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

BRIEF OF THE HOWARD UNIVERSITY SCHOOL OF LAW HUMAN AND CIVIL RIGHTS CLINIC AS *AMICUS CURIAE* SUPPORTING APPELLANT

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INTEREST OF AMICUS CURIAE

Howard University School of Law is the nation's first historically Black law school. For more than 150 years since its founding during Reconstruction, the law school has worked to train "social engineers" devoted to the pursuit of human rights and racial justice. As part of this mission, the Howard University School of Law's Human and Civil Rights Clinic advocates on behalf of clients and communities fighting for the realization of civil rights guaranteed by the U.S. Constitution. Having served as a training ground for lawyers and protestors from the Civil Rights Movement through today, the Clinic has a particular interest in ensuring that the constitutional rights of protestors are adequately protected by the courts.[1]

[1] No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

In accordance with Federal Rule of Appellate Procedure 29(a)(2), all parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."[2] Through "collective effort individuals can make their views known, when, individually, their voices would be faint or lost."[3] Sadly, for as long as this has been the case, so too has been the forceful silencing of collective voices when those voices come from people of color. Throughout American history, peaceful protest has been the cornerstone of efforts by people of color to address rampant injustice and to raise dissent against discriminatory practices of the state. All too often, those attempts "to change a social order . . . [t]hrough speech, assembly, and petition—rather than through riot"[4]—have been met with a violent backlash, often at the hands of law enforcement ostensibly charged to protect and serve.

This appeal concerns yet another instance of violent backlash in this long history. Appellant Marcus Mitchell joined fellow Water Protectors in North Dakota in early 2017 to express their collective

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[2] *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 294 (1981).

[3] *Id.*

[4] *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 912 (1982).

opposition to the construction of the Dakota Access Pipeline and its potential impact on the Standing Rock Sioux Tribe. While standing in solidarity with other peaceful protestors attempting to protect Native American ancestral lands, burial sites, and natural resources, officers fired upon Appellant with "less-lethal" rounds. These rounds struck the back of Appellant's head, his leg, and a "bean bag" shattered his eye socket and became lodged in his eye. Appellant thereafter sued the officers for violations of his First, Fourteenth, and Fourth Amendment rights. Despite the gross concerns raised by Appellant in his lawsuit against the officers, the district court denied Appellant any relief and dismissed all of his claims without leave to amend. As so often happens, the district court failed to acknowledge the threat to Appellant's constitutional rights, giving them only the most cursory of consideration.

It is in this context that amicus writes to emphasize two points.

First, the district court's opinion minimizes the racial discrimination underlying Appellant's claims by ignoring the facts, history, and context of protests by people of color. Not only does that context show, as Appellant alleged, a disparity in the treatment of protestors of color by law enforcement, but it also demonstrates an

increasingly militarized and brutal response to such protests not seen at protests led by predominantly white individuals. In dismissing this context as "mere slander," the district court erroneously failed to grapple with the serious First and Fourteenth Amendment implications of this case.

Second, the district court's opinion is irreconcilable with Fourth Amendment principles and fails to consider the serious harm the weapons used against Appellant and his fellow protestors can and often do inflict.

For these reasons, and for the reasons stated in Appellant's brief, the district court's opinion should be reversed.

ARGUMENT

I. THE DISTRICT COURT'S OPINION IGNORES THE FACTS, HISTORY, AND CONTEXT OF PROTESTS BY PEOPLE OF COLOR

"Those who won our independence by revolution" believed "in the power of reason as applied through public discussion" and "eschewed silence coerced by law."[5] Because they understood that freedom to speak—*particularly* in opposition to government action—is an "indispensable condition . . . of nearly every other form of freedom,"[6] the Framers "amended the Constitution so that free speech and assembly should be guaranteed."[7] So when Marcus Mitchell assembled with Water Protectors on the Backwater Bridge to pray and peacefully protest the government's construction of the Dakota Access Pipeline on tribal land, he was acting within the heartland of the rights guaranteed to him by the First Amendment. And when Mitchell, a member of the Navajo Nation, was shot in the face on account of his peaceful protest, he suffered not only a grave violation of the First Amendment, but also a grievous

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[5] *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[6] *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (Cardozo, J.), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969).

[7] *Whitney*, 274 U.S. at 376 (Brandeis, J., concurring).

violation of the Equal Protection Clause experienced by untold numbers of people of color who have faced state violence for exercising their rights to speak, assemble, and petition for redress of grievances.

The Equal Protection Clause forbids government action "based on an unjustifiable standard such as race, religion, or other arbitrary classification."[8] Its relationship with the First Amendment, particularly with respect to racial equality, is "bi-directional and stereoscopic."[9] While it is undeniable that every movement toward equality for people of color has been prompted by their exercise of the First Amendment rights to speech and assembly, it is equally true that the exercise of First Amendment rights by people of color has been met with unjustifiable violence that has rarely, if ever, been applied to white protestors. Law enforcement's "brutalization of Black protestors is part and parcel of our country's ugly racial history."[10] And "the military tactics . . . used in North Dakota are reminiscent of the tactics used against [Black] civil

[8] *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

[9] Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. OF CONST. L. & PUB. POL'Y 13, 17 (2016).

[10] Tasnim Motala, *"Foreseeable Violence" & Black Lives Matter: How* McKesson *Can Stifle a Movement*, 73 STAN. L. REV. ONLINE 61, 64 (2020).

rights protestors during the civil rights movement some 50 years ago."[11] Given this historical context, in addition to the facts detailed in Appellant's Complaint,[12] this case raises serious issues under both the First Amendment and the Equal Protection Clause that demanded thorough consideration by the district court.

A. Law Enforcement Has Responded To Protests By People Of Color With Unwarranted Violence.

For the first two centuries of their existence in this country, Black people were denied any freedom of speech or assembly. The Constitution did not recognize them as citizens to whom the Bill of Rights could apply,[13] and the "Black Codes" enacted by many states expressly forbid "Blacks to . . . hold any religious meetings, or to attend any gatherings whatsoever, upon threat of lashings, hangings or torture."[14] Native Americans were likewise regarded as "an inferior race of people, without

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[11] Letter from Dave Archambault II, Chairman, Standing Rock Sioux Tribe, to Att'y Gen. Loretta Lynch (Oct. 24, 2016).

[12] Compl. ¶¶ 28-41, 88-93.

[13] *Dred Scott v. Sandford*, 60 U.S. 393, 407 (1857) (finding it "too clear for dispute, that the enslaved African race were not intended to be included" in the Constitution and thus "had no rights which the white man was bound to respect"), *superseded by constitutional amendments* (1868).

[14] Justin Hansford, *The First Amendment Freedom of Assembly as a Racial Project*, 127 YALE L.J. F. 685, 692 (2018).

the privileges of citizens"[15] such as First Amendment protection. After centuries of *de jure* denial of First Amendment rights to people of color, the Fourteenth Amendment and the Indian Citizenship Act granted all persons born in this country—including Black and Native people—birthright citizenship and the privileges and immunities attendant to citizenship. But even after the law formally recognized that all persons within the United States possess rights to speech and assembly, the exercise of these rights by people of color has been met with virulent oppression. The brutality that began with indiscriminate vigilante violence during Reconstruction transformed to the dogs and water hoses of the 1960s to the tanks and military-style weapons faced by Water Protectors at the Backwater Bridge.

1. Reconstruction

The death of slavery in the United States ushered in a time of hope for Black people, who immediately began to exercise their rights to assemble and speak out in favor of expanded rights. Unfortunately, that hope was almost immediately crushed by those who refused to accept the equality of Black citizens.

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[15] *Johnson v. M'Intosh*, 21 U.S. 543, 569 (1823).

In the immediate aftermath of the Civil War, Louisiana convened a convention at the Mechanics' Institute in New Orleans to amend its state constitution. A group of Black men, including many Black war veterans, staged a demonstration outside of the Institute in support of Black suffrage and repeal of the discriminatory Black Codes.[16] The demonstration was peaceful; protestors held American flags and danced to the music of a marching band. This exercise of First Amendment rights outraged "a white mob, backed by police, many of them Confederate veterans," who responded with unhinged violence:

> The whites stomped, kicked, and clubbed the black marchers mercilessly. Policemen smashed the Institute's windows and fired into it indiscriminately until the floor grew slick with blood. When blacks inside shook a white flag from a window, the white policemen ignored it and invaded the building. They emptied their revolvers on the convention delegates, who desperately sought to escape. Some leapt from windows and were shot dead when they landed. Those lying wounded on the ground were stabbed repeatedly, their skulls bashed in with brickbats. The sadism was so wanton that men who kneeled and prayed for mercy were killed instantly, while dead bodies were stabbed and mutilated.[17]

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[16] Bryan Stevenson, *A Presumption of Guilt: The Legacy of America's History of Racial Injustice, in* POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 10 (Angela J. Davis ed., 2017).

[17] Ron Chernow, GRANT 574–75 (2017).

The brutal response to Black speech and assembly left 48 people dead and at least 200 wounded.[18]

Native American protests drew a similar level of racial hatred during this period. In 1890, in the largest deployment of the military since the Civil War, federal troops and National Guard units arrived in the Northern Plains to quash a new political and religious movement among the Lakota, Dakota, and other Tribes referred to as the Ghost Dance.[19] The Ghost Dance was a movement of resistance to the Dawes Act, which allowed the federal government to seize and break up tribal lands.[20] The movement protested "the final destruction of Native culture," including the "appropriation of Tribal lands" and "the annihilation of the great herds of buffalo," which had great economic and cultural significance for the Tribes.[21] To stifle the widespread influence the movement had on Indigenous people, the United States government's

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[18] Stevenson, *supra* note 8, at 11.

[19] Nick Estes, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 127–28 (2019).

[20] *Id.* at 120.

[21] Alexander Lesser, *The Cultural Significance of the Ghost Dance*, 35 AM. ANTHROPOLOGY 108, 109 (1933), https://anthrosource.onlinelibrary.wiley.com/doi/epdf/10.1525/aa.1933.35.1.02a00090.

Seventh Calvary massacred 270 to 300 Lakota people engaged in peaceful resistance, two-thirds of whom were women and children.[22]

2. Civil Rights Movement

The struggle for equality continued throughout the next century. And as those efforts organized, so too did the brutal response to them. The Civil Rights Movement of the 1950s and '60s was propelled by courageous "Black citizens [who] banded together and collectively expressed their dissatisfaction with a social structure that had denied them rights to equal treatment and respect."[23] The Birmingham Campaign throughout the spring and summer of 1963, which involved "a series of lunch counter sit-ins, marches on City Hall, and boycotts on downtown merchants to protest segregation laws in the city," [24] represented a turning point in the movement. The response to these nonviolent protests reflected the same brutality deployed against protestors a century before. But rather than spontaneous mob violence, the brutality came from uniformed state officers acting on official state

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[22] Estes, *supra* note 18, at 128.

[23] *Claiborne Hardware*, 458 U.S. at 907–08.

[24] *The Birmingham Campaign*, PBS, http://www.pbs.org/black-culture/explore/civil-rights-movement-birmingham-campaign/ (last visited Mar. 29, 2021).

orders. In response to peaceful protestors praying, singing, and marching, state officers waged war on those they were charged to protect and serve: "Americans saw nightly news coverage of Birmingham demonstrators being struck by police clubs, bitten by dogs, and knocked down by torrents of water strong enough to rip bark from trees."[25]

Alabama would horrify the nation again two years later, when a group of approximately 600 protestors crossed the Edmond Pettus Bridge in Selma to protest the murder of Jimmie Lee Jackson by state police.[26] At the base of the bridge, the protestors met "a wall of state troopers, wearing white helmets and slapping billy clubs in their hands" with sheriff deputies on horseback and white spectators waving Confederate flags "giddily anticipating a showdown."[27] Governor George Wallace had ordered the troopers to "use whatever measures [were] necessary to prevent a march."[28] The troopers obeyed, trampling the protestors with

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[25] Sarah Bullard, FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE 430 (1993).

[26] *Id.*

[27] Christopher Klein, *How Selma's 'Bloody Sunday' Became a Turning Point in the Civil Rights Movement*, HISTORY (July 18, 2020), https://www.history.com/news/selma-bloody-sunday-attack-civil-rights-movement.

[28] *Id.*

horses and beating them with nightsticks.[29] Thirty minutes after the carnage began, not a single Black person of the 600 who had gathered on the bridge "could . . . be seen walking the streets."[30]

Indigenous protests also drew violent responses. In 1973, members of the American Indian Movement (AIM) in Rapid City, South Dakota attempted to raise concern regarding "vigilantes and the police" who victimized Native people and ongoing discrimination in housing and employment.[31] In response, the mayor declared, "If [AIM] want[s] Rapid City to be as famous as Selma, Alabama [he] could take care of that in about 15 minutes."[32] Thereafter, AIM members took to the streets in protest for thirty days.[33] Street fights occurred, and riot cops were deployed, with hundreds beaten, arrested, and driven out of town.[34] True to his word, the mayor joined in the melee.[35]

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[29] Taylor Branch, AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965–68, at 51 (2006).

[30] *Id.* at 53.

[31] Estes, *supra* note 18, at 191.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

3. Modern-Day Protests

The nightsticks, dogs, and pistols of the 1960s have graduated to the military tanks, chemical weapons, and semiautomatic firearms faced by the Water Protectors at the Backwater Bridge. The drift toward this militarized approach to quelling protest has its roots in the 1960s and the responses to the social unrest that swept the nation at the time.[36] The uprising in the Watts neighborhood of Los Angeles, spurred by a traffic stop and altercation between white police officers and Black onlookers, is widely regarded as "the first major incident to nudge the United States toward more militaristic policing."[37] In response to the Watts Uprising, the Los Angeles Police Department and other cities across the nation imposed a "rigid, hierarchical, and militaristic bureaucracy" to address civil arrest which was viewed as "guerrilla warfare."[38] Subsequent years brought the proliferation of Special Weapons and Tactics (SWAT) teams that "employ[ed] quasi-military tactics, such as the targeting of "suspect"

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[36] Radley Balko, RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES 59–61 (2013).

[37] *Id.* at 59; "[Militarization] is the process of arming, organizing, planning, training for, threatening, and sometimes implementing violent conflict." Peter B. Kraska, *Militarization and Policing—Its Relevance to 21st Century Police*, 1 POLICING 501, 507 (2007). POLICING 501, 507 (2007)

[38] Balko, *supra* note 35, at 46, 61.

populations and the "pacification" of high-crime areas through . . . the use of massive dragnet-style sweeps."[39] These tactics were followed by federal initiatives that provided local police departments with excess military equipment and funds to purchase weapons of war for use in civilian law enforcement functions.[40] All of this has resulted in "violent, excessive, and militaristic law enforcement responses" to protests by people of color that have played out repeatedly in recent years.[41]

In 2014, Black residents of Ferguson, Missouri took to the streets to protest the police killing of unarmed teenager Michael Brown. From the outset, these protests were met with officers outfitted in riot gear and armed with semi-automatic rifles.[42] In the days and weeks that followed, law enforcement employed "tanks, armored vehicles and other military-style armaments, and placed the town under siege in response to largely

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[39] Ron Daniels, *The Crisis of Police Brutality & Misconduct in America*, *in* POLICE BRUTALITY: AN ANTHOLOGY 249 (Jill Nelson ed., 2000).

[40] Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime But May Harm Police Reputation*, 115 PROC. NAT'L ACAD. SCI. 9181, 9182 (2018).

[41] Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 820–21 (2020).

[42] *On the Streets of America: Human Rights Abuses in Ferguson,* AMNESTY INT'L (Oct. 23, 2014), https://www.amnestyusa.org/reports/on-the-streets-of-america-human-rights-abuses-in-ferguson/.

peaceful protests."[43] Officers sprayed tear gas indiscriminately and shot protestors and bystanders with rubber bullets and bean bag rounds.[44] Social media flooded with "pictures of protestors with their hands up, many of whom where African American, covering their faces with bandanas to fight off tear gas while standing before police officers in riot gear near military grade tanks."[45]

Similar protests and demonstrations followed the 2020 deaths of Breonna Taylor by Louisville, Kentucky police officers and George Floyd by a Minneapolis, Minnesota police officer. From New York City to Seattle and countless cities in between, "we saw peaceful protesters met with brute force. We saw cracked skulls and mass arrests, law enforcement pepper spraying its way through a peaceful demonstration."[46]

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[43] Justin Hansford & Meena Jagannath, *Ferguson to Geneva: Using the Human Rights Framework to Push Forward a Vision for Racial Justice in the United States After Ferguson*, 12 HASTINGS RACE & POVERTY L. J. 121, 131 (2015).

[44] *Id.* at 132.

[45] Abby Harrington, *Tanks and Rubber Bullets vs. Pussy Hats and High-Fives: A Comparative Look at the 2014 Ferguson Uprising and the 2017 Women's March on Washington*, 31 HASTINGS WOMEN'S L.J. 101, 101 (2020).

[46] Brakkton Booker, *Protests in White and Black, and the Different Response of Law Enforcement*, NPR (Jan. 07, 2021), https://www.npr.org/2021/01/07/954568499/protests-in-white-and-black-and-the-different-response-of-law-enforcement.

In a particularly notable incident, various law enforcement agencies moved with "military precision" to remove Black Lives Matters protestors from Lafayette Park in Washington, D.C.[47] Officers deployed several rounds of chemical irritants, rubber bullets, and sound cannons to remove peaceful Black Lives Matter protestors from a public park.[48] The inordinate response to this seemingly commonplace protest was notably apparent:

> The dissonance between the show of civil obedience—a peaceable assembly petitioning its government for a redress of grievances—and the display of state power was unnerving. It wasn't exactly tanks in Tiananmen Square, but the potential for the armed troops to take what the military likes to call 'kinetic' action against a docile crowd grew by the minute.[49]

This event was not isolated but is a representation of at least 950 incidents of police violence and brutality occurring at anti-racism

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[47] Jonathan Allen, *Trump and Tear Gas in Lafayette Square: A Memo From the Protest Frontlines*, NBC NEWS (June 2, 2020), https://www.nbcnews.com/politics/white-house/memo-front-lines-different-america-n1222066.

[48] *Civil Rights Groups Sue Trump, Barr For Tear-Gassing Protestors Outside White House*, ACLU D.C. (June 04, 2020, 3:45 PM), https://www.acludc.org/en/news/civil-rights-groups-sue-trump-barr-tear-gassing-protesters-outside-white-house.

[49] Allen, *supra* note 46.

protests in a five-month period in 2020 alone.[50] This included more than 500 incidents of law enforcement using less-lethal rounds, pepper spray, and teargas on protesters.[51]

B. Law Enforcement Has *Not* Responded To Majority White Protests With Violence.

The horrific violence employed against minority protests is made all the more vile—and constitutionally problematic—given the comparatively lax law enforcement response to majority white protests and riots. When 435,000 majority white protestors marched from the Capitol to the White House the day after Donald Trump's inauguration, the police showed them grace they would later deprive the several hundred protestors in Lafayette Square. Police "did not attempt to disperse the crowd, use chemical irritants, or make any arrests."[52] Officers "worked to ensure the First Amendment rights of the protestors were protected, *even when the protestors engaged in protesting outside the bounds of their permits*."[53] Law enforcement allowed protestors to move

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[50] Tobi Thomas, Adam Gabbatt & Caelainn Barr, *Nearly 1,000 Instances of Police Brutality Recorded in US Anti-Racism Protests*, GUARDIAN (Oct. 29, 2020), https://www.theguardian.com/us-news/2020/oct/29/us-police-brutality-protest.

[51] *Id.*

[52] Harrington, *supra* note 44, at 123.

[53] *Id.* (emphasis added).

freely, moved barriers, and engaged positively with protestors, giving them high-fives and taking pictures with them. "[A]rguably the police reaction was in part a result of the tendency to be lenient towards [white women]."[54]

The passive law enforcement response to white protests persists even when white protesters are armed, violent, and confrontational. In 2017, white supremacists protested the removal of a confederate monument at the "Unite the Right" rally in Charlottesville, Virginia.[55] Protestors, including self-identified Neo-Nazis, carried semi-automatic weapons and yelled anti-Semitic slogans. One of the Neo-Nazis drove his car into a crowd of counter protestors, killing a young woman.[56] They beat another counter protestor with poles and shot at others.[57] Despite the

[54] *Id.* at 125.

[55] Hansford, *supra* note 13, at 707.

[56] *Id.*

[57] *Id.*

large presence of people instigating violence,[58] law enforcement remained passive, and no tanks, rubber bullets, or other such tactics were used.[59]

A similar disparity in police response was brazenly apparent at the January 6, 2021 insurrection and attack on the United States Capitol. There, several hundred mostly white individuals stormed the U.S. Capitol building to attempt to overturn the presidential election.[60] The rioters smashed windows, stole and destroyed government property, and shoved and beat police officers. Many of the protestors were armed—despite Washington, D.C.'s laws against open carry—and wore tactical gear demonstrating their readiness for chaos and violence.[61] Despite all of this, the rioters were met with a relatively peaceful response from law enforcement and were largely unobstructed as they pillaged the federal

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[58] ("[Organizers] planned and coordinated the march of white nationalists and white supremacists in Charlottesville, provided videos on fighting techniques, and urged marchers to bring weapons such as semiautomatic rifles, handguns and knives. Most significantly, the defendants encouraged unlawful acts of violence, posting explicit calls for violence against protestors and making approving remarks about running over protestors with a vehicle, which in fact occurred."). Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating* Brandenburg *After Charlottesville*, 5 U. PA. J.L. & PUB. AFF. 189, 193–94 (2020).

[59] Hansford, *supra* note 13, at 708.

[60] Rachel Chason & Samantha Smith, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response,* WASH. POST (Jan. 14, 2021), https://www.washingtonpost.com/dc-md-va/interactive/2021/blm-protest-capitol-riot-police-comparison/.

[61] *Id.*

building for hours.[62] Several police officers posed for "selfies" and shook hands with the rioters.[63] Police made only 14 arrests that day, largely for curfew violations and not for the violence committed at the U.S. Capitol.[64]

This differential treatment of white protests as compared to protests by people of color—a dynamic displayed in the allegations of Appellant's Complaint—raises weighty First Amendment and equal protection concerns that the district failed to address. The excessive violence deployed against minority protestors also implicates the Fourth Amendment.

II. THE DISTRICT COURT FAILED TO GIVE DUE CONSIDERATION TO MITCHELL'S FOURTH AMENDMENT CLAIM

A. The District Court's Analysis Is Irreconcilable With Fourth Amendment Principles.

"The right to be free from excessive force is a clearly established right under the Fourth Amendment's prohibition against unreasonable

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[62] Booker, *supra* note 45.

[63] Shaila Dewan, Neil MacFarquhar, Zolan Kanos-Young & Ali Watkins, *Police Failures Spur Resignations and Complaints of Double Standard,* N.Y. TIMES (Jan. 7, 2021), https://www.nytimes.com/2021/01/07/us/Capitol-cops-police.html.

[64] Chason & Smith, *supra* note 59.

seizures of the person."[65] In determining the reasonableness of excessive force, courts must give "careful attention to the facts and circumstances of each particular case, including 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."[66] And "[w]here activities protected under the First Amendment are involved, 'the requirements of the Fourth Amendment must be applied with scrupulous exactitude.'"[67]

The district court did not undertake the proper Fourth Amendment analysis and gave no consideration of the First Amendment implications in this case. The district court instead dismissed Appellant's Fourth Amendment claim because of its observation that "law enforcement officers routinely and lawfully use less-lethal munitions to control crowds, even when individuals are peacefully protesting" and that Appellant "positioned himself in the exact line of fire."[68] Because

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[65] *Moore v. Indehar*, 514 F.3d 756, 759 (8th Cir. 2008) (quoting *Guite v. Wright*, 147 F.3d 747, 750 (8th Cir. 1998)).

[66] *Graham v. Connor*, 490 U.S. 386, 396 (1989).

[67] *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1263 (C.D. Ill. 1996) (quoting *Stanford v. Texas,* 379 U.S. 476, 485 (1965)).

[68] *Mitchell v. Kirchmeier*, No. 1:19-cv-149, 2020 WL 8073625, at *7 (D.N.D. Dec. 10, 2020).

Appellant, the court reasoned, "was the cause of his own injury," the force used against him was reasonable and "appropriate."[69] This reasoning represents a startling distortion of Fourth Amendment principles. The Fourth Amendment has neither a contributory fault nor a causation standard. Instead, the proper inquiry is whether, under the totality of the circumstances, the police's use of force against a peaceful protester was *reasonable*. It was not.

Regarding Appellant's alleged crime of trespassing, "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."[70] Nowhere in the district court's opinion does it suggest that Appellant acted violently, dangerously, or otherwise attempted to evade arrest. While the court notes "chaos and tension" at the protests generally, Appellant's Complaint emphasizes the peaceful nature of his involvement in those protests. He kept "his hands raised above his head to make clear to the law enforcement officers that he was unarmed and peaceful."[71] Appellant was at worst trespassing (something he disputes),

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[69] *Id.* at *8.

[70] *Brown v. City of Golden Valley*, 574 F.3d 491, 499 (8th Cir. 2009).

[71] *Mitchell*, 2020 WL 8073625, at *3, *7.

was not a danger to the police or others, and was not resisting arrest or attempting to avoid arrest.

Moreover, the district court's focus on law enforcement's growing presence at the protests and Sheriff Kirchmeier's request for assistance from multiple agencies[72] does not at all minimize the officers' decision to brutally apprehend Appellant. Instead, it suggests that this was not a circumstance where officers were "forced to make split-second judgments . . . about the amount of force that is necessary in a particular situation,"[73] but rather an example of the enormous reinforcements at law enforcement's disposal to address the 200 peaceful protestors present when Appellant was shot. To allow the force used against Appellant to stand as simply routine would undermine the protection provided by the principles embedded in the Fourth Amendment.

Finally, the district court's conclusion that because Appellant "placed himself in the line of fire rather than leaving the area,"[74] he was the cause of his own injury, leads to troubling conclusions. It suggests

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[72] *Id.* at *7.

[73] *Graham*, 490 U.S. at 397.

[74] *Mitchell*, 2020 WL 8073625, at *8.

that no use of force—no matter how egregious—can be unreasonable so long as a protestor—no matter how peaceful and nonthreatening—had notice that law enforcement was engaged in a show of force in preparation for planned demonstrations. This is not only incorrect, but also leaves protesters with a Hobson's choice: either waive their Fourth Amendment protections in order to exercise their First Amendment rights or refrain from exercising their First Amendment rights due to legitimate concerns about their safety. In either case, the end result is the suppression of a constitutional right. The district court's reasoning would also give law enforcement license to use indiscriminate force so long as protestors were forewarned of possible police violence—an outcome that is particularly troubling given that law enforcement often engages in threatening shows of force in advance of minority protests.

By relying entirely on an inapposite application of contrived circumstances of contributory fault or causation, the lower court abdicated its responsibility to pay "careful attention" to the full facts and circumstances as presented to the court. Under a proper consideration of the *Graham* factors, the officers' actions here were patently unreasonable.

B. The "Less-Lethal" Measures Employed Against People Of Color Are Extremely Dangerous And Often Inflict Severe Injuries.

Under the reasonable analysis, "the degree of injury is certainly relevant insofar as it tends to show the amount and type of force used."[75] Although the district court chose not to address it in his analysis, Appellant sustained serious injuries from the crowd control measures utilized by the police. The so-called "crowd control measures" with which the district court indicates police "routinely" respond to peaceful protests include what are often referred to as "less-lethal" weapons. They are anything but. Less-lethal weapons are "weapons and munitions designed to be used without a substantial risk of serious or permanent injury or death to the subject on whom they are applied."[76] They include blunt force weapons, chemical irritants, and other specialized technologies.[77] Despite their supposed design, the capability of each these weapons to

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[75] *Chambers v. Pennycook*, 641 F.3d 898, 906 (8th Cir. 2011).

[76] *Armed Policing*, COLL. OF POLICING, https://www.app.college.police.uk/app-content/armed-policing/use-of-force-firearms-and-less-lethal-weapons/ (last visited Mar. 24, 2021).

[77] Kelsey Atherton, *What 'Less Lethal' Weapons Actually Do*, SCI. AM. (June 23, 2020), https://www.scientificamerican.com/article/what-less-lethal-weapons-actually-do/.

cause serious physical harm is well documented.[78]

The primary concern in this case is the use of a bean bag shotgun against Appellant and other protestors. As the Ninth Circuit has explained, a bean bag shotgun is "a twelve-gauge shotgun loaded with . . . 'beanbag' round[s]," which consist of "lead shot contained in a cloth sack."[79] The weapon is:

> intended to induce compliance by causing sudden, debilitating, localized pain, similar to a hard punch or baton strike. Although bean bag guns are not designed to cause serious injury or death, a bean bag gun is considered a "less-lethal" weapon, as opposed to a non-lethal weapon, because the bean bags can cause serious injury or death if they hit a relatively sensitive area of the body, such as [the] eyes, throat, temple or groin. [80]

The Court further observed that "'the euphemism 'beanbag' grossly underrates the dangerousness of this projectile, which can kill a person if it strikes his head or the left side of his chest at a range of under fifty feet."[81] Here, police shot Appellant in the face from a distance of about 20

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[78] *See* Physicians for Human Rights, *Lethal in Disguise: The Health Consequences of Crowd-Control Measures* (2016) [hereinafter *Lethal in Disguise*].

[79] *Deorle v. Rutherford*, 272 F.3d 1272, 1277 (9th Cir. 2001).

[80] *Glenn v. Washington County*, 673 F.3d 864, 871 (9th Cir. 2011) (quotation marks omitted).

[81] *Id.*

feet.

Bean bag rounds are classed within a group of weapons referred to as kinetic impact projectiles (KIPs). As well as bean bag rounds, KIPs include rubber and plastic bullets, sponge rounds, and pellet rounds,[82] many of which police deployed against Dakota Access Pipeline protestors. Although law enforcement worldwide uses KIPs for crowd control purposes, research indicates that the weapons cause serious injury, disability, and death. This is especially so because they are inherently inaccurate when fired from afar.[83] Such inaccuracy increases the chance the projectiles will unintentionally hit vulnerable body parts or bystanders.[84] Moreover, firing too closely to increase the accuracy of aim also increases the risk of serious injury. This makes them particularly inappropriate as a crowd control measure.[85]

These "less-lethal" projectiles can cause injury in a number of ways. Impact can lead to skull fractures, concussions, or brain injuries.[86]

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[82] *Lethal in Disguise*, *supra* note 77, at 26.

[83] *Id.* at 7.

[84] *Id.* at 35.

[85] *Id.* at 36.

[86] Donovan Slack, Dennis Wagner, Jay Hancock & Kevin McCoy, *Less-Lethal Weapons Blind, Maim and Kill. Victims Say Enough is Enough*, KHN (July 24, 2020),

Impact to the neck can also cause spinal injuries.[87] And in the realm of Appellant's injury, a direct hit to the eye can rupture the eyeball, causing blindness and fracture the bones around the eye.[88] A 2017 review from the British Medical Journal of the use of less-lethal munitions including rubber bullets, bean bag rounds, and other projectiles found that they have caused significant morbidity and mortality rates during the past 27 years.[89] The data reviewed showed 15 percent of 1,984 people injured by such projectiles were left with permanent disabilities[90] and 3 percent—fifty-three people—died.[91] Overall, 71 percent of those injuries were severe.[92] The review further showed that deaths and permanent disability often resulted from strikes to the head and neck.[93]

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https://khn.org/news/less-lethal-weapons-blind-maim-and-kill-victims-say-enough-is-enough/.

[87] *Id.*

[88] *Id.*

[89] Rohini Harr et al., *Death, Injury and Disability from Kinetic Impact Projectiles in Crowd-Control Settings: A Systematic Review*, 7 BRITISH MED. J. 1 (2017).

[90] *Id.* at 7.

[91] *Id.* at 3.

[92] *Id.* at 7.

[93] Knvul Sheikh & David Montgomery, *Rubber Bullets and Beanbag Rounds Can Cause Devastating Injuries*, N.Y. Times (June 12, 2020), https://www.nytimes.com/2020/06/12/health/protests-rubber-bullets-beanbag.html#:~:text=A%202017%20analysis%20published%20in,those%20who%20were%20injured%20died.

Although this data reflected injuries inflicted during not just protests, one need only look to the numerous injuries inflicted on protestors recently to understand the danger of these types of weapon. During the Black Lives Matter protests during the summer of 2020 alone, at least 60 protestors suffered head wounds, causing bone fractures, blindness, and traumatic brain injuries.[94] This includes a woman who lost an eye after being hit by a foam projectile in Minneapolis, one who was placed in a medically-induced coma after she was shot between the eyes by a bean bag round in California, another who lost an eye and several teeth after being hit with a sponge round in Dallas, and yet another who suffered facial and skull fractures when a federal officer in Oregon shot him with a less-lethal round.[95]

In one protest in Austin alone, doctors treated 19 patients for bean bag related injuries, with a sixteen-year-old requiring hours of surgery and experiencing brain damage after police officers hit him in the head.[96]

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[94] Slack, *supra* note 5.

[95] *Id.*

[96] Chuck Lindell, *Bean Bag Rounds Caused Horrific Injuries and "Less-Lethal" Rounds Need to Go, Texas Doctors Say*, USA TODAY (Aug. 16, 2020), https://www.usatoday.com/story/news/nation/2020/08/16/less-lethal-ammo-bean-bag-rounds-caused-major-injuries/113237602/.

Others also required brain surgery, breathing tubes, and long stays in the ICU resulting from their injuries.[97] Appellant's injuries and others like them manifestly show the unreasonable nature of the indiscriminate use of bean bag rounds. These weapons may be less dangerous than the standard firearm, but they frequently cause severe harm—especially when used at protests. Their use should not be considered reasonable as general matter of law just because officers frequently utilize them.

CONCLUSION

For the foregoing reasons, the district court's decision dismissing Appellant's Complaint should be reversed.

Respectfully Submitted,

s/ Tiffany R. Wright

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[97] *Id.*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and 5th Cir. R. 32.3, 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 5,902 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 5th Cir. R. 32.1 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 21, 2021

s/ Tiffany R. Wright
TIFFANY R. WRIGHT

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: May 21, 2021

s/ Tiffany R. Wright
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