No. 24-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MATTHEW LOCKE,

Plaintiff-Appellant,

v.

COUNTY OF HUBBARD, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
No. 0:23-cv-00571-WMW
The Honorable United States District Judge Wilhelmina M. Wright

BRIEF OF THE NATIONAL POLICE ACCOUNTABILITY PROJECT (NPAP) AS *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for *amicus curiae* respectfully submit the National Police Accountability Project (NPAP) is a non-profit organization. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock because it has no stock. *Amicus* does not have a financial interest in the outcome of this litigation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*

The National Police Accountability Project (NPAP)[1] was founded in 1999 by members of the National Lawyers Guild to address allegations of misconduct by law-enforcement and detention-facility officers through coordinating and assisting civil-rights lawyers and community organizations. NPAP has approximately 550 attorney members practicing in every region of the United States, including over a dozen members throughout the Eighth Circuit. Every year, NPAP members litigate the thousands of cases of law enforcement and detention facility abuse that do not make headlines as well as many of the high-profile cases that capture national attention. NPAP provides training and support for its member attorneys and resources for non-profit organizations and community groups working on law-enforcement and detention-facility accountability issues. NPAP also advocates for legislation to increase accountability and appears regularly as *amicus curiae* in cases, such as this one, presenting issues of particular importance for its members and their clients.

AUTHORSHIP AND PREPARATION OF THE BRIEF

Pursuant to Fed. R. App. P. 29(a)(4)(E), *amicus curiae* NPAP certifies that no party or counsel for any party authored any portion of the brief, in whole or in part. No party or counsel for any party contributed money for the preparation or

[1] All parties consented to the National Police Accountability Project's participation as *amicus curiae* in this case. Accordingly, *amicus curiae* files this brief without moving for leave pursuant to FRAP 29(a)(2).

submission of the brief. No person, other than *amicus curiae* NPAP, contributed money for the preparation or submission of the brief.

INTRODUCTION

The District Court's opinion granting qualified immunity to Defendants-Appellees Aukes and Parks adopted far too restrictive a definition of "clearly established law" and should be reversed. The law of this Circuit is clear that, when analyzing a defendant officer's use of force against a non-threatening, non-violent protestor, the key inquiry for the purposes of determining "clearly established law" is not whether the precise tactic the defendant employed had ever previously been deemed excessive, but whether the defendant had fair warning that the degree of force he used—regardless of the tactic employed to achieve such force—was more than *de minimis*. The District Court's departure from this longstanding rule was reversible error.

The issue on appeal is not whether Defendants-Appellees used excessive force when they used pain compliance to remove Plaintiff-Appellant Matthew Locke ("Mr. Locke") from the construction equipment to which he had attached himself as part of his peaceful protest. Rather, the issue before this Court is simply whether Mr. Locke may even pursue his well-pleaded excessive force claims against Defendants-Appellees to the discovery stage, as the Seventh Amendment and Rule 12 mandate. The District Court improperly denied Mr. Locke this right by reducing "clearly established law" to such a granular level.

Unduly restrictive definitions of "clearly established law" like the one adopted below not only weaken the Constitution's protections but also highlight the dubious assumption at the heart of qualified immunity's "clearly established law" requirement: that law enforcement officers stay thoroughly informed of newly

decided Fourth Amendment cases and consult their fact-specific holdings while on duty. As Professor Joanna Schwartz's recent survey of law enforcement training and policy materials reveals, officers are generally aware of the use-of-force principles announced in *Tennessee v. Garner* and *Graham v. Connor* which instruct officers that the constitutionality of their use of force depends upon the degree of force they used in light of the severity of the threat and resistance they confronted. *See* Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 610-11 (2021). But law enforcement officers do not reliably learn about use-of-force precedents beyond those two landmark cases, and they are certainly not looking to the detailed facts and holdings of developing case law to understand the constitutional limits of their authority. *See id*. This reality shatters the premise that an exceedingly narrow definition of "clearly established law" is necessary to ensure fairness for the defendant law enforcement officer.

Amicus NPAP urges the Court to reverse the District Court's grant of qualified immunity to Defendants-Appellees to ensure that this Circuit's standard for "clearly established law" protects not only meritorious liability cases and the role of juries but also this Court's own precedents establishing the limits of officers' authority to use force against non-threatening civilians. In announcing the proper test for "clearly established law" in this case, the Court should keep in mind that the assumption purportedly animating a strict "clearly established" standard—that the Court's detailed, fact-intensive excessive force precedents actually provide notice to officers of developing restrictions on their authority to use force—is dubious at best. Such a faulty foundation cannot justify the steady erosion of civil

rights predictably and invariably triggered by excessively exacting definitions of "clearly established law."

ARGUMENT

I. In Adopting an Unduly Rigid Definition of "Clearly Established Law," the District Court Erased Mr. Locke's Fourth Amendment Right to be Free of Excessive Force as a Peaceful, Non-Threatening Protestor.

"Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). These dual purposes are not fulfilled when a court places too much weight on the immunity side by defining the "clearly established right" at such an unrealistically particularized level that the injured party's claim cannot be tried to a jury.

The Supreme Court has warned that requiring previous cases that are "materially similar" is a "rigid gloss on the qualified immunity standard" that is "not consistent with [its] cases." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). Accordingly, the second prong of the qualified immunity analysis—whether the law was clearly established at the time of the defendant officer's alleged misconduct—"does not require a case directly on point." *White v. Pauly*, 580 U.S. 73, 79 (2017) (cleaned up). "'The salient question is whether the state of the law' at the time of an incident provided 'fair warning' to the defendants 'that their alleged conduct was unconstitutional.'" *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (quoting *Hope*, 536 U.S. at 741) (cleaned up). "The 'driving force' behind creation of the

qualified immunity doctrine was a desire to ensure that '*insubstantial claims* against government officials be resolved prior to discovery.'" *Pearson*, 555 U.S. at 231 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987) (emphasis added)). Defining rights too narrowly undermines the competing interests at the heart of qualified immunity: accountability when power is exercised irresponsibly and immunity to "insubstantial" lawsuits.

This Circuit has "held *time and again* that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him" as matter of clearly established law. *Mitchell v. Morton Cty.*, 28 F.4th 888, 898 (8th Cir. 2022) (emphasis added) (collecting cases). *See also Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010) ("Assuming, then, that . . . [the plaintiff] was not threatening anyone, not resisting arrest, and so on—it was not reasonable for [the defendant officer] to use more than *de minimis* force against him."); *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009) ("[I]t is clearly established that force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public"). The *type* of force employed—whether a tackle, pepper spray, taser, or any other tactic—is relevant in that it informs the degree of force applied. But the ultimate inquiry, for the purposes of determining "clearly established law," is thus whether the officer had fair notice that the *degree* of force they used was reasonable in light of the level of threat and resistance they faced.

Faithfully applying these principles, this Court has consistently held that the relevant inquiry for the purposes of determining "clearly established law" in cases involving the use of force against a non-violent civilian, is whether the degree of force used was clearly more than *de minimis*—regardless of the precise tactic employed to achieve such force. For example, in *Mitchell v. Morton County*, this Court denied qualified immunity to officers who fired lead-filled bean bags at a nonviolent protestor by analogizing to previous cases involving entirely distinct types of force. *See* 28 F.4th at 898-99 (citing *Montoya v. City of Flandreu*, 669 F.3d 867, 873 (8th Cir. 2012) (reversing grant of qualified immunity to officer who "perform[ed] a 'leg sweep' . . . [on] a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee"); *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013) (denying qualified immunity to officer who tackled nonviolent misdemeanant suspect to the ground, "resulting in three lacerations above his eye . . . [that] were treated without stitches"); *Shannon*, 616 F.3d at 858, 864 (upholding district court's denial of qualified immunity to officer who used a takedown maneuver on a non-threatening misdemeanant suspect because the Eighth Circuit had "[l]ong before . . . announced that the use of force against a suspect who was not threatening and not resisting may be unlawful")).[2]

[2] This Court applied this same reasoning as recently as last month in *Watkins v. City of St. Louis*, 2024 U.S. App. LEXIS 12797 (8th Cir. May 29, 2024). *See id*. at **7-8 (citing precedent deeming varying types of force against misdemeanor suspects more than *de minimis* in concluding the law was clearly established that pepper spraying and hitting a handcuffed misdemeanor suspect violated the Fourth Amendment).

Yet the District Court below, in granting qualified immunity to Defendants-Appellees Aukes and Parks, focused *exclusively* on the type of force used. Noting only the absence of case law specifically "forbid[ding] the use of pain compliance techniques," the District Court concluded that "Aukes and Parks were not on notice that their conduct was or would be clearly unlawful." *Locke v. Cnty. of Hubbard*, 2024 U.S. Dist. LEXIS 10413, at *6 (D. Minn. Jan. 22, 2024). In applying this constricted view of "clearly established law," the District Court missed the forest for the trees. Because Mr. Locke's right to be free from more than *de minimis* force as a non-threatening and peaceful protestor was clearly established, the key question for the District Court to consider was whether Defendants-Appellees' use of pain compliance techniques amounted to greater than *de minimis* force—not whether this Circuit has ever forbidden the use of pain compliance techniques. Under the District Court's definition of "clearly established law," officers would be able to cause severe injury through their use of excessive force so long as they do so by employing novel tactics. This result cannot stand.

The District Court further erred in rejecting evidence of Mr. Locke's resulting injuries when analyzing Defendants-Appellees' entitlement to qualified immunity. Contrary to the District Court's interpretation of *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011), this Court has never held that evidence of a plaintiff's injuries is irrelevant to determining the reasonableness of the defendant officer's force. *See Locke*, 2024 U.S. Dist. LEXIS 10413, at *7. Instead, the *Chambers* Court made clear that a plaintiff's excessive force claim does not hinge upon the extent of his injuries, and, more specifically, that a

plaintiff's *de minimis* injuries do not foreclose his claim of excessive force. 641 F.3d at 906. This Court has repeatedly held—both before and after deciding *Chambers*—that the severity of a plaintiff's injuries helps determine whether the degree of force used was excessive under the circumstances. *See, e.g.*, *Shannon*, 616 F.3d at 863 (stating, after holding defendant officer's use of more than *de minimis* force against a non-threatening, non-resisting misdemeanor suspect was unreasonable: "It follows, *a fortiori*, that using enough force to cause the injuries that [the plaintiff] alleges . . . was also unreasonable"); *Mitchell*, 28 F.4th 888, 898-99 ("[T]he severity of [the plaintiff's] injuries confirms what any reasonable officer in the defendants' position would have known: to fire a shotgun loaded with a lead-filled bean bag at a person . . . is to use more than *de minimis* force against the person") (cleaned up); *Small*, 708 F.3d at 1005-06 (noting the plaintiff's injuries—"three lacerations above his eye . . . [that] were treated without stitches"—in denying qualified immunity to the defendant officer who tackled him).

The District Court's insistence on a granular analysis of "clearly established law" improperly redirected the task of factfinding from the jury to the bench, contrary to the mandates of the Seventh Amendment and Federal Rules. The District Court imposed an impossible burden on Mr. Locke—and future plaintiffs—by holding, contrary to the controlling cases cited above, that for a precedent to qualify as "clearly established law" for the purposes of defining the peaceful protestor's Fourth Amendment right to be free from more than *de minimis* force, it must involve precisely identical force tactics. The District Court's process and result here are out of step not only with the purposes underlying qualified

immunity but also the longstanding rule of this Circuit that officers, when faced with a non-violent, non-resistant civilian, may not use force substantial enough to cause injuries like those Mr. Locke sustained.

This Court should reverse to ensure that when a plaintiff adequately alleges law enforcement officers subjected him to force while he was engaged in peaceful protest, he is entitled to discover evidence to determine whether the officers' use of force violated the Fourth Amendment.

II. Unreasonably Exacting Definitions of "Clearly Established Law" Like the One Adopted by the District Court Below Not Only Erode the Constitution's Protections But Also Rest on a Fundamentally Flawed Assumption Regarding Law Enforcement Officers' Knowledge of Controlling Law.

As a provision of the Ku Klux Klan Act of 1871—"An Act to Enforce the Fourteenth Amendment"— 42 U.S.C. § 1983 is a component of the sea change in our national structure that occurred during Reconstruction. *See generally* ERIC FONER, THE SECOND FOUNDING: HOW THE CIVIL WAR AND RECONSTRUCTION REMADE THE CONSTITUTION (2019). Designed to make the Constitution's promised protections meaningful, § 1983 establishes an individual's private right of action against any government actor who has violated his or her constitutional or statutory rights. 42 U.S.C. § 1983. The statute itself does not establish a defendant's affirmative defense of qualified immunity. *See id*.

Qualified immunity instead dates to 1967, when the Supreme Court first made a "good faith" defense available to individual § 1983 defendants. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Fifteen years later, in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court purported to remove the "subjective" element from this affirmative defense, declaring that its availability depends not on the individual officer's state of mind but on the objective reasonableness of his conduct or, put differently, whether or not his conduct "violate[d] clearly established statutory or constitutional rights of which a reasonable person would have known." *Id*. at 818. With this, *Harlow* introduced the concept of "clearly established" law, designed to protect officials from liability for conduct that they "could not . . . fairly be said to 'know' . . . the law forbade." *Id*.

In essence, "[q]ualified immunity's requirement that plaintiffs produce clearly established law is intended to shield government officials from damages liability unless they had 'fair warning' or 'fair notice' of the unlawfulness of their conduct." Joanna C. Schwartz, *Qualified Immunity's Boldest Lie*, 88 U. Chi. L. Rev. 605, 609 (2021) (quoting *Hope v. Pelzer*, 536 U.S. 730, 740-41 (2002) and *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)). Thus, the foundation of the "clearly established law" requirement is the assumption that law enforcement officers dutifully follow developments in case law delineating the boundaries of constitutionally acceptable conduct. *See id*.

But research shows that this assumption at the heart of the "clearly established law" requirement is profoundly unsubstantiated by empirical evidence. Upon examining "hundreds of use-of-force policies, trainings, and other educational materials," Professor Joanna Schwartz confirmed that although "police departments regularly inform their officers about watershed decisions like *Graham* [*v. Connor*, 490 U.S. 386 (1989)] and [*Tennessee v.*] *Garner*[, 471 U.S. 1 (1985)] . . . [,] officers are not regularly or reliably informed about court decisions interpreting those decisions in different factual scenarios—the very types of decisions that are necessary to clearly establish the law about the constitutionality of uses of force." Schwartz, *Qualified Immunity's Boldest Lie* at 610. And, "even if law enforcement relied more heavily on court decisions to educate their officers about the constitutional limits of force, . . . [t]here could never be sufficient time to train officers about the hundreds—if not thousands—of court cases that could clearly establish the law," nor could officers realistically be expected to recall those details. *Id*. at 611.

The more exacting the similarities between the facts of a defendant's alleged excessive force and the facts of controlling precedent a court requires, the less likely the court's definition of "clearly established law" reflects the actual content of a defendant officer's "fair warning" with respect to the constitutional limits on his authority. In adopting an unduly exacting definition of "clearly established

law," the District Court not only weakened the protective force of the Fourth Amendment but also needlessly expanded the doctrine of qualified immunity well beyond its intended purpose.

Because Defendants-Appellees could not have reasonably been expected to know whether prior case law—binding precedent or persuasive authority—had ever deemed the use of pain compliance techniques excessive before they encountered Mr. Locke in peaceful protest, a principled analysis of their entitlement to qualified immunity cannot depend upon the existence of such specific case law. But, as this Circuit's precedent makes clear, and as the research confirms, all reasonable officers know that their authority to employ force depends upon "(1) 'the severity of the crime at issue,' (2) 'whether the suspect poses an immediate threat to the safety of the officers or others,' and (3) 'whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight.'" *Mitchell v. Morton Cty.*, 28 F.4th 888, 898 (8th Cir. 2022) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)) (alterations in original). Further, all reasonable officers know that it is categorically unreasonable to employ more than *de minimis* force against a non-threatening, peaceful protestor who is, at most, passively resisting arrest. *See id*. Thus Defendants-Appellees had fair warning that their use of greater than *de minimis* force against Mr. Locke would violate the Fourth

Amendment, and, accordingly, that qualified immunity would not shield them from suit.

CONCLUSION

Amicus respectfully urges the Court to reverse the District Court's grant of qualified immunity to Defendants-Appellees, because clearly established law provided fair warning that they could not lawfully employ greater than *de minimis* force against Plaintiff-Appellant, and Plaintiff-Appellant is entitled to proceed to discovery to determine whether Defendants-Appellees' pain compliance techniques amounted to greater than *de minimis* force.

Dated: June 10, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief complies with the type-volume limitations of Rule 29(a)(5) and Rule 32(a)(7) because it contains about 3,181 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f). I also certify that this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.85.2, set in Times New Roman 14-point font.

/s/ Eliana Machefsky
Eliana Machefsky

CERTIFICATE OF SERVICE

I certify that on June 10, 2024, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Eliana Machefsky
Eliana Machefsky