No. 16-1697

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

DORIAN JOHNSON,

Appellee/Plaintiff,

vs.

THE CITY OF FERGUSON, MISSOURI; FERGUSON POLICE CHIEF THOMAS JACKSON, AND FERGUSON POLICE OFFICER DARREN WILSON,

Appellants/Defendants.

On appeal from the United States District Court for the Eastern District of Missouri, The Honorable Audrey G. Fleissig, Judge

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BRIEF AMICUS CURIAE OF THE NATIONAL POLICE ASSOCIATION IN SUPPORT OF APPELLANTS/DEFENDANTS AND SUPPORTING REVERSAL

EDWARD D. GREIM
ALAN SIMPSON
Graves Garrett LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
Telephone: (816) 256-3181

KENT S. SCHEIDEGGER*
KYMBERLEE C. STAPLETON
Criminal Justice Legal Foundation
2131 L Street
Sacramento, California 95816
Telephone: (916) 446-0345
Fax: (916) 446-1194
E-mail: kent.scheidegger@cjlf.org

Attorneys for Amicus Curiae National Police Association

*Attorney of Record

CORPORATE DISCLOSURE STATEMENT
(Rule 26.1)

The National Police Association is a Delaware nonprofit corporation. The corporation has no parents or stockholders.

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BRIEF AMICUS CURIAE OF THE NATIONAL POLICE ASSOCIATION IN SUPPORT OF APPELLANTS/DEFENDANTS AND SUPPORTING REVERSAL

INTEREST OF AMICUS CURIAE

The National Police Association[1] is a Delaware nonprofit corporation founded to provide educational assistance to supporters of law enforcement, as well as to provide support to individual law enforcement officers and the agencies they serve. The National Police Association seeks to bring issues of importance to the forefront in order to facilitate remedies and broaden public awareness.

1. No counsel for a party authored this brief in whole or in part. No party or party's counsel contributed money to fund preparing or submitting the brief. The Criminal Justice Legal Foundation, Sacramento, California, has provided representation and incidental expenses.

The Fourth Amendment issues and consequences to individual law enforcement officers in this case are of the utmost importance—importance not only to those who dedicate their careers and place their lives in harm's way to protect their fellow citizens but to those citizens and their communities. It is the responsibility of the National Police Association to raise these issues and by doing so serve the interests of those who serve us all so selflessly.

SUMMARY OF ARGUMENT

The question presented in this case on the qualified immunity motion is simply whether Plaintiff Dorian Johnson was seized at the time that Officer Darren Wilson had only ordered him to get off the street and onto the sidewalk and parked his car so as to block further walking in the street. Plaintiff was not seized at this time because his freedom of movement was not terminated or restrained.

The standard of *Brower v. County of Inyo* only applies when a person is actually stopped by physical means. When a person stops while untouched, a different analysis is required.

Stopping in response to a show of authority does not constitute a seizure unless that authority commanded remaining in one place rather than merely using a different route. In most seizure cases, the complaining party was either physically stopped or unambiguously commanded to remain in one place. Where the party is both able to proceed in another direction and not commanded to remain, as in this case, the cases generally do not find a seizure.

Qualified immunity is granted to public officials, but its purpose is to benefit society as a whole. In the case of police officers, particularly, "the danger that fear of being sued will dampen the ardor of all but the most resolute," of which the Supreme Court warned, is a very real danger to the safety of innocent people. The costs of litigation, which are not limited to monetary costs, are great even if the accused officials ultimately prevail at trial. For this reason, the Supreme Court's jurisprudence has focused on dismissing claims pretrial, prior to discovery.

To survive a qualified immunity defense, the Plaintiff's case on the facts he alleges must make out a violation of his rights "beyond dispute." The law must be clearly established as applied to the particular facts and not at a high level of generality.

In this case, the facts alleged by the Plaintiff would have to establish a seizure under law that was clearly established beyond dispute as of the time of the incident. That question is not even close. None of the cases cited by the panel opinion in its "clearly established" discussion involves a dispute as to whether a seizure occurred. The cases discussed in this brief make a strong argument that there was no seizure here. That is enough to decide this case on qualified immunity.

ARGUMENT

I. The question presented is only whether Johnson was seized at the time Officer Wilson parked his car, and later, disputed facts are irrelevant.

A. Facts, Allegations, and Assumptions.

When pretrial orders are reviewed on appeal, it is common for appellate courts to begin with a statement such as the one made by the panel in this

case. "Because this matter comes before us as an appeal from the denial of a motion to dismiss, we set forth the facts as alleged in the complaint." Panel Opn. 2. The allegations that follow are often highly defamatory and may be completely unsupported by evidence.

This method is analytically valid in the sense of leading to the correct result, but the description of allegations as if they were facts in a published opinion can be misleading to the reader and damaging to the people involved. Nearly all laymen and many lawyers and law professors fail to grasp the significance of the initial statement and later treat the "facts" assumed by an appellate court as if they were actual facts.

The danger of collateral damage from the standard method is greatly multiplied in a controversial case such as the present one. This is an incendiary case, both figuratively and literally. Comparing the allegations of the complaint with the best available indication of the actual facts of the case, the report of the United States Department of Justice,[2] it appears likely that the complaint in this matter is largely a work of creative fiction. The most incendiary "fact" alleged by the Plaintiff and assumed by the panel is an allegation that Officer Wilson shot Brown as he and the Plaintiff were running away, *see* Panel Opn. 2, and this is contrary to the evidence as established by credible witnesses. *See* U.S. Dept. of Justice, Report Regarding the Criminal Investigation into the Shooting Death of Michael

2. Plaintiff repeatedly cites the other USDOJ report, on the Ferguson Police Department generally, *see* Appellee Brief 8, 9, 26, 27, and so he can hardly complain that amicus cites the one more specific to this case.

Brown by Ferguson, Missouri Police Officer Darren Wilson 8 (2015) (cited below as "DOJ Report").[3]

Rather than reciting incendiary, hotly disputed, and likely false allegations as "facts" in a published opinion, a safer and more prudent method would be to note what is disputed, what is not, what is material, and what is not at each step. It can then be noted where appropriate that if a material allegation is disputed the question is whether the disputed allegations, *if proved at trial*, would amount to a cause of action. That is a bit more work, but given the nature of the case and the potential for damage, amicus believes it is worth the effort.

B. The Material Facts in this Case.

The issue before this court concerns primarily the allegations made in the complaint, District Court Document no. 1-3, under the heading "General Facts and Allegations," paragraphs 20-30 on pages 7-8.

In paragraph 20, Plaintiff alleges that on August 9, 2014, he and Brown were "peacefully and lawfully walking down Canfield Drive." "Peacefully" appears to be undisputed. "Lawfully" is a conclusion rather than a fact. It is apparent from Plaintiff's complaint that he and Brown were walking in the street and not the sidewalk on a street that has sidewalks. *See* § 300.405.1 RSMo (pedestrians required to use sidewalks where available).

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3. "There is no credible evidence to refute Wilson's stated subjective belief that he was acting in self-defense. As discussed throughout this report, Wilson's account is corroborated by physical evidence and his perception of a threat posed by Brown is corroborated by other credible eyewitness accounts." DOJ Report 12.

In paragraph 21, Plaintiff alleges that Officer Wilson approached in a vehicle and ordered him and Brown to get on the sidewalk. This much is consistent with the DOJ findings and Officer Wilson's statement. *See* DOJ Report 6, 12. Plaintiff alleges that Officer Wilson used profanity in this order, and Officer Wilson denies that claim. *See* DOJ Report 12. There is no need to assume the Plaintiff's version, however, because the disputed allegation is not material, as discussed further below.

In paragraph 22, Plaintiff alleges that Officer Wilson then "parked his vehicle at an angle so as to block the paths of Plaintiff Johnson and Brown." This also is consistent with the DOJ findings. *See* DOJ Report 6.

Plaintiff does not allege that Officer Wilson's vehicle blocked them in all directions, nor is it possible to do so with a single vehicle. His brief in this court concedes he was "physically able to turn and walk in another direction . . . ." Appellee Brief 16. In context, both the complaint and the DOJ Report say that the vehicle blocked Johnson and Brown's path down the middle of the street. There is no allegation that Officer Wilson physically prevented the Plaintiff from complying with the law and with his order by moving to the sidewalk. Plaintiff's argument is that he was seized within the meaning of the Fourth Amendment "from that moment." *See* Appellee Brief 9-10.

In paragraph 27, he alleges, "At no point in time did Officer Wilson order Plaintiff Johnson or Brown to 'stop' or 'freeze.' " "At no point in time" obviously includes the time before the altercation as well as the time during the altercation.

Once the altercation between Officer Wilson and Brown began, Plaintiff ran away, and therefore he was not seized under *California v. Hodari D.*, 499

U.S. 621, 626 (1991) and *County of Sacramento v. Lewis*, 523 U.S. 833, 843-844 (1998). The hotly disputed allegations regarding that altercation and Officer Wilson's use of force are therefore not material to the question of whether Johnson was seized before the altercation began, and no assumption regarding these facts is necessary to the resolution of the case.

As framed by the pleadings and arguments, then, the question is whether a pedestrian walking down a street rather than using the sidewalk is "seized" within the meaning of the Fourth Amendment when a police officer (1) directs him to use the sidewalk rather than the street, (2) parks the police car so as to block his progress down the street but not the sidewalk, and (3) at no time tells him to "stop" or "freeze." The answer is clearly no.

II. Johnson was not seized at the time in question because his freedom of movement was not terminated or restrained.

"It is clear . . . that a Fourth Amendment seizure . . . occur[s] . . . only when there is a governmental *termination of freedom of movement* through means intentionally applied." *Brower v. County of Inyo*, 489 U.S. 593, 596-597 (1989) (emphasis altered). In *Brower* the court emphasized intent, since the termination was obvious, but in this case it is the termination that is lacking. Johnson was not seized at the moment in question because he was unambiguously free to continue moving on the sidewalk rather than the street.

Sometimes the element is phrased as "terminates or restrains," *see Brendlin v. California*, 551 U.S. 249, 254 (2007), but in this context "restrains" cannot be so broad as to mean freedom from any limitation whatever. A person is not "seized" merely because he cannot trespass on

private property or go the wrong way on a one-way street. A person who is ordered to leave a courthouse and escorted off the premises, without more, and who is free to go anywhere else has not been seized within the meaning of the Fourth Amendment. *See Sheppard v. Beerman*, 18 F.3d 147, 152 (2d Cir. 1994). The Second Circuit reaffirmed the principle of *Sheppard* in *Salmon v. Blesser*, 802 F.3d 249, 251 (2015), although *Salmon* was distinguishable because the officer took physical control of the plaintiff, *see id*., a fact not present in this case.

Stephen E. Henderson, *"Move On" Orders as Fourth Amendment Seizures*, 2008 B.Y.U.L. Rev. 1 (2008), discusses police orders that he calls "move on orders" and "anywhere but here" orders and concludes that most such orders do not raise a Fourth Amendment issue. *See id*. at 5. They are not seizures, see *id*. at 45, though the orders and the laws that authorize them may, under some circumstances, raise other legal issues. *See id*. at 1-4.

In this case, Officer Wilson's order was simply for two pedestrians to get off the street and use the sidewalk. He did not order anything other than compliance with the law. When a street has sidewalks, Missouri law requires pedestrians to use the sidewalks rather than walk in the street, *see* § 300.405.1 RSMo, and an officer's observation of a violation of this law constitutes probable cause for arrest. *See United States v. Pratt*, 355 F.3d 1119, 1123-1124 (8th Cir. 2004). A simple order to cease the violation and begin compliance was far less restraining than what Officer Wilson was authorized to do.

Following disobedience of this lawful order, Officer Wilson then parked his police car so as to block the path of Johnson and Brown on the street, *i.e.*,

preventing their continued violation of the law. From this action and the prior verbal command, Plaintiff Johnson would have this court find a seizure. *See* Appellee Brief 14-15. That is not even close to a seizure.

Plaintiff quotes *Brower v. County of Inyo*, 489 U.S. 593, 598 (1989) for the proposition that "a roadblock is a 'significant show of authority to induce a voluntary stop.' " Appellee Brief 13. Here is a more complete quote of this passage (emphasis added):

> "Petitioners have alleged the establishment of *a roadblock crossing both lanes of the highway*. In marked contrast to a police car pursuing with flashing lights, or to a policeman in the road signaling an oncoming car to halt, [citation], a roadblock is not just a significant show of authority to induce a voluntary stop, but is designed to produce a stop by physical impact if voluntary compliance does not occur."

Brower was driving a car on a highway in sparsely populated Inyo County, California, home of Death Valley, and the roadblock blocked both lanes, the high court took care to note. Brown and Johnson were walking on a city street, and Officer Wilson's car blocked only the street, not the sidewalk. In terms of the feasibility of leaving via an unblocked path, the two situations are entirely different.

The panel opinion accepts Plaintiff's view that "show of authority" is the dispositive factor and cites *Brower*, Panel Opn. 5-6, without really grappling with the question of show of authority *to do what?* Police officers may make many shows of authority without seizing people. It is only when that show of authority " 'has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred.' " *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quoting *Terry v. Ohio*, 392 U.S. 1, 19, n.16 (1968)).

For example, suppose a police officer cruising on a busy street wants to stop a car five cars ahead and turns on the flashing lights. This is a show of authority requiring the four cars in between to pull to the right and let the police car pass. Depending on conditions, they may even have to stop briefly. Yet we would not say that the occupants of these four cars have been seized within the meaning of the Fourth Amendment. If they were, it would be a violation, as there is no cause whatever to think that they have done anything illegal. The only car occupants seized are those in the fifth car, when its driver pulls over and stops in obedience to the show of authority. *See Brendlin v. California*, 551 U.S. 249, 257 (2007). The others are free to "go about [their] business," *i.e.*, not seized. *See United States v. Drayton*, 536 U.S. 194, 201 (2002).

The panel opinion's interpretation of *Brower* seems to make it a *per se* rule that roadblocks are always seizures. Yet the Supreme Court has "made it clear that for the most part *per se* rules are inappropriate in the Fourth Amendment context. The proper inquiry necessitates a consideration of 'all the circumstances surrounding the encounter.' " *Drayton*, 536 U.S. at 201 (quoting *Bostick*, 501 U.S. at 439).

For passengers on public transportation, the question is not one of freedom to leave but rather freedom to disregard or decline whatever request the police are making, a question decided "taking into account all of the circumstances." *See Bostick*, 501 U.S. at 436-437. Similarly, a person who stops in response to a partial blockage of his path would only be seized if (1) under all the circumstances, the person had no practical way to "go about his business," or (2) the circumstances, assessed objectively, would have

indicated to a reasonable person an authoritative command to stay put and not use the available and feasible alternative path.

There are several cases on partial roadblocks, but they are not particularly helpful because, like *Brower*, they all involve blockages that were unambiguously intended to stop, not divert, a person driving a vehicle, and they all did forcibly stop the suspect via a collision. *See Horta v. Sullivan*, 4 F.3d 2, 13-14 (1st Cir. 1993) (distinguishing total roadblock in *Brower* from partial roadblock in case before it, but deciding on qualified immunity); *Seekamp v. Michaud*, 109 F.3d 802, 805 (1st Cir. 1997) (finding a seizure under *Brower*); *Hawkins v. City of Farmington*, 189 F.3d 695, 701-702 (8th Cir. 1999) (same).

Brower establishes a simple rule for cases where a person is stopped by physical force. " 'We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.' " *Hawkins*, 189 F.3d at 702 (quoting *Brower*, 489 U.S. at 599). Where a person does not leave the scene and go about his business though he physically could, however, a different analysis is required.

Brendlin v. California, supra, is instructive on this point. Brendlin was a passenger in a car that had been stopped without reasonable suspicion. (*See* 551 U.S. at 252.) The court noted the rules of *Bostick* and *Brower* as well as the contrasting rules for cases where the suspect flees. *See id*. at 254 (citing *California v. Hodari D.*, 499 U.S. 621 (1991) and *County of Sacramento v. Lewis*, 523 U.S. 833 (1989)). Brendlin's forward motion in the car had stopped because of the officer's show of authority and the driver's obedience

to it, and if the simple *Brower* rule extended to that situation there would have been no need to go any further.

The *Brendlin* court did not take that route, though. This case fell into a different category from *Brower*.

> "When the actions of the police do not show an unambiguous intent to restrain or when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U. S. 544 (1980), who wrote that a seizure occurs if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave," *id*., at 554 (principal opinion). Later on, the Court adopted Justice Stewart's touchstone, see, *e. g*., *Hodari D*., *supra*, at 627 . . . ." *Brendlin*, 551 U.S. at 255.

Although Brendlin's travel in the car had been halted by the police show of authority, he still would not have been seized if "a reasonable person in Brendlin's position when the car stopped would have believed himself free to 'terminate the encounter' " between the police and himself.' " *Id*. at 256-257. Unquestionably there had been a "show of authority," but the key question was what a reasonable person would understand the authority to be commanding. The Supreme Court concluded that "in these circumstances any reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to depart without police permission." *Id*. at 257. Conversely, it follows, if a reasonable person in this situation had felt free to walk away, he would not have been seized, even though the police action meant he could not continue as he had been going before, *i.e.*, riding in the car.

In determining what a reasonable person in Brendlin's situation would have understood, the court notes, only the objective meaning of police acts and statements count, not the motives or undisclosed intent of the police. *See id*. at 260. For the present case, then, the only facts that matter are Officer Wilson's directive to get off the street and onto the sidewalk and his parking of the car to block Brown and Johnson's further progress down the street but not the sidewalk.

The principle that merely blocking one path of egress does not amount to a seizure is illustrated by *United States v. Mabery*, 686 F.3d 591, 597 (8th Cir. 2012). Mabery alleged that the police parked their car so as to block the only entrance to the parking lot where he was parked. This was not a seizure of his person, though it might have been of his vehicle, because he was free to leave on foot. *See id*.

Partial blockage of the path of a person on foot was addressed by the First Circuit in *United States v. Smith*, 423 F.3d 25, 30 (2005). Two officers stood on either side of a telephone pole in front of Smith, and a wall was behind him, but even so he "could have moved in a variety of directions." *Id*. The officers did not, therefore, "restrict Smith's freedom of movement" as that term is used in Fourth Amendment cases. *See id*.

Smith also addressed the officers' tone of voice, a point that Plaintiff makes in this case. The court rejected Smith's argument that even though the officers were asking questions rather than voicing commands, their aggressive and sarcastic tones were "sufficient to escalate the encounter into a seizure." The key point is that whatever their tone, the officers "did not communicate a command to stay." *Id*.

Smith appears to be the closest case to the present one on its facts. In this case also the blockage of Johnson's path was not complete. He had a safe and legal path to continue on his way. Johnson makes the hotly disputed claim that Officer Wilson's command to get on the sidewalk instead of the street included profanity. Officer Wilson denied this, *see* DOJ Report at 12, but it does not matter to the outcome. "Get <expletive or not> on the sidewalk" does not mean "halt." It means get on the sidewalk.

Even without the doctrine of qualified immunity, this would be a clear case. Objectively viewed, the words and actions of Officer Wilson would not be taken by a reasonable person to be a command to stop rather than a command to proceed in a lawful manner, *i.e.*, on the sidewalk. Once the qualified immunity standard is applied, this case goes from clear to beyond question.

III. The qualified immunity rule requires dismissal.

A. The Purpose of Qualified Immunity.

Qualified immunity is granted to public officials, but its ultimate beneficiary is " 'society as a whole.' " *See City & County of San Francisco v. Sheehan*, 135 S.Ct. 1765, 1774, n.3 (2015) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)). *Harlow* established the rule in its modern form after balancing the evils of denying what may be the only available remedy against the costs to society of subjecting officials to a multitude of civil suits. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-814 (1982).

> "These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, *there is the danger*

> *that fear of being sued will 'dampen the ardor of all but the most resolute*, or the most irresponsible [public officials], in the unflinching discharge of their duties.' [Citation.]." *Id*. at 814 (emphasis added).

Failure to appreciate these social costs may be behind the numerous instances in which the Supreme Court has found it necessary to reverse court of appeals decisions denying qualified immunity in recent years, a frequency the high court has noted with some consternation. *See White v. Pauly*, 137 S.Ct. 548, 551-552 (2017) (per curiam); *Mullenix v. Luna*, 136 S.Ct. 305, 308 (2015); *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011).

The deadly consequences to innocent people of "dampen[ing] the ardor" of law enforcement have become all too clear in the three years since Plaintiff's "hands up" falsehood[4] sparked national outrage. After many years of declining crime rates, "[v]iolent crime has now risen by a significant amount for two consecutive years." Heather Mac Donald, Hard Data, Hollow Protests, City Journal, Sept. 25, 2017, https://www.city-journal.org/html/hard-data-hollow-protests-15458.html. While civil suits may not be the main reason for the "Ferguson Effect," *see id*., the effect illustrates that the *Harlow* court's concern of police pull-backs was a genuine one.

B. Dismissal Pretrial.

In *Harlow v. Fitzgerald*, *supra*, the Supreme Court decided that recalibration of immunity law was necessary because the costs of litigation under modern civil procedure required that immunity provide for dismissal pretrial, and the subjective component of prior immunity law generally

4. *See* DOJ Report 44, 82. "Witness 101" is obviously the Plaintiff.

allowed plaintiffs to easily plead a triable issue of fact. *See* 457 U.S. at 816. The costs of litigation are not only monetary. They also include "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id*. To avoid these costs, the court scrapped the subjective element and adopted the standard of "objective reasonableness of an official's conduct, as measured by reference to clearly established law . . . ." *Id*. at pp 817-818.

The importance of terminating litigation at the threshold, not merely prevailing at trial, is a continuing theme in the Supreme Court's immunity jurisprudence after *Harlow*. *See Pearson v. Callahan*, 555 U.S. 223, 231-232 (2009). "Insubstantial claims" are to be dismissed "at the earliest possible stage in litigation," "prior to discovery." *Id*., quoting earlier cases.

If this case were to go to trial and the facts were to be found as the Department of Justice investigation found them, then the Defendants would prevail. *See* DOJ Report 11-12.[5] A principal purpose of qualified immunity, however, is to preclude the costs of trial. In this case, the doctrine can and should serve that function because it is not "beyond dispute" that the Plaintiff's allegations of fact would constitute a violation of the Fourth Amendment rights of the Plaintiff.

5. The panel opinion says at page 4, "if there was a seizure, the Defendants make little argument that the force used was not unreasonable." That is in the context of the present pretrial motion. The reasonableness of the force used would surely be a major issue if the case went to trial.

C. Not Beyond Dispute.

The panel opinion notes on page 4, "Johnson concedes that if there was no seizure virtually all of his claims fall away." In Part II of this brief, amicus has explained why there was no seizure as that term is used in the Fourth Amendment. The Fourth Amendment right at issue is the right to be free of unreasonable seizures, and a violation of that right necessarily requires a seizure. To decide a qualified immunity claim in favor of a plaintiff, a court must find both (1) that the plaintiff's allegations, if proved, would be a violation of a right, and (2) that the right in issue was "clearly established" at the time of the act. *Pearson*, 555 U.S. at 232. After *Pearson*, federal courts have the option to skip the first step if the defendant wins on the second. *See id*. at 236.

A common error in qualified immunity cases is defining the right in question "at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. at 742. Of course the right to be free of unreasonable seizures is clearly established, but the question is whether it was clearly established that Officer Wilson's actions constituted a seizure at all on the "particularized" facts of this case. *See White v. Pauly*, 137 S.Ct. 548, 552 (2017) (per curiam). In *White*, "[t]he panel majority misunderstood the 'clearly established' analysis: It failed to identify a case where an officer acting under similar circumstances as Officer White was held to have violated the Fourth Amendment." *Id*. Except for the officer's name, those words could just as well have been written for this case.

Every case cited for the panel's "particularized" analysis, see Panel Opn. 10-11, is a case where the existence of a seizure is undisputed and the only question is whether the amount of force was justified, *i.e.*, whether the

seizure was reasonable under the rule of *Graham v. Connor*, 490 U.S. 386 (1989). *See Craighead v. Lee*, 399 F.3d 954, 958 (8th Cir. 2005) (shot and killed); *Brown v. City of Golden Valley*, 574 F.3d 491, 494 (8th Cir. 2009) (traffic stop, taser actually applied); *Shekleton v. Eichenberger*, 677 F.3d 361, 365 (8th Cir. 2012) (handcuffed); *Small v. McCrystal*, 708 F.3d 997, 1002 (8th Cir. 2013) (tackled and handcuffed).

What *is* clearly established is that an attempted seizure is not a seizure within the meaning of the Fourth Amendment. *See California v. Hodari D.*, 499 U.S. 621, 626, n.2 (1991). Plaintiff must allege an "unreasonable seizure," and cases about "unreasonable" are not established law, clearly or otherwise, on the issue of whether there was a "seizure." It would have been unreasonable to shoot in the highly unlikely event that the circumstances alleged by the Plaintiff were actually true, but it still would not be a violation of Plaintiff's Fourth Amendment rights if the actions did not constitute a seizure. *See id*. at 623-624; *id*. at 630 (Stevens, J., dissenting); *McGrath v. Tavares*, 757 F.3d 20, 24, n.7 (1st Cir. 2014) (shoot and miss); *Adams v. City of Auburn Hills*, 336 F.3d 515, 519 (6th Cir. 2003) (same).

On disputed questions of law, including application of general rules to particular facts, the "clearly established" hurdle is a very high one for the Plaintiff. The rule does "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. at 741 (emphasis added). That is, it must be "beyond debate" in the Plaintiff's favor. In this case, it is beyond debate that it is *not* beyond debate that the actions alleged by the Plaintiff

amount to a "seizure" within the meaning of the Fourth Amendment. That is all that is needed to decide this case.

CONCLUSION

The decision of the District Court should be reversed.

November 8, 2017

Respectfully submitted,

/s/KENT S. SCHEIDEGGER
KENT S. SCHEIDEGGER
KYMBERLEE C. STAPLETON
EDWARD D. GREIM
ALAN SIMPSON
Attorneys for Amicus Curiae
National Police Association

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,161 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X7 in 15-point Times New Roman.

STATEMENT OF COMPLIANCE WITH RULE 28A(h)(2)

This brief complies with the 8th Cir. Rule 28A(h)(2) because it has been scanned for viruses and is virus-free.

/s/KENT S. SCHEIDEGGER
KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
National Police Association
Dated: November 8, 2017