No. 21-1071

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

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**MARCUS MITCHELL,**

*Plaintiff-Appellant*,

v.

**MORTON COUNTY SHERIFF KYLE KIRCHMEIER, ET AL.,**

*Defendants-Appellees*.

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Appeal from The United States District Court
for the District of North Dakota
Case No. 1:19-CV-149
The Honorable Judge Daniel M. Traynor

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# REPLY BRIEF OF APPELLANT MARCUS MITCHELL

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# ARGUMENT

## I. Mr. Mitchell Stated Claims For Violations Of The First Amendment.

### A. Public Prayer And Protest Are Protected By The First Amendment.

Mr. Mitchell alleges that he was on a public road, engaged in public prayer and protest on a matter of public concern. Defendants do not contest that such speech occupies the "highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). And they do not contest that the First Amendment extends special protection to public roads as the quintessential public forum. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). Defendants make only two arguments that Mr. Mitchell's conduct was not protected by the First Amendment.

**1.** First, Defendants argue that because there was probable cause to believe Mr. Mitchell was committing a misdemeanor, he was stripped of all First Amendment protection. As Mr. Mitchell argued in his opening brief—and as Defendants do not contest—it is black-letter law that probable cause to believe that someone has engaged in criminal conduct does

not strip them of First Amendment rights. OB14-16.[1] So even if there *were* probable cause, it wouldn't matter.

In any event, at this stage, the Court cannot conclude that there was such probable cause. As explained in Mr. Mitchell's brief, under North Dakota law, his pretrial diversion agreement said nothing about probable cause. OB19-20.

Defendants wrongly assert that the complaint itself conclusively demonstrates probable cause. That, too, is wrong. Start with trespass. Trespass requires proof that an individual "enter[ed] or remain[ed] in any place so enclosed as manifestly to exclude intruders…knowing that that individual is not licensed or privileged to do so." N.D.C.C. §12.1-22-3(2)(b) (2007).

Viewing Mr. Mitchell's complaint in the light most favorable to him, Backwater Bridge wasn't "enclosed as to manifestly exclude" the protesters—the complaint alleges that only nine miles of Highway 1806 were closed to foot traffic (a smaller section than the 35-mile section between

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[1] Citations to appellant's opening brief are denoted OB##. Citations to the answering brief of City and County Defendants are denoted CB##. Citations to the answering brief of the State Defendant Benjamin Kennelly are denoted SB##.

Fort Rice and Fort Yates closed off to vehicular traffic) and does not allege that the Bridge was in that nine-mile stretch. AA28 ¶91. Assuming the Backwater Bridge was within the nine-mile section closed to protesters on foot, then, would require this Court to draw an inference against Mr. Mitchell—precisely the inverse of the standard of review at this stage.

There's also no allegation that Mr. Mitchell knew he was "not licensed or privileged" to be on the Bridge. Defendants argue otherwise by citing to an affidavit in a criminal case. CB18-19. But judicial notice simply can't be extended to these sorts of affidavits. *See N. Oil & Gas, Inc. v. EOG Res., Inc.*, 970 F.3d 889, 895 n.6 (8th Cir. 2020) ("'[J]udicial notice is inappropriate' when documents are offered 'for the truth of the matters within them and inferences to be drawn from them' and the opposing party disputes those matters.").

Nor does the complaint allow this Court to conclude there was probable cause to arrest Mr. Mitchell for obstructing a government function. Defendants argue "Mitchell's admission that he placed himself between law enforcement and the other protesters…gave the officer's [sic] at least arguable probable cause to believe Mitchell was obstructing a government function." CB34-35. But prosecutors alleged that the "government



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function" was Defendants' "attempts to disperse the crowd." OB18-19. Even assuming that government function was lawful, *but see infra*, 5-8; N.D.C.C. §12.1-08(3), Mr. Mitchell did not obstruct it; he didn't block the crowd's egress, tussle with an officer, hamper an arrest, or even tell protesters to stay where they were. *See City of Grand Forks v. Cameron*, 435 N.W.2d 700, 703 (N.D. 1989); *State v. Rott*, 380 N.W.2d 325, 326-28 (N.D. 1986). And he certainly didn't do any of those things with the purpose of preventing Defendants from doing their jobs. *See* N.D.C.C. §12.1-02-02(1) (defining "intentionally").

Instead, the complaint alleges that Mr. Mitchell was attempting to shield elderly protesters from injury. AA20 ¶¶48-50; OB18-19. The only way Mr. Mitchell could have been "obstructing a government function," then, is if the "government function" were to injure those protesters—and, unsurprisingly, Defendants have not argued it was.

Again, Mr. Mitchell's peaceful protest is protected by the First Amendment whether or not there was probable cause to believe he committed a misdemeanor. But Defendants offer no basis for this Court to conclude that there was any such probable cause.

**2.** In the alternative, Defendants argue that whether or not there was probable cause to believe Mr. Mitchell was committing a crime, his speech was entitled to no protection because the Backwater Bridge was closed. For starters, as explained *supra*, 2-3, this Court can't assume at this junction that the Bridge was closed to foot traffic.

But even if the Backwater Bridge were closed, that wouldn't end the matter. Defendants do not dispute that the Bridge was a public forum, and the Government cannot by fiat turn a public forum into a forum where the First Amendment does not apply. When States have sought to bar protesters from public sidewalks in front of abortion clinics, for instance, the Supreme Court has repeatedly held that a sidewalk does not cease to become a public forum simply because the Government no longer wants it to be. *See, e.g.*, *McCullen v. Coakley*, 573 U.S. 464, 476 (2014); *Hill v. Colorado*, 530 U.S. 703, 715 (2000). Public roads "remain one of the few places where a speaker can be confident that he is not simply preaching to the choir," and they have served as sites for assembly throughout this country's history. *McCullen*, 573 U.S. at 476. Because of the unique role such roads occupy, the First Amendment prohibits the Government from limiting speech on them. *Id.*



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Accordingly, Defendants' citations to *Adderley v. Florida*, 385 U.S. 39 (1966), are entirely inapposite. *See* CB21-22. *Adderley* dealt with a forum—the grounds of a county jail—that was never public to begin with. The Supreme Court specifically distinguished that case from others with similar facts because the jail was not a public forum. *Id.* at 41-42 ("Traditionally, state capitol grounds are open to the public. Jails, built for security purposes, are not.").

It's true that, in some circumstances, the First Amendment allows the Government to close off a public forum. But the Government may only do so where the closure is "narrowly tailored to serve a significant government interest." *McCullen*, 573 U.S. at 486. Critically, proving that there is a significant government interest and that the law is narrowly tailored is *Defendants'* burden. *See, e.g.*, *Survivors Network of Those Abused by Priests, Inc. v. Joyce*, 779 F.3d 785, 794 (8th Cir. 2015); *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969, 975 (8th Cir. 2014); *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 437 (2002). Obviously, at this stage of the case, Defendants haven't made any such showing. And whether Defendants could meet that high



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burden would turn on the kind of factual minutiae unsuitable to resolution at this junction.[2]

Indeed, Defendants' burden may be even higher than that summary suggests for two reasons. First, the First Amendment imposes even stricter scrutiny on government actions that target a "specific subject matter." *Reed v. Town of Gilbert*, 576 U.S. 155, 169 (2015). Mr. Mitchell's complaint alleges that Defendants chose to close Highway 1806 to vehicular traffic because it was the site of conversation about a "specific subject matter," the Dakota Access Pipeline. AA15 ¶25; AA28 ¶91. Second, the First Amendment virtually always bars restrictions that discriminate based on viewpoint. *See Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018). Mr. Mitchell's complaint alleges that closing off a section of

[2] *See, e.g., McCullen*, 573 U.S. at 487 (First Amendment analysis turned on whether respondents had to raise their voices to be heard outside buffer zone); *Traditionalist Am. Knights of the Ku Klux Klan*, 775 F.3d at 976 (First Amendment analysis turned on expert testimony regarding traffic safety); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 781-82 & n.8 (1988) (First Amendment analysis turned on expert testimony regarding the dangers of newsracks placed too close to fire hydrants).



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the highway was just such a restriction: Defendants prohibited only "water protector travel," not travel by, for instance, citizens who support the Dakota Access Pipeline. AA28 ¶91.

And regardless, the premise of Defendants' argument—that if decisionmakers acted constitutionally by closing the Backwater Bridge, the First Amendment simply doesn't govern police conduct in the course of clearing it—is obviously wrong. Imagine a city decides for a constitutionally valid reason to clear protesters from a public square (the square is about to flood, for instance). In the course of clearing the square, police officers still couldn't punch someone in the face because they dared criticize the police; arrest only those carrying signs that support a Republican candidate, rather than a Democratic one; or shoot only at the protesters who are talking about the election and not at those talking about a new zoning law, to take just a few examples. Similarly, the First Amendment still governed police conduct in the course of clearing the Backwater Bridge, even assuming the decision to clear that Bridge in the first place complied with the Constitution.

In short, the First Amendment imposes a simple rule: Public prayer and protest on an issue of public concern in a public forum is protected



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by the First Amendment. Defendants' arguments to the contrary will have to await summary judgment, where they will have the chance to meet their burden of showing they interfered with such protected activity for a constitutionally valid reason.

### B. Appellees Unlawfully Retaliated Against Mr. Mitchell For Exercising His First Amendment Rights.

**1.** Mr. Mitchell has sufficiently alleged a First Amendment claim for retaliatory use of force. As explained *supra*, §I.A, his complaint alleges the first element of such a claim, that he was "engaged in a protected activity." *See Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014). He has also alleged the second element, a sufficiently "adverse action," *id.*, shooting him in the face with a lead-filled "bean bag" round, shattering his cheekbone. And he has sufficiently alleged that "the adverse action was motivated at least in part by the exercise of the protected activity," *id.*, pleading that he was shot while speaking the words "water is life," with his hands in the air to show he was not a threat, and that law enforcement records reveal he was singled out as an "agitator" because of his role in the protest. *See Kilpatrick v. King*, 499 F.3d 759, 768 (8th Cir. 2007) ("[a]dverse action that cannot be defended by any non-retaliatory



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explanation" gives rise to inference of retaliation); *Wedow v. City of Kansas City*, 442 F.3d 661, 676 (8th Cir. 2006); OB22-23.

Defendants argue that "there existed probable cause, or at least arguable probable cause, for law enforcements' [sic] use of force against" Mr. Mitchell. CB23-24. As explained *supra*, §I.A.1, that's not true. And regardless, probable cause does not defeat a retaliatory use-of-force claim. *Peterson*, 754 F.3d at 602.

**2.** Mr. Mitchell has also adequately pleaded the three elements of a retaliatory arrest claim. As explained *supra*, §I.A, Mr. Mitchell has alleged that he engaged in protected conduct. Defendants don't meaningfully contest the second element of a retaliatory arrest claim, an adverse action. OB21.

Mr. Mitchell's allegations also allow an inference of motive, the third element of a retaliatory arrest claim, for three reasons. First, there was no probable cause for the arrest. OB24; *Garcia v. City of New Hope*, 984 F.3d 655, 670 (8th Cir. 2021). Defendants' arguments to the contrary are unavailing at this stage in the litigation. *See supra*, §I.A.1.

Second, there was a "premeditated plan to intimidate [Mr. Mitchell] in retaliation for his protected speech." OB24; *Lozman v. City of Riviera*



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*Beach*, 138 S. Ct. 1945, 1954 (2018). Defendants do not contest this (*Lozman* is not even cited in their briefs).

And third, "otherwise similarly situated individuals not engaged in the same sort of protected speech" would not have been arrested. OB25; *Nieves v. Bartlett*, 139 S. Ct. at 1715, 1727. Defendants protest that "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." CB27. But *Nieves* doesn't require such a specific comparison group. *Nieves* explained that an individual arrested for jaywalking while "vocally complaining about police conduct" can prove retaliatory motive by showing that "jaywalking is endemic but rarely results in arrest." 139 S. Ct. at 1727. *Nieves* didn't require that the comparison group—other individuals not arrested for jaywalking—be jaywalking on the same day. *Id.* And of course, the other individuals on the Bridge on January 19, 2017, were engaging in the same protected speech as Mr. Mitchell—expressing disapproval of the Dakota Access Pipeline—so the fact that law enforcement treated them similarly to Mr. Mitchell doesn't disprove that his treatment was based on the content of his speech.



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Defendants ultimately waive off Mr. Mitchell's allegation as "a conclusion that is so absurd it is not worth consideration." CB27. But *Nieves* considered just such a conclusion. As Justice Gorsuch put it, "No one doubts that officers regularly choose against making arrests, especially for minor crimes, even when they possess probable cause." *Nieves*, 139 S. Ct. at 1732. Many considerations go into whether to make such arrests; the First Amendment is violated when the suspect's speech is a significant one.

Finally, Defendants argue that, should Mr. Mitchell prove causation by showing that similarly situated individuals were not arrested whereas Mr. Mitchell was, they are entitled to qualified immunity. CB25-26.[3] That is wrong. A decade before the events in question, this Court made clear that the Government cannot single out someone for their speech when it would treat "others similarly situated" differently. *Osborne v. Grussing*, 477 F.3d 1002, 1006 (8th Cir. 2007). Defendants claim that prior case can't supply the requisite "fair warning" qualified immunity demands because that case was a retaliatory prosecution case, not a

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[3] Defendants concede that, should Mr. Mitchell prove causation in another way—by showing the absence of probable cause or the existence of a premeditated plan—they would not be entitled to qualified immunity.



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retaliatory arrest case. CB26. But the principle that the First Amendment does not tolerate retaliation cuts across different kinds of retaliatory government action. One retaliatory arrest case,[4] for example, denied qualified immunity based on a prior case about placing a plaintiff on a sex offender registry in retaliation for his speech,[5] which in turn relied on a retaliatory employment action case[6] and a case where a municipality retaliated against a citizen by building a drainage ditch on her property.[7]

Mr. Mitchell has thus stated claims both for retaliatory use of force and for retaliatory arrest.

### C. *Heck v. Humphrey* Does Not Bar Mr. Mitchell's Claims.

*Heck v. Humphrey*, 512 U.S. 477 (1994), bars a §1983 suit only where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" unless the plaintiff can show the "termination of the prior criminal proceeding in favor of the accused." *Id.*

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[4] *Baribeau v. City of Minneapolis*, 596 F.3d 465 (8th Cir. 2010).

[5] *Kilpatrick*, 499 F.3d at 767.

[6] *Pendleton v. St. Louis Cnty.*, 178 F.3d 1007, 1011 (8th Cir. 1999).

[7] *Wilson v. Northcutt*, 441 F.3d 586 (8th Cir. 2006).



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at 484, 487; OB25-34. Not one of those conditions obtains in this case. There is no "conviction or sentence"; a judgment in Mr. Mitchell's favor would not "necessarily imply the invalidity" of anything; and, in any case, there has been a "termination of the prior criminal proceeding in favor of the accused."[8]

**1.** The *Heck* rule applies only where there is a "conviction or sentence." 512 U.S. at 487. There is none here. North Dakota law makes clear that a pretrial diversion agreement is in lieu of a conviction or sentence. OB27-28. The Tenth and Eleventh Circuits reached the same conclusion when considering similar programs. OB28-30.

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[8] Defendants urge this Court to follow the lead of "the circuits with which this Court has sided" on the question whether *Heck* can bar a claim when a plaintiff is no longer incarcerated. CB15-18. Defendants never explain why a circuit's position on whether the *Heck* bar applies where a plaintiff is not incarcerated would have any bearing on this case. Mr. Mitchell isn't arguing that *Heck* doesn't apply because he isn't incarcerated. *See* OB34 n.7. He's arguing it doesn't apply because there's no "conviction or sentence" that would be "necessarily invalidat[ed]" by a judgment in his favor. OB26-31. Regardless, Defendants are wrong to suggest any sort of correlation. *Compare, e.g.*, *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001) (*Heck* does not apply when plaintiff is no longer incarcerated) *with Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992) (pretrial diversion agreement triggers *Heck* bar).



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Defendants appear to concede that Mr. Mitchell had no "conviction" that would trigger the *Heck* bar. They argue, however, that Mr. Mitchell was subject to a "sentence" because "there was a judicially imposed limitation on [Mr. Mitchell's] freedom"—he could not "commit a felony, misdemeanor, or infraction during the period" of the agreement on pain of prosecution. CB20. Even assuming that Defendants' test for what constitutes a "sentence" has any basis in law,[9] Mr. Mitchell's pretrial diversion agreement can't possibly constitute a "sentence" for *Heck* purposes. If it did, *everyone* in North Dakota would be subject to the *Heck* bar: Every

[9] For their definition of "sentence," Defendants cite a Third Circuit case that, in turn, cites to a case that pre-dates *Heck* entirely. CB20 (quoting *Gilles v. Davis*, 427 F.3d 197, 211 (3d Cir. 2005) (citing *Singleton v. City of New York*, 632 F.2d 185, 193-95 (2d Cir. 1980)). The definition is inconsistent with at least one Supreme Court case. In *Muhammad v. Close*, the Supreme Court considered whether a 30-day deprivation of privileges imposed through a prison disciplinary process was a "sentence" within the meaning of *Heck*. 540 U.S. 749, 753-55 (2004) (per curiam). It was not, because it did not affect the total duration of the plaintiff's "time to be served" in prison. *Id.* (contrasting case with *Edwards v. Balisok*, 520 U.S. 641 (1997), in which prison disciplinary proceeding resulted in longer time served in prison). Even though there was a "limitation on [the petitioner's] freedom" imposed pursuant to a disciplinary process, *Heck* did not apply because the limitation did not constitute a "sentence."

North Dakota citizen risks prosecution if they "commit a felony, misdemeanor, or infraction."[10]

Defendants also rely on out-of-circuit cases applying the *Heck* bar to different pretrial diversion programs in different States. In addition to the cases cited by the district court, OB29-30, Defendants cite one published circuit court case, *DeLeon v. City of Corpus Christi*, 488 F.3d 649, 655-56 (5th Cir. 2007). *DeLeon* found Texas' deferred adjudications to be "convictions or sentences" because "they have been accorded finality, for instance in the appellate context"; because "there is at least a judicial finding that the evidence substantiates the defendant's guilt"; and because deferred adjudications are accompanied by a fine and probation. *Id.*

None of those reasons are true of North Dakota's pretrial diversion agreements. North Dakota's appellate courts don't "accord finality" to pretrial diversion agreements. OB28. In a basic pretrial diversion agreement like Mr. Mitchell's, there is no "judicial finding that the evidence

[10] The State Defendant argues, with no citation, that Mr. Mitchell's pretrial diversion agreement is a sentence because it is "a post-charging disposition of a criminal proceeding." SB22. But that's not what a sentence is. An acquittal, for instance, is a "post-charging disposition of a criminal proceeding," but no lawyer would call an acquittal a "sentence."



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substantiates the defendant's guilt"; in fact, there need be no finding regarding guilt at all. OB27-28. And whereas the deferred adjudication in *DeLeon* required the plaintiff to pay a $2,500 fine and serve 10 years of probation, the pretrial diversion agreement in this case only required Mr. Mitchell to do what every other citizen is also required to do—obey the law. N.D. R. Crim. P. 32.2(a)(2); OB27; Amicus Br. of Inst. for Justice 8-10.

**2.** Even if Mr. Mitchell's pretrial diversion agreement were a "conviction or sentence," a judgment in his favor in this case would not "necessarily imply the invalidity" of such a conviction or sentence. Defendants make no argument that a judgment in Mr. Mitchell's favor on his retaliatory use of force claim would "necessarily imply" the invalidity of a conviction or sentence, nor could they. *See Colbert v. City of Monticello*, 775 F.3d 1006, 1008 (8th Cir. 2014) (retaliatory use-of-force claim does not trigger *Heck* bar).

As to Mr. Mitchell's retaliatory arrest claim, defendants argue that "Mitchell is now *Heck*-barred from challenging the probable cause determination" as to his arrest. CB25. But because Mr. Mitchell entered into North Dakota's pretrial diversion program, there *was* no probable cause



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determination—a pretrial diversion agreement does not require any court to determine that the allegations in question are even plausibly true. OB19. And anyway, even someone with a criminal conviction may sue for retaliatory arrest without running afoul of *Heck*. That's because proof that there was no probable cause at the time of the arrest (the critical question for a retaliatory arrest claim) does not "necessarily imply" that there was no probable cause later, at the time of conviction. *Moore v. Sims*, 200 F.3d 1170, 1171-72 (8th Cir. 2000); *see also* OB31-33.

**3.** Finally, even if Defendants could show that a judgment in Mr. Mitchell's favor would "necessarily imply the invalidity" of a "conviction or sentence," Mr. Mitchell could *still* proceed because the pretrial diversion agreement was a termination in his favor. *Heck*, 512 U.S. at 484. Although this Court has not articulated a test for the "favorable termination" requirement, Mr. Mitchell's opening brief directed this Court to Judge W. Pryor's canvass of eighteenth and nineteenth century common law in *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020), which concluded that the proper test for the "favorable termination" requirement is "a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence." *Id.* at 1289. Defendants ignore those centuries of common-



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law cases and make no argument in support of their proposed definition for the requirement.

Ultimately, Defendants' argument regarding the *Heck* bar is an appeal to policy, not law. Defendants protest that allowing plaintiffs to proceed with a civil suit after entering into a pretrial diversion agreement under North Dakota law allows them to "have their cake and eat it too." CB21. But imposing the *Heck* bar in this case would mean government officials were the ones to "have their cake and eat it too." The prosecution did not manage to secure a guilty plea or a conviction that would trigger the *Heck* bar. Defendants cannot now protest that proof of civil liability would somehow undermine a non-conviction.

## II. Mr. Mitchell Stated Claims For Violations Of The Fourth Amendment.

### A. Firing Lead-Filled Rounds From 12-Gauge Shotguns At A Protester With His Hands In The Air Violates The Fourth Amendment.

Mr. Mitchell's allegations—that Defendants fired lead-filled "beanbag" rounds from 12-gauge shotguns directly at him as he stood with his hands raised above his head in peaceful protest—state a claim for a violation of the Fourth Amendment. To recap, the Supreme Court has identified three factors as relevant to assessing whether a particular use of



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force is unreasonable: the severity of the crime, whether the suspect poses an immediate threat, and whether he is actively resisting arrest or attempting to flee. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). All point against the use of force in this case. OB35-38. First, even assuming there was probable cause to believe Mr. Mitchell had committed trespass and obstruction,[11] both were nonviolent misdemeanors. OB36. Second, Mr. Mitchell stood unarmed, with his hands above his head to make clear to officers he was not a threat. OB37. And third, Mr. Mitchell was not resisting arrest or fleeing—he was standing still, 20 feet from officers, trying to shield vulnerable protesters. OB37.

Defendants make four arguments in response. First, Defendants cite a hodgepodge of cases they claim stand for the proposition that the Fourth Amendment demands some sort of "initial inquiry" as to "whether the [sic] Mitchell has alleged something more than negligent or grossly negligent conduct." CB30. Some of those cases are Fourteenth Amendment cases, not Fourth Amendment cases, and are thus inapposite. *See, e.g.*, *Daniels v. Williams*, 474 U.S. 327, 335-36 (1986). Others hold only

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[11] Defendants argue that Mr. Mitchell is *Heck*-barred from arguing there was no probable cause. For the reasons articulated *supra*, §I.C, that's not true.



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that where an officer does not intend to use force at all, but does so accidentally, the Fourth Amendment's protections are not triggered. *See, e.g.*, *Roach v. City of Fredericktown*, 882 F.2d 294, 297 (8th Cir. 1989) (officer accidentally crashed into victim's car). Here, however, Mr. Mitchell alleges that it was no accident that Defendants fired their weapons. OB38-39 n.9.

Second, Defendants argue that "Mitchell's allegations do not allege officers intended to shoot Mitchell in the eye or directed their fire at his head or upper body," because "[s]imply shooting at Mitchell is not the same as intentionally shooting at Mitchell's head." CB31-32. Mr. Mitchell has alleged that he heard officers count down and saw officers aim for his head from 20 feet away. Defendants may establish at some later stage that shooting Mr. Mitchell in the face was an accident, but at this point, this Court must draw all inferences in Mr. Mitchell's favor and assume it wasn't.[12]

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[12] Defendants also, puzzlingly, cite *Brown v. City of Bloomington*, 280 F. Supp. 2d 889, 894 (D. Minn. 2003). But in that case, officers accidentally fired the wrong type of bullets. *Id.* If Defendants later prove that law enforcement officers reasonably believed they were firing something other than a lead-filled "bean-bag" rounds, the Fourth Amendment analysis would look different. But at this stage, *Brown* has no bearing on Mr. Mitchell's claims.

Third, Defendants argue that Mr. Mitchell was given a warning because "[l]aw enforcements' application of force…was in of itself a clear and unambiguous command to leave that area." CB34-35. But firing on a crowd cannot be the same as issuing a warning. OB17-18. And at this stage, the Court must accept Mr. Mitchell's allegation that officers had issued no warnings or notices to disperse. AA16 ¶33; AA21 ¶¶54-55.

Finally, Defendants spend pages arguing that the Fourth Amendment and North Dakota statutes allow warrantless arrests. CB33, 41. But Mr. Mitchell has never alleged that the problem with his arrest was that it was warrantless. His Fourth Amendment claim is that he was *shot in the face* with a lead-filled "bean-bag" round while his hands were raised above his head. No statute sanctions *that* conduct.

### B. Individual Defendants Are Liable For That Fourth Amendment Violation.

Individual defendants are liable for constitutional violations where this Court's precedents or "a robust consensus of persuasive authority" give officers "fair warning" that their conduct was unconstitutional. *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134-36 (8th Cir. 2020). In this case, both this Court's opinions and those of its sister circuits supply that "fair warning." In a dozen different cases, this Court has held both



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that the Fourth Amendment prohibits more-than-de-minimis physical force against a nonthreatening suspected misdemeanant and that such a rule gives officers "fair warning." OB39-41 & n.10. And at least five of this Court's sister circuits echo that rule. OB43-44.

Defendants' first response is that the Fourth Amendment prohibition of more-than-de-minimis physical force against a nonthreatening suspected misdemeanant is not defined specifically enough. CB41-43. They submit that Mr. Mitchell must point to "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 constitutes excessive force." CB42-43. But again, a dozen published decisions of this Court articulate the right in question at *exactly* the level of generality that Mr. Mitchell did. OB39-41 & n.10.

In particular, this Court has never required clearly established law as to the particular weapon used to apply more-than-de-minimis force. *See, e.g., Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) (relying on cases about officer tackling suspect as clearly establishing law

regarding officer's use of taser). And it has never required plaintiffs to point to another case where the misdemeanant was suspected of committing precisely the same misdemeanor. *See, e.g., Rokusek v. Jansen*, 899 F.3d 544, 548 (8th Cir. 2018) (relying on cases about victims suspected of disorderly conduct, obstructing legal process, and assault as clearly establishing rights of victim suspected of DUI).

Second, Defendants distinguish three of the dozen cases Mr. Mitchell cites because, they say, police officers there had not issued any commands that the plaintiffs disobeyed. CB43-44. Conversely, Defendants claim that three other cases, in which the victim disobeyed officer commands, govern this case.[13] CB44-45. Even if that were the rule, Defendants would not be entitled to qualified immunity here. As explained *supra*, 22, at this preliminary stage, this Court must assume that officers in this case did *not* issue any commands. *See McReynolds v. Schmidli*,

[13] *See Kelsay v. Ernst*, 833 F.3d 975, 980 (8th Cir. 2019) (police officer took victim down to the ground after victim ignored command to stop walking); *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1009 (8th Cir. 2017) (police officer took victim down to the ground after victim disobeyed two commands to put his hands behind his back); *Vester v. Hallock*, 864 F.3d 884, 886 (8th Cir. 2017) (police officer took victim—who had threatened to stab multiple bystanders with a knife—down to the ground after she disobeyed three separate commands to get on the ground).

No. 19-3772, __ F.4th __, 2021 WL 2932508, at *3-4 (8th Cir. 2021) (*Kelsay* limited to cases where victim "openly disregard[ed] a direct and lawful command").

In any event, Defendants' rule sweeps too broadly. In *Brown v. City of Golden Valley*, for instance, the nonviolent suspected misdemeanant disobeyed two officer commands to get off her phone, yet this Court denied qualified immunity when the officer tased her. 574 F.3d at 499. At best, then, Defendants' case law survey shows that officers are denied qualified immunity *every* time they use more-than-de-minimis force against a suspected misdemeanant who poses no threat and has not disobeyed any officer commands—and sometimes even when such a plaintiff *has* disobeyed commands.[14]

### C. Morton County Is Liable For That Fourth Amendment Violation.

Mr. Mitchell has alleged that Morton County is liable for the violation of his Fourth Amendment rights for three reasons.

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[14] Defendants also cite *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012). But as Mr. Mitchell explained in his opening brief, that case, by its own terms, was limited to cases where an officer did not "directly use[] force" against any particular person. *Id.* at 1006; OB45-46. Defendants make no effort to respond to that point.



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**1.** First, Mr. Mitchell alleged that Sheriff Kirchmeier—the official responsible for setting policy regarding the law enforcement response to the protests—made the decision that led to his injury by encouraging Defendants to "quell the water protectors by any means necessary, including excessive force." OB47-49. Defendants assert that any such decision was not the "moving force" behind Mr. Mitchell's injuries, but at the complaint stage, this Court must take as true Mr. Mitchell's allegations that Defendants acted pursuant to Sheriff Kirchmeier's direction. *See* CB46-47. Defendants also argue that Mr. Mitchell has "failed to identify…a deliberate choice of guiding principal [sic]," but that confuses Mr. Mitchell's second and third theories of liability (which rely on policies and customs) with this final decision-maker theory of liability, which requires only "a single decision," not a "guiding principle." CB46-47; OB47-49.

**2.** Second, Mr. Mitchell alleged that Morton County expected its officers to fire potentially lethal lead-filled "bean-bag" rounds from shotguns but failed to train them to do so safely. OB49-53. He alleged that Morton County was on notice that its training program was deficient both because there was a pattern of incidents where those rounds were used



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unsafely and because it is obvious that these weapons require training. OB51-52. Defendants don't make *any* argument to the contrary.

**3.** Finally, Mr. Mitchell alleged Morton County had a custom of using excessive force against peaceful protesters. OB53-55. He alleged a pattern of unreasonable force over the course of the winter of 2016-17; knowledge by the municipality; and a causal link between the injuries in this case and the "by any means necessary" approach to quelling the protests. *Id.*

Defendants' only response is that Mr. Mitchell's allegations are "far too generalized." CB45-48. But this Court has held that the pleading requirements for a municipal liability claim are low because "a plaintiff may not be privy to the facts necessary to accurately describe or identify any policies or customs." *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003). And Mr. Mitchell has easily cleared that low bar. He identified four specific incidents over a five-month span and supplied details about each. OB53-54. At this early stage, no more was required.



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### D. Defendant Kennelly Is Liable For That Fourth Amendment Violation.

Defendant Kennelly is also liable for the alleged Fourth Amendment violation. This Court has explained that an officer who "participated in the tactical decision" leading to a Fourth Amendment violation or even one who did not do so but "fail[ed] to take action to deescalate the situation" is liable under a failure-to-intervene theory. *Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009). Here, Mr. Mitchell has alleged that Kennelly ordered officers to fire upon unarmed protesters and thus violate the Fourth Amendment. AA19 ¶¶46-47. He thus both "participated in the tactical decision" leading to the shooting and also "failed to take action to deescalate the situation."

Defendants protest that "the complaint does not allege facts to show Kennelly had the opportunity and means to intervene in the split second it takes to deploy a bean bag round." SB10. But Mr. Mitchell's theory is not that Defendant Kennelly should have tackled the shooting officers to prevent them from firing. It's that Defendant Kennelly should not have



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*directed* officers to do so in the first place. AA19 ¶¶46-47; AA20 ¶52; AA21 ¶58.[15]

Nor is Kennelly entitled to qualified immunity. *See* SB19 n.6. This Court has explained that it is "clearly established that an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment"; no more specific precedent is necessary. *Nance*, 586 F.3d at 611-12. In one case, for instance, this Court applied precedents about correctional officers dealing with prison escapes or failing to protect an inmate to deny qualified immunity to a police officer who witnessed his fellow officers beat a suspect in a parking lot. *See Krout v. Goemmer*, 583 F.3d 557, 565-66 (8th Cir. 2008).[16]

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[15] Defendants also claim that *Bernini*, 665 F.3d at 1006, forecloses Mr. Mitchell's claim. SB17. But the *Bernini* plaintiffs did not raise a failure-to-intervene claim, so the only question was whether the commanding officer's conduct "amounted to direct participation." *Bernini*, 665 F.3d at 1006.

[16] Defendant Kennelly also argues that Mr. Mitchell's state-law and conspiracy claims were properly dismissed without leave to amend because "a dismissal for failure to state a claim upon which relief can be granted is an adjudication on the merits." SB12. This Court has held, however, that dismissal for failure to state a claim need not be with prejudice. *See,*



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## III. Mr. Mitchell Stated A Claim For A Violation Of The Equal Protection Clause.

Mr. Mitchell sufficiently pled a violation of the Equal Protection Clause, pointing to generations of discrimination, recent incidents targeting Indigenous communities, and an atypical and unnecessarily harsh response to the Dakota Access Pipeline protests. OB56-62. He has also adequately pled that Morton County is liable for that Equal Protection Clause violation, because the custom of discriminatory policing against Indigenous communities was sufficiently widespread that the County must have known about it. OB61-62. (As to this last point, Defendants concede that if Mr. Mitchell has stated a claim for a violation of the Equal Protection Clause, Morton County is liable.)

Defendants make two arguments in response. First, Defendants argue that Mr. Mitchell cannot maintain an Equal Protection Clause claim because "Mitchell's presence on the Bridge provided officers with probable cause to arrest Mitchell for criminal trespass, regardless of race."

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*e.g.*, *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 438-39 (8th Cir. 1983) (per curiam) ("Ordinarily dismissal of a plaintiff's complaint for failure to comply with Rule 8 should be with leave to amend. But if the plaintiff has persisted in violating Rule 8 the district court is justified in dismissing the complaint with prejudice." (citation omitted)).



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CB38-39. But it is well-established that probable cause does not immunize officers from Equal Protection Clause claims. *See Whren v. United States*, 517 U.S. 806, 813 (1996); *United States v. Pipes*, 125 F.3d 638, 640 (8th Cir. 1997).

Second, Defendants are wrong that Mr. Mitchell has not alleged a "suspect classification." CB37-38. His complaint makes clear that the other protesters on the Backwater Bridge that night were also Indigenous. CB37-38; AA14 ¶23 ("water protectors" are "representatives of indigenous nations"). Defendants argue that they could not have violated the Equal Protection Clause because they also shot at other protesters on the Backwater Bridge, but of course, shooting at *other* Indigenous protesters does not insulate Defendants from a claim that they discriminated against Indigenous civilians as compared to protesters of other races. *See* CB37-38.[17]

* * *

[17] Defendants also reprise their argument that Mr. Mitchell must point to a specific "similarly situated comparator" to make out an Equal Protection Clause claim. CB37-38. As Mr. Mitchell explained in his opening brief, that is not the case. OB60-61; *United States v. Armstrong*, 517 U.S. 456, 465 (1996); *Nieves*, 139 S. Ct. at 1734 (Gorsuch, J., concurring). And regardless, he *has* alleged a "comparator"—a non-Indigenous protester demonstrating on a different issue. OB60-61.



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Mr. Mitchell alleged that Defendants targeted him with lead-filled "bean-bag" rounds and a trumped-up arrest because they did not like his speech; that he was shot while peacefully praying; and that he and his fellow protesters were treated differently from other protesters based on their race. Those allegations are sufficient to state claims on which relief can be granted.

## CONCLUSION

For the foregoing reasons, the district court's decision dismissing Mr. Mitchell's complaint should be reversed.

Respectfully Submitted,

*s/ Easha Anand*

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a), I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,497 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point Century Schoolbook typeface.

Date: August 12, 2021

*s/ Easha Anand*

EASHA ANAND

## CERTIFICATE OF SERVICE

I hereby certify that on August 12, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: August 12, 2021

*s/ Easha Anand*

EASHA ANAND