No. _____

IN THE

Supreme Court of the United States

SARAH K. MOLINA and CHRISTINA VOGEL,

Petitioners,

—v.—

DANIEL BOOK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether words printed on clothing are pure speech, and thus presumptively entitled to First Amendment protection—as the Fourth, Fifth, and Ninth Circuits have held—or whether they are protected only if they convey a "particularized message," as the Eighth Circuit below, and the Sixth and Seventh Circuits, have held.

2. Whether, in light of important new historical evidence, this Court should reconsider the doctrine of qualified immunity.

3. Whether the court of appeals erred in holding that a First Amendment right to unobtrusively observe and record police performing their duties in public is not clearly established.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs below, are Sarah K. Molina and Christina Vogel. Peter Groce was plaintiff-appellee below but does not join the petition.

Respondents, defendants below, are Daniel Book, Joseph Busso, Stephen Dodge, Michael Mayo, Lane Coats, Joseph Mader, Mark Seper, and William Wethington, in their individual capacities.

The City of St. Louis is a defendant in the district court; proceedings against the city are currently stayed. Jason Chambers was initially a defendant in the district court, but petitioners moved to voluntarily dismiss their claims against him. The County of St. Clair, Illinois was also initially a defendant in the district court.

RELATED PROCEEDINGS

Molina v. City of St. Louis, No. 4:17-cv-02498-AGF (E.D. Mo. March 31, 2021) (Memorandum & Order denying in part and granting in part Defendants' motion for summary judgment).

Molina v. City of St. Louis, No. 21-1830 (8th Cir. Feb. 2, 2023) (Panel opinion).

Molina v. City of St. Louis, No. 21-1830 (8th Cir. Apr. 24, 2023) (Order denying rehearing en banc).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Sarah K. Molina and Christina Vogel respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, App. 1a–App. 26a, is reported at 59 F.4th 334. The opinion of the United States District Court for the Eastern District of Missouri, App. 27a–63a, is available at 2021 WL 1222432. The Eighth Circuit's order denying rehearing en banc, App. 64a–69a, is reported at 65 F.4th 994.

JURISDICTION

The Eighth Circuit entered judgment on February 2, 2023. It denied rehearing en banc on April 24, 2023. On July 18, 2023, Justice Kavanaugh extended the time to file this petition for a writ of certiorari up to and including September 7, 2023. *See* No. 23A42. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press."

As codified, 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

The court below ruled that written words, a form of pure speech, are not presumptively entitled to First Amendment protection when they are printed on clothing. Instead, it held that they are protected only if "everyone" would understand them to express a particularized message—here, a "pro-protest" message. App. 12a. On that basis, the court deemed the words emblazoned on petitioners' hats—"National Lawyers Guild Legal Observer"—wholly unprotected by the First Amendment. Remarkably, this approach—a First Amendment category mistake that grafts the test for expressive conduct to pure speech—has also been adopted by two other circuits, the Sixth and Seventh. By contrast, three circuits, the Fourth, Fifth, and Ninth, have correctly recognized that words printed on clothing are no less protected than words appearing on foolscap, banners, or computer screens.

Resolving this conflict is critical to safeguard the full scope of First Amendment protections across the courts of appeals. In the Eighth, Seventh, and Sixth Circuits—most of the American Midwest—the government has license to stifle or retaliate against speech simply because a written message appears printed on clothing and its substantive meaning is arguably unclear. Save for a few narrow categories of unprotected speech not implicated here, this Court has never permitted that kind of message-based cherry-picking in determining which pure speech the First Amendment protects. The Court should grant review to resolve the conflict and correct the Eighth Circuit's category mistake.

The Court should also grant review to reconsider qualified immunity in light of newly discovered

evidence about the circumstances of Section 1983's original enactment. That evidence demonstrates that the doctrine is fundamentally flawed in two respects. First, it relies on an "anti-derogation canon" to read words into the statute that were not there, at a time when that canon was not accepted. And second, the "good faith" or "qualified immunity" defense that it judicially superimposed was not just absent from Section 1983's text, but contradicted by the full text Congress adopted, sixteen words of which were inadvertently omitted during the statute's codification. Those words, as much a part of the law Congress enacted as those that appear in the U.S. Code, make clear that Section 1983 provided a right of action *notwithstanding any existing law to the contrary*, including common law tort principles like the good faith defense.

Finally, in its application of the qualified immunity doctrine here, the court below erred by concluding that it was not clearly established that citizens have a constitutional right to unobtrusively observe and record the police in public. No reasonable officer could think that the state can bar its citizens from watching what the police do in public, at a distance, and unobtrusively. This error is so egregious that it justifies summary reversal.

STATEMENT OF THE CASE

I. Factual Background

Petitioners Sarah K. Molina and Christina Vogel are attorneys who attended a protest organized in the wake of a high-profile fatal shooting of a citizen by a St. Louis police officer. App. 28a. Both women chose to participate in the day's events as legal observers with

the National Lawyers Guild—a progressive legal organization that defends, among other things, the right to protest. *Id.* at 28a, 43a. To signify their roles, Molina and Vogel wore bright green hats emblazoned with the words "National Lawyers Guild Legal Observer." *Id.* at 2a.[1]

At one point during the protest, police officers issued a series of dispersal orders. *Id.* at 29a. As the crowd began to dissipate, officers riding in a Ballistic Engineered Armored Response Counter Attack Truck (nicknamed the "BEAR") pursued and shot projectiles at retreating protesters. *Id.* at 29a–30a. Overhead, a police helicopter monitored the BEAR's path. *Id.* at 31a. Witnessing the vehicle's movements, one bystander was captured on film saying, "I think they're chasing some people." *Id.* at 30a.

Molina and Vogel complied with the dispersal orders and left the protest site. *Id.* at 29a. They turned off the thoroughfare where the protest took place and officers had issued dispersal orders and headed toward Molina's house, located on a side street several blocks away from the site of the protest. *Id.* at 30a. Once there, Molina and Vogel stood on the sidewalk in front of Molina's property. *Id.*

The BEAR, too, veered away from the protest site and proceeded down the same side street. *Id.* (The

[1] This case comes before the Court on a motion for summary judgment. In that posture, all evidence must be viewed "in the light most favorable to the opposing party." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Additionally, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

primary liaison between the helicopter and the BEAR later acknowledged that he recognized the individuals wearing bright hats as legal observers. *Id.* at 31a.) As the vehicle approached Molina's house, officers flung canisters of tear gas from a port hole in the armored vehicle. *Id.* Molina and Vogel sought shelter in a gangway shared with a neighboring house, but the officers simply re-trained their projectiles toward them. *Id.* Vogel recalled experiencing "the smell of tear gas" and "a fog, a cloud of smoke." *Id.* She later found a spent canister of tear gas in the street. *Id.*

II. Procedural Background

1. Molina and Vogel filed suit under 42 U.S.C. § 1983 against the police officers who operated and directed the BEAR, as well as the City of St. Louis and St. Clair County, Illinois. As relevant here, they claimed First Amendment retaliation, alleging the officers targeted them with tear gas because they engaged in protected speech. App. 3a.[2]

At the close of discovery, respondents moved for summary judgment. *Id.* at 34a. Among other arguments, they raised the affirmative defense of qualified immunity. *Id.* at 38a. Respondents also argued that the record, even viewed in the light most favorable to petitioners, established that they had probable cause to fire the tear gas and failed to

[2] A third plaintiff brought similar claims based on police actions during the same protest, but rooted in slightly different facts. App. 15a. The opinion below agreed with the district court that those claims could proceed past summary judgment, *Id.* at 16a–18a; that plaintiff is therefore not a party to this petition.

establish that the officers' deployment of tear gas canisters was in retaliation for petitioners' exercise of First Amendment rights. *Id.* at 38a–42a.

The district court denied summary judgment on petitioners' First Amendment retaliation claim. *Id.* at 51a. First, it found the officers lacked even arguable probable cause to deploy the tear gas against Molina and Vogel. *Id.* at 40a. Next, it held respondents were not entitled to qualified immunity because petitioners' First Amendment right to participate in a protest that criticized police conduct was clearly established by the time of the events in question. *Id.* at 45a. It also determined a jury could reasonably find the officers retaliated against petitioners based on their participation in the protest as legal observers. *Id.* at 44a.

2. A divided panel of the Eighth Circuit reversed. *Id.* at 18a. It did so on grounds not raised by the parties, nor addressed by the district court. Instead, following oral argument, the panel *sua sponte* ordered supplemental briefing on two questions: (1) whether petitioners had engaged in *any* First Amendment protected activity by participating in the protest as legal observers and, if so, (2) whether the protected nature of that speech was clearly established when officers tear gassed Molina and Vogel.

Molina and Vogel's supplemental brief identified several forms of First Amendment protected activity associated with their participating in the protest as legal observers. As relevant here, the first was that they engaged in protected expression by wearing hats

bearing the words "National Lawyers Guild Legal Observer." *Id.* at 11a. The second was that, by acting as legal observers, Molina and Vogel exercised a First Amendment right to unobtrusively observe and record police officers while the officers executed their duties in public. *Id.* at 5a.

The panel majority rejected both theories. *Id.* at 8a, 13a. With respect to petitioners' argument that the written words on their hats constituted protected speech, the majority reasoned that only "some symbols and words carry a clear message"—and only those words that are "intended" and "likel[y]" to "convey a particularized message" warrant constitutional protection. *Id.* at 12a–13a (internal quotation marks omitted). Applying this test, the majority concluded that the phrase on the hats, "National Lawyers Guild Legal Observer," contained "no obvious pro-protest message" and therefore was not protected by the First Amendment. *Id.* at 13a.

Additionally, the panel majority held that because the fact that the hats bore a "pro-protest" message was not "beyond debate," the officers were entitled to qualified immunity. *Id.*

The panel also rejected Molina and Vogel's theory of retaliation based on their exercise of a First Amendment right to unobtrusively observe and record police officers in public. *Id.* at 5a. The panel majority held that even if this activity motivated the officers to tear gas petitioners, respondents were entitled to qualified immunity because it was not clearly established at the time that people have a First

Amendment right to observe the police unobtrusively in public. *Id.* Although previous Eighth Circuit precedents had identified a right to record police, the majority discounted those cases as arising under the Fourth Amendment, not the First Amendment. *Id.* at 6a–8a (citing *Chestnut v. Wallace*, 947 F.3d 1085, 1090–91 (8th Cir. 2020); *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005)).

3. Judge Benton dissented from the relevant portions of the majority opinion. He concluded that there was a clearly established First Amendment right to unobtrusively record and observe on-duty police in public, noting prior Eighth Circuit precedents establishing such a right. App. 18a–19a. The fact that those cases raised Fourth Amendment claims did not support qualified immunity, because their reasoning was inextricably tied to the scope of First Amendment freedoms. *Id.* at 24a–26a. As he put it, "the Fourth Amendment makes it unreasonable to arrest or detain someone for conduct that, *because the constitution protects it*, could never be criminal." *Id.* at 26a (emphasis added).

4. A divided Eighth Circuit denied rehearing en banc. Four of the circuit's eleven active-status judges would have granted the petition. App. 65a. Dissenting from denial, Judge Colloton criticized the panel's conclusion that no clearly established First Amendment right to unobtrusively record police officers performing their jobs in public existed at the time of the protest. *Id.* He reasoned that the right was obvious, noting that no reasonable officer could believe the Constitution would tolerate an ordinance making

it "unlawful for any person to watch police-citizen interactions at a distance and without interfering." *Id.* Yet under the majority's reasoning, "a reasonable public official" at the time of the protest "could have believed that this hypothetical ordinance is consistent with the First Amendment." *Id.* Judge Colloton then emphasized prior Eighth Circuit precedent demonstrating that citizens have such a constitutional right, as well as a "robust consensus of cases" from outside the circuit reinforcing that conclusion. *Id.* at 66a.

The dissent from denial of rehearing also disputed the panel's conclusion that Molina and Vogel's neon green hats bearing the message "National Lawyers Guild Legal Observer" were not speech entitled to First Amendment protection. *Id.* at 67a. Drawing on this Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), as well as binding circuit precedent, Judge Colloton explained that constitutionally protected speech is not limited to "expressions conveying a 'particularized message.'" App. 67a (quoting *Hurley*, 515 U.S. at 569). Otherwise, the First Amendment "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Id.* (quoting *Hurley*, 515 U.S. at 569). In his view, the panel majority erred in denying First Amendment protection to written words simply because it did not read them as expressing a pro-protest message. *Id.*

REASONS FOR GRANTING THE WRIT

I. The Courts of Appeals Are Divided on Whether Written Words Printed on Clothing Must Express a Particularized Viewpoint in Order to be Protected by the First Amendment.

By holding that the words written on Molina and Vogel's hats lacked First Amendment protection because they failed to adequately communicate a pro-protest viewpoint, the Eighth Circuit deepened a conflict in the courts of appeals over when words printed on clothing deserve constitutional protection. Three circuits hold that such words, as pure speech, are protected without regard to whether they express a particular viewpoint. Three others hold that First Amendment protection extends only to words that express a particularized message. That division is longstanding and shows no signs of going away on its own.

Addressing this conflict is important, and the Eighth Circuit's resolution of it is plainly wrong. Central to the First Amendment is the principle that the government must permit nearly all speech to flourish, without regard to its substantive content, ideological valence, or particular viewpoint. By denying *any* protection to words appearing on clothing unless they express a particularized message, the Eighth Circuit and other courts on its side of the split have eroded that basic tenet for a significant portion of the country. The Constitution protects speech regardless of whether it expresses a pro-protest, anti-protest, or protest-agnostic message. Yet the court below held that petitioners' speech, because it was

written on their clothing, was unprotected unless it expressed a "pro-protest" message. App. 13a.

Moreover, petitioners' case gives the Court an excellent vehicle to address this division. Distinctively, it comes before the Court unburdened by the additional doctrinal considerations that may complicate this question when it arises—as it often has—in the context of public schools.

This Court should grant review, reverse the erroneous reasoning that led the Eighth Circuit to deny First Amendment protection to "pure speech," and reassert the Constitution's historically comprehensive protection of written words regardless of where they appear or whether they express a particular viewpoint.

A. The Circuits Have Reached Conflicting Decisions Over Whether Words Printed on Clothing Qualify as Pure Speech.

1. "From 1791 to the present," the First Amendment has protected pure speech regardless of its content, save for a "few limited areas." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382–83 (1992). Written words are incontrovertibly pure speech, and thus presumptively entitled to significant constitutional protection. *303 Creative v. Elenis*, 143 S. Ct. 2298, 2312 (2023).

In the opinion below, however, the Eighth Circuit reasoned that the words printed on petitioners' hats deserved First Amendment protection only if they "directly conveyed a pro-protest message." App. 11a. To reach the surprising conclusion that some written words are not protected speech, the Eighth Circuit

erroneously grafted this Court's test for "expressive conduct," which identifies when *conduct* receives First Amendment protection*, United States v. O'Brien*, 391 U.S. 367, 375 (1968), onto *pure speech*—a category of expression that receives "comprehensive protection under the First Amendment," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969); *303 Creative*, 143 S. Ct. 2312. Because the phrase "National Lawyers Guild Legal Observer" did not, in the majority's view, communicate a "particularized message" that was "easily identifiable," the court concluded that the message written on petitioners' hats was not entitled to any First Amendment protection. App. 12a.

Limiting protection for written words in this way is a category mistake. The expressive conduct test provides as a threshold matter that conduct must express a "particularized message" to trigger First Amendment protection. *Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam). The Eighth Circuit applied that test to petitioners' written words seemingly because they appeared on clothing, and denied First Amendment protection because they did not meet the threshold required for expressive conduct. *See* App. 12a (lumping together *Cohen v. California*, 403 U.S. 15, 16 (1971) (jacket inscribed with anti-draft words) with *Baribeau v. City of Minneapolis*, 596 F.3d 465, 470–71 (8th Cir. 2010) (assessing whether zombie costumes worn to express anti-consumerism message are protected)). But this Court has never applied the "expressive conduct" test to pure speech, nor suggested that pure speech is

entitled to First Amendment protection only if it expresses a "particularized message"—no matter where it appears.

2. The Eighth Circuit is not the first federal appellate court to make this fundamental mistake. Like the majority below, the Seventh and Sixth Circuits protect words written on clothing only if they express an identifiable idea or opinion.

In *Brandt v. Board of Education of City of Chicago*, 480 F.3d 460 (7th Cir. 2007), a group of eighth graders placed in their school's gifted program faced discipline for wearing T-shirts to school in protest of what they considered a rigged class election. The T-shirts in question largely replicated a school-sanctioned design: a print of an animal, a baseball cap, and each student's last name. *Id.* at 463. But the plaintiffs added a slogan designating their inclusion in the gifted program: "Gifties 2003." *Id.* School officials banned the shirts, reasoning that the added-on slogan would "disrespect" the principal and "create a risk to the good order of the school." *Id.*

The court of appeals held that the T-shirts, notwithstanding the words "Gifties 2003" printed on them, were not speech deserving any First Amendment protection. *Id.* at 465. The opinion began from the uncontroversial premise that "clothing as such is not—not normally at any rate—constitutionally protected expression." *Id.* It acknowledged that "there can be speech printed on clothing." *Id.* But it concluded that the "few words imprinted" on the plaintiffs' T-shirts were not speech

within the meaning of the First Amendment because the slogan was insufficiently "expressive of an idea or opinion." *Id.* at 466. Thus, the written words "Gifties 2003" were "no more" worthy of constitutional protection than "a young child's talentless infantile drawing." *Id.*

Just last year, another Seventh Circuit panel, considering whether the First Amendment protected a plaintiff's pro-gun T-shirt, cited *Brandt* for the proposition that speech printed on clothing warrants constitutional protection only if it "convey[ed] a political or other message." *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th 412, 422 (7th Cir. 2022) (quoting *Brandt*, 480 F.3d at 465). Although *Sonnabend* found the plaintiff's T-shirt satisfied that test, it nevertheless relied on *Brandt*'s reasoning that words on clothing are not protected absent a threshold determination that they "convey a political or other message." *Id.* at 422. Because the plaintiff's shirt, "through its text and the image of a handgun," communicated "a political message—a positive opinion of firearms and support for the right to bear them," the court held it was entitled to First Amendment protection. *Id.*

The Sixth Circuit has similarly insisted that when written words appear on clothing, they must convey a particularized message to qualify for any First Amendment protection. Thus, in *Castorina ex rel. Rewt v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), the court held that students' T-shirts bearing the words "Southern Thunder," a Confederate flag, and a likeness of country singer

Hank Williams, Jr. qualified as speech for First Amendment purposes only because the T-shirts conveyed a "particularized message" about the plaintiffs' pride in their Southern heritage, meaning they "express[ed] more than a mere appreciation for the life and music" of Hank Williams, Jr. *Id.* at 539.

In short, the Sixth, Seventh, and Eighth Circuits all deny First Amendment protection to written words on clothing unless they express a particularized viewpoint.

3. Three other courts of appeals—the Ninth, Fourth, and Fifth Circuits—properly treat words on clothing as pure speech protected by the First Amendment without first requiring that the speech express a particularized message or viewpoint.

The Ninth Circuit has squarely held that written words are protected as pure speech even when printed on clothing, without needing to satisfy any content-based threshold test. It "do[es] not believe the First Amendment analysis turns on an examination of the ideological message (or lack thereof)" that the words express. *Frudden v. Pilling*, 742 F.3d 1199, 1206 (9th Cir. 2014).

The Ninth Circuit first articulated this view in *Jacobs v. Clark County School District*, 526 F.3d 419 (9th Cir. 2008), which upheld a mandatory uniform policy against students' compelled speech claim. *Id.* at 437–38. The court observed that the particular clothing the district required students to wear—unadorned khaki tops and pants—did not "involve written or verbal expression of any kind." *Id.* at 438. Thus, to warrant constitutional protection, the uniform needed to force students to communicate a

particularized message. *Id.* (citing *Spence*, 418 U.S. 411). Because the message the plain clothing conveyed was, at best, "imprecise," the court held the district's chosen uniforms did not amount to compelled speech. *Id.*

In reaching this conclusion, however, *Jacobs* pointed out that "t-shirts containing written messages," *id.* at 428, would be a different story. These, it stated, were "unquestionably protected by the First Amendment." *Id.* at 428 n.21.

Subsequently, in a challenge to school uniforms that did feature written words, *Frudden*, 742 F.3d at 1199, the court reiterated that principle, distinguishing *Jacobs* because the defendants in *Frudden* "mandat[ed] that a written motto" reading "Tomorrow's Leaders" be displayed on the students' uniform. *Id.* at 1201. As a result, the court explained, the uniform "compels speech"—and thus triggers First Amendment scrutiny. *Id.* at 1202. It declined to require that plaintiffs first show the motto "Tomorrow's Leaders" expressed a particularized message, directly dismissing the defendants' contention that the words' First Amendment protections would hinge on their substantive meaning. *Id.* at 1206.

The Fourth Circuit has also rejected the approach the court of appeals took below. In a case challenging a middle school dress code that barred apparel featuring "messages that relate to . . . weapons," the school argued that its dress code did not violate the First Amendment because it did "not regulate speech, but rather conduct." *Newsom ex rel. Newsom v. Albermarle Cnty. Sch. Bd.*, 354 F.3d 249, 258 n.6 (4th Cir. 2003). The court dismissed that

argument for "the simple reason" that the dress code policy "regulates speech" because it prohibits certain written messages printed on clothing while permitting others. *Id.*

The Fifth Circuit also falls on this side of the split. In another challenge to a school district's mandatory dress code, the court explained that different kinds of clothing are subject to different First Amendment protections. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 440 (5th Cir. 2001). Where clothing bears no words, its protected status turns on whether "the message is likely to be understood by those intended to view it." *Id.* at 441 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989); and *Spence*, 418 U.S. at 410–11). But "[w]ords printed on clothing" require no such threshold inquiry, and instead "qualify as pure speech and are protected under the First Amendment." *Id.* at 440; *see also One World One Family Now v. City of Miami Beach*, 175 F.3d 1282, 1285 n.5 (11th Cir. 1999) ("It has long been recognized" that written messages on clothing "constitute[] protected speech.").

In short, three circuits have erroneously applied the threshold standard for expressive conduct to words printed on clothing. Three others have properly ruled that words printed on clothing, like words on paper or a computer screen, are protected without a threshold inquiry into whether they express a particularized message. Only this Court can resolve the split.

B. The Question Presented Is Important.

The lower courts' confusion about whether words are protected speech when they appear on clothing warrants this Court's review. Few principles are more basic to the First Amendment than the proposition that words are presumptively protected, regardless of their content. The opinion below departs from that fundamental precept, ruling that some words—simply because they appear on clothing—are not entitled to constitutional protection unless they communicate a particularized viewpoint. That conclusion leaves a common form of everyday expression exposed to state censorship. And it invites arbitrary judicial decision-making, permitting judges to deny protection to messages they claim are not sufficiently clear—as the court below did in this case.

The upshot is that in much of the Midwest, home to the Sixth, Seventh, and Eighth Circuits, the First Amendment has nothing to say about a T-shirt printed with lines from Lewis Carroll's Jabberwocky, let alone a slogan identifying individuals as "legal observers," so long as "not everyone would understand" its meaning. App. 12a. The protection of pure speech cannot rest on such accidents of geography and subjective assessments of judges.

C. This Case Is an Ideal Vehicle for Resolving the Split.

This case supplies the Court with a strong vehicle to resolve this long-simmering division. Unlike other cases implicating the same circuit split, the underlying facts here present the Court with a clean

opportunity to clarify that words printed on clothing, no less than words printed on parchment, qualify as presumptively protected "pure speech" without necessitating a threshold inquiry into whether they convey a particularized viewpoint.

As the cases discussed above illustrate, the question has often arisen in challenges to grade school and high school clothing restrictions. *See, e.g.*, *Brandt*, 480 F.3d at 463; *Rewt*, 246 F.3d at 538; *Canady*, 240 F.3d at 438. But the education context presents unique, and often especially nuanced, First Amendment considerations. *See, e.g.*, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2045 (2021); *Morse v. Frederick*, 551 U.S. 393, 404 (2007). Those considerations can complicate the ultimate resolution of school dress code challenges, even where such cases present the same threshold question of whether written words printed on clothing qualify as speech within the meaning of the First Amendment.

Here, the "special characteristics" presented by student speech, *Mahanoy*, 141 S. Ct. at 2045, are not present. The panel's decision rested squarely on its legal conclusion that petitioners' words did not clearly express a "pro-protest message." All the Court need do in this case is clarify that the words emblazoned on petitioners' hats were pure speech—and were thus entitled to constitutional protection whether or not they expressed a "pro-protest" message.[3]

[3] Having concluded that the First Amendment does not protect petitioners' written words because they do not express a

D. The Opinion Below Is Wrong.

The opinion below is premised on a category mistake. Where pure speech is involved, the First Amendment is presumptively implicated, without necessitating any threshold inquiry. Where, by contrast, plaintiffs claim that their *conduct* is protected by the First Amendment, the Court must first assess whether the conduct is "expressive" before applying First Amendment scrutiny. *Spence*, 418 U.S. 411; *O'Brien*, 391 U.S. at 375.

Here, the Eighth Circuit applied to written words, a form of pure speech, a threshold test meant only for expressive conduct. It held that words on clothing are not protected *at all* unless they communicate a "particularized message" whose meaning "everyone would have understood." App. 12a. Based on that misapplication, it found that even words that plainly communicate an idea, "National Lawyers Guild Legal Observer," receive no First Amendment protection whatsoever. *Id.*

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sufficiently particularized "pro-protest" message, the court went on to hold in the alternative that the officers did not violate a clearly established right by retaliating in response to these words because "any pro-protest message was not 'beyond debate.'" App. 13a (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)). But that conclusion fails for the same reason the panel's initial holding fails—written words are protected *regardless* of whether they express a particularized message. If written words are protected regardless of whether they express a particularized message, the fact that one could debate whether these words were "pro-protest" is legally irrelevant, both on the merits and as to qualified immunity.

That is not the law. As this Court reiterated just last Term, written words fall within the heartland of "pure speech," and are presumptively protected by the First Amendment. *303 Creative*, 143 S. Ct. at 2312. It has never mattered whether those words express a particularized message, much less, as the court below required here, a "pro-protest" viewpoint "that everyone would have understood." App. 12a. Even Lewis Carroll's nonsense poem, Jabberwocky, is "unquestionably shielded" by the First Amendment. *Hurley*, 515 U.S. at 569. Nor does that protection waver based on the medium used to transmit the words. From the revolutionary pamphlets of Thomas Paine to a cloth banner "cryptic[ally]" reading "BONG HiTS 4 JESUS," *Morse*, 551 U.S. at 397, 401, to words appearing via computer code on a website, *303 Creative,* 143 S. Ct. at 2312, written expression qualifies as speech protected by the First Amendment, without a threshold inquiry into whether it expresses a particularized message clear to all.

The rule that constitutional protection turns on whether a particularized message is expressed applies only in the context of expressive conduct. It stems from *United States v. O'Brien*, 391 U.S. at 375, which addressed whether regulations of conduct must satisfy First Amendment scrutiny. In that case, involving a prohibition on draft card destruction, the Court began from the premise that not all regulations of conduct implicate the First Amendment. *Id.* at 376. However, it suggested some forms of expressive conduct can have a sufficient communicative element to trigger constitutional protection. *Id.* at 376. The

Court subsequently made clear that to distinguish between expressive conduct that implicates the First Amendment and conduct that does not, one asks whether the conduct is "inten[ded] to convey a particularized message" and whether "the message would be understood by those who viewed it." *Johnson*, 491 U.S. at 404 (quoting *Spence*, 418 U.S. at 410–11 (applying the test to a flag display)).

But the *O'Brien-Spence* test is inapposite for speech communicated through writing. Its premise is that conduct is generally distinct from pure speech, and therefore warrants First Amendment protection only where it is in fact expressive. By contrast, written words *always* communicate and are protected regardless of the message they express—whether it is pro-protest, anti-protest, protest-agnostic, or just confused. Written words therefore need not clear the expressive conduct threshold showing to trigger constitutional protection. Yet the Eighth Circuit—like the Sixth and Seventh Circuits before it—insisted on just that here.

II. New Historical Evidence Warrants a Fresh Look at the Doctrine of Qualified Immunity.

In addition to resolving the circuits' longstanding division over the constitutional status of words printed on clothing, this Court should also grant certiorari to revisit qualified immunity in light of important new historical evidence that confirms the doctrine's incompatibility with the original meaning of Section 1983.

In recent years, calls to reconsider qualified immunity have grown. Members of the Court have openly questioned its legitimacy. *See Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari); *N.S. ex rel. Lee v. Kan. City Bd. of Police Comm'rs*, 143 S. Ct. 2422, 2424 (2023) (Sotomayor, J., dissenting from denial of certiorari). Academics have cast doubt on its foundations. *See, e.g.*, William Baude, *Is Qualified Immunity Unlawful?*, 106 Cal. L. Rev. 45, 47 (2018); Joanna Schwartz, *The Case Against Qualified Immunity*, 93 Notre Dame L. Rev. 1797, 1800 (2018). Circuit judges have decried its consequences and questioned its theoretical basis. *See, e.g.*, *Rogers v. Jarrett*, 63 F.4th 971, 979 (5th Cir. 2023) (Willett, J., concurring); *McKinney v. City of Middletown*, 49 F.4th 730, 756 & n.9 (2d Cir. 2022) (Calabresi, J., dissenting); *Wearry v. Foster*, 33 F.4th 260, 279 (5th Cir. 2022) (Ho, J., dubitante).

The issue has taken on fresh urgency in the wake of scholarship that directly undermines this Court's rationale for the doctrine. Professor Alexander Reinert's new article, *Qualified Immunity's Flawed Foundation*, 111 Cal. L. Rev. 201 (2023), calls into question this Court's reliance on the so-called anti-derogation canon to interpret Section 1983 to encompass qualified immunity. *Pierson v. Ray*, 386 U.S. 547 (1967). And it shows how a key phrase from the oft-overlooked original text of Section 1983—omitted from the modern U.S. Code only by historical accident—directly forecloses using the anti-derogation canon to adopt this reading.

Those "game-changing" historical insights, *Rogers*, 63 F.4th at 980 (Willett, J., concurring), strongly counsel against maintaining the doctrine of qualified immunity in its current form. As this Court has already warned, where its precedents derive from "an erroneous historical narrative," reversing course and correcting the record will often trump the force of *stare decisis*. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2266 (2022). The Court should correct what is now plainly revealed as a fundamental mistake.

A. The Anti-Derogation Canon Is Not a Proper Means of Interpreting Section 1983.

When this Court first grafted a prototypical version of qualified immunity onto its interpretation of Section 1983, it justified doing so by reading the statute "against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Pierson*, 386 U.S. at 554 (citation omitted). One such background principle, it continued, was a good faith defense. *Id.* at 556–57. Since then, the Court has substantially altered this affirmative defense, now known as qualified immunity. Most significantly, it has replaced its original good faith inquiry with an objective test asking whether the defendant's actions violated clearly established law. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). But qualified immunity's foundational justification has remained that courts should interpret Section 1983 "in harmony" with background tort immunities and defenses that existed when Congress passed the

statute, "rather than in derogation of them." *Imbler v. Patchman*, 424 U.S. 409, 418 (1976).

That foundational interpretive premise is mistaken. It relies on the anti-derogation canon, which assumes "[s]tatutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). But a closer look at the historical record refutes the assumption that Congress anticipated its new cause of action would be limited by applying this canon to interpose common law defenses. Reinert, *supra*, at 218–28. For starters, the canon itself was subject to significant scholarly criticism in the years surrounding Reconstruction—hardly the sort of widely accepted interpretive principle legislators would have expected to apply when they crafted this new cause of action. *Id.* at 218–21. Moreover, the Supreme Court's limited 19th-century reliance on the canon arose in meaningfully different contexts—primarily in cases involving novel procedural devices, interference with established common law property rights, or claims affirmatively resting on the common law. *Id.* at 227–28. Those applications lend no support for using the canon to read a common law defense into a statutory cause of action *sub silentio*. *Id.* Thus, "[i]f we take seriously the Court's declaration that its interpretation of Section 1983 is guided by" the Congress of 1868's "understanding" at the time of enactment, "it follows that the Court should not rely on the Derogation Canon that legislators at the time

would not have expected to apply to Section 1983." *Id.* at 228.

B. The Lost Text of Section 1983 Confirms that Congress Intended to Override Common Law Immunities, Including the Good Faith Defense.

Reinert's scholarship also reveals an even more startling incompatibility between the judicially created defense of qualified immunity and Section 1983. Even if the anti-derogation canon were a proper interpretive gloss in the *absence* of contrary statutory text, Congress was not actually silent as to whether it intended to displace the common law. It expressly displaced all existing barriers to relief. As Congress originally passed Section 1983, the statute directed that its new cause of action should be available, any "*law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding*." *Id.* at 235 (quoting Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13). This clause affirmatively displaced existing state law barriers, including state common law barriers, to constitutional accountability. In light of that text, the anti-derogation canon was the very last principle the Court should have applied in construing Section 1983.

An apparent scrivener's error introduced during the codification process meant this clause was omitted from the United States Code. *Id.* at 236–37. In *Pierson* and the Court's subsequent qualified immunity jurisprudence, the Court ignored it. But the statute Congress passed included these words, so they cannot

be ignored; "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1738 (2020). Recovery of the omitted words reveals that the Court's decision to superimpose a judicially created defense onto Section 1983 directly contravenes the statute's full text. Such a direct conflict between statutory text and existing precedent is precisely the kind of "superspecial justification" that warrants revisiting past precedent. *Kimble v. Marvel Ent., LLC*, 576 U.S. 446, 458 (2015).

III. The Court of Appeals Erred by Holding a First Amendment Right to Observe Police Officers in Public Had Not Been Clearly Established.

Even if this Court does not grant certiorari to reconsider qualified immunity altogether, it should still rein in the doctrine's excesses by summarily reversing the Eighth Circuit's erroneous conclusion that the right to unobtrusively observe police officers performing their duties in public was not clearly established at the time of the protest.

That conclusion is simply implausible. It has always been abundantly clear that citizens have a right to observe the police unobtrusively in public, and no reasonable officer could think otherwise. As Judge Colloton persuasively noted in his dissent from denial of rehearing, no reasonable officer could think it constitutional to have a rule making it "unlawful for any person to watch police-citizen interactions at a distance and without interfering." App. 65a. Yet under

the majority's logic, "a reasonable public official" at the time of the protest "could have believed that this hypothetical ordinance is consistent with the First Amendment." *Id.*

Indeed, the Eighth Circuit's own precedents established that citizens have a right to unobtrusively observe the police in public. As the opinion below acknowledged, prior in-circuit cases had expressly recognized a right to record police carrying out their duties in public by holding that doing so could not give rise to probable cause. *Id.* (citing *Walker*, 414 F.3d 989; *Chestnut*, 947 F.3d 1085). The majority dismissed these cases because they addressed Fourth Amendment rather than First Amendment claims. *Id.* at 8a. But the reason those cases found no probable cause is precisely because citizens have a First Amendment right to observe the police in public unobtrusively. *Id.* at 21a (Benton, J., dissenting in part); *see also Chestnut*, 947 F.3d at 1090–91 (citing six First Amendment cases as a "robust consensus of persuasive authority" establishing that "the constitution protects" recording and observing officers). Moreover, if it is unconstitutional to arrest someone for observing the police, it's obviously unconstitutional to hurl tear gas at them for the same conduct. By holding otherwise, the Eighth Circuit extended qualified immunity to conduct the officers were reasonably on notice was unconstitutional, merely because the claims at issue arose under the First rather than the Fourth Amendment.

The proposition that citizens can observe the police in public is so obvious that it would not require

a precedent directly on point. *Cf. Hope v. Pelzer*, 536 U.S. 730, 734–35 (2002). Indeed, the First Amendment's protection of this conduct is so obvious that every court to have considered the question head-on has agreed. App. 66a (Colloton, J., dissenting from denial of rehearing en banc); *see also Turner v. Lieutenant Driver*, 848 F.3d 678, 686–87 (5th Cir. 2017) (chronicling the circuits' uniformity). In total, six circuits have identified a First Amendment right to observe police officers in this manner, not even counting the Eighth Circuit precedents the panel below erroneously dismissed. *See Irizarry v. Yehia*, 38 F.4th 1282, 1292 (10th Cir. 2022); *Askins v. U.S. Dep't of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018); *Turner*, 848 F.3d at 686–87; *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). None has come out the other way.

There is good reason for that unanimity. The right to record and observe police officers in public follows from basic constitutional principles safeguarding the public's ability to collect and transmit information of public significance. The First Amendment "prohibit[s] government from limiting the stock of information from which members of the public may draw." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978). Thus, in addition to other forms of speech, its protections encompass "the creation and dissemination of information." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011). That includes "an undoubted right to gather news from any

source by means within the law." *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (internal quotation marks and citation omitted).

Observations about police officers' on-duty conduct in public fall within the heartland of constitutionally protected information-gathering. There is "practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." *Bellotti*, 435 U.S. at 777 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The First Amendment is therefore particularly concerned about information that sheds light on "government affairs," including "the manner in which government is operated." *Mills*, 384 U.S. at 218. That concern extends, of course, to how police perform their work. (It was, after all, a bystander's cell phone recording of George Floyd's death at the hands of police officers that ignited a national debate over racial justice and law enforcement practices.)

Thus, no police officer could have "reasonably misapprehend[ed]" that he had constitutional license to tear gas petitioners in retaliation for exercising this basic form of government oversight, *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam). This Court's precedents leave no doubt that individuals possess a First Amendment right to unobtrusively observe the police while they conduct their duties in public. And not a single circuit has held otherwise. At a minimum, this Court should summarily reverse on that basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

DATED: Sept. 7, 2023

Respectfully submitted,

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APPENDIX

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-1830

Sarah K. Molina; Christina Vogel; Peter Groce

Plaintiffs – Appellees

—v.—

City of St. Louis, Missouri;
County of St. Clair, Illinois; John Doe, I-VI

Defendants

Daniel Book, in his individual capacity;
Joseph Busso, in his individual capacity

Defendants – Appellants

Jason C. Chambers

Defendant

Lance Coats, in his individual capacity; Stephen Dodge, in his individual capacity; Joseph Mader, in his individual capacity; Michael D. Mayo, in his individual capacity; Mark S. Seper, in his individual capacity; William Wethington, in his individual capacity

Defendants – Appellants

Appeal from the United States District Court
for the Eastern District of Missouri – St. Louis

Submitted: January 12, 2022
Filed: February 2, 2023

Before BENTON, SHEPHERD, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

Officers in an armored police vehicle shot tear gas at three people near the scene of a protest in downtown St. Louis. The district court concluded that all three had a First Amendment retaliation claim. We agree that one of them does, but qualified immunity shields the officers from the claims brought by the others. We affirm in part, reverse in part, and remand.

I.

A large protest broke out in St. Louis in 2015. In the crowd were Sarah Molina and Christina Vogel, both members of the National Lawyers Guild. In Molina's words, their goal was to "protect[] the right to protest," not to participate in one. To make their self-appointed role known, they wore bright green hats emblazoned with the words "National Lawyers Guild Legal Observer."

During the protest, St. Louis police officers formed a line and repeatedly ordered the crowd to disperse. Instead of leaving, the protestors responded by throwing rocks and bottles. The officers warned

protestors about the possible use of chemical agents, and when they refused to go, shot inert smoke canisters into the crowd.

Vogel recorded these events as Molina stood nearby and watched. Once officers switched to tear gas, the two women left. A few minutes later, they reassembled with five to ten others on Molina's property, located about 550 feet away.

Minutes later, an armored vehicle known as the BEAR barreled down the street toward them. As it drove past, tear-gas canisters landed near Molina and Vogel. Although the officers would later deny shooting chemicals from the BEAR, an after-action report revealed otherwise.

As the BEAR continued down the street, Peter Groce followed on a bicycle. Once it stopped, he approached and shouted, "[g]et the fuck out of my park." The officers responded by launching a tear-gas canister that allegedly hit him in the hip.

Molina, Vogel, and Groce sued the officers and their supervisor, Lieutenant Stephen Dodge, under 42 U.S.C. § 1983 for, among other claims, First Amendment retaliation. In the face of a summary-judgment motion seeking qualified immunity, the district court ruled that the claims could proceed to a jury. The officers ask us to determine whether the case should have ended there.

II.

In deciding whether the district court should have granted summary judgment, we must answer two questions. First, did the officers violate a constitutional right? Second, was the right clearly established? *See Morgan v. Robinson*, 920 F.3d 521,

523 (8th Cir. 2019) (en banc) (explaining that we may answer them in either order). In answering these questions, "we [must] accept as true the facts that the district court found were adequately supported, as well as the facts the district court likely assumed." *Burbridge v. City of St. Louis*, 2 F.4th 774, 779–80 (8th Cir. 2021) (bracket and quotation marks omitted) (reviewing the summary-judgment determination de novo); *see Berry v. Doss*, 900 F.3d 1017, 1021 (8th Cir. 2018) (explaining that, in an appeal from a denial of qualified immunity, we review "purely legal issue[s]" based on "the district court's factual presumptions" (quotation marks omitted)).

A.

To prevail on their retaliation claim, the plaintiffs must show that "they engaged in protected [First Amendment] activity." *Quraishi v. St. Charles County.*, 986 F.3d 831, 837 (8th Cir. 2021); *see Hoyland v. McMenomy*, 869 F.3d 644, 655 (8th Cir. 2017), *abrogated on other grounds by Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019), *as recognized in Laney v. City of St. Louis*, 56 F.4th 1153, 1157 n.2 (8th Cir. 2023). If they can make that showing, then the focus shifts to whether the officers "took [an] adverse action . . . that would chill a person of ordinary firmness from continuing in the [protected] activity." *Hoyland*, 869 F.3d at 655 (citation omitted); *see Eggenberger v. West Albany Township*, 820 F.3d 938, 943 (8th Cir. 2016). If they did, then the next hurdle is causation: was the First Amendment activity a "but-for cause" of the injury? *Nieves*, 139 S. Ct. at 1722 (quotation marks omitted).

Establishing the violation itself, however, is only half the battle. Getting past qualified immunity

requires the plaintiffs to show that it would have been "sufficiently clear [to] every reasonable official . . . that what [they were] doing violate[d]" the First Amendment. *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (quotation marks omitted); *Wilson v. Lamp*, 901 F.3d 981, 986 (8th Cir. 2018) (explaining that the burden remains with the plaintiffs, even at this step). "Existing precedent," in other words, must have put the issue "beyond debate." *Reichle*, 566 U.S. at 664 (quoting *al-Kidd*, 563 U.S. at 741). Although Groce gets over each of these hurdles, Molina and Vogel do not.

B.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. It protects "symbolic or expressive conduct as well as . . . actual speech." *Virginia v. Black*, 538 U.S. 343, 358 (2003). Molina and Vogel claim that the First Amendment covers what they did, which was observe and record police conduct during the St. Louis protest. Even if we were to assume they are correct, observing and recording police-citizen interactions was not a *clearly established* First Amendment right in 2015.

Start with the Supreme Court's 50-year-old decision in *Colten v. Kentucky*, 407 U.S. 104 (1972). After a group of college students left a political demonstration in a "procession of [6] to 10" cars, a police officer pulled one of them over for an expired license plate. *Id.* at 106. A student from another car then went over to observe the traffic stop and ask questions. Eventually, other students joined him, which prompted another trooper to repeatedly ask the group to "disperse." *Id.* When those efforts failed,

the officer arrested one of the students for disorderly conduct. *Id.* at 107.

Throughout trial and on appeal, the student claimed that Kentucky's disorderly-conduct statute was unconstitutionally overbroad. In concluding it was not, the Supreme Court announced that individuals "[have] no constitutional right to observe the issuance of a traffic ticket or to engage the issuing officer in conversation." *Id.* at 109. As for the student's refusal to "move on," it too was unprotected, at least "without more." *Id.* *Colten* suggests that observing police conduct is not expressive.[1]

None of the plaintiffs' cases clearly establish otherwise. *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005), is an ordinary *Fourth Amendment* case. When two police officers approached someone who had watched them conduct a traffic stop, the bystander said he had been watching "Pine Bluff's

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[1] The dissent claims that two other cases cabin *Colten*, but neither undermines our conclusion here. *See post*, at 4–5 (citing *Hoyland*, 869 F.3d at 656, and *City of Houston v. Hill*, 482 U.S. 451 (1987)). The first one, *Houston v. Hill*, distinguished protected expression, such as "words or conduct that annoy or offend," from unprotected activities like "stand[ing] near a police officer and persistently attempt[ing] to engage the officer in conversation while the officer is directing traffic at a busy intersection." 482 U.S. at 462 n.11, 465 (citation omitted). Indeed, *Hill* even touted the disorderly conduct statute in *Colten* as an example of the kind of properly tailored statute that "infringe[d] *no* protected speech or conduct." *Id.* at 465 n.14 (emphasis added) (quoting *Colten*, 407 U.S. at 111). *Hoyland* drew a similar distinction. It contrasted a plaintiff's "exercis[e of] his First Amendment rights" to "verbally . . . oppose or challenge police action" with "simply 'refusing to move on after being directed to do so . . . without more.'" *Hoyland*, 896 F.3d at 656 (quoting *Colten*, 407 U.S. at 109). Far from ignoring precedent, as the dissent alleges, we are faithfully applying it.

finest in action." *Id.* at 992. The officers arrested the bystander for "obstructing government operations." *Id.* at 993. Qualified immunity was unavailable, we concluded, because the officers lacked "arguable *probable cause* to arrest . . . [him] in this situation." *Id.* (emphasis added). The opinion never mentions, much less discusses, the First Amendment.

The same goes for the second case, *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020). Like *Walker*, *Chestnut* involved a bystander who watched as a police officer "perform[ed] traffic stops." *Id.* at 1087. The officer eventually called for backup because of the "suspicious person . . . following her to her car stops." *Id.* The arriving officer placed the bystander in handcuffs and detained him for about 20 minutes. *See id.* at 1087–88. We concluded there was no reasonable suspicion to conduct an investigatory stop because the bystander was not doing anything illegal. *Id.* at 1090 (stating that "no reasonable officer could conclude that a citizen's passive observation of a police-citizen interaction from a distance was criminal").

It is true, as the plaintiffs note, that some of the language in *Chestnut* was broad. Relying on a few out-of-circuit cases invoking the First Amendment, for example, we stated that there is a "clearly established right to watch police-citizen interactions at a distance and without interfering." *Id.* at 1090. But we did so based only on "the facts that existed when [the bystander] was *seized*"—a clear reference to the *Fourth Amendment* issue we were deciding. *Id.* (emphasis added). And the First Amendment cases only bolstered our (narrow) Fourth Amendment holding: "[w]e *merely* hold that it was clearly established that [a police officer] could not detain [the

bystander] without more indication of wrongdoing." *Id.* at 1091 (emphasis added).

The point is that neither of these Fourth Amendment cases can clearly establish a *First Amendment* right to observe police officers.[2] *See Colten*, 407 U.S. at 109. Nor did a clearly established First Amendment right to record them exist in 2015. *See Frasier v. Evans*, 992 F.3d 1003, 1019–20 (10th Cir. 2021) (holding that a "purported First Amendment right to record [police officers] was not clearly established in August 2014"); *Fields v. City of Philadelphia*, 862 F.3d 353, 362 (3d Cir. 2017) ("[W]e cannot say that the state of the law at the time of our cases (2012 and 2013) gave fair warning so that every reasonable officer knew that, absent some sort of expressive intent, recording public police activity was constitutionally protected."); *Turner v. Lieutenant Driver*, 848 F.3d 678, 687 (5th Cir. 2017) (explaining that "there was no clearly established First Amendment right to record the police" in 2015). The question is whether, as *Colten* put it, there is anything "more" here.

C.

Molina and Vogel try to give us "more" in the form of three other theories. The first is a peaceful-

[2] It is not beyond the realm of possibility that a First Amendment right to observe police exists, but our Fourth Amendment cases like *Walker* and *Chestnut* do not clearly establish it. And it makes good sense why. It is one thing to conclude that officers cannot arrest someone passively standing by and watching as they do their job. After all, in the absence of interference, there is no crime in it. But it is another matter to say that watching is itself expressive. Expressive of what? Not even Molina and Vogel can provide a clear answer.

assembly theory: although the protest may have been unruly, the gathering at Molina's property was not. The second is based on the bright green hats they wore, which they believe "proclaimed both their affiliation and their role within the larger demonstration." Their third theory is that the officers must have mistakenly thought they were protestors, which they say is good enough to allow them to sue on a First Amendment retaliation theory. In the end, none of these theories work.[3]

1.

Timing is the basis for the peaceful-assembly theory. The officers did not fire the tear-gas canisters until after Molina and Vogel had reassembled with five to ten others. The argument is that the officers must have been reacting to their lawful assembly, not to the protest itself. There are two problems with this argument.

The first is that not every gathering falls under the umbrella of the First Amendment. The right of association presupposes that the purpose is to "engag[e] in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). And here, as the district court explained, the handful of people in Molina's yard were just trying to find "a

[3] In their supplemental reply brief, Molina and Vogel argue they had a right of "access to information about how our public servants operate in public." We decline to address this argument because the officers have never had a chance to respond to it. *See Berg v. Norand Corp.*, 169 F.3d 1140, 1146 (8th Cir. 1999) ("refus[ing] to entertain [a] new argument" mentioned "for the first time in [the] reply brief").

safe meeting place away from the protest site." *See URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 12–13 (1st Cir. 2011) ("The constitutionally protected right of association . . . has never been expanded to include purely social gatherings."). Not all reasonable officers would have known the gathering was a protected assembly, particularly when they were dodging rocks and bottles just a few minutes earlier. *See Reichle*, 566 U.S. at 664; *see also Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (explaining that demonstrations "lose their protected quality as expression under the First Amendment" when they "turn violent").

The second is that, even assuming the gathering in Molina's yard was protected, there is no evidence to suggest that it had anything to do with the officers' decision to use tear gas. To succeed on their theory, Molina and Vogel must show that the officers "singled [them] out because" they lawfully reassembled elsewhere, regardless of what happened earlier. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) (quotation marks omitted). If something else was the motivation, however, then the reassembly was not a "but-for cause" of their injuries. *Nieves*, 139 S. Ct. at 1722 (quotation marks omitted).

If Molina and Vogel were "singled out," the district court suggested that, "at the least," it was because the officers "assumed" the gathering was a continuation of the earlier *un*lawful assembly. When they were patrolling the streets surrounding the protest, they were following orders from Lieutenant Dodge to break up the crowd and prevent the protestors from doing further harm. Molina even admitted that she "was assembled with [the protestors]" before moving to her house. The only reasonable inference to draw

from these facts is that the officers were "merely carrying out their duty as they underst[ood] it." *Mitchell v. Kirchmeier*, 28 F.4th 888, 897 (8th Cir. 2022).

It makes no difference that the officers may have made a mistake. As we have explained, retaliatory animus cannot be the driving force whenever officers act based on their "understanding—however mistaken—of [their] official duties," even if the mistake turns out to be "unreasonable."[4] *Id.* at 896. So even if the officers "unreasonably believed" that the group was refusing to comply with their earlier directions to disperse, their official orders—not retaliatory animus—caused them to use the tear gas. *Baribeau*, 596 F.3d at 481.

2.

Returning to the protest itself, their second theory is that wearing the bright green hats expressed a "pro-protest" message. Recall that the hats said, "National Lawyers Guild Legal Observer." Although neither their color nor the words emblazoned on them directly conveyed a pro-protest message, Molina and Vogel claim that the act of wearing them sent a "particularized message." *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997).

In First Amendment parlance, their theory is that wearing the hats was "expressive behavior" that "constitutes speech." *Id.* As we have recognized, "nonverbal conduct constitutes speech if it is intended to convey a particularized message and the likelihood

[4] An "unreasonable mistake," by contrast, does not shield officials from Fourth Amendment claims. *Baribeau*, 596 F.3d at 481.

is great that the message will be understood by those who view it." *Id.* And if wearing the hats is speech, qualified immunity is still available unless "every reasonable official would know" that the act conveyed a pro-protest (or other particularized) message. *District of Columbia v. Wesby*, 138 S. Ct. 577, 590–92 (2018).

Whether wearing the hats expressed a pro-protest message is a close call. On the one hand, knowing a bit more about the National Lawyers Guild could lead a reasonable officer to conclude that Molina and Vogel were there to support the protestors. On the other, the words "legal observer" could lead someone less knowledgeable to think they were neutral, there to make sure that neither the police nor the protestors broke the law. Under the latter view, the hats would identify their role, not express a "particularized message." *Burnham*, 119 F.3d at 674. The point is that not everyone would have understood the pro-protest message they were trying to convey. *See id.*

To the extent courts have recognized that clothing can convey a particularized message, the meaning was easily identifiable. Perhaps the most famous example was the anti-war activist who wore a jacket with the words, "Fuck the Draft." *See Cohen v. California*, 403 U.S. 15, 16 (1971). The message was clear: he strongly opposed "the Vietnam War and the draft" and wanted everybody to know it. *Id.*

The message in *Baribeau v. City of Minneapolis* was equally clear. 596 F.3d at 470–71. As part of an elaborate protest, the participants "dressed as zombies" by wearing "white powder and fake blood on their faces and dark makeup around their eyes" and "broadcasted announcements such as 'get your brains

here' and '[b]rain cleanup in Aisle 5.'" *Id.* at 470–71. During the protest, they "explained that they meant their actions as an anticonsumerist commentary." *Id.* at 471. So every reasonable officer would have understood their anti-consumer-culture message.

The point is that some symbols and words carry a clear message. "Fuck the Draft" unmistakably expresses an anti-war message. *See Cohen*, 403 U.S. at 16. Displaying a swastika carries a different kind of message, though its import is equally unmistakable. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 569 (1995). And in *Tinker v. Des Moines Independent Community School District*, the "black armbands" were a "silent symbol . . . of opposition to [the] Nation's part in the conflagration in Vietnam" and the wearers' "objections to the hostilities in Vietnam and their support for a truce." 393 U.S. 503, 504, 510 (1969).

We cannot say the same thing about bright green hats that say "National Lawyers Guild Legal Observer" on them.[5] There is no obvious pro-protest message. Or, at the very least, any pro-protest message is not "beyond debate," which means that this theory, like the others, cannot overcome qualified immunity. *Wesby*, 138 S. Ct. at 589 (quoting *al-Kidd*, 563 U.S. at 741).

[5] Molina and Vogel also cite *Hurley*, but it involves "the protected expression that inheres in a parade," not in specific articles of clothing. 515 U.S. at 569. It could not have clearly established a First Amendment right to wear the bright green hats.

3.

Their final theory is that, even if they did not *actually* engage in First Amendment activity, the officers must have thought they did. There is support for this argument, given that some of the officers thought they were protestors who had remained together and just moved a couple of blocks away. Citing *Heffernan v. City of Paterson*, 578 U.S. 266, 268 (2016), Molina and Vogel argue that even a mistaken belief about what they did is good enough because perception is what counts for a constitutional claim like this one.

Heffernan involved the "demot[ion] [of] an employee because [an] official [incorrectly] believed . . . that the employee" had participated "in constitutionally protected political [First Amendment] activity." *Id.* at 268. The Supreme Court concluded that the "demotion" was "what count[ed]," even though the employee "*had not engaged* in . . . protected activities." *Id.* at 270–71. Molina and Vogel argue the same logic should apply here.

The problem with this theory is timing. The Supreme Court decided *Heffernan* months *after* the events in this case took place. 578 U.S. at 266. Even if the rule it adopted would otherwise apply here, no "controlling authority" or "robust 'consensus of cases of persuasive authority'" clearly established the right before early 2016—too late for it to matter here. *See Wesby*, 138 S. Ct. at 589–90 (quoting *al-Kidd*, 563 U.S. at 741–42); *see also Heffernan*, 578 U.S. at 275 (Thomas, J., dissenting) ("[F]ederal law does not provide a cause of action to plaintiffs whose constitutional rights have not been violated. . . .").

* * *

Having considered multiple possibilities, we conclude that none of them work. Qualified immunity prevents Molina and Vogel from recovering on their First Amendment retaliation claims.

III.

Groce's First Amendment retaliation claim, on the other hand, fares better. Recall that he followed the BEAR on a bicycle and then yelled, "[g]et the fuck out of my park." His "[c]riticism of [the] officers, even with profanity, is protected speech." *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019); *see Hoyland*, 869 F.3d at 656 (citing *Hill*, 482 U.S. at 461). And at least one case clearly established the right to be free from retaliation in those circumstances. *See Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014) (stating that "criticizing a police officer and asking for his badge number is protected speech"); *see also Hill*, 482 U.S. at 461 ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers.").

A.

To counter what appears to be a clearly established constitutional right, the officers claim this case is different. In their view, Groce acted in an aggressive and threatening manner, which then gave them arguable probable cause to act. Even assuming that the presence of arguable probable cause is an absolute defense to a First Amendment retaliation claim—a question we need not decide today—their position depends on reinterpreting the facts in a "light most favorable to" them, not Groce. *Engesser v. Fox*, 993 F.3d 626, 629 (8th Cir. 2021) (stating that

we must view the facts "in [the] light most favorable to [the plaintiff]").

Under the "plaintiff-friendly version of the facts," by contrast, there was no probable cause, arguable or otherwise, to take any action against Groce. *N.S. v. Kansas City Bd. of Police Comm'rs*, 933 F.3d 967, 969 (8th Cir. 2019). The officers cannot identify any crime that he allegedly committed. Yet they launched a tear-gas canister at him a few minutes after video footage "depict[ed] a calm scene," even though they had no evidence "that [he] was armed or otherwise presented any threat to the [officers] inside their armored vehicle." We have no jurisdiction to reinterpret these facts, which support the denial of qualified immunity. *See Berry*, 900 F.3d at 1021.

B.

Setting qualified immunity aside, the officers also challenge whether the evidence is specific enough to allege that any of them *individually* violated Groce's First Amendment rights. He cannot identify who launched the tear-gas canister, so in their view, no one can be held liable for his injuries.

1.

Liability under section 1983 is "personal." *White v. Jackson*, 865 F.3d 1064, 1080–81 (8th Cir. 2017). By personal, we mean that "a plaintiff must show each individual defendant's personal involvement in the alleged violation." *Id.* It does not follow, however, that a plaintiff must be able to "*personally* identify his assailant[] to avoid summary judgment." *Id.* at 1081 (emphasis added).

What we know from the evidence, viewing it in Groce's favor, is that someone launched a tear-gas canister from the BEAR. We also know that seven officers were riding in it at the time: Michael Mayo, Joseph Mader, William Wethington, Mark Seper, Daniel Book, Lance Coats, and Joseph Busso. All of them "had access to [chemical] munitions," which could "be released from one of many portholes of [the] armored vehicle[,] either by hand or using a launcher."

At this stage, there is enough evidence to establish the "personal involvement" of everyone in the BEAR. *Id.* at 1081. To be sure, Groce could not see who launched the tear-gas canister. But with multiple "officers present," the jury could find that each one of them participated in the decision or that one did it "while the other[s] failed to intervene." *Velazquez v. City of Hialeah*, 484 F.3d 1340, 1342 (11th Cir. 2007). Under these circumstances, the claims against the individual officers can proceed.

2.

Not so for Lieutenant Dodge. Although Groce alleges that he was "deliberately indifferent to or tacitly authorized the offending acts," we disagree. *Barton v. Taber*, 908 F.3d 1119, 1125 (8th Cir. 2018) (quotation marks omitted).

Unlike the individual officers in the BEAR, Lieutenant Dodge had no "personal involvement" in the violation. *White*, 865 F.3d at 1081. Supervisory status on its own is not enough. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) (stating that "vicarious liability is inapplicable to *Bivens* and § 1983 suits"); *Tlamka v. Serrell*, 244 F.3d 628, 635 (8th Cir. 2001) ("A supervisor may not be held liable under § 1983 for

the constitutional violations of a subordinate on a respondeat superior theory."). And when the officers fired the tear-gas canister at Groce, Lieutenant Dodge was in another vehicle patrolling a different area. To be sure, he gave an order to "use chemical munitions to disperse" the crowd. But he had no notice that his lawful order was "likely to result in a constitutional violation" or that his "supervision [under the circumstances] w[as] inadequate." *Barton*, 908 F.3d at 1125.

IV.

We accordingly affirm the denial of summary judgment on Groce's First Amendment retaliation claim, but only against the individual officers in the BEAR. We otherwise reverse and remand for the entry of judgment on all other claims.

BENTON, Circuit Judge, dissenting in part and concurring in part.

The panel opinion here holds that observing and recording police-citizen interactions was not a clearly established First Amendment right on August 19, 2015. This conclusion violates this circuit's "cardinal rule . . . that one panel is bound by the decision of a prior panel." ***Mader v. United States***, 654 F.3d 794, 800 (8th Cir. 2011) (en banc). "One panel of this Court is not at liberty to disregard a precedent handed down by another panel." ***Drake v. Scott***, 812 F.2d 395, 400 (8th Cir. 1987).

I.

Two cases bind this court: *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020), and *Walker v. City of Pine*

Bluff, 414 F.3d 989 (8th Cir. 2005). Both cases found a clearly established First Amendment right to observe police officers that existed before the events precipitating this case. *See* ***Chestnut***, 947 F.3d at 1090; ***Walker***, 414 F.3d at 993.

Walker, the earlier case, held that observing police officers *could not* be outlawed. ***Id.*** This court denied qualified immunity to an officer who arrested an individual for "silently watching the [police] encounter from across the street with his arms folded in a disapproving manner." ***Id.*** at 992. The *Walker* case analyzed the legal effect of only this silent observation. ***Id.*** This court held that the officer lacked probable cause because it was "clearly established" that a peaceful onlooker could not be arrested "for obstruction of governmental operations *or for any other purported crime*." ***Id.*** at 993 (emphasis added). The state, said this court, did not just *happen* to permit officer-watching, it *had* to permit it.

This court detailed the nature and origin of *Walker*'s clearly established substantive right in *Chestnut v. Wallace*, 947 F.3d 1085. This court there reaffirmed the constitutional origin of the "clearly established right to watch police-citizen interactions at a distance and without interfering." ***Chestnut***, 947 F.3d at 1091 ("[I]f the constitution protects one who records police activity, then surely it protects one who merely observes it."). And it confirmed that the First Amendment gives rise to this right by citing seven First Amendment cases, including two from this circuit.[6] ***Id.*** at 1090–91, *citing* ***Thurairajah v. City***

[6] The dissent "agree[d] with the court's characterization of those [First Amendment] cases" as establishing that the "right exists." ***Chestnut***, 947 F.3d at 1096 (Gruender, J. dissenting).

of Fort Smith, 925 F.3d 979, 985 (8th Cir. 2019) ("[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out," *quoting* ***Hartman v. Moore***, 547 U.S. 250, 256 (2006)); ***Hoyland v. McMenomy***, 869 F.3d 644, 655 (8th Cir. 2017), *overruled as to causation element by* ***Nieves v. Bartlett***, 139 S. Ct. 1715, 1722 (2019), *as recognized by* ***Laney v. City of St. Louis***, ___ F.4th ___, 2023 WL 116837, at *3 n.2 (8th Cir. Jan. 6, 2023); ***Fields v. City of Philadelphia***, 862 F.3d 353, 359 (3d Cir. 2017) ("The First Amendment protects the public's right of access to information about their officials' public activities."); ***id.*** (because "there is the right for the eye to see or the ear to hear," the First Amendment also protects the right to record police); ***ACLU of Ill. v. Alvarez***, 679 F.3d 583, 597 (7th Cir. 2012) (First Amendment protects "gathering . . . information about the affairs of government," including secret audio recordings of police officers); ***id.*** ("[T]he First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *quoting* ***First Natl Bank of Boston v. Bellotti***, 435 U.S. 765, 783 (1978)); ***Glik v. Cunniffe***, 655 F.3d 78, 81 (1st Cir. 2011) ("It is firmly established that the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct related to the gathering and dissemination of information."); ***Smith v. City of Cumming***, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on public property."); ***Fordyce v. City of Seattle***, 55

F.3d 436, 439 (9th Cir. 1995) (authorizing § 1983 claims against an officer who attempt[ed] to prevent or dissuade [plaintiff] from exercising his First Amendment right to film matters of public interest.).

Walker and *Chestnut* correctly attribute this right to the First Amendment. The First Amendment protects the right to protest "by silent and reproachful presence." ***Brown v. Louisiana***, 383 U.S. 131, 141–42 (1966) (opinion of Fortas, J., announcing the judgment of the Court). *See also* ***id.*** at 148–49 (Brennan, J., concurring in the judgment); ***id.*** at 150–51 (White, J., concurring in the result). *Walker* and *Chestnut* concerned silent and reproachful police-observation. *See, e.g.*, ***Walker***, 414 F.3d at 992 (plaintiff watched police "with his arms folded in a disapproving manner"); ***Chestnut***, 947 F.3d at 1087 (plaintiff's desire to observe police arose because "there had been a lot of difficulty in citizen/police interaction as of late" (quotation omitted)). *Cf.* ***Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston***, 515 U.S. 557, 568–69, 579 (1995) (a parade is First Amendment-protected expressive conduct); ***Spence v. Washington***, 418 U.S. 405, 410 (1974) (context determines whether conduct is expressive, and the Kent State tragedy contextualized an upside-down flag with a peace sign); ***Baribeau v. City of Minneapolis***, 596 F.3d 465, 476, 477 (8th Cir. 2010) (the First Amendment protected zombie costumes even though the anti-consumerism message was only clear after protestors explained their meaning).[7]

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[7] The First Amendment's broad sweep is "the proudest boast of [] free speech jurisprudence." ***Matal v. Tam***, 137 S. Ct. 1744, 1764 (2017). It protects people of all stripes. *See, e.g.*, ***Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n***,

The panel opinion here tries to avoid *Chestnut* and *Walker*'s First Amendment conclusions based on what one Supreme Court case suggests. In *Colten v. Kentucky*, 407 U.S. 104 (1972), the Court found that "appellant was not engaged in activity protected by the First Amendment" because "[h]e had no constitutional right to observe the issuance of a traffic ticket" and, as the state court found, "appears to have had no purpose other than to cause inconvenience and annoyance." ***Colten***, 407 U.S. at 109.

Again, this violates the prior-panel rule. This court has established *Colten*'s reach in this circuit. In *Hoyland v. McMenomy*, this court articulated two facts—and identified one later case—that distinguished *Colten*. ***Hoyland***, 869 F.3d at 656 ("[T]the officers' reliance on *Colten* is misplaced" and plaintiff was engaged in "protected activity."). Unlike the *Colten* appellant, the *Hoyland* plaintiff was at home (rather than by a busy highway) and brought a § 1983 claim (rather than a direct attack on a state statute). ***Id.*** This case contains both factors underlying *Hoyland*'s conclusion that "reliance on *Colten* [was] misplaced." ***Id.*** Molina and Vogel were (allegedly) teargassed at their home where public safety was not threatened, and they bring § 1983 claims rather than challenges to state criminal law.

More importantly, *Hoyland* recognized that the Supreme Court had already cabined *Colten* in *City of Houston v. Hill*, 482 U.S. 451 (1987). The Court there

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138 S. Ct. 1719, 1741–42 (2018) (Thomas, J., concurring in part and concurring in the judgment). Narrowing its scope undermines "bedrock principles of [the Supreme Court's] free-speech jurisprudence" and "should not pass without comment." ***Id.*** at 1740.

explained that the *Colten* ordinance "prohibit[ed] only disorderly conduct or fighting words" and survived the First Amendment challenge only because it "infringe[d] no protected speech or conduct." ***Hill***, 482 U.S. at 465 & n.14, *quoting* ***Colten***, 407 U.S. at 108 (second alteration in original). Laws prohibiting "words or conduct that annoy or offend" officers, by contrast, ran afoul of the First Amendment. ***Id.*** at 465. *Hill*'s protection for criticizing officers—and *Hoyland*'s fidelity to *Hill*—underpinned *Chestnut*'s holding that "if officers cannot seize someone who criticizes or curses at them while they perform official duties, they cannot seize someone for exercising the necessarily included right to observe the police in public from a distance and without interfering." ***Chestnut***, 947 F.3d at 1091, *citing* ***Hoyland***, 869 F.3d at 654.

Finally, *Chestnut*'s recognition of a clearly established First Amendment right to observe police interactions was a holding, not dicta. This court said so:

> Other legal authorities fully support *our holding* that the right here was clearly established. Every circuit court to have considered the question has held that a person has the right to record police activity in public. [citation omitted]. Four circuits had so decided by the time of the events in question here. [citations omitted]. This robust consensus of cases of persuasive authority suggests that, if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary prerequisite to recording.

Chestnut, 947 F.3d at 1090 (emphasis added).[8]

II.

The panel opinion here attributes that clearly established right to the Fourth, rather than First, Amendment. In doing do, it underappreciates the interplay between First and Fourth Amendment rights in this circuit's precedent.

Police may not seize a person without suspecting or believing that the person committed or is about to commit a crime. *See* ***Waters v. Madson***, 921 F.3d 725, 736 (8th Cir. 2019). The Fourth Amendment sets two thresholds, "reasonable suspicion" for a detention and "probable cause" for an arrest. ***Id.*** Thus the Fourth Amendment deems it "unreasonable" to seize someone solely for conduct not suggesting a crime. *See* ***United States v. Cortez***, 449 U.S. 411, 417 (1981) ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity."). Legal conduct generally does not suggest a crime and therefore does not, without more, furnish the suspicion or belief necessary for a seizure. *See* ***Illinois v. Wardlow***, 528 U.S. 119, 125 (2000) ("[R]easonable suspicion must be based on

[8] In *Chestnut*, this court did not confine this clearly established right to an expressive-conduct strand of First Amendment jurisprudence. The First Amendment captures more than expressive conduct. *See* ***Chestnut***, 947 F.3d at 1090, *citing* ***Fields***, 862 F.3d at 359 (holding that the First Amendment right to record police stems from "the right for the eye to see or the ear to hear"). *See also* ***Brown***, 383 U.S. at 141–42, 148–49, 150–51 (Fortas, J., announcing the judgment of the Court, supported in concurrences by Brennan, J., and White, J.) ("[S]ilent and reproachful presence" is protected by the First Amendment).

commonsense judgments and inferences about human behavior.").

Conduct can be legal—and therefore insufficient, standing alone, to justify a seizure—in one of two ways: First, the conduct might *happen to be* legal in a certain jurisdiction. In a city that permits skateboarding, for example, an officer cannot seize an individual merely for riding a skateboard because, without more, that legal conduct would not indicate "that criminal activity may be afoot." *See* ***United States v. Arvizu***, 534 U.S. 266, 273 (2002) (quotation omitted). Second, some conduct does not raise red flags because it *must always be* legal. In a traditional public forum, an officer cannot seize a person merely for praying the Rosary, pleading the Fifth, or even flying a Nazi flag because that conduct is constitutionally protected, cannot be illegal, and does not, without more, suggest criminal activity.[9] *See* ***R.A.V. v. St. Paul***, 505 U.S. 377, 381 (1992) (Nazi swastikas could not be outlawed "solely on the basis of the subjects the speech addresses"). *See also* ***Baribeau***, 596 F.3d at 479 (narrowing a state prohibition to exclude First Amendment-protected activity and holding that "there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct").

Chestnut and *Walker* found it clearly established that peacefully observing a police officer did not furnish reasonable suspicion (or probable cause) of

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[9] True, context may render suspicious otherwise-innocuous activity. ***Cortez***, 449 U.S. at 417–18 ("[T]he totality of the circumstances—the whole picture—must be taken into account. Based upon that whole picture, the detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity.").

criminal activity and therefore did not justify a Fourth Amendment seizure. The panel opinion today presumes that peaceful police-observation fits the first category of legal conduct insufficient for a search or seizure—conduct that just happens to be legal. But this circuit's precedent clearly establishes that peaceful police-observation *must be* legal—it is constitutionally protected First Amendment activity. *See* ***Chestnut***, 947 F.3d at 1090; ***Walker***, 414 F.3d at 993.

Chestnut and *Walker* were indeed Fourth Amendment cases. But the Fourth Amendment makes it unreasonable to arrest or detain someone for conduct that, because the constitution protects it, could never be criminal. *Chestnut* and *Walker*, in reaching their Fourth Amendment holdings, clearly established that the First Amendment protects peaceful police-observation in this circuit. This panel is "powerless" to overturn those holdings. ***Kostelec v. State Farm Fire & Cas. Co.***, 64 F.3d 1220, 1228 n.8 (8th Cir. 1995). Because Molina and Vogel were engaged in protected First Amendment activity, their First Amendment claims should be allowed to proceed.

I dissent from Part II of the panel opinion here, but fully concur in Part III.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:17-CV-2498-AGF

SARAH MOLINA, et al.,

Plaintiffs,

—v.—

CITY OF ST. LOUIS, MISSOURI, et al.,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court on Defendants' motion for summary judgment in this civil rights case brought under 42 U.S.C. § 1983. ECF No. 169. Plaintiffs are St. Louis area residents Sarah Molina, Christina Vogel, and Peter Groce. Defendants are the City of St. Louis and several officers of the St. Louis Metropolitan Police Department (SLMPD).[1] Plaintiffs

[1] The Defendant police officers are Lieutenant Stephen Dodge, Sergeant Michael Mayo, and Officers Daniel Book, Joseph Busso, Lance Coats, Joseph Mader, Mark Seper, and William Wethington. Officer Jason Chambers was also named in the complaint but later voluntarily dismissed. ECF No. 173. Plaintiffs also move to dismiss Officer Coats on Count III. ECF No. 185 at 14 n. 6.

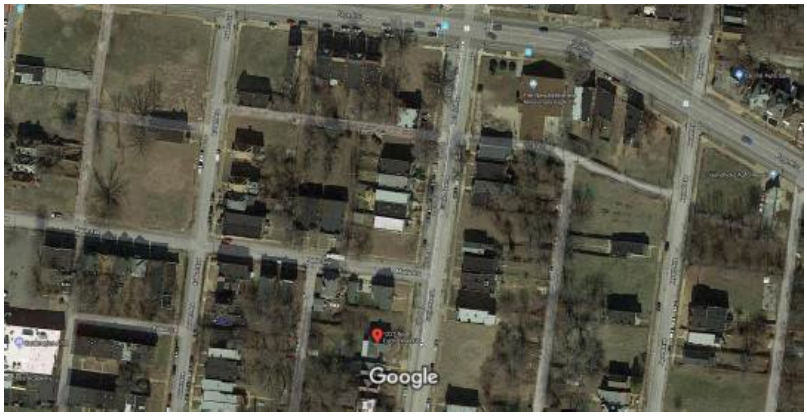
assert that Defendants violated their First and Fourth Amendment rights by deploying chemical munitions at them after they dispersed from a protest. For the reasons set forth below, the motion will be granted in part and denied in part.

BACKGROUND

Facts

Viewed in the light most favorable to Plaintiffs for purposes of the present motion, the facts are as follows. On August 19, 2015, Plaintiffs attended a protest near the intersection of Walton and Page Avenues in St. Louis following the police shooting of Mansur Ball-Bey during the execution of a search warrant. Molina and Vogel, both lawyers, attended the protest as legal observers and wore neon green hats to designate themselves as such. Defendant Dodge was a supervising lieutenant on the scene. The other individual Defendants were onboard an armored vehicle deployed to release chemical munitions to disperse protestors. Police Chief Sam Dotson and Lieutenant Colonel Gerald Leyshock, not parties to this action, were also on the scene.

The record contains several cell phone videos recorded from different vantage points on Page Avenue and an ariel photo of the area. The image below (ECF No. 171-12) shows Page curving east-west at the top of the photo and Euclid running north-south in the center. Molina's house is the red pin near the bottom center. The street to the east of Euclid is Bayard. To the east out of view are Walton and Marcus Avenues.



Video footage from the early evening shows a crowd of roughly 150 people in the street on Page and over 40 officers spanning across Page at Marcus in a skirmish line facing west toward the crowd. At 6:55 p.m., the police gave two dispersal orders informing protestors that they were impeding the flow of traffic and would be subject to chemical munitions if they did not disperse west on Page or north or south on side streets. About ten minutes later, the police gave a third dispersal order and deployed inert smoke. By 7:10 p.m., most people were on the sidewalk, and traffic was flowing slowly at the intersection of Page and Walton. A few stragglers threw rocks, and the officers responded with small munitions as the police line marched west toward Walton chanting "move back." At 7:12 p.m., the police gave a fourth dispersal order. By this point, Molina and Vogel were heading west on Page as instructed.

At 7:15 p.m., at the order of Defendant Dodge, an SLMPD armored vehicle known as a Ballistic Engineered Armored Response Counter Attack Truck (the "BEAR") traveled west on Page from the intersection of Walton and Page to Euclid and Page, deploying tear gas. According to Molina, officers were shooting projectiles at people who were retreating.

ECF No. 171-1 at 23 ("We're not talking about just *into* an area, we're talking about *at* people to hit people."). Molina and Vogel fled south on Bayard and through an alleyway to Molina's property on Euclid, approximately two and a half blocks (550 feet) south of the intersection of Euclid and Page and even farther (over a block west) from the police line then on Page between Bayard and Walton.

By 7:24 p.m., most of the protestors had dispersed from Page Avenue and scattered in different directions. The police issued another dispersal order, and Defendant Dodge instructed Defendant Mayo's team in the BEAR to patrol the area south of Page, while Dodge and other officers in a BearCat tactical vehicle patrolled the area north of Page.[2] An observer named Heather DeMian, who was recording events and following the BEAR west on Page at that time (from the sidewalk), says on video, "the people have dispersed, and [the police] appear to be chasing them." DeMian video at 7:00. When DeMian arrives at the corner of Page and Euclid, the BEAR is out of view headed south on Euclid. She asks a bystander, "What the f--- are they doing?" to which the bystander replies, "I think they're chasing some people." *Id*.

By that time (roughly 7:28 p.m.), Molina and Vogel and a few others were standing on the sidewalk in front of Molina's house on Euclid. Vogel testified that there were also "maybe five to ten" other people on Euclid south of Page at that time. ECF No. 171-5 at 83. Molina described her property as a safe meeting place away from the protest site. ECF No. 171-1 at 25. The record contains no evidence of prior protest

[2] The BearCat and its team from St. Clair County, Illinois, were on site to assist. The St. Clair County officers are not named as defendants in this case.

activity at this location. Molina observed a police helicopter hovering overhead and speculated that they could see Molina's and Vogel's neon green hats and were communicating with officers by radio. ECF No. 171-1 at 25, 35. Defendant Mader generally confirmed that police helicopters have the ability to give updates on where people are located. ECF No. 171-15 at 26. Defendant Book also knew that legal observers are "the ones with the yellow hats." ECF No. 171-18 at 12. Defendant Dodge knew that individuals wearing green hats were legal observers, and he recalled seeing some that day. ECF No. 171-6 at 16. Defendant Dodge was the commander in charge of the helicopter at the time (ECF No. 171-18 at 11) and was the commanding officer who gave the order for the BEAR's patrol down Euclid (ECF No. 171-6 at 16).

Seeing the BEAR approaching and canisters flying toward other people on Euclid, the small group at Molina's property sought cover in the gangway between her house and a neighboring house. Plaintiffs allege that chemical weapons were deployed directly at them in the space between the houses. Though neither Vogel nor Molina actually saw canisters released from the BEAR as they were attempting to flee from it, Vogel noticed "the smell of tear gas" and said "the sound that it makes when it comes out started hitting and we had a fog, a cloud of smoke coming up at that point." ECF No. 171-5 at 92. Vogel recovered one of the canisters from the street.

Around 7:30 p.m., Plaintiff Groce turned south onto Euclid following the BEAR on his bicycle. He does not recall whether he saw the BEAR deploy tear gas at that time. Groce followed the BEAR to Fountain Park at the end of the street, where the BEAR had stopped. Groce approached it and told the police to leave the

park. Though Groce claimed not to remember his precise wording, Molina testified that Groce told her that he told the police to "get the f--- out of my park." ECF No. 171-1 at 32. Groce was then hit in the hip by what he believed to be a tear gas canister. Groce believed that the canister came from the BEAR because, he explained, "I was oriented to the BEAR and didn't see anyone else around me. I felt an impact on my hip, I looked down, I found the object, then the BEAR drove away." ECF No. 171-10 at 35.

The next day, Officer Nicholas Manasco (not a party) was tasked with writing a report of the day's events. He met with the officers involved and wrote an After Action Report based on their verbal accounts.[3] ECF No. 183-5 at 36. There is no dispute

[3] Defendants assert in a footnote in their reply brief that the After Action Report is inadmissible hearsay that cannot be presented in admissible form at trial. Fed. R. Civ. P. 56(c)(2). When such an objection is made, the burden is on the proponent of the evidence to show that the material is admissible as presented or to explain the admissible form in which the party anticipates presenting it. *Gannon Int'l, Ltd. v. Blocker*, 684 F.3d 785, 793 (8th Cir. 2012) (citing the advisory committee's notes to Rule 56). Plaintiffs have not had an opportunity to respond because the matter was raised in the reply brief. But Defendants have not identified any factual dispute that depends on the admission of the report itself. The identity of the officers in the BEAR is not in dispute, and Defendants themselves confirmed in deposition that they may have deployed tear gas at the location in question. Thus, the facts stated in the report could be presented in admissible form through the direct testimony of the individual Defendants who provided their accounts of the day's events to Officer Manasco shortly thereafter in preparation of the report. Of course, Plaintiffs can also testify to this fact. Additionally, the facts stated in the report itself may be admissible as a public record under Fed. R. Evid. 803(8). The Court will consider the facts stated in the report to the extent it assists in the Court's determination whether genuine material facts are in dispute.

that, as reflected in the report, Defendants Mayo (the sergeant in charge), Mader, Seper, Book, and Wethington were inside the BEAR; Defendants Busso and Coats were on the top; and Officer Chambers was driving. ECF No. 183-3. The report further states that Defendant Dodge ordered the officers to deploy chemical munitions and that, as the BEAR traveled south on Euclid, Defendants Busso, Book, and Mader deployed munitions on Euclid south of Page. Several officers explained in deposition that munitions canisters can be released from one of many portholes of an armored vehicle either by hand or using a launcher. A small window above each porthole allows an officer to see outside the vehicle, albeit with a limited view.

Procedural History

In August 2017, Plaintiffs filed an original complaint against St. Clair County, St. Louis City, and eleven John Doe police officers asserting claims of retaliation in violation of the First Amendment (Count I) and excessive force in violation of the Fourth Amendment (Count II). The municipal defendants moved to dismiss for failure to state a claim for municipal liability under *Monell*.[4] ECF No. 11, 17. This Court granted the motions, reasoning that Plaintiffs did not plead sufficient facts indicating a failure to train and supervise or an unconstitutional policy. ECF No. 33.

In May 2018, Plaintiffs filed an amended complaint naming the St. Louis Defendants only and asserting claims against the individual officers for First

[4] *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978).

Amendment retaliation (Count I), Fourth Amendment excessive force (Count II), and failure to intervene (Count III) and against the City for municipal liability under *Monell* (Count IV). ECF No. 36. At the close of lengthy and contested discovery, Defendants filed the present motion for summary judgment, which is fully briefed and ripe for review.

Defendants assert that they are entitled to summary judgment on the following grounds: (1) Plaintiffs' factual assertions are unsupported and contradicted by the record insofar as Plaintiffs did not actually witness officers fire munitions at them and video evidence does not substantiate their allegations; (2) Plaintiffs cannot identify any individual officer involved in the alleged deployment of chemical munitions and, even if they could, any deployment was justified because Molina and Vogel failed to disperse; (3) even if the use of the munitions was not justified, the Defendant officers are entitled to qualified immunity because Plaintiffs cannot show that Defendants' conduct violated clearly established law at the time; (4) Neither Molina nor Vogel can establish that they were actually injured, so any possible recovery should be limited to one dollar in nominal damages; (5) Plaintiffs' First Amendment retaliation claim fails because they cannot establish that any Defendant recognized them as participating in the protest; (6) Plaintiffs' failure-to-protect claim fails because no officer inside the BEAR could have seen where any other officer was deploying munitions, nor could they discern whether that officer's actions were justified; and (7) Plaintiffs have not established sufficient facts to support their *Monell* claim against the City. Defendants have also filed a motion to strike certain evidence from the

record, as addressed in Count IV below. Additional facts are set forth below as relevant to specific claims.

DISCUSSION

I. Applicable Law

Summary Judgment

Summary judgment is proper when the moving party shows "that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); *Clary v. City of Cape Girardeau*, 165 F. Supp. 3d 808, 815 (E.D. Mo. 2016). In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Id*. (citing *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987)). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. *Id*. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87, (1986). To withstand summary judgment, the non-moving party must set forth affirmative evidence and specific facts, supported by affidavits and other evidence, showing that there is a genuine dispute on a material factual issue. *Holmes v. Slay*, 4:12CV2333 HEA, 2015 WL 1349598, at *3 (E.D. Mo. Mar. 25, 2015) (citing *Anderson*, 477 U.S. at 249).

When opposing parties tell two different stories and one is blatantly contradicted by the record such that no reasonable jury could believe it, a court

should not adopt that version of the facts when ruling on a motion for summary judgment. *Scott v. Harris*, 550 U.S. 372, 380 (2007). However, summary judgment is improper "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. 248. The court is required to resolve all conflicts of evidence in favor of the non-moving party. *Moore v. City of Ferguson, Mo.*, 213 F. Supp. 3d 1138, 1143 (E.D. Mo. 2016) (citation omitted).

Based on the foregoing standards, Defendants first argue that they are entitled to summary judgment because the videos and other evidence conclusively refute Plaintiffs' version of events. Relying on the fact that the DeMian video lacks any clear visual or distinct sound of deployment, Defendants deny that *any* munitions were deployed when the BEAR traveled south on Euclid. ECF No. 183 ¶51. Defendants note that the video captures the noise of a canister being launched from atop the BearCat around the same time (DeMian video at 7:12), yet no sound can be identified as a deployment from the BEAR. They argue that this forecloses the fact of any deployment.

The Court finds Defendants' reliance on the DeMian video unpersuasive given the totality of circumstances. The video is blurry even at close range. It was recorded from Page with a cell phone, at dusk, 550 feet (183 yards) from Molina's house, with a helicopter audible overhead, cars passing, and other noises in the vicinity. Tree branches hang over the street. The video simply does not capture events at or near the specific location in question. The fact that DeMian's cell phone captured the sound of a deployment (allegedly from atop the BearCat as it turned north on Euclid) does not foreclose the possibility that other canisters were deployed near

Molina's house, possibly by hand. *See, Michael v. Trevena*, 899 F.3d 528, 532 (8th Cir. 2018) (rejecting defendants' position that dash cam footage was dispositive where the video revealed little of the incident); *Garcia v. City of New Hope*, 984 F.3d 655, 664 (8th Cir. 2021) (reasoning that a blurry video was insufficient to resolve a factual dispute as to whether the officer had probable cause for a traffic stop). The video does not "blatantly contradict" the facts asserted by Plaintiffs.

Defendants also rely heavily on Groce's statement that he did not recall seeing the deployment of tear gas as he followed the BEAR down Euclid on his bicycle. But he did not refute the allegation; he only said that he did not specifically recall a deployment at that moment, noting the extraordinary and "bewildering" scene that day. ECF No. 171-10 at 72. This is insufficient to remove the factual inquiry from the jury.

Other evidence in the record offers conflicting accounts about what transpired on Euclid. Molina and Vogel testified that the BEAR shot tear gas directly at them as they fled to the back of Molina's house. The City's own After Action Report states that Defendant Mader alone deployed a total of seven canisters as the BEAR traveled down Euclid, causing people to run for cover in the gangways "out of sight." ECF No. 183-3. The report states that Defendants Busso and Book also deployed tear gas on Euclid south of Page. Six officers in the BEAR that day (excluding Officer Chambers, who was driving, and Defendant Mayo, who was supervising) testified that they deployed tear gas on the BEAR's patrol route, though most could not say exactly where. Viewed in the light most favorable to Plaintiffs, this evidence is sufficient to create a triable jury question as to

whether and how Defendants deployed tear gas at Molina and Vogel. Defendants have not established an absence of triable facts on this record.

Qualified Immunity

Qualified immunity shields a government official from suit under § 1983 if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Kelsay v. Ernst*, 933 F.3d 975, 979 (8th Cir. 2019) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). When a defendant invokes a claim of qualified immunity, the burden falls on the plaintiff to show that (1) the facts, viewed in the light most favorable to the plaintiff, demonstrate the deprivation of a constitutional right and (2) the right was clearly established at the time of the deprivation. *Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1155 (8th Cir. 2014) (quoting *Baribeau v. City of Minneapolis*, 596 F.3d 465, 474 (8th Cir. 2010)). If the answer to either question is no, then the defendant is entitled to qualified immunity. *Baude v. City of St. Louis*, 476 F. Supp. 3d 900, 909 (E.D. Mo. 2020) (citing *Doe v. Flaherty*, 623 F.3d 577, 583 (8th Cir. 2010)).

To be clearly established, the contours of the right must be sufficiently clear that a reasonable official would have understood that what he is doing violates that right. *Quraishi v. St. Charles County, Mo.*, 986 F.3d 831, 835 (8th Cir. 2021) (citation omitted). The state of the law at the time of the alleged violation – articulated by precedent, controlling authority, or a robust consensus of persuasive authority – must give officials fair warning that their conduct was unlawful. *Id.* There may also be the rare obvious case where the unlawfulness of the officer's conduct is

sufficiently clear even though existing precedent does not address similar circumstances. *Id*.

II. Whether Defendants Had Probable Cause

To prevail on their First or Fourth Amendment claims, Plaintiffs must show that Defendants had no probable cause for their actions. *Quraishi*, 986 F.3d at 836. To receive qualified immunity, Defendants need only establish arguable probable cause, which exists even where an officer has a mistaken but objectively reasonable belief that Plaintiffs committed a criminal offense. *Id*.

Defendants argue that, even if they did launch munitions from the BEAR on Euclid south of Page, such deployment was justified because Molina and Vogel had been part of a "riotous crowd" that had thrown rocks at officers 12 minutes earlier at the corner of Page and Euclid, "just 550 feet away"; they were unlawfully assembled with six to ten people in front of Molina's house and refused to disperse; and other protestors were still throwing rocks at the BearCat north of Page. ECF No. 170 at 17-18; ECF No. 171 ¶¶ 30, 49, 53; ECF No. 189.

Quraishi is instructive. There, an officer deployed tear gas at journalists covering the Ferguson protests after the police shooting of Michael Brown. The officer claimed that there were projectiles coming from the area, but the totality of the evidence did not support his version of the facts. The trial court concluded that the defendant was not entitled to qualified immunity as to probable cause because there were genuine issues of material fact insofar as the parties' accounts varied widely and the video evidence did not support the defendant's version. *Quraishi v. St. Charles County, Mo.*, 4:16-CV-1320

NAB, 2019 WL 2423321, at *7 (E.D. Mo. June 10, 2019), *aff'd in part, rev'd in part and remanded*, 986 F.3d 831 (8th Cir. 2021). The Eighth Circuit affirmed this conclusion. It noted that there were no projectiles coming from the reporters' location, and it was disputed whether the reporters' location was an unlawful assembly. Thus, accepting the plaintiffs' version of the facts, the officer "did not have arguable probable cause to use tear gas." *Quraishi*, 986 F.3 at 836.

Here, it is difficult to say that even Defendants' own description of events establishes arguable probable cause. Defendant Dodge testified that, in order to comply with a dispersal order, a person must get out of the street to allow the free flow of traffic and, if there is an unlawful assembly, "they need to leave the area altogether. It's not enough for the group to move two blocks away if you still have the same group blocking the traffic, throwing objects at officers, or looting." ECF No. 171-6 at 28. Defendant Mayo's testimony was similar. ECF No. 171-7 at 14. By Defendants' own account, however, Molina and Vogel dispersed west on Page and south down side streets as protestors were ordered to do; a few individuals who dispersed from Page ended up at Molina's house two and a half blocks farther down Euclid; and there is no evidence whatsoever that anyone at that location was throwing objects, blocking traffic, or engaging in similar disruptive conduct. ECF No. 170 at 18. Thus, according to the standards articulated by Defendants Dodge and Mayo, Plaintiffs had complied with the dispersal order. Nonetheless, Dodge ordered the BEAR to patrol down Euclid, and Mayo's team deployed chemical munitions there because of conditions existing 12 minutes earlier and/or at a distance of nearly two football fields. Multiple Defendants inside

the BEAR testified that they deployed munitions without knowing exactly where they were or what was happening outside. These facts belie an objectively reasonable belief of unlawful assembly, mistaken or otherwise.

Moreover, in evaluating probable cause, the Court is not limited to only the Defendants' version of the facts. *Quraishi*, 986 F.3d 836. Again, the video evidence does not capture what happened at Molina's house. *See, Garcia*, 984 F.3d at 664 (blurry video insufficient to establish probable cause). But ample footage taken from different angles on Page provides a general sense of conditions. The footage depicts confrontation earlier in the day but a marked dissipation, relative calm, and a significant police presence at the time in question. When Chief Dotson saw the BearCat turning north on Euclid at that same time (the BEAR already out of view), he exclaimed, "What the f--- are they doing *chasing them* there?"[5] ECF No. 171-11 (Video 10 at 2:20). Chief Dotson ordered them to "disengage" (*Id*. at 2:34) and ordered Defendant Dodge to call back the BEAR. ECF No. 171-6 at 19. Traffic was flowing freely along Page and side streets at that time. A few pedestrians are visible on the sidewalks. Video 10.

Overall, the video footage from Page at that time of the evening totally contradicts Defendants' characterization of ongoing unlawful assembly or high conflict. Like *Quraishi*, there are no undisputed facts supporting even a mistaken belief that Plaintiffs

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[5] Plaintiffs infer that Chief Dotson was referring to the BearCat because the BEAR was out of view then and Colonel Leyshock responded by ordering the BearCat to return to the police line. ECF No. 183; ECF No. 171-11 (Video 10 at 2:22); ECF No. 171-6 at 18-19.

had refused to disperse or were unlawfully assembled (e.g., blocking traffic, throwing things) 183 yards from Page and even farther from the police line. *Compare White v. Jackson*, 865 F.3d 1064, 1075-1076 (8th Cir. 2017) (finding arguable probable cause where a protester heard a dispersal order and chose not to disperse or disassociate himself from others committing unlawful acts).

Viewing the facts in a light most favorable to Plaintiffs but even still allowing for reasonable misperceptions by Defendants, the present record does not supply arguable probable cause entitling Defendants to qualified immunity. The Court thus proceeds to the parties' arguments on specific claims in the complaint.

III. First Amendment Retaliation (Count I)

"The First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." *Hoyland v. McMenomy*, 869 F.3d 644, 655 (8th Cir. 2017) (quotations omitted). "Indeed, criticism of public officials lies at the very core of speech protected by the First Amendment." *Id*. To prevail on a claim of First Amendment retaliation, Plaintiffs must show that (1) they engaged in constitutionally protected activity; (2) Defendants took adverse action that would chill a person of ordinary firmness from continuing in the activity; and (3) Defendants' actions were motivated in part by Plaintiffs' exercise of their constitutional rights. *Eggenberger v. W. Albany Twp.*, 820 F.3d 938, 943 (8th Cir. 2016) (citations omitted). In their complaint, Plaintiffs essentially claim that Defendants shot tear gas at them because they had been part of the protest on Page criticizing the police for the death of Mansur

Ball-Bey. Plaintiffs further suggest that Molina and Vogel were singled-out as legal observers and that Groce was targeted for telling the police to get out of Fountain Park.

In support of their motion for summary judgment, Defendants assert that Plaintiffs have failed to establish that Defendants recognized them as protestors and acted with retaliatory motive. By this argument, Defendants seem to imply that, on the contrary, they shot canisters at individuals whom they believed had nothing to do with the protests. Defendants' position is illogical and also untenable on the present record. While Defendants are correct that bare allegations of retaliatory animus cannot withstand summary judgment, *Green v. Nocciero*, 676 F.3d 748, 753 (8th Cir. 2012), Defendants themselves admit that Molina and Vogel were among the protestors on Page and were standing with a few of them in front of Molina's house when the BEAR passed on patrol. Molina and Vogel stood out in neon hats. The evidence is unclear whether Defendants other than Dodge knew the hats to signify legal observers, some of whom were recording events. However, in one of the videos taken from the police line, legal observers are close enough to read the words National Lawyers' Guild on their distinct hats. Defendants Mayo and Busso acknowledged that they had seen some protestors wearing the hats, and Defendant Book testified that he knew that legal observers were "the ones with the yellow hats." Viewed in the light most favorable to Plaintiffs, the evidence permits an inference that Defendants recognized Molina and Vogel as legal observers. In the very least, the jury could reasonably infer that Defendants believed the individuals at Molina's house to be protestors dispersed from Page, as this is precisely Defendants'

cited justification for deploying tear gas at them. ECF No. 170 at 18.

With respect to retaliatory motive, Plaintiffs rely on *Peterson v. Kopp*, 754 F.3d 594 (8th Cir. 2014), where the Eighth Circuit instructed that the "causal connection" (i.e., retaliatory motive) is generally a jury question unless it is so free from doubt as to justify taking it from the jury. *Id.* at 603. On this inquiry, a jury could find notable that officers cheered and clapped when smoke was deployed at protestors (Video 8 at 13:32), or that some Defendants might have recognized Plaintiffs as legal observers. Again, at the least, Defendants assumed that Plaintiffs were among the protestors who dispersed from Page. ECF No. 170 at 18. Viewed in Plaintiffs' favor, the Court finds the totality of the record sufficient to create a jury question as to Defendants' retaliatory motives in deploying tear gas at Molina and Vogel from an armored vehicle, while Plaintiffs were peaceably standing on the sidewalk, 183 yards away from and 12 minutes after the protest scene at Page. *Quraishi*, 986 F.3d at 838 (holding, "Anderson's motive is not so free from doubt as to justify taking it from the jury.") (quotations omitted).

From here, Defendants argue that they are nonetheless entitled to qualified immunity because their conduct did not violate clearly established law. But Defendants' briefing fails to articulate any contours of First Amendment precedent at the time. While this case was pending, the Eighth Circuit issued its opinion in *Quraishi*. There, after finding that the officer lacked arguable probable cause to believe that the plaintiffs were engaged in any unlawful conduct, the trial court went on to conclude that the officer was not entitled to qualified immunity because, in 2014, a reasonable police officer would

know that shooting tear gas at journalists was a violation of the First Amendment. *Quraishi*, 2019 WL 2423321, at *7. In affirming the denial of qualified immunity on that claim, the Eighth Circuit noted that the reporters appeared to have been singled-out, suggesting a retaliatory motive. *Quraishi*, 986 F.3 at 838. Though there existed no prior case directly on point, the Circuit noted generally that a citizen's right to exercise First Amendment freedoms without facing retaliation from government officials is clearly established, and an exact match is not necessary when an issue is "beyond debate." *Id*. at 838 (collecting cases). *See, e.g., Hartman v. Moore*, 547 U.S. 250, 256 (2006) ("[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … for speaking out."); *Peterson*, 754 F.3d at 603 (denying immunity to an officer who pepper-sprayed a citizen who asked for the officer's badge number); *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005) (denying immunity to an officer who arrested a civil rights attorney observing a traffic stop).

To be sure, the facts before the Eighth Circuit in *Quraishi* were compelling insofar as the plaintiffs were journalists. However, the supporting precedent cited in the Circuit's decision and other precedent pre-dating August 2015 confirms that First Amendment applies with equal force to citizens exercising their rights to criticize police conduct. This, too, is beyond debate. *City of Houston, Tex. v. Hill*, 482 U.S. 451, 462–63 (1987) ("The freedom of individuals verbally to oppose or challenge police action . . . is one of the principal characteristics by which we distinguish a free nation from a police state.").

Again retreating to their "justification" argument, Defendants suggest a scenario where protestors refused to disperse, lingered nearby, and unlawfully reassembled minutes later in another location.[6] But viewing the evidence in a light favorable to Plaintiffs, there is nothing to suggest that this occurred here. Video footage of Page and Euclid depicts a calm scene at that time and captures three witnesses, including Chief Dotson, describe what they saw on Euclid as the police "chasing" protestors. Molina and Vogel had complied with police orders to disburse west and down the side streets, and were quite distant from the scene of the protest, simply standing on the sidewalk outside Molina's house, when Defendants rolled down the street in an armored vehicle releasing tear gas. A reasonable jury could infer from the record that Molina and Vogel stood out in their neon hats. A reasonable officer would have understood that "chasing" after and deploying tear gas at legal observers and peaceful protestors who complied with a dispersal order and retreated to a sidewalk far away from an earlier assembly is impermissible. Absent a showing of even arguable (mistaken) probable cause to believe that there was an unlawful assembly at Molina's house, Defendants have not established that they are entitled to

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[6] Defendants cite *Abdullah v. County of St. Louis, Mo.*, 52 F. Supp. 3d 936, 943 (E.D. Mo. 2014), discussing Missouri's failure-to-disperse statute. *See* Rev. Stat. Mo. § 574.060; *State v. Mast*, 713 S.W.2d 601 (Mo. App. E.D. 1986) (holding that people who are present and cognizant of the unlawful acts of other protestors can be guilty of unlawful assembly if they refuse to depart from the scene). As previously discussed in the context of probable cause, Defendants' own characterization (ECF No. 170 at 18) belies their assertion that Plaintiffs refused to disperse or reassembled unlawfully at Molina's house.

qualified immunity on the First Amendment claims of Molina and Vogel. *Quraishi*, 986 F.3d at 839.

Groce's First Amendment claim is even simpler. Viewed in Groce's favor, the evidence reflects that Groce approached the BEAR in Fountain Park and told the officers to leave, in response to which Groce was shot in the hip with a canister. There is no evidence suggesting that Groce was armed or otherwise presented any threat to Defendants inside their armored vehicle. The law was settled, in August 2015, that the First Amendment prohibits government officials from subjecting an individual to retaliatory actions for speaking out. *Thurairajah v. City of Fort Smith, Ark.*, 925 F.3d 979, 985 (8th Cir. 2019) (citing *Hartman*, 547 U.S. at 256). Criticism of law enforcement officers, even with profanity, is protected speech. *Thurairajah*, 925 F.3d. at 985 (citing *City of Houston*, 482 U.S. at 461). Defendants supply no facts or analysis suggesting they had probable cause to react to or limit Groce's speech, and the Court finds none in the record. *Cf., Virginia v. Black*, 538 U.S. 343 (proscribing speech likely to incite violence).

Rather, Defendants' only argument in defense of Groce's First Amendment claim is that Groce cannot establish which officer shot at him. As Defendants advance this theory with respect to all three Plaintiffs on all of their claims against the individual Defendants, the Court now proceeds to that theory.

Identity of Officers

Defendants assert that they are entitled to summary judgment on Counts I-III because Plaintiffs fail to identify which officers were directly involved in and responsible for the alleged deployment of munitions. Plaintiffs counter that they need not

establish which Defendant did what at this stage but only that sufficient evidence exists for a jury to find any of them responsible or at least collusive.

Defendants note that "[l]iability for damages for a federal constitutional tort is personal, so each defendant's conduct must be independently assessed." *Wilson v. Northcutt*, 441 F.3d 586, 591 (8th Cir. 2006). *Wilson* involved a First Amendment retaliation claim, albeit factually dissimilar. In that case, the plaintiff claimed that municipal officials retaliated against her for complaining about a drainage ditch near her property by extending it onto the property and failing to maintain it. The Eighth Circuit directly addressed the question of "which individual defendants were responsible" and concluded that the defendants for whom the evidence lacked any indication of involvement or knowledge were entitled to summary judgment, but the defendants who were either directly involved in allegedly retaliatory conduct or aware of such conduct and did nothing were not entitled to summary judgment. *Id*. at 591-592.

Defendants also rely on the Fourth Amendment case *White v. Jackson*, which states, "To prevail on a § 1983 claim, a plaintiff must establish each individual defendant's personal involvement in the alleged violation." 865 F.3d at 1081 (citing *Wilson*, 441 F.3d at 591, and *Dahl v. Weber*, 580 F.3d 730, 733 (8th Cir. 2009)). But *White* does not support Defendants' position. There, as here, the officers' own testimony confirmed their involvement in the incident in question, but the parties disputed whether the officers used excessive force, and the plaintiff could not identify which officer(s) allegedly beat him. The officers asserted the same theory Defendants advance here, namely that the plaintiff could not establish any particular defendant's

personal liability for his injury. The Eighth Circuit rejected this argument, instructing that a plaintiff need not "be able to personally identify his assailants to avoid summary judgment." *Id.* Rather, it is sufficient that some evidence identifies the officers who participated. *Id.* The Circuit also noted that an officer who was not personally involved still may be liable for failing to intervene if (1) he was aware of the violation and (2) the duration was sufficient to permit an inference of tacit collaboration. *Id. See also Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009) (recognizing liability for failure to intervene when an officer knew of excessive force and had both the opportunity and the means to prevent harm).[7]

Defendants further rely on *Burbridge v. City of St. Louis, Mo.*, 430 F. Supp. 3d 595 (E.D. Mo. 2019), where a named defendant and unidentified officers used pepper spray on a non-party, causing a residual effect on a plaintiff. The trial court granted summary judgment for the defendants because the plaintiffs offered no evidence that the named officers used force against that plaintiff or that the spray delivered by any of them was what affected her. These facts are clearly distinguishable. *Burbridge* involved unknown officers and secondary exposure. The present case involves identified officers who, according to their own testimony, either ordered the deployment, deployed canisters themselves, assisted with the deployment, or at least were aware of it and did nothing. Consistent with *Wilson* and *White*, the Court finds the evidence sufficient to survive summary judgment.

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[7] *White* and *Nance* involved the use of significant physical force not present here.

Plaintiffs cite deposition testimony implicating each Defendant officer in some manner. Defendant Dodge ordered the BEAR to launch gas to disperse protestors that day and specifically ordered the BEAR's patrol south of Page. Dodge ordered the Euclid patrol on his own initiative (ECF No. 171-6 at 16), which Chief Dotson clearly and vehemently opposed. Defendant Mayo was the commanding officer in the BEAR. He did not deploy munitions but heard other officers do so from atop the BEAR, although he could not recall where. Defendants Coats and Busso were positioned atop the BEAR. Busso was in the "hatch," and Coats was in the "overwatch" position to see into the crowd. ECF No. 171-20 at 14-15, 17. Both deployed munitions that day. Coats had a launcher, which he described as fairly accurate at short range (10-30 yards). ECF No. 171-20 at 21-22. He remembered that the BEAR traveled down Euclid but, from the overwatch position where he could see into the street, he did not deploy munitions there himself. ECF No. 171-20 at 14-15. Defendants Mader, Seper, Book, and Wethington stated that they deployed munitions from the BEAR that day and were part of the patrol when it passed Molina's house. The inside of the vehicle is an open space, permitting coordination among officers. They all had access to munitions and at least one launcher inside the vehicle. There are multiple portholes from which munitions can be deployed by hand or using a launcher, with windows above each porthole. Three portholes faced Molina's house on the right side of the vehicle as it traveled south on Euclid. The After Action Report states that multiple canisters were deployed on Euclid, causing people to run for the gangways. ECF No. 183-3. The report suggests that Defendants Busso, Book, and Mader may have

deployed canisters from that location. Mader testified that canisters were in buckets in the floorboard of the BEAR that day and they deployed them by hand from the porthole. ECF No. 171-15 at 20. Only Defendant Coats could specifically recall that he did not deploy munitions on Euclid from the overwatch position, but he was uniquely positioned to see the area and assess whether any unlawful assembly was occurring.

Though Plaintiffs cannot specifically identify which officer(s) directed canisters at them, the Court finds the foregoing evidence sufficient to create a triable fact as to each officer's involvement in or awareness of the alleged constitutional violation. Stated inversely, applicable precedent does not support Defendants' position that Plaintiffs are required to establish each officer's tactical role inside an armored vehicle in order to survive summary judgment. *White*, 865 F.3d at 1081.

For all of the foregoing reasons, the Court concludes that Defendants are not entitled to summary judgment or qualified immunity on Plaintiffs' First Amendment claims.

IV. Fourth Amendment Excessive Force (Count II)

For Count II, Plaintiffs claim that Defendants seized them using excessive force and without probable cause, as Plaintiffs had dispersed in compliance with police orders, were not committing any crime, posed no threat, and were not resisting arrest when Defendants used chemical munitions against them on Euclid and in Fountain Park, well after and away from the protest scene.

In support of their motion for summary judgment on this count, Defendants assert that Molina and Vogel suffered no actual injury, and Defendants are entitled to qualified immunity because their conduct did not violate clearly established law at the time. The Court need not address the nature of Plaintiffs' injuries because that argument is premature at this stage,[8] and because the Court concludes that Defendants are entitled to qualified immunity on this claim.

To defeat the defense of qualified immunity in a Fourth Amendment excessive force context, Plaintiffs must demonstrate that their right to be free from Defendants' particular use of force was clearly established at the time of the incident. *Shelton v. Stevens*, 964 F.3d 747, 753 (8th Cir. 2020). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Even where an officer's action is deemed unreasonable under the Fourth Amendment, he is entitled to qualified immunity if a reasonable officer could have believed (even mistakenly) that the use of force was permissible." *Id.* (quoting *Anderson*, 483 U.S. at 643). Use of excessive force is an area of the law in which the result depends very much on the facts of each case. *Id.* While there does not have to be a case directly on point, existing precedent must place the lawfulness of the particular action beyond debate. *Id.*

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[8] The cases cited by both parties demonstrate that the issue of damages is premature at the summary judgment stage. *See e.g., Bennett v. Riceland Foods, Inc.*, 721 F.3d 546, 552-553 (8th Cir. 2013) (affirming the district court's denial of remittitur of the jury's award); *Corpus v. Bennett*, 430 F.3d 912, 915 (8th Cir. 2005) (affirming the district court's reduction of the jury's damage award to one dollar).

"A plaintiff need not show that the very action in question has previously been held unlawful, but [she] must establish that the unlawfulness was apparent in light of preexisting law." *Burnikel v. Fong*, 886 F.3d 706, 712 (8th Cir. 2018) (quoting *Anderson*, 483 U.S. at 640).

Quraishi is controlling and dispositive. There, although the officer's alleged use of tear gas at reporters without probable cause would clearly violate the First Amendment, the Eighth Circuit held that it was not clearly established that the officer's acts constituted a seizure under the Fourth Amendment. As such, the officer was entitled to qualified immunity on that claim. *Quraishi*, 986 F.3d at 839-840. To establish a Fourth Amendment violation, the claimant must demonstrate that a seizure occurred. *Id*. at 839. To be seized, a reasonable person would have believed that he was not free to leave. *Id*. Even viewed in the light most favorable to Plaintiffs, the evidence does not suggest that Plaintiffs Molina and Vogel were seized. Like the plaintiffs in *Quraishi*, they merely felt the effects of the tear gas without suffering any corporal impact.

Although Groce was actually hit by a flying canister and sustained a bruise to the hip, ultimately the conclusion is the same. A seizure requires the use of force with intent to restrain, as opposed to force applied by accident or for some other purpose. *Torres v. Madrid*, 2021 WL 1132514 (U.S. Mar. 25, 2021), 592 U.S. ___ (2021) (holding that a seizure occurred where a subject evaded apprehension by officers who shot her). The appropriate inquiry is whether the challenged conduct objectively manifests an intent to restrain. *Id*. Absent an intent to terminate a subject's freedom of movement, there is no seizure. *Johnson v. City of Ferguson, Mo.*, 926 F.3d 504, 506 (8th Cir.

2019) (en banc) (finding no seizure without verbal or physical impediment to movement or submission to authority). Groce does not allege that Defendants attempted to seize him, and the record reflects no such intent by Defendants. Even if the record did contain allegations or evidence of a failed attempt constituting a seizure under *Torres*, it was not clearly established in 2015 that Defendants' actions would have constituted a seizure at that time. *Torres*, 2021 WL 1132514, at *10. Therefore, consistent with *Quraishi*, this Court must conclude that Defendants are entitled to qualified immunity on Plaintiffs' Fourth Amendment claims.[9]

V. Failure to Intervene (Count III)

An officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer may be held liable for violating the Fourth Amendment. *Hollingsworth v. City of St. Ann*, 800 F.3d 985, 991 (8th Cir. 2015). While the Eighth Circuit recognizes an officer's duty to intervene to prevent excessive force in violation of the Fourth Amendment, there is no clearly established law creating a duty to intervene to prevent other

[9] In a footnote, Plaintiffs attempt to distinguish *Quraishi* insofar as the plaintiffs there characterized the officer's conduct as a seizure rather than excessive force. ECF No. 197 at 2. But Plaintiffs' own complaint states that they were seized by an unreasonable use of chemicals. In a Fourth Amendment context, force is examined as an aspect of the seizure. *See e.g., Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011) ("The determination whether the force used to effect a seizure was reasonable ultimately requires a case-specific balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.")

constitutional violations. *Hess v. Ables*, 714 F.3d 1048, 1052 (8th Cir. 2013); *Zorich v. St. Louis County*, 4:17-CV-1522 PLC, 2018 WL 6621525, at *24 (E.D. Mo. Dec. 18, 2018). As Plaintiffs' claim for failure to intervene is entirely dependent on their predicate Fourth Amendment claim, Defendants are entitled to qualified immunity on this count as well.

VI. Municipal Liability for First Amendment Retaliation (Count IV)[10]

Liability for an officer's constitutional violation may attach to the City if it resulted from (1) an official municipal policy, (2) an unofficial custom, or (3) a deliberately indifferent failure to train or supervise. *Garcia*, 984 F.3d at 670.

In order to prove a municipal custom, Plaintiffs must demonstrate: (1) a continuing, widespread, persistent pattern of unconstitutional misconduct; (2) deliberate indifference to or tacit authorization of such conduct by the governmental entity's policymaking officials after notice of the misconduct; and (3) that the plaintiff was injured as a result of the custom. *Moore*, 213 F. Supp. 3d at 1146.

The inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact.

[10] To the extent Plaintiffs assert a claim for municipal liability under the Fourth Amendment, that claim fails with the grant of summary judgment for the individual Defendants on Counts II and III. *Corwin v. City of Indep., Mo.*, 829 F.3d 695, 700 (8th Cir. 2016) ("In order for municipal liability to attach, individual liability first must be found on an underlying substantive claim."). As such, the Court's analysis here focuses on Plaintiffs' claims under the First Amendment.

City of Canton v. Harris, 489 U.S. 378, 388-389 (1989). A plaintiff must show that the defendant had notice that its procedures were inadequate and likely to result in a violation of constitutional rights. *Thelma D. By & Through Delores A. v. Bd. of Educ. of City of St. Louis*, 934 F.2d 929, 934 (8th Cir. 1991).

In Count IV, Plaintiffs assert that the SLMPD had a custom of deploying chemical munitions against protestors and observers in retaliation and suppression of speech critical of law enforcement. Plaintiffs cite approximately 15 other incidents between 2012 and 2017 when SLMPD officers deployed tear gas at non-violent protestors. Plaintiffs thus contend that City officials knew about a widespread pattern of retaliatory use of chemical munitions to chill protected speech, and that such officials either were deliberately indifferent to such conduct or explicitly authorized it.[11]

As a preliminary matter, Defendants move to strike certain evidence obtained in other § 1983 cases filed in this district, which Plaintiffs offer in support of their claim that the City has a custom and practice of misusing chemical munitions against peaceful protestors. ECF No. 191. Four exhibits come from *Ahmad v. City of St. Louis, Mo.*, 4:17 CV 2455 CDP, 2017 WL 5478410 (E.D. Mo. Nov. 15, 2017).[12] One is

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[11] Post-incident evidence is admissible to prove the existence of a municipality's customs at the time in question. *See Whitt v. City of St. Louis*, 4:18-CV-1294 RLW, 2020 WL 7122615, at *7 (E.D. Mo. Dec. 4, 2020) (collecting cases).

[12] On September 15, 2017, St. Louis police officer Jason Stockley was acquitted of murder for the death of Anthony Smith, prompting several protests in the days that followed. *State of Missouri v. Stockley*, Missouri 22nd Circuit, Cause No. 1622-CR2213-01. *Ahmad* examines the City's actions taken against protestors in the wake of that verdict.

an excerpt of the hearing testimony of Officer Timothy Sachs concerning the City's policy on the use of chemical munitions and the deployment of them at the Stockley protests. ECF No. 183-7. Another is an excerpt of the hearing testimony of Officer Brian Rossomanno discussing how officers determine whether an assembly is unlawful. ECF No. 183-8. The third is an excerpt of the hearing testimony of a citizen, Keith Rose, describing his experience being pepper sprayed while serving as a legal observer at numerous protests between October 2014 and September 2017. ECF No. 183-15. The fourth is the full deposition of Colonel Lawrence O'Toole, exploring a wide range of issues such as training, policies on the use chemical agents, unlawful assembly and crowd management, and incident review. ECF No. 183-25. Additionally, Plaintiffs offer the declaration of a citizen, Suzanne Brown, submitted in *Templeton, et al. v. Dotson et al.*, 4:14-cv-2019-CEJ (E.D. Mo.), describing an event where, as a legal observer, she witnessed police officers pepper-spray protestors on November 25, 2014. ECF No. 183-11.

Defendants move to strike these exhibits because (1) Plaintiffs failed to disclose their intent to rely on these witnesses under Rule 26(a); (2) Defendants' counsel was not present for the testimony; and (3) Defendants did not consent to the use of these materials in this case. Defendants urge the Court to exclude these exhibits as a discovery sanction under Rule 37(c)(1). Plaintiffs counter in pertinent part that (1) these witnesses were indeed disclosed as part of Plaintiffs' Rule 26(a) disclosures (ECF No. 193 Ex. 1 and 2); (2) the City was a party in *Ahmad* and *Templeton* and the same City Counselor represented the City in *Ahmad*; and (3) the evidence submitted can be presented in an admissible form at trial.

The Court does not find a discovery sanction warranted here, as the names of these witnesses appear on Plaintiffs' disclosures, and will deny the request on this ground. ECF No. 193, Ex. 1 and 2. With regard to whether the Court may rely on the evidence at this stage, the Court notes that Defendants do not argue that the evidence could not be presented in admissible form, i.e., through the direct testimony of the witnesses in question, or under Rule 804,[13] or, with regard to some of the exhibits, as statements of a party opponent (Rule 801). The Court will therefore consider this evidence as relevant to Count IV.

In support of their motion for summary judgment, Defendants emphasize that, at the time of the protest, the City had in effect a Use of Force policy stating that "Officers will use the least amount of force reasonably necessary to accomplish their lawful objectives while safeguarding their own lives and the lives of others." ECF No. 171-21. It states that "chemical agents will not be used for the purpose of frightening or punishing individuals for exercising their constitutional rights." *Id.* at 50. It further instructs that chemical agents should not be used to disperse groups engaging in non-criminal activity unless a warning is issued, individuals are given the chance to heed it, the impact on compliant individuals is minimized, and safe egress is announced and ensured. *Id.* at 50-51. The City adopted this policy in March 2015 – at least four months before the events at issue here – in connection with a settlement

[13] If the declarant is unavailable, former testimony is admissible when given in a case where the party against whom it is offered had an opportunity and similar motive to develop it. Fed. R. Evid. 804(b)(1).

agreement in another civil rights case in this district: *Templeton, et al. v. Dotson, et al.*, Case No. 4:14-CV-2019 CEJ. *See Ahmad*, 2017 WL 5478410, at *7.

Major Eric Larson stated by affidavit in this case that all officers receive a copy of the Use of Force policy during their training and are also required to acknowledge it monthly through an electronic system. ECF No. 171-21 at 1. But numerous Defendants in this case stated in their depositions that they did not actually receive training as to when it was appropriate to use chemical munitions in a protest, and the electronic acknowledgment could be completed in a matter of seconds without actually reviewing the policy. Plaintiffs thus assert that, notwithstanding the existence of a written policy, there is a widespread pattern and custom by City police officers to deploy chemical munitions unlawfully against protestors critical of law enforcement.

Plaintiffs submit more than a dozen sworn declarations and excerpts of deposition testimony by witnesses, including some legal observers, describing allegedly retaliatory and excessive chemical munition deployments on several occasions before and after August 19, 2015. ECF 183, Ex. 9 through 23. Plaintiffs also submit internal SLMPD emails in an effort to depict a hostile culture and establish that supervisory staff knew of the problem and failed to conduct reviews or take other appropriate action. ECF No. 199-2 at 82 (email from Sgt. Rossomano, dated August 27, 2015, stating, "the DOJ is not your friend in this. I'll try to send you a report from one of our protests in a bit so you can see how we write the narrative."); ECF No. 199-2 at 40 (email from Sgt. Rossomanno, dated November 12, 2014, stating that superiors' jobs are to "protect the troops from the protestors and to protect our troops from themselves");

ECF No. 199-2 at 75 (after a protest in December 2014, an officer's email stating, "[W]e were very lucky the crowd was a bunch of cowards or we would not have been able to deter them.").

Plaintiffs allege that the City provides little to no training on the circumstances in which munition deployment against protestors is appropriate. Lieutenant Colonel Lawrence O'Toole, in his deposition in *Ahmad*, could not identify any written materials provided to officers explaining when it is appropriate to use chemical agents consistent with the requirements of City policy on chemical agents. ECF 183-25 at 55. Notably, there is no training about how long and how far a legitimate use of chemical munitions may persist. ECF No. 183-17.

Plaintiffs also rely on *Ahmad*, where the trial court reviewed police officers' conduct and the City's practices in the fall of 2017 and found sufficient evidence of unconstitutional conduct and underlying customs to warrant preliminary injunctive relief. *Ahmad*, 2017 WL 5478410, at *3 ("Sachs testified that he could not say 'exactly how far would be enough to comply with this, or any dispersal order. . . A tactical vehicle eventually deployed chemical munitions at the group."); *Id.* at 15 ("plaintiffs presented testimony . . . of witnesses who reasonably thought they had complied with the dispersal order by moving further down the street because the order did not indicate how far they should disperse"). The facts discussed at length in *Ahmad* confirm Plaintiffs' evidence before and after August 2015 and are

consistent with other evidence in the present record.[14]

The testimony of the Defendant officers in this case further supports Plaintiffs' position. Defendant Book testified that he had worked more protests than he could count, but he was not familiar with the City's policy regarding chemical munitions (adopted after *Templeton*) or the *Ahmad* preliminary injunction order, and he had "no idea" how far a group would need to go in order to comply with a dispersal order. ECF 171-18 at 26. Similarly, Defendant Seper testified that he had received no training about unlawful assembly and dispersal orders. He had worked a lot of protests but did not know about the City policy or the *Ahmad* order; he described a "crowd" as "just several people"; and he could not articulate how far a person would need to go to be dispersed and disassociated from such a crowd. ECF 171-16 at 18-19. Defendant Mayo, the sergeant in charge of the BEAR at the time of the Euclid patrol, testified that he had not had any specific training on unlawful assembly, the First Amendment, or the use of chemical munitions. ECF No. 171-7 at 20-21. Defendant Wethington likewise testified that he did not recall attending any specific trainings on protests, the First Amendment, or the use of chemical munitions. ECF No. 171-2 at 8, 23.

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[14] As previously addressed on Defendants' motion to strike, certain witness statements from the *Ahmad* case are spread upon the record here and the Court considers them on this motion. ECF No. 183, Exhibits 7, 8, 11, 15, and 25. Evidence from events after 2015 is relevant to the determination whether the City had a particular pattern, practice, or custom at the time of the alleged violation. *See, Whitt v. City of St. Louis*, 2020 WL 7122615, at *7 (E.D. Mo. Dec. 4, 2020) (collecting cases).

Plaintiffs also assert that the City does not conduct meaningful incident reviews of the uses of chemical munitions against protestors from a constitutional standpoint. ECF No. 183-27 (discovery response confirming that the City does not generate any critical incident reviews regarding protests). In the after-action meeting following August 19, 2015, the only take-away that Defendant Dodge recalled for future improvement was that the police line was upwind of the protestors such that smoke and gas blew back on the officers. ECF 171-6 at 22. When asked in deposition if he would do anything differently, he said they should have arrested more people at the beginning. *Id*. at 30.

The Court recognizes that Plaintiffs' witness declarations are not dispositive as to the lawfulness of police actions in each instance and that *Ahmad* was decided on its specific facts. But the existence of a municipal custom is a fact question for the jury. *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999). Viewing the totality of evidence in the present record in a light most favorable to Plaintiffs, a jury could find that the City's customs and practices permit officers to deploy chemical munitions in an indiscriminate and retaliatory manner in violation of citizens' First Amendment rights. Because genuine issues of material fact must be resolved by a jury, the City is not entitled to summary judgment on Count IV as it relates to Plaintiffs' First Amendment claims.

CONCLUSION

Genuine issues of material fact preclude summary judgment on Plaintiffs' claims of First Amendment retaliation by the Defendant officers and corresponding municipal liability for the City. However, on

Plaintiffs' Fourth Amendment claims of excessive force and failure to intervene, Defendants are entitled to qualified immunity because their conduct did not constitute a seizure according to clearly established law at the time of the protest, and accordingly the City bears no municipal liability on those claims.

For the reasons set forth above,

IT IS HEREBY ORDERED that Defendants' motion for summary judgment is **DENIED** on Count I and **GRANTED** on Counts II and III. As to Count IV, the motion is **DENIED** as it relates to Plaintiffs' First Amendment claims on Count I and **GRANTED** as it relates to Plaintiffs' Fourth Amendment claims on Counts II and III. ECF No. 169.

IT IS FURTHER ORDERED that Defendants' motion to strike Plaintiffs' exhibits (ECF No. 183, Exhibits 7, 8, 11, 15, and 25) is **DENIED**. ECF No. 191.

/s/ Audrey G. Fleissig
AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

Dated this 31st day of March 2021.

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 21-1830

Sarah K. Molina, et al.

Appellees

—v.—

City of St. Louis, Missouri, et al.

Daniel Book, in his individual capacity and
Joseph Busso, in his individual capacity

Appellants

Jason C. Chambers

Lance Coats, in his individual capacity, et al.

Appellants

On Appeal from the United States District Court
for the Eastern District of Missouri – St. Louis
(4:17-cv-02498-AGF)

ORDER

The petition for rehearing en banc is denied. The petition for panel rehearing is also denied.

Chief Judge Smith and Judges Colloton, Benton and Kelly would grant the petition for rehearing en banc.

COLLOTON, Circuit Judge, with whom BENTON, Circuit Judge, joins, dissenting from denial of rehearing en banc.

> Imagine the following local ordinance:
>
> It shall be unlawful for any person to watch police-citizen interactions at a distance and without interfering. A violation of this section shall be punishable as a misdemeanor.

According to the rationale of the panel majority in this case, a reasonable public official in August 2015 could have believed that this hypothetical ordinance is consistent with the First Amendment. And the panel majority volunteered further that the supposed absence of a decision recognizing a First Amendment right to observe police conduct at a distance and without interfering "makes good sense." *Molina v. City of St. Louis*, 59 F.4th 334, 340 n.2 (8th Cir. 2023).

Rehearing is warranted to consider whether intentional police retaliation against citizens identifying themselves as legal observers during a public protest violated a clearly established right of the legal observers. As the panel dissent pointed out, this court already concluded that police officers were on notice of a clearly established right under the First Amendment to observe police conduct *as of February 2015*—before the incident in this case. *Chestnut v. Wallace*, 947 F.3d 1085, 1090-91 (8th Cir. 2020); *see Chestnut v. Wallace*, No. 4:16-cv-1721, 2018 WL 5831260, at *1 (E.D. Mo. Nov. 7, 2018). Applying *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir.

2005), the court in *Chestnut* held that a police officer's seizure of a citizen was unreasonable under the Fourth Amendment precisely because the citizen was exercising a clearly established right under the First Amendment:

> Taking the facts in Chestnut's favor, we think *Walker* establishes that Wallace violated Chestnut's clearly established right to watch police-citizen interactions at a distance and without interfering. . . . We think we have correctly characterized the principle acted on in *Walker*, and thus the right in question, and we conclude that Chestnut has carried his burden to show that *Walker* clearly establishes such a right.
>
> * * *
>
> Other legal authorities fully support our holding that the right here was clearly established. Every circuit court to have considered the question has held that a person has the right to record police activity in public. *See, e.g.*, *Fields v. City of Philadelphia*, 862 F.3d 353, 355–56 (3d Cir. 2017). Four circuits had so decided by the time of the events in question here. *See ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82–83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995). This robust consensus of cases of persuasive authority suggests that, if the constitution protects one who records police activity, then surely it protects one who merely observes it—a necessary

> prerequisite to recording. . . . Surely if officers cannot seize someone who criticizes or curses at them while they perform official duties, they cannot seize someone for exercising the necessarily included right to observe the police in public from a distance and without interfering.

947 F.3d at 1090-91.

Chestnut's conclusion about a clearly established First Amendment right to observe police activity as of February 2015 was part and parcel of the court's analysis as to why a police officer could not reasonably seize the citizen in that case. A subsequent panel is not free to disregard that aspect of *Chestnut* even if the panel majority thinks it would make "good sense" for a court to say that the First Amendment allows a city to outlaw the observation of police activity.

Rehearing also would allow consideration of the panel opinion's conclusion that attending a protest while wearing a bright-colored hat emblazoned with "National Lawyers Guild Legal Observer" rather than "Protestor" is not clearly protected expression. The panel majority deemed this a "close call" only after mistakenly requiring that the legal observers communicate a "particularized message" during the protest. The Supreme Court has explained that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). As the Court's examples show, this rule is not limited to

expression in parades: our circuit law already said as much before the panel opinion in this case purported to narrow it. *See Baribeau v. City of Minneapolis*, 596 F.3d 465, 477 (8th Cir. 2010) (per curiam); *Robb v. Hungerbeeler*, 370 F.3d 735, 744 (8th Cir. 2004); *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003).

The conflicts between the panel opinion and circuit precedent are particularly regrettable because the issues under discussion were not even raised by the police officers in this case. The officers did not argue in the district court or in their opening brief on appeal that the legal observers engaged in no protected First Amendment activity, so that issue was waived. *Walker-Swinton v. Philander Smith College*, 62 F.4th 435, 441 (8th Cir. 2023). Nor did they assert the panel majority's theory of qualified immunity on the civil rights claim that requires no First Amendment activity. *See Heffernan v. City of Paterson*, 578 U.S. 266 (2016); *DeCrane v. Eckart*, 12 F.4th 586, 594 (6th Cir. 2021). The officers argued on appeal only (1) that they had arguable probable cause to deploy tear gas canisters against the legal observers, (2) that the district court failed to analyze the conduct of each officer individually, and (3) that it was reasonable for the officers to believe that they could attempt to disperse a disorderly and assaultive crowd. The panel raised new issues in an order for supplemental briefing, and then reversed the district court's order on that basis in a divided decision. That is not how the system should work: "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983)

(Scalia, J.); *see Irving v. Mazda Motor Corp.*, 136 F.3d 764, 769 (11th Cir. 1998) ("Too often our colleagues on the district court complain that the appellate cases about which they read were not the cases argued before them.").

I would grant the petition for rehearing.

April 24, 2023

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

_____

/s/ Michael E. Gans