

Case No. 22-1246

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

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**Vanessa Dundon, et al.**

*Plaintiffs-Appellants,*

**vs.**

**Kyle Kirchmeier, et al.**

*Defendants – Appellees.*

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Appeal from the U.S. District Court for the District of North Dakota  
Case No. 1:16-cv-406 DMT ARS  
The Honorable Judge Daniel M. Traynor

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**BRIEF OF DEFENDANTS-APPELLEES**

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## **RESPONSE TO APPELLANT'S SUMMARY OF THE CASE**

Despite the voluminous irrefutable evidence establishing the unlawful conduct of protesters during the November 20, 2016 riot at the Backwater Bridge, Appellants continue to deny any meaningful lawlessness occurred, describing the protests against the Dakota Access Pipeline as peaceful and prayerful. Appellants outright deny protesters posed any threat to law enforcement officers, deny protesters were trying to get through law enforcements' defensive barricade, and deny protesters attempted to flank law enforcement's barricade cross-country during the riot. Unfortunately for the Appellants, nearly the entire incident was recorded by a surveillance aircraft with the North Dakota Highway Patrol in infrared imagery. Such video conclusively establishes the locations and numbers of protesters and law enforcement officers throughout the riot, along with force applied (to the extent visible in infrared – where a heat differential with surroundings was involved, i.e. water, smoke, CS gas, etc.) No reasonable juror, presented with this video evidence (and substantiated by the numerous videos, photographs, and law enforcement incident reports and sworn testimony in the record) could accept Appellants' fabricated version of events.

## **REQUEST FOR ORAL ARGUMENT**

Law Enforcement request 20 minutes oral argument.

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**STATEMENT OF THE ISSUES PRESENTED – APPOSITE CASES**

1. Whether the district court correctly dismissed Appellants’ Fourth Amendment Excessive Force claim.

Most apposite authority:

*Torres v. Madrid*, 141 S.Ct. 989 (2021)

*Bernini v. City of St. Paul*, 655 F.3d 997 (8<sup>th</sup> Cir. 2012)

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

*Graham v. Barnette*, 5 F.4<sup>th</sup> 872 (8<sup>th</sup> Cir. 2021), reh’g denied (Aug. 20, 2021)

2. Whether the district court correctly dismissed Appellants’ Fourteenth Amendment Excessive Force claim.

Most apposite authority:

*County of Sacramento v. Lewis*, 523 U.S. 833 (1998)

*Truong v. Hassan*, 829 F.3d 627 (8<sup>th</sup> Cir. 2016)

*Wilson v. Spain*, 209 F.3d 713 (8<sup>th</sup> Cir. 2000)

3. Whether the district court correctly dismissed Appellants’ *Monell* claims.

Most apposite authority:

*Monell v. Dept. of Social Services of City of New York*, 436 U.S. 658 (1978)

*Jackson v. Nixon*, 747 F3d 537 (8<sup>th</sup> Cir. 2014)

*Speer v. City of Wynne, Arkansas*, 376 F.3d 960 (8<sup>th</sup> Cir. 2002)



## **STATEMENT OF THE CASE**

### **Events Leading to November 20, 2016 Riot**

During the course of the prolonged Dakota Access Pipeline (“DAPL”) protest, protesters principally occupied three areas: the Sacred Stone Camp and the Rosebud Camp located south of the Cannonball River, and the Seven Council Fires Camp (i.e. Oceti Sakowin) located between the north bank of the Cannonball River and the south bank of the North Branch of the Cantapeta Creek, a tributary of the Cannonball River. The Sacred Stone Camp and Rosebud Camps were located in Sioux County, whereas the Seven Council Fires Camp was located in Morton County. The Backwater Bridge (“Bridge”) was and is located on North Dakota Highway 1806 and crosses the north branch of the Cantapeta Creek, north of the Seven Council Fires Camp. A map depicting the camps and related areas of interest is provided. (LEApp<sup>1</sup>.85, R.Doc.61-1.)

The United States Army Corps of Engineers (“Corps”) managed lands upon which all three camps were located, as well as additional federal lands in Morton County located along the north bank of the North Branch of the Cantapeta Creek extending from the Bridge and eastward to and then along the north bank of the Cannonball River, all the way eastward to the Missouri River. The Corps-managed land located along said north banks, as well as privately owned property

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<sup>1</sup> “LEApp” refers to the Defendants-Appellees Appendix.

north thereof, encompassed the DAPL project route and the location from which the DAPL project then planned to cross the Missouri River via horizontal directional drilling. The DAPL project route was located less than one-mile north of the Seven Council Fires Camp. The protesters openly stated their objective was to prevent completion of the DAPL project under the Missouri River, by any means necessary.

The Corps had not granted anyone any permits or permission with respect to public use of Corps managed lands located north of the Bridge or north and east of the confluence of the Cantepeta Creek and Cannonball Rivers, extending to the Missouri River. (LEApp.98; R.Doc.61-7.)

### **November 20-21, 2016 Riot at Backwater Bridge**

Prior to November 20, 2016, protesters had been making incursions onto private land (including the Cannonball Ranch across which the DAPL project passed) and the Corps-managed property located north of the Bridge, and destroyed private property and terrorized citizens and law enforcement for over three months. The District Court's order summarizes, with citations to the record, the ongoing mayhem which occurred in the vicinity of the DAPL project (the vicinity at issue in this case), and law enforcements' response thereto, leading up to the events of November 20, 2016. (App.6-14, R.Doc.286 at ¶¶12-32.) The Bridge was deemed unsafe and closed to all access on October 28, 2016 by the North

Dakota Department of Transportation (“NDDOT”) due to a large fire the protesters had started on the Bridge on October 27, 2016 during a riot, including the burning of a vehicle and NDDOT electronic sign on the Bridge, as well as burning two dump trucks which law enforcement had placed across the north end of the Bridge. (LEApp.68-69, R.Doc.58 at ¶¶4-7; LEApp.71-73, R.Doc.58-1.) The closure of the Bridge was communicated to the public in numerous ways, including via multiple news releases through traditional media, television, radio, newspaper, and social media by multiple agencies, including the NDDOT, the North Dakota Highway Patrol, Morton County, Morton County Sheriff’s Office, well before November 20, 2016. (App.835-36, R.Doc.239-10 at 38-39, 43; LEApp.79, R.Doc.59-2; LEApp.80, R.Doc.59-3; LEApp.68-69, R.Doc.58 at ¶¶4-7.) The Bridge closure was also communicated via signage on-site, as well as verbal warnings by officers, discussed below.

On November 20, 2016, the two trucks previously burned by protesters were located next to, and south of, the concrete Jersey barriers and concertina wire barricades located on the north side of the Bridge blocking Highway 1806. (LEApp.41-42, R.Doc.54 at ¶35.) Both trucks were chained with large log chains to the concrete Jersey barriers, and formed a part of law enforcements’ barricade. (*Id.*) The Bridge was still closed by the NDDOT following the fire thereon on October 27, 2016. Combination “No Trespassing on

Bridge” and “No Trespassing” signs (four signs in two groupings) were posted on the east and west sides of Highway 1806 along law enforcements’ barricade positioned on the north end of the Bridge, and such signage was clearly visible from the Bridge and from south of the Cantapeta Creek/Bridge. (LEApp.100, R.Doc.92-1 at Item 8; LEApp.248-50, R.Doc.239-11; LEApp.251, R.Doc.239-12 at depo. exhs. 43 and 44; LEApp.11, R.Doc.52 at ¶44; LEApp.42, R.Doc.54. at ¶36.) Appellants admit law enforcement utilized bright floodlights along the barricade (App.710, R.Doc.239-7 at 54), and multiple photographs and videos establish this. Photos and video all establish the Bridge did not extend north beyond the defensive barricade, so the “No Trespassing on Bridge” signs could not have been more clear. The Corps had requested law enforcement prevent protesters from trespassing on Corps-managed land located north of the Seven Council Fires Camp. (LEApp.98-99, R.Doc.61-7.)

The November 20, 2016 riot commenced in the afternoon when, against the repeated warnings and commands of law enforcement officers located on the north side of the barricade, protesters utilizing a large bolt cutter and a semi-truck cut the chain securing the burned out dump truck located in the west most lane, and drug it away from the barricade. (LEApp.41-43, R.Doc.54 at ¶¶33-34,41-44.) The protesters returned, determined to remove the remaining burned out dump truck which was secured to, and a part of, law enforcements’ barricade. (LEApp.43,

R.Doc.54 at ¶45; App.508, R.Doc.92-1 at Item 4 at 0:03:00-0:05:40.) The number of protesters on the Bridge swelled quickly at this point to several hundred. (LEApp.43; R.Doc.54 at ¶45.) These protesters came organized and prepared for an assault on the roughly 20 law enforcement officers then manning the barricade. (LEApp.43-45; R.Doc.54 at ¶¶43,45-47,55.) Reinforcements were requested by law enforcement. (LEApp.44-45; R.Doc.54 at ¶49.) It was dark out. (App.508, R.Doc.92-1 at Item 4 [brief video not in infrared] at 0:22:56]

The protesters organized themselves into two principal bodies – a forward staged siege group wearing rain coats, goggles and bandanas over their faces, and bearing assorted shields made of plywood, plastic and corrugated tin/steel, along with tarps, and the larger group which remained further back on the Bridge. (LEApp.43,45,49, R.Doc.54 at ¶¶45,55,74; LEApp.11-12,15-16, R.Doc.52 at ¶¶47,61,63,69; LEApp.26-30, R.Doc.53 at ¶¶26,28,33,34,40; App.508, R.Doc.92-1 at Item 4 at 00:20:37.) The forward group utilized their shields and tarps to form a mobile barricade to shield themselves and other protesters from officers’ view and from any force which may be applied by law enforcement. (LEApp.30, R.Doc.53 at ¶¶40,41; LEApp.15, R.Doc.52 Aff. at ¶¶61,63; LEApp.45-46, R.Doc.54 at ¶¶55,60-61; App.508, R.Doc.92-1 at Item 4 from 00:20:37-end.) Protesters moved this mobile barricade up against law enforcements’ barricade to shield other protesters who were attempting to cut the chains on the remaining burned out

dump truck, and protesters cutting the concertina wire in the barricade. (LEApp.45-48, R.Doc.54 at ¶¶55,60-61,73-74,81; LEApp.11,15,-16, R.Doc.52 at ¶¶47,61,63,69; LEApp.27-29, R.Doc.53 at ¶¶28,33-34.) Throughout the riot on November 20, 2016, amplified warnings were being given repeatedly by law enforcement officers to protesters located south of the barricade to “stay off the bridge”, “move to the south of the bridge”, “go back south”, “stand back”, “get off the bridge”, “go back to the camp”, “don’t come any closer”, “don’t cut the chains”, “stay away from the barricades”, “you’re trespassing if you’re on the bridge” and “less lethal will be deployed on you” – warnings which were not heeded. (LEApp.105, R.Doc.100 at “RAW CLIP 1 STANDING ROCK POLICE ATTACK NOV202016.mp4” [amplified warning “I will give you one last warning: vacate the Bridge immediately...you’re gonna be trespassing”]; LEApp.251, R.Doc.239-12 at “161120-PVT\_Bridge\_Bridge\_WaterCannonTeargasRubberBullets.mp4” at :07:10; LEApp.257, R.Doc.241 at ¶13; LEApp.266-67, R.Doc.242 at ¶17; LEApp.285, R.Doc.245 at ¶10; LEApp.272, R.Doc.243 at ¶9; LEApp.279, R.Doc.244 at ¶10; LEApp.42-44,48-51, R.Doc.54 at ¶¶39,40,42,43,47,73,76,77,81,82; LEApp.13-15, R.Doc.52 at ¶¶52,60; LEApp.27,30, R.Doc.53 at ¶¶27,42; App.972, R.Doc.239-14 at 42-43; App.1054-56,1062, R.Doc.239-15 at 151-57,181-83; App.1368-71,1377-79, R.Doc.239-16 at 259-62,269-70; LEApp.180,191,

R.Doc.239-10 at 266-68, 309.) Officers would give verbal warnings before use of less-lethal weapons and use of water. (App.972, R.Doc.239-14 at 42; App.1078, R.Doc.239-15 at 245; App.1368-71, R.Doc.239-16 at 259-62; LEApp.180, R.Doc.239-10 at 265-66.) Further, videos produced by Appellants in this case evidence some of the warnings given by law enforcement officers to protesters on November 20, 2016, video of the no trespassing signs, along with an index thereto. (LEApp.251, R.Doc.239-12.)

Protesters were yelling profanities and throwing and slinging large rocks, lug nuts, split logs, cement chunks, construction nuts, padlocks, frozen water bottles and other objects at law enforcement. (LEApp.43-44,46-48,51; R.Doc.54 at ¶¶46,47,59,61,66,84; LEApp.11-12,14-16; R.Doc.52 at ¶¶47,59,60,66; LEApp.27,31, R.Doc.53 at ¶¶27,44; App.508, R.Doc.92-1 at Item 4 at 1:06:18 (protester throwing object at officer); LEApp.100, R.Doc.92-1 at Item 1 at 0:00:13 (unidentified object seen flying over barricade towards law enforcement); LEApp.100, R.Doc.92-1 at Item 6 at 0:32 (officer yells “heads up” while object flies through air at officers and officers dodge); LEApp.255, R.Doc.241 at ¶5; LEApp.263-64, R.Doc.242 at ¶6; LEApp.270-71, R.Doc.243 at ¶5. *See* LEApp.87-97, R.Doc.61-3 at DEF000127–DEF000137 (photographs of weapons recovered following the riot).) Officers were being struck by these objects – one officer was struck so violently he was dazed and required assistance

back to an armored vehicle. (LEApp.43-44,48 R.Doc.54 at ¶¶46,71; LEApp.14-15, R.Doc.52 at ¶60; LEApp.31, R.Doc.53 at ¶44; LEApp.255, R.Doc.241 at ¶5; LEApp.263-64, R.Doc. 242 at ¶6; LEApp.270-71, R.Doc.243 at ¶5.) Law enforcement feared for their physical safety due to the imminent threats of serious bodily injury or death they were encountering. (LEApp.45,47-48-52, R.Doc.54 at ¶¶51,68,79,85; LEApp.12,14-16, R.Doc.52 at ¶¶49,60,67; LEApp.32, R.Doc.53 at ¶¶47,48; LEApp.256, R.Doc.241 at ¶8; LEApp.264, R.Doc.242 at ¶8; LEApp.284, R.Doc.245 at ¶7; LEApp.271, R.Doc.243 at ¶7; LEApp.278, R.Doc.244 at ¶5.)

Protesters attempted to pull one of the combination “No Trespassing on Bridge” “No Trespassing” signs over onto the concertina wire barricade. This incident was captured on video on the ground, and from the air. (LEApp.100, R.Doc.92-1 at Item 5; App.508, R.Doc.92.1 at Item 4 at 1:05:50).

Law enforcement deployed CS gas canisters to drive protesters away from the barricade, but due to the wind blowing to the northwest, the gas crossed over the police line, and its use was discontinued. (LEApp.45, R.Doc.54 at ¶52; LEApp.8-9, R.Doc.52 at ¶¶36,38.) From the very beginning of the riot during the removal of the first burned out truck (App.600, R.Doc.239-2 at 0:00:06), and thereafter throughout the riot, protesters also threw the live CS gas canisters back at law enforcement. (LEApp.46, R.Doc.54 at ¶58; LEApp.8-9, R.Doc.52



at ¶36; App.508, R.Doc.92-1 at Item 4 at 1:41:50, 1:59:37, 2:59:40, 3:05:00, 3:07:25; LEApp.255, R.Doc.241 at ¶5.) Officers also attempted to stop the forward siege group and protesters from throwing objects through use of OC spray and direct impact sponge and bean bag rounds, again to limited effect due to the protesters' mobile barricade and law enforcements' barricade. (LEApp.43-45,47-48, R.Doc.54 at ¶¶46,53,67,70; LEApp.14, R.Doc.52 at ¶59; LEApp.28-30,32 R.Doc.53 at ¶¶32,36,37,38,39,49.) Police shields were requested for the first time during the ongoing DAPL protests due to the constant barrage of objects being thrown at law enforcement. (LEApp.45, R.Doc.54 at ¶50.) Not all officers had helmets as the quarter master had run out. (LEApp.46, R.Doc.54 at ¶61.) A second Code Red was issued requesting all available officers to respond within a 100-mile radius. (LEApp.46, R.Doc.54 at ¶56.)

Protesters crossed the bridge and took up positions along the east and west flanks of the police line, starting several large bonfires along the east flank and along the north shore of the Cantapeta Creek. (LEApp.46-47, R.Doc.54 at ¶59,63,66; LEApp.12-13, R.Doc.52 at ¶49,51,53; LEApp.26-27, R.Doc.53 at ¶26; App.508, R.Doc.92-1 at Item 4 at 01:32:30, 2:20:30, 3:03:24; LEApp.255, R.Doc.241 at ¶5; LEApp.264, R.Doc.242 at ¶7.) One of the bonfires was built within roughly 30 feet of law enforcements' barricade and protesters in that vicinity began throwing burning logs at the police line. (LEApp.47, R.Doc.54 at

¶66.) A brush truck from the Mandan Rural Fire Department was requested to address these sorts of fires. (LEApp.48,49-50, R.Doc.54 at ¶¶70,77; LEApp.13-14, R.Doc.52 at ¶¶56-59; LEApp.54-55, R.Doc.56 at ¶2.)

As law enforcement reinforcements started to arrive, and when there were approximately 70 officers on the scene against approximately 800 to 1,000 protesters on or north of the Bridge, the officers formed a shield line along the barricade. (LEApp.46, R.Doc.54 at ¶57.) Protesters threw shields across the concertina wire and one protester climbed over the barricade. (LEApp.49, R.Doc.54 at ¶74; LEApp.30, R.Doc.53 at ¶42.) This individual was the only person arrested during the riot – law enforcement was fully occupied in holding the line. (LEApp.49, R.Doc.54 at ¶74.)

While the siege group was working on cutting and ripping out the concertina wire forming a part of the barricade and the chains securing the truck to the barricade, and while other protesters continued to throw objects at law enforcement, a group of approximately 150 protesters gathered in the west ditch north of the Bridge and proceeded west and north in an attempt to flank the police line, cross-country. (LEApp.46, R.Doc.54 at ¶63; LEApp.12-13, R.Doc.52 at ¶¶49-55; LEApp.31-32, R.Doc.53 at ¶46; App.508, R.Doc.92-1 at Item 4 at 1:32:30-2:00:00; LEApp.255, R.Doc.241 at ¶5.) A small group of roughly 20 officers proceeded west to intercept this group. (LEApp.47-48, R.Doc.54 at ¶68;

LEApp.12-13, R.Doc. 52 at ¶¶49-55; App.508, R.Doc.92-1 at Item 4 at 01:35:50.)

During this time period, law enforcement on the scene were also being marked by lasers and spotlights by individuals on high ground. (LEApp.46, R.Doc.54 at ¶62; LEApp.12-13, R.Doc.52 at ¶50; LEApp.31, R.Doc.53 at ¶45.) This gave concern officers were being targeted by snipers, consistent with previously known social media threats and intelligence regarding weapons in the possession of protesters. (LEApp.36,46, R.Doc.54 at ¶¶4-5,62; LEApp.2,12-13, R.Doc.52 at ¶¶2,50; LEApp.24-25,31, R.Doc.53 at ¶¶14,45; LEApp.82; R.Doc.60 at ¶¶3-6; LEApp.86; R.Doc.61-3 at DEF000108.) Law enforcement were also very concerned about being overrun by the aggressive and violent protesters, and the possible consequences in that eventuality. (LEApp.47-48, R.Doc.54 at ¶68; LEApp.12, R.Doc.52 at ¶49; LEApp.32, R.Doc.53 at ¶47; LEApp.56-57, R.Doc.56 at ¶¶16-18; LEApp.63-64, R.Doc.57 at ¶¶19-21; LEApp.256, R.Doc.241 at ¶8; LEApp.265, R.Doc.242 at ¶9; LEApp.284, R.Doc.245 at ¶7; LEApp.271, R.Doc.243 at ¶7; LEApp.278, R.Doc.244 at ¶5.) In addition to being concerned about the obvious risks to the physical safety of everyone involved if protesters overran law enforcement on the scene, there was genuine concern about the potential need to resort to deadly force for the protection of law enforcement and emergency responders now on site, and concern about the

potential loss of law enforcement vehicles (including armored vehicles) and the weapons and munitions contained therein which may later be used by the protesters against law enforcement and others, as well as concerns other private and public property located north of the barricade would have been damaged or destroyed by the protesters. (LEApp.47-48, R.Doc.54 at ¶68; LEApp.12,15, R.Doc.52 at ¶¶49,60,67; LEApp32, R.Doc.53 at ¶47,48; LEApp.256, R.Doc.241 at ¶8; LEApp.265, R.Doc.242 at ¶9; LEApp.284, R.Doc.245 at ¶7; LEApp.271, R.Doc.243 at ¶7; LEApp.278, R.Doc.244 at ¶5.) Officers on the scene believed during the evening hours of November 20, 2016 that law enforcement would lose the barricaded defensive line that night, and if that happened, there would have been chaos behind law enforcement's defensive line with serious bodily injuries and/or death likely to result. (LEApp.256-57, R.Doc.241 at ¶¶10-11.) A Signal-100 was issued, requesting the assistance of all available law enforcement, state-wide. (LEApp.48, R.Doc.54 at ¶69.) Photographs and video of the riot are provided. (LEApp.100, R.Doc.92-1 with index at LEApp.101, R.Doc.92-2.)

With fire apparatus on the scene, and the methods thus far being utilized by law enforcement proving ineffective against the protesters, permission was requested, and received from command, to utilize water to extinguish fires and hold the police line. (LEApp.48, R.Doc.54 at ¶70; LEApp.13-15, R.Doc.52 at

¶¶56, 59, 63; LEApp.61-63, R.Doc.57 at ¶¶4-18.) Following warnings by law enforcement, water was ultimately deployed against protesters utilizing the mobile barricade and attempting to dismantle and penetrate the barricade, and those throwing objects at law enforcement. (LEApp.48-49, R.Doc.54 at ¶¶73,74; LEApp.55-56, R.Doc.56 at ¶¶3-4,11,12,15; LEApp.61-63, R.Doc.57 at ¶¶5,6,8,17,19.) Water was also applied to put out unlawful fires located north of the Cantapeta Creek, in proximity to the police line. (LEApp.55-56, R.Doc.56 at ¶¶9,10; LEApp.63, R.Doc.57 at ¶¶18.) All the protesters had to do to avoid getting wet or having force applied against them was obey the lawful commands of law enforcement and walk back south across the Bridge. (LEApp.48-50, R.Doc.54 at ¶¶73,76,77; LEApp.15, R.Doc.52 at ¶¶62; LEApp.57, R.Doc.56 at ¶¶21; LEApp.64-65, R.Doc.57 at ¶¶24-25.) The application of water was crucial to law enforcements' ability to prevent the penetration of the barricade and prevent serious bodily injury or death to law enforcement and emergency responders on the scene as a result of the immediate threats presented by the protesters. (LEApp.50, R.Doc.54 at ¶¶79; LEApp.256, R.Doc.241 at ¶¶10.)

Throughout the November 20, 2016 riot, it was the understanding and belief of law enforcement officers on the scene that the intent of a large number of the protesters located south of the barricade was to breach and/or

circumvent law enforcements' defensive barricade in order to again gain access to the DAPL drill pad site located a short distance to the north of the Bridge for the purpose of preventing completion of that project through further destruction of private property and likely violent confrontation with DAPL construction workers. (LEApp.255-56, R.Doc.241 at ¶7; LEApp.264, R.Doc.242 at ¶8; LEApp.284, R.Doc.245 at ¶6; LEApp.271, R.Doc.243 at ¶6; LEApp.277-78, R.Doc.244 at ¶4.) Throughout the riot, officers on the scene were greatly outnumbered by protesters located on or in close proximity to the Bridge. (LEApp.255, R.Doc.241 at ¶6; LEApp.264, R.Doc.242 at ¶8; App.508 at Item 4 [aerial video irrefutably establishing officers vastly outnumbered throughout riot.) Throughout the riot, officers were also always in a defensive position north of the barricade, and no officer proceeded south of the barricade during the riot. (LEApp.256, R.Doc.241 at ¶9; LEApp.263, R.Doc.242 at ¶5; LEApp.283-84, R.Doc.245 at ¶5; LEApp.272, R.Doc.243 at ¶8; LEApp.279, R.Doc.244 at ¶11.)

### **Relevant Testimony of Vanessa Dundon**

Plaintiff/Appellant Dundon arrived in North Dakota on September 11 or 12, 2016. (App.522, R.Doc.239-1 at 21.) Although Dundon stayed primarily at the Oceti Sakowin camp until her departure on November 20, 2016 (*id.* at 23), she also spent about four days at the North Camp located north of the Bridge and was

present during law enforcement's removal of protesters from the North Camp on October 27, 2016. (*Id.* at 23-24.) Dundon contends she was present at the North Camp to hold the front line. (App.523, R.Doc.239.1 at 25.) She concedes to hearing commands by law enforcement officers during the clearing of the North Camp on October 27 to "clear the road" and "just go back". (App.534, R.Doc.239-1 at 71.) Dundon recalls law enforcement officers threatening to use less-lethal munitions against trespassing protesters – Dundon knew less-lethal weapons would be utilized. (App.536-37, R.Doc.239-1 at 80-81.) On October 27, Dundon returned to the Bridge after the dump trucks placed across the north end of the bridge had been burned. (App.540, R.Doc.239-1 at 93.) Prior to November 20, 2016, Dundon admits that every time she was at the Bridge, officers would tell protesters located on the Bridge to go back to the camp. (App.552, R.Doc.239-1 at 141-44.)

On November 20, 2016, Dundon went to the Bridge right before the sun went down, probably around 4:00 pm. (App.554, R.Doc.239-1 at 152.) She heard a call for help in her native tongue over the radio, so she got a ride to the Bridge. (*Id.* at 152-54.) When she arrived at the Bridge, she observed several protesters were in the process of moving one of the burnt-out trucks away from the barricade with a diesel semi-tractor. (App.554,577, R.Doc.239-1 at 154,241-43.) Dundon understood the burned-out trucks were a part of law enforcements' barricade.

(App.556, R.Doc.239-1 at 159.) Dundon did not tell the protesters trying to remove the burnt-out truck to stop, purportedly because they would not have heard her due to the noise from the semi-tractor engine. (App.555, R.Doc.239-1 at 154.) Dundon also claims all of the protesters were wearing ear plugs at the time. (App.593, R.Doc.239-1 at 307.) Dundon observed the chain originally being utilized by the protesters to pull the first burnt-out dump truck away break. (App.556,578, R.Doc.239-1 at 157,247.) Dundon asserts she could not hear anything due to the noise from the semi-tractor engine and tires spinning on the pavement, and noise coming from law enforcements' side of the barricade. (*Id.* at 158.) Dundon asserts that even if law enforcement were giving orders, she would not have been able to hear them with all of the background noise. (*Id.* at 158-59.)

Dundon recalls that in response to attempts by protesters to remove the burnt-out truck, she observed law enforcement officers shooting something at the semi-truck – she does not know what was being shot, but she could hear the shots and impacts on the semi-truck. (App.562, R.Doc.239-1 at 183-85.) This activity frightened Dundon, so Dundon positioned herself between the law enforcement officers and all of the other protesters on the Bridge, and began smudging sage and cedar near the burned out trucks to purportedly protect everybody from harm. (App.558,561-62, R.Doc.239-1 at 165-66,177-78,183-84.) Dundon did not see any officers cross the barricade to the south at any time. (*Id.* at 166-67,178.) Dundon



thinks law enforcement officers should have crossed the barricade and arrested the protesters who were removing the burned out truck, while at the same time denying knowing they were doing anything wrong. (*Id.* at 168,177-78.)

After the chain broke, a larger crowd of protesters started to arrive at the Bridge. (App.563, R.Doc.239-1 at 186.) Dundon then focused her attention to trying to keep the crowd back away from the group of protesters who were involved in trying to remove the burnt-out truck. (*Id.*) Dundon recalls protesters shouting to fix the chain or to replace the chain. (*Id.* at 189-90.)

Dundon believes the burnt-out truck had already been removed from the Bridge by the protesters, and protesters were in the process of attempting to remove the second burnt-out truck when she was struck with a projectile. (App.569,578,586, R.Doc.239-1 at 211,247,277-78.) Dundon recalls protesters being all over the Bridge at this point. (App.564-65, R.Doc.239-1 at 192.) She acknowledges she should not have been there as it was getting dangerous. (*Id.* at 195.) Dundon claims that while she was on the east side of the Bridge, she was standing, facing the police to her north when she was struck with a flaming projectile. (App.565,582-83, R.Doc.239-1 at 195,264-65.) Dundon concedes she never saw a specific law enforcement officer shoot whatever struck her. (*Id.* at 266.) She believes there may have been a couple of other protesters positioned closer to the burnt-out truck than herself when this happened. (*Id.* at 194-95.)

Dundon estimates she was on the scene for approximately 30 minutes before the chain broke, and was injured perhaps 30 minutes thereafter. (App.555-56, R.Doc.239-1 at 152,157.)

Video depicting these events, and in which Dundon believes she was present before her injury, are provided (App.600, R.Doc.239-2 [“Unicorn Riot Video”]; LEApp.106, R.Doc.239-3 [“Finan Video”]). In relation to the Unicorn Riot Video, Dundon believes her injury occurred after what is depicted up to 0:00:38, but before what is depicted after 0:00:39. (App.577,586, R.Doc.239-1 at 241-44, 277-79.) In other words, Dundon concedes she was present during what is depicted in the Unicorn Riot Video prior to 0:00:39, but that the specific time period when her injury was sustained has been edited out of the Unicorn Riot Video (a third-party video produced by Plaintiffs in this case). Notably, between 0:00:30 and 0:00:32, combination “No Trespassing on Bridge” and “No Trespassing” signs are shown posted to the right of the Bridge (east side) along law enforcements’ barricade, clearly visible from the Bridge. Dundon also concedes the Finan Video was taken during the removal of the first burnt-out truck at the Bridge on November 20, 2016, while she was likely present, and prior to her injury. (App.594, R.Doc.239-1 at 312.) Dundon concedes the Finan Video shows throughout the video large and clearly legible combination “No Trespassing on Bridge” and “No Trespassing” signs posted on the east side of Bridge along the barricade. (App.592-93,

R.Doc.239-1 at 301-02,304,306.) Dundon concedes that had she seen those signs, she would have understood she was trespassing by being on the Bridge, and she believes other protesters would have also understood they were trespassing by being on the Bridge if they saw those signs. (App.589, R.Doc.239-1 at 291-92.) Dundon knew trespassing was a crime. (*Id.*) Dundon concedes the Unicorn Riot Video and Finan Video depict law enforcement deploying tear gas canisters or some other type of less-lethal munitions with chemical irritants at the protesters in this vicinity visibly filling the air with smoke/irritants, while protesters were in the process of removing the first burnt-out truck from the Bridge (i.e. while she was present but before her injury), and evidence protesters throwing the canisters back at law enforcement. (App.569,577, R.Doc.239-1 at 210-11,242-43; App.600, R.Doc.239-2 at 0:00:32–0:00:39; LEApp.106, R.Doc.239-3 at 0:00:00-0:00:11.)

Ultimately, Dundon concedes she saw when she first arrived on the scene law enforcement utilizing less-lethal munitions, including direct impact rounds and tear gas, against other protesters in an attempt to prevent protesters from removing the burnt-out trucks from the barricade, all prior to such munitions being utilized against her. (App.595, R.Doc.239-1 at 313-16.) Dundon concedes neither the Unicorn Riot Video nor Finan Video show any of the protesters praying, or performing any sort of religious ceremony. (*Id.* at 316.) Dundon concedes the protesters depicted in these videos were not prayerful. (*Id.* at 317.)

### **Relevant Testimony of David Demo**

Plaintiff/Appellant Demo is from Maine and came to North Dakota for the DAPL protests in August or September of 2016, and remained at the DAPL protests for six to seven months, until the end of March or early April 2017. (App.607, R.Doc.239-4 at 16-17,54.) He primarily stayed at the Sacred Stone (aka Spirit) protester camp. (App.623, R.Doc.239-4 at 81-82.) While staying in the Sacred Stone camp, Demo had access to social media and the news. (App.651, R.Doc.239-4 at 194.)

Prior to the events of November 20, 2016, Demo had been to the Bridge at least two times after law enforcements' barricade had been erected. (App.631, R.Doc.239-4 at 112.) There were a few officers along the barricade each time, and the closer protesters would get to the barricade, the more officers who would appear along the barricade (i.e backup would arrive). (*Id.* at 113.)

Demo was present at the North Camp (i.e. privately owned Cannonball Ranch) during law enforcements' clearing of that camp on October 27, 2016. (App.643, R.Doc.239-4 at 163-64,166.) Demo witnessed law enforcement officers make multiple arrests of protesters during that incident, including himself, and was aware the barricade along the north side of the Bridge was erected shortly thereafter, and that law enforcement were not allowing anyone north of the barricade thereafter. (*Id.* at 163-64,167-68.) When Demo was at the North Camp,

he understood the Cannonball Ranch was not part of the Standing Rock Sioux Reservation and was owned by someone else. (App.645-46, R.Doc.239-4 at 170.) Demo admits to hearing law enforcement give commands to protesters, including “get back” and “go home”. (*Id.* at 173.) Demo was arrested because he refused to leave the North Camp, and was charged with conspiracy to endanger by fire, maintaining a public nuisance, and engaging in a riot. (App.644-45,648,650, R.Doc.239-4 at 167-68,181,188; LEApp.107-09, R.Doc.239-5.) After a couple of days in jail, Demo returned to the protester camps after bail was posted by someone Demo does not know. (App.650-51, R.Doc.239-4 at 191-92.) The charges were later dropped. It is Demo’s position that just because a law enforcement officer asks you leave private property, it is not a lawful order unless the property owner directly requests you to leave. (App.646-47, R.Doc.239-4 at 175-76.) Upon returning to the protester camps, Demo was told two vehicles had been placed across the north end of the Bridge, that the vehicle had been set on fire, and the Bridge wasn’t accessible to be crossed. (App.651, R.Doc.239-4 at 193.)

Demo was also present during protester attempts to access Turtle Hill (located on the north bank of the Cannonball River) from Turtle Island. (App.654, R.Doc.239-4 at 207.) Several attempts by protesters to cross over to Turtle Hill were made prior to November 20, 2016. During the confrontation with law

enforcement, Demo asserts he was sprayed with a chemical irritant and hit with an impact less lethal round. (*Id.* at 207-08.)

On November 20, 2016, Demo was watching a Facebook live stream video of events occurring at the Bridge taken by someone on the protester side of the Bridge, while he was in Bismarck finishing laundry. (App.626, R.Doc.239-4 at 93-94.) At that time, the live stream depicted water and less lethal munitions being utilized by law enforcement officers against protesters. (*Id.* at 95.) Demo continued to watch the live stream video as he travelled directly to the Bridge. (App.627, R.Doc.239-4 at 96, 99.) Demo could see on the live stream video flashes and bangs, and then he could see protesters reacting in apparent pain, and the use of water against the protesters. (App.629, R.Doc.239-4 at 105.)

Upon arriving at the Bridge, Demo went right up to the concertina wire forming a part of the barricade separating the protesters from law enforcement officers and videoed the scene with his GoPro. (App.629, R.Doc.239-4 at 107,117-18.) He was wearing a gas mask because he contends he had previously been sprayed with chemical irritants during a confrontation with law enforcement at Turtle Hill, before November 20, and wasn't interested in getting sprayed again. (App.654,656, R.Doc.239-4 at 206-07,212.) He wanted to get close enough to get good video quality of the alleged police brutality. (*Id.*) Demo concedes he heard someone from the law enforcement side of the barricade shout "get back".

(App.634-35, R.Doc.239-4 at 126-28.) While he was recording along the barricade, he was getting sprayed with water. (*Id.*) Demo was not sprayed with water until after he got close to the wire. (*Id.* at 129-30.) Demo says he turned his back to the law enforcement officers to avoid getting water in his face and asserts he was not moving because he was afraid he would slip and fall. (App.632-33,635, R.Doc.239-4 at 119-20,129.) When the water stopped, he then felt an intense pain in his right hand and had been hit with something. (*Id.* at 117-18,130.) Demo then left the area. (*Id.* at 120.)

Demo's GoPro video of the November 20 events is provided. (LEApp.110, R.Doc.239-6). Demo's GoPro video establishes he was present directly up against/along law enforcement's barricade between meters 12:09 to about 15:17, more than three minutes. A low pressure stream of water can be seen first hitting Demo at 14:20. Demo can be heard saying he had been shot in the hand at 15:17. Demo claims an injury to a finger on his right hand as a result. After having his finger examined at a medical tent in the protester camp, Demo changed to dry clothes and returned to the Bridge to take more video, including from on the Bridge itself. (App.637, R.Doc.239-4 at 136-40.) Demo is unable to identify any of the officers who used force against him on November 20. (App.655-56,658-59, R.Doc.239-4 at 210,213-14,223-24.)

### **Relevant Testimony of Guy Dullknife III**

Plaintiff Guy Dullknife III came to North Dakota from the Pine Ridge Reservation in mid-July 2016. (App.701-02,706, R.Doc.239-7 at 16,22,37-38.) Dullknife stayed at the Oceti Sakowin (aka Seven Council Fires) camp while in North Dakota. (App.709, R.Doc.239-7 at 49-50.)

Dullknife concedes he was one of the protesters involved with attempts by protesters to cross over the Cannonball River from Turtle Island to Turtle Hill, but was turned back through the use of force (pepper spray) by law enforcement officers. (App.706-07,709, R.Doc.239-7 at 38-42,48-49.) These events occurred prior to November 20, 2016. Turtle Hill is located on the north bank of the Cannonball River and immediately south of the DAPL drill pad site. Dullknife concedes he observed law enforcement officers applying force against other protesters attempting to cross over to Turtle Hill via a protester made makeshift log bridge. He then entered a canoe and attached the canoe to the log bridge purportedly to protect protesters on the bridge from law enforcement officers. (*Id.* at 43.) An unidentified officer sprayed him with pepper spray. (*Id.* at 42.) His canoe tipped over and he went back to Turtle Island. (*Id.* at 44.)

On November 20, 2016, sometime between 10-11 pm, and while at the Oceti Sakowin Camp, Dullknife heard commotion emanating from the Bridge, so he went to investigate. (App.710, R.Doc.239-7 at 52.) He estimates it only took him five minutes to walk that distance. (*Id.* at 53.) When he arrived, he observed water



being sprayed upon protesters. (*Id.*) Dullknife observed law enforcement officers firing shotguns and some kind of big barreled weapon shooting big blue bullets at protesters. (*Id.*) Dullknife asserts he grabbed a plastic lid and tried to protect protesters from getting sprayed with water by placing himself between law enforcement and the protesters – he wasn’t there to pray. (App.710-11,713,723, R.Doc.239-7 at 53,58,66,104.) Dullknife asserts he was shot once with a rubber bullet and four times by bean bag rounds. (*Id.* at 59.) The only photo produced by Plaintiffs of Dullknife’s purported injury was taken on November 21, 2016, and reveals not even a bruise. (LEApp.253, R.Doc.239-19.) Dullknife has no idea which officer(s) shot him. (App.712, R.Doc.239-7 at 60-61.)

### **Relevant Testimony of Frank Finan**

Plaintiff Frank Finan is from Pennsylvania and arrived in North Dakota on November 4, 2016 and left North Dakota in mid-December, 2016, but returned again in February of 2017. (App.742, R.Doc.239-8 at 20.) He stayed in the Oceti Sakowin camp the entire time he was in North Dakota. (*Id.*)

On November 20, 2016, Finan arrived at the Bridge around 8:30 pm. (App.771, R.Doc.239-8 at 136.) He brought a gas mask with “in case we got gassed.” (App.775-77, R.Doc.239-8 at 152,156-57.) A video taken by Finan during this 8:30 pm trip to the Bridge on November 20 is provided. (App.822, R.Doc.239-9 [“Finan Night Video”]; App. 239-8, R.Doc.239-8 at 165-66.) Finan

observed and narrates on the video as he first entered the Bridge from the south end, that water and tear gas are being utilized by law enforcement officers against other protesters. (App.777, R.Doc.239-8 at 157-58; App.822, R.Doc.239-9 at 0:00:08-0:00:30.) Finan assumes the water was being used to get the protesters to leave the Bridge. (App.774, R.Doc.239-8 at 147-48.) Despite seeing this force being applied against other protesters, Finan chose to proceed forward on the Bridge, and his narration indicates he intended to get as close as he could. (App.779, R.Doc.239-8 at 167-68; App.822, R.Doc.239-9 at 0:00:18.) At 00:01:18, Finan states “here comes the tear gas”, yet continues to proceed northwards toward the barricade. At 00:01:40, a boom can be heard to which Finan says “I wonder what that was”, yet he continued toward the barricade. At 00:03:35 to the end of the Finan Video, Finan focuses upon water being sprayed upon protesters. Despite these observations, Finan continued forward toward the barricade. Finan took a photograph of the west-side grouping of signs from atop the Bridge deck when it was dark outside on November 20 establishing the signs were brightly illuminated and clearly visible (LEApp.252, R.Doc.239-13), and yet he asserts he did not see the signs. After being on the Bridge about a half an hour, and due to his not initially understanding how to properly operate the gas mask he was wearing, he could not breathe when law enforcement used some sort of gas, so

he ran back to his recreational vehicle in the camp to recuperate. (App.771, R.Doc.239-8 at 136,141,143,151.)

Finan returned to the Bridge around 11:10 pm. (App.771,778, R.Doc.239-8 at 136,161.) Things had quieted down considerably by this time. (App.782-83, R.Doc.239-8 at 178-79,181.) Finan proceeded up to the concertina wire forming part of the barricade) and took photographs, but was not sprayed with water. (App.773,783-84, R.Doc.239-8 at 142-47,182,187.) While he was standing within two to three feet from the wire, when he was “at the frontline there”, Finan believes he was hit in his left abdomen while he faced east by something shot by law enforcement. (*Id.* at 141-42,179-82,186-87.) Other than being inspected in the protester camp, Finan did not receive any medical or mental health treatment as a result of being struck on the Bridge. (App.795, R.Doc.239-8 at 229.) He did not see what struck him and does not know what struck him. (App.784-85, R.Doc.239-8 at 185-86.) Finan concedes there was no other protester closer to the barricade when he was struck with the object. (*Id.* at 189.) Finan estimates there were hundreds of protesters still on the Bridge when he was struck with the object. (*Id.* at 190.) Finan never got wet from any water utilized by law enforcement. (App.789, R.Doc.239-8 at 205.) Finan does not know who specifically shot him, or whether the person who shot at him on November 20 was an employee of Morton County. (App.790, R.Doc.239-8 at 211.)

## Admissions of Crystal Wilson and Mariah Marie Bruce

Appellants Crystal Wilson and Mariah Marie Bruce admit being forcibly removed from, or prevented from accessing, private property located north of the Cantapeta Creek by Law Enforcement prior to November 20, 2016. (App.167-69, R.Doc.14-16 at ¶¶5-9; App.130, R.Doc.14-9 at ¶¶4-5.) On November 20, 2016, Bruce admits observing Highway 1806 heavily barricaded on the north side of the Bridge and manned by Law Enforcement on November 20, 2016, and Wilson admits being at the Bridge for about an hour, prior to force allegedly being applied against them. (App.170, R.Doc.14-16 at ¶11; App.131, R.Doc.14-9 at ¶8.) Bruce admits to observing law enforcement utilizing force against other protesters in the vicinity of the barricade and Bridge prior to force allegedly being applied as against him on November 20. (App.131, R.Doc.14-9 at ¶9 [Bruce Decl].) Wilson and Bruce admit they were either on the Bridge or along the north shoreline of the Creek, in close proximity to law enforcement's barricade, when force was allegedly applied as against them and they remained for extended periods of time thereafter within range of the continued force being applied. (App.170-71, R.Doc.14-16 at ¶¶11-115; App.131, R.Doc.14-9 at ¶¶9,10,15.) Wilson admits to leaving the Bridge after water was applied against her, and returning to the Bridge later that night after resting, changing clothes and donning a raincoat and plastic shield. (App.170-71, R.Doc.14-16 at ¶¶11-15.) Wilson and Bruce also admit to

being surrounded by other protesters engaging in similar conduct when force was applied against them (App.170-71, R.Doc.14-16 at ¶¶11-15; App.131, R.Doc.14-19 at ¶¶10,12), and the video footage and affidavits submitted by law enforcement, discussed above, substantiate that conduct.

### **SUMMARY OF THE ARGUMENT**

Appellants’ Fourth Amendment excessive force claim was correctly dismissed as no Appellant was “seized” as the undisputed and irrefutable evidence establishes officers’ conduct did not objectively manifest an intent to restrain Appellants. To the contrary, officers’ conduct objectively manifested an intent to disperse and repel Appellants with an available means of egress. In the alternative, even if a seizure occurred, officers’ application of less-lethal force and water was objectively reasonable under the totality of the circumstances, and therefore did not violate any Appellants’ Fourth Amendment rights. In addition, individual officers are entitled to qualified immunity on the basis officers were not on clear notice their conduct violated any clearly established constitutional right of Appellants as the circumstances involved in this case are utterly unique in the history of the United States.

Appellants’ Fourteenth Amendment excessive force claim was also correctly dismissed as the officers’ conduct under the undisputed and irrefutable circumstances was not so extreme as to “shock the conscience.” In addition, due to

the unique circumstances presented and lack of binding case precedent, officers are entitled to qualified immunity on the Fourteenth Amendment claim.

A lack of a constitutional violation is also fatal to Appellants' *Monell* claims.

## **ARGUMENT**

### **A. Standard of Review**

The party seeking summary judgment must first identify grounds demonstrating the absence of a genuine issue of material fact. Such a showing shifts to the non-movant the burden to go beyond the pleadings and present affirmative evidence showing that a genuine issue of material fact exists. The non-moving party must do more than simply show that there is some metaphysical doubt as to the material facts. The non-movant “must show there is sufficient evidence to support a jury verdict in his favor. Factual disputes that are irrelevant or unnecessary will not be counted, and a mere scintilla of evidence supporting the non-movant’s position will not fulfill the non-movant’s burden.

*Uhiren v. Bristol-Meyers Squibb Company, Inc.*, 346 F.3d 824, 827 (8th Cir. 2003)

(citations and quotations omitted) “At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 550 U.S. 370, 380 (2007).

“When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

### **B. Claims Waived by Appellants**

Appellants have not presented any substantive argument on appeal in relation to the following claims dismissed by the District Court: (1) violations of the First Amendment (42 U.S.C. § 1983); (2) Unequal Protection of Law; (3) Declaratory Relief (28 U.S.C. § 2201); (4) Assault and Battery; and (5) Negligence. Appellants have thereby waived such claims. *See Mitchell v. Kirchmeier*, 28 F.4<sup>th</sup> 888, 894 (8<sup>th</sup> Cir. 2022) (deeming as waived appellant’s claims not meaningfully argued in his opening brief).

**C. Appellants’ Fourth Amendment Excessive Force Claim**

The District Court appropriately dismissed Appellants’ Fourth Amendment excessive force claim on the basis Appellants were not “seized”, and thus the Fourth Amendment is not implicated. In the alternative, even if any Appellant was seized by law enforcement, the force applied was objectively reasonable under the totality of the circumstances. Further, Defendant/Appellee officers are entitled to qualified immunity as the law was not clearly established that their conduct violated Appellants’ Fourth Amendment rights.

**1. Appellants Were Not “Seized” As Required For An Excessive Force Claim Under The Fourth Amendment**

The District Court properly dismissed Appellants’ Fourth Amendment excessive force claim for lack of a “seizure” because law enforcements’ application of force, under the totality of circumstances, did not objectively manifest an intent to restrain Appellants. Instead, the evidence establishes law

enforcements’ objective intent to disperse the protesters with an available means of egress. The United States Supreme Court recently confirmed “The ‘seizure’ of a ‘person’ plainly refers to an arrest[,]” and that “[a] seizure requires the use of force *with intent to restrain.*” *Torres v. Madrid*, 141 S.Ct. 989, 996, 998 (2021) (emphasis in original).

In *Torres*, a suspect brought a § 1983 action against state police officers alleging they used excessive force when, while attempting to execute an arrest warrant, they fired their weapons into the suspect’s vehicle as she drove off, striking her. The suspect was not then apprehended. The relevant issue on appeal was whether the suspect had been seized for purposes of the Fourth Amendment when the bullets struck her, despite her alluding capture. The Court in *Torres* held that “the application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.” *Torres*, at 1003 (underline added).

A seizure requires the use of force *with intent to restrain*. Accidental force will not qualify. Nor will force intentionally applied for some other purpose satisfy this rule. In this opinion, we consider only force used to apprehend. We do not accept the dissent’s invitation to opine on matters not presented here – pepper spray, flash-bang grenades, lasers, and more.

Moreover, the appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain, for we rarely probe the subjective motivations of police officers in the Fourth Amendment context. Only an objective test “allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment. . . .



Nor does the seizure depend on the subjective perceptions of the seized person.

*Torres*, at 998 (citations omitted, italics in original, underline added).

In Justice Gorsuch’s dissenting opinion in *Torres*, with whom Justice Thomas and Justice Alito joined, it was noted that prior to the decision in *Torres* (2021), “a Fourth Amendment ‘seizure’ has required taking possession of someone or something.” *Torres*, at 1003. The dissent noted that although prior to *Torres* some lower courts had held that a “mere touch” constitutes a Fourth Amendment “seizure”, the “mere touch” reasoning was simply based upon dicta originating in *California v. Hodari D.*, 499 U.S. 621 (1991), a case where the issue presented was whether officers seized a defendant by a show of authority *without* touching him, which the Court answered in the negative. “The separate question whether a ‘mere touch’ also qualifies as a seizure was not presented by the facts of the case.” *Torres*, at 1005. “*Hodari D.* has generated considerable confusion” and a split between the circuits. *Torres*, at 1004-05. In other words, at the time of the Bridge riot at issue (November 20, 2016), a seizure under the Fourth Amendment required an objective manifestation of intent to restrain. *Torres* was the first case in which the Supreme Court addressed and concluded that a seizure of a person occurs through the application of force where the suspect eludes capture, provided the challenged conduct objectively manifests an intent to restrain. Under *Torres*, intentional application of physical force which does not objectively manifest an

intent to acquire possession of the person does not constitute a seizure under the Fourth Amendment. In *Torres*, a seizure occurred because the officers were trying to enforce an arrest warrant at the time they fired live ammunition which struck the fleeing suspect, thereby objectively manifesting an intent to acquire possession of the suspect.

The District Court also properly noted this Court’s precedent pre-dating the November 20, 2016 riot recognized the Fourth Amendment seizure requirement of an objective manifestation of intent to arrest in *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201 (8<sup>th</sup> Cir. 2013). Although the District Court concluded *Atkinson* to be inapplicable to the question of seizure in the present indirect physical touch crowd control case – it noted *Atkinson* falls in line with *Torres*. (App.42, R.Doc. 286 at ¶86.) In *Atkinson*, a plain-clothed police officer tackled and “bull rushed” the plaintiff, resulting in physical injuries to the plaintiff, with the plaintiff being arrested thereafter. The Court in *Atkinson* noted “a reasonable jury could find that [the officer] ‘objectively manifested,’ an intent to arrest Atkinson. The reported fury of [the officer’s] charge temporarily incapacitated Atkinson, and immediately thereafter [the officer] ordered Mountain View police officers to take Atkinson into custody.” *Atkinson*, 709 F.3 at 1212, n. 4 (citation omitted). The requirement of an objective manifestation of intent to arrest in the

context of Fourth Amendment seizures was recognized by this Court prior to the November 2016 riot at issue.

The District Court also properly distinguished other crowd control cases decided prior to the events in this case, and involving application of less-lethal force against protesters, including *Rauen v. City of Miami*, 2007 WL 686609 (S.D. Fla. Mar. 2, 2007); *Jennings v. City of Miami*, 2009 WL 413110 (S.D. Fla. Jan. 27, 2009); *Coles v. City of Oakland*, 2005 WL 8177790 (N.D. Cal. April 27, 2005); and *Nelson v City of Davis*, 685 F.3d 867 (9<sup>th</sup> Cir. 2012). In each of these cases, the protesters “essentially had no egress after force was used against them while they were ‘herded’ and encircled by officers into a certain location.” (App.42-43, R.Doc.286 at ¶¶86-87.) Such circumstances evidenced an objective manifestation of intent by the officers to restrain the protesters.

In the present case, it is not disputed officers were at all times positioned behind a defensive barricade and made no attempt to proceed south of the barricade in an attempt to apprehend anyone. The only person arrested during the riot was one protester who successfully climbed over the barricade. Law enforcement’s application of force objectively manifested an intent to disperse the protesters, not to acquire possession of them as Appellants and other protesters were always able to, and did, leave the area where force was being applied by proceeding south across the bridge. *See Quraishi v. St. Charles County, Missouri*,

986 F.3d 831, 839-40 (8<sup>th</sup> Cir. 2021) (in a case decided pre-*Torres*, determining the use of tear gas by an officer against plaintiffs did not constitute a seizure because it was used to disperse the plaintiffs, not to terminate or restrict their freedom of movement – plaintiffs were able to leave the scene); *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 48-49 (D.C. 2021) (citing *Torres*, and determining officers did not seize protesters under the Fourth Amendment through use of flashbang grenades, rubber bullets and tear gas because they were used to disperse the crowd, not to restrain them or attempt to seize them in place – protesters had a means of egress). The District Court properly concluded “[t]he evidence in this case shows only one conclusion: officers objectively manifested an intent to move protesters away from the Bridge, get them to disperse, and control the crowd.” (App.44, R.Doc.286 at ¶89.) Therefore, no Fourth Amendment seizure occurred as to any Appellant in this case, requiring dismissal of Appellants’ Fourth Amendment claim.

## 2. **Officers’ Conduct Was Objectively Reasonable**

A determination by the Court that Appellants were not “seized” would moot the issue of whether force applied by law enforcement was objectively reasonable, and whether officers are entitled to qualified immunity in relation to Appellants’ Fourth Amendment claims. Even assuming, *arguendo*, any Appellant was “seized” for purposes of the Fourth Amendment, the officers’ conduct was objectively

reasonable, and therefore did not violate any Appellants' Fourth Amendment rights. The relevant inquiry is whether the force applied was "objectively reasonable" under a totality of the circumstances analysis. *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

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.* (citations and quotations omitted).

The undisputed and irrefutable facts establish law enforcement's alleged application of force was objectively reasonable under the circumstances, and consistent with standards applied in *Bernini v. City of St. Paul*, 665 F.3d 997 (8<sup>th</sup>

Cir. 2012) (discussed below). Appellants' Fourth Amendment unreasonable use of force claims therefore fail on this basis as well.

Dundon admits the protesters she was intermingled with when force was allegedly applied as to her were actively engaged in attempts to remove the second burned out dump truck from law enforcement's barricade. Such protester activity is verified by the North Dakota Highway Patrol aerial surveillance video. (App.508, R.Doc.92-1 at Item 4 at 0:03:00, 18:00 military time). Dundon also admits witnessing, while on the Bridge, protesters remove the first dump truck from the barricade. It is a violation of N.D.C.C. § 24-03-05, for any person to open, remove, or deface any barricade, fence, or other obstruction, or any warning sign placed by the NDDOT across any highway without express written permission. Such activity also constitutes an unlawful obstruction of a law enforcement or other government (NDDOT) function in violation of N.D.C.C. § 12.1-25-01(2). Law enforcement clearly had a duty to prevent public property (i.e. the barricade and dump trucks forming part of the barricade) from being damaged or hauled away by the protesters, and to prevent unauthorized and unprivileged entry upon public property which has been closed to the public, particularly where the governmental entity managing the property has requested law enforcement's assistance in removing what it referred to as trespassers. A person violates

N.D.C.C. § 12.1-08-02 if a person employs means justifying or requiring substantial force to overcome resistance to . . . the discharge of the duty.”

Force is justified if it is used to . . . prevent an unlawful carrying away or damaging of property, if the person using such force first requests the person against whom such force is to be used to desist from his interference with the premises or property, except that a request is not necessary if it would be useless or dangerous to make the request or substantial damage would be done to the property sought to be protected before the request could effectively be made.

N.D.C.C. § 12.1-05-06. Pursuant to N.D.C.C. § 12.1-05-06, force is justified to prevent the carrying away of personal property, even without an advance request to stop the activity where such request would have been useless under the circumstances. Section 12.1-05-06 only references a warning to desist from interference with the property – it does not reference any warning about the actual use of force.

The record irrefutably establishes law enforcement did warn the protesters against removal of the dump trucks. Video footage published on Youtube on November 6, 2016 (two weeks prior to the events at issue) memorializes a clear and unequivocal warning by law enforcement to protesters with a semi-tractor at the barricade not to remove the barricade. (App.508, R.Doc.92-1 at Item 4 at Item 7.) In relation to the protesters’ removal of the first dump truck from the barricade with the Semi on November 20, 2016, one protester, who asserts this occurred shortly after 5 p.m. on November 20, admits “I heard the police on the bullhorn

address one of the guys on the bridge by name. ‘Don’t do this Mike. We have 10 more of these trucks, and tomorrow we’ll just bring another one in. Go home!’” (App.472, R.Doc.81-27 at ¶15.) The protester also admits law enforcement utilized tear gas in an unsuccessful attempt to prevent the first dump truck from being removed by protesters, and provides a color photograph of the incident evidencing the cloud of smoke is clearly visible from a long distance away as there was still daylight. (*Id.* at ¶16.) The protester asserts that, following several unsuccessful attempts and in the face of *less-lethal* force being applied by law enforcement, protesters were ultimately successful in removing the first dump truck away from the rest of the barricade at approximately 5:30 p.m. (*Id.* at ¶17.) Law enforcement confirm they repeatedly warned the protesters against removal of the dump trucks, and applied less-lethal force in attempts to prevent their removal. (LEApp.41-43, R.Doc.54 at ¶¶34,39-45.) In other words, it was plainly evident to everyone from the outset of the protesters’ activity in removing the first dump truck on November 20, before anyone alleges they were injured, that attempts to tamper with or remove the barricade would be met with force. Dundon alleges she was one of the first protesters on the Bridge and she alleges she was injured during the protesters’ attempt to remove the second dump truck from the barricade. After admitting to observing less-lethal munitions being deployed against the protesters attempting to remove the burnt-out trucks, including tear gas and impact rounds,



Dundon intentionally placed herself between law enforcement and those protesters, and she was in this vicinity for up to an hour before she was allegedly struck with a projectile. All other Plaintiffs allege they arrived on the scene after Dundon. Under these circumstances, it was objectively reasonable for law enforcement to believe the protesters, as a whole in the vicinity, were acting as a unit and engaging in unlawful conduct which justified the use of force.

The evidence also establishes the protesters, even at this early stage, were engaged in a riot. “Riot” is defined under North Dakota’s Criminal Code to mean “a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function.” N.D.C.C. § 12.1-25-01(2). The protester who alleges he heard the warnings given by law enforcement to protesters against removal of the dump trucks also alleges he observed the protesters remove both the first dump truck from the barricade, as well as the protesters initial efforts to remove the second dump truck. (App.471-73, R.Doc.81-27 at ¶¶10-18.) He estimates 10 protesters were involved with removing the first dump truck, but noted more protesters had showed up to help with the initial attempts to remove the second dump truck, with numbers of protesters growing by the minute. (*Id.* at ¶18.) This is consistent with the record filed by Defendants/Appellees. (LEApp.41-43, R.Doc.54 at ¶¶34,39-

45.) Dundon admits she was present among the other protesters when they removed the first dump truck, and also when they initially attempted to remove the second dump truck. Dundon alleges force was applied by law enforcement against her during the protesters initial attempts to remove the second dump truck.

Law enforcement also had the authority and duty to protect private property interests and individuals located north of the Bridge – interests which had been infringed upon and damaged, and individuals assaulted, by protesters during the ongoing protest activities against DAPL. Appellants admit their objective was to prevent completion of DAPL – completion of which would occur from a drill pad located less than one mile northeast of the Bridge.

In addition, in accordance with *Bernini*, discussed below, the use of less-lethal munitions for the purpose of restoring order under riot conditions and preventing unlawful entry onto property by an unruly crowd is objectively reasonable. In addition, it is objectively reasonable for law enforcement to utilize not only less-lethal force, but lethal force as well “when used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence.” N.D.C.C. § 12.1-05-07(2)(b).

a. Severity of the Crimes at Issue and Threat

As correctly determined by the District Court, criminal trespass was not the only crime engaged in by the protesters during the November 20 riot. Although the Appellants allege they went to the Bridge to “peacefully” or “peaceably” protest or pray, the evidence establishes otherwise.

The evidence irrefutably establishes law enforcement were being struck by the objects being thrown by protesters, and one officer was struck so hard he became dazed and required assistance by other officers to an armored vehicle. Other protesters grudgingly admit to seeing objects thrown at law enforcement by protesters. (App.457-58, R.Doc.81-24 at ¶21 (“I saw one person throw what appeared to be a rock in the direction of the police. I saw another throw a stick in the direction of the police.”); App.503, R.Doc.81-28 at ¶12 (“I did not see water protectors threaten the police, or use any weapons, with the exception of a few individuals who I saw throw the gas canisters that had been launched by the police, back toward the police.”); App.494, R.Doc.81-27 at ¶58 (“A few people . . . threw plastic water bottles at the police . . . .”); (App.451-52, R.Doc.81-23 at ¶15 (“The only things that I saw thrown from the side of the water protectors to the side of the razor wire where law enforcement was located was an occasional plastic bottle of water, maybe 4 in total throughout the entire evening (7 hours). I also witnessed an individual protester try to throw a spent smoke canister from where it landed on the west side side [sic] of the Highway 1806 to the north side of the razor wire

where the police were located.”) These events, plus more violent behavior by the protesters is established through video and affidavit testimony in the record submitted by law enforcement and fire service officers. A group of approximately 150 protesters gathered in the west ditch north of the Bridge and proceeded west and north in an attempt to flank the police line, cross-country. Protesters also threw shields across the concertina wire and one protester climbed over law enforcements’ barricade. Law enforcement were genuinely concerned they were going to be overrun and were concerned about the immediate attempts by protesters to inflict serious bodily injury or death upon law enforcement and emergency responders on the scene. The NDHP aerial surveillance video establishes there were hundreds, if not more than one thousand, protesters involved in the riot at or near the Bridge. At all times, law enforcement were in a defensive position behind law enforcements’ barricade.

Appellants admit to bearing shields and tarps (App.170, R.Doc.14-16 at ¶12; App.173, R.Doc.14-17 at ¶8; App.131, R.Doc.14-9 at ¶14), and wearing bandanas (App.183, R.Doc.14-19 at ¶ 9), goggles (App.131, R.Doc.14-9 at ¶12), rain coats (App.170, R.Doc.14-16 at ¶12), and gas masks (App.775, R.Doc.239-8 at 152,156-57) while in close proximity to the barricade, matching the descriptions of protesters who engaged in assaults on the barricade behind shield walls, as identified in law enforcement’s affidavits, documented in video evidence shot from

the perspective of the protesters forming the shield wall, and evidenced by the aerial video. (LEApp.43,45-46,48-51, R.Doc.54 at ¶¶45,55,60-61,73,74,81; LEApp.11,15-16, R.Doc.52 at ¶¶47,61,63,69; LEApp.26-30, R.Doc.53 at ¶¶26,28,33,34,40,41; App.508, R.Doc.92-1 at Item 4; LEApp.100, R.Doc.92-1 at Item 9.) These activities constitute felony assault upon law enforcement officers (N.D.C.C. § 12.1-17-01), felony reckless endangerment with extreme indifference to the value of human life (N.D.C.C. § 12.1-17-03), and felony terrorizing (N.D.C.C. § 12.1-17-04), as well as the misdemeanors of criminal trespass (N.D.C.C. § 12.1-22-03), engaging in a riot (N.D.C.C. § 12.1-25-03), disobedience of public safety orders under riot conditions (N.D.C.C. § 12.1-25-04), other assaults (N.D.C.C. § 12.1-17-02), passing over a closed highway and removing a barricade thereon (N.D.C.C. § 24-03-05), and obstruction of government function (N.D.C.C. § 12.1-08-01). (LEApp.52, R.Doc.54 at ¶88; LEApp.16-17, R.Doc.52 at ¶70.)

b. Resisting & Warnings

As discussed above, and summarized by the District Court (App.50-53; R.Doc.286 at ¶¶101-04), it is indisputable that the NDDOT closed the Bridge prior to the November 20 riot, and published press releases advising the public of a concern about the structural integrity of the Bridge, and that “the Bridge is unsafe for anyone to cross[]” and was closed. (LEApp.80; R.Doc.59-3.) It is also

indisputable due to numerous videos and photographic evidence that large combination “No Trespassing on Bridge” and “No Trespassing” signs were clearly posted and visible day and night to protesters on the Bridge and along the south bank of the Cantapeta Creek throughout the riot. It is also indisputable that law enforcement gave amplified warnings to protesters, as discussed above and summarized in the District Court’s opinion. (App.53; R.Doc.286 at ¶105 (summarizing video evidence of warnings.) Demo admits to hearing law enforcement yelling “get back” before he claims he was hit with a projectile. Another protester asserts in his declaration:

I do not recall any warning announcements. At some points the police would say, **“move off the side of the bridge;”** Once, I heard them say “we are going to test the LRAD” and they did for a second. That was the only time I heard it. I did not hear, or at least I do not recall hearing, any announcement about them using other less lethal weapons. However, it was hard to hear. There was a lot of noise and commotion. There were also people singing and praying. If they did announce anything, I could not hear it. **I only heard them announce things like “you’re trespassing,” “you’re not supposed to be on the bridge,” and “move to the south side.”** There were no announcements that were warnings that I can recall.

(App.458, R.Doc.81-24 at ¶22 (emphasis added).)

Appellants and protester declarants also admit observing law enforcement’s application of force as to others, including alleged use of gas canisters, smoke, impact munitions, fire hose, etc., yet incredibly decided to place themselves in close proximity to the barricade, often for extended periods of time, and despite law enforcements’ alleged multiple applications of force as to them. Query the

futility of providing additional warnings to individuals with this mindset. Appellants allege the air was full of smoke and gas, there were shots being fired and explosions heard, and fire hose(s) utilized on persons standing in proximity to the barricade. No reasonable person would observe such alleged use of force by law enforcement standing behind a barricade with armored vehicles and believe their presence was authorized or lawful, regardless of whether any additional warnings were provided by law enforcement. At the very least, it was objectively reasonable for officers on the scene to believe protesters had been warned.

c. Force

The District Court correctly analyzed the force applied by officers as follows:

It is undisputed this protest lasted over the course of approximately ten hours. It is undisputed officers used less-lethal force at the very beginning of the protest when protestors removed the burned-out truck off the Bridge with a semi against law enforcement orders. Plaintiffs admit this use of force did not stop protesters from continuing to pool in numbers on the Bridge, the sides of it, and in numbers behind it. Almost all Plaintiffs also admit they returned to the Bridge after tear gas, rubber bullets, water, and other munitions had already been used on them in an effort to get them to disperse or leave the scene. The aerial footage and video provided in this case show protesters pushing toward the barricade even in the face of law enforcement officers using less-lethal munitions. Officers issued two code reds and a Signal 100 seeking immediate assistance from officers in not only the area but the entire state. The undisputed evidence leads only to one conclusion that no reasonable juror could find the use of tear gas, rubber bullets, OC spray, and the like, was objectively unreasonable in this particular circumstance.

(App. 68-69, R.Doc. 286 at ¶134 (underline added).)

With respect to the use of water, law enforcement utilized tear gas and impact munitions on the rapidly growing crowd of protesters for about ninety minutes before water was first deployed by law enforcement. (App.475, R.Doc.81-27 at ¶20; App.508, R.Doc.92-1 at Item 4, 00:37:48 (first deployment of water at 18:36 military time).) Neither the parties nor the District Court located a single reported decision in the United States determining the use of water in a crowd control context constituted excessive force. Law enforcement believed the use of water deterred some protesters from engaging law enforcement officers along the barricaded law enforcement defensive line, and that without the use of water by law enforcement, law enforcements' defensive line would have been overtaken by the protesters. (LEApp.50, R.Doc.54 at ¶79; LEApp.256, R.Doc.241 at ¶10.) The indisputable evidence establishes law enforcements' application of force was objectively reasonable and Appellants' Fourth Amendment rights were not violated.

**3. Even Assuming, Arguendo, A Fourth Amendment Violation Occurred, Individual Defendants Are Entitled To Qualified Immunity**

The District Court also properly concluded the individual officers would be entitled to qualified immunity in any event because, at the time of the 2016 riot, it



was not clearly established that officers' conduct violated the Appellants' Fourth Amendment rights.

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, [] (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. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815-16 [] (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2006).

*Nance v. Sammis*, 586 F.3d 604, 609 (8<sup>th</sup> Cir. 2009). “To be clearly established, a legal principle must have a sufficiently clear foundation in then-existing precedent.” *Graham v. Barnette*, 5 F.4<sup>th</sup> 872, 887 (8<sup>th</sup> Cir. 2021, reh'g denied (Aug. 20, 2021)). “This generally requires a plaintiff to point to existing circuit precedent that involves sufficiently ‘similar facts’ to ‘squarely govern’ the officers’ conduct in the specific circumstances at issue, or, in the absence of binding precedent, to present ‘a robust consensus of cases of persuasive authority’ constituting settled law.” *Id.* (citing *De La Rosa v. White*, 852 F.3d 740, 745 (8<sup>th</sup> Cir. 2017)). “The plaintiff has the burden to prove that a right was clearly established at the time of the alleged violation.” *Boudoin v. Harsson*, 962 F.3d

1034, 1040 (8<sup>th</sup> Cir. 2020) (citing *Wilson v. Lamp*, 901 F.3d 981, 986 (8<sup>th</sup> Cir. 2018)).

The District Court properly concluded the facts of this case are “utterly unique” from any other prior protest occurring in the United States. (App.72, R.Doc.286 at ¶143.) Appellants have not cited to any prior case involving circumstances even remotely similar to the situation presented in this case, where vastly outnumbered officers are positioned in a strictly defensive position, behind a barricade in a remote rural area, with officers being struck with objects thrown by protesters, protesters actively engaged in trespass and shield wall surges toward the barricade, and engaged in demolition of the barricade despite warnings against such conduct and in the face of force being applied, all for the purpose of once again gaining unlawful access to private property (DAPL drill pad site) located a short distance away, among other unique circumstances. In addition, neither the parties nor the District Court were able to locate a single case determining the use of water for crowd control purposes constituted excessive force. These unique circumstances alone establish officers are entitled to qualified immunity as they were not on fair notice their conduct violated Appellants’ constitutional rights.

The District Court also correctly determined law enforcements’ entitlement to qualified immunity is supported by this Court’s decision in *Bernini v. City of St. Paul*, 655 F.3d 997 (8<sup>th</sup> Cir. 2012). (App.77-78; R.Doc. 286 at ¶¶152-53.) The

2016 events at issue, and Appellants' claims in this action, are very similar to those considered in *Bernini*. In *Bernini*, law enforcement cordoned off downtown St. Paul, Minnesota as a no-go zone during the Republican National Convention in 2008 due to prior heavy property damage caused by protesters in the vicinity, and utilized less-lethal munitions [i.e. stinger blast balls containing rubber pellets designed to sting the targeted person, smoke, and chemical irritants] to hold back aggressive protesters attempting to breach barricades and refusing to comply with orders to disperse. *Bernini* establishes the use of *less-lethal* munitions (described as *non-lethal* in *Bernini*) for the purpose of preventing unlawful entry into a restricted area closed to the public, by an unruly crowd which officers reasonably believe is acting as a unit, and to otherwise restore order, is objectively reasonable. *See id.* at 1006 (“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 protesters turned to face the police.”). In considering the application of force in a crowd control context, this Court noted “[t]he D.C. Circuit has addressed the practical dilemma faced by officers responsible for reacting to large group activity, and recognized that a requirement that the officers verify that each and every member of a crowd engaged in a specific riotous act would be practically impossible in any situation involving a

large riot.”). *Bernini*, 665 F.3d at 1004 (citing *Carr v. District of Columbia*, 587 F.3d 401, 408 (D.C. Cir. 2009)).

In the present case, as discussed above, protesters were engaged in numerous criminal activities and were attempting penetrate or circumvent the barricade to once again access the secured area around the DAPL drill pad site located a short distance north of the barricade. Law enforcements’ use of force was directed at preventing protesters from accessing the secured area, and in preventing the destruction of both public and private property, including, among other things, the barricade itself. Due to the scale and severity of the protesters’ unlawful conduct, law enforcement issued two Code Red requests for assistance, and a Signal 100 request for all available law enforcement officers, state-wide, to come to the immediate aid of the officers in distress – a first in North Dakota history. No reasonable officer under these circumstances could have believed the use of less-lethal munitions and water upon the protesters violated any clearly established constitutional rights, especially in light of *Bernini*. *See, also 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 protesters who refused to comply with dispersal orders due to unlawful assembly, including upon members of the press intermingled with the protesters, did not violate Fourth Amendment, and officers were entitled to

qualified immunity). Law enforcement are therefore entitled to qualified immunity.

**D. Plaintiffs' Fourteenth Amendment Excessive Force Claim**

Appellants' Fourteenth Amendment excessive force claim was also correctly dismissed for lack of evidence of conduct by law enforcement which "shocks the conscience" under the circumstances, as required under *County of Sacramento v. Lewis*, 523 U.S. 833, 844-45 (1998), *Wilson v. Spain*, 209 F.3d 713, 716 (8<sup>th</sup> Cir. 2000) and other precedent. "[T]he alleged substantive due process violations must involve conduct 'so severe . . . so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'" *Truong v. Hassan*, 829 F.3d 627, 631 (8<sup>th</sup> Cir. 2016) (quoting *Moran v. Clarke*, 296 F.3d 638, 647 (8<sup>th</sup> Cir. 2002)). An excessive force claimant who cannot win his case under the Fourth Amendment standard certainly cannot win his case under the Fourteenth Amendment standard. *Wilson v. Spain*, 209 F.3d at 716.

Considering the circumstances law enforcement were confronted with during the November 20 riot, it cannot reasonably be concluded the use of water and less lethal force by law enforcement to hold back the uncontrolled mob, protect private and public property and the physical safety of law enforcement and

other fire service personnel on the scene, and otherwise restore order “shocks the conscience”, in a constitutional sense.

**E. Monell Claims**

Appellants also appeal from the dismissal of their claims under *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978) against Morton County, Stutsman County and City of Mandan on the basis the alleged constitutional violations were the result of their “policies, practices and customs”. Appellants also appeal from the dismissal of their *Monell* claims against Sheriffs Kirchmeier, Zeigler and Kaiser for alleged failure to train, supervise, or discipline.

Appellants’ *Monell* claims were correctly dismissed on the basis a political subdivision cannot be held liable in a § 1983 action absent an actual violation of a plaintiff’s constitutional rights. *Russell v. Hennepin Cty.*, 420 F.3d 841, 846 (8<sup>th</sup> Cir. 2005); *Speer v. City of Wynne, Arkansas*, 376 F.3d 960 (8<sup>th</sup> Cir. 2002). In addition, a failure to train, supervise or discipline must also result in an actual constitutional violation to be actionable under § 1983. *See Jackson v. Nixon*, 747 F3d 537, 543 (8<sup>th</sup> Cir. 2014) (“While the doctrine of respondeat superior does not apply to § 1983 cases, a supervisor may still be liable under § 1983 if either his direct action or his ‘failure to properly supervise and train the offending employee’ caused the constitutional violation at issue.” (emphasis added)). As discussed above and as correctly determined by the District Court, Appellants

have failed to present evidence of a violation of their constitutional rights – fatal to Appellants’ *Monell* claims.

**CONCLUSION**

Defendants/Appellees request the district court’s dismissal of Appellants’ claims against them be affirmed.

Dated this 15th day of June, 2022.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 12,997 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 15, 2022