No. 22-1246

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Vanessa Dundon, et al.

Plaintiffs-Appellants,

v.

Kyle Kirchmeier, et al.,

Defendants-Appellees.

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

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. Appellants Have Shown Genuine Issues of Material Fact That Preclude Summary Judgment.

Appellees concede that summary judgment is inapplicable where there are genuine issues of material fact, but then simply recount their version of the facts without attempting to address any of the evidence presented in Appellants' principal brief. However, the Court must view the facts and draw all inferences in the light most favorable to the non-movant. (*Klein v. Affiliated Grp., Inc.*, 994 F.3d 913, 916 (8th Cir. 2021).)

Appellants have presented evidence showing genuine disputes as to each of Appellees' factual contentions. Appellees' insistent emphasis on their disputed contentions and failure to properly address Appellants' factual presentation only supports Appellants' position that summary judgment was precluded by genuine issues of fact that must be decided by a jury, and that the District Court's wholesale adoption of Appellees' narrative improperly usurped the role of a jury. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." (*Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).)

A. Appellees' Attempt to Characterize the Standing Rock Movement as a Violent, Criminal One is Inaccurate and of Material Dispute.

Appellees go to great effort to paint a picture of the water protectors as a single-minded criminal group bent on rioting and violence, despite lack of factual support in the record. Appellees employ and rely on hyperbole and self-serving declarations drafted for the purpose of defending against Appellants' and Sophia Wilansky's lawsuits. They use this false narrative to justify law enforcement's attributions of collective intent to ALL of the individuals located on the bridge at different times on November 20, 2016, and to justify their ten-hour indiscriminate use of dangerous weapons against these disparate individuals.

Appellees entirely fail to address the contrary evidence presented by Appellants and *amicus curiae* National Congress of American Indians (NCAI). This evidence shows that the Standing Rock Movement involved 356 Tribal Nations and thousands of people from around the world, who made history by gathering in prayer camps near the confluence of the Cannonball and Missouri Rivers in response to a call from the Standing Rock Sioux Tribe to support its rights to the Missouri waters. In a sworn declaration, movement leader and former Tribal official Wašté Win Young explained that the Tribe put out this call as part of its efforts to call attention to the dangers posed by DAPL and

the Tribe's unlawful exclusion from the pipeline permitting process. These efforts included a federal lawsuit challenging the pipeline permit, which was ultimately successful. The Tribe made clear that the movement was nonviolent, and weapons were strictly forbidden. The water protectors adopted the nonviolent tactics of the civil rights movement and other historic movements for social change. (App.1673–1676; R.Doc. 269; NCAI amicus, 9–11, 16–22[1].)

Appellees inaccurately describe a series of incidents over the several months prior to November 20, 2016, as part of their attempt to portray the movement as violent. NCAI paints a different picture, in which law enforcement and private security sought to repress predominately peaceful protests with increasing violence and wrongful arrests. (NCAI amicus, 24–32.) It is notable that Appellees do not report one single injury to law enforcement prior to November 20, 2016. And while Appellees refer to many arrests of water protectors in those preceding months, Appellants have disputed the validity of those arrests, pointing out that only a tiny percentage of the final total of more than 850 arrests resulted in convictions. (App.1677 at ¶19; R.Doc. 269; NCAI amicus, 32; High Country News, *More Than Two Years Later, Last NoDAPL Trials Finish*, Feb. 5, 2019.)

[1] All page citations to filed documents are to the ECF-generated PDF page numbers, *not* to the internal document page numbers.

B. Appellees Fail to Challenge the Evidence Disputing Their Contention That Appellants Posed a Threat Justifying the Use of Force.

Appellees have not challenged the evidence presented in Appellants' Principal Brief showing that Appellants posed no threat, that the overwhelming majority of those gathered on the bridge over many hours were peaceful, with most remaining at a distance from the barricade, and that, in fact, no large group ever attempted to breach the barricade. (APB 21–24[2].)

Appellees do not even address their own testimony conceding that there is no evidence that any of the Appellants threw anything or threatened law enforcement in any way. (APB 21 citing Appellees' depositions.) Nor do Appellees address their own testimony conceding that there were peaceful persons on the bridge when law enforcement fired munitions and water cannons at them, or the 38 eyewitness declarations and the video evidence which show a lack of widespread aggressive activity and that most water protectors remained at a distance from the barricade, engaged in disparate peaceful activities. (APB 21–22 citing Appellees' depositions; videos; and declarations.) Moreover, Appellees have not contested the fact that only a small number of people were involved in towing the burned out truck, and

[2] "APB" refers to Appellants' Principal Brief. All page citations are to the ECF-generated PDF page numbers, *not* the internal document page numbers.

that this occurred early in the evening before most of the water protectors came to the bridge (with the exception of Plaintiff-Appellant Vanessa Dundon, who was one of the first to arrive, and was trying to move away when law enforcement shot her repeatedly). (APB 23.)

While conceding that the majority of the water protectors stayed back from the barricade, Appellees claim, without citing any specific elapsed time, that an aerial video documents "assaults on the barricade behind shield walls" and a "forward staged siege group". (BDA[3] 13, 52–53.) There is no such footage on the aerial video. On the contrary, the video shows only a small group of individuals who move slowly toward the barricade but remain at a distance from it and do *not* attempt to break through. Most of the people behind them are scattered, not moving along with them in an organized fashion as Appellees describe. It is uncontested that in the entire night, only one person tried to climb over the barricade, and was immediately arrested. Similarly, Appellees claim that a YouTube video shows an organized assault by a "shield wall". But like the aerial video, the YouTube video shows a small group holding up plastic container lids, tarps and other makeshift objects to try to protect themselves and others from the onslaught of munitions and water, while most of the crowd remains further back. There is no assault on the barricade. (LEApp.100, R. Doc. 92–1 Item 9.)

[3] "BDA" refers to the Brief of Defendants-Appellees.

C. Appellees Fail to Challenge the Evidence Disputing Their Contention That Appellants Received Notice, Warning and Opportunity to Leave Prior to Being Subjected to Force.

Appellees fail to address any of the evidence Appellants cited as demonstrating lack of notice that pedestrians were not allowed on the bridge. This evidence includes, *inter alia*, that pedestrians and large groups had been allowed on the bridge in the weeks leading up to the incident; the misleading location of the "No Trespassing" signs *north* of the bridge behind the concertina wire, on the sides and below the level of the road; and that law enforcement took at least one of the signs down during the incident. (APB 19.))

Similarly, Appellees fail to meaningfully address the evidence presented in Appellants' Section F, *Evidence Disputing That Appellants Received Notice, Warning and Opportunity to Leave Prior to Being Subjected to Force*. (APB 21–22.) Appellees do not explain the complete lack of documentation concerning the "hundreds" of amplified dispersal announcements they claim were given throughout the night, discussed at APB 20. They have only managed to come up with one video, also relied on by the district court, which documents a single announcement: "I'm going to give you one last warning. Vacate the bridge or you will be trespassing". This is entirely consistent with Appellants' evidence that there was one amplified general announcement to the crowd, early in the night before most of the protesters arrived, and that this was never

repeated. (See BDA 14, citing LEApp.105, R. Doc.100, at 0:06:43.) Appellees do cite to one other video, on which an officer can be heard saying: "Step away from the wire, step away from the barricade". This served only to inform people in direct proximity to the barricade and within earshot to move back. It did *not* command individuals to leave the bridge, and was not calculated to reach all those persons at a distance from the barricade, where Appellees admit the majority of protesters were. (See LEApp.251, R. Doc.239–12, Item 3 at 0:07:10.)[4] The district court referred to other similar verbal orders, but made no further reference to amplified dispersal announcements notifying everyone on the bridge that they were trespassing and must leave.

D. Appellees Fail to Challenge the Evidence Disputing Their Contention That Law Enforcement Was in Danger of Being Overrun.

Appellees impliedly concede that there are genuine disputes of fact as to their contention that force was necessary because law enforcement

[4] Appellees also cite Appellants' Lenoble declaration, which states that at the very beginning of the November 20 event, when there were only a handful of people present, an officer told the person driving the semi not to remove the trucks. (BDA 47.) Obviously, this could not have been heard by the hundreds who arrived later. Moreover, the communication did not pertain to or prohibit mere presence on the bridge. Appellees also cite a video taken on a different date, November 6, that shows officers telling people not to remove the trucks.

was in danger of being overrun, as they do not respond to the evidence cited in Appellants' Section H, *Law Enforcement Was Not Overrun by Water Protectors*. (APB 24–25.)

Appellees claim that the aerial video establishes that officers were "vastly outnumbered" by protesters. (BDA 22.) But Appellees' make no attempt to explain their own testimony and documents showing that at maximum, there were 400–500 protestors and up to 350 law enforcement officers present at the Bridge, with officers stationed behind multiple layers of razor-sharp concertina wire, concrete barriers, and armored vehicles with all their weapons and gear. The aerial video is consistent with these numbers. (See, e.g., App.508; R.Doc. 92–1 at 2:52 - 2:57.)

Similarly, the aerial video does not support Appellees' contention that a large group of protesters tried to "flank" them, which they seem to mean in the military sense of attacking an opponent from the side. A review of the video starting at the elapsed time Appellees cite, 1:32:30, shows scattered individuals walking toward the west. At one point, individuals appear to form a line, but are immediately intercepted by a single law enforcement vehicle while still far from the police line. There is no evidence of projectiles or other aggressive or threatening behavior by protestors on the aerial footage during this time. This is consistent with Sheriff Kaiser's testimony that he was able to head off any anticipated threat with only 20 officers. (App.508, R.Doc. 92–1 at 1:36.)

Appellees argue that force was reasonable because officers believed a large number of protesters intended to breach the barricade to get to the DAPL drill pad site to stop construction there, by "violent confrontation with DAPL construction workers." (BDA 14.) At minimum. there are disputes as to the underlying facts supporting such belief. Appellees fail to cite anything in the record supporting their assertion that all or some water protectors' objective was to prevent completion of DAPL "by any means necessary" (BDA 10), and fail to respond to the evidence that the NoDAPL movement was nonviolent, as discussed above. Appellees impliedly concede that there were no DAPL workers or construction that could be disrupted on the night in question, because the federal government had frozen the DAPL project in September, 2016, and *as of November 20, no construction was occurring*. (APB 16, 55; App.1673 at ¶18; R.Doc. 269; App.977; R.Doc. 239–14.) Appellees entirely fail to address movement leader Young's sworn statement that there was no coordinated plan to try to get past the barricade for any kind of action against DAPL. Rather, Ms. Young and others went to the bridge in response to the law enforcement violence that was occurring against peaceful water protectors, and stayed to nonviolently express their views against that violence. (App.1679; R.Doc. 269.)

Notably, Appellees have not responded to police expert Frazier's declaration, which concluded, based on detailed review of the video and

other evidence, that the officers were in no danger of being overrun and that their characterization of the event as a "riot" was overstated and inaccurate. (App.370, R.Doc. 81–1.)

E. Appellees Fail to Challenge Evidence Disputing That Law Enforcement Used a High Level of Force Indiscriminately on All Present on the Bridge and That This Force Caused Appellants Serious Injuries.

Appellees admit using teargas and impact munitions for ninety minutes and then adding water cannons, and that these actions continued for ten hours. (BDA 55–56.) They make no attempt to challenge the evidence Appellants have presented showing that each of the weapons used is highly dangerous, with potential to cause serious injuries and deaths, including the high pressure firefighting equipment that was powerful enough to knock walls down. Appellees impliedly concede that law enforcement used these weapons indiscriminately on all present regardless of the individuals' activity, injuring approximately 300 people seriously enough to require treatment, including Appellants. (Evidence cited at APB 25–32.)

II. A Jury Must Determine Whether the Force Used Against Appellants Was Objectively Reasonable Under the Fourth Amendment.

A. Appellants Were Seized by Law Enforcement When They Applied Force to Restrain Their Freedom of Movement.

Under the Fourth Amendment, a seizure of a person occurs when there is an "application of physical force to restrain movement." (*California v. Hodari D.*, 499 U.S. 621, 626 (1991); *aff'd*, *Torres v. Madrid*, 141 S.Ct. 989, 994 (2021).) In circumstances not involving an effort to arrest, as was the case here, a seizure occurs "when there is a governmental termination of freedom of movement through means intentionally applied." (*Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989).) The officers terminated appellants' freedom of movement through means intentionally applied when they fired and launched impact munitions and explosive grenades at appellants and blasted them with water cannons. Appellees admit that these weapons were deployed with an intent to control and restrain the freedom of movement of those assembled.

The appellees and district court erroneously posit that the Fourth Amendment does not apply in this case based on the assertion that appellants had an ability to leave the area, either after force was used against them or outside the times when their movements were

controlled by the impact of force. (Add.44; BDA 43–44.) However, this argument ignores the actual force used by law enforcement, and clear legal precedent that pre-dated this incident.

Both Supreme Court and 8th Circuit precedent reject the district court's contention here that the Fourth Amendment is not offended by the intentional use of force that physically injures a person but only reduces or temporarily stops their freedom of movement, rather than completely eliminating it for a protracted time. (*See Hodari*, 499 U.S. at 626 ["The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful"]*; Atkinson v. City of Mountain View,* 709 F.3d 1201, 1208–1209 (8th Cir. 2013) [It would make little sense to ask whether a person felt "free to leave" while an officer restrained the person's freedom of movement through physical force because the force itself necessarily—if only briefly— restrained their liberty]; *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993) citing *Graham v. Connor*, 490 U.S. 386, 394–95 (1989) ["All claims that law enforcement officials used excessive force — deadly or not — in the course of making an arrest *or other 'seizure' of a free citizen* are properly analyzed under the Fourth Amendment." (emphasis added)].)

Moreover, it was settled law in 2016 that "a seizure is 'effected by the slightest application of physical force' despite later escape and regardless of whether that citizen yields to that force ." (*Ludwig v.*

Anderson, 54 F.3d 465, 471 (8th Cir. 1995) quoting *Hodari D.*,499 U.S. at 625 [finding a person not suspected of a crime was seized when police attempted to hit that person with a squad car].) "*Hodari D.* instructs that many different seizures may occur during a single series of events." (*Ludwig,* at 471, citations omitted.) Yet, Appellees rely almost entirely on the non-authoritative dissent in *Torres v. Madrid*, 141 S.Ct. 989 (2021), at points without citing it as the dissent, to assert that a seizure requires taking physical possession of the person. (BDA 41.) It is only by ignoring controlling law that the conclusion could be reached in this case that the use of force did not constitute a seizure.

Appellees do not respond to the arguments made in the *amicus* brief filed by the National Police Accountability Project (NPAP) that restraint is a broader term than apprehension or possession. Appellees' argument, that officers sought, at points, to *repel* the protestors is merely another way of expressing the rationale of the district court that there was no seizure because appellants were "free to leave", and ignores the fact that officers' manifest intent in using force was to control the protestors' freedom of movement, to restrain their liberty to move as they wished unfettered by police control.

The NPAP brief convincingly argues that whether a Fourth Amendment seizure occurred cannot be determined simply by asking whether the subject of the alleged seizure was "free to leave." The intent

to restrain required by *Torres* is present whenever officers purposefully seek "the termination of freedom of movement" of a person. (*Torres,* 141 S.Ct. at 1001.)

> A "restraining order" from a court may enjoin a party either to do or not do something. See, e.g., Fed. R. Civ. P., rule 65: "every restraining order must … describe in reasonable detail … the act or acts restrained or required." Restraint in that sense is coercion either to hold one in place or to require other actions.
>
> The term restrain readily encompasses what the intent of law enforcement was in the instant case: to prevent the protestors from remaining on the bridge, to prevent them from moving toward the police barricade, to limit and restrict their ability to continue to protest on the bridge, to deprive them of their liberty to continue their protest on the bridge, and to require them to move.
>
> (NPAP amicus 12.)

As NPAP demonstrated, cases from several Courts of Appeals make clear that a seizure occurs when the government restrains a person's freedom to remain as well as their freedom to leave. (*Bennett v. City of Eastpointe*, 410 F.3d 810, 834 (6th Cir. 2005), *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994), *Wallace by Wallace v. Batavia School Dist. 101,* 68 F.3d 1010 (7th Cir. 1995), *Salmon v. Blesser*, 802 F.3d 249 (2d Cir. 2015), *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 523 (6th Cir. 2019), *Heaney v. Roberts*, 846 F.3d 795, 804–05 (5th Cir. 2017). See also, *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 48–49

(D.D.C. 2021), *Price v. Mueller-Owens*, 516 F. Supp. 3d 816, 828 (W.D. Wis. 2021), *J.L. v. Eastern Suffolk Boces*, 2018 WL 1882847 (E.D. N.Y. 2018) *11, *Muhammad v. Chicago Bd. of Ed.*, 1995 WL 89013 (N.D. Ill. 1995).)

Appellants and other water protectors were seized during the ten hours they were subjected to law enforcements' use of water cannons and munitions. The subjective intent of the officers deploying the force, whether they meant to restrain Appellants' freedom to move forward on the Bridge or their freedom to move around remaining on the Bridge where they were protesting and praying, is irrelevant. "The intent that counts under the Fourth Amendment is the intent that has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." (*Brendlin*, 551 U.S. 249, 260–261 (2007), internal quotation marks and citation omitted.) An objective standard applies. "[T]he 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." (*Torres*, 141 S. Ct. at 998.) The extended barrage of indiscriminate dangerous weapons objectively manifests an intent to restrain.

Notably, Appellees fail to respond to, distinguish or address Appellants' citation to and discussion of *Alsaada v. City of Columbus*,

536 F.Supp.3d 216 (S.D. Ohio 2021) or *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022). Nor do they address or counter Appellants' discussion of *Coles v. City of Oakland, No. C03–2961 TEH*, 2005 WL 8177790 (N.D. Cal. Apr. 27, 2005) or *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012). These failures are concessions to Appellants' arguments.

The arguments above demonstrate that there were seizures in the instant case, and that there is sufficient authority that the law is clearly established.

B. A Jury Must Decide the Reasonableness of the Use of Force

Appellees repeatedly describe the November 20, 2016, protest as a "riot," an assertion essential to their argument. Their brief uses "riot" 44 times. Yet, there are no documented warnings that protestors were engaging in felony riot, and these issues are matters of contested fact. Appellees' baseless claims that appellants should have known they were breaking the law are irrelevant to the reasonableness of the force officers used against them. (*See e.g. Hollingsworth v. City of St. Ann*, 800 F.3d 985, 988, 990 (8th Cir. 2015) ["even when officers are justified in using some force, they violate suspects' Fourth Amendment rights if they use unreasonable amounts of force"].) Here, where the crime

arguably at issue is misdemeanor trespass, it is clearly established that no more than a de minimis use of force is reasonable. (APB 51–52; 59; 62–63; *Mitchell*, 28 F.4th at 898.)

In the absence of supporting evidence, Appellees rely on an extremist and false characterization of Appellants' and other water protectors' actions over the hours of the law enforcement assault. As if writing a screenplay, Appellees fabricate an outrageous fiction about "siege groups" and people "prepar[ing] for an assault" on police. (BDA 13, 17, 18.) They fail to present evidence that Appellants, in fact, engaged in the actions Appellees assert justify the police violence against them.

Appellees also conflate all of the hundreds of persons who were present on the Bridge at different time over the course of many hours and two days to impute collective action and collective knowledge to all, regardless of temporal or physical scope. This is an overreaching effort to justify a massive barrage of maiming force indiscriminately applied to persons who committed no unlawful act, or at most allegedly engaged in misdemeanor trespass in the context of speech, assembly and religious activities.

Appellees repeatedly refer to all persons present at any point over many hours as responsible for efforts of a few persons earlier in the day to pull away the burned trucks, an event that occurred long before most persons were present. Appellees similarly generally ascribe claims that everyone present sought to cut chains or concertina wire – despite the

lack of evidence. Appellees' case as to reasonable use of force improperly rests on their version of disputed facts and collective attribution of actions and intent that defies the laws of space and time.

Appellees' assertion that hundreds of persons present at completely different times in different locations in and around the Bridge over 10 hours can be ascribed a single-minded purpose or that those hundreds of people acted as a unit as a justification for Appellees' use of brutal force necessarily fails. Appellees' derogatory and colorful fabrication is not a substitute for factual evidence and precision. This is a fatal flaw in Appellees' position and in the district court's findings. Further, "in determining the issue of Fourth Amendment reasonableness, the district court should scrutinize only the seizure or seizures themselves, not the events leading to them." (*Ludwig v. Anderson*, 54 F.3d 465, 471 (8th Cir. 1995), internal citations omitted.)

III. Alternatively, A Jury Must Determine Appellants' Excessive Force Claim Pursuant to the Fourteenth Amendment.

Objective reasonableness must guide the analysis of excessive force claims pursuant to either the Fourth or Fourteenth Amendment, and, applying that analysis, Appellants' claims must be determined by a jury. Appellees' assertion that the proper standard for an excessive force claim under the Fourteenth Amendment is the outdated "shocks the

conscience" standard completely ignores the reality that after *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), and its progeny in the Eighth Circuit, the proper standard under the Fourteenth Amendment is in fact whether a defendant's use of force is objectively unreasonable.

The Supreme Court in *Kingsley* expressly held that the State may only mete out punishment pursuant to the Eighth Amendment. Prior to any criminal conviction, the Fourteenth Amendment protects persons who "cannot be punished at all" by the State, from objectively unreasonable conduct. (*Kingsley,* 576 U.S. at 400–401.) Therefore, if the lack of a seizure takes Appellees' conduct outside the purview of the Fourth Amendment, Appellants are protected by the Fourteenth Amendment from Appellees' objectively unreasonable conduct. There is no justification to provide more constitutional protection to one who has been taken into custody upon suspicion of a crime than an individual who has not been charged with any crime and remains free on the street, particularly in the context of attempting to engage in First Amendment activity.

While "prior excessive force cases spoke of whether the official's conduct 'shocks the conscience,' *Kingsley* asked whether the force was 'objectively unreasonable." (*Edrei v. Maguire*, 892 F.3d 525, 537 (2d Cir. 2018), citations omitted.) In *Edrei,* individuals gathered in Manhattan to protest the failure to indict a police officer who had placed Eric Garner, an unarmed Black man, in a fatal chokehold. Defendant NYPD

officers, claiming they were attempting to prevent protestors from interfering with vehicular traffic, discharged pepper spray and activated a long-range acoustic weapon that caused hearing damage and other injury. Plaintiff protestors brought excessive force claims under the Fourteenth Amendment, and defendant officers were denied qualified immunity. As the court explained:

> The distinction *Kingsley* drew was not between pretrial detainees and non-detainees. Instead, it was between claims brought under the Eighth Amendment's Cruel and Unusual Punishment Clause and those brought under the Fourteenth Amendment's Due Process Clause. 135 S. Ct. at 2475. As the Court observed, not only do the two clauses use distinct language, but, "most importantly, pretrial detainees (unlike convicted prisoners) cannot be punished *at all*." *Id.* (emphasis added). The same is true of non-detainees, except more so. After all, with a non-detainee the government has not even shown probable cause of criminal activity, much less a public safety (or flight) risk warranting detention. For this reason, it would be extraordinary to conclude that "pretrial detainees . . . cannot be punished at all, much less 'maliciously and sadistically,'" *id.*, while requiring non-detainees to prove malice and sadism.

(*Edrei v. Maguire*, 892 F.3d at 535–536.)

Thus, *Kingsley* must control in an excessive force case such as Appellants'. (*Whitney v. City of St. Louis, Mo*, 887 F.3d 857, 869 n.4 (8th Cir. 2018). See also, *Smith v. Lisenbe,* No. 4:20 CV 804 JMB, 2022 WL 407142, at *19, n.20 (E.D. Mo. Feb. 10, 2022)[The Eighth Circuit has explicitly confined *Kingsley* to excessive force claims]; *Ivey v. Williams,*

No. 12–30 (DWF/TNL), 2019 U.S. Dist. LEXIS 26034, at *4 (D. Minn. Feb. 19, 2019) [excessive force claim in civil commitment context governed by objectively unreasonable standard set forth in *Kingsley*]; *Clark v. Gross, No. 4:15-CV-04068-KES*, 2016 U.S. Dist. LEXIS 155633, at *44 (D.S.D. Oct. 3, 2016) ["After *Kingsley*, requiring a showing of subjective intent to punish in order to recover on a Fourteenth Amendment excessive force claim is clearly incorrect"].)

Appellees ignore this *Kingsley* analysis, and instead rely on *County of Sacramento v. Lewis,* 523 U.S. 833 (1998) and *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000). (BDA 61.) These cases are inapposite. *County of Sacramento* involved an accidental car crash in the context of a police pursuit. In *Wilson,* the Eighth Circuit applied the Fourth, not the Fourteenth Amendment reasonableness standard to a pretrial detainee's excessive force claim . *Truong v. Hassan*, 829 F.3d 6270 (8th Cir. 2016), also cited by Appellees, applies the "shocks the conscience" standard in a completely different context and is therefore similarly unavailing. Thus, contrary to Appellees' arguments, a standard of reasonableness now guides the analysis of excessive force claims pursuant to either the Fourth or Fourteenth Amendment.

However, in the unlikely event this Court were to apply the "shocks the conscience" standard to Appellants' claims here, a reasonable jury could find Appellees' conduct met that standard. The standard is met with a showing of an "intent to harm" or deliberate indifference when a

defendant has time to consider their actions. (*Truong,* 829 F. 3d at 631–632.) Appellees had many hours to contemplate their decisions while continuing the barrage of freezing water and munitions. Blasting high pressure water in freezing conditions and aiming munitions at individuals' heads and bodies, even knocking down an elderly woman as she kneeled and prayed, as officers laughed (APB 30), clearly evidence an intent to harm or at least a deliberate indifference to the real possibility of causing harm, and shocks the conscience.

IV. Appellees are Not Entitled to Qualified Immunity

Appellees' argument in favor of qualified immunity rests on two primary and infirm points. First, Appellees assert that there must be a prior case addressing exactly the facts of this matter, although they fail to provide supporting authority for that argument. In addition to providing no supporting authority, Appellees also fail to respond to, address, or distinguish Appellants' arguments and supporting authority. As Appellants addressed in their opening brief, "There does not have to be a previous case with exactly the same factual issues, rather the right is clearly established if a reasonable officer would be on notice from prior cases that the use of force in the circumstances presented would violate the law. (APB 62, citing *Williams v. City of Burlington,* 27 F.4th 1346, 1352 (8th Cir. 2022), and cases cited therein.) Appellees also wholly ignore and fail to address, as raised by

Appellants, this Court's finding in *Mitchell*, 28 F.4th 888 that it was clearly established that use of less lethals was more than *de minimus* force and inappropriate against persons not suspected of a serious crime, not threatening anyone and not fleeing or resisting arrest.

Objective reasonableness has guided the analysis of both qualified immunity and excessive force claims, even before the Supreme Court's decision in *Kingsley*. (*Ivey v. Williams, No. 12–30 (DWF/TNL)*, 2019 U.S. Dist. LEXIS 26034, at *10–11, citing *Wilson v. Spain*, 209 F.3d 713, 716 (8th Cir. 2000) [linchpin of qualified immunity is objective reasonableness of officer's actions; objective reasonableness also applied in analyzing merits of Fourth Amendment excessive-force claims]; *Nelson v. County of Wright*, 162 F.3d 986, 989–990, 990 n.5 (8th Cir. 1998) [standard for determining qualified immunity is identical to standard for deciding if use of force was excessive; both involve considerations of objective reasonableness].)

Appellees' argument as to qualified immunity rests, again, entirely on a falsely constructed presentation of facts that are of record disputed, requiring the court to stand in the stead of the fact finder to find for Appellees. Unfortunately, the district court incorrectly did just that. Those disputed facts also require collective attribution of unspecified conduct to all persons present over many hours and the collective attribution and assumption of intent of all persons who may have been present or absent at any time over all hours ("protesters were

engaged in numerous criminal activities and were attempting penetrate or circumvent the barricade") (BDA 60.) Tellingly, none of this is attributed to the Appellants.

Where "there is a genuine dispute concerning predicate facts material to the qualified immunity issue, there can be no summary judgment." (*Greiner v. City of Champlin*, 152 F.3d 787, 1352 (8th Cir. 1998).) As in *Ludwig*, "[t]he evidence in this case presents material issues of fact on which the issue of qualified immunity turns and 'presents a sufficient disagreement to require submission to a jury.'" (*Ludwig v. Anderson*, 54 F.3d at 470, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 251–252 (1986).)

V. A Jury Must Determine Supervisory Liability and Liability Pursuant to Monell

Appellees similarly fail to respond to Appellants' arguments for supervisory liability or policy liability under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978). (APB 66.) Appellees were direct participants in constitutional violations, failed to intervene to stop those violations and failed to train or supervise employees who committed constitutional violations. Appellees do not deny that supervisors Kaiser, Kirchmeier and Ziegler directly participated in constitutional violations by directing or ratifying the use of high-powered water cannons in sub-freezing temperatures against Appellants and other peaceful protestors

who were at most committing a misdemeanor trespass. Furthermore, Kaiser, Kirchmeier and Ziegler supervised the use of impact munitions being fired at the head and groin of Appellants and others, causing serious injury. No one intervened or made any attempt to mitigate the excessive force used against Appellants and others. Thus, a reasonable jury could find Kaiser, Kirchmeier and Ziegler acted with deliberate indifference to Appellants' constitutional rights.

Additionally, Morton County, Stutsman County and City of Mandan are liable to Appellants pursuant to *Monell*, for acts committed by their policy makers in directing, authorizing and ratifying the uses of force against Appellants and others on November 20, 2016. The complete lack of adequate supervision of these officers utilizing force over many hours as well as the complete deliberately indifferent failure to provide specific training in the use of military-grade weapons and the proper use of force in crowd control situations, despite having many months to do so, also subjects these municipal entities to liability. (See *City of Canton v. Harris*, 489 U.S. 378, 389–90 (1989).)[5]

[5] "It may seem contrary to common sense to assert that a municipality will actually have a policy of not taking reasonable steps to train its employees. But it may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need."(*Canton,* 489 U.S. at 390.)

Appellees dismiss all these arguments with a sweeping contention that neither supervisors nor entities can be liable in a § 1983 action absent an actual violation of a plaintiff's constitutional rights, citing *Russell v. Hennepin Cty.*, 420 F.3d 841, 846 (8th Cir. 2005); *Speer v. City of Wynne, Arkansas*, 276 F.3d 960 (8th Cir. 2002)[6] and *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014). These cases are unavailing, and Appellees' argument is not only wrong because Appellants have established an underlying constitutional violation in this case, but also because it is overly simplistic in construing the law.

Through their citation to *Jackson v. Nixon*, 747 F.3d 537, 543 (8th Cir. 2014), Appellees concede that a failure to properly train or supervise claim can be actionable under § 1983. While municipal liability requires a constitutional violation by a municipal employee, it does not require the plaintiff to bring suit against the individual employee or for there to be a finding of individual liability against an employee. (*Meier v. St. Louis*, 934 F.3d 824, 829 (8th Cir. 2019).)

In *Russell,* the plaintiff did not bring an allegation of excessive force. The sole unlawful detention/false imprisonment claim was not actionable because the plaintiff's prolonged detention resulted from confusion or negligence and therefore did not rise to the level of a constitutional violation. (*Russell,* 420 F.3d at 847.) Further, the court in *Speer* remanded the case for a determination of the basis of the

[6] *Speer* is inaccurately cited at BDA 62 as 376 F.3d 960.

municipality's dismissal, recognizing that "situations may arise where the combined actions of multiple officials or employees may give rise to a constitutional violation, supporting municipal liability, but where no one individual's actions are sufficient to establish personal liability for the violation." (*Speer,* 276 F.3d at 987.)

Appellants have shown the personal involvement of each supervisory defendant and a jury must determine the individual liability of Defendants-Appellees Kaiser, Kirchmeier and Ziegler as well as the liability of the entity Defendants-Appellees Morton County, Stutsman County and City of Mandan.

CONCLUSION

Genuine issues of material fact preclude summary judgment here. Appellees' false characterization of Appellants' actions is hotly contested and belied by the evidence and established facts. A jury must determine whether Appellees' ten-hour barrage of maiming force, injuring many, including Appellants, was objectively unreasonable in violation of the Fourth and Fourteenth Amendments. Appellants' supervisory and *Monell* liability claims must also be presented to a jury.

Respectfully submitted,

Dated: July 6, 2022

By: /s/ Rachel Lederman

One of the Attorneys
for Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **6,360 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, **14-pt Century Schoolbook**, using TypeLaw.com's legal text editor.

Dated: July 6, 2022 By: /s/ Rachel Lederman

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2022, 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.

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Respectfully submitted,

Dated: July 6, 2022

By: /s/ Rachel Lederman

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