No. 21-1071

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARCUS MITCHELL,

Plaintiff-Appellant,

v.

MORTON COUNTY SHERIFF KYLE KIRCHMEIER, 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

OPENING BRIEF OF APPELLANT MARCUS MITCHELL

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ORAL ARGUMENT REQUESTED

RULE 28A(i)(1) SUMMARY OF THE CASE

Marcus Mitchell alleges that he was peacefully protesting, standing with his hands in the air, and speaking the words "Mni Wiconi," Lakota for "water is life," when law enforcement officials singled him out, aimed directly at him, and fired lead-filled "bean-bag" rounds at his face. The rounds shattered his eye socket and lodged in his eye. Officers arrested Mr. Mitchell and charged him with two misdemeanors, but the charges were dismissed pursuant to a pretrial diversion agreement. Mr. Mitchell then brought the present civil rights suit. The district court dismissed all of Mr. Mitchell's claims with prejudice.

This appeal involves core constitutional concerns, including the First Amendment right to peacefully protest on matters of grave public concern and the Fourth Amendment right to be free from excessive force. It includes several questions of first impression, including whether a pretrial diversion agreement triggers the bar of *Heck v. Humphrey*, 512 U.S. 477 (1994). In light of the complexity and importance of this case, appellant respectfully requests 20 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1A, the undersigned counsel for Marcus Mitchell hereby certifies that Marcus Mitchell is an individual.

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STATEMENT OF JURISDICTION

Plaintiff-Appellant Marcus Mitchell brought this action under 42 U.S.C. § 1983, alleging violations of his First, Fourth, and Fourteenth Amendment rights and state law. AA9-10 ¶¶1-3. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), and 1367(a). It entered a final order dismissing all claims on December 10, 2020. AA43. On January 8, 2021, Mr. Mitchell timely appealed. AA96. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Whether allegations that law enforcement singled out Mr. Mitchell as an "agitator," fired at his face, and arrested him during a peaceful protest state claims for retaliation in violation of the First Amendment, and, if so, whether the doctrine of *Heck v. Humphrey*, 512 U.S. 477 (1994), bars Mr. Mitchell's claims, even though he was never convicted of a crime.

- *Snyder v. Phelps*, 562 U.S. 443 (2011)
- *Heck v. Humphrey*, 512 U.S. 477 (1994)
- *Peterson v. Kopp*, 754 F.3d 594 (8th Cir. 2014)
- *Nieves v. Bartlett*, 139 S. Ct. 1715 (2019)

II. Whether the Fourth Amendment prohibited officers from firing lead-filled "bean-bag" rounds at Mr. Mitchell when he had his hands in the air; was not fleeing; and was, at worst, suspected of a misdemeanor—and, if so, whether Defendants may be held liable.

- *Small v. McCrystal*, 708 F.3d 997 (8th Cir. 2013)
- *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012)
- *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009)
- *Rohrbough v. Hall*, 586 F.3d 582 (8th Cir. 2009)

III. Whether the district court erred by ignoring the full context of discrimination by law enforcement officials against Indigenous groups in dismissing Mr. Mitchell's Equal Protection Clause claim.

- *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977)
- *Wilson v. Northcutt*, 441 F.3d 586 (8th Cir. 2006)

STATEMENT OF THE CASE

I. Factual Background.

In November of 2016, Mr. Mitchell, a member of the Navajo Nation, traveled to North Dakota to join the Standing Rock Sioux Tribe in protesting the Dakota Access Pipeline. AA11 ¶9; AA14 ¶23; AA18-19 ¶43. These peaceful protesters, known as "water protectors," objected to the Dakota Access Pipeline because it threatened the local tribes' vital water supply and encroached on historic treaty land. AA10 ¶4; AA13 ¶19.

Peaceful protests against the Dakota Access Pipeline, often in the form of group prayer, took place from April 2016 through February 2017. AA10 ¶4; AA15 ¶26. Although protesters posed no threat, law enforcement officers deployed severe force—rubber bullets, tear gas, and fire hoses spraying freezing water—against protesters without warning or notices to disperse. AA16-18 ¶¶32-41. That indiscriminate use of force took place against a historical backdrop of law enforcement targeting Indigenous communities. For instance, law enforcement officials have scheduled highway patrols to target Indigenous motorists, shut down

public roadways to harass members of local tribes, and subjected Indigenous activists to constant surveillance. AA27-29 ¶¶88-93.

Among the types of force law enforcement deployed were "bean-bag" munitions. Though the name evokes a children's toy, "bean-bag" rounds are serious weapons, lead-filled munitions fired from a 12-gauge shotgun. AA17 ¶37; AA19 ¶45; AA26-27 ¶83. Such so-called "less-lethal" munitions are capable of causing severe injury, including organ damage and permanent physical disability, even when properly deployed. AA24 ¶77; AA25-26 ¶¶80-83. When improperly deployed, they are lethal. AA25-26 ¶¶80-83. Manufacturers of "bean-bag" rounds warn that they should not be used unless law enforcement officers have been trained, and experts ranging from POLICE Magazine to former Los Angeles Police Department commanders have underscored the need for training to ensure that the munitions are never aimed at the head. AA24-27 ¶¶73-87. The officers using these lead-filled "bean-bag" rounds against the water protectors were not trained in their use. AA24¶73; AA26-27 ¶¶84-87.

In the early morning hours of January 19, 2017, a group of water protectors were gathered at the Backwater Bridge, a public road that

connected the water protectors' camp to a nearby highway. AA15 ¶¶24-25; AA19 ¶44. The water protectors protested by praying, chanting, and playing drums. AA19 ¶44. When Mr. Mitchell arrived at the Backwater Bridge to join the protest, he saw law enforcement officers shooting at unarmed water protectors. AA20 ¶49. He placed himself in front of the women and elders in the group to shield them, about 20 feet away from the officers. AA20 ¶¶49-51. He kept his hands above his head to make clear that he was unarmed, and he spoke the words "Mni Wiconi," meaning "water is life" in the Lakota language. AA20 ¶¶51, 53.

Although Mr. Mitchell was not armed and not threatening anyone, four law enforcement officers aimed their 12-gauge shotguns at him, counted down to coordinate their fire, and shot several lead-filled "bean-bag" rounds directly at him. AA20-21 ¶¶52-54. Law enforcement records later revealed that Mr. Mitchell had been deemed an "agitator" and that law enforcement officers were instructed to single him out as part of an effort to end the protests. AA20 ¶52.

The "bean-bag" rounds hit Mr. Mitchell in the face, head, and leg. AA21 ¶56. One round entered his left eye socket, shattering the orbital wall of his eye and cheekbone and tearing open the skin on the left side

of his face. AA21 ¶57. The round lodged in his eyeball, with strands of the round protruding from his eye socket. AA21 ¶57. Mr. Mitchell collapsed on the ground, face-down, and struggled to breathe as blood filled his nostrils. AA21 ¶59.

Officers pinned him with their knees and loaded Mr. Mitchell—who was unable to stand on his own or see through the blood on his face—into a police vehicle. AA21-22 ¶¶60-61. Mr. Mitchell was eventually transported to a hospital. AA22 ¶62. When he arrived, he fainted. AA22 ¶62. He awoke shackled to a hospital gurney, having undergone surgery to remove the lead-filled "bean-bag" round from his eye. AA22 ¶¶62-63. Two North Dakota law enforcement officials kept him shackled to that gurney for a day and a half, interrogating him about the water protectors' plans and concealing his whereabouts from friends and family frantically searching for him. AA22 ¶¶64-65.

Mr. Mitchell was charged with two misdemeanors, criminal trespass and obstruction of a government function. AA23 ¶68. Those charges were dismissed pursuant to a pretrial diversion agreement. AA23 ¶70.

Mr. Mitchell's left eye, as well as his vision, hearing, and sense of smell, are irreparably damaged, and he has chronic, debilitating pain on the left side of his face despite several medical procedures. AA22-23 ¶66.

II. Proceedings Below.

Mr. Mitchell filed a civil rights suit in the U.S. District Court for the District of North Dakota. He named the four officers who had fired directly at him: Morton County Sheriff's Deputy George Piehl, Bismarck Police Officer Tyler Welk, and John Does 1-2 ("Individual Defendants"). AA9 ¶1. He also named Morton County and the Morton County Sheriff, Kyle Kirchmeier, in his official capacity. AA9 ¶1. And he named North Dakota Highway Patrol Sergeant Benjamin Kennelly, the "scene commander" acting under Sheriff Kirchmeier's direction when Mr. Mitchell was shot. AA9¶1; AA12-13 ¶11.

Mr. Mitchell alleged that the Individual Defendants violated his First, Fourth, and Fourteenth Amendment rights; that Morton County was liable for the Fourth and Fourteenth Amendment violations under a theory of municipal liability; and that Defendant Kennelly was also liable

for the Fourth Amendment violation by failing to intervene.[1] AA29-39 ¶¶94-153.

The district court dismissed all of Mr. Mitchell's claims as to all Defendants. AA94. And it did so without explaining why the dismissal was with prejudice and without affording Mr. Mitchell leave to amend. *Id.*

SUMMARY OF THE ARGUMENT

I.A.1. Mr. Mitchell alleges that he was shot and arrested while peacefully protesting an issue of public concern on a public bridge—quintessential protected conduct under the First Amendment. **2.** The district court found that Mr. Mitchell's conduct was not protected by the First Amendment because it thought there was probable cause to believe Mr. Mitchell was committing a misdemeanor. But it is black-letter law that probable cause to believe someone is committing a crime does not erase the protections of the First Amendment. **3.** And in any event, at

[1] Mr. Mitchell also raised civil conspiracy and state law claims against those defendants and against the City of Bismarck. AA34-35 ¶¶119-126; AA36-37 ¶¶132-139; AA39-41 ¶¶154-167. Those claims are not at issue on this appeal except insofar as the dismissal of those claims should not have been with prejudice.

this preliminary stage, the district court should not have assumed there was such probable cause.

B. Mr. Mitchell's complaint stated two First Amendment claims. First, he alleged that he was shot in the face with a lead-filled "bean-bag" round because he spoke the words "Mni Wiconi" (Lakota for "water is life") and because he was perceived as an "agitator" of the protests—a retaliatory use-of-force claim. Second, he alleged that he was arrested for the same reason—a retaliatory arrest claim. Both sets of allegations are sufficient to proceed to discovery.

C. The district court found that *Heck v. Humphrey*, 512 U.S. 477 (1994), barred Mr. Mitchell's First Amendment claims because he entered into a pretrial diversion agreement to dismiss two misdemeanor charges. *Heck* holds that a § 1983 suit must be dismissed where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence" unless the plaintiff can show the "termination of the prior criminal proceeding in [his] favor." 512 U.S. at 484. *Heck* is triply inapplicable here. **1.** Mr. Mitchell's pretrial diversion agreement is not a "conviction or sentence." **2.** Even if there were a conviction, a judgment in Mr. Mitchell's favor on the First Amendment

claims in this suit would not "necessarily imply the invalidity" of any such conviction. **3.** And a pretrial diversion agreement *is* a "termination of the prior criminal proceeding" in Mr. Mitchell's "favor."

II.A. Mr. Mitchell alleges that law enforcement officials fired lead-filled "bean-bag" rounds at him from 20 feet away as he was standing with his hands above his head. That conduct violated the Fourth Amendment: If Mr. Mitchell was committing any crime at all, it was a nonviolent misdemeanor; he did not attempt to flee or resist arrest; there was no reason to believe he was a threat (indeed, his raised hands showed he was unarmed); and Defendants used force that shattered his eye socket and left him permanently disabled.

B. Individual Defendants are liable for shooting Mr. Mitchell because the contours of his Fourth Amendment right were clearly established. Some dozen published cases of this Court define the right at issue as the right of a nonthreatening suspected misdemeanant to be free of more-than-de-minimis physical force. All have denied qualified immunity to officers who violate that right.

C. Morton County is liable for the Fourth Amendment violation under any of three theories of liability. **1.** First, Sheriff Kirchmeier, who

ordered the shooting, was a final policymaker for Morton County whose decisions properly bind that municipality. **2.** Second, Morton County equipped its officers with lead-filled "bean-bag" rounds but provided no training on how to fire those munitions, contrary to standard law enforcement practice and to the manufacturers' own instructions. **3.** Third, Morton County had an informal custom of responding to peaceful protests with disproportionate force.

D. Finally, Defendant Kennelly is liable for the Fourth Amendment violation because he was the scene commander on the night in question, had a chance to stop the shooting but chose not to.

III.A. Mr. Mitchell alleges that law enforcement officials responded to the mostly Indigenous Dakota Access Pipeline protests differently than they responded to other protests; that Defendants and their colleagues engaged in other forms of racial profiling against Indigenous citizens; and that the events of January 2017 played out against a historical backdrop of law enforcement discrimination against Indigenous communities. Viewed in the light most favorable to Mr. Mitchell, those allegations are sufficient to state a claim for a violation of the Equal Protection Clause at this early stage.

B. And Morton County is also liable, given that its deliberate indifference to a pattern of discriminatory conduct caused Mr. Mitchell's rights to be violated.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss a plaintiff's complaint. *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007). In conducting this review, this Court must "accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party." *Cole v. Homier Distributing Co.*, 599 F.3d 856, 861 (8th Cir. 2010).

ARGUMENT

I. Mr. Mitchell Stated Claims For Violations Of The First Amendment.

A. Public Prayer And Protest Are Protected By The First Amendment.

Mr. Mitchell was protesting a matter of public concern through prayer and assembly on a public road. His conduct falls within the core of the First Amendment's protections. The district court found otherwise only because it thought there was probable cause to believe Mr. Mitchell had committed a crime and that such probable cause somehow erased

any First Amendment protection. But that dangerous proposition is not the law—the First Amendment's protection cannot be erased by a State misdemeanor law. And, in any event, at this preliminary stage, drawing all inferences in Mr. Mitchell's favor, the district court should not have assumed there *was* probable cause to believe Mr. Mitchell had committed any crimes.

1. Sitting at the heart of our country's constitutional liberties, the First Amendment prohibits the government from abridging the freedom of speech or assembly. *Phelps-Roper v. City of Manchester*, 697 F.3d 678, 686 (8th Cir. 2012) (citing *Gitlow v. New York*, 268 U.S. 652, 666 (1925)). Speech and assembly regarding "matters of public concern . . . occup[y] the highest rung of the hierarchy of First Amendment values." *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011). Protest and public prayer are "indispensable" forms of speech and assembly. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984). And public streets "occupy a 'special position in terms of First Amendment protection' because of their historic role as

sites for discussion and debate." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014).[2]

Mr. Mitchell's participation in the Dakota Access Pipeline protests at the Backwater Bridge thus lies at the core of the First Amendment's protections. Mr. Mitchell and other water protectors assembled to oppose the destruction and pollution of ancestral land, including sacred places, burial sites, and historic treaty lands—a matter of grave public concern. AA11 ¶9; AA13 ¶19. They conveyed their views through protest and public prayer—"indispensable" forms of speech and assembly. AA15 ¶26; AA19 ¶44. And that protest and prayer took place on a public road, the original and most important of public fora. AA15 ¶25.

2. The district court believed that Mr. Mitchell's speech and public prayer would be entitled to no First Amendment protection if "there was probable cause to find he committed the crimes of criminal trespass and interference with a government function." AA68. But probable cause to believe someone has engaged in criminal conduct does not strip them of

[2] *See also Frisby v. Schulz*, 487 U.S. 474, 480 (1988) ("[P]ublic streets [are] the archetype of a traditional public forum."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets . . . may rest, they have immemorially been held in trust for the use of the public.").

their First Amendment rights. The district court's mistake to the contrary is both incorrect and dangerous.

Cases from this Court and the Supreme Court make clear that an individual retains his First Amendment rights even where there is probable cause to believe he is committing a crime. In *Peterson v. Kopp*, for instance, this Court found that plaintiff's act of asking a police officer for his badge number was still protected by the First Amendment even though there was probable cause to arrest plaintiff for trespass. 754 F.3d 594, 598-99, 602-03 (8th Cir. 2014). In *Lozman v. City of Riviera Beach*, the Supreme Court found that the plaintiff had engaged in protected criticism of public officials even though there was probable cause to arrest him for disorderly conduct. 138 S. Ct. 1945, 1950-51 (2018). True, the existence of probable cause may foreclose liability in some circumstances. But that's not because probable cause strips away the protection of the First Amendment. It's instead because the existence of probable cause may make it impossible to prove causation—to prove that retaliation, rather than the underlying crime, is the reason for a

government action. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1723-24 (2019).[3]

To hold otherwise would effectively erase the protections of the First Amendment. As Justice Gorsuch warned in *Nieves*, "History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly, and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." *Id.* at 1730 (Gorsuch, J., concurring). To strip a speaker of First Amendment protection merely because there is probable cause for an arrest would eviscerate the First Amendment.

3. In any event, the district court's assumption that Defendants had probable cause to believe Mr. Mitchell was committing trespass or government obstruction is at odds with the complaint.

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[3] The district court cited *Adderley v. Florida*, 385 U.S. 39 (1966), for the proposition that someone engaged in criminal conduct cannot also be engaged in First Amendment protected speech. *See* AA59. But *Adderley* only addresses whether the First Amendment entirely prevents an arrest for expressive conduct in traditionally non-public fora—in that case, on jail grounds. *Adderley*, 385 U.S. at 47-48. Whether Mr. Mitchell engaged in any protected activity at all is an entirely different inquiry.

The trespass statute under which Mr. Mitchell was later charged requires proof that an individual "enter[ed] or remain[ed] in any place so enclosed as manifestly to exclude intruders" and that the individual entered "knowing that that individual is not licensed or privileged to do so." N.D.C.C. § 12.1-22-3(2)(b). Taking the allegations in the complaint as true, and drawing all inferences in Mr. Mitchell's favor, there is no evidence that the Backwater Bridge was "enclosed as manifestly to exclude" Mr. Mitchell, and no evidence that Mr. Mitchell had actual knowledge he was not licensed to be there. The Backwater Bridge is a public bridge connecting the water protectors' camp to the nearest highway, where hundreds of protesters routinely gathered. AA15 ¶25; AA17 ¶37; AA19 ¶44. Based on the allegations in the complaint, there was no reason to believe the Bridge was designated off-limits to pedestrians, let alone that Mr. Mitchell knew it was. AA19 ¶44. And the Defendants shot Mr. Mitchell without any warning that might have given him such actual knowledge. AA16 ¶33.

The district court assumed that because Mr. Mitchell witnessed law enforcement officers using force against other protesters, he should have known he was trespassing. AA68. But of course, law enforcement officers

use force against civilians for many reasons—and sometimes without good reason—not solely because they are trespassing. The mere fact that officers deployed munitions against peaceful protesters does not supply actual knowledge that those protesters are no longer licensed to be on what had theretofore been a public road.

The district court also wrongly assumed that there was probable cause to believe Mr. Mitchell physically obstructed a government function. A person is guilty of that misdemeanor if he "intentionally obstructs, impairs, impedes, hinders, prevents, or perverts the administration of law or other governmental function." N.D.C.C. § 12.1-08-01(1). The criminal complaint alleges that Mr. Mitchell was obstructing Defendants' "attempts to disperse the crowd . . . at the Backwater Bridge." Second Amended Complaint at 2, *State v. Nunez*, No. 30-2017-CR-101 (N.D. S. Cent. Jud. Dist., Feb. 10, 2017). According to the allegations in Mr. Mitchell's complaint, though, it should have been apparent that Mr. Mitchell's intent was not to prevent law enforcement officers from breaking up the crowd; it was instead to shield women and elderly water protectors from harm. AA20 ¶¶48-50; *see* N.D.C.C. § 12.1-02-02(1) (a person engages in conduct "intentionally" if "it is his purpose

to do so"). There was thus no reason to believe Mr. Mitchell was "intentionally" obstructing a government function.

The district court also assumed that Mr. Mitchell's entry into a pretrial diversion agreement to dismiss the trespass and government obstruction charges somehow conceded that he indeed committed those misdemeanors. AA67. That, too, was error. The existence of a pretrial diversion agreement doesn't say anything about the underlying conduct that led to the agreement. A basic pretrial diversion agreement requires only an agreement by "the prosecuting attorney and the defendant," "court[] approval," and "due consideration of the victim's views." N.D. R. Crim. P. 32.2(a)(1). It does *not* indicate that there is any factual basis for the charges filed; a defendant needn't admit as much, a prosecutor needn't prove as much, and a court needn't find as much. *Compare id. with* N.D. R. Crim. P. 11(b)(4) (defendants entering a guilty plea must acknowledge that "facts exist that support the guilty plea" or that "evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime").

True, as the district court pointed out, AA63, to impose "additional conditions" over and above the basic provisions present in every pretrial

agreement, a prosecution must show "a substantial likelihood that a conviction could be obtained." N.D. R. Crim. P. 32.2(a)(2). But there is no reason to believe that there are such "additional conditions" attached to Mr. Mitchell's pretrial agreement. The district court concededly did not have access to the actual agreement; Mr. Mitchell hasn't alleged there are any such conditions; and at this preliminary stage, drawing all inferences in Mr. Mitchell's favor, this Court can't assume there are any.

Mr. Mitchell's protest and prayer on the Backwater Bridge were thus protected by the First Amendment.

B. Defendants Unlawfully Retaliated Against Mr. Mitchell For Exercising His First Amendment Rights.

"[T]he First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in protected speech. *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010). Mr. Mitchell's complaint adequately alleges that Defendants' decisions to shoot him in the face and to subsequently arrest him were retaliation for his protected speech.

1. Retaliatory Use Of Force. A claim for retaliation under the First Amendment has three elements: (a) the plaintiff "engaged in a

protected activity," (b) defendants "took adverse action against him that would chill a person of ordinary firmness from continuing in the activity," and (c) "the adverse action was motivated at least in part by the exercise of the protected activity." *Peterson*, 754 F.3d at 602.

As explained *supra*, § I.A.1, Mr. Mitchell's complaint adequately alleges the first element—that he was engaged in protected activity when he publicly demonstrated against construction of the Dakota Access Pipeline.

Mr. Mitchell has also adequately alleged the second element. This Court has held that the standard for an "adverse action" is quite low in order to adequately protect the sanctity of free speech. In one case, for example, this Court held that the use of pepper spray was enough to chill a person of ordinary firmness. *Peterson*, 754 F.3d at 602. In another, this Court held that even issuing $35.00 in parking tickets was sufficiently chilling to satisfy the "adverse action" requirement. *Garcia v. City of Trenton*, 348 F.3d 726, 729 (8th Cir. 2003). Surely, then, being shot in the eye with lead-filled "bean-bag" rounds—rounds that shattered Mr. Mitchell's orbital wall and cheekbone—also qualifies.

Finally, Mr. Mitchell has pleaded the third element, motive. To prove motive, a plaintiff must show that the protected speech was a "substantial factor" in the retaliation; it need not be the "sole motive." *Baribeau*, 596 F.3d at 481. A plaintiff can prove motive by showing he was "singled-out" for adverse treatment because of his speech. *Kilpatrick v. King*, 499 F.3d 759, 767 (8th Cir. 2007). This Court has cautioned that motive is generally a question for the jury. *Revels v. Vincenz*, 382 F.3d 870, 876 (8th Cir. 2004); *see also Santiago v. Blair*, 707 F.3d 984, 993 (8th Cir. 2013).

The allegations in Mr. Mitchell's complaint comfortably clear this hurdle. Mr. Mitchell was shot while speaking the words "water is life" in the Lakota language. AA20-21 ¶¶53-54. He has also alleged that law enforcement reports revealed a practice of labeling certain water protectors as "agitators" and singling them out for punishment in an attempt to end the protests. AA20 ¶52. And, as alleged in the complaint, there was no other reason to fire at Mr. Mitchell; he had his arms raised above his head to show that he was unarmed. AA20-21 ¶¶53-54. Taking those allegations as true, there is at least a plausible inference that Mr. Mitchell's speech—both the words he spoke immediately before he was

shot and his broader affiliation with the protests—were substantial motivating factors in the Defendants' use of force.

Mr. Mitchell has therefore successfully pleaded a retaliatory use-of-force claim.

2. Retaliatory arrest. As with his retaliatory use-of-force claim, Mr. Mitchell has stated a retaliatory arrest claim. A retaliatory arrest claim requires proof of the same three elements as a retaliatory use-of-force claim—protected conduct, adverse action, and motivation. *Peterson*, 754 F.3d at 602. First, Mr. Mitchell's advocacy against the destruction of Indigenous land and for the preservation of vital water supplies was protected activity. Second, this Court has consistently held that being arrested is a sufficiently "adverse action." *See Hoyland v. McMenomy*, 869 F.3d 644, 657 (8th Cir. 2017).

As to the third element, retaliatory motive, the Supreme Court has explained that retaliatory arrest claims involve "causal complexities" that other types of First Amendment claims don't and has thus identified a limited number of ways that plaintiffs can prove retaliatory motive.[4]

[4] The district court apparently believed that these limitations on proving causation applied to retaliatory use-of-force claims as well. AA71. That

The easiest is to show that no probable cause existed for the arrest. The question of probable cause is an inherently fact-intensive inquiry. For that reason, this Court usually declines to dismiss such claims at a preliminary stage. *See Garcia v. City of New Hope*, 984 F.3d 655, 670 (8th Cir. 2021); *Thurairajah v. City of Fort Smith*, 925 F.3d 979, 985 (8th Cir. 2019). As explained *supra*, § I.A.3, drawing all inferences in Mr. Mitchell's favor, there was no probable cause to arrest him for either trespass or obstruction of a government function.

Alternatively, a plaintiff may show a "premeditated plan to intimidate him in retaliation" for his protected speech. *Lozman*, 138 S. Ct. at 1954. At this preliminary stage, Mr. Mitchell has alleged that, too. He alleges that law enforcement records revealed just such a "premeditated plan" to single out so-called "agitators" whose arrest they believed would stop the protest and chill other water protectors. AA20 ¶52.

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was error; retaliatory use-of-force claims do not involve the same "causal complexities" as retaliatory arrest claims, so no special showing is required to establish a retaliatory motive. *See, e.g.*, *Peterson*, 754 F.3d at 602.

Finally, a plaintiff can show that "otherwise similarly situated individuals not engaged in the same sort of protected speech had not been" arrested. *Nieves*, 139 S. Ct. at 1727. At this preliminary stage, Mr. Mitchell's allegations that law enforcement "particular[ly] punish[ed]" protest "agitators" and that Defendants themselves admitted that the tactics they used against the water protectors were "not typical crowd control tactics" are sufficient to infer that a similarly situated individual, who had not been labeled an "agitator" or who was protesting a different cause would not have been arrested.[5] AA18¶39; AA20 ¶52.

Mr. Mitchell has thus stated a claim on which relief can be granted for retaliatory arrest.

C. *Heck v. Humphrey* Does Not Bar Mr. Mitchell's Claims.

In *Heck v. Humphrey*, the Supreme Court held that a § 1983 suit must be dismissed where "a judgment in favor of the plaintiff would

[5] The district court assumed that Defendants would be entitled to qualified immunity if Mr. Mitchell proved his retaliatory arrest claim by demonstrating that similarly situated individuals not engaged in protected speech were not arrested because the Supreme Court's decision in *Nieves v. Bartlett*, postdated the conduct at issue in this case. AA73-74. But the principle that the government cannot punish someone for their speech when they would not punish "others similarly situated" well predates *Nieves*. *See Osborne v. Grussing*, 477 F.3d 1002, 1006 (8th Cir. 2007).

necessarily imply the invalidity of his conviction or sentence" unless the plaintiff can show the "termination of the prior criminal proceeding in favor of the accused." 512 U.S. at 484 (1994).

The district court held that *Heck* barred all of Mr. Mitchell's First Amendment claims because Mr. Mitchell entered a pretrial diversion agreement. But no part of the *Heck* rule applies to this case. A pretrial diversion agreement is not a "conviction or sentence." Success on Mr. Mitchell's First Amendment claims would not "necessarily imply the invalidity" of anything. And a pretrial diversion agreement constitutes a "termination of the prior criminal proceeding in favor of the accused." *Heck* thus does not bar this suit.

1. There is no "conviction or sentence."

The *Heck* rule, by its terms, only applies where there is a "conviction or sentence" that victory in a § 1983 suit would necessarily invalidate. 512 U.S. at 487. There is no such "conviction or sentence" at issue in this case. Mr. Mitchell entered into a pretrial agreement, thereby *avoiding* the possibility of a conviction. And when the period specified in the pretrial diversion agreement lapsed without further incident, all charges were dismissed.

The district court simply presumed the *Heck* bar was triggered by a pretrial diversion agreement because it believed "it would constitute poor public policy" to find otherwise. AA61. But North Dakota law, not public policy, determines whether a pretrial diversion agreement constitutes a "conviction or sentence" and thus whether it triggers the *Heck* bar.

Start with the North Dakota rule creating pretrial diversion agreements. That rule explains that a pretrial diversion agreement means "the prosecution will be suspended for a specified period after which it will be dismissed." N.D. R. Crim. P. 32.2(a)(1). A conviction can't be obtained without a prosecution, and under the terms of Mr. Mitchell's pretrial diversion agreement, the prosecution was first suspended and then dismissed. As the district court itself noted, it "d[id] not have before it the pretrial diversion agreement." AA64. That's because after the period specified in the pretrial diversion agreement lapsed without further incident, it was as if charges had never been filed.

The North Dakota rule goes on to allow "additional conditions" to be added to pretrial diversion agreements only "upon a showing of substantial likelihood that a conviction *could be obtained*"—proving that

a conviction has not yet been obtained when a pretrial diversion agreement is signed. N.D. R. Crim. P. 32.2(a)(2) (emphasis added). And the rule neither says that pretrial diversions are convictions nor makes any mention of conceding guilt. *Compare id. with* N.D. R. Crim. P. 11(b)(4) (defendants entering a guilty plea must acknowledge that "facts exist that support the guilty plea" or that "evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime").

Unsurprisingly, a pretrial diversion agreement isn't a conviction in the eyes of North Dakota's highest court, either. While the North Dakota Supreme Court allows an appeal from any "judgment of conviction," it does not allow appeals from pretrial diversion agreements. *State v. Abuhamda*, 923 N.W.2d 498, 500-01 (N.D. 2019); *State v. Jorgenson*, 914 N.W.2d 485, 486 (N.D. 2018).

Two other circuits to consider this question have both held that analogous pretrial diversion agreements are not "conviction[s] or sentence[s]" within the meaning of *Heck*. In *Vasquez Arroyo v. Starks*, the Tenth Circuit considered a pretrial diversion agreement under Kansas law. 589 F.3d 1091, 1096 (10th Cir. 2009). The Kansas provisions in

question mirrored the North Dakota rule under which Mr. Mitchell entered into a pretrial diversion agreement. *Compare* Kan. Stat. Ann. § 22-2906 *et seq.* *with* N.D. R. Crim. P. 32.2. Because a diversion agreement "resulted in deferral of prosecution of the offenses at issue," the Tenth Circuit found it was "the opposite of a conviction" and that the *Heck* bar was not triggered. *Vasquez Arroyo*, 589 F.3d at 1095. In *McClish v. Nugent*, the Eleventh Circuit considered a similar pretrial intervention program under Florida law. 483 F.3d 1231, 1251 (11th Cir. 2007). It held that the *Heck* bar did not apply: "[T]o prevail in his § 1983 suit, [plaintiff] would not have to 'negate an element of the offense of which he has been convicted' because he was never convicted of *any* offense." *Id.*

The district court cited to *Gilles v. Davis*, 427 F.3d 197, 208-12 (3d Cir. 2005), and *Roesch v. Otarola*, 980 F.2d 850, 853 (2d Cir. 1992), for the proposition that a pretrial diversion agreement triggers the *Heck* bar. But *Gilles* and *Roesch* analyzed only whether a pretrial diversion agreement constituted a "termination of the prior criminal proceeding in the accused's favor." As the Eleventh Circuit explained, neither circuit considered the fundamental "antecedent" question of "whether *Heck*

applies at all"—that is, whether a pretrial diversion agreement is a "conviction or sentence" in the first place. *McClish*, 483 F.3d at 1251.

Finding that the dismissal of charges pursuant to a pretrial diversion agreement qualifies as a "conviction" would turn *Heck* on its head. The purpose of *Heck* is to prevent conflicting civil and criminal judgments on determinations of guilt. No conflict can exist if there is no criminal judgment. The Supreme Court has rejected the notion that an "anticipated future conviction" could trigger the *Heck* bar, characterizing the idea as a "bizarre extension of *Heck*" that would leave courts to "speculate about whether a prosecution will be brought, whether it will result in conviction, and whether the pending civil action will impugn that verdict." *Wallace v. Kato*, 549 U.S. 384, 393 (2007). Finding that *Heck* applies here would be more bizarre still: Because Mr. Mitchell completed the pretrial diversion agreement, there is no need to even "speculate about whether a prosecution will be brought"; we *know* it will not be—the criminal charges were dismissed with prejudice and the prosecution tossed. As the Eleventh Circuit put the point, "to dismiss this § 1983 claim as barred by *Heck* because of a potential conflict that we

know now with certainty will never materialize would stretch *Heck* beyond the limits of its reasoning." *McClish*, 483 F.3d at 1251-52.

Mr. Mitchell was never convicted, and Mr. Mitchell was never sentenced. *Heck* therefore does not apply.

2. A judgment in Mr. Mitchell's favor would not "necessarily imply" the invalidity of a conviction.

The *Heck* bar does not apply for a second reason. *Heck* bars § 1983 cases only where "a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." 512 U.S. at 487. Even if Mr. Mitchell *had* been convicted on the criminal charges, success on his First Amendment claims would not "necessarily imply the invalidity" of that conviction.

As explained *supra*, § I.A.3, a jury could find that Mr. Mitchell was engaged in protected First Amendment activity whether or not he was also committing a crime. As to Mr. Mitchell's retaliatory use-of-force claim, this Court has explained that there is no "inherent conflict" between claims about the type of force police officers use in effectuating an arrest and a subsequent conviction. *See Colbert v. City of Monticello*, 775 F.3d 1006, 1008 (8th Cir. 2014) (collecting cases).

As to Mr. Mitchell's retaliatory arrest claim, this Court has explained that proof that there was no probable cause *at the time of the arrest*—the critical question for a retaliatory arrest claim—does not "necessarily imply" the invalidity of an ultimate conviction on the same charge. *See Moore v. Sims*, 200 F.3d 1170, 1171-72 (8th Cir. 2000). Alternatively, Mr. Mitchell could prove his retaliatory arrest claim by showing that, despite the existence of probable cause, other similarly situated individuals were not arrested for the same crimes or that he was arrested pursuant to a premeditated plan—showings that, again, would do nothing to undermine a criminal conviction. *See Nieves*, 139 S. Ct. at 1727; *Lozman*, 138 S. Ct. at 1954.

A final note: The *Heck* bar applies by its terms only to "convictions or sentences." But even if it somehow applied to Mr. Mitchell's pretrial diversion agreement, which is neither, it *still* wouldn't matter here: A judgment in Mr. Mitchell's favor in this case wouldn't "necessarily imply the invalidity" of the pretrial diversion agreement, either. As explained *supra*, § I.A.2, a pretrial diversion agreement needs only three things to be valid: an agreement between the defendant and the prosecuting attorney; court approval; and due consideration for the views of the

victim. N.D. R. Crim. P. 32.2(a)(1). Because nothing alleged in Mr. Mitchell's § 1983 suit has anything to do with whether he and the prosecuting attorney reached an agreement, whether the court approved the pretrial diversion agreement, or whether the victim's views were duly considered, *Heck* wouldn't apply.

3. The pretrial agreement was a "termination in favor of the accused."

Heck does not bar Mr. Mitchell's suit for yet a third reason. Even where "a judgment in favor of the plaintiff [in a § 1983 suit] would necessarily imply the invalidity of his conviction or sentence," the suit may still proceed if the plaintiff can show that the proceedings terminated "in favor of the accused." *Heck*, 512 U.S. at 484. This circuit has not yet articulated a test for that "favorable termination" requirement. Because the *Heck* test was derived from the common-law tort of malicious prosecution, the "favorable termination" requirement for purposes of *Heck* can be no more onerous than the "favorable termination" requirement for proving common-law malicious prosecution. In *Laskar v. Hurd*, 972 F.3d 1278 (11th Cir. 2020), Judge Pryor canvassed common-law cases from the eighteenth and nineteenth centuries to conclude that the proper test for "favorable termination" is

"a formal end to a prosecution in a manner not inconsistent with a plaintiff's innocence."[6] *Id.* at 1289.

Mr. Mitchell's pretrial diversion agreement satisfies that test. It formally ended his prosecution by fully dismissing the charges. And it was "not inconsistent with [his] innocence," because it did not require an admission of guilt or a finding that the charges had merit. *Compare* N.D. R. Crim. P. 32.2(a)(1) *with* N.D. R. Crim. P. 11; *see supra*, § I.A.3.

Thus, even if the *Heck* rule applied, it would *still* not bar this suit, because Mr. Mitchell has shown a "favorable termination" of his criminal proceeding.[7]

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[6] The Supreme Court has granted review to decide the proper standard for the favorable termination requirement in malicious prosecution cases. *Thompson v. Clark*, 794 F. App'x 140 (2d Cir. 2020), *cert. granted*, 141 S. Ct. 1513, (2021), *amended*, No. 20-659, 2021 WL 922983 (Mar. 11, 2021).

[7] *Heck* does not apply for yet another reason. Because his prosecution was dismissed pursuant to the pretrial diversion agreement, Mr. Mitchell was never in custody and thus was never able to file a habeas petition challenging that agreement. This Court held in *Newmy v. Johnson*, 758 F.3d 1008 (8th Cir. 2014), that the *Heck* bar applies even where habeas relief is a "*practical* impossibility." *Id.* at 1011 (emphasis added). But this Court has never held that the *Heck* bar applies where habeas is an *actual* impossibility—where, as here, a plaintiff was *never* incarcerated pursuant to a conviction and so *never* had the opportunity to file a habeas petition. It should not do so here. At least five other circuits waive the *Heck* bar when plaintiffs never had recourse to habeas. *See Covey v. Assessor of Ohio Cnty.*, 777 F.3d 186, 197 (4th Cir. 2015); *Cohen v.*

II. Mr. Mitchell Stated Claims For Violations Of The Fourth Amendment.

A. Firing Lead-Filled Rounds From 12-Gauge Shotguns At A Visibly Unarmed Protester Violates The Fourth Amendment.

Mr. Mitchell alleges that Defendants fired lead-filled "bean-bag" rounds from 12-gauge shotguns directly at him as he stood with his hands raised above his head to show he was unarmed. Those allegations are more than sufficient to state a claim under the Fourth Amendment.

The Fourth Amendment prohibits "unreasonable . . . seizures." U.S. Const. amend. IV. The Supreme Court has identified three factors key to

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Longshore, 621 F.3d 1311, 1316-17 (10th Cir. 2010); *S.E. v. Grant Cnty. Bd. Of Educ.*, 544 F.3d 633, 638 (6th Cir. 2008); *Nonnette v. Small*, 316 F.3d 872, 877 (9th Cir. 2002); *Huang v. Johnson*, 251 F.3d 65, 75 (2d Cir. 2001).

To find that the *Heck* bar applies even when a plaintiff was never eligible for habeas relief would be to find that those guilty of the lowest-level offenses are most likely to be categorically barred from vindicating their rights, because those low-level offenses are least likely to entail any time in custody and therefore least likely to allow for the filing of a habeas petition. And that unfairness is particularly acute because the *Heck* bar is entirely atextual. Because "such a rule cannot be found in any enacted statute," this Court should be particularly wary of interpreting it to kick plaintiffs out of court through no fault of their own. *Savory v. Cannon*, 947 F.3d 409, 434 (7th Cir. 2020) (en banc) (Easterbrook, J., dissenting); *see also Spencer v. Kemna*, 523 U.S. 1, 21 (1998) (Souter, J., concurring, joined by three other Justices); *id.* at 25 n.8 (Stevens, J., dissenting) (five justices of Supreme Court agree that *Heck* does not apply when petitioner does not have a remedy under habeas).

assessing whether a particular use of force constitutes an unreasonable seizure: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). This Court has added that the severity of the injuries sustained by the victim is also a consideration in evaluating reasonableness. *See Rohrbough v. Hall*, 586 F.3d 582, 586 (8th Cir. 2009); *Montoya v. City of Flandreau*, 669 F.3d 867, 872 (8th Cir. 2012). All four considerations weigh in Mr. Mitchell's favor.

First, the complaint does not allege that Mr. Mitchell committed a crime. Although Mr. Mitchell was subsequently charged with two misdemeanors, those charges were dismissed, and at this preliminary stage, this Court must assume that no probable cause supported them. *See supra*, § I.A.3. And even if there *had* been a basis for the charges, the crimes at issue—nonviolent misdemeanors of trespass and obstruction—would not weigh in favor of using force. *See Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013) (describing disorderly conduct as a "nonviolent misdemeanor" that did not make use of force reasonable).

Second, taking the allegations in the complaint as true, Mr. Mitchell posed no "immediate threat to the safety of the officers or others." He alleges that officers shot him "without cause or provocation," as he was standing with his "hands raised above his head" to show that "he was unarmed and peaceful" and speaking the words "Mni Wiconi," Lakota for "water is life." AA9-10 ¶2; AA20-21 ¶¶51, 53-54. The district court assumed a backdrop of "chaos and tension between protesters and law enforcement," *see* AA56, but that's not what the complaint says. Instead, the complaint alleges—and this Court must assume—that law enforcement engaged in an "increasingly hostile and aggressive" response "*[d]espite* the fact that the water protectors were peacefully protesting." AA10 ¶2.

Third, the complaint clearly alleges that Mr. Mitchell was not "actively resisting arrest or attempting to evade arrest by flight." *See Graham*, 490 U.S. at 396. Rather, Mr. Mitchell was standing still, 20 feet from officers, trying to shield women and elders with his body. AA20 ¶52. And Mr. Mitchell didn't disobey any commands; on the contrary, his complaint suggests that officers had issued no warnings or notices to disperse. AA16 ¶33; AA18 ¶39.

Finally, this Court considers the severity of the plaintiff's injuries. Here, Mr. Mitchell alleges that the lead-filled "bean-bag" rounds shattered the bones surrounding his eye socket and lodged in his eyeball; that the blood filling his face and eyes suffocated and blinded him; and that he is permanently disabled as a result. AA21-23 ¶¶59-63, 66.[8]

Because all of the factors this Court has considered when assessing a Fourth Amendment violation counsel in favor of finding one here, the district court erred in granting Defendants' motion to dismiss Mr. Mitchell's Fourth Amendment claim.[9]

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[8] Indeed, the force used against Mr. Mitchell was so great that it may warrant classification as "deadly force." Such force can be used *only* if there is a "threat of serious physical harm, either to the officer or to others." *Tennessee v. Garner*, 471 U.S. 1, 11 (1985). While lead-filled "bean-bag" rounds are often called "less-lethal munitions," they are in fact capable of causing serious bodily harm and even death. AA25-26 ¶¶17-18 (documenting seven such instances in recent years); *cf. Mercado v. City of Orlando*, 407 F.3d 1152, 1160 (11th Cir. 2005) (characterizing "less-lethal" weapon as deadly force when aimed at the head). Not even Defendants argued that Mr. Mitchell posed a "threat of serious physical harm" to anyone, so if lead-filled "bean-bag" rounds *are* "deadly force," their use against Mr. Mitchell clearly violated the Fourth Amendment.

[9] Defendants argued that an excessive force claim "cannot be supported by mere negligent or grossly negligent conduct." Dkt. 25 at 29. Several of the cases cited for that proposition interpret the Fourteenth Amendment's substantive due process provision, not the Fourth Amendment. *Id.* The others simply restate the Supreme Court's unremarkable rule that an *accidental* use of force does not form the basis

B. Individual Defendants Are Liable For That Fourth Amendment Violation.

Officers are entitled to qualified immunity only if they did not have "fair warning" that their conduct was unconstitutional. *Tolan v. Cotton*, 572 U.S. 650, 656 (2014). As relevant here, that warning can come from Supreme Court precedent, this Court's precedent, or a "robust consensus of persuasive authority" defining the contours of a constitutional right. *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134-36 (8th Cir. 2020). Because qualified immunity is an intensely factual inquiry, it should not be granted at the motion to dismiss stage unless an entitlement to qualified immunity is apparent on the face of the complaint. *Mathers v. Wright*, 636 F.3d 396, 399 (8th Cir. 2011); *see also Solomon v. Petray*, 795 F.3d 777, 791 (8th Cir. 2015) (noting that "limited discovery" may be appropriate to resolve qualified immunity inquiry).

Although the constitutional right in question should not be defined at a high level of generality, "precise factual correspondence" is not required. *Mountain Pure, L.L.C. v. Roberts*, 814 F.3d 928, 932 (8th Cir.

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for a Fourth Amendment violation. *Id.* Mr. Mitchell does not allege that he was shot when Defendants tripped over their 12-gauge shotguns; he alleges that they acted "intentionally, with malice." AA30 ¶22.

2016). Here, the right in question is the right of a nonthreatening suspected misdemeanant to be free of more-than-de-minimis physical force. Some dozen published cases in this circuit have articulated the right at that level of specificity.[10] And each of those cases, dating back to

[10] *See Neal v. Ficcadenti*, 895 F.3d 576, 582 (8th Cir. 2018) ("In June 2012, the state of the law would have given a reasonable officer fair warning that using physical force against a suspect who was not resisting or threatening anyone was unlawful."); *Rokusek v. Jansen*, 899 F.3d 544, 548 (8th Cir. 2018) ("[S]everal cases [decided by 2015] establish that every reasonable official would have understood that he could not throw [plaintiff]—a nonviolent, nonthreatening misdemeanant who was not actively resisting—face-first to the ground."); *Small*, 708 F.3d at 1005 ("It was unreasonable for [defendant] to use more than de minimis force against [plaintiff]" where plaintiff "was charged with nonviolent misdemeanors," "did not pose an immediate threat to the safety of the officers or others," and "was not in flight or resisting arrest."); *Montoya*, 669 F.3d at 873 ("[T]he contours of the right at issue were sufficiently clear to inform a reasonable officer in [defendant's] position it was unlawful for him to perform a 'leg sweep' and throw to the ground a nonviolent, suspected misdemeanant who was not threatening anyone, was not actively resisting arrest, and was not attempting to flee."); *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012) ("[T]he general law prohibiting excessive force in place at the time of the incident was sufficient to inform an officer that use of his taser on a nonfleeing, nonviolent suspected misdemeanant was unreasonable."); *Johnson v. Carroll*, 658 F.3d 819, 828 (8th Cir. 2011) ("At the time of this incident, the law was sufficiently clear to inform a reasonable officer that it was unlawful to throw to the ground and mace a nonviolent, suspected misdemeanant who was not fleeing or herself resisting arrest, who posed little or no threat to anyone's safety, who never received verbal commands to remove herself, and whose only action was to engage in a protective maneuver."); *Shannon v. Koehler*, 616 F.3d 855, 864 (8th Cir.

2006, concluded that such a right was clearly established, denying qualified immunity to officers that violated it.

This case falls squarely within the rule that an officer may not use more-than-de-minimis force against a nonthreatening misdemeanant. Officers fired lead-filled "bean-bag" rounds at Mr. Mitchell, shattering his eye socket—at least as much force as in similar cases where this Court has denied qualified immunity. *See, e.g.*, *Brown v. City of Golden Valley*, 574 F.3d 491 495 (8th Cir. 2009) (2-3 seconds of Taser to upper arm); *Rohrbough*, 586 F.3d at 585 (punched by officers); *Montoya*, 669 F.3d at 870 (officers kicked suspect's leg). Mr. Mitchell alleges that he was unarmed, had his hands in the air, and was standing 20 feet from officers—rendering Mr. Mitchell even less threatening than suspects in other cases where this Court has denied qualified immunity. *See, e.g.*,

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2010) ("Long before September 13, 2006, this court (among others) had announced that the use of force against a suspect who was not threatening and not resisting may be unlawful."); *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."); *see also Rohrbough*, 586 F.3d at 586-87; *Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002); *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1996).

Neal v. Ficcadenti, 895 F.3d 576, 578 (8th Cir. 2018) (suspect reported to have a gun and was acting "somewhat erratically"); *Rohrbough*, 586 F.3d at 585 (plaintiff shoved police officer); *Shannon v. Koehler*, 616 F.3d 855, 858 (8th Cir. 2010) (suspect had punched a woman in a bar; cursed at police officers, ordering them out of the bar; and was within arm's length of officers). And even assuming that Mr. Mitchell *was* a suspected misdemeanant, *but see supra*, § I.A.3, he was suspected of a crime that was no more serious than those at issue in this Court's prior cases. *See, e.g.*, *Rokusek v. Jansen*, 899 F.3d 544, 546 (8th Cir. 2018) (DUI); *Small*, 708 F.3d at 1002 (disorderly conduct, failing to disperse, unlawful assembly, and interference with official acts).[11]

The district court apparently assumed that because there were other people on the bridge with Mr. Mitchell, those dozen cases clearly establishing the right of a nonthreatening misdemeanant to be free from

[11] Defendants argued that Mr. Mitchell invited the force by placing himself between elderly protesters and the officers firing on them. Dkt. 25 at 31-32. But precedent makes clear that a citizen does not forfeit his clearly established constitutional right to be free from excessive force simply because he interposes himself between police and the person they are attempting to seize. *See Johnson*, 658 F.3d at 823-24, 827 (plaintiff's excessive force claim survived summary judgment, notwithstanding fact she "bear-hugged" the suspect whom officers were attempting to arrest, positioning herself between suspect and officers).

more-than-de-minimis force were inapposite. That was error. For starters, several of this Court's prior cases involve officers encountering groups of people. *See, e.g.*, *Small*, 708 F.3d at 1002 (officers were responding to a "large disturbance" at 1:30 a.m., involving 30 to 50 people); *Johnson v. Carroll*, 658 F.3d 819, 824 (8th Cir. 2011) ("quite large and very hostile" crowd was "loudly protesting" police conduct); *Neal*, 895 F.3d at 578 (scene, captured on video, "was chaotic"). This Court has never suggested that the *Graham* analysis melts away when an officer is faced with more than one person.

In addition, a "robust consensus of cases of persuasive authority" from this Court's sister circuits make clear that an individual's Fourth Amendment rights don't dissipate just because they are part of a protest. At least five circuits have denied qualified immunity in cases where officers use force against a particular nonthreatening plaintiff who is part of a larger protest—enough to establish a "robust consensus" on this point.[12]

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[12] *See, e.g.*, *Bus. Leaders In Christ v. Univ. of Iowa*, 991 F.3d 969, 984-86 (8th Cir. 2021) (finding a robust consensus based on opinions from three circuits); *Cole*, 959 F.3d at 1134-36 (four circuits); *Chestnut v. Wallace*, 947 F.3d 1085, 1090-91 (8th Cir. 2020) (four circuits); *Z.J. by & through*

The Sixth Circuit's opinion in *Ciminillo v. Streicher*, 434 F.3d 461 (6th Cir. 2006), is illustrative. There, the plaintiff attended a street party at which the crowd began setting fires in the street and throwing bottles at police officers and civilians. *Id.* at 463. Officers ordered the crowd to disperse. *Id.* Ciminillo walked toward the officers with his hands raised above his head. *Id.* An officer shot Ciminillo with "bean-bag" rounds. *Id.* The Sixth Circuit held that the officer was not entitled to qualified immunity because, even in the context of a riot, the officer "was on notice that it is unreasonable to use beanbag propellants against individuals who pose no immediate risk to officer safety." *Id.* at 469.

Like the plaintiff in *Ciminillo*, Mr. Mitchell had his hands raised above his head, visibly showing that he was unarmed, when he was shot with "bean-bag" munitions. And the crowd in *Ciminillo*—which actually posed a threat, unlike the peaceful protesters depicted in Mr. Mitchell's complaint—did not change the analysis; the key inquiry was whether the individual suspect who was targeted for violence posed a threat, and

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Jones v. Kansas City Bd. of Police Comm'rs, 931 F.3d 672, 683-85, 690 (8th Cir. 2019) (two circuits); *Turner v. Arkansas Ins. Dep't*, 297 F.3d 751, 759 (8th Cir. 2002) (two circuits).

because he did not, the Sixth Circuit denied qualified immunity. Four other circuits have similarly held.[13]

The district court cited to *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012), to deny qualified immunity. Both that case and this one involved protests, but the similarities end there. The *Bernini* case was about injuries that protesters sustained as police officers engaged in crowd control techniques necessary to stave off a "large-scale urban riot." *Id.* at 1001-03 (referencing video evidence in summary-judgment record). This Court said no fewer than three times that it was *not* dealing with a case where force was used against any particular person. *See, e.g.*, *id.* at 1006 ("The record does not show that any of the defendants directly used force against any of the plaintiffs.").

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[13] *See Edrei v. Maguire*, 892 F.3d 525, 544 (2d Cir. 2018) (at motion to dismiss stage, denying qualified immunity to officers who used long range acoustic device to disperse non-violent protesters who were disrupting traffic); *Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 59-60 (1st Cir. 2008) (denying qualified immunity where officers pepper sprayed plaintiffs as "crowd control" tactic); *Fogarty v. Gallegos*, 523 F.3d 1147, 1152 n.4, 1161-62 (10th Cir. 2008) (denying qualified immunity where officer used "pepper balls"—rifle-fired projectiles that release mace upon impact—against peaceful protesters); *Headwaters Forest Def. v. Cnty. of Humboldt*, 276 F.3d 1125, 1131 (9th Cir. 2002) (denying qualified immunity to officers who sprayed protesters with pepper spray during riot).

Were Mr. Mitchell litigating over injuries he suffered incidental to law enforcement efforts to control a riotous crowd on the Backwater Bridge, *Bernini* might be relevant. But in this case, Mr. Mitchell alleges not that he was just part of a crowd that officers were attempting to control, but that officers shot directly at him, because he had been singled out as an "agitator"—and did so amidst an entirely peaceful protest. AA20-21 ¶¶53-54; AA32 ¶108. As the district court in this case acknowledged, *Bernini* deals with when it is "reasonable for [] officers to deploy non-lethal munitions to keep all members of [a] crowd moving," AA58; it has nothing to say about when police officers may deploy potentially lethal munitions against a particular individual.

Because Mr. Mitchell's right as a nonthreatening misdemeanant to be free from more-than-de-minimis force was clearly established, the district court erred in granting qualified immunity to the Individual Defendants.

C. Morton County Is Liable For That Fourth Amendment Violation.

Mr. Mitchell's allegations state a claim for liability against Morton County in at least three ways, none of which Defendants contested below.[14]

1. Final Decisionmaker. First, "a public official's single incident of unconstitutional activity" is sufficient for municipal liability "if the decision is 'taken by the highest officials responsible for setting policy in that area of the government's business.'" *Rynders v. Williams*, 650 F.3d 1188, 1195 (8th Cir. 2011). That "decision" needn't be some sort of written, formal pronouncement; in *Dean v. County of Gage*, for instance, this Court reversed the grant of judgment as a matter of law to a municipality where the "highest official[] responsible for setting policy" was present at various unconstitutional arrests and interrogations and said nothing to stop them. 807 F.3d 931, 942-43 (8th Cir. 2015).

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[14] Mr. Mitchell brought his municipal liability claims against Sheriff Kirchmeier in his official capacity. AA38-39 ¶¶144-53). A suit against an officer in his official capacity "is actually a suit against the entity for which the official is an agent." *Smith v. Conway Cnty.*, 759 F.3d 853, 857 (8th Cir. 2014) (quoting *Elder-Keep v. Aksamit*, 460 F.3d 979, 986 (8th Cir. 2006)).

In this case, Mr. Mitchell alleges, and Defendants do not contest, that Sheriff Kirchmeier was the "highest official[] responsible for setting policy" for the law enforcement response to the Dakota Access Pipeline protests. *Rynders*, 650 F.3d at 1195; AA11 ¶10; AA38 ¶147. He alleges that Sheriff Kirchmeier made the decision that led to his injuries: Sheriff Kirchmeier instructed the other Defendants to "quell the water protectors by any means necessary, including excessive force," and on the night Mr. Mitchell was shot, the scene commander was acting under the direction of Sheriff Kirchmeier when he ordered law enforcement to fire at the water protectors. AA10 ¶5; AA12-13 ¶15; AA19 ¶¶46-47.

Mr. Mitchell also presented circumstantial evidence that the decision to fire upon him that night was ultimately Sheriff Kirchmeier's decision. Law enforcement officers working under Sheriff Kirchmeier's command had engaged in excessive force for months, and Sheriff Kirchmeier had defended that use of force. AA16-18 ¶¶32-41. And law enforcement reports later revealed that Defendants, under the control of Sheriff Kirchmeier, planned to single out and shoot Mr. Mitchell and other "agitators," despite the fact that they were protesting peacefully. AA20 ¶52.

The district court held that Mr. Mitchell failed to state a claim for this theory of municipal liability because he did not allege a "guiding principle." AA87-88. But that confuses Mr. Mitchell's "final decisionmaker" theory of liability with his theories of liability for a municipal custom, discussed below. In contrast to allegations of a custom or policy, "[i]t is plain that municipal liability may be imposed" for even "a single decision by municipal policymakers." *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986); *see also Buzek v. Cnty. of Saunders*, 972 F.2d 992, 996 (8th Cir. 1992). Here, Sheriff Kirchmeier's decision to respond to the "water protectors' peaceful protest" on January 18, 2017 by dispatching officers and "command[ing]" them to "fire at the water protectors" is itself a sufficient basis for liability. AA19 ¶¶44-45. The district court erred in dismissing this theory of municipal liability.

2. Failure to Train. Mr. Mitchell also alleged that Morton County is liable because it equipped its officers with lead-filled "bean-bag" rounds, and expected them to fire those potentially lethal munitions from 12-gauge shotguns, but failed to train them on using such munitions. A municipality is liable for a constitutional violation on a failure-to-train theory where a plaintiff alleges that "the failure to train amounts to

deliberate indifference to the rights of persons with whom the police come into contact" and the failure to train caused the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 388-90 (1989). Mr. Mitchell's allegations more than meet that standard.

Mr. Mitchell has alleged that Morton County was "deliberate[ly] indifferen[t]" to the Fourth Amendment rights of protesters with whom its officers come into contact. Deliberate indifference may be shown in two ways. Mr. Mitchell has done both.

First, a plaintiff may show a "pattern of injuries" that should have put a decisionmaker "on notice that a new program is called for." *Bd. of Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 407-08 (1997). In this case, Mr. Mitchell alleged that law enforcement officials in the Morton County Sheriff's Office "routinely and indiscriminately used bean bag guns and other less-lethal weapons at unsafe distances and without precise aim." AA27 ¶87. He detailed four incidents in the five months leading up to the shooting at issue here where officers unreasonably used impact munitions, including lead-filled "bean-bag" rounds, against entirely peaceful protesters, causing serious injuries. AA17 ¶¶35-38. And decisionmakers within the Sheriff's Office were well aware of those

incidents; for instance, Sheriff Kirchmeier issued multiple statements regarding the use of those munitions. AA18 ¶39. At this preliminary stage, drawing all inferences in Mr. Mitchell's favor, that's sufficient to infer that Morton County was "on notice" that it needed to train police on the use of lead-filled "bean-bag" rounds, yet took no action. *See Ware v. Jackson Cnty.*, 150 F.3d 873, 883 (8th Cir. 1998) (jail director's knowledge of allegations that officer committed sexual misconduct against two inmates sufficient to establish deliberate indifference).

Second, a plaintiff may also show deliberate indifference where "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." *City of Canton*, 489 U.S. at 390. The Supreme Court gave the example of a failure to train officers in how to properly apprehend a fleeing felon: Where a city "has armed its officers with firearms, in part to allow them to accomplish" those apprehensions, the need to train them on the constitutional limitations on that task "can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference.'" *Id.* at 390 n.10.

The same applies in this case. Mr. Mitchell has alleged that Morton County "armed its officers" with lead-filled "bean-bag" munitions and 12-gauge shotguns "in part to allow them to accomplish" the task of quelling the protests at the Backwater Bridge. AA24 ¶73; AA27 ¶¶85-87. It was "obvious to any qualified and reasonably competent" officer that "bean-bag" guns "are dangerous and can cause serious bodily harm"; indeed, manufacturers of these weapons specifically advise that the weapons "should only be used by law enforcement officers who have successfully completed formal and adequate training in their appropriate use." AA24-25 ¶78; AA27 ¶85; *see also* AA24 ¶¶74-77; AA25-27 ¶¶79-84 (documenting similar warnings from experts, law enforcement magazines, model policies, reports, and news coverage). And yet Morton County failed to provide that training. AA27 ¶86.

In addition to alleging deliberate indifference, Mr. Mitchell adequately alleged causation. Causation is generally a question of fact that cannot be resolved on a motion to dismiss. *S.M. v. Lincoln Cnty.*, 874 F.3d 581, 589 (8th Cir. 2017); *see also J.K.J. v. Polk Cnty.*, 960 F.3d 367, 384-85 (7th Cir. 2020) (en banc). Here, it is at least plausible that better training might have taught officers that they needed to be careful when

firing not to hit a suspect's face, thereby preventing Mr. Mitchell's injuries. AA25 ¶¶80-81; AA27 ¶85.

Mr. Mitchell's allegations thus state a claim that Morton County is liable for his Fourth Amendment injuries on a failure-to-train theory.

3. Custom of Using Excessive Force. Mr. Mitchell's complaint alleges yet a third theory of municipal liability. Morton County has a policy or custom of using excessive force against peaceful protesters. AA10 ¶5; AA16 ¶¶32-34. Liability under such a theory requires (i) a policy or custom, that is, either an official rule or a pattern of conduct[15]; (ii) "[d]eliberate indifference to or tacit authorization of such conduct . . . after notice to the officials"; and (iii) that plaintiff was injured "by acts pursuant to the governmental entity's custom." *Ware*, 150 F.3d at 880.

Here, Mr. Mitchell has shown a pattern of excessive force. He alleges that over the fall and winter of 2016-17, officers used increasing and unreasonable force against peaceful protesters, identifying at least

[15] The district court below characterized the standard as "the existence of a continuing, widespread, persistent pattern." AA88. But this Court has explained that the words "continuing," "widespread," and "persistent" "merely lay[] out the common characteristics of the word 'pattern' and [are], therefore, surplusage." *Parrish v. Luckie*, 963 F.2d 201, 206 (8th Cir. 1992).

four specific instances over a five-month period. AA16¶32; AA17 ¶¶35-38. He also alleges deliberate indifference: The Sheriff himself knew that protests were being stopped "by any means necessary," issued full-throated endorsements of the excessive force, and ultimately commanded its use. AA10 ¶5; AA18 ¶39; AA19 ¶¶44-47. And a jury could conclude that the custom of excessive force caused Mr. Mitchell's injuries, because officers were acting pursuant to a command to use "any means necessary" to stop the protests and because Morton County's endorsements of excessive force predictably begot more excessive force. *See Ware*, 150 F.3d at 885 (finding it "axiomatic that unpunished crimes tend to breed more criminal behavior").

The district court dismissed this claim because it held that Mr. Mitchell failed to substantiate the unconstitutionality of prior law enforcement misconduct. AA88-89. For starters, at this early stage, it is enough for Mr. Mitchell to "allege facts which would support the existence of an unconstitutional policy or custom," as this Court recognizes that "a plaintiff may not be privy to the facts necessary to accurately describe or identify any policies or customs which may have

caused the deprivation of a constitutional right." *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 614 (8th Cir. 2003).

In any event, Mr. Mitchell *has* alleged that the pattern of force he describes consisted of incidents that violated the Fourth Amendment. As explained *supra*, § II.A-B, it has long been established that using anything more than de minimis force against a nonthreatening misdemeanant violates the Fourth Amendment. Accepting Mr. Mitchell's telling, as this Court must, the Morton County Sheriff's Office led law enforcement officials in using more-than-de-minimis force—rubber bullets, pepper spray, sponge bullets, explosive munitions, and freezing water—against entirely peaceful protesters. AA16-18 ¶¶32-41. Drawing all inferences in Mr. Mitchell's favor, he has sufficiently alleged municipal liability for the violation of his Fourth Amendment rights.

D. Defendant Kennelly Is Liable For That Fourth Amendment Violation.

Finally, Defendant Benjamin Kennelly—the "scene commander" the night Mr. Mitchell was shot—is liable for the excessive force used against Mr. Mitchell because he failed to intervene to prevent it. AA19 ¶¶45-47; AA21 ¶58.

This Court has recognized the "clearly established" principle 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). In *Nance*, for instance, this Court held that an officer who "fail[ed] to take action to deescalate the situation" was liable for failing to intervene. *Id.*

In this case, Mr. Mitchell's allegations create a plausible inference that Kennelly "had reason to know that excessive force would be used." He was both the scene commander and assigned the "Forward Command" position, AA19 ¶¶46-47, giving him the "means to prevent the harm from occurring." Not only did he fail to prevent that harm, he actually directed his officers to fire upon unarmed protesters and is therefore liable under the Fourth Amendment. *See id.*

III. Mr. Mitchell Stated A Claim For A Violation Of The Equal Protection Clause.

A. Mr. Mitchell's complaint alleges that violently targeting and shooting him, viewed against the backdrop of generations of

discrimination against Indigenous communities in North Dakota, violated the Equal Protection Clause. In order for Mr. Mitchell to prevail on this claim, he must plead enough facts to show that the Defendants' conduct, first, was motivated by a discriminatory purpose and, second, had a discriminatory effect. *See United States v. Armstrong*, 517 U.S. 456, 465 (1996).

Equal protection claims rarely feature direct evidence. The Supreme Court has explained, and this Court has reiterated, that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including . . . that the law bears more heavily upon one race than another." *Rogers v. Lodge*, 458 U.S. 613, 618 (1982). Courts must properly analyze historical context, look at circumstantial evidence of intent, and carefully scrutinize the "sequence of events leading up to" the challenged action. *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977).

Mr. Mitchell has pleaded both components of an equal protection claim. Starting with discriminatory purpose, Mr. Mitchell has alleged a historical backdrop and a sequence of events from which discriminatory purpose may be inferred, especially at this early stage. Generations of

law enforcement discrimination against Indigenous groups in North Dakota cannot be untangled from the Defendants' hostile response to the Dakota Access Pipeline protests. AA27-28 ¶¶88-89.

In recent times, law enforcement officials have deliberately scheduled highway patrols to police more heavily when Indigenous persons are more likely to be on the roads. AA27-28 ¶89. They strategically blocked the one roadway connecting an Indigenous community with essential services, including the nearest major hospital, and they maintained that blockade in the face of multiple blizzards and sub-zero temperatures. AA28-29 ¶¶91-92. The Morton County Sheriff's Office even escorted school buses full of white children through camps of Indigenous protesters to suggest that those peaceful protesters were dangerous. AA28 ¶90. These practices have led thousands to call for an end to discriminatory policing by Morton County law enforcement. AA27-28 ¶89; AA29 ¶93.

In addition, this Court has held that where defendants have no other explanation for their conduct, a finding of purposeful discrimination may be inferred. In *Wilson v. Northcutt*, for instance, the plaintiff alleged that various city officials failed to maintain a drainage

ditch constructed on her property because of racial animus. 441 F.3d 586, 591 (8th Cir. 2006). This Court allowed the claim to proceed past summary judgment, holding that "[t]he failures to respond to [plaintiff's] facially legitimate complaints, to correct a harmful condition seemingly caused by [defendants'] incompetence, and to explain those failures to act create a reasonable inference of unconstitutional motive." *Id.* The same is true here. As explained *supra*, § II.A, there is no legitimate explanation for firing lead-filled "bean-bag" rounds at Mr. Mitchell's face when he had his arms raised to demonstrate that he was unarmed. The complaint at least "create[s] a reasonable inference of unconstitutional motive"—that Defendants fired at Mr. Mitchell because he was Indigenous, because he was associated with a protest bound up in the rights of Indigenous citizens, because of the words he spoke in the Lakota language, or all three.

The district court believed Mr. Mitchell had not made a showing of discriminatory effect. It dismissed Mr. Mitchell's Equal Protection Clause claim because "he did not identify a 'specific comparator to show he was treated differently from others similarly situated.'" AA75.

As an initial matter, the district court was wrong to presume that every Equal Protection Clause claim requires such a "comparator." In the specific context of race-based selective prosecution, the Supreme Court has held that most such cases will require evidence regarding treatment of similarly situated individuals (though even in those cases, other forms of proof may suffice). *Armstrong*, 517 U.S. at 469 & n.3; *Nieves*, 139 S. Ct. at 1733 (Gorsuch, J., concurring). But as Justice Gorsuch explained in *Nieves v. Bartlett*, the heightened standard of proof in selective prosecution cases rests on principles of "separation of powers and federalism." 139 S. Ct. at 1733 (Gorsuch, J., concurring). By contrast, a comparator may not be necessary in the "less formal setting of police arrests," where "presumptions of regularity and immunity that usually attach to official prosecutorial decisions do not apply equally," and "comparative data about similarly situated individuals may be less readily available." *Id.* at 1733-34.

In any event, Mr. Mitchell *has* alleged a "comparator." The district court held that he failed to do so because he did not allege that law enforcement officials inflicted severe force only on Indigenous protesters while avoiding any non-Indigenous protesters mixed in among the 200

individuals at the Backwater Bridge that night. AA77-78. But non-Indigenous protesters in a largely Indigenous crowd during a protest focused on tribal sovereignty aren't the relevant "similarly situated" individuals. Instead, the relevant comparator is a non-Indigenous participant in a different protest—one that did not have to do with Indigenous rights—who was visibly unarmed and peacefully demonstrating on an issue of public concern. Drawing all inferences in his favor, Mr. Mitchell's complaint suggests *that* person would not have been subjected to violence and arrest. Indeed, by Defendants' own admission, their response to the Dakota Access Pipeline protests was "not typical." AA18 ¶39. Particularly in light of substantial evidence of discriminatory law enforcement policies, such an allegation is at least sufficiently plausible to survive a motion to dismiss.

B. Mr. Mitchell has sufficiently alleged that Morton County is also liable for that Equal Protection Clause violation because he has shown a "pattern of misconduct," "[d]eliberate indifference . . . or tacit authorization," and causation. *Ware*, 150 F.3d at 880, 884. Mr. Mitchell's allegations of discriminatory law enforcement tactics and targeted surveillance establish a "pattern of misconduct." *Id.* The facts alleged by

Mr. Mitchell support an inference that the custom of discriminatory policing against Indigenous communities was "so widespread or flagrant" that the County "should have known" about it. *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 461 (8th Cir. 2009); *see Riis v. Shaver*, 458 F. Supp. 3d 1130, 1199 (D.S.D. 2020), *appeal dismissed*, No. 20-1958, 2020 WL 6580487 (8th Cir. Aug. 17, 2020). And "it is logical to assume that continued official tolerance" of discriminatory policing against Indigenous communities caused Mr. Mitchell's treatment. *Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990). Thus, Mr. Mitchell's claim against the County for its custom of discriminatory policing did not fail as a matter of law.

* * *

Throughout its decision, the district court "violate[d] the familiar axiom that on a motion to dismiss, inferences are to be drawn in favor of the non-moving party." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 595 (8th Cir. 2009). Where the complaint alleged no fewer than six times that the protests were peaceful and that law enforcement responded with unwarranted escalation, the district court conjured a picture of "continuing chaos and tension between protestors and law enforcement."

Compare AA14 ¶22; AA15 ¶26; AA16 ¶¶32-33; AA17 ¶38; AA19 ¶¶44, 46 *with* AA56. Where the complaint alleged only that charges were dismissed pursuant to a pretrial agreement, the district court decided—concededly without "Mr. Mitchell's exact agreement in front of it"—that the agreement must have contained additional conditions triggering the *Heck* bar (conditions that are optional under North Dakota law and that, as a matter of fact, were absent from Mr. Mitchell's agreement). *Compare* AA23 ¶70 *with* AA63, 65-67. And where Mr. Mitchell alleged that he was peacefully protesting on a public bridge alongside hundreds of others, the district court assumed not only that the bridge was no longer open to the public but that Mr. Mitchell had actual knowledge of that closure and was thus guilty of trespass, based solely on an affidavit filed in a different protester's case. *Compare* AA15 ¶25; AA17 ¶37; AA19 ¶44, *with* AA65-67, 68.

At the very least, the district court erred in dismissing Mr. Mitchell's complaint with prejudice. "Dismissals with prejudice are drastic and extremely harsh sanction[s]." *Bergstrom v. Frascone*, 744 F.3d 571, 575 (8th Cir. 2014). The district court here issued a dismissal with prejudice even though none of the Defendants requested such a

dismissal—and did so without any sort of explanation. At a minimum, this Court must allow Mr. Mitchell to amend his complaint.

CONCLUSION

For the foregoing reasons, the district court's decision dismissing Mr. Mitchell's complaint should be reversed.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,933 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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 proportionally spaced typeface using Microsoft Word 2016 in 14-point Century Schoolbook typeface.

Date: May 14, 2021

s/ Easha Anand
Easha Anand

CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus free.

Dated: May 14, 2021

s/ Easha Anand
Easha Anand

CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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