UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 22-2600

MARK NIETERS,
Plaintiff-Appellant,

v.

BRANDON HOLTAN, DANA WINGERT, and the
CITY OF DES MOINES, IOWA,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Iowa
Case No. 4:21-cv-00042-RGE-HCA

APPELLEES' BRIEF

FOR THE APPELLEES

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Summary of the Case & Request for Oral Argument

Mark Nieters filed a multi-count civil action against Des Moines Police Officer Brandon Holtan, Chief Dana Wingert, and the City of Des Moines after his arrest in the midst of rioting in June 2020. On appeal, the scope is limited to §1983 claims related to Nieters' arrest, the force used, and whether media-based animus was present.

Based on the undisputed record at summary judgment, the District Court correctly found that Officer Holtan had probable cause to arrest Mr. Nieters. The presence of probable cause defeats all of Nieters' arguments on appeal, including the First Amendment retaliation claim. Further, there is no clearly established law to be free from seizure when one deliberately places oneself in the middle of a riot and then turned away from the police presence and did not follow police instructions and there is no special right for members of the media to violate the law. In making the arrest of Nieters, Holtan used reasonable force within acceptable police practices, in the context of an ongoing riot.

Oral argument is appropriate in this case due to the public importance related to the unprecedented conditions of rioting that were present in the summer of 2020. The Appellees concur with Nieters that 15 minutes of oral argument per party is sufficient.

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Jurisdictional Statement

The decision appealed: Mark Nieters appeals the district court's July 19, 2022, order granting partial summary judgment in favor of the Appellant-Defendants.

Jurisdiction of the court below: Nieters's complaint claims that Defendants violated his rights, in part, under the United States Constitution. The district court had original jurisdiction of his claims under 28 U.S.C. section 1331.

Jurisdiction of this court: This is an appeal from the entry of judgment on the Appellant-Defendants' motion for summary judgment. This Court has jurisdiction under 28 U.S.C. section 1291.

Timeliness of appeal: Nieters filed a timely notice of appeal on July 27, 2022.

Statement of the Issues

I. Officer Brandon Holtan is entitled to qualified immunity for the arrest of Mark Nieters for failure to disperse.

Beck v. Ohio, 379 U.S. 89 (1964)

U.S. v. Flores-Lagonas, 993 F.3d 550 (8th Cir. 2021)

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

II. Officer Brandon Holtan is entitled to qualified immunity for the force used during the arrest of Mark Nieters.

Graham v. O'Connor, 490 U.S. 396 (1989)

City of Escondido, Cal. v. Emmons, 139 U.S. 500 (2019)

Johnson v. McCarver, 942 F.3d 405 (8th Cir. 2019)

III. Officer Brandon Holtan is entitled to qualified immunity on the retaliation claim because Mark Nieters was not singled out for arrest or force because of his press-related activity.

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

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

Statement of the Case

FACTS

On the night of June 1 into the morning of June 2, 2020, the City of Des Moines experienced a fourth consecutive night of rioting that followed protests related to the killing of George Floyd in Minneapolis. (App. at 6; R. Doc. 33-2 at 5). During the nights of rioting, several officers were assaulted when crowds that remained and grew threw water bottles—some frozen for greater impact, rocks, broken concrete, and landscaping blocks. (App. at 14-23; R. Doc. 33-2 at 15-24). Over the course of these four nights, the riots resulted in substantial damages to Hilltop Tire (all windows smashed and items looted), the Federal Courthouse, Polk County Courthouse (broken windows, attempted arson), the Embassy Suites (See attached video and photographs), Merle Hay Mall (windows smashed and businesses looted), and many Court Avenue businesses (windows smashed and businesses looted). (App. at 14-23; R. Doc. 33-2 at 15-24).

An emergency curfew order was put in place on May 31, 2020 and was in effect on the night of June 1 to June 2, 2020. (App. at 7, 10-11, R. Doc. 33-2 at 9-11). On the afternoon of June 1, 2020, there were organized protests and speakers at the Capitol building in Des Moines, Iowa. (App. at 511; R. Doc. 42-1 at 2). Brandon Holtan was called to duty with the Des Moines Police Department on this day. (App. at 89; R. Doc. 33-2 at 88). He was called in to work in his capacity as a member of a

multi-agency tactical squad called Metro STAR. (App. at 89; R. Doc. 33-2 at 88). Metro STAR Team stands for Special Tactics And Response Unit. (App. at 196; R. Doc. 33-2 at 195). Metro STAR Team includes individuals from surrounding law enforcement agencies, not just the City of Des Moines Police Department. (App. at 196; R. Doc. 33-2 at 195). The mission of the Metro Special Tactics and Response Unit is to provide the public with a prepared and professional emergency response and defensive capability to manmade and naturally occurring critical incidents. (App. at 196; R. Doc. 33-2 at 195). This is achieved through the combination of management, professional training, and the use of specialty equipment and techniques. (App. at 197; R. Doc. 33-2 at 196).

Nieters learned of these protests and attended to photograph the event. (App. at 234; R. Doc. 33-2 at 233). Nieters was wearing a blue helmet, a painter's mask, and non-black clothing. (App. at 259, 260-261, 269; R. Doc 33-2 at 258, 259-260, 268). Nieters was not displaying press credentials or any written markings announcing that he was a member of the media. (App. at 261; R. Doc. 33-2 at 260-261). The formal event ended at approximately 8:15 P.M. (App. at 234-235; R. Doc. 234-235). After that time, several hundred individuals remained on the Capitol grounds. (App. at 235; R. Doc. 32-2 at 235).

Eventually, the remaining group left the Capitol grounds marched downtown, then back to the Capitol arriving around 10:45 p.m. (App. at 235; R. Doc. 32-2 at

235). At 10:20 p.m. that night, a group of protesters threw a rock at a window of a building at 400 Locust Street, in the downtown area of Des Moines. (App. at 13; R. App. 32-2 at 12). Nieters followed this movement from the Capitol to downtown and back to the Capitol placing him at the Capitol building between 10:45 and 11:45 P.M. (App. at 235-236; R. Doc. 32-2 at 234-235). This roving assembly engaged in property damage, obstruction of public roads, and violence. (App. at 12; R. Doc. 32-2 at 12).

Five dispersal orders were read at the Capitol. (App. at 90 and Michael Bartak Body-Worn Camera; R. Doc. 32-2 at 89, 469). The first dispersal order was given around 11:30 p.m. (App. at 108; R. Doc. 32-2 at 107). A fifth and final dispersal order was given at approximately 11:43. (Michael Bartak Body-Worn Camera, 5:00-10:36; R. Doc. 32-2 at 469)[1]. Despite dispersal orders, the group remained and engaged in assaultive conduct, intimidation and destruction of property. (App. at 12; R. Doc. at 11). The unlawful assemblers were throwing fireworks, water bottles and other objects at officers. (App. at 12; R. Doc. at 11). Tear gas was deployed at approximately 11:46 P.M. (Michael Bartak Body-Worn Camera, 10:36-13:00; R. Doc. 32-2 at 469). Some arrests were made at the Capitol grounds. (Jared

[1] To determine the actual time, one can use the date/time stamp on the video, which is fixed at its start time (top left). Then, using the number of minutes and seconds into the video, one is able to arrive at the time of day something has occurred. On some video, clicking on the expand icon in the bottom right will show a time stamp.

Underwood Body-Worn Camera and Michael Bartak Body-Worn Camera, 12:00-14:00; R. Doc. 32-2 at 468, 469). Those who weren't arrested at the Capitol grounds moved west again in groups. (Jared Underwood Body-Worn Camera R. Doc. 32-2 at 468). Nieters left the Capitol grounds by around 11:45 P.M. (App. at 236; R. Doc. 32-2 at 235).

Perhaps the most challenging civil disorder situation is that of the mobile crowd. (App. at 7; R. Doc. 32-2 at 6). Unlike a stationary protest or even violence and rioting that is confined to a particular area, mobile violent crowds are very difficult for law enforcement to address. (App. at 7; R. Doc. 32-2 at 6). Nieters was moving with this group when he observed a "tussle" during which undercover officers were "caught" by unlawful assemblers and the rioters began "wrestling" with these officers. (App. at 240; R. Doc. 32-2 at 239). Nieters recalled the "tussle" including about 12 unlawful assemblers and two officers; the unlawful assemblers had one of the officers taken down to the ground. (App. at 240-241; R. Doc. 32-2 at 239-240). Many police officers were in that area with a mobile crowd from 11:49-12:02 p.m.; officers were repeatedly telling people to leave and go home. (Jeffery Shannon Body-Worn Camera; R. Doc. 32-2 at 470). Large crowds can be heard in the background continuing to confront officers and remain in the area; vehicles are stopping, blocking and turning around in the road. (Jared Underwood Body-Worn Camera and Jeffrey Shannon Body-Worn Camera; R. Doc. 32-2 at 468, 470).

Nieters was following the group that was on Locust Street headed west between 11:45 P.M. and when he was arrested around two minutes after midnight. (App. at 248; R. Doc. 32-2 at 247). Nieters followed this group because he thought it would be safer because of the presence of a community leader. (App. at 246; R. Doc. 32-2 at 245). However, that community leader had left the group 10 or 15 minutes prior to his arrest. (App. at 248; R. Doc. 32-2 at 247). Nieters stayed behind to have a cigarette before moving toward the Embassy Suites. (App. at 239; R. Doc. 32-2 at 238). When he approached Embassy Suites, Nieters observed people running along the westside of the hotel in response to tear gas deployment. (App. at 244; R. Doc. 32-2 at 243). He observed approximately 6 to 12 of these individuals running. (App. at 244; R. Doc. 32-2 at 243).

DMPD dispatchers were providing information to Holtan, and other officers, that a group of unlawful assemblers was moving westward on Locust. (Jared Underwood Body-Worn Camera, 9:30-12:30; R. Doc. 32-2 at 468). Dispatch advised that several windows had been broken at Iowa Motor Truck. (Jared Underwood Body-Worn Camera, 9:30-12:30; R. Doc. 32-2 at 468). Officers in STAR Team 1, Holtan's team, were in a cube van driving west on Grand Avenue attempting to move parallel to the mobile group. (App. at 90; R. Doc. 32-2 at 89). Officers were getting real-time tracking of large groups of unlawful assemblers from dispatchers including that the group was running north on Robert D. Ray Drive. (Jared Underwood Body-

Worn Camera; R. Doc. 32-2 at 468). Holtan's orders were to arrest people remaining in the area. (App. at 93; R. Doc. 32-2 at 92). Holtan exited the cube van and ran toward a group of unlawful assemblers he could see fleeing north on Robert D. Ray Drive. (App. at 108; R. Doc. 32-2 at 107).

It was chaos with people running everywhere. (App. at 94; R. Doc. 32-2 at 93). At this time, Nieters observed riot police running toward the Embassy Suites. (App. at 253; R. Doc. 32-2 at 252). Holtan had learned that people were in the parking ramp to the east of Robert D Ray Drive, so he was being mindful of that because of the danger of people throwing things off the ramp at officers. (App. at 111 and Jared Underwood Body-Worn Camera, 9:30-13:30; R. Doc. 32-2 at 110, 468). Holtan observed Nieters and believed he was part of the group of unlawful assemblers in the immediate area that had been running from police. (App. at 111; R. Doc. 32-2 at 110). Initially, Holtan perceived Nieters to be an antagonist ready to confront police. (App. at 113; R. Doc. 32-2 at 112). Holtan did not observe Nieters' cameras; rather he believed the straps on Nieters' shoulders to be that of a backpack. (App. at 113; R. Doc. 32-2 at 112). The perceived backpack and the actual gas mask worn by Nieters reminded Holtan of a previous encounter with a rioter. (App. at 113; R. Doc. 32-2 at 112).

When Holtan caught up with Nieters, Holtan was by himself. (App. at 9; R. Doc. 32-2 at 8). Holtan gave a command for Nieters to get on the ground. (App. at

13, 83; R. Doc. 32-2 at 12, 82). Then Nieters turned away from him. (App. at 113, 303; R. Doc. 32-2 at 112, 302). Holtan perceived that as being a sign that Nieters intended to flee, as others were doing in the immediate vicinity. (App. at 113, 303; R. Doc. 32-2 at 112, 302). As Holtan approached Nieters, he appeared to move in one direction then abruptly change course. (App. at 8; R. Doc. 32-2 at 7).

The element of flight is important when considering if force is appropriate. (App. at 9; R. Doc. 32-2 at 8). Flight is also a form of resisting arrest. (App. at 9; R. Doc. 32-2 at 8). Nieters put his hands up and turned away so when Holtan got to him, Nieters had his back to Holtan. Photos, (App. at 120; R. Doc. 32-2 at 119). Holtan reached around Nieters, grabbed him around the chest, sprayed him with OC spray, and took him to the ground. (App. at 120; R. Doc. 32-2 at 119). Nieters' cameras were not damaged in this arrest. (App. at 280; R. Doc. 32-2 at 279). Holtan applied zip ties to Nieters' wrists. (App. at 13, 121; R. Doc. 32-2 at 12, 120).

OC spray, commonly known as "pepper spray", is a relatively low level of force or minimal level of force. (App. at 8; R. Doc. 32-2 at 7). It is designed to cause discomfort in the mucus membranes, eyes, nose, and throat. (App. at 8; R. Doc. 32-2 at 7). The hope is that this discomfort is enough to encourage the offender to comply with police orders. (App. at 8; R. Doc. 32-2 at 7). The short burst of OC to the recommended target area, followed by the taking of Nieters to the ground, were

absolutely reasonable given the actions of Nieters and the totality of the circumstances. (App. at 9; R. Doc. 32-2 at 8).

Nieters indicated to Holtan that he was a member of the press. (App. at 13, 121; R. Doc. 32-2 at 12, 120). Holtan reviewed Nieters' press credentials from his back pocket. (App. at 121; R. Doc. 32-2 at 120). Holtan continued with the arrest because he did not want to be perceived as treating Nieters more favorably or preferentially than any other citizen who was arrested. (App. at 121; R. Doc. 32-2 at 120). Holtan left Nieters with approximately 7 other arrestees under the supervision of another officer; this occurred at approximately 12:08 a.m. on June 2, 2020. (App. at 13, 14; R. Doc. 32-2 at 12, 13). After this, Holton has no contact or interaction with Nieters.

Nieters was given assistance rinsing his eyes out by Officer Lu at approximately 12:12 p.m. (Xiaotian Lu Body-Worn Camera). Nieters asked other officers to loosen his zip ties saying they were "rather tight". (App. at 281 and Xiaotian Lu Body-Worn Camera, 1:30; R. Doc. 32-2 at 471). For nearly 7 minutes, Nieters said nothing about his zip ties or his eyes. (Xiaotian Lu Body-Worn Camera, 1:30-8:03; R. Doc. 32-2 at 471). Officer Lu assisted Nieters with removing his mask to help with his comfort. (Xiaotian Lu Body-Worn Camera 1:30-8:03; R. Doc. 32-2 at 471). Officer Lu again interacted with Nieters and Nieters complained of the way his camera was hanging but said nothing about the tightness of the zip ties, nor did he

ask for any additional help with water for his eyes. (Xiaotian Lu Body-Worn Camera 1:30-8:03; R. Doc. 32-2 at 471). Once Nieters did complain of his zip ties, the time prior to removal of the zip ties was prolonged because unknown officers were having a "hard time getting my cuffs off"; Nieters said the total time in zip ties was approximately 20 minutes and 10 minutes of that was with unknown officers trying to get them off. (App. at 326; R. Doc. 32-2 at 471)

Other journalists, Brian Powers and Olivia Sun, were in the same immediate area as Nieters. (App. at 268 and Jared Underwood Body-Worn Camera, 14:30-15:00; R. Doc. 32-2 at 267, 468). Both worked for the Des Moines Register at the time. (App. at 268, 328; R. Doc. 32-2 at 267, 327). Neither Powers nor Sun was arrested. (App. at 268, 328; R. Doc. 32-2 at 267, 327). The City of Des Moines Police Department's Public Information Officer (PIO), Paul Parizek, is the primary contact with members of the press and has daily contact with the media. (App. at 36; R. Doc. 32-2 at 35). In his role as PIO, for nearly 7 years, he has been in daily contact with media, including TV and print journalists and photographers. (App. at 36; R. Doc. 32-2 at 35). Prior to the riots of May and June 2020, he did not know who Nieters was. (App. at 36; R. Doc. 32-2 at 35). After his arrest, Nieters made email contact with Parizek to ask how to be better recognized as media; he indicated that he wears a blue helmet to signify that. (App. at 36; R. Doc. 32-2 at 35). In addition to substantial work with local media, Parizek has experience working with national and

international media. (App. at 36; R. Doc. 32-2 at 35). Parizek has never heard of or seen members of the media wearing blue helmets. (App. at 36; R. Doc. 32-2 at 35). Parizek encouraged Nieters to wear visible press credentials. (App. at 36; R. Doc. 32-2 at 35). Parizek advised Nieters to pay attention to and comply with dispersal orders as that avoids enforcement of laws against members of the press. (App. at 36; R. Doc. 32-2 at 35).

Ben Carter, the chief investigator of the riots that took place in May and June 2020, watched hundreds of hours of video including body worn camera, drone, social media, media, fixed camera and business surveillance. (App. at 37; R. Doc. 32-2 at 36). In reviewing video footage and through his presence at the riots, Carter had the opportunity to observe many members of the press present at the riots. (App. at 37; R. Doc. 32-2 at 36). Of the individuals Carter observed as members of the press, some were identifiable as media through their clothing, markings, or press badges. (App. at 37; R. Doc. 32-2 at 36). Carter observed none, other than Nieters, wearing a blue helmet or anything similar to that. (App. at 37; R. Doc. 32-2 at 36). Nieters only saw one other journalist wearing a helmet, it was not a blue helmet. (App. at 259; R. Doc. 32-2 at 258). Nieters acknowledged that one reason to wear his helmet is to protect against items thrown by rioters. (App. at 259; R. Doc. 32-2 at 258). Holtan understood this group of people engaged in unlawful assembly at the Capitol was continuing to be mobile as an unlawful assembly. (App. at 83; R. Doc. 32-2 at 82).

Procedural History

The Appellees concur with Nieters' statement of procedural history.

Argument Summary

There are no disputed factual issues in this case. Much of the events are captured on video or still photograph, and the Appellees (hereinafter "City") accept Mr. Nieters' deposition testimony of events for purposes of summary judgment, to the extent that is not unequivocally contradicted by video evidence. Based on this undisputed record, Officer Holtan had probable cause to arrest Mr. Nieters due to his presence among a mobile riot moving *en masse* after dispersal orders. Due to his proximity in time and place to the mobile riot, Officer Holtan held the reasonable belief that Nieters failed to disperse, along with the others who were still engaged in an unlawful assembly. Further, there is no clearly established law to be free from seizure when one deliberately places oneself in the middle of a riot, then turned away from the police presence and did not follow police instructions and there is no special right for members of the media to violate the law.

Moreover, there is no evidence in the record that Holtan was aware that Nieters was a member of the press or that Nieters was targeted for that activity. Finally, the force used by Holtan in making the arrest of Nieters was reasonable and within acceptable police practices, especially in the context of a riot. There is also no

clearly established law that would instruct an officer that, in the midst of a riot, the use of pepper spray, a takedown, and zip ties is objectively unreasonable.

Argument

I. Officer Brandon Holtan is entitled to qualified immunity for the arrest of Mark Nieters for failure to disperse.

I.A. Preservation and Standard of Review

The City concurs that this issue was preserved for review. This court reviews de novo a district court's grant or denial of summary judgment, applying the same standard as the district court. *Dahlin v. Lyondell Chem. Co.*, 881 F.3d 599, 603 (8th Cir. 2018). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is particularly appropriate when only questions of law are involved, rather than factual issues that may or may not be subject to genuine dispute. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011) (en banc).

I.B. Contentions and Reasons

"Qualified immunity shields government officials from suit unless their conduct violated a clearly established constitutional or statutory right of which a reasonable person would have known." *Yowell v. Combs*, 89 F.3d 542, 544 (8th Cir. 1996). "What this means in practice is that 'whether an official protected by

qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective legal reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken.'" *Wilson v. Layne*, 526 U.S. 603, 614 (1999) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)). The applicable standard in such cases is viewed from the totality of the circumstances and judged from the viewpoint of a reasonable officer -- irrespective of the officer's underlying intent or motivation. *McCoy v. City of Monticello*, 342 F.3d 842, 848 (8th Cir. 2003).

Qualified immunity is an immunity from suit rather than a mere defense to liability… it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As the Eighth Circuit has noted, "[t]he Supreme Court has generously construed qualified immunity to shield 'all but the plainly incompetent or those who knowingly violate the law.'" *Littrell v. Franklin*, 388 F.3d 578, 582 (8th Cir. 2004) (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Littrell*, 388 F.3d at 582. To overcome qualified immunity inquiry, Nieters must establish that the defendants were "intentional or reckless, thereby shocking the conscience." *Brockinton v. City of Sherwood, Ark.*, 503 F.3d 667, 672 (8th Cir. 2007) (citing *Wilson v. Lawrence*

County, Mo., 260 F.3d 946, 955-56 (8th Cir. 2001)). Mere negligence will not suffice. *Id.*

Courts use a two-part test when determining whether a lawsuit against an official may proceed under a qualified immunity assertion. First, the court must determine whether, "taken in the light most favorable to the party asserting the injury… the facts alleged show the officer's conduct violated a constitutional right." *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Second, the court must determine whether the right in question was "clearly established." *Id*. For the right to be clearly established, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he was doing violates that right." *Buckley v. Rogerson*, 133 F. 3d 1125, 1128 (8th Cir. 1998).

The plaintiff has the burden to show that his right is clearly established at the time of the violation. *Davis v. Scherer*, 468 U.S. 183, 197 (1984). As a consequence, a plaintiff is required to point to closely analogous cases or show that the right is so clear that no one thought it worthwhile to litigate the issue. *Dunn v. City of Elgin*, 347 F.3d 641, 650 (8th Cir. 2003). "If either question is answered in the negative, the public official is entitled to qualified immunity." *Norris v. Engles*, 494 F.3d 634, 637 (8th Cir. 2007) (quoting *Vaughn v. Ruoff*, 253 F.3d 1124, 1128 (8th Cir. 2001)). Both of these questions are answered in the negative for the reasons set forth below.

I.B.1. There was probable cause to arrest Nieters so there was no constitutional violation.

The first part of the qualified immunity test answers the question of whether there has been a violation of the Fourth Amendment to the United States Constitution. If the answer is no, then, no further analysis is needed as to immunity. The Constitution prohibits arrests that are not based on probable cause. *Clay v. Conlee*, 815 F.2d 1164, 1167–68 (8th Cir. 1987).

> Whether [an] arrest was constitutionally valid depends ... upon whether, at the moment the arrest was made, the officers had probable cause to make it-whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [person arrested] had committed ... an offense.

Beck v. Ohio, 379 U.S. 89 (1964). "Probable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would warrant a man of reasonable caution in the belief that certain items may be …useful as evidence of a crime; it does not require a showing that a belief be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983)[internal citations omitted]. "Probable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians act." *Bell v. Neukirch*, 979 F.3d 594, 603 (8th Cir. 2020). "In a case involving an arrest without probable cause, officers have qualified immunity if they reasonably but mistakenly conclude[d] that probable cause [wa]s present." *Id*. at 607.

Officer Holtan had probable cause to arrest and charge Nieters with failure to disperse. The charge is defined below.

> Iowa Code § 723.3 Failure to Disperse: 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.

Nieters was in the immediate vicinity of the Capitol from 10:45 and 11:45 P.M. (App. 235-236; R. Doc. 32-2 at 234-235). Five dispersal orders were given between 11:30 and 11:45 p.m. and Officer Holtan was aware of that. (App. 93: Ln. 11-13; Bartak video 10:36-13:00; R. Doc. 32-2 at 92, 469). Tear gas was deployed at approximately 11:46 P.M. at the Capitol. (Bartak video 10:36-13:00; R. Doc. 32-2 at 469). In response, the group of unlawful assemblers began to travel in groups westward. (App. 246; Shannon video :00-3:10; R. Doc. 32-2 at 245, 470).

Logic dictates that the point of the 'Failure to Disperse' statute is to break up an unlawful assembly or riot, not to relocate it. But that is what this group did; it took the unlawful assembly and rioting behavior and moved it westward. Nieters admittedly followed along with one of these groups. This mobile unlawful assembly ended up at the Embassy Suites on Robert D. Ray Drive, as reported over radio communication. Nieters was at the Embassy Suites at the intersection of Locust Avenue and Robert D. Ray Drive. He was so close to the mobile unlawful assembly, Nieters saw people fleeing past him on the westside of the hotel. (App.

244: Ln. 20-23; R. Doc. 32-2 at 243). More importantly, Holtan saw Nieters in the immediate vicinity of people fleeing southbound on Robert D. Ray Drive toward the Embassy Suites.

Then as Holtan was approaching him, he saw Nieters turn away from him, which Nieters admits doing. (App. 113: Ln. 2-8; 302; R. Doc. 32-2 at 112, 301). Holtan believed that to be a sign of fleeing, similar to what was happening all around them. (App. 113: Ln. 2-8; 302; R. Doc. 32-2 at 112, 301). The act of fleeing the immediate area of a crime provides probable cause for arrest. *U.S. v. Reed*, 733 F.2d 492 (8th Cir. 1984); *Thompson v. Hubbard*, 257 F. 3d 896 (8th Cir. 2001); *U.S. v. Smith*, 990 F. 3d 607 (8th Cir. 2021); *U.S. v. Flores-Lagonas*, 993 F.3d 550 (8th Cir. 2021). Although the Courts don't force officers to have the ability of hindsight when making an arrest, it is important to note in this case, Officer Holtan was correct. Nieters had turned away from him. Nieters' personal reasons for doing so were not known to Holtan and needn't be known to an arresting officer.

Nieters was wearing a helmet and gas mask, which was similar to gear used by rioters in the four nights of unrest. Nieters was in the immediate vicinity of the mobile riot and he looked the part of previous rioters, with his helmet and gas mask. (App. 149: Ln. 1-8; 258, 259-260, 268; R. Doc. 32-2 at 148, 247, 258-259, 267). The behavior of this group included throwing fireworks, water bottles and other objects at officers. (App. 12-13; R. Doc. 32-2 at 11-12). The group engaged in

intimidation, assault and property destruction. (App. 12-13; R. Doc. 32-2 at 11-13). Finally, the behavior of the group included remaining in a group after being told to disperse. (App. 240: Ln. 3-23; R. Doc. 32-2 at 239). Nieters was admittedly moving with this group after the dispersal orders were given. The Fourth Amendment analysis for his arrest should stop right there. There was no constitutional violation for his arrest because there was ample probable cause to place him in the midst of an unlawful assembly. Officer Holtan's grant of summary judgment should be affirmed as to Nieters' arrest.

I.B.2. The right to be in the immediate proximity of a riot or unlawful assembly so one can observe, photograph and/or participate is not a clearly established right.

The District Court did not analyze this prong of qualified immunity because it determined there was probable cause for Nieters' arrest. However, if this Court finds that there was a federal constitutional right violated, the inquiry moves on to the second prong of immunity analysis, regarding whether a right is clearly established. As summarized by the Supreme Court,

> The doctrine of qualified immunity shields officials from civil liability so long as their conduct "'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan,* 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800 (1982)). A clearly established right is one that is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards,* 566 U.S. 658 (2012). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al–*

> *Kidd,* 563 U.S. 731, 741 (2011). Put simply, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Mullenix v. Luna, 577 U.S. 7, 11 (2015). All the reasons applied above related to probable cause set forth above, apply equally to the issue of whether the right to attend an unlawful assembly is clearly established. It is axiomatic; no one has the right to engage in unlawful activity; not even members of the press. The definition of an unlawful assembly "is three or more persons assembled together, with them or any of them acting in a violent manner, and with intent that they or any of them will commit a public offense." Iowa Code § 723.2. Nieters was among people, following along, with a group that was unlawful at the Capitol, moved unlawfully as a group west on Locust, which continued to block a public right-of-way. A person can join "an unlawful assembly by not disassociating himself from the group assembled and by knowingly joining or remaining with the group assembled after it has become unlawful." *White v. Jackson*, 865 F.3d 1064, 1075 (8th Cir. 2017). In *White v. Jackson*, several people were arrested for being in the vicinity of areas officers were trying to clear. *Id*. at 1075-7076.

As was demonstrated in the nights of protests that turned violent, these gatherings became riots. Officers must take aggressive measures, using such force as is necessary and proper to suppress the riot. *State v. Boles*, 5 Conn. Cir. Ct. 22, 240 A.2d 920 (1967). The balance of caselaw indicates that, in situations of mass

or group arrest, it is permissible to make mass arrests if in proximity to—in time and place—a riot or unlawful assembly. *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012); *Carr v. District of Columbia*, 587 F.3d 401 (D.C. Cir. 2009). Again, it is important to note, this was not the first day of riots. This was the fourth consecutive night of protests that morphed into riots and the pattern played out similarly on this night of June 1st into the morning of June 2nd. The rioting was mobile; the group moved together and caused damage, intimidation, and violence. Nieters himself saw a group of 12 assemblers take an undercover police officer to the ground in a "tussle" on Locust—something others might call an assault—while he was walking in proximity to the mobile rioters from the Capitol to the scene of his arrest, a span of some 15 blocks. (App. 240; R. Doc. 32-2 at 239). Once Holtan and Metro STAR were directed to try to make arrests of the remaining group, Team 1 was being kept appraised of movement by radio, giving them real-time reports of an active group of rioters traveling west on Locust from 7th Street all the way to Robert D. Ray Drive where they actually saw people running away from officers toward Embassy Suites. (App. 94: Ln. 17-24; Armstrong video 9:30-12:30; R. Doc. 32-2 at 93, 467). And there was Mark Nieters, right in the middle of it.

That proximity gives probable cause for an arrest for unlawful assembly, so Holtan ran toward Nieters and ordered him to get on the ground. When a person

fails to follow an order of the officer related to safety, like an order to get on the ground and instead turn away from the officer, that amounts to arguable probable cause to make an arrest. *White,* at 1078-1079. For all the above reasons, it is clearly established that Officer Holtan is entitled to federal qualified immunity related to the arrest of Mark Nieters.

II. Officer Brandon Holtan is entitled to qualified immunity for the force used during the arrest of Mark Nieters.

II.A. Preservation and Standard of Review

The City concurs that this issue was preserved for review. This court reviews de novo a district court's grant or denial of summary judgment, applying the same standard as the district court. *Dahlin v. Lyondell Chem. Co.*, 881 F.3d 599, 603 (8th Cir. 2018). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is particularly appropriate when only questions of law are involved, rather than factual issues that may or may not be subject to genuine dispute. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011) (en banc).

II.B. Contentions and Reasons

Excessive force is analyzed in the context of a seizure under the Fourth Amendment, applying the reasonableness standard. U.S.C.A. Const. Amend. 4; *Graham v. Connor*, 490 U.S. 386, 396 (1989). The reasonableness of an officer's use of force is evaluated "from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight." *Id*. at 396. This method of appraisal allows "for the fact that police officers are often forced to make split-second judgments —in circumstances that are tense, uncertain, and rapidly evolving— about the amount of force that is necessary in a particular situation." *Partlow v. Stadler*, 774 F.3d 497, 502 (8th Cir. 2014) (quoting *Graham v. Connor*, 490 U.S. at 397).

II.B.1. Officers Holtan did not violate Nieters' Constitutional Right in terms of the force used.

The nature and extent of force that may reasonably be used by officers depends on the specific circumstances of the arrest, including whether he is actively resisting arrest or attempting to evade arrest by flight. *Estate of Brown v. Thomas*, 7 F. Supp. 3d 906 (E.D. Wis. 2014). Other relevant factors include the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, the possibility that the suspect may be armed, whether the action takes place in the context of effecting an arrest, and the number

of persons with whom the police officers must contend at one time. *Ansell v. Ross Township,* 419 Fed. App'x 209, 213 (3d Cir. 2011); *Sharrar v. Felsing,* 128 F.3d 810, 822 (3d Cir. 1997). The issue of the number of people an officer had to contend with was of particular importance during the riots. The DMPD was severely outnumbered as compared to the number of rioters. "The Fourth Amendment inquiry focuses not on what the most prudent course of action may have been or whether there were other alternatives available, but instead whether the seizure actually effectuated falls within a range of conduct which is objectively 'reasonable' under the Fourth Amendment." *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995).

In his sworn deposition testimony, Nieters provided greater detail regarding his claims of several different uses of force. One was the application of pepper spray by Holtan. Another was when Holtan took him to the ground. The third was the tightness of Holtan's application of zip ties, which Nieters later made known to other officers who assisted with loosening them. Officers may take any measures that are "reasonably necessary" to protect their personal safety and maintain the status quo during the course of the stop. *United States v. Smith*, 648 F.3d 654, 659 (8th Cir. 2011); *United States v. Sanford*, 813 F.3d 708, 713 (8th Cir. 2016).

Further, as here, officers can use handcuffs in order to control the scene and protect their safety. *United States v. Fisher*, 364 F.3d 970, 973 (8th Cir. 2004). The

Eighth Circuit "has declined to second-guess whether alternative actions by police officers 'might conceivably have been available.'" *Estate of Morgan v. Cook,* 686 F.3d 494, 497 (8th Cir.2012). "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Kaleta v. Johnson*, 2013 WL 3448148, at *8 (D. Minn. July 9, 2013), citing *Graham v. Connor,* 490 U.S. 386, 396–97 (1989). That was never more the case than in the late evening and early morning of June 1 and 2, 2020, respectively.

Officer Holtan was responding to hours of criminal activity occurring, and the crowd wasn't dispersing—it was a mobile riot. The individuals in the immediate area between the Capitol and Embassy Suites, that Nieters was following, were not protesters, they were a traveling unlawful assembly. The City's expert, Anthony DiCara, was the one and only expert who opined about both the arrest of and the force used against Mark Nieters. He stated,

> Following multiple orders for the crowd to disperse at the State Capitol, the crowd splintered and spread out across the city. Mark Nieters was part of one of those crowds. Perhaps the most challenging civil disorder situation is that of the mobile crowd. Unlike a stationary protest or even violence and rioting that is confined to a particular area, mobile violent crowds are very difficult for law enforcement to address…At times, these groups would appear to be merely walking down the street. In fact, they were repositioning and staying mobile in order to avoid detection and arrest…

> The conditions in which the Des Moines officers operated during the 2020 riots were the worst of circumstances. They were under constant threat from the rioters for multiple nights and, indeed, many officers were injured. OC spray, commonly known as "pepper spray", is a relatively low level of force or minimal level of force. It is designed to cause discomfort in the mucus membranes, eyes, nose, and throat. The hope is that this mild discomfort is enough to encourage the offender to comply with police orders...
>
> As Ofc. Holtan approached Mr. Nieters he does appear to move in one direction then abruptly change course. Ofc. Holtan perceived Nieters' movement and subsequent actions as a precursor to flight…Flight is also a form of resisting arrest. Also, the relatively small group of officers had split up in different directions to pursue the crowd. When Ofc. Holtan caught up with Mr. Nieters he was by himself. The short burst of OC to the recommended target area, followed by the taking of Nieters to the ground, were absolutely reasonable given the actions of Mr. Nieters and the totality of the circumstances. Taking him to the ground to make the arrest was an appropriate action. The photographs of the arrest support the conclusion of a proper arrest. Throughout their interaction with Mark Nieters the officers behaved professionally and with restraint. (App. 7-8; R. Doc. 32-2 at 6-7).

"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." *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009). The Court considers the claim from the "perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id*. As noted by DiCara, making an arrest in a situation

in which they were under constant threat of harm from active rioters made for extremely challenging circumstances. Nevertheless, they used minimally intrusive force on Nieters. Holtan ordered Nieters to get to the ground. (App. 13, 119: ln. 23-25; R. Doc. 32-2 at 12). When Nieters didn't comply—and whether Nieters heard Holtan or not is irrelevant—Holtan virtually simultaneously used a short burst of pepper spray and took Nieters to the ground and placed him in zip ties. (App. 120; Ln. 23-25; R. Doc. 32-2 at 22-24).

The entire interaction was approximately five seconds long. Holtan can be seen approaching Nieters at 14:13 of Ryan Armstrong's body worn camera video. (See Armstrong video at times notes in sentences below). Using the initial time stamp of 23:48 (or 11:48 p.m.) and adding 14 minutes and 13 seconds to that, the arrest begins seconds after 12:02 p.m. By 14 minutes, 18 seconds into the video, Holtan is taking Nieters to the ground. At 14:46 into the video, Holtan can be seen securing Nieters, who is on the ground. At 15:28, Holtan can be seen with Nieters still on the ground. At 16:05, another person is arrested who is walking toward the officers with hands in the air. There are several officers together when this person approached. By 16:33, Holtan and Nieters are no longer on the ground, nor can they be seen. That is less than a two-minute encounter.

It is only after Holtan left Nieters with others that Nieters spoke with others about his eyes and zip ties. (App. 12-14; R. Doc. 32-2 at 11-13). Officer Lu helped

him, by 12:12 p.m. with rinsing his eyes. (Lu video 0:40-0:50; R. Doc. 32-2 at 471). Shortly thereafter, Nieters said his zip ties were "rather tight" which is unnecessary because he doesn't intend to resist. (Lu video 1:28-1:33; R. Doc. 32-2 at 471). For 10 minutes thereafter and during another exchange with Officer Lu, Nieters made no complaint about his eyes, his zip ties, or any other complaint of pain or discomfort. (Lu video 1:33-11:15; R. Doc. 32-2 at 471).

Under *Graham v. O'Connor*, the amount of force that can be used depends on a careful analysis of the facts and circumstances of each particular case regarding (1) the seriousness of the offense, (2) physical threat to officers and others, (3) and whether the subject is actively resisting or attempting to flee. 490 U.S. 396 (1989). The offense of rioting, especially on the night in question was extremely serious. There were assaults on officers and significant property damage. The physical threat to officers does not just relate to Mr. Nieters. These officers were surrounded by violent opportunists. They were in very serious danger from all sides as rioters were scattering, then remobilizing and returning in a pattern. Given that Nieters had been seen in the act of turning away as Holtan approached him, that would lead a reasonable officer to believe that he would flee like all the others around him and call for taking him to the ground and using a short burst of OC spray. As to the zip ties, controlling precedent has held that in making an arrest "[a]llegations of pain as a result of being handcuffed, without

some evidence of more permanent injury, are not sufficient to sustain a claim of excessive force." *Crumley v. City of St. Paul,* 324 F.3d 1003, 1008 (8th Cir. 2003). Handcuffing in and of itself, and physical contact generally associated with handcuffing, is not excessive force. *Robinson v. Hawkins,* 937 F.3d 1128, 1136 (8th Cir. 2019). Being handcuffed, or actions associated with handcuffing, resulting in minor discomfort and abrasions does not constitute a Fourth Amendment excessive claim. Mr. Nieters had one doctor appointment and declined testing. He claims no long-term damage to his arms, wrists, or hands. All the factors weigh in favor of these uses of force being reasonable. Use of minimal force in order to gain compliance, safety and control of a person who appeared to be fleeing from officers does not present a constitutional violation or an assault and battery. As such, the district court's decision in favor of Holton regarding the force used should be affirmed.

II.B.2. Nieters failed to demonstrate that his right to be free from this particular use of force was clearly established at the time.

It is well-established in law and common practice for an officer to use force to effectuate arrest and maintain safety in the specific circumstances as described above. Otherwise stated, there is no clearly established law that prohibited Holtan, in the midst of an unlawful assembly that included violence, property damage, and intimidation from a mobile group, to use pepper spray and a take down to gain compliance. *City of Escondido, Cal. v. Emmons*, 139 U.S. 500, 503 (2019), *Rice v.*

Murakami, 2015 WL 1736427 (D. Idaho Apr. 16, 2015), aff'd, 671 F. App'x 472 (9th Cir. 2016). It is undisputed that Holtan yelled at Nieters to get on the ground. Whether Nieters heard it or not is not material. *Johnson v. McCarver*, 942 F.3d 405, 410 (8th Cir. 2019). Nieters did not get to the ground; instead he turned away from Holtan.

When an individual has taken action that demonstrates noncompliance, a takedown is reasonable. *Ehlers v. City of Rapid City*, 846 F. 3d 1002 (8th Cir. 2017), *Hosea v. City of St. Paul*, 867 F.3d 949 (8th Cir. 2017). As noted above, "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment." *Saucier v. Katz*, 533 U.S. 194, 209 (2001).

> While we have previously stated that "the use of force against a suspect who was not threatening and not resisting may be unlawful," *Shannon v. Koehler*, 616 F.3d 855, 864 (8th Cir. 2010), that general proposition does not answer whether a particular use of force is *de minimis* (and therefore insufficient to support a claim). In *Crumley v. City of St. Paul*, we held that a police officer did not violate a suspect's clearly established rights when he "struck or pushed [the suspect] approximately five times and then spun her around and handcuffed her," and where the suspect suffered bleeding wrists as a result of being handcuffed. 324 F.3d 1003, 1006–08 (8th Cir. 2003) ("[W]e conclude no reasonable jury could have found the police officer used excessive force by pushing or shoving Crumley to effect the arrest.").[3] The amount of force used in *Crumley* was comparable to that alleged here, where Robinson was shoved up against a trailer and handcuffed. The injuries Robinson sustained as a result of the force were fairly minor, including some pain and bleeding from the wrists as a result of being handcuffed and pain in her shoulders from being pushed against the trailer.

Robinson v. Hawkins, 937 F.3d 1128, 1136 (8th Cir. 2019).

It is first important to acknowledge that Officer Holton employed force that is widely accepted among models as non-lethal methods to gain compliance. Force models are preferred that allow officers to choose a level of force. *National Consensus Policy and Discussion Paper on Use of Force* (July 2020). It is appropriate to use non-lethal force in the following instances: "(1) to protect the officer or others from immediate physical harm, (2) to restrain or subdue an individual who is actively resisting or evading arrest, or (3) to bring an unlawful situation safely and effectively under control." *Id*.

The core question under this portion of the argument is whether there was sufficient caselaw to demonstrate to any basically competent officer that the actions of Holtan were unconstitutional, and this must be at a highly detailed level. Starting with pepper spray, it was not clearly established that Nieters had a right to be free from a short burst of pepper spray when appearing to turn away from an officer who gave a command to get on the ground, within the context of active unrest. When he failed to comply with Holtan's order to get on the ground—within the context of active unrest, it was not clearly established that he had a right to be free from being taken to the ground. Once arrested, he was zip tied in a way that

caused temporary marks to his wrist. It is not clearly established that this is a constitutional violation.

To the contrary, in 2014, it was clearly established that police officers could use stun guns, kicks, and knee strikes when an arrestee fled one officer and continued to resist arrest. *Smith v. City of Minneapolis*, 754 F.3d 541 (8th Cir. 2014). In 2015, it was clearly established that officers could take to the ground, pepper spray, hit, and kick an individual who was resisting arrest. *Schoettle v. Jefferson Cty.*, 788 F.3d 855, 858 (8th Cir. 2015). And finally, "[a]llegations of pain as a result of being handcuffed, without some evidence of more permanent injury, are not sufficient to sustain a claim of excessive force." *Crumley v. City of St. Paul,* 324 F.3d 1003, 1008 (8th Cir. 2003).

The circumstances Officer Holtan found himself in with Nieters was no ordinary arrest. He was surrounded by danger this night, just like the three nights before. "Because police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Peterson v. Kopp*, 754 F.3d 594, 600 (8th Cir. 2014) (internal quotation marks omitted) (quoting *Graham*, 490 U.S. at 396–97). Given the totality of the circumstances and the caselaw as it stood at the time of Nieters' arrest, he did not

have a clearly established right to attend and remain with an unlawful assembly, turn away from police presence, fail to obey a command to get on the ground and then avoid pepper spray and being taken to the ground. Officers Holtan is entitled to immunity for his use of force when the totality of circumstances are considered at the highly specified level required for this analysis.

III. Officer Brandon Holtan is entitled to qualified immunity on the retaliation claim because Mark Nieters was not singled out for arrest or force because of his press-related activity.

III.A. Preservation and Standard of Review

The City concurs that this issue was preserved for review. This court reviews de novo a district court's grant or denial of summary judgment, applying the same standard as the district court. *Dahlin v. Lyondell Chem. Co.*, 881 F.3d 599, 603 (8th Cir. 2018). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Summary judgment is particularly appropriate when only questions of law are involved, rather than factual issues that may or may not be subject to genuine dispute. *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042-43 (8th Cir. 2011) (en banc).

III.B. Contentions and Reasons

Nieters alleges both retaliatory arrest and retaliatory use of force based on his newsgathering during a protest. First Amendment activity— such as media

gathering, is generally protected, however, it loses its protection when it violates the law. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Hence, reporters have no greater right than any other citizen to ignore dispersal orders and to be planted in the middle of a riot. And generally applicable laws, like those that prohibit interference with a police investigation, "do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991). A reporter's constitutional rights are no greater than those of any other member of the public." *Estes v. Texas*, 381 U.S. 532, 589, (1965) (Harlan, J., concurring).

Even though Nieters had no special right to participate in unlawful activity to engage in First Amendment activity, animus toward that activity was not the impetus for his arrest. "To establish a First Amendment retaliation claim under 42 U.S.C. § 1983, the plaintiff must show (1) he engaged in a protected activity, (2) the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity, and (3) the adverse action was motivated at least in part by the exercise of the protected activity." *Peterson v. Kopp*, 754 F.3d 594, 602 (8th Cir. 2014) (internal quotation marks and citation omitted). The Eighth Circuit has identified a fourth prong to include "lack of probable cause or arguable probable cause." *Id*. "Lack of probable cause is a

necessary element of a First Amendment retaliatory arrest claim." *Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012). In sum, since the City concedes prongs 1 and 2, Nieters must show that Holtan had an impermissible motive and he must plead and prove the absence of probable cause. Nieters failed to do either.

As to the probable cause element, the City points to previous argument in section I related to the constitutionality of Nieters' arrest. For the reasons argued therein, Holtan had probable cause to arrest Nieters. Thus, Nieters has failed to prove the 4th prong required in the Eighth Circuit.

As to motive, to overcome qualified immunity, Nieters must point to facts that establish that Holtan knew of, retaliated against, and singled him out because he was a member of the media reporting on news. A recent Eighth Circuit case examined the elements of a First Amendment claim filed by reporters covering a protest:

> To prevail on a First Amendment retaliation claim, the reporters must show: (1) they engaged in protected activity; (2) [the police officer] caused an injury to the reporters that would chill a person of ordinary firmness from continuing the activity; (3) and a causal connection between the retaliatory animus and injury.

Quraishi v. St. Charles Co., MO., 986 F.3d 831, 837 (8th Cir. 2021) (citing *Baribeau v. City of Minneapolis*, 596 F.3d 465, 481 (8th Cir. 2010) (per curiam)) (emphasis added).

To establish the causal connection, the reporters must show they were "singled out" because of their exercise of constitutional rights. The facts of *Quaraishi* are important to review and contrast with the facts in this case. In *Quaraishi,* reporters were clearly broadcasting at a calm scene, complete with cameras and a spotlight. *Quaraishi* at 834. For no apparent reason, an unidentified officer began shooting rubber bullets at them and the reporters yelled that they were reporters. *Id*. Multiple unidentified people walked past the camera at the scene, even stopped in front of the camera to be filmed, but the police did not shoot at them, only at the clearly-reporting media. *Id*. Then, officers deployed more tear gas directly at the reporters before ordering them to turn off their spotlight and laying the reporters' camera on the ground. *Id*.

There was not even arguable probable cause to arrest the reporters because there was no evidence that the reporters had been ordered to disperse before they were tear-gassed and no evidence that the reporters had been present with a crowd throwing objects at police. *Id*. Under those circumstances, where the reporters were clearly broadcasting, had announced that they were reporters, and were afterward shot with rubber bullets and tear gas while other non-reporters were not, there was sufficient evidence to establish that, but-for the act reporting, these individuals would not likely have been singled out. Otherwise stated, there was sufficient

evidence that the reporters had been unlawfully "singled out" for their press activity.

Unlike *Quraishi*, this scene was not calm. It was chaos and people were running everywhere. (App. 94: Ln. 6-13; R. Doc. 32-2 at 93). Five dispersal orders had been given. (App. 90: Ln. 1-7, Bartak video 5:00-11:00; R. Doc. 32-2 at 89, 469). Also, unlike *Quraishi*, there is no evidence in the record that Officer Holtan (or any other identified police officer) knew Nieters was a reporter. (App. 36, 37, 111: Ln. 5-25- 112: 1-18; 120; R. Doc. 32-2 at 35, 36, 110). It was only after Holtan took Nieters to the ground, gave a short burst of pepper spray and zip-tied his hands that Nieters identified himself as a reporter. (App. 13, 121: Ln. 1-10; R. Doc. 32-2 at 12, 120). Nieters had no external writing or markings demonstrating he was a member of the press. (App. 261: Ln. 3-7; R. Doc. 32-2 at 260). Holtan did not perceive Nieters to have cameras; he perceived the straps of his cameras to be a backpack, which was commonly worn by rioters. (App. 112: Ln. 23-25-113: 1-4; R. Doc. 32-2 at 111). Also commonly worn by rioters were helmets and higher-grade masks; Nieters wore both. (App. 112-113; R. Doc. 32-2 at 111-112). To address Nieters' claim that his blue helmet marked him as press was not anything known to Holtan, the Police Department's Public Information Officer, or the City's expert who teaches nationally on the issue of civil unrest. (App. 8, 36; R. Doc. 32-2 at 7, 35). Detective Ben Carter, who watched hundreds of hours of riot video that

included lots of media members and served on the front lines at the riots in 2020 saw no one other than Nieters wearing a blue helmet. (App. 37; R. Doc. 32-2 at 36). Finally, there is no evidence that Holton treated Nieters differently because he was a reporter. To the contrary, Holtan testified that he specifically chose to treat him as any other citizen once he knew he was a reporter. (App. 121: Ln. 1-7; R. Doc. 32-2 at 120). And there were at least 7 other citizens who were arrested, just like Mr. Nieters was, for being in the immediate vicinity of the unlawful assembly. (App. 13, 14; R. Doc. 32-2 at 12, 13).

Perhaps most important as to whether animus against media was a motivating factor for arresting Nieters is the fact that two other reporters—for the most prominent paper in the area, the Des Moines Register, were in the immediate area, mere feet from Nieters, and they were not singled out for arrest. (App. 268: Ln. 5-23; 328, Armstrong video 14:30-15:00; R. Doc. 32-2 at 267, 327, 468). This is demonstrated on video. Officer Ryan Armstrong addresses one of these reporters in close proximity to Nieters and states, "Disperse means you too. I already told you." (Armstrong video 14:30-15:00; R. Doc. 32-2 at 468). That person was a recognizable local reporter in the heart of this melee—and while it was not lawful for him to be there—Officer Armstrong did not "target" him for getting footage of the events of the night.

Finally, Nieters argues that he was targeted because Holtan perceived him to be a protester. So, that argument would go as follows: Nieters was actually engaged in press activity, not protest; the causal connection was based not on a First Amendment activity he was actually engaged in, rather what he was perceived to be doing. Even if this made sense, merely perceiving Nieters to be engaged in one protected activity rather than another does not meet the causal connection. Holtan had seen many people protesting that he did not arrest. (App. at 174: Ln. 8-20; R. Doc. 32-2 at 173). He worked to protect areas to support the ability of people to protest. (App. at 174: Ln. 8-20; R. Doc. 32-2 at 173). There is no evidence in the record that he targeted or had malice against protesters. Holtan's team was specifically responding to reports of a large group moving together and continuing to engage in unlawful assembly. Nieters was in the immediate vicinity of that group.

More importantly, the record does not reflect, as Nieters suggests, that Holtan perceived Nieters to just be a protester. Holtan differentiated between activities that were protest from those that were riot. (App. at 167: Ln. 18-25; R. Doc. 32-2 at 166). Holtan saw Nieters and perceived him to be wearing items consistent with rioters, not protesters. He saw rioters wearing goggles. (App. at 173: Ln. 10-12; R. Doc. 32-2 at 172). He saw rioters wearing helmets. He saw rioters wearing gas masks. (App. at 173: Ln. 13-14; R. Doc. 32-2 at 172). Nieters

had on a helmet, goggles, and a painter's mask, that resembled a gas mask. Holton believed the straps around Nieters' shoulders was a backpack. (App. at 173: Ln. 21-25-174: 1-7; R. Doc. 32-2 at 172, 173). Rioters were carrying backpacks to carry bricks and other riot-related supplies. (App. 174: Ln. 1-7; R. Doc. 32-2 at 173).

There is no evidence of retaliation in the arrest or the force used based on Nieters' profession as a reporter or a perceived role as a protester. Holtan and the response team received information from dispatchers about a large group of protestors traveling westward on Locust Street after receiving dispersal orders at the Capitol grounds. The undisputed record shows Holtan was pursuing fleeing individuals directly prior to observing Nieters in front of Embassy Suites on Locust Street as part of their effort to quell the ongoing riot and unlawful assembly. For these reasons, the District Court order in favor of the City should be affirmed.

Conclusion

Brandon Holtan did not violate Nieters' First or Fourth Amendment Rights. Nieters placed himself in the midst of an unlawful event and that created probable cause for his arrest. Every act that followed was reasonable and based on the permissible motive of quelling a dangerous situation. The District Court's order in favor of Officer Holtan and the City of Des Moines should be affirmed.

Respectfully Submitted,

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Certifications

Filing and Service. I certify that on October 25, 2022,1 filed the foregoing errata brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit for review by filing with the electronic filing system.

/s/ Michelle Mackel-Wiederanders
Michelle Mackel-Wiederanders

Compliance. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,449 words. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/Michelle Mackel-Wiederanders
Michelle Mackel-Wiederanders

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