No. 20-2864

In the
UNITED STATES COURT OF APPEALS
for the EIGHTH CIRCUIT

BRIAN BAUDE,
Plaintiff/Appellee,

v.

GERALD LEYSHOCK, et al.,
Defendants/Appellants.

On Appeal from the United States District Court
Eastern District of Missouri, Eastern Division
The Honorable Rodney W. Sippel, Chief District Judge

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

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Preliminary Statement

Appellant-defendant City of St. Louis submits that rehearing *en banc* is necessary because the panel opinion allows constitutional violations against each police officer present for a mass arrest during civil disorder. The panel directly conflicts with decisions of the Supreme Court and this Court on the application of qualified immunity. The panel opinion further distorts the Rule 12(b)(6) pleading standard requiring a claim be facially plausible. Appellant also requests that the panel reconsider its ruling on the issues described herein.

SUMMARY OF THE CASE[1]

Procedural History

This action was commenced in September 2018. JA 9. Plaintiff filed a second amended complaint ("SAC") in February 2019, citing lengthy portions of the transcript of testimony in the related case of *Ahmad v. City of St. Louis*, No. 4:17 CV 2455-CDP, 2017 U.S. Dist. LEXIS 188478 (E.D. Mo. 2017). JA 12, JA 102ff., 433ff. Defendants named in the SAC were the City of St. Louis, Lt. Col. Gerald Leyshock, Lt. Scott Boyher, Lt. Timothy Sachs, Sergeants Brian Rossomanno, Randy Jemerson and Matthew Karnowski, and Officer Timothy Bockskopf. The

[1] Citations will be to the Joint Appendix (J.App.) and to the appendix to this petition (Pet.App.).

SAC alleged four claims against the individual defendant officers under 42 U.S.C.§ 1983: Count I, unlawful seizure in violation of the Fourth Amendment; Count II, unlawful seizure in violation of the First Amendment; Count III, unlawful conspiracy to deprive plaintiff of federally protected rights; and Count XII, unlawful use of excessive force in arresting plaintiff. JA 46, 47, 59.

The district court denied defendants' motion for judgment on the pleadings except as to Count III, recognizing qualified immunity on that count. JA 825, 850; Add. A-001, A-025. The panel affirmed the district court in all respects.

Facts[2]

On September 15, 2017, the verdict was announced in the trial of former St. Louis Police Officer Jason Stockley. JA 748. Protests against the verdict and the police began on streets in downtown St. Louis. *Id.*, 107, 148, 369ff., 749. The protests continued during the weekend of September 15-17, 2017. Daylight protests were generally peaceful, except for the afternoon of September 15, which entailed blocking police buses, and assaults on police officers. After dark on September 15, a mob damaged the Mayor's home, among other buildings; several police officers were injured. Another suburban nighttime protest resulted in property damage.

On September 17, a large protest march took place in downtown St. Louis,

[2] The facts are drawn from the panel opinion, the district court opinion, andfrom the plaintiff's second amended complaint, including its extensive exhibits. .

beginning and ending at police headquarters. In the evening, a large group detached itself from the main protest and headed into downtown. That group vandalized property and some arrests were made. The group reassembled after City police CDT teams were withdrawn. The group threatened and assaulted police officers at the downtown intersection of Tucker and Locust. The group was ordered to disperse, but did not; instead it migrated to the intersection of Tucker and Washington.

Defendant Leyshock, the incident commander, and defendant Sachs, in charge of the CDT, ordered that anyone who disobeyed dispersal orders would be arrested. The CDT was summoned back downtown to disperse the crowd. It took over an hour to assemble sufficient police to execute the planned maneuver. People were free to enter or leave the area. It was not until approximately 11 p.m. that the CDTs were positioned to seal off the Tucker and Washington intersection. Most of the crowd made no attempt to depart before the CDTs closed in, although there is evidence in the record that persons could leave by going north along Tucker.

Defendants concede the mass arrest on September 17 was not a model operation. Officers and arrestees became intermingled, making it difficult to identify which officers interacted with which arrestees. JA 689 (Video Ex. G); see also JA 638-39. Regardless, no mace or physical force was used until officers were taking members of the crowd into custody. *Id.* Only a small number of the 90-odd arrestees were subjected to mace. *Id.*; see also JA 642-43. Eventually, all persons on the street

and sidewalks at Tucker and Washington were arrested.

Plaintiff lived in an apartment downtown and had heard media reports of downtown vandalism. He decided that he would venture out at about 9:30 p.m. to "document" any damage. JA 19, 43. He came to the area of Tucker and Locust after the larger group of "protesters" had moved north. He heard at least one dispersal order directed to a small group of youths. *Id.*, 44. He attempted to comply with the dispersal order that he heard, and return to his home, but he was prevented by officers who told him it was "too late." *Id.*, 45.

As plaintiff remained in the vicinity of Tucker and Washington, police surrounded the area as described above. The video shows a crowd milling about, moving in an out of the intersection as some automobiles attempted to get by. JA 689 (Video Ex. G). That crowd included persons with masks and goggles and persons thought to have participated in the earlier downtown vandalism. JA 564, 764.

Plaintiff alleges that, without warning, he was hit with pepper spray on his back and the side of his head. He does not allege that any named defendant used pepper spray on him, or was in the vicinity when the spraying occurred. JA 781, ¶147. Plaintiff was handcuffed ("zip-tied") and taken into custody, apparently by defendant Officer Bockskopf. JA 22, ¶16; JA 781, ¶151.

Plaintiff alleges that police commanders ordered or approved of the use of

"excessive" force against the crowd at Tucker and Washington for the purpose of punishing protesters. He alleges that some protesters were subjected to pepper spray and handcuffing by officers that caused substantial pain. He alleges generally that some supervisors were in a position to prevent pepper spraying of some arrestees, but none of them were anywhere near Plaintiff. He does not allege was injured or needed medical treatment resulting from the pepper spray or handcuffing. Only Officer Bockskopf was near Plaintiff when he was handcuffed.

ARGUMENT

I. Rehearing in this case is required because the panel opinion raises questions of national importance in the context of policing mass civil disorder by analyzing defendants' claims of qualified immunity at a high level of generality to hold that each defendant can be individually liable to plaintiff for First and Fourth Amendment violations.

Perhaps most striking about the panel opinion in this case is the absence of citation to any precedent to support its novel conclusion that each defendant can be liable to plaintiff in the context of a mass arrest, absent any allegation that any defendant had any personal involvement with plaintiff's actualarrest or the application of any force..

Leaving aside the question of arguable probable cause for the mass arrest, the panel's conclusion that the encirclement of the crowd of which plaintiff was a part amounted to a Fourth Amendment "seizure" is a novel theory of liability. The denial of qualified immunity to defendants on the premise that they each can be liable for that seizure is contrary to Supreme Court precedent. Officers are entitled to qualified immunity unless there was a violation of a constitutional right, and the law was so clearly established at the time that no reasonable officer would be in doubt concerning it. E.g., *City of Tahlequah v. Bond*, 211 L.Ed.2d 170 (2021); *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011).

Here, there was and is no clearly established law that, in the context of policing mass civil disorder, the encirclement of a potentially riotous crowd is a "seizure." The panel adverts to the general proposition that a seizure is effected by a restraint on liberty by physical force or show of authority. Slip op. xx. The problem with the panel's view is that, if the mere encirclement of a crowd of potential rioters constitutes a seizure, every officer engaging in the encirclement can be liable for unlawful seizure, even though no prior case p has ever so held, and there is a plan to try to identify persons who are innocently present within the crowd and release them. Cf. *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012). Indeed, it is not unusual for government agencies to establish "free speech zones" and act to corral protesters in those zones in order to minimize traffic or public service disruptions. See, e.g., *Puente v. City of Phoenix*, No. CV-18-02778-PHX-JJT, 2022 U.S. Dist. LEXIS 21489 (D. Ariz. Feb. 7, 2022); *Bloedorn v. Keel*, No. 6:09-cv-55, 2012 U.S. Dist. LEXIS 61737 (S.D. Ga. May 2, 2012). The panel's framework would expose officers to liability merely by acting to ensure that protesters observe such zones, with or without arguable probable cause to arrest.

Rehearing *en banc* or by the panel is essential to clarify the law in this regard and to avoid a species of strict liability in crowd control situations.

II. Rehearing in this case is required because the panel opinion raises questions of national importance in the context of policing mass civil disorder by analyzing defendants' claims of qualified immunity at a high level of generality by reason of their participation in the mass arrest that included plaintiff.

Defendants do not assert that superior orders always insulate individual police officers from liability of violating constitutional rights, or that they may "blindly" follow superior orders. Defendants do assert that it is antithetical to principles of qualified immunity to deny them such immunity in this case under the unique circumstances of a mass arrest, during mass civil disorder.

The panel opinion denies qualified immunity to the subordinate officer defendants (Rossomanno, Jemerson, Boyher, Karnowski and Bockskopf) on the basis of selected allegations of plaintiff, without reference to the massive record created by the complaint's exhibits.. Even accepting the panel's approach on its own terms, there is no question that the decision arrest was made by defendants Leyshock and Sachs. It is undisputed that Leyshock and Sachs received information from many sources, including an undercover officer. There is no allegation that any individual subordinate defendant relayed false information to them.

The panel insists that the subordinates cannot rely on superior orders unless that reliance is "reasonable," but the panel makes no effort to demonstrate how the

reliance by the subordinate defendants was unreasonable. The panel cites to no precedent supporting the proposition that subordinate officers in a mass arrest cannot reasonably rely on their superiors' judgment and greater information. A mass arrest is necessarily a command decision, and disobedience of such an order in the face of a crowd--disorderly or potentially riotous--is an invitation to chaos. How are subordinates supposed to second-guess their superiors? What obligation do they have to assess probable cause independently of their superiors? These are not questions of fact; they are questions of law.

The Supreme Court has never addressed the liability of subordinate officers for obeying superior orders in executing a mass arrest. Similarly, cases from this and other circuits do not clearly establish that every subordinate officer participating in a mass arrest is unreasonable in relying on a superiors' information and judgment as to the propriety of the arrest. *Vodak v. City of Chicago*, 639 F.3d 738 (7th Cir. 2011), denied qualified immunity to police officers who arrested demonstrators who were given permission to march, without any advance notice of revocation of permission. In the case at bar, there is nothing to indicate that plaintiff or anyone else had been given permission to block streets, and orders to disperse were given prior to the mass arrest. Indeed, plaintiff admits that defendant Rossomanno gave dispersal orders.

Carr v. District of Columbia, 587 F.3d 401 (D.C.Cir. 2009) and *Washington*

Mobilization Committee v. Cullinane, 566 F.2d 107 (D.C.Cir. 1977), recognized that police confronted by a mass of protesters may lawfully treat the group as a unit without individualized probable cause, but do not speak to the issue of subordinate officers' liability.

With regard to this Court's holdings in *Bernini v. City of St. Paul* and *White v. Jackson*, those cases did not establish inflexible criteria for supervisory officers at all mass arrests, nor could they. Qualified immunity in a mass arrest, as in any situation, must be assessed with respect to the facts and circumstances of the specific situation. *City of Tahlequah v. Bond*, 211 L. Ed. 2d at 173.

White v. Jackson, 865 F.2d 1065 (8th Cir. 2017), holds that a §1983 plaintiff must be able to prove the personal involvement of a defendant in the constitutional violation. As demonstrated in *Quraishi v. St, Charles County*, 986 F.3d 831 (8th Cir. 2021), both the sergeant and the subordinate were personally involved in deploying tear gas. If *Quraishi* clearly establishes anything, it is that a subordinate may be unreasonable in obeying a superior's order regarding a use of force when the subordinate can see and hear everything that the superior saw and heard.

The subordinate officers who had no contact with plaintiff in this case could not be on notice that their conduct with regard to him was unlawful. Given that there is no dispute that Lt. Col. Leyshock had been in command of the police response to protests for the entire weekend, and given the facts, among others, that undercover

officers had been deployed, see JA 549, 581, R.Doc. 33-5, pp. 91, 122; JA 889, R.Doc. 106, p.21, and that the vast majority of officers were not on the scene when Lt. Col. Leyshock set the plan in motion, it was entirely reasonable for the subordinate officers to believe that Lt.Col. Leyshock was better informed than they. Cf. *White v. Pauly*, 137 S. Ct. 548, 552 (2017)("No settled Fourth Amendment principle requires that officer to second-guess the earlier steps already taken by his or her fellow officers in instances like the one . . . confronted here.").

The panel addressed a novel issue, and it did so in a manner inconsistent with Supreme Court precedent. For this reason alone, rehearing is clearly warranted.

III. Rehearing in this case is required because the panel opinion raises questions of critical national importance in the context of policing mass civil disorder by analyzing defendants' claims of qualified immunity at a high level of generality to hold that each and every defendant can be individually liable to plaintiff for First and Fourth Amendment violations despite the absence of any allegation of contact with or knowledge of the named plaintiff.

The panel held that all defendants can be denied qualified immunity even though only Officer Bockskopf had any alleged contact with plaintiff. In fact, only Officer Bockskopf was near plaintiff at any time. . Even with regard to defendant Bockskopf, the plaintiff fails to allegea plausible claim that he could have intervened to prevent the spraying of plaintiff, which was “without warning.”

"To prevail on a § 1983 claim, a plaintiff must show each individual defendant's personal involvement in the alleged violation." *Burbridge v. City of St. Louis*, 2 F.4th 774, at 782 (8th Cir. 2021), citing *White v. Jackson*, 865 F.3d 1064, 1081 (8th Cir. 2017); accord *Wood v. Moss*, 572 U.S. 744, at 763 (2014); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009).

In the case at bar, the panel accepted plaintiff's formulaic allegations that each defendant generally approved of or failed to prevent the unlawful use of force on the crowd during the mass arrest, and then proceeded to hold that these threadbare allegations sufficed to deny qualified immunity. Slip op. at x. This is not the law as enunciated by *Ashcroft v. Iqbal*, and *Saucier v. Katz*, 533 U.S. 194, 209 (2001)

The panel's opinion is nothing short of vicarious liability, and rehearing is warranted to correct the radical departure from the norms of §1983 jurisprudence.

IV. Rehearing is required because the panel raises questions of national importance regarding arrests by holding that each defendant can be individually liable for First and Fourth Amendment violations by participating in a mass arrest— even though handcuffing an arrestee, without actual injury, cannot give rise to an excessive force claim.

This Court has repeatedly held that handcuffing, without significant injury, is not excessive force. *Robinson v. Hawkins*, 937 F.3d 1128 (8th Cir. 2019); *Chambers v. Pennycook*, 641 F.3d 898 (8th Cir. 2011). As *Chambers* teaches:

"'Handcuffing inevitably involves some use of force,' . . ., and it almost inevitably will result in some irritation, minor injury, or discomfort where the handcuffs are applied. . . . To prove that the force applied was excessive in that context, therefore, a plaintiff must demonstrate something more."

Here, plaintiff alleges only that he was "zip tied." He does not assert he suffered any injury. Thus, he has failed to plausibly allege more than the force required to zip-tie him. Since he does not assert an actionable violation of constitutional rights, the first prong of the immunity analysis dictates that his "handcuffing" claim of excessive force in must be dismissed.

Even if the Court finds a plausible constitutional violation, the second prong of the analysis compels dismissal of plaintiff's handcuffing claim. As of September 2017it was not clearly established that routine handcuffing of a misdemeanor arrestee was excessive force. Thus, these defendants could not have known that handcuffing plaintiff was unconstitutional excessive force. Indeed, a majority of Eastern District judges have held otherwise. See *Laird v. City of Saint Louis*, No. 4:18-cv-01567-AGF, 2021 U.S. Dist. LEXIS 186160 (E.D. Mo. Sep. 29, 2021); *Alston v. City of Saint Louis*, No. 4:18-cv-01569-AGF, 2021 U.S. Dist. LEXIS 187526 (E.D. Mo. Sep. 30, 2021); *Ortega v. City of St. Louis*, No. 4:18 CV 1576 DDN, 2021 U.S. Dist. LEXIS 143904 (E.D. Mo. Aug. 2, 2021); *Newbold v. City of Saint Louis*, No. 4:18CV1572 HEA, 2021 U.S. Dist. LEXIS 168997 (E.D. Mo. Sep.

7, 2021); *Davis v. City of Saint Louis*, No. 4:18CV1574 HEA, 2021 U.S. Dist. LEXIS 173199 (E.D. Mo. Sep. 13, 2021); *Thomas v. City of St. Louis*, No. 4:18-CV-01566 JAR, 2021 U.S. Dist. LEXIS 193964 (E.D. Mo. Oct. 7, 2021).The panel opinion contradicts clearly established law.

V. Rehearing is required because the panel opinion conflicts with Supreme Court and Eighth Circuit precedent regarding (A) the standards of pleading a constitutional claim and (B) the application of clearly established law regarding police officer liability arising out of civil disorder.

A. The panel opinion misapplies the Supreme Court's standards for evaluating a complaint in the context of a claim of qualified immunity.

The panel erred in its analysis of defendants' assertion of qualified immunity. Although acknowledging that the great mass of evidence included in the exhibits to the second amended complaint could and should be considered in analyzing a motion for judgment on the pleadings, slip op. at x, the panel simply ignored uncontroverted facts on the face of those exhibits that refuted plaintiff's formulaic and threadbare allegations of unconstitutional misconduct by the named defendants.

The panel quoted *Iqbal* (a qualified immunity case) for the proposition that "[a] claim must be plausible on its face to survive dismissal." Slip op. at x, citing *Iqbal*. The panel then proceeded to apply an idiosyncratic version of this standard, characterizing it as requiring "merely" that a complaint set forth "allegations

plausibly suggesting" a legal violation.'" Slip op. at x. This lip service to the Supreme Court's holdings in *Iqbal* and *Ashcroft v. al-Kidd* is inconsistent with both cases.

Plaintiff's allegations that any or all police officers, or their superiors, agreed to, approved of, or failed to prevent plaintiff's arrest or the use of force on plaintiff are precisely the kind of threadbare, formulaic allegations that the Supreme Court has condemned. Moreover, it plainly contradicts this Court's insistence that "[t]o prevail on a § 1983 claim, a plaintiff must show each individual defendant's personal involvement in the alleged violation." *Burbridge v. City of St. Louis*, 2 F.4th 774, at 782 (8th Cir. 2021), citing *White v. Jackson*, 865 F.3d 1064, 1081 (8th Cir. 2017);

In spite of the exhibits which contain no evidence that-any subordinate defendant agreed to, ordered or knowingly approved of any misconduct toward plaintiff, the panel accepts conclusory allegations that every officer on the scene did so. Worse, the panel ignores the absence of allegations that any named defendant was anywhere near him when he was handcuffed and allegedly pepper sprayed. Thus, plaintiff's claim is wholly unlike that in *White v. Jackson*, where there was evidence that identifiable officers had contact with the plaintiff.

The panel opinion is similarly in conflict with Eighth Circuit precedent, in the matter of liability of officers who rely on other officers in participating in an arrest, *Doran v. Eckold*, 409 F.3d 958 (8th Cir. 2005); liability absent personal

involvement, *Burbridge v. City of St. Louis* and *White v. Jackson,* and liability for handcuffing. *Robinson v. Hawkins,* supra.

B. The panel's qualified immunity analysis flies in the face of binding Supreme Court precedent.

The panel opinion contradicts virtually every qualified immunity decision handed down by the Supreme Court. It particularly contradicts *Wood v. Moss,* supra. In *Wood*, Secret Service agents were sued on a *Bivens* theory because they established a security perimeter around President Bush's location to force anti-Bush protesters away from the President, but allowed pro-Bush demonstrators to remain closer. Reversing the Ninth Circuit, the Supreme Court unanimously held that the actions of the agents did not violate a clearly established constitutional right. "The dispositive inquiry, we have said, is whether it would [have been] clear to a reasonable officer' in the agents' position that [their] conduct was unlawful in the situation [they] confronted." 572 U.S. at 758 (internal quotation omitted).

Even if defendants Leyshock and Sachs were plainly incompetent in ordering the mass arrest, it was not clear to the remaining defendants that this crowd-control action was unlawful. These defendants indisputably dealt with protests the entire weekend, and knew firsthand that violence often erupted after dark. They also knew that thiscrowd had not been peaceful and had been ordered to disperse. Indeed, one district judge has found arguable probable cause for Leyshock's decision.

The panel opinion cites no case holding that subordinate officers are liable for their superiors' mass arrest decision under the circumstances present here. Indeed, the panel declared that *Bernini*, supra the only mass arrest case decided in this Circuit prior to 2017, does not resolve the issues on this appeal.

The panel said that First and Fourth Amendment rights can be violated by officers who participate in a mass arrest ordered by superiors without arguable probable cause. Denying qualified immunity to officers on the basis of such a general proposition is exactly what the Supreme Court rejects. This abstract statement ignores the actual circumstances of the mass arrest in this case. Rehearing is essential to redress the panel's conflict with the Supreme Court.

CONCLUSION

The panel's misapplication of the law compels appellants to seek rehearing. Because the panel opinion sets a dangerous precedent for police attempting to preserve public order in civil disorder situations, appellants respectfully request that this Court to grant rehearing in this cause, and set the case for argument before the Court *en banc*.

At a minimum, hearing *en banc* is warranted in order to examine the standards for applying qualified immunity to officers in the context of mass arrests in response to civil disorder. Alternatively, appellants request that the panel reconsider and modify its opinion and judgment in accordance with the foregoing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2022, a copy of the foregoing brief was served on counsel of record for appellees by means of the Court's electronic filing and service system.

/s/Brandon Laird
Associate City Counselor

CERTIFICATION OF COMPLIANCE

CERTIFICATION OF TYPE AND VOLUME LIMITATION

I hereby certify that the text of the foregoing document contains 3,861 words of proportionally spaced text as determined by the automated word count of the Microsoft Word 2010 word processing system and has 14 point print size.

/s/ Brandon Laird
Associate City Counselor