No. 24-1285

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MATTHEW LOCKE,

Plaintiff-Appellant,

v.

COUNTY OF HUBBARD, *et al.*,

Defendants-Appellees.

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

PLAINTIFF-APPELLANT'S OPENING BRIEF

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RULE 28A(i)(1) SUMMARY AND REQUEST FOR ARGUMENT

While Matthew Locke was peacefully protesting, Hubbard County Sheriff Cory Aukes and Chief Deputy Sheriff Scott Parks used extreme and unnecessary force on sensitive nerves in Mr. Locke's head and neck, which caused him severe pain and ongoing physical injuries, including tinnitus and partial facial paralysis. Mr. Locke sued Sheriff Aukes and Chief Deputy Parks in their individual and official capacities, alleging that they violated his rights under the Fourth Amendment to the United States Constitution. He also sued the individual defendants and Hubbard County under Minnesota tort law. The district court dismissed the entire action under Federal Rule of Civil Procedure 12(b)(6).

This appeal involves core constitutional concerns, including the Fourth Amendment right to be free from excessive force, as well as important questions regarding when a municipality and its officers can be held liable for such constitutional violations. Accordingly, Mr. Locke respectfully requests 15 minutes of oral argument.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § § 1331, 1367, and 42 U.S.C. § 1983. The district court entered a final order dismissing Mr. Locke's action on January 22, 2024. App. 26; R. Doc. 23, at 9. Mr. Locke filed a timely notice of appeal on February 12, 2024. R. Doc. 25. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

In August 2021, Plaintiff Matthew Locke joined a peaceful protest at a fossil fuel pipeline construction easement in Hubbard County, Minnesota. His protest involved attaching himself to idle construction equipment and a fellow protestor. He did not threaten anyone, flee, actively resist arrest, or commit any violence. He simply remained still.

Although Hubbard County had a dedicated extraction team to remove protestors who attached themselves to construction equipment, Sheriff Cory Aukes and Chief Deputy Sheriff Scott Parks decided not to wait for the extraction team. Instead, they tortured Mr. Locke. Aukes and Parks used an escalating series of targeted pressure point holds against the sensitive nerves in Mr. Locke's head and neck. This extreme force caused Mr. Locke to suffer not only excruciating pain but lasting physical injuries—including partial facial paralysis.

This Court's black-letter law prohibits an officer from using more than *de minimis* force against a nonthreatening suspect of a low-level offense who is neither fleeing nor actively resisting arrest. This Court's case law also makes clear that gratuitous and unnecessary acts of violence violate the Fourth Amendment. Because Mr. Locke's allegations

fit squarely within that longstanding precedent, the district court's decision to grant Defendants qualified immunity on the face of the complaint was wrong. And because Sheriff Aukes is the county's final policymaker for law enforcement tactics, Hubbard County can be held liable for Aukes's decision to authorize—and himself employ—excessive force against Mr. Locke. This Court should reverse.

STATEMENT OF ISSUES

I. Whether the district court erred in dismissing the individual-capacity excessive-force claims on qualified immunity grounds, where clearly established law prohibited Sheriff Aukes and Chief Deputy Parks from inflicting extreme and gratuitous force on Mr. Locke severe enough to induce facial paralysis when he was peacefully protesting at a construction site—not threatening anyone, fleeing, actively resisting arrest, or suspected of a serious or violent crime.

- *Graham v. Connor*, 490 U.S. 386 (1989)
- *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022)
- *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009)
- *Headwaters Forest Def. v. County of Humboldt,* 276 F.3d 1125 (9th Cir. 2002)

II. Whether the district court erred in dismissing the official capacity claims, which operate against Hubbard County under 42 U.S.C. § 1983, where the constitutional violations derived from decisions and actions of Sheriff Aukes, the County's final policymaker for law enforcement tactics.

- *Mitchell v. Kirchmeier*, 28 F.4th 888 (8th Cir. 2022)
- *Dean v. County of Gage*, 807 F.3d 931 (8th Cir. 2015)

III. Whether the district court erred in dismissing the state-law tort claims under Minnesota's official immunity doctrine.

- *Johnson v. City of Minneapolis*, 901 F.3d 963 (8th Cir. 2018)
- *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009)

STATEMENT OF THE CASE

I. Factual Background[1]

In August 2021, Matthew Locke joined a peaceful protest at a fossil fuel pipeline construction site in Hubbard County, Minnesota. App. 5–6;

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[1] The facts stated here, which this Court must "assume are true" at the motion to dismiss stage, *Brown v. Mo. Dep't of Corrs.*, 353 F.3d 1038, 1040 (8th Cir. 2004), are drawn from Mr. Locke's complaint and incorporated video transcript. *See Podraza v. Whiting*, 790 F.3d 828, 833 (8th Cir. 2015) (considering the complaint, "documents incorporated into

R. Doc. 1, at 2–3. The protest began around 8:00 a.m.—in broad daylight—and involved four protestors securing themselves to idle construction equipment. *Id.*

Not long after, the Hubbard County Sheriff's Department aired a dispatch that protestors were trespassing on the pipeline easement. App. 5; R. Doc. 1, at 2. Hubbard County Sheriff Cory Aukes and Chief Deputy Sheriff Scott Parks responded. App. 4–6; R. Doc. 1, at 1, 2–3.

When Aukes and Parks arrived at the protest, they found Mr. Locke linked to another protestor and an idle excavator machine. App. 5–6; R. Doc. 1, at 2–3. His arm was chained to the other protestor through the excavator and wrapped within a pipe. App. 5–6; R. Doc. 1, at 2–3. This contraption is sometimes referred to as a "sleeping dragon" device. App. 5; R. Doc. 1, at 2. Such contraptions are commonly used peaceful protest tools, often made from PVC or metal pipes. App. 5; R. Doc. 1, at 2. Mr. Locke did not flee, actively resist arrest, or "pose any threat of harm." App. 6; R. Doc. 1, at 3. He simply remained still, effectively handcuffed to another protestor and the excavator. App. 5–6; R. Doc. 1, at 2–3.

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the complaint by reference," and "matters of which a court may take judicial notice" on a motion to dismiss (cleaned up)).

Hubbard County and adjacent Cass County each had dedicated extraction teams trained and ready to remove protestors like Mr. Locke from construction equipment. *See* App. 7; R. Doc. 1, at 4. The extraction teams from both counties were dispatched to this protest. App. 7; R. Doc. 1, at 4. But rather than wait for the extraction teams to arrive, Sheriff Aukes and Chief Deputy Parks decided to torture Mr. Locke instead. App. 6; R. Doc. 1, at 3.

Parks used a series of excruciating "pain compliance" tactics, one after the other, to torment Mr. Locke. First, Parks applied severe pressure with his hands to the nerve behind Mr. Locke's right ear. App. 6; R. Doc. 1, at 3. This "mandibular angle technique" attempts to incapacitate someone by causing "excruciating pain." App. 6; R. Doc. 1, at 3; *see also* App. 14; R. Doc. 18-1, at 2. Parks then moved to the pressure point behind Mr. Locke's left ear, digging his hands into Mr. Locke's nerve to inflict more excruciating pain. App. 6; R. Doc. 1, at 3. Parks then pushed his hands directly into Mr. Locke's face, applying pressure to the "infra orbital nerve" at the base of Mr. Locke's nose—a "very painful pressure point control tactic." App. 6; R. Doc. 1, at 3.

Sheriff Aukes then joined in. App. 6; R. Doc. 1, at 3. Like Parks, Aukes also employed the "mandibular angle" technique, applying targeted pressure behind one or both of Mr. Locke's ears to "caus[e] excruciating pain." App. 6; R. Doc. 1, at 3. Aukes then applied pressure to Mr. Locke's "hypoglossal nerve," App. 6; R. Doc. 1, at 3, a cranial nerve running from the brainstem through the neck towards the base of the mouth that controls the ability to use one's mouth and tongue.[2] Finally, as Parks had, Aukes applied pressure to Mr. Locke's "infra orbital nerve"—pushing "so hard into [Mr. Locke's] nasal cavity" that his "nasal airwaves were completely blocked," depriving him of oxygen. App. 6; R. Doc. 1, at 3; App. 14; R. Doc. 18-1, at 2.[3] Mr. Locke alleged that the pain these techniques caused was "intense" and "rose to the level of torture." App. 4; R. Doc. 1, at 1.

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[2] *See* Hypoglossal Nerve, Cleveland Clinic, https://rb.gy/h9zi3c, (last accessed May 31, 2024).

[3] The video link referenced in the complaint is no longer active. *See* App. 4; R. Doc. 1, at 1. However, Mr. Locke submitted a transcript of the video alongside his opposition to the motion to dismiss. App. 12; R. Doc. 18, at 1; App. 13; R. Doc. 18-1; *see Meehan v. United Consumers Club Franchising Corp.*, 312 F.3d 909, 913 (8th Cir. 2002) (considering exhibits incorporated and attached to complaint).

Indeed, "pain compliance" explicitly aims to hurt an arrestee. In audio captured during the protest, one protestor exclaimed, "I can't breathe. You're – man, covering my mouth." App. 14; R. Doc. 18-1, at 2. When an onlooker warned the officer that he was hurting the protestor, the officer calmly responded, "That's the point. It's called pain compliance." App. 14; R. Doc. 18-1, at 2. One protestor described being put in a "headlock" as an officer "forced his thumb" into the nerve below his ear for 30 to 45 seconds. App. 14; R. Doc. 18-1, at 2. Another recalled "screaming" in pain as the officer pushed his entire body weight into his nerve, building so much pressure in his eardrum that he feared it might break. App. 14; R. Doc. 18-1, at 2. And a third explained: "As somebody who has given birth, the level of pain was, like, beyond that." App. 14; R. Doc. 18-1, at 2.

In Mr. Locke's case, Aukes and Parks pushed so hard into these sensitive nerves that he began to "feel that the right side of his face was no longer moving in a normal manner." App. 6; R. Doc. 1, at 3; *see also* App. 14; R. Doc. 18-1, at 2 ("I could feel that my right side of my face wasn't working anymore."). Mr. Locke recounted that, "[a]fter they thought it was long enough, they left [him] and said, 'I'll give you a

minute to think about that,'" and then moved on to harm another protestor. App. 14; R. Doc. 18-1, at 2.

When the Hubbard County and Cass County extraction teams arrived, they removed Mr. Locke from the excavator without incident. App. 7; R. Doc. 1, at 4. A deputy escorted Mr. Locke to an ambulance on the scene, where paramedics examined him and determined that he needed further evaluation. App. 7; R. Doc. 1, at 4. The ambulance then transported Mr. Locke to a nearby hospital where he received medical treatment, after which he was taken to the Hubbard County Jail.[4] App. 7; R. Doc. 1, at 4.

Mr. Locke was diagnosed with Bell's Palsy, a form of facial paralysis, as a result of Aukes's and Parks's extreme force. App. 4, 7; R. Doc. 1, at 1, 4. Another protester subjected to the same techniques alongside Mr. Locke was also diagnosed with Bell's Palsy, which doctors warned "could be permanent." App. 14; R. Doc. 18-1, at 2. In a video

[4] The complaint did not state what happened to Mr. Locke after that point. Defendants, however, submitted documents with their motion to dismiss showing that Mr. Locke was subsequently charged with four counts and ultimately pled guilty to a single count of misdemeanor trespass. R. Doc. 15-2, at 2.

interview published over a month after the event, Mr. Locke observed that his facial paralysis was still visible. App. 14; R. Doc. 18-1, at 2. Mr. Locke also suffered tinnitus (ringing in the ears) and emotional distress as a result of Aukes's and Parks's actions. App. 7; R. Doc. 1, at 4.

II. Procedural History

Mr. Locke brought federal and state claims in the United States District Court for the District of Minnesota. App. 4–11; R. Doc. 1, at 1–8. He sued Sheriff Aukes and Chief Deputy Parks in both their individual and official capacities, alleging that their repeated use of painful pressure point tactics was "gratuitous," amounted to "torture," and constituted excessive force in violation of the Fourth and Fourteenth Amendments. App. 4–5, 8–9; R. Doc. 1, at 1–2, 5–6. Mr. Locke also alleged state-law tort claims against Aukes, Parks, and Hubbard County. App. 9–10; R. Doc. 1, at 6–7.

Defendants moved to dismiss under Federal Rule of Civil Procedure 12(b)(6). R. Doc. 14. The district court granted the motion in its entirety. App. 18; R. Doc. 23. Regarding the individual capacity § 1983 claims, the court concluded that Aukes and Parks were entitled to qualified immunity on the pleadings because Mr. Locke had not identified a case

"that forbids the use" of the particular pain compliance techniques Defendants employed. App. 22; R. Doc. 23, at 5. Although the court recognized that the specific "action in question" need not have been "previously held unlawful," the court concluded that it would not have been "clear to a reasonable officer" under existing case law that the "pain compliance" techniques Aukes and Parks employed constituted excessive force. App. 23; R. Doc. 23, at 6 (citations omitted).

The court also dismissed Mr. Locke's official capacity § 1983 claims. App. 24; R. Doc. 23, at 7. The court recognized that the official capacity claims were, in essence, a "claim against the County" and thus governed by the municipal liability principles of *Monell v. Department of Social Services*, 436 U.S. 658 (1978). App. 23–24; R. Doc. 23, at 6–7. Although Defendants had not moved to dismiss the official capacity § 1983 claims on municipal liability grounds, the district court concluded *sua sponte* that Mr. Locke failed to state a municipal liability claim because he did not allege "an official municipal policy, an unofficial custom, or a deliberately indifferent failure to train or supervise that violated his constitutional rights." App. 24; R. Doc. 23, at 7.

Finally, the court granted Aukes and Parks official immunity on Mr. Locke's state-law tort claims. App. 25; R. Doc. 23, at 8. Having done so, the court dismissed the state-law vicarious liability claim against Hubbard County. App. 25; R. Doc. 23, at 8.

The court issued a final order dismissing Mr. Locke's action. App. 26; R. Doc. 23, at 9. Although Mr. Locke had requested leave to amend, R. Doc. 17, at 18 n.10, the court did not grant leave to amend or otherwise address that request in its order. App. 26; R. Doc. 23, at 9.

SUMMARY OF THE ARGUMENT

I. The district court erred in granting Aukes and Parks qualified immunity on the pleadings. Mr. Locke's complaint stated a Fourth Amendment violation: he alleged that, while he was engaged in a peaceful, motionless, nonthreatening protest—posing no danger and neither fleeing nor actively resisting arrest—Aukes and Parks repeatedly and deliberately inflicted extreme pressure on his sensitive cranial nerves, causing excruciating pain and inducing neurological damage. Mr. Locke also alleged that such infliction of harm was gratuitous and unnecessary, as the County had trained extraction teams available that could—and eventually did—remove Mr. Locke without incident. These

allegations, if proved, establish that the officers' use of force against Mr. Locke was objectively unreasonable.

And clearly established law gave fair notice that the officers' conduct, as alleged, was constitutionally excessive. This Court's case law has long established that an officer may not use more than *de minimis* force against a nonthreatening suspect of a low-level offense, who is not actively resisting arrest and not fleeing. *See, e.g.*, *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009). Mr. Locke's allegations fell squarely within that clearly established rule. This Court's case law also clearly established, well before the officers' conduct here, that "gratuitous and unnecessary acts of violence" violate the Fourth Amendment. *See, e.g.*, *Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006). And ample out-of-circuit case law further provided the officers notice that the Fourth Amendment forbids gratuitously inflicting pain on nonviolent protesters, particularly when other means of effectuating an arrest without causing harm are available. *See, e.g.*, *Headwaters Forest Def. v. County of Humboldt,* 276 F.3d 1125, 1128–31 (9th Cir. 2002); *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 118, 123–24 (2d Cir. 2004).

In granting the officers qualified immunity, the district court misapprehended the qualified immunity inquiry. An officer is not entitled to qualified immunity "every time a novel method is used to inflict injury." *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (cleaned up). Rather, the clearly established law inquiry cuts across the varied methods officers use to deploy excessive force. *See*, *e.g.*, *Mitchell v. Kirchmeier*, 28 F.4th 888, 898–99 (8th Cir. 2022) (relying on cases involving various methods of force to hold that use of bean bag gun violated peaceful protesters' clearly established right to be free from more than *de minimis* force). These officers had abundant warning to put them on notice that employing gratuitous force severe enough to cause neurological damage against a nonviolent protester who is not actively resisting arrest, not fleeing, and not suspected of a serious or dangerous crime is objectively unreasonable.

II. The district court also erred in dismissing the official capacity claims on a ground Defendants did not assert. Mr. Locke alleged that Sheriff Aukes—in his official capacity as the Hubbard County Sheriff—both engaged in unconstitutionally excessive force and authorized his Chief Deputy to do so. Because Sheriff Aukes is Hubbard County's final

policymaker on law enforcement practices, his decisions constitute municipal policy for Hubbard County, and thus the County can be held liable for those decisions. *See*, *e.g.*, *Mitchell*, 28 F.4th at 898. In dismissing the official capacity claims without briefing on this point, the court failed to recognize the well-established final policymaker theory of municipal liability.

III. Finally, the district court erred in granting Aukes and Parks official immunity on Mr. Locke's state-law tort claims. Under Minnesota law, official immunity is a jury question and should not be granted where there are factual disputes as to the reasonableness of officers' use of force. Because a jury could find that the facts, as alleged, establish excessive force, the officers are not entitled to official immunity at this early stage. And because the district court's dismissal of Mr. Locke's vicarious-liability tort claims against Hubbard County hinged on its erroneous official-immunity ruling, this Court should reverse that decision as well.

STANDARD OF REVIEW

This Court reviews *de novo* a district court's decision to dismiss a civil complaint under Rule 12(b)(6). *McAuley v. Fed. Ins. Co.*, 500 F.3d 784, 787 (8th Cir. 2007). To survive a motion to dismiss, a complaint

must state a "plausible claim" for relief, which requires sufficient "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Topchian v. JPMorgan Chase Bank, N.A.*, 760 F.3d 843, 848 (8th Cir. 2014).

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"—here, Mr. Locke. *Cole v. Homier Distributing Co.*, 599 F.3d 856, 861 (8th Cir. 2010). Because qualified immunity is an affirmative defense, it should not be granted at the motion-to-dismiss stage unless, drawing all reasonable inferences in the plaintiff's favor, an entitlement to qualified immunity is apparent on the face of the complaint. *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996); *see also Solomon v. Petray*, 795 F.3d 777, 791 (8th Cir. 2015) (noting that "limited discovery" can resolve the qualified immunity inquiry).

ARGUMENT

I. The District Court Erred In Dismissing the Individual Capacity Claims on Qualified Immunity Grounds.

Mr. Locke alleged that, while he was peacefully protesting—sitting still, attached to idle construction equipment, not fleeing police or actively resisting arrest, and posing no safety threat—Hubbard County

Sheriff Cory Aukes and Chief Deputy Scott Parks repeatedly and deliberately applied extreme, targeted pressure to multiple nerves on his face and neck. They applied so much pressure to these sensitive areas that Mr. Locke not only experienced excruciating pain and loss of oxygen, but the force they employed caused him physical and neurological injuries, including facial paralysis and tinnitus. And the use of such force was completely unnecessary: there were no exigent circumstances, and the County had a dedicated extraction team that could—and in fact did—remove Mr. Locke from the construction equipment without causing him any harm. Under these circumstances, Mr. Locke alleged, the officers' use of force was entirely "gratuitous" and amounted to "torture." App. 4; R. Doc. 1, at 1. It was, in essence, pain for pain's sake.

These allegations were more than sufficient to state a claim that both officers used constitutionally excessive force. And, in August 2021, Mr. Locke's right to be free from such extreme force in these circumstances was clearly established.

A. Mr. Locke's Allegations Stated a Fourth Amendment Violation.

1. Repeatedly inflicting severe, targeted pressure on the sensitive cranial nerves of a peaceful protester who is not fleeing, threatening, or actively resisting arrest—to the

point of causing neurological damage—is objectively unreasonable force under the Fourth Amendment.

Mr. Locke alleged that Aukes and Parks used repeated and "gratuitous" "torture" tactics designed to cause him extreme pain while he was engaged in peaceful protest, not threatening anyone, fleeing, or actively resisting arrest. App. 4–6; R. Doc. 1, at 1–3. Those allegations state a claim that Defendants violated Mr. Locke's Fourth Amendment rights.

The Fourth Amendment's prohibition on "unreasonable . . . seizures," U.S. Const. amend. IV, encompasses a "right to be free from excessive force in the context of an arrest." *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009). Force is constitutionally excessive when it is "objectively unreasonable." *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1207 (8th Cir. 2013). To determine whether force used was objectively unreasonable, courts look to "the totality of the circumstances" from the perspective of a reasonable officer on the scene. *Graham v. Connor*, 490 U.S. 386, 396 (1989). Relevant factors include (1) "the severity of the crime at issue," (2) "whether the suspect poses an immediate threat to the safety of the officers or others,"

and (3) "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Id.*

The "critical factor" in most cases is whether the individual "posed a realistic threat to safety" or "a risk of flight that justified the use of force." *Westwater v. Church*, 60 F.4th 1124, 1129 (8th Cir. 2023). This Court also considers "the degree of injury . . . insofar as it tends to show the amount and type of force used," *McDaniel v. Neal*, 44 F.4th 1085, 1090 (8th Cir. 2022) (cleaned up), and "the availability of alternative methods of capturing or subduing a suspect," *Retz v. Seaton*, 741 F.3d 913, 918 (8th Cir. 2014).

Applying these factors, this Court has repeatedly held that it is objectively unreasonable for an officer to use "more than *de minimis* force" against an individual who is not threatening anyone, is not suspected of a serious crime, and is neither fleeing nor actively resisting arrest. *See, e.g.*, *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022); *Brown*, 574 F.3d at 499. Mr. Locke's complaint alleges precisely those circumstances.

To start, Mr. Locke's complaint alleged all of the circumstances that this Court has held render the use of "more than *de minimis* force"

against an arrestee objectively unreasonable. *Mitchell*, 28 F.4th at 898. Mr. Locke alleged expressly that he "did not actively resist" arrest, "did not pose any threat of harm" to the officers or anyone else, and did not "attempt[] to evade arrest by flight." App. 6, 8; R. Doc. 1, at 3, 5. Indeed, the complaint suggests—and Defendants admitted—that the officers harmed Mr. Locke precisely *because* he remained motionless while "attached to" the excavator. App. 5–6; R. Doc. 1, at 2–3; App. 14; R. Doc. 18-1, at 2; *see* R. Doc. 14, at 10. Defendants also conceded below that Mr. Locke was "nonviolent" and that he did not actively resist arrest. R. Doc. 14, at 11.

Mr. Locke's complaint also supports an inference that he was "not suspected of a serious crime." *Mitchell*, 28 F.4th at 898. The complaint alleged that Aukes and Parks responded to a dispatch concerning "protesters trespassing on an Enbridge pipeline easement" and "securing themselves to construction equipment at that site," and that's precisely how they found Mr. Locke. App. 5; R. Doc. 1, at 2. Thus, the "complaint did not suggest that" Mr. Locke "was suspected of anything more than" trespass on a pipeline site—a nonviolent misdemeanor in Minnesota. *Mitchell*, 28 F.4th at 898 (complaint supported inference that peaceful

protestor trespassing on a bridge was at most engaged in nonviolent misdemeanors); *see* Minn. Stat. § 609.6055.1(a). In short, Mr. Locke's complaint alleged all of the circumstances that this Court has held render anything more than *de minimis* police force unjustified.

And Mr. Locke alleged that Aukes and Parks employed far more than *de minimis* force against him. He alleged that each officer employed a series of "pain compliance techniques" on him, one after the other, applying extreme, targeted pressure with their hands to multiple different nerves on his face and head. App. 6; R. Doc. 1, at 3. He alleged that the pressure they applied to these sensitive nerves was "very painful" and so "intense" and "excruciating" that it "rose to the level of torture." App. 4, 6; R. Doc. 1, at 1, 3. His complaint supports an inference that each "pain compliance technique" applied—at least six total, by both the Sheriff and his Chief Deputy—lasted half a minute or more, suggesting that the "excruciating" pain he experienced was not momentary but calculated and prolonged. App. 6; R. Doc. 1, at 3; App. 14; R. Doc. 18-1, at 2 (another protester explaining that each application of pressure lasted "probably 30 to 45 seconds"); App. 14; R. Doc. 18-1, at 2 (Mr. Locke stating, "After they thought it was long enough, they left me

and said, 'I'll give you a minute to think about that.'"). He alleged that one officer "push[ed] so hard into [his] nasal cavity that [his] airwaves were completely blocked," depriving him of oxygen. App. 14; R. Doc. 18-1, at 2. And he alleged that the pressure Aukes and Parks applied was so severe that it caused the right side of his face to stop "moving in a normal manner"—resulting in a diagnosis of Bell's Palsy, a form of facial paralysis, as well as tinnitus. App. 6; R. Doc. 1, at 3; *see* App. 4, 7; R. Doc. 1, at 1, 4; App. 14; R. Doc. 18-1, at 2.

These facts were more than sufficient to state a claim that Aukes's and Parks's use of force against Mr. Locke, a nonthreatening person suspected of a minor offense who was neither fleeing nor actively resisting arrest, was "more than *de minimis*" and thus objectively unreasonable. *Mitchell*, 28 F.4th at 898. Indeed, the force alleged here—repeated applications of extreme pressure to sensitive cranial nerves that caused excruciating pain and induced facial paralysis—was at least as severe, if not more so, than uses of force this Court has deemed "more than *de minimis*." *See, e.g., Montoya v. City of Flandreau*, 669 F.3d 867, 870, 872 (8th Cir. 2012) (single "leg sweep" to trip suspect); *Rohrbough v. Hall*, 586 F.3d 582, 585 (8th Cir. 2009) (single punch to the face and

wrestle to the ground); *Brown*, 574 F.3d at 495 (2 to 3 seconds of Taser in "drive stun mode" to upper arm).

That the officers' use of force caused Mr. Locke to suffer a diagnosed neurological disorder requiring treatment at a hospital, in addition to excruciating pain and tinnitus, is a strong indication that it was more than *de minimis*. As this Court has recognized, if it is "not reasonable . . . to use more than de minimis force" against an arrestee, then "[i]t follows, *a fortiori*, that using enough force to cause" serious injuries is "also unreasonable." *Shannon v. Koehler*, 616 F.3d 855, 863 (8th Cir. 2010); *see also Montoya*, 669 F.3d at 872 (inferring from plaintiff's broken leg that significant force was used, and rejecting the officers' argument that broken leg was "simply an 'unfortunate' and 'unintended' consequence of" an objectively reasonable use of force). The "degree of injury" Mr. Locke suffered—facial paralysis, ringing in the ears, and excruciating pain—is "certainly relevant insofar as it tends to show the

amount and type of force used." *See Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).[5]

Moreover, Mr. Locke alleged not just that the force the officers used against him was significant but that it was entirely "gratuitous," App. 4; R. Doc. 1, at 1—and his factual allegations supported that characterization. Indeed, the complaint suggests that Aukes and Parks did not need to use force at all to arrest Mr. Locke, as they had "alternative methods" of removing him from the excavator—namely, the

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[5] The district court discounted the probative value of Mr. Locke's injuries, citing dictum in *Chambers* observing that "the degree of injury should not be dispositive" because some citizens might have a "latent weakness." App. 23; R. Doc. 23, at 6 (citing *Chambers*, 641 F.3d at 906). But nothing in the complaint suggested that Mr. Locke had "a latent weakness" or that the officers aggravated some preexisting injury. To the contrary, Mr. Locke alleged that before the officers hurt him, his face was working normally; afterward, it wasn't. App. 7; R. Doc. 1, at 4; App. 14; R. Doc. 18-1, at 2. Indeed, Mr. Locke alleged that the officers' "pain compliance" techniques caused Bell's Palsy in not just him but another protester as well—a strong indication that it was the officers' force, and not some unalleged "latent weakness," that caused his neurological disorder. App. 14; R. Doc. 18-1, at 2. Moreover, *Chambers* held that even where a plaintiff suffers only *de minimis* injury, the use of force could still be unreasonable, particularly where it is "gratuitous." 641 F.3d at 907–08. It follows that gratuitous force causing *more* than *de minimis* injury is even more likely to be unreasonable. Where, as here, the plaintiff suffered not just excruciating pain but a lasting neurological condition, that far more than *de minimis* injury is "certainly relevant" to show "the amount and type of force used." *Id.* at 906.

trained extraction teams. *See Retz*, 741 F.3d at 918 (the "availability of alternative methods of capturing or subduing a suspect" bears on whether force was reasonable); *McDaniel*, 44 F.4th at 1090 (considering relationship between the need for force and the amount of force used).

That extraction teams existed and were dispatched to the protest supports an inference that Hubbard County had experience removing protestors under similar circumstances. App. 7; R. Doc. 1, at 4. Nothing in the complaint suggests that Aukes and Parks faced an urgent or split-second need to arrest Mr. Locke, necessitating the use of extreme and escalating force. Rather, the complaint suggests that they could have simply waited for Hubbard County's dedicated extraction team to remove Mr. Locke from the excavator without incident. App. 7; R. Doc. 1, at 4. The availability of this peaceful alternative in a non-urgent setting supports a conclusion that the officers' decision to harm Mr. Locke while they waited for the extraction teams—to the point of causing neurological damage—was a "gratuitous and completely unnecessary act[] of violence" in violation of the Fourth Amendment. *Henderson v. Munn*, 439 F.3d 497, 503 (8th Cir. 2006); *see also Headwaters Forest Def. v. County of Humboldt,* 276 F.3d 1125, 1128–31 (9th Cir. 2002) (holding that repeated

infliction of pain on peaceful protestors constituted excessive force where police had a means to remove protestors from chain devices without causing injury).

2. Defendants' contrary arguments below are wrong.

Below, Defendants contended that their use of force against Mr. Locke was justified "as a matter of law" because he was a "felony suspect" and "refused to release himself from the excavator" in response to their "pain compliance tactic[s]." R. Doc. 14, at 8 n.2, 9–11. Neither contention undermines Mr. Locke's Fourth Amendment claim, much less "as a matter of law." R. Doc. 14, at 8–11.

For starters, nothing in the complaint suggested that Mr. Locke was a "felony suspect" when Aukes and Parks tortured him. R. Doc. 14, at 8 n.2, 9–11. As noted above, the complaint suggested that, at most, Mr. Locke was suspected of the nonviolent misdemeanor of trespassing on a construction site. Defendants' claim that Mr. Locke was a "felony suspect" was based on documents Defendants attached to their motion to dismiss showing that, the day after the protest, the State charged him with theft in addition to trespass—a charge that was deemed a felony because the value of the allegedly stolen property—the excavator—

exceeded $5,000. *See* R. Doc. 14, at 8 n.2 (citing R. Doc. 15-1 (criminal complaint)). Even assuming Mr. Locke's act of attaching himself to the excavator could conceivably have supported a charge under Minnesota's felony theft statute,[6] a creative *post hoc* felony charge, concocted the following day by a prosecutor who was not on the scene of the protest, has little bearing on the excessive-force question, which turns on what reasonable officers *on the scene* would have perceived. *Graham*, 490 U.S. at 396. Because it strains belief that a reasonable officer on the scene would have considered Mr. Locke's peaceful protest to constitute "theft," Defendants' after-the-fact justification carries little weight.

Regardless, what matters under the Fourth Amendment is not whether Mr. Locke's conduct could be formally classified as a felony

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[6] Minnesota's theft statute criminalizes temporary possession of another's property if "the control exercised manifests an indifference to the rights of the owner." Minn. Stat. § 609.52.2(a)(5)(i). The "typical" case of theft by indifference to rights involves joyriding. *State v. Beito,* 332 N.W.2d 645, 648 (Minn. 1983). Notably, the State dropped the theft charge against Mr. Locke when he pled to misdemeanor trespass. R. Doc. 15-2, at 1; *see also State v. Sponheim*, No. 29-CR-21-1298, slip op. at 8–9 (Minn. Dist. Ct., Hubbard Cty., May 4, 2022) (Index #37) (trial court dismissing felony theft charge against pipeline protester who temporarily occupied an unburied pipe on a construction site because that conduct "does not meet the legal definition of felony theft").

versus a misdemeanor, but whether it "amount[ed] to a severe or violent crime," *Brown*, 574 F.3d at 496, such that an officer could reasonably perceive that Mr. Locke posed a safety threat. *See Tennessee v. Garner*, 471 U.S. 1, 14 (1985) (explaining that safety risks, not formal classifications, justify force because "the assumption that a 'felon' is more dangerous than a misdemeanant [is] untenable. Indeed, numerous misdemeanors involve conduct more dangerous than many felonies."). Peacefully attaching oneself to an idle excavator to protest pipeline construction is not violent or dangerous, and no reasonable officer could have perceived it as such. *Cf. Rokusek v. Jansen*, 899 F.3d 544, 546 (8th Cir. 2018) (DUI suspect deemed a "nonviolent offender"); *Small v. McCrystal*, 708 F.3d 997, 1002 (8th Cir. 2013) (disorderly conduct, failing to disperse, unlawful assembly, and interference with official acts considered nonviolent). The excavator's monetary value—the only possible basis for a felony-level charge—did not change the nonviolent, nonthreatening nature of Mr. Locke's conduct, much less give Defendants

free rein to employ significant force against him "as a matter of law." R. Doc. 14, at 11.[7]

Nor did the fact that Mr. Locke "did not release himself" from the excavator in response to the officers' "pain compliance" tactics—an infliction of pain that was entirely unnecessary to begin with—somehow make it objectively reasonable for the officers to inflict even *more* "excruciating pain," on at least six separate instances, to the point of causing neurological damage. App. 6; R. Doc. 1, at 3; *see* R. Doc. 14, at 10–12 (Defendants arguing that Mr. Locke's "refus[al] to release himself" justified their repeated infliction of pain "as a matter of law"). If it was unnecessary and unreasonable to inflict significant force *at all*, given the nonviolent nature of Mr. Locke's protest and the availability of alternative means to remove him without causing injury, then it was certainly unnecessary and unreasonable to inflict *additional* and

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[7] Indeed, Defendants' position would mean that law enforcement officers could constitutionally use more force to arrest someone suspected of stealing a brand-new iPhone than someone suspected of stealing an old flip phone—a troubling proposition that has no basis in Fourth Amendment law. Additionally, this Court has recognized that protection of property does not give police officers a "freestanding right" to use more force than otherwise would be necessary. *See Atkinson*, 709 F.3d at 1212 (unreasonable to use a takedown maneuver to recover a cellphone).

repeated force just because the infliction of pain was not having its intended effect. *See*, *e.g.*, *Headwaters*, 276 F.3d at 1130 (where it was "unnecessary" to use force against peaceful protesters to begin with given the circumstances, it was "even *less* necessary to *repeatedly*" use force simply because the protesters "refused to release" from locking devices); *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 527 (7th Cir. 2012) ("Permitting substantial escalation of force in response to passive non-compliance would be incompatible with our excessive force doctrine and would likely bring more injured citizens before our courts.").

In sum, every relevant consideration counseled against the use of extreme force here. Mr. Locke was not violent, suspected of a dangerous offense, actively resisting, or fleeing arrest. He just remained still, peacefully protesting. Rather than wait for the trained extraction teams, Aukes and Parks escalated the situation with gratuitous and dangerous "pain compliance" tactics that caused Mr. Locke excruciating pain and facial paralysis. Under these circumstances, as pled in the complaint, the officers used unreasonable force against Mr. Locke.

B. Clearly Established Law Put the Officers on Notice That Their Use of Force Was Unreasonable.

1. Case law from this Court and multiple other circuits gave the officers fair warning that their use of force on Mr. Locke was excessive.

The district court erred in granting the officers qualified immunity on the complaint. Because qualified immunity is an affirmative defense, 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." *Hafley v. Lohman*, 90 F.3d 264, 266 (8th Cir. 1996). 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). 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 ex rel. Est. of Richards v. Hutchins*, 959 F.3d 1127, 1134–36 (8th Cir. 2020).

Although the constitutional right in question should not be defined at a high level of generality, "precise factual correspondence" with prior cases is not required. *Mountain Pure, L.L.C. v. Roberts*, 814 F.3d 928, 932 (8th Cir. 2016); *see also Brown*, 574 F.3d at 499 ("The standard does not require that there be a case with materially or fundamentally similar

facts."). Here, the right in question is the right of a nonthreatening person suspected of a low-level offense, who is neither fleeing nor actively resisting arrest, to be free from more than *de minimis* police force. Ample case law put the officers on notice of that clearly established right.

"[T]ime and again," this Court has held that "if a person is not suspected of a serious crime, is not threatening anyone, and is neither fleeing nor resisting arrest, then it is unreasonable for an officer to use more than *de minimis* force against him." *Mitchell*, 28 F.4th at 898. This Court has recognized that principle to be "clearly established" for decades—well before the conduct here—and has relied on this same clearly established right to deny qualified immunity in numerous cases involving varied circumstances and types of force. *See id.* (collecting cases); *see also Watkins v. City of St. Louis*, No. 22-3248, __ F.4th __, 2024 WL 2745056, at *3 (8th Cir. May 29, 2024); *Jackson v. Stair*, 944 F.3d 704, 711 (8th Cir. 2019); *Johnson v. McCarver*, 942 F.3d 405, 412 (8th Cir. 2019); *Small*, 708 F.3d at 1005; *Montoya*, 669 F.3d at 873; *Shekleton v. Eichenberger*, 677 F.3d 361, 367 (8th Cir. 2012); *Johnson v. Carroll*, 658 F.3d 819, 828 (8th Cir. 2011); *Shannon*, 616 F.3d at 864.

In *Brown v. City of Golden Valley*, for example, this Court held that an officer violated clearly established law in 2005 when he used a Taser in "drive stun mode" for 2 to 3 seconds as a "pain compliance tool" on the upper arm of a seat-belted, nonthreatening, non-actively resisting, non-fleeing person suspected of a low-level offense. 574 F.3d at 495 n.3, 499. This Court denied qualified immunity, explaining that "it 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." *Id.* at 499.

More recently, in *Mitchell*, this Court held that officers were on notice in 2017 that firing lead-filled bean bags at a peaceful protester—who was standing with his hands raised among hundreds of protesters, had not "threatened anyone or fled or resisted arrest," and was at most suspected of trespass and obstructing a government function, "both nonviolent misdemeanors"—violated the Fourth Amendment. 28 F.4th at 894, 898–99. This Court concluded that "[i]t is 'clearly established' that the use of more than *de minimis* force in circumstances like these violates the Fourth Amendment," citing a slew of cases dating back to 2010 involving a range of situations and types of force. *Id.* at 898. Based

on the same canon of cases cited in *Mitchell*, Mr. Locke's allegations fall squarely within this longstanding, clearly established principle.

Indeed, Defendants had notice that their conduct was unreasonable on every relevant axis in the *Graham* analysis. Mr. Locke—a peaceful protester attached to an excavator—posed less of a flight risk or threat to officer safety than suspects in cases where this Court has denied qualified immunity to officers employing more than *de minimis* force.[8] As a peaceful protestor trespassing on a construction site, Mr. Locke was suspected of an offense no more serious than those at issue in other cases where this Court has found more than *de minimis* force unjustified.[9] And the force the officers employed here—extreme, targeted pressure on

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[8] *See, e.g.*, *Neal v. Ficcadenti*, 895 F.3d 576, 578 (8th Cir. 2018) (suspect reported to have a gun and was acting "somewhat erratically"); *Div. of Empl. Sec., Mo. v. Bd. of Police Comm'rs*, 864 F.3d 974, 976–77 (8th Cir. 2017) (felony burglary suspect was "having some mental issues" and armed with a metal pipe); *Rohrbough*, 586 F.3d at 585 (plaintiff shoved police officer); *Shannon*, 616 F.3d at 858 (intoxicated 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).

[9] *See, e.g.*, *Rokusek*, 899 F.3d 546 (driving under the influence); *Div. of Empl. Sec.*, 864 F.3d at 976 (felony burglary); *Small*, 708 F.3d at 1002 (disorderly conduct, failing to disperse, unlawful assembly, and interference with official acts).

multiple sensitive cranial nerves, causing excruciating pain, loss of oxygen, and facial paralysis—was as, if not more, significant than force this Court has deemed "more than *de minimis*."[10]

In addition to the long line of cases prohibiting more than *de minimis* force in these circumstances, this Court has also recognized that "a gratuitous and completely unnecessary act of violence" against a "subdued and restrained" arrestee "is unreasonable and violates the Fourth Amendment," and has deemed that principle "clearly established" since well before the conduct here. *Blazek v. City of Iowa*, 761 F.3d 920, 925–26 (8th Cir. 2014) (quoting *Henderson*, 439 F.3d at 503) (deeming the law "sufficiently developed" to put officers on notice that using "gratuitous" and "unnecessary" injury-causing force is unreasonable); *see also Watkins*, 2024 WL 2745056, at *3 (clearly established in 2016 that gratuitous force "for the express purpose of inflicting pain" is unconstitutional); *Henderson*, 439 F.3d at 503–04 (denying qualified immunity to an officer who pepper sprayed a handcuffed arrestee because

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[10] *See, e.g., Montoya*, 669 F.3d at 870 (single "leg sweep" to trip suspect); *Rohrbough*, 586 F.3d at 585 (single punch to the face and wrestle to the ground); *Brown*, 574 F.3d at 495 (2 to 3 seconds of Taser in drive stun mode to upper arm).

a jury could reasonably find the use of force a "gratuitous and completely unnecessary act of violence" (cleaned up)).

This case law provided Aukes and Parks additional notice that their conduct, as alleged in the complaint, violated the Fourth Amendment. Mr. Locke alleged that he "did not pose any threat of harm" and was effectively restrained, having attached himself to an excavator. App. 5–6; R. Doc. 1, at 2–3. His complaint also made clear that it was entirely unnecessary for the officers to employ force to remove him from the excavator at all: two counties had dedicated extraction teams that could—and did—remove him without causing any harm whatsoever, and there was nothing to suggest any urgency necessitating that the officers attempt to remove him by violent force rather than simply waiting briefly for the extraction teams to arrive. Under these circumstances, Mr. Locke alleged, the officers' repeated use of "pain compliance" severe enough to cause facial paralysis amounted to "torture" and was entirely "gratuitous." App. 4; R. Doc. 1, at 1. These allegations fell well within this Court's clearly established law prohibiting "gratuitous and completely unnecessary act[s] of violence." *Blazek*, 761 F.3d at 925.

Moreover, a "robust consensus of persuasive authority" makes clear that the officers' gratuitous use of extreme "pain compliance" techniques on Mr. Locke—a peaceful protester—was unreasonable here. *See Bus. Leaders in Christ v. Univ. of Iowa*, 991 F.3d 969, 984-86 (8th Cir. 2021) (finding a consensus based on opinions from three circuits); *Z.J. ex rel. Jones v. Kansas City Bd. of Police Comm'rs*, 931 F.3d 672, 683-85, 690 (8th Cir. 2019) (consensus based on two circuits).[11] At least four circuits have denied qualified immunity in cases where officers used more than *de minimis* force against nonthreatening individuals at a protest—in some cases, under very similar circumstances as Mr. Locke alleges here.

Start with the Ninth Circuit's decision in *Headwaters*. The plaintiffs were a group of peaceful protestors who had chained themselves to one another with devices similar to the one Mr. Locke and his fellow protesters used. 276 F.3d at 1128-29. Although the defendant police department had a means to extricate protesters easily and safely from such devices, officers decided instead to inflict pain on the protesters

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[11] *See* also *Cole*, 959 F.3d at 1134–36 (four circuits); *Chestnut v. Wallace*, 947 F.3d 1085, 1090–91 (8th Cir. 2020) (four circuits); *Turner v. Arkansas Ins. Dep't*, 297 F.3d 751, 759 (8th Cir. 2002) (two circuits).

to try to force them to release themselves voluntarily. *Id.* at 1128. Specifically, the officers applied pepper spray to the corners of the protesters' eyes with a Q-tip, then refused to give them water to wash out their eyes. *Id.* When this infliction of pain was unsuccessful, the officers reverted to their standard method to remove the protesters from their devices, doing so with "[n]o pain or injury" in a matter of minutes. *Id.*

The Ninth Circuit denied the officers qualified immunity. Although "no prior case" dealt with "the precise force at issue," the Court held that "it would be clear to a reasonable officer" that inflicting pain on the protesters was excessive when the officers had means to remove the protesters "in a matter of minutes and without causing pain or injury," and "the protestors were sitting peacefully" and "did not threaten or harm the officers." *Id.* at 1130–31; *see also id.* at 1130 (noting that "it is the need for force which is at the heart of the *Graham* factors" (cleaned up)). So too here: it would be clear to a reasonable officer that inflicting significant pain on Mr. Locke—to the point of causing neurological damage—was excessive where he posed no threat, was sitting peacefully, and the County had a way to extract him without causing any pain or injury. The denial of qualified immunity under materially similar

circumstances in *Headwaters* provided Aukes and Parks notice that their conduct was unreasonable.[12]

The Tenth Circuit has similarly proscribed using force significant enough to cause injury against nonthreatening protestors. In *Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008), for example, the Tenth Circuit denied qualified immunity to officers who used a painful wrist hyperflexion, which resulted in a torn tendon, to subdue a nonthreatening protestor who was not fleeing or actively resisting arrest and had at most engaged in disorderly conduct. *Id.* at 1160–62. The Tenth Circuit has also held that "the use of less-lethal munitions—'*as*

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[12] The Ninth Circuit's earlier ruling in *Forrester v. City of San Diego*, 25 F.3d 804 (9th Cir. 1994), on which the district court relied below, App. 23; R. Doc. 23, at 6, is not on point here. In *Forrester*, the Ninth Circuit affirmed a *post-trial jury verdict* for officers who used pain compliance techniques to arrest a group of demonstrators at a medical clinic because evidence at trial showed that the officers were "justifiably concerned about the risk of injury to the medical staff, patients of the clinic, and other protestors." 25 F.3d at 807. Critically, the *Forrester* plaintiffs' claims had survived a motion for summary judgment and proceeded to a jury "to determine whether any particular uses of force were unconstitutional." *Id.* at 806. As in *Forrester*, Aukes and Parks will have the opportunity to develop evidence that supports their position. But *Forrester* does not stand for the proposition that "pain compliance techniques" are allowed as a matter of law. To the contrary, *Forrester* supports Mr. Locke's position that a jury must decide whether particular uses of "pain compliance" violate the Fourth Amendment.

with any other type of pain-inflicting compliance technique'—is unconstitutionally excessive force when applied to an unthreatening protester who has neither committed a serious offense nor attempted to flee." *Packard v. Budaj*, 86 F.4th 859, 869 (10th Cir. 2023) (quoting *Fogarty*, 523 F.3d at 1161) (cleaned up) (emphasis added).

The Second Circuit has likewise held that employing force to cause "pain and incapacitation" on protesters to gain compliance is unconstitutionally excessive when the protesters pose a low security threat and are not actively resisting. *Edrei v. Maguire*, 892 F.3d 525, 542–43 (2d Cir. 2018) (denying qualified immunity on a Fourteenth Amendment claim to officers who used a long-range acoustic device, causing pain, hearing loss, and tinnitus, on nonviolent protesters in an attempt to compel them to exit the street). Indeed, the Second Circuit has specifically "warned officers against gratuitously employing 'pain compliance techniques,' such as bending protesters' wrists, thumbs, and fingers backwards." *Id.* at 541–42 (quoting *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 119, 123–24 (2d Cir. 2004), which held that protesters who employed "passive resistance" techniques like going limp stated Fourth Amendment violation against officers who used "pain

compliance techniques," including choke holds and wrist-bending, because jury could conclude that "the officers gratuitously inflicted pain in a manner that was not a reasonable response to the circumstances"); *see also Asociacion de Periodistas de Puerto Rico v. Mueller*, 529 F.3d 52, 60 (1st Cir. 2008) (citing *Headwaters* for the proposition that "mere obstinance by a crowd, without any evidence of a potential public safety threat or other law enforcement consideration, is insufficient to warrant" hitting and pepper spraying a group of journalists to "force them to exit [a] gated area").

2. The absence of a prior case involving the precise method of inflicting harm the officers used here does not entitle them to qualified immunity.

The district court concluded that Aukes and Parks "were not on notice that their conduct was or would be clearly unlawful" because Mr. Locke did not identify "any case law . . . that forbids the use of" the specific "pain compliance techniques" the officers used here. App. 22; R. Doc. 23, at 5. Although the court recognized that "[t]here is no requirement that the action in question be previously held unlawful," the court seemed to demand just that—concluding, for example, that *Headwaters* did not provide the officers notice because it involved a

different type of force than "the pain compliance techniques used in this case." App. 22–23; R. Doc. 23, at 5–6. In doing so, the district court misapplied the qualified immunity standard.

For starters, as explained above, *supra* pp. 32–35, this Court has repeatedly held that it is "clearly established" that officers cannot use more than *de minimis* force against nonthreatening, non-fleeing, non-actively-resisting people suspected of low-level crimes. And it has held that level of specificity to provide adequate notice in cases involving a vast variety of methods of force. In doing so, this Court has not demanded that the precise method of force have appeared in a prior case for the officers to have notice that their conduct was unconstitutional.

In *Mitchell*, for example, this Court denied qualified immunity to officers who shot a lead-filled bean bag at a peaceful protestor based on the "clearly established" principle articulated above. 28 F.4th at 898. None of the prior cases *Mitchell* cited as establishing that "clearly established" principle involved shooting protesters with lead-filled bean bags; to the contrary, they involved a wide range of circumstances and types of police force, including tackling, leg sweeps, and use of a Taser. *Id.* The articulation of the principle in numerous prior cases was

sufficiently specific to put the officers in *Mitchell* on notice that using more than *de minimis* force in those circumstances was unconstitutional. *See also Wilson v. Lamp*, 901 F.3d 981, 990–91 (8th Cir. 2018) (holding it clearly established that using force against a nonthreatening, non-resisting arrestee is unreasonable, and rejecting argument that the law was not clearly established because "this court has not recognized excessive force under similar facts" (citing, *inter alia*, *Brown*, *Shannon*, and *Henderson*)).

More broadly, this Court has rejected the notion that notice, for qualified immunity purposes, requires "a nearly identical case" involving the same method of causing harm. *Banks v. Hawkins*, 999 F.3d 521, 528–29 (8th Cir. 2021) ("Our precedent does not set such a prohibitively difficult standard."). In *Banks*, for example, this Court highlighted a prior decision in which it held that officers who "pushed the shirtless plaintiff onto hot asphalt" and refused to move him despite his complaints of pain and burning violated clearly established law, based on "a series of cases involving failure to respond to complaints of overly-tight handcuffs." *Id.* (citing *Howard v. Kan. City Police Dep't*, 570 F.3d 984 (8th Cir. 2009)). As this Court explained, "[i]t mattered not that hot

asphalt is different from tight restraints"—the prior case law "made the constitutional violation sufficiently clear, even in unique circumstances." *Id.* at 529. The "appropriate level of specificity" to give notice did not require a case specifically involving hot asphalt. *Id.*

Other circuits have similarly rejected the notion that clearly established law must be developed weapon-by-weapon or harm-by-harm. As the Fifth Circuit has said, "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." *Newman v. Guedry*, 703 F.3d 757, 763–64 (5th Cir. 2012) (rejecting argument that officer lacked notice that tasing an unthreatening, non-resisting man who had committed no crime was unconstitutional because there was "no binding caselaw on the appropriate use of tasers"); *see also McCoy v. Alamu*, 141 S. Ct. 1364 (2021) (summarily vacating Fifth Circuit decision that had granted qualified immunity to officers who gratuitously pepper sprayed prisoner, despite cases clearly establishing that gratuitous force is unconstitutional, because none of those cases involved pepper spray).

The Second, Seventh, and Ninth Circuits have likewise recognized that "an officer is not entitled to qualified immunity on the grounds that the law is not clearly established every time a novel method is used to inflict injury." *Jones v. Treubig*, 963 F.3d 214, 225 (2d Cir. 2020) (cleaned up); *Nelson v. City of Davis*, 685 F.3d 867, 884 (9th Cir. 2012) (same); *see also Phillips*, 678 F.3d at 528 (rejecting a weapon-specific requirement). Rather, "some measure of abstraction and common sense is required with respect to police methods and weapons in light of rapid innovation in hardware and tactics." *Jones*, 963 F.3d at 225. As the Seventh Circuit put it, "[e]very time the police employ a new weapon, officers do not get a free pass to use it in any manner until a case . . . involving that particular weapon is decided." *Phillips*, 678 F.3d at 528. "Even where there are 'notable factual distinctions'" between methods of inflicting harm, "prior cases may give an officer reasonable warning that his conduct is unlawful." *Id.* (rejecting argument that officers lacked notice that their use of an SL6 baton launcher was excessive just because no binding case "had held use of the SL6 unconstitutional").

Indeed, as the Fourth Circuit has explained, "draw[ing] a line" between different methods of inflicting harm "would encourage bad

actors to invent creative and novel means of using unjustified force." *Thompson v. Commonwealth of Virginia*, 878 F.3d 89, 102 (4th Cir. 2017). Thus, in *Thompson*, the Court held that cases involving gratuitous "direct punches and kicks" provided fair warning that "gratuitously giving an inmate a 'rough ride'" in a prison van was unconstitutionally excessive. *Id.* The precise method of causing harm made "no difference to the constitutional analysis"; the "intentionally erratic driving was simply a different means of effectuating the same constitutional violation." *Id.*

The high level of specificity the district court demanded here—a prior case "forbid[ding]" the exact "pain compliance techniques" the officers used, App. 22; R. Doc. 23, at 5—is particularly inappropriate given that the officers' conduct was the result of calculated choices, not split-second decisions. Courts require a higher level of specificity in fast-moving situations to give officers breathing room to make reasonable mistakes without fear of liability. *Stanton v. Sims*, 571 U.S. 3, 5 (2013); *see, e.g.*, *Morgan-Tyra v. City of St. Louis*, 89 F.4th 1082, 1086 (8th Cir. 2024) (emphasizing the lack of clearly established law where "[t]his situation was about as high pressure as it gets"). But where an officer has "time to make calculated choices," less specificity is necessary to put

the officer on notice of the governing constitutional principles. *Intervarsity Christian Fellowship/USA v. Univ. of Iowa*, 5 F.4th 855, 867 (8th Cir. 2021) (quoting *Hoggard v. Rhodes*, 141 S. Ct. 2421, 2422 (2021) (Thomas, J., respecting the denial of certiorari)). Qualified immunity provides "no safe haven" to officers who "make calculated choices" to use gratuitous, injury-causing force in circumstances where prior case law has made clear that more than *de minimis* force is unreasonable. *See id.*; *see also Rieman v. Vazquez*, 96 F.4th 1085, 1094–95 (9th Cir. 2024) (requiring less specificity to clearly establish due process violation where officials did not "have to make quick decisions . . . under pressing circumstances" but "had ample time" to consider their conduct).

Moreover, the Supreme Court has recognized that, "in an obvious case," the *Graham* test itself "can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (citing *Hope v. Pelzer*, 536 U.S. 730, 738 (2002)); *see also Taylor v. Riojas*, 141 S. Ct. 52, 53–54 (2020). At bottom, the qualified immunity inquiry boils down to notice. "There is no requirement that 'the very action in question has previously been held unlawful.'" *Vaughn v. Ruoff*, 253 F.3d 1124, 1129 (8th Cir. 2001) (quoting *Anderson v.*

Creighton, 483 U.S. 635, 640 (1987)). Viewed in the light most favorable to Mr. Locke, he engaged in peaceful protest and Defendants tortured him with enough force to paralyze half his face. A reasonable officer in Defendants' position would not have "needed to consult a casebook . . . to recognize the unreasonableness of using enough force to" paralyze the face of a peaceful protestor who was not struggling, fighting, threatening, or fleeing. *Atkinson*, 709 F.3d at 1212 (cleaned up).[13]

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In sum, Aukes and Parks are not entitled to qualified immunity on the face of Mr. Locke's complaint. Mr. Locke stated a claim that Aukes

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[13] Although the Supreme Court has not yet jettisoned the judge-made doctrine of qualified immunity altogether, the questionable origins of the doctrine—combined with the growing calls, from across the ideological spectrum, for the Court to reconsider it—militate against applying it broadly to shield Aukes and Parks from liability, particularly at the pleading stage. *See, e.g.*, *Baxter v. Bracey*, 140 S. Ct. 1862, 1865 (2020) (Thomas, J., dissenting from denial of certiorari) ("I continue to have strong doubts about our § 1983 qualified immunity doctrine."); *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (critiquing the doctrine); *see also* R. Doc. 17, at 8 n.4 (Mr. Locke citing recent originalist scholarship casting doubts on the continued viability of qualified immunity); *Villarreal v. City of Laredo*, 94 F.4th 374, 408 n.14 (5th Cir. 2024) (Willett, J., dissenting) ("[T]here is really no debate on the fundamental point that the 'clearly established law' test is untethered from § 1983's text and history and nigh impossible to defend.").

and Parks used excessive force against him when they inflicted excruciating pain causing neurological damage, when he was not suspected of a serious offense, not fleeing or actively resisting, and not a threat to officers or others. Because clearly established law prohibits officers from using more than *de minimis*—much less gratuitous—force under such circumstances, this Court should reverse the district court's decision to grant qualified immunity on the pleadings.

II. The District Court Erred In Dismissing the Official Capacity Claims Under § 1983.

The district court also erred in dismissing Mr. Locke's official capacity claims against Sheriff Aukes and Chief Deputy Sheriff Parks on a ground Defendants never asserted. Defendants did not ask the court to dismiss Mr. Locke's official capacity claims for failure to allege municipal liability under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and thus the parties never briefed that issue.[14] *See* R.

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[14] Defendants moved to dismiss Mr. Locke's § 1983 excessive-force claims solely on the ground that Aukes and Parks are entitled to qualified immunity. *See* R. Doc. 14, at 5–17; R. Doc. 19, at 2–12. Qualified immunity, however, "only applies to claims against public officials in their individual capacities," not to official-capacity claims. *Serna v. Goodno*, 567 F.3d 944, 952 (8th Cir. 2009).

Doc. 14, at 5–17; R. Doc. 19, at 2–12. Indeed, the district court specifically asked Defendants about the official capacity claims at the motions hearing; Defendants responded concerning state-law official immunity but did not address municipal liability or any *Monell* principles. TR. 7.[15] Nevertheless, the district court *sua sponte* dismissed Mr. Locke's official capacity claims on the ground that Mr. Locke did not "allege an official municipal policy, an unofficial custom, or a deliberately indifferent failure to train or supervise that violated his constitutional rights." App. 24; R. Doc. 23, at 7. That was error.

As the district court correctly recognized, a suit against an officer in his official capacity "is actually a suit against the entity for which the official is an agent," and thus Mr. Locke's official capacity § 1983 excessive force claims are, in effect, a suit against Hubbard County. *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)); *see* App. 24; R. Doc. 23, at 7. Under *Monell* and its progeny, a municipality can be liable under § 1983 for the constitutional torts of its officers "only where the

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[15] "TR." refers to the motions hearing transcript at R. Doc. 29. The transcript is also in the Joint Appendix at App. 28–49.

municipality *itself* causes the constitutional violation"—that is, where the violation results from a municipal policy, custom, or failure to train. *Perkins v. Hastings*, 915 F.3d 512, 520–21 (8th Cir. 2019) (internal quotation marks omitted).

It is well-established that the actions of a municipal official with "final policymaking authority" can constitute "municipal policy," thereby subjecting a municipality to § 1983 liability. *Pembaur v. City of Cincinnati,* 475 U.S. 469, 483 (1986). Under Minnesota law, county sheriffs are final policymakers for purposes of the county's "law enforcement practices." *Pembaur*, 475 U.S. at 483 n.12; *see Soltesz v. Rushmore Plaza Civic Ctr.*, 847 F.3d 941, 946 (8th Cir. 2017) (state law determines whether an individual is a final policymaker for a municipality). The county sheriff is the elected county officer empowered to "keep and preserve the peace of the county." Minn. Stat. § 387.03; *see also id.* § 382.01. The sheriff also appoints the county deputies, whom he can remove at will, and is expressly "responsible" for their "acts." *Id.* § 387.14. These statutes establish Sheriff Aukes as the highest authority in Hubbard County on law enforcement matters. *See Dean v. County of*

Gage, 807 F.3d 931, 941 (8th Cir. 2015) (finding sheriff was county's final policymaker for law enforcement based on analogous Nebraska statutes).

Because Sheriff Aukes is Hubbard County's final policymaker for law enforcement practices, the County can be held liable for his unconstitutional actions here. Indeed, even a single incident of unconstitutional activity can constitute "municipal policy" if the action 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) (cleaned up). And that policymaker's action needn't be some sort of express or formal pronouncement. In *Dean*, for instance, this Court held that municipal liability could attach where the county sheriff—the "highest official responsible for setting policy"—was present at various unconstitutional arrests and interrogations and said nothing to stop them. 807 F.3d at 941–43; *see also Mitchell*, 28 F.4th at 901 (plaintiff stated municipal liability claim where complaint alleged that county sheriff, a final policymaker on law enforcement practices, "tacitly authorized [the] use of excessive force" against peaceful protesters).

Here, the complaint alleged that Sheriff Aukes himself committed the acts of excessive force against Mr. Locke, personally employing

multiple types of "pain compliance" techniques until Mr. Locke "could feel that the right side of his face was no longer moving in a normal manner." App. 6; R. Doc. 1, at 3. The complaint, fairly read, also suggests that Sheriff Aukes was present for, and therefore approved of, Chief Deputy Parks's multiple uses of force against Mr. Locke that preceded Sheriff Aukes's own actions. *See* App. 6; R. Doc. 1, at 3; *Cole*, 599 F.3d at 861 (stating that on a motion to dismiss, reasonable inferences are drawn in the non-moving party's favor).

Because Sheriff Aukes was the final policymaker for Hubbard County for law enforcement tactics, Hubbard County can be held liable for the constitutional violations that resulted from his acts and decisions. *Mitchell*, 28 F.4th at 901. The district court thus erred in *sua sponte* dismissing the official capacity claims without considering a final policymaker theory of liability. Because Mr. Locke's complaint, fairly read, makes out such a theory, he should be permitted to proceed on his official capacity claims. *See Watkins*, 2024 WL 2745056, at *3 (plaintiff is "not required to specifically plead the existence of an unconstitutional policy or custom," so long as he alleges facts that would support the

existence of an unconstitutional policy or custom, such as a "deliberate choice of a guiding principle" made by a final policymaker).

At a minimum, this Court should remand with instructions to grant Mr. Locke leave to amend his complaint to bolster his allegations supporting municipal liability.[16] For example, Defendants stated at the motions hearing that Hubbard County officers are trained to use "the specific pain compliance tactics" Aukes and Parks employed here. TR. 9. Mr. Locke should be permitted to amend his complaint to include additional allegations that the County's use-of-force policy caused the constitutional violations he alleges.[17]

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[16] Mr. Locke requested leave to amend below as an alternative to dismissal, R. Doc. 17, at 18 n.10, but the district court dismissed the entire matter without addressing his request, App. 26; R. Doc. 23 at 9.

[17] The record includes additional facts that Mr. Locke could also include in an amended complaint to further support a policy or custom claim. *See, e.g.*, R. Doc. 17, at 7 (describing additional instances of Defendants using pain compliance techniques against protestors 18 days before the events here); TR. 10 (describing the history of the pipeline protests and Defendants' deliberate decision to deprioritize extraction teams in favor of inflicting harm on protesters).

III. The District Court Erred In Dismissing the State-Law Tort Claims on Official Immunity Grounds.

Finally, the district court wrongly granted Defendants official immunity on Mr. Locke's state-law claims. App. 24–25; R. Doc. 23, at 7–8. In Minnesota, official immunity protects public officials in the performance of discretionary functions "absent a showing of a willful or malicious wrong." *Birkeland as Tr. for Birkeland v. Jorgensen*, 971 F.3d 787, 792 (8th Cir. 2020) (cleaned up). "In the context of official immunity, 'willful' and 'malicious' are synonymous" and mean "nothing more than the intentional doing of a wrongful act without legal justification or excuse"—that is, "the willful violation of a known right." *Brown*, 574 F.3d at 500–01 (cleaned up). Although the terms sound subjective, the Minnesota Supreme Court "has described the malice inquiry—on which official immunity for discretionary acts turns—as a 'principally objective' one which focuses on the 'legal reasonableness of an official's actions.'" *Johnson v. City of Minneapolis*, 901 F.3d 963, 972 (8th Cir. 2018) (quoting *State v. City of Mounds View,* 518 N.W.2d 567, 571 (Minn. 1994)).

Critically, this Court has recognized that whether an official acted willfully or maliciously "is normally something 'to be resolved by the jury.'" *Id.* (quoting *Craighead v. Lee*, 399 F.3d 954, 963 (8th Cir. 2005)).

Thus, where there is "a factual dispute regarding whether the officers used excessive force," a jury could find they are "not entitled to official immunity because they willfully violated [the plaintiff's] right to be free from excessive force." *Johnson*, 658 F.3d at 829; *see also Brown*, 574 F.3d at 501 (same); *Johnson*, 901 F.3d at 972 (officers not entitled to state-law official immunity in false-arrest case where jury could find officers arrested plaintiff without probable cause).

Here, as in *Johnson* and *Brown*, there is a factual dispute regarding whether Aukes and Parks engaged in excessive force against Mr. Locke. "Accepting [Mr. Locke's] account as true, a jury could find that the officers are not entitled to official immunity because they willfully violated [his] right to be free from excessive force." *Johnson*, 658 F.3d at 829. The district court thus erred in granting Aukes and Parks official immunity to shield them from Mr. Locke's state-law claims at this early stage. Because the court's dismissal of Mr. Locke's vicarious liability claims against Hubbard County turned on that erroneous official-immunity ruling, App. 25; R. Doc. 23, at 8, that dismissal must be reversed as well.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision dismissing Mr. Locke's action and remand for further proceedings.

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Respectfully submitted,

s/ Christine A. Monta

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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 it contains 11,796 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In addition, 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 it has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

Pursuant to Circuit Rule 28A(h)(2), this brief and the attached addendum have been scanned for viruses and are virus-free.

s/ Christine A. Monta

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2024, I caused the foregoing brief 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/ Christine A. Monta