

Nos. 24-1911 & 24-1919

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

SOPHIA WILANSKY,
Plaintiff/Appellant,

vs.

MORTON COUNTY, NORTH DAKOTA, *et al.*
Defendants/Appellees.

SOPHIA WILANSKY,
Plaintiff/Appellant,

vs.

PAUL D. BAKKE, in his personal capacity, *et al.*
Defendants/Appellees.

On Appeal from the U.S. District Court for the District of North Dakota,
No. 1:18-cv-236 and No. 3:23-cv-00142,
Honorable Daniel M. Traynor, U.S. District Judge

BRIEF OF APPELLANT SOPHIA WILANSKY

(Counsel listed on next page)

Joseph H. Lang, Jr.
D. Matthew Allen
CARLTON FIELDS, P.A.
4221 W. Boy Scout Blvd.
Suite 1000
Tampa, Florida 33607
Telephone: (813) 229-4253
jlang@carltonfields.com
mallen@carltonfields.com

Benjamin Michael Stoll
John L. Gibbons
CARLTON FIELDS, P.A.
1025 Thomas Jefferson Street NW
Suite 400 West
Washington, DC 20007
Telephone: (202) 965-8100
bstoll@carltonfields.com
jgibbons@carltonfields.com

Samuel B. Spinner
CARLTON FIELDS, P.A.
700 NW 1st Avenue
Suite 1200
Miami, Florida 33136
Telephone: (305) 347-6885
sspinner@carltonfields.com

Attorneys for Appellant Sophia Wilansky

SUMMARY OF THE CASE

Sophia Wilansky nearly lost her arm on November 21, 2016, when one of the Defendants shot her with an explosive munition near an expansive barricade on the Backwater Bridge, which was constructed about a mile south of the Dakota Access Pipeline drill pad. She was extremely lucky to avoid amputation, but the munition destroyed nearly all the arteries, tissue, muscle, tendons, and bones in her forearm.

Sophia filed an excessive force lawsuit. The lawsuit included claims under the Fourth and Fourteenth Amendments, as well as other claims. The case proceeded at a crawl and, at one point, the district court disallowed a proposed amended complaint and actually dictated what the replacement amended complaint must say. In reaction, Sophia had to file a second lawsuit against additional defendants. The district court eventually dismissed both complaints and denied leave to amend. This is the appeal of both dismissals.

Given the critical importance of the legal issues and the strange procedural history of the case, oral argument would benefit the panel. Sophia requests that the Court schedule an oral argument for 15 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, undersigned counsel hereby certifies that Sophia Wilansky is an individual.

TABLE OF CONTENTS

SUMMARY OF THE CASEi

CORPORATE DISCLOSURE STATEMENT..... ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES.....v

JURISDICTIONAL STATEMENTxi

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW xii

STATEMENT OF THE CASE 1

 I. Factual background 1

 II. Proceedings below9

SUMMARY OF THE ARGUMENT..... 14

ARGUMENT 16

 I. Legal Standard: The district court’s dismissals are reviewed *de novo*. 16

 II. Sophia plausibly alleged Fourth Amendment violations to which qualified immunity does not apply. 17

 A. Sophia plausibly alleged seizure by force..... 17

 B. Sophia plausibly alleged seizure by control. 20

 C. Sophia plausibly alleged excessive, objectively unreasonable force. 21

 D. Qualified immunity does not apply. 23

E.	None of the district court’s reasons for rejecting Sophia’s claim has merit.....	27
III.	Sophia stated a Fourteenth Amendment claim.	33
A.	The district court applied the wrong legal standard to the Fourteenth Amendment claim.	34
B.	The district court erred in concluding that Sophia had not plausibly alleged police conduct that shocks the conscience.	40
IV.	Qualified immunity should be categorically rejected.....	45
V.	The district court erred in dismissing the <i>Monell</i> claim.	48
VI.	Reversing the final judgment in Case No. 24-1911 requires reversal of the final judgment in Case No. 24-1919.	52
VII.	The district court erred in dismissing Sophia’s claims with prejudice.....	53
CONCLUSION.....		58
CERTIFICATE OF COMPLIANCE.....		60
CERTIFICATE OF SERVICE		61

TABLE OF AUTHORITIES

<i>Baxter v. Bracey</i> , 140 S. Ct. 1862 (2020)	46
<i>Boude v. City of Raymore</i> , 855 F.3d 930 (8th Cir. 2017)	16
<i>Boyd v. Benton Cnty.</i> , 374 F.3d 773 (9th Cir. 2004).....	25
<i>Braden v. Wal-Mart Stores, Inc.</i> , 588 F.3d 585 (8th Cir. 2009).....	29, 30
<i>Brown v. City of Golden Valley</i> , 574 F.3d 491 (8th Cir. 2009).....	24
<i>Butler v. City of Detroit</i> , 936 F.3d 410 (6th Cir. 2019)	xii, 23
<i>Cole v. Homier Distrib. Co.</i> , 599 F.3d 856 (8th Cir. 2010)	16
<i>Cook v. George’s, Inc.</i> , 952 F.3d 935 (8th Cir. 2020)	29
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998)	47
<i>Davis v. White</i> , 794 F.3d 1008 (8th Cir. 2015)	35, 39
<i>Dukes v. Deaton</i> , 852 F.3d 1035 (11th Cir. 2017)	25
<i>Dundon v. Kirchmeier</i> , 85 F.4th 1250 (8th Cir. 2023).....	30

<i>Edrei v. Maguire</i> , 892 F.3d 525 (2d Cir. 2018)	xii, 35, 37
<i>Estate of Escobedo v. Bender</i> , 600 F.3d 770 (7th Cir. 2010).....	22, 23, 25
<i>Ferguson v. Short</i> , 840 F.3d 508 (8th Cir. 2016)	23
<i>Gonzales v. Douglas</i> , 2016 WL 4530442 (D. Aziz. Aug. 30, 2016)	25
<i>Graham v. Barnette</i> , 5 F.4th 872 (8th Cir. 2021).....	24
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982).....	xiii, 46
<i>Hennessey v. Gap, Inc.</i> , 86 F.4th 823 (8th Cir. 2023)	16
<i>Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.</i> , 535 U.S. 826 (2002)	57
<i>Ingram v. Ark. Dep’t of Corr.</i> , 91 F.4th 924 (8th Cir. 2024).....	40
<i>Jackson v. Gerl</i> , 622 F. Supp. 2d 738 (W.D. Wis. 2009)	25
<i>Janus v. Am. Fed’n of State, Cnty., & Mun. Emps.</i> , 585 U.S. 878 (2018)	xiii, 48
<i>Kedra v. Schroeter</i> , 876 F.3d 424 (3d Cir. 2017)	37
<i>Kelly v. City of Omaha</i> , 813 F.3d 1070 (8th Cir. 2016)	28

<i>Kingsley v. Hendrickson</i> , 576 U.S. 389 (2015).....	xii, 34, 35, 36, 37, 38, 39, 40
<i>Kisela v. Hughes</i> , 584 U.S. 100 (2018)	47, 48
<i>Krause v. Jones</i> , 765 F.3d 675 (6th Cir. 2014)	25
<i>Lombardo v. City of St. Louis</i> , 594 U.S. 464 (2021)	xii, 37
<i>Marmo v. Tyson Fresh Meats, Inc.</i> , 457 F.3d 748 (8th Cir. 2006)	17
<i>Masters v. City of Independence</i> , 998 F.3d 827 (8th Cir. 2021)	43
<i>Miranda-Rivera v. Toledo-Davila</i> , 813 F.3d 64 (1st Cir. 2016)	35
<i>Mitchell v. Dakota Cty. Soc. Servs.</i> , 959 F.3d 887 (8th Cir. 2020)	40
<i>Mitchell v. Kirchmeier</i> , 28 F.4th 888 (8th Cir. 2022)	xiii, 16, 21, 22, 49, 50, 51
<i>Monell v. Dep’t of Soc. Servs.</i> , 436 U.S. 658 (1997)	xiii, 14, 48–49, 50, 51
<i>Murphy v. Aurora Loan Servs.</i> , 560 F. App’x 645 (8th Cir. 2014)	16–17
<i>Neal v. Ficcadenti</i> , 895 F.3d 576 (8th Cir. 2018).....	43

<i>N.S. v. Kan. City Bd. of Police Comm’rs</i> , 143 S. Ct. 2422 (2023)	47, 48
<i>Owen v. City of Independence</i> , 445 U.S. 622 (1980)	45
<i>Pierson v. Ray</i> , 386 U.S. 547 (1967)	46
<i>Popoalii v. Corr. Med. Servs.</i> , 512 F.3d 488 (8th Cir. 2008)	xiii, 17
<i>Ryan v. Armstrong</i> , 850 F.3d 419	xii, 35, 39
<i>Sacramento v. Lewis</i> , 523 U.S. 833 (1998)	33, 35
<i>Shekleton v. Eichenberger</i> , 677 F.3d 361 (8th Cir. 2012)	xii, 24
<i>Taylor v. City of Middletown</i> , 436 F. Supp. 2d 377 (D. Conn. 2006)	25
<i>Tennessee v. Garner</i> , 471 U.S. 1 (1985).....	27
<i>Terebesi v. Torres</i> , 764 F.3d 217 (2d Cir. 2014).....	24–25
<i>Thompson v. Dill</i> , 930 F.3d 1008 (8th Cir. 2019)	26–27
<i>Torres v. City of St. Louis</i> , 39 F.4th 494 (8th Cir. 2022).....	xii, 26
<i>Torres v. Madrid</i> , 592 U.S. 306 (2021).....	xii, 17, 19, 20

<i>Truong v. Hassan</i> , 829 F.3d 627 (8th Cir. 2016)	39, 40, 41
<i>Westwater v. Church</i> , 60 F.4th 1124 (8th Cir. 2023).....	16
<i>Wilansky v. Bakke</i> , 2024 WL 1435322 (D.N.D. Apr. 3, 2024).....	xiii
<i>Wilansky v. United States</i> , 326 F. Supp. 3d 784 (D. Minn. 2018)	9–10
<i>Winfrey v. City of Forrest City</i> , 882 F.3d 757 (8th Cir. 2018)	xiii, 57
<i>Wyatt v. Cole</i> , 504 US. 158 (1992)	47
<i>Z.J. v. Kan. City Bd. of Police Comm’rs</i> , 931 F.3d 672 (8th Cir. 2019)	17, 23, 25–26
<i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017).....	xiii, 46
STATUTES AND RULES	
28 U.S.C. § 1291	xi
28 U.S.C. § 1331	xi
28 U.S.C. § 1332	xi
28 U.S.C. § 1343	xi
28 U.S.C. § 1367	xi
42 U.S.C. § 1983	xi, 45, 46, 47

42 U.S.C. § 1988 xi

Fed. R. Civ. P. 12(b)(6) 14, 28, 29, 30, 40

Fed. R. Civ. P. 15(a)(2) 16

OTHER AUTHORITIES

Diana Hassel, *Excessive Reasonableness*,
43 Ind. L. Rev. 117 (2009) 32

JURISDICTIONAL STATEMENT

The lawsuits in these appeals arose under the Fourth and Fourteenth Amendments to the Constitution of the United States, 42 U.S.C. § 1983, 42 U.S.C. § 1988, and the laws of the State of North Dakota. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, 1343, and 1367. The district court entered final orders dismissing the cases on April 3, 2024. On April 29, 2024, Sophia timely appealed the final orders. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Sophia was not seized by Defendants for Fourth Amendment purposes.

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

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

Torres v. City of St. Louis, 39 F.4th 494 (8th Cir. 2022)

Shekleton v. Eichenberger, 677 F.3d 361 (8th Cir. 2012)

Butler v. City of Detroit, 936 F.3d 410 (6th Cir. 2019)

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

Kingsley v. Hendrickson, 576 U.S. 389 (2015)

Lombardo v. City of St. Louis, 594 U.S. 464 (2021)

Ryan v. Armstrong, 850 F.3d 419 (8th Cir. 2017)

Edrei v. Maguire, 892 F.3d 525 (2d Cir. 2018)

4. Whether the district court erred by not categorically rejecting qualified immunity.

Harlow v. Fitzgerald, 457 U.S. 800 (1982)

Ziglar v. Abbasi, 582 U.S. 120 (2017) (Thomas, J., concurring in part and concurring in judgment)

Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., 585 U.S. 878 (2018)

5. Whether the district court erred in dismissing Plaintiff's *Monell* claim.

Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1997)

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

6. Whether the district court erred in dismissing Sophia's Complaint against the other Defendants (3:23-cv-00142).

Wilansky v. Bakke, 2024 WL 1435322 (D.N.D. Apr. 3, 2024)

7. Whether the district court erred in dismissing the Second Amended Complaint with prejudice without giving Sophia a full and fair opportunity to amend her Complaint.

Winfrey v. City of Forrest City, 882 F.3d 757 (8th Cir. 2018)

Popoalii v. Corr. Med. Servs., 512 F.3d 488 (8th Cir. 2008)

STATEMENT OF THE CASE

I. Factual background

The 2016–2017 protests against the Dakota Access Pipeline (“DAPL”) have already been the subject of multiple appeals to this Court. The construction of the pipeline under Lake Oahe—the primary water source for the Standing Rock Sioux Tribe—attracted thousands of protesters from across the country throughout the spring and summer of 2016. (App. 337-38, R. Doc. 259¹ ¶¶ 19–22.) These protesters called themselves “water protectors,” and they established a camp they called Oceti Sakowin on federal land managed by the Army Corp of Engineers south of the Backwater Bridge on North Dakota Highway 1806. (App. 338, R. Doc. 259 ¶¶ 24–26.)

Between April and November 2016, these protesters held numerous protests near the DAPL drill pad north of the Backwater Bridge. (App. 339–40, R. Doc. 259 ¶¶ 27, 32–34.) In response to these protests, local and state law enforcement agencies created a “Unified Command” structure led by Defendant Morton County Sheriff Kyle Kirchmeier. (App. 340–41, R. Doc.

¹ All “R. Doc.” record citations are to No. 1:18-cv-00236; all “Companion R. Doc.” record citations are to No. 3:23-cv-00142.

259 ¶¶ 36–41.) To keep protesters away from the DAPL drill pad, law enforcement acting at Defendant Kirchmeier’s direction erected a massive barricade of concrete jersey blocks and razor wire on the north end of the Backwater Bridge. (App. 352, R. Doc. 259 ¶ 95.) This barricade sat roughly halfway between the DAPL drill pad and Oceti Sakowin, and it demarcated the “no cross line” for protesters, who were allowed to peacefully gather and protest south of the barricade (including on the bridge itself) but were not allowed to cross the barricade or protest north of it. (App. 449, Companion R. Doc. 14 ¶¶ 105–06.)

Between September and November 2016, police operating under Kirchmeier’s command and at his direction responded to DAPL protests with increasing aggression and violence. (App. 341–44, R. Doc. 259 ¶¶ 42–56; App. 439, Companion R. Doc. 14 ¶¶ 55–59.) Officers began wearing tactical riot gear, removing their badges, and arriving at protests in armored and military vehicles. (App. 341, R. Doc. 259 ¶ 42; App. 439, Companion R. Doc. 14 ¶ 60.) Officers at the protests increasingly and wantonly used less-lethal munitions on protesters, the overwhelming majority of whom were peaceful. (App. 342–44, R. Doc. 259 ¶¶ 43–56; App. 439–40, Companion R. Doc. 14 ¶¶ 60–64.) By November 2016, the

unconstitutional misuse of less-lethal munitions by officers, many of whom were inadequately trained and supervised, was continual, widespread, and obvious. (App. 351, R. Doc. 259 ¶¶ 87–90; App. 441, Companion R. Doc. 14 ¶¶ 65–69.) The local and national media routinely reported on this unconstitutional conduct, and Defendant Kirchmeier publicly defended it. (App. 342, 362–63, R. Doc. 259 ¶¶ 46, 164–73; App. 441, 463–64, Companion R. Doc. 14 ¶¶ 67, 205–07.)

Officers acting under Defendant Kirchmeier’s supervision and authority purchased hundreds of explosive munitions—including flashbangs, stinger grenades, and aerial signaling/warning munitions²—

² These munitions are “explosive” because they contain flash powder, which explodes when the munition detonates. Because these munitions explode, they can seriously injure or even kill anyone who is within the detonation zone. (App. 345–46, R. Doc. 259 ¶¶ 60–64; App. 444–45, Companion R. Doc. 14 ¶¶ 79, 82–83.) Courts have repeatedly warned that explosive munitions should never be aimed at people (even criminal suspects and pretrial detainees) and that officers must visually ensure no one is in the detonation zone before deploying them. (App. 350, R. Doc. 259 ¶ 85; App. 447, Companion R. Doc. 14 ¶ 92; *see also* R. Doc. 277 at 23–24 (collecting almost a dozen court decisions).) Flashbangs are steel-bodied devices that explode with a bright flash and loud bang; stinger grenades are similar to flashbangs but have a rubber body filled with rubber pellets that are expelled when the grenade explodes; and aerial signaling/warning munitions are essentially flashbangs connected to bullets, so the flashbang can be fired out of a gun instead of thrown. (App. 345, R. Doc. 259 ¶¶ 60–62; App. 443–44, Companion R. Doc. 14 ¶¶ 75–77.)

for use against DAPL protesters. (App. 442–43, Companion R. Doc. 14 ¶¶ 71–73.) Then—again with Defendant Kirchmeier’s knowledge and under his supervision—they developed a pattern and custom of unconstitutionally misusing these dangerous explosive munitions by: (1) allowing officers who were neither certified nor adequately trained to carry and use them; and (2) deploying them into crowds and directly at individuals, in direct contravention of the devices’ warning labels, the manufacturers’ instructions, customary training, conventional law enforcement practices, and numerous judicial admonitions. (App. 445–48, Companion R. Doc. 14 ¶¶ 82–84, 98–101.)

The increasing abuse of protesters and misuse of explosive and less-lethal munitions by law enforcement officers culminated in a massive confrontation at the Backwater Bridge on the evening of November 20, 2016. (App. 352–55, R. Doc. 259 ¶¶ 94–114; App. 450–52, Companion R. Doc. 14 ¶¶ 111–22.) That evening, hundreds of protesters gathered south of the barricade and protested while scores of officers amassed to its north. (App. 353, R. Doc. 259 ¶¶ 100–101; App. 450, Companion R. Doc. 14 ¶¶ 110–11.) For several hours, officers in riot gear and armored vehicles protected by concrete barricades and razor wire fired hundreds of less-

lethal and explosive munitions over those barricades into crowds of overwhelming peaceful protesters. (App. 353–54, R. Doc. 259 ¶¶ 101–12; App. 450–51, Companion R. Doc. 14 ¶¶ 112–19.) Over the course of the entire evening, only a single protester crossed the barricade, and he was immediately apprehended and arrested. (App. 451, Companion R. Doc. 14 ¶ 117.)

By midnight, the confrontation had ended and nearly all protesters were back at Oceti Sakowin. (App. 355, R. Doc. 259 ¶¶ 112–14; App. 452, Companion R. Doc. 14 ¶¶ 122–24.) When Sophia approached the bridge at approximately 2:00 a.m. on November 21, the scene had been calm and peaceful for hours. (App. 356, R. Doc. 259 ¶¶ 120–123; App. 454, Companion R. Doc. 14 ¶¶ 133–34.) Dozens of officers—including Defendants—remained stationed north of the barricade behind armored vehicles, but they were no longer deploying munitions or ordering anyone to disperse. (App. 355–56, R. Doc. 259 ¶¶ 112–23; App. 453, 454, Companion R. Doc. 14 ¶¶ 128, 135–39.) Only a handful of protesters remained near the bridge, mostly huddled around small campfires, talking quietly, and trying to keep warm. (App. 355–56, R. Doc. 259 ¶¶ 114, 119–23; App. 453, Companion R. Doc. 14 ¶ 127.) Unarmed, emptyhanded, and in clear view of the officers

north of the bridge, Sophia walked around and conversed with protesters from 2:00 a.m. until about 3:00 a.m. (App. 356–57, R. Doc. 259 ¶¶ 123–24; App. 454, Companion R. Doc. 14 ¶¶ 135–36.) No officer objected to her presence or directed her to leave. (App. 356–57, R. Doc. 259 ¶¶ 123, 127; App. 454, Companion R. Doc. 14 ¶¶ 138–39.)

Around 3:30 a.m. Sophia approached some protesters standing next to a burned-out truck located on the bridge near (but south of) the barricade. (App. 357, R. Doc. 259 ¶ 124; App. 455, Companion R. Doc. 14 ¶ 140.) They talked for some time; when the protesters returned to the campfires, Sophia stayed in front of the barricade in silent protest. (App. 357, R. Doc. 259 ¶¶ 124–127; App. 455, Companion R. Doc. 14 ¶¶ 143–44.) Again, no officer objected to her presence or ordered her to move. (App. 357, R. Doc. 259 ¶ 127; App. 455, Companion R. Doc. 14 ¶ 145.)

Shortly before 4:00 a.m., a protester named Stephen Joachinson approached Sophia and talked with her for several minutes. (App. 357, R. Doc. 259 ¶ 128; App. 455, Companion R. Doc. 14 ¶ 146.) Neither Sophia nor Stephen engaged in any threatening, menacing, suspicious, or illegal activity. (App. 357, R. Doc. 259 ¶¶ 128–30; App. 455, Companion R. Doc. 14 ¶ 147.)

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. (App. 357, R. Doc. 259 ¶ 131; App. 456, Companion R. Doc. 14 ¶ 150.) Neither Sophia nor Stephen were under (or otherwise touching or tampering with) the truck, so Stephen responded to Defendants that no one was under the truck. (App. 357, R. Doc. 259 ¶¶ 130, 132; App. 455–56, Companion R. Doc. 14 ¶¶ 148, 152.)

Instead of responding to this explanation or clarifying their order, Defendants immediately and rapidly fired less-lethal munitions at Sophia and Stephen, causing them to duck behind a metal sheet that was propped up against the truck. (App. 358, R. Doc. 259 ¶¶ 133–34; App. 456–57, Companion R. Doc. 14 ¶¶ 153–62.) Defendants continued firing munitions so rapidly that Sophia and Stephen were stuck behind the sheet, unable to leave without sustaining injuries. (App. 358, R. Doc. 259 ¶ 135; App. 457, Companion R. Doc. 14 ¶¶ 162–63.) While they cowered behind the sheet, some Defendants moved east to get a better line of sight, while another Defendant lobbed two stinger ball grenades over the barricade at Sophia. (App. 358, R. Doc. 259 ¶¶ 135–38; App. 457–58, Companion R. Doc. 14 ¶¶ 163–68.)

Eventually, a Defendant hit Sophia in the arm with a munition, and (despite munitions still being fired at her) she panicked and fled south, away from the barricade. (App. 358–59, R. Doc. 259 ¶¶ 139–41; App. 459, Companion R. Doc. 14 ¶¶ 175–77.) As she ran, she screamed “I’m leaving! Please don’t shoot.” (App. 359, R. Doc. 259 ¶ 142; App. 460, Companion R. Doc. 14 ¶ 178.) Though Sophia was unarmed and complying with the order to leave, the Defendants continued their attack. (App. 359, R. Doc. 259 ¶¶ 141–48; App. 460, Companion R. Doc. 14 ¶¶ 179–85.) Sophia saw a piece of plywood on the ground. (App. 359, R. Doc. 259 ¶ 146; App. 461, Companion R. Doc. 14 ¶ 188.) Just as she stopped to pick it up, one of the Defendants (Defendant Moll) hit her with an explosive munition (an aerial signaling/warning munition), which he must have aimed and fired before Sophia stopped to grab the plywood. (App. 359–60, R. Doc. 259 ¶¶ 147–50; App. 461, Companion R. Doc. 14 ¶¶ 189–90.)

The explosive munition, which should never be fired directly at someone, hit Sophia’s left arm and exploded, almost severing her entire left arm and destroying nearly all the arteries, tissue, muscle, tendons, and bone in her forearm. (App. 360, R. Doc. 259 ¶¶ 150–51; App. 461, Companion R. Doc. 14 ¶¶ 191–92; *see also* App. 93 R. Doc. 1-1 (photograph).)

Sophia fell to the ground screaming, blood pouring out of her jacket. (App. 360, R. Doc. 259 ¶¶ 152–53; App. 462, Companion R. Doc. 14 ¶¶ 193–94.) Protesters at nearby campfires ran to her and carried her off the bridge to a car, while Defendants *cheered and laughed*, and even congratulated Defendant Moll on his “marksmanship.” (App. 360–61, R. Doc. 259 ¶¶ 156–57; App. 462, Companion R. Doc. 14 ¶¶ 195–98.) The protestors drove Sophia to the nearby casino, where an ambulance arrived and took her to the nearest hospital, which then airlifted her to a level one trauma center in Minneapolis. (App. 361, R. Doc. 259 ¶¶ 158–161; App. 462–63, Companion R. Doc. 14 ¶¶ 198–202.) Sophia underwent multiple surgeries and barely avoided the amputation of her arm. (App. 361, R. Doc. 259 ¶¶ 161–63; App. 466, Companion R. Doc. 14 ¶ 217.) She still has essentially no feeling in or ability to use her left hand or forearm, and likely never will. (App. 365, R. Doc. 259 ¶¶ 184–85; App. 468, Companion R. Doc. 14 ¶ 228.)

II. Proceedings below

Sophia hired attorneys to identify what and who injured her. Numerous open record requests were served, and a federal lawsuit was filed to try to obtain forensic evidence related to her injury. *See Wilansky v. United States*, 326 F. Supp. 3d 784 (D. Minn. 2018). These efforts were

unsuccessful, and Sophia’s only remaining recourse was to file suit against a John Doe officer and seek the information via discovery. In November 2018, Sophia filed that suit (“Primary Lawsuit”). (App. 42, R. Doc. 1.) Having filed her suit more than four years before the applicable limitations period expired, Sophia expected she would have plenty of time to learn the relevant officers’ identities during discovery and then amend her complaint to name them. That turned out not to be the case.

Defendants moved to dismiss Sophia’s complaint in January 2019 (R. Doc. 26–30), and the district court stayed all discovery while the motion was pending (over Sophia’s objection) (R. Doc. 24–25). The district court then waited 18 months to rule on the motion. Finally, in October 2020, the district court converted the motion to dismiss into one for summary judgment and deferred decision on it until after the parties had conducted extremely limited discovery (two depositions, two subpoenas, and a handful of document requests) solely on the issue of qualified immunity. (R. Doc. 46, 51.) Sophia used this limited discovery to identify what injured her (an aerial signaling/warning munition), the officer who fired it (Defendant Moll), the officer who threw stinger grenades at her (Defendant Dvorak), the officer who hit her in the arm with a rubber bullet (Defendant Arndt),

and some (but not all) of the other officers who either participated in the attack or failed to stop it (the other Defendants).

After the limited discovery concluded, the district court ordered the parties to completely rebrief Defendants' converted summary judgment motion. (R. Doc. 93.) Defendants filed their renewed motion in June 2021, and briefing was completed in July 2021. (R. Doc. 110, 124, 133.) Again, the district court took no action on the motion for months. Worried about the limitations period expiring before she could replace the John Doe placeholder with the actual officers who attacked her, Sophia moved in March 2022 for permission to amend her complaint while the motion for summary judgment was still pending. (R. Doc. 140.) The district court eventually granted this motion in June 2022. (App. 205, R. Doc. 151.)

Sophia filed her Amended Complaint in July 2022, naming the officers who attacked her—at least, those she had identified as of that time. (App. 212, R. Doc. 153.) Defendants used the Amended Complaint as an opportunity to completely reset the lawsuit by moving to (1) dismiss the Amended Complaint, (2) strike every allegation that was not a verbatim recitation of a fact included in Sophia's summary judgment briefing, and (3) stay discovery again. (R. Doc. 174–76, 179–80, 187–91.) The district

court allowed this, thereby mooting the prior summary judgment briefing and essentially erasing all progress in the lawsuit over the prior four years. The parties fully briefed Defendants' new motions in November 2022. The district court took eight months to rule on them.

In July 2023, after ordering Sophia to show cause for every amendment she made to her complaint, the district court granted Defendants' motion to strike. (App. 267, 272, R. Doc. 235, 254.) Rather than let Sophia have an unfettered opportunity to amend her complaint after learning the identities of her attackers and the circumstances surrounding their attack, the district court ordered her to file a Second Amended Complaint and issued a 52-page spreadsheet dictating the exact wording Sophia had to include in every sentence of that complaint. (App. 281, R. Doc. 254-1.) Sophia filed this court-written Second Amended Complaint (while preserving her objection to it) in July 2023. (App. 333, R. Doc. 259.)

Because the district court struck ten defendants from her Primary Lawsuit, and the statute of limitations would run in a few short months, Sophia had to file an entirely new lawsuit against the stricken defendants ("Companion Lawsuit"). (App. 428, Companion R. Doc. 14.) This Companion Lawsuit alleged the same facts as the Primary Lawsuit but

named the Defendants who had been stricken from the First Amended Complaint in the Primary Lawsuit.

The district court allowed these new complaints—which it had essentially mandated—to restart the entire lawsuit yet again. Defendants then filed their *third* and *fourth* motions to dismiss. (R. Doc. 265–66, 270–71; Companion R. Doc. 20, 23.) In April 2024—five and a half years after Sophia filed her lawsuit—the district court dismissed both of her complaints. (App. 390, 409, 481, R. Doc. 290, 295, Companion R. Doc. 36.) And it did so with prejudice, even though Defendants never argued in any of their briefs that amendment would be futile or otherwise inappropriate.

SUMMARY OF THE ARGUMENT

Sophia's arm was mangled when one of the Defendants shot her with an explosive munition. In seeking relief for that use of excessive force, she faced hurdles at every turn. Now, almost six years after she filed her original complaint, her claims have been inappropriately dismissed under Rule 12(b)(6) with prejudice and without an opportunity to amend. Notably, the district court acknowledged that some of Defendants' alleged behavior, "if true," was "appalling." (App. 402, R. Doc. 290, at 13 n.9.)

In dismissing Sophia's claims, the district court committed numerous legal errors. It applied the wrong legal standards to both her Fourth and Fourteenth Amendment excessive force claims. And it misapplied even those incorrect standards, failing to assume the truth of Sophia's allegations and make reasonable inferences in her favor. The district court also erred in dismissing Sophia's plausible *Monell* claims.

Moreover, the dismissal in Case No. 24-1919 was based entirely upon the dismissal in Case 24-1911. As the district court expressly recognized, Case No. 24-1919 "arises out of the exact same facts and circumstances alleged in *Wilansky v. Morton County et al.*, Case No. 1:18-cv-236." And the dismissal was granted "for the same reasons" as the dismissal in Case No.

24-1911. Thus, a reversal in Case No. 24-1911 should dictate a reversal in Case No. 24-1919, as well.

Finally, the district court further erred by dismissing without giving Sophia leave to amend in these circumstances. The operative complaint in Case 24-1911 was essentially authored by the district court when it required Sophia to revise her proposed amendment to the court's exacting recitation of what she was allowed to plead. None of the traditional bases that allow dismissal with prejudice exists here.

This Court should reverse and remand.

ARGUMENT

I. **Legal Standard: The district court's dismissals are reviewed *de novo*.**

This Court reviews a dismissal *de novo*. *Mitchell v. Kirchmeier*, 28 F.4th 888, 895 (8th Cir. 2022). The Court “accept[s] the allegations contained in the complaint as true and draw[s] all reasonable inferences in favor of the nonmoving party.” *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 861 (8th Cir. 2010). *De novo* review also extends to “a grant of qualified immunity.” *Boude v. City of Raymore*, 855 F.3d 930, 933 (8th Cir. 2017). Where a district court dismisses an excessive force complaint as a matter of law, “the question whether force used was objectively reasonable or constitutionally excessive is a question of law,” so it is also reviewed *de novo* without deference to the district court. *Westwater v. Church*, 60 F.4th 1124, 1129 n.1 (8th Cir. 2023).

A district court should freely grant leave to amend. Fed. R. Civ. P. 15(a)(2). This Court reviews a “decision to dismiss with prejudice without granting leave to amend for an abuse of discretion.” *Hennessey v. Gap, Inc.*, 86 F.4th 823, 831 (8th Cir. 2023). When denial of leave to amend is premised on a legal conclusion, such as “futility,” this Court reviews that conclusion *de novo*. *Murphy v. Aurora Loan Servs.*, 560 F. App'x 645, 645

(8th Cir. 2014) (citing *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 755 (8th Cir. 2006)). A district court abuses its discretion by denying leave to amend “unless there exists undue delay, bad faith, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the non-moving party, or futility of the amendment.” *Popoalii v. Corr. Med. Servs.*, 512 F.3d 488, 497 (8th Cir. 2008).

II. Sophia plausibly alleged Fourth Amendment violations to which qualified immunity does not apply.

In *Torres v. Madrid*, 592 U.S. 306 (2021), the Supreme Court distinguished between two types of seizures for purposes of Fourth Amendment excessive force claims: seizures by force and seizures by control. *Id.* at 322. If either type occurs, the factfinder determines “whether the amount of force used was objectively reasonable under the particular circumstances.” *Z.J. v. Kan. City Bd. of Police Comm’rs*, 931 F.3d 672, 681 (8th Cir. 2019). Sophia alleged viable Fourth Amendment violations under both types of seizure.

A. Sophia plausibly alleged seizure by force.

Sophia plausibly alleged a seizure by force, which “requires the use of force with intent to restrain.” *Torres*, 592 U.S. at 317 (emphasis omitted). Courts “rarely probe the subjective motivations of police officers in the

Fourth Amendment context,” so “the appropriate inquiry is whether the challenged conduct *objectively* manifests an intent to restrain.” *Id.* Sophia plausibly pleads both the use of force and the objective intent to restrain.

She alleged use of force when she claimed that one or more Defendants “hit [her] in the upper left arm” with rubber bullets, causing “extreme pain” and leaving “a mark that is still visible today,” (App. 359, R. Doc. 259 ¶¶ 140–41), and as she ran away, Defendant Moll “intentionally hit her with an explosive munition,” which “exploded” and “nearly severed her left hand from her arm,” (App. 359, R. Doc. ¶¶ 148, 150–51.) Both are, quite plainly, use of force.

Sophia’s allegations also objectively indicate Defendants intended to restrain—as opposed to repel or disperse—her. At least six aspects of the attack generate this clear inference. *First*, Defendants had no reason to repel Sophia from the barricade: she had been there peacefully for more than half an hour without objection or incident. *Second*, Defendants began shooting rapidly at her without responding to Stephen’s explanation that no one was under the truck. *Third*, Defendants fired at Sophia so rapidly and from so many angles that they trapped her behind the metal sheet. *Fourth*, while Sophia was trapped behind the metal sheet, Defendant

Dvorak threw explosive munitions *at* her, indicating intent to harm. *Fifth*, Defendants continued attacking Sophia even after she started running away from the barricade. Indeed, the munition that destroyed her arm was fired while Sophia was running away from the barricade. If Defendants merely intended to disperse Sophia, they would have stopped attacking when she fled. *Sixth*, Defendants cheered and applauded after injuring Sophia, which objectively indicates their desire to restrain and harm her. Cheering such a gruesome injury is incompatible with a mere intent to disperse.

Taken in the light most favorable to Sophia, these alleged circumstances objectively show that Defendants' intended result was the actual result: Sophia was restrained and wounded.

The parallel to *Torres* is striking. In *Torres*, police unleashed a "fusillade of bullets" at their victim as she fled from (she thought) an attempted carjacking. 592 U.S. at 310. 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. Sophia was already moving away from the barricade, so there was no need to repel her. Shooting less-lethal and explosive munitions at her as

she fled manifested Defendants' intent to restrain her; thus, a seizure by force.

B. Sophia plausibly alleged seizure by control.

Sophia also adequately alleged a seizure by control, which involves “either voluntary submission to a show of authority or the termination of freedom of movement.” *Torres*, 592 U.S. at 322. Termination of freedom of movement “requires that ‘a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.’” *Id.*

Sophia pleads termination of freedom of movement twice: first when she was trapped behind the metal sheet by the barrage of munitions and explosives, and second when Defendant Moll hit her with an explosive munition that knocked her to the ground and rendered her unable to move. If getting knocked to the ground and rendered immobile does not constitute the termination of freedom of movement, it is hard to imagine what would.

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.” *Id.* at 323. “[T]he moment of the seizure” was the moment Defendants incapacitated her. *Id.*; *see also id.* at 318 (“[B]rief seizures are seizures all the same.”). And, as explained above, the alleged circumstances

show the officers intended precisely that result. Sophia, therefore, plausibly alleged a seizure by control.³

C. Sophia plausibly alleged excessive, objectively unreasonable force.

Sophia’s allegations also plausibly showed that Defendants used objectively unreasonable—and therefore constitutionally excessive—force against her when they seized her. The bridge was peaceful, and Sophia and the other protesters were unarmed, non-threatening, and not resisting.

Under these circumstances, it was unreasonable for Defendants to attack Sophia with explosive or less-lethal munitions. Whether force is objectively reasonable depends on three factors: “(1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.” *Mitchell*, 28 F.4th at 898. In the light of these factors, “force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose

³ The district court even correctly reached this conclusion in the first round of dismissal briefing, writing that “[h]er facts support a plausible finding that Defendant Officer Doe intended to control her physical movement, and he succeeded in doing so when he terminated her freedom of movement by intentionally throwing an explosive less-lethal munition at her.” (App. 144, R. Doc. 46, at 47.)

little or no threat to the security of the officers or the public.” *Michael v. Trevena*, 899 F.3d 528, 532–33 (8th Cir. 2018). This Court has “held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him.” *Mitchell*, 28 F.4th at 898.

Michael controls. Sophia was not suspected of any serious crimes and posed no threat to anyone. When she was near the barricade with Stephen, she was neither fleeing nor resisting arrest. Thus, it was unreasonable for Defendants “to use more than *de minimis* force against” her. *Id.* Rapidly shooting at her with rubber bullets from multiple directions and throwing stinger grenades at her was therefore unreasonable and constitutionally excessive. Using this force in a manner that pinned her against the truck, precluding any escape, was particularly so.

Intentionally hitting Sophia with an aerial signaling/warning munition was likewise unreasonable and excessive force. Defendants lacked any justification for deploying explosive munitions, which “are essentially grenades and can be very dangerous and destructive.” *Estate of Escobedo v. Bender*, 600 F.3d 770, 786 (7th Cir. 2010). In short, “under the

particular circumstances” alleged, “the amount of force used” was objectively unreasonable and therefore constitutionally excessive. *Z.J.*, 931 F.3d at 681; *cf. Estate of Escobedo*, 600 F.3d at 786 (“[W]e have repeatedly expressed our concern with the overuse of flash bang devices, especially where the circumstances do not warrant such extreme measures.”). That is true as to the rubber bullets, the stinger grenades, and (most of all) the aerial signaling/warning munition that ultimately destroyed her arm.

D. Qualified immunity does not apply.

“Qualified immunity shields government officials from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would know.” *Ferguson v. Short*, 840 F.3d 508, 510 (8th Cir. 2016). Qualified immunity offers no safe harbor to Defendants because a reasonable officer would know that firing an explosive munition at Sophia when she was unarmed and running away would constitute excessive force: “Assaulting an unarmed and compliant individual has been a clearly established violation of the Fourth Amendment for decades.” *Butler v. City of Detroit*, 936 F.3d 410, 425 (6th Cir. 2019). For example, even tasing “an unarmed suspected misdemeanant” not behaving aggressively, threatening, or fleeing from the officer violates clearly

established law. *Shekleton v. Eichenberger*, 677 F.3d 361, 366 (8th Cir. 2012); *see also Johnson v. Carroll*, 658 F.3d 819, 827–28 (8th Cir. 2011) (similar); *Brown v. City of Golden Valley*, 574 F.3d 491, 499–500 (8th Cir. 2009) (similar). These cases are “sufficiently clear” to identify the “contours” of the Fourth Amendment right, such that any reasonable officer would know assaulting an unarmed individual who is not resisting and is not suspected of any serious crime violates the Constitution. *Brown*, 574 F.3d at 499.

A constitutional violation, such as excessive force, is “clearly established” if the plaintiff can “point to existing circuit precedent that involves sufficiently similar facts to squarely govern the officers’ conduct in the specific circumstances at issue,” or “present a robust consensus of cases of persuasive authority constituting settled law.” *Graham v. Barnette*, 5 F.4th 872, 887 (8th Cir. 2021). Sophia can do both.

Numerous pre-2016 decisions have held that it is excessive force to deploy an explosive munition at an individual, especially an individual who is not violent and not resisting. *Terebesi v. Torres*, 764 F.3d 217, 238 (2d Cir. 2014) (denying qualified immunity to officer who threw explosive munition at suspect and holding “[t]he Court cannot conceive of a set of

circumstances that would permit an officer,” contrary to the intended use of the device, “to throw a flash-bang directly” at someone); *Gonzales v. Douglas*, 2016 WL 4530442, *9 (D. Ariz. Aug. 30, 2016) (same); *Taylor v. City of Middletown*, 436 F. Supp. 2d 377, 386–87 (D. Conn. 2006) (same); *Jackson v. Gerl*, 622 F. Supp. 2d 738, 748 (W.D. Wis. 2009) (denying qualified immunity to officer who deployed stinger grenade at non-compliant prisoner who refused to leave cell). This Court has even denied qualified immunity to officers who did not aim explosive munitions at anyone but simply deployed them without first visually inspecting the detonation zone to ensure no one was present. *Z.J.*, 931 F.3d at 681; *accord Dukes v. Deaton*, 852 F.3d 1035, 1043 (11th Cir. 2017); *Estate of Escobedo*, 600 F.3d at 785; *Boyd v. Benton Cnty.*, 374 F.3d 773, 779 (9th Cir. 2004). Deploying an explosive munition in a crowded area or room is likewise unreasonable because of the risk to innocent bystanders. *Dukes*, 852 F.3d at 1043; *Estate of Escobedo*, 600 F.3d at 786; *Boyd*, 374 F.3d at 779; *cf. Krause v. Jones*, 765 F.3d 675, 679 (6th Cir. 2014).

Thus, “the relevant case law clearly established that the use of flash-bang grenades is unreasonable where officers have no basis to believe they will face the threat of violence and they unreasonably fail to ascertain

whether there are any innocent bystanders in the area it is deployed.” *Z.J.*, 931 F.3d at 684. A reasonable officer who knows that he cannot deploy an explosive device in a way that could cause unnecessary injury would also know that it would be *even more* unreasonable to “intentionally hit” a nonthreatening, compliant individual “with an explosive munition,” as is the allegation here. (App. 359, R. Doc. ¶ 148.)

Qualified immunity is unavailable for another reason. The force used here was not simply “less-lethal”: a reasonable officer would know that aiming explosive munitions *at someone* constitutes potentially deadly force, because “fir[ing] directly at personnel” can result in “serious injury or death.” (App. 347, R. Doc. ¶ 72); *see also Z.J.*, 931 F.3d at 681 (“In some cases, [flashbangs] can even be lethal.”).⁴ And “[a]bsent probable cause for an officer to believe that the suspect poses an immediate threat of death or serious bodily injury to others, use of deadly force is not objectively reasonable.” *Torres v. City of St. Louis*, 39 F.4th 494, 503 (8th Cir. 2022); *Thompson v. Dill*, 930 F.3d 1008, 1013 (8th Cir. 2019) (“[W]here it is not

⁴ (*See also* App. 351, R. Doc. ¶ 87 (“As of November 2016, it was obvious to any qualified and reasonably competent law enforcement supervisor and policy-maker that flashbangs and other explosive less-lethal munitions are dangerous and can cause serious bodily harm if detonated in close proximity to an individual.”).)

objectively reasonable for an officer to believe a suspect posed an immediate threat to the officer or others, ‘deadly force is not justified.’”); *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985) (shooting fleeing, unarmed young man in back was excessive force).

For these reasons, the district court erred in dismissing Sophia’s Fourth Amendment claim. She plausibly pleaded seizure both by force and by control; she adequately alleged that the force used in effectuating the seizure was unreasonable; no reasonable officer could think otherwise.

E. None of the district court’s reasons for rejecting Sophia’s claim has merit.

None of the district court’s justifications for dismissing Sophia’s claims suggests that the force used against her was objectively reasonable or cloaked in qualified immunity.

The district court held that no seizure by force occurred because Sophia’s allegations did not show Defendants intended to restrain her when they attacked her. “Under the physical force analysis,” it wrote, “the Amended Complaint clearly demonstrates the officers’ intention in using less-lethal munitions and flash-bang grenades was to get [Sophia] and others away from the burned-out vehicles and away from the Bridge.” (App. 418, R. Doc. 295 at 10.) This reasoning violates the *fundamental* principle

that, on a Rule 12(b)(6) motion, the court “must draw all reasonable inferences in favor of plaintiffs.” *Kelly v. City of Omaha*, 813 F.3d 1070, 1075 (8th Cir. 2016). Even if the district court’s conclusion regarding Defendants’ motivation were one plausible inference (which it is not), it is certainly not the inference in Sophia’s favor. As explained above, a factfinder could easily infer that Defendants—who fired at Sophia rapidly, threw explosive munitions at her, and hit her while she was fleeing—intended to stop her.

Similarly, the district court inferred that Defendants meant to drive Sophia away because “Moll only shot the flashbang at Wilansky after Wilansky stopped retreating and retrieved the plywood.” (App. 418, R. Doc. 295, at 10.) This is decidedly *not* what Sophia alleged. To the contrary, Sophia alleged that she was hit the second she stopped, meaning 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. (App. 359, R. Doc. 259 ¶ 148.)

The district court also concluded that “[e]ven after the flashbang exploded on her arm, [Sophia] was able to leave without any indication from the officers they intended to arrest her.” (App. 418, R. Doc. 295 at 10.) But the mere fact that the officers permitted bystanders to carry the bleeding

and immobile Sophia away does not imply Defendants did not mean to seize her at the time they fired at her. To the contrary, Defendants congratulated Defendant Moll for hitting Sophia, knocking her to the ground, and grievously injuring her—suggesting they intended to bring Sophia down. (App. 360, R. Doc. 259 ¶ 154) A factfinder could reasonably infer that Defendants simply wanted to injure her, rather than arrest her. And because a reasonable factfinder could infer this, the district court on a Rule 12(b)(6) motion *must* infer it. The district court erred by “ignore[ing] reasonable inferences supported by the facts alleged” and instead “dr[awing] inferences in [the defendants’] favor.” *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009); *see also Cook v. George’s, Inc.*, 952 F.3d 935, 939–40 (8th Cir. 2020) (reversing dismissal where district court drew inferences in defendant’s favor).

The errors in the district court’s seizure-by-force analysis equally infect its seizure-by-control analysis. Under its seizure-by-force analysis, the district court concluded Sophia’s “claim fails because the use of force was not set in place in order to place her under arrest the Amended Complaint plainly alleges the officers[’] use of the munitions and grenades were set in place to disperse Wilansky from the area, not to stop her in her

tracks.” (App. 419, R. Doc. 295, at 11.) But as described above, this is not what Sophia alleged at all. To the contrary, Sophia plausibly alleged that Defendants intended their less-lethal and explosive munitions to stop (not disperse) her. By concluding otherwise, the district court ignored Sophia’s actual allegations and again violated the “fundamental tenet of Rule 12(b)(6) practice” that “inferences are to be drawn in favor of the non-moving party.” *Braden*, 588 F.3d at 595.

The district court’s alternative holding that qualified immunity protects Defendants Moll and Dvorak was legal error as well. The court stated: “[I]t was not clearly established at the time that the use of force to disperse individuals, as opposed to restrain them, constituted a seizure under the Fourth Amendment.” (App. 420, R. Doc. 295, at 12.) For that point, the district court relied on *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023). This reasoning is faulty for three reasons.

First, whether “the use of force to disperse individuals” is a seizure has no application to the dismissal motion once the correct plaintiff-favoring inferences are drawn. As alleged, this is not a dispersal case. Rather, the allegations indicate that the officers intended to restrain and harm Sophia. Therefore, *Dundon* is inapposite.

Second, as explained above, the necessary questions for the court to resolve (having drawn the required inferences in Sophia's favor) are (1) whether a reasonable officer would know it is unreasonable and excessive to fire an explosive munition at a protestor who is not violent, not resisting, and not posing a safety threat; and (2) whether a reasonable officer would know it is unreasonable and excessive to use deadly force against a nonthreatening individual not suspected of any serious crime. Both answers are an easy *yes*.

Third, 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. The Supreme Court created the qualified immunity doctrine and has never applied it to the question of whether a seizure occurred. Applying qualified immunity to both the question of whether the force was excessive and the question of whether the force was a seizure is thus a massive expansion of the doctrine, which the Supreme Court has never endorsed. The purpose of qualified immunity is to protect reasonable officers who are unclear whether their use of force was excessive, not to protect officers who are unclear whether their force constitutes a seizure. Under the district court's

analysis, an officer could knowingly use blatantly excessive force—gunning down a fleeing non-violent misdemeanant with an assault rifle—and still obtain qualified immunity because it was unclear whether his force seized the victim. That is patently ridiculous and should not be allowed. In short, officers should not obtain qualified immunity on *excessive force* claims on the grounds that the relevant *seizure* rules are unclear.

Rather, once a court decides a search or seizure has occurred (and therefore the Fourth Amendment applies) the court should then analyze both whether the force was unreasonable under the circumstances (merits) as well as whether any reasonable officer would have known the force was unreasonable (immunity). This double layer of reasonableness review offers ample protection to officers; some scholars persuasively argue it already offers too much. *See, e.g.,* Diana Hassel, *Excessive Reasonableness*, 43 Ind. L. Rev. 117, 117 (2009) (“When qualified immunity is applied in a Fourth Amendment excessive force case, the defendant, typically a police officer, is protected from liability by two layers of reasonableness.”). To inject an additional layer of qualified immunity into the threshold seizure determination would supercharge qualified immunity in the Fourth Amendment context beyond even its existing overbreadth.

For these reasons, this Court should reverse the judgment dismissing Sophia’s Fourth Amendment claims and hold that: (1) she has plausibly alleged a seizure; (2) she has plausibly alleged objectively unreasonable and therefore excessive force; and (3) qualified immunity does not protect Defendants.

III. Sophia stated a Fourteenth Amendment claim.

Sophia consistently and unwaveringly asserted excessive-force claims against Defendants under *both* the Fourth and Fourteenth Amendments. (App. 78–80, R. Doc. 1 ¶¶ 190–205; App. 366–69, R. Doc. 259 ¶¶ 192–208; App. 469–75, Companion R. Doc. 14 ¶¶ 236–68.) She did this specifically so that she could rely on her Fourteenth Amendment claims if the district court incorrectly concluded no seizure had occurred. The district court even agreed that were Sophia not seized—and therefore could not bring an excessive force claim under the Fourth Amendment—she could “find reprieve in substantive due process” and “her [excessive force] claim would appropriately be brought under the Fourteenth Amendment.” (App. 114, R. Doc. 46 at 17 (citing *Sacramento v. Lewis*, 523 U.S. 833, 844–45 (1998)).)⁵

⁵ The district court dismissed the Fourteenth Amendment claim in its order converting Defendants’ first dismissal motion into one for summary judgment. (App. 113–20, R. Doc. 46 at 16–23.) Sophia reasserted her

The district court, however, then went astray in two ways. *First*, it applied the wrong legal standard to Sophia’s Fourteenth Amendment claims. In particular, the district court improperly applied the “shocks the conscience” standard that was expressly abrogated by *Kingsley v. Hendrickson*, 576 U.S. 389 (2015), and replaced with the objective-reasonableness standard long applied to Fourth Amendment excessive force claims. *Second*, after applying the incorrect “shocks the conscience” standard, the district court improperly disregarded Sophia’s well-pleaded allegations, adopted Defendants’ contrary allegations, and drew inferences in Defendants’ favor to conclude that their conduct did not shock the conscience. (App. 118–20, R. Doc. 46 at 21–23.)

A. The district court applied the wrong legal standard to the Fourteenth Amendment claim.

Before *Kingsley*, courts traditionally applied a “shocks the conscience” standard to excessive-force claims brought under the Fourteenth

Fourteenth Amendment claim in her First Amended Complaint, in the Second Amended Complaint (App. 368–69, R. Doc. 259 ¶¶ 200–08), and in the Companion Lawsuit (App. 472–75, Companion R. Doc. 14 ¶¶ 251–68), thereby unambiguously preserving this claim for appeal. The district court relied on its original dismissal to dismiss the Fourteenth Amendment claims in the Second Amended Complaint and Companion Lawsuit. Thus, the relevant legal analysis for this Court’s review is found in the district court’s decision at App. 98–151, R. Doc. 46.

Amendment, which involved both objective reasonableness and subjective malice components. *See, e.g., Sacramento*, 523 U.S. at 845–46. *Kingsley* clarified that the appropriate standard for an excessive force claim brought by a pretrial detainee under the Fourteenth Amendment was “objective reasonableness” with no subjective component—*i.e.*, the same standard that governs Fourth Amendment excessive-force claims. *Kingsley*, 576 U.S. at 389–90. Numerous circuits (including this one) have now recognized this is the relevant standard for Fourteenth Amendment excessive-force claims. *Davis v. White*, 794 F.3d 1008, 1011 (8th Cir. 2015) (“In *Kingsley v. Hendrickson*, the Supreme Court recently held that the objective reasonableness standard applies to excessive force *due process* [i.e., Fourteenth Amendment] claims by pretrial detainees.”); *Ryan v. Armstrong*, 850 F.3d 419, 427 (8th Cir. 2017) (“We analyze the excessive force claims of pretrial detainees under an objective reasonableness standard.”); *see also Edrei v. Maguire*, 892 F.3d 525, 534 (2d Cir. 2018) (same); *Miranda-Rivera v. Toledo-Davila*, 813 F.3d 64, 70 (1st Cir. 2016) (same).

The district court erred by applying the defunct “shocks the conscience” standard to Sophia’s claims, rather than *Kingsley*’s correct

“objective reasonableness” standard. It incorrectly reasoned that because *Kingsley* happened to involve a pretrial detainee, the case’s holding applies only to pretrial detainees, not free citizens like Sophia. (App. 115, R. Doc. 46 at 18.) If that were the case, the standard for excessive-force claims under the Fourteenth Amendment would be different for pretrial detainees and free citizens: the former would use the “objective reasonableness” standard while the latter would use a more demanding “shocks the conscience” standard. This conclusion was erroneous as a matter of law.

First, *Kingsley* did not restrict its holding solely to pretrial detainees. To the contrary, the Court expressly noted that its decision creates a standard for pretrial detainees that is “consistent with our use of an objective ‘excessive force’ standard where officers apply force to a person who, like *Kingsley*, has been accused but not convicted of a crime, but who, unlike *Kingsley*, is free on bail.” *Kingsley*, 576 U.S. at 399. The opinion thus specifically indicated the “objective reasonableness” standard applies to more than pretrial detainees. That is consistent with *Lombardo v. City of St. Louis*, 594 U.S. 464 (2021), where the Supreme Court reiterated that the objective reasonableness standard applied to excessive force claims under both the Fourth and Fourteenth Amendments. *Id.* at 466 n.2.

To be sure, the *Lombardo* petitioner (like *Kingsley*) was a pretrial detainee. But like *Kingsley*, *Lombardo* again said nothing to limit the objective reasonableness standard to pretrial detainees. It suggested instead that the same standard applies to all Fourteenth and Fourth Amendment excessive force claims. If the Supreme Court intended for different excessive force standards to apply to claims under the same Fourteenth Amendment, presumably it would have said so.

Both circuits that have examined whether *Kingsley*'s "objective reasonableness" standard applies to excessive force claims of unseized free persons agree that it does.⁶ *Edrei*, 892 F.3d at 534; *Kedra v. Schroeter*, 876 F.3d 424, 438–39 (3d Cir. 2017). The district court even acknowledged this, specifically noting that the Second Circuit expressly held that *Kingsley* requires an "objective reasonableness" standard for claims brought by unseized protesters. (App. 117, R. Doc. 46 at 20.) Yet the district court paid these opinions no heed merely because this circuit had not yet addressed this specific situation.

Indeed, the district court's ruling defies common sense by creating a complicated and illogical excessive-force regime in which the same

⁶ This Court has not yet opined on this question.

“objective reasonableness” standard applies to Fourth Amendment claims brought by free persons who are stopped *and* to Fourteenth Amendment claims brought by pretrial detainees, but a different, more demanding “shocks the conscience” standard applies to Fourteenth Amendment claims brought by free persons. It makes no sense to render it harder for a free citizen to vindicate her constitutional rights than a pretrial detainee. Nor did the district court explain why it believed the Supreme Court would match the Fourteenth Amendment standard to the Fourth Amendment *only* for pretrial detainees, rather than for all individuals. If the district court’s holding stands, getting arrested and charged with a crime would enhance, rather than curtail, one’s rights. The only free persons for whom the objective reasonableness standard would apply under the district court’s logic, are those who have “been accused but not convicted of a crime” and are “free on bail.” *Kingsley*, 576 U.S. at 399. This likewise makes no sense.

The district court did not try to justify the complicated framework it adopted. It simply claimed that “[m]any courts, including the Eighth Circuit, have ... continued to apply the *Lewis* [shocks the conscience] standard to non-detainees and the *Kingsley* standard to pretrial detainees.”

(App. 116, R. Doc. 46 at 19.) But this simply is not true, and none of the three cases the district court cites actually supports this proposition. *Ryan* and *Davis* are both post-*Kingsley* cases where this Court applied the “objective reasonableness” standard to excessive force claims brought by pretrial detainees. *Ryan*, 850 F.3d at 427; *Davis*, 794 F.3d at 1012–13. Neither suggests that a different analysis might govern if the appellants had been free citizens.

Truong v. Hasan, 829 F.3d 627 (8th Cir. 2016), involved a non-paying bus rider asserting both a Fourth Amendment excessive force claim as well as a Fourteenth Amendment substantive due process claim against the bus driver who physically removed him from the bus. *Id.* at 629. This Court analyzed the Fourteenth Amendment claim under the “shocks the conscience” standard—but did so because *Truong* asserted a *due process* claim under the Fourteenth Amendment, not an *excessive force* claim. *Id.* at 632. *Truong* asserted an excessive force claim only under the Fourth Amendment and did not appeal its dismissal. *Id.* at 630 n.3. This explains why *Truong* never references or discusses *Kingsley*; neither did the parties’ briefing or oral argument. Appellant canvassed the caselaw on Fourteenth Amendment excessive force claims; she found no case in which any court

applied the “shocks the conscience” standard to an excessive-force claim under the Fourteenth Amendment. Nor has she found any case suggesting that *Kingsley* applies only to pretrial detainees.

Because Sophia alleged police conduct that is objectively unreasonable (as discussed above), this Court should reverse and order that the Fourteenth Amendment claim proceed to full discovery.

B. The district court erred in concluding that Sophia had not plausibly alleged police conduct that shocks the conscience.

Even if the district court were correct that “shocks the conscience” is the appropriate standard for Sophia’s Fourteenth Amendment excessive force claims, the district court committed multiple legal errors in concluding that Sophia had failed to satisfy this standard. At dismissal, whether the alleged conduct “shocks the conscience is a question of law.” *Mitchell v. Dakota Cty. Soc. Servs.*, 959 F.3d 887, 898 (8th Cir. 2020). For a Rule 12 motion, courts must “accept the factual allegations in the complaint as true and draw all reasonable inferences in the nonmovant’s favor.” *Ingram v. Ark. Dep’t of Corr.*, 91 F.4th 924, 927 (8th Cir. 2024). The district court erred by ignoring material allegations and drawing inferences in Defendants’

favor. Accordingly, this Court should revisit the question *de novo* and reverse.

Conduct that “shocks the conscience” is “inspired by malice or sadism” such that it is “unrelated to the legitimate object” of the government action in question. *Truong*, 829 F.3d at 631–32. The facts Sophia alleges easily imply malice by the Defendants. She alleges:

- Defendants knew Sophia was unarmed and had not objected to her being next to the truck for a half hour before they attacked her, the reasonable inference being that Defendants did not think she was a safety threat.
- Defendants did not respond to Stephen’s explanation that no one was under the truck or repeat their order to leave, implying Defendants did not actually intend to give Sophia and Stephen an opportunity to move south before attacking them.
- Defendants fired numerous weapons at Sophia from multiple angles and threw explosive munitions at her, implying they were not trying to get her to leave but were instead trying to hurt her.
- Defendants nearly blew Sophia’s left arm off by intentionally hitting her with an explosive munition—while she was retreating

in clear compliance with the original order to leave. This implies Defendants were trying to hurt her, not trying to obtain compliance or force her departure.

- Defendants responded to Sophia's screams of pain with laughter and jubilation, a callousness that implies their goal was to hurt her.

These basic allegations, drawing all inferences in Sophia's favor, easily add up to conduct that shocks the conscience. Certainly a reasonable factfinder could reach that conclusion. Defendants viciously attacked and nearly dismembered her without any legitimate government objective.

The district court, however, ignored these well-pleaded allegations. Its decision does not mention them. Nor does it provide any indication it incorporated them into its reasoning. It does not even address the allegation that Defendants intentionally hit Sophia with an explosive device while she was fleeing. Instead, the district court spilled considerable ink reciting allegations about the tensions and confrontations between protesters and law enforcement during September, October, and November 2016. (App. 118-20, R. Doc. 46 at 21–23.) None of these confrontations involved Sophia.

And they are all irrelevant anyway because officers are “not permitted to ignore changing circumstances and information.” *Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018); *Masters v. City of Independence*, 998 F.3d 827, 836–37 (8th Cir. 2021). Defendants cannot justify their attack on Sophia after the fact by saying they were worried about confrontations or threats that had concluded hours earlier and were now clearly past. Sophia specifically alleged that the bridge had been calm for hours—yet the district court impermissibly inferred that the “tension likely lingered after the protest did die down.” (App. 120, R. Doc. 46 at 23.)

The district court also misconstrued the Complaint as conceding that Sophia was somehow in the wrong when she stood near the burned-out truck. (App. 119–20, R. Doc. 46 at 22–23.) There were already a couple protesters present at this vehicle when Sophia approached it; Defendants never objected to their presence. These protesters even left the area thirty minutes before Sophia was attacked. The reasonable inference—and, in this dismissal posture, the inference that the district court was *required* to draw—is that Defendants were not actually concerned about protesters being next to the vehicle.

The district court also incorrectly believed police gave Sophia “orders to move away from the burned-out vehicle”; in fact, as alleged, this order was directed to an unknown individual supposedly under the truck. Stephen responded to the order by explaining there was no one under the truck. Were Defendants actually concerned about Sophia and Stephen being near the truck, they would have clarified their order rather than attacking them suddenly and without provocation—and thereby preventing the two from leaving without getting injured.

Finally, the district court improperly inferred that “law enforcement’s desire remained to keep protestors away from the burned-out vehicle on the Bridge.” (App. 120, R. Doc. 46 at 23.) But at this posture, the district court cannot draw this inference. Other well-pleaded allegations directly contradict it. Sophia alleged, for example, that Defendants did not object to any protesters standing near the truck for hours. She herself stood there for more than half an hour without complaint. And she alleged that they continued attacking her even as she ran away from the truck. The district court could not permissibly infer that Defendants’ objective was to move Sophia away from the truck.

In short, the Complaint raises a plausible inference that Defendants' objective was to maliciously harm Sophia (who was herself unarmed), a purpose unrelated to any legitimate police objective. Even under the outdated and abrogated "shocks the conscience standard," the Complaint must survive a motion to dismiss. The Court should reverse and order that Sophia's Fourteenth Amendment claims proceed to full discovery.

IV. Qualified immunity should be categorically rejected.

The district court found that Defendants enjoyed qualified immunity even in the light of Sophia's allegations. Yet the entire concept of qualified immunity lacks any basis in the Constitution or Section 1983's plain language. This free-floating doctrine provides near-limitless immunity for unprovoked, egregious conduct by police officers. This Court should categorically reject qualified immunity as lacking any constitutional or statutory anchor.

Section 1983's plain language contains no qualified immunity defense. It is "absolute and *unqualified*." *Owen v. City of Independence*, 445 U.S. 622, 635 (1980) (emphasis added). The statute provides that persons acting under color of state law who deprive others of their rights, privileges, or immunities "*shall* be liable" to the injured party. 42 U.S.C. § 1983

(emphasis added). For nearly an entire century after Congress passed section 1983, the Supreme Court did not recognize a qualified immunity defense. *Baxter v. Bracey*, 140 S. Ct. 1862, 1863 (2020) (Thomas, J., dissenting from denial of cert.).

The Supreme Court first held that Section 1983 allowed a police officer to raise a common law “good faith” immunity defense in 1967, reasoning that Congress did not clearly indicate an intent to abolish common-law good faith immunity. *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Yet the Supreme Court later retreated from this common-law justification in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), instead substituting its own creation: government officials enjoyed qualified immunity “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Id.* at 818.

Several justices have expressed their discomfort with the Supreme Court’s policy-based justifications for qualified immunity. Justice Thomas has long called for abolishing or revising the doctrine, reasoning that the Court has “completely reformulated qualified immunity along principles not at all embodied in the common law.” *Ziglar v. Abbasi*, 582 U.S. 120, 159 (2017) (Thomas, J., concurring in part and concurring in judgment). Justice

Sotomayor likewise hopes to “restore some reason to a doctrine that is becoming increasingly unreasonable” if not “reexamine its judge-made doctrine of qualified immunity writ large.” *N.S. v. Kan. City Bd. of Police Comm’rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of cert); *see also Kisela v. Hughes*, 584 U.S. 100, 121 (2018) (Sotomayor, J., dissenting) (criticizing Court’s “one-sided approach to qualified immunity [which] transforms the doctrine into an absolute shield for law enforcement”). And Justice Kennedy wrote in a concurrence joined by Justice Scalia that the Court had “diverged to a substantial degree from the historical standards” by focusing not on subjective malice required at common law, but rather “special policy concerns arising from public officials’ exposure to repeated suits.” *Wyatt v. Cole*, 504 US. 158, 170–71 (1992) (Kennedy, J., concurring); *see also Crawford-El v. Britton*, 523 U.S. 574, 611 (1998) (Scalia, J., dissenting) (“[O]ur treatment of qualified immunity under 42 U.S.C. § 1983 has not purported to be faithful to the common-law immunities that existed when § 1983 was enacted, and that the statute presumably intended to subsume.”). These are valid, important critiques. And applying traditional *stare decisis* factors—the quality of the decision’s reasoning, its workability, post-decision reliance, and post-

decision legal developments, *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878, 917 (2018)—counsels in favor of abrogating qualified immunity.

Upholding qualified immunity in this case would lead to a profoundly unjust result. Sophia was never arrested before or after the attack. She was peacefully exercising her First Amendment right to assemble, in support of access to clean water. She was nonviolent and nonthreatening. She was running away from the officers and begging them not to shoot when they nearly blew off her arm. Sophia suffered a life-altering injury as a result, and she very well could have lost her life in this encounter.

Even if this Court finds itself constrained to accept qualified immunity, it should highlight the inequity of that constraint to the Supreme Court. This case makes clear the problems that result from telling police “that they can shoot first and think later.” *N.S.*, 143 S. Ct. at 2424 (Sotomayor, J., dissenting) (quoting *Kisela*, 584 U.S. at 121).

V. The district court erred in dismissing the *Monell* claim.

In addition to her claims against the officers who directly harmed her, Sophia brought a claim against Morton County and Sheriff Kirchmeier (in his official capacity) under *Monell v. Department of Social Services*, 436 U.S.

658 (1997). She asserted that Defendant Kirchmeier had policymaking final authority over the law enforcement response to the DAPL protests, and (a) tacitly authorized the widespread misuse of less-lethal munitions and the use of excessive force against peaceful protesters, (b) knew about but did nothing to stop this widespread practice and custom among the officers operating under his direction, and (c) knew that officers operating under his direction and authority were deploying less-lethal and explosive munitions against peaceful protesters without adequate training but failed to take any remedial action. (App. 369–372, R. Doc. 259 ¶¶ 211–225.)

The district court nevertheless dismissed Sophia’s *Monell* claim when it converted Defendants’ first dismissal motion into a motion for summary judgment. (App. 131–137, R. Doc. 46 at 34–40.) It did not dispute that Defendant Kirchmeier had policymaking authority over the protest response, but concluded that Sophia’s allegations failed as a matter of law to establish a tacit policy or a knowing failure to take remedial action. (App. 133–36, R. Doc. 46 at 36–39.) That was legal error.

Mitchell v. Kirchmeier, 28 F.4th 888 (8th Cir. 2022), is directly on point and requires reversal. *Mitchell* involved a peaceful DAPL protester who, like Sophia, was injured when police supervised by Defendant

Kirchmeier used excessive force against him by injuring him with less-lethal munitions. Like Sophia, Mitchell brought a *Monell* claim against Defendant Kirchmeier for tacitly approving the use of such force and doing nothing to stop the widespread persistent constitutional violations of the officers he supervised. And as with Sophia’s claim here, the district court dismissed Mitchell’s *Monell* claim on the grounds that he had not adequately pleaded a policy, custom, or inadequate training.

This Court reversed, holding that a plaintiff can state a *Monell* claim by plausibly pleading: (1) “a continuing widespread, persistent pattern of unconstitutional misconduct by the governmental entity’s employees; (2) “[d]eliberate indifference to or tacit authorization of such conduct by the governmental entity’s policymaking officials after notice to the officials of that misconduct”; and (3) “an injury by acting pursuant to the governmental entity’s custom.” *Mitchell*, 28 F.4th at 899–900. This Court concluded Mitchell had shown a widespread persistent pattern by alleging the existence of multiple prior conflicts between DAPL protesters and law enforcement officers where less-lethal munitions were misused against peaceful protesters. *Id.* at 990–91. Sophia alleges the same prior protests

met with the same misuse and excessive force. (App. 337–55, R. Doc. 259 ¶¶ 16–114.)

This Court also held that Mitchell had established the deliberate indifference/tacit authorization prong by alleging that Defendant Kirchmeier tacitly authorized the widespread unconstitutional conduct when he publicly defended it. *Mitchell*, 28 F.4th at 900. Indeed, “Sheriff Kirchmeier had been supervising law enforcement’s response to the protests since they began” and therefore “must have been aware” of these issues, such that his public defense of this force constituted tacit authorization of the excessive force. *Id.* The same straightforward inference applies to Sophia’s allegation that Defendant Kirchmeier defended his officers’ constitutional violations. (App. 441, Companion R. Doc. ¶ 66.)

Finally, this Court ruled that Mitchell was injured by precisely the pattern of excessive force Defendant Kirchmeier had tacitly authorized. *Mitchell*, 28 F.4th at 900. So too was Sophia. Applying *Mitchell* to this case thus dictates reversal. There is simply no daylight between Mitchell’s and Sophia’s *Monell* claims, which makes sense because their injuries arose from the same widespread practices and tacit policies.

VI. Reversing the final judgment in Case No. 24-1911 requires reversal of the final judgment in Case No. 24-1919.

Sophia initiated the Companion Lawsuit only because the district court struck her claims against the Defendants who did not physically assault her with explosive munitions. (*See* App. 469–75, Companion R. Doc. 14 ¶¶ 236–68.) Because the district court removed these Defendants from Sophia’s First Amended Complaint, she had to file a separate complaint against them before the limitations period expired.

This Companion Lawsuit, however, pleads the same allegations as her First Amended Complaint and asserts the same Fourth and Fourteenth Amendment excessive force claims against the named Defendants. (App. 469-75, Companion R. Doc. ¶¶ 236–68.) Sophia asserted two bases for these excessive force claims against these officers: some of them directly subjected Sophia to excessive force in the form of less-lethal munitions, and all of them failed to intervene to stop the attack on her. (App. 469–75, Companion R. Doc. ¶¶ 236–68.)

The district court recognized that the Companion Complaint involves “the exact same facts and circumstances” as the Primary Complaint, (App. 482, Companion R. Doc. 36 at 2), and then dismissed the Companion Complaint using the “same reasoning” as it dismissed the Primary

Complaint with no additional analysis. (App. 486, Companion R. Doc. 36 at 3.)

The district court correctly determined that the claims in the Primary and Companion Complaints must rise or fall together. The district court erred, however, in concluding that the claims should fall. Thus, this Court should reverse the Companion Lawsuit's dismissal for the same reasons that it should reverse the Primary Lawsuit's dismissal. And it should remand with instructions to consolidate the two cases.

VII. The district court erred in dismissing Sophia's claims with prejudice.

Though Defendants never requested it, the district court dismissed both the Primary and Companion Complaints with prejudice and without offering any explanation for denying Sophia an opportunity to amend her allegations to overcome the pleading deficiencies the district court believed it had identified. For the reasons described above, this Court should reverse the dismissal of both Complaints, but it should also expressly instruct the district court to combine the two lawsuits and grant Sophia leave to file a consolidated amended complaint that contains all the good faith allegations she wishes to make against all Defendants.

The district court provided no reasoning for its decision to deny Sophia an opportunity to amend her complaint, nor can a reason be inferred since Defendants never argued that Sophia should be denied this opportunity. Making a conclusion with no legal reasoning at all is the very definition of abuse of discretion. Moreover, this is not the first time the district court effectively denied Sophia an opportunity to amend. After Sophia amended her complaint the first time, the district court struck a significant number of her allegations—including all claims against ten separate Defendants—effectively rewriting the entire complaint itself and forcing Sophia to file a Second Amended Complaint she did not agree with. (App. 272–80, R. Doc. 254.) By doing this, the district court effectively denied Sophia’s request to amend, and it did so with no analysis or justification other than that it had not authorized her to amend as much as she did. *Id.* This Court should reverse the district court and allow Sophia to amend her Complaint for this reason alone.

Moreover, none of the acceptable bases for denying Sophia an opportunity to amend applies here.

First, there would be no undue delay because the case is still at the motion to dismiss stage and full discovery has not even commenced.

Admittedly, this case is already suffering from massive delays, but after Defendants have been given three separate opportunities to move to dismiss Sophia's complaints, it is not undue to give Sophia a single unfettered opportunity to amend her complaint so that her allegations conform to her understanding of the facts after conducting preliminary discovery.

Second, Sophia's 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. The Second Amended Complaint that the district court dismissed is largely the same as her original Complaint, which she filed before she knew the identities of her attackers, the weapons they used, or almost anything about what happened on the night she was injured.

Third, Sophia has not repeatedly failed to cure legal deficiencies in her Complaint. As discussed above, her current complaint is legally sufficient already, and she has not had even a single fulsome opportunity to amend it as she sees fit.

Fourth, amending the complaint will not prejudice Defendants, who will still get to conduct discovery on the new complaint and then move for summary judgment.

Fifth, amending the complaint will not be futile. To the contrary, the fact that the district court struck dozens of allegations from Sophia's First Amended Complaint when it required her to file a Second Amended Complaint shows that the allegations Sophia wishes to add are not futile. If the allegations she added—and the district court struck—were irrelevant, Defendants would not have moved to strike them, and the district court would not have granted that motion. That the district court felt it was worth the time to strike Sophia's proposed allegations indicates those allegations are relevant and material. Since none of the bases for denying leave to amend applies here, the district court abused its discretion by dismissing Sophia's complaints with prejudice.

Indeed, the district court's refusal to let Sophia amend her complaint here is particularly egregious because the Second Amended Complaint the district court dismissed was effectively written by the district court itself. The district court's order striking claims from Sophia's First Amended Complaint, (App. 272–80, R. Doc. 254), includes a 52-page spreadsheet in

which the district court dictated to Sophia word-for-word how she had to write the Second Amended Complaint. (App. 281–332, R. Doc. 254-1.) It is well-settled that the “plaintiff is the master of [her] complaint” and therefore gets to decide which allegations and claims to include and which to exclude. *Winfrey v. City of Forrest City*, 882 F.3d 757, 758 (8th Cir. 2018) (quoting *Holmes Grp., Inc. v. Vornado Air Circulation Sys., Inc.*, 535 U.S. 826, 831 (2002)). Yet the district court denied Sophia the right to decide what allegations to include in her complaint by rewriting her First Amended Complaint and forcing her to file that rewrite as a Second Amended Complaint. This act of usurpation by the district court denied Sophia the bedrock right to control her own allegations and claims. That is an abuse of discretion and requires reversal.

All Sophia seeks is 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.

CONCLUSION

For the foregoing reasons, the final judgments dismissing the complaints should be reversed and the cases should be remanded to the district court with instructions to combine the cases and allow Sophia to file a consolidated Third Amended Complaint containing the good-faith allegations she chooses.

Dated: July 22, 2024

Respectfully submitted,

/s/ Joseph H. Lang, Jr.

Joseph H. Lang, Jr.
D. Matthew Allen
CARLTON FIELDS, P.A.
4221 W. Boy Scout Blvd.
Suite 1000
Tampa, Florida 33607
Telephone: (813) 229-4253
jlang@carltonfields.com
mallen@carltonfields.com

Benjamin Michael Stoll
John L. Gibbons
CARLTON FIELDS, P.A.
1025 Thomas Jefferson Street NW
Suite 400 West
Washington, DC 20007
Telephone: (202) 965-8100
bstoll@carltonfields.com
jgibbons@carltonfields.com

Samuel B. Spinner
CARLTON FIELDS, P.A.
700 NW 1st Avenue
Suite 1200
Miami, Florida 33136
Telephone: (305) 347-6885
sspinner@carltonfields.com

*Attorneys for Appellant Sophia
Wilansky*

CERTIFICATE OF COMPLIANCE

I hereby certify that the text of the Appellant's Brief as defined by Federal Rule of Appellate Procedure 27(d)(2) contains 12,261 words of proportionally-spaced text as determined by the automated word count of Microsoft Word and has been prepared in 14-point Century Schoolbook font. I also certify that, pursuant to Circuit Rule 28A(h), a version of the brief and addendum in non-scanned PDF format have been filed electronically. I further certify that the brief and addendum have been scanned for viruses and are virus free.

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Appellant's Brief and the addendum were filed electronically with the Court using the CM/ECF system, which action will cause automatic electronic notification of the filing from the Court to be served upon all parties who have registered for electronic service with this Court's efileing portal on this 22d day of July, 2024.

/s/ Joseph H. Lang, Jr.
Joseph H. Lang, Jr.