. Blesser*, 802 F.3d 249 (2d Cir. 2015). If force is used to control the target's movement, then a seizure has occurred even if the ultimate goal of the force was to disperse the target. *Id*. at 254. And the Tenth Circuit appears to have concluded that if force is deployed intentionally and actually results in terminating the movement of the target, then it constitutes a seizure regardless of the officer's intent. *Packard v. Budaj*, 86 F.4th 859, 865 n.7 (10th Cir. 2023).

As a result of this lack of alignment among the circuits, neither law enforcement officers nor protesters have any clarity as to when the use of crowd-control devices constitutes a seizure and what excessive force standard applies to the use of such devices.

B. Factual Background: Petitioner Is Restrained and Grievously Injured by Force Intentionally Applied to Disperse.

In late 2016, the Backwater Bridge in Morton County, North Dakota, was the site of protests against the Dakota Access Pipeline. Pet. App. 3a. Police erected a barricade of concrete blocks and razor wire on the north side of the bridge. *Id.* On November 20, 2016, a large protest took place at the barricade between 6:00 p.m. and midnight. *Id.*

Hours after the protest had quieted, Petitioner stood next to a burned-out truck just south of the barricade. *Id*. She chatted with another protester. *Id*. Both were unarmed. *Id.* at 18a. While they talked, law enforcement gave an order over the loudspeaker: "We see you behind the truck and underneath the truck. Get out now. Return to the south side of the bridge. Otherwise, we will use less-lethal munitions." *Id.* at 3a. The other protester replied that no one was under the truck. *Id*. The officers responded by firing rubber bullets and stinger ball grenades at Petitioner and the other protester. *Id.*

One of the rubber bullets hit Petitioner, and she fled south away from the barricade while yelling "I'm leaving. Please don't shoot." *Id.* at 19a. After running thirty yards to the south, Petitioner stopped to pick up a piece of plywood to protect her from further munitions. *Id.* Just as she stopped (before she could pick up the plywood), she was hit by an aerial warning/signaling munition, which had been fired at her by one of the officers while she was retreating. *Id.* at 4a. An aerial warning/signaling munition is essentially a flashbang embedded in a less-lethal bullet, so it can be fired from a shotgun rather than thrown by hand. *Id.* at 4a & n.4. The munition hit Petitioner in the arm and exploded, knocking her to the ground and destroying almost all the skin, tissue, muscle, nerves, tendons, and bone in her arm. *Id.* at 19a.

Petitioner lay on the ground screaming in pain with blood gushing from her wound, while officers laughed, cheered, and congratulated the gunman on his aim. *Id.* at 4a, 46a. The officers made no attempt to arrest or help Petitioner. *Id.* at 4a. Eventually, other protesters ran onto the bridge, picked Petitioner up, and carried her to a car that drove her to receive medical care. *Id*.

She was ultimately airlifted to Minneapolis where she endured multiple surgeries to avoid the complete amputation of her arm. *Id.* at 19a. To this day, she cannot feel or move her left arm. *Id.* at 4a.

C. Procedural Background: The Eighth Circuit Affirms the Dismissal of Petitioner's Excessive Force Claims Under Both the Fourth and Fourteenth Amendments.

In November 2018, Petitioner filed an excessive force claim against a John Doe placeholder for the law enforcement officer who injured her and against Morton County, North Dakota, which employed the officer. Petitioner alleged violations of both her Fourth Amendment right to be free of unreasonable seizures and her Fourteenth Amendment right to Due Process. Morton County moved to dismiss her claims under Rule 12(b)(6).

In October 2020, the district court held that Petitioner had plausibly alleged she had been seized and therefore allowed her Fourth Amendment claim to proceed to summary judgment. Pet. App. 92a–97a. But the district court dismissed her Fourteenth Amendment claim on the grounds that the officer's conduct did not "shock the conscience." *Id.* at 56a–65a.

Petitioner received limited discovery, which enabled her to identify the officer who injured her. She amended her Complaint to name him in July 2022. The officer moved to dismiss her claims against him under Rule 12(b)(6).

This time, the district court ruled that in light of this Court's 2021 decision in *Torres v. Madrid*, 592 U.S. 306 (2021), it was no longer clearly established that Petitioner was seized by the officer's deployment of an explosive munition against her. Pet. App. 23a–29a. The

district court therefore granted the officer qualified immunity and dismissed Petitioner's Fourth Amendment Claim. *Id.* at 29a. The district court reiterated its prior dismissal of Petitioner's Fourteenth Amendment claim on the grounds that the officer's conduct did not "shock the conscience." *Id.* at 30a.

Petitioner appealed to the Eighth Circuit, which affirmed the dismissal of both her Fourth and Fourteenth Amendment claims on the same grounds the district court had used. *Id.* at 10a–12a. In applying the "shocks the conscience" standard to Petitioner's Fourteenth Amendment claim, the Eighth Circuit expressly acknowledged it was creating a circuit split with the Second Circuit. *Id.* at 11a. In affirming the lack of a clearly established seizure, the Eighth Circuit held that even where a civilian's freedom of movement is actually terminated by the intentional use of force, no clearly established Fourth Amendment seizure occurs as long as the officer intended the force to disperse, rather than detain. *Id.* at 8a–10a.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT HAS DEEPENED TWO DIFFERENT CIRCUIT SPLITS.

1. In 2015, this Court defined the standard for excessive force claims brought by pretrial detainees under the Fourteenth Amendment: "[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable" under the totality of the circumstances. *Kingsley v. Hendrickson*, 576 U.S. 389, 396–97 (2015). This harmonized the standard for Fourteenth Amendment excessive force claims by pretrial detainees with the longstanding standard for excessive force claims under the Fourth Amendment. *See Graham v. Connor*,

490 U.S. 386, 388 (1989) (articulating objective reasonableness standard for excessive force claims under Fourth Amendment).

But what about the standard for excessive force claims under the Fourteenth Amendment *brought by unseized civilians?* The intuitive answer is that the "objective reasonableness" standard should apply to these claims as well. After all, these claims are brought under the same Amendment, and civilians are entitled to as much due process as pretrial detainees. The Second Circuit analyzed this question at length and reached the commonsense conclusion that the same "objective reasonableness" standard applies to all excessive force claims under the Fourteenth Amendment regardless of whether they are brought by pretrial detainees or unseized civilians. *Edrei v. Maguire*, 892 F.3d 525, 535–37 (2d Cir. 2018) ("[W]e now hold that *Kingsley* provides the appropriate standard for all excessive force claims brought under the Fourteenth Amendment.").

Petitioner cited *Edrei* to the Eighth Circuit, and the Eighth Circuit rejected it. Pet. App. 11a. The Eighth Circuit expressly stated that it "disagree[d]" with the Second Circuit and instead held that the "objective reasonableness" standard articulated in *Kingsley* was "limited . . . to pretrial detainees." *Id.* In direct conflict with the Second Circuit, the Eighth Circuit held that the "shocks the conscience" standard—with its subjective component—continues to apply to the Fourteenth Amendment excessive force claims of unseized civilians. *Id.* The Eighth Circuit provided no justification for its decision to cabin *Kingsley* in this way.

Both the Second and Eighth Circuits have since dug in on this circuit split by issuing additional conflicting decisions on the applicability of *Kingsley* to the

Fourteenth Amendment excessive force claims of unseized civilians. *Compare Tennyson v. Francemone*, 2025 WL 3230500, at *2 (2d Cir. Nov. 19, 2025) (applying objective reasonableness standard to unseized civilian's Fourteenth Amendment excessive force claim), *with Stearns v. Wagner*, 122 F.4th 699, 704 (8th Cir. 2024) (applying "shocks the conscience" standard to unseized civilian's Fourteenth Amendment excessive force claim), *and Dundon v. Kirchmeier*, 85 F.4th 1250, 1257 (8th Cir. 2023) (same).

A circuit split has never been more explicit.

Nor are the Second and Eighth Circuits the only ones involved in this split. In a decision citing *Kingsley*, the Sixth Circuit in dicta agreed with the Eighth, stating: "To violate the Fourteenth Amendment rights of free citizens not subject to search or seizure, the conduct of law enforcement officials must 'shock[] the conscience.'" *Coley v. Lucas Cnty.*, 799 F.3d 530, 537–38 (6th Cir. 2015). Similarly, in decisions issued after *Kingsley*, the Ninth Circuit has repeatedly applied the pre-*Kingsley* "shocks the conscience" standard to Fourteenth Amendment excessive force cases involving civilians. *S.R. Nehad v. Browder*, 929 F.3d 1125, 1139 (9th Cir. 2019); *Zion v. Cnty. of Orange*, 874 F.3d 1072, 1076–77 (9th Cir. 2017). Thus, the Sixth and Ninth Circuits appear allied with the Eighth on this issue.

In contrast, the Eleventh Circuit applied the "objective reasonableness" standard from *Kingsley* to a Fourteenth Amendment excessive force claim brought by a civilian (although one who was ultimately seized). *Crocker v. Beatty*, 995 F.3d 1232, 1247–50 (11th Cir. 2021). And, in a case involving a gray zone where a civilian died while confined after his arrest but before his arraignment, the First Circuit explained that

the question of whether the Fourth or Fourteenth Amendment applied no longer matters after *Kingsley* because the same "objective reasonableness" standard now applies generally to all Fourth and Fourteenth Amendment excessive force claims. *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016). The Fifth Circuit made the same pronouncement in *Boyd v. McNamara*, 74 F.4th 662, 667 n.3 (5th Cir. 2023). Thus, the First, Fifth, and Eleventh Circuits appear to agree with the Second.

The Tenth Circuit has taken yet a third approach, holding that after *Kingsley* claims under the Fourth and Fourteenth Amendments both use an "objective reasonableness" standard but are nonetheless different because the Court must weigh different factors depending on the applicable Amendment. *Geddes v. Weber Cnty.*, 2022 WL 3371010, at *6–8 (10th Cir. Aug. 16, 2022).

The circuit split on this issue has persisted for more than a decade and now involves more than half the circuits. The circuits are split roughly equally on the issue, with no clear majority rule emerging. The circuits are in dire need of clarity regarding the scope and breadth of this Court's holding in *Kingsley* and the appropriate standard for the excessive force claims of unseized civilians.

2. This need for clarity is even more urgent now that a second circuit split has emerged over when, if ever, forced used to disperse can constitute a seizure.

In *Torres v. Madrid*, 592 U.S. 306 (2021), this Court distinguished between two types of seizures: seizures by force and seizures by control. *Id.* at 322. A seizure by force occurs where force is intentionally applied to a target and objectively manifests an intent to detain,

even if it fails to terminate the target's movement. *Id.* at 317. In contrast, a seizure by control occurs where either force or a show of authority actually results in the termination of the target's movement. *Id.* at 322. This Court admonished that these are two distinct types of seizure and that lower courts must not conflate them. *Id.* But this Court then declined to opine on a frequently occurring form of government force: crowd-control devices deployed by law enforcement officers at protesters who are not under arrest. *Id*. at 317. The Court left open the question of when, if ever, such force constitutes a seizure.

The circuit courts are now divided on this question.

The Eighth Circuit concluded that after *Torres*, it is no longer clear whether the intentional deployment of a crowd-control device—including an explosive one—directly at a civilian constitutes a seizure when that deployment is pursuant to a broader goal of dispersing protesters. Pet. App. 8a–10a. As a result, the Eighth Circuit granted qualified immunity to the officer who injured Petitioner on the grounds that there was no clearly established seizure. This qualified immunity ruling effectively eliminates the ability for protesters injured by crowd-control devices to bring Fourth Amendment excessive force claims in the Eighth Circuit. *Id.* at 10a.

The Eighth Circuit is not alone in reaching this conclusion. The Seventh Circuit held that "[g]iven the uncertainty in the case law," it is not clearly established "that an officer who intentionally deploys less-than-lethal munitions during a protest seizes an unintended target within the meaning of the Fourth Amendment." *Schukar v. Kenosha Cnty*, 183 F.4th 508, 515 (7th Cir. 2026). The Seventh Circuit, like the Eighth, read *Torres* to create ambiguity regarding the

requirements for a seizure in the context of crowd-control devices deployed at protesters. As a result of that ambiguity, the Seventh Circuit also granted qualified immunity to officers who used such force regardless of how excessive it was. *Id.*

Similarly, the Sixth Circuit has held that intentionally applied force does not constitute a seizure even when it actually terminates the target's movement unless the officer intended to detain the target. *Arthur v. Krause*, 186 F.4th 405, 411 (6th Cir. 2026). The Sixth Circuit interpreted *Torres* to hold that both seizures by force and seizures by control "require[] an intent to acquire control," with seizures by control additionally requiring that "'the officer must actually take control of' an individual." *Id.*

As a result, currently in the Sixth, Seventh, and Eighth Circuits no amount of force—no matter how unreasonably applied—can generate a Fourth Amendment excessive force claim if the officer's ultimate goal in using the force is to disperse. This is true even where the force is intentionally applied to the target to control their movement and results in the termination of that movement, at least temporarily.

Other circuits have reached a different conclusion. In a case similar to the one here—where non-threatening protesters were intentionally hit with less-lethal munitions that terminated their movement—the Tenth Circuit declined even to consider whether the officer intended to restrain or disperse and concluded that because the plaintiffs were subjected to the "intentional application of force, we find it difficult to imagine a circumstance in which [the plaintiffs] would *not* be considered 'seized.'" *Packard*, 86 F.4th at 865 n.7 (emphasis in original). In other words, the Tenth Circuit effectively held that the intentional

deployment of a crowd-control device at a civilian is a seizure if it results in stopping the citizen's movement regardless of the officer's intent in deploying the force.

The Second Circuit has taken a different approach and has held that if force is deployed to control a civilian's movement, then a seizure has plausibly occurred regardless of whether the officer's ultimate goal (or intent) was to detain the civilian or disperse him. In *Salmon v. Blesser*, 802 F.3d 249 (2d Cir. 2015), the Second Circuit considered a case where a law enforcement officer physically removed a civilian from a courthouse. *Id.* at 251. There was no dispute that the officer's ultimate goal was to disperse the civilian, but the Second Circuit reasoned that once the officer physically grabbed the civilian and thereby intentionally used force to control his movement, "it no longer mattered whether his ultimate purpose was to secure [the civilian's] departure from the courthouse or to prevent it." *Id.* at 254. Unlike the Sixth and Eighth Circuits, which both looked broadly at whether the officer's ultimate goal in using force was detention or dispersal, the Second Circuit focused narrowly on whether the force deployed was aimed at controlling the target's movement.

The difference between the Second Circuit's analysis and that of the Sixth and Eighth Circuits is likely to be outcome-determinative in protest settings because crowd-control devices are primarily used to control the target's movement with the ultimate goal of dispersing the target. The Second Circuit will routinely find such force to constitute a seizure, while the Sixth, Seventh, and Eighth Circuits will not.

The Ninth Circuit has analyzed the use of crowd-control devices in yet a different way. Like the Sixth, Seventh, and Eighth, the Ninth Circuit has ruled that

all seizures require an objective intent to detain. As a result, the Ninth Circuit has concluded that the use of aerosolized chemical irritants, bright flashes, and loud sounds do not constitute seizures because they are inherently intended to disperse (and may not even constitute force). *Puente v. City of Phoenix*, 123 F.4th 1035, 1051–52 (9th Cir. 2024). However, the Ninth Circuit also has held that physical crowd-control devices like foam batons and stinger ball grenades are fundamentally designed to stop individuals, so deploying these devices at protesters inherently objectively manifests an intent to detain and therefore constitutes a seizure. *Sanderlin v. Dwyer*, 116 F.4th 905, 912–13 (9th Cir. 2024); *Nelson v. City of Davis*, 685 F.3d 867, 875-77 (9th Cir. 2012).

In short, the Second, Sixth, Seventh, Eighth, and Ninth circuits disagree on how to analyze Fourth Amendment excessive force claims arising from the deployment of control-control devices. Worse than a circuit split, this is a circuit muddle. This Court should resolve this muddle by ruling on whether and when the intentional use of force with the ultimate goal of dispersal constitutes a seizure.

II. THE EIGHTH CIRCUIT'S RULINGS ARE CLEARLY AND EGREGIOUSLY WRONG.

Not only did the Eighth Circuit wade into two different circuit splits, but it put itself on the wrong side of both.

1. The Eighth Circuit's ruling that unseized civilians' Fourteenth Amendment excessive force claims must still be analyzed under a "shocks the conscience" standard is illogical and cannot be squared with this Court's precedents.

In *Kingsley*, this Court held that the proper standard for excessive force claims under the Fourteenth Amendment is "objective reasonableness." 576 U.S. 389, 396–97 (2015). *Kingsley* happened to involve a pretrial detainee, but that fact was not pertinent to this Court's analysis, and this Court never suggested that its ruling was somehow restricted to pretrial detainees only. To the contrary, this Court's analysis in *Kingsley* is equally (if not more) applicable to civilians.

And this Court subsequently indicated that it intended *Kingsley* to apply to non-detainees. In *Lombardo v. City of St. Louis*, 594 U.S. 464 (2021), this Court considered an excessive force claim brought by a civilian who was injured while being seized. Even though *Lombardo* involved a Fourth Amendment claim brought by a non-detainee, the Court cited *Kingsley* for the applicable factors to consider under the "objective reasonableness" standard. *Id.* at 467. That citation makes sense only if this Court intended *Kingsley* to apply to both pretrial detainees and civilians. If this Court believed that different excessive force standards applied to civilians and pretrial detainees, then the citation to *Kingsley* would be a non-sequitur. To the contrary, the only intelligible interpretation of the *Kingsley* citation in *Lombardo* is that this Court intended the standard articulated in *Kingsley* to apply equally to civilians and to harmonize with the longstanding Fourth Amendment standard.

One of the key benefits of *Kingsley* was that it harmonized the excessive force standards under the Fourth and Fourteenth Amendments. This simplified the excessive force analysis because it no longer mattered whether the claim was brought by a pretrial detainee or a civilian or whether the person bringing

the claim had been seized. And lower courts no longer had to assess the subjective intent of the officer. Instead, the lower courts simply had to determine whether the force was objectively reasonable or not.

The Eighth Circuit's interpretation of *Kingsley* eliminates all this simplicity and replaces it with something even more convoluted than what existed prior to *Kingsley*. Under the Eighth Circuit's interpretation, the same excessive force standard applies to seized civilians and pretrial detainees under two different Amendments, but somehow a different (and more demanding) standard applies only to unseized civilians under the same Amendment that provides the cause of action for pretrial detainees. That is not just convoluted, but downright nonsensical for at least two reasons.

First, under the Eighth Circuit's interpretation, whether force violates Due Process turns on whether the target is a pretrial detainee or a civilian. Nothing about the Due Process clause or any of this Court's prior decisions indicates that should be the case. Nor does it make any sense. If anything, the Eighth Circuit's distinction is backwards. In general, force is *less* justified against civilians than against pretrial detainees, so the excessive force claims of civilians—especially civilians not subject to arrest—should be analyzed under an *easier* standard, not a *harder* one. It makes no sense that force need only be objectively unreasonable to create a Fourteenth Amendment claim for a pretrial detainee but that force must "shock the conscience" before a civilian has a claim under the same Amendment. The Eighth Circuit provided no analysis or justification for this conclusion, and it is plainly wrong.

Second, under the Eighth Circuit's interpretation, the applicable excessive force standard turns on the subjective intent of the officer applying the force. If an officer applies force with intent to detain, then the target is seized and receives the "objective reasonableness" standard. But if the officer applies force with intent to disperse, the target is not seized and must litigate under the more difficult "shocks the conscience" standard. This is antithetical to this Court's admonishment in *Kingsley* that whether force is excessive should not turn on the mental state of the officer. 576 U.S. at 403–04. Indeed, the desire to get away from assessing subjective intent was one of the express justifications this Court gave for its decision in *Kingsley*. *Id.* at 395–96. Again, the Eighth Circuit's logic is backwards. As a baseline rule, force is more justifiable when a civilian is being seized (and there is probable cause for arrest) than when he isn't. But the Eighth Circuit's rule offers an easier standard to the seized civilian than the unseized one.

For these reasons, the Eighth Circuit's holding that *Kingsley* does not apply to unseized civilians and that their excessive force claims under the Fourteenth Amendment should be governed by a different and more demanding "shocks the conscience" standard is plainly wrong and should be reversed.

2. Equally wrong is the Eighth Circuit's conclusion (shared by the Sixth and Seventh Circuits) that deploying a physical crowd-control device directly at a civilian does not constitute a seizure as long as the officer's ultimate goal is dispersal. The Eighth Circuit's seizure ruling cannot be correct for two reasons.

First, under the Eighth Circuit's reasoning, a law enforcement officer can intentionally apply force to his intended target and actually terminate that target's

movement without seizing him. This result defies any sensible definition of "seizure." Any viable seizure analysis must conclude that intentional actions resulting in actual detention constitute a seizure. The Second, Ninth, and Tenth Circuits' analyses—which are all different—all manage to reach this commonsense result. The Tenth Circuit reasoned that if the force was intentional and the target was detained, a seizure occurred, *Packard*, 86 F.4th at 865 n.7; the Second Circuit reasoned that force applied to control a target's movement constituted a seizure even if the ultimate goal was to disperse the target, *Salmon*, 802 F.3d at 251; and the Ninth Circuit reasoned that deploying physical crowd-control devices directly at a target objectively manifests an intent to detain (regardless of the officer's stated goal) and therefore constitutes a seizure by force, *Sanderlin*, 116 F.4th at 912–13. All of these differing analyses reach the plainly correct conclusion that a seizure occurred, and each analysis makes substantially more sense than the one employed by the Eighth Circuit. Intentionally shooting someone with an explosive munition that knocks them to the ground and terminates their movement must constitute a seizure. The Eighth Circuit's failure to reach this obvious result means its analysis must be wrong.

According to the Eighth Circuit, as long as a law enforcement officer is dispersing protesters, no amount of force would ever constitute a seizure, no matter how extreme. A law enforcement officer could execute unarmed protesters by shooting them in the back of the head as they fled without generating a Fourth Amendment seizure. That is a crazy result. And that is not some far-off terminus of a long slippery slope argument; it is the immediate upshot of the Eighth Circuit's holding.

Second, the Eighth Circuit's analysis violates this Court's admonishment not to "erase[] the distinction between seizures by force and seizures by control." *Torres*, 592 U.S. at 322. Outside the show-of-authority context, a seizure by control involves force that results in "the termination of freedom of movement." *Id.* If all seizures by control also require an intent to detain, as the Eighth Circuit has held, then all seizures by control are also seizures by force. Seizures by control become nothing more than the subset of seizures by force in which the force successfully detains the target. If one type of force is merely a subset of the other, the distinction between the two types has been erased. Indeed, a core holding in *Torres* was that seizures by force do not require successful detention because that would make such seizures merely a subset of seizures by control. That same logic applies in the other direction and requires that there be some seizures by control that are not also seizures by force. The Eighth Circuit's analysis violates this requirement and therefore violates this Court's admonishment in *Torres*.

For both reasons, the Eighth Circuit's seizure analysis is wrong and should be reversed.

III. LAW ENFORCEMENT OFFICERS AND PROTESTERS BOTH DESERVE CLARITY REGARDING THE CONSTITUTIONALLY ACCEPTABLE USE OF CROWD-CONTROL DEVICES.

The Eighth Circuit's decision below deserves this Court's attention. The Eighth Circuit concluded that *Torres* created uncertainty regarding when, if ever, the use of force to disperse civilians constitutes a seizure. Pet. App. 8a–10a. The Sixth and Seventh Circuits have declared the same thing. Multiple circuits are asking for clarity. This Court should provide it.

The Eighth Circuit announced its intention to grant law enforcement officers qualified immunity on Fourth Amendment claims arising from force used to disperse until this Court clarifies the law. *Id.* That blanket immunity is especially problematic because the Eighth Circuit currently applies the extremely demanding "shocks the conscience" standard to the Fourteenth Amendment excessive force claims of unseized civilians. Indeed, the Eighth Circuit held that shooting an unarmed, nonthreatening civilian with an explosive munition does not shock the conscience *as a matter of law*. *Id.* at 10a–12a. Unless and until this Court reviews the Eighth Circuit's decision here, law enforcement (at least in the Eighth Circuit) can essentially apply any force they want when dispersing civilians. This Court should not let that status quo stand.

The circuit splits on the seizure and Fourteenth Amendment issues described above justify this Court's immediate attention for several reasons.

First, these are frequently recurring issues. Law enforcement officers interact with protesters on a regular basis and are therefore repeatedly faced with questions regarding how they may use force, especially in the form of crowd-control devices. Both law enforcement officers and protesters deserve clarity on the contours of the Constitutionally permissible use of such devices.

Second, such clarity is particularly important where, as here, qualified immunity applies. Until the law is "clearly established," officers receive qualified immunity for their conduct, and victims of unreasonable force are left without redress. The law cannot be considered "clearly established" where, as here, there is a long-

standing multi-dimensional circuit split. This calls for immediate review and clarification.

Third, the standard for the constitutionally appropriate deployment of crowd-control devices should not depend on where in the country they are deployed. Right now, it does. The qualified immunity analysis assumes that law enforcement officers are trained on the law regarding constitutionally allowable force. Officers are assumed to know legal precedents regarding the force they are using, and they receive qualified immunity when there is no precedent on point (*i.e.*, when there is no "clearly established law"). But law enforcement officers are often called to work in states other than where they reside and were trained. A circuit split creates the risk that officers will be unfairly subjected to civil liability when called to work in a state where the excessive force law differs from the state where they were trained. Indeed, officers from states in both the Ninth and Tenth Circuits were operating in North Dakota when Petitioner was injured. Those officers would have been trained on a law regarding the appropriate use of crowd-control devices that differed from the law of the place where they were working. The Court should resolve the ongoing circuit split regarding the use of crowd-control devices to fix this problem.

For these reasons, this Court should grant this petition and resolve the circuit splits described above.

IV. THIS CASE OFFERS A STRAIGHTFORWARD WAY TO RESOLVE EITHER OR BOTH CIRCUIT SPLITS.

This case presents a simple and efficient vehicle for resolving these circuit splits.

First, the procedural posture of the case negates any need to deal with evidentiary issues or disputes of fact. This petition arises from a motion to dismiss, so the operative facts are taken straight from the Eighth Circuit's decision, which are themselves taken from the face of the complaint.

Second, those facts are simple. Petitioner was hit by an explosive munition intentionally fired at her while she was running away from law enforcement in compliance with their command to do so. The officer who deployed that munition did so with an over-arching goal of dispersing Petitioner, but the munition terminated Petitioner's movement (albeit temporarily). That is the full extent of the facts necessary to adjudicate the dispute.

Third, the Court can resolve either or both circuit splits. The Court could, for example, decline to opine on whether Petitioner was seized and resolve only the question of what the proper standard is for her Fourteenth Amendment claim. Alternatively, the Court could opine that Petitioner was seized (and therefore has a viable Fourth Amendment excessive force claim) and decline to opine on the standard for her Fourteenth Amendment claim. Or the Court could resolve both questions.

Fourth, the Court's decision will be outcome-determinative regardless of which question(s) the Court chooses to address. The District Court in this case has already concluded that Petitioner's excessive force claim would survive a motion to dismiss under the "objective reasonableness" standard. Pet. App. 99a–100a. Thus, if this Court opines that this standard applies—either because Petitioner was seized or because it is the appropriate standard for her Fourteenth Amendment claim or both—the result

would be a reversal of the Eighth Circuit's and District Court's decisions and a denial of Respondents' motion to dismiss. In other words, this is not a case where the judgment on review was decided on multiple grounds or involved unreached issues.

For all these reasons, this case presents an excellent avenue for resolving persistent and broad circuit splits involving a frequently recurring issue.

CONCLUSION

To settle important questions regarding the analysis of force applied to disperse civilians, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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November 19, 2026

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 24-1911

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SOPHIA WILANSKY

Plaintiff - Appellant

v.

MORTON COUNTY, NORTH DAKOTA; KYLE KIRCHMEIER, IN HIS OFFICIAL CAPACITY; ADAM J. DVORAK, IN HIS PERSONAL CAPACITY; JONATHAN R. MOLL, IN HIS PERSONAL CAPACITY

Defendants - Appellees

THOMAS IVERSON, in his personal capacity

Defendant

———

No. 24-1919

———

SOPHIA WILANSKY

Plaintiff - Appellant

v.

PAUL D. BAKKE, IN HIS PERSONAL CAPACITY; THOMAS M. GROSZ, IN HIS PERSONAL CAPACITY; MATTHEW J. HANSON, IN HIS PERSONAL CAPACITY; MICHAEL W. HINRICHS, IN HIS PERSONAL CAPACITY; TRAVIS A. NELSON, IN HIS PERSONAL CAPACITY; JOSHUA W. RODE, IN HIS PERSONAL CAPACITY; EVAN M. SAVAGEAU,

IN HIS PERSONAL CAPACITY; TRAVIS M. SKAR, IN HIS PERSONAL CAPACITY; GLEN TERNES, IN HIS PERSONAL CAPACITY; JUSTIN W. WHITE, IN HIS PERSONAL CAPACITY; DEREK J. ARNDT; KYLE KIRCHMEIER, IN HIS OFFICIAL CAPACITY; NORTH DAKOTA MORTON COUNTY

Defendants - Appellees

Appeal from United States District Court
for the District of North Dakota - Eastern

Submitted: December 16, 2025
Filed: June 24, 2026

Before LOKEN, LAVENSKI R. SMITH, and KOBES, Circuit Judges.

KOBES, Circuit Judge.

Sophia Wilansky was severely injured by an aerial warning munition police fired during a pipeline protest. She sued under 42 U.S.C. § 1983, alleging that county and state officers used excessive force and that Morton County, North Dakota failed to train them, ratified their unconstitutional actions, and maintained an unconstitutional policy or custom. Wilansky filed a second suit based on the same events, adding more defendants and allegations. The district court[1] dismissed both cases with prejudice. We affirm.

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[1] The Honorable Daniel M. Traynor, United States District Judge for the District of North Dakota.

I.

These are the relevant facts alleged by Wilansky. *See Mitchell v. Kirchmeier*, 28 F.4th 888, 893 (8th Cir. 2022). In September 2016, protesters opposing the Dakota Access Pipeline camped on the southern side of Backwater Bridge on North Dakota Highway 1806. Authorities closed the bridge and stationed officers to its north. Police were armed with less-lethal munitions[2] and set up a barricade comprising two burned trucks backed by concrete roadblocks and rings of razor wire.

On the night of November 20, protesters clashed with police and towed away one of the barricade trucks. Police fired less-lethal munitions. When things quieted down, Wilansky walked to the bridge, where she remained for about an hour. Another protester joined her near the remaining truck, and they talked for a few minutes. Police ordered them to leave: "We see you behind the truck and underneath the truck. Get out now. Return to the south side of the bridge. Otherwise, we will use less-lethal munitions."[3] Neither moved, and the other protester yelled back that there was no one under the truck. Officers Dvorak, Arndt, and Hanson then fired less-lethal munitions, including a stinger ball, at Wilansky as she ducked behind a metal sheet next to the truck. Officers Skar, Hinrich,

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[2] Less-lethal munitions include rubber and sponge bullets, pepper spray, pepper balls, lead beanbags, tear gas, and flash-bangs.

[3] Wilansky's complaints used different language, but she does not dispute that we may consider the command's exact words as captured in a video recording of the incident. *See, e.g.*, *Young v. Keyes*, 176 F.4th 576, 577 (8th Cir. 2026); *Ching ex rel. Jordan v. City of Minneapolis*, 73 F.4th 617, 621 (8th Cir. 2023).

Rode, and Arndt moved west to get a better line of sight.

Wilansky ran south after a less-lethal munition fired by either Officer Arndt or Hanson hit her arm. About 30 yards away, she stopped to pick up a piece of plywood. As she leaned down, she was hit with an aerial warning munition[4] fired by Officer Moll. It tore the flesh off her arm, and she fell to the ground. Other protestors carried her away and drove her to a nearby casino, and she was taken to the hospital. Officers laughed and congratulated Officer Moll on his "marksmanship."[5] Wilansky was not arrested or detained. Her left hand and forearm are permanently and severely injured.

II.

These cases have an unusual procedural history. When the defendants moved to dismiss the first complaint, the district court converted the motion to one for summary judgment and granted limited discovery so that Wilansky could identify the officers, including who fired the aerial warning munition. She asked for leave to amend her complaint "to substitute [named] officers" for the John Doe defendants, and the district court granted leave for that purpose. *See* Fed. R. Civ. P. 15(a)(2).

Wilansky's amended complaint did more than name the officers—it added factual allegations. The defendants moved to strike, and the court ordered Wilansky to

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[4] An aerial warning munition is a flashbang embedded in a less-lethal bullet. It is designed to be fired above crowds for dispersal.

[5] The defendants dispute this, but we accept the facts alleged in the complaint. *Mitchell*, 28 F.4th at 893.

show cause why it should accept her beyond-the-scope changes. Unsatisfied with her response, the court struck the new allegations and several new defendants and ordered Wilansky to file a second amended complaint that complied with its order, which she did. But she also filed a second lawsuit with new factual allegations and claims against the ten stricken defendants. The defendants then abandoned their summary judgment briefing and moved to dismiss based on the operative complaints in both cases. The district court did so with prejudice.

We review the district court's dismissal *de novo*, *Mitchell*, 28 F.4th at 895, and its decision to do so with prejudice for abuse of discretion, *Ellis v. Nike USA, Inc.*, 158 F.4th 932, 936 (8th Cir. 2025). Wilansky concedes that the "district court correctly determined that the claims in the Primary and Companion Complaints must rise or fall together."

III.

Wilansky claims officers twice violated her Fourth Amendment right to be free from unreasonable seizures: first, when she was hit by a less-lethal munition as she hid behind the metal sheet and second, when the aerial warning hit her and she fell to the ground. To state a claim for a Fourth Amendment violation, she must plead "that a seizure occurred and that the seizure was unreasonable." *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). "And because qualified immunity is at issue, [she] must show that it was clearly established that what happened to [her] was a seizure." *Keup v. Sarpy County*, 159 F.4th 533, 538 (8th Cir. 2025). A seizure requires an "objective[] manifest[ation]" of "an intent to restrain." *Torres v. Madrid*, 592 U.S. 306, 317 (2021) (emphasis omitted). "Force intentionally applied for

some other purpose" is not enough, *id.*, and we have found it "was not clearly established as of November 2016 that use of force to disperse" is a seizure, *Dundon*, 85 F.4th at 1257; *see also Keup*, 159 F.4th at 538.

A.

We begin with Wilansky's claims against Officers Bakke, Hinrichs, Nelson, Rode, Savageau, Grosz, Ternes, White, and Skar. A § 1983 plaintiff "must plead that each Government-official defendant, through the official's own individual actions, has violated the constitution." *Reynolds v. Dormire*, 636 F.3d 976, 979 (8th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). Wilansky's complaint does not allege that defendants Bakke, Nelson, Savageau, Grosz, Ternes, or White did anything.[6] And the most she says about Officers Skar, Hinrichs, and Rhode is that they "moved west to get a better line of sight." That is not unconstitutional, nor is it a "specific and plausible" allegation showing "a causal link between each defendant and the specific wrongs" they committed. *Faulk v. City of St. Louis*, 30 F.4th 739, 745 (8th Cir. 2022) (emphasis omitted) (dismissing § 1983 claim against officer because the complaint did not set out facts linking his conduct to the alleged constitutional violations); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007) (requiring that the complaint "give the defendant fair notice of what the claim [against them] is and the grounds upon which it rests" (cleaned up)).

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[6] Wilansky's first amended complaint says "Law Enforcement Officer Defendants rapidly fired at [her] with less-lethal munitions," but then that only some Officer Defendants "actively participated" "by firing less-lethal munitions" while others merely "assist[ed]" the "Officer Defendants who were firing." This is not enough when, despite discovery, she failed to plead what these officers did. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The dismissal of the claims against these officers is affirmed.

B.

Wilansky argues that Officers Dvorak, Arndt, and Hanson seized her when they fired less-lethal munitions at her as she hid behind the metal sheet. The district court found any seizure was not clearly established because the officers objectively manifested an intent to disperse. *See Dundon*, 85 F.4th at 1257. Wilansky asks us to infer intent to restrain because the officers fired without responding to the protestor who shouted that there was no one under the truck. But the officers ordered the pair to "get out now [and] return to the south side of the bridge," which was an order to disperse. Their lack of a response to the other protester does not change that. She also says we can infer an intent to restrain because she felt trapped when officers fired at her. But "the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain." *Torres*, 592 U.S. at 317. It does not "depend on the subjective perceptions of the seized person." *Id.*

The same goes for Wilansky's arguments that Officer Dvorak showed his subjective intent to restrain her by shooting a stinger ball directly at her and that other unidentified officers revealed the same intent by celebrating after a later shot fired by Officer Moll hit her. *Torres*'s objective test "focuses on what the officer communicated through his actions, not what he subjectively thought," and the officer's subjective intent matters "only to the extent it has been conveyed to others." *Hight v. Williams*, 164 F.4th 672, 676 (8th Cir. 2026) (cleaned up). That Officer Dvorak may have subjectively aimed to hit Wilansky with a dispersal weapon after she was ordered to disperse does not

objectively manifest an intent to restrain. And that unidentified officers laughed after Officer Moll later hit Wilansky does not affect whether Officer Dvorak's, Arndt's, and Hanson's actions objectively manifested an intent to restrain Wilansky while she hid behind the metal sheet.

Wilansky's remaining arguments are belied by her own pleadings. First, she says that the officers had no reason to disperse her because she had been peacefully at the barricade for over an hour without objection. But the officers did eventually object. They ordered her to leave and warned they would use less-lethal munitions if she stayed. And they had reasons for wanting her to leave. She was trespassing, she failed to comply with a lawful order, and earlier that night there had been a violent protest. Second, she argues that continuing to fire after she started to retreat shows an intent to restrain. But she does not allege that Dvorak, Ardnt, or Hanson fired at her while she was retreating.

Officers Dvorak, Arndt, and Hanson are entitled to qualified immunity on Wilansky's Fourth Amendment claim against them because "it was not clearly established as of November 2016 that use of force to disperse . . . was a seizure." *Dundon*, 85 F.4th at 1257; *see also Quraishi v. St. Charles County*, 986 F.3d 831, 839–40 (8th Cir. 2021) (not clearly established that using tear gas to disperse reporters from protest site was a seizure); *Martinez v. Sasse*, 37 F.4th 506, 510 (8th Cir. 2022) (not clearly established that a push used to repel a lawyer was a seizure).

C.

That leaves Wilansky's claim that she was seized "by acquisition of control" when Officer Moll's aerial

warning munition severely injured her arm, knocked her down, and left her unable to move. *See Torres*, 592 U.S. at 322 ("[A] seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement."). To overcome qualified immunity, Wilansky must point to law clearly establishing that Officer Moll seized her. *Keup*, 159 F.4th at 538. A seizure by control requires "that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result," so Wilansky has to show it was clearly established that Moll's actions manifested an objective intent to restrain or stop her. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (finding "it was enough" to allege a seizure where plaintiff "was meant to be stopped" by the officers' roadblock and "he was so stopped"); *see also Torres*, 592 U.S. at 317, 321–323.

Wilansky says *Torres* clearly established that shooting someone who is fleeing is a seizure. But *Torres* found specifically that "the conduct of the officers—ordering Torres to stop and then shooting to restrain her movement—satisfies[d] the objective test for a seizure." *Torres*, 592 U.S. at 318. Wilansky was ordered to leave and was hit with the less-lethal munition after she stopped fleeing, so *Torres* does not have "sufficiently similar facts" to "squarely govern" Wilansky's situation. *Graham v. Barnette*, 5 F.4th 872, 887 (8th Cir. 2021) (cleaned up).[7]

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[7] At oral argument, counsel argued that firing an explosive weapon must manifest an intent to seize, not disperse. But counsel could not point to any clearly established precedent about whether using certain weapons in certain ways turns a dispersal into a seizure per se. And in any case, we "do not consider arguments first raised at oral argument." *Bennie v. Munn,* 822 F.3d 392, 398 n.3 (8th Cir. 2016).

None of the other cases Wilansky cites involve force used to disperse, *see, e.g.*, *Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012) (tasering unarmed, nonviolent individual suspected of only a misdemeanor is excessive force); *Terebesi v. Torreso*, 764 F.3d 217, 237–38 (2d Cir. 2014) (clearly established that the use of stun guns in certain contexts and manners was unreasonable), so they do not help clearly establish a Fourth Amendment violation, *see Graham*, 5 F.4th at 887. And some were also decided after 2016, *see, e.g.*, *Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672, 684 (8th Cir. 2019) (clearly established that the "use of flash-bang grenades is unreasonable where officers have no basis to believe they will face the threat of violence and they unreasonably fail to ascertain whether there are any innocent bystanders in the area it is deployed"), so they also "do[] not constitute clearly established law for purposes of this case," *Dundon*, 85 F.4th at 1256.

Because Wilansky has not shown that Officer Moll committed a clearly established seizure, Moll is entitled to qualified immunity and the district court properly dismissed the Fourth Amendment claim against him. See *Dundon*, 85 F.4th at 1257.

IV.

Wilansky also alleges that Officers Dvorak and Moll used excessive force in violation of the Fourteenth Amendment. *See County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (excessive force claims that do not fit under the Fourth Amendment's or Eighth Amendment's protections may be brought under a Fourteenth Amendment substantive due process claim). To prevail, she must allege that the officer's behavior was "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Id. at 847 n.8. "[C]onduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *Id.* at 849. "Whether conduct shocks the conscience is a question of law," *Folkerts v. City of Waverly*, 707 F.3d 975, 980 (8th Cir. 2013), and "[p]roof of intent to harm is usually required," *Stearns v. Wagner*, 122 F.4th 699, 704 (8th Cir. 2024) (citation omitted).

Wilansky objects that this is the wrong test, and that we should instead consider whether the officers acted objectively reasonably. *See Kingsley v. Hendrickson*, 576 U.S. 389, 397 (2015) (applying objective reasonableness standard to excessive force claims brought by pretrial detainees); *see also Edrei v. Maguire*, 892 F.3d 525, 537 (2nd Cir. 2018) (applying *Kingsley* to "all excessive force claims brought under the Fourteenth Amendment"). We disagree. *Kingsley* explicitly limited its holding to pretrial detainees. 576 U.S. at 402. It did not overturn *Lewis*, which requires a shocks-the-conscience test for excessive force claims by non-pretrial detainees. 523 U.S. at 846–47; s*ee also Agostini v. Felton*, 521 U.S. 203, 237 (1997) (if "a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls"). Since *Kingsley*, we have applied the shocks-the-conscience standard to Fourteenth Amendment claims. *See, e.g.*, *Stearns*, 122 F.4th at 704 (Fourteenth Amendment excessive force claim); *see also Dundon*, 85 F.4th at 1257 (same); *cf. Truong v. Hassan*, 829 F.3d 627, 631 (8th Cir. 2016) (Fourteenth Amendment due process claim).

According to Wilansky, Officer Moll shocked the conscience when he shot an aerial munition warning

at a lone protester after partial compliance with a dispersal order. But because qualified immunity is at issue, she has to show that violation was clearly established. *See, e.g.*, *Webster v. St. Louis County,* 135 F.4th 614, 617 (8th Cir. 2025) (officer entitled to qualified immunity because it was not clearly established that his actions would violate inmate's Fourteen Amendment right). "To find that a right is clearly established, courts generally need to identify a case where an officer acting under similar circumstances was held to have violated the Constitution." *Zorn v. Linton*, 146 S. Ct. 926, 930 (2026) (per curiam) (cleaned up). Wilansky does not point us to any cases but instead argues it's a "commonsense inference" that aiming and firing an aerial munition weapon directly at someone is either a seizure or shocks the conscience. That inference, if it exists, is not enough to carry her burden. *See Zorn*, 146 S. Ct. at 930 ("Officers receive qualified immunity unless they could have read the relevant precedent beforehand and known that it proscribed their specific conduct." (cleaned up)); *Hess v. Ables*, 714 F.3d 1048, 1051 (8th Cir. 2013) ("The plaintiff bears the burden of proving that the law was clearly established.").

V.

Turning to *Monell*, Wilansky argues that because the plaintiff in *Mitchell* sufficiently alleged a pattern or practice of unconstitutional conduct against Morton County and Sherriff Kyle Kirchmeier, she has too. *Mitchell*, 28 F.4th at 901. But there are significant differences between Wilansky's and Mitchell's complaints. Both alleged that on October 22 and October 27, officers deployed less-lethal bullets and pepper spray at protestors and that on November 20, they used water, chemical repellents, and other less-lethal

weapons to break up the protest that immediately preceded Wilansky's injury. *Id.* at 893. Mitchell's complaint went on to say that during the two months between Wilansky's injury and his own in January 2017, "law enforcement officers continually deployed weapons such as bean bag guns" against peaceful protesters. *Id.* at 901. He also relied on Wilansky's injury to establish that the force used against him was part of a pattern, not an isolated incident. *Id.* Wilansky, on the other hand, alleged that as of November 2016, Morton County had an unconstitutional "policy or custom of using explosive less-lethal munitions." She does not allege that either October incident involved explosive less-lethal munitions, and the alleged misuse of those munitions on November 20 is not enough to establish "[t]he existence of a continuing, widespread, persistent pattern." *Id.* at 899. That Mitchell pleaded a pattern of excessive force against peaceful protestors as of January 2017, does not mean that Wilansky pleaded a pattern of inappropriately using explosive munitions as of November 2016.

VI.

Finally, we do not think the district court abused its discretion by dismissing Wilansky's claims with prejudice. In *Ellis*, we held that it was not an abuse of discretion to dismiss with prejudice when the plaintiff, faced with a 12(b)(6) motion, chose to "stand on her complaint," rather than seeking leave to amend and cure its deficiencies. 158 F.4th at 937. We also rejected the idea the court should have dismissed Ellis's claims without prejudice based on "a single line" in her opposition to the motion to dismiss which "request[ed] leave to amend again if the court dismissed her complaint." *Id.* Like Ellis, Wilansky had "months to

properly seek leave to file a second amended complaint by filing a motion to amend." *Id.* at 936 (emphasis omitted). But she did not amend her pleadings as a matter of right, *see* Fed. R. Civ. P. 15(a)(1), nor did she move for additional leave to add or alter her factual allegations, *see* Fed. R. Civ. P. 15(a)(2). And unlike Ellis, she did not make even a passing request that if the court granted the defendants' motion, it should also grant her leave to amend. Under these circumstances, we affirm the dismissal of Wilansky's claims with prejudice. *Ellis*, 158 F.4th at 937.

The judgments of the district court are affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Case No. 1:18-cv-00236

SOPHIA WILANSKY,

Plaintiff,

vs.

MORTON COUNTY, NORTH DAKOTA; KYLE KIRCHMEIER IN HIS OFFICIAL CAPACITY; ADAM J. DVORAK, IN HIS PERSONAL CAPACITY; AND JONATHAN R. MOLL, IN HIS PERSONAL CAPACITY,

Defendants.

AMENDED ORDER GRANTING
MOTIONS TO DISMISS

INTRODUCTION

[¶1] THIS MATTER comes before the Court upon two Motions to Dismiss filed by the Defendants on August 18 and August 25, 2023. Doc. Nos. 265, 270. Plaintiff Sophia Wilansky ("Wilansky") filed a consolidated Response on September 29, 2023. Doc. No. 277. The Defendants filed their Replies on October 20, 2023. Doc. Nos. 283, 284. For the reasons set forth below, the Motions to Dismiss are GRANTED.

BACKGROUND

[¶2] This case has followed a peculiar procedural history. Suffice it to say, Wilansky filed an Amended Complaint (Doc. No. 259) on July 28, 2023, after the

Court previously permitted limited discovery after converting the Defendants original Motion to Dismiss the Complaint into a Motion for Summary Judgment. However, throughout the course of the limited discovery, the Court stayed consideration of Summary Judgment because Plaintiff was seeking to amend her Complaint. Once the Amended Complaint was filed, and certain matters were struck as outside the scope of the permission, the Defendants, rather than continue with Summary Judgment, moved to dismiss the Amended Complaint. In doing so, the Defendants ask the Court to consider numerous extraneous matters in support of their Motion to Dismiss. Because the Amended Complaint can be dismissed without consideration of these matters, the Court exercises its discretion and only considers the facts as alleged in the Amended Complaint. *See Packard v. Darveau,* 759 F.3d 897, 905 (8th Cir. 2014) (finding the district court did not abuse its discretion in declining to consider matters outside the pleadings); *Stahl v. U.S. Dept. of Agriculture,* 327 F.3d 697, 701 (8th Cir. 2003) (quoting 5A Charles Alan Write & Arthur R. Miller, *Federal Practice and Procedure* § 1366, at 491 (2d ed. 1990) ("The court has complete discretion to determine whether or not to accept any materials beyond the pleadings that is offered in conjunction with a Rule 12(b)(6) motion.")); *Skyberg v. United Food and Commercial Workers Intern. Union, AFL-CIO,* 5 F.3d 297, 302., n.2 (8th Cir. 1993) ("A court has wide discretion in electing to consider matters outside the pleadings.").

[¶3] The circumstances of this case are well known to the Court. Leading up to November 20 and 21, 2016, there was a tumultuous protest at the Dakota Access Pipeline ("DAPL") site near the Backwater Bridge ("the Bridge") on Highway 1806 in Morton County, North Dakota, in which Morton County recruited law

enforcement help from across the United States. Doc. No. 259, ¶¶ 27-114. Sometime on or before November 20, 2016, law enforcement constructed a barricade across the Bridge to prevent protestors[1] from accessing the highway further down the road. *Id.* at ¶ 95. Due to the protest activities, there were two burned out vehicles on the Bridge on the opposite side of the roadblock from law enforcement. *Id.* On the afternoon of November 20, 2016, numerous protestors went to the Backwater Bridge with a semi-truck to move one of the burned-out vehicles to the ditch. *Id.* at ¶ 98. When it came to the removal of the second burned-out vehicle, law enforcement ordered the protestors not to remove it. *Id.* at ¶ 99 ("Law enforcement officers prevented these [protestors] from towing away the second burned-out vehicle.").

[¶4] Over the next several hours, hundreds of protestors gathered to protest the continued closure of the Bridge. *Id.* at ¶ 100. In response, Morton County Sheriff Kyle Kirchmeier ("Sheriff Kirchmeier") requested help from all law enforcement within 100 miles of the Bridge. *Id.* at ¶ 101. The protest allegedly ended around midnight, at which time all the protestors returned to their camps or were otherwise dispersed by law enforcement. *Id.* at ¶¶ 111-12. By 2:00 a.m. on November 21, 2016, with most of the protestors dispersed, those who remained were chatting near "makeshift campfires." *Id.* at ¶ 114. Wilansky wandered back to the Bridge around 2:00 a.m., alleging the area was "quiet and tranquil." *Id.* at ¶ 120.

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[1] The Amended Complaint euphemistically refers to the protestors as "water protectors." The reality of the situation, even as alleged in the Amended Complaint, is these individuals were protesting the construction of the pipeline and, thus, were protestors.

Throughout the night, Wilansky was unarmed. *Id.* at ¶ 126 Around 4:00 a.m., Wilansky approached the barricade and stayed in very close-proximity to the burned out vehicle for more than thirty minutes. *Id.* at ¶¶ 124, 127.

[¶5] Law enforcement officers ordered the protestors to move away from the burned-out vehicle around 3:57 a.m. on November 21, 2016, believing someone to be under the vehicle. *Id.* at ¶ 131. A fellow protestor yelled there was no one under the car. *Id.* at ¶ 132. Believing someone was nevertheless still under the burned-out vehicle, law enforcement began firing less-lethal munitions towards Wilansky and the other protestor. *Id.* at ¶ 133. Rather than leave the scene and comply with the officers' commands, Wilansky and the other protestors hid behind a metal sheet propped up against the driver-side of the burned-out vehicle in order to avoid getting hit. *Id.* at ¶¶ 125, 134. At this time Defendant Adam Dvorak ("Dvorak") threw two Stinger Ball grenades[2] toward them, which landed and exploded within a few feet of Wilansky. *Id.* at ¶ 135. No one was injured from this use of force. *See id.* (not indicating any injury from this use of the Stinger Ball grenade).

[¶6] While Wilanksy and the other protestor were still behind the metal sheet next to the burned-out vehicle, Defendant Jonathan Moll ("Moll") positioned himself on the turret of a Humvee with his 12-gauge shotgun to better aim at Wilansky. *Id.* at ¶ 138. One of

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[2] Stinger Ball grenades are 32 caliber rubber ball grenades. Doc. No. 259, ¶ 57. They are akin to flashbangs, containing flash powder ignited by fuse and producing a bright light and loud sound. *Id.* at ¶ 61. They differ from flashbangs in that Stinger Ball grenades have numerous rubber pellets that function as projectiles when the grenade detonates. *Id.*

the law enforcement officers eventually shot a less-lethal munition at Wilansky. *Id.* at ¶ 139. The Amended Complaint indicates two other officers may have hit her with less-lethal munitions. *Id.* They are not named as Defendants to this case. After this, Wilansky "began running as fast as she could south, away from the barricade and [burned-out] truck" yelling, "I'm leaving. Please don't shoot." *Id.* at ¶¶ 141-42. Wilansky was able to run approximately thirty (30) yards south. *Id.* at ¶ 145. While running, she saw a piece of plywood lying on the ground, stopped, and picked it up to use as a shield. *Id.* at ¶¶ 146-47.

[¶7] As she stopped, Moll shot an Aerial Signaling/Warning Munition[3] which hit Wilansky's left forearm and exploded, causing significant injuries. *Id.* at ¶¶ 148-50; *see also* Doc. No. 1-1 (photo of Wilansky's injury). According to the Amended Complaint, "[t]he blast destroyed almost all of the arteries, skin, tissue, muscle, nerves, tendons, and bone in her left forearm." *Id.* at ¶ 151. Wilansky claims the officers "laughed and cheered" and "congratulated Defendant Moll on his marksmanship." *Id.* at ¶ 154. Protestors helped transport her in a car away from the Bridge for medical care. *Id.* at ¶¶ 156-159. Wilansky was ultimately treated at the Hennepin County Medical Center, which incredibly avoided amputation. *Id.* at ¶¶ 160-63.

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[3] Aerial Signaling/Warning Munitions are flashbangs launched from a 12-guage shotgun shell. Doc. No. 259, ¶ 62. The shell contains flash powder and a fuse that ignites when fired from a shotgun. *Id.* They are designed to travel approximately fifty (50) to one hundred (100) meters before the fuse ignites the flash powder and creates a bright flash with loud sound. *Id.* For ease, the Court will refer to the Aerial Signaling/Warning Munitions launched by Moll simply as a flashbang.

[¶8] Wilansky's Amended Complaint Seven (7) claims for relief: (1) Excessive Force under the Fourth Amendment; (2) Excessive Force under the Fourteenth Amendment; (3) Monell Claim against Defendants Kirchmeier and Morton County; (4) Assault and batter under North Dakota law; (5) Intentional Infliction of Emotional Distress; (6) Negligent Infliction of Emotional Distress; and (7) Negligence and Violation of North Dakota Century Code §§ 9-10-01 and 9-10 06. The Defendants seek to dismiss each claim alleged in the Amended Complaint.

DISCUSSION

I. Motion to Dismiss Standard

[¶9] Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a pleading to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A defendant may file a motion to dismiss asserting the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). To survive such a motion, a complaint must contain "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (internal quotations omitted). A plaintiff must show that success on the merits is more than a "sheer possibility." *Id.* A complaint does not need detailed factual allegations, but it must contain more than labels and conclusions. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

[¶10] The Court must accept a complaint's factual allegations as true, but it does not need to accept a complaint's legal conclusions or "formulaic recitation of the elements of a cause of action." *Iqbal,* 556 U.S. at 678. A complaint does not "suffice if it tenders 'naked

assertion[s]' devoid of 'further factual enhancement.'" *Id.* However, the determination of whether a complaint states a claim upon which relief can be granted is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling him to relief. *Ulrich v. Pope Cty.,* 715 F.3d 1054, 1058 (8th Cir. 2013).

II. Qualified Immunity Standard

[¶11] This case involves several claims for qualified immunity[4] by the individual Defendants. "Qualified immunity shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would know." *Ferguson v. Short,* 840 F.3d 508, 510 (8th Cir. 2016). "The determination of whether qualified immunity is applicable in given circumstances is one of 'objective reasonableness.'" *Herts v. Smith,* 345 F.3d 581, 585 (8th Cir. 2003). The issue is not "whether the defendant acted wrongly, but whether reasonable persons would know they acted in a manner which deprived another of a known constitutional right." *Id.* (citing *Sparr v. Ward,* 306 F.3d 589, 593 (8th Cir. 2002)).

[¶12] A two-step inquiry is undertaken to determine if qualified immunity is invoked: "(1) [whether] the

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[4] Plaintiff urges the Court to reject the well-established jurisprudence relating to qualified immunity because it has no basis in the Constitution or Laws of the United States and "should be categorically rejected." Doc. No. 277, pp. 26-28. The Court has no authority to ignore the overabundance of binding caselaw regarding qualified immunity regardless of the degree to which the Court agrees qualified immunity cannot be found in Section 1983 or the Constitution.

facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) [whether] the right was clearly established at the time of the deprivation." *Jones v. McNeese,* 675 F.3d 1158, 1161 (8th Cir. 2012).

[¶13] Because the defendants bear the burden of proof on this affirmative defense, *id.,* "qualified immunity is 'an immunity from suit rather than a mere defense to liability.'" *Watson v. Boyd,* 2 F.4th 1106, 1110 (8th Cir. 2021) (citation omitted). However, to defeat an asserted qualified immunity defense, the plaintiffs have the burden to show that their asserted right was clearly established at the time of the alleged violation. *Quraishi v. St. Charles Cty., Missouri,* 986 F.3d 831, 835 (8th Cir. 2021). At the motion to dismiss stage, defendants must show they are entitled to qualified immunity on the face of the complaint. *Elder v. Gillespie,* 54 F.4th 1055, 1063 (8th Cir. 2022); *Baude v. Leyshock,* 23 F.4th 1065, 1071 (8th Cir. 2022); *Dadd v. Anoka County,* 827 F.3d 749, 754 (8th Cir. 2016).

[¶14] For the purposes of step two, "clearly established" means "[t]he 'contours of the right must be sufficiently clear that a reasonable official would [have understood] that what he was doing violates that right.'" *Quraishi,* 986 F.3d at 835 (quoting *Anderson v. Creighton,* 483 U.S. 635, 640 (1987)). "This generally requires a plaintiff to point to existing circuit precedent that involves sufficiently similar facts to squarely govern the officer['s] conduct in the specific circumstances at issue." *Martin v. Turner,* 73 F.4th 1007, 1010 (8th Cir. 2023) (quotation marks omitted) (quoting *Graham v. Barnette,* 5 F.4th 872, 887 (8th Cir. 2021)). "We . . . look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this

circuit." *Meloy v. Bachmeier,* 302 F.3d 845, 848 (8th Cir. 2002). While qualified immunity "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly,* 137 S. Ct. 548, 551 (2017) (citations omitted). In other words, when there is no directly controlling authority, courts look to whether there is "a robust 'consensus of cases of persuasive authority.'" *Ashcrof v. al-Kidd,* 563 U.S. 731, 741-42 (2011) (quoting *Wilson v. Layne,* 526 U.S. 603, 617 (2011)). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning so long as the unlawfulness is apparent." *Dean v. Searcey,* 893 F.3d 504, 518 (8th Cir. 2018), *cert. denied,* 139 S. Ct. 1291, 203 L. Ed. 2d 414 (2019).

[¶15] The Court will address which step in the qualified immunity analysis it will address first when discussing each claim.

III. Claim One: Excessive Force under the Fourth Amendment

[¶16] Plaintiffs alleges Defendants Moll and Dvorak used excessive force on her while effectuating an alleged seizure. The Defendants argue the Amended Complaint fails to state a claim for excessive force under the Fourth Amendment because the use of force as alleged did not constitute a seizure. Even if it was a seizure, the Defendants argue the use of force was reasonable under the circumstances. Finally, the Defendants argue even if there was excessive force adequately alleged in the Amended Complaint, the Defendants would nevertheless be entitled to qualified immunity because the law was not clearly established by November 20, 2016, that their use of force

(1) constituted a seizure and (2) was excessive under the circumstances.

[¶17] Wilansky argues the Amended Complaint states a Fourth Amendment Excessive Force cause of action because the facts adequately allege a seizure by control and the use of force was unreasonable. She also argues the Defendants are not entitled to qualified immunity because it was clearly established by November 20, 2016, that the use of force here on an unarmed, peaceful individual was unreasonable.

[¶18] The Court will begin with whether a constitutional violation occurred. The primary issue is whether the officers' use of force against Wilansky in the early morning hours of November 21, 2016 constituted a "seizure" under the Fourth Amendment. The Court concludes it does not.[5] Because there was no seizure under the circumstances alleged in the Amended Complaint, the Court does not need to reconsider[6] the objective reasonableness of the officers' conduct here.

[¶19] "To establish a Fourth Amendment violation, the claimant must demonstrate that a seizure occurred and that the seizure was unreasonable." *Dundon v. Kirchmeier,* 85 F.4th 1250, 1255 (8th Cir. 2023). "A 'seizure' of a 'person' plainly refers to an arrest" and "that linkage persists today." *Torres v. Madrid,* 592

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[5] The Court previously concluded the facts and circumstances as pled adequately state a claim that the Officers seized Wilansky. Doc. No. 46, ¶¶ 103-110. This, however, was prior to *Torres v. Madrid,* 592 U.S. 306 (2021) and other subsequent caselaw. In light of these cases, the analysis must result in a different conclusion.

[6] The Court previously held the Original Complaint adequately state a claim for unreasonable use of force on essentially the same facts here except for the allegation was against "John Doe Officers". Doc. No. 46, ¶¶ 111-116.

U.S. 306, 312 (2021). Under the Fourth Amendment, there are two ways in which a law enforcement officer may effectuate a "seizure," thus triggering the excessive force analysis: seizure by force and seizure by control. *Id.* at 322. These concepts have not been well-distinguished in past cases. *Id.* ("In all fairness, we too have not always been attentive to this distinction when a case did not implicate the issue."). Wilansky's Amended Complaint fails under both theories.

[¶20] Use of force against an individual, even if an officer does not gain control over the arrestee, might be a seizure. *Id.* at 313. Nevertheless, not "every physical contact between a government employee and a member of the public" is "a Fourth Amendment seizure." *Id.* at 317. Indeed, with a seizure by force, there must be an intent to restrain the individual. *Id.* "Force intentionally applied for some other purpose [will not] satisfy this rule." *Id.* The "inquiry is whether the challenged conduct *objectively* manifests an intent to restrain" because courts "rarely probe the subjective motivations of police officers in the Fourth Amendment context." *Id.* A simple touch could potentially be enough to constitute a seizure, but the amount of force may be important to determine "the objective intent to restrain." *Id.* Likewise, the subjective perceptions of the individual claiming seizure are not considered. *Id.* "[T]he application of physical force to the body of a person *with intent to restrain* is a seizure even if the person does not submit and is not subdued." *Id.* at 325 (emphasis added).

[¶21] Under the physical force analysis, the Amended Complaint clearly demonstrates the officers' intention in using less-lethal munitions and flash-bang grenades was to get Wilansky and others away from the burned-out vehicle and away from the Bridge. The officers

never stated Wilansky was under arrest, likely because she was not under arrest. Prior to any use of force, the officers ordered Wilansky and her companion to move away from the burned-out vehicle shortly before 4:00 a.m. on November 21, 1016. Only after Wilansky refused to comply did the officers begin to use force to disperse her from the Bridge. During this time, the officers may have temporarily stalled her movement, but she was able to get away from the scene. Moll only shot the flashbang at Wilansky after Wilansky stopped retreating and retrieved the plywood. Even after the flashbang exploded on her arm, she was able to leave without any indication from the officers they intended to arrest her. As alleged in the Amended Complaint, there is no objective manifestation of officers' intent to seize Wilansky. *Torres,* 592 U.S. at 317 (requiring an objective manifestation of an intent to seize for a seizure by force). Rather, their objective intent was to disperse her from the Bridge and surrounding area. There was no seizure by force. *Id.* at 325 (explaining a seizure by force only occurs after (1) force is exerted on an individual and (2) the use of force was intended to restrain).

[¶22] When use of force is not the basis for analysis, "a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement." *Id.* Seizures by control require actual control of the individual. *Id.* "Such a seizure requires that 'a person be stopped by the very instrumentality set in motion or put in place *in order to achieve that result.*'" *Id.* (quoting *Brower v. County of Inyo,* 489 U.S. 593, 599 (1989)) (emphasis added). "That result," being exercising physical control to effectuate an arrest. *See id.*

[¶23] Under the seizure by control analysis, Wilansky's claim fails because the use of force was not set in place in order to place her under arrest.[7] After the officers began using force, Wilansky began moving away from the burned-out vehicle in compliance with their order. The officers must have stopped Wilansky by the less-lethal munitions or flash-bang grenades "put in place in order to achieve that result." *Id.* at 325. In other words, the officers must have intended to stop her by using the less-lethal munitions and flash-bang grenades. But the Amended Complaint plainly shows the officers use of the munitions and grenades were set in place to disperse Wilansky from the area, not to stop her in her tracks. In addition, the Amended Complaint fails to allege the officers were attempting to arrest her under the circumstances. Such an omission is independently fatal. *See id.*

[¶24] The United States District Court for the District of Columbia faced a similar set of circumstances in *Black Lives Matter D.C. v. Trump,* 544 F.Supp.3d 15 (D.D.C. 2021). There, the plaintiffs alleged they were engaged in peacefully protesting racial injustice in Lafayette Park across from the White House. *Id.* at 26. In response to the protest, plaintiffs alleged officers were using tear gas, flash-bang grenades, smoke bombs, and rubber bullets in order to clear the area for the President to walk to a photo opportunity nearby. *Id.* at 26-27. Plaintiffs alleged the use of tear gas caused them to be seized under the Fourth Amendment and the force was objectively unreasonable under the circumstances. *Id.* at 48. The court concluded the officers had no intent to restrain the protestors because their express intent

[7] Wilansky also did not voluntarily submit to the officers show of authority, but that is not at issue here.

was to disperse them to make way for the President. *Id.* Similar to *Black Lives Matter D.C.,* the officers' express intent here was to force Wilansky to leave the area, not to seize her or stop her movement. It was to propel her movement away from the burned-out vehicle.

[¶25] Accordingly, Wilansky was not "seized" under the Fourth Amendment either by physical force or under acquisition of control. Her claim for excessive force under the Fourth Amendment, therefore, fails.

[¶26] Even if a seizure occurred, however, Moll and Dvorak are still protected under qualified immunity because it was not clearly established at the time that the use of force to disperse individuals, as opposed to restrain them, constituted a seizure under the Fourth amendment. *Dundon v. Kirchmeier,* 85 F.4th 1250, 1255 (8th Cir. 2023) (discussing the same protest on the same date at issue in this case, holding "the protestors have not shown that it was clearly established as of November 2016 that a use of force designed to disperse a crowd constituted a seizure"). *Dundon* controls this issue.

[¶27] In *Dundon,* the protestors were ordered to leave the exact same Bridge area on November 20, 2016, but refused. *Id.* at 1254. In response, the officers fired tear gas canisters at the protestors. *Id.* The protestors argued the officers seized them by using force intended to disperse the crowd. *Id.* at 1255. The Eighth Circuit noted:

> As of 2014, it was not clearly established that the use of tear gas by police to disperse news reports from the site of public unrest and protests was a seizure. *Quraishi v. St. Charles County,* 986 F.3d 831, 839-40 (8th Cir. 2021). As of 2018, it was not clearly established that

> a push used to repel a subject seeking to enter a government facility was a seizure. *Martinez v. Sasse,* 37 F.4th 506, 510 (8th Cir. 2022).

Id. In concluding, the Eighth Circuit in *Dundon* held, "[w]e conclude that the protestors have not established that the individual officers violated a clearly established right under the Fourth Amendment, because it was not clearly established as of November 2016 that the use of force to disperse a crowd was a seizure." *Id.* at 1257. What was true in *Dundon* remains true today.[8] The use of force to disperse Wilansky from the scene was not clearly established at the time to be a seizure under the Fourth Amendment. *Id.; see also Keup v. Sarpy County,* ___ F.Supp.3d ___, 2023 WL 8829298, *17 (D. Neb. Dec. 21, 2023) (relying on *Dundon,* concluding it was not clearly established on May 29, 2020, that the use of force to disperse constituted a seizure under the Fourth Amendment). Because it was not clearly established, Moll and Dvorak are entitled to qualified immunity on Wilansky's Fourth Amendment Excessive Force claim.

[¶28] Accordingly, The Defendants' Motion to Dismiss Claim One of the amended Complaint is GRANTED.[9]

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[8] The Court notes in *Torres,* the Supreme Court expressly avoided the question whether the use of "pepper spray, flash-bang grenades, lasers, and more" may constitute a *de facto* seizure. *Torres,* 592 U.S. at 317. As of 2021, when *Torres* was decided, the question presented in this case remained undecided at the Supreme Court. This further bolsters the conclusion the law was not clearly established in November 2016 that the use of force to disperse Wilansky constituted a seizure under the Fourth Amendment.

[9] The court does not take this conclusion lightly. Wilansky suffered horrific injuries to her forearm that was spared amputation because of the expert care she received at the Hennepin

IV. Claim Two: Excessive Force under the Fourteenth Amendment

[¶29] Wilansky re-alleges her Excessive Force under the Fourteenth Amendment claim in the Amended Complaint. The Court previously found the use of non-lethal force against an unarmed protestor who was told to disperse did not shock the conscience. Doc. No. 46, ¶¶ 38-54. This claim was dismissed with prejudice as to the officers when they were unnamed. Nothing changes that holding and this claim remains dismissed with prejudice. However, even if Wilansky was permitted to have a second bite at this apple, the Court would dismiss it for the same reasons previously stated. *Id.* Accordingly, the Defendants' Motion to Dismiss Claim Two is GRANTED.

V. Claim Three: *Monell* Liability Against Sheriff Kirchmeier and Morton County

[¶30] The Court previously dismissed with prejudice the *Monell* claims against Sheriff Kirchmeier and Morton County. Doc. No. 46, ¶¶ 77-91. This claim remains dismissed with prejudice. However, even if Wilansky were permitted to bring this claim, the Court would dismiss it with prejudice as previously stated. *Id.* Accordingly, the Defendants' Motions to Dismiss Claim Three are GRANTED.

County Medical Center. Wilansky alleges the officers laughed at her and congratulated Moll for his "marksmanship." While the Court appreciates the need for officer safety, it can be easy to devalue the human life officers are sworn to protect—in this instance, the protestors. The allegation of laughing and congratulating, if true, is appalling.

VI. Claims Four through Seven: State Law Claims Count

[¶31] Wilansky stipulates to the dismissal of Claims Four through Seven against Defendant Dvorak. Dvorak's Motion to Dismiss Claims Four through Seven is, therefore, GRANTED. Wilansky further stipulates to the dismissal of Claim Seven against all Defendants. The Defendants' Motions to Dismiss Claim Seven are, therefore, GRANTED.

[¶32] Wilansky maintains Claims Four through Six as alleged against Defendant Moll, Sheriff Kirchmeier, and Morton County should be considered by the Court. The Defendants argue these claims are time-barred as alleged against Moll and the claims against Sheriff Kirchmeier and Morton County should be dismissed because they are provided immunity from these claims under North Dakota law. Wilansky argues that including Moll as a named Defendant in the Amended Complaint relates back to the filing date of the original Complaint and is, therefore, not barred by North Dakota's Statue of limitations. Furthermore, she argues Sheriff Kirchmeier and Morton County should not be afforded immunity. The Court agrees with the Defendants.

[¶33] Section 32-12.1-10 of the North Dakota Century Code provides, "an action brought [against a political subdivision or political subdivision employee] must be commenced within three years after the claim for relief has accrued." N.D.C.C. § 32-12.1-10(1). The claims against Moll accrued on November 21, 2016, when he launched the Aerial Signal/Warning Munition at Wilansky. The clock began that day. Three years later was November 21, 2019. The original Complaint (Doc. No. 1), filed almost one year before that on November 19, 2018, and listed "John Doe law

enforcement officer" for the remaining state law claims. The Amended Complaint naming Moll as a Defendant in the state law claims was not filed until July 21, 2022,[10] well over two years past November 21, 2019, statute of limitations deadline. Doc. No. 153. The question before the Court is whether the substitute of Moll for "John Doe" relates back to the filing of the original Complaint under Rule 15(c) of the Federal Rules of Civil Procedure.

[¶34] Rule 15(c) of the Federal Rules of Civil Procedure governs when amended pleadings relate back in time to the filing of an original complaint. It provides, in relevant part:

> (1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when:
>
> * * *
>
> (C) the amendment changes the party or the naming of the party against whom a claim is asserted, if Rule 15(c)(1)(B) is satisfied and if, within the period provided by Rule 4(m) for serving the summons and complaint, the party to be brought in by amendment:

[10] Issues arose relating to the scope of the amendments and the Court ultimately struck certain portions of the amendments as outside the permission to amend. Doc. No. 254. The revised Amended Complaint, considered by this Court in this Order, was filed on July 28, 2023. Doc. No. 259. For the statute of limitations purposes, the Court uses the filing date of the first Amended Complaint (Doc. No. 153).

> (i) received such notice of the action that it will not be prejudiced in defending on the merits; and
>
> (ii) knew or should have known that the action would have been brought against it, but for a *mistake* concerning the proper party's identity.

Fed. R. Civ. P. 15(c)(1)(C) (emphasis added).

[¶35] Relying on *Heglund v. Aitkin County,* 871 F.3d 572 (8th Cir. 2017), the Defendants argue the substitution does not relate back because Rule 15(c) proscribes relations back except when the inclusion of the original defendant was a "mistake". Wilansky urges the Court to disregard the mistake requirement and focus on "what the party to be added knew or should have known, not the amending party's knowledge of its timeliness in seeking to amend the pleading." Doc. No. 277, p. 32 (quotation marks omitted) (quoting *Krupski v. Costa Crociere S. p. A.,* 560 U.S. 538, 579 (2010).

[¶36] *Heglund* directly controls this issue. In *Heglund,* the plaintiffs sued numerous state agencies and "John Doe" state defendants. *Heglund,* 871 F.3d at 575. Later, they amended the complaint to replace one John Doe with Frank Scherf, a former police chief. *Id.* The Eighth Circuit considered this amendment in light of it falling outside the ordinary statute of limitations of such claims. *Id.* at 578-79. In doing so, the Circuit Court addressed the Supreme Court *Krupski* case. *Id.* at 579. The Circuit noted that the Supreme Court "affirmed that a plaintiff's deliberate choice, made with a full understanding of the legal and factual situation, is 'the antithesis of making a mistake.'" *Id.* (quoting *Krupski,* 560 U.S. at 549). As

noted in *Heglund,* "a mistake occurs if a plaintiff knows that two or more parties exist but chooses to sue the wrong one based on a misunderstanding about the party's status or role." *Id.* (quoting *Kurpski,* 560 U.S. at 549). The Eighth Circuit concluded naming a "John Doe" defendant does not constitute a "mistake" as required by Rule 15(c) to qualify for a relation back to the date of the original complaint. *Id.* ("We conclude that naming a John Doe defendant is not a 'mistake.' Mistake implies inadvertence or a sincere but wrong belief.").

[¶37] Wilansky's inclusion of John Doe in her original Complaint was not a "mistake" under Rule 15(c) and the Court is unpersuaded to consider *Krupski* in the manner Wilansky suggests. In *Krupski,* the Supreme Court held a mistake occurred because the plaintiff inadvertently chose the wrong individual as the defendant. *Krupski,* 560 U.S. at 579; *see also Smith v. City of Akron,* 476 Fed. Appx. 67, 69 (6th Cir. 2012) (noting that in *Krupski,* "the plaintiff knew of two potential parties when she filed the lawsuit, but she sued the wrong party and corrected the mistake only after the statute of limitations had expired"). But the Eight Circuit held that the inclusion of a John Doe defendant is not a mistake. *Heglund,* 871 F.3d at 579.

[¶38] Wilansky was fully aware at the time she filed her Complaint of the legal consequences of suing a John Doe rather than waiting to determine the name of the Defendant. She does not contend otherwise. She asks the Court to find Moll should have been aware of his potential for liability. But that only goes to part of the requirements. John Doe's inclusion in the original Complaint was not a mistake and the Eighth Circuit has made clear Wilansky is not given the benefit of

relating her claims against Moll back to the date of the original Complaint under these circumstances. *Id.*

[¶39] Wilansky did not file her Amended Complaint until over a year after the three-year statute of limitations ran on her claims against Moll. Her claims against Moll are, therefore, time-barred under Section 28-01-22.1(1). Defendant Moll's Motion to Dismiss Wilansky's State Law claims against his is GRANTED.

[¶40] As it relates to Wilansky's State Law claims against Sheriff Kirchmeier and Morton County, these Defendants are afforded immunity under Section 32-12.1-03 of the North Dakota Century Code, which provides in relevant part:

> 3. A political subdivision or a political subdivision employee *may not be held liable* under this chapter for any of the following claims:
>
> * * *
>
> f. A claim relating to injury directly or indirectly caused by the performance or nonperformance of a public duty, including:
>
> * * *
>
> (3) Providing or failing to provide law enforcement services in the ordinary course of a political subdivision's law enforcement operations.

N.D.C.C. § 32-12.1-03(3)(f)(3). There is a dearth of caselaw interpreting the scope of this provision.

[¶41] Wilansky argues it "cannot possibly be correct" Sheriff Kirchmeier and Morton County are granted immunity under this provision because it defies "common sense." Doc. No. 277, p. 33. In making this

argument, Wilansky claims cases in North Dakota have permitted assault and battery claims against law enforcement officers, relying on *Ellis v. Devig,* 2009 WL 1886644, at *9 (D.N.D. June 26, 2009).

[¶42] *Ellis* is inapplicable here. *Ellis* dealt with a claim for immunity under North Dakota's discretionary function exception under N.D.C.C. § 32-12.1-03(3)(d). This case falls under N.D.C.C. § 32-12.1-03(3)(f)(3), which provides immunity for actions relating to law enforcement services in the ordinary course of Morton County's law enforcement operations. The circumstances of this case were extraordinary. But it is entirely ordinary for a county to send law enforcement to a protest site, especially a site that becomes embroiled in conflict between a private company and protestors, such as happened at the DAPL protests. Sheriff Kirchmeier's and Morton County's response was providing law enforcement services in the ordinary course of Morton County's law enforcement operations. N.D.C.C. § 32-12.1-03(3)(f)(3). This does not defy common sense. Rather, it is the law and this Court has no authority to disregard what the North Dakota legislature has made clear: Kirchmeier and Morton County are afforded immunity from Wilansky's state law claims under North Dakota law.[11] *Id.*

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[11] This holding is similar to *Smith,* 476 Fed. Appx at 70-71. In *Smith,* the Sixth Circuit noted, "Smith filed several state common law tort claims against the city defendants, including negligence and intentional infliction of emotional distress." Because Ohio law provided immunity to municipalizes "for injuries 'caused by an act or omission of . . . an employee of the political subdivision in connection with a governmental . . . function.'" *Id.* (quoting Ohio Rev. Code § 2744.02(A)(1)). "Smith claim[ed] that police do not serve a governmental function." *Id.* The Six Circuit disagreed

CONCLUSION

[¶43] For the reasons set forth above, the Defendants' Motions to Dismiss are GRANTED. The Amended Complaint is DISMISSED with prejudice.

[¶44] IT IS SO ORDERED.

DATED April 5, 2024.

/s/ Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court

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concluding, "Ohio law says otherwise" and granted the municipalities immunity from Smith's state law claims. *Id.*

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Civil No.: 1:18-cv-236

SOPHIA WILANSKY,

Plaintiff,

vs.

MORTON COUNTY, NORTH DAKOTA; "JOHN DOE" LAW ENFORCEMENT OFFICER IN HIS PERSONAL CAPACITY; KYLE KIRCHMEIER, IN HIS PERSONAL AND OFFICIAL CAPACITIES; PAUL LANEY, IN HIS PERSONAL CAPACITY; AND THOMAS IVERSON, IN HIS PERSONAL CAPACITY,

Defendants.

ORDER GRANTING, IN PART, AND CONVERTING TO SUMMARY JUDGMENT AND DEFERRING, IN PART, COUNTY DEFENDANTS' MOTION TO DISMISS AND GRANTING DEFENDANT IVERSON'S MOTION TO DISMISS

[¶1] THIS MATTER comes before the Court on the Motions to Dismiss filed by State Defendant Major Thomas Iverson ("Defendant Iverson") and County Defendants Morton County, Sheriff Kyle Kirchmeier, and Former Sheriff Paul Laney ("County Defendants"). Doc. Nos. 26, 28. Plaintiff, Sophia Wilansky ("Wilansky"), filed a Consolidated Opposition to both Motions on February 25, 2019. Doc. No. 35. Defendant Iverson replied in support of his Motion on March 8, 2019, and the County Defendants replied in support of their Motion on March 21, 2019. Doc. Nos. 38, 41. For

the reasons explained below, Defendant Iverson's Motion to Dismiss is GRANTED and County Defendants' Motion to Dismiss is GRANTED, IN PART, AND CONVERTED TO SUMMARY JUDGMENT AND DEFERRED, IN PART.

I. FACTUAL BACKGROUND

[¶2] The facts are taken from the Complaint and assumed to be true for purposes of ruling on the present Motions. *See Minnesota Majority v. Mansky,* 708 F.3d 1051, 1056 (8th Cir. 2013).

[¶3] Wilansky, a citizen and resident of the State of New York, traveled to North Dakota in the fall of 2016 to join the Standing Rock Sioux Tribe and its supporters in advocating against the construction of the Dakota Access Pipeline ("DAPL"), which was slated to cross a few miles north of the Standing Rock Tribe's Reservation. Doc. No. 1, ¶¶6, 20, 79. The Tribe opposed the location and construction of the Pipeline, asserting it would endanger their water supply, disrupt cultural sites, and violate their sovereignty. Doc. No. 1, ¶6. Wilansky, who describes herself as "a passionate environmentalist and committed social justice advocate," joined the Tribe and its supporters in vocalizing this message, including living at the protestors' main camp, Oceti Sakowin, located near Highway 1806 and the Backwater Bridge. Doc. No. 1, ¶¶25, 78. Wilansky joined thousands of protestors residing at Oceti Sakowin between September and December of 2016. Doc. No. 1, ¶27.

[¶4] Wilansky asserts prior to September 2016, there was minimal law enforcement presence, even with the protestors employing periodic protests as early as April 2016. Doc. No. 1, ¶¶28-29. Wilansky asserts this minimal presence changed due to an

incident on September 3, 2016, involving the protestors and private security guards hired by Energy Transfer Partners. Doc. No. 1, ¶30. Wilansky indicates several protestors were bitten by security dogs handled by the security guards. Doc. No. 1, ¶30. According to Wilansky, Morton County's law enforcement officials faced widespread criticism after the "attack." Doc. No. 1, ¶30. As a result, she asserts, the Morton County Sheriff's Office began "maintaining a larger presence at and responding more aggressively to DAPL protests." Doc. No. 1, ¶31.

[¶5] This larger presence included law enforcement agencies from other North Dakota sheriff's offices, police departments, and the North Dakota State Highway Patrol. Doc. No. 1, ¶¶32, 33. In addition, the Governor of North Dakota activated the North Dakota National Guard on September 8, 2016 to provide assistance to law enforcement at the DAPL protest sites. Doc. No. 1, ¶33. In total, more than 400 law enforcement officers from across North Dakota were assisting Morton County by early October of 2016. Doc. No. 1, ¶36.

[¶6] In October 2016, North Dakota issued an "Emergency Management Assistance Compact". Doc. No. 1, ¶37. In response, law enforcement agencies from numerous states, including, Wisconsin, South Dakota, Minnesota, Wyoming, Indiana, and Nebraska, joined Morton County and other North Dakota law enforcement agencies at the protest sites. Doc. No. 1, ¶37. Wilansky asserts these local and out-of-state law enforcement personnel worked "under the supervision and direction of Defendant Kirchmeier and acted under the authority of the Morton County Sheriff's Office." Doc. No. 1, ¶¶34, 38. Many of these officers, Wilansky asserts, "lacked adequate training in the

appropriate use of less-lethal weapons." Doc. No. 1, ¶¶35, 39. Almost 1,000 law enforcement officials were assisting Morton County by the end of October of 2016. Doc. No. 1, ¶40.

[¶7] Wilansky alleges as the law enforcement presence grew, the militarized nature of these officials did as well. Doc. No. 1, ¶41. She asserts law enforcement officers arrived in armored vehicles, wore tactical riot gear, removed their badges, and carried riot batons. Doc. No. 1, ¶41. She alleges Defendants Kirchmeier and Morton County equipped these officers with less-lethal weapons throughout October and November 2016. Doc. No. 1, ¶42. According to the Complaint, the officers deployed less-lethal weapons against DAPL protestors, including:

> OC spray (commonly known as "pepper spray"), sponge bullets (commonly known as "rubber bullets"), CS grenades and cannisters (commonly known as "tear gas grenades"), beanbags, stinger ball grenades (grenade-like objects that expel numerous small rubber pellets), Tasers, and flash-sound diversionary devices (commonly known as "flashbangs" and sometimes referred to as "concussion grenades" or "percussion grenades")

Doc. No. 1, ¶¶42, 43, 45.

[¶8] In particular, Wilansky alleges officers used rubber bullets and pepper spray on October 22, 2016, pepper spray, shotguns loaded with sponge bullets and bean bags, and other less-lethal weapons on October 27, 2016, and tear gas on November 2, 2016. Doc. No. 1, ¶¶47-49. She contends officers "repeatedly aimed and launched flashbangs and other explosive less-

lethal munitions at individuals and/or into crowded areas." Doc. No. 1, ¶76.

[¶9] Wilansky asserts law enforcement officers who deployed these less-lethal weapons, particularly explosives, during October and November 2016 lacked sufficient training to use these weapons. Doc. No. 1, ¶75. These weapons, Wilansky argues, should only be used by law enforcement officers who have successfully completed formal training in their use. Doc. No. 1, ¶53. She points to a number of sources lending credence to her statement: the manufacturers and suppliers of these weapons, warnings on the product specifications themselves, statements from The National Tactical Officers Association, and standard policies in law enforcement agencies. Doc. No. 1, ¶¶52, 60, 71.

[¶10] One specific warning some of these sources issue, which Wilansky asserts is vital, is explosive less-lethal munitions should never be fired into crowds or directly at individuals. Doc. No. 1, ¶54. To support her view of the dangerousness of these weapons, Wilansky provides several examples of individuals who have suffered injuries due to flashbangs or other explosives, including those who lost hands, arms, and suffered other serious injuries. Doc. No. 1, ¶¶61-66. She asserts "numerous Courts have ruled that throwing flashbangs without conducting a prior visual inspection of the deployment area to ensure no one is present constitutes unconstitutional excessive force." Doc. No. 1, ¶67.

[¶11] On this basis, she asserts "[a]s of November 2016, it was obvious to any qualified and reasonably competent law enforcement supervisor and policy-maker that flashbangs and other explosive less-lethal munitions are dangerous and can cause serious bodily harm if denotated in close proximity to an individual." Doc. No. 1, ¶72. Wilansky further claims only officers

who have successfully completed training on their use should be given such weapons. Doc. No. 1, 173. She avers "these explosive less-lethal munitions should never be launched at individuals or in crowded areas." Doc. No. 1, 1174.

[¶12] This is relevant, she claims, because her injuries were allegedly a result of an officer using a flashbang on November 21, 2016. Doc. No. 184. Wilansky maintains the injury occurred near a barricade set up by Morton County immediately north of the Backwater Bridge ("the Bridge") on Highway 1806. Doc. No. 1, ¶80. The barricade consisted of "concrete roadblocks covered in multiple rings of concertina razor wire," and spanned the width of the highway. Doc. No. 1, 181. In front of the barricade sat two large burned-out vehicles. Doc. No. 1, 181. The barricade's location, she maintains, prevented individuals from travelling between Oceti Sakowin Camp and Bismarck-Mandan on Highway 1806. Doc. No. 1, 182.

[¶13] Wilansky asserts throughout November of 2016 protestors attempted to negotiate with Morton County to reopen the Backwater Bridge, but were unsuccessful. Doc. No. 1, 183. When these negotiations failed, on the afternoon of November 20, 2016, several protestors towed one of the burned-out vehicles off the Bridge with a semi. Doc. No. 1, 185. Protestors attempted to tow away the second burned-out vehicle, but law enforcement prevented them from doing so. Doc. No. 1, 185. After this occurred, protestors continued to gather over the next several hours south of the barricade on the Backwater Bridge to protest the continued closure of the Bridge. Doc. No. 1, 186.

[¶14] In response, Morton County issued a request for assistance of all available law enforcement officers in the state of North Dakota. Doc. No. 1, ¶87. "Dozens

of law enforcement officers arrived at Backwater Bridge." Doc. No. 1, ¶88. Wilansky asserts "Morton County equipped these officers with tactical riot gear, police shields, and less lethal weapons, including sponge bullets, beanbags, tear gas canisters, pepper spray, and flashbangs." Doc. No. 1, ¶89. Wilansky alleges "many of the law enforcement officers equipped with less-lethal weapons lacked sufficient training in their proper use and deployment." Doc. No. 1, ¶90.

[¶15] Wilansky asserts over the course of the protest on November 20, 2016, law enforcement officers used dozens of less-lethal weapons, "repeatedly fir[ing] tear gas canisters into crowds of protestors on the bridge." Doc. No. 1, ¶94. In addition, she asserts law enforcement officers "launched numerous explosive less-lethal munitions, including flashbangs, directly into crowds of protestors." Doc. No. 1, ¶95. However, "by midnight almost all of the protestors had returned to Oceti Sakowin or otherwise dispersed." Doc. No. 1, ¶97.

[¶16] Wilansky asserts that by 2:00 a.m. on November 21, 2016, only a few protestors remained on the Bridge, chatting quietly near makeshift campfires. Doc. No. 1, 198. She asserts there were no active protests happening. Doc. No. 1, 198. She maintains "the area around the bridge was quiet and tranquil," with a few protestors occasionally approaching the barricade to communicate with law enforcement. Doc. No. 1, 1199, 100.

[¶17] Wilansky herself approached the barricade near the remaining burned-out vehicle slightly before 4:00 a.m. to chat with other nearby protestors. Doc. No. 1, 1101. She asserts the other protestors departed from the area leaving her alone in front of the barricade. Doc. No. 1, 1101. She alleges she "did not yell at, menace, or threaten the law enforcement officers on

the other side of the barricade in any way," nor did she have any weapons. Doc. No. 1, ¶102. Wilansky maintains another protestor approached her to engage in a conversation while she was standing in front of the barricade when law enforcement ordered them to "move away from the burned-out vehicle." Doc. No. 1, ¶¶104-105. She then claims the following events happened:

> Before [she] had a chance to react to this order, law enforcement officers began firing sponge bullets at her and the other water protector. One of these bullets hit [her] in the upper left arm. It left a mark that is still visible today. [She] began retreating from the barricade and pleaded with the officers to stop firing at her. While [she] was still retreating, Defendant Doe fired an explosive less-lethal munition at her. Upon information and belief, the explosive less-lethal munition was a flashbang. Upon information and belief, the flashbang was a Defense Technology low roll non-reloadable distraction device. This munition hit [her] in the left forearm and exploded. The explosion blew through [her] jacket and nearly severed her left hand from her arm. The blast destroyed almost all of the arteries, skin, tissue, muscles, nerves, tendons, and bone in her left forearm. Blood poured out of the wound and filled the sleeve of her jacket. Her forearm bone was protruded from her sleeve. [She] screamed in pain and fell to the ground. While [she] lay in the road, bleeding and crying out in pain, the law enforcement officers on the scene laughed and cheered.

> They congratulated Defendant Doe on his marksmanship.[1]

Doc. No. 1, ¶¶105-114.

[¶18] Wilansky asserts law enforcement did not assist her; rather, protestors loaded her into a car and brought her to the Prairie Knights Casino and Resort to wait for an ambulance. Doc. No. 1, ¶¶118-119. She was eventually flown to Hennepin County Medical Center in Minneapolis, Minnesota. Doc. No. 1, ¶120. She was brought into surgery where the doctors removed a small piece of shrapnel, which was then sent to the pathology department to be preserved and photographed. Doc. No. 1, ¶122.

[¶19] After the incident, Wilansky alleges, "[i]n an attempt to avoid the ensuing negative media coverage, Defendants Kirchmeier, Iverson, Laney, and Morton County embarked on a public campaign of misinformation and false accusations." Doc. No. 1, ¶126. For example, she asserts Defendant Kirchmeier accused protestors near Wilansky of "hurling explosive fuel canisters at law enforcement officers and suggested that [she] may have been injured by one of these," also stating, "We don't know where [the explosion] came from, but it wasn't law enforcement." Doc. No. 1, ¶¶127-128. She contends Morton County Sheriff's Office Spokesperson, Maxine Herr, stated "[n]one of our equipment would cause an injury like that," and the device that injured Wilansky "wasn't from our law

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[1] The Defendants assert Wilansky's injuries were self-inflicted and occurred when she was attempting to create an explosive device using a propane tank. The Defendants maintain the homemade bomb exploded, causing Wilansky's injuries. However, the Court does not consider this evidence as it is not in the Complaint.

enforcement, because we didn't deploy anything that should have caused that type of damage to her arm[.]" Doc. No. 1, ¶129. Wilansky also alleges Herr stated that Wilansky "may have been injured while protesters were 'rigging up their own explosives' to use against law enforcement." Doc. No. 1, ¶129.

[¶20] Morton County and Defendant Kirchmeier were not the only ones to issue statements on the incident, according to Wilansky. She maintains Defendant Iverson issued written statements which repeated Defendants Kirchmeier and Morton County's statements. Doc. No. 1, ¶130. She asserts Defendant Iverson stated in one of these written statements that the injuries Wilansky "sustained are inconsistent with any resources utilized by law enforcement and are not a direct result of any tools or weapons used by law enforcement," further stating to news media that no flashbangs were used by officers at the Backwater Bridge on November 20-21. Doc. No. 1, ¶¶131,132. In other statements, Wilansky asserts Defendant Iverson stated "protestors rolled metal cylinders toward [Wilansky] immediately before she was injured, and that 'Law Enforcement had received information that protest[e]rs were using one-pound propane cylinders as explosives,' and that 'small propane tanks rigged as improvised explosive devices' were recovered from the crime scene." Doc. No. 1, ¶133. Wilansky alleges Defendant Iverson also wrote "at the time [Wilansky] was injured, she and other protestors nearby exhibited 'strange mannerisms [that] led law enforcement to believe they were there for a purpose with a calculated effort to either cause harm or breach the line." Doc. No. 1, ¶134. Lastly, she asserts Defendant Iverson wrote "at the time [Wilansky] was injured, water protectors were broadcasting over the radio that protestors were

arriving at Backwater Bridge with guns, possibly to charge the police barricade." Doc. No. 1, ¶135.

[¶21] Wilansky asserts Defendants Kirchmeier and Laney also made other public statements at a December 3, 2016, news conference. Doc. No. 1, ¶136. She maintains at this conference the Defendants asserted she caused her own injury by "participating in the attempted use of improvised explosive devices against law enforcement officers." Doc. No. 1, ¶137. Specifically, she asserts Defendant Laney stated:

> There were explosive instruments being handled by people on that bridge that night. . . . Whether their intent was to throw them at us or whether their intent was to blow up that truck, I don't know. But I do know that they were handling explosive devices and they handled it wrong and something happened.

Doc. No. 1, ¶138.

[¶22] Wilansky further asserts Defendants Kirchmeier and Morton County repeated in a legal filing on December 22, 2016 the "accusation that [Wilansky] was injured by the premature explosion of an improvised explosive device created by DAPL protesters." Doc. No. 1, ¶139. She also asserts in a May 2017 presentation, Defendant Laney showed a picture of Wilansky's arm and stated:

> You can see the damage she did to her arm. What happened—our people saw her sneak up—the remaining five-ton vehicle that was left there, she had taken cover behind that. Whether she was going to use this propane bomb to throw at our lines or whether she was going to try to place it under the truck to blow it up, we don't know. We don't know what that

> intent was. But it went off in her arms and that's what did the damage and that's what hurt her.... [T]here was nothing we had in our inventory that we would have launched at people that would do that.

Doc. No. 1, ¶147.

[¶23]Wilansky asserts these statements by Defendants Morton County, Kirchmeier, Iverson, and Laney are false. Doc. No. 1, ¶140. As support for this assertion, she maintains in September 2016 law enforcement purchased hundreds of flashbangs expressly for DAPL protests and videos of the November 20, 2016 protest show officers launching flashbangs at protesters. Doc. No. 1, ¶¶141-142. She also denies participating in the creation or deployment of an improvised explosive device, and she maintains she was not injured by the same. Instead, she argues her injuries were caused by "an explosive less-lethal munition, which was launched at her by Defendant John Doe." Doc. No. 1, ¶¶143-144.

[¶24] Wilansky maintains Defendants Kirchmeier, Iverson, Laney, and Morton County "made the defamatory statements above, and others like them, knowing that they were untrue, with actual malice, or with reckless indifference to the unreasonable risk that they were false." Doc. No. 1, ¶148 She further avers they made the statements "knowing that they would damage [her] reputation in order to discredit her and deflect blame for her injury away from Morton County and the law enforcement officers acting under its authority, supervision, and direction." Doc. No. 1, ¶149. She asserts none of the Defendants have "retracted or corrected their defamatory statements." Doc. No. 1, ¶145.

[¶25] In addition, Wilansky asserts she attempted to identify the specific law enforcement officer who allegedly injured her, but her efforts were blocked by law enforcement. Doc. No. 1, ¶ H. She states that on November 22, 2016, in between surgeries, "FBI agents arrived at her hospital room and – without a warrant – confiscated her clothes and the shrapnel removed from her arm." Doc. No. 1, ¶150. After her surgeries and when she returned home, she claims she attempted to identify Defendant Officer Doe. Doc. No. 1, ¶151.

[¶26] In February of 2017, she states she sent Open Records Requests to Morton County, the North Dakota State Highway Patrol, and other law enforcement agencies to request all videos from the night in question at the Backwater Bridge. Doc. No. 1, ¶153. She asserts she was told in response that if the videos exist, they were protected from disclosure due to the ongoing criminal investigation. Doc. No. 1, ¶154. One dashcam video, however, was released by Morton County. Doc. No. 1, ¶155.

[¶27] Wilansky asserts the video covers the time frame of approximately 3:49 a.m. to 4:15 a.m. on November 21, 2016. Doc. No. 1, ¶155. She asserts there are two unexplained gaps in audio and video, including one gap for five-minutes "that appears to cover the exact time [Wilansky] was injured." Doc. No. 1, ¶155. She indicates the video shows no active protesting, no one yelling, law enforcement relaxed, and a few protestors roaming around on the Backwater Bridge. Doc. No. 1, ¶¶156, 157. She also points out that "the officers do not appear scared or worried that there might be an explosive device nearby, even when they order protestors away from the burned-out vehicle." Doc. No. 1, ¶157. To Wilansky, this "is inconsistent with

the public accusations made by Defendants that protestors were throwing Coleman propane tanks rigged to explode at law enforcement officers and that [Wilansky] was planting such an explosive at the barricade." Doc. No. 1, ¶157.

[¶28] Wilansky also sent Morton County an Open Records Request in March 2017, requesting use of force reports from November 20-21, policies pertaining to less-lethal weapons and dash/body cameras, and also a list of officers present at the Backwater Bridge on November 21, 2016. Doc. No. 1, ¶159. Morton County denied those requests again on the grounds of there being an open investigation. Doc. No. 1, ¶159. In April 2017, Wilansky made an appeal of the denial of the records request to the North Dakota State Attorney General, who affirmed the denial in August 2017. Doc. No. 1, 11160-161.

[¶29] While Wilansky made Open Records Requests to Morton County for any document related to herself and Freedom of Information Act requests to the FBI, DOJ, and ATF, these requests were all denied largely on similar grounds: there was an active investigation. Doc. No. 1, 11162-164. Wilansky was apparently the subject of a criminal investigation for her alleged use of a home-made propane bomb at the scene of the DAPL protest. Such records are not available as open records under North Dakota law. *See* N.D.C.C. § 44-04-18.7.

[¶30] She also filed a lawsuit against the United States in February 2018, in the Federal District Court for the District of Minnesota, requesting the Court to compel the FBI to return the piece of shrapnel and clothing confiscated when she was in the hospital so she could conduct forensic testing. Doc. No. 1, 1165. The United States, and Morton County which inter-

vened, argued, "it was unnecessary for the court to compel the return of Sophia's clothing and shrapnel because Sophia could file a civil rights lawsuit and demand these items in discovery." Doc. No. 1, ¶167. The Court agreed, dismissing her lawsuit. Doc. No. 1, 1168. Wilansky asserts she has still not been able to identify the John Doe Defendant who allegedly injured her. Doc. No. 1, 1169.

[¶31] Wilansky has undergone numerous surgeries to repair her arm. Doc. No. 1, 11170-175. She avers the injury has "robbed her of her independence and caused her extraordinary mental trauma." Doc. No. 1, ¶183. She also asserts the "defamatory statements made by Defendants have caused [her] significant reputational, social, and occupational harm." Doc. No. 1, ¶185.

[¶32] On November 19, 2018, Wilansky filed a Complaint embodying eight causes of action including (1) Excessive Force in Violation of 42 U.S.C. § 1983 (Fourth Amendment) (John Doe Law Enforcement Officer); (2) Excessive Force in violation of 42 U.S.C. § 1983 (Fourteenth Amendment); (3) Excessive Force in violation of 42 U.S.C. § 1983 *(Monell v. Dep't of Social Serv.,* 436 U.S. 658 (1977)) (Morton County and Kyle Kirchmeier in his official capacity); (4) Assault and Battery (John Doe Law Enforcement Officer and Morton County); (5) Intentional Infliction of Emotional Distress (John Doe Law Enforcement Officer and Morton County); (6) Negligent Infliction of Emotional Distress (John Doe Law Enforcement Officer and Morton County); (7) Negligence and Violation of North Dakota Century Code §§ 9-10-01 and 9-10-06 (John Doe Law Enforcement Officer, Morton County, and Kyle Kirchmeier in his official capacity); and (8) Defamation and Violation of North Dakota Century Code § 14-02-01 (Paul Laney, Thomas Iverson, Morton

County, and Kyle Kirchmeier in both his official and personal capacities). Doc. No. 1. In lieu of filing Answers, the Defendants filed these respective Motions to Dismiss.

II. LEGAL DISCUSSION

1. Causes of Action the Court Will Dismiss

[¶33] For clarity, the Court will first consider Wilansky's claims that will be dismissed: (2) Excessive Force in violation of 42 U.S.C. § 1983 (Fourteenth Amendment); (3) Excessive Force in violation of 42 U.S.C. § 1983 *(Monell v. Dep't of Social Serv.,* 436 U.S. 658 (1977)) (Morton County and Kyle Kirchmeier in his official capacity); and (8) Defamation and Violation of North Dakota Century Code § 14-02-01 (Paul Laney, Thomas Iverson, Morton County, and Kyle Kirchmeier in both his official and personal capacities). Doc. No. 1.

A. Standard of Review

[¶34] The Court applies the following standard to these specific claims. Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. When considering a motion to dismiss under Rule 12(b)(6), the court must accept all well-pleaded factual allegations in the complaint as true. Detailed factual allegations are not necessary under the Rule 8 pleading standard, rather a plaintiff must set forth grounds of its entitlement to relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S.

544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Aschcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 557). The determination of whether a complaint states a claim upon which relief can be granted is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The court must consider whether the allegations set forth in the complaint "plausibly give rise to an entitlement to relief." *Id.* at 679. Dismissal will not be granted unless it appears beyond doubt the plaintiff can prove no set of facts entitling him or her to relief. *Ulrich v. Pope Cty.,* 715 F.3d 1054, 1058 (8th Cir. 2013).

B. Facts Considered

[¶35] "When considering . . . a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court generally must ignore materials outside the pleadings, but it may consider some materials that are part of the public record or do not contradict the complaint, as well as materials that are necessarily embraced by the pleadings." *Miller v. Redwood Toxicology Lab., Inc.,* 688 F.3d 928, 931 (8th Cir. 2012). Those materials include "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleadings." *Hughes v. City of Cedar Rapids, Iowa,* 840 F.3d 987, 998 (8th Cir. 2016). Courts may also consider "matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; without converting the motion into one for summary judgment." *Miller,* 688 F.3d at 931. However, if "matters outside the pleadings

are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d).

[¶36] The Defendants request the Court to consider a number of extrinsic documents they provided in conjunction with their Motions to Dismiss and take judicial notice of a number of facts not contained in Wilansky's Complaint without converting their Motions to Dismiss into Motions for Summary Judgment. These extrinsic documents include an emergency declaration issued by Morton County, an Executive Order by former Governor Jack Dalrymple, numerous press releases by law enforcement agencies, communications between government officials, warranty deeds, leases, and maps, among other documents. *See* Doc. Nos. 27-1 – 27-3; 30-1 – 30-13. In addition, the Defendants urge the Court to take judicial notice of facts contained in separate orders issued by this District in other DAPL-related cases such as *Dakota Access, LLC v. Archambault, et al,* Case No. 1:16-cv-296, and *Dundon et al v. Kirchmeier et al,* Case No. 1:16-cv-406. The Defendants request the Court to take judicial notice of at least twenty-three facts embedded in some of these extrinsic documents.

[¶37] While the Court could go through a detailed analysis of each of the extrinsic facts provided by the Defendants to determine if they are "embraced by the pleadings" or meet another exception for consideration at this stage of the proceedings, the Court finds it unnecessary to do so as it relates to these claims. Unless otherwise noted, the Court has considered only the facts on the face of Wilansky's Complaint and determines, based on the same, these causes of action fail to state viable claims for relief. Causes (2), (3), and

(8) will therefore be dismissed for the following reasons.

C. *Causes of Action*

i. Excessive Force (Fourteenth Amendment) (Defendant Officer Doe)

[¶38] "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham v. Connor,* 490 U.S. 386, 394 (1989). "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* (citation omitted).

[¶39] While the parties agree an excessive force claim may be brought under the Fourteenth Amendment, they disagree as to the standard to be applied. The Defendants argue the standard is whether the law enforcement officer's specific application of force "shocks the conscience" which would include a subjective analysis into the officer's state of mind and whether he or she acted maliciously and sadistically for the purpose of causing harm. Doc. No. 29, p. 24. Wilansky, in contrast, argues the "shocks the conscience" standard was abrogated in 2015 by the Supreme Court in *Kingsley v. Hendrickson,* 135 S. Ct. 2466 (2015) and supplanted with the "objective reasonableness" standard applied in Fourth Amendment

excessive force cases. Doc. No. 35, p. 11. For the reasons stated below, the Court agrees with the Defendants and will apply the "shocks the conscience" standard to this case.

[¶40] To begin, the Supreme Court has noted not "all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, *[Graham v. Connor,* 490 U.S. 386 (1989)] simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier,* 520 U.S. 259, 272 (1997). However, for those excessive force claims that do not fit neatly into the Fourth or Eighth Amendment inquiries, a plaintiff may find reprieve in substantive due process under the Fourteenth Amendment.

[¶41] If Wilansky was not seized pursuant to the Fourth Amendment but was rather a free citizen or non-detainee at the time Defendant Officer Doe allegedly subjected her to physical injury, her claim would appropriately be brought under the Fourteenth Amendment. *See Cty. of Sacramento v. Lewis,* 523 U.S. 833, 844-45 (1998) *("Graham* 'preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right . . . through means other than a law enforcement official's arrest, investigatory stop or other seizure.'"); *see also id.* at 844 (quoting *Evans v. Avery,* 100 F.3d 1033, 1036 (1st Cir. 1996) ("[O]utside the context of a seizure . . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983")).

[¶42] The Supreme Court has also grounded the standard to be applied in Fourteenth Amendment excessive force cases as those applications of force that "shock the conscience." In 1998 in *Lewis,* a case involving an excessive force claim brought under the Fourteenth Amendment on behalf of a non-detainee, the Supreme Court reiterated "[t]he touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective." *Id.* at 845-46. (alterations). The Court noted the "cognizable level of executive abuse of power [is] that which shocks the conscience," further noting "the Due Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.'" *Id.* The Court went on to explain, "[w]hile the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" *Id.*

[¶43] Wilansky argues the Supreme Court abrogated *Lewis*' "shocks the conscience" standard in 2015 in *Kingsley,* instead requiring all excessive force claims brought by any individual, detainee or not, be subjected to the "objective reasonableness" standard applied in Fourth Amendment cases. The Court disagrees. *Kingsley* did not expressly or implicitly overrule *Lewis.*

[¶44] *Kingsley* sought to address a narrow issue applied to a narrow class of prospective plaintiffs, pretrial detainees. The Supreme Court in *Kingsley* was tasked with answering "whether, to prove an excessive force claim [under the Fourteenth Amendment], *a pretrial detainee* must show that the officers were

subjectively aware that their use of force was unreasonable, or only that the officers' use of that force was *objectively* unreasonable."[2] *Id.* at 391-392 (emphasis added). The Court's discussion in *Kingsley* pertained to the specialized status of individuals as pretrial detainees and why the Court's articulated standard as applied to them specifically was appropriate. *See Kingsley,* 576 U.S. at 399-98 ("We have said that 'the Due Process Clause protects a *pretrial detainee* from the use of excessive force that amounts to punishment.'") (emphasis added); ("Our standard is also consistent with our use of an objective 'excessive force' standard where officers apply force to a person who, like Kingsley, *has been accused but not convicted of a crime,* but who, unlike Kingsley, is free on bail.") (emphasis added); ("For another thing, experience suggests that an objective standard is workable . . . We are also told that many facilities, including the facility at issue here, train officers to interact with all *detainees* as if the officers' conduct is subject to an objective reasonableness standard.") (emphasis added);

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[2] In *Kingsley,* the respondents argued the relevant legal standard for excessive force claims brought by pretrial detainees under the Fourteenth Amendment "should be subjective, *i.e.,* that the plaintiff must prove that the use of force was not 'applied in a good-faith effort to maintain or restore discipline' but, rather, was applied 'maliciously and sadistically to cause harm.'" *Id.* at 400. The *Kingsley* Court declined the invitation to make the standard a subjective one, instead holding "that *a pretrial detainee* must only show that the force purposely or knowingly used against him was objectively unreasonable." *Id.* (emphasis added). The Court listed a myriad of factors to consider in assessing objective reasonableness of the force, noting that one of the factors is whether the defendant had a malicious and sadistic purpose to cause harm. *Id.* The Court explained that while a showing of this factor is "not necessarily a condition for liability," it "might help show that the use of force was excessive." *Id.* at 402.

("Finally, the use of an objective standard adequately protects an officer who acts in good faith. We recognize that '[r]unning a prison is an inordinately difficult undertaking.'").

[¶45] More importantly, *Kingsley* ended by acknowledging its potential limited application. *Kingsley,* 576 U.S. at 402 ("We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.").

[¶46] The Supreme Court in *Kingsley* did not address the applicability of their newly-articulated "objective reasonableness" standard to cases involving non-detainees and free citizens. In fact, the Supreme Court did not address the "shocks the conscience standard" of *Lewis.* Many courts, including the Eighth Circuit, have therefore continued to apply the *Lewis* standard to non-detainees and the *Kingsley* standard to pretrial detainees. *See Ryan v. Armstrong,* 850 F.3d 419, 427 (8th Cir. 2017) ("We analyze the excessive force claims of pretrial detainees under an objective reasonableness standard."); *Davis v. White,* 794 F.3d 1008, 1011 (8th Cir. 2015) ("Davis was a post-arrest detainee at the time of the incident[, and] [i]n *Kingsley v. Hendrickson,* the Supreme Court recently held that the objective reasonableness standard applies to excessive force due process claims by pretrial detainees."); *cf Truong v. Hassan,* 829 F.3d 627 (8th Cir. 2016) (applying the "shocks the conscience" standard to actions of city bus driver who forcibly removed

passenger, non-detainee, from bus for failing to pay bus fare).

[¶47] While other circuits[3] have adopted Wilansky's interpretation that the "objective reasonableness standard" in *Kingsley* is the appropriate standard in *all* excessive force claims under the Fourteenth Amendment, the Eighth Circuit has not made that same ruling. Therefore, because Wilansky's Fourteenth Amendment claim is based upon her status as a non-detainee or free citizen at the time of events in question, the Court will apply the "shocks the conscience standard" from *Lewis*.

[¶48] "Whether conduct shocks the conscience is a question of law." *Id.* Conscience shocking conduct only includes "the most severe violations of individual rights that result from the brutal and inhumane abuse of official power." *Id.* (citing *White v. Smith,* 696 F.3d 740, 757–58 (8th Cir. 2012). "[T]he alleged substantive due process violations must involve conduct 'so severe . . . so disproportionate to the need presented, and . . .

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[3] For example, the Second Circuit in *Edrei v. Maguire,* 892 F.3d 525 (2d Cir. 2018) expressly held *"Kingsley* provides the appropriate standard for all excessive force claims brough under the Fourteenth Amendment." *Id.* at 537. However, the *Edrei* Court noted it did not believe *Kingsley* overruled *Lewis,* but rather "elaborated on it." *Id.* Explaining that under the *Kingsley* test, a court considers a myriad of factors to determine objective reasonableness, *including* whether the force "was applied maliciously and sadistically for the very purpose of causing harm." *Id.* While not a necessary showing to find objective unreasonableness, the *Kingsley* Court explained a showing of this factor "might help show the use of force was excessive." *Id.* Under this framework, the *Edrei* Court explained, *"Kingsley* teaches that purposeful, knowing or (perhaps) reckless action that uses an objectively unreasonable degree of force *is* conscience shocking." *Id.* at 536 (emphasis in original).

so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Truong,* 829 F.3d at 631.

[¶49] "Only a purpose to cause harm *unrelated to the legitimate object of* the government action in question will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation." *Id.* (emphasis in original); *see also McCants v. City of Mobile,* 752 F. App'x 744, 749 (11th Cir. 2018) ("In a non-custodial situation, like the present one, only a purpose to cause harm unrelated to the legitimate object of law enforcement satisfies the element of arbitrary conduct shocking to the conscience that is necessary for a due process violation."). The Eighth Circuit has further elaborated on the level of culpability a plaintiff must show:

> Proof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold. The lower deliberate indifference standard is sensibly employed only when actual deliberation is practical. By contrast, the intent-to-harm standard most clearly applies in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation. Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.

Truong, 829 F.3d at 631 (citations omitted).

[¶50] The Court finds based upon the facts alleged in the Complaint, Wilansky has not shown the Court could find Defendant Officer Doe's alleged use of force "shocks the conscience." By Wilansky's own description of events leading up to the November 21, 2016, incident, law enforcement dramatically increased their presence at DAPL protests beginning in September 2016. Doc. No. 1, ¶31. The tension rising between protestors and law enforcement was evident. This prompted Morton County to not only request assistance from other law enforcement agencies within the State, but also from Wisconsin, South Dakota, Minnesota, Wyoming, Indiana, and Nebraska. Doc. No. 1, ¶37. By the end of October, 1,000 law enforcement officers were providing assistance to Morton County, and the North Dakota National Guard was also assisting. Doc. No. 1, ¶40.

[¶51] By Wilansky's own account, the protestors and law enforcement had numerous confrontations between September 2016 and November 2016. Doc. No. 1, 1144-50. She asserts officers became militarized, wearing tactical gear, arriving in military-style vehicles, and using crowd-control disbursal tactics. Doc. No. 1, 148. Particularly, according to Wilansky, it was the October 27, 2016, confrontation that "dramatically escalated" the dispute between law enforcement and the water protectors." Doc. No. 1, ¶48. It is apparent tensions between officers and protestors continued to grow as the protestors continued to demand the reopening of the Backwater Bridge, which law enforcement refused to reopen and kept barricaded.

[¶52] The tension grew even more on November 20, 2016, when protestors arrived at the Backwater Bridge with a semi-truck to tow away one of two burned-out vehicles positioned on the Bridge near the

barricade. Doc. No. 1, 184. After protestors successfully towed away the first vehicle, law enforcement intervened and prevented protestors from trying to remove the second vehicle. These facts suggest law enforcement intended protestors to remain distanced from the burned-out vehicles.

[¶53] A large protest ensued after this according to Wilansky, with hundreds of protestors gathering south of the Backwater Bridge, and Morton County requesting "the assistance of every available law enforcement officer in the entire state of North Dakota." Doc. No. 1, 187. Wilansky asserts the protest lasted for hours, and law enforcement were again equipped with tactical riot gear. Doc. No. 1, 190. While Wilansky asserts the protest ended at midnight and "the area around the bridge was quiet and tranquil," she admits protestors were still approaching the barricade to try to communicate with law enforcement after the protestors were no longer "actively protesting." Doc. No. 1, 198-100. She also admits that at the time she approached the barricade around 4:00 a.m., protestors were gathered around the remaining burned-out vehicle that law enforcement previously forbid protestors from removing from the Bridge. Doc. No. 1, ¶101. She admits law enforcement officers gave her, and the other protestor standing with her, orders to move away from the burned-out vehicle. Doc. No. 1, ¶104.

[¶54] Wilansky's Complaint describes a chaotic scene the afternoon of November 20, 2016, going late into the night. Tensions were clearly elevated between protestors and law enforcement. While Wilansky maintains the protest just ended at midnight and all was calm and tranquil thereafter, it is difficult to ignore the tension that likely lingered after the protest

did die down. It is evident law enforcement's desire remained to keep protestors away from the burned-out vehicle on the Bridge. Wilansky positioned herself near the exact burned-out vehicle. It does not shock the conscience for law enforcement to use non-lethal force to disburse protestors from an area where they were told to avoid. She has failed to show Defendant Officer Doe had "a purpose to cause harm *unrelated to the legitimate object of* the government action in question," removing protestors from an area they were ordered to move away from. Wilanksy's cause of action (2) is, therefore, dismissed.

ii. Defamation and Violation of North Dakota Century Code § 14-02-01 (Paul Laney, Thomas Iverson, Morton County, and Kyle Kirchmeier in both his official and personal capacities)

[¶55] Wilansky has brought defamation claims against County Defendants Sheriff Laney, Sheriff Kirchmeier, and Morton County. She has also brought a defamation claim against State Defendant Iverson. Because the County and State Defendants have moved for dismissal of the defamation claims on slightly different grounds, the Court will address them separately, starting with the County Defendants.

(1) *County Defendants*

[¶56] Wilansky asserts the County Defendants made multiple defamatory statements about her, specifically that she caused her own injury by participating in the attempted use of improvised explosive devices against law enforcement officers. Doc. No. 1, ¶¶137, 147. Wilansky asserts the County Defendants made the following defamatory statements after the incident:

1. "In a news conference on November 21, Defendant Kirchmeier denied that law enforcement agents caused Sophia's injury, stating, 'We don't know where [the explosion] came from, but it wasn't law enforcement.'" Doc. No. 1, ¶127.

2. "Defendant Kirchmeier then accused the water protectors near Sophia of hurling explosive fuel canisters at law enforcement officers and suggested that Sophia may have been injured by one of these canisters." Doc. No. 1, ¶128.

3. "Maxine Herr, a spokesperson for Morton County Sheriff's Office, reiterated Defendant Kirchmeier's false accusations to other media outlets, stating that '[n]one of our equipment would cause an injury like that,' that the munition that injured Sophia 'wasn't from our law enforcement, because we didn't deploy anything that should have caused that type of damage to her arm,' and that Sophia may have been injured while protesters were 'rigging up their own explosives' to use against law enforcement." Doc. No. 1, ¶129.

4. "On December 3, Defendants Laney and Kirchmeier gave another news conference in which they again denied that law enforcement was responsible for Sophia's injury. Defendant Kirchmeier told the news media that he was unaware of any use of flashbangs by any law enforcement officers and that none of the weapons law

enforcement used could have caused the injury Sophia suffered." Doc. No. 1, ¶136.

5. "At this conference, Defendants Laney and Kirchmeier accused Sophia of causing her own injury by participating in the attempted use of improvised explosive devices against law enforcement officers." Doc. No. 1, ¶137.

6. "Defendant Laney told the news media, 'There were explosive instruments being handled by people on that bridge that night. . . . Whether their intent was to throw them at us or whether their intent was to blow up that truck, I don't know. But I do know that they were handling explosive devices and they handled it wrong and something happened.'" Doc. No. 1, ¶138.

7. "In a legal filing on December 22, 2016, Defendants Kirchmeier and Morton County repeated the accusation that Sophia was injured by the premature explosion of an improvised explosive device created by DAPL protesters." Doc. No. 1, ¶139.

8. "In a May 2017 presentation that is still publicly available online, Defendant Laney displayed a picture of Sophia and publicly declared:

   You can see the damage she did to her arm. What happened—our people saw her sneak up—the remaining five-ton vehicle that was left there, she had taken cover behind that. Whether she was going

> to use this propane bomb to throw at our lines or whether she was going to try to place it under the truck to blow it up, we don't know. We don't know what that intent was. But it went off in her arms and that's what did the damage and that's what hurt her.... [T]here was nothing we had in our inventory that we would have launched at people that would do that." Doc. No. 1, ¶147.

[¶57] Under North Dakota law, defamation is actionable through libel or slander. N.D.C.C. § 14-02-02. Libel is defined as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes the person to be shunned or avoided, or which has a tendency to injure the person in the person's occupation." N.D.C.C. § 14-02-03. Slander is defined as unprivileged and false publications, other than libel, which:

> 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;
>
> 2. Imputes to the person the present existence of an infectious, contagious, or loathsome disease;
>
> 3. Tends directly to injure the person in respect to the person's office, profession, trade, or business, either by imputing to the person general disqualifications in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to the person's office, profes-

> sion, trade, or business that has a natural tendency to lessen its profits;
>
> 4. Imputes to the person impotence or want of chastity; or
>
> 5. By natural consequence causes actual damage.

N.D.C.C. § 14-02-04(1)-(5).

[¶58] Wilansky asserts the statements made by the County Defendants are false because she never participated in the creation or deployment of any improvised explosive device, against law enforcement or anyone else. Doc. No. 1, ¶144. She also asserts her injuries were not due to a propane tank or other improvised explosive device; she contends her injuries were caused by "an explosive less-lethal munition, which was launched at her by Defendant John Doe." Doc. No. 1, ¶143. Wilansky maintains these alleged defamatory statements have harmed her reputationally, socially, and occupationally. Doc. No. 1, ¶185. She asserts she received threats of violence, has lost her privacy, people post hurtful messages about her online, and people scorn her on social media. Doc. No. 1, ¶186. A google search of her name, she asserts, will bring up news stories accusing her of attempting to harm law enforcement with explosives. Doc. No. 1, ¶187. These stories refer back to the alleged defamatory statements made by Defendants, she contends. Doc. No. 1, ¶187. In her opinion, prospective employers would have a negative perception of her from these search results which would harm her chances of obtaining a job. Doc. No. 1, ¶188.

[¶59] Despite Wilansky's assertion that the statements made by the County Defendants concerning her and the incident in question meet all the elements of

defamation, the County Defendants assert the statements they made are privileged, and "[it] is well established that there is no liability for defamatory statements that are privileged." *Soentgen v. Quain & Ramstad Clinic, P.C.,* 467 N.W.2d 73, 78 (N.D. 1991). The Court agrees.

[¶60] "Privilege is based upon the sound public policy that some communications are so socially important that the full and unrestricted exchange of information requires some latitude for mistake." *Id.* "Privilege is either absolute or qualified." *Id.* "A privilege is absolute when the free exchange of information is so important that even evidence of actual malice does not destroy the privilege." *Krile v. Lawyer,* 2020 ND 176, ¶ 19, 947 N.W.2d 366, 374. A communication is absolutely privileged if (1) made in "the proper discharge of an official duty," or (2) made in "any legislative or judicial proceeding or in any other proceeding authorized by law." N.D.C.C. § 14 02-05(1)-(2). In contrast, a communication is only afforded qualified privilege if it is made:

> (3) In a communication, without malice, to a person interested therein by one who also is interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information; and
>
> (4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding, or of anything said in the course thereof.

N.D.C.C. § 14-02-05(3)-(4).

[¶61] The Defendants seek to invoke the absolute immunity protections of N.D.C.C. § 14-02-05(1), arguing the statements they made pertaining to the incident involving Wilansky were in the proper discharge of their official duties. The Defendants argue it was Sheriffs Kirchmeier and Laney's "official duty to disseminate information concerning the DAPL protests." Doc. No. 29, p. 34. The Defendants also point to an extrinsic exhibit offered by them in support of their Motion to further illustrate Sheriff Kirchmeier's duties, including the apparent designation as Chair of the Uniform Incident Command Policy Group. Doc. No. 30-13. The Defendants also state Sheriff Laney was the Operations Commander in Morton County during the protests. Doc. No. 29, p. 34. On this basis, the Defendants assert "[a]ll statements were made within the scope of their positions as Sheriff." Doc. No. 29, p. 35.

[¶62] Wilansky counters the determination of whether the Defendants were properly discharging their official duties is a fact-intensive inquiry not ripe for resolution at this time, referencing the Defendants' reliance upon extrinsic information. Doc. No. 35, p. 24. She further asserts that even if the Court were to consider the Defendants' argument regarding Sheriffs Laney and Kirchmeier's specific job titles during the protest, "they tell us nothing about what Kirchmeier's and Laney's actual job duties were." Doc. No. 35, p. 28.

[¶63] Upon review of the Complaint, the Court finds the statements made by the County Defendants were made in the proper discharge of their official duties and are thus protected by absolute immunity. Wilansky's Complaint admits her father "gave interviews to several news organizations to decry law enforcement's wanton use of excessive force" against her "in the

middle of the night when no protest was occurring." Doc. No. 1, ¶125. Wilansky admits she publicly made serious allegations that a law enforcement officer caused her injuries. It comes as no surprise, the County Defendants issued public statements to respond to her accusation in an attempt to defend themselves and their respective agencies by explaining their version of events that night. Wilansky admits in her Complaint investigations immediately began into the cause of her injuries, including FBI agents confiscating the clothing she was wearing that night and also the shrapnel removed from her arm. Doc. No. 1, ¶150. She was obviously the subject of a criminal investigation, which is the reason her request for all records pertaining to herself from the Morton County Sheriff's Office was denied. Doc. No. 1, ¶163. The County Defendants' statements regarding the potential cause of her injuries are defensive and were properly made.

[¶64] In addition, despite Wilansky's assertion the statements made by the Defendants were "on a subject matter irrelevant to any common interest or duty," the statements were pertinent to the incident involving Wilansky. *See Rykowsky v. Dickinson Pub. Sch. Dist. No. 1,* 508 N.W.2d 348, 351 (N.D. 1993) ("Even in the case of an absolute privilege under § 14–02–05(1) or (2), N.D.C.C., however, a communication must be pertinent to be free of liability."); *see also* Doc. No. 1, ¶260.

[¶65] Wilansky believes in order to determine if the County Defendants are entitled to absolute immunity a detailed factual record regarding the job duties of the County Defendants needs to first be developed. The Court disagrees. Wilansky admits Sheriffs Kirchmeier and Laney were "at all times relevant to this action"

sheriffs of their respective counties. Doc. No. 1, ¶¶9, 10. She further avers in her Complaint that "Defendant Kirchmeier was responsible, on behalf of Defendant Morton County, for supervising and directing the conduct of the law enforcement officers who responded to DAPL protests." Doc. No. 1, ¶216. She also admits Sheriff Laney "personally participated in the law enforcement response to the Dakota Access Pipeline protests between August 2016 and March 2017." Doc. No. 1, ¶10. As Chief Law Enforcement Officers, who Wilansky admits were directly involved with the protests, it is a proper discharge of official duties to issue statements of defense on behalf of an unnamed law enforcement officer potentially under their command who has been accused of using excessive force.[4]

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[4] *See Johnston v. Borders,* where the court found a sheriff was entitled to absolute immunity for press releases he issued responding to accusations that the local animal shelter under his control euthanized animals. No. 615CV936ORL40DCI, 2018 WL 8244336, at *5 (M.D. Fla. June 19, 2018). The *Johnston* Court noted:

> Here, Sheriff Boarders issued the press releases following intense public outcry resulting from the euthanasia of animals conducted by the Shelter. Because the Shelter was under the control of the Sheriff's Office at the time the euthanasia was conducted, the Sheriff's Office had a responsibility to respond to that outcry. The press statements the Sheriff's Office released in response to the outcry were, therefore, plainly within the scope of the Sheriff's Office's authority. That the statements made in the press releases proved to be untrue, or to harm Plaintiff's reputation, does not remove the statements from the protections afforded by the absolute privilege.

=*Id.*

(2) *State Defendant Iverson*

[¶66] Wilansky also asserts Defendant Iverson made multiple defamatory statements about her. Defendant Iverson moves for dismissal on two separate grounds, including a lack of subject matter jurisdiction under Rule 12(b)(1) and failure to state a claim under Rule 12(b)6). Because the Court cannot move forward with the claim against Defendant Iverson if it lacks subject matter jurisdiction over it, the Court will consider it first.

[¶67] Federal Rule of Criminal Procedure 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction. "Subject matter jurisdiction defines the court's authority to hear a given type of case." *Carlsbad Tech., Inc. v. HIF Bio, Inc.,* 556 U.S. 635, 639 (2009). Jurisdictional issues are a matter for the Court to resolve prior to trial. *Osborn v. United States,* 918 F.2d 724, 729 (8th Cir. 1990). A party who brings a motion pursuant to Rule 12(b)(1) may do so in one of two ways: either by a facial attack or a factual attack. *Branson Label, Inc. v. City of Branson,* 793 F.3d 910, 914 (8th Cir. 2015).

[¶68] A facial attack simply asserts the plaintiff has not pled a basis for subject matter jurisdiction. *Id.* In a facial attack, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Carlsen v. GameStop, Inc.,* 833 F.3d 903, 908 (8th Cir. 2016). Therefore, in a facial attack, the Court must accept as true all facts alleged in the complaint, and it may only consider the pleadings and "materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint.'" *Id.* (quoting *Cox v. Mortg. Elec. Registration Sys., Inc.,* 685 F.3d 663, 668 (8th Cir.

2012)). A factual attack, on the other hand, asserts the actual existence of subject matter jurisdiction is lacking "irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Branson Label,* 793 F.3d at 914-15 (quoting *Menchaca v. Chrysler Credit Corp.,* 613 F.2d 507, 511 (5th Cir. 1980)).

[¶69] As the basis for this Court's jurisdiction over the state-law defamation claim, Wilansky invokes supplemental jurisdiction pursuant to 28 U.S.C. § 1367 and diversity jurisdiction pursuant to 28 U.S.C. § 1332. Defendant Iverson, however, contends he was acting within the scope of his employment when he made the allegedly defamatory statements. Doc. No. 27, p. 5. On this basis, he argues the Court lacks subject matter jurisdiction over Wilansky's defamation claim because it should be brought against the State of North Dakota in state court, as the State of North Dakota has not waived its Eleventh Amendment Immunity to be sued in federal court. Doc. No. 27, p. 5. Wilansky contends Defendant Iverson went outside of the scope of his employment when he made the alleged statements. This contention presents a factual attack, and therefore, the Court will consider the three exhibits offered by Defendant Iverson to support his position that the alleged defamatory statements were made within the scope of his employment.

[¶70] Defendant Iverson asserts Wilansky's Complaint "makes no allegations that [his] statements were anything other than made within the scope of his employment." Doc. No. 27, p. 5. For support, he points to Wilansky's Complaint wherein she states "[a]t all times relevant to this action, Defendant Iverson was a Lieutenant in the North Dakota State Highway Patrol." Doc. No. 1, ¶11. On this basis, he argues

N.D.C.C. § 32-12.2-03(2) mandates Wilansky's defamation claim should instead be brought against his employer, the State of North Dakota. *See* N.D.C.C. § 32-12.2-03(2) ("A state employee is not personally liable for money damages for an injury when the injury is proximately caused by the negligence, wrongful act, or omission of the employee acting within the scope of employment."); *see also* N.D.C.C. § 32-12.2-03(1) ("When the state employee is acting within the scope of their employment, the action for negligence, wrongful act, or omission must be brought against the State.").

[¶71] Wilansky counters that her Complaint asserts Defendant Iverson's statements were "on a subject matter irrelevant to any common interest or duty." Doc. No. 1, ¶260. Specifically, she contends Defendant Iverson made the following statements:

1. "Over the next few days, Defendant Iverson issued several written statements to the news media, in which he repeated and elaborated on the false accusations made by Defendants Kirchmeier and Morton County." Doc. No. 1, ¶130.

2. "Defendant Iverson wrote that the injuries Sophia "sustained are inconsistent with any resources utilized by law enforcement and are not a direct result of any tools or weapons used by law enforcement." Doc. No. 1, ¶131.

3. "Defendant Iverson also told the news media that law enforcement officers present at Backwater Bridge on November 20–21 did not use flashbangs at any time." Doc. No. 1, ¶132.

4. "Defendant Iverson also wrote that protesters rolled metal cylinders toward Sophia immediately before she was injured, that 'Law Enforcement had received information that protest[e]rs were using one-pound propane cylinders as explosives,' and that 'small propane tanks rigged as improvised explosive devices' were recovered from the crime scene." Doc. No. 1, ¶133.

5. Defendant Iverson also wrote that at the time Sophia was injured, she and other protesters nearby exhibited 'strange mannerisms [that] led law enforcement to believe they were there for a purpose with a calculated effort to either cause harm or breach the line.'" Doc. No. 1, ¶134.

6. "Defendant Iverson also wrote that at the time Sophia was injured, water protectors were broadcasting over the radio that protesters were arriving at Backwater Bridge with guns, possibly to charge the police barricade." Doc. No. 1, ¶135.

[¶72] Wilansky asserts these statements were made outside of the scope of Defendant Iverson's position. She argues "[n]either the Complaint, *nor any of the documents referenced in Defendants' brief* suggests that the State of North Dakota ever tasked Defendant Iverson with commenting on local law enforcement activities and investigations related to protests." Doc. No. 35, p. 24 (emphasis added). However, upon review of Defendant Iverson's extrinsic exhibits, which the Court may consider for purposes of determining

subject matter jurisdiction and which Wilansky has invited the Court to consider, the Court disagrees.

[¶73] Wilansky's opinion is Defendant Iverson's job position was *only* related to "the reduction of motor vehicle crashes" and because her injury didn't relate to the same, Defendant Iverson was not acting pursuant to is official duty when he made statements related to her injury. Doc. No. 35, p. 26 (citing Defendant's Ex. at 27-2, ¶12.). She asserts Defendant Iverson's "express duty to provide information to the public on traffic safety cannot possible be deemed to imply a duty to provide information on purported bomb-rigging activity." Doc. No. 35, p. 27. The Court disagrees and finds Defendant Iverson's position tasked him with disseminating information to the public, including on major incidents such as the DAPL protests.

[¶74] Defendant Iverson was designated the Public Information Officer for the North Dakota Highway Patrol at the time. Doc. No. 27-2, p. 4. Part of these duties included "collect[ing], verify[ing], and disseminat[ing] information to the public through effective communication with the news media." *Id.* Another task required Defendant Iverson to "[o]perate within the Incident Command System framework during large scale incidents, reporting to the incident commander." *Id.* Defendant Iverson was required to be "knowledgeable about all aspects relating to department functions, the community [] serve[d], emergency management concepts, news media and incident characteristics." *Id.* He was also required to "[b]rief the Governor's Office on sensitive public information topics." *Id.* Defendant Iverson was also responsible for supervising the homeland security coordinator whose "primary duty is the active participation in the North Dakota State and Local Intelligence Center." *Id.* In

addition, the North Dakota Highway Patrol Policy Manual 2-11 specifies Defendant Iverson was to "prepare and issue timely news releases," "supervise the public information specialist", and supervise the homeland security coordinator, among other tasks. Doc. No. 27-3, p. 1.

[¶75] Wilansky's Complaint describes the DAPL protests in question and her injuries as occurring on a public highway in North Dakota. Doc. No. 1, ¶44. By her own description, situations between protestors and law enforcement continued to grow tense over multiple months, with law enforcement presence at protests swelling. Doc. No. 1, ¶¶30-34. In fact, she alleges the Governor of North Dakota activated the North Dakota National Guard to assist in September 2016, and she notes the North Dakota State Highway Patrol began routinely assisting other enforcement agencies at the protest site. Doc. No. 1, ¶33. Defendant Iverson, the Public Information Officer for the North Dakota Highway Patrol, was tasked with providing the public with information on largescale incidents, especially those involving his own agency. The Court agrees with Defendant Iverson that Wilansky's Complaint emphasizes "the DAPL protests were widely publicized, involved inter-agency law enforcement cooperation, affected members of the public, and closed a highway for several months," and on this basis, " "[i]n his role as the Public Information Officer, Maj. Iverson's statements regarding an explosive device causing Wilansky's injuries were unquestionable pertinent." Doc. No. 27, p. 12 (citing Doc. No. 1, ¶¶40, 81, 86). Defendant Iverson was acting within the scope of his employment when he issued the statements concerning Wilansky. On this basis, the Court does not have subject matter jurisdiction.

[¶76] However, even if the Court did have subject matter jurisdiction, for largely the same reasons as annotated above, the Court would find Defendant Iverson's statements are protected by absolutely immunity under N.D.C.C. § 14-02-05(1). Defendant Iverson made these statements in the proper discharge of an official duty, as they were in the scope of his employment. It was within Defendant Iverson's official duties as Public Information Officer of the North Dakota State Highway Patrol to disseminate information regarding public safety on public roadways, which includes potential bomb-rigging activity at a large-scale incident to which his own agency was responding.

iii. Monell v. Dep't of Social Serv., 436 U.S. 658 (1977)(Morton County and Kyle Kirchmeier in his official capacity)

[¶77] Wilansky asserts *Monell* claims against Morton County and Sheriff Kirchmeier in his official capacity. First, she asserts "Defendant Kirchmeier directed, approved, or ratified the objectively unreasonable and unconstitutional use of explosive less-lethal munitions by his subordinates." Doc. No. 1, ¶¶208-211. Next, she asserts "Defendant Morton County had a policy or custom of using explosive less-lethal munitions in an objectively unreasonable and unconstitutional manner against DAPL protestors." Doc. No. 1, ¶¶212-215. Lastly, she asserts "Defendants Kirchmeier and Morton County failed to adequately train and supervise the law enforcement officers who responded to the DAPL Protests." Doc. No. 1, ¶¶216-222.

[¶78] In support of dismissal, the Defendants assert Wilansky has failed to plead facts showing Defendant Officer Doe violated her Fourth or Fourteenth Amend-

ment Rights, a prerequisite they maintain must be met in holding Morton County and Sheriff Kirchmeier liable for actions under *Monell*. Doc. No. 29, p. The Court, as noted below, finds Wilansky has sufficiently alleged facts to support a Fourth Amendment excessive force claim. Therefore, the Court must only determine if Wilansky has alleged facts to support her specific *Monell* claims against Morton County and Sheriff Kirchmeier. The Court finds she does not.

(1) *Unconstitutional Policies, Customs, or Practices*

[¶79] "A municipality may be liable under § 1983 when an official municipal policy or custom caused a violation of a plaintiff's substantive due process rights." *Russell v. Hennepin Cty.,* 420 F.3d 841, 846 (8th Cir. 2005)." "Municipal officials who have final policymaking authority may, by their actions, subject the government to Section 1983 liability.'" *Id.* (citing *Angarita v. St. Louis County,* 981 F.2d 1537, 1546 (8th Cir.1992)). "Before a municipality can be held liable, however, there must be an unconstitutional act by a municipal employee." *Id.*

[¶80] "Section 1983 liability for a constitutional violation may attach to a municipality if the violation resulted from (1) an 'official municipal policy,' (2) an unofficial 'custom,' or (3) a deliberately indifferent failure to train or supervise." *Malone v. Hinman,* 847 F.3d 949, 955 (8th Cir. 2017) (citations omitted). "Policy and custom are not the same thing." *Id.* "[A] 'policy' is an official policy, a deliberate choice of a guiding principle or procedure made by the municipal official who has final authority regarding such matters." *Id.* "[T]he plaintiff must prove that the policy was the "moving force" behind a constitutional violation." *Schaffer v. Beringer,* 842 F.3d 585, 596 (8th Cir. 2016).

[¶81] In the alternative, "a plaintiff may establish municipal liability through an unofficial custom of the municipality by demonstrating:

> 1) the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice to the officials of that misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was a moving force behind the constitutional violation.

Id.

[¶82] Wilansky has not pled sufficient facts to establish Morton County may have had an unconstitutional policy or custom of using explosive less-lethal munitions in an unconstitutional manner which was the moving force behind Defendant Officer Doe's alleged violation of her rights. As to policy, Wilansky has failed to point to "an official policy, a deliberate choice of guiding principle or procedure" of Morton County made by Sheriff Kirchmeier authorizing the use of unreasonable force. Wilansky has failed to point to an official policy either in writing or orally issued by the County Defendants authorizing law enforcement officers to use explosive less-lethal weapons in an unconstitutional manner. Furthermore, she has failed to put forth facts showing County Defendants established a guiding principle or procedure wherein law enforcement officers were authorized or encouraged to utilize explosive less-lethal weapons in an objectively unreasonable manner. Simply asserting the County Defendants allegedly equipped officers

with explosive less-lethal weapons, even if some were allegedly untrained in their use, does not suffice to show these officers who allegedly used explosive less-lethal weapons did so at the direction of the County Defendant's policy. Therefore, her allegation that law enforcement officers "repeatedly aimed and launched flashbangs and other explosive less-lethal munitions at individuals and/or into crowded areas" does not suffice to establish that these officers were acting pursuant to a policy promulgated by the County Defendants. Doc. No. 1, ¶76. Furthermore, Wilansky has failed to put forth facts showing an alleged policy was the driving force behind her injury. Generally asserting "Defendant Doe acted pursuant to this policy or custom and under the color of state law when s/he launched an explosive munition at" her is not strong enough to tie Defendant Doe's actions to the County Defendants. Doc. No. 1, ¶214.

[¶83] As to custom, Wilansky has failed to point to "the existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Mettler,* 165 F.3d at 1204. Wilansky asserts "[i]n September 2016, North Dakota law enforcement agencies purchased . . . one hundred flashbangs expressly for use at DAPL protests." Doc. No. 1, ¶141. Wilansky further asserts that throughout "October and November 2016, Morton County routinely distributed flashbangs and other explosive less-lethal munitions to law enforcement officers who lacked sufficient training in the proper use of such devices." Doc. No. 1, ¶75. However, there is nothing unconstitutional about law enforcement purchasing explosive less-lethal weapons nor does the fact that law enforcement were equipped with them, on its own, mean a pattern of constitutional violations occurred.

[¶84] Moreover, Wilansky's statements that law enforcement officers routinely used explosive less-lethal munitions unreasonably prior to her alleged injury is far too generalized to make the finding that law enforcement officers were engaging in a continuing, widespread, persistent pattern of unconstitutional misconduct. *See* Doc. No. 1, ¶76 ("Prior to [her] injury, law enforcement officers responding to DAPL protests in Morton County . . . repeatedly aimed and launched flashbangs and other explosive less-lethal munitions at individuals and/or into crowded areas."); *see also* Doc. No. 1, ¶217 ("Defendant Kirchmeier knew that the officers under his direction and supervision were routinely using explosive less-lethal munitions in an objectively unreasonable manner against protestors."). In fact, her discussions of prior protests on October 22, 2016, October 27, 2016, and November 2, 2016, do not discuss law enforcement's use of *explosive* less-lethal munitions. Doc. No. 1, ¶¶47 – 49.

[¶85] Additionally, the more specific instance she provides in her Complaint to support her belief law enforcement officers unreasonably used explosive less-lethal munitions relates to one particular protest on November 20, 2016. *See* Doc. No. 1, ¶95 (asserting that on November 20, 2016, "law enforcement officers . . . launched numerous explosive less-lethal munitions, including flashbangs, directly into crowds of protestors."); Doc. No. 1, ¶142 ("Videos taken at the protest on November 20 show law enforcement officers launching flashbangs at protestors."). This instance does not show a widespread, continuing, and persistent pattern.

[¶86] Furthermore, Wilansky has failed to allege facts showing Defendant Kirchmeier and Morton County had notice of a pattern of alleged constitutional violations and tacitly authorized or were

deliberately indifferent to their use or that this custom was the driving force behind her alleged injury. Wilansky asserts Morton County routinely equipped law enforcement officers with less-lethal weapons, including the night of November 20 and early morning of November 21. Doc. No. 1, ¶¶75, 89. She asserts some of these officers lacked sufficient training in their use, including Defendant Officer Doe, further alleging Defendant Kirchmeier was aware of this fact. Doc. No. 1, ¶218. However, equipping officers with less-lethal weapons does not equate to the Defendants having notice that any of these officers were using these weapons routinely in an unconstitutional manner. Wilansky's statement, "Defendant Kirchmeier knew that the officers under his direction and supervision were routinely using explosive less-lethal munitions in an objectively unreasonable manner against protestors," is again far too generalized to establish notice. Again, Wilansky has failed to establish a "routine" to strengthen this statement.

[¶87] In addition, Wilansky has failed to establish the alleged custom or policy was the "driving force" behind her injury. In a conclusory fashion, she asserts "Defendant Morton County established a policy or custom of using explosive less-lethal munitions in an objectively unreasonable and unconstitutional manner against DAPL protesters." Doc. No. 1, ¶212. She avers "Defendant Doe acted pursuant to this policy or custom and under the color of law when s/he launched an explosive munition at [Wilansky]." Doc. No. 1, ¶214. Wilansky's conclusory statement, however, is far too generalized to assert Defendant Officer Doe's alleged actions were driven by such an alleged policy or custom.

(2) *Violations Resulting from Training, Supervision, or Discipline*

[¶88] Wilansky also asserts a *Monell* claim against Sheriff Kirchheimer and Morton County on a failure to train, supervise, or discipline theory. "To state a claim under § 1983, the plaintiff must plead that a government official has personally violated the plaintiff's constitutional rights." *Jackson v. Nixon,* 747 F.3d 537, 543 (8th Cir. 2014). "While the doctrine of respondeat superior does not apply to § 1983 cases, a supervisor may still be liable under § 1983 if either his direct action or his 'failure to properly supervise and train the offending employee' caused the constitutional violation at issue." *Id.* "Even if a supervisor is not involved in day-to-day operations, his personal involvement may be found if he is involved in 'creating, applying, or interpreting a policy' that gives rise to unconstitutional conditions." *Id.*

[¶89] The County Defendants may therefore be liable under § 1983 if they "(1) had 'notice of a pattern of unconstitutional acts committed by subordinates'; (2) [were] deliberately indifferent to or tacitly authorized those acts; and (3) failed to take 'sufficient remedial action'; (4) proximately caus[ed] injury to the Plaintiffs." *Livers v. Schenck,* 700 F.3d 340, 355–56 (8th Cir. 2012) (quoting *Jane Doe A. v. Special Sch. Dist. of St. Louis Cnty,* 901 F.2d 642, 645 (8th Cir.1990)).

[¶90] For largely the same reasons as noted above, Wilansky has failed to show a pattern of unconstitutional acts to which the County Defendants had notice. Her general allegations that "prior to her injury" officers used explosive less-lethal munitions unreasonably is inadequate to aid in the establishment of a pattern. Additionally, the previous protests her Complaint elaborates on do not discuss law enforcement using

explosive less-lethal munitions. The specific instance she discusses wherein law enforcement officers used explosive less-lethal weapons occurred at the protest on November 20-21, 2016. Simply asserting these officers acted "under the direction, supervision, and authority of Defendants Kirchmeier and Morton County" is too generalized to establish the County Defendants had notice law enforcement officers were going to use or did use these explosive less-lethal weapons in an objectively unreasonable manner.

[¶91] Wilanksy has also failed to show the County Defendants failed to take sufficient remedial action. She therefore cannot show it was the Defendants' alleged failure to train, supervise, or discipline that was the proximate cause of her injuries because there was not a pattern of unconstitutional conduct of subordinates that the County Defendants' had knowledge of and tacitly authorized or were deliberately indifferent to. Cause of action three (3) will be dismissed.

iv. Injunctive Relief

[¶92] Wilansky requests injunctive relief in two aspects in this matter. She requests the Court issue Orders and Permanent Injunctions requiring the Morton County Sheriff's Office:

> to train all of its law enforcement officers in the proper and appropriate use of less-lethal weapons and prohibiting all law enforcement officers acting under the authority of Morton County from handling, possessing, or deploying any less-lethal weapons until they have successfully completed such training;
>
> and

> to issue a press release to local and national news media in which it retracts the false and defamatory statements made by Defendants about Sophia, identifies the law enforcement officer who injured her, and accepts responsibility for her injury.

Doc. No. 1, Prayer for Relief, pp. 47-48, ¶¶C-D.

[¶93] Defendants have asserted Wilansky does not possess standing to bring injunctive relief to the request for Morton County to train officers in the use of less-lethal weapons. "For an injunction to be appropriate, 'a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.'" *Richland/Wilkin Joint Powers Auth. v. United States Army Corps of Engineers,* 826 F.3d 1030, 1037 (8th Cir. 2016). "[I]t is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury [is] 'certainly impending.'" *Park v. Forest Serv. of U.S.,* 205 F.3d 1034, 1037 (8th Cir. 2000) (alterations to original) (citations omitted).

[¶94] Wilansky asserts her Complaint alleges facts to "imply such a threat." Doc. No. 35, p. 28. Specifically, she asserts her Complaint states she is a "passionate environmentalist and committed social justice advocate." *Id.* (citing Doc. No. 1, ¶78). She also states "[s]he has protested DAPL in Morton County in the past, but she is afraid to do so in the future because of the safety threat to even peaceful protestors posed by Morton County's practice of equipping inadequately trained officers with flashbangs." *Id.* (citing Doc. No. 1, ¶¶75-76) ("Upon information and belief, throughout October and November 2016, Morton County routinely

distributed flashbangs and other explosive less-lethal munitions to law enforcement officers who lacked sufficient training in the proper use of such devices."); ("Upon information and belief, prior to Sophia's injury, law enforcement officers responding to DAPL protests in Morton County and acting under the authority, direction, and supervision of Defendants Kirchmeier and Morton County repeatedly aimed and launched flashbangs and other explosive less-lethal munitions at individuals and/or into crowded areas."). She asserts the facts in her Complaint imply "Morton County's ongoing practice of inadequately training officers equipped with flashbangs makes her uncomfortable continuing her desired protest activities." Doc. No. 35, p. 29.

[¶95] The Defendants assert these facts do not establish Wilansky is faced with a threatened injury that is "certainly impending." Doc. No. 29, p. 36. The Court agrees. Wilansky is asserting a "mere possibility" if she were to return to Morton County at some point in the future under unspecified circumstances allegedly untrained law enforcement officers would use or handle an explosive less lethal munition in a way that would potentially injure her. This hypothetical is too attenuated to warrant injunctive relief. *See Murphy by Murphy v. Minnesota Dep't of Human Servs.,* 260 F. Supp. 3d 1084, 1101 (D. Minn. 2017) (citing *O'Shea v. Littleton,* 414 U.S. 488, 495–96 (1974) ("[A] plaintiff's speculation that a future injury may occur is not sufficient to warrant injunctive relief.")); *see also Rogers v. Scurr,* 676 F.2d 1211, 1214 (8th Cir. 1982) ("The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; it may not be used simply to eliminate a possibility of a remote future injury, or a future

invasion of rights, be those rights protected by statute or by the common law.").

[¶96] The Court will dismiss Wilansky's injunctive relief request under Doc. No. 1, Prayer for Relief, ¶C. Additionally, the Court will deny Wilansky's injunctive relief request under Doc. No. 1, Prayer for Relief, ¶D on the basis that the defamation claims are dismissed.

2. Surviving Causes of Action

[¶97] The Court now moves to Wilansky's causes of action which will not be dismissed. These claims include: cause of action (1) Excessive Force in Violation of 42 U.S.C. § 1983 (Fourth Amendment) (John Doe Law Enforcement Officer), cause of action (4) Assault and Battery (John Doe Law Enforcement Officer and Morton County); cause of action (5) Intentional Infliction of Emotional Distress (John Doe Law Enforcement Officer and Morton County); cause of action (6) Negligent Infliction of Emotional Distress (John Doe Law Enforcement Officer and Morton County); and cause of action (7) Negligence and Violation of North Dakota Century Code §§ 9-10-01 and 9-10-06 (John Doe Law Enforcement Officer, Morton County, and Kyle Kirchmeier in his official capacity). Doc. No. 1.

A. Causes of Action

i. Causes Four (4) – Assault and Battery; Five (5) – Intentional Infliction of Emotional Distress; Six (6) – Negligent Infliction of Emotional Distress; Seven (7) – Negligence and Violation of North Dakota Century Code §§ 9-10-01 and 9-10-06

[¶98] Wilansky has asserted state-law claims against Defendant Officer Doe: assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence. Doc. No. 1, pp. 41-45. Wilansky argues "[d]efendants do not dispute the legal sufficiency of any of [her] state law causes of action against Officer Doe," and therefore, these claims "automatically survive Defendants' motion to dismiss." Doc. No. 35, p. 23.

[¶99] Wilansky also brings vicarious liability claims against Morton County for her state-law based causes of action against Defendant Officer Doe (assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, and negligence). While the Defendants are correct that Wilansky's *Monell* claims are dependent upon the viability of her federal excessive force claims, they neglect to address Wilansky's claims for supervisory liability of Morton County under North Dakota state law.

[¶100] Upon review of the State and County Defendants' briefs, it appears neither contested the merits of these state-law claims against Defendant Officer Doe or Morton County. In addition, Wilansky pled diversity jurisdiction in her Complaint regarding these state-law claims. Therefore, causes of action four (4), five (5), six (6), and seven (7) will proceed against

Defendant Officer Doe and Morton County in the manner more fully discussed in the section below addressing discovery moving forward. *Fox v. Wardy,* No. EP-04-CV-439-PRM, 2005 WL 1421514, at *5 (W.D. Tex. June 16, 2005) ("The Court denies the Defendant's Motion as to certain claims based upon Defendant's failure to address those claims.").

ii. Excessive Force in Violation of 42 U.S.C. § 1983 (Fourth Amendment) (John Doe Law Enforcement Officer)

[¶101] "In addressing an excessive force claim brought under § 1983, analysis begins by identifying the specific constitutional right allegedly infringed by the challenged application of force." *Graham,* 490 U.S. at 394. "In most instances, that will be either the Fourth Amendment's prohibition against unreasonable seizures of the person, or the Eighth Amendment's ban on cruel and unusual punishments, which are the two primary sources of constitutional protection against physically abusive governmental conduct." *Id.* "The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* (citation omitted).

[¶102] The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. Amend. IV. "All claims that law enforcement officers have used excessive force . . . in the course of . . . [a] 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard.'" *Id.* at 395. In order to state a viable claim for excessive force under the Fourth Amendment, Wilansky must allege facts showing Defendant Officer Doe (1) seized her under the Fourth Amendment; (2) this seizure was objectively unreasonably, and

(3) Defendant Officer Doe is not entitled to qualified immunity. *Atkinson v. City of Mountain View, Mo.,* 709 F.3d 1201, 1207 (8th Cir. 2013).

(1) *Seizure*

[¶103] "A Fourth Amendment seizure occurs when there is 'meaningful interference, however brief, with an individual's freedom of movement.'" *United States v. Dolson,* 673 F. Supp. 2d 842, 864–65 (D. Minn. 2009). "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Dortch,* 868 F.3d 674, 677 (8th Cir. 2017).

[¶104] A seizure can occur through law enforcement's show of authority or through law enforcement's use of physical force. *See Oglesby v. Lesan,* 929 F.3d 526, 532 (8th Cir. 2019) ("Only when the officer, by means of physical force *or* show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred.") (emphasis added) *see also Atkinson,* 709 F.3d at 1208 ("Because the Supreme Court has directed us to apply this common law dichotomy to seizure of the person under the Fourth Amendment, we similarly require *either* physical force *or* where that is absent, *submission* to the assertion of authority.") (alterations). "A seizure does not require any magic words, rather physical force can suffice." *See United States v. Cook,* 842 F.3d 597, 600 (8th Cir. 2016). The Eighth Circuit further outlined the parameters of when physical force may constitute a seizure:

> To constitute a Fourth Amendment seizure, an application of physical force must be

> willful because the word seizure can hardly be applied to an unknowing act. Whether physical force was intentionally applied, is determined by the officer's objective behavior, not his subjective motive. Also implicit in the term seizure is a requirement that the application of physical force restrain freedom of movement. This restraint need not actually succeed in stopping or holding the person even for an instant. But the seizure does not outlast the restraint on free movement.

Atkinson, 709 F.3d at 1208 (citations omitted) (alterations to original).

[¶105] The Defendants argue Wilansky could not have been seized because she has not alleged facts showing the alleged force used upon her by Defendant Officer Doe "was applied for the purpose of law enforcement gaining physical control over" her. Doc. No. 29, p. 23. They argue Wilansky did not allege she did not feel free to terminate her encounter with law enforcement, did not allege she was arrested, was not advised she was not free to leave, or was not told to remain where she was. Doc. No. 29, p. 23. Instead, they assert she could have walked away, and the facts in her Complaint "objectively manifest law enforcement's intention in applying the alleged force of keeping Plaintiff and other protestors away from law enforcement – the exact opposite of what is required for a seizure under the Fourth Amendment." Doc. No. 29, p. 23.

[¶106] Wilansky asserts the intent required is the officer's intent "to apply physical force, not that the officer intend the force to generate a particular outcome." Doc. No. 35, p. 7. Caselaw supports Wilansky's view. As explained by the Ninth Circuit in *Nelson v. City of Davis,* 685 F.3d 867 (9th Cir. 2012):

> The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. *See, e.g., Ashcroft v. al–Kidd,* —— U.S. ——, 131 S.Ct. 2074, 2080, 179 L.Ed.2d 1149 (2011); *Brendlin,* 551 U.S. at 261, 127 S.Ct. 2400; *Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996). "The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." *Brendlin,* 551 U.S. at 260–61, 127 S.Ct. 2400 (alterations in original) (internal quotation marks and citation omitted). Recently, the Court again emphasized that "the Fourth Amendment regulates conduct rather than thoughts." *al–Kidd,* 131 S.Ct. at 2080.

Id.

[¶107] In fact, *Nelson* provides an example of the intent inquiry required in physical-force seizure cases. In *Nelson,* law enforcement officers deployed pepper balls at a group of party-goers in an attempt to get them to disperse from an apartment building, causing permanent injuries to one individual who was shot in the eye. *Nelson,* 685 F.3d at 874. The officers in *Nelson* argued "their actions could not constitute a seizure because their intent was to disperse the crowd." *Id.* at 877. The Court rejected this notion, stating "the officers took aim and fired their weapons towards Nelson and his associates," so "[w]hether the officer intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred." *Id.* Instead, the Court noted "[r]egardless of

their motives, their application of force was a knowing and willful act that terminated Nelson's freedom of movement." *Id.*

[¶108] This mirrors the Eighth Circuit's mandate that a seizure occurs by law enforcement's intentional acquisition of physical control terminating an individual's freedom of movement through means intentionally applied. *Johnson v. City of Ferguson, Missouri,* 926 F.3d 504, 506 (8th Cir.), *cert. denied,* 140 S. Ct. 553, 205 L. Ed. 2d 357 (2019). The Court finds based on the allegations outlined in Wilansky's Complaint, she has alleged Defendant Officer Doe may have seized her. Her facts support a plausible finding Defendant Officer Doe intended to control her physical movement, and he succeeded in doing so when he terminated her freedom of movement by intentionally throwing an explosive less-lethal munition at her.

[¶109] Wilansky alleges the only two people on the Backwater Bridge at the time of the incident were herself and one other protestor. Doc. No. 1, ¶104. She asserts law enforcement officers verbalized the order to back away from the burned-out vehicle specifically to the two of them. Doc. No. 1, ¶104. She asserts without being given the opportunity to react to the order, law enforcement officers started to fire sponge bullets at the two of them, hitting her in the upper left arm. Doc. No. 1, ¶105. While speaking directly to the law enforcement officers and retreating away from the barricade, she alleges she verbalized a plea for them to stop firing at her. Doc. No. 1, ¶107. In the process of her attempting to move away from the barricade, she asserts Defendant Officer Doe fired an explosive less-lethal munition at her person. Doc. No. 1, ¶108. She asserts the explosive hit her left forearm, exploding and causing her to fall to the ground. Doc. No. 1, ¶113-

114. Instead of helping her, she asserts law enforcement officers congratulated Defendant Doe. Doc. No. 1, ¶114. She asserts she had to be carried away by other protestors. Doc. No. 1, ¶117.

[¶110] Her facts support a plausible finding that Defendant Officer Doe intended to control her physical movement, and he succeeded in doing so when he terminated her freedom of movement by intentionally throwing an explosive less-lethal munition at her person. Wilansky asserts she was stopped in her tracks from the force applied to her by law enforcement. Her arm was severely injured by the blast, as her arteries, skin, tissue, muscle, nerve, tendons, and bone in her left forearm were destroyed. Doc. No. 1, ¶111. As the *Atkinson* Court noted "[i]t would make little sense to ask whether a person felt 'free to leave' while an officer restrained the person's freedom of movement through physical force because the force itself necessarily —if only briefly— 'restrained [the person's] liberty.'" *Atkinson,* 709 F.3d at 1209.

(2) *Objective Reasonableness*

[¶111] Wilansky must also show Defendant Officer Doe's seizure was unreasonable. "When evaluating a Fourth Amendment excessive force claim under § 1983, [a court] consider[s] 'whether the amount of force used was objectively reasonable under the particular circumstances.'" *Kohorst v. Smith,* 968 F.3d 871, 876 (8th Cir. 2020) (citation omitted). The Court evaluates "the reasonableness of the force used from the perspective of a reasonable officer on the scene, not with the benefit of hindsight." *Id.* "This evaluation entails careful consideration of the case's particular facts and circumstances, including: '(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the officers or others;

and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." *Id.* (citing *Graham,* 490 U.S. at 396). The court may "also consider the result of the use of force." *Id.*

[¶112] Wilansky asserts that after the larger gathering of protestors calmed down around 2:00 a.m. on November 21, 2016, only a few protestors remained at the Backwater Bridge. Doc. No. 1, ¶98. She maintains the area was "quiet and tranquil" and there was no active protesting occurring. Doc. No. 1, ¶¶98, 99. She states her allegations of tranquility around this time are corroborated by a dashcam video from the North Dakota State Highway Patrol provided to her through counsel for Morton County. Doc. No. 1, ¶¶155, 156. She asserts the video shows law enforcement officers relaxed, exhibiting no concern "that protestors with guns might be approaching the bridge to storm the barricade." Doc. No. 1, ¶157. More importantly, she asserts, "the officers do not appear scared or worried that there might be an explosive device nearby, even when they ordered protestors away from the burned-out vehicle." Doc. No. 1, ¶157. This shows an inconsistency, she argues, "with the public accusations made by Defendants that protesters were throwing Coleman propane tanks rigged to explode at law enforcement and that [she] was planting such an explosive at the barricade." *Id.*

[¶113] In contrast, she asserts that when she approached the burned-out vehicle on the barricade around 4:00 a.m. she was not carrying any weapons nor was she yelling at, menacing, or threatening officers. Doc. No. 1, ¶102. She maintains only herself and another protestor were on the Backwater Bridge quietly chatting when law enforcement officers began using force on them, including Defendant Officer Doe

allegedly throwing the explosive at her while she was attempting to retreat from the barricade in compliance with the officers orders.

[¶114] The Defendants assert Defendant Officer Doe was acting in a defensive position when he or she allegedly acted and given the totality of the circumstances he or she acted objectively reasonable. To support this assertion, the Defendants request the Court to consider a number of facts not contained on the face of the Complaint. The Court appreciates that many of these extrinsic facts may go directly to the heart of whether Defendant Officer Doe's actions were objectively reasonable.

[¶115] The Court could go through each and every extrinsic fact offered by the Defendants, explaining why some may be considered and why others may not. However, in the interests of efficiency and justice, the Court deems it more appropriate to convert the Defendants' Motion to Dismiss as it pertains to Wilansky's remaining claims into a Motion for Summary Judgment, consider all of the extrinsic facts thereafter, and allow further limited discovery as outlined below. *See* Fed. R. Civ. P. 12(d) (If "matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56."); *see also Brooks v. Midwest Heart Grp.,* 655 F.3d 796, 800 (8th Cir. 2011) ("Upon conversion to a motion for summary judgment, '[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.'").

[¶116] Wilansky's remaining Fourth Amendment and state-law claims largely turn on the resolution of a limited number of factual disputes, including (1) whether Defendant Officer Doe used an explosive

less-lethal munition at the time and place of Wilansky's injury; (2) if Defendant Officer Doe was acting in a defensive position when he or she used such munition if he or she did; and (3) whether protestors were handling improvised explosive devices at the time and location of Wilansky's injuries. These facts will aid a factfinder in determining if Defendant Officer Doe used an explosive less-lethal munition in an objectively unreasonable manner.

(3) *Qualified Immunity*

[¶117] In addition, these facts must first be developed in order to determine if Defendant Officer Doe is entitled to qualified immunity. "Qualified immunity shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would know." *Ferguson v. Short,* 840 F.3d 508, 510 (8th Cir. 2016). "The determination of whether qualified immunity is applicable in given circumstances is one of 'objective reasonableness.'" *Herts v. Smith,* 345 F.3d 581, 585 (8th Cir. 2003). The issue is not "whether the defendant acted wrongly, but whether reasonable persons would know they acted in a manner which deprived another of a known constitutional right." *Id.* (citing *Sparr v. Ward,* 306 F.3d 589, 593 (8th Cir. 2002)). The defendant bears the burden of proof on this affirmative defense. *Id.*

[¶118] A two-step inquiry is undertaken to determine if qualified immunity is invoked: "(1) [whether] the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional or statutory right; and (2) [whether] the right was clearly established at the time of the deprivation." *Jones v. McNeese,* 675 F.3d 1158, 1161 (8th Cir. 2012). "For the purposes of step two, "clearly established" means "[t]he

contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* While qualified immunity "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate." *White v. Pauly,* 137 S. Ct. 548, 551 (2017) (citations omitted). "We . . . look to all available decisional law, including decisions from other courts, federal and state, when there is no binding precedent in this circuit." *Meloy v. Bachmeier,* 302 F.3d 845, 848 (8th Cir. 2002). "[G]eneral statements of the law are not inherently incapable of giving fair and clear warning so long as the unlawfulness is apparent." *Dean v. Searcey,* 893 F.3d 504, 518 (8th Cir. 2018), *cert. denied,* 139 S. Ct. 1291, 203 L. Ed. 2d 414 (2019)

[¶119] The Defendants assert Wilansky has failed to cite "case law involving the use of less-lethal munitions *from a strictly defensive position* by law enforcement under a totality of the circumstances similar to those in the present case in which such deployment constituted excessive force." Doc. No. 29, p. 32 (emphasis added). The Defendants assert in the inverse there is case law which supports the finding that a law enforcement officer may use less-lethal munitions to prevent unlawful access to property, protecting public, and protecting private property rights without running afoul of the Fourth or Fourteenth Amendments. *Id.* These assertions, however, rely upon facts not found on the face of Wilansky's Complaint. In fact, her Complaint asserts the opposite of law enforcement being in a defensive position – she asserts she was peacefully standing near the barricade, breaking no laws, when Defendant Officer Doe, who was calm and had no threat of harm, threw the flashbang at her. Limited discovery is

needed to establish the facts as they relate to the excessive force claim in order to determine if Defendant Officer Doe is entitled to qualified immunity.

[¶120] Indeed, this case is an example of why "qualified immunity is often best decided on a motion for summary judgment when the details of the alleged deprivations are more fully developed." *Walker v. Schult,* 717 F.3d 119, 130 (2d Cir. 2013) As the United States Supreme Court has noted, "when qualified immunity is asserted at the pleading stage, the precise factual basis for the plaintiff's claim or claims may be hard to identify" and "the answer [to] whether there was a violation may depend on a kaleidoscope of facts not yet fully developed." *Pearson v. Callahan,* 555 U.S. 223, 238–39, 129 S. Ct. 808, 819, 172 L. Ed. 2d 565 (2009).

B. *Limited Discovery*

[¶121] The Defendants' converted Motion for Summary Judgment narrows what factual disputes are present for purposes of resolving their specific converted Motion. As noted above, these disputes largely include (1) whether Defendant Officer Doe used an explosive less-lethal munition at the time and place of Wilansky's injury; (2) if Defendant Officer Doe was acting in a defensive position when he or she used such munition if he or she did; and (3) whether protestors were handling improvised explosive devices at the time and location of Wilansky's injuries.

[¶122] As a result, the Court will limit the discovery to address the Defendants' specific Motion. Both parties shall provide to the Court, and serve upon the other, a detailed list of the discovery each seeks. This includes a list of each individual to be deposed (not to exceed two (2) persons or entities), a list of each third-

party intended to be subpoenaed (not to exceed two (2) persons or entities), a list of each individual or entity (not to exceed two (2) individuals or entities, including named parties) to be served with interrogatories and production of document requests (not to exceed twelve (12) in total, including subparts), and a detailed list of any other discovery sought. This list shall be filed and served within seven (7) days of the date of this Order.

[¶123] The Court will then review each submitted list and issue an Order outlining what discovery will be permitted for each party. After the issuance of the limited discovery order, the Court will schedule a status conference with the parties to address the scheduling order in this matter as it pertains to this Motion for Summary Judgment and other pertinent deadlines.

III. CONCLUSION

[¶124] The Court ORDERS State Defendant Iverson's Motion to Dismiss [Doc. No. 26] is GRANTED. Cause of Action Eight (8) as to Defendant Iverson is DISMISSED WITH PREJUDICE.

[¶125] In addition, the Court ORDERS County Defendants' Motion to Dismiss [Doc. No. 28] is GRANTED, in part, and CONVERTED TO SUMMARY JUDGMENT AND DEFERRED, in part. County Defendants' Motion to Dismiss Causes of Action Two (2) as to Defendant John Doe Law Enforcement Officer; Three (3) as to Defendants Morton County and Kyle Kirchmeier in his official capacity; and Eight (8) as to Defendants Laney, Morton County, and Kyle Kirchmeier in both is official and personal capacities is GRANTED. Causes of Action (2), (3), and (8) are DISMISSED WITH PREJUDICE.

[¶126] County Defendants' Motion to Dismiss Causes of Action One (1) as to John Doe Law Enforcement Officer; Four (4) as to Defendants John Doe Law Enforcement Office and Morton County; Five (5) as to Defendants John Doe Law Enforcement Office and Morton County; Six (6) as to Defendants John Doe Law Enforcement Office and Morton County; and Seven (7) as to Defendants John Doe Law Enforcement Office, Morton County, and Kyle Kirchmeier in his official capacity is CONVERTED TO SUMMARY JUDGMENT AND DEFERRED. The parties shall be allowed to conduct limited discovery as discussed above.

[¶127] IT IS SO ORDERED.

DATED October 29, 2020.

/s/ Daniel M. Traynor
Daniel M. Traynor, District Judge
United States District Court