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

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**Case No: 24-1911**

**Sophia Wilansky**  
*Plaintiff/Appellant*

**vs.**

**Morton County, North Dakota, et al.**  
*Defendants/Appellees*

**Case No: 24-1919**

**Sophia Wilansky**  
*Plaintiff/Appellant*

**vs.**

**Paul D. Bakke, In his personal capacity et al.**  
*Defendants/Appellees*

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Appeals from the U.S. District Court for the District of North Dakota - Eastern  
Case No. 1:18-CV-00236-DMT  
Case No: 3:23-CV-00142-DMT  
The Honorable Judge Daniel M. Traynor

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**BRIEF OF CITY AND COUNTY APPELLEES**

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## SUMMARY OF THE CASE

City and County Appellees deny responsibility for the explosion which injured Wilansky's arm. Regardless, Wilansky's purely factual allegations and matters this Court may consider in relation to a Rule 12 motion establish Wilansky has failed to allege a violation of her federal constitutional rights, fatal to her *Monell* claim. The circumstances surrounding the events, as alleged by Wilansky, establish she was not "seized" under the Fourth Amendment, as all use of force against her objectively manifested an intent to disperse/repel her from a restricted area (the closed Backwater Bridge and barricade), not an intent to restrain. Force allegedly applied was also objectively reasonable. Wilansky has also failed to allege conduct "unrelated to the legitimate object of the government action in question" which "shocks the conscience" in relation to her Fourteenth Amendment excessive force claim. Officers are also entitled to qualified immunity as the law was not clearly established at the time of the events at issue to place officers on reasonable notice that their alleged conduct would violate Wilansky's constitutional rights. The district court did not abuse its discretion by dismissing Wilansky's pleadings, with prejudice as Wilansky did not request leave to amend, did not explain what amendments were desired or how such amendments would have precluded dismissal. The district court's dismissals should be affirmed.

City and County Appellees request 20 minutes oral argument.

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

1. Whether the district court erred in holding that Wilansky has not alleged she was seized by Defendants for Fourth Amendment purposes.

*Torres v. Madrid*, 592 U.S. 306 (2021)

*Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023)

*Quraishi v. St. Charles County, Mo.*, 986 F.3d 831 (8<sup>th</sup> Cir. 2021)

*Martinez v. Sasse*, 37 F.4<sup>th</sup> 506 (8<sup>th</sup> Cir. 2022)

2. Whether the district court erred in holding that qualified immunity applies to the question of whether a Fourth Amendment seizure has occurred.

*Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023)

*Quraishi v. St. Charles County, Mo.*, 986 F.3d 831 (8<sup>th</sup> Cir. 2021)

*Martinez v. Sasse*, 37 F.4<sup>th</sup> 506 (8<sup>th</sup> Cir. 2022)

3. Whether the district court erred in holding that Wilansky was not subjected to excessive force under the Fourteenth Amendment.

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

*Agostini v Felton*, 521 U.S. 203 (1997)

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

*Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023)

4. Whether the district court erred by not categorically rejecting qualified immunity.  
*Agostini v Felton*, 521 U.S. 203 (1997)  
*Okruhlik v. Univ. of Arkansas ex rel. May*, 255 F.3d 615 (8th Cir. 2001)
5. Whether the district court erred in dismissing Wilansky's *Monell* claim.  
*Monell v. Department of Social Services*, 436 U.S. 658 (1997)  
*Russell v. Hennepin County*, 420 F.3d 841 (8th Cir. 2005)
6. Whether the district court erred in dismissing Wilansky's complaint against the other Defendants (3:23-cv-00142)  
*Wilansky v. Bakke*, 2024 WL 1435322 (D.N.D. Apr. 3, 2024)
7. Whether the district court erred in dismissing the Second Amended Complaint with prejudice.  
*Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751 (8th Cir. 2021)  
*Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772 (8th Cir. 2009)

## STATEMENT OF THE CASE

### I. WILANSKY’S RELEVANT ALLEGATIONS

Leading up to the events of November 20 and 21, 2016 at issue, there was a tumultuous protest at the Dakota Access Pipeline (“DAPL”) site near the Backwater Bridge (“the Bridge”) on Highway 1806 in Morton County, North Dakota which spanned a period of months. (JA339-355<sup>1</sup>, R.Doc.259 at ¶¶27-114). In response to construction of the Dakota Access pipeline and plans for it to cross the Missouri River approximately one mile north of the Backwater Bridge, “individuals from around the country and the world began traveling to North Dakota to . . . protest the pipeline.” (JA338, R.Doc.259 at ¶22.) “By September 2016, [protestors] had established a central camp, known as ‘Oceti Sakowin.’ Oceti Sakowin was located immediately east of North Dakota Highway 1806, approximately 50 miles south of Bismarck/Mandan and a mile south of the Backwater Bridge.” (JA338, R.Doc.259 at ¶24.) “Between September and December 2016, thousands of [protestors] resided at Oceti Sakowin.” (JA338, R.Doc.259 at ¶26.) “Morton County Sheriff’s Office requested assistance from other law enforcement agencies in North Dakota. In response, law enforcement officers from other North Dakota sheriff’s offices and

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<sup>1</sup> All “JA” citations refer to the Joint Appendix; all “SA” citations refer to the Supplemental Appendix of Appellees; all “R.Doc.” record citations are to no. 1:18-cv-00236; all “Companion R.Doc.” record citations are to No. 3:23-cv-00142.

police departments traveled to Morton County to assist in responding to the DAPL protests.” (JA339, R.Doc.259 at ¶31.) “On September 8, 2016, the Governor of North Dakota activated the North Dakota National Guard, which, along with the North Dakota Highway Patrol, began routinely assisting the Morton County Sheriff’s Office in responding to DAPL protests.” (JA340, R.Doc.259 at ¶32.) “In October 2016, North Dakota made an Emergency Management Assistance Compact request to neighboring states for assistance with the DAPL protests. In response, law enforcement officers from numerous states – including Wisconsin, South Dakota, Minnesota, Wyoming, Indiana, and Nebraska – traveled to Morton County to help the Morton County Sheriff’s Office respond to the DAPL protests.” (JA340, R.Doc.259 at ¶34.) Protestors clashed with pipeline construction workers, and law enforcement officers on numerous occasions between September 3 and November 20, 2016. (JA339, 342-343, R.Doc.259 at ¶¶29, 45-49.)

Sometime on or before November 20, 2016, law enforcement erected a barricade immediately north of the Bridge. (JA352, R.Doc.259 at ¶94.) “The barricade spanned the width of the highway and consisted of concrete roadblocks covered in multiple rings of concertina razor wire.” (JA352, R.Doc.259 at ¶95.) “Immediately in front of these concrete roadblocks were two large burned-out vehicles.” *Id.* This barricade prevented protestors from accessing the highway

further down the road. (JA352, R.Doc.259 at ¶96.) “Throughout November 2016, [protestors] attempted to negotiate the reopening of Backwater Bridge with Morton County to no avail. The County kept the bridge closed and barricaded.” (JA353, R.Doc.259 at ¶97.)

On the afternoon of November 20, 2016, numerous protestors went to the Backwater Bridge with a semi-truck and towed one of the burned-out vehicles off the Bridge and into a nearby ditch. (JA353, R.Doc.259 at ¶98.) “Law enforcement officers prevented these [protestors] from towing away the second burned-out vehicle.” (JA353, R.Doc.259 at ¶99.)

“Over the next several hours, hundreds of [protestors] gathered south of the barricade on Backwater Bridge to protest the continued closure of the bridge.” (JA353, R.Doc.259 at ¶100.) “In response, Defendant Kirchmeier issued a ‘Code Red,’ requesting that every law enforcement officer within 100 miles come to Backwater Bridge.”<sup>2</sup> (JA353, R.Doc.259 at ¶101.) “Throughout the entire protest, the law enforcement officers and the protestors remained separated by the barricade of concrete blocks and razor wire.” (JA354, R.Doc.259 at ¶103.) “Despite the protection afforded by this barrier, law

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<sup>2</sup> Wilansky’s original Complaint in the Primary Lawsuit also correctly alleged Morton County requested “the assistance of every available law enforcement officer in the entire state of North Dakota.” (JA061, R.Doc.001 at ¶87.) Although the district court relied upon this allegation in relation to its dismissal of Wilansky’s *Monell* and Fourteenth Amendment claims (JA103, R.Doc.046 at ¶14), Wilansky scrubbed this admission from her subsequent amended pleadings.

enforcement officers used dozens of less-lethal weapons on the protestors.”<sup>3</sup> (JA354, R.Doc.259 at ¶104.) “The November 20 protest lasted several hours and ended around midnight[,]” when “almost all of the protestors had returned to [to their camp] or otherwise dispersed.” (JA355, R.Doc.259 at ¶¶111-112.) “By 2:00 a.m. on November 21, 2016, the few ‘[protestors] still present at Backwater Bridge were chatting quietly near the makeshift campfires’ and “were no longer actively protesting.” (JA255, R.Doc.153 at ¶114.)

“In the early hours of November 21, 2016, [Wilansky] walked from Oceti Sakowin [protestor camp] to the Backwater Bridge, arriving at the bridge around 2:00 a.m.” (JA356, R.Doc.259 at ¶120.) “Slightly before 4:00 a.m., Sophia Wilansky approached the barricade near the remaining burned-out vehicle and chatted with other water protectors nearby. After a few minutes, the other [protestors] departed, leaving [Wilansky] alone in front of the barricade.” (JA357, R.Doc.259 at ¶124.) “A metal sheet about the size of a standard door was propped up against the driver-side front bumper of the truck.” (JA357, R.Doc.259 at ¶125.) Wilansky “stood unarmed near the truck for more than 30 minutes.” (JA357, R.Doc.259 at ¶127.)

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<sup>3</sup> This Court affirmed the district court’s dismissal of other protestors’ excessive force claims under the Fourth and Fourteenth Amendment and related *Monell* claims in relation to these events of November 20, 2016 in *Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250, 1257 (8<sup>th</sup> Cir. 2023), determining, in part, that the law was “not clearly established as of November 2016 that use of force to disperse the crowd was a seizure [under the Fourth Amendment].”

Shortly before 4:00 a.m., Stephen Joachinson approached [Wilansky] and they began to talk.” (JA357, R.Doc.259 at ¶128.) “At approximately 3:57 a.m., law enforcement officers ordered them to move away from the burned-out vehicle and accused them of having someone under the truck.” (JA357, R.Doc.259 at ¶131.) “Upon information and belief, this command was issued by Defendant Ternes.” (JA456, Companion R.Doc. 014 at ¶151.) “[Joachinson] yelled back that no one was under the truck.” (JA357, R.Doc.259 at ¶132.) “Instead of responding to [Joachinson’s] explanation, numerous law enforcement officers began firing less-lethal munitions at [Wilansky] and [Joachinson].” (JA358, R.Doc.259 at ¶133.) Wilansky alleges these officers were Defendants Arndt, Hanson, Skar, White, Moll and other unidentified officers. (JA456, Companion R.Doc.014 at ¶¶154-159.) “To avoid getting hit, [Wilansky] and [Joachinson] cowered behind the metal sheet.” (JA358, R.Doc.259 at ¶134.) “While [Wilansky] and [Joachinson] were pinned behind the sheet unable to move or leave, Defendant Dvorak lobbed two Stinger Ball [sic] toward them.” (JA358, R.Doc.259 at ¶135.) Dvorak “actively aimed the grenades toward [Wilansky].” (JA358, R.Doc.259 at ¶136.) “The Stinger Ball Grenades landed and exploded within a few feet of [Wilansky].” (JA358, R.Doc.259 at ¶137.) No one was injured from this use of force. *See id.* (not indicating any injury from this use of the stinger ball grenade).

“While [Wilansky] and [Joachinson] were pinned behind the metal sheet, Defendants Moll and law enforcement officers Skar, Hinrich, Rode, and Arndt moved west to get a better line of sight. Defendant Moll climbed into the turret of a Humvee with his 12-gauge shotgun, so he could better aim at [Wilansky] and [Joachinson].” (JA358, R.Doc.259 at ¶138.) “[Wilansky] was pinned behind the metal sheet for multiple minutes.” (JA458, Companion R.Doc.014 at ¶169.) “Eventually, the law enforcement officers hit [Wilansky] with at least one less-lethal munition. Upon information and belief, Defendant Arndt hit [Wilansky] with a less-lethal munition. Defendant Hanson may have hit [Wilansky] with a less-lethal munition as well.” (JA358-359, R.Doc.259 at ¶139.) “One of these bullets hit [Wilansky] in the upper left arm.” (JA359, R.Doc.259 at ¶140.) “The Law Enforcement Officer Defendants who were not personally shooting at [Wilansky] and [Joachinson] were actively assisting and encouraging the attack, by, for example, repositioning to get a better angle of fire on [Wilansky] and [Joachinson] and by helping to move obstructions so their fellow Defendants could get a better line of sight. (JA457, Companion R.Doc.014 at ¶161.)

“In extreme pain and realizing she had no way to avoid getting hit with additional munitions, [Wilansky] began running as fast as she could south, away from the barricade and truck.” (JA359, R.Doc.259 at ¶141.) “As [Wilansky] ran south, she pleaded with the law enforcement officers, yelling, ‘I’m leaving.

Please don't shoot.” (JA359, R.Doc.259 at ¶142). “While she was running, she was overtly complying with a law enforcement order to move south away from the barricade.” (JA359, R.Doc.259 at ¶144.)

“Over the course of the next few seconds, [Wilansky] ran approximately 30 yards south.” (JA359, R.Doc.259 at ¶145.) “While Sophia was retreating and pleading for the violence to stop, the Law Enforcement Officer Defendants [Arndt, Hanson, White, and other unidentified officers] continued to shoot at her.”<sup>4</sup> (JA460, Companion R.Doc.259 at ¶¶181-185.)

“[Wilansky] saw a piece of plywood on the ground as she was running south.” (JA359, R.Doc.259 at ¶146.) “[Wilansky] stopped at the plywood and attempted to pick it up to use as a shield.” (JA359, R.Doc.259 at ¶147.) “But just as [Wilansky] stopped and began to bend down toward the plywood, Defendant Moll intentionally hit her with an explosive munition.” (JA359, R.Doc.259 at

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<sup>4</sup> Wilansky first made this allegation of officers shooting at her as she ran south from the barricade in the Companion Lawsuit, filed seven years after the events at issue. Such new allegation is contrary to Wilansky's sworn deposition testimony in this case wherein Wilansky admitted she was not struck with any impact munitions from the time she left the truck until she reached down towards the debris pile to pick up a piece of plywood. (JA185, R.Doc.120-10 [Wilansky Depo.], pp.134-135.) She did not hear or see anything as she jogged between those two points that suggested someone was attempting to shoot something at her. (*Id.*)

¶148.) “Upon information and belief, the explosive munition was an Aerial Warning/Signaling Munition.” (JA360, R.Doc.259 at ¶149.)

“While the Law Enforcement Officer Defendants callously disregarded Sophia’s suffering and failed to render any aid, individuals from the nearby campfires ran to help her.” (JA462, Companion R.Doc.014 at ¶197.) “These individuals carried Sophia off the bridge and loaded her into a car.” (JA462, Companion R.Doc.014 at ¶198.) “Because Backwater Bridge was closed and barricaded, Sophia could not be transported directly to Sanford Hospital in Bismarck. Instead, she was taken south to the Prairie Knights Casino and Resort, where she waited in agony for an ambulance to arrive.” (JA462, Companion R.Doc.014 at ¶199.)

## **II. RELEVANT PROCEDURAL HISTORY**

Wilansky commenced the Primary Lawsuit by filing her Complaint (JA044, R.Doc.001, at ¶8) on November 19, 2018 asserting claims against, in relevant part, Morton County, Morton County Sheriff Kirchmeier and John Doe (“County Defendants”) - John Doe being the officer who allegedly deployed an explosive munition which injured Wilansky’s left arm. Wilansky had not alleged any claims pertaining to any other use of force, or any use of force claims against any other officer despite referencing the use of other impact munitions against her leading up to the subject explosion.

Instead of answering the Complaint, County Defendants filed a Rule 12(b)(6) motion to dismiss on January 22, 2019. (R.Doc. 29.) Instead of amending her pleading as a matter of right, Wilansky chose to stand on her pleadings and filed briefing in opposition. (R.Doc. 35.) On October 29, 2020, the district court granted the County Defendants' motion to dismiss Wilansky's Fourteenth Amendment excessive force claim and *Monell* claims as alleged under Wilansky's original complaint, and converted the balance of the County Defendants' Rule 12(b)(6) motion to a motion for summary judgment. (JA113-120, 131-137, R.Doc.046 at ¶¶38-54, 77-91.)

Following completion of limited discovery on the issue of qualified immunity, County Defendants' filed supplemental briefing in support of their converted motion for summary judgment at the district court's instruction. (SA085-130, R.Doc.110.) Without requesting leave to amend, Wilansky again stood by her pleadings and filed supplemental briefing in opposition. (*See generally* SA131-184, R.Doc. 124.)

Seven months following completion of all briefing on the converted motion for summary judgment, Wilansky requested leave to amend her complaint for the limited relevant purpose of identifying defendant John Doe. (SA186-190, R.Doc. 140 at pp.1-5.) The purpose of the requested amendment was to address the County Defendants' argument in supplemental briefing on the converted motion

for summary judgment that Wilansky had not met the threshold requirement of specifically identifying defendant John Doe. (SA107-108, R.Doc. 110, at pp.23-24.) The district court granted Wilansky limited authority to amend her complaint to identify John Doe, as requested by Wilansky. (JA205-211, R.Doc.151, at ¶13.)

As explained in the district court's *Order to Show Cause Regarding the First Amended Complaint's Compliance with the Court's Order* (JA267-271, R.Doc.235, at ¶¶2-10), and the district court's *Order Granting, in Part, and Denying, in Part, City and County Defendants' Motion to Strike Portions of Plaintiff's First Amended Complaint* (JA272-332, R.Doc.254, at ¶¶2-16), instead of limiting her amendments contained in her First Amended Complaint in the Primary Lawsuit to identifying John Doe, as requested and authorized, Wilansky attempted a do-over by filing an expansive rewrite of her pleadings to add eleven new defendants, new legal theories of liability (conspiracy, failure to intervene, excessive force as to use of impact rounds), alleging new damages resulting from impact (non-explosive) munitions, and a new theory as to how her arm was injured (changed allegation from hand-deployed low roll distraction device (i.e. flashbang) (JA063, R.Doc.001 ¶109), to a 12 gauge shotgun deployed aerial warning/signaling round (JA240, R.Doc.153 at ¶156)) – all post summary judgment briefing. The District Court appropriately determined Wilansky exceeded the limited authority to amend granted her in the Primary Lawsuit (only

limited amendments were requested) and struck the unauthorized amendments, requiring Wilansky to file a Second Amended Complaint containing only the authorized amendments (JA272-332, R.Doc.254, at ¶¶2-16), which Wilansky did on July 28, 2023 (JA333-379, R.Doc.259).

Wilansky then filed the Companion Lawsuit to allege the new claims and theories against the new defendants – the matters stricken from the original lawsuit. (JA428-484, Companion R.Docs.014, 036.) In response to Defendants filing Rule 12(b)(6) motions to dismiss the latest versions of the pleadings in both cases (R.Docs.265, 270; Companion R.Docs.20, 23), Wilansky did not again request leave to amend, did not submit proposed amended pleadings for consideration in either case, and instead proceeded with briefing in both cases (*see generally* SA366-409, R.Doc.277; Companion R.Doc.28). The district court granted the Defendants Rule 12(b)(6) motions, dismissing Wilansky’s remaining claims, with prejudice. (JA427 R.Doc.295 at ¶43; JA484, Companion R.Doc.036, at ¶6.) Wilansky appealed the dismissal of her excessive force claims under the Fourth and Fourteenth Amendments and related *Monell* claims in both cases. (SA410, R.Doc.301 at p.1; SA078, Companion R.Doc.38 at p.1.) Wilansky provides no argument in relation to the dismissal of her failure to intervene and conspiracy claims in her Companion Lawsuit, or in relation to the dismissal of her state law claims in the Primary Lawsuit. *See Mitchell v. Kirchmeier*, 28 F.4<sup>th</sup> 888,

895 (8<sup>th</sup> Cir. 2022) (deeming waived any challenge to dismissal of claims for which argument is not developed on appeal).

### **SUMMARY OF THE ARGUMENT**

Wilansky's Fourth Amendment excessive force claim was correctly dismissed as Wilansky has not alleged she was "seized" as the officer defendants' alleged use of force objectively manifested an intent to disperse or repel Wilansky from a restricted area with an available means of egress, rather than to restrain her. In the alternative, even if a seizure occurred, officers' application of force was objectively reasonable under the totality of the circumstances, and therefore did not violate Wilansky's Fourth Amendment rights.

Wilansky's Fourteenth Amendment excessive force claim was also correctly dismissed as officers' alleged use of force was related to the legitimate object of their government action in question and was not so extreme as to "shock the conscience". Even assuming, arguendo, Wilansky has alleged a violation of her constitutional rights, individual officers would be entitled to qualified immunity on the basis officers were not on clear notice their conduct violated a clearly established constitutional right of Wilansky under clearly established binding precedent. A lack of constitutional violation is also fatal to Wilansky's *Monell* claim.

This Court should also reject Wilansky's invitation to reject the overabundance of binding case law applying the doctrine of qualified immunity and leave to the Supreme Court the prerogative of overruling its own decisions. Further, the district court's dismissal of Wilansky's claims, with prejudice, was not in error. Wilansky did not request further leave to amend her pleadings in response to the Rule 12 motions to dismiss at issue, and stood on her pleadings. Wilansky also did not explain what amendments she would have made and how those amendments would have precluded dismissal of her claims in this case.

## **ARGUMENT**

### **I. STANDARD OF REVIEW**

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a party may move the Court to dismiss a claim if, on the pleadings, a party has failed to state a claim upon which relief may be granted.

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

*Zutz v. Nelson*, 601 F.3d 842, 848 (8<sup>th</sup> Cir. 2010) (citations omitted). The Court need not accept as true wholly conclusory allegations, *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8<sup>th</sup> Cir. 1999), or legal conclusions that the

plaintiff draws from the facts pled. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8<sup>th</sup> Cir. 1990). Well-pleaded facts, not legal theories or conclusions, determine the adequacy of the complaint. *Clemons v. Crawford*, 585 F.3d 1119, 1124 (8<sup>th</sup> Cir. 2009). The facts alleged in the complaint “must be enough to raise a right to relief above the speculative level.” *Id.* “[A] plaintiff ‘must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . . , rather than facts that are merely consistent with such a right.’” *Gregory v. Dillard’s, Inc.*, 565 F.3d 464, 473 (8<sup>th</sup> Cir. 2009), quoting *Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8<sup>th</sup> Cir. 2007). “[D]etermining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

In this circuit, Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or in opposition to the motion. *See Martin v. Sargent*, 780 F.2d 1334, 1336-37 (8<sup>th</sup> Cir. 1985). Some materials that are part of the public record or do not contradict the complaint may be considered by a court in deciding a Rule 12(b)(6) motion to dismiss. *See Papasan v. Allain*, 478 U.S. 265, 268 n. 1, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986); *Hollis v. United States Dep’t of Army*, 856 F.2d 1541, 1543-44 (D.C. Cir. 1988).

*State v. Coeur D’Alene Tribe*, 164 F.3d 1102, 1107 (8<sup>th</sup> Cir. 1999); *see Papasan v. Allain*, 478 U.S. 265, 268 n.1 (1986) (“Although this case comes to us on a motion to dismiss under Federal Rule of Civil Procedure 12(b), we are not precluded in

our review of the complaint from taking notice of items in the public record, such as documentation of the history of the Mississippi and other school lands grants.”).

While courts primarily consider the allegations in the complaint in determining whether to grant a Rule 12(b)(6) motion, courts additionally consider “matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned;” without converting the motion into one for summary judgment. 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357 (3d ed. 2004).

*Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d 928, 931 n.3 (8<sup>th</sup> Cir. 2012) (taking into consideration, in relation to Rule 12(b)(6) motion, plaintiff’s initial and amended complaints, and the record created as a result of the plaintiff’s motion for temporary restraining order, preliminary injunction and expedited discovery filed by plaintiff after the motion to dismiss was filed); *see, also Williams v. Employers Mutual Casualty Company*, 845 F.3d 891, 903-04 (8<sup>th</sup> Cir. 2017).

In addition, although not considered by the district court, Wilansky’s own deposition testimony in this case may also be considered in the context of a Rule 12 motion to dismiss. *See Miller v. Redwood Toxicology Laboratory, Inc.*, 688 F.3d at 931 n.3 (taking into consideration, in relation to Rule 12(b)(6) motion, plaintiff’s initial and amended complaints, and the record created as a result of the plaintiff’s motion for temporary restraining order, preliminary injunction and

expedited discovery filed by plaintiff after the motion to dismiss was filed); *Blount v. ADP, Inc.*, 2012 WL 12957379 \*2 (S.D. Cal. 2012) (considering the plaintiff's sworn deposition testimony which was part of the record in that case which contradicted allegations in complaint when ruling on Rule 12 motion to dismiss); *Elkharwily v. Mayo Holding Co.*, 955 F. Supp. 2d 988, 996 (D. Minn. 2013) (internal quotation marks omitted), *aff'd*, 823 F.3d 462 (8th Cir. 2016) (when evaluating a motion to dismiss, if "a written instrument contradicts allegations in the complaint ... the exhibit trumps the allegations.") Wilansky cannot reasonably argue her own testimony cannot be used against her.

In addition, a court may take judicial notice of, and give effect to, its own records in another, but interrelated proceeding. *Freshman v. Atkins*, 269 U.S. 121, 124 (1925). *See also Insulate SB, Inc. v. Advanced Finishing, Inc.*, 797 F.3d 538, 543 n.4 (8<sup>th</sup> Cir. 2015) (taking judicial notice of an order and documents in interrelated cases in relation to the existence of and basic facts surrounding the actions); *Rosemann v. Sigillito*, 785 F.3d 1175, 1178 n.3 (8<sup>th</sup> Cir. 2015) ("We may take judicial notice of judicial opinions, especially our own, and thus may reference the fact of Sigillito's conviction and his sentence in our consideration of this case."); *State of Florida Board of Trustees of Internal Improvement Trust fund v. Charley Toppino and Sons, Inc.*, 514 F.2d 700, 704 (5<sup>th</sup> Cir. 1975) ("It is not error . . . for a court to take judicial notice of related proceedings and records in cases before that

court.” (citing *National Fire Insurance Co. v. Thompson*, 281 U.S. 331, 335 (1930)); *Enterprise Bank v. Magna Bank of Missouri*, 894 F.Supp. 1337, 1341 (E.D. Mo. 1995) (taking judicial notice of records of two earlier actions before the same court for the purpose of establishing the facts leading up to the action then before the court).

Dismissal of all claims as to all Defendants was appropriate as Wilansky has failed to allege a plausible violation of her constitutional rights. Even assuming, *arguendo*, Wilansky has alleged a plausible claim for violation of a constitutional right, such right was not so clearly established at the time of the deprivation so that a reasonable officer would have understood his conduct was unlawful under the very unique circumstances presented, thereby entitling the individual defendants to qualified immunity.

## **II. WILANSKY FAILS TO ALLEGE A PLAUSIBLE EXCESSIVE FORCE CLAIM UNDER THE FOURTH AMENDMENT**

### **A. Wilansky Has Not Alleged She Was “Seized”**

Wilansky’s purely factual allegations fail to allege a “seizure” as required to state a cognizable Fourth Amendment excessive force claim. The Fourth Amendment protects individuals against “unreasonable searches and seizures.” U.S. CONST. AMEND. IV. An excessive force claim under the Fourth Amendment requires an allegation of the use of excessive force by the government in connection with a “seizure” of the plaintiff by the government.

*See Graham v. Connor*, 490 U.S. 386, 393-396 (1989) (noting the Fourth Amendment guarantees citizens right “ ‘to be secure in their persons . . . against unreasonable . . . seizures’ of the person”, and noting excessive force claims under the Fourth Amendment relate to the use of force in the context of seizures). “A ‘seizure’ of a ‘person’ plainly refers to an arrest” and “that linkage persists today.” *Torres v. Madrid*, 592 U.S. 306, 312 (2021).

Under the Fourth Amendment, there are two ways in which a law enforcement officer may effectuate a “seizure,” thus triggering the excessive force: seizure by force and seizure by control. *Torres v. Madrid*, 592 U.S. at 322. Each of these types of seizures has a separate common law pedigree and for which different principles are applied. “An arrest requires *either* physical force . . . or, where that is absent, submission to the assertion of authority.” (citing *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (italics in original)). Wilansky does not contend she has alleged a seizure through submission to the assertion of authority in this case. *See* JA419, R.Doc.295 at fn. 7 (“Wilansky also did not voluntarily submit to the officers show of authority, but that is not at issue here.”). Instead, Wilansky asserts she has alleged a seizure as a result of physical force applied to her body, and as the alleged result of termination of her freedom of movement as a result of the use of force by officers. A seizure through termination of freedom of movement “requires that ‘a person be stopped by the very instrumentality set in

motion or put in place **in order to achieve that result[]**” through “an intentional acquisition of physical control.” *Torres*, at 322 (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596, 599 (1989)) (bold added). “That result,” being exercising physical control to effectuate an arrest. *See id.* As explained by the United States Supreme Court in *Torres*:

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. . . .

*Torres*, at 998 (citations omitted, italics in original, underline added). “Only an objective test **allows the police to determine in advance** whether the conduct contemplated will implicate the Fourth Amendment.” *Id.* (bold added). “Nor does the seizure depend on the subjective perceptions of the seized person.” *Id.* at 999. Wilansky’s perceptions in relation to the force allegedly applied by officers are irrelevant to the seizure inquiry (i.e. Wilansky’s perception she was trapped or pinned behind the metal shield by force directed at her), and instead the proper inquiry is whether the officer’s contemplated use of force would have been

understood by a reasonable officer under the totality of the circumstances presented to manifest an intent to restrain, or manifest some other intent, such as to repel or disperse. How else could officers “determine in advance whether the conduct contemplated would implicate the Fourth Amendment”? *Torres*, at 998. 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.

This Court, and other courts, have interpreted *Torres* to mean that an officer’s use of force for some purpose other than to restrain, such as to disperse or repel, does not constitute a seizure under the Fourth Amendment. *See Wolk v. City of Brooklyn Center*, 107 F.4<sup>th</sup> 854 (8<sup>th</sup> Cir. 2024) (officers entitled to qualified immunity as law was not clearly established as of April of 2021 that use of tear gas, flashbang grenades, pepper spray and rubber bullets to disperse a crowd constituted a seizure under the Fourth Amendment); *Martinez v. Sasse*, 37 F.4<sup>th</sup> 506 (8<sup>th</sup> Cir. 2022) (officer entitled to qualified immunity as law was not clearly established as of June 2018 that repelling an individual by pushing them to the ground to prevent entry into a building constituted a seizure under the Fourth Amendment); *Quraishi v. St. Charles County, Mo.*, 986 F.3d 831 (8<sup>th</sup> Cir. 2021) (officers entitled to qualified immunity as law was not clearly established as of August 2014 that use of tear gas to disperse a crowd constituted a seizure under

the Fourth Amendment); *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 48-49 (D.C. 2021) (“BLM”) (officers entitled to qualified immunity as law was not clearly established as of June 2020 that use of flashbang grenades, rubber bullets and tear gas to disperse a crowd constituted a seizure under the Fourth Amendment). In each of those cases, despite alleged injuries and alleged impacts upon the plaintiffs’ freedom of movement as a result of force applied, the courts determined each use of force objectively manifested an intent to disperse or repel rather than to restrain, and as a result, no seizure under the Fourth Amendment occurred. In these cases, officers applied either direct force (pushing a lawyer to the ground to prevent entry into a building in *Martinez*) or indirect force (deploying teargas, flashbang grenades, pepper spray and rubber bullets in *Wolk*, teargas in *Quraishi*, and flashbang grenades, rubber bullets and teargas in *BLM*) to the bodies of individuals. *See, also Hollamon v. County of Wright*, 2024 WL 3653092 at \*\*8-12 (D. Minn. Aug. 5, 2024) (oil pipeline protester struck in the head with pepper balls in 2021 was not seized under the Fourth Amendment as the use of force objectively manifested an intent to disperse, not restrain); *Perkins v. City of Des Moines, Iowa*, 2024 WL 756283 \*\*6-8 (S.D. Iowa Jan. 22, 2024), *appeal docketed*, No. 24-1375 (8th Cir. February 23, 2024) (vehicle passenger struck by impact round during protest in 2020 was not seized under the Fourth Amendment as such force objectively manifested an intent to disperse, not

restrain); *Keup v. Sarpy County*, 2023 WL 8829298 \*\*17-19 (D. Neb. Dec. 21, 2023), *appeal docketed*, No. 24-1114 (8<sup>th</sup> Cir. Jan. 22, 2024) (protest attendee who was shot in the eye with a pepper ball was not seized under the Fourth Amendment as such force objectively manifested intent to disperse rather than restrain); *Meggs v. City of Berkeley*, 2005 WL 483445, at \*\*6-7 (N.D. Cal. Mar. 2, 2005) (an officer’s use of a police baton to push back a protester from police line, and chop strike to protester’s arm while directing protester to stay back was intended to repel rather than restrain, and therefore did not constitute a seizure under Fourth Amendment).

Wilansky’s Fourth Amendment excessive force claim is foreclosed by this Court’s decision in *Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023). Wilansky’s claims in the present case pertain to events occurring at the exact same location, and only a few hours later from those at issue in *Dundon*. In *Dundon*, this Court considered whether “officers effected a seizure when they used force [water, tear gas, and rubber bullets] against [protestors] with an intent to disperse the crowd.” *Id.* at 1255. This Court in *Dundon* concluded that “the protestors have not shown that it was clearly established as of November 2016 that a use of force designed to disperse a crowd constituted a seizure.” *Id.* The Court acknowledged that there was Eighth Circuit precedent at the time stating that use of force (including pepper spray, lead-filled bean bags, mace) constituted a seizure but

distinguished those cases as “inapposite because the officer used force to *apprehend* a suspect,” rather than to *disperse* them. *Id.* at 1256 (emphasis added) (citing *Mitchell v. Kirchmeier*, 28 F.4th 888 (8<sup>th</sup> Cir. 2022); *Baude v. Leyschock*, 23 F.4th 1065, 1070 (8th Cir. 2022); *Small v. McCrystal*, 708 F.3d 997, 1002 (8th Cir. 2013); *Montoya v. City of Flandreau*, 669 F.3d 867, 873 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 823-24 (8th Cir. 2011); *Shannon v. Koehler*, 616 F.3d 855, 858 (8th Cir. 2010)). This Court in *Dundon* also distinguished *Torres*, 592 U.S. at 317, “which held that police seized a suspect for the instant that police bullets struck her, even though the suspect temporarily eluded arrest thereafter” because that case also “involved force used to *apprehend* a suspect.” *Dundon*, 85 F.4th at 1255 (emphasis in original) (also noting that “*Torres* was decided after the encounter at issue here, so it does not constitute clearly established law for purposes of this case”).

In *Dundon*, this Court also relied upon its prior decisions in *Martinez* and *Quraishi* as well as a decision by the United States District Court of the District of Columbia, in *BLM*. Those cases all found that the law was not clearly established that the use of force to disperse a crowd or repel an individual constitutes a seizure under the Fourth Amendment.

In *Martinez*, an officer who pushed an attorney to the ground and locked the door to an ICE facility to prevent the attorney’s entry was entitled to qualified

immunity in relation to a Fourth Amendment excessive force claim because the law was not clearly established as of June 2018 that the application of physical force for the purpose of repelling someone, rather than apprehending someone, constituted a seizure under the Fourth Amendment. *Id.* at 509-10. *Martinez* distinguished *Atkinson v. City of Mountain View*, 709 F.3d 1201 (8<sup>th</sup> Cir. 2013) on the basis officer’s conduct in *Atkinson* objectively manifested an intent to restrain the plaintiff because after bull-rushing the plaintiff, the plaintiff was immediately hand-cuffed and arrested. “The ‘bull rush’ was not performed to repel the citizen, and the decision did not provide clear guidance on whether force used only for that purpose constitutes a seizure.” *Martinez* at 510.

In 2021, even before *Torres* was decided, the Eighth Circuit determined in *Quraishi* that an officer who deployed tear gas to disperse a crowd of protesters was entitled to qualified immunity in relation to a Fourth Amendment excessive force claim brought by members of the press who were intermingled with protesters because the law was not clearly established as of August 2014 that deploying tear gas for the purpose of dispersing a crowd, rather than to restrain anyone, constituted a seizure under the Fourth Amendment. *Id.* at 840. The Court rejected the plaintiffs’ argument they were restrained because they could not stay in their chosen location, noting the cited cases did not give fair warning the use of tear gas to disperse a crowd constituted a seizure. *Id.*

In *BLM*, the United States District Court for the District of Columbia, citing *Torres*, determined the law was not clear as of June 2020 that officers seized protesters under the Fourth Amendment through the 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. 544 F.Supp.3d at 48-49.

This Court's very recent decision in *Marks v. Bauer*, 107 F.4th 840 (8th Cir. 2024) is distinguishable from the present case. In *Marks*, an officer shot a protestor in the face with a projectile from only 5 to 10 feet away purportedly to stop the assaultive protestor from re-engaging with another officer. As explained by the district court in *Marks* in concluding a seizure had occurred:

The cases cited by Officer Bauer do not compel a different result because all involve force used to disperse or repel individuals from restricted areas rather than force used to restrain movement. See *Dundon v. Kirchmeier*, 2017 WL 5894552, at \*3, \*18 (D.N.D. Feb. 7, 2017), *aff'd mem.*, 701 F. App'x 538 (8th Cir. 2017) (holding officers' use of rubber bullets and projectiles to disperse a crowd of protesters was not a seizure); *Martinez v. Sasse*, 37 F.4th 506, 509-10 (8th Cir. 2022) (holding officer's push of plaintiff to prevent her from entering a building was not a seizure because the alleged push did not "restrain" plaintiff but instead "repelled" plaintiff from entering the building). Officer Bauer has stated that he did not use the 40-millimeter launcher as a dispersal tool. He also described Marks as "fleeing," rather than dispersing, which further shows that Officer Bauer used force to restrain Marks and not to repel him. A person who is free to leave or who is complying with an officer's dispersal efforts is typically not described as "fleeing the scene."

*Marks v. Bauer*, 2023 WL 1478015, at \*6 (D. Minn. Feb. 2, 2023), *aff'd*, 107 F.4th 840 (8th Cir. 2024) (citations to the record omitted). The district court in *Marks*

expressly distinguished the facts of *Dundon* on the basis force was utilized by officers in *Dundon* to disperse or repel individuals from restricted areas rather than force used to restrain movement (i.e. inquiry is on objective manifestation of intent in using force). The current case also involves officers' alleged use of force to repel Wilansky from the exact same restricted area at issue in *Dundon*, the closed bridge, barricade, and areas located beyond the barricade. *Marks* is distinguishable.

As explained below, Wilansky's purely factual allegations as to what each individual Defendant did establish none of them individually seized Wilansky under the Fourth Amendment under either the use of force or seizure by control tests. The claims against the individual Defendants must be analyzed separately from each other, and separately from the alleged conduct of other officers on the scene. "Liability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed. Section 1983 does not sanction tort by association." *Smith v. City of Minneapolis*, 754 F.3d 541, 547 (8<sup>th</sup> Cir. 2014) (internal quotation marks omitted). "An officer may be held liable only for his or her own use of excessive force." *Id.* at 547-48 (quoting *Smith v. Kansas City, Mo. Police Dep't*, 586 F.3d 576, 581 (8<sup>th</sup> Cir. 2009)). Wilansky's attempt to impute the conduct of each individual Defendant to the other Defendants runs afoul of these principles.

Wilansky alleges she was struck one time by an impact round allegedly fired by Arndt while Wilansky was behind the metal shield (JA358-359, R.Doc.259 at ¶139; JA459, Companion R.Doc.014 at ¶175.) She also alleges she was later struck by an explosive aerial warning/signaling munition allegedly deployed by Moll (JA359, R.Doc.259 at ¶148; JA461, Companion R.Doc.014 at ¶¶189-90) when she stopped proceeding south across the Bridge (i.e stopped complying with the admitted command to move south away from the barricade), and bent down to pick up a piece of plywood to use as a shield (again, admitting Wilansky’s intent to defy admitted command to proceed south way from the barricade). Wilansky does not allege her body was actually impacted by any other use of force by any other officer, including with respect to the two Stinger Ball Grenades allegedly deployed by Dvorak. Wilansky’s alleged perceptions, including her perception she was “pinned” or “trapped” behind the metal shield/barricade, are not relevant to the seizure analysis. *Torres* at 998.

In the present case, Wilansky admits that over a period of months (September through November) leading up to the incident at issue, other protests occurred in Morton County involving confrontations between protesters and law enforcement (JA341-343, R.Doc.259 at ¶¶42-49; JA439-440, Companion R.Doc.014 at ¶¶59-64), including a large confrontation between protesters and officers at this same location only a few hours prior to the events at issue in this

case. (JA353-355, R.Doc.259 at ¶¶97-111; JA450-451, Companion R.Doc.014 at ¶¶108-18.) Wilansky admits not all of the protesters on November 20, 2016 were peaceful by alleging only “[t]he vast majority of protesters were peaceful”, and admitting “a protester was able to cross the concertina wire and jersey barrier barricade, who “was immediately apprehended by law enforcement and arrested. (JA451, Companion R.Doc.014 at ¶117.) These admitted facts establish continuing chaos and tension between protesters and law enforcement. Wilansky acknowledges law enforcements’ presence significantly grew over the fall months of 2016, with requests being made by Sheriff Kirchmeier and the State of North Dakota for assistance in responding to the DAPL protests from multiple law enforcement agencies within North Dakota and surrounding states. (JA339-340, R.Doc.259 at ¶¶31-34; JA437, Companion R.Doc.014 at ¶¶44-47.) Wilansky also acknowledges a large crowd of protesters gathered on the Bridge on November 20, 2016 hours earlier, with protesters removing one of two burned-out trucks from the barricade, and with protesters attempts to remove the second burned-out truck being thwarted due to the application of less-lethal force by law enforcement. (JA449-450, Companion R.Doc.014 at ¶¶107-09; JA353, R.Doc.259 at ¶¶98-99.) Wilansky has testified she knew that law enforcement officers were utilizing less lethal munitions at the Bridge before she went to the Bridge herself on November 20, 2016, and she alleges that while she was at the Bridge for several hours before

the incident at issue she observed law enforcement deploying bean bag rounds, rubber bullets, teargas, light sound munitions and water cannons for hours that night, all prior to her positioning herself along the barricade. (JA160, R.Doc.120-10 [Wilansky Depo.], at pp.35-36.) This observance alone constituted a prior warning. Wilansky alleges that prior to force being applied against her, law enforcement manning the barricade warned her to move south away from the burned-out vehicle forming a part of the barricade - away from law enforcement. Wilansky admits the Bridge itself was closed and barricaded at the time of the incident – i.e. a restricted area. (JA352-351, R.Doc.259 at ¶¶94, 96-97; JA462, Companion R.Doc.014 at ¶199.) Press releases issued by the North Dakota Department of Transportation on October 28 and 31, 2016 (SA076-077, R.Docs.30-6, 30-7 at p.1; SA001-002, Companion R.Docs.22-9, 22-10 at p.1), stated the Bridge was closed due to the structural integrity of the Bridge, and “the Bridge is unsafe for anyone to cross.” As noted by the district court in *Dundon*, “[e]ven if an ambiguity exists, it is hard to envision a situation where an officer, or even a reasonable juror for that matter, would think it was safe for a pedestrian to be on the Bridge when engineers were concerned about the safety of the Bridge’s structure.” *Dundon v. Kirchmeier*, 577 F.Supp.3d 1007, 1044 (D.N.D. 2021). This Court, in affirming the dismissal of other protestors’ excessive force claims in the interrelated *Dundon* case, noted “The North Dakota Department of Transportation

closed the bridge and placed ‘No Trespassing’ signs near it.” *Dundon*, 85 F.4<sup>th</sup> at 1254. It cannot reasonably be disputed Wilansky was trespassing at all locations where force was allegedly applied against her. Wilansky admits officers were positioned north of the barricade. (JA355, R.Doc.259 at ¶1113; JA453, at ¶128.) It is not disputed officers made no attempt to proceed south of the barricade to apprehend anyone.

Wilansky has not alleged she was arrested or restrained by law enforcement, or even advised by law enforcement she was not free to terminate the encounter with law enforcement. Wilansky does not allege law enforcement at any time told her to remain where she was. Wilansky does not allege nonconclusory facts to infer the force was applied for the purpose of law enforcement gaining physical control over Wilansky. Wilansky admits following the explosion, she proceeded with the assistance of other protesters south off the Bridge, and was transported further south to the Prairie Knights Casino and Resort, from where she was transported to a hospital.

Wilansky’s allegation the deployment of stinger ball grenades (which did not impact her), or any other munition prevented her from proceeding south across the Bridge is contrary to her own admission that she did in fact proceed south across the Bridge. Wilansky and other protesters were always able to, and did, leave the area where force was being applied by proceeding south across the

bridge. As a practical matter, the stinger ball grenades and other less-lethal munitions allegedly deployed did not, as a matter of common sense, create any barrier to Wilansky's retreat. Wilansky admitted during her deposition that she was not struck with any impact munitions from the time she left the truck until she reached down towards the debris pile to pick up a piece of plywood. (JA185, R.Doc.120-10 [Wilansky Depo.], at p.134.) She did not hear or see anything as she jogged between those two points that suggested someone was attempting to shoot something at her. (JA185, R.Doc. 120-10 at pp.134-135.)

Under Wilansky's alleged facts and materials this Court may consider in ruling upon this Rule 12 motion, the alleged application of force against Wilansky objectively manifested an intent to repel/disperse Wilansky and the other protester (Joachinson) hiding behind the burnt-out truck and propped up metal shield, not an intent to restrain them.

### **1. Wilansky Has Failed To Allege A Seizure by Moll**

Defendant Moll is only a named-defendant in the Primary Lawsuit. The only conduct Wilansky specifically alleges in the Primary Lawsuit that Moll engaged in is as follows:

138. While Sophia and Stephen were pinned behind the metal sheet, Defendant Moll and law enforcement officers Skar, Hinrich, Rode, and Arndt moved west to get a better line of sight. Defendant Moll climbed into the turret of a Humvee with his 12-gauge shotgun, so he could get a better aim at Sophia and Stephen.

139. Eventually, the law enforcement officers hit Sophia with at least one less-lethal munition. Upon information and belief, Defendant [sic] Arndt hit Sophia with a less-lethal munition. Defendant [sic] Hanson may have hit Sophia with a less-lethal munition as well.

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148. But just as Sophia stopped and began to bend down toward the plywood, Defendant Moll intentionally hit her with an explosive munition.

149. Upon information and belief, the explosive munition was an Aerial Warning/Signaling Munition.

(JA358-360, R.Doc.259 ¶¶138-39, 148-49.)

In the Companion Lawsuit, to which Moll is not a party, Wilansky further alleges Moll was one of the officers who shot at her [but does not allege he struck her] while she was behind the metal sheet. (JA457, Companion R.Doc.014 at ¶ 158.) Wilansky does not allege Moll issued any commands to Wilansky in either action. Wilansky only alleges she was hit by an alleged Aerial Warning/Signaling Munition fired by Moll after she stopped proceeding south across the bridge (i.e. stopped complying with the command by other officers to move away from the barricade) and began to bend down toward a piece of plywood she intended to use as a shield (JA359, R.Doc.259 at ¶¶146-148) (i.e. again admits intention to stop complying with command by other officers to move away from the barricade). These specific allegations as to the conduct of Moll, in conjunction with Wilansky's other allegations of events surrounding the incident discussed above, objectively manifest the intent behind Moll's use of force was to repel Wilansky

from the restricted area (i.e. the Bridge and barricade). Wilansky's Fourth Amendment excessive force claim against Moll fails on this basis alone.

## **2. Wilansky Has Failed to Allege A Seizure By Dvorak**

Like Moll, Dvorak is only a named defendant in the Primary Lawsuit. The only conduct Wilansky alleges in the Primary Lawsuit Dvorak engaged in is as follows:

135. While Sophia and Stephen were pinned behind the sheet unable to move or leave, Defendant Dvorak lobbed two Stinger Ball [sic] toward them.

136. In a blatant violation of his less-lethal training and appropriate police tactics, Defendant Dvorak did not inspect the likely detonation area to ensure no one would be hit by the grenades. Instead, he actively aimed the grenades toward Sophia.

137. The Stinger Ball Grenades landed and exploded within a few feet of Sophia.

(JA358, R.Doc.259 ¶¶135-37.)

Wilansky asserts she perceived she was pinned behind the metal sheet before Dvorak deployed either stinger ball grenade, and does not allege she was actually struck by either stinger ball grenade. Wilansky does not allege Dvorak issued any verbal commands to her, but rather alleges other officers had commanded her to move away from the barricade prior to Dvorak's alleged use of indirect force.

Even assuming, arguendo, the deployment of the stinger ball grenades which are not alleged to have actually impacted Wilansky could be construed as a use of force upon which an excessive force claim could be based, Wilansky's allegations establish a reasonable officer would have perceived the planned deployment of the stinger ball grenades under the alleged circumstances as manifesting an intent to repel rather than to restrain Wilansky and Joachinson from behind the barricade. Wilansky admits that prior to the deployment of the stinger ball grenades, other officers commanded Wilansky to move away from the barricade and other officers were deploying impact rounds, yet Wilansky remained concealed behind the metal shield. As discussed, Wilansky's pleadings admit a large violent confrontation between protesters and law enforcement officers had occurred at this very location only hours prior, with protesters removing a burned-out truck forming a part of the barricade (chained to the concrete traffic barriers<sup>5</sup>), and attempting to pull away the other burned-out truck in the face of force applied by officers (i.e. protester attempts to dismantle the defensive barricade). Being dispersed/repelled from a restricted area as a result of the application of force does not constitute a termination or restriction on freedom of movement. *See Quraishi*, at 840 (an officer's dispersal of a crowd through the

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<sup>5</sup> *Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> at 1254.

use of tear gas did not result in termination or restriction upon freedom of movement).

**3. Wilansky Has Failed To Allege A Seizure By Any Other Defendant**

Wilansky does not allege Defendants Ternes, Grosz, Bakke, Hinrichs, Nelson, Rode, or Savageau used any force against her at all, whether impacting her or being directed at her. After specifically identifying Defendants Arndt, Hanson, Skar, White and Moll as individuals who allegedly shot at Wilansky while she “cowered behind the metal sheet” to avoid getting hit, Wilansky expressly alleges not all individual Defendants were personally shooting at her. (JA457, Companion R.Doc.014 at ¶161.) Wilansky’s additional allegation that “[o]n information and belief, other Law Enforcement Officer Defendants fired less-lethal munitions at Sophia and Stephen as well” (JA457, Companion R.Doc.014 at ¶159) is too vague to place Defendants Ternes, Grosz, Bakke, Hinrichs, Nelson, Rode, or Savageau on notice whether Wilansky is asserting they are alleged to have been shooting at Wilansky. Defendants Bakke, Nelson, and Savageau are not even specifically referenced in relation to the events on November 21, 2016. The only reference to Defendants Hinrichs and Grosz in relation to the events of November 21 was that Hinrichs allegedly “moved west to get a better line of sight on Sophia” (JA458, Companion R.Doc.014 at ¶166), and “Grosz moved out from behind one of the

military vehicles to get a better line of sight on Sophia[ ]” [JA458, Companion R.Doc.014 at ¶167].

Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

*Ashcroft v. Iqbal*, 556 U.S. at 678 (quotation marks and citations omitted). “But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’ Fed. Rule Civ. Proc. 8(a)(2).” *Id.* at 679.

Although Wilansky alleges in her *First Amended Complaint* in the Companion Lawsuit that after she began running south from the barricade and truck “the Law Enforcement Officer Defendants continued to shoot at her” (JA460, Companion R.Doc.014 at ¶¶181, 185), and specifically identifies Arndt, Hanson, and White as doing so (JA460, Companion R.Doc.014 at ¶¶182-84), such allegations are too vague to place any Defendant aside from Arndt, Hanson and White on notice that they are alleged to have engaged in such conduct. In addition, such allegations are directly contrary to Wilansky’s sworn deposition testimony where she admitted she was not struck with any impact munitions from the time she left the truck until she reached down towards the plywood, and she did not hear or see anything as she jogged between those two points that suggested someone was attempting to shoot something at her. (JA185, R.Doc.120-10 at pp.134-35.)

Wilansky's allegations concerning the deployment of impact munitions toward her as she proceeded south was not alleged in the Companion Case and first appears in her *First Amended Complaint* in this action. Such allegations which are contrary to Wilansky's sworn testimony should be disregarded. But even if such allegations are accepted as true (which are denied), Wilansky none-the-less fails to allege a seizure in relation to such alleged conduct. The Eighth Circuit in *Quraishi* rejected the argument that an officer's deployment of tear gas terminated or restricted the plaintiff reporters' freedom of movement because they could not stay in their chosen location, noting the reporters were instead dispersed. *Quraishi*, at 840 (citing *Johnson v. City of Ferguson*, 926 F.3d 504, 506 (8<sup>th</sup> Cir. 2019 (en banc) (no seizure where plaintiff was not "ordered to stop and remain in place" and "was able to leave the scene"))). In other words, being dispersed or repelled does not constitute a termination or restriction upon freedom of movement under the Fourth Amendment. *See also Martinez*, at 510 (pushing attorney to the ground to prevent entry into a building did not constitute a seizure under the Fourth Amendment).

Wilansky does not allege any officer commanded or instructed her to stop and remain in place. Wilansky alleges the exact opposite, that officers made commands to "get out from under the truck" (JA456, Companion R.Doc.014 at ¶150), "ordered them to move away from the burned out truck" (JA357, R.Doc.259 at ¶131) and "move south away from the barricade" (JA359, R.Doc.259 at ¶144).

Wilansky denies she was under the truck, but admits she did not comply with the other commands, and did not move away as a result of impact rounds fired at her prior to her being hit by one round allegedly fired by Arndt, at which point she alleges she ran south away from the barricade because she “real[ized] she had no way to avoid getting hit with additional munitions.” (JA359, R.Doc.259 at ¶141; JA459, Companion R.Doc.014 at ¶177.) Wilansky does not allege officers engaged in “kettling” by encircling her, as officers remained north of the barricade. Wilansky does not argue or allege she complied with any such show of authority. Consistent with the analysis in *Quraishi*, any alleged munitions fired at Wilansky as she proceeded south did not constitute a seizure through control as she continued to proceed south and was being repelled/dispersed. *See Torres*, at 839 (“To be seized, ‘a reasonable person would have believed that he was not free to leave.’”) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Wilansky’s allegation of serious injury to her left arm and requiring assistance by other protesters to proceed south off the Bridge does not change the seizure analysis. A seizure by acquisition of physical control requires an intentional acquisition of physical control. *Compare Brower v. County of Inyo*, 489 U.S. at 598-99 (decedent who was killed as a result of the stolen vehicle he was driving impacting a road block during a high speed chase was seized through police acquisition of control because the decedent “was meant to be stopped by the

physical obstacle of the roadblock – and [] he was so stopped.”) *with County of Sacramento v. Lewis*, 523 U.S. 833, 843-44 (1988) (decedent motorcyclist was not seized when his motorcycle tipped over during high speed chase and pursuing officer accidentally ran into him, resulting in fatal injuries, because the officer only sought to stop the suspect only by a show of authority represented by flashing lights and continuing pursuit, but accidentally stopped the suspect by crashing into him – means not intentionally applied). As explained by the Supreme Court in *Brower*, and quoted in *Lewis*:

[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

*Lewis*, 523 U.S. at 844 (quoting *Brower*, at 596-97). In both *Brower* and *Lewis*, officers intended to stop the fleeing suspect. Wilansky’s alleged facts establish the opposite – officers’ actions were intended to repel Wilansky away from officers and the restricted area (i.e. the barricade and closed Bridge). Whether any force allegedly applied was reasonable is a separate question which only becomes relevant if a seizure occurred in the first instance.

Wilansky’s allegations objectively manifest law enforcement’s intention in applying the alleged force of keeping Wilansky and other protesters away from law enforcement – the exact opposite of what is required for a seizure under the

Fourth Amendment. Wilansky has failed to allege a “seizure” by law enforcement governed by the Fourth Amendment. Wilansky’s Fourth Amendment excessive force claims, including her derivative claims of failure to intervene and conspiracy (for which Wilansky presents no argument), were properly dismissed.

**B. Alleged Force Applied Was Objectively Reasonable, And Did Not Violate Wilansky’s Fourth Amendment Rights**

The district court did not address the issue of whether the officers’ alleged use of force against Wilansky was objectively reasonable due to Wilansky’s failure to allege a seizure under the Fourth Amendment. However, as argued by City and County Defendants to the district court, Wilansky’s purely factual allegations, and those matters which this Court may consider under Rule 12, establish that even assuming, *arguendo*, Wilansky was seized, the officers’ alleged use of force was objectively reasonable under the totality of the circumstances. *See e.g. Ahmed v. U.S.*, 147 F.3d 791, 796 (8<sup>th</sup> Cir. 1998) (a district court’s dismissal of claims may be affirmed on another ground).

To decide whether the force used to seize a suspect was excessive and thus “unreasonable” for purposes of the Fourth Amendment, we look to “the totality of the circumstances.” *Tennessee v. Garner*, 471 U.S. 1, 8-9, 11 (1985). Relevant factors include (1) “the severity of the crime at issue,” (2) “whether the suspect

poses an immediate threat to the safety of the officers or others,” and (3) “whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.”

*Graham v. Connor*, 490 U.S. 386, 396 (1989).

As our sharply divided en banc decision in *Kelsay [v. Ernst]*, 933 F.3d 975 (8<sup>th</sup> Cir. 2019) (enbanc) illustrates, controlling Supreme Court and Eighth Circuit precedents prior to May 2018 drew fine lines in determining when police officers’ use of non-deadly force was objectively reasonable in making an arrest or other seizure. Our cases clearly established that it was objectively unreasonable to use more than *de minimis* force to seize a non-threatening misdemeanor who was not fleeing, resisting arrest, or ignoring officer commands. See *Kelsay*, 933 F.3d at 985 (Smith, C.J., dissenting), and pre-2018 cases cited; *Blazek v. City of Iowa City*, 761 F.3d 920 (8<sup>th</sup> Cir. 2014).

*Westwater v. Church*, 60 F.4th 1124, 1130–31 (8<sup>th</sup> Cir. 2023).

An officer’s use of force is not excessive if no injuries are alleged to have resulted from the officer’s acts. See *Grider v. Bowling*, 785 F.3d 1248, 1252 (8<sup>th</sup> Cir. 2015) (if the suspect does not allege injuries from the officer’s acts, then the use of force was not excessive); *Johnson v. Carroll*, 658 F.3d 819, 830 (8<sup>th</sup> Cir. 2011) (finding force not excessive in part because the plaintiff sustained no injury); *Chambers v. Pennycock*, 641 F.3d 898, 906 (8<sup>th</sup> Cir. 2011) (a “*de minimis* use of force is insufficient to support a claim” of excessive force under the Fourth Amendment, “and it may well be that most plaintiffs showing only *de minimis* injury can show only a corresponding *de minimis* use of force.”).

Wilansky does not allege she sustained any injuries as a result of any alleged conduct by Defendants Bakke, Grosz, Hanson, Hinrichs, Nelson, Rode, Savageau, Skar, Ternes, or White. As discussed, Wilansky does not allege any Defendant applied physical force to her body other than Arndt (one impact round to her upper left arm) and Moll (alleged aerial warning/signaling munition). Wilansky does not allege Dvorak's deployment of two stinger ball grenades actually touched her – the stinger ball grenades landed and exploded within a few feet of Wilansky. Such alleged munition deployments which did not actually touch and injure her could not constitute excessive force as a matter of law – force was not actually applied upon her nor injured her. Wilansky's Fourth Amendment excessive force claims against Defendants Bakke, Grosz, Hanson, Hinrichs, Nelson, Rode, Savageau, Skar, Ternes or White should be dismissed on this basis as well.

In addition, the severity of the injury alleged is not dispositive of whether Wilansky has alleged a plausible claim of excessive force under the Fourth Amendment, or determinative of whether individual Defendants are entitled to qualified immunity. Instead, the appropriate inquiry is whether it was objectively reasonable for officers to use the force alleged to achieve their lawful objectives under the totality of the circumstances, not whether it was objectively reasonable to cause the injury alleged by Wilansky. The focus is on the force applied, not the

resulting injury. *See Plumhoff v. Rickard*, 572 U.S. 765 (2014) (officer's firing of 15 shots into vehicle resulting in death of suspect during high speed car chase was objectively reasonable and did not amount to excessive force under the circumstances); *Mullenix v. Luna*, 136 S.Ct. 305 (2015) (trooper did not violate clearly established law by shooting and killing motorist who was fleeing from arrest during high-speed pursuit as the officer's actions in utilizing deadly force were objectively reasonable under the circumstances presented).

Furthermore, even assuming officers' alleged use of force objectively manifested an intent to restrain Wilansky, which it did not, a reasonable officer would conclude Wilansky was disobeying lawful commands to extricate herself from the restricted area, and was resisting and fleeing any alleged attempts to restrain her. The appearance of resisting arrest justifies the use of force.

In *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8<sup>th</sup> Cir. 2017), an officer who performed takedown of the plaintiff was entitled to qualified immunity. The appellate court rejected the plaintiff's argument no force was appropriate because plaintiff was being arrested for a nonviolent misdemeanor for twice refusing officer's commands to put his hands behind his back because plaintiff at least appeared to be resisting. The appellate court also determined qualified immunity applied to the officer who thereafter tasered the plaintiff when plaintiff refused to give his hands to officers upon command for cuffing as he laid

on the ground because officers could have reasonably interpreted such conduct as resistance and responded with the amount of force that was reasonable to effect the arrest. Note, active resistance therefore does not require physical altercation with officers – failure to comply with commands incident to an arrest constitutes active resistance. *See also Carpenter v. Gage*, 686 F.3d 644 (8<sup>th</sup> Cir. 2012) (use of taser was objectively reasonable where a person refused command to offer his hands for cuffing, which constituted active resistance).

Further, officers may apply force to regain control of a situation incident to an arrest, even where the suspect is a nonviolent misdemeanor who poses no threat to anyone, and is provided no warning prior to the use of force or even advised they are subject to arrest. In *Kelsay v. Ernst*, 933 F.3d 975 (8<sup>th</sup> Cir. 2019) (en banc), this Court determined an officer was entitled to qualified immunity as it was not clearly established in May 2014 that a deputy was forbidden to use a takedown maneuver to effect the arrest of a suspect who ignored the deputy’s instruction to “get back here” and continued to walk away from the officer. *Kelsay*, at 980. The appellate court disagreed with the district court’s conclusion that where a nonviolent misdemeanor poses no threat to officers and is not actively resisting arrest or attempting to flee, an officer may not employ force just because the suspect is interfering with police or behaving disrespectfully. *Id.* “Decision concerning use of force against suspects who were compliant or

engaged in passive resistance were insufficient to constitute clearly established law that governs an officer's use of force against a suspect who ignores a command and walks away.” *Id.* at 980. In other words, ignoring lawful commands is non-compliant and does not constitute passive resistance. Notably, at no time prior to force being applied against Kelsay was Kelsay advised she was subject to arrest or that force was going to be applied against her.

In the present case, a reasonable officer under the totality of the circumstances alleged would have believed Wilansky and Joachinson were disobeying lawful commands. In addition, even if the officers' were attempting to restrain Wilansky (which has not been alleged), Wilansky's actions would have reasonably been interpreted by officers as disobeying commands and resisting and fleeing arrest. Wilansky admits that only hours earlier, a large-scale confrontation occurred at the very location at issue, with protesters removing one of two burned-out trucks forming a part of the barricade, and attempting to remove the second burned-out truck. As discussed, Wilansky admits at the time of the events at issue she and Joachinson were positioned alongside the remaining burned-out truck, and behind a metal shield “to avoid getting hit”. She admits officers commanded her and Joachinson to “get out from under the truck”, “move away from the burned out truck”, and “move south away from the barricade”, and yet Wilansky and Joachinson remained behind the metal shield while impact rounds

and two stinger ball grenades were deployed in their direction, allegedly for several minutes (JA456-457, Companion R.Doc.014 ¶¶54-58; JA182, R.Doc.120-10 [Wilansky Depo.], p.121 (testifying two minutes elapsed from when first impact rounds hit the metal shield until she was hit in her arm with an impact round). Wilansky does not allege she said anything to officers while this was occurring, and she admitted during her deposition that she did not say anything to officers while she was alongside the barricade. (JA182, R.Doc.120-10 [Wilansky Depo.], pp. 121-22.) She only proceeded south away from the barricade after she was hit by an impact munition in her upper left arm allegedly deployed by Arndt and she then realized her position behind the metal shield was no longer safe. Wilansky admits she stopped proceeding south across the Bridge in contravention of law enforcement commands, then bent down to pick up a piece of plywood to use as a shield (again in defiance of officer commands) before she was allegedly struck by an aerial warning/signaling munition allegedly deployed by non-party Moll. Under these circumstances a reasonable officer would have believed Wilansky was disobeying lawful commands, and if the officers' were attempting to restrain Wilansky (which has not been alleged), Wilansky's actions would have reasonably been interpreted by officers as resisting and fleeing arrest. The individual Defendants alleged use of force was objectively reasonable under the totality of the circumstances.

### III. WILANSKY DOES NOT ALLEGE A PLAUSIBLE EXCESSIVE FORCE CLAIM UNDER THE FOURTEENTH AMENDMENT

The United States Supreme Court has explained that in the absence of a seizure, a claim of excessive force by a free citizen or non-detainee is properly analyzed under the Fourteenth Amendment. *See County Of Sacramento v. Lewis*, 523 U.S. at 844-45 (“*Graham* ‘preserve[s] fourteenth amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right . . . through means other than a law enforcement official’s arrest, investigatory stop or other seizure.’”). “The touchstone of due process is protection of the individual against arbitrary action of government, whether the fault lies in a denial of fundamental procedural fairness, or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective.” *Id.* at 845-56. The “cognizable level of executive abuse of power [is] that which shocks the conscience” and “the Due Process Clause is violated by executive action only when it can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense.” *Id.* (quotation marks and citation omitted).

This Court has stated that “[o]nly a purpose to cause harm *unrelated to the legitimate object of the government action in question* will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process

violation.” *Helseth v. Burch*, 258 F.3d 867, 870 (8<sup>th</sup> Cir. 2001) (emphasis added). See *Truong v. Hassan*, 829 F.3d 627, 631 (8<sup>th</sup> Cir. 2016) (Fourteenth Amendment substantive due process claim against a bus driver failed, in part, because the bus driver’s action of throwing the plaintiff passenger off a bus for failing to pay a fee were related to his legitimate responsibilities of driving the bus, and therefore not inspired by malice or sadism). It cannot reasonably be disputed that the individual Defendants’ alleged conduct at issue related to their employment responsibilities as law enforcement officers. Dismissal of this claim was warranted on this basis alone.

In addition, the alleged conduct of the individual Defendants does not otherwise shock the conscience in a constitutional sense. “Whether conduct shocks the conscience is a question of law.” *County of Sacramento v. Lewis*, 523 U.S. at 844-45. “Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.” *Truong*, at 631 (quoting *Terrell v. Larson*, 396 F.3d 975, 981 (8<sup>th</sup> Cir. 2005)). “[A]lleged 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.” *Id.* As correctly concluded by the district court, “[i]t does not shock

the conscience for law enforcement to use non-lethal force to disburse protesters from an area where they were told to avoid.” (JA098, R.Doc. 46 at ¶ 54.)

Wilansky’s argument that the “shocks the conscience” standard was abrogated in 2015 by the Supreme Court in *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) and replaced with the “objective reasonableness” standard applicable in Fourth Amendment excessive force cases is without merit. *Kingsley* did not expressly or implicitly overrule *Lewis*. *Kingsley* involved a pre-trial detainees claim of excessive force. *Kingsley* also did not address the applicability of the “objective reasonableness” standard to cases involving free citizens and non-detainees, and was careful to limit the scope of the holding to pre-trial detainees. *See Kingsley*, at 402 (“We acknowledge that our view that an objective standard is appropriate in the context of excessive force claims brought by pretrial detainees pursuant to the Fourteenth Amendment may raise questions about the use of a subjective standard in the context of excessive force claims brought by convicted prisoners. We are not confronted with such a claim, however, so we need not address that issue today.”). *Kingsley* did not even address the “shocks the conscience” standard of *Lewis*.

As the Supreme Court explained in *Agostini [v. Felton]*, 502 U.S. 203, 237 (1997), “ [if] a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.’ ” *Id.* (citation omitted). As for existing circuit precedent,

only the court en banc can overrule it. *See, e.g., Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 576 n. 3 (8th Cir.1999).

*Okruhlik v. Univ. of Arkansas ex rel. May*, 255 F.3d 615, 622 (8th Cir. 2001).

Wilansky's Fourteenth Amendment claim fails as a matter of law under existing binding precedent.

#### **IV. INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY**

As discussed above, Wilansky has failed to allege a plausible claim of violation of her federal constitutional rights. Even assuming, *arguendo*, Wilansky has alleged a plausible claim of violation of her constitutional rights, such rights were not clearly established as of November 21, 2016, thereby entitling the individual Defendants to qualified immunity from suit. As summarized by this Court:

Qualified immunity protects government officials from liability under § 1983 when their conduct does not violate “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). The test for whether an officer is entitled to qualified immunity is twofold: (1) whether the facts alleged, taken in the light most favorable to the injured party, show that the officer's conduct violated a constitutional right; and (2) whether the constitutional right was clearly established at the time of the deprivation so that a reasonable officer would understand his conduct was unlawful. *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 815-16, 172 L.Ed.2d 565 (2009); *Henderson v. Munn*, 439 F.3d 497, 501-02 (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). The defense of qualified immunity must be evaluated from the perspective of a reasonable officer based on facts available to the officer at the time of the alleged constitutional violation. *Gladden v. Richbourg*, 759 F.3d 960, 964 (8<sup>th</sup> Cir. 2014). If “based on those facts, the officer reasonably failed to comprehend that he was violating a person’s clearly established constitutional rights, he is entitled to qualified immunity from suit.” *Id.*

As explained by the Supreme Court of the United States:

Although this Court’s caselaw does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law. This Court has repeatedly told courts . . . not to define clearly established law at a high level of generality.

Specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. Use of excessive force is an area of the law in which the result depends very much on the facts of each case, and thus police officers are entitled to qualified immunity unless existing precedent “squarely governs” the specific facts at issue.

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. . . Where constitutional guidelines seem inapplicable or too remote, it does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness. An officer cannot be said to have violated a clearly established right unless the right’s contours were sufficiently definite that any reasonable official in the defendant’s shoes would have understood that he was violating it.

*Kisela v. Hughes*, 138 S.Ct. 1148, 1152-53 (2018) (per curiam) (numerous citations and quotations omitted). “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); *Boudoin v. Harsson*, 962 F.3d 1034, 1040 (8<sup>th</sup> Cir. 2020) (alterations to original)). “The plaintiff has the burden to prove that a right was clearly established at the time of the alleged violation.” *Id.* (citing *Wilson v. Lamp*, 901 F.3d 981, 986 (8<sup>th</sup> Cir. 2018)). “A right is not clearly established by ‘controlling authority’ merely because it may be ‘suggested by then-existing precedent.’” *Id.* (quoting *District of Columbia v. Wesby*, 138 S. Ct 577, 589-90 (2018)). “[E]xisting precedent must have placed the statutory or constitutional question beyond debate.” *Ashcroft v. Kidd*, 563 U.S. 731, 741 (2011). Qualified immunity applies when a plaintiff has “failed to identify a case where an [official] acting under similar circumstances . . . was held to have violated the [Constitution].” *White v. Pauly*, 137 S. Ct. 548, 552 (2017) (internal quotation marks and citations omitted).

It was not clearly established as of November 21, 2016 that the application of force for the objectively manifested intent to disperse a crowd or repel an individual from a restricted area, rather than to restrain, constituted a seizure under the Fourth Amendment, thereby entitling individual Defendants to qualified immunity from suit. *Quraishi* establishes that the law was not clearly established as of August of 2014 that the application of tear gas which objectively manifested an intent to disperse a crowd rather than to restrain constituted a seizure under the Fourth Amendment. *Martinez* establishes that the law was not clearly established as of June of 2018 that the application of direct physical force which objectively manifested an intent to repel from a restricted area rather than restrain constituted a seizure under the Fourth Amendment. The events at issue in this case occurred in November of 2016, between the events involved in *Quraishi* and *Martinez*. The *BLM* case (District of Columbia) further establishes that the law was not clearly established as of June of 2020 that the use of flashbang grenades, rubber bullets and tear gas which manifests an intent to disperse rather than restrain constituted a seizure under the Fourth Amendment. This Court again concluded that the law was still not sufficiently clear as of April of 2021 that officers use of tear gas, flashbang grenades, pepper spray, and rubber bullets to disperse a crowd constituted a seizure under the Fourth Amendment in *Wolk*. *Quraishi*, *Martinez* and *Wolk* are binding Eighth Circuit appellate precedent.

In addition, there is no clearly established, existing precedent establishing the use of less-lethal munitions from a strictly defensive position to repel or disperse constitutes a seizure within the meaning of the Fourth Amendment, and the individual officers would none-the-less be entitled to qualified immunity from suit in relation to Wilansky's Fourth Amendment excessive force claim. By comparison, existing case law supports the use of less-lethal munitions for the purpose of preventing the unlawful access to property, and protecting public and private property rights. *See e.g. Bernini v. City of St. Paul*, 655 F.3d 997 (8<sup>th</sup> Cir. 2012) (involving law enforcement's cordoning off downtown St. Paul, Minnesota as a no-go zone during Republican National Convention in 2008 due to prior heavy property damage by protesters in the vicinity, and utilizing less-lethal munitions to hold back aggressive protesters attempting to breach barricades); *Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023) (a recent decision by this Court determining officers were entitled to qualified immunity in relation to DAPL protesters' claims of excessive force as a result of use of less-lethal munitions against protesters at the Backwater Bridge barricade during the evening of November 20, 2016 as there was no clearly established law to establish such use of force to disperse a crowd constituted a seizure under the Fourth Amendment). There simply is no existing precedent which establishes beyond debate the unconstitutionality of Defendants' alleged conduct in this case. *See Kisela v.*

*Hughes*, 138 S.Ct. at 1151 (“Although this Court’s case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate.”). The alleged conduct of the individual Defendants did not violate clearly established federal constitutional rights of Wilansky at the time of the alleged conduct, and the individually-named Defendants are therefore entitled to qualified immunity as to all claims.

Similarly, as explained above, existing binding precedent on the issue of excessive force under the Fourteenth Amendment required conduct which shocks the conscience in a constitutional sense, and “[o]nly a purpose to cause harm *unrelated to the legitimate object of the government action in question* will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.” *Helseth v. Burch*, 258 F.3d at 870 (emphasis added). Individual Defendants are also entitled to qualified immunity on Wilansky’s Fourteenth Amendment claim.

## **V. THIS COURT MUST UPHOLD UNITED STATES SUPREME COURT PRECEDENT ON QUALIFIED IMMUNITY**

As noted by the district court, “the Court has no authority to ignore the overabundance of binding case law regarding qualified immunity . . . .” (JA409, R.Doc. 295, fn. 6).

As the Supreme Court explained in *Agostini* [*v. Felton*, 502 U.S. 203, 237 (1997)], “[if] a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.’ ” *Id.* (citation omitted). As for existing circuit precedent, only the court en banc can overrule it. *See, e.g., Gipson v. KAS Snacktime Co.*, 171 F.3d 574, 576 n. 3 (8th Cir.1999).

*Okruhlik v. Univ. of Arkansas ex rel. May*, 255 F.3d at 622.

## **VI. WILANSKY DOES NOT ALLEGE A PLAUSIBLE *MONELL* CLAIM AGAINST MORTON COUNTY**

Wilansky argues she has pled plausible claims against Morton County and Sheriff Kirchmeier under *Monell v. Department of Social Services*, 436 U.S. 658 (1997), asserting this Court’s ruling in *Mitchell v. Kirchmeier*, 28 F.4th 888 (8<sup>th</sup> Cir. 2022)<sup>6</sup> is dispositive of the question. Wilansky’s argument is without merit.

First, *Mitchell* involved a seizure under the Fourth Amendment as force was utilized against Mitchell specifically to effectuate his arrest, and Mitchell was arrested immediately following application of force. By comparison, as discussed above, Wilansky has failed to allege a violation of her federal constitutional rights, including a seizure under the Fourth Amendment. “Before a municipality can be held liable, however, there must be an unconstitutional act by a municipal employee.” *Russell v. Hennepin County*, 420 F.3d 841, 846 (8th Cir. 2005)

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<sup>6</sup> Mitchell’s claims pertaining to officers’ use of office against him in January 2017 at the Backwater Bridge were dismissed on summary judgment on July 31, 2024. *Mitchell v. Kirchmeier*, 2024 WL 4119428 (D.N.D. Aug. 29, 2024), *appeal docketed*, No. 24-2755 (8<sup>th</sup> Cir. August 28, 2024).

(emphasis added). Wilansky’s *Monell* claim was properly dismissed on this basis alone. Second, the district court properly determined Wilansky failed to alleged facts to support her specific *Monell* claims.<sup>7</sup>

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

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<sup>7</sup> The district court dismissed, with prejudice, Wilansky’s *Monell* claims against Morton County and Sheriff Kirchmeier in relation to this incident on October 29, 2020. (JA131-136, R.Doc.46 at ¶¶77-87.) “A dismissal with prejudice has the effect of a final adjudication on the merits.” *TCBY Sys., Inc. v. EGB Assocs., Inc.*, 2 F.3d 288, 290 (8<sup>th</sup> Cir. 1993) (quotation cite omitted). Subsequent thereto, Wilansky added additional allegation to her *Second Amended Complaint* in the Primary Lawsuit, and *First Amended Complaint* in the Companion Lawsuit, in an attempt to revive her previously dismissed *Monell* claims. Wilansky’s original Complaint in the Primary Lawsuit (JA042-049, R.Doc.001) should be considered the operative pleading in relation to Wilansky’s *Monell* claims. Even assuming Wilansky’s subsequent amended pleadings are considered, Wilansky’s *Monell* claim fails none-the-less.

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

*Id.*

Wilansky has not alleged facts to establish any violation of her constitutional rights was caused by any official policy or unofficial custom of Morton County, or by any failure to train or supervise by Morton County. Wilansky's *Monell* cause of action is comprised formulaic recitations of the elements of the claim, numerous legal conclusions which should be disregarded in relation to this Rule 12 inquiry, and her purely factual allegations are insufficient to establish a plausible *Monell* claim. *See Ashcroft v. Iqbal*, 556 U.S. at 678 (“Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.”). Wilansky has failed to point to an official policy either in writing or orally issued by Morton County or Sheriff Kirchmeier authorizing the use of unreasonable force, or to use explosive less-lethal weapons in an unconstitutional manner. Wilansky has also failed to put forth facts showing an alleged policy was the driving force behind her injury.

Wilansky has failed to allege facts from which it could be determined any use of less lethal munitions by law enforcement officers under Morton County's

direction and control on prior occasions violated anyone's constitutional rights as required to establish a "continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees." *Schaffer v. Beringer*, 842 F.3d 585, 596 (8<sup>th</sup> Cir. 2016). This failure to show a pattern of unconstitutional acts of which Morton County and Sheriff Kirchmeier were aware is also fatal to Wilansky's failure to train, supervise and discipline claim. Wilansky's pure factual allegation are insufficient to establish the alleged prior uses of force involved a "seizure" as required to trigger the Fourth Amendment, or that any such use of force was excessive. For example, even assuming any prior use of force involved a seizure, which cannot be determined from Wilansky's allegations, Wilansky does not allege sufficient contextual facts, including whether the individuals against which force was applied on prior occasions were disobeying orders, resisting or evading arrest, or posed an imminent threat to the safety of officers or others. Wilansky also fails to allege facts from which it can be ascertained whether any warnings would have been feasible or futile under the unspecified circumstances of each prior alleged use of force. *See Dundon v. Kirchmeier*, 577 F.Supp.3d at 1050 ("warnings need only be given if feasible", and "[c]ourts have also found that there are times when giving a warning is futile." (citations omitted)). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and

plausibility of entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. at 678. *See Gregory v. Dillard’s, Inc.*, 565 F.3d 464, 473 (8<sup>th</sup> Cir. 2009) (“[A] plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims, . . . rather than facts that are merely consistent with such a right.” (quoted citation omitted)). Wilansky’s *Monell* claims should be dismissed.

In addition, we are now nearly eight years following the events of November 20-21, 2016. Wilansky does not cite, and there are no cases finally concluding any law enforcement officer violated any DAPL protestor’s federal constitutional rights, let alone any cases involving events occurring prior to November 21, 2016. *See generally Dundon v. Kirchmeier*, 85 F.4<sup>th</sup> 1250 (8<sup>th</sup> Cir. 2023) (affirming summary judgment dismissal of DAPL protestors’ claims, including excessive force and *Monell* claims, in relation to events at the Backwater Bridge occurring on November 20, 2016).

## **VII. THE DISTRICT COURT’S DISMISSAL OF WILANSKY’S CLAIMS, WITH PREJUDICE WAS NOT ERROR**

Wilansky’s argument the district court erred by dismissing her claims with prejudice without granting Wilansky leave to amend is without merit. As explained above, Wilansky never requested leave to amend in the Companion Lawsuit – Wilansky instead stood by her pleading. In addition, Wilansky did not again request leave to amend her pleadings in the Primary Lawsuit following the district court’s striking of unauthorized amendments. Wilansky has also not

explained what amendments she would have requested, or how such amendments would have cured the deficiencies in her pleadings.

The decision to dismiss with prejudice without granting leave to amend is reviewed for an abuse of discretion. *Knowles v. TD Ameritrade Holding Corp.*, 2 F.4th 751, 758 (8th Cir. 2021). “Leave to amend generally is inappropriate ... where the plaintiff has not indicated how [he] would make the complaint viable, either by submitting a proposed amendment or indicating somewhere in [his] court filings what an amended complaint would have contained.” *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009); *cf.* Steven S. Gensler & Lumen N. Mulligan, *1 Federal Rules of Civil Procedure, Rules and Commentary*, Rule 12 cmt. (2021) (observing that when “the plaintiff has failed to state a claim upon which relief may be granted, ... courts tend to dismiss with prejudice precisely because the motion reaches the merits of the claim”). The district court’s dismissal of Wilansky’s claims with prejudice was not in error.

### **CONCLUSION**

City and County Appellees request the district court’s dismissal of Appellant’s claims against them be affirmed.

Dated this 11th day of September, 2024.

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Dated: September 5, 2024