No. 24-2755

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARCUS MITCHELL,

Plaintiff-Appellant,

v.

KYLE KIRCHMEIER, MORTON COUNTY SHERIFF, et al.,

Defendants-Appellees.

Appeal from The United States District Court
for the District of North Dakota
Case No. 1:19-CV-149
The Honorable Judge Daniel M. Traynor

REPLY BRIEF OF APPELLANT MARCUS MITCHELL

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INTRODUCTION

When this Court last encountered this case in *Mitchell I*, it reversed the district court's grant of Defendants' motions to dismiss on Mr. Mitchell's excessive force claim, holding both that Mr. Mitchell stated a claim and that the law was clearly established. *Mitchell v. Kirchmeier*, 28 F.4th 888, 898-99 (8th Cir. 2022). According to his allegations, the Court explained, Mr. Mitchell "was 'peacefully protesting'—neither committing a serious crime nor threatening anyone's safety nor fleeing or resisting arrest—when the officers shot him with lead-filled bean bags capable of shattering his eye socket." *Id.* at 899. The officers were not entitled to qualified immunity, this Court noted, "[u]nless and until discovery tells a different story." *Id.* at 899.

It does not.

Reading the facts in the light most favorable to Mr. Mitchell, he was not engaged in serious crimes, did not pose an immediate threat, and was not fleeing or resisting arrest. The district court erred in concluding otherwise, and Defendants' arguments to resuscitate that ruling fail.

This Court should reverse.

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ARGUMENT

I. The district court erred in concluding no genuine issues of material fact exist on Mr. Mitchell's excessive force claim.

A. The standard.

The district court concluded that Mr. "Mitchell was engaged in serious crimes, threatened law enforcement, and posed a risk of flight." App.1140, R.Doc. 134, at 24. But that is wrong after "[v]iewing the record and drawing all reasonable inferences in the light most favorable to" Mr. Mitchell, the nonmoving party. *Montoya v. City of Flandreau*, 669 F.3d 867, 871 (8th Cir. 2012); *see generally* Opening Brief (hereinafter "OB") 24-52. This Court has routinely reversed grants of summary judgment where, under this well-worn standard, "nothing in the record indicates [plaintiff] threatened or posed any threat to the safety of the officers," *Montoya*, 669 F.3d at 871, or there are questions regarding whether a plaintiff's actions should be interpreted as "an attempt to shield himself . . . rather than an attempt to flee," *Nieters v. Holtan*, 83 F.4th 1099, 1109 (8th Cir. 2023).

Whether the force used was unreasonable is a question of law. *Westwater v. Church*, 60 F.4th 1124, 1129 n.1 (8th Cir. 2023). And so Kennelly is correct that the district court's *conclusion* that the force here

was reasonable was a legal ruling, Kennelly Brief (hereinafter "KB") 25-26, which this Court reviews de novo. Ultimately, though, whether this Court focuses on the district court's refusal to view the evidence in Mr. Mitchell's favor—as a jury could—or the error of its ultimate legal conclusion as to the appropriateness of the force on these facts, the same result yields: The district court's grant of summary judgment must be reversed.

As this Court put it in *Mitchell I*, this Court has "held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." 28 F.4th at 898.

B. The facts, read in Mr. Mitchell's favor, do not support the district court's conclusion that he was engaged in "serious crimes."

In his opening brief, Mr. Mitchell explained that, appropriately construing the facts, he was only engaged in minor crimes—which would not justify the use of more-than-*de-minimis* force—when Defendants shot him. *See* OB27-29. The shooting officers themselves testified that they had no information about Mr. Mitchell's prior conduct that could have

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justified the use of force—Piehl said that at the time he fired lead-filled bean bag rounds at Mr. Mitchell, he thought Mr. Mitchell was only violating laws against "trespassing" and "disobedience of a lawful order." OB28-29. Kennelly also denied witnessing Mr. Mitchell instigate any violence, a predicate to many of the more serious crimes the Defendants (and the district court) would ascribe to Mr. Mitchell. OB27-28. This testimony is consistent with the video footage from the night in question. OB27. In other words, the evidence is not meaningfully different from the allegations this Court encountered in *Mitchell I* and do "not suggest that Mitchell was suspected of anything more than trespassing and obstructing a government function, both nonviolent misdemeanors." 28 F.4th at 898.

And although the district court concluded that Mr. Mitchell "was clearly engaged in a multitude of serious felony crimes," App.1133, R.Doc. 134, at 17, Mr. Mitchell explained that it reached this conclusion by ascribing to Mr. Mitchell descriptions about protestors *in general*, OB31-32, which is antithetical to the individualized nature of the inquiry required under this Court's caselaw. *See, e.g.*, *Nieters*, 83 F.4th at 1108 (noting crime of arrest was "failure to disperse—a misdemeanor," despite

defendant's "focus[] on the fact there had been 'hours of criminal activity occurring'"); *Baude v. Leyshock*, 23 F.4th 1065, 1073 (8th Cir. 2022) (noting plaintiff was "a compliant individual among a generally peaceful and compliant crowd").

Defendants fail to support the proposition that Mr. Mitchell was involved in a serious crime when they shot him. They principally follow the district court's example, discussing Mr. Mitchell's conduct in the same breath as that of "the other protestors within the crowd." *See* City and County Defendants' Brief (hereinafter "CB") 36; *see also* KB34 ("many protestors in the crowd were subject to immediate arrest for multiple crimes").[1] This is an odd choice, however, because they do not attempt to dispute this Circuit's caselaw that the "crimes" inquiry needs to be *individualized* to the subject of the force. *See* OB32. Indeed, Kennelly even seems to acknowledge the correctness of Mr. Mitchell's "contention that he might have only committed several misdemeanors,"

[1] The one undisputed act they ascribe to Mr. Mitchell himself—cutting the concertina wire—they claim was "for the purpose of being thrown at officers," which is nowhere supported by the record (nor do they try). CB38; *see* OB30 (acknowledging cutting concertina wire supports a misdemeanor property destruction charge).

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but argues that the force was still reasonable under the circumstances. KB34. It was not.

The language in *Bernini* on which Kennelly relies (at KB34-35), is not on-point. There, the Court merely found that officers could have concluded each of the individuals in the group "was committing one or more offenses under state law" for purposes of assessing whether there was probable cause for warrantless arrests. *Bernini v. City of St. Paul*, 665 F.3d 997, 1003-04 (8th Cir. 2012). Here, the question is not whether Mr. Mitchell could be lumped in with the crowd for purposes of justifying his *arrest*, but whether the specter of the crowd can somehow be used to justify *the force used in effectuating* his arrest. As to *that* question, *Mitchell I* recognized that this Court has repeatedly held that crimes such as the misdemeanors with which Mr. Mitchell was charged—criminal trespass and obstructing a governmental function—do not support a more-than-*de-minimis* use of force. *See* OB34-36 (citing *Mitchell I*, 28 F.4th at 898, and collecting six other cases).[2]

[2] Mr. Mitchell was notably not charged with inciting a riot, which shows up (unsupported by relevant facts) in Peltier's affidavit. *Compare* CB37 *and* KB33 *with* OB33-34 & n.10.

In short, under a proper reading of the record and the caselaw, Mr. Mitchell's misdemeanors do not count as "serious crimes" for purposes of the first prong of the *Graham* test—just as this Court held in *Mitchell I*.

C. The facts, read in Mr. Mitchell's favor, do not support the district court's conclusion that he posed an "immediate threat" to officer safety at the moment he was shot.

Mr. Mitchell set out at some length in his opening brief that a reasonable jury would not think he posed an immediate risk to officer safety at the moment he was shot. *See* OB36-45. Both Piehl and Welk admitted that at the time they fired the bean bag rounds at him, Mr. Mitchell was not posing a threat, *see* OB37 (citing App.937, R.Doc. 111-17, at 47 (177:4-13) and App.531, R.Doc. 111-5, at 72 (279:25-280:20)), and, consistent with these assessments, nothing in the video recording would indicate Mr. Mitchell posed a threat either, *see generally* App.699, R.Doc. 111-12. As in *Mitchell I*, then, the evidence does not "suggest that Mitchell threatened anyone." 28 F.4th at 898.

To reach its contrary conclusion that Mr. Mitchell posed a threat, the district court looked too broadly—to the actions of other protestors, *see* OB39-50—and ascribed outsized meaning to the fact that (unbeknownst to Piehl and Welk) Mr. Mitchell cut some concertina wire

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two days prior to the shooting, *see* OB40-41, 31 n.9; the fact that Mr. Mitchell was carrying a shield, *see* OB42-43; his single "[f]uck you" to officers, *see* OB43-45; and even to *disputed testimony* regarding Mr. Mitchell setting fires with tires along the eastern flank, *see* OB41-42.

Again, Defendants' response on this issue is spare. Critically, none of the Defendants argue it is appropriate to look to the conduct of *other individuals* in assessing "whether the suspect poses an immediate threat to the safety of the officers or others." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Yet they nevertheless lump together all "the protestors" when describing the alleged threat, *see, e.g.*, CB37-39 (discussing conduct "Kennelly observed [by] protestors within the crowd" and Steele's testimony that "[w]e were threatened by these protestors"); KB32 ("[A]ny reasonable officer would have perceived their safety to be threatened by the actions of Mitchell and the rioters" because officers "witnessed violent behavior").

Nor do any of the Defendants dispute that the "immediate threat" inquiry looks specifically "at the threat present at the time an officer deploys the force," *see* OB36-37 (citing *Marks v. Bauer*, 107 F.4th 840, 847 (8th Cir. 2024)); KB32 (acknowledging test is "immediate threat"),

though the City and County Defendants try to bring in Mr. Mitchell's earlier conduct, *see* CB37 (vaguely referring to Mr. Mitchell's "conduct on January 16, 17, 18-19").[3] These Defendants also try to penalize Mr. Mitchell for telling Stugelmeyer "fuck you," yet do not even attempt to respond to Mr. Mitchell's precedent holding that use of force cannot be condoned based on verbal disrespect (even when laced with profanity). *Compare* CB40 *with* OB44.

Kennelly, for his part, again relies on *Bernini*, but to no effect. *See* KB32-33. As an initial matter, the passage in *Bernini* he features relates to the reasonableness of the force employed to *disperse* a crowd, not to effectuate an arrest, as is the case here, and so the Court did not analyze the facts under the three-part test for force-incident-to-arrest. *See* 665 F.3d at 1006 (discussing force "to direct the crowd away from the intersection"). And because the force was not used to effectuate an arrest,

[3] If the Defendants' briefs can be read to suggest that Mr. Mitchell's awareness of earlier uses of force by officers is relevant, *see* CB35 ("Mitchell admits he observed officers utilize force against and arrest protestors…"); KB43 (similar), they provide no caselaw to support the outlandish notion that a plaintiff being on notice of the possibility that unconstitutional force is used against them somehow insulates the defendants who use said excessive force.

the record in *Bernini* did "not show that any of the defendants directly used force against any of the plaintiffs"—again, quite unlike this case. *Id.*

To the extent that *Bernini* looked to a general "threat" facing the officers in assessing the reasonableness of the force used to redirect the crowd, the facts are distinguishable, as the bolded language in Kennelly's brief indicates. *See* KB33. In *Bernini*, the officers encountered "a growing crowd [that] intended to penetrate a police line." 665 F.3d at 1006. The group, "advancing behind two large signs," began "moving toward the officers." *Id.* at 1001. The officers instructed them to "back up, back up!," but "the group continued to" advance toward the officers, during which time "the officers reported that numerous objects—including rocks and bags containing feces—were propelled at them." *Id.* And even after the bulk of the group was redirected, the Court noted that "[t]he video footage reveal[ed] . . . that some people" continued to pose a threat to the officers. *Id.* at 1006. That is a far cry from this case, where, for example, Welk testified that the protestors were not threatening officers or targeting officers with violence, testimony supported by indisputable video evidence at the time Mr. Mitchell was shot. App.527, R.Doc. 111-5, at 68 (263:1-20); App.699, R.Doc. 111-12, at 1:20:03-1:20:40.

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In sum, where the two shooting officers testified that Mr. Mitchell did not pose a threat at the time they shot him, the district court erred in concluding that it was reasonable for those very same officers to believe Mr. Mitchell posed a threat, *see* App.1133, R.Doc. 134, at 17, and Defendants' provide no meaningful argument to the contrary.

D. The facts, read in Mr. Mitchell's favor, do not support the district court's conclusion that Mr. Mitchell was resisting arrest and fleeing.

A jury could also conclude that a Mr. Mitchell was not actively resisting arrest or attempting to evade arrest by flight. *See* OB45-51. Both Piehl and Welk testified that Mr. Mitchell was not doing either when they shot him. *See* App.937, R.Doc. 111-17, at 47 (177:11-13); App.523, R.Doc. 111-5, at 64 (247:1-12). And the video confirms Mr. Mitchell was standing still when he was shot. App.699, R.Doc. 111-12, at 1:20:03-1:20:40. The district court interpreted the facts against Mr. Mitchell when it characterized him as "admitting" to fleeing, *see* OB46-47 & n.11; erroneously concluded Mr. Mitchell holding a shield constituted "active physical resistance," *see* OB47-48; and relied on distinguishable precedent involving arrests of suspects who had fled

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previously or who were actually fleeing at the moment of the use of force, *see* OB49-51.

Defendants' few arguments are unpersuasive. First, the City and County Defendants cite the identical cases as did the district court to support its "flight" conclusion, *compare* CB41-42, *with* App.1135, R.Doc. 134, at 19, which Mr. Mitchell already explained are not on-point, *see* OB49-51, OB48 n.12.

Second, the Defendants try to piece together facts to suggest Mr. Mitchell was resisting arrest: protestors were told to leave the bridge and that they were subject to arrest for protesting; Mr. Mitchell saw officers use force against other protestors and saw other protestors being arrested; and officers earlier in the evening told protestors to "back up" or else less-lethal force might be used. CB43; KB36, 28. But note that neither set of Defendants say that Mr. Mitchell *was actually told he was under arrest*. *See also* KB28-29 ("Piehl and Welk . . . explained that immediately before Mitchell was shot they did not hear or remember a specific instruction being given to him about arrest." (emphasis omitted)). This omission speaks volumes, as someone who is not told they are under arrest cannot, by definition, be resisting arrest. *See Small v. McCrystal*,

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708 F.3d 997, 1005 (8th Cir. 2013) ("He was not in flight or resisting arrest. [The officer] had not advised him he was under arrest."); *Poemoceah v. Morton Cnty.*, 117 F.4th 1049, 1055 (8th Cir. 2024) (holding plaintiff "was not resisting arrest or attempting to evade arrest" by flight because "[h]e was not under arrest, and he had been given no command to stay in place").

Third, Kennelly claims that because Mr. Mitchell knew that he was arrestable, that should have been sufficient for him to "turn himself in" and since he did not, it was reasonable to shoot him with bean bag rounds. *See* KB28, 35-36. But Kennelly cites no cases to support this proposition. Perhaps because it is refuted by this Court's precedent.

As a threshold matter, when this Court has considered an individual to be resisting arrest for purposes of assessing the force applied to arrest them (or whether the law was clearly established), the individuals were given specific police commands that amounted to being told they were under arrest: to "put his hands behind his back," *Ehlers v. City of Rapid City*, 846 F.3d 1002, 1011 (8th Cir. 2017), "give [officers] his hands so he could be handcuffed," *Carpenter v. Gage*, 686 F.3d 644, 647

(8th Cir. 2012), or "put his hands on a nearby clothes rack" because "he was under arrest," *Tatum v. Robinson*, 858 F.3d 544, 548 (8th Cir. 2017).

Here, in contrast, there is no testimony to suggest that Mr. Mitchell was told anything of the sort before Welk and Piehl fired upon him. *Cf. Bernini*, 665 F.3d at 1002 ("After the officers contained the crowd in the park, they announced multiple times by loudspeaker that all persons were under arrest and must sit down and place their hands on their heads."). Nor was he given a verbal warning that force would imminently be used against him if he failed to comply. *See Ehlers*, 846 F.3d at 1008 (officer "warning [plaintiff] that he was going to use the taser"); *Carpenter*, 686 F.3d at 650 (plaintiff "does not dispute that he was . . . warned about the use of the taser").

And even if Mr. Mitchell *had* been told he was under arrest, or asked to surrender or put his hands above his head, this Court's caselaw is clear that much more than just ignoring law enforcement commands is required to constitute *active*, *physical* resistance, such that more-than-*de-minimis* force is justified. Mr. Mitchell explained in his opening brief that mere "[n]oncompliance . . . do[es] not amount to active resistance." *Tatum*, 858 F.3d at 549; OB48 (citing additional cases). Defendants

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respond to none of this. In the end, as in *Mitchell I*, the evidence does not "suggest that Mitchell . . . fled or resisted arrest." 28 F.4th at 898.

E. The severity of Mr. Mitchell's injury also indicates the force used was excessive.

The severity of Mr. Mitchell's injury is a further factor that indicates that the force used here was excessive. *See* OB51-52. Indeed, Mr. Mitchell's injuries have not changed since the complaint stage of this case, when this Court remarked in *Mitchell I* that "the severity of Mitchell's injuries confirms what any reasonable officer in the defendants' position would have known: to fire a shotgun loaded with lead-filled bean bag at a person, regardless of whether one is aiming at the person's face, is to use more than *de minimis* force against the person." 28 F.4th at 898-99 (cleaned up).

Kennelly does not respond at all to this point, *see generally* KB30-31, and the City and County Defendants only describe the extent of Mr. Mitchell's injuries as "regrettable" but "not dispositive," CB30. True, the extent of Mr. Mitchell's injuries does not overtake the rest of the *Graham* test, but it "is certainly relevant insofar as it tends to show the amount and type of force used." *McDaniel v. Neal*, 44 F.4th 1085, 1090 (8th Cir. 2022).

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F. Defendants' other arguments fail.

i. Mr. Mitchell does not need to definitively prove which defendant shot him in the eye.

The City and County Defendants assert that they are entitled to summary judgment because there is no evidence to establish either Welk or Piehl shot Mitchell in the eye. *See* CB31-33. This is incorrect for the reasons Mr. Mitchell explained in his opening brief. A reasonable jury could find that the officers' use of less-than-lethal force *at all* was excessive, regardless of where they aimed or where their shots landed. *See Mitchell I*, 28 F.4th at 898 (noting officers were not "aiming at Mitchell's face," but were aiming at him, and holding that Mr. Mitchell had stated a claim "regardless of whether [Piehl and Welk] aim[ed] at [Mr. Mitchell]'s face"). So Welk's testimony that he saw his shot strike Mr. Mitchell in the leg, *see* CB33, does not somehow entitle him to summary judgment.[4] And even on the face of Piehl's brief, it is clear there are factual issues regarding where Piehl's shot landed. *See* CB33 (Piehl "was aiming above Mitchell's left knee . . . but could not see" where his

[4] At any rate, a jury could refuse to credit this self-serving testimony from Welk (a Bismarck Police officer), which is inconsistent with Mr. Mitchell's statement at his deposition that he thought the officer who shot him in the eye was wearing a Bismarck Police uniform. *See* CB33.

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shot landed, and raising "the *possibility* of a deflection off of Mitchell's shield" (emphasis added)).

This Court's opinion in *White v. Jackson*, 865 F.3d 1064 (8th Cir. 2017), makes clear that Mr. Mitchell is entitled to make his case before a jury, who will determine whether either of the defendants used excessive force in arresting him. In *White*, this Court held that the district court had improperly granted summary judgment to five officers who were involved in arresting plaintiff DeWayne Matthews. *Id.* at 1080. During Matthews's arrest, "officers kicked, punched, and pepper sprayed him" and "held his head underwater," but at summary judgment the plaintiff was "unable to identify the defendants who performed these acts." *Id.* This Court rejected the defendants' arguments "that a § 1983 excessive force plaintiff must be able to personally identify his assailants to avoid summary judgment," and held that "identify[ing] [the defendants] as officers who personally participated in [plaintiff's] arrest" was sufficient to survive summary judgment. *Id.* at 1081; *see also Burbridge v. City of St. Louis*, 2 F.4th 774, 782 (8th Cir. 2021) (relying on *White* to conclude personal participation requirement met for excessive force claim and noting "the case against" the officer there "appears even stronger since

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he, unlike [the officer in *White*] admitted to using force during [plaintiff's] arrest"). The same result should yield here.

The City and County Defendants cite a different part of *White*, in which the Court affirmed the grant of summary judgment on the excessive force claims of two other plaintiffs relating to the use of rubber bullets. CB31. But there, the undisputed evidence indicated that it could not *possibly* have been the named police officers who shot the plaintiffs, because the officers "had not been carrying nonlethal firearms at the time." *White*, 865 F.3d at 1076. For that claim, unlike Matthews's claim (and Mr. Mitchell's) where several officers were actually implicated, there was no role for the jury to play.

ii. This is not a claim of mere negligence.

Mr. Mitchell's claim is not one of negligence or about negligent conduct, as the City and County Defendants suggest (at CB44); rather, Mr. Mitchell alleges that shooting him with lead-filled rounds under the circumstances was an unreasonable use of force.

Young v. City of Little Rock, 249 F.3d 730 (8th Cir. 2001), which the Defendants cite, is distinguishable. There, the plaintiff's warrantless arrest was triggered by a police communications operator incorrectly

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verifying a warrant for the plaintiff, and this "mistake was not deliberate," but was rather "occasioned . . . by the speed with which officers in [the operator's] position were required to act." *Id.* at 734. Here, in contrast, shooting Mr. Mitchell was both deliberate and not the result of any need for a quick-fire response. *See also* OB52-53 (dispelling district court suggestion that defendants acted at most negligently). Indeed, both Piehl and Welk shot Mr. Mitchell because they were told to target him.

iii. Defendants made no effort to temper or limit the force used.

An "effort made by the officer to temper or limit the amount of force" used is relevant to assessing the reasonableness of force. *Cravener v. Shuster*, 885 F.3d 1135, 1138 (8th Cir. 2018). Kennelly argues this works in Defendants' favor, *see* KB36, but in fact the opposite is true. To start, the officers could have given direct instructions to Mr. Mitchell that he was under arrest, and to sit down and put his hands above his head. *See Bernini*, 665 F.3d at 1002. There were "no circumstances that prevented the officers from issuing such an order." *Poemoceah*, 117 F.4th at 1055. Or, the officers could have given warnings that they would be using less-lethal force imminently if Mr. Mitchell did not submit himself for arrest. *See, e.g.*, *Tatum*, 858 F.3d at 550 (noting that officer "warned [plaintiff]

he would use pepper spray if he did not calm down" and plaintiff "was given an opportunity to comply"). They did neither. Rather, at some point in the night they decided it was time to arrest Mr. Mitchell—though they didn't tell him that—and started firing.

It is also telling that the officers "had ample time in which to" try these other approaches, and "there is nothing to indicate that [defendants were] faced with the need to make any split-second decisions." *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009). Nor, until they started firing, could the "circumstances fairly be described as constituting a 'tense, uncertain, and rapidly evolving' situation." *Id.* (quoting *Graham*, 490 U.S. at 397).

* * *

As set out above and in the opening brief, the facts read in Mr. Mitchell's favor show that, as in *Mitchell I*, he was not suspected of serious crimes, did not pose an immediate threat, and was not resisting arrest or fleeing when Piehl and Welk shot him with lead-filled bean bag rounds. The district court thus erred in granting summary judgment to Defendants, and a jury will need to assess Mr. Mitchell's excessive force claim.

II. The district court erred in granting qualified immunity to Defendants Piehl and Welk on Mr. Mitchell's excessive force claim.

Mr. Mitchell explained in his opening brief that, once the facts are viewed in his favor, the law was clearly established here. *See* OB57-61. *Mitchell I* noted that this Court has "held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." 28 F.4th at 898 (collecting cases). And just last fall, in *Poemoceah*, a case arising out of the same set of protests, this Court again concluded that for years it has been clear that an individual that had not committed serious crimes, poses no threat, and was not resisting arrest cannot be subjected to more than *de minimis* force. 117 F.4th at 1055.

Defendants' arguments on this front are not persuasive. The City and County Defendants argue that clearly established law did not prohibit "the use of drag stabilized bean bag rounds to apprehend and arrest an individual who is engaged in serious crimes in the presence of officers and who is actively resisting arrest and evading arrest by flight, and agitating a crowd to engage in continued criminal conduct which

threatens the safety of officers." CB46. Kennelly would require Mr. Mitchell to "identify controlling precedent that an officer faced with a subject who has been breaking the law continuously for hours, who is part of a group violently rioting, and who has evaded arrest and continues to resist it, must not escalate even to a single bean bag round." KB37. There are several errors here. First, as explained above, the factual premises of these statements are not supported by a fair reading of the record. *See supra* Parts I.B-E.

Second, the Defendants caricature the qualified immunity inquiry, suggesting that a case on the same set of facts is required to have put the Defendants on notice. But that is wrong. In *Mitchell I*, for example, this Court defined the inquiry at the appropriate level of generality, noting that this Court has "held time and again that, if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." 28 F.4th at 898. That is, where *none* of the *Graham* factors point in favor of the force, a reasonable officer would know that more-than-*de-minimis* force is constitutionally excessive.

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And if Defendants are asserting that Mr. Mitchell needed to identify a case about *this specific type* of force, *see* CB46 (referencing "drag stabilized bean bag rounds"); KB37 (referencing "bean bag round"), that argument is also foreclosed by precedent. To defeat qualified immunity, "there is no requirement that [the plaintiff] must find a case where the very action in question has previously been held unlawful." *Karels v. Storz*, 906 F.3d 740, 747 (8th Cir. 2018) (cleaned up); *see also Mountain Pure, L.L.C. v. Roberts*, 814 F.3d 928, 932 (8th Cir. 2016) (holding "precise factual correspondence" with prior cases is not required); *see also Newman v. Guedry*, 703 F.3d 757, 763-64 (5th Cir. 2012) ("Lawfulness of force . . . does not depend on the precise instrument used to apply it. Qualified immunity will not protect officers who apply excessive and unreasonable force merely because their means of applying it are novel.").

Indeed, in *Mitchell I*, this Court did not require a case with the same type of force, since this Court's "cases clearly establish that gentler treatment than this constitutes more than *de minimis* force." 28 F.4th at 898 (citing cases involving tackling, "leg sweep," and takedown); *see also Wilson v. Lamp*, 901 F.3d 981, 990 (8th Cir. 2018) (rejecting defendants'

argument "that this court has not recognized excessive force under similar facts" and holding caselaw clearly establishes that "an officer's use of force against a suspect who was not threatening and not resisting is unreasonable" (cleaned up)).

The Defendants also seek to rely on *Bernini*, *see* CB47; KB38, but even on their descriptions of *Bernini* it is evident these arguments fail. *See* CB47 (*Bernini* concerned "riot conditions"); KB32-33 ("large urban protest"); KB33 (quoting *Bernini*'s discussion of "growing crowd [that] intended to penetrate a police line"). Because the facts in *Bernini* were meaningfully different, as Mr. Mitchell explained in his opening brief, it has no bearing here. *See* OB59-60.

Kennelly attempts to refute Mr. Mitchell's reliance on *Marks v. Bauer*, 107 F.4th 840 (8th Cir. 2024), but to no end. *See* OB60-61; KB37-38. At the outset, Mr. Mitchell is not arguing that *Marks* itself "create[d] a clearly-established right," *see* KB38-39, but *Marks* is instructive because it identifies the right in the same way this Court did in *Mitchell I*. Specifically, drawing on *Montoya* (from 2012), *Johnson v. Carroll*, 658 F.3d 819, 827-28 (8th Cir. 2011), and *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir. 2009), all of which predate the force in question here, and

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Westwater, which looked back to a similar time period, the Court in *Marks* concluded that "[o]ur cases clearly established that it was objectively unreasonable to use more than *de minimis* force to seize a non-threatening misdemeanant who was not fleeing, resisting arrest, or ignoring officer commands." 107 F.4th at 850-51. Kennelly's attempt to distinguish *Marks* on its facts fails—there, like here, "the crowd was demonstrating no hostility toward the officers when [the officer] shot [plaintiff] in the face, who was unarmed." *Id.* at 850.[5]

On the facts appropriately construed, the law was clearly established.

III. The district court erred in granting summary judgment on Mr. Mitchell's claims against Sergeant Kennelly, Sheriff Kirchmeier, and Morton County.

The district court did not address the merits of Mr. Mitchell's claims against Sergeant Kennelly, Sheriff Kirchmeier, or Morton County, concluding simply that because neither Piehl nor Welk used excessive force against Mr. Mitchell, the claims against the other defendants

[5] *Marks*'s discussion of *Bernini* hurts Kennelly's case rather than helps it, *see* KB38; the Court noted in *Marks* that in *Bernini*, "officers suspected the individuals intended on penetrating the police line," *Marks*, 107 F.4th at 850. There are no such facts here.

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"necessarily fail." App.1141, R.Doc. 134, at 25. The court did not examine these claims on the merits. Because there are triable issues on Mr. Mitchell's excessive force claim, this Court should reverse the district court's grant of summary judgment on his failure-to-intervene and *Monell* claims. The Defendants' arguments to the contrary are not persuasive.

A. Triable issues exist as to Mr. Mitchell's failure-to-intervene claim against Sergeant Kennelly.

Kennelly argues on appeal that this Court should affirm the grant of summary judgment against him on the merits of the claim against him, despite the fact that the district court did not reach this issue. *See* KB39-45. But "[b]ecause the district court did not decide the merits of th[is] claim[], which [is] heavily fact-based," this Court should "decline to consider them in the first instance." *Alliant Techsystems, Inc. v. Marks*, 465 F.3d 864, 873 (8th Cir. 2006). Indeed, where this Court has held that triable issues exist as to an excessive force claim, it has also remanded failure-to-intervene claims for trial. *See, e.g.*, *Krout v. Goemmer*, 583 F.3d 557, 566 (8th Cir. 2009); *Bell v. Kansas City Police Dep't*, 635 F.3d 346, 347 (8th Cir. 2011); *cf. Irvin v. Richardson*, 20 F.4th 1199, 1209 (8th Cir. 2021) (declining to resolve "fact intensive" issues "as a matter of law on

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this summary judgment record and therefore includ[ing] these issues in reversing the grant of summary judgment").

Should this Court choose to address Kennelly's alternative arguments in the first instance, it should reject them. A reasonable jury could find that Kennelly "had reason to know that excessive force would be or was being used" and "had both the opportunity and the means to prevent the harm from occurring." *Mitchell I*, 28 F.4th at 901. Viewed in the light most favorable to Mr. Mitchell, the record supports that Kennelly was the supervising officer on the scene, App.623, R.Doc. 111-7, at 25 (91:14-24); that he knew officers under his command were using dangerous weapons against people without prior warning, App.644-45, R.Doc. 111-7, at 46-47 (176:21-177:11); that he ordered the push in which Mr. Mitchell was injured, App.632, R.Doc. 111-7, at 34 (128:15-23); and that he ordered the officers to engage in the shoot-first, arrest-second protocol that resulted in Mr. Mitchell's injuries, App.638, R.Doc. 111-7, at 40 (149:10-150:10). In other words, a jury could conclude, as described by the Court in *Mitchell I*, that "Kennelly had reason to know that the officers would continue to deploy [bean bag rounds]" and that, "as 'scene commander,' Sergeant Kennelly had the opportunity and means to stop

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the use of the bean bags." 28 F.4th at 901. At a minimum, a jury could conclude that Kennelly "allow[ed his] subordinates to use excessive force against" Mr. Mitchell, a non-threatening member of a "peaceful crowd." *Baude*, 23 F.4th at 1074.

Kennelly's assertions to the contrary are the result of a skewed and cherry-picked read of the record. First, Kennelly claims that he "never directed any officer to deploy their weapon on the night in question, and . . . never directed an officer to use less-lethal munitions during the entirety of the DAPL protest." KB41. However, Kennelly testified that he personally "deployed [his] less-lethal weapon during the DAPL protest," and stated that "as forward command, [he instructed that] the use of force can be used while effecting arrest . . . ." App.622-23, R.Doc. 111-7, at 24-25 (88:12-89:6). Second, Kennelly claims that he did not observe that excessive force was being used, *see* KB42, but when asked at his deposition whether he "observe[d] less-lethal weapons . . . being deployed at Standing Rock," he responded in the affirmative, App.622, R.Doc. 111-7, at 24 (86:16-19). Third, Kennelly protests that he had no opportunity to intervene, but a jury will need to decide this question; Kennelly

conceded that he could have ordered officers to mitigate their use of force, but chose not to do so. App.638, R.Doc. 111-7, at 40 (149:14-150:10).

Nor is Kennelly entitled to protection from qualified immunity. KB44-45. This Court already addressed this question in *Mitchell I*. *See* 28 F.4th at 902 ("[I]t was clearly established that the force allegedly used was excessive . . . and that supervising officers with the opportunity and means to prevent the use of excessive force have a duty to do so."). As a matter of Eighth Circuit precedent, it was clearly established long before January 2017 that "an officer who fails to intervene to prevent the unconstitutional use of excessive force by another officer" is liable if that officer (1) "observed or had reason to know that excessive force would be or was being used," and (2) "had both the opportunity and the means to prevent the harm from occurring." *Nance v. Sammis*, 586 F.3d 604, 612 (8th Cir. 2009) (citations omitted). It was also clearly established that "participat[ing] in the tactical decision" that leads to the excessive force is sufficient for a failure-to-intervene claim. *Id.* A jury must decide Mr. Mitchell's claim against Kennelly.

B. This Court should remand for consideration of Mr. Mitchell's *Monell* claim on the merits.

Because there are triable issues on Mr. Mitchell's excessive force claim, and because the district court relied solely on its (erroneous) grant of summary judgment on this force claim to likewise grant summary judgment on Mr. Mitchell's *Monell* claim, this Court should vacate the district court's *Monell* decision as well. *See e.g.*, *Partridge v. City of Benton*, 70 F.4th 489, 493 (8th Cir. 2023) ("Because the district court relied on its excessive-force conclusion to dismiss Partridge's *Monell* and state-law claims, those decisions are vacated.").

The County and City Defendants make no independent argument on this issue, only asserting that Mr. Mitchell's *Monell* claim should fail because his excessive force claim fails. CB48. For the reasons explained above and in Mr. Mitchell's opening brief, that is incorrect as to the merits of his excessive force claim. What is more, Mr. Mitchell pointed out in his opening brief that *Monell* claims do not always rise and fall with individual liability, *see* OB62 (citing *Speer v. City of Wynne*, 276 F.3d 980, 986 (8th Cir. 2002)). For example, the district court's (incorrect) conclusion that Mr. Mitchell's excessive force claim against Piehl failed because he could not prove Piehl shot him does not mean that Mr.

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Mitchell's rights were not violated. In that situation, a "decision exonerating the individual government actor[] can be harmonized with a concomitant . . . decision imposing liability on the municipal entity," and individual liability is not the end of the game for *Monell* purposes. *Speer*, 276 F.3d at 986.

CONCLUSION

This Court should reverse the district court's grant of summary judgment on the merits of Mr. Mitchell's excessive force claim and on the basis of qualified immunity, and vacate and remand on the remaining claims.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) because this brief contains 6,386 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

/s/ Devi Rao
Devi Rao

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2025, I caused the foregoing *Reply Brief of Appellant Marcus Mitchell* to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Devi Rao
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