IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
NO. 22-2600

MARK NIETERS,
Plaintiff-Appellant

vs.

BRANDON HOLTAN et al.,
Defendants-Appellees.

APPEAL FROM THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION
HONORABLE REBECCA GOODGAME EBINGER

PLAINTIFF/APPELLANT'S BRIEF AND REQUEST FOR ORAL ARGUMENT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Mark (Ted) Nieters, a freelance photojournalist, was covering a protest in honor of George Floyd in downtown Des Moines when he was pepper-sprayed, tackled, and arrested for failure to disperse—all with no warning—by Des Moines Police Officer Brandon Holtan. Given Nieters' actions, his location, and the lack of evidence that he'd committed any criminal offense, it was unreasonable for Holtan to assault and arrest him. Despite this, the District Court granted summary judgment to the Defendants on Nieters' claims for illegal seizure, excessive force, and First Amendment retaliation.

The District Court erred in ignoring record evidence demonstrating the lack of probable cause. It also failed to construe the facts in favor of the nonmoving party. The District Court's order granting qualified immunity to Holtan for Nieters' claims of unlawful arrest, excessive force, and First Amendment retaliation therefore must be reversed.

Nieters requests oral argument of 15 minutes.

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JURISDICTIONAL STATEMENT

The Southern District of Iowa had jurisdiction pursuant to 28 U.S.C. § 1331, because Nieters' suit alleges violations of his federal constitutional rights, through 42 U.S.C. § 1983.

Judgment entered against Nieters and for Holtan on July 20, 2022. (Add. 28). The notice of appeal was timely filed July 27, 2022. This Court has jurisdiction through 28 U.S.C. § 1291.

STATEMENT OF ISSUES

I. The District Court erred in finding Holtan had arguable probable cause to arrest Nieters.

Baribeau v. City of Minneapolis, 596 F.3d 465 (8th Cir. 2010)

Bernini v. City of St. Paul, 665 F.3d 997 (8th Cir. 2012)

Small v. McCrystal, No. 10-cv-04088-DEO, 2012 WL 1134013 (N.D. Iowa Apr. 4, 2012), *aff'd* 708 F.3d 997 (8th Cir. 2013).

White v. Jackson, 865 F.3d 1064 (8th Cir. 2017)

II. The District Court erred in finding Holtan was entitled to qualified immunity for tackling and pepper-spraying a Nieters, a photojournalist, during a simple misdemeanor arrest, where Nieters' hands were raised, he was standing still, and he was not given time to comply.

McReynolds v. Schmidli, 4 F.4th 648 (8th Cir. 2021)

Rokusek v. Jansen, 899 F.3d 544 (8th Cir. 2018)

Small v. McCrystal, 708 F.3d 997 (8th Cir. 2013)

Tatum v. Robinson, 858 F.3d 544 (8th Cir. 2017)

III. The District Court's errors on the unlawful seizure and excessive force claims require reversal on the First Amendment retaliation claim.

Hartmann v. Moore, 126 S. Ct. 1695 (2006)

Molina v. City of St. Louis, 4:17-CV-2498-AGF, 2021 WL 1222432 (E.D. Mo. Mar. 31, 2021)

Quraishi v. St. Charles Cnty., Mo., 986 F.3d 831 (8th Cir. 2021)

Peterson v. Kopp, 754 F.3d 594 (8th Cir. 2014)

STATEMENT OF THE CASE

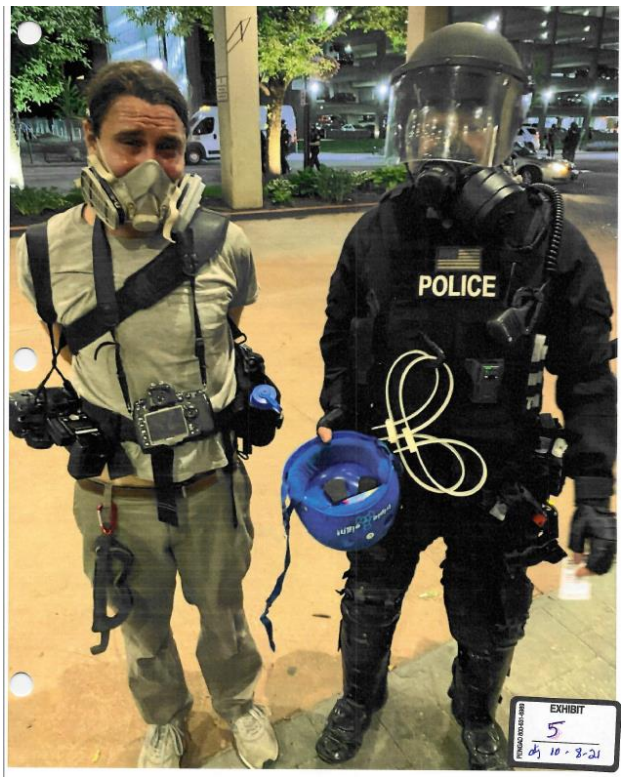
I. Facts

Nieters is a freelance photographer/filmmaker from Des Moines, Iowa. (App. 301; R. Doc. 33-2 at 300). He works for various international television and/or print publications throughout the world, covering current affairs and politics. (*Id.*). His photography work is distributed by Polaris Images. (App. 222–26, 301; R. Doc. 33-2 at 221–25, 300). As part of his job, he spent years documenting conflicts in the Middle East and Africa, including a civil war in Syria, Gaza under Israeli occupation, and the Arab Spring in Egypt and Libya. (App. 221–26, 229–30, 301; R. Doc. 33-2 at 220–25, 228–29, 300).

Beginning around May 31, 2020, Nieters began documenting the BLM movement in Des Moines. (App. 226; R. Doc. 33-2 at 225).

He photographed the protests in the wake of George Floyd's death. (App. 226–29; R. Doc. 33-2 at 225–28). On June 1, 2020, Nieters learned that there was a protest occurring at the Capitol Complex in Des Moines. (App. 233–34; R. Doc. 33-2 at 232–33). He began photographing the "Together We Can Make a Change: A Call to Action" event during the afternoon of June 1, 2020. (App. 234; R. Doc. 33-2 at 233).

While working these protests, Nieters wore clothing that would distinguish him from protesters and protect him in the event the protests turned violent. (App. 269–70; R. Doc. 33-2 at 268–69). Specifically, he was wearing a blue helmet, light-colored pants, a light-colored shirt, and a painter's mask, with two cameras and photography equipment strapped to his body.



(App. 269–70, 331, 471; R. Doc. 33-2 at 268–69, 330; R. Doc. 42-2 at 6). Nieters doesn't wear black because he has observed that protesters frequently wear black, and he doesn't want to be confused with the protesters. (App. 270; R. Doc. 33-2 at 269). In Nieters' experience, it is an international norm for journalists at demonstrations to wear a blue helmet to both protect themselves and to identify themselves as members of the media. (App. 258–61, 287–88; R. Doc. 33-2 at 257–60, 286–87). Nieters carried his press credentials in his pocket. (App. 121; R. Doc. 33-2 at 120).

The formal event ended around 8:15 p.m. (App. 234–35, 302; R. Doc. 33-2 at 233–34, 301). Some protesters continued to march around downtown, before returning to the Capitol around 10:45. (App. 235; R. Doc. 33-2 at 234). Nieters was still working. He followed the crowd, continuing to take pictures, as they marched around downtown. (*Id.*).

At some point, law enforcement began dispersing the crowd from the Capitol Complex. Nieters left the Capitol Complex area before law enforcement gave dispersal warnings or deployed tear gas. (App. 236–37, 248; R. Doc. 33-2 at 235–36, 247). Nieters continued to follow a group of protesters on Locust who were heading east, for the purpose of photographing them.

(App. 239, Shannon BWC[1] at 1:02 (Nieters circled in yellow); R. Doc. 33-2 at 238). Nieters remained apart from the crowd, trailing them and taking photographs of both the crowd and the officers. (*See* Shannon BWC at 1:02-26).

Nieters attempted to get a photograph of an incident between individuals believed to be undercover officers and protesters who had identified those officers. (App. 239–41; R. Doc. 33-2 at 238–40). Meanwhile, a group of around five police officers were walking several yards behind Nieters. The officers encouraged the remaining individuals to disperse to the east. (App. 241; Shannon BWC at 1-14:15; R. Doc. 33-2 at 240). At no point did these officers tell Nieters he needed to leave. (App. 244, Shannon BWC at 1-14:15; R. Doc. 33-2 at 243).

Nieters reached the southwest area of the Embassy Suites hotel drop-off driveway, which is approximately five blocks from where dispersal orders had been given at the Capitol. (App. 244; R. Doc. 33-2 at 243). Nieters stopped walking and began to take pictures towards

[1] "BWC" is an abbreviation for body worn camera. The videos referenced in this brief are being provided to the Court on a flash drive.

the west side of Embassy Suites. (*Id.*). From his position in the Embassy Suites drop-off driveway, Nieters observed a group of six-to-twelve people on Locust, towards the direction of downtown (further away from the Capitol). (App. 252–53; R. Doc. 33-2 at 251–52). A tear gas canister was deployed, and the individuals in the area ran away in response. (App. 244, 253; R. Doc. 33-2 at 243, 252). While standing there, Nieters photographed the tear gas cannister and the dispersing individuals. (App. 245; R. Doc. 33-2 at 244).

Meanwhile, a van full of police officers was approaching the Embassy Suites area. (*See generally* Armstrong, Underwood, Bartak, and Shannon BWCs).[2] Officer Armstrong's camera captures the deployment of the tear gas cannister as officers approached the protesters near the Embassy Suites. (Armstrong BWC). Armstrong described a large group running southbound on Robert D. Ray, in the construction area, towards Embassy Suites. (*Id.*). As police advanced, several cars appeared to be leaving the Embassy Suites

[2] Holtan did not have his body camera activated at this time, though he was wearing it. His interaction with Nieters thus is not captured on camera. (App. 131; R. Doc. 33-2 at 130).

area. (App. 106; Armstrong BWC at 13:30-14:30; R. Doc. 33-2 at 105).

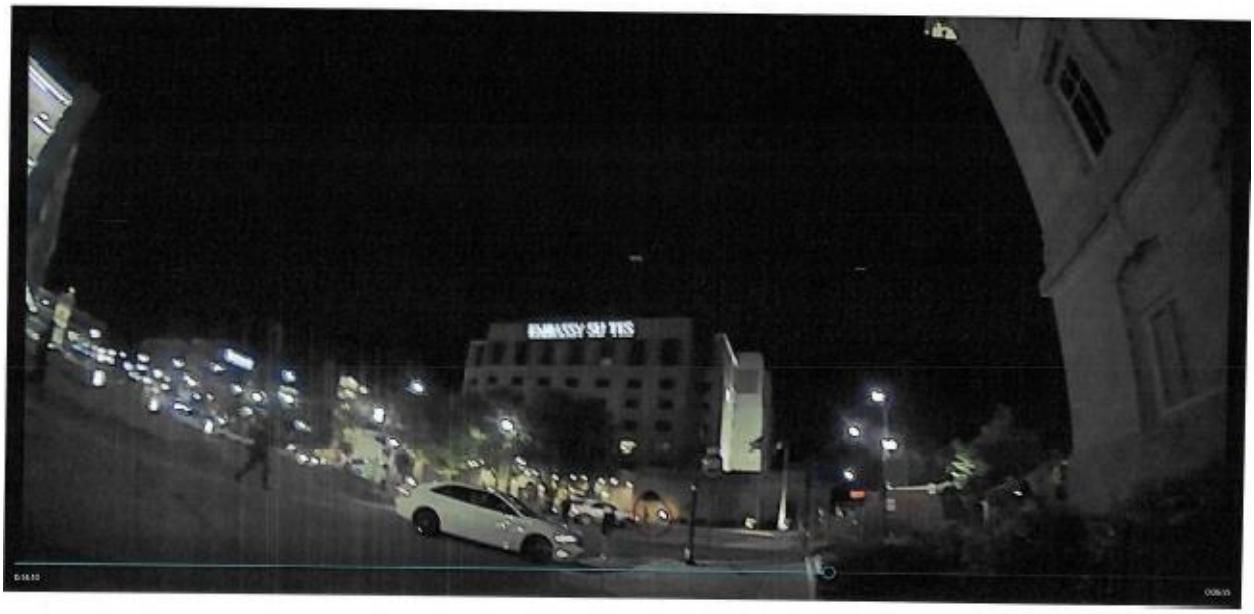
The officers from the van, including Holtan, ran towards the group of people on Robert D. Ray, chasing them south. (*See* Armstrong, Underwood, Bartak and Shannon BWCs). Holtan chased individuals on foot to the intersection of East Locust and Robert D. Ray. (App. 109; R. Doc. 33-2 at 108). The group on Robert D. Ray ran away to the west of Embassy Suites. (App. 112, 254; R. Doc. 33-2 at 111, 253).

It was then that Nieters caught Holtan's attention. Holtan did not observe Nieters with the group that he was chasing – he only observed Nieters as he was chasing the group of protesters. (App. 112; R. Doc. 33-2 at 111). To Holtan's knowledge, Nieters was not a part of the specific group that he was chasing. (*Id.*). The closest Holtan saw Nieters to the group he was chasing was 50 to 70 feet. (Def. App. 138; R. Doc. 33-2 at 137). Exhibits 12, 13, and 14 depict Nieters standing in front of the Embassy Suites, by himself:

Plaintiff's Appendix 15

EXHIBIT
12
11-8-21

(App. 161 (noting Nieters circled in red), 480; R. Doc. 33-2 at 160; ; R. Doc. 42-2 at 15).



Plaintiff's Appendix 16

EXHIBIT 13 dj 10-8-21

(App. 161, 481; R. Doc. 33-2 at 160; R. Doc. 42-2 at 16).

Plaintiff's Appendix 17

EXHIBIT 14 dj 10-8-21

(App. 162, 482; R. Doc. 33-2 at 161; R. Doc. 42-2 at 17).

Contrary to Holtan's claim that Nieters was running away, the video shows Nieters turns back *towards* Holtan, away from the protesters Holtan was chasing, as Holtan approaches. (App. 161–63, 480–81, 537; R. Doc. 33-2 at 160–62; R. Doc. 42-2 at 15–16; R. Doc. 42-1 at 9).[3] Nieters is not running, and certainly not running away. (*Id.*).

Although Holtan did not believe Nieters was part of the group he was chasing, (App. 111; R. Doc. 33-2 at 110), and Nieters was standing by himself photographing, Holtan charged towards Nieters. When Nieters observed Holtan charging at him, he stood still and put his hands up. (App. 254, 323; R. Doc. 33-2 at 253, 322). One of Nieters' cameras was in his hand. The other was strapped to his shoulder. (App. 255, 471–74; R. Doc. 33-2 at 254; R. Doc. 42-2 at 6–9). Holtan grabbed Nieters with one arm and sprayed him in the face with pepper spray with the other hand. (App. 323, 472–75; R. Doc. 33-2 at 322; R. Doc. 42-2 at 7–10). Holtan tackled Nieters to the

[3] Notably, Nieters included these facts in his statement of material facts and Defendants did not respond to any of those facts. The failure to respond is deemed an admission. SDIA LR 56(d) ("The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact.").

ground. (App. 472–74; R. Doc. 42-2 at 7–9). Nieters continued to hold his hands up in the air as Holtan tackled him. (*Id.*)

Holtan did not give Nieters a warning or say anything prior to tackling him. (App. 323; R. Doc. 33-2 at 322). According to Holtan, he was "running towards Mr. Nieters to give him my command . . . when I deployed my pepper spray to his face." (App. 120; R. Doc. 33-2 at 119). Holtan testified that he took Nieters to the ground "once Mr. Nieters turns to run." (App. 121; R. Doc. 33-2 at 120). Holtan confirmed that all of these events —the oral command, the pepper spray, and his claimed perception that Nieters began to run— happened "almost simultaneously." (*Id.*). He "shot [his] spray off right about the same time [he] said 'Get on the ground,' and [Nieters] turned to run." The "pepper spray was the same time as the command." (*Id.*).

Nieters immediately told Holtan he was a journalist and he was not resisting. (App. 323; R. Doc. 33-2 at 322). The takedown was captured by another photojournalist nearby:

(App. 472–78; R. Doc. 42-2 at 7–13).

Nieters identified himself as press and told Holtan his press ID was in his pocket. (App. 121, 256; R. Doc. 33-2 at 120, 255). Holtan decided that he was going to continue with the arrest despite obtaining the press ID. (App. 121; R. Doc. 33-2 at 120). As Holtan arrested Nieters, Armstrong (Holtan's team leader) screamed at the photographer who captured Nieters' arrest: "You can arrest that reporter too if they're going to keep getting in our way." (Armstrong BWC at 14:00-14:45).

Prior to arresting Nieters, Holtan did not see Nieters commit any acts of vandalism, intimidation, or assaultive behavior. (App. 124; R. Doc. 33-2 at 123). He did not see Nieters throw anything. (*Id.*). Holtan is aware of no other witnesses who saw Nieters commit any of those acts. (*Id.*). Nieters did not cross a police line. (App. 155; R. Doc. 33-2 at 154). He was not in an area closed to the public. (*Id.*). He was not physically intervening with law enforcement. (App. 156; R. Doc. 33-2 at 155). He was not tampering with a witness or another involved citizen. (*Id.*). He was not persistently questioning or interrupting law enforcement. (App. 156–57; R. Doc. 33-2 at 155–56). He was not impeding emergency equipment or the flow of traffic or personnel. (App. 157; R. Doc. 33-2 at 156). He was not jeopardizing anyone's safety. (*Id.*).

Holtan did not know where Nieters was before he was arrested outside of the Embassy Suites. (App. 126; R. Doc. 33-2 at 125). Holtan had no evidence that Nieters was at the Capitol Complex when orders to disperse were read there. (App. 175; R. Doc. 33-2 at 174). Holtan did not remember doing any further investigation to determine whether Nieters was part of an unlawful assembly. (App. 128; R. Doc. 33-2 at 127). Holtan did not remember questioning

Nieters as to whether he had received an order to disperse. (*Id.*). Holtan did not follow up with anyone else to determine whether Nieters had received an order to disperse. (*Id.*).

As a result of Holtan's arrest of Nieters, Nieters was charged with failure to disperse in violation of Iowa Code § 723.3, a simple misdemeanor. (App. 501; R. Doc. 33-2 at 500). The affidavit in support of the charge stated:

> Defendant was a member of a group (of WELL over three people) that assembled to protest allegations of racism and police brutality. The protests evolved to property damage and obstruction of public roadways, with many of the remaining participants engaging in violent, intimidating and destructive behavior.
>
> Police officers clearly, loudly and repeatedly instructed all participants to disperse intermittently a total of 5 times over a period of approximately 20 minutes, reading a command to disperse as written in the state code of Iowa.
>
> Despite those instructions, Defendant willfully stayed among the group that remained. This group was engaging in assaultive conduct, the intimidation of people and destruction of property. Private businesses and public buildings were damaged by breaking windows. Water bottles and other objects were thrown at individuals.
>
> This destruction as open, extensive and obvious, yet the defendant willfully remained among the group of persons responsible for this conduct all of which occurred in the City of Des Moines, Polk County, Iowa.
>
> Defendant was within hearing distance of the commands to disperse and failed to leave.

(*Id.*).

This affidavit appears to have been copy/pasted from the generic narrative used to justify the majority of arrests made downtown during the protests. (App. 12; R. Doc. 33-2 at 11). It does not indicate where Nieters was arrested, who arrested him, when the order to disperse was given, where it was given, and which property was being damaged. (App. 501; R. Doc. 42-2 at 36). More importantly, the affidavit and the narrative are both false as to Nieters. Nieters was not part of a group of more than 3 people, he did not hear a dispersal order while at the Capitol (and in any event he was no longer at the Capitol), and at the time Nieters was arrested, there was no property damage or assaults on police – just fleeing protesters.

On June 10, 2020, Nieters, through counsel, contacted the County Attorney's office to ask that the case be reviewed and subsequently communicated about the case with the prosecution. (App. 486–87; R. Doc. 42-2 at 21–22). The email chain was forwarded to Holtan on June 15, 2020, at 12:06 PM. (App. 483–96; R. Doc. 42-2 at 18–32). In response, Holtan authored a supplemental report and sent it to his supervisor later in the day on June 15th. (App. 497–98; R. Doc. 42-2 at 32–33). This report contained several false or

misleading statements in an attempt to justify the arrest, including that Nieters "began to run into the driveway of the Embassy Suites," and Nieters "did not comply" with a "verbal command to get on the ground." (App. 498; R. Doc. 42-2 at 33). These statements are inconsistent with Holtan and Nieter's testimony and Armstrong's video footage. Regardless, the supplemental report does not indicate that Nieters was doing anything unlawful, or even that dispersal orders were given near the Embassy Suites. (*Id.*).

On August 13, 2022, the State filed a motion to dismiss the charges, stating that it had "been unable to sufficiently document this defendant's actions for charges to go forward at this time." (App. 504; R. Doc. 42-2 at 39). The charge was dismissed on the same day. (App. 505; R. Doc. 42-2 at 40).

II. Procedural history

Based on Holtan's actions, Nieters brought claims for:

> Count 1: Illegal Seizure, Civil Rights Violation under 42 U.S.C. § 1983, Violation of the Fourth Amendment to the U.S. Constitution against Holtan.
>
> Count 2: Illegal Seizure, Civil Rights Violation of Article I, § 8 of the Iowa Constitution against Holtan.
>
> Count 3: Excessive Force, Civil Rights Violation under 42 U.S.C. § 1983, Violation of the Fourth Amendment to the U.S. Constitution against Holtan.

> Count 4: Excessive Force, Civil Rights Violation of Article I, § 8 of the Iowa Constitution against Holtan.
>
> Count 5: Retaliation, Civil Rights Violation under 42 U.S.C. §§ 1983, Violation of First Amendment to the U.S. Constitution against Holtan.
>
> Count 6: Retaliation, Civil Rights Violation of Article I, § 7 of the Iowa Constitution against Holtan.
>
> Count 7: Deliberately Indifferent Policies, Practices, Customs, Training and Supervision, Civil Rights Violation pursuant to 42 U.S.C. § 1983, Violation of 4th, 5th, & 14th Amendments to the United States Constitution against Wingert and City of Des Moines, Iowa.
>
> Count 8: Deliberately Indifferent Policies, Practices, Customs, Training and Supervision, Civil Rights Violation Pursuant to Article I, §§ 6 & 8 of the Iowa Constitution against Wingert and City of Des Moines, Iowa.
>
> Count 9: Malicious Prosecution against Holtan.
>
> Count 10: False Arrest/Imprisonment against Holtan.
>
> Count 11: Assault and Battery against Holtan.
>
> Count 12: Libel against Holtan.

(App. 300–319; R. Doc. 33-2 at 299–318).

At summary judgment, Nieters did not resist the dismissal of his deliberate indifference claims (Counts 7 and 8). The District Court ruled on the merits of Nieters' federal constitutional claims (Counts 1, 3, and 5), granting qualified immunity to Holtan. The remainder of Nieters' claims arose under state law and the District Court declined

to exercise supplemental jurisdiction. (Add. 26 (R. Doc. 49 at 22)). The District Court then remanded Counts 2, 4, 6, 9, 10, 11, and 12 back to state court. *Id.* Accordingly, this appeal pertains only to Nieters' federal constitutional claims for illegal seizure, excessive force, and retaliation.

SUMMARY OF THE ARGUMENT

The District Court erred when it found Holtan was entitled to qualified immunity on Nieters' claims for illegal seizure, excessive force, and retaliation because it construed the evidence against Nieters and ignored record evidence that contradicted the defendant's claims. Properly viewed, the evidence created a jury issue on each of Nieters' claims. Viewing the facts in the light most favorable to Nieters, Holtan had no reason to believe that Nieters was a protester, and reasonably should have recognized him as a photojournalist. His federal constitutional claims should be presented to a jury.

ARGUMENT

I. Fact questions exist regarding whether Holtan had arguable probable cause to arrest Nieters for failure to disperse.

1. Preservation & Standard of Review

Error was preserved where Nieters resisted summary judgment on his Fourth Amendment illegal seizure claim and the District Court

found that Holtan was entitled to qualified immunity based on arguable probable cause. (Add. 14–15 (R. Doc. 49 at 10–11).

The Court of Appeals "reviews de novo the district court's grant of summary judgment, viewing the record in the light most favorable to the nonmoving party." *Barnhart v. UNUM Life Ins. Co. of Am.*, 179 F.3d 583, 587 (8th Cir. 1999).

Summary judgment is a "drastic remedy" that "should not be granted unless the moving party has established the right to a judgment with such clarity that there is no room for controversy." *Buford v. Tremayne*, 747 F.2d 445, 447 (8th Cir. 1984) (citations omitted). Torts in particular, including torts arising under 42 U.S.C. § 1983, "are usually not appropriate for disposition by summary judgment" because they involve "a multitude of factual issues and abstract concepts that become elusive when applied to varying concrete factual situations." *Hughes v. A.M. Jawa, Ltd.*, 529 F.2d 21, 23 (8th Cir. 1976). It is only in the "rare and extraordinary tort case" that the nonmoving party is unable to produce a genuine factual dispute in any discernable circumstance. *Id.* Put another way, summary judgment is appropriate when there "exists only one

conclusion" that could be drawn from the facts. *Kiel v. Select Artificials, Inc.*, 169 F.3d 1131, 1137 (8th Cir. 1999).

The party moving for summary judgment bears the burden to demonstrate that the record does not contain a genuine dispute of material fact. *Moore v. Martin*, 854 F.3d 1021, 1025 (8th Cir. 2017). A genuine dispute is one where the evidence would allow a reasonable jury to return a verdict for the nonmoving party. *Zubrod v. Hoch*, 907 F.3d 568, 575 (8th Cir. 2018). Additionally, should the court in its assessment find a genuine factual dispute, it must deny summary judgment even if it is convinced the action will ultimately fail. *Hughes*, 529 F.2d at 23. Finally, at the summary judgment stage of litigation, "the evidence of the non-moving party is to believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

2. Argument

In granting Holtan qualified immunity, the District Court found that he had "arguable probable cause" to arrest Nieters for failure to disperse based on evidence that, after dispersal orders were given at the Capitol grounds, a "large" group travelled westwards towards the location where Holtan arrested Nieters, and "Holtan understood there

were individuals on Locust Street that were part of the larger group that moved westward after dispersal orders were read at the Capitol grounds." (Add. 14–15 (R. Doc. 49 at 10–11)). The Court concluded that "even if Holtan was mistaken in believing Nieters heard the dispersal orders and was following an unlawful assembly, such a mistake was objectively reasonable" given the above information. (Add. 15 (R. Doc. 49 at 11)). The Court then claimed, "Nieters points to no evidence from which a reasonable jury could find Holtan lacked arguable probable cause to arrest him for failure to disperse." (Add. 15–16 (R. Doc. 49 at 11–12)).

The above findings of facts are directly contradicted by the record, including by Holtan's own testimony. Simply put, Nieters *did* put forth evidence that Holtan lacked arguable probable cause to arrest him for failure to disperse. Because "[i]t is clearly established that a warrantless arrest, unsupported by probable cause, violates the Fourth Amendment," the District Court therefore erred in granting qualified immunity to Holtan. *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478 (8th Cir. 2010).

Looking to the elements of "failure to disperse," probable cause was lacking for each element. Iowa Code § 723.3 provides: "A peace

officer may order the participants in a riot or unlawful assembly or persons in the immediate vicinity of a riot or unlawful assembly to disperse. Any person within hearing distance of such command, who refuses to obey, commits a simple misdemeanor."

To begin, Holtan admitted he had no evidence suggesting Nieters was within hearing distance of a command to disperse. (App. 175; R. Doc. 33-2 at 174). Where there is a dispute of fact as to whether the plaintiff heard the command to disperse, summary judgment is not appropriate. *Small v. McCrystal*, No. 10-cv-04088-DEO, 2012 WL 1134013, at *7 (N.D. Iowa Apr. 4, 2012), *aff'd* 708 F.3d 997 (8th Cir. 2013).

Moreover, even assuming Nieters had heard the dispersal order (he of course did not), Holtan had no reasonable basis to believe that Nieters did not heed it. The evidence relied upon by the District Court was that the group Nieters was following *did disperse*. They left the Capitol grounds. *Cf. id.* at *7 (noting Small had dispersed by walking back towards his camper). The area where Nieters was arrested was five blocks away from the Capitol building where the orders to disperse was read. (App. 468; R. Doc. 42-2 at 468).

Finally, there was not probable cause that Nieters was a part of or in the immediate vicinity of a riot or an unlawful assembly on Locust Street. He was 50-70 feet away from the nearest group of protesters. (App. 124; R. Doc. 33-2 at 123). Holtan acknowledged that Nieters was not part of the group that he was chasing. (App. 111; R. Doc. 33-2 at 110). Holtan did not see Nieters take any action consistent with the protesters' actions: he was not interfering with law enforcement and not participating in any mayhem, violence, or destruction. (App. 155–57; R. Doc. 33-2 at 154–56). Rather, the evidence suggested that Nieters was working, not protesting: he was visibly wearing two cameras, and he was taking photos of the gas canister and the fleeing protesters just before Holtan tackled him. (App. 244–45, 252–53, 471–79; R. Doc. 33-2 at 243–44, 251–52; R. Doc. 42-2 at 6–14). Taking the inferences from these facts in Nieters' favor, a reasonable jury could conclude there was not probable cause for Holtan to believe Nieters was a part of any illegal activity.

Next, while the defendants and the District Court relied on case law suggesting that someone who is within a "group of people in an area that officers had been attempting to clear" is arguably subject to an arrest for failure to disperse, *White v. Jackson*, 865 F.3d 1064,

1075 (8th Cir. 2017); *see also Bernini v. City of St. Paul*, 665 F.3d 997, 1003 (8th Cir. 2012), these cases are easily distinguishable. In *White*, the Plaintiff was arrested on the same street corner as a hundred other protesters who were throwing objects at law enforcement and resisting dispersal tactics including tear gas. *White*, 865 F.3d at 1069–70. In *Bernini*, law enforcement encircled a park containing 160 suspected violent protesters, and made efforts to determine which of those were involved in the violence while releasing others. *Bernini*, 665 F.3d at 1002. ("[T]he Fourth Amendment is satisfied if the officers have grounds to believe all arrested persons were a part of the unit observed violating the law." (cleaned up)). The common thread between these two cases is that the plaintiffs were actually a part of the large group that the defendant police officers were targeting. Further distinguishing *Bernini* is the fact that Holtan, after tackling Nieters, made no effort to determine whether Nieters had done anything wrong. (App. 128; R. Doc. 33-2 at 127).

Holtan's testimony demonstrates that Nieters was not doing anything to associate himself with the protesters that law enforcement was targeting. Holtan assumed Nieters was a protester despite:

- Having no evidence Nieters had been at the Capitol when the order to disperse was read (App. 139; R. Doc. 33-2 at 138);
- Observing Nieters over five blocks away from where the dispersal order was given, suggesting compliance with dispersal order (App. 468; R. Doc. 42-2 at 3);
- Not observing Nieters with the group of protesters he was chasing (App. 111; R. Doc. 33-2 at 110);
- Observing that Nieters was 50-70 feet away from the protesters (App. 138; R. Doc. 33-2 at 137);
- Not seeing Nieters commit any acts of vandalism, assaultive behavior, intimidation, or obstruction (App. 124, 156–57; R. Doc. 33-2 at 123, 155–56);
- Not seeing Nieters cross a police line (App. 155; R. Doc. 33-2 at 154);
- Seeing Nieters in the driveway of a hotel, in an area open to the public (*Id*);
- Not seeing Nieters impede law enforcement or traffic (App. 157).

See United States v. Shavers, 524 F.2d 1094, 1095-96 (8th Cir. 1975) (recognizing "proximity to the scene of crime does not provide probable cause of arrest"); *Ybarra v. Illinois*, 100 S. Ct. 338, 342 (1979) ("[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.").

Importantly, the District Court did not engage with the fact that Nieters was clearly working as a photojournalist, and not protesting.

Reporters, including photojournalists, have a First Amendment right to cover protests. *Quraishi v. St. Charles Cnty., Mo.*, 986 F.3d 831, 838 (8th Cir. 2021); *see also Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 834 (9th Cir. 2020) (holding law enforcement defendants failed to establish that general dispersal orders were essential or narrowly tailored, and observing that "[t]he many peaceful protesters, journalists, and members of the general public cannot be punished for the violent acts of others"). It is not reasonable to arrest a journalist because they are near a protest, or even a riot. Even if the Court was to accept Holtan's testimony that he did not realize Nieters was a photojournalist prior to tackling him, Nieters immediately identified himself as press after being tackled and provided a press ID. (App. 121, 256; R. Doc. 33-2 at 120, 255). Despite receiving this information, Holtan proceeded to arrest Nieters.

All of these are facts from which a reasonable jury could find that Holtan did not have arguable probable cause to arrest Nieters for failure to disperse. Nieters did not hear the order to disperse, he was not anywhere near the location where the order to disperse was given, and he was not in the immediate vicinity of other protesters.

Taking all reasonable inferences in Nieters' favor, summary judgment was inappropriate on his illegal seizure claim.

II. Holtan is not entitled to qualified immunity for tackling and pepper-spraying Nieters.

1. Preservation & Standard of Review

This issue was preserved when Nieters resisted the motion for summary judgment on the excessive force count and the District Court granted summary judgment on the basis of qualified immunity. (Add. 20 (R. Doc. 49 at 16)).

An appeal of an order granting summary judgment is reviewed de novo, with all reasonable inferences weighed in favor of the plaintiff. *Supra* Sec. I(1).

2. Fact questions exist regarding whether the force Holtan used against Nieters was objectively reasonable.

"To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances." *Coker v. Ark. State Police*, 734 F.3d 838, 842 (8th Cir. 2013). In assessing the reasonableness of uses of force, courts consider the *Graham* factors: "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*, 109 S. Ct. 1865, 1872 (1989). "Force may be objectively unreasonable when a plaintiff does not resist, lacks an opportunity to comply with requests before force is exercised, or does not pose an immediate safety threat." *Wilson v. Lamp*, 901 F.3d 981, 989 (8th Cir. 2018).

The District Court agreed that the first two *Graham* factors weighed in favor of a finding of excessive force, because Nieters was a non-violent, (suspected) misdemeanant. (Add. 17 (R. Doc. 49 at 13)). However, the District Court went astray on the third factor. Because the District Court wrongly believed there was arguable probable cause to arrest Nieters for failure to disperse and because Nieters turned away as Holtan tackled him, the District Court concluded that Holtan reasonably believed Nieters was fleeing arrest. But the disputed facts, construed in Nieters' favor, did not support a conclusion that the use of force against him was reasonable under the circumstances.

First of all, as discussed above, a reasonable jury could conclude there was no probable cause justifying an arrest. And if there was no cause for arrest, there was no cause to use force.

Second, there is a fact dispute on whether it was reasonable for Holtan to believe Nieters was resisting arrest or was otherwise noncompliant. Nieters turned *towards* Holtan, stood still, and did not flee as Holtan ran at him. (App. 161–63, 323, 480–81, 534 ¶ 48; R. Doc. 33-2 at 160–62, 322; R. Doc. 42-2 at 15–16; R. Doc. 42-1 at 6). Nieters had his hands up in surrender as Holtan approached and as Holtan tackled him. (App. 254, 472–73; R. Doc. 33-2 at 253; R. Doc. 42-2 at 7–8). Holtan admitted he was running towards Nieters and that he pepper-sprayed and tackled Nieters at the same time he ordered him to get on the ground. (App. 85; R. Doc. 33-2 at 84). A reasonable jury could conclude Nieters' action in turning his body to shield his cameras as Holtan tackled him did not post hoc justify the tackling and pepper-spraying.

Notably, Nieters had no time to respond before Holtan barreled into him, further supporting a conclusion that the use of force was unconstitutional. "[P]rior to using force officers must allow a reasonable opportunity to comply with their commands." *McReynolds v. Schmidli*, 4 F.4th 648, 653 (8th Cir. 2021) (citing *Smith v. Kansas City Police Dep't*, 586 F.3d 576, 581 (8th Cir. 2009)). The minimal action of turning to protect his cameras during the takedown could

not justify the use of force Holtan was *already in the process of committing*. Holtan specifically agreed that he did not give Nieters any information on acceptable alternatives prior to arresting him. (App. 157; R. Doc. 33-2 at 156). Because Nieters did not have an opportunity to comply, it is for a jury to decide whether Nieters' turning away during the tackle rendered reasonable Holtan's decision to tackle and pepper-spray him.

In these respects, Nieters' case is comparable to *Small v. McCrystal*, 708 F.3d 997, 1005 (8th Cir. 2013). Neither Nieters nor the plaintiff in *Small* committed the alleged offense of failure to disperse. *Id.* at 1003–04. The plaintiff in *Small* was moving away from law enforcement officers when he was tackled, but the Court recognized that the mere act of walking away did not equate to flight or resisting arrest. *Id.* at 1005. Like Holtan, the officer in *Small* did not give the plaintiff the opportunity to apply, instead tackling him without warning. *Id.* While some level of force is inherent even in a wrongful arrest, Holtan and the defendant in *Small* went beyond merely holding and handcuffing their suspects—they took actions designed to cause pain without giving their suspects any opportunity to comply. *See also Smith*, 586 F.3d at 581 (finding officer used

excessive force where plaintiff was forcibly removed from his home before having the opportunity to comply with commands); *McReynolds*, 4 F.4th at 653 ("Whether a reasonable officer could have viewed [plaintiff's] alleged delay . . . as noncompliant is, at most, a jury question."); *Tatum v. Robinson*, 858 F.3d 544, 549 (8th Cir. 2017) (noting affidavits describing plaintiff as "fighting and resisting" were "inconsistent with the security footage" and denying qualified immunity because "a reasonable officer would not think he was 'actively' resisting arrest"); *Rokusek v. Jansen*, 899 F.3d 544, 548 (8th Cir. 2018) (finding force used against plaintiff was excessive even though plaintiff did not comply with three requests).

In sum, Nieters' act of turning away to shield his expensive equipment from the officer who was running full-steam to tackle him does not render the tackle constitutional. A reasonable jury could have found that Holtan's use of force was unreasonable. It was error not to give the jury that opportunity.

3. *The right to be free of tackling and pepper-spraying was clearly established.*

The District Court also justified the grant of qualified immunity to Holtan based on its conclusion that Nieters' right to be free of

excessive force was not clearly established. The District Court reasoned the right was not clearly established because the Court "did not locate any cases in which the use of pepper spray, a takedown, and zip ties is not objectively reasonable where a suspect, though a nonviolent misdemeanant, turns away from an officer where a reasonable officer would believe the suspect was attempting to flee." (Add. 20 (R. Doc. 49 at 16)).

The first flaw with the District Court's framing of the issue is its reliance on its conclusion that "a reasonable officer would believe the suspect was attempting to flee." As discussed above, fact questions exist as to whether a reasonable officer would have believed Nieters was attempting to flee.

The second issue with the District Court's framing of the issue is that it was inappropriately granular. Although the right at issue should not be defined "at a high level of generality," *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011), "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." *U.S. v. Lanier*, 117 S. Ct. 1219, 1227 (1997) (cleaned up). "[O]fficials can still be on notice that

their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 122 S. Ct. 2508, 2516 (2002). "There need not be a prior case directly on point, but existing precedent must have placed the statutory or constitutional questions beyond debate." *Dillard v. O'Kelley*, 961 F.3d 1048, 1052 (8th Cir. 2020).

Nieters' right to be free from being tackled and pepper-sprayed was "beyond debate." The caselaw makes clear that a non-violent misdemeanor arrestee—even one that is noncompliant—has a right to be free from excessive force. *Rokusek*, 899 F.3d at 548 (holding "every reasonable official would have understood that he could not throw Rokusek—a nonviolent, nonthreatening misdemeanant who was not actively resisting—face-first to the ground," despite Rokusek's failure to comply with orders"); *see also Smith*, 586 F.3d at 582 (noting arrestee had "no opportunity to comply" and "the right to be free from excessive force in the context of an arrest [is] clearly established under the Fourth Amendment."); *Neal v. Ficcadenti*, 895 F.3d 576, 582 (8th Cir. 2018) ("In June 2012, the state of the law would have given a reasonable officer fair warning that using physical force against a suspect who was not resisting or threatening anyone was unlawful."); *Bauer v. Norris*, 713 F.2d 408, 412–13 (8th Cir.

1983) (holding no use of force was reasonable where the plaintiffs were charged with disorderly conduct, there was no evidence that any crime had been committed, and no evidence that the plaintiffs physically resisted or threatened the officer—even though the plaintiffs were "argumentative, vituperative, and threatened legal action").

Taking the facts in the light most favorable to Nieters, he was a nonviolent suspected misdemeanant who did not resist arrest. Holtan therefore "had 'fair warning' that he should not have thrown a nonviolent, nonthreatening suspect who was not actively resisting face-first to the ground." *Rokusek*, 899 F.3d at 548. The law is clearly established and Nieters' excessive force claim should submitted to the jury.

III. The District Court's errors on the unlawful seizure and excessive force claims require reversal on the First Amendment retaliation claim.

1. Preservation & Standard of Review

This issue was preserved by Nieters resisting summary judgment on his First Amendment retaliation claim and the District Court granting summary judgment on the claim. (Add. 22–23 (R. Doc. 49 at 18–19)).

An appeal of an order granting summary judgment is reviewed de novo, with all reasonable inferences weighed in favor of the plaintiff. *Supra* Sec. I(1).

2. Argument

Nieters alleged two separate bases for First Amendment retaliation: the fact that he was arrested without probable cause, and the fact that he was subjected to excessive force, all while exercising his First Amendment right to document a protest. The District Court granted summary judgment on the first ground because it found there was at least arguable probable cause to arrest Nieters for failure to disperse. *See, e.g. Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014). As discussed in Section I above, fact questions exist regarding whether probable cause existed to arrest Nieters for failure to disperse. A jury could find that Holtan had no reasonable basis to believe Nieters had received a dispersal order and failed to obey it. Moreover, a reasonable jury could easily find that Holtan's assumption that Nieters was a protester was unreasonable.

On the excessive force ground, the District Court found Nieters "fail[ed] to generate a genuine issue of material fact as to whether a retaliatory motive was the but-for cause of Holtan's decision to

pepper spray him and take him to the ground." (Add. 22 (R. Doc. 49 at 18)). The District Court further commented, "Nieters fail[ed] to point to anything on the record from which a reasonable jury could find Nieters' First Amendment activity was a substantial factor in Holtan's decision to use force." (Add. 23 (R. Doc. 49 at 19)). These conclusions again ignored several disputed facts.

Although Holtan denied that he perceived Nieters to be a member of the press, he expressly admitted that he believed Nieters was a protester. (App. 113; R. Doc. 33-2 at 112). At a minimum, Nieters was targeted because of a perceived association with protesters. This is a prohibited basis for using force. *See, e.g. Molina v. City of St. Louis*, 4:17-CV-2498-AGF, 2021 WL 1222432, at *7 (E.D. Mo. Mar. 31, 2021) ("Defendants assert that Plaintiffs have failed to establish that Defendants recognized them as protesters and acted with retaliatory motive. By this argument, Defendants seem to imply that, on the contrary, they shot canisters at individuals whom they believed had nothing to do with the protesters."). However, Nieters also put forth facts to demonstrate that Holtan's statements were either false or unreasonable. Nieters was dressed to identify himself as a member of the press, based on his experience reporting on

conflicts around the world. He carried his press credentials, and produced them after Holtan arrested him.

Motive is not an element that should be taken from the jury lightly. Motive is seldom capable of direct proof. *Quraishi*, 986 F.3d at 838 ("[T]he district court does not have to rely solely on Anderson's account of events to discern what motivated him."). Motive can be discerned based on a lack of justification for aggressive police tactics. *See, e.g. Hartmann v. Moore*, 126 S. Ct. 1695, 1701 (2006) ("[W]hen nonretaliatory grounds are in fact insufficient to provoke the adverse consequences, we have held that retaliation is subject to recovery as the but-for cause of official action offending the Constitution."); *Fakorzi v. Dillard's, Inc.*, 252 F. Supp. 2d 819, 834 (S.D. Iowa 2003) (finding jury question on issue of officer's intent when "the officers could have conducted the investigation in far less threatening ways."). Here, the District Court ignored disputed facts and made inferences in Holtan's favor to take the issue of motive from the jury. This was error, and the grant of summary judgment should be reversed.

CONCLUSION

Holtan agreed that he did not see Nieters engage in any of the activities that would have marked him as law breaker. The therefore jury should have been permitted to decide whether Holtan's actions were reasonable or unconstitutional. The grant of summary judgment should be reversed, and this matter should be remanded for further proceedings.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies the Appellant's Brief was electronically filed with Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system on

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The undersigned hereby certifies that upon receipt of the notice from CM/ECF system that the brief and addendum have been reviewed, the foregoing Appellant's Brief will be served upon counsel by depositing one copy thereof in the U.S. Mail, postage prepaid, in an envelope addressed to the following counsel:

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