No. 23-227

In The
Supreme Court of the United States

SARAH K. MOLINA, ET AL.,

Petitioners,

v.

DANIEL BOOK, ET AL.,

Respondents.

On Petition For A Writ Of *Certiorari*
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether police officers attempting to disperse an unlawfully assembled, disorderly, and assaultive crowd violate the First Amendment or are otherwise entitled to qualified immunity where – assuming admissible evidence sufficient to establish that any defendant officer actually deployed tear gas – one or more unidentified officers took objectively reasonable action by deploying tear gas in seeking to disperse a portion of the crowd that remained assembled after an initial deployment of tear gas and multiple warnings and dispersal orders, within close proximity in time and distance to the scene of assaults on police by the crowd and obstruction of traffic.

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INTRODUCTION

Petitioners' bait-and-switch bid for *certiorari* review asks this Court to decide questions that their claims below fundamentally failed to raise, and they offer in support primarily waived arguments that were never presented to or considered by the lower courts – much less decided by them. Petitioners never argued below, as they do for the first time now, that the relatively small *words* inscribed on their green hats were the reason they were subjected to tear gas, and likely did not do so because there is no evidence in the record that any Defendant officer ever saw or read those words amidst the riotous crowd of violent protestors that Petitioners were assembled with – many of whom were assaulting police officers within close proximity in time and distance to the alleged tear gas deployment at issue. And, Petitioners' new claim that the words on their hats were expressive rings hollow where Petitioner Vogel admits that, aside from "National Lawyer's Guild," she is "not exactly sure what [her hat] says" because she "never took the time to read it." (JA 453).

In any event, as the Eighth Circuit correctly held, it was the crowd's violent and unlawful behavior, not any protected expression, that caused the reasonable police dispersal efforts complained of by Petitioners. Thus, as set forth below, Petitioners' questions presented are misleading, impermissibly framed at a high level of generality, and ignore the actual issues and undisputed facts from the voluminous record below.

The facts, which Petitioners strain to ignore, support the Eighth Circuit's conclusion that "there is no evidence to suggest that [First Amendment protected activity] had anything to do with the [Defendant] officers' decision to use tear gas." *Molina v. City of St. Louis, Missouri*, 59 F.4th 334, 341 (8th Cir. 2023). Instead, as the Eighth Circuit correctly recognized, to the extent there is evidence sufficient to support a tear gas deployment at the time alleged, the Defendant officers were motivated by their duty to disperse what they had probable cause to believe was a continuation of an unlawful assembly at approximately the same location where, just minutes earlier, assaultive rioters hurled bricks, rocks and other objects at the Defendant officers. *Id*.

Because Petitioners gloss over material facts that were critical to the actual analysis conducted by the Eighth Circuit, and do so to conjure inapposite questions that this Court could not and need not answer on this record, the Respondent officers are obliged to briefly set the record straight. St. Louis Police Officers were assaulted by protestors early in the afternoon on August 19, 2015. After the crowd seemed to disperse, a large crowd reassembled near the intersection of Page and Walton Avenues that evening, with Petitioners Molina and Vogel among them. For at least 15 minutes, the crowd assaulted police officers and ignored lawful dispersal orders, at which point, after multiple orders and warnings that Petitioners ignored, police deployed tear gas. That pushed the unlawful assembly two blocks west to the intersection of Page and Euclid,

where the dangerous behavior continued by way of additional assaults upon the Defendant officers. At that point, police still had probable cause to believe those who remained assembled at Page and Euclid had refused to disperse in violation RSMo. § 574.060. The Respondent officers retreated from the barrage to give yet another dispersal order and yet another opportunity for the group to disperse before returning minutes later to find the Petitioners apparently still assembled with at least 8-10 persons who they reasonably believed were part of the earlier unlawful assembly and had refused to disperse. The deployment of tear gas under these circumstances is objectively reasonable, and certainly does not violate clearly established law of which a reasonable officer would have known.

This record does not raise the broad questions presented by Petitioners, and this case is a poor vehicle, or no vehicle at all, to answer them. Indeed, the first two questions presented were never argued or decided below, and are otherwise unreachable in light of the record on appeal. The third is as close as Petitioners come to framing an appropriate question, but it depends on an alternative argument that this Court need not reach where there was no constitutional violation and the Defendant officers' objectively reasonable actions were not motivated by retaliatory animus. And, of course, the Eighth Circuit's decision was, in any event, manifestly correct.

At bottom, this case involves the application of properly stated First Amendment and qualified immunity principles to a fact-intensive record. Even if

this Court were to undertake a plenary review of this record to issue a fact-specific decision with limited applicability, it would apply settled law to inevitably reach the status quo: the application of qualified immunity and summary judgment in favor of Respondents.

The Petition for a Writ of *Certiorari* should be denied.

STATEMENT OF THE CASE

A. Facts

On August 19, 2015, violent protests erupted in the City of St. Louis after word spread of a police officer-involved shooting in the City earlier that day. A large crowd assembled near the intersection of Page and Walton Avenues in the City and obstructed traffic. Later in the afternoon, members of the crowd threw objects at and injured police officers, all while the crowd completely obstructed traffic in and near the intersection. (JA271).

Petitioners Sarah Molina ("Molina") and Christina Vogel ("Vogel"), acting as self-appointed "legal observers" of the protest activity, joined the crowd at different times during the afternoon. At various times throughout the day they wore green hats, which they believed, notwithstanding any words written on them, identified them by their green color as legal observers. Both Molina and Vogel later testified that they were not

there to protest, but instead to observe. Molina acknowledges that she heard multiple dispersal orders given that afternoon, which included warnings regarding the use of chemical munitions. (JA202). Molina ignored those dispersal orders because she believed they were unlawful. (JA202-03).

The crowd seemed to disperse in the early evening, but it turned out that the majority of the protestors' unlawful activity was yet to come. By 6:45 p.m. the crowd had reassembled and was blocking the street between Page and Marcus and Page and Walton, again obstructing traffic. (JA271; JA307, Video 8). St. Louis police officers, many of whom lacked helmets or any other protective gear, formed a line and repeatedly ordered the crowd to disperse. (JA271, 307, Video 8).

At 6:54 p.m., Vogel was standing at the northwest corner of Page and Marcus Avenues with the crowd. (JA307, Video 8 at 00:16). Molina was also present with the unruly crowd, which at this time consisted of approximately 150 people. (JA204). At 6:55 p.m., a clear and audible dispersal order was given over a loudspeaker that included an order to disperse and a warning that failure to disperse could result in arrest or other action, including the deployment of chemical munitions. Molina and Vogel heard this dispersal order and understood that it was a dispersal order. (JA204; JA355-56). Neither Molina nor Vogel dispersed. (JA307, Video 8 at 5:43, 8:59; 9:52; 12:00).

A similar dispersal order was given at 6:56 p.m., and the crowd responded by hurling bricks and rocks

at unprotected police officers. (JA347-48). Despite knowing that members of the group they were assembled with were assaulting police, Molina and Vogel remained. (JA353; JA205 ("I was assembled with them")). More bricks, rocks, and objects were thrown at police, injuring some, and more dispersal orders were issued, including a final warning regarding the use of chemical munitions. Despite being part of an unlawful assembly and despite hearing a third dispersal order, neither Molina nor Vogel dispersed. (JA307, Video 8 at 5:43, 8:59; 9:52; 12:00).

At 7:08 p.m., in response to the assaultive behavior of the crowd, police at first deployed inert smoke. (JA307, Video 8). At this point, the unlawfully assembled crowd, which included Molina and Vogel, had moved east to the intersection of Bayard and Page. (JA307, Video 8 at 18:00; JA444; JA212). Still, Molina, Vogel, and others in the unruly crowd did not disperse. *Id*.

At 7:15 p.m., after a final dispersal warning, Defendant SWAT officers in an armored police vehicle called the "BEAR" traveled west on Page and deployed tear gas at the intersections of Bayard and Page and Euclid and Page to disperse the riotous crowd, *which continued to throw rocks at the BEAR while it was at the intersection of Euclid and Page* (JA307, Video 8 at 29:40-22:30; JA484; JA533).[1]

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[1] SWAT supervisor Lieutenant Stephen Dodge was not on the BEAR at this time, nor was he on the BEAR at any other time during the incidents at issue in this case. Former Defendant

Critically, at 7:16 p.m., and while the BEAR was at Page and Euclid, "many" of the violent protestors that had been pushed a total of 900 feet west from Page and Walton to Page and Euclid continued to throw bottles and rocks at the BEAR (and the Defendant officers on it) *from south of Page on Euclid* – approximately where Molina and Vogel allege they were unlawfully tear gassed minutes later. (JA533). Faced with this barrage, the BEAR retreated from the intersection of Euclid and Page in order to issue another dispersal order and give those south of Page on Euclid another opportunity to disperse. (JA307, Video 8 at 29:40 – 22:30).

Thus, as far as the Appellant officers knew, "many" members of the violent crowd *remained unlawfully assembled south of Page on Euclid*, where they had just again assaulted police and where they were readily capable of engaging in further violence and causing property damage. (JA533). So, at 7:24 p.m., yet another dispersal order was given from a police loudspeaker. (JA557, DeMian Video at 4:36; JA488). The 7:24 p.m. dispersal order, stated in part over a loudspeaker: "Clear the area immediately. This is an unlawful

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Chambers was driving the BEAR and not involved in deploying munitions. Sgt. Mayo was standing on a step looking out from the hatch atop the BEAR, and likewise did not deploy any munitions. Defendants Busso and Coats were also positioned atop the BEAR behind ballistic shields. The other defendants (aside from Defendant Dodge) were inside the BEAR's main compartment – which offered extremely limited visibility. (JA274, 747, 690). Officers traveling inside of the BEAR were in close confines with their backs to each other and were unable to see one another. (JA747).

assembly. You need to leave the area now . . . we are getting ready to come back." (JA557).

Consistent with this warning, the Defendant officers returned to near the intersection of Page and Euclid, where they had been assaulted just minutes prior, to ensure the unlawful assembly had dispersed. According to Molina and Vogel, the BEAR came upon them near that intersection, at which time they were assembled with a group of 8-10 people – all but one or two of whom were not wearing green hats. Though the officers maintain that video evidence refutes the ensuing alleged deployment, and two witnesses (including a third plaintiff) denied seeing or recalling any deployments at this time, Molina and Vogel allege that an unidentified officer on the BEAR fired tear gas in their direction at this time and complained that this action was unconstitutional retaliation for First Amended protected activity. Petitioners advanced multiple theories regarding what that "First Amendment protected activity" was before the Eighth Circuit, and none were that the Defendant officers read the words written on their hats and retaliated against them as a result. In any event, at the time of the alleged deployment at issue, the Defendant officers still had probable cause to believe those who remained assembled near Page and Euclid had refused to disperse in violation of RSMo. § 574.060, and took objectively reasonable action to disperse them.

The Defendant officers and other police personnel left the area shortly thereafter, hoping that the violent crowd had dispersed and would not return. Almost

immediately after police left, multiple buildings and vehicles were set ablaze and a local business was looted, and so police returned to protect lives and property. But, their actions thereafter are not at issue in this case.

B. Procedural History

In September of 2017, Petitioners Molina and Vogel brought suit against Respondent police officers and their employer, the City of St. Louis, Missouri. (JA5).[2] Petitioners brought First and Fourth Amendment claims against the officers and a claim for constitutional municipal liability against the City. After partial grant of a motion to dismiss, Petitioners filed an amended complaint. (JA24). Discovery followed. In February of 2019. After the close of discovery, Respondents renewed their motion for summary judgment on qualified immunity grounds. (JA19). That motion was granted with respect to the Fourth Amendment claims for lack of a clearly established seizure, but denied with respect to the First Amendment "retaliatory use of force" claims against the Defendant officers. The officers appealed to the Eighth Circuit. (JA22). The panel's majority reversed and remanded for the entry of judgment in favor of the Defendant officers on the

[2] Peter Groce, a third Plaintiff, brought similar claims against Respondents under a different set of facts. The Eighth Circuit affirmed the denial of summary judgment on his claim, and Petitioners, thus, have not included him as a party to this Petition.

First Amendment claims brought by Molina and Vogel. The instant Petition followed.

ARGUMENT

I. This case is a poor vehicle to address the Petitioners' questions presented.

This case is a poor vehicle to address the questions presented, and so this Court should deny *certiorari*.

A. This case offers no vehicle at all to decide "[w]ether words printed on [Petitioners' green hats] are pure speech, and thus presumptively entitled to First Amendment protection . . . or whether they are protected only if they convey a "particularized message . . . " (at i).

Petitioners ask this Court to decide "[w]ether words printed on [Petitioners' green hats] are pure speech, and thus presumptively entitled to First Amendment protection . . . or whether they are protected only if they convey a "particularized message . . . " *Id*. This case offers not just a poor vehicle to address this question, but no vehicle at all. This is so for multiple reasons.

As an initial matter, Petitioners ask this Court to answer a question that their claims fundamentally fail to raise. Petitioners' operative First Amended Complaint never alleged they were wearing hats at all, and certainly did not allege they were wearing hats with words printed on them. (JA11-12). Given that

Petitioners did not allege that they were wearing hats with words on them (or any hats at all), this Court should not be surprised to learn that Petitioners *did not allege that any words written on their hats constituted protected speech*. *Id*. This being so, Petitioners certainly did not allege that the Defendant officers retaliated against them because of words printed on their hats. This new and waived claim, raised for the first time on Petition to this Court, forms the basis of the first question presented, and this Court cannot answer a question premised upon a waived claim.

Not only did Plaintiffs fail to allege the waived claims upon which their bait-and-switch bid for *certiorari* review depends to the lower courts below, Petitioners likewise never argued, either to the District Court or to the Eighth Circuit, that the Defendant officers deployed tear gas at them *because of the words* written on their green hats. And, Petitioners never argued, as they do for the first time now, that the words on their hats "are pure speech, and thus presumptively entitled to First Amendment protection . . . " Because Petitioners never raised these arguments, they are waived and this case offers no vehicle at all to decide them.

Indeed, Plaintiffs' bid for plenary review in this Court is based on a false premise: that the Eighth Circuit "ruled that written words, a form of pure speech, are not presumptively entitled to First Amendment Protection." It did no such thing. Indeed, the Eighth Circuit never decided the first question presented because Petitioners never raised it, and no amount of obfuscation or contortion of the record will make it

otherwise. So, this Court cannot decide, as might a forum of first resort, the broad question posed by Petitioners here. Because Petitioners never alleged or argued that the Defendant officers deployed tear gas at them because of the *words* written on their hats, the Defendant officers never had the opportunity to respond to that assertion, the Eighth Circuit never had the opportunity to consider that assertion, and the Eighth Circuit certainly did not hold, as the Petitioners now erroneously assert, that "written words, a form of pure speech, are not presumptively entitled to First Amendment Protection." To be sure, the Eighth Circuit noted that the hats said "National Lawyers Guild Legal Observer" on them, but it also made abundantly clear that the *words* on the hats were not the issue on appeal.[3] The Eighth Circuit also briefly discussed whether reasonable officers and others would

[3] Indeed, the words on the hats were such a non-issue below that the voluminous record arguably does not even contain sufficient evidence to establish that the hats said "National Lawyers Guild Legal Observer" on them. Those words do not all appear, at least not legibly, on any portion of video cited in the record. Indeed, as set forth below, Petitioner Vogel "never took the time to read [her hat]." (JA453). Petitioner Molina mentioned the words "National Lawyers Guild Legal Observer" only in the context of a hypothetical, without ever testifying that her hat said those words. (JA211). And, the only evidence mentioned by the District Court (without citation to the record) came where the district court mentioned that "in one of the videos taken from the police line, legal observers are close enough to read the words National Lawyers' Guild on their distinct hats. (JA604). The Respondent officers were never on the police line. So, even the district court did not identify or rely on any evidence demonstrating what words were on the hats, much less that any Defendant officer read them.

understand that a "legal observer," by nature of their role, express a "pro-protest message." *Molina*, 59 F.4th at 342. But, this is not a reference to the words on the hats and, instead, is a reference to Petitioners' theory: that police officers should have known that people in green hats are legal observers and that Petitioners' conduct in wearing the green hats was itself expressive – without regard for the words inscribed on them. So, Petitioners misconstrue the Eighth Circuit's holding to conjure a question never addressed by that Court's well-reasoned decision.

That Petitioners' bid for *certiorari* depends on waived claims and waived arguments never considered by the lower courts is dispositive, and this Court need not take its analysis further. Still, even if this Court were to grant *certiorari* and conduct a fact-intensive plenary review of the voluminous record in this case, it would ultimately find that the record, taken in the light most favorable to Petitioners, cannot support Petitioners' newly-raised claim that the Defendant officers retaliated against them because of the written words on Petitioners' hats. This is so because, among other reasons which fatally undermine such a claim, there is no evidence anywhere in the record that any Defendant officer *ever saw or read the words on Petitioners' hats*. Petitioners cite none, and a plenary review would reveal none. Respondents suspect this is why Petitioners argued below only that their *conduct* in wearing green hats was expressive, and did not argue that any Defendant officer *ever saw or read the*

words on Petitioners' hats.[4] In any event, the Defendant officers could not possibly have retaliated against Petitioners because of words they never read, and so this Court would never reach the first question presented and this case provides no vehicle at all to answer it.

It is not particularly surprising that the Defendant SWAT officers, who were never on the front police line closest to the riotous crowd and were later inside an armored tactical vehicle with poor visibility, never read the relatively small inscription allegedly adorning the hats of two protestors assembled amongst a violent and riotous crowd of well over a hundred – many of whom actively assaulted police in the leadup to the alleged deployment at issue. It is even less surprising that the Defendant officers did not have the opportunity to read the Petitioners' hats when the Court considers that Vogel never took the time to read her own. Indeed, Vogel testified that, aside from "National Lawyer's Guild," she is "not exactly sure what [her green hat] says" because she "never took the time to read it." (JA 453).[5] And, Molina, at one point, was not

[4] In fact, with the sole exception of Lieutenant Dodge, who was not involved in the alleged tear gas deployment at issue and was not on the BEAR at the time of the alleged deployment, no Defendant officer had any idea that wearing a green hat purported to identify the wearer's role, and most had no memory of seeing anyone wear a green hat at any protest – much less a memory of reading the relatively small and innocuous words imprinted on Petitioners' headwear. E.G. (JA274; JA529; JA693; JA872; JA912).

[5] The fact that Petitioner Vogel "never took the time to read" the written words which she now, for the first time, argues were

able to state with any degree of certainty that she was wearing her hat at the time of the deployment at issue, and video evidence from very shortly after the alleged deployment showed that she was not at that time. (JA200).

Additional reasons preclude *certiorari* on the first question presented. As set forth in Section II below, on this fact-intensive record that involved violent assaults against police officers attempting to protect persons and property under difficult circumstances, the Eighth Circuit correctly held that the deployment of tear gas at issue was not in retaliation for any exercise of the Petitioners' First Amendment rights, and so there was no constitutional violation at all. With respect to the alleged tear gas deployment at issue, the Court held that "[t]he only reasonable inference to draw from these facts is that the officers were 'merely carrying out their duty as they underst[ood] it.'" *Molina*, 59 F.4th at 341 (quoting *Mitchell v. Kirchmeier*, 28 F.4th 888, 897 (8th Cir. 2022)). This was so, in part, because "[n]ot all reasonable officers would have known the gathering was a protected assembly, particularly when they were dodging rocks and bottles just a few minutes earlier." *Id*. (*citing Reichle v. Howards*, 566 U.S. 658, 664 (2012)); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (holding that demonstrations "lose

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her "pure speech," undercuts her belatedly raised claim and prevents meaningful review by this Court. "Speech" is, at bottom, the expression of thoughts and ideas, and Vogel cannot express her thoughts or ideas by way of words she never read.

their protected quality as expression under the First Amendment" when they "turn violent").

This was the primary basis for the Eighth Circuit's decision, and the Petitioners do not meaningfully challenge it. So, even if this Court were to grant *certiorari* and conduct a plenary review, it could (and, in that instance, should) affirm without ever reaching the first question posed by Petitioners. For these reasons, along with those otherwise set forth herein, this case offers no vehicle at all to decide the first question presented, and the Petition for Writ of *Certiorari* should be denied.

B. This case offers no vehicle whether the doctrine of qualified immunity should be reconsidered in light of "new historical evidence."

Petitioners ask this Court to consider whether the doctrine of qualified immunity should be reconsidered in its entirety. Petitioners' first mention of this argument is in their Petition to this Court. It was not pleaded, raised, or argued at any other stage in this litigation. The "new historical evidence" that Petitioners mention does not appear anywhere in the record in this case, and there is no evidence in the record to support it. Therefore, this Court should not consider this argument because Petitioners failed to raise it below. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Moreover, lower courts across the country may well have the opportunity to consider and reach consensus on Petitioners' "new historical evidence" theory, and will presumably do so on developed records. No such developed record exists here, nor have the

lower courts had adequate opportunity to reach consensus on this apparently new theory by which Petitioners seek to upend decades of well-established precedent. For these reasons, this case offers no vehicle for this Court to consider Petitioners' waived arguments.

Even if this Court chooses to consider this unpreserved argument, it offers no reason to grant *certiorari*. Assuming the Petitioners' assertions to be true, which there is no evidence in the record to support, it should not affect the defense grounded in common law. Congress has since passed the current version of 42 U.S.C. § 1983 in 1995. Under standard statutory rules of construction, "Congress is presumed to know the state of the law that existed at the time it passed," the law. *United States v. Gonzales*, 547 F.Supp. 3d 1083, 1117 (D.N.M. June 1, 2021), *aff'd*, No. 21-2060, 2021 WL 5985347 (10th Cir. Dec. 17, 2021). In any event, and without delving into a merits argument that would be inappropriate at this stage, particularly on a waived argument that was never raised below and the lower courts had no opportunity to consider, it is sufficient to say that, if this Court were ever inclined to consider this issue in the future, this case, with no record and no lower court decision, is absolutely not the vehicle to do so.

C. This case is a poor vehicle to decide whether the right to "unobtrusively" observe and record police was clearly established on August 19, 2015.

The Court cannot answer this third question on this record because it assumes Petitioners did nothing but "unobtrusively" observe and record police conduct, and that is belied by the record. On this record, taken in the light most favorable to Petitioners, it is undisputed that, in the minutes leading up to the alleged tear gas deployment at issue in this case, Molina and Vogel assembled with a riotous crowd while members of that crowd hurled objects at, and thereby assaulted, police officers in apparent violation of Missouri law. It is undisputed that Molina and Vogel, along with the riotous crowd they assembled with, ignored multiple dispersal orders from police and multiple warnings that chemical munitions could be used if the crowd did not disperse. This undisputed evidence, much of which is captured on video in the record, is such that even Petitioners do not challenge the constitutionality of tear gas deployments at 7:15 p.m. (minutes before the deployment at issue in this case), which pushed a large portion of the unlawful assembly East to the intersection of Page and Euclid. Neither do Petitioners challenge deployments at 7:16 p.m. at the intersection of Page and Euclid – where a large remaining portion of the unlawful assembly once again threw bricks and rocks at the BEAR (and the Defendant officers on it) *from south of Page on Euclid*. (JA533; JA484-486 JA695). After the Defendant officers on the BEAR retreated to safety for a few short minutes and issued yet another dispersal order, they returned to near where they had just been assaulted to find Petitioners and others apparently still assembled in that location, and so had probable cause, and at least arguable probable

cause, to believe that Molina and Vogel violated RSMo. § 574.060, which provides that "[a] person commits the crime of refusal to disperse if, being present at the scene of an unlawful assembly, or at the scene of a riot, he knowingly fails or refuses to obey the lawful command of a law enforcement officer to depart from the scene of such unlawful assembly or riot." RSMo. § 574.060.

The point is that, if this Court were looking for a case to consider whether *peaceful* observers have a First Amendment right to "unobtrusively" observe or record police activity on a record unbound by complicated facts and unhindered by probable cause to believe that the so-called "observers" had committed a crime, this is not such a case. The above facts, which Petitioners strain to ignore, make this case a poor vehicle to decide the third question presented.

Moreover, while Petitioners lumped observing and recording together before the lower courts, neither Molina or Vogel alleged that they were retaliated against for *recording* police activity. (JA34) (alleging that "Ms. Molina and Ms. Vogel engaged in constitutionally protected expressive activity when they marched with a group *to observe* the protest after the police shooting of Mansur Ball-Bey on August 19, 2015."). Indeed, Molina testified that she did not take any pictures, photos, or videos on the day in question. (JA200). For her part, Vogel did record videos on August 19, 2015, but claims she was not recording when she was allegedly retaliated against, and there is no evidence that any Defendant officer saw Vogel

recording earlier that day. At oral argument, Plaintiffs referenced a video recorded by Vogel wherein Vogel narrates her observation of the BEAR in Fountain Park as she walks south on Euclid after the BEAR had already passed her. (Oral argument at 18:30 – 20:50). But, the referenced video (JA1047) (referred to as "Video .13" in Vogel's Deposition), which was again relied upon in Plaintiffs' Supplemental Brief (Supp. Brief at 8), was taken *after* the alleged retaliation, and so could not have *caused* the alleged retaliation. (JA414) (wherein Vogel testifies that the video at issue was taken in the minutes *after* she was allegedly retaliated against via the deployment of tear gas south on Euclid). (JA389). Thus, any question regarding whether recording police is a clearly established First Amendment right or whether the Defendant officers violated such a right would not properly be before the court were it to grant *certiorari*.

And, as is the case with the other questions presented, this Court would not need to reach them where, as here, the primary basis for the Eighth Circuit's decision was that the tear gas deployment at issue was not in retaliation for any exercise of the Petitioners' First Amendment rights where officers were dodging bricks and bottled water minutes earlier and the Defendants officers were lawfully working to disperse what appeared to be remaining members of an unlawful assembly, as defined by Missouri law. Thus, in the absence of a constitutional violation, there is no cause to answer any of the questions presented by Petitioners. If this court were to grant *certiorari*, it may never

reach the issue of qualified immunity at all, and could not endeavor to consider the dubious proposition that a First Amendment right to observe and record police activity existed in August of 2015. It did not.

For this reason, along with those otherwise set forth herein, this case offers no vehicle at all to decide the questions presented, and the Petition for Writ of *Certiorari* should be denied.

D. This case is an inappropriate vehicle to address the questions presented because Petitioners cannot identify any specific officer who acted with inappropriate force.

Finally, this case is an inappropriate vehicle for addressing Petitioners' First Amendment questions because Petitioners fail to identify any specific officer who acted with inappropriate force, and so even if this Court conducted a record-intensive review, it would necessarily reach the same result as the Eighth Circuit: that all officers are entitled to qualified immunity. A hallmark of section § 1983 actions is that, to be liable, each Defendant must be personally involved in the unconstitutional action and their conduct individually assessed. *See*, *e.g.*, *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990); *see also Jones v. Williams*, 297 F.3d 930, 935 (9th Cir. 2002) ("[A] plaintiff could not hold an officer liable because of his membership in a group without a showing of individual participation in the unlawful conduct."). "[V]icarious liability is inapplicable to . . . § 1983 suits, a plaintiff must plead that each government-official defendant, through the

official's own actions, has violated the constitution." *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1948 (2009). Each Defendant's conduct "must be independently assessed and Section 1983 does not sanction tort by association." *Smith v. City of Minneapolis*, 754 F.3d 541, 547-548 (8th Cir. 2014).

Here, Petitioners' failure to identify which Defendant officer, if any, fired tear gas at Petitioners should be disqualifying of this Court's review because the inevitable result of such review would be that reached by the Eighth Circuit – that the Defendant officers, none of which have been identified as the individual who allegedly fired the tear gas canister in question, are entitled to qualified immunity. *See*, *e.g.*, *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 291-92 (3d Cir. 2018) (no police officer could be liable under § 1983 for excessive force, absent identification of specific officer who kicked arrestee); *Pineda v. Hamilton Cnty., Ohio*, 977 F.3d 483, 492 (6th Cir. 2020).

As set forth above, this Court could not possibly answer the broad questions posed by Petitioners on this record, and so this case is not a proper vehicle to decide them.

II. The decision below is correct

As the Eighth Circuit correctly recognized, it is undisputed in this case that Petitioners Molina and Vogel were assembled with a large group unlawfully throwing bricks and rocks at police, that the group was pushed 900 feet west to the intersection of Page and

Euclid by tear gas after multiple dispersal orders that the group ignored, that the group continued to throw rocks at the BEAR at Page and Euclid, and that, after the BEAR retreated to issue another dispersal order, it returned minutes later to find Molina and Vogel apparently still assembled with a group of 8-10 people near Page and Euclid. Having at least arguable probable cause to believe that Petitioners had unlawfully refused to disperse from an unlawful assembly in violation of RSMo. § 574.060, an unidentified officer on the BEAR allegedly deployed tear gas at that group in order to disperse them.

The Eighth Circuit correctly held that the alleged deployment of tear gas was not in retaliation for any exercise of the Petitioners' First Amendment rights, and that "[t]he only reasonable inference to draw from these facts is that the officers were 'merely carrying out their duty as they underst[ood] it.'" *Molina*, 59 F.4th at 341 (quoting *Mitchell*, 28 F.4th at 897 (8th Cir. 2022)). The Eighth Circuit also correctly held that "[n]ot all reasonable officers would have known the gathering was a protected assembly, particularly when they were dodging rocks and bottles just a few minutes earlier," and did so by noting that violent assemblies lose any First Amendment protection. *Id.* (*citing Reichle*, 566 U.S. at 664; *Grayned*, 408 U.S. at 116). Even the District Court recognized that the Defendant officers "at the least . . . assumed" that "the gathering was a continuation of the earlier unlawful assembly." *Molina*, 59 F.4th at 341. "So even if the officers 'unreasonably believed' that the group was refusing to

comply with their earlier directions to disperse, their official orders – not retaliatory animus – caused them to use the tear gas." *Id*. (*citing Baribeau*, 596 F.3d at 481).[6]

Remarkably, the Petitioners do not meaningfully challenge the above dispositive analysis in their Petition for Writ of *Certiorari*. Instead, Petitioners distort the record to attack a straw man holding which exists only in the imaginations of Petitioners and their *amici*. As set forth in Section I above, Petitioners' argument in this regard is waived and, in any event, would fail on this record even if this Court were to consider it. Regardless, considering only the preserved arguments and claims actually presented to the Eighth Circuit, as this Court must, the Eighth Circuit's decision remains manifestly correct.

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[6] The Defendant officers argued below that "particularly given its specific reference to policing protests, [this Court's] holding in *[Nieves v. Bartlett, 139 S.Ct. 1715 (2019)]* compels application of the no-probable cause (or at least arguable probable cause) requirement to so-called 'retaliatory use of force' claims, like this one, that arise in the context of policing unruly protests, and further compels the conclusion that a First Amendment 'retaliatory use of force claim' necessarily fails where the use of force upon which it is premised was objectively reasonable." (Reply Br. at 14). Here, the tear gas deployment at issue was objectively reasonable under these specific facts and circumstances, taken in the light most favorable to the Petitioners, and so Petitioners' so-called "retaliatory use of force" claims fail as a matter of law. It is not clear whether the Eighth Circuit adopted this reasoning, particularly given that its decision later noted that it did not need to, but its conclusion was nevertheless correct: the Defendant officers were not motivated by retaliatory animus and are entitled to qualified immunity.

With respect to Molina and Vogel's First Amendment Retaliation claims, they strained to identify their First Amendment protected activity before the Eighth Circuit. First, they argued that "Molina's observation and Vogel's observation and recording of the police were First Amendment Activities." (Supp. Br. at 6).[7] The Eighth Circuit correctly held that, on August 19, 2015, there was no clearly established First Amendment right to observe or record police officers, and so qualified immunity barred Petitioners' claims. *Molina*, 59 F.4th at 340. In reaching this conclusion, the Eighth Circuit correctly distinguished its decisions in *Chestnut v. Wallace*, 947 F.3d 1085 (8th Cir. 2020) and *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005) – both of which are *Fourth Amendment* cases that did not and could not overrule this Court's holding in *Colten v. Kentucky*, 407 U.S. 104 (1972).

Far from announcing a broadly defined First Amendment "constitutional right to observe police" regardless of the circumstances, the Eighth Circuit's narrow holding in *Chestnut* was that "merely observing

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[7] Here, both Molina and Vogel testified that they attended the protests at issue not as protestors, but, instead, in their capacity as "legal observers." (JA200; JA205, at 15) (Q: Were you there to protest? A: I was there as a legal observer) Vogel likewise attended the protest at issue as a "legal observer" and testified that there was "no protest" on Euclid when she was allegedly subjected to tear gas at that location. (JA426). There is no evidence in the record that Molina or Vogel said anything to criticize police or otherwise engaged in any overtly expressive speech. Accordingly, the lower courts construed Plaintiffs' First Amendment claim to be that they were retaliated against for *observing* a protest. *See Molina*, 59 F.4th at 338-39.

police officers at work *cannot give rise to a reasonable inference that criminal mischief is afoot*." *Id*. at 1092. (emphasis added). That narrow holding followed from the issue in *Chestnut*, which was whether observing police was itself indicative of *criminal activity* such that the Defendant officer had reasonable suspicion, or at least arguable reasonable suspicion, to believe that Plaintiff Chestnut had engaged in criminal activity by observing police traffic stops sufficient to justify his detention. *Id*. at 1088. Thus, in reliance on its prior decision in *Walker*, the Eighth Circuit held that "no reasonable officer could conclude that a citizen's passive observation of a police-citizen interaction from a distance was *criminal*." *Chestnut*, 947 F.3d at 1090 (emphasis added). Neither *Walker* nor *Chestnut* involved a First Amendment claim, and neither involved any challenge to the constitutionality of any statute or ordinance on First Amendment grounds.

So, *Walker* and *Chestnut*, at most, held that observing police, without more, is not a crime and does not alone give rise to reasonable suspicion that the observer committed a crime, but neither held that observing police is *First Amendment expressive conduct or First Amendment protected activity*. The Eighth Circuit correctly recognized this axiomatic truth in its decision, and rejected Petitioners' first bid to overcome qualified immunity. *Molina*, 59 F.4th at 340, n. 2 ("It is one thing to conclude that officers cannot arrest someone passively standing by and watching as they do their job. After all, in the absence of interference, there is no crime in it. But it is another matter to say that

watching is itself expressive. Expressive of what? Not even Molina and Vogel can provide a clear answer.")

Petitioners then argued that they engaged in First Amendment protected activity where they " . . . intended to convey – by their presence and clothing – a particularized pro-protest message that would be understood by onlookers." (Supp. Br. at 11). With respect to their hats, Petitioners did *not* argue in their Supplemental Brief that the *words* written on their hats were "pure speech," and did not argue that the Defendant officers deployed tear gas at them because of the *words* written on their green hats. Instead, "Molina and Vogel claim[ed] that the act of wearing [their green hats] sent a 'particularized message.'" *Molina*, 59 F.4th at 341 (*citing Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997)); *see* Supp. Br. at 12-14. The Eighth Circuit correctly rejected this theory on this particular record and correctly held that "not everyone would have understood [by the green hats] the pro-protest message they were trying to convey." *Id*. (*citing Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997)).This holding is consistent with this Court's precedent. *See*, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). Thus, as the Eighth Circuit aptly explained, qualified immunity applies, and the Eighth Circuit's decision is correct.

Finally, notwithstanding the Eighth Circuit's manifestly correct analysis, even if this Court were to

grant *certiorari* and conduct a plenary review, it could (and, in that instance, should) affirm without ever reaching the questions posed by Petitioners, and without reaching the "clearly established" prong of the qualified immunity analysis. For this reason alone, the Petition for Writ of C*ertiorari* should be denied.

III. There is no Circuit Split regarding the inapposite question of whether words on clothing are pure speech that necessarily invoke First Amendment protection, no matter how meaningless.

As set forth above, there is no cause for this Court to address the inapposite first question posed by Petitioners on this record, and this case provides no vehicle to decide it even if this Court were to grant *certiorari*. Still, in the interest of fully addressing Petitioners' assertions, Respondents do so below.

Petitioners argue that the Circuits are split as to whether words on clothing are, no matter how meaningless, *de facto* "pure speech" protected by the First Amendment. No such circuit split exists. Indeed, the circuits are uniform in their approach, and all circuits hold, consistent with this Court's teaching, that words, or any other symbol on clothing, must communicate some thought or message to invoke First Amendment protection. No circuit holds that words on clothing are automatically endowed with constitutional protection, even where they are subjectively and practically meaningless.

No case more clearly encapsulates the correct standard for analyzing words on clothing than *Cohen v. California*, 403 U.S. 15 (1971). In that case, the Court distinguished between conduct and communication and found the only "conduct" which the State sought to punish – the wearing of a jacket bearing the words "Fuck the Draft" – was a conviction resting solely upon speech, and not upon any separately identifiable conduct which was intended to be perceived by others as expressive. *Id*. at 1784. And, as the Eighth Circuit recognized in this case below, "[t]he message was clear: he strongly opposed 'the Vietnam War and the draft' and wanted everybody to know it." *Molina*, 59 F.4th at 342 (*citing Cohen*, 403 U.S. at 16).

In *303 Creative v. Elenis*, the Court found that the First Amendment prohibits the government from compelling a website designer to create websites celebrating weddings not endorsed by the content creator. 143 S.Ct. 2298 (2022). In *303 Creative*, this Court's analysis hinged on the undisputed fact that, in creating a website for a wedding, the content creator communicates and expresses ideas. Critical to this Court's analysis were the stipulated facts which established that the website, which publishes writings and graphics, creates expressive content in cooperation with clients who endeavor to communicate their marital story in the way they want it told. *Id*., at 2309-12. In other words, the website, by its nature, expressed thoughts and ideas.

Consistent with reasoning, circuits across the country hold that words, symbols, or anything else that

appears on clothing must express an idea for it to be considered speech protected by the First Amendment. Petitioners' approach runs contrary to this principle, which underscores the purpose of the First Amendment itself, and their approach would significantly expand the already broad scope of the First Amendment in an unworkable way. It would allow, for example, any person wearing clothes that were not completely blank that was subjected to any action by a government actor to claim First Amendment retaliation. Even if that writing was a clothing brand name such, those words would be First Amendment protected. But, that proposition finds no support in established law or in the purpose of the First Amendment, which is to protect the expression of thoughts and ideas.

Second Circuit

The primary case in the Second Circuit dealing with expression by clothing is *Church of the American Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 207 (2d Cir. 2004). Though this case does not deal with words on clothing, it does deal with the prerequisite that clothing express an idea to invoke First Amendment protection – in that instance a reprehensible one. In *Kerik*, the Second Circuit stated that the uniform of the Ku Klux Klan members was protected, as it demonstrated a person's affiliation with the organization and their acceptance of the organization's well known, though deplorable, beliefs and mission. But, a city ordinance that barred wearing the organization's masks was constitutional, because there was nothing on the

mask that communicated or expressed any ideas, so there was no First Amendment violation. *Church of Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 207 (2d Cir. 2004); *citing Hernandez v. Superintendent*, 800 F.Supp. 1344, 1351 (E.D. Va. Aug. 26, 1992). So, the Second Circuit also requires a particularized message for an article of clothing to receive First Amendment protection.

Third Circuit

In *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, students wore a t-shirt that contained the word "redneck." 307 F.3d 243, 250-51 (3d Cir. 2002), *cert. denied*, 538 U.S. 1033, 123 S.Ct. 2077 (2003). This was viewed as a violation of the school district's policy on racial harassment. *Id*. In evaluating whether the policy was constitutional as applied to the shirt, the Third Circuit looked to the *Tinker* decision. The Court stated, "like the armbands at issue in *Tinker*, the wearing of the T-shirt was "akin to 'pure speech, targeted for its expressive content." *Id*. at 254; *citing Tinker* 393 U.S. at 508. Once again, the basis of the speech was not the presence of the words on the shirt, but the fact that they expressed an idea, which is a conceptual prerequisite that is uniform across the circuits.

Fourth Circuit

The Fourth Circuit in *Newsom ex rel. Newsom v. Albemarle Cnty. Sch. Bd.*, evaluated a school uniform policy that banned messages on clothing that related

to, among other things, guns. 354 F.3d 249, 260 (4th Cir. 2003). Critical to the Court's analysis was that no dispute existed as to whether the shirt worn by the plaintiff contained a message protected by the First Amendment. *Id*. It was undisputed that the clothing at issue clearly included a message or an expression of an idea that was unmistakable in its meaning. *Id*. Not so here.

Sixth Circuit

The Sixth Circuit also follows this Court's precedent by holding that words, symbols or other items contained on clothing are protected as speech when the clothing expresses "a certain viewpoint and that viewpoint was easily ascertainable by an observer." *Castorina ex rel. Rewt v. Madison Cnty. Sch. Bd.*, 246 F.3d 536, 539 (6th Cir. 2001).

Seventh Circuit

The Seventh Circuit remains faithful to this Court's teaching that words, like anything else printed on clothing, must express or communicate an idea to be protected by the First Amendment. In *Brandt v. Bd. of Educ. of City of Chicago*, the Seventh Circuit found that shirts that included words and a picture, but did not convey a particular message, were not protected under the First Amendment. 480 F.3d 460 (7th Cir. 2007). The Seventh Circuit acknowledged that clothing can be a medium for conveying political messages: " . . . there can be speech printed on clothing,

political symbols such as a swastika or a campaign button affixed to clothing, and masks and costumes that convey a political or other message." *Id* at 465. The Court further observed that "wearing clothing inappropriate to a particular occasion could be a political statement" or "parading in public wearing no clothing at all can, depending on the circumstances, convey a political message." *Id*. (citations omitted). However, the Court found that the t-shirt at issue worn by the plaintiff students did not express an idea or an opinion and was therefore not subject to First Amendment protection. *Id.* at 465-66. If it were, the Court reasoned, " . . . every T-shirt that was not all white with no design or words, with not even the manufacturer's logo or the owner's name tag, would be protected by the First Amendment." *Id.* Thus, the mere presence of words on an article of clothing does not – in and of itself – afford the clothing constitutional protection. Rather, the words must express a message or an idea to be protected by the First Amendment.

The Seventh Circuit buttressed this ruling in *N.J. by Jacob v. Sonnabend* by stating that "[a]lthough clothing as such is not normally classified as constitutionally protected expression, there can be speech printed on clothing . . . that conveys a political or other message." 37 F.4th 412, 422 (7th Cir. 2022) (internal quotation omitted). In that case, a student had worn a shirt bearing the logo and name of a Second Amendment rights group and a provision of the Wisconsin Constitution that secured the right to keep and bear arms. *Id*. The Court found that the student's t-shirt

was a form of protected expression and remanded the case to the district court for further proceedings. *Id*. at 426-27. Finally, in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, the Seventh Circuit issued a preliminary injunction enjoining the application of a school rule forbidding "derogatory comments," "that refer to race, ethnicity, religion, gender, sexual orientation, or disability" to a T-shirt reciting the phrase "Be Happy, Not Gay," worn to express the student's disapproval of homosexuality. 523 F.3d 668, 670-76 (7th Cir. 2008). Finding the message unmistakable and noting that "context is vital," the Court found the school had failed to justify the ban on that particular expression but declined to enjoin the rule in its entirety. *Id.* at 675-76.

Ninth Circuit

The Ninth Circuit has also considered whether words on clothing constitute speech. On each occasion, the Ninth Circuit examined content printed on clothing – not for the mere presence of words – but to determine whether the content at issue involves expression. In *Jacobs v. Clark County School District*, the Ninth Circuit upheld a school requirement that students wear uniforms that were blank or had the school's logo on them. 526 F.3d 419 (9th Cir. 2008). In that case, the Ninth Circuit found that "[w]hatever marginal expression wearing [a school] logo implicates, it does not rise to the level of expression to implicate concerns of viewpoint [non] neutrality." *Id.* at 433 (citation omitted). The logo, the Court found, "involved no 'written or

verbal expression of any kind,'" and thus, the plaintiff's school did not force him to 'communicate any message whatsoever'. . ." *Id*. at 438. By contrast, in *Frudden v. Pilling*, the Ninth Circuit found a mandatory uniform policy ran afoul of the First Amendment because it compelled students to wear clothing bearing the district's motto, "Tomorrow's Leaders," was communicating an idea. 742 F.3d 1199, 1205-06 (9th Cir. 2014). Consequently, the Ninth Circuit also requires a particularized idea to be communicated for the First Amendment to be implicated. Neither *Frudden* nor *Jacobs* stand for a bright-line rule that all clothing bearing words is necessarily entitled to First Amendment protection. Rather, the analysis set forth by the Ninth Circuit regards whether the clothing actually communicates a message or an expression of an idea.

In sum, there is no split amongst the circuits. All courts, including this Court, require that, to invoke First Amendment protection, words on clothing must express an idea. That principle is consistent across the circuits, and there is no need for this Court to resolve a circuit split which does not exist.

CONCLUSION

The Respondent officers acted reasonably in the face of violent unrest to protect people and property. After years of burdensome litigation and a well-reasoned order from the Eighth Circuit Court of Appeals, the instant Petition gives no cause to call their conduct into

further question and it would serve no benefit to do so. The Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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