No. 23-3391

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Sumaya Aden, as next-of-kin and trustee for the
Estate of Isak Abdirahman Aden, Decedent,

Plaintiff-Appellee,

v.

City of Eagan, Minnesota, Officer Jacob Peterson,
Officer Matthew Ryan, Officer Daniel Nelson,
Officer Adam Stier, Officer Anthony Kiehl,
Chief Roger New, Lieutenant Andrew Speakman,
and Sergeant Corey Cardenas,

Defendants-Appellants.

On Appeal from the
United States District Court For the District of Minnesota
Case No. 20-cv-01508 (JWB-TNL)

RESPONSE BRIEF OF APPELLEE

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Defendants challenge the district court's denial of summary judgment for the authorization of potentially lethal force, and use of lethal force, against Aden. While properly construing all facts and inferences in Plaintiff's favor, the district court correctly ruled that authorizing the use of unannounced potentially lethal force against a calm, seated man who was not touching a weapon was objectively unreasonable and violated clearly established law. The district court further appropriately concluded that the use of lethal force against an intentionally shocked and blinded individual who did not point a weapon at or threaten anyone was objectively unreasonable and violated clearly established law. Defendants also request review of Plaintiff's *Monell* and state law claims, but these matters are not properly before this Court. Plaintiff requests 30 minutes of oral argument.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties in this proceeding.

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JURISDICTIONAL STATEMENT

Plaintiff incorporates Defendants' characterization of her amended complaint except to note that the negligence and wrongful death claim under Minn. Stat. § 573.02 were pled separately. District court jurisdiction was proper under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. Plaintiff agrees that the court granted Defendants summary judgment against her substantive due process claim, dismissed three Defendants from her second excessive force claim, and denied summary judgement on all other counts. (App.1-33, R.Doc.93, at 1-33, Add.1-33). Plaintiff agrees Defendants' interlocutory appeal is timely.

However, "Defendants [did] not seek summary judgment on the Wrongful Death Count," App. 10; R. Doc. 93, at 10. The Court cannot review it now. Moreover, the Court cannot address pendent legal issues that are not "coterminous with, or subsumed in," the qualified immunity analysis. *Veneklase v. City of Fargo*, 78 F.3d 1264, 1269–70 (8th Cir. 1996). Because Plaintiff's *Monell* claim hinges "on the allocation of law enforcement power" rather than the clearly established law relevant to qualified immunity, the Court cannot review it beyond an inquiry into the reasonableness of the seizure. *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 36 (1995). This also applies to state tort immunity, which is not "coterminous" with a Fourth Amendment qualified immunity analysis. *See Torres v. City of St. Louis*, 39

F.4th 494, 507 (8th Cir. 2022), *reh'g denied,* No. 21-1761, 2022 WL 3151858 (8th Cir. Aug. 8, 2022); *Clinton v. Garrett*, 49 F.4th 1132, 1139 (8th Cir. 2022).

This Court can review the reasonableness of Defendants' authorization of flashbang grenades and 40-mm rounds against a calm, seated non-threatening man who was not touching a weapon; the reasonableness of lethal force against a startled, blinded, albeit armed, man who jumped in response to three explosions and 40-mm fire and then sat back down; as well as the existence of clear legal guidance defining the scope of Aden's right to be free of both seizures. All other issues, including identification of factual disputes, lie beyond this Court's jurisdiction. *See Johnson v. Jones*, 515 U.S. 304 (1995).

STATEMENT OF LEGAL ISSUES

1) Did the district court properly deny qualified immunity for authorizing the unannounced application of potentially lethal flash-bang grenades and 40-mm rounds directly against the body of a calm, seated man who never threatened officers based solely on the presence of a gun near the subject's foot?

- *Division of Employment Security v. Board of Police Commissioners*, 864 F.3d 974 (8th Cir. 2017)
- *Tatum v. Robinson*, 858 F.3d 544 (8th Cir. 2017)
- *Kuha v. City of Minnetonka*, 365 F.3d 590 (8th Cir. 2003)
- *Escobedo v. Bender*, 600 F.3d 770 (7th Cir. 2010)

2) Did the district court properly deny qualified immunity for using lethal force against a man who jumped and grasped a gun in response to an onslaught of police-induced force aimed at inflicting pain when he never pointed the weapon at anyone or otherwise signaled an intent to harm and immediately sat back down?

- *Nance v. Sammis*, 586 F.3d 604 (8th Cir. 2009)
- *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127 (8th Cir. 2020)
- *Ludwig v. Anderson*, 54 F.3d 465 (8th Cir. 1995)
- *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017)

3) Does the Court have interlocutory jurisdiction over Plaintiff's *Monell* claims?

- *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35 (1995)
- *Veneklase v. City of Fargo*, 78 F.3d 1264 (8th Cir. 1996)

4) Does the Court have interlocutory jurisdiction over Plaintiff's state law claims?

- Fed. R. App. P. 4
- *Clinton v. Garrett*, 49 F.4th 1132 (8th Cir. 2022)
- *Torres v. City of St. Louis*, 39 F.4th 494 (8th Cir. 2022)

STATEMENT OF THE CASE

On July 2, 2019, Defendants responded to an alleged domestic incident. App. 3; R. Doc. 93, at 3; Add. 3. Tigst Asnake initially reported Aden pointed a weapon at her and drove into traffic. Aden exited the vehicle and travelled to a nearby wooded area carrying his brother's handgun. *Id.* In the woods, Aden tripped and dropped the weapon, causing a discharge. *Id.* Aden verified this with negotiators. *Id.*

Aden traveled west and officers intercepted him on Seneca Road. *Id.* Aden, holding the gun to his head, stopped at the southeastern corner of an empty parking lot between two commercial buildings. *Id.* Seneca Road was southwest of the lot. *Id.* at 7, Figure A.

Aden sat on a curb and initially pointed the handgun at his temple. *Id.* at 3. He subsequently set the weapon on the ground without pointing it at officers. *Id.* at 4. Aden remained seated for the next four hours. *Id.* at 6. He never threatened anyone. *Id.* While Aden picked up the weapon, he never pointed it at anyone and set it down where it remained untouched on the ground for the last hour and forty-two minutes while Aden remained in place. *Id.*

"The scene was heavily policed," with "[o]ver eighty police officers from eight different police forces." *Id.* at 1, 4. Police and SWAT officers "wore tactical body armor and helmets, carried military-style assault weapons and less-lethal weapons, and were equipped with bullet-proof and bullet-resistant ballistic shields."

Id. at 4. Three armored vehicles were positioned at the northwest corner and south exit of the lot and slightly behind Aden's left. *Id.* at 4, 7, Figure A; App. 1120; R. Doc. 73-4, at 22. These vehicles created an inner perimeter. App. 6 n.3, 7, Figure A, 16; R. Doc. 93, at 6 n.3, 7, Figure A, 16; App. 112; R. Doc. 63-9; App. 2071; R.Doc. 76-1 at 18.

Officers were interspersed between squad cars and armored vehicles. App. 8; R. Doc. 93, at 8. Three canines were positioned amongst the vehicles. *Id.* at 6 n.3, 8; App. 1490; R. Doc. 74-8, at 9. Officers had "360-degree coverage." App. 520; R. Doc. 64-13, at 7; App. 6; R. Doc. 93, at 6 n.3. "The area was confirmed clear of bystanders." App. 4; R. Doc. 93, at 4. Multiple squad cars formed a second perimeter.

There were four snipers. *Id.*; App. 1246; R. Doc. 73-6, at 27. Defendants Stier and Kiehl were on a roof to the south, 84 yards from Aden. App. 1080; R. Doc. 73-3, at 83; App. 4, 7, Figure A, 8; R. Doc. 93, at 4, 7, Figure A, 8. Two additional snipers set up at street level to the west. App. 1750; R. Doc. 78-5, at 5.

There were at least a dozen lethal weapons and two 40-mm launchers always trained on Aden. App. 756; R. Doc. 65-5, at 63; App. 808, 812; R. Doc. 65-6, at 92, 108; App. 4; R. Doc. 93, at 4. The officers on the interior perimeter were fifteen to thirty yards from Aden. App. 1124; R. Doc. 73-4, at 40; App. 1181; R. Doc. 73-5, at 62. "[T]he area was well lit, illuminated with streetlights, surrounding business flood

lights, vehicles headlights, and vehicle-mounted spot/flood lights." App. 4; R. Doc. 93, at 4. Nobody requested supplemental lighting. App. 132, 134; R. Doc. 63-11, at 39, 48.

Officers gathered information throughout the evening. App. 922; R. Doc. 73-1, at 52. They confirmed Aden had no history of mental illness. App. 1731; R. Doc. 77-10, at 12. Dispatch broadcast that Aden had no criminal record. App. 2041; R.Doc. 78. Asnake, once officers located her, clarified that Aden never threatened or tried to harm her. App. 434; R. Doc. 64-2, at 4; App. 1742, 1745; R. Doc. 78-2, at 8, 11; App. 3 n.2, 15; R. Doc. 93, at 2, 3 n.2, 15; Add. at 2, 3 n.2, 15. She confirmed Aden had no history of violence. App. 1744; R. Doc. 78-2, at 10.

Aden corroborated these points. App. 432; R. Doc. 64-2, at 2. Aden reported the gun discharged unintentionally when he dropped it while running. App. 432; R. Doc. 64-2, at 2; App. 3; R. Doc. 93, at 3. Moseng reiterated Aden only committed a misdemeanor. App. 433; R. Doc. 64-2, at 3. Defendants knew, before advancing on Aden, they were dealing with an inexperienced person with no history of mental illness or criminality. Defendants received—and leadership ignored—this additional information.

a. Moments before the Tactical Assault

Officers began one-way communication with Aden over a P.A. system at 7:34. App. 1476; R. Doc. 74-7, at 7. Aden obliged by removing his finger from the

trigger guard. At 8:56, he put the gun on the ground between his legs. App. 1623; R.Doc. 75-2 at 17; App. 4; R. Doc. 93, at 4. He later scooted left, away from the gun. *Id.*; App. 142; R. Doc. 63-11, at 80.

Officers delivered a cellphone with monitoring software at 9:22. App. 990; R. Doc. 73-2, at 70. Moseng's first two-way engagement with Aden began at 9:25. App. 431; R. Doc. 64-2, at 1. Aden remained calmly seated throughout. App. 762; R. Doc. 65-5, at 87; App. 4, 6, 15, 19–20; R. Doc. 93, at 4, 6, 15, 19–20, Add. 4, 6, 15, 19–20. Defendants' phone allowed Aden to communicate with Asnake. App. 403, 433–35; R. Doc. 64-2, at 3–5, 59–60. Aden unsurprisingly focused on wanting Asnake to explain what happened. *Id.* at 3.

Aden never raised his voice. App. 403; R. Doc. 64 at 56; App. 6, 15, 19–20; R. Doc. 93, at 6, 15, 19–20; Add. 6, 15, 19–20. His body language never changed. App. 672; R. Doc 65-3 at 59; App. 15; R. Doc. 93, at 15; Add. 15. He started to yield by scooting away from the gun. App. 142; R. Doc. 63-11, at 80; App. 4, 15–16; R. Doc. 93, at 4, 15–16; Add. 4, 15–16. Officers recorded a statement from Asnake and played it for Aden, impacting him favorably. App. 449; R. Doc. 64-2, at 19.

Negotiations were contemporaneously broadcast to New, Speakman, Cardenas, and Yakovlev, who nonetheless finalized an assault plan. App. 920; R. Doc. 73-1, at 42; App. 14, 23; R. Doc. 93, at 14, 23; Add. 14, 23. "The tactical plan reflected a planned strategy and not a split-second decision." App. 13; R. Doc. 93,

at 13; Add. 13. New authorized force because the threat had waned, App. 932; R. Doc. 73-1 at 90–91, and he disregarded negotiators based on what he had seen on TV. *Id.* at 52; App. 5; R. Doc. 93, at 5; Add. 5.

Negotiators believed they could still motivate Aden to surrender. App. 1505; R. Doc. 74-9 at 9. Officers believed "negotiations were progressing nicely" when the assault began. App. 1451; R. Doc. 74-5 at 13. Just 85 minutes of two-way negotiations preceded the assault. App. 431; R. Doc. 64-2, at 1. "Aden had become calmer, put the gun down, and moved away from the gun." App. 4; R. Doc. 93, at 4; Add. 4. There was plenty of light from the buildings and vehicles. *Id.* Defendants proceeded anyway.

b. The Tactical Plan - Shooting Aden while Seated on the Ground

Defendants planned to throw flashbang grenades within feet of Aden and pummel him with 40-mm rounds. App. 142; R. Doc. 63-11, at 88; App. 5, 14; R. Doc. 93, at 5, 14; Add. 5, 14. Flashbangs "can injure or kill when detonated in close proximity," and 40-mm rounds are "potentially lethal." App. 5; R. Doc. 93, at 5; Add. 5. Tactical leaders knew this. *Id.* New and Officer Vonderharr openly questioned the plan in real time. App. 929; R. Doc. 73-1 at 78; App. 2005; R. Doc. 77-3:14:51. The intent was to inflict pain. App. 2040, R. Doc. 77-9. "[N]o notice was given to Aden or the active negotiators." App. 14; R. Doc. 93, at 14; Add. 14. Canines were present but wholly ignored. *Id.* at 8; App. 132; R. Doc. 63-11, at 38.

Chief New instructed negotiators to keep Aden talking on the phone knowing that he authorized commencing the assault. *Id.* at 1, 4, 5; R. Doc. 93, at 1, 4, 5; Add. 1, 4, 5. When Defendants launched their tactical assault, Aden was seated on the curb in plain sight, the firearm on the ground away from him, talking to Officer Moseng. *Id.* at 6.

At 10:37, three flashbangs were thrown, one of which exploded in Aden's face. App. 2003; R. Doc. 77-2; App.711; R. Doc. 65-4 at 41; App. 6; R. Doc. 93, at 6; Add. 6. Defendants fired eight 40-mm shots, threw three flashbang grenades, and fired twelve lethal bullets. *Id.*[1]

As the grenades exploded, Aden rose to a crouch and turned laterally along the curb. He took a step laterally, "stumbl[ing] with his right arm extended down toward the pavement." App. 6; R. Doc. 93, at 6; Add. 6. He palmed the gun with his right hand but never assumed a shooter's grip. Aden step laterally along the curb with his right arm locked towards the ground, and the gun near his shin. App. 2003; R. Doc. 77-2; App. 1631; R. Doc. 75-2 at 25; App. 6, R. Doc. 93, at 6; Add. 6.

Peterson fired the first lethal round "2.63 seconds after the less-lethal rounds were deployed." App. 1631; R. Doc. 75-2 at 25; App. 25; R. Doc. 93, at 25; Add. 25. "[W]hen Officer Peterson fired his first shot, Aden was moving to his right while

[1] Martini notes an "unaccounted for shooter," which explains the thirteenth cartridge. App. 2065; R. Doc. 76-1 at 12; App. 558–61; R. Doc. 64-18.

in a hunched posture—not standing upright—and the gun in his right hand was directed toward the ground, not at the officers." App. 25; R. Doc. 93, at 25; Add. 25. Ryan fired next. *Id.*; App. 1663; R. Doc. 75-2 at 57.

Aden returned to the curb, sat, leaned onto his right side, his right hand placing the gun on the ground. App. 1669; R. Doc. 75-2 at 63; App. 26; R. Doc. 93, at 26; Add. 26. He looked towards the south. Peterson then expended more rounds, continuing even when Aden lay on his side. App. 25–26; R. Doc. 93, at 25–26; Add. 25–26; App. 1657; R. Doc. 75-2 at 51. As Aden lay prone, Stier fired. *Id.*; App. 26; R. Doc. 93, at 26; Add. 26. Ryan fired again, stopping *only* because his gun jammed. App. 1664; R. Doc. 75-2 at 58; App. 26; R. Doc. 93, at 26; Add. 26. Nelson fired into Aden's back. App. 1646; R. Doc. 75-2 at 40; App. 26; R. Doc. 93, at 26; Add. 26. Kiehl, well behind the others, shot last. App. 1674; R. Doc. 75-2 at 69; App. 26; R. Doc. 93, at 26; Add. 26. Each officer struck Aden. App. 2064–66; R. Doc. 76-1 at 11–13.

Defendants' descriptions of Aden range from the improbable to the ludicrous. The forensic evidence debunks them all. Aden still had the phone in his left hand. App. 2003; R. Doc. 77-2; App. 998; R. Doc. 73-2, at 104; App. 6; R. Doc. 93, at 6; Add. 6. His left arm rose behind him. App. 1631; R. Doc. 75-2 at 25. He moved a few feet, the gun never rising above his shin. App. 2003; R. Doc. 77-2; App. 1630-31; R. Doc. 75-2 at 24–25; App. 2; R. Doc. 93, at 2; Add. 2. He sat back down,

facing southwest, away from officers. App. 2003; R. Doc. 77-2; App. 1631; R. Doc. 75-2 at 25. The gun pointed toward the ground. *Id.*; App. 1419; R. Doc. 74-3 at 10; App. 25; R. Doc. 93, at 25; Add. 25. Then Defendants shot. App. 1643–44, 46, 57, 58, 63, 69; R. Doc. 75-2 at 37–38,40,51,52,57,58,63,69. Aden never raised his arm, displayed a shooter's grip, twisted, or moved toward any officer. App. 6; R. Doc. 93, at 6; Add. 6. Video and audio confirm the gun never rose above Aden's shin. *Id.*; App. 2003; R. Doc. 77-2. Importantly, there was ample time for each officer between shots to reassess the situation before shooting. They shot anyway.

Medical evidence confirms almost all the shots entered Aden's left side, including shots that travelled from the lower left part of his body up towards his right shoulder. App. 2064-66; R. Doc. 76-1 at 11–13; App. 1908-11; R. Doc. 67 at 1–4. Given each shooter's height, geometry confirms Aden was lying with his right shoulder on or near the ground and his back to the officers when shot.

Aden's gun discharged after Defendants' shot, not vice versa. App. 2063; R. Doc. 76-1 at 10. The gun was on the ground to Aden's right, pointed away from officers. App. 1643–44, 46, 57, 58, 63, 69; R. Doc. 75-2 at 37–38,40,51,52,57,58,63,69; App. 6; R. Doc. 93 at 6; Add. 6. The round travelled "downwards into the ground" and northeast, in the opposite direction of officers. App. 2063; R. Doc. 76-1 at 10; App. 6; R. Doc. 93, at 6; Add. 6. Forensic evidence

confirmed the weapon was pointed away from officers. App. 6; R. Doc. 93, at 6; Add. 6. Aden died almost immediately.

Plaintiff filed suit. Defendants moved for summary judgment asserting qualified immunity for all named officers and other defenses. The court partially granted Defendants' summary judgment by dismissing officers who deployed lethal munitions from Count II and dismissing Plaintiff's substantive due process claim. App. 2; R. Doc. 93, at 2; Add. 2. The district court denied the remainder of Defendants' motion. *Id*. Defendants now appeal.

SUMMARY OF THE ARGUMENT

Authorizing and then using potentially lethal flashbang grenades and 40-mm rounds directly against the body of a calm, seated, communicative, and passively resistant man who never once threatened officers was wholly unreasonable. The presence of a gun near his foot and the hypothetical that he might pose a threat if he picked it up are insufficient. The lack of warning objectively increased the risk, making the action even more egregious. This level of force violated clearly established law. The subsequent use of lethal force was also wholly unreasonable. Officers rely exclusively on Aden's picking up a handgun despite clear precedent declaring that possession without more is not an immediate threat. Through three flashbang explosions and 40-mm fire, Aden never aimed his weapon at officers or moved towards them, and almost immediately sat down after a lateral step. Using lethal force against a non-threatening armed man violated clearly established law. The remaining *Monell* and state law claims are not properly before the Court.

ARGUMENT

I. STANDARD AND SCOPE OF REVIEW

The Court review of qualified immunity questions is de novo. The Court must view "the facts in the light most favorable to the nonmoving parties and drawing all reasonable inferences in their favor." *Nance v. Sammis*, 586 F.3d 604, 609 (8th Cir. 2009). Precedent circumscribes the Court's interlocutory jurisdiction to legal questions of qualified immunity. *Wallace v. City of Alexander*, 843 F.3d 763, 766 (8th Cir. 2016). The Court can only review matters that resolve on an issue of law, *Thompson v. Murray*, 800 F.3d 979, 982 (8th Cir. 2015), and are "'inextricably intertwined' with the defense of qualified immunity." *White v. McKinley*, 519 F.3d 806, 815 (8th Cir. 2008).

The Court cannot address "the existence, or nonexistence, of a triable issue of fact." *Johnson*, 515 U.S. at 316. Nor can it "cast aside the district court's factual findings, analyze the factual record, and resolve genuine factual disputes against the non-moving party." *Taylor v. St. Louis Cmty. Coll.*, 2 F.4th 1124, 1127 (8th Cir. 2021). Defendants cannot "create appellate jurisdiction by using qualified immunity verbiage to cloak factual disputes as a legal issue." *Berry v. Doss*, 900 F.3d 1017,

1021 (8th Cir. 2018).[2] The court's findings neither "blatantly contradict" the record, nor do Defendants claim they do. Thus, the Court cannot make new factual findings.

II. DEFENDANTS NEW, SPEAKMAN, AND CARDENAS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS IT RELATES TO THEIR TACTICAL PLAN.

a. Plaintiff Pled a Fourth Amendment Direct Participation theory with Specificity.

Rule Eight requires no more than "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). [3] "Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). There must be enough to provide "'fair notice of what the ... claim is and the grounds upon which it rests.'" *Id.*

Plaintiff's amended complaint identified New, Speakman, and Cardenas as "[t]he central figures in developing and authorizing the assault plan." R. Doc. 1 ¶ 141. It alleged New "authorized the assault," *id.* ¶ 142 and identified the reasons why the use of 40-mm rounds and flashbang grenades was inappropriate. *Id.* ¶¶ 145–

[2] Defendants repeatedly mischaracterize the district court's findings by making several fact statements that Plaintiffs dispute. Defendants' attempt to contradict the findings is ineffectual under the correct application of the Court's limited interlocutory authority.

[3] Defendants did not raise this argument in their motion. "Ordinarily, this court will not consider arguments raised for the first time on appeal." *Wever*, 388 F.3d at 608. There are exceptions for "purely legal" matters that do not require additional fact finding. *Id.* Additional fact finding is undeniably required here.

264. Count II specifically alleged "Law Enforcement Defendants … deprived Mr. Aden of rights, privileges and immunities secured by the United States Constitution … by assaulting Mr. Aden with less lethal munitions and explosives." *Id.* ¶ 394. "Law Enforcement Defendants" expressly included New, Speakman, and Cardenas. *Id.* ¶ 25.

"Ordering actions that constitute a constitutional violation qualifies as direct participation." *Mountain Pure v. Roberts*, 27 F. Supp. 3d 962, 972 (E.D. Ark. 2014) (citing *Otey v. Marshall*, 121 F.3d 1150, 1155 (8th Cir. 1997)). "Plaintiff did not sue the officers who deployed the less-lethal munitions," and considering that Peterson, Ryan, Nelson, Stier, and Kiehl never deployed less-lethal munitions, the only thing Count II could possibly apply to is Plaintiff's direct participant cause of action against New, Speakman, and Cardenas. Defendants had "fair notice" of Plaintiff's direct participation claim. *Twombly*, 550 U.S. at 555.

Count IV further bolsters this conclusion by alleging "[t]he election by the Supervising Defendants to use violence against Mr. Aden … placed Mr. Aden and the officers on scene at a grossly disproportionate and unreasonable risk of injury." R. Doc. 1 ¶¶ 414–15. New, Speakman, and Cardenas were identified as "Supervising Defendants." *Id.* ¶ 22. While the district court dismissed this count, it did so because it was "subsumed in the Fourth Amendment claim asserted against the Supervising Defendants." App. 29; R. Doc. 93, at 29; Add. 29. This is consistent with

Defendants' position before the lower court that "even if … New, Speakman and Cardenas were considered direct participants, they would be entitled to qualified immunity." R. Doc. 62, at 49–50. Suggesting the matter was not properly pleaded while argued below is discordant with reality.

b. Defendants New, Cardenas, and Speakman Violated Aden's Constitutional Rights by Authorizing the Use of Multiple Flashbang Grenades and 40-mm Rounds Against an Unarmed Seated Person.

Defendants New, Cardenas, and Speakman violated Aden's constitutional rights. Aden was sitting on a curb, calmly talking to officers, and acquiescing to the negotiator's requests. He was not touching a weapon. Defendants nevertheless devised a plan to assault him with force all parties agree carried potentially deadly consequences. The gun rested untouched on the ground for an hour and forty-two minutes when New authorized the plan. This was patently unreasonable and violated Aden's clearly established rights.

i. The Use of Potentially Lethal Force Against a Seated, Calm, Unarmed Individual Who Posed No Immediate Threat Was Categorically Unreasonable.

Using potentially lethal force against a calm, unarmed, seated man surrounded by 84 armed officers was unreasonable even if Defendants suspected Aden committed a significant crime. "Where a suspect is neither fleeing nor resisting arrest and does not pose a threat to the safety of the officers, it is 'unreasonable . . . to use more than de minimis force against' the suspect." *Division of Employment Security*

v. Board of Police Commissioners, 864 F.3d 974, 979 (8th Cir. 2017) (citing *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013)).

Courts consider the "totality of the circumstances" to analyze the use of force. This includes, but is not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). What is "objectively reasonable" under the circumstances is evaluated from the "perspective of a reasonable officer on the scene and turns on those facts known to the officer at the precise moment he effectuated the seizure." *Cole Est. of Richards v. Hutchins*, 959 F.3d 1127, 1132 (8th Cir. 2020).

While Defendants initially suspected Aden pointed a gun at Asnake, "the question remains whether it was objectively reasonable for them to proceed on this assumption in the face of the contradictory information they received." *Phillips v. Cmty. Ins. Corp.*, 678 F.3d 513, 523 (7th Cir. 2012). Information to rebut this contention exists and, at this stage, the Court must assume that "at the precise moment [they] effectuated the seizure," Defendants knew they were dealing with a "nonviolent, suspected misdemeanant." *Tatum*, 858 F.3d at 548.[4] This militated against using more than de minimis force.

[4] Defendants claim Aden committed misdemeanor domestic assault, regardless of whether he pointed the gun, because his girlfriend was scared. Possessing a

More importantly, even if suspicion of a dangerous crime were undisputed, this did not justify the level of force employed because there was no immediate threat. *See Division of Employment Security*, 864 F.3d at 979. The "threat of serious physical harm, either to the officer or to others" is paramount when evaluating the reasonableness of deploying potentially deadly force. *Garner*, 471 U.S. at 11. Even in felony cases, "[w]here a suspect is neither fleeing nor resisting arrest and does not pose a threat to the safety of the officers, it is 'unreasonable . . . to use more than de minimis force against' the suspect." *Division of Employment Security*, 864 F.3d at 979.

Even if Aden posed a risk to officers earlier, "the requirement that the threat be reasonably perceived as 'immediate' means that if the threat has passed, so too has the justification." *Cole*, 959 F.3d at 1133. There was no immediacy whatsoever when New authorized the use of potentially lethal force. He proceeded *because the threat had abated*. App.100; R. Doc. 66-6, at 5; App. 932; R. Doc. 73-1 at 90–91. A calm, seated man who had not touched a gun for more than an hour did not pose any immediate risk. The second *Graham* factor cuts against Defendants' use of force.

Third, "a reasonable officer would not believe [Aden] was 'actively' resisting arrest." *Tatum*, 858 F.3d at 549. Aden was not physically struggling with officers,

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concealed gun and arguing is not an act with "intent to cause fear in another." Minn. Stat. § 609.2242 (2018).

threatening them, or attempting to flee. New and Yakovlev concede nothing suggested Aden would flee again. App. 353; R. Doc. 63-17 at 46; App. 923; R. Doc. 73-1 at 57. "Noncompliance and arguing do not amount to active resistance." *Tatum*, 858 F.3d at 549. Officers are limited to de minimis force and no more. *Kohorst v. Smith*, 968 F.3d 871, 876 (8th Cir. 2020); *see also Division of Employment Security*, 864 F.3d at 979. Using every armament available was more than de minimis force. Furthermore, "the presence or absence of a warning is a critical fact in virtually every excessive force case involving" less-lethal force. *Kuha v. City of Minnetonka*, 365 F.3d 590, 599 (8th Cir. 2003), *abrogated on other grounds by Szabla v. City of Brooklyn Park*, 486 F.3d 385 (8th Cir. 2007). New, Cardenas, and Speakman failed to warn Aden by design. This was facially unreasonable.

Finally, Defendants intended the force to inflict severe pain and cause mental disarray. 40-mm rounds "are considered Deadly Force if intentionally deployed at the head and neck area of the subject," App. 894; R. Doc. 65-9 at 9; App. 2040; R. Doc. 77-9. Flashbang grenades "can also be lethal," *Z.J. v. Kansas City Bd. of Police Commissioners*, 931 F.3d 672, 681 (8th Cir. 2019). The Second Circuit held it could not "conceive of a set of circumstances that would permit an officer, contrary to the intended use of the device, to throw a flash-bang device directly at a person." *Terebesi v. Torreso*, 764 F.3d 217, 238 (2d Cir. 2014). *Defendants did this three times*. Defendants authorized throwing grenades "between [Aden] and the handgun,"

within a foot and a half of him. App. 675; R. Doc. 65-3 at 70; App. 715; R. Doc. 65-4 at 56. Defendants coupled multiple grenades with potentially deadly 40-mm rounds that struck Aden in the chest and flew past his head. App. 1925; R. Doc. 68 at 13; App. 2003; R. Doc. 77-2:0:03. Chief New authorized using the penultimate degree of force against a seated, unarmed man who did not intimate any threat.[5]

Caselaw illustrates Defendants' unreasonableness. *Coleman v. Moldenhauer*, No. 14-CV-1234-JPS, 2015 WL 6680225, at *6–7 (E.D. Wis. Nov. 2, 2015), rejected qualified immunity for officers who shot "flash bangs 'into' [a] vehicle" and shot "out the rear and side windows of the vehicle with less lethal rounds from a 40mm gas gun" because nobody "was taking action that could at any moment harm police or the public." *Id.* at 6. *Anderson v. Avond*, 631 F. Supp. 3d 721, 725 (D. Minn. 2022), concluded an officer acted unreasonably by firing a beanbag round into the chest of an inebriated, suicidal man in a car who committed a "felony domestic assault," threatened officers, and told them, "I have a gun," because Anderson's hands, like Aden's, "were visible" and "empty," posing no immediate threat. *Id.* New authorized the plan *because* the threat had reached a nadir. App. 932; R. Doc. 73-1 at 90-1. "A future hypothetical—plausible or not—is not a justification for the

[5] Plaintiff's experts opined that "[n]o reasonable chief of police would have abandoned efforts to secure a negotiated solution in these circumstances," App. 1599; R. Doc. 75-1 at ¶ 68, and "[t]here was no emergency at that moment." App. 1981; R. Doc. 75-4 at 27. Even New complained that they were "forcin' the issue." App. 200; R. Doc. 63-13 at 8.

use of significant force because a threat cannot be immediate when it has not yet materialized." *Anderson*, 631 F. Supp. 3d at 736–37.

Defendants cite *Fortunati v. Vermont* to suggest their conduct was reasonable. Defendants misread *Fortunati*. The court there assumed the use of beanbag rounds against an armed man walking towards police without threatening them "violated [his] Fourth Amendment right to be free from an unlawful seizure" before finding the right was not clearly established in 2012. 503 F. App'x 78, 81 (2d Cir. 2012), *as amended* (Dec. 3, 2012). *Fortunati* held that hours passing since the suspect threatened anyone with a gun, paired with the fact that he was "never acting combative and never threatened to use his weapon" made the use of beanbag rounds unreasonable. *Fortunati v. Campagne*, 681 F. Supp. 2d 528, 540–41 (D. Vt. 2009), *aff'd sub nom. Fortunati v. Vermont*, 503 F. App'x 78 (2d Cir. 2012), *as amended* (Dec. 3, 2012). *Fortunati* verified that using less-lethal force against a man merely holding a gun is unreasonable. *See also Marks v. Bauer*, No. CV 20-1913 ADM/JFD, 2023 WL 1478015 (D. Minn. Feb. 2, 2023); *Kelly v. City of St. Paul*, No. CIV. 09-461 JRT/JSM, 2010 WL 4272460 (D. Minn. Oct. 18, 2010); *Tuchez v. City of Sioux Falls*, No. CIV. 11-4058-KES, 2012 WL 2524979 (D.S.D. June 29, 2012); *Jones v. Sandusky Cnty.*, No. 3:10 CV 2261, 2014 WL 3543778 (N.D. Ohio July 16, 2014).

Defendants caution against the application of "20/20 vision of hindsight" and ask for "deference to the judgment of reasonable officers on the scene." *Saucier* is

pertinent when officers must make a split-second judgment about the force a particular situation warrants "in circumstances that are tense, uncertain, and rapidly evolving." *Saucier v. Katz*, 533 U.S. 194, 205 (2001). This was absent here.

Defendants manufacture the presence of tension to obfuscate that *impatience* Defendants to use force. Not a single case that Defendants cite condones the use of force against a person seated in an open area who is not holding a weapon. *Cf. Conlogue v. Hamilton*, 906 F.3d 150, 156 (1st Cir. 2018) (suicidal man with handgun escalated confrontation through gestures, movement towards troopers, and pointing the gun towards them while cursing at them); *Foster v. Carroll Cnty.*, 502 F. App'x 356, 359 (5th Cir. 2012) (emotionally unstable prisoner who repeatedly refused to comply with orders to put down weapon); *Schaapveld v. City of Sulphur*, No. CV-16-428-SPS, 2019 WL 6843666 (E.D. Okla. Dec. 16, 2019) ("agitated" subject moving in and out of view who said "she was only coming out in a body bag" and "refused to put [the gun] down for hours" picked up a firearm).

The situation was "static," App. 1955; R. Doc 75-4 at 28, not a "rapidly evolving, fluid, and dangerous situations which preclude[d] the luxury of calm and reflective deliberation." *Neal v. St. Louis County. Board of Police Commissioners*, 217 F.3d 955, 958 (8th Cir. 2000). "The tactical plan reflected a planned strategy and not a split-second decision." App. 13; R. Doc. 93, at 13; Add. 13. Defendants planned for hours. App. 265; R. Doc 63-5 at 43; App. 193; R. Doc 63-13 at 53, while

Aden remained calm, nonthreatening, and communicative with negotiators. App. 1955; R. Doc 75-4 at 28. Impatience rather than uncertainty ruled.

Defendants next claim that the threat because Aden "remained armed" and refused to surrender." Nonsense—the gun was on the ground. The Court cannot overlook that Defendants declare the district court "inexplicably concluded Aden 'was unarmed,'" but simultaneously concede "Aden remained 1 - 2 feet from the gun." Defendants describe Aden as choosing "to arm himself during a standoff." Def. Br. at 52. If he "armed himself" by picking up the gun *after* the tactical assault commenced, he logically was unarmed *before* it began. Defendants contend Aden was armed the entire time, yet, subsequently armed himself. The Court must conclude Aden was unarmed immediately before Defendants used 40-mm rounds and grenades.

Defendants cite *Bing v. City of Whitehall*, 456 F.3d 555, 565 (6th Cir. 2006), without addressing this circuit's precedent. *See Cole*, 959 F.3d at 1132. Moreover, *Bing* is inapposite because it involved civilian onlookers, an unstable subject, history of violence, constant movement out of officers' sight, and previous shots fired at children. *Bing*, 456 F.3d at 564. If anything, *Bing* highlights how unreasonably Defendants acted. In *Bing*, officers indicated they would have "just outwaited him, maybe sat there all night" if the subject had not "shot through the wall at the

officers." *Id.* at 567. Aden never shot at officers, yet Defendants advanced under circumstances that officers in *Bing* indicated required patience.

Defendants' reference to *United States v. Jones*, 635 F.2d 1357, 1358 (8th Cir. 1980) misses the mark. *Jones* analyzed officers' warrantless search of a suspect's apartment, not a seizure of his person. *Id.* at 1359. The standards differ. Furthermore, the exigency in *Jones* is absent here. The subject in *Jones* did not respond to calls or knocks, was out of sight, and smoke was pouring from his apartment. *Id.* at 1360–61. "[N]o new facts came to the attention of the police suggesting that the danger had subsided." *Id.* at 1259. Defendants learned Aden lacked any criminal history, Asnake recanted, and the gun discharged accidentally. They knew Aden never threatened them, set the gun down, spoke calmly, and slowly yielded to the negotiators' commands. "A reasonable officer is not permitted to ignore changing circumstances and information that emerges once arriving on scene." *Neal v. Ficcadenti*, 895 F.3d 576, 581 (8th Cir. 2018). Far more than the "mere passage of time" illustrated Aden was not a threat.

Defendants try to recast their horrific choice by relying on *Z.J.* for the proposition that "'surprise' is a legitimate police tactic." 931 F.3d at 682. Supreme Court precedent "requires the officer to give a warning 'where feasible.'" *Ludwig v. Anderson*, 54 F.3d 465, 474 (8th Cir. 1995) (citing *Tennessee v. Garner*, 471 U.S. 1, 11–12 (1985)). Surprise trumps the need for a warning *only* where it "protect[s] the

safety of officers or others." *Id.* This factor is absent here. Far from protecting officers, this surprise added risk. *Z.J.* involved using flashbang grenades to overcome risk inherent in breaching a room. *Id. Z.J.* also did not weigh grenades thrown *at a person* combined with 40-mm rounds shot to inflict pain. Other touted authorities also involved less force against more threatening subjects. *See Garrett v. Athens-Clarke Cnty.*, 378 F.3d 1274, 1279 (11th Cir. 2004) (pepper spray and physical restraints detaining an inebriated man "kicking, swinging, yelling, and fighting" officers after a 30-mile high-speed chase); *McCormick v. City of Fort Lauderdale*, 333 F.3d 1234, 1239 (11th Cir. 2003) (pepper spray subduing an unstable man holding a large stick after finding a victim "bleeding profusely from her head"); *Smith v. City of Minneapolis*, 754 F.3d 541, 548 (8th Cir. 2014) (punches and kicks from officer responding to man in "defensive stance" who then fled and actively resisted, leading to use of taser). Aden's case is dissimilar.

Defendants argue that varying levels of force are viable to apprehend different suspects. It is undeniable that what is acceptable depends on the totality of the circumstances. Defendants' proffered precedents, however, do not support their use of force *here*. For example, in *Puskas v. Delaware Cnty.*, officers responded to an alleged domestic assault involving a firearm, but the similarities end there. 56 F.4th 1088, 1091 (6th Cir. 2023). Whereas Aden was calm and communicative, Puskas was "acting erratically during his encounter," *id.* at 1094, and officers knew he "was

on 'new medication.'" *Id.* at 1091. Puskas was warned and officers only acted "*after* Puskas had turned and started to run towards the house." *Id.* at 1095. *Puskas* involved force that did "not carry with it a substantial risk of causing death or serious bodily harm," *id.* at 1094, whereas 40-mm rounds can kill, App. 2040; R. Doc. 77-9, and flashbang grenades "can be lethal." *Z.J.*, 931 F.3d at 681.

Escobedo v. Martin, 702 F.3d 388 (7th Cir. 2012), is also distinguishable. First, the Seventh Circuit allowed a factfinder to ascertain the nature of the threat at trial. *Escobedo v. Bender*, 600 F.3d 770, 785 (7th Cir. 2010) ("*Escobedo I*"). Second, the justification cited in *Escobedo II* depended on factors absent here. Escobedo was "hallucinating [and] high on drugs … on the seventh floor of a building that was surrounded by other buildings, including a hospital and a church with a daycare center," presenting a danger to the public. 702 F.3d at 405–08. Aden was isolated in a vacant industrial lot, and officers even lifted the public stay-in-place order. App. 100; R. Doc. 63-6 at 5. Escobedo barricaded himself in a dark room where the precise location of the gun was uncertain, and officers heard him "chamber a round into a handgun," suggesting he was ready to fire, 702 F.3d at 392, whereas officers here saw Aden place the weapon on the ground. The objective threat was infinitely higher in *Escobedo II*, and the flashbangs were used to flush the subject, not thrown inches from his head while pelting him with 40-mm rounds intended to inflict "pain compliance." *Escobedo II* involved a greater threat; yet officers used less force.

Defendants refrain from acknowledging factors relevant to evaluating totality of the circumstances because they militate against Defendants. *Bell v. Irwin* involved use of a beanbag against a drunk, raving man with a history of violence who stabbed a wall, threw knives, and leaned over a propane tank with a lighter. 321 F.3d 637, 638–39 (7th Cir. 2003). The subject posed an immediate threat. This is also true of Defendants' remaining cases. *Cf. Brown v. City of Bloomington*, 280 F. Supp. 2d 889, 891–94 (D. Minn. 2003) (subject "was not calming down … threatening [others] and officers with a knife, … holding the knife [and] … failed to comply with commands to drop the knife"); *White v. Jackson*, 865 F.3d 1064, 1080 (8th Cir. 2017) (subject was "part of the violent crowd" and "advance[d] toward" police after being instructed to stop); *Bernini v. City of St. Paul*, 665 F.3d 997, 1002 (8th Cir. 2012) (responding to crowd of more than 100 people approaching police throwing rocks and bags of feces); *Cooper v. Nebraska State Patrol*, 8:98-cv-466, 2000 U.S. Dist. LEXIS 16127, *4–6 (D. Neb. Oct. 30, 2000) (warnings issued before using "less-lethal" force against armed mentally ill person who doused his spouse with gasoline and prepared to set her ablaze while randomly firing a weapon). These cases illustrate the requirement of action beyond possession before an immediate threat exists. There was no such threat here.[6] Nothing justified this barrage.

[6] Defendants' rationale has shifted over time. Speakman predicated the use of force on Aden having "pointed a firearm at a victim, [ ] fled on foot from the scene, fired off a shot in a residential neighborhood, broke through a police perimeter at one

Precedent instructs that potential future threats do not justify the use of force. *See Z.J.*, 931 F.3d at 682; *Brown v. City of Golden Valley*, 574 F.3d 491, 497 (8th Cir. 2009); *Tatum*, 858 F.3d at 549. Fearing what a suspect might do, without contemporaneous action evincing an intent to act, does not suffice. The suggestion that the mere presence of a firearm justifies force is plainly wrong because the test requires an analysis of the totality of the circumstances, including all counterbalancing factors of lethal coverage. Furthermore, expediency is not a valid reason either. *See Phillips*, 678 F.3d at 525; *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001); *Anderson*, 631 F. Supp. 3d at 737.

Defendants contend the district court failed to prioritize the domestic violence report and Aden's initial actions, but the court expressly noted these factors. Moreover, the focus must rest on the moment force was used, not conduct from hours earlier. The Court must reject Defendants ignoring developments at the scene and absence of immediacy of any threat. Defendants bemoan a failure to consider the

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point already across Highway 13, was a public safety risk, [and because] darkness was a factor." App.125; R. Doc 63-11 at 11. These facts are not accurate. App. 14–15; R. Doc. 93, at 14–15; Add. 14-15. More important, they were not germane to the calculus, as they all focus on what Aden *might* do. There were two armed perimeters. The buildings were clear. Defendants withdrew an earlier warning so civilians could return to normal activities. App. 96; R. Doc 63-6 at 5. Aden "didn't run from the cops, he just ran from the car," App. 1416; R. Doc 74-3 at 7, refuting the suggestion of a broken perimeter. Finally, the specter of Aden possibly pointing a gun at Asnake and the nature of the round fired earlier in the afternoon are disputed.

totality of the circumstances *while asking this Court to ignore the actual circumstances*. The unannounced application of potentially lethal force against a calm, seated, unarmed person in plain view during an active negotiation was patently unreasonable.

ii. Denying Summary Judgment Was Appropriate Because Factual Disputes Exist Regarding New, Speakman, and Cardenas' Authorization of 40-mm Rounds and Flashbang Grenades.

This Court must accept the district's conclusion that factual discrepancies persist. *See Wallace*, 843 F.3d at 766 (citing *Johnson*, 515 U.S. at 316) ("[I]ssues such as 'the existence, or nonexistence, of a triable issue of fact' are not reviewable."). There are at least two critical factual disputes.

First, a jury must determine whether it was reasonable to believe Aden ever threatened Asnake with a gun. App. 1; R. Doc. 93, at 1; Add. 1; *see Phillips*, 678 F.3d at 523; *Neal*, 895 F.3d at 581 ("A reasonable officer is not permitted to ignore changing circumstances and information that emerges once arriving on scene."). Asnake recanted her earlier claim, and Aden denied threatening her. App. 432-34; R. Doc. 64-2 at 2,4; App.1377; R. Doc.74-1 at 48; App. 1745; R. Doc. 78-2 at 8. This denial was broadcast over the negotiation system that New, Speakman, and Cardenas confirmed they monitored. App. 920, 34; R. Doc. 73-1 at 42, 98.

Negotiators told Aden he was guilty of only a misdemeanor,[7] which was relayed to supervisors. App. 432, 34, 43; R. Doc. 64-2 at 2,4,13; App.1422; R. Doc. 74-3 at 13. A jury could find Defendants' initial understanding was no longer reasonable. This is material under *Graham*.

Defendants challenge the reliability of Asnake's recantation. This very debate is jury fodder, especially because Aden's statements corroborated her account and Defendants knew he had no history of violence. "[T]he weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). A jury must decide whether it was objectively reasonable to believe Aden threatened Asnake when there is contradictory evidence in the record. *Phillips*, 678 F.3d at 523; *see also Craighead v. Lee*, 399 F.3d 954, 961 (8th Cir. 2005) (jury could find officer heard what was broadcast over the radio). The reliability of an officer's statement and what the officer should have known are credibility issues for a jury to weigh. *Westcott v. Crinklaw*, 68 F.3d 1073, 1076 (8th Cir. 1995).

Second, "[w]hether the officers involved were meaningfully threatened … is an open question." App. 16; R. Doc. 93, at 16; Add. 16. Defendants take umbrage with this assertion, complaining that "whether a subject's conduct is a 'threat' is a

[7] Eagan policy forbids promises of clemency or charge reduction negotiation with suspects absent supervisor authorization. App. 2034; R.Doc. 77-8 at 10.

question of law, not a fact issue for the jury's consideration."[8] This "meaningfully threatened" language stems from precedent. *See Brown*, 574 F.3d at 497 (jury could interpret subject's conduct as "instinctive self-protective reaction consistent with" fear, rather than threat). A jury still decides the import of conduct and whether it is construable as "threatening." Once again, "the drawing of legitimate inferences from the facts are jury functions." *Anderson*, 477 U.S. at 255. This, in turn, relates to whether officers were "meaningfully threatened," or stated alternatively, whether they could reasonably believe Aden "pose[d] an immediate threat to the safety of the officers or others." *Graham*, 490 U.S. at 396. Defendants instead assert the Court should cast aside the identified factual disputes in favor of Defendants' accounts. This is neither permissible nor reviewable. *See Tolan v. Cotton*, 572 U.S. 650, 656 (2014); *Johnson*, 515 U.S. at 316.

There are other disputed facts. The parties disagree whether glancing around is threatening or merely a natural reaction to spotlights and being surrounded by

[8] Because this Court "review[s] a district court's denial of qualified immunity de novo," *Nance*, 586 F.3d at 609, the precise formulation of the district court's standard is largely immaterial. Plaintiff agrees "whether the undisputed or assumed facts would establish a constitutional violation" is a "purely legal argument[ ]." *Wallace*, 843 F.3d at 766. The district court's jury deference regarding whether there was threat is best read as suggesting a reasonable jury might find facts supporting a conclusion that officers acted unreasonably. The Eighth Circuit regularly uses similar phrasing. *See, e.g.*, *Moore*, 514 F.3d at 762–63; *Tatum*, 858 F.3d at 548; *Brown*, 574 F.3d at 501.

canines, armored vehicles, and armed men. The jury must evaluate how Aden appeared and what inferences to draw. *Anderson*, 477 U.S. at 255. The parties disagree whether Aden was contained. A jury needs to assess whether Defendants' contention was reasonable given the number of vehicles, canines, weapons, and personnel.[9] The parties disagree whether Aden inadvertently pointed the gun at officers,[10] and how characterize the discharge that occurred in the woods. These unresolved fact disagreements stymie a *Graham* analysis.

Finally, the parties disagree about the level of force authorized. Whether force is "deadly" depends on how an officer uses a particular weapon. *See Anderson*, 631 F. Supp. 3d at 731 (citing *Ludwig*, 54 F.3d at 473). Whether "the instrument of the force was used in a way that could be considered deadly force is a fact issue for the jury." *Id.* Defendants acknowledge 40-mm launchers can kill. Flashbangs can too. *See Z.J.*, 931 F.3d at 681. Defendants flippantly dismissed the risk to Aden as officers threw grenades "to get it near the gun," App. 669-75; R. Doc. 65-3 at 48,70, and "between [Aden] and the handgun." App. 715; R. Doc. 65-4 at 57. They threw grenades directly at Aden. Forensic evidence confirms Aden suffered substantial abrasions and lacerations to his head. Video shows a grenade exploding immediately

[9] Plaintiff notes hypotheticals are irrelevant under *Graham*.

[10] The district court appears to have concluded, consistent with video and testimonial evidence, that Aden did not. App. 20; R. Doc. 93 at 20; Add. 20.

in front of Aden's face at eye level. App. 2003; R. Doc. 77-2. The Constitution does not tolerate using flashbang grenades this way. *See Terebesi*, 764 F.3d at 238; *Escobedo I*, 600 F.3d at 786.

Aden also had injuries consistent with 40-mm rounds on his thighs and chest. App. 1925; R. Doc. 68 at 13; App. 2067; R. Doc. 76-1 at 14. One officer aimed for the "upper leg, lower abdomen area." App. 812; R.Doc. 65-6 at 107. A 40-mm round buzzed Aden's head. App. 2003; R.Doc. 77-2. A trained officer can be assumed to have hit what he aimed at. *See Mercado v. City of Orlando*, 407 F.3d 1152, 1158 (11th Cir. 2005); *Moore v. Indehar*, 514 F.3d 756, 760 (8th Cir. 2008) . A reasonable jury could find that officers exercised, and Defendants authorized, deadly force. These factual disputes correctly precluded summary judgement.

c. The Use of Potentially Lethal Force Against a Seated, Calm, Unarmed, Non-Threatening Individual Violated Clearly Established Law.

Defendants violated a clear prohibition against the use of potentially lethal force against a person who posed no immediate threat and was not actively resisting. Defendants also violated Aden's right to a warning before using such force. These tenets existed before this incident, making the violation clear.

"A plaintiff need not show that the 'very action in question has previously been held unlawful,' but he must establish that the unlawfulness was apparent in light of preexisting law." *Ellison v. Lesher*, 796 F.3d 910, 914 (8th Cir. 2015) (citing

Anderson v. Creighton, 483 U.S. 635, 640 (1987)). "Though earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding." *Banks v. Hawkins*, 999 F.3d 521, 528 (8th Cir. 2021) (citing *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "[T]he critical question 'is not whether prior cases present facts substantially similar to the present case but whether prior cases would have put a reasonable officer on notice that the use of [] force in these circumstances would violate' the individual's 'right not to be seized by the use of excessive force.'" *Cole*, 959 F.3d at 1134 (citing *Craighead*, 399 F.3d at 962). Notice exists when there is "circuit precedent that involves sufficiently similar facts, … a robust consensus of cases of persuasive authority," *Perry v. Adams*, 993 F.3d 584, 587 (8th Cir. 2021), or "conduct is obviously unlawful, even in the absence of a case addressing the particular violation." *Z.J.*, 931 F.3d at 685.

All three forms of notice were present. In 2017, the Eighth Circuit expressly held "[w]here a suspect is neither fleeing nor resisting arrest and does not pose a threat to the safety of the officers, it is 'unreasonable for [an officer] to use more than de minimis force," *Division of Employment Security*, 864 F.3d at 979, and "[n]oncompliance and arguing do not amount to active resistance." *Tatum*, 858 F.3d at 549. Defendant New confirmed Aden did not "ma[k]e any threat of violence to any person." App. 923-24; R.Doc. 73-1 at 57–58. Aden was not struggling with

officers. New verified there was no "indication that Mr. Aden was expressing an intention to run." App. 923; R. Doc. 73-1 at 57. The use of potentially lethal 40-mm rounds and flashbang grenades violated clearly established law.

The lack of warning also violated clearly established law. *Kuha*, 365 F.3d at 595, established the need for a warning when using a canine. A canine is objectively less force than a barrage of flashbangs and 40-mm munitions. The greater the force, the more necessary the warning. Defendants *intentionally* surprised Aden without warning. If the right to a warning before the use of a lesser force existed since 2003, the failure to provide one before using potentially lethal force was plainly violative in 2019.

A robust consensus of authority exposes the constitutional excessiveness of the plan. *See Terebesi*, 764 F.3d at 238; *Phillips*, 678 F.3d at 525 (rejecting use of SL6-baton launcher against parked drunk driver based on dubious information, no threatening behavior, and containment); *Escobedo I*, 600 F.3d at 777 (possession of gun did not support use of flashbang when it exploded near subject's head and he was not an immediate threat); *Glenn v. Washington Cnty.*, 673 F.3d 864, 873 (9th Cir. 2011) (unreasonable to use beanbags because officers had unobstructed view and subject "stayed in the same position from the moment officers arrived and showed no signs of attempting to move until after he was fired upon"); *Deorle*, 272 F.3d at 1276–82 (unreasonable to fire beanbag at "verbally abusive" and "erratic"

man who had discarded crossbow in a police controlled area and made no threats or attempts to flee); *Mercado*, 407 F.3d at 1154 (SL6 launcher unreasonable where subject armed with knife refused to drop knife but made no threatening moves). *Mercado* was "one of the cases that lie 'so obviously at the very core of what the Fourth Amendment prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law.'" 407 F.3d at 1160. By 2019, a robust consensus established that expending 40-mm rounds while simultaneously throwing multiple flashbang grenades at an unarmed, isolated, seated, passively resistant person clearly violated the person's constitutional rights. This is "an obvious case" where the *Graham* standards "'clearly establish' the answer, even without a body of relevant case law." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004). The Court must affirm.

III. DEFENDANTS PETERSON, RYAN, NELSON, STIER, AND KIEHL ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Defendants Ryan, Nelson, Peterson, Stier, and Kiehl do not enjoy qualified immunity because Aden posed no immediate threat of death or serious bodily injury to officers or anyone else. *See Cole*, 959 F.3d at 1132 (citing *Billingsley v. City of Omaha*, 277 F.3d 990, 993 (8th Cir. 2002)).

a. The Totality of the Circumstances Did Not Support the Use of Lethal Force.

The applicable test considers "whether the totality of the circumstances justified a particular sort of search or seizure." *Garner*, 471 U.S. at 8–9. Relevant factors include, but are not limited to, "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

Whether it remained reasonable to assume Aden threatened Asnake is open for debate. Even if this were not the case, the severity-of-the-crime factor under *Graham* weakened "against a backdrop of multiple hours having passed and Aden's non-threatening and de-escalating conduct." App. 23; R. Doc. 93, at 23; Add. at 23. Accounting for the length of the stand-off vis-à-vis the alleged crime is precisely the kind of "careful attention to the facts and circumstances" that *Graham* mandates over the "mechanical application" of hard-and-fast factors. *Graham*, 490 U.S. at 396 (citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). Furthermore, whether Aden was "actively" fleeing before the lethal seizure is a jury question. App. 23; R. Doc. 93, at 23; *Coates v. Powell*, No. 2:08-CV-04158-NKL, 2009 WL 1310302, at *6 (W.D. Mo. May 11, 2009).

The most significant factor is whether Aden was an immediate threat. *See Garner*, 471 U.S. at 11. This question cannot be answered in isolation without context. The district court observed:

> [T]he number of officers on the scene, their positioning relative to Aden, the protective measures they had taken and the protective gear they were wearing, and their ability to see Aden from their vantage points [and the fact that] the extent of armed officers and protective equipment was extraordinary, including highly trained SWAT team members, snipers with magnified scopes trained on Aden, and dozens of other officers and K-9 units. The officers were strategically placed in protective positions with clear sightlines on Aden—some inside armored vehicles, and others in or behind various police vehicles. The area was well-lit, and a communication center was established to discuss updates among officers about Aden's actions.

App. 23; R. Doc. 93, at 23; Add. 23. The court cannot determine whether an immediate threat existed without a jury resolving whether Aden ever "lifted his arm, pointed the gun at any officer, or moved toward any of them." *Id.* at 25. This disagreement cuts to the core of whether Aden posed an immediate threat to the safety of officers or others. Resolving this disagreement is beyond the Court's authority on interlocutory appeal. *See Thompson*, 800 F.3d at 982.

Defendants erroneously contend the district court erred by considering the objective of the tactical assault—eliciting a reaction through pain and shock, App. 146; R. Doc. 63-11 at 97; App. 1084; R. Doc. 73-3 at 101—as part of its *Graham* analysis. They try to conflate *County of Los Angeles v. Mendez*, 581 U.S. 420 (2017). The Supreme Court, however, expressly declined refused to go as far as Defendants

aver. *See id*. at 429 n.1 (2017) (declining to address whether the totality of the circumstances "means taking into account unreasonable police conduct prior to the use of force that foreseeably created the need to use it"). *Mendez* left undisturbed precedent determining that when "the person seized … is provoked by police escalation of the situation, the 'importance of the governmental interests alleged to justify the intrusion' is necessarily diminished.'" *Ludwig*, 54 F.3d at 471.[11] *Ludwig* controls what *Mendez* left open. Prior conduct and what officers reasonably would have anticipated are factors under *Graham*. Other circuits agree that *Mendez* did not change this rule. *See, e.g.*, *Biegert v. Molitor*, 968 F.3d 693, 698 (7th Cir. 2020); *Arnold v. City of Olathe*, 35 F.4th 778, 790 (10th Cir. 2022). Here, officers anticipated that Aden would be "startled," blinded, "overwhelmed," and that he would "flinch." App. 1084; R. Doc. 73-3 at 101; App. 1118; R. Doc. 73-4 at 14; App. 146; R. Doc. 63-11 at 94; App. 1186; R. Doc. 73-5 at 82. This is relevant under the totality of the circumstances.

Defendants attempt to reduce the totality-of-the-circumstances analysis to a single fact–Aden picked up a firearm. *Nance*, 586 F.3d at 611, and *Cole*, 959 F.3d 1127 expose this is erroneous. It is clear that "the suspect must also point the firearm at another individual or take similar 'menacing action.'" *Cole*, 959 F.3d at 1132.

[11] Defendants cite *Frederick v. Motsinger*, 873 F.3d 641, 645 (8th Cir. 2017), in which this Court, following *Mendez*, rejected the Ninth Circuit's provocation rule. The case misses the mark. The district court did not apply the overruled doctrine.

Defendants try to winnow the inquiry to a single fact; yet, the Supreme Court stated empathetically, "The operative question in excessive force cases is 'whether the totality of the circumstances justified a particular sort of search or seizure.'" *Mendez*, 581 U.S. at . The cases that feature prominently in Defendants' argument stand for the proposition that using lethal force is not per se unreasonable when a subject is—or is believed to be—armed. *See, e.g.*, *Loch v. City of Litchfield*, 689 F.3d 961, 967 (8th Cir. 2012) ("[A] reasonable officer could believe that deadly force was necessary to protect himself from death or serious harm."); *Liggins v. Cohen*, 971 F.3d 798, 801 (8th Cir. 2020) ("officer may be justified in using a firearm before a subject actually points a weapon at the officer or others"). Put differently, the fact that lethal force was used against a suspect who was—or was believed to be—armed does not in itself render a lethal seizure unconstitutional. This is uncontroversial.

There are many circumstances in which lethal force is justified. However, Defendants part ways both with courts and logic when they parse cases as standing for the notion that "picking up a gun during an armed standoff" is "in-and-of-itself, a threat of death or great bodily harm." Nothing could be further from the truth. Even the cases Defendants cite do not cut short the totality of the circumstances analysis after finding a suspect was armed. The district court did the same. Construing all inferences in Plaintiff's favor, Aden did not move towards officers, point the

weapon, or otherwise act in a menacing fashion. There was no menacing action and no immediate threat as a matter of law.

None of Defendants' citations involved officers who controlled the encounter and prepared to startle a subject. *United States v. Hill*, 583 F.3d 1075, 1078 (8th Cir. 2009), is a sentencing enhancement, not a use-of-force case. *Sinclair v. City of Des Moines*, 268 F.3d 594, 596 (8th Cir. 2001), which subsequent authority has eroded, involved two officers and a vulnerable entry point; i.e., a highly volatile situation. The remaining cases involved one or two officers confronted with clearly "menacing action." *Smith v. Kilgore*, 926 F.3d 479 (8th Cir. 2019) (subject shot at officers); *Dooley v. Tharp*, 856 F.3d 1177 (8th Cir. 2017) (subject pointed gun); *McElree v. City of Cedar Rapids*, 983 F.3d 1009 (8th Cir. 2020) (fleeing man "fell, twisted, and drew a handgun" towards officers); *Loch*, 689 F.3d at 964 (subject walked toward officer, muttered "kill" while moving his hand toward his side); *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001) (sprinting subject "moved his arms as though reaching for a weapon at waist level"); *Liggins*, 971 F.3d 801 (carjacker ran towards officer with gun at waist level). Defendants try to respond by suggesting that *Sabbe v. Washington County. Board of Commissioners*, 84 F.4th 807 (9th Cir. 2023) makes the presence of cover and armored vehicles irrelevant. This misinterprets *Sabbe*. *Sabbe* held that armored vehicles "reduced the risk of harm to the officers but it did

not eliminate it." *Id.* at 823. The presence of multiple armored vehicles and tiers of lethal cover are relevant.

Defendants also believe their warnings were sufficient. *Loch*, 689 F.3d at 967, and *Rogers v. King*, 885 F.3d 1118 (8th Cir. 2018), suggest that repeated instructions with guns drawn put a person on notice that "escalation of the situation would result in the use of the firearm," *Loch*, 689 F.3d at 967. The impact of a warning in hour one wanes with each passing hour, especially when a person cannot perceive what degree of forces awaits him soon if additional steps are not taken. No said to Aden that it is now or never. In fact, the ongoing negotiation portended the opposite impression on purpose. This differentiates this case from all Defendants' cited cases involving officers firing at a downed subject.

How Aden handled the firearm matters too. *See Cole*, 959 F.3d at 1136; *see also Franklin v. City of Charlotte*, 64 F.4th 519, 533–34 (4th Cir. 2023) (finding how person handled the firearm in plain sight mattered); *Weinmann v. McClone*, 787 F.3d 444, 449 (7th Cir. 2015) (noting disputes over handling of weapon are critical to analysis). Defendants claim that forensics did not contradict Defendants' recitation. Plaintiff's experts refute Defendants' entire narrative. The district court surveyed all the evidence and plainly could see that Plaintiff's evidence impugned the officers' credibility, which militates towards concluding that material issues

persist. *See Partridge v. City of Benton*, 70 F.4th 489 (8th Cir. 2023); *Wilson v. City of Des Moines*, 293 F.3d 447 (8th Cir. 2018).

Defendants also fail to see any error with shooting Aden after he sat back on the curb. *Ching v. City of Minneapolis*, 73 F.4th 617 (8th Cir. 2023) did not establish a bright-line rule that Defendants suggest. More importantly, Plaintiff established that Ryan, Stier, and Kiehl had sufficient time to observe that Aden returned to the curb and put the gun back on the ground. They had time to observe and reassess. *See* App.1665, 70, 76, ; R.Doc. 75-2 at 59, 64, 70. Defendants suggest some shots were fired after Aden went to the ground. Plaintiffs maintain the evidence shows that Defendants fired lethal rounds after Aden began to sit back towards the curb. App. 2003; R. Doc. at 77-2. It is clear that "a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force." *Cole*, 959 F.3d at 1134.

Ching is clearly different because it involved seven shots in two seconds from a single officer. 73 F.4th at 620. Two seconds may lie within the standard re-assessment time for duly trained officers. 3.4 seconds, however, is outside the recognized standard. App. 1665, R.Doc. 75-2 at 59. Defendants further try to avoid reality by pointing to other cases, but these cases actually serve to highlight the importance of restraint and reassessment instead of firing indiscriminately. *Cf. Palacios v. Fortuna*, 61 F.4th 1248, 1254 (10th Cir. 2023) (only firing when rising

a third time after multiple warnings); *Doxtator v. O'Brien*, 39 F.4th 852, 862 (7th Cir. 2022) (issuing warnings and using less lethal rounds for 10 seconds until officers thought they heard a gunshot); *Berube v. Conley*, 506 F.3d 79, 85 (1st Cir. 2007) (responding to metallic object when person rose and ignored demands to show his hands); *Clark v. City of Atlanta*, 544 F. App'x 848, 857 (11th Cir. 2013) (firing when person kept moving a hand holding a weapon over instructions). The same distinction bereft *Bifelt v. Alaska*, 854 F. App'x 799 (9th Cir. 2021), and *Puskas*, 56 F.4th at 1088. A clear threat was detected, officers issued warnings, and only used lethal force when there was no response. That is not what happened here. The district court correctly considered *all* the circumstances when concluding that material issues of fact exist that inhibited the court from making final legal conclusions.

b. Using Lethal Force Violated Clearly Established Law.

Long before July 2, 2019, the law recognized a person is not an immediate threat of serious physical harm by merely possessing a weapon. *Cole* postdates these events, but it identified two critical principles established before July 2, 2019.[12]

> First, it was clearly established that a person does not pose an immediate threat of serious physical harm to another when, although the person is in possession of a gun, he does not point it at another or wield it in an otherwise menacing fashion. Second, it was clearly established that a few seconds is enough time to determine an immediate threat has passed, extinguishing a preexisting justification for the use of deadly force.

[12] *Cole* referenced *Nance*, 586 F.3d at 611, and confirmed this principle was established as of October 25, 2016.

Id. (citing *Nance*, 586 F.3d at 611). Defendants aver that "whether a subject's conduct is a 'threat' is a question of law." While the ultimate determination as to "whether the undisputed or assumed facts would establish a constitutional violation" is a "purely legal argument," *Wallace*, 843 F.3d at 766, "the drawing of legitimate inferences from the facts are jury functions." *Anderson*, 477 U.S. at 255. Therefore, a jury must determine what Aden was doing during each shot before a court can decide objective reasonability.

Ample precedent evinces that under circumstances consistent with Plaintiff's version of events that Defendants violated a clear constitutional protection. *See Bennett v. Murphy*, 120 F. App'x 914 (3d Cir. 2005) (armed distraught man who refused to drop weapon during hour-long standoff, had never pointed single-shot shotgun at anyone but himself, and was not in flight at the time he was shot); *Cooper v. Sheehan*, 735 F.3d 153 (4th Cir. 2013) (armed man shot despite never pointing gun); *Pena v. Porter*, 316 F. App'x 303 (4th Cir. 2009) (unlawful to shoot man without warnings when victim opened his door with rifle pointed down and did nothing else); *King v. Taylor*, 694 F.3d 650, 662 (6th Cir. 2012) ("[I]f Taylor shot King while he was lying on his couch and not pointing a gun at the officers, Taylor violated King's clearly-established right to be free from deadly force."); *Brandenburg v. Cureton*, 882 F.2d 211 (6th Cir. 1989) (man fired warning shot at officers who shot him when he tried to pick gun up again); *Weinmann v. McClone*,

787 F.3d 444 (7th Cir. 2015) (no evidence that person armed with shotgun threatened officer); *Lopez v. Gelhaus*, 871 F.3d 998, 1003 (9th Cir. 2017) (officer did not know direction of rifle at time of shooting); *George v. Morris*, 736 F.3d 829 (9th Cir. 2013) (denying immunity when expert report questioned whether person manipulated gun or pointed it).

Defendants cite *McElree*, 983 F.3d at 1009; *Loch*, 689 F.3d at 961; *Thompson*, 257 F.3d at 896; and *Billingsley*, 277 F.3d at 990, for the proposition that "reaching for a weapon during a police encounter is a threat of death or great bodily harm" in and of itself. The Court must reject this reading. Rather, these cases involved individuals who turned or moved directly *towards* an officer with a hand in a shooting position, *and* the officers were either alone or supported by one officer. Not one involved a battery of officers blinding a person and then blasting him from multiple directions simultaneously to inflict pain with no warning. Context matters. A jury may find facts that compel the court to conclude Defendants' use of lethal force against an armed, non-threatening individual violated clearly established law. The Court should affirm.

IV. THIS COURT CANNOT REVIEW PLAINTIFF'S *MONELL* CLAIM.

The Supreme Court forbids interlocutory review of Plaintiff's claim for municipal liability under *Monell v. Department of Social Services of City of New York*, 436 U.S. 658 (1978). *See Swint*, 514 U.S. at 36. In *Swint*, the Supreme Court

held that because the district court found the sheriff "may have been" the final decisionmaker, subject to later revision, the decision was not a final order independently appealable under the collateral order doctrine. *Id.* at 42.

The same principle applies here. The court concluded that "municipal liability [ ] may attach here." App. 31; R. Doc. 93, at 31. This is not a final order. Just like in *Swint*, the resolution of the question of qualified immunity for an individual officer does not resolve the question of *Monell* liability.[13] This is because *Monell* liability hinges on "the allocation of law enforcement power." *Swint*, 514 U.S. at 51.

This Court permits interlocutory jurisdiction only where the pendent claim is "coterminous with, or subsumed in," the qualified immunity claim. *Veneklase*, 78 F.3d at 1270 . The issues must be "'inextricably intertwined' with the defense of qualified immunity." *White*, 519 F.3d at 815. To be "inextricably intertwined," a ruling on the merits must necessarily resolve all pendent claims. *Id.* Individual qualified immunity and municipal liability under *Monell* are not inextricably intertwined because the former turns on whether the officers violated a clearly established right, "the contours of [which are] sufficiently clear that a reasonable

[13] Plaintiff concedes that if the Court were to find the use of 40-mm and flashbang grenades reasonable, it would resolve the *Monell* claim. However, contrary to Defendants' claims, whether a seizure violated clearly established law is irrelevant under *Monell*. *See Szabla*, 486 F.3d at 393.

officers would understand that what he is doing violates that right." *Clinton*, 49 F.4th at 1143.

In contrast, *Monell* liability may attach to Defendant Eagan's conduct even if officers are shielded by qualified immunity because "a municipality does not enjoy qualified immunity … from an unconstitutional decision by municipal policymakers." *Szabla*, 486 F.3d at 393. Thus, resolution of the qualified immunity inquiry does not automatically resolve the pendent claim. *See, e.g.*, *Veneklase*, 78 F.3d at 1270 (denial of summary judgment on *Monell* claim was not inextricably intertwined with underlying qualified immunity appeal because resolving the relevant claims "require[d] entirely different analyses").

Defendants cite *Eagle v. Morgan*, 88 F.3d 620, 628 (8th Cir. 1996) for the proposition that this Court can exercise pendent jurisdiction over the *Monell* claim. This is only true if the initial authorization of flashbang grenades and 40-mm rounds was constitutionally reasonable. If it was not, the issues of municipal authority are wholly independent from the qualified immunity analysis. Finally, in a footnote, Defendants claim Plaintiff did not properly plead her *Monell* claim. This contention contradicts Defendants' jurisdictional statement as well as the amended complaint. R. Doc. 1 ¶¶ 18, 415. Plaintiff properly pled a *Monell* claim, and the Court cannot review it.

V. THIS COURT CANNOT REVIEW PLAINTIFF'S STATE LAW CLAIMS.

Defendants contend that "[d]ismissal of the negligence claim requires dismissal of the wrongful death action," overlooking that the district court did not rule on the issue because Defendants did not seek summary judgment of Plaintiff's Wrongful Death claim. *See* App. 10; R. Doc. 93 at 10; Add. at 10. First, "this court will not consider arguments raised for the first time on appeal." *Wever v. Lincoln County*, 388 F.3d 601, 608 (8th Cir. 2004). Second, there is no judgment to review. *See* Fed. R. App. P. 4(a)(1).

Furthermore, the Court has correctly concluded it lacks jurisdiction to consider questions of official state immunity on an interlocutory appeal of qualified immunity questions. *See Clinton*, 49 F.4th at 1139 (circuit lacked pendent jurisdiction to review Iowa state immunity claim, which—like Minnesota doctrine but in contrast to § 1983 immunity—does not require the court to determine whether officer violated "a clearly established right"); *Torres*, 39 F.4th at 508 (no jurisdiction to review denial of official state law immunity claims because application of the doctrine turned on whether officers acted with malice). The same "malice" inquiry is required under Minnesota's official immunity doctrine. *Vassallo ex rel. Brown v. Majeski*, 842 N.W.2d 456, 465 (Minn. 2014). These issues are not "inextricably intertwined" with qualified immunity. The Court accordingly should decline to review them.

Likewise, a jury could find facts that would lead to the conclusion that officers "willfully violated a known right while performing a discretionary duty," *Vassallo*, 842 N.W.2d at 462, in their usage of flashbang grenades, 40-mm rounds, and lethal rounds. Because the requisite "malice" is established by "the willful violation of a known right,'" *Rico v. State*, 472 N.W.2d 100, 107 (Minn. 1991), a jury could find facts that would lead to the inevitable conclusion that Defendants acted with requisite malice and are therefore not entitled to official immunity. Even if the Court could act, the unsettled factual record inhibits a conclusion as a matter of law.

CONCLUSION

The Court should affirm the lower court and remand this matter for further proceedings.

Date: **February 13, 2024**

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CERTIFICATE OF SERVICE

I, **David Wilson**, hereby certify that on February 10, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, **David Wilson**, hereby certify that Plaintiff-Appellee's Opening Brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the items described in Fed. R. App. P. 32(f), this document contains 12,585 words.

I further certify that the Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document was prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point size Times New Roman font.

Respectfully submitted,

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