Case No. 21-1071

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Marcus Mitchell,

Plaintiff - Appellant,

v.

Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, Bismarck Police Officer Tyler Welk, North Dakota Highway Patrol Sergeant Benjamin Kennelly, John Does 1-2

Defendants– Appellees,

RESPONSE BRIEF OF APPELLEES MORTON COUNTY SHERIFF KYLE KIRCHMEIER, MORTON COUNTY, CITY OF BISMARCK, MORTON COUNTY SHERIFF'S DEPUTY GEORGE PIEHL, AND BISMARCK POLICE OFFICER TYLER WELK

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SUMMARY OF THE CASE

Marcus Mitchell appeals from the dismissal of his claims against Morton County Sheriff Kyle Kirchmeier; Morton County, North Dakota; City of Bismarck, North Dakota; Morton County Sheriff's Deputy George Piehl; and Bismarck Police Officer Tyler Welk (Collectively "City and County Appellees") of alleged violations of his rights under the First, Fourth and Fourteenth Amendments to the United States Constitution. Mitchell alleges he suffered injuries when Deputy Piehl and/or Officer Welk shot him with a less-lethal impact round while he and others were protesting against completion of the Dakota Access Pipeline in southern Morton County on January 19, 2017. The district court correctly dismissed Mitchell's First Amendment claims on the basis such claims are *Heck*-barred. Mitchell also failed to plead facts to establish a plausible violation of his constitutional rights, and his allegations establish the alleged conduct at issue was objectively reasonable under the totaling of the circumstances presented, and the law was not clearly established the alleged wrongful conduct violated Mitchell's constitutional rights, thereby entitling individual officers to qualified immunity.

Oral argument is appropriate in this case as application of the *Heck*-bar to a pretrial diversion agreement is a matter of first impression. City and County Appellees suggest twenty minutes is sufficient to permit the separately represented appellees to respond to Mitchell's arguments.

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STATEMENT OF ISSUES – APPOSITE CASES

I. Whether the district court correctly dismissed Mitchell's First Amendment claims.

Most apposite authority:

Heck v. Humphrey, 512 U.S. 443 (2011)

Newmy v. Johnson, 758 F.3d 1008 (8th Cir. 2014)

Wood v. Moss, 134 S. Ct. 2056 (2014)

Adderley v. Florida, 385 U.S. 39 (1966)

N.D. R. Crim. P. 32.2

II. Whether the district court correctly dismissed Mitchell's Fourth Amendment claim.

Most apposite authority:

Bernini v. City of St. Paul, 655 F.3d 997 (8th Cir. 2012)

Graham v. Connor, 490 U.S. 386 (1989)

Kisela v. Hughes, 138 S. Ct. 1148 (2018) (per curiam)

III. Whether the district court correctly dismissed Mitchell's Fourteenth Amendment claim.

Most apposite authority:

Klinger v. Department of Corrections, 31 F.3d 727 (8th Cir. 1994)

In re Kemp, 894 F.3d 900 (8th Cir. 2018), *cert. denied sub nom. Griffen v. Kemp*, 139 S. Ct. 1176 (2019)

U.S. v. Bell, 86 F.3d 820 (8th Cir. 1996)

IV. Whether the district court correctly dismissed Mitchell's *Monell* claim.

Most apposite authority:

Speer v. City of Wynne, Arkansas, 376 F.3d 960 (8th Cir. 2002)

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STATEMENT OF THE CASE

I. The District Court's Recitation of Plaintiff's Allegations

Mitchell's Complaint (AA9-42) is comprised of 33 pages and 167 paragraphs. The majority of the pleading is comprised of legal conclusions, often cast in the form of factual allegations – all of which this Court should disregard for purposes of review under Fed. R. Civ. P. 12 review. Examples of legal conclusions alleged by Mitchell include that Mitchell and other Dakota Access Pipeline ("DAPL") protestors were "peaceful" and "posed no threat" to law enforcement, and that law enforcement's actions at issue were "intentional" and with "malice."

Following is the district court's summary recitation of Plaintiff's allegations in this case, taken verbatim from the *Order Granting Defendant Kennelly's Motion to Dismiss, and Granting City of County Defendants' Motion to Dismiss* from which Mitchell appeals. The district court's original citations to the record have been updated to the Appellant's Appendix ("AA") to facilitate appellate review.

> [¶3] Marcus Mitchell, an enrolled member of the Navajo Nation living in Arizona, travelled to North Dakota in November of 2016 to join the Standing Rock and Cheyenne River Sioux Tribes and their supporters in advocating against the construction of the Dakota Access Pipeline ("DAPL"), which was slated to cross the Missouri River a few miles north of the Standing Rock Tribe's Reservation. [AA9-10, ¶2; AA10-11, ¶43.] According to Mitchell, the Tribes opposed the location and construction of the Pipeline, asserting it would endanger their water supply and the environment, disrupt cultural sites, and threaten historic treaty land. [AA13, ¶19.] Mitchell asserts, after the federal government "failed to adequately or

meaningfully consult them or obtain their consent in contravention of federal law and the [United Nations Declaration on the Rights of Indigenous Peoples]" (UNDRIP), 1 the Standing Rock Sioux Tribe issued "a call to all Sioux and their allies to peacefully stand in support of the Nation's sovereignty and treaty rights and to protect people's essential water." [AA13-14, ¶¶20-22.] Mitchell joined the Tribes and their supporters in vocalizing this message, including spending time at the protestors' main camp, Oceti Sakowin, located near Highway 1806 and the Backwater Bridge. [AA15, ¶¶24, 25; AA18-19, ¶43.]

[¶4] Mitchell maintains the protests against DAPL began in April of 2016. [AA10, ¶5.] Mitchell asserts law enforcement presence at protest sites increased on September 3, 2016, after an incident involving the protestors and private security guards hired by Energy Transfer Partners. [AA15, ¶28.] Mitchell indicates several protestors were attacked and bitten by security dogs handled by the security guards. [AA15, ¶28.] As a result, he asserts, the Morton County Sheriff's Office began "maintaining a larger presence at and responding more aggressively to DAPL protests." [AA15, ¶28.]

[¶5] This larger presence included the Bismarck Police Department, the North Dakota National Guard which was activated by the Governor on September 8, 2016, and the North Dakota Highway Patrol. [AA15-16, ¶¶29, 30.] In addition, in October 2016, North Dakota issued an "Emergency Management Assistance Compact" request to surrounding states for assistance at the DAPL protest sites. [AA16, ¶31.] 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. [AA16, ¶31.]

[¶6] Mitchell asserts these officers, who were "led by the Morton County Sheriff's Office and Defendant Kirchmeier, became increasingly hostile to and aggressive with the water protectors," and the officers used "violent tactics and munitions to deter and quell the protests." [AA16, ¶32.] Mitchell alleges as the law enforcement presence grew, the militarized nature of these officials did as well. [AA16, ¶33.] He further asserts "officers began using less-lethal weapons against water protectors without warning or notices to disperse." [AA16, ¶33.]

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[¶7] For example, Mitchell asserts on October 22, 2016, Sheriff Kirchmeier commanded law enforcement officers to fire rubber bullets and spray pepper spray at protestors. [AA17, ¶35.] On October 27, 2016, Mitchell maintains "hundreds of law enforcement officers wearing tactical riot gear and equipped with pepper spray, shotguns loaded with sponge bullets and bean bags, and other less-lethal weapons, arrived at a DAPL protest site in armored vehicles." [AA17, ¶36.] He asserts officers deployed these weapons against protestors, causing injuries. [AA17, ¶36.]

[¶8] He also discusses a large-scale protest that took place on November 20, 2016 into the early morning on November 21, 2016. [AA17, ¶ 37.] At this protest, he states law enforcement, "acting under the direction and supervision of Defendant Kirchmeier and the Morton County Sheriff's Office, indiscriminately deployed freezing water, chemical agents, and other less-lethal weapons, including lead-filled bean bags like the munitions [he] was harmed by, at individuals within the crowd." [AA17, ¶37.] He asserts officers did this without providing adequate warnings or announcements. [AA17, ¶37.] Many protestors, he states, suffered serious injuries. [AA17, ¶37.]

[¶9] Mitchell states, "throughout the fall of 2016 and the winter of 2017, Defendant Kirchmeier and the Morton County Sheriff's Office regularly equipped the law enforcement officers under their direction, supervision, and authority with less-lethal weapons, including bean bag guns." [AA24, ¶73.] He further asserts many of these officers "lacked adequate training in the appropriate use of these less-lethal weapons" which "if deployed indiscriminately or inappropriately are dangerous; they can cause severe injuries, including death." [AA24, ¶¶73, 77.] Mitchell claims numerous individuals were severely injured or died from being hit by bean bag pellets. [AA25-26, ¶83.]

[¶10] Mitchell contends Defendant Kirchmeier "defended law enforcement's use of force, and specifically the use of impact munitions, in response to the DAPL protests." [AA18, ¶39.] Specifically, he alleges Defendant Kirchmeier stated "when we're put in the position of protected areas being overrun by numbers of people, these are lawful tools to quell the advancement." [AA18, ¶39.] He also asserts Defendant Kirchmeier stated "we're not just gonna let people and protestors in large groups come in and threaten officers. That's not happening." [AA18, ¶39.] Mitchell asserts officers "under the command of Defendant Kirchmeier and the Morton

County Sheriff's Office maintained and engaged in these unconstitutional policies and practices of using excessive force throughout their response to the DAPL protests, including the protest where [he] was harmed in January 2017." [AA18, ¶41.]

[¶11] On January 18, 2017, and into the early morning of January 19, 2017, Mitchell states a protest involving around 200 protestors occurred. [AA19, ¶44.] He maintains certain officers dispatched to the scene were issued 12-gauge shotguns that deployed drag stabilizing beanbag rounds. [AA19, ¶45.] He identified these officers to include Bismarck Police Officer Josh Brown, Bismarck Police Officer Lane Masters, Defendant Bismarck Police Officer Tyler Welk, Bismarck Police Officer Damian Girodat, Morton County Sheriff's Deputy Cameron McClenahan, Defendant Morton County Sheriff's Deputy George Piehl, North Dakota Highway Patrol Trooper Scott Guenthner, and Defendant North Dakota Highway Patrol Sergeant Benjamin Kennelly. [AA19, ¶45.] Mitchell maintains Defendant Kennelly was the scene commander, assigned the "Forward Command" position. Doc. No. 1, ¶46. In this position, Mitchell asserts, Defendant Kennelly "directed law enforcement officers during 'pushes', during which officers rushed, advanced toward and deployed munitions at the water protectors." [AA19, ¶46.] He further avers Defendant Kennelly was "at all times carrying out the policies of Defendant Kirchmeier and Morton County." [AA19, ¶47.]

[¶12] Mitchell contends he went to the Bridge in the late hours of January 18 when he heard "law enforcement officers were shooting unarmed water protectors, including elders and women[.]" [AA20, ¶48.] Upon arrival, he observed that law enforcement "were indeed shooting people on the Bridge." [AA20, ¶49.] He then "positioned himself in front of women and elders in the crowd" about 20 feet from the line of law enforcement officers. [AA20, ¶50.]

[¶13] Mitchell claims he was "unarmed and standing among other unarmed water protectors, generally keeping his hands raised above his head to make clear to the law enforcement officers that he was unarmed and peaceful." [AA20, ¶51.] He states despite having his hands raised in the air, "[u]pon a countdown and without cause or justification, Defendant Morton County Sheriff's Deputy Piehl and Morton County Sheriff's Deputy John Doe 1 shot at [him] with a 12-gauge less-than-lethal shotgun loaded with drag stabilizing bean bag rounds." [AA21, ¶54.] Mitchell asserts around the same time he was also shot with a beanbag round by Defendant Welk and

Defendant Bismarck Police Department Officer John Doe 2. [AA21, ¶55.] Mitchell alleges Defendant Kennelly did not intervene, instead "directed, encouraged, and/or facilitated the Defendant Officers' shooting of [him]." [AA21, ¶58.] He explains the extent of his injuries including: [He] was hit in the face, leg, and in the back of his head by the Defendant Officers. A bean bag round shot by the Defendants Officers entered [his] left eye socket, shattering the orbital wall of his eye and his cheekbone, and ripping open a flap of skin nearly to his left ear. The bean bag round became lodged into his eye, with strands of the round protruding out of his left eye socket. After being shot, [he] became disoriented and fell face down to the ground, which was covered in snow. His nostrils filled with blood and he was unable to breathe, causing him to feel like he was drowning in his own blood. [AA21, ¶¶56, 57, 59.]

[¶14] After the incident, Mitchell contends law enforcement officers immediately approached him and "pinned him to the ground, placing their knees on this body, and holding him down in the snow." [AA21, ¶60.] He then claims officers handcuffed him "tightly behind his back and pulled him up and into a vehicle, as he was unable to get up on his own." [AA21, ¶60.] In the vehicle, he asserts he could not see through the blood on his face, and an officer held him so tightly he was unable to breathe. [A22, ¶61.] He was also allegedly denied water. [A22, ¶61.]

[¶15] Mitchell was transported to Sanford Bismarck Medical Center by ambulance, accompanied by Morton County Sheriff's Deputies. [AA22, ¶62.] When he arrived at the hospital, he fainted, waking up to find his left wrist and right leg were handcuffed to the hospital bed. [AA22, ¶62.] Doctors advised him he had undergone surgery. [AA22, ¶63.]

[¶16] Mitchell alleges he was interrogated by two North Dakota law enforcement officers regarding the Oceti Sakowin camp while restrained to his hospital bed. [AA22, ¶64.] The officers inquired about 'water protectors' upcoming plans and whether there were weapons present at the camp." [A22, ¶64.] Over the next day and a half, Mitchell asserts that, while he lay alone in his hospital bed, he learned "people were desperately searching for him, but could not find him, because law enforcement officers, in collusion with hospital staff, concealed his whereabouts." [AA22, ¶65.]

[¶17] Mitchell claims he was singled out that night by the Defendants as an "agitator" of the protests. [AA20, ¶52.] He contends law enforcement

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identified certain individuals as "agitators," planning to arrest them "to particularly punish them, stop the protest, and chill the rights of other water protectors." [AA20, ¶52.] On this basis, he asserts the Defendants planned to shoot and arrest him. [AA20, ¶52.] Mitchell states this information is "documented in law enforcement reports." [AA20, ¶52.]

[¶18] In relation to the incident, Mitchell was charged by the State of North Dakota with criminal trespass and obstruction of a government function. [AA23, ¶68.] Mitchell asserts law enforcement did not advise him of the charges while he was in the hospital, and a warrant was issued for his arrest. [AA23, ¶69.] Mitchell concedes "the charges were ultimately resolved through a pretrial diversion agreement that resulted in the dismissal of the charges." [AA23, ¶70.] He further contends, "[b]y bringing broad and ill defined charges against [him], law enforcement unlawfully criminalized [his] right to defend indigenous sacred land and resources recognized in the [UNDRIP] and the United Nations Declaration on Human Rights Defenders." [AA23, ¶71.]

[¶19] In addition, Mitchell contends "[d]efendants have a history of discriminating against and racially profiling individuals in Indigenous communities." [AA27, ¶89.] Mitchell claims the Defendants' closure of Highway 1806 had a substantial and disproportionate effect on the Standing Rock Sioux Tribe and tribal members. [AA29, ¶92.] To support this assertion, Mitchell alleges John Floberg, an Episcopalian priest living at Standing Rock, has stated law enforcement officers patrol areas at times "when they know Native traffic is moving on the reservation, profiling for drunk driving, driving without a license or without insurance." [AA27-28, ¶89.] Mitchell also states:

> Upon information and belief, during the early stage of the DAPL protests – from August 2016 to October 2016 – the Morton County Sheriff's Office assigned law enforcement officer to escort school buses filled with white children through areas where groups of Indigenous people were camped out, peacefully protesting, near a highway in North Dakota. These actions were intended to suggest to the white children that Indigenous people are dangerous. [AA28, ¶90.]

[¶20] On these facts, Mitchell filed a Complaint in this matter on July 18, 2019, bringing twelve claims against the Defendants: Count I – Excessive Force (Fourth Amendment) (Defendants Piehl, Welk, and John Does 1-2);

> Count II – Violation of Freedom of Speech and Association (Defendants Piehl, Welk, and John Does 1-2); Count III – First Amendment – Retaliatory Use of Force (Defendants Piehl, Welk, and John Does 1-2); Count IV – First Amendment – Retaliatory Arrest (Defendants Piehl, Welk, and John Does 1-2); Count V – Conspiracy to Deprive Mitchell of Civil Rights (All Individual Defendants); Count VI – Equal Protection (Defendants Piehl, Welk, and John Does 1-2); Count VII – Racially-Motivated Civil Conspiracy (All Individual Defendants); Count VIII – Failure to Intervene (Defendant Kennelly); IX – Unlawful Policy and Practice (Monell Claim) (Defendant Kirchmeier in Official Capacity); X – Intentional Infliction of Emotional Distress (Individual Defendants); Count XI – Respondeat Superior (Morton County and City of Bismarck); and XII – Indemnification (Morton County and City of Bismarck). [AA9-AA41.]

(AA43-AA94.)

II. Proceedings Below

City and County Appellees accept Mitchell's recitation of the proceedings below.

III. Summary of Mitchell's Critical Admissions

Specifically relevant to City and County's Rule 12 motion, Mitchell admits the following in his Complaint:

1. Prior to force being applied to Mitchell on January 19, 2017, numerous confrontations had occurred between DAPL protestors and law enforcement in the vicinity of and upon the Backwater Bridge since at least October 2016 (AA15-AA17, ¶¶28-38.)

2. On October 24, 2016, Defendant Kirchmeier and other officials from the state of North Dakota closed Highway 1806 from Fort Rice to Fort Yates. (AA28, ¶ 91.)

3. "On the evening of January 18, 2017, and into the early morning hours of January 19, 2017, approximately 200 water protectors gathered at the Backwater Bridge to . . . protest the DAPL. The water protectors' . . . protest included praying, chanting, and playing drums. Elders and women were among the water protectors protesting at the Bridge." (AA19, ¶44.)

4. Prior to force being applied to Mitchell on January 19, 2017, law enforcement officers had engaged in "pushes" during which officers rushed, advanced toward and deployed munitions at water protectors. (AA19, ¶46.)

5. "Sometime during the late hours of January 18 and the early morning hours of January 19, [Mitchell] went to Backwater Bridge when he heard that law enforcement officers were shooting unarmed water protectors, including elders and women, on the Bridge." (AA20, ¶48.)

6. "As [Mitchell] approached the Bridge, he observed from a distance that law enforcement officers were indeed shooting people on the Bridge." (AA20, ¶49.)

7. "[Mitchell] positioned himself in front of women and elders in the crowd, and maintained a distance of no less than 20 feet away from a line of law

enforcement officers, which included those he identified as members of the Morton County Sheriff's Office and the Bismarck Police Department." (AA20, ¶50.)

8. "Upon a countdown, . . . Defendant Morton County Sheriff's Deputy Piehl and Defendant Morton County Sheriff's Deputy John Doe 1 shot at [Mitchell] with a 12 gauge less-than-lethal shotgun loaded with drag stabilizing bean bag rounds." (AA21, ¶54.)

9. "At about the same time, . . . Defendant Bismarck Police Department Swat Officer Tyler Welk and Defendant Bismarck Police Department Officer John Doe 2 shot at [Mitchell] with a 12 gauge less than lethal shotgun loaded with drag stabilizing bean bag rounds." (AA21, ¶55.)

10. "[Mitchell] was hit in the face, leg, and in the back of his head by the Defendant Officers." (AA21, ¶56.)

11. Law enforcement officers immediately thereafter handcuffed Mr. Mitchell and placed him into a vehicle, and transported Mitchell to a hospital. (AA21-22, ¶¶ 60, 62.)

12. "Law enforcement officers charged Mr. Mitchell with criminal trespass and obstruction of a government function in connection with the abovementioned events, carrying a maximum sentence of two years in prison and $6,000 in fines." (AA23, ¶68.)

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13. “The charges were ultimately resolved through a pretrial diversion agreement that resulted in the dismissal of the charges.” (AA23, ¶70.)

SUMMARY OF THE ARGUMENT

Mitchell was one of thousands of individuals who came to North Dakota to protest against completion of the Dakota Access Pipeline (“DAPL”) in southern Morton County, North Dakota in the fall of 2016. Mitchell alleges that from November of 2016 until the events at issue on January 19, 2017, he was living in the Oceti Sakowin (a/k/a Seven Council Fires) camp located a short distance south of the Backwater Bridge on Highway 1806 at the time of the incidents alleged. Mitchell alleges defendants/appellees Morton County Sheriff’s Deputy George Piehl, Bismarck Police Officer Tyler Welk and unidentified John Does 1-2 (“Individual Officers”), allegedly shot Mitchell with bean bag rounds and arrested him on January 19, 2017. Relevant to this appeal, Mitchell alleges violation of his: Fourth Amendment right to be free from excessive force under the Fourth Amendment to the United States Constitution (Count I); First Amendment rights of freedom of speech and association (Count II), retaliatory use of force (Count III) and retaliatory arrest (Count IV); and Fourteenth Amendment right of equal protection (Count VI). Mitchell further alleges a claim against defendant/appellee Morton County Sheriff Kyle Kirchmeier for unlawful policy and practice under *Monell v. Dep’t of Social Service*, 436 U.S. 658 (1977).

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The district court properly dismissed all of Mitchell's claims against City and County Appellees. Mitchell's First Amendment claims are *Heck*-barred, and Mitchell has not alleged a plausible claim of violation of his federal constitutional rights. Even assuming, arguendo, Mitchell has alleged a plausible violation of his federal constitutional rights, the individual law enforcement defendants/appellees are entitled to qualified immunity as their alleged conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted. In reviewing a motion to dismiss, the court takes all facts alleged in the complaint to be true. *Zutz v. Nelson*, 601 F.3d 842, 848 (8th Cir. 2010).

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. Thus, although a complaint need not include detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

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Id. (citations omitted). The Court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999), or legal conclusions that the plaintiff draws from the facts pled. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8th Cir. 2009). The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Id.* "[A] plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . ., rather than facts that are merely consistent with such a right.'" *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009), quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007). A complaint does not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) "[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense." *Id.* at 679.

> While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally 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. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004).

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Miller v. Redwood Toxicology Laboratory, Inc., 688 F.3d 928, 931 n.3 (8th Cir. 2012).

In the present case, the district court stated it was exercising its discretion in excluding for consideration "any information not contained in Mitchell's Complaint, unless specifically noted and explained." The district court found Mitchell's Complaint fails to state claims for relief even without considering extrinsic evidence[1]. (AA53, ¶24.)

With respect to the City and County Appellees, Mitchell appeals from the district court's dismissal of his Fourth Amendment excessive force claim (Count I), First Amendment retaliation claim (Counts II-IV), his Fourteenth Amendment equal protection claim (Count VI), and his derivative *Monell* claims (Count IX), each of which is discussed below. Mitchell does not appeal from the district court's dismissal of conspiracy claims (Counts V, VII), or state law claims (Counts X, XI, and XII).

II. THE DISTRICT COURT CORRECTLY DISMISSED MITCHELL'S FIRST AMENDMENT CLAIMS

[1] Among other public records City and County Appellees requested the district court to consider was former Governor Jack Dalrymple's November 28, 2016 Executive Order 2016-08 ordering the mandatory evacuation of the area at issue in this case, as well as records establishing the North Dakota Department of Transportation's closure of the Bridge effective October 28, 2016.

Mitchell alleges Individual Officers violated his rights under the First Amendment to engage in free speech and association, and to be free from retaliatory use of force and retaliatory arrest. (AA30-33, Counts II-IV.) The district court properly dismissed Mitchell's First Amendment claims on the basis such claims are *Heck*-barred, and as Mitchell has failed to plead a plausible violation of his First Amendment rights.

A. Mitchell's First Amendment Claims Are *Heck*-Barred

The district court correctly determined Mitchell's First Amendment claims are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994). Under *Heck*,

> [I]n order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983."

512 US at 486-87.

Although there is a conflict between the circuits in interpreting the scope of *Heck*, this Court has interpreted *Heck* as requiring a § 1983 plaintiff to have achieved a favorable-termination of a prior criminal charge before proceeding with a § 1983 claim which may invalidate or impugn the plaintiff's prior criminal conviction or sentence, regardless of whether the plaintiff is incarcerated or not. *See Newmy v.*

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Johnson, 758 F.3d 1008, 1010-12 (8th Cir. 2014) ("Four other circuits, including this one, have adhered to the conclusion – set forth in footnote 10 of *Heck* – that the favorable-termination rule still applies when a § 1983 plaintiff is not incarcerated", and have "interpreted *Heck* to impose a universal favorable termination requirement on all § 1983 plaintiffs attacking the validity of their conviction or sentence."); *see also Marlowe v. Fabian*, 676 F.3d 676, 747 (8th Cir. 2012) (citing *Entzi v. Redmann*, 485 F.3d 998, 1003 (8th Cir. 2007) ("The favorable termination requirement applies 'even when [the § 1983 plaintiff] is no longer incarcerated.'"). Although neither this Court nor any federal district court in the Eighth Circuit (aside from the North Dakota district court in this case) has yet addressed the issue of whether entry into a pretrial diversion agreement under N.D. R. Crim. P. 32.2 or similar state program, falls within the scope of *Heck*, the circuits with which this Court has sided in interpreting *Heck* to date have concluded that programs similar to North Dakota's pretrial diversion agreements do fall within the scope of *Heck* and do <u>not</u> result in a favorable termination. *See Gilles v. Davis*, 427 F.3d 197, 208-12 (3d Cir. 2005) (plaintiff's claims of constitutional violations in connection with arrest were barred by *Heck* as plaintiff's successful completion of Pennsylvania's Accelerated Rehabilitative Disposition program, which permitted expungement of record upon successful completion of probationary term, was not a favorable termination of his disorderly conduct charge); *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655-56

(5th Cir. 2007) (plaintiff's § 1983 excessive force claim was barred by deferred adjudication in Texas state court; rejecting plaintiff's argument *Heck* did not apply because there was no finding or verdict of guilt and the charge would be dismissed upon completion of deferred adjudication period); *Roesch v. Otarola*, 980 F.2d 850, 853 (2nd Cir. 1992) (in a case predating *Heck*, determining termination of criminal case pursuant to Connecticut's accelerated pretrial rehabilitation program did not constitute termination in favor of defendant, so as to permit defendant to maintain subsequent civil rights action sounding in malicious prosecution or false imprisonment – "A person who thinks there is not even probable cause to believe he committed the crime with which he is charged must pursue the criminal case to an acquittal or an unqualified dismissal, or else waive his section 1983 claim."); *Miles v. City of Hartford*, 445 Fed. Appx. 379, 381 (2d Cir. 2011) (subsequent to *Heck* and following *Roesch* in concluding plaintiff's participation in Connecticut's accelerated rehabilitation program following arrest and being charged with witness tampering and fabricating evidence did not constitute a favorable termination of criminal proceedings against the plaintiff, and as a result plaintiff's § 1983 claims and state law claims of malicious prosecution, false arrest and abuse of process were therefore barred.); *Elphage v. Gautreaux*, 969 F. Supp. 2d 493, 507-08 (M.D. La. 2013) ("[The plaintiff] entered into and completed a pretrial intervention program resulting in the

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dismissal of the charges brought against her. This resulted in a conviction for the purpose of Heck.").

Mitchell admits in his Complaint as follows: "Law enforcement officers charged Mr. Mitchell with criminal trespass and obstruction of a government function in connection with the abovementioned events, carrying a maximum sentence of two years in prison and $6,000 in fines." (AA23, ¶68). "The charges were ultimately resolved through a pretrial diversion agreement that resulted in the dismissal of the charges." (AA23, ¶70.) The district court properly took judicial notice of documents embedded in the publicly accessible case of *State of North Dakota v. Andrew Nunez*, *et al*. No. 30-2017-CR-101, Morton County District Court, State of North Dakota, as they are necessarily embraced by Mitchell's Complaint[2]. (AA64-65, ¶52.) *See Meiners v. Wells Fargo & Co.,* 898 F.3d 820, 822 (8th Cir. 2018) (a court may take judicial notice of public records and those necessarily embraced by the pleadings). The district court specifically considered the *Second Amended Complaint* (index 15), and the affidavit of Morton County Sheriff's Corporal Dion Bitz (index 1 at pp. 4-6) to ascertain the bases underlying Mitchell's criminal charges of trespass and obstruction of a government function. (AA65-66, ¶¶ 54-55.) These public records explained the bases upon which Mitchell had been charged, including the existence of probable cause underlying the criminal charges.

[2] Mitchell does not challenge the district court's consideration of these materials.

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This information was relevant to the issue of whether Mitchell's prevailing upon his § 1983 claims in this action would impugn the validity of the pretrial diversion agreement.

Mitchell's pretrial diversion agreement was entered into pursuant to North Dakota Rule of Criminal Procedure 32.2, which provides in relevant part as follows:

> **(a) Agreements Permitted.**
>
> (1) *Generally*. After due consideration of the victim's views and subject to the court's approval, the prosecuting attorney and the defendant may agree that the prosecution will be suspended for a specified period after which it will be dismissed under Rule 32.2(f) on condition that the defendant not commit a felony, misdemeanor or infraction during the period. The agreement must be in writing and signed by the parties. It must state that the defendant waives the right to a speedy trial. It may include stipulations concerning the existence of specified facts or the admissibility into evidence of specified testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge.
>
> (2) *Additional Conditions*. Subject to the court's approval after due consideration of the victim's views and upon a showing of substantial likelihood that a conviction could be obtained and that the benefits to society from rehabilitation outweigh any harm to society from suspending criminal prosecution, the agreement may specify additional conditions to be observed by the defendant during the period, including:
>
> ***

N.D. R. Crim. P. 32.2(a)(1)-(2). Notably, pursuant to N. D. R Crim. P. 32.2(a)(1), all pretrial diversion agreements are entered "on condition that the defendant not commit a felony, misdemeanor or infraction during the period[]", and that upon a breach of any such condition, prosecution of the charged offense(s) will resume.

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These required conditions are inconsistent with a favorable termination, and constitute a "sentence" under *Heck*. While additional conditions may be imposed pursuant to Rule 32.2(a)(2) "upon a showing of substantial likelihood that a conviction could be obtained . . .", all pretrial diversion agreements under North Dakota law are inconsistent with a favorable termination. During the term of the pretrial diversion agreement, the person charged is effectively sentenced to abide by the conditions of Rule 32.2(a)(1) during the term of postponement of prosecution, and only upon compliance with those conditions for the duration of the term of the pretrial diversion agreement are the charges dismissed.

The district court, applying the rationale from *Gilles* and *Roesch*, correctly determined that pretrial diversion agreements under North Dakota law do not equate with acquittals. "There was a 'judicially imposed limitation[] on [his] freedom in which [his] violation of the [agreement's] terms may result in criminal prosecution.'" (AA66, ¶56 (quoting *Gilles*, 427 F.3d at 212).) Dismissal of the charges against Mitchell were conditioned upon his agreement to do or not do something.

The district court also correctly determined that "[i]f the Court were to find in this case that [Mitchell] was lawfully exercising his rights when he was arrested, this would necessarily invalidate the state-law proceedings wherein officers had probable cause to charge him with trespass and obstruction of a government function

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for the same exact incident." (AA67, ¶57.) Mitchell "now requests this [district court] ignore the state court proceedings in order to allow him to bring claims in this [district court]. Heck is designed to prohibit this exact situation in which plaintiffs desire to have their cake and eat it too." (AA66-67, ¶56.) The district court correctly determined Mitchell's claims are *Heck*-barred. (*Id*.)

B. Mitchell Fails To Allege A Plausible First Amendment Claim

Mitchell also fails to allege a plausible claim of violation of his First Amendment rights.

1. Freedom of Speech and Assembly

Mitchell alleges law enforcement violated his "rights under the First Amendment to freedom of speech and freedom of assembly by interfering with his ability to associate freely in public and express his views as part of a peaceful demonstration." (AA31, ¶ 102.) Mitchell's claim fails as Mitchell had no constitutional right to express his views, assemble, exercise his religious beliefs, or travel at any location at issue while that area was closed. *See Wood v. Moss*, 134 S.Ct. 2056, 2066 (2014) ("[T]he fundamental right to speak secured by the First Amendment does not leave people at liberty to publicize their views "'whenever and however and wherever they please.'" (quoting *United States v. Grace*, 461 U.S. 171, 177-178 (1983), quoting *Adderley v. Florida*, 385 U.S. 39, 48 (1966)). The United States Supreme Court has clearly indicated the First Amendment cannot be utilized

as a justification for trespass and that the government has the right to enforce trespass laws in relation to both private and public property. *See Adderley v. State of Florida*, 385 U.S. at 48, (rejecting protestors' argument they had a constitutional First Amendment right to remain in the curtilage of a jailhouse over the objection of the sheriff, concluding "[t]he United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.").

Mitchell concedes Highway 1806 (which passes over the Bridge) where these event occurred was closed. Mitchell admits hearing about and observing from a distance law enforcement applying force against other protestors via "pushes" to remove protestors from the same location on the Bridge, and just prior to, force being applied against Mitchell. Despite these obvious warnings by law enforcement to vacate the location where force was applied against Mitchell on the Bridge, Mitchell admits he intentionally placed himself at the forefront of the protestors, before the law enforcement line, and in the direct path of the less lethal force being applied by law enforcement. Because Mitchell was trespassing, he lost the protections of the First Amendment. The district court correctly dismissed Mitchell's First Amendment freedom of speech and assembly claim.

2. Mitchell's Retaliatory Use of Force and Retaliatory Arrest Claims Also Fail

Mitchell's claims of retaliatory use of force (Count III) and retaliatory arrest (Count IV) under the First Amendment similarly fail. "To establish a claim for First

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Amendment retaliation under § 1983, the plaintiff must show that [he] 1) 'engaged in a constitutionally protected activity'; 2) that the government official's adverse action caused [him] to suffer an injury which would 'chill a person of ordinary firmness from continuing . . . in that activity'; and 3) 'that the adverse action was motivated in part by . . . the exercise of [his] constitutional rights.'" *Palmore v. City of Pacific*, 851 F. Supp. 2d 1162, 1172 (E.D. Mo. 2010) (citing *Naucke v. City of Park Hills*, 284 F.3d 923, 927-28 (8th Cir. 2002)). For retaliatory arrest claims, the plaintiff must also show "the lack of probable cause or arguable probable cause." *Graham v. Barnette*, 970 F.3d 1075, 1091 (8th Cir. 2020) (quoting *Hoyland v. McMenomy*, 869 F.3d 644, 655 (8th Cir. 2017). A plaintiff alleging First Amendment retaliation must also show a causal connection between a defendant's retaliatory animus and [plaintiff's] subsequent injury." *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). A retaliatory motive must have been a "but-for" cause of the alleged injury, "i.e., that the plaintiffs were 'singled out' because of their exercise of constitutional rights." *Kilpatrick v. King,* 499 F.3d 759, 767 (8th Cir. 2007).

In this case, Mitchell's purely factual allegations establish 1) Mitchell was not engaged in a constitutionally protected activity, 2) there existed probable cause, or at least arguable probable cause for law enforcements' use of force against, and arrest of Mitchell, and 3) such adverse actions were not motivated by the content of

Mitchell's speech, but rather by Mitchell's unlawful actions. As correctly summarized by the district court:

> Mitchell admits he was charged with criminal trespass and obstruction of a governmental function. He admits 200 individuals were on the Bridge that night, and he concedes he was aware of the fact that law enforcement officers were in a uniform line performing "pushes" to move individuals back from the line, yelling countdowns, and using crowd-control tactics against other individuals. Mitchell concedes he placed himself in front of the other individuals. Additionally, Officer Bitz' affidavit again states "law enforcement officers gave verbal commands to the protestors to leave the bridge or they were subject to arrest," noting he specifically "told the protestors they were trespassing and told them to go back to their camp." 30-2017-CV-101, Doc. No. 1, p. 4. Again, Mitchell was included in these "protestors."

(AA71, ¶67.)

As discussed in paragraph II(B)(1) above, Mitchell's First Amendment claims fail because he had no right to express his views, assemble, exercise his religious beliefs, or travel at any location at issue as he was trespassing. In other words, Mitchell cannot meet the first element of his retaliation claim of engaging in constitutionally protected activity. Second, the existence of probable cause or arguable probable cause is fatal to Mitchell's retaliation claims as defeating the causation element. Retaliatory animus was not the "but for" cause of Mitchell's alleged injury. It was Mitchell's unlawful conduct of trespass and obstruction of a government function which motivated the use of force against him and his arrest, not the content of his speech. *See Graham v. Connor* 490 U.S. 386, 396 (1989) ("The Fourth Amendment is not violated by an arrest based on probable cause");

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Galarnyk v. Fraser, 687 F.3d 1070, 1076 (8th Cir. 2012) ("Lack of probable cause is a necessary element of a First Amendment retaliatory arrest claim." (citation omitted)); *Weed v. Jenkins*, 2016 WL 4420985 *6 (E.D. Mo. Aug. 18, 2016), *aff'd*, 873 F.3d 1023 (8th Cir. 2017) (rejecting First Amendment violation claim by protestors arrested by police, noting protestors were arrested for engaging in trespass, blocking traffic, and creating hazards for others, not for the content of their speech); *Caravalho v. City of New York*, 732 Fed. Appx. 18, 23 (S.D.N.Y 2018) (rejecting Occupy Wall Street protestors' claim of retaliation upon their arrest, concluding law enforcement had probable cause to believe they were violating the law by refusing to obey law enforcements commands to leave, and that such probable cause defeated the protestors' First Amendment claim).

Mitchell had the opportunity to contest the probable cause determination in relation to his charges of trespass and obstruction of a government function, but waived and/or abandoned such right by voluntarily entering into the pretrial diversion agreement, and Mitchell is now *Heck*-barred from challenging the probable cause determination.

The district court also correctly concluded the narrow exception to the general rule that probable cause defeats a retaliatory arrest claim established in *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019) does not apply to this case because *Nieves* was decided years after the events in this case, and therefore Individual Officers would

be entitled to qualified immunity in relation to application of any such exception. (AA72-73, ¶¶70-72.) In *Nieves*, the Supreme Court established a narrow exception "for circumstances where officers have probable cause to make arrests, but typically exercise their discretion not to do so." 39 S. Ct. at 1716. "Thus, the no-probable cause requirement should not apply when a plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been." *Id.* Mitchell's argument the principle that the government cannot punish someone for their speech when they would not punish "others similarly situated" well predates *Nieves*, citing *Osborne v. Grussing*, 477 F.3d 1002, 1006 (8th Cir. 2007), misses the critical point. Prior to *Nieves*, and when the events at issue in this case occurred, the presence of probable cause would defeat a First Amendment retaliatory arrest claim. The narrow exception to this general rule was only first established in *Nieves* in 2019, and was therefore not clearly established law at the time of the 2017 events at issue in this case. In addition, in *Osborne*, the Court noted the probable cause requirement to support a retaliatory prosecution claim, while crafting a causation standard for the specific claim of retaliatory adverse regulatory enforcement action at issue in that case. *Osborne v. Grussing*, 477 F.3d at 1006. *Osborne* is inapposite.

In addition, the *Nieves* exception only applies "when a plaintiff presents objective evidence that he was not arrested when otherwise similarly situated

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individuals not engaged in the same sort of protected speech had not been." 139 S. Ct. at 1716. Mitchell did not allege other similarly situated individuals, i.e. other individuals trespassing on the Bridge and obstructing a government function on January 19, 2017, were treated differently by law enforcement officers than himself. Instead, Mitchell concedes law enforcement officers were engaged in "pushes" and otherwise applying force against other individuals located in the same location where force was applied against Mitchell. In addition, the *Second Amended Complaint* pertaining to the criminal charges brought against Mitchell, discussed above, charges nineteen (19) other individuals who were arrested and charged with similar offenses as Mitchell in relation to the same incident. Further, the district court correctly determined Mitchell has not made a threshold showing to establish "North Dakota law enforcement only does its job when persons are asserting a constitutional right – a conclusion that is so absurd it is not worth consideration." (AA73, ¶71.)

Mitchell has not made a submissible First Amendment retaliation claim. As explained in *Bernini v. City of St. Paul*, unlawful conduct is not protected speech. 655 F.3d 997, 1007 (8th Cir. 2012). The district court correctly dismissed Mitchell's retaliatory use of force and retaliatory arrest claims.

III. THE DISTRICT COURT CORRECTLY DISMISSED MITCHELL'S FOURTH AMENDMENT EXCESSIVE FORCE CLAIM

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As a preliminary matter, City and County Appellees deny any intent to cause the injury Mitchell is alleging in this action, and any such injury is regrettable. However, the severity of the injury alleged is not dispositive of whether Mitchell has alleged a plausible claim of excessive force under the Fourth Amendment, or determinative of whether Individual Officers are entitled to qualified immunity. Instead, the appropriate inquiry is whether it was objectively reasonable for officers to utilize drag stabilized bean bag rounds to achieve their lawful objectives under the totality of the circumstances, not whether it was objectively reasonable to cause the injury alleged by Mitchell. The focus is on the force applied, not the resulting injury. *See Plumhoff v. Rickard*, 572 U.S. 765 (2014) (officer's firing of 15 shots into vehicle resulting in death of suspect during high speed car chase was objectively reasonable and did not amount to excessive force under the circumstances); *Mullenix v. Luna*, 136 S. Ct. 305 (2015) (trooper did not violate clearly established law by shooting and killing motorist who was fleeing from arrest during high-speed pursuit as the officer's actions in utilizing deadly force were objectively reasonable under the circumstances presented).

The Fourth Amendment protects individuals against "unreasonable searches and seizures." U.S. CONST. AMEND. IV. As Mitchell alleges force was applied against Mitchell in furtherance of Mitchell's arrest (i.e. seizure), the objective

reasonableness standard under *Graham v. Conner*, 490 U.S. 386 (1989) applies to Mitchell's excessive force claim under the Fourth Amendment.

> Determining whether the force used to effect a particular seizure is "reasonable" under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it. Because the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application, however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.
>
> The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.
>
> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 396-97 (citations and quotations omitted).

Although the "reasonableness" inquiry in an excessive force case is an objective one, without regard to the officer's subjective motive or intent (*id*. at 397), an excessive force claim under § 1983, whether under the Fourth or Fourteenth Amendment, cannot be supported by mere negligent or grossly negligent conduct as such conduct does not rise to the level of conduct that would be actionable under § 1983. *See Roach v. City of Fredericktown, Mo*., 882 F.2d 294, 297 (8th Cir. 1989) (officer's alleged negligence in pursuit of automobile did not rise to level of conduct which would sustain claim under § 1983 of excessive force); *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986) (a negligence claim does not support a § 1983 action); *Young v. City of Little Rock*, 249 F.3d 730, 734 (8th Cir. 2001) (same); *Brown v. City of Bloomington*, 280 F. Supp. 2d 889, 894 (D. Minn. 2003) (same); *Ansley v. Heinrich*, 925 F.2d 1339, 1344 (11th Cir. 1991) (holding that a district court did not err when it charged a jury in a Fourth Amendment excessive force case that "negligence, standing alone, is not a constitutional violation"). Therefore, the initial inquiry is whether the Mitchell has alleged something more than negligent or grossly negligent conduct by the Individual Officers in relation to their use of force against him.

In the present case, Mitchell has failed to allege a plausible claim of excessive force under the Fourth Amendment. Well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. *Clemons v. Crawford*, 585

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F.3d 1119, 1124 (8th Cir. 2009). The facts alleged in the complaint "must be enough to raise a right to relief above the speculative level." *Id*. "[A] plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . ., rather than facts that are merely consistent with such a right.'" *Gregory v. Dillard's, Inc*., 565 F.3d 464, 473 (8th Cir. 2009), quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007).

Mitchell's purely factual allegations, at most, only allege negligent application of less lethal force against him. Although Mitchell alleges formulaic legal conclusions that Individual Officers intentionally and with malice shot drag-stabilized bean bag rounds at him, and separately alleges he was struck in the left eye with a drag-stabilized bean bag, Mitchell's allegations do not allege officers intended to shoot Mitchell in the eye or directed their fire at his head or upper body. Simply shooting at Mitchell is not the same as intentionally shooting at Mitchell's head. Mitchell alleges he was at all times no less than 20 feet away from the police line, and that upon a countdown, officers fired drag-stabilized bean bag rounds at him. Mitchell has failed to allege his injuries were caused by anything more than a negligent application of less lethal force. Such allegations are not actionable under § 1983. *See*, e.g. *Brown v. City of Bloomington*, 280 F. Supp. 2d 889, 894 (D.Minn. 2003) (determining officer's firing of first bean bag round was objectively reasonable under circumstances presented, and firing of live second round under

mistaken belief it was also a bean bag round did not establish a claim under § 1983 as the second live round simply constituted negligently employed deadly force – "[n]egligent conduct fails to establish a claim under section 1983." (citations omitted)). Although Mitchell's allegations may be consistent with a claim of excessive force, they fail to affirmatively and plausibly allege facts upon which a determination of excessive force can be made in Mitchell's favor. *See Gregory v. Dillard's, Inc*., 565 F.3d at 473 ("[A] plaintiff 'must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . ., rather than facts that are merely consistent with such a right.'").

Even assuming, arguendo, Mitchell has alleged more than negligent or grossly negligent conduct by Individual Officers, Mitchell's purely factual allegations, along with those matters the district court properly considered, establish the alleged application of force by Individual Officers was objectively reasonable under the circumstances alleged. Mitchell admits force was applied against him while he occupied the Bridge, along with 200 other DAPL protestors. This concession alone establishes Mitchell was engaging in criminal trespass. Mitchell admits that despite observing law enforcement shooting at and otherwise applying force against other protestors at the same location shortly before the same force was applied against him, he intentionally placed himself in the forefront of the other protestors before the line of law enforcement officers, thereby engaging in obstruction of a

government function. Mitchell admits officers had been engaging in "pushes" wherein officers rushed, advanced toward and deployed munitions at water protectors. Mitchell admits he was apprehended at the scene immediately following application of the force. Under these admitted facts, it was objectively reasonable for law enforcement to apply less lethal drag stabilized bean bags to apprehend and arrest Mitchell and to obtain compliance with the lawful commands of law enforcement relative to both Mitchell and the other protestors on the scene.

Pursuant to North Dakota Century Code § 12.1-05-02, "[c]onduct engaged in by a public servant in the course of the person's official duties is justified when it is required or authorized by law." A Sheriff shall, in part, "preserve the peace", "prevent and suppress all affrays, breaches of the peace, riots, and insurrections which may come to the sheriff's knowledge", and "[p]erform such other duties as are required of the sheriff by law." N.D.C.C. § 11-15-03(1), (3), (10).

In addition, existing precedent established the use of less-lethal munitions by law enforcement did not violate constitutional rights when used to direct crowds away from closed areas, to effectuate an arrest, and/or to gain compliance with a lawful order. In *Bernini v. City of St. Paul*, 655 F.3d 997, 1006 (8th Cir. 2012) this Court determined officers were entitled to qualified immunity as it was objectively reasonable for law enforcement officers to use non-lethal munitions (aka less-lethal and less-than-lethal), including stinger blast balls containing rubber pellets designed

to sting the targeted person, smoke, and chemical irritants, against protestors to prevent their accessing a secured area in downtown St. Paul during Republican National Convention where protestors had previously destroyed property, to effectuate compliance with law enforcements' commands, and to move the unruly crowd away from the restricted area to another location where arrests were being made. In *Bernini,* the Court rejected the protestors' argument it was unreasonable for officers to continue to utilize non-lethal munitions when protestors were allegedly complying with the commands of law enforcement, the Court noting protestors turned to face law enforcement while being directed away from the secured area. 655 F.3d at 1006. In *Bernini*, this Court noted "it was reasonable for the officers to deploy non-lethal munitions to keep all members of the crowd moving west [away from the closed area] even after they began to leave, because some protestors turned to face the police." *Id.*

In the present case, as discussed in paragraph II(A) of the Argument above, Mitchell is *Heck*-barred from now challenging the probable cause determinations that he was engaged in trespass and obstruction of a government function when force was applied against him. But even assuming, arguendo, Mitchell's claims are not *Heck*-barred, Mitchell's factual allegations none-the-less fail to allege a plausible violation of his Fourth Amendment rights. Mitchell admits observing force being applied against others and intentionally placing himself in the line of fire between

officers and other protestors against whom force was being applied. Law enforcements' application of force (including both several alleged law enforcement "pushes" to remove protestors from the Bridge, as well as alleged prior use of less-lethal munitions) against other protestors was in of itself a clear and unambiguous command to leave that area where force was being applied. Mitchell failed to heed that command. Mitchell's admission that he placed himself between law enforcement and the other protestors against whom force was being applied also gave the officer's at least arguable probable cause to believe Mitchell was obstructing a government function. It was established law prior to the events at issue in this case pursuant to *Bernini* that less lethal munitions may be utilized by law enforcement officers to effectuate an arrest, to prevent the unauthorized access to a secured area, to protect private and public property, and to gain compliance with lawful orders from law enforcement.

Mitchell has failed to plead a plausible excessive force claim under the Fourth Amendment, warranting its dismissal.

IV. THE DISTRICT COURT CORRECTLY DISMISSED MITCHELL'S EQUAL PROTECTION CLAIM

Mitchell alleges City and County Appellees intentionally discriminated against Mitchell on the basis of his status as an Indigenous person and his political and religious beliefs in opposition to DAPL. (AA35, ¶129.) Mitchell fails to allege a plausible claim of violation of his right to equal protection under the law.

The Fourteenth Amendment to the United States Constitution indicates no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. This clause essentially "guarantees citizens their State will govern them impartially." *Davis v. Bandemer*, 478 U.S. 109, 166 (1986)(citing *Karcher v. Daggett*, 462 U.S. 725, 748 (1983)(Stevens, J., concurring)). However, while Equal Protection requires a "distinction made have some relevance to the purpose for which the classification is made", it "does not require that all persons be dealt with identically." *Baxtrom v. Herold*, 383 U.S. 107, 111 (1966)(citing *Walters v. City of St. Louis*, 347 U.S. 231, 237 (1954)).

> The Equal Protection Clause generally requires the government to treat similarly situated people alike. *City of Cleburne v. Cleburne Living Ctr., Inc.,* 473 U.S. 432, 439, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). Dissimilar treatment of dissimilarly situated persons does not violate equal protection. *See Barket, Levy & Fine, Inc. v. St. Louis Thermal Energy Corp.,* 21 F.3d 237, 242 (8th Cir.1994). Thus, the first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her. *See, e.g., Samaad v. City of Dallas,* 940 F.2d 925, 940–41 (5th Cir.1991). Absent a threshold showing that she is similarly situated to those who allegedly receive favorable treatment, the plaintiff does not have a viable equal protection claim. *See id.* at 941 (holding that black residents failed to state an equal protection claim where they did not allege the existence of a similarly situated group of white residents who were treated differently).

Klinger v. Dep't of Corr., 31 F.3d 727, 731 (8th Cir. 1994). An equal protection plaintiff must show a comparator within the Complaint at the motion to dismiss stage. *See In re Kemp*, 894 F.3d 900, 909 (8th Cir. 2018), *cert. denied sub nom.*

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Griffen v. Kemp, 139 S. Ct. 1176 (2019); *ARRM v. Piper*, 367 F. Supp. 3d 944, 958 (D. Minn. 2019); *HCI Distribution, Inc. v. Peterson*, 360 F. Supp. 3d 910, 922 (D. Neb. 2018).

In the present case, Mitchell fails to identify a comparator in his Complaint, i.e. others similarly situated to him who were treated differently. Although Mitchell alleges he was discriminated against on the basis of his race as an Indigenous person, and based upon his religious and political beliefs, his purely factual allegations do not support such legal conclusions. Mitchell does not allege all of the other individuals against which force was applied were also Indigenous persons or shared Mitchell's religious beliefs. Mitchell does not allege force was not applied to persons of other races or religious beliefs who were also engaging in trespass or obstructing a government function at the Bridge. Rather, Mitchell concedes he observed officers shooting other protestors on the Bridge with less-lethal munitions, even before his arrival on the Bridge. (AA20, ¶¶48-49.) Mitchell admits that prior to force being applied to Mitchell, law enforcement engaged in "pushes" during which law enforcement officers rushed, advanced toward and deployed munitions at the water protectors. (AA19, ¶46.) Mitchell describes the "water protectors" as simply other concerned individuals who opposed DAPL. (AA10, ¶4.) Mitchell's allegation or implication the "water protectors" shared the political goal of preventing completion of DAPL, even if true, does not allege a

suspect classification by law enforcement. The common theme in Mitchell's factual allegations is that law enforcement applied force to individuals trespassing on the Bridge who refused law enforcement commands to leave, regardless of race, religion or politics. Mitchell has failed to allege he was treated differently than the roughly 200 other protestors on the Bridge. Mitchell's Equal Protection claim fails as a result. *See U.S. v. Bell*, 86 F.3d 820, 823 (8th Cir. 1996) (claim of selective enforcement of law based on race failed because, although black claimant established the law was only applied against black people during a particular period of time, claimant failed to show white people also violated the law and police chose not to arrest them as well – as a result, claimant failed to prove discriminatory effect).

In addition, for the same reasons the Individual Officers' actions were justified under First Amendment analysis, discussed above, they also provide a rational basis for law enforcement's application of force against Mitchell under an Equal Protection analysis. As discussed, Mitchell's presence on the Bridge provided officers with probable cause to arrest Mitchell for criminal trespass, regardless of race, or political or religious beliefs. This undisputed fact alone is fatal to Mitchell's Equal Protection claim. In addition, Mitchell's admission that he intentionally placed himself between law enforcement officers and other protestors against which force was allegedly being applied by law enforcement

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officers establishes probable cause to believe Mitchell was obstructing a government function.

Furthermore, Mitchell's assertion the "relevant comparator is a non-Indigenous participant in a different protest – one that did not have to do with Indigenous rights – who was visibly unarmed and peacefully demonstrating on an issue of public concern" (Mitchell Brief at p. 61) fails to support his equal protection claim as providing a mere hypothetical situation. "[A]n equal protection violation cannot be founded on theoretical possibilities." *Walker v. Nelson*, 863 F. Supp. 1059, 1065 (D. Neb. 1994), *aff'd in part*, 70 F.3d 1276 (8th Cir. 1995). Mitchell is required to identify an actual comparator who was actually treated differently under similar circumstances. He has not done so. The district court correctly dismissed Mitchell's Equal Protection claim (Count VI).

V. INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY

Individual Officers are also entitled to qualified immunity in relation to Mitchell's claims.

> Qualified immunity protects government officials from liability under § 1983 when their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 Led.2d 666 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful.

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> *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (8th Cir. 2006). If no reasonable factfinder could answer yes to both of these questions, the officer is entitled to qualified immunity. *See Plemmons v. Roberts*, 439 F.3d 818, 822 (8th Cir. 2006).

Nance v. Sammis, 586 F.3d 604, 609 (8th Cir. 2009).

> The protection of qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." [citation omitted].
>
> * * *
>
> Because qualified immunity is "an immunity from suit rather than a mere defense to liability ... it is effectively lost if a case is erroneously permitted to go to trial." ... Indeed, we have made clear that the "driving force" behind creation of the qualified immunity doctrine was a desire to ensure that "'insubstantial claims' against government officials [will] be resolved **prior to discovery**." .... Accordingly, "we repeatedly have stressed the importance of resolving immunity questions at the earliest possible stage in litigation."

Pearson v. Callahan, 555 U.S. 223, 231 (2009) (bold added).

Individual Officers are entitled to qualified immunity as Mitchell has not alleged a plausible claim of violation of his federal constitutional rights, as discussed above.

In addition, Mitchell's purely factual allegations establish the Individual Officers are entitled to qualified immunity because they had probable cause to believe Mitchell was engaging in criminal trespass and obstructing a government function. Mitchell's own allegations establish he was engaged in such unlawful conduct when force was applied against him and he was apprehended and arrested.

> "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001). Because the qualified immunity privilege extends to a police officer who is wrong, so long as he is reasonable, "[t]he issue for immunity purposes is not probable cause in fact but arguable probable cause, that is, whether the officer should have known that the arrest violated plaintiff's clearly established right." *Habiger v. City of Fargo*, 80 F.3d 289, 295 (8th Cir. 1996).
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> ***
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> The fact that an arrest may be for a misdemeanor is immaterial to the Fourth Amendment analysis. *Smithson v. Aldrich*, 235 F.3d 1058, 1062 (8th Cir. 2000).

Glasper v. City of Hughes, Arkansas, 269 F. Supp. 3d 875, 888 (E.D. Ark. 2017). "A warrantless arrest does not violate Fourth Amendment if it is supported by probable cause, and an officer is entitled to quailed immunity if there is at least 'arguable probable cause'" *White v. Jackson*, 865 F.3d 1064, 1074 (8th Cir. 2017) (citations omitted). *See Bernini v. City of St. Paul*, 665 F.3d 997, 1001-02 (8th Cir. 2012) (determining officers were entitled to qualified immunity in relation to arrests of unruly crowd members as officers had arguable probable cause to believe individuals were part of a crowd engaged in unlawful conduct and that such individuals were acting as a unit).

Alternatively, even assuming, arguendo, Mitchell has adequately alleged a violation of his constitutional rights, such rights were not clearly established as of January 19, 2017, thereby providing the Individual Officers to a separate grounds

for qualified immunity from suit. As explained by the Supreme Court of the United States:

> Although this Court's case law 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. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law. This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality.
>
> Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the fact of each case, and thus police officers are entitled to qualified immunity unless existing precedent "squarely governs" the specific facts at issue.
>
> ***
>
> . . . Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

Kisela v. Hughes, 138 S. Ct. 1148, 1152-53 (2018) (per curiam) (numerous citations and quotations omitted).

As of January 19, 2017, there was no clearly established, existing precedent establishing the use of drag stabilized bean bag rounds (albeit non-lethal force) to apprehend and arrest an individual who is engaged in criminal trespass and obstruction of a government function and ignoring officer commands to leave

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constitutes excessive force. Instead, then existing case law supported the use of less-lethal munitions for the purpose of preventing the unlawful access to restricted areas secured by law enforcement, in protecting public and private property rights, in controlling an unruly crowd, and to facilitate arrests. *See e.g. Bernini v. City of St. Paul*, 655 F.3d 997 (8th Cir. 2012) (involving law enforcement's cordoning off downtown St. Paul, Minnesota as a no-go zone during Republican National Convention in 2008 due to prior heavy property damage by protestors in the vicinity, and utilizing less-lethal munitions to prevent protestors from accessing the secured area and in shepherding the protestors to another location where arrests could be effectuated).

None of the cases cited by Mitchell involved a situation which squarely governed what occurred in this case. In *Johnson v. Carroll*, 658 F.3d 819, 823-24, 828 (8th Cir. 2011), law enforcement had not commanded the plaintiff to stop doing what she was doing (bear-hugging her nephew) before force was applied against plaintiff. In *Small v. McCrystal*, 708 F.3d 997, 1002 (8th Cir. 2013), the plaintiff was tackled from behind without any warning by officers – there was no resistance or noncompliance with officer commands involved. In *Neal v. Ficcadenti*, 895 F.3d 576, 580 (8th Cir. 2018), at the time the arm-bar takedown maneuver was used by an officer, the plaintiff was fully compliant with officer commands. *Johnson*, *Small* and *Neal* did not involve a noncompliant/resistant subject, did not involve

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trespass, nor otherwise involve facts similar to those at issue in the present case. *Neal* also post-dates the events at issue in this case. There simply was no existing precedent which established beyond debate the unconstitutionality of Individual Officers' alleged conduct in this case. *See Kisela v. Hughes*, 138 S.Ct. at 1151 ("Although this Court's case law 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.").

Subsequent cases within the Eighth Circuit also establish officers are entitled to use the level of force necessary to effectuate an arrest where a reasonable officer could interpret the subject's actions as noncompliant or resistant, regardless of whether the subject is a misdemeanant and nonviolent. *See Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017) (determining officer's use of a spin takedown maneuver and use of taser on nonviolent misdemeanant did not violate Fourth Amendment under clearly established precedent as a reasonable officer could have interpreted the subject's noncompliance with the officer's commands as constituting resistance, and an officer is entitled to use the force necessary to effect the arrest); *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019) (it was not clearly established law that an officer could not use a takedown maneuver to arrest a suspect who was ignoring the deputy's instruction to "get back here" and continued to walk away from the deputy – existing precedent did not squarely

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govern the specific facts at issue); *Vester v. Hallock*, 864 F.3d 884, 887 (8th Cir. 2017) (officers use of arm-bar technique to take noncompliant arrestee swiftly to the ground and resulting in contusions, abrasions and lacerations to head and hand did not constitute excessive force, and even if excessive, law was not clearly established that such conduct constituted a constitutional violation); *Burbridge v. City of St. Louis*, Mo., 430 F. Supp. 3d 595 (E.D. Mo. 2019) (officers use of pepper spray on unruly crowd of protestors who refused to comply with dispersal orders due to unlawful assembly, including upon members of the press intermingled with the protestors, did not violate Fourth Amendment, and officers were entitled to qualified immunity).

The district court correctly determined the Individual Officers are entitled to qualified immunity.

VI. THE DISTRICT COURT CORRECTLY DISMISSED MITCHELL'S *MONELL* CLAIMS

Mitchell alleges Morton County Sheriff Kirchmeier, in his official capacity and as alleged final policymaker, developed and maintained policies, practices, procedures and/or customs of using excessive force and discriminatory policing against water protectors. (AA38, ¶¶145-48.) Mitchell also alleges Sheriff Kirchmeier was deliberately indifferent to the need for further training, supervision, or discipline related to the use of less-lethal weapons and nondiscriminatory policing

tactics. (AA38-39, ¶¶150.) Mitchell alleges such deficiencies resulted in the violation of Mitchell's constitutional rights. (AA39, ¶153.)

The district court correctly dismissed these claims. First, such claims are derivative of, and dependent upon Mitchell's pleading a viable claim of violation of his constitutional rights in the first instance. As explained by this Court in *Speer v. City of Wynne, Arkansas*, 376 F.3d 960, 986 (8th Cir. 2002), neither a political subdivision nor its employees can be held liable in a § 1983 action absent an actual violation of a plaintiff's constitutional rights. *See also Monell v. Dept. of Social Services of City of New York,* 436 U.S. 658, 691 (1978) (municipality cannot be held liable under § 1983 official municipal policy theory absent such policy actually causing a constitutional tort – a municipality cannot be held liable under § 1983 simply for employing a tortfeasor and cannot be held liable on a respondeat superior theory); *Schulz v. Long*, 44 F.3d 643, 650 (8th Cir. 1995) ("It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located."). As discussed above, Mitchell has failed to allege a violation of his constitutional rights. Therefore, the district court correctly dismissed these derivative claims.

In addition, the district court also correctly determined that even if Mitchell has pled a plausible claim of violation of his constitutional rights, Mitchell's pleadings none-the-less fail to allege facts to support specific *Monell* claims.

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(AA86; ¶101.) Instead, Mitchell has simply alleged formulaic recitations of legal elements of each claim without factual specifics to support such claims. Mitchell has failed to identify a specific official policy, a deliberate choice of guiding principal or procedure made by Sheriff Kirchemier as the alleged final authority on such matter for Morton County, or any unofficial custom, or that any such specific policy or custom was the "moving force" behind Mitchell's alleged injury. *See Schaffer v. Beringer,* 842 F.3d 585, 596 (8th Cir. 2016) ("[T]he plaintiff must prove that the policy was the 'moving force' behind a constitutional violation."). Mitchell has not identified any specific unconstitutional policy or custom of using explosive less-lethal munitions in an unconstitutional manner. As correctly noted by the district court, Mitchell is "[s]tating in conclusory fashion without support that Sheriff Kirchmeier directed, condoned, and/or ratified using excessive force and discriminatory policing does not suffice." (AA88, ¶ 105.) Mitchell's allegations regarding law enforcement officers' routine use of less-lethal munitions unreasonably "is far too generalized to make the finding that law enforcement officers were engaging in a continuing, widespread, persistent pattern of unconstitutional conduct." (AA89, ¶ 108.) Further, facts have not been alleged to establish "Sheriff Kirchmeier had notice of a pattern of alleged constitutional violations and tacitly authorized or was deliberately indifferent to their use or that this custom was a driving force behind [Mitchell's] alleged injury." (AA89, ¶ 109.)

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Mitchell's *Monell* claims are conclusory and devoid of factual support, and were correctly dismissed.

VII. MITCHELL HAS ABANDONED HIS CONSPIRACY AND STATE LAW CLAIMS

Mitchell concedes the district court's dismissal of his conspiracy and state law claims are not at issue on this appeal, "except insofar as the dismissal of those claims should not have been with prejudice." (Mitchell Brief at p. 8, fn. 1.) Mitchell asserts the district court erred by not affording him leave to amend. (*Id*. at p. 8.) Mitchell does not provide any applicable legal authority or substantive argument in support of this position, did not raise any error by the district court as an issue on appeal, never requested leave to amend, has not offered a proposed pleading or explained how any proposed amendment would cure the deficiencies in his pleadings. Mitchell abandoned these claims. *See Freitas v. Wells Fargo Home Mortgage, Inc*., 703 F.3d 436, 438 n.3 (8th Cir. 2013) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue." (quoting *Jasperson v. Purolator Courier Corp*., 765 F.2d 736, 740 (8th Cir. 1985))). City and County Appellees adopt the arguments of State Appellee Kennelly on this issue.

CONCLUSION

Appellees Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, and Bismarck Police Officer Tyler Welk request the Court affirm the district court's judgment dismissing

all claims against them.

BAKKE GRINOLDS WIEDERHOLT

Date: June 30, 2021

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CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Fed. R. App. P. 32(a)(7) and 8th Cir. R. 28(A) that the text of Response Brief of Appellees Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, and Bismarck Police Officer Tyler Welk (excluding the table of contents, and table of authorities) contains 12,596 words.

This brief has been prepared in a proportionally spaced typeface using Microsoft Word processing software in Time New Roman 14 point font. The

Response Brief of Appellees Morton County Sheriff Kyle Kirchmeier, Morton County, City of Bismarck, Morton County Sheriff's Deputy George Piehl, and Bismarck Police Officer Tyler Welk has been scanned for viruses and is virus-free.

Dated this 30th day of June, 2021.

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