

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

Civil No. 24-1911

Sophia Wilansky,

Appellant,

v.

Morton County, North Dakota, et al.,

Appellees.

Civil No. 24-1919

Sophia Wilansky,

Appellant,

v.

Paul D. Bakke, in his personal capacity, et al.,

Appellees.

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA**

**(NO. 1:18-CV-236)
(NO. 3:23-CV-00142)**

HONORABLE JUDGE DANIEL M. TRAYNOR

BRIEF OF STATE APPELLEES

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ Jane G. Sportiello
Jane G. Sportiello
Assistant Attorney General
State Bar ID No. 08900
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jsportiello@nd.gov

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email ctitus@nd.gov

Attorneys for Appellees Derek J. Arndt,
Travis M. Skar, Evan M. Savageau, Joshua
W. Rode, Travis A. Nelson, Michael W.
Hinrichs, Paul D. Bakke, and Adam J.
Dvorak

SUMMARY OF THE CASE

This case turns on qualified immunity. The question before this Court is whether the law enforcement officers on Backwater Bridge on November 21, 2016 were on notice by clearly-established law that deployment of less-lethal force to disperse a protestor would constitute a seizure. Defendants were entitled to an answer to this purely legal question at the earliest stage of the litigation. But the district court permitted discovery even while Defendants' qualified immunity defense was still outstanding. In the past six years, the district court ordered limited discovery to occur three separate times.

The litigation was complicated by Wilansky's amendment of her pleadings in 2022 to assert factual allegations which contradicted the evidence of record. The district court initially allowed the amendments, before striking many of them the following year. In response, Wilansky filed a brand-new complaint, but the allegations therein were still wholly barred by qualified immunity.

Five and a half years after the first complaint was filed, the district court dismissed both Wilansky's cases on the grounds that all defendants were shielded by qualified immunity. These dismissals should be affirmed. Because of the unusual procedural background of this case, the State Defendants request oral argument with 20 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Appellees Derek J. Arndt, Travis M. Skar, Evan M. Savageau, Joshue W. Rode, Travis A. Nelson, Michael E. Hinrichs, Paul D. Bakke, and Adam J. Dvorak are sued in their individual capacities for alleged actions arising out of the course of their employment with the North Dakota Highway Patrol. They are government employees, not corporations, and therefore no corporate disclosure statement is required pursuant to Fed. R. App. P. 26.1 or 8th Cir. R. 26.1A.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	vi
Statement of the Issues.....	1
Statement of the Case.....	3
I. Proceedings Below	3
A. November 2018 to March 2022: Wilansky’s First Complaint in the Primary Lawsuit and First Round of Discovery	4
B. March 2022 through May 2023: Wilansky’s First Amended Complaint and Second Round of Discovery.....	5
C. May 2023 to April 2024: Wilansky’s Second Amended Complaint, Third Round of Discovery, and Second Lawsuit.....	7
D. Both Cases are Dismissed	8
II. Factual Background.....	8
A. The Law Enforcement Barricade and the Protestors’ Opposition to It.....	8
B. Wilansky Returns to the Bridge, Stands by the Burned-Out Truck, and is Ordered to Disperse	10
C. Officers Deploy Less Lethal Weapons Until Wilansky Starts to Disperse	12
D. Wilansky Runs For Several Seconds, Stops, And Is Injured.....	13
III. Wilansky’s Claims Against State Defendants.....	13
Summary of the Argument.....	14
Argument.....	15
I. Standard of Review.....	15
A. Qualified Immunity at the Rule 12.....	15
B. Availability of Matters Outside the Pleadings	15
1. Dashcam Video from 3:56:56 AM to 3:59:50 AM on November 21, 2016	16

2.	Wilansky’s Own Deposition Testimony	17
II.	The Court Did Not Abuse its Discretion in Dismissing Wilansky’s Claims with Prejudice	17
A.	The District Court Did Not Abuse Its Discretion by Not Inviting Wilansky to Amend Her Complaint.....	18
B.	The District Court Did Not Abuse Its Discretion by Partially Striking Wilansky’s Amendments Earlier in the Case	19
1.	Context Surrounding Wilansky’s 2022 Motion to Amend.....	20
i.	Wilansky’s New Allegation that Law Enforcement Deployed Less-Lethal Munitions at Her As She Fled South.....	22
ii.	Wilansky’s Evolving Allegations Regarding the Law Enforcement Command.....	25
C.	The District Court Did Not Abuse its Discretion by Holding Wilansky To Her Representations	28
D.	Wilansky Already Filed an Entirely New Case Containing All of Her Allegations	30
III.	Wilansky’s claims against Bakke, Nelson, Savageau, Rode, and Hinrichs fail as a matter of law	30
IV.	Every State Defendant is Entitled to Qualified Immunity on Wilansky’s Fourth Amendment Claim.....	32
A.	Wilansky Does Not Allege That Any Defendant Seized Her by Force	34
B.	Wilansky Does Not Allege That Any Defendant Seized Her by Control	39
C.	Any Seizure That Occurred Was Not Clearly Established.....	44
D.	Even if Wilansky Did Allege a Seizure, She Does Not Allege Objectively Unreasonable Force	47
E.	Any Excessive Force Was Not Clearly Established	49
F.	Even if There Was Excessive Force, and Was a Seizure, There Was No Failure to Intervene.....	51
V.	Every State Defendant is Entitled to Qualified Immunity on Wilansky’s Fourteenth Amendment Claim	53

Conclusion54

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Adam & Eve Jonesboro, LLC v. Perrin</i> , 933 F.3d 951 (8th Cir. 2019)	15
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	1, 32
<i>Beard v. Falkenrath</i> , 97 F.4th 1109 (8th Cir. 2024)	15, 33, 34
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	1, 31
<i>Bernini v. City of St. Paul</i> , 655 F.3d 997 (8th Cir. 2012)	2, 49, 50
<i>BJC Health Sys. v. Columbia Cas. Co.</i> , 478 F.3d 908 (8th Cir.2007)	18
<i>Brower v. Cnty. of Inyo</i> , 489 U.S. 593 (1989).....	40, 41, 42
<i>Ching as Tr. for Jordan v. City of Minneapolis</i> , 73 F.4th 617 (8th Cir. 2023).....	16
<i>Cnty. of Sacramento v. Lewis</i> , 523 U.S. 833 (1998).....	2, 53
<i>Coley v. Lucas Cnty., Ohio</i> , 799 F.3d 530 (6th Cir. 2015)	53
<i>Doe v. Cassel</i> , 403 F.3d 986 (8th Cir. 2005)	18
<i>Drew v. City of Des Moines</i> , No. 23-2656, 2024 WL 3630108, 3 (8th Cir. Aug. 2, 2024).....	51
<i>Dundon v. Kirchmeier</i> , 85 F.4th 1250 (8th Cir. 2023)	passim
<i>ecoNugenics, Inc. v. Bioenergy Life Sci., Inc.</i> , 355 F. Supp. 3d 785 (D. Minn. 2019)	29
<i>Francis v. Huff</i> , 590 F. Supp. 3d 1092 (E.D. Tenn. 2022), aff'd, No. 22-5282, 2022 WL 7973109 (6th Cir. Oct. 14, 2022).....	53

<i>Graham v. Connor</i> , 490 U.S. 386 (1989).....	47, 53
<i>Hayes v. Whitman</i> , 264 F.3d 1017 (10th Cir.2001).....	29
<i>Hennessey v. Gap, Inc.</i> , 86 F.4th 823 (8th Cir. 2023).....	19
<i>Hernandez v. Jarman</i> , 340 F.3d 617 (8th Cir. 2003).....	41
<i>Hope v. Pelzer</i> , 536 U.S. 730 (2002).....	44
<i>In re SuperValu, Inc.</i> , 925 F.3d 955 (8th Cir. 2019).....	15, 35, 39
<i>Kingsley v. Hendrickson</i> , 576 U.S. 389 (2015).....	53
<i>Kohorst v. Smith</i> , 968 F.3d 871 (8th Cir. 2020).....	47
<i>Lombardo v. City of St. Louis</i> , 38 F.4th 684 (8th Cir. 2022).....	44
<i>Marks v. Bauer</i> , 107 F.4th 840 (8th Cir. 2024).....	50
<i>Martinez v. Sasse</i> , 37 F.4th 506 (8th Cir. 2022).....	1, 45, 46
<i>Miller v. Redwood Toxicology Lab'y, Inc.</i> , 688 F.3d 928 (8th Cir. 2012).....	17
<i>Minter v. Prime Equip. Co.</i> , 451 F.3d 1196 (10th Cir. 2006).....	29
<i>Mitchell v. Kirchmeier</i> , 28 F.4th 888 (8th Cir. 2022).....	1, 19, 34
<i>Pallottino v. City of Rio Rancho</i> , 31 F.3d 1023 (10th Cir.1994).....	29
<i>Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.</i> , 559 F.3d 772 (8th Cir. 2009).....	1, 19
<i>Peterson v. Heinen</i> , 89 F.4th 628 (8th Cir. 2023).....	51

<i>Popoalii v. Corr. Med. Servs.</i> , 512 F.3d 488 (8th Cir. 2008)	21
<i>Quraishi v. St. Charles County</i> , 986 F.3d 831 (8th Cir. 2021)	1, 42, 45
<i>Retro Television Network, Inc. v. Luken Commc'ns, LLC</i> , 696 F.3d 766 (8th Cir. 2012)	15
<i>Reynolds v. Dormire</i> , 636 F.3d 976 (8th Cir. 2011)	32
<i>Robinson v. Payton</i> , 791 F.3d 824 (8th Cir. 2015)	34
<i>Schulz v. Long</i> , 44 F.3d 643 (8th Cir. 1995)	48
<i>State ex rel. Nixon v. Coeur D'Alene Tribe</i> , 164 F.3d 1102 (8th Cir. 1999)	16
<i>Tatone v. SunTrust Mortg., Inc.</i> , 857 F. Supp. 2d 821 (D. Minn. 2012)	32
<i>Terebesi v. Torres</i> , 764 F.3d 217 (2d Cir. 2014)	50, 51
<i>Torres v. Madrid</i> , 592 U.S. 306, (2021)	passim
<i>Viernow v. Euripides Dev. Corp.</i> , 157 F.3d 785 (10th Cir. 1998)	29
<i>Walters v. Monarch Life Ins. Co.</i> , 57 F.3d 899 (10th Cir. 1995)	29
<i>White v. Jackson</i> , 865 F.3d 1064 (8th Cir. 2017)	50
<i>White v. Smith</i> , 696 F.3d 740 (8th Cir. 2012)	54
<u>Statutes</u>	
42 U.S.C. § 1983	15, 32, 34, 44
Fed. R. Civ. P. 8	1

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing Wilansky's complaint with prejudice when she did not indicate how she would amend it.

Most apposite authority:

Mitchell v. Kirchmeier, 28 F.4th 888 (8th Cir. 2022)

Pet Quarters, Inc. v. Depository Tr. & Clearing Corp., 559 F.3d 772 (8th Cir. 2009)

2. Whether Wilansky complied with Fed. R. Civ. P. 8 when it is unclear from the face of the complaints which conduct is attributed to which defendant.

Most apposite authority:

Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

Ashcroft v. Iqbal, 556 U.S. 662 (2009)

3. Whether officers' conduct constituted a seizure under the Fourth Amendment when they deployed less-lethal munitions to disperse a protestor from a law enforcement barricade, after the protestor failed to comply with an order to disperse.

Most apposite authority:

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

Dundon v. Kirchmeier, 85 F.4th 1250, 1255 (8th Cir. 2023)

Martinez v. Sasse, 37 F.4th 506, 510 (8th Cir. 2022)

Quraishi v. St. Charles County, 986 F.3d 831, 839-40 (8th Cir. 2021)

4. Whether officers' conduct constituted excessive force under the Fourth Amendment when they deployed less-lethal munitions to disperse a protestor from a law enforcement barricade, after the protestor failed to comply with an order to disperse.

Most apposite authority:

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

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

Most apposite authority:

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

STATEMENT OF THE CASE

I. PROCEEDINGS BELOW

This unusual litigation is best understood through the framework of Wilansky’s evolving complaints. Two cases are now before the court in this consolidated appeal – the Primary Lawsuit (1:18-cv-00236, cited as “R.Doc.”), filed on November 19, 2018, and the Companion Lawsuit (3:23-cv-00142, cited as “Companion R.Doc.”), filed on August 2, 2023. (*See* JA006; R.Doc.1, JA037; Companion R.Doc.1.)¹

Both cases stem from the events of November 20th through 21st, 2016, on Backwater Bridge in Morton County, North Dakota. Wilansky alleges that law enforcement is responsible for her serious arm injury which occurred at roughly 4:00 AM on November 21st. For the entirety of this litigation, Defendants have opposed these allegations.

Wilansky has filed five total complaints and amended complaints across the two actions since 2018. The complaints have been met with multiple motions to dismiss (some of which were granted, and some of which were never adjudicated and eventually denied as moot), one motion for summary judgment (never adjudicated and denied as moot), and three periods of limited discovery ordered by the district court over Defendants’ objections.

Across the two cases, Wilansky brings her claims against 15 total defendants – Morton County, and 14 individual members of law enforcement. At the time of the

¹ All “JA” citations refer to the Joint Appendix; all “SA” citations refer to the Supplemental Appendix.

events in question, eight of these defendants were members of the North Dakota Highway Patrol: Paul Bakke, Adam Dvorak, Michael Hinrichs, Travis Nelson, Joshua Rode, Evan Savageau, Travis Skar, and Derek Arndt (collectively, “State Defendants.”). The remaining defendants are associated with Morton County and other cities (collectively, “Municipal Defendants.”). A brief procedural history of the Primary Lawsuit and the Companion Lawsuit is set forth below, arranged chronologically by complaint.

A. November 2018 to March 2022: Wilansky’s First Complaint in the Primary Lawsuit and First Round of Discovery.

Wilansky’s first Complaint was filed on November 19, 2018, against Morton County, Sheriff Kyle Kirchmeier, and the “John Doe” law enforcement officer who allegedly injured Wilansky’s arm. (JA042; R.Doc.1.) The Primary Lawsuit also included one State Defendant: Major Tom Iverson of the North Dakota Highway Patrol. While Iverson was not present on the Bridge the night Wilansky was injured, she sued him for defamation based on his role as public information officer for his statements that Wilansky’s injuries were not caused by law enforcement. (JA088-089; R.Doc.1 at ¶¶ 255-261.) All Defendants move to dismiss, and the claims against Iverson were dismissed by the Court on October 29, 2020. (JA098; R.Doc.46 at 1.)

Rather than adjudicating the Motion to Dismiss filed by the Municipal Defendants, the Court converted it to a Motion for Summary Judgment, and ordered limited discovery to address several questions: whether Defendant Officer Doe used an explosive less-lethal munition; if so, whether he was acting in a defensive position; and, whether protestors were handling improvised explosive devices at the time. (JA149-151; R.Doc.46 at 52-54.)

Wilansky and the Municipal Defendants conducted discovery until June 4, 2021. During this time, Wilansky took depositions of Sheriff Kyle Kirchmeier, North Dakota Highway Patrol Sergeant Derek Arndt,² and a 30(b)(6) deposition of Morton County that included five witnesses. *See* R.Docs.120-14, 120-15. The Municipal Defendants took depositions of Sophia Wilansky and Brandi King. *See* R.Doc.120-10. The parties also served written discovery and perform munitions testing with the assistance of the West Dakota SWAT Team. *See* R.Doc.85. In June and July 2021, the County Defendants rebriefed their Motion for Summary Judgment. Collectively, the parties submitted 18 declarations and affidavits and over 80 exhibits. *See generally* R.Docs.110-121; R.Docs.124-126.

B. March 2022 through May 2023: Wilansky’s First Amended Complaint and Second Round of Discovery.

More than seven months later, on March 2, 2022, Wilansky made a motion asking that the Court stay its adjudication of the pending motion for summary judgment. She also requested to file an Amended Complaint to substitute the “John Doe” placeholder with “the specific law enforcement officers responsible for causing her injury.” (186; R.Doc.140 at 1.) She cast her amendments as limited ones which would “simplify” the case, based entirely on her summary judgment briefing. *Id.* The Municipal Defendants opposed Wilansky’s request, citing the expansive discovery already completed, the close of summary judgment briefing nearly eight

² While Arndt was not a defendant at this time, he was later added into the Primary Lawsuit, then dismissed, then added into the Companion Lawsuit, which was then dismissed leading to this appeal.

months before, and the total lack of evidence that any officer deployed any munition that could have caused her injury. (SA193-195; R.Doc.141 at 3-5.)

The District Court did not order Wilansky to file a Proposed Amended Complaint. Rather, citing her assurances that the amendments would be limited, the Court granted her permission to file an Amended Complaint. (JA205; R.Doc.151.) It also granted her request to stay adjudication of the motion for summary judgment briefed the previous summer. (This motion would never be adjudicated on the merits, and eventually denied as moot. *See* SA297; R.Doc.256 at 3.

Plaintiff filed her Amended Complaint on July 21, 2022. (JA212; R.Doc.153.) In addition to replacing the “John Doe” defendant who allegedly caused her arm injury with Deputy John Moll of the Morton County Sheriff’s Office, *see generally id.*, she also added eleven new individual defendants to the case. Included among these were seven State Defendants, all members of the North Dakota Highway Patrol. Of these seven, one was alleged to have impacted her with a less-lethal munition and one was alleged to have deployed two Stinger Grenades near her, but without hitting her.

Once brought into the case, all the new Defendants filed respective motions to dismiss invoking qualified immunity. (R.Docs.187-190.) Further, the Municipal Defendants filed a Motion to Strike, asserting that Wilansky’s Amended Complaint exceeded her representations as to its contents. (SA199; R.Doc.174.)

While the Motions to Dismiss and Motion to Strike were pending, district court ordered a second period of discovery to commence. (R.Doc.199.) This occurred over the objection of all Defendants, who asked the district court to stay

discovery until their qualified immunity defense was adjudicated. *See* R.Docs.179, 180, 191, 192, 201-208. The district court denied their requests.

During this second phase of discovery on qualified immunity, all the newly-added defendants answered interrogatories and requests for production.³ Further, Wilansky served a total of 15 third party subpoenas, including a total of 9 on state-controlled entities. A breakdown of the discovery produced by state defendants and state-controlled entities is available at SA363-65; R.Doc.275-6 at 6-8. Discovery proceeded from roughly December 2022 until May 2023.

C. May 2023 to April 2024: Wilansky’s Second Amended Complaint, Third Round of Discovery, and Second Lawsuit.

In May 2023, the Court issued an Order to Show Cause regarding the complaint which Wilansky had filed the previous July. Specifically, the Court found that Wilansky had exceeded her representations as to the scope of her proposed amendments. (JA269; R.Doc.235 at 3.) The Court ultimately struck many of Wilansky’s allegations from her First Amended Complaint and ordered her to file a Second Amended Complaint. (JA279; R.Doc.254 at 8). Effectively, this Order

³ An example of a Request for Production served by Wilansky on the State Defendants is as follows:

All Documents and Communications since January 1, 2016, reflecting statements, declarations, jokes, assertions, or opinions by You regarding police brutality, the use or alleged use of excessive force by Law Enforcement Agents, defunding of police departments, Black Lives Matter, or victims of alleged police brutality, including Daunte Wright, Andre Hill, George Floyd, Daniel Prude, Breonna Taylor, Atatiana Jefferson, Philando Castile, Freddie Gray, Eric Garner, Tamir Rice, Michael Brown, Laquan McDonald, Jordan Edwards, Manuel Brooks, Tyre Nichols, Rayshard Brooks, and Casey Goodson Jr.

SA320-21; R.Doc.275-1 at 3, 4.

dismissed six of the seven State Defendants from the case, but allowed Wilansky to retain her claims against State Defendant Dvorak. *See id.*

On July 28, 2023, Wilansky filed her Second Amended Complaint in the Primary Lawsuit containing only her allegations against Municipal Defendant Moll and State Defendant Dvorak. (JA333; R.Doc.259.) A few weeks later, she filed a new action – the Companion Lawsuit. (JA037; Companion R.Doc.1.) Her complaint in the Companion Lawsuit contained, in essence, her recently-stricken allegations from the Primary Lawsuit. *See generally id.*

In the original case, remaining individual defendants again filed Motions to Dismiss, and again asked that discovery be stayed until their qualified immunity defense was adjudicated. Again, the district court denied this request, and ordered that limited discovery proceed. (JA316; R.Doc.275.) From September 2023 to April 3, 2024, the parties engaged in discovery.

D. Both Cases are Dismissed.

On April 3, 2024, the Court issued an order granting Defendants’ Motions to Dismiss on qualified immunity grounds. JA428; R.Doc.290; JA481; Companion R.Doc.36. This appeal followed.

II. FACTUAL BACKGROUND

The facts set forth below are drawn from Wilansky’s allegations in both actions, and from matters embraced by the pleadings, including dashcam video capturing the audio of the law enforcement command referenced in her complaint as well as excerpts from her deposition testimony.

A. The Law Enforcement Barricade and the Protestors’ Opposition to It.

The factual center of this case is the law enforcement barricade located at the north end of Backwater Bridge. Wilansky begins her discussion of the night of her injury with the moment that she learns about the law enforcement barricade. “While at Oceti Sakowin, Sophia learned that law enforcement had erected a barricade immediately north of Backwater Bridge.” (JA352; R.Doc.259 at ¶ 94.) She describes the barricade:

95. The barricade spanned the width of the highway and consisted of concrete roadblocks covered in multiple rings of concertina razor wire. Immediately in front of these concrete roadblocks were two large burned-out vehicles.

(JA352; R.Doc.259 at ¶ 95.)

At her 2021 deposition, Wilansky testified to the additional detail that the burnt-out truck was chained to the concrete barrier. (JA171; R.Doc.120-10 at 77-78 (internal pagination)) (explaining that somebody said the burnt-out truck was chained to the concrete barrier).

Wilansky next recounts the barricade’s negative effects on protestors. (JA352, R.Doc.259 at ¶96.) She explains that the presence of the barricade across highway 1806 had the effect of preventing direct travel between the Bismarck/Mandan area and the protestor camp so that travelers “were forced to use a considerably longer and more circuitous route between the camp and Mandan.” *Id.*

Wilansky next recounts the protestors’ attempts to reopen the bridge: first by diplomacy, and then by force.

97. Throughout November 2016, water protectors attempted to negotiate the reopening of Backwater Bridge with Morton County to no avail. The County kept the bridge closed and barricaded.

98. On the afternoon of November 20, several water protectors arrived at Backwater Bridge with a semi-truck and towed one of the burned-out vehicles off of the bridge and into a nearby ditch.

(JA353; R.Doc.259 at ¶¶ 97-98.)

Wilansky admits that law enforcement “prevented these water protectors from towing away the second burned-out vehicle.” (JA353; R.Doc.259 at ¶ 99.)

After law enforcement blocked the protestors from removing the second truck, “over the next several hours, *hundreds* of water protectors gathered south of the barricade on Backwater Bridge to protest the continued closure of the bridge.” (JA353; R.Doc.259 at ¶ 100) (emphasis added). In response, “Defendant Kirchmeier issued a “Code Red,” requesting that every law enforcement officer within 100 miles come to Backwater Bridge.” (JA353; R.Doc.259 at ¶ 101.)

A tumultuous protest ensued. During the protest, Wilansky alleges that law enforcement used less-lethal weapons and “explosive munitions” against protestors who presented no safety threat, and that protestors and law enforcement remained separated by the barricade. (JA354-55; R.Doc.259 at ¶¶ 103-111.) The protest lasted several hours and “ended around midnight.” *Id.* at ¶ 111.

B. Wilansky Returns to the Bridge, Stands by the Burned-Out Truck, and is Ordered to Disperse.

After several hours of intense confrontation, the barricade was still intact by the time the protests died down. (JA355; R.Doc.259 at ¶ 113.) And the burned-out truck was still in place when Wilansky arrived on the bridge at approximately 2 AM on the morning of November 21, 2016. (JA355-56; R.Doc.259 at ¶¶ 120-124.)

Wilansky alleges that after arriving on the bridge, she “walked around the Bridge and talked to people for approximately an hour” without any objection from

law enforcement. (JA356; R.Doc.259 at ¶ 123.) Then, she approached individuals who were standing “vigil” and began to talk to them. JA455; Companion R.Doc.14 at ¶ 140. Eventually she continued the “vigil” herself. *Id.* at ¶ 144.

Wilansky does not explain why she or the other protestors were standing “vigil” on a closed bridge in the middle of the night. She does, however, disclose the location of her vigil: at the very burned-out truck which law enforcement had protected from protestors hours before. (JA455; Companion R.Doc.14 at ¶ 144.)

Wilansky alleges that she stood near the truck for over 30 minutes with no objection from law enforcement. (JA357; R.Doc.259 at ¶ 127.) Then she is approached by another protestor named Stephen Joachinson and “they began to talk.” *Id.* at ¶ 128.

While Wilansky does not allege in her Complaint what she and Joachinson discussed, she testified at her deposition that they were discussing the events of November 20th, and “how people had moved the other truck and tried to move the one that was still there.” (JA176; R.Doc.120-10 at 97 (internal pagination), lines 12-24.)

Wilansky alleges that shortly after Joachinson approaches her and they begin to talk, the 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.) She alleges that Municipal Defendant Glen Ternes made this command. (JA456; CompanionR.Doc. 14 at ¶ 151.)

The audio recording of this command was filed by Wilansky with the District Court and contains the following contents:

[Inaudible] We see you behind the truck **and** underneath the truck. Get out now. Return to the south side of the bridge. Otherwise, we will use less-lethal munitions.

Timestamp 3:57:51 in SA185; R.Doc.126-29.

At this point, Wilansky does not allege that either she or Joachinson moved south. Rather, Joachinson “yelled back that no one was under the truck.” (JA357; R.Doc.259 at ¶ 132.)

C. Officers Deploy Less Lethal Weapons Until Wilansky Starts to Disperse.

Wilansky alleges that, instead of responding to Joachinson’s explanation that nobody was under the truck, numerous law enforcement officers began rapidly firing less-lethal munitions at her and Joachinson. (JA358; R.Doc.259 at ¶ 133.) She alleges that State Defendants Arndt and Skar were among those deploying less-lethal munitions. (JA456; Companion R.Doc. at ¶ 154, 156.) She alleges that “to avoid getting hit,” she and Joachinson “cowered behind the metal sheet.” (JA358; R.Doc. 259 at ¶ 134.) During this time, “Defendant Dvorak lobbed two Stinger Ball toward them,” which exploded within a few feet of her. *Id.* at ¶¶ 134-137. She also alleges that while she and Joachinson “were pinned behind the metal sheet,” Municipal Defendant Moll and State Defendants Skar, Hinrich, Rode, and Arndt “moved west to get a better line of sight.” *Id.* at ¶ 138.

Eventually, Defendant Arndt hits Wilansky with a less-lethal munition. (JA358-59; R.Doc.259 at ¶ 139.) Next, “[i]n extreme pain and realizing she had no way to avoid getting hit with additional munitions, Sophia began running as fast as she could south, away from the barricade and truck.” (JA359; R.Doc.259 at ¶ 141.)

She alleges that “[W]hile she was running, she was overtly complying with a law enforcement order to move south away from the barricade.” *Id.* at ¶ 144.

D. Wilansky Runs For Several Seconds, Stops, And Is Injured.

In both the Primary Lawsuit and the Companion Lawsuit, Wilansky admits that she starts retreating south. At this point, her two complaints diverge.

In her Primary Lawsuit, she explains that “over the course of the next few seconds” she ran approximately 30 yards south, stopped to pick up a piece of plywood, and was then hit with what she alleges to be an “Aerial Warning/Signaling Munition” fired by Deputy Moll. (JA359-60; R.Doc.259 at ¶¶ 145-151.)

In her Companion Lawsuit, Wilansky alleges that while she was running south, the law enforcement officers continued to shoot at her. (JA460; Companion R.Doc.14 at ¶¶ 181 – 187.) This occurs for “a few seconds” until she stops to pick up the plywood, when she alleges that Moll hits her with the munition, injuring her arm. *Id.* at ¶¶ 180, 188-89.

III. Wilansky’s Claims Against State Defendants.

In the Primary Lawsuit, she alleged an excessive force claim under the Fourth and Fourteenth Amendment against State Defendant Dvorak for deployment of the two Stinger ball grenades. (JA366-369; R.Doc.259 at ¶¶ 192-208.) In the Companion Lawsuit, she alleges excessive force claims under the Fourth and Fourteenth Amendment against the other seven State Defendants for deploying less-lethal munitions at her and failing to intervene in the violation of her rights. (JA469-475; Companion R.Doc.14 at ¶¶ 236-268.)

SUMMARY OF THE ARGUMENT

On the date of Wilansky’s injury, a law enforcement barricade stretched across Backwater Bridge. It consisted of concrete roadblocks and razor wire, with two large burned-out trucks chained to the roadblocks. For at least the previous month, water protectors had opposed the closure of the bridge. On the afternoon of November 20, they took matters into their own hands, and used a semi-trailer to forcibly remove one of the burned-out trucks. Law enforcement stopped them from removing the other. A tumultuous protest ensued.

By 4 AM, most protestors had dispersed. Wilansky and a handful of others were still on the bridge, which was closed to all members of the public. Wilansky decided to “stand vigil” by the remaining burned-out truck. After she is joined by another protestor, law enforcement commands them to disperse. They do not do so.

The questions for this Court are these: were the members of law enforcement, including State Defendants Arndt, Dvorak, and Skar, on fair notice by clearly-established law that their use of less-lethal munitions to disperse Wilansky would constitute a seizure under the Fourth Amendment? Or that their use of less-lethal munitions constituted excessive force, even when only one of their munitions impacted her in the upper arm? And were the remaining members of law enforcement who were not alleged to have deployed *any* force, including State Defendants Bakke, Hinrichs, Nelson, Rode, and Savageau, on notice by clearly-established law of their obligation to intervene in such a scenario (even setting aside their ability to do so)? The answer to these questions must be no. State Defendants respectfully request that the judgments of the district court be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews de novo a district court's grant of a motion to dismiss, construing all reasonable inferences in favor of the non-moving party. *Retro Television Network, Inc. v. Luken Commc'ns, LLC*, 696 F.3d 766, 768–69 (8th Cir. 2012). A court must accept a plaintiff's factual allegations as true, but need not accept a plaintiff's legal conclusions. *Id.* Importantly, because a plaintiff is a master of their own complaint, a court is “not required to draw unreasonable inferences in [plaintiff's] favor.” *In re SuperValu, Inc.*, 925 F.3d 955, 965 (8th Cir. 2019).

Lastly, this Court may affirm a judgment on any ground supported by the record. *Adam & Eve Jonesboro, LLC v. Perrin*, 933 F.3d 951, 958 (8th Cir. 2019).

A. Qualified Immunity at the Rule 12 Stage.

An appellate court has jurisdiction to answer two questions when considering a motion to dismiss on qualified immunity grounds. “**First**, do the allegations in the complaint make out a constitutional violation? And **second**, was the right clearly established at the time?” *Beard v. Falkenrath*, 97 F.4th 1109, 1114 (8th Cir. 2024) (emphasis added) (internal citations omitted). If, from the face of the complaint, the answer to either of these questions is “no,” qualified immunity applies and the complaint must be dismissed. *Beard*, 97 F.4th at 1114.

Because liability under Section 1983 is personal, a court must answer the two prongs of the qualified immunity test “defendant-by-defendant and claim-by-claim.” *Beard*, 97 F.4th at 1114.

B. Availability of Matters Outside the Pleadings

Although a Rule 12 motion tests the legal sufficiency of the pleadings, some matters outside the pleadings can be considered. *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1107 (8th Cir. 1999). Here, the State Defendants ask that two such items may be considered by this Court: the Dashcam Video which is embraced by Wilansky's complaint, and, Wilansky's own deposition testimony.

1. Dashcam Video from 3:56:56 AM to 3:59:50 AM on November 21, 2016.

The consideration of video at the motion-to-dismiss stage was recently confirmed by this court in *Ching as Tr. for Jordan v. City of Minneapolis*, where the Court held that “videos of an incident are necessarily embraced by the pleadings” and went on to consider videos capturing a law enforcement use-of-force incident before dismissing a complaint under Rule 12(b)(6) on qualified immunity grounds. 73 F.4th 617, 621 (8th Cir. 2023).

Here, the Court should not hesitate to consider the Dashcam Video. (SA185; R.Doc.126-29.⁴) This video was referenced in Wilansky's very first Complaint, (JA071; R.Doc.1 at ¶ 155), and filed by Wilansky with the district court over three years ago as R.Doc.126-29. While the video appears to be taken from the side of the highway south of the bridge, and does not show the events of this case taking place, it does provide some audio, including of the command issued by law enforcement. More recently, State Defendants referenced this video in their Motion to Dismiss Wilansky's most recent Complaint, SA014-18, Companion R.Doc.23-1 at 12-16.

⁴ The video was filed conventionally and was transmitted by the District Court to the Eighth Circuit Court of Appeals on August 19, 2024. *See* R. Doc. entry 8/19/24 (“Appeal Remark”).

Wilansky responded that she “has no objection to the Court’s consideration” of the dash cam video, and agrees that it captures the order described in her Complaint. SA052; Companion R.Doc.28 at 14.

Based on Wilansky’s yearslong reliance on this video, and its capture of the command which is key to her allegations, State Defendants respectfully request that Court should consider this audio to be “embraced by the pleadings” and consider it in its qualified immunity analysis.

2. Wilansky’s Own Deposition Testimony.

In the unique context of this case, this Court should also consider Wilansky’s deposition testimony when reviewing the grant of Defendants’ Motion to Dismiss. For instance, in *Miller v. Redwood Toxicology Lab’y, Inc.*, when reviewing the grant of a motion to dismiss, this Court looked to the record created by the Plaintiff’s motion for temporary restraining order, preliminary injunction, and expedited discovery. *Miller*, 688 F.3d 928, 931 (8th Cir. 2012). Here, where the litigation has been going on for so many years, it is reasonable to consider the Plaintiff’s own deposition testimony, particularly as she already agreed to its consideration at the motion-to-dismiss stage which led to the current appeal. *See* SA052; Companion R.Doc.28 at 14 (“Plaintiff has no objection to the Court considering her deposition as part of the record on the motion to dismiss. Everything Plaintiff said in her deposition is true to the best of her knowledge, and she stands by all of it.”) Accordingly, the State Defendants also request that the Court consider Wilansky’s deposition transcript, filed at JA152; R.Doc.120-10.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING WILANSKY’S CLAIMS WITH PREJUDICE.

Wilansky asserts that the district court erred by dismissing her complaints in the Primary and Companion Cases without explaining why it was denying her an opportunity to amend. Appellant Brief at 53. She further contends that this Court should, after reversing the district court’s dismissals, order the district court to permit her to file a “consolidated amended complaint that contains all the good faith allegations she wishes to make against all Defendants.” *Id.*

These requests are unavailing for several reasons. District courts enjoy considerable latitude in adjudicating both motions to amend and motions to strike. Denial of leave to amend is reviewed for abuse of discretion. *Doe v. Cassel*, 403 F.3d 986, 990 (8th Cir. 2005). In adjudicating a motion to strike, a district court “enjoy[s] liberal discretion, and its ruling is reviewed only for abuse of that discretion.” *BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir.2007). The district court’s decisions fell well within the zone of its discretion, as set forth below.

A. The District Court Did Not Abuse Its Discretion by Not Inviting Wilansky to Amend Her Complaint.

Wilansky’s first assertion is that the district court erred by dismissing her complaints in the two cases “without offering any explanation for denying Sophia an opportunity to amend her allegations.” Appellant Brief at 53. The simplest reason for the district court’s lack of explanation for denying Wilansky the opportunity to amend is that Wilansky had not asked for the opportunity to amend.

At the time when Wilansky’s Primary and Companion complaints were dismissed, Wilansky had not filed a motion to amend the current complaint in either

action, nor had she made any such request in the course of her response to Defendants' motions to dismiss. As this Court explained *Mitchell v. Kirchmeier*, 28 F.4th 888, 903 (8th Cir. 2022), it is not an abuse of discretion to dismiss a complaint with prejudice when a plaintiff does not submit a proposed amended complaint or clarify what one might have contained.

The State Defendants filed a motion to dismiss Wilansky's most recent complaint in her Primary Lawsuit on August 18, 2023, and filed a motion to dismiss Wilansky's most recent complaint in her Companion Lawsuit on October 30, 2023. (R.Doc.265; Companion R.Doc.23.) Neither motion was adjudicated until April 3, 2024, when they were both granted. If Wilansky had wanted to avoid dismissal of her claims without prejudice, her remedy was to amend her complaints as a matter of right within 21 of service of the Defendants' Rule 12(b)(6) motion to dismiss, or, to move amend the complaint by consent or leave of court thereafter. But she failed to do so, and failed to "indicate to the court what [she] would add to [her] complaint to make it viable." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 782 (8th Cir. 2009). The district court was not obligated to request that she move to amend. "[A] district court in granting a motion to dismiss is not obliged to invite a motion for leave to amend if plaintiff did not file one." *Hennessey v. Gap, Inc.*, 86 F.4th 823, 831 (8th Cir. 2023). Accordingly, the district court's dismissal of her complaints with prejudice was not an abuse of discretion.

B. The District Court Did Not Abuse Its Discretion by Partially Striking Wilansky's Amendments Earlier in the Case.

In July of 2023, the district court issued an order in the Primary Lawsuit striking portions of Wilansky's First Amended Complaint. (JA272; R.Doc.254.)

While Wilansky does not explicitly appeal this order, she cites it as justification for her request that this Court reverse the dismissals of her complaints and allow her to amend them again. *See* Appellant Brief at 54 (“By [striking a significant number of her allegations], the district court effectively denied Sophia’s request to amend. . . The Court should reverse the district court and allow Sophia to amend her Complaint for this reason alone.”) Wilansky also contends that the district court abused its discretion in partially striking her complaint. *Id.* at 57.

A full examination of the circumstances of Wilansky’s previous amendments fully refutes this characterization. Faced with Wilansky’s failure to adhere to her own representations as to the scope of her amended complaint, the district court acted well within the bounds of its discretion in partially striking it.

1. Context Surrounding Wilansky’s 2022 Motion to Amend.

In March of 2022, seven months after briefing closed on the Municipal Defendants’ motion for summary judgment, Wilansky moved to amend her Complaint. (SA186; R.Doc.140.) At the same time, she asked the District Court to stay its decision on the motion for summary judgment, which was poised to resolve the outstanding questions of qualified immunity that had been raised back in 2018.

In her request for leave to amend, Wilansky wrote that her new complaint would simplify the lawsuit, because she “[did] not intend to add any new causes of actions or allege any new facts other than those already contained in the summary judgment brief and appendices.” (SA186-87; R.Doc.140 at 1-2.)

Unfortunately, the district court granted the motion to amend without requiring her to file a copy of her proposed Amended Complaint. *See Popoalii v.*

Corr. Med. Servs., 512 F.3d 488, 497 (8th Cir. 2008) (granting leave to amend where the plaintiff has not submitted a proposed amended complaint is “inappropriate.”) Instead, the district court relied upon Wilansky’s representations – that she would not “add any new causes of action or allege any new facts other than those already contained in the summary judgment briefs and appendices.” (JA210; R.Doc.151 at 6.)

This was not to be the case. When Wilansky filed the resulting First Amended Complaint, it revealed supplemental allegations beyond those she had established her summary judgment brief. *See generally* JA212; R.Doc.153. Even more egregiously, Wilansky had amended her allegations *in contradiction* of the evidence in her summary judgment brief, even including her own deposition testimony.

The County Defendants filed a motion to strike the First Amended Complaint on September 7, 2022. (SA199; R.Doc.174.) However, it was not adjudicated the following May, after the parties had been in discovery on the First Amended Complaint for months. (JA267; R.Doc.235.)

On May 16, 2023, the district court issued an Order to Show Cause regarding the Motion to Strike, declaring that Wilansky had far exceeded the parameters of her earlier representation that the complaint would simply be updated to correspond with her summary judgment briefing. It described her First Amended Complaint as “practically a complete do-over of her original Complaint,” (JA269; R.Doc.235 at 3.) However, the district court did not grant the motion to strike immediately. Rather, it ordered Wilansky to file an explanation of her amendments and how they were supported – or not – by her summary judgment briefing. (JA271; R.Doc.235 at 5.)

Wilansky duly filed such an explanation, writing that “she understood the Court’s order to authorize her to amend her complaint only to the extent necessary to plausibly allege her existing causes of action against the newly added Defendants and to eliminate the claims and parties she was dismissing.” (SA258; R.Doc.246 at 1.) She also confirmed her understanding that “the new factual allegations in the Amended Complaint should comport with the facts presented” in her summary judgment brief. *Id.* After reviewing Wilansky’s explanations, the Court allowed some of her amendments as properly founded in her summary judgment briefing and within the scope of its order allowing her to amend. It struck many others. *See generally* JA272; R.Doc.254.

An examination of the stricken amendments justifies the district court’s exercise of its discretion. It also refutes Wilansky’s statement to this Court on that her request to amend “is not made in bad faith—she simply seeks to update her allegations based on what she learned from preliminary discovery and her own investigations.” Appellant Brief at 55. Below are two of the more egregious examples of Wilansky’s attempts to amend her complaint in contradiction of the evidence of record.

i. Wilansky’s New Allegation that Law Enforcement Deployed Less-Lethal Munitions at Her As She Fled South.

Central to Wilansky’s current argument is her allegation that law enforcement continued to deploy less-lethal munitions after she finally began to retreat south over the bridge. *See* Appellant Brief at 19 (citing Defendants’ continued deployment “even after she started running away” as proof of intent to restrain); *id.* at 28 (Defendants “hit her while she was fleeing,” and therefore intended to stop her); *id.*

at 44 (because Defendants “continued attacking her” while she ran away from the truck, they intended to maliciously harm her.)

Strikingly, for such an important detail, this allegation was not made by Wilansky until she filed her First Amended Complaint in 2022, nearly four years after the case began. *See* JA239; R.Doc.153 at ¶¶ 151-152. This new allegation is particularly striking because Wilansky herself, at her 2021 deposition, testified as follows:

Attorney: Between the time period from when you were struck in the upper-left arm to the point where the explosion occurred, were you struck at all by any rubber bullets or impact munitions or anything else?

Wilansky: No.

Attorney: Did you see anything or hear anything that suggested that, in that distance that you made it from when the impact munition hit you in the upper-left arm and the point where the explosion occurred, that someone was attempting to shoot something at you?

Wilansky: No. I knew it was possibility because they were just shooting at us right before.

Attorney: But you didn't hear or see anything to suggest that, as you were retreating, that any law enforcement officer was attempting to shoot at you at that point until the explosion occurred?

Mr. Stoll: Objection to form.

Wilansky: I wasn't looking at the police.

Attorney: I understand that but did you hear anything whizzing by you or anything that you, you saw or heard land by your feet or in the area that suggested that law enforcement were shooting at you while you were retreating?

Mr. Stoll: Objection, calls for speculation.

Wilansky: Not that I can recall.

(JA185; R.Doc.120-10 at 134-135 (internal pagination)).

In February of 2021, Wilansky had no awareness of anyone attempting to shoot at her when she was retreating in November of 2016. Yet in July of 2022, she

made a new allegation that at least Defendants Arndt, Hanson, Moll, and White did so. JA239; R.Doc.153 at ¶¶ 151-152.

When prompted by the district court in its Order to Show Cause to justify this addition to her complaint, Wilansky told the court that the new allegations regarding the events leading up to her injury was supported in her summary judgment brief based off of information she “learned in discovery.” (SA 260; R.Doc.246 at 3.) She specifically directed the court to two paragraphs in her summary judgment brief. (SA276; R.Doc.246-1 at 15, line 151.) But these paragraphs simply do not support the new allegation that *anyone* – let alone four specific officers – was actually continuing to shoot at her as she retreated:

40. Sophia had run approximately 20-30 yards south, when she saw a pile of plywood on the ground. Wilansky Depo. Tr. 129: 12-132: 17, 134:9-16. Understanding she could be hit by another munition at any second, Sophia stopped and began to turn and bend to pick up a piece of plywood to use as a shield. Wilansky Depo. Tr. 134:9-16 (testifying she was hit right as she stopped to reach for plywood to use as “protection against being shot while retreating”).

41. Just as Sophia stopped and turned, Deputy Moll *intentionally* hit her with a munition. Ex. E at MOR0647 (Moll Incident Report documenting that Moll “fired a round at [Sophia], striking [her] in the side and [s]he fell” (emphasis added)); Morton Cnty. 3/23/2021 Depo Tr. 78:22-79:4 (Moll testifying to intentionally hitting Sophia with munition); Wilansky Depo. Tr. 134:9-11 (testifying she was hit when “she just started to reach towards the pile [of plywood]”), 136:11-137:7 (testifying she had just stopped and was turning to pick up plywood when she was hit); Cohen Dec. ¶ 22 (“It was clear to me from their reaction that [law enforcement] had intentionally injured her.”); Ex. 30 at HP010 (Nelson Incident Report documenting, “w[hen] the protestor made the step back towards the truck I saw either a bean bag round or sponge round impact the stomach of the protestor”); Ex. 35 at HP055 (Bakke Incident Report documenting that he “saw what appeared to be a bean bag round hit the person in the midsection”); Arndt Depo. Tr. 174:20-175:8 (“[W]hat I can see in my head is she stopped, face back to the north and was impacted by a sponge round.”).

SA149; R.Doc.124 at ¶ 40-41 (emphasis in original).

The district court was not persuaded that the above two paragraphs presented foundation for the allegation that Wilansky was still being shot at as she retreated. It observed: “Wilansky’s new allegation is not found in the cited summary judgment brief or appendices. Her own allegation is that she was hit when she “stopped [retreating] and turned.” She makes no mention of any “continued” shooting while she was allegedly fleeing.” (JA310; R.Doc.254-1 at 30, line 151) (internal citations omitted). Accordingly, the district court struck these allegations from her complaint. The State Defendants submit that the district court was within its discretion to do so.

ii. Wilansky’s Evolving Allegations Regarding the Law Enforcement Command.

Another example of Wilansky’s evolving allegations is in her representation of the law enforcement command issued to her and Joachinson just before the deployment of less-lethal weapons against them. The integrity of these representations is easily demonstrable because an audio recording of the command itself was captured on video. *See* R.Doc.126-29; R.Doc. entry 8/19/24 (“Appeal Remark”).

According to Wilansky’s own allegations, she possessed the video before her Complaint was even filed. (JA 71; R. Doc. 1 ¶ 155.) Yet despite invoking this command in her original Complaint from 2018, four subsequent Complaints, and multiple dispositive briefs, she never disclosed to the District Court the actual text of the command, and she has altered her summaries of it over the years.

Again, this command was issued to Wilansky and her other protector, Stephen Joachinson, by law enforcement just before less-lethal weapons were deployed against them. The original text of the command as captured on video is as follows:

[Inaudible] We see you behind the truck **and** underneath the truck. Get out now. Return to the south side of the bridge. Otherwise, we will use less-lethal munitions.

Timestamp 3:57:51, SA185; R. Doc. 126-29 (emphasis added).

The meaning of the command is straightforward. The law enforcement officers are addressing a person (or persons) behind the truck, **and**, a person (or persons) underneath the truck. Those persons are instructed to return to the south side of the bridge, or, law enforcement will use less-lethal munitions.

At the outset of the case, Wilansky's pleadings were reasonably faithful to this plain language. "While Sophia was talking with this other water protector, law enforcement officers ordered **them** to move away from the burned-out vehicle." (JA063; R.Doc.1 ¶ 104.) (emphasis added).

Over the next several years, Wilansky gradually erases her initial admission that the command was issued to her. In 2021, responding to a Motion for Summary Judgment, Wilansky files this same video with the Court, but now describes the command as an "ambiguous announcement." (SA 144; R.Doc.124 at ¶ 24.) She writes, "[a]t approximately 3:57 a.m., law enforcement issued a command for **someone** to get out from under the truck." *Id.* (emphasis added).

The next year, in her 2022 Amended Complaint, Wilansky further modifies the individual to whom this command is directed. She writes, "At approximately 3:57 a.m., as a pretext for attacking Sophia and Stephen, the Law Enforcement Officer Defendants issued a command for **an unnamed undescribed individual** to get out from under the truck." (JA237; R.Doc.153 at ¶ 134) (emphasis added). Here, she omits any mention of the directive to move south.

Two months ago, in her appellate brief, Wilansky gives her newest version yet: “At approximately 3:57 a.m., one of the Defendants issued a **vague command that an individual must get out from under the truck and move south off the bridge.**” Appellant Brief at 7. In this latest iteration, Wilansky admits to the command to move south, but tries to convince Court that it was only the individual under the truck who was supposed to move south.

These changes did not go unnoticed. In the district court’s Order to Show Cause, the court specifically notes this alteration, writing, “[Wilansky] also omitted facts previously explaining that the police ordered her and another water protector to move away from a burned-out vehicle. Instead, Wilansky now alleges that the officers ‘issued a command for an unnamed undescribed individual’ to move.” (JA269; R.Doc.235 at ¶ 5.)

Ordered to explain the change, Wilansky explains it as “more accurate in light of the discovery record, including Plaintiff’s deposition testimony and videos of the moments before her injury.” (SA 260; R.Doc.246 at 3.) Specifically, she describes the video containing the command as new evidence uncovered in discovery. *See* SA 290; R.Doc.251-2 at 2; *see also* SA213; R.Doc. 211 at 12, n.1 (“ . . . Plaintiff learned more details about [the command] in discovery, including from a video that appears to actually show the command being given. It is totally appropriate for an amended complaint to contain new allegations learned in discovery.”)

It is certainly appropriate for an amended complaint to contain new allegations learned in discovery. It is not appropriate, however, for Wilansky to possess a video before her case commenced, rely upon it in her Complaint, and then tell the Court

she only received it in discovery. It is even less appropriate for Wilansky to rely upon the alleged “newness” of the video to justify misquoting it in a later complaint, in order to erase her failure to comply with a law enforcement command from the face of the pleadings.

The district court was well within its discretion to instruct Wilansky to strike this amendment. *See* JA308; R.Doc.254-1 at 28, line 134 (discussing inconsistency of new pleading with Wilansky’s earlier exhibit.) Further, Wilansky’s bad faith should not be rewarded with another opportunity to amend her complaint.

C. The District Court Did Not Abuse its Discretion by Holding Wilansky To Her Representations.

Wilansky also appears to object to the scope of her previously-allowed amendments. She writes that she was never given “an unfettered opportunity to amend her complaint after learning the identities of her attackers and the circumstances surrounding their attack,” and she asks this Court for “a single fulsome opportunity to amend her complaint in the light of what she has learned in the six years since she filed her suit.” Appellant Brief at 57. But, critically, Wilansky never made these requests to the district court. She did not ask for an “unfettered opportunity” to amend her Complaint or a “single fulsome opportunity” to rewrite her action. Instead, she made a narrow request asking the district court for a chance to replace “John Doe” based solely on the causes of actions and facts “already contained in the summary judgment brief and appendices.” (SA 186; R.Doc.140 at 1.) It makes sense that she limited the scope of her request, because with a pending summary judgment motion, the Court was probably not likely to grant a total rewrite of the action. Wilansky made a strategic decision to only ask for relatively minor

amendments. The district court did not abuse its discretion by accepting her representations, issuing an order based on them, and then striking the allegations that did not comply. Wilansky cannot now complain of not receiving something she never requested from the district court.

Indeed, even if Wilansky had filed her proposed amended complaint with the district court before filing her First Amended Complaint, it would have been liable to rejection on grounds of futility, bad faith, undue delay, or all three. District courts in the Eighth Circuit recognize that amended pleadings must maintain a baseline consistency with prior pleadings. *See ecoNugenics, Inc. v. Bioenergy Life Sci., Inc.*, 355 F. Supp. 3d 785, 794 (D. Minn. 2019) (“[Plaintiff cannot simply delete damaging admissions from its complaint to render its claims plausible. The Court finds this proposed amendment futile and in bad faith.”). Other circuits are more explicit about pleading-related misconduct:

Courts will properly deny a motion to amend when it appears that the plaintiff is using Rule 15 to make the complaint “a moving target,” *Viernow v. Euripides Dev. Corp.*, 157 F.3d 785, 800 (10th Cir.1998), to “salvage a lost case by untimely suggestion of new theories of recovery,” *Hayes v. Whitman*, 264 F.3d 1017, 1027 (10th Cir.2001), to present “theories seriatim” in an effort to avoid dismissal, *Pallottino v. City of Rio Rancho*, 31 F.3d 1023, 1027 (10th Cir.1994), or to “knowingly delay[] raising [an] issue until the ‘eve of trial,’ ” *Walters v. Monarch Life Ins. Co.*, 57 F.3d 899, 903 (10th Cir.1995).

Minter v. Prime Equip. Co., 451 F.3d 1196, 1206 (10th Cir. 2006).

While of course there is no way to know what the outcome would have been had Wilansky filed her First Amended Complaint as a proposed amended complaint for the Court’s consideration, it was ultimately her choice not to do so. She cannot now ask this Court to undo years of litigation and allow her to proceed as if she had.

D. Wilansky Already Filed an Entirely New Case Containing All of Her Allegations.

As set forth above, after giving Wilansky a chance to justify her amendments, the district court struck many of the allegations in the First Amended Complaint and ordered her to file a Second Amended Complaint. (JA279; R.Doc.254 at 8.)

Wilansky did so – but she also filed an entirely new action.⁵ See JA 428; Companion R. Doc. 1. As she explains to this Court, the Companion Lawsuit included all of the defendants and claims which the district court had stricken from the Primary Lawsuit. Appellant Brief at 52. The Companion Lawsuit *was* her “fulsome opportunity” to offer a complaint with everything she learned since her injury. But the Companion Lawsuit was also dismissed by the district court, who correctly applied the principles of qualified immunity.

In sum, Wilansky has shown no reason why she should be allowed a brand-new chance to consolidate her complaints and amend them again. Reuniting the allegations in the Primary Lawsuit and the Companion Lawsuit would neither add merit to the claims therein nor change the clearly-established law. The details which Wilansky seeks to add or subtract have zero effect on the State Defendants’ qualified immunity, as set forth in the remainder of this brief. And to the extent Wilansky has brand new allegations, they have never been presented to any court. For all of these reasons, her request for permission to amend should be denied.

III. WILANSKY’S CLAIMS AGAINST BAKKE, NELSON, SAVAGEAU, RODE, AND HINRICHS FAIL AS A MATTER OF LAW.

⁵ Unlike the Primary Lawsuit which was filed in the Western District of North Dakota, the location of the DAPL protests, the Companion Lawsuit was filed in the Eastern District of North Dakota, where two of the 12 defendants resided. JA034; Companion R.Doc.1. The judge in the Eastern District transferred it back to the Western District. JA 040; Companion R.Doc.25.

Before reaching the legal question of qualified immunity for the State Defendants on Wilansky's Fourth and Fourteenth Amendment claims, there is the baseline problem of establishing what claims Wilansky intends to assert against them in the first place.

To be sure, Wilansky makes specific allegations against certain State Defendants. For instance, Dvorak is alleged to have deployed Stinger ball grenades. But three of the State Defendants – Bakke, Nelson, and Savageau – are not even mentioned in the factual body of the complaint. Two more, Hinrich and Rode, are only have alleged to “move west to get a better line of sight” when Wilansky was behind the metal shield. (JA458; Companion R.Doc.14 at ¶ 166.) Even combined with her use of the phrase “Law Enforcement Officer Defendants,” her pleadings against these five defendants fail the baseline requirement of “fair notice of what the ... claim is and the grounds upon which it rests.” *Twombly*, 550 U.S. at 545.

Wilansky initially uses the term “Law Enforcement Officer Defendants” in the first paragraph of her complaint, explaining it as a reference to the 11 individually-named defendants in the Companion Lawsuit. (JA429; Companion R.Doc.14 at ¶ 1.) It is clear, however, that she does not mean to refer to all 11 defendants every time she uses the term. For instance, she alleges that the Law Enforcement Officer Defendants “rapidly fired at Sophia with less-lethal munitions,” *id.* at ¶ 2, but several paragraphs later explains that the Law Enforcement Officer Defendants “all actively participated in the attack from the beginning by *either* firing less-lethal munitions themselves *or* assisting the Law Enforcement Officer Defendants who were firing less-lethal munitions.” *Id.* at ¶ 5 (JA 429). As

such, it is clear that the Law Enforcement Officer Defendants in paragraph 2 encompass a smaller group than those in paragraph 5. In other words, the identities of the Law Enforcement Officer Defendants change from allegation to allegation.

Such ambiguity cannot be reconciled with Wilansky's obligations to plead specifically under § 1983. In order to state a claim under § 1983, "a plaintiff must plead that *each* Government-official defendant, through the official's own individual actions, has violated the Constitution." *Reynolds v. Dormire*, 636 F.3d 976, 979 (8th Cir. 2011), citing *Iqbal*, 556 U.S. 662 (emphasis added). Here, Wilansky does not offer any factual allegations concerning the "individual actions" of five State Defendants, aside from alleging that Rode and Hinrichs "moved west to get a better line of sight," which by itself does nothing to establish a constitutional violation. And is not clear which allegations against the Law Enforcement Officer Defendants are supposed to be attributed to these five individuals. *See Tatone v. SunTrust Mortg., Inc.*, 857 F. Supp. 2d 821, 831 (D. Minn. 2012) ("A complaint which lumps all defendants together and does not sufficiently allege who did what to whom, fails to state a claim for relief because it does not provide fair notice of the grounds for the claims made against a particular defendant.")

The Court should affirm the dismissal of these five State Defendants because over two years into the litigation against them, they have been denied fair notice of the claim they face and the grounds upon which it rests.

IV. EVERY STATE DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY ON WILANSKY'S FOURTH AMENDMENT CLAIM.

The district court correctly found that Wilansky cannot overcome Defendants' qualified immunity on her Fourth Amendment claim.

Again, to overcome State Defendants' qualified immunity on any claim, Wilansky must meet each part of a two-part test. First, her complaint must [1] allege a constitutional violation, and [2] that the right violated was clearly established as of November 21, 2016. *Beard*, 97 F.4th at 1114.

In the context of the Fourth Amendment specifically, alleging a constitutional violation has two elements. A plaintiff must demonstrate that [1] a seizure occurred and [2] that the seizure was unreasonable. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). Then, to meet the second part of the qualified immunity test, a plaintiff must show a clearly-established body of law putting the law enforcement defendants on notice as to *both* these elements.

Yet this is still not the end of what Wilansky's complaint must show with regards to the State Defendants. Wilansky alleges that the explosion which injured her arm was caused by Deputy Moll, one of the Municipal Defendants. While she names eight State Defendants in total, she only alleges that three (Arndt, Dvorak, and Skar) even attempt to deploy any force against her. The sole basis of liability discernible on the face of the Complaint for the remaining five State Defendants is presumably their failure to "intervene in, stop, or mitigate the attack on Sophia." (JA461; Companion R.Doc.14 ¶ 187.)

Accordingly, to state any claim at all against *those* five State Defendants (Bakke, Nelson, Rode, Hinrichs, and Savageau) Wilansky must also overcome their qualified immunity on failure to intervene claim, which itself requires a two-part showing. That is, she must allege that *each* of the five personally [1] observed or had reason to know that excessive force would be or was being used to effectuate a

seizure, *and* [2] had both the opportunity and the means to prevent the harm from occurring. *Mitchell*, 28 F.4th at 901, citing *Robinson v. Payton*, 791 F.3d 824, 829 (8th Cir. 2015). Notably, Wilansky does not even attempt to articulate the test for failure to intervene in her Appellant Brief.

As this Court has stated, liability under Section 1983 is personal, so the two-part test of qualified immunity must be analyzed “defendant-by-defendant and claim-by-claim.” *Beard*, 97 F.4th at 1114. Applying the test to the eight State Defendants mandates affirming the district court’s decision to dismiss.

A. Wilansky Does Not Allege That Any Defendant Seized Her by Force.

As set forth above, a violation of the Fourth Amendment has two elements; the first of these is that a seizure actually occurs. Wilansky contends that her complaint alleges two kinds of seizures – a seizure by force, and, a seizure by control.

Wilansky interprets her allegations as showing two separate seizures by force. The first occurs when one of the Defendants (apparently State Defendant Arndt) hits her in the upper arm with a less-lethal munitions. *See* Appellant Brief at 18. The second seizure by force occurred when Municipal Defendant Moll allegedly hit her with an “explosive munition,” injuring her arm. Appellant Brief at 18.

The requirements of a seizure by physical force were addressed by the United States Supreme Court in *Torres v. Madrid*, 592 U.S. 306 (2021). There, the Court was faced with deciding whether a woman was seized when she was hit by a bullet but continued driving away. *Torres v. Madrid*, 592 U.S. at 310.

Looking to common law, the Court concluded that the plaintiff *was* seized “for the instant that the bullets struck her.” *Id.* at 318. However, the Court placed important limits on its holding regarding a physical force seizure:

We stress, however, that the application of the common law rule does not transform every physical contact between a government employee and a member of the public into a Fourth Amendment seizure. **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.

Id. at 318. In other words, only force **intentionally applied to restrain** is cognizable as a seizure.

Taking Wilansky’s pleadings as true and accepting all *reasonable* inferences, she does not plead a cognizable seizure by physical force because she does not plausibly allege any intent to restrain. Evaluated objectively, the officers’ conduct manifests an intent to disperse and repel her throughout their interaction with her. Wilansky’s arguments to the contrary are based on unreasonable inferences which this Court is not obligated to accept. *In re SuperValu, Inc.*, 925 F.3d at 965.

The officers’ intent to disperse Wilansky is most apparent from their order telling her to do so. (“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.) Wilansky does not comply with this order. Rather, she remains behind a metal sheet, apparently at least partially concealed from law enforcement who have to move west to get a better line of sight. Nothing on the face of her allegations indicates that any member of law enforcement has changed his mind about ordering her to leave and now wants to seize her.

While Wilansky is behind the metal sheet, she is impacted by Arndt's munition. (JA358-59; R.Doc.259 at ¶ 139.) Nothing about the deployment of this munition creates an inference of an intent to restrain. Once she was struck in the arm, Wilansky finally began to comply with the order which was addressed to her earlier. Put another way, the law enforcement munitions achieved their intended effect: the deployment of a less-lethal munition achieved the dispersal of Wilansky.

Like Arndt's deployment, Moll's alleged deployment also occurs in the context of law enforcement's attempts to disperse Wilansky to the south. Moll only deploys the alleged explosive munition after Wilansky stopped to pick up a piece of plywood. (JA359; R.Doc. 259 at ¶ 147.) The only plausible inference is that Deputy Moll deployed this munition because she stopped.

Even considering Wilansky's newer allegation that she was still being fired on as she retreated, (JA460; Companion R.Doc.14 at ¶¶ 181 – 187), the only logical inference is that the officers were simply trying to keep her moving south in compliance with an order which she had already resisted once. There is simply no "intent to restrain" present anywhere on the face of the Complaint or in the reasonable inferences therefrom with regards to the force deployed by Arndt and Moll.

Wilansky presents several other arguments, and none hold water. First of all, she objects that Defendants had "no reason" to repel her from the barricade. Appellant Brief at 33. But they certainly did, according to her own allegations. Hours before, the protestors had taken the remarkable step of using a semi-truck to forcibly dismantle the barricade themselves. Only the interference of law enforcement had

prevented the protestors from hauling away the second burned-out vehicle. The forcible destruction of a law enforcement barricade is *extraordinary* conduct, and the continuing risk to the barricade would be in the forefront of any reasonable office's mind.

From this background, it is clear that any member of law enforcement would be particularly attentive to, and suspicious of, any protestor activity near the burned-out truck. This is true even despite Wilansky's attempts to downplay the risk posed by her presence by the truck, asserting that she was unarmed, that she was empty-handed, and that she "never shouted or made any threats." (JA455; Companion R.Doc.14 at ¶ 147.) None of her assertions mitigate the *objective* risk of the situation, and the objective risk is all that matters in the Fourth Amendment context. While Wilansky successfully alleges that she had no *visible* weapons or means of harming the burned-out truck, law enforcement would have no way of knowing what any protestor could have on their person. For example, a pair of bolt cutters could fit inside a pocket; an improvised explosive device could be similarly concealed. All of this is compounded by the unusual situation of several "water protectors" happening to wander over to the remaining burned-out truck in the middle of the night, hours after the bridge was cleared and "almost all of the protestors had returned to Oceti Sakowin or otherwise dispersed." (JA355; Companion R.Doc.14 at ¶ 124.) Nothing about the Court's obligation to draw reasonable inferences in favor of the plaintiff require the Court to imbue law enforcement with subjective knowledge of Wilansky's allegedly innocent intentions. Given the context of the night in question, her presence at the truck was objectively suspicious.

Wilansky's argument regarding Deputy Moll is also unreasonable. She writes that, because she was allegedly hit the second she stopped, "Defendant Moll must have aimed and fired the explosive munition at her while she was still running, thus indicating an intent to stop, rather than repel her." Appellant Brief at 28. But deployment of a munition takes a split second. How could Moll have "aimed and fired" and successfully hit her arm from 90 feet away if she were running at full speed and he didn't know that she would stop? The only reasonable inference is that Wilansky's decision to halt prompted Moll to aim and deploy.

Even the baseless allegation that law enforcement "celebrated" Wilansky's injury supports an intent to disperse. If any of them wanted to restrain Wilansky, they would have taken her into custody when she was allegedly lying on the ground. It is not plausible that 14 law enforcement officers who mount a concerted attack to restrain someone would, after the person is injured, forget about the fact that they were trying to restrain the person and simply let their friends carry the person away. And again, Wilansky was never actually restrained, further militating against any finding of a seizure.

If one looks beyond Wilansky's complaint to the video capturing law enforcement's actual command, all ambiguity vanishes.

[Inaudible] We see you behind the truck **and** underneath the truck. Get out now. Return to the south side of the bridge. Otherwise, we will use less-lethal munitions.

SA185; R. Doc.126-29.

The command is clear. Law enforcement is announcing a command to retreat south, and making it very clear that less-lethal munitions will be employed if the

protestors refused to disperse. The protestors refused to disperse, and so law enforcement used less-lethal munitions. There is no plausible reason to suspect that their warning indicated anything other than what it said. And what it said unequivocally manifests an intent to disperse.

In conclusion, while Wilansky successfully alleges that both Moll and Arndt physically contacted her, the missing element of “intent to restrain” means that she can’t allege a seizure. This is nowhere so clear as from Wilansky’s own brief. She writes of *Torres*:

The Supreme Court said “ordering Torres to stop and then shooting to restrain her movement ... satisfie[d] the objective test for a seizure.” *Id.* at 318. The same is true here, for the same reasons.

Appellant Brief, at 19.

But the same is not true here. In *Torres*, law enforcement “[ordered] Torres to **stop.**” *Id.* at 318. Here, law enforcement ordered Wilansky to **go.** Wilansky cannot ask this Court to infer that “go” means “stop.” *See Supervalu*, 925 F.3d at 965 (plaintiff not entitled to “unreasonable inferences.”) Wilansky fails to allege a seizure by force.

B. Wilansky Does Not Allege That Any Defendant Seized Her by Control.

Wilansky’s claim of seizure by control fares no better. Wilansky contends that she was seized by control on two occasions. First, she argues that she was seized when she was “trapped behind the metal sheet by the barrage of munitions and explosives.” Appellant Brief, at 20. It is not clear which Defendants are specifically implicated in the first seizure, but presumably the group includes State Defendants Arndt, Dvorak, and Skar, all of whom were alleged to have deployed less-lethal

munitions at Wilansky when she was behind the metal sheet. JA456-67; Companion R.Doc.14 at ¶¶ 154-156, 163. Second, Wilansky alleges that she was seized when Moll allegedly hit her with an explosive munition. None of the conduct alleged by Arndt, Dvorak, Skar, or Moll constitutes a seizure.

Besides a seizure by force, the other type of seizure is a seizure by control. *See Torres*, 592 U.S. at 322. There are two types: voluntary submission to a show of authority, or, termination of freedom of movement. Wilansky appears to allege the latter type here.

As noted by the Court in *Torres*, the “prime example” of termination-of-freedom-of-movement seizures is *Brower v. Cnty. of Inyo*, 489 U.S. 593, 595-96 (1989). In *Brower*, the Court considered whether police use of a roadblock during a high-speed chase was a seizure when the suspect car’s movement was not restrained by law enforcement until he hit the roadblock. *Brower*, 489 U.S. at 595-96. The Court noted that, if a suspect was being chased by police and accidentally lost control of their car, that would not be a seizure – because “[v]iolation of the Fourth Amendment requires *an intentional acquisition of physical control.*” *Id.* at 596. But the Court reasoned that the accidental crash hypothetical was distinguishable from the case before them, which involved the use of a police roadblock “crossing both lanes of the highway.” *Id.* at 598. Discussing the distinction, the Court wrote that for a seizure, “the detention or taking itself *must be willful.*” *Id.* at 596. Noting that the police roadblock crossing the entire highway “is *designed* to produce a stop by physical impact,” the Court held the stop to be a seizure. *Id.* at 598.

The first seizure which Wilansky purports to allege – when she was “pinned” to the barricade by the deployment of less-lethal munitions behind her – fails to meet the requirement of seizure by control for several reasons.

First of all, a seizure by control still requires an underlying intent to obtain control. Violation of the Fourth Amendment requires an “intentional acquisition of physical control.” *Brower*, 489 U.S. at 596; *see also id.* (“[T]he detention or taking itself *must be willful*”). For the reasons discussed above, law enforcements’ alleged actions objectively manifest an intention to disperse and repel Wilansky, not to restrain her. Accordingly, any claim of seizure against fails out of the gate.

In addition to failing to show “intentional” conduct required by *Brower*, Wilansky also fails to allege the “acquisition of physical control.” Wilansky alleges she was trapped behind the barricade by the deployment of less-lethal munitions around her, but she clearly was not literally trapped – she retreated south as soon as she decided to. In the absence of actual restraint, her subjective feeling of being “trapped” is ultimately irrelevant in the Fourth Amendment context. *See Hernandez v. Jarman*, 340 F.3d 617, 622 (8th Cir. 2003) (disregarding the possibility that suspect “may have felt trapped” and explaining that “for purposes of whether a Fourth Amendment seizure occurred during this collision, it is irrelevant what [suspect] may have been thinking.”)

Setting aside Wilansky’s perceptions, the complaints cannot plausibly be read to suggest that she was physically restrained. In front of her was a law enforcement barricade. Behind her was an entire highway. As evidenced by the fact that she did, eventually, move to the south, nothing was preventing her from doing so earlier. She

states that she was “pinned,” JA358; R.Doc.259 at ¶ 138, but this conclusory allegation is not actually supported by the factual contents of the surrounding allegations. Wilansky certainly does not allege that law enforcement crossed the barricade and encircled her to the south. Indeed, from the face of her complaint at least in her first lawsuit, her dispersal to the south actually *halts* the deployment of less-lethal munitions, confirming the common-sense conclusion that they were only being deployed in the first place because she wasn’t dispersing.

The Eighth Circuit recently refused to find clearly established law establishing a seizure by control in a very similar case. *Quraishi v. St. Charles Cnty., Missouri*, 986 F.3d 831, 840 (8th Cir. 2021). There, plaintiffs were dispersed at a protest and attempted to invoke a *Brower*-like seizure by control. *Quraishi*, 986 F.3d at 840. But the Court distinguished such cases from the facts before them, noting, “Here, the reporters’ freedom to move was not terminated or restricted. . . **They were dispersed.**” *Quraishi*, 986 F.3d at 840 (internal citations omitted).

Here, likewise, Wilansky’s freedom to move was not terminated or restricted – rather, she was dispersed. She does not plausibly allege a seizure by control by any of the defendants who were allegedly deploying less-lethal munitions at her, including State Defendants Arndt, Dvorak, and Skar.

Wilansky’s claim regarding Moll fares no better. While she states she was temporarily “knocked . . . to the ground” by his alleged deployment, the Eighth Circuit very recently confirmed that being knocked off one’s feet by deployment of munitions was not clearly a seizure when the force was used to compel departure from an area. *Dundon*, 1255-1256.

More critically, Wilansky’s argument on this point confuses the two types of seizure set forth in *Torres*. She writes, “It makes no difference that bystanders were eventually able to carry Sophia away in search of a doctor, because “[a] seizure is a single act, not a continuous fact.” Appellant Brief at 20, citing *Torres* at 323.

But the cited passage in *Torres* was referring to physical-force seizures in the cited paragraph, not seizures by control. The Supreme Court was making the point that the *difference* between seizures by force and seizures by control is that actual control is required for the latter. *See id.* at 322-323. “Unlike a seizure by force, a seizure by acquisition of control involves either voluntary submission to a show of authority or the termination of freedom of movement. . .” *Id.* at 322. The Court went on to note that the requirement of control or submission “never extended to seizures by force,” because “any such requirement of control would be difficult to apply **in cases involving the application of force.**” *Id.* at 322-323. The Supreme Court went on to say that a seizure by force (*i.e.*, a mere touch with intent to restrain) has the benefit of being a “single act, not a continuous fact.” *Id.* at 323.

In essence, Wilansky is trying to combine elements from both tests in *Torres*, because she can meet neither independently. She can show the “mere touch” of a physical force seizure, but not the intent to restrain. She can show the momentary termination of movement associated with some seizures by control, but not the requisite actual control or the intent to apply force for this purpose. So she asks this Court to solve the very “line-drawing problem” that the Supreme Court warned against in *Torres*, by asserting that Moll’s use of physical force (which fails to qualify as a seizure by force, as set forth above) nevertheless controlled and seized

her. The Court should reject this contorted reading of *Torres*, particularly as the law in this area has been recognized by this Court many times as not clearly established.

In sum, Wilansky fails to plausibly allege a seizure by control by Arndt, Dvorak, Skar, or Moll.

C. Any Seizure That Occurred Was Not Clearly Established.

Even if this Court would find that some of the officers seized Wilansky on these facts, she still cannot show that a reasonable officer would have had fair notice, based on clearly established law, that his conduct would objectively constitute a seizure. As such, Wilansky cannot overcome the second part of the qualified immunity test.

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, 731 (2002). To defeat qualified immunity a plaintiff must demonstrate that “existing precedent [has] placed the statutory or constitutional question beyond debate.” *Lombardo v. City of St. Louis*, 38 F.4th 684, 690 (8th Cir. 2022).

Rather than demonstrating that the existence of a seizure on similar facts is “beyond debate” as a matter of clearly-established law, Wilansky asserts that no such showing is necessary. She writes, “the district court erred conceptually in applying the qualified-immunity analysis not to the question of whether the force was excessive, but to the threshold question of whether a seizure occurred.” Appellant Brief, at 31. But the district court did not err. The Eighth Circuit has repeatedly applied the “clearly-established” analysis to the question of whether a seizure

occurred on a given set of facts. *See, e.g., Qurashi v. St. Charles Cnty., Missouri*, 986 F.3d 831, 840 (8th Cir. 2021) (considering whether deployment of tear gas was a seizure); *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023) (considering whether use of force designed to disperse a crowd was a seizure). Wilansky’s failure to address this question waives her opposition to all Defendants’ qualified immunity on the seizure question.

But even had Wilansky tried to set forth caselaw putting Defendants on notice of the possibility of a seizure on these facts, she could not have done so. The recent case of *Dundon v. Kirchmeier* addressed police response to protestor activity on the Backwater Bridge in the hours before Wilansky’s injury. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). Addressing the protestors’ claims of excessive force under the Fourth Amendment, the Court recognized that the “threshold question . . . is whether the protestors were seized.” *Dundon*, 85 F.4th at 1255.

The Court held that the law was not clearly established in this area, citing its previous decisions:

As of 2014, it was not clearly established that the use of tear gas by police to disperse news reporters from the site of public unrest and protests was a seizure. *Quraishi v. St. Charles County*, 986 F.3d 831, 839-40 (8th Cir. 2021). As of 2018, it was not clearly established that a push used to repel a subject seeking to enter a government facility was a seizure. *Martinez v. Sasse*, 37 F.4th 506, 510 (8th Cir. 2022).

Dundon, 85 F.4th at 1256 (8th Cir. 2023).

This instant case originates on the same day as *Dundon*, and is governed by the same principles. There, as here, officers used less-lethal force to disperse protestors from a distance, knocking some over and stopping them in their tracks. This Court, too, should find that the law enforcement officers here lacked notice that

the use of less-lethal munitions to disperse a protestor could ultimately effectuate a seizure.

Martinez v. Sasse is another case where this Court explicitly found that conduct similar to the conduct alleged here was not clearly established as a seizure. *Martinez v. Sasse*, 37 F.4th 506, 510 (8th Cir. 2022). That case concerns conduct which took place in June of 2018, concerning an ICE officer who physically pushed an attorney to keep them out of an ICE facility. *Martinez*, 37 F.4th at 508. Considering whether the push was a seizure as a matter of clearly-established law, the Court explained, “If there is a constitutional distinction between **force used for repulsion that momentarily restricts forward movement and force used for dispersion that impels retreat**, the distinction is not so readily apparent that every reasonable officer would have understood it.” *Id.* at 510.

Even if the Court should draw so fine a line, the force alleged here is clearly classified as “force used for dispersion that impels retreat,” as opposed to force that momentarily restricts forward movement given that Wilansky does not allege she was *trying* to move forward and climb over the burned-out truck towards law enforcement. This Court should recognize the same and dismiss these claims based on qualified immunity.

Even if this Court finds that *Martinez* and *Dundon* do not control, however, Wilansky is still unable to point to a single case, let alone a “robust consensus” of cases, putting State Defendants on notice that the deployment of force in the unique circumstances facing them – *i.e.*, dispersing a protestor away from a barrier that had been partially dismantled by different protestors hours before – would constitute a

seizure. Accordingly, Wilansky cannot show that the conduct of the State Defendants was clearly established as a seizure, and the Fourth Amendment claim against all Defendants must be dismissed.

D. Even if Wilansky Did Allege a Seizure, She Does Not Allege Objectively Unreasonable Force.

As set forth above, in order to state a claim for violation of the Fourth Amendment, a plaintiff must successfully plead a seizure *and* that the force used to effectuate it was excessive. Even setting aside the lack of seizure here, Wilansky’s allegations do not actually state a claim of excessive force.

The test for whether force is excessive under the Fourth Amendment is “whether the amount of force used was objectively reasonable under the particular circumstances.” *Kohorst v. Smith*, 968 F.3d 871, 876 (8th Cir. 2020). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.” *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Here, the objective threat posed by Wilansky to a reasonable law enforcement officer was substantial. Despite her claims of peaceful intentions, none of the law enforcement officers had any way of knowing who Wilansky was when she approached the truck – in itself an illegal action, because the bridge was closed. All they knew is that she was one of hundreds of protestors who gathered illegally on a state highway to “protest the continued closure of the bridge” after other protestors took the extraordinary step of using a semi-truck to forcibly dismantle the barricade themselves. The risk posed by Wilansky was compounded by the fact that the

officers on Backwater Bridge within hearing distance of the warning would be under the impression that she or another protestor was under the truck. And the risk only increased as Wilansky failed to disperse in response to the law enforcement command.

Given these circumstances, it was not unreasonable for any of the three State Defendants alleged to have used force – Arndt, Dvorak, or Skar – to have deployed less-lethal in an attempt to compel Wilansky to disperse.

It was not unreasonable for State Defendant Dvorak to deploy a Stinger ball grenade near her, in the hope that it would prompt her to disperse to the south. Wilansky does not allege that the Stinger ball grenade injured her or impacted her in any way. All she alleges is that the Stinger ball grenades were deployed closer than perhaps they should have been for purposes of dispersing her. But “the Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general.” *Schulz v. Long*, 44 F.3d 643, 648 (8th Cir. 1995). Wilansky’s claim against Dvorak is based on deployment of less-lethal munitions that did not seize, touch, or injure her in any way. All she manages to truly allege is that his conduct is “ill-advised.” But not every criticism of a law enforcement decision equals a Constitutional violation. She has failed to plead one here.

Along similar lines, it was not unreasonable for State Defendant Arndt to deploy less lethal rounds at her arm, in the hope that it would prompt her to disperse to the south. This is true from the face of the pleadings alone, and is particularly apparent when the full contents of the law enforcement command is considered. According to the actual command, law enforcement warned that they would use less-

lethal munitions if Wilansky did not return to the south side of the bridge. Wilansky was warned, and she did not disperse. In light of the circumstances facing Arndt, his decision to deploy less-lethal was reasonable. The same is certainly true of Skar, who was not even alleged to have impacted her with his less-lethal rounds. Wilansky cannot be found to have stated a claim for excessive force in effectuating a seizure on these allegations.

E. Any Excessive Force Was Not Clearly Established.

Even if Wilansky did manage to allege that the seizure was unreasonable and clearly excessive, however, her right to be free from this specific force was not clearly established under these unique circumstances. Consider the case of *Bernini v. City of St. Paul*, 665 F.3d 997, 1006 (8th Cir. 2012). There, officers faced with a protest “used non-lethal munitions, including smoke, blast balls, and chemical irritants,” to keep a crowd moving west. *Bernini*, 665 F.3d at 1002. Analyzing a claim of Fourth Amendment excessive force, the Court held that “at a minimum, it was not objectively unreasonable for [the police supervisor] to authorize the force deployed in light of clearly established law.” *Id.* at 1006. The plaintiffs contended that it was unreasonable for the officers to continue using force once the protestors were complying with the movement of the officers. *Id.* But the Court noted that “some people would not leave the roadway and that some turned east and faced the officers. It was reasonable for the officers to deploy non-lethal munitions to keep all members of the crowd moving west.” *Id.*

Against the background of *Bernini*, where officers were authorized to use less-lethal force to keep members of a crowd moving west merely because some people

turned to face the officers, it would not have been at all apparent to an officer in 2016 that deployment of less-lethal force was unreasonable in the situation on the Backwater Bridge.

The recent Eighth Circuit case of *Marks v. Bauer* is illustratively distinguishable. There, a plaintiff was falling backwards away from law enforcement when the defendant officer deployed a projectile into his face from 5-10 feet away. *Marks v. Bauer*, 107 F.4th 840, 843 (8th Cir. 2024). In concluding that this force was clearly established as unreasonable as of May 2020, the Court distinguished the situation facing the officer from that in past cases:

The video evidence shows that the crowd at this moment was compliant. Some members were assisting law enforcement. Another part of the crowd watched from a distance and recorded the events on their phones. Unlike the individuals in *White v. Jackson*, 865 F.3d 1064, 1072 (8th Cir. 2017), who were ordered to disperse and who saw police forming a skirmish line to disperse them, the crowd present at this scene had never been given a dispersal order. This case is also unlike the crowd in *Bernini v. City of St. Paul*, 665 F.3d 997, 1001, 1006 (8th Cir. 2012), where officers suspected the individuals intended on penetrating the police line.

Marks, 107 F.4th at 850.

Here, the situation is the opposite of that faced by the officer in *Marks*. Here, Wilansky and Joachinson *had* been given a dispersal order. Here, Wilansky and Joachinson *were* suspected of intending on penetrating the police line. Here, force was deployed not from five feet away at someone's face, but from 90 feet away at someone's arm. In sum, Wilansky cannot show an overwhelming consensus of law that use of force in this situation was unreasonable. The cases Wilansky relies upon are inapposite. For instance, *Terebesi* concerns the use of stun grenades during a "routine" execution of a search warrant. *Terebesi v. Torres*, 764 F.3d 217, 238-39

(2d Cir. 2014). Stun grenades are not alleged to be use here, nor was this the routine execution of a search warrant. Wilansky brings forward no cases pertaining to the particular circumstances putting the officers on notice that their force was unreasonable here.

Lastly, in response to Wilansky's request that this Court reject qualified immunity entirely, the State Defendants submit that she has identified no legal reason for this Court to do so.

F. Even If There Was a Seizure, and Was Excessive Force, There Was No Failure to Intervene.

Lastly, Wilansky's failure-to-intervene claims were properly dismissed.

First of all, failure to intervene is a derivative claim which necessarily fails in the absence of an underlying constitutional violation. "Without an underlying constitutional violation, there can be no liability for failure to intervene." *Peterson v. Heinen*, 89 F.4th 628, 640 (8th Cir. 2023). Here, as set forth above, Wilansky does not allege an underlying Fourth Amendment violation. Accordingly, there can be no liability on behalf of any Defendant for any failure to intervene.

Second, even if this Court finds that Wilansky alleged a Constitutional violation, any such Constitutional violation would not be clearly established for the reasons set forth above. And when it is not clearly established that a use of force violates the Constitution, a bystander officer is not "on fair notice that his failure to intervene would be unconstitutional," so the bystander officer cannot be liable for failure to intervene. *Drew v. City of Des Moines*, No. 23-2656, 2024 WL 3630108, at *3 (8th Cir. Aug. 2, 2024).

Third, even if this Court would find that (1) a seizure occurred which (2) was clearly established and (3) unreasonable force occurred which was (4) clearly established, any case for failure to intervene remains impossible on these facts. This is because of the warning which Wilansky admits on her Complaint was given by law enforcement, specifically, by Lieutenant Ternes of Morton County. Even if the Court does not examine the audio of the warning itself, Wilansky's allegation – that officers “ordered them to move away from the burned out vehicle and accused them of having someone under the truck” – inoculates all Defendants from any possible liability. Again, to state a claim for failure to intervene, an officer must know or have reason to know that excessive force for purposes of effectuating a seizure is occurring. But any officer hearing that warning could only have concluded that protestors were interfering with the barricade, even if Wilansky alleges that no one was actually under the truck. Further, any officer on scene would have quickly realized that Wilansky and Joachinson did not, as ordered, disperse. As such, from the viewpoint of any observing officer, the force used by his fellow officers was reasonable in light of the threat facing them. And lastly, even if the officers somehow could be construed to have known of the presence of excessive force, it is implausible to the vanishing point to suggest that could have had the means to stop it – it only takes a second to deploy a munition, and once Wilansky started dispersing, the other officers would have simply assumed that all deployment was done.

On the basis of the pleadings, then, Wilansky fails to state a cognizable case for failure to intervene. All eight State Defendants are entitled to qualified immunity, because Wilansky cannot meet either test.

V. EVERY STATE DEFENDANT IS ENTITLED TO QUALIFIED IMMUNITY ON WILANSKY'S FOURTEENTH AMENDMENT CLAIM.

Wilansky appears to assert that Fourteenth Amendment “due process” claims are analytically distinct from Fourteenth Amendment “excessive force” claims, and that Fourteenth Amendment “excessive force” claims by free citizens are, post-*Kingsley*, analyzed under an “objective reasonableness” test rather than the “shocks-the-conscience” test. Appellant Brief at 39-40. She writes, “Appellant . . . found no case in which any court applied the “shocks the conscience” standard to an excessive-force claim under the Fourteenth Amendment.” *Id.* But substantive due process claims under the Fourteenth Amendment can certainly include claims for excessive force, and many post-*Kingsley* cases apply the shocks-the-conscience test in this exact situation. *See, e.g., Francis v. Huff*, 590 F. Supp. 3d 1092, 1103 (E.D. Tenn. 2022), *aff'd*, No. 22-5282, 2022 WL 7973109 (6th Cir. Oct. 14, 2022). And at least one other circuit has noted that, post-*Kingsley*, the proper standard for free citizens not subject to search or seizure is the “shock the conscience” standard. *Coley v. Lucas Cnty., Ohio*, 799 F.3d 530, 537 (6th Cir. 2015).

Accordingly, without any indication from the United States Supreme Court or this Court that *Kingsley v. Hendrickson* abrogated the “shocks the conscience” standard for free citizens, this Court should not hesitate to apply it to Wilansky’s claims here. *See Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 844 (1998) (“*Graham*

‘preserve[s] fourteenth amendment substantive due process analysis’ for free citizens outside of seizure context).

Under this familiar standard, Wilansky cannot prevail. “Only the most severe violations of individual rights that result from the brutal and inhumane abuse of official power rise to this level.” *White v. Smith*, 696 F.3d 740, 757–58 (8th Cir. 2012) (citations and quotations omitted).

Here, even taking Wilansky’s allegations as true, she was on a bridge closed to the public, specifically located at a defensive barricade which had already been partially dismantled hours earlier, and was warned to leave. In such a scenario, it does not shock the conscience to deploy less-lethal munitions at a person. As such, Wilansky fails to allege a violation of a Fourteenth Amendment right, and certainly not one that was clearly established such that a law enforcement officer would have known about it. Accordingly, State Defendants are entitled to qualified immunity on Plaintiff’s Fourteenth Amendment claims.

CONCLUSION

For all of these reasons, the State Defendants respectfully request that the judgments of the district court be affirmed.

Dated this 11th day of September, 2024.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ Jane G. Sportiello
Jane G. Sportiello
Assistant Attorney General
State Bar ID No. 08900
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jSPORTIELLO@ND.GOV

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email CTITUS@ND.GOV

Attorneys for Appellees Derek J. Arndt,
Travis M. Skar, Evan M. Savageau, Joshua
W. Rode, Travis A. Nelson, Michael W.
Hinrichs, Paul D. Bakke, and Adam Dvorak

CERTIFICATE OF COMPLIANCE

Civil No. 24-1919

Civil No. 24-1911

The undersigned hereby certifies that this Motion conforms with the type-volume limitations of Fed. R. App. P. 27(d) and that the text of this motion contains 14,762 words, excluding the parts exempted by Fed. R. App. P. 32(f). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 365 word processing software in Times New Roman 14 point font. The brief has been scanned for viruses and is virus-free. I further certify that the digital version of this brief was generated by printing to PDF from the original word processing file so that the text of the digital version of the pleading may be searched and copied in compliance with this Court’s Local Rule 25(A).

Dated this 11th day of September, 2024.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ Jane G. Sportiello
Jane G. Sportiello
Assistant Attorney General
State Bar ID No. 08900
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Email jsportiello@nd.gov

By: /s/ Courtney R. Titus
Courtney R. Titus
Assistant Attorney General
State Bar ID No. 08810
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640

Email ctitus@nd.gov

Attorneys for Appellees Derek J. Arndt, Travis M. Skar, Evan M. Savageau, Joshua W. Rode, Travis A. Nelson, Michael W. Hinrichs, Paul D. Bakke, and Adam J. Dvorak