No. 22-1246

IN THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Vanessa Dundon et. al.
*Plaintiffs-Appellants*,
v.

Kyle Kirchmeier, et. al.
*Defendants-Appellees*.

Appeal from the U.S. District Court for the District of North Dakota
Case No. 1:16-cv-406 DMT ARS
The Honorable Judge Daniel M. Traynor

# BRIEF FOR THE NATIONAL POLICE ACCOUNTABILITY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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## CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Policy Accountability Project (NPAP) states that it is a non-profit organization, that it has no parent corporation, and that no publicly held corporation owns ten percent or more of its stock because it has no stock.

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## STATEMENT OF INTEREST[1]

The National Police Accountability Project (NPAP) was founded in 1999 by members of the National Lawyers Guild to address misconduct by law enforcement officers through coordinating and assisting civil-rights lawyers. NPAP has approximately 550 attorney members practicing in every region of the United States, including dozens of members who represent clients that have been subjected to force and restrained while engaged in protest activity.

NPAP provides training and support for these attorneys and resources for non-profit organizations and community groups working on law enforcement officer accountability issues. NPAP also advocates for legislation to increase police accountability and appears regularly as amicus curiae in cases, such as this one, presenting issues of particular importance for its members and their clients.

Over the last two years, NPAP members have encountered a disturbing trend of law enforcement agencies using violent tactics to suppress peaceful protests, including using impact munitions and tear gas against people engaged in lawful First Amendment activity. In particular, NPAP members have represented

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), Amicus National Police Accountability Project (NPAP) has received consent to file this brief from counsel for the parties.

protesters injured during the summer 2020 George Floyd protests who were targeted with noxious gases, rubber bullets, 40mm rounds, bean bags fired out of a shotgun, and other munitions. Currently, NPAP members have filed civil rights cases on behalf protesters injured while protesting police brutality in over 20 cities including Minneapolis, MN and St. Louis, MO. Courts must enforce Fourth Amendment protections to stem the tide of police violence and prevent constitutional violations at future protests.

## STATEMENT OF ISSUES

Whether law enforcement officers who fire munitions at, and strike, peaceful protestors to restrain them from remaining in their place of protest, or to restrain them from moving closer to the officers, have seized the persons hit within the meaning of the Fourth Amendment at the instant they are struck.

## STATEMENT OF FACTS

Amicus NPAP adopts the Statement of Facts in the Appellants' Brief insofar as it is relevant to the issue of whether the defendants seized the plaintiffs within the meaning of the Fourth Amendment.

## ARGUMENT

I. A Fourth Amendment Seizure May Occur in a Variety of Circumstances.

The court below held that the appellants who were struck by munitions and water cannons fired by law enforcement officers were not seized within the meaning of the Fourth Amendment. *Dundon v. Kirchmeier*, --- F.Supp.3d ---, 2021 WL 6774678 (D. No. Dakota 2021), *23. The court recognized a previous decision by the Eighth Circuit establishing both that a seizure occurs when there is an "application of physical force [to] restrain[ ] freedom of movement," and that the "restraint need not actually "'succeed in stopping or holding [the person] even for an instant,'" *Atkinson v. City of Mountain View, Mo.*, 709 F.3d 1201, 1208 (8th Cir. 2013), citing *Brendlin v. California,* 551 U.S. 249, 260 (2007) and *California v. Hodari D.*, 499 U.S. 621, 625 (1991). Nonetheless, the court below found that because the officers did not encircle and herd the protestors, and because the protestors were able to move *after* force was used against them, there was no seizure. *Dundon* at *23. In essence, the court held that because appellants were "free to leave" the area after having been shot, there was no seizure. *Id.* at *17, 22.

The "free to leave" test applied by the lower court misstates the principles that the Supreme Court has established to define a seizure under the Fourth Amendment and fails to account for the variety of circumstances under which seizures take place. The Court has provided multiple definitions of when a Fourth Amendment "seizure" takes place. In some circumstances, whether a subject of law enforcement interest is free to leave may resolve whether there was a seizure.

*I.N.S. v. Delgado*, 466 U.S. 210 (1984) (an initially consensual encounter between a citizen and an officer may be transformed into a seizure "if, in view of all the circumstances surrounding the incident, a reasonable person would believe he was not free to leave"); *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (the fatal shooting of a fleeing suspect constituted a seizure: "Whenever an officer restrains the freedom of a person to walk away, he has seized that person.").

In *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989), the Court ruled more broadly that, "Violation of the Fourth Amendment requires an intentional acquisition of physical control." This was said to require "a government termination of movement *through means intentionally applied.*" *Id.* at 597. (emphasis in original).[2]

In *California v. Hodari D.*, 499 U.S. 621 (1991), the Court distinguished between a seizure that results from a show of authority as opposed to an application of physical force. With respect to a seizure by a show of authority, a seizure occurs only if the subject yields to the authority. Thus, a suspect running from the police who continues to flee despite the officer's order to stop has not been seized. The "slightest application of physical force," however, even if the

[2] Significantly, Justice Scalia noted, "In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the accidental discharge of a gun with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg." *Id.* at 598-99.

suspect is able to escape, is sufficient to constitute a seizure *for the duration of the application of force*. *Id.* at 625. Justice Scalia explained, "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful." *Id.* at 626.

In *Florida v. Bostick*, 501 U.S. 429, 435 (1991), a decision critical to the analysis of the instant case, the Court explicitly recognized that the "free to leave" test to define a seizure is not always appropriate. Indeed, the Court concluded that the Florida Supreme Court in that case had "erred ... in focusing on whether [defendant] was 'free to leave' rather than on the principle that those words were intended to capture." *Id.* at 435. In circumstances in which the "free to leave" test is inappropriate, the test was said to be "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 436. The Court noted that it had previously said that the "crucial test" is "whether, taking into account all the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.'" *Id.* at 437. (citing *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988).

In *Bostick* a bus passenger was approached by officers who boarded the bus and requested his permission to search his luggage. The issue presented for review was "whether a police encounter on a bus of the type described above necessarily

constitutes a 'seizure' within the meaning of the Fourth Amendment." *Id.* at 433. The issue in the case was not the seizure of the cocaine in Bostick's luggage, but the seizure of his person. The encounter was said to trigger Fourth Amendment scrutiny if "it loses its consensual nature." *Id.* at 434. Under the circumstances, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter." *Id.* at 435-36. The Court did not determine whether Bostick had been seized but remanded that question for a determination of how coercive the police conduct had been.

In *Brendlin v. California,* 551 U.S. at 254, the Court stated that a person is seized when an officer "'by means of physical force or show of authority,' terminates or restrains his freedom of movement 'through means intentionally applied.'" (citations omitted)

Most recently, in *Torres v. Madrid*, 141 S.Ct. 989, 994 (2021), the Court reaffirmed *Hodari D.*, and held that, "The application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person." The Court also reaffirmed the distinction between seizures by a show of authority and seizures by physical force. In the former, compliance with the official demand is essential for there to be a seizure. In the latter, a seizure occurs *at the instant physical force is applied*, even if the subject does not submit to apprehension. *Id.* at 999. As a result, the Court held that a person shot by the

police was seized, even though she subsequently escaped.

The Court stated that, "A seizure requires the use of force *with intent to restrain.*" *Id.* at 989. The Court had no occasion in *Torres* to define the full scope of the meaning of "restrain." The Court specifically noted that it was not opining on matters not presented, such as "pepper spray, flash-bang grenades, lasers, and more." *Id.* It considered "only force used to apprehend." *Id.*

Restraint is a broader term than apprehension. In *Torres* the Court began its discussion of the law by citing *Terry v. Ohio*, 392 U.S. 1, 19, n. 16 (1968) for the proposition that "the 'seizure' of a 'person,' … can take the form of 'physical force' or a 'show of authority' that 'in some way restrain[s] the liberty' of the person." The Court also referred to a seizure as "the termination of freedom of movement." *Torres*, 141 S.Ct. at 1001.

The Merriam-Webster Dictionary defines "restrain" as:

1. a. to prevent from doing, exhibiting, or expressing something
   // *restrained* the child from jumping
   b. to limit, restrict, or keep under control
   // try to *restrain* your anger

2. to moderate or limit the force, effect, development, or full exercise of
   // *restrain* trade

3. to deprive of liberty
   *especially*: to place under arrest or restraint[3]

[3] *Restrain*, Merriam Webster Dictionary, https://www.merriam-webster.com/dictionary/restrain

A "restraining order" from a court may enjoin a party either to do or not do something. See, e.g., Fed. R. Civ. Proc. 65: "every restraining order must … describe in reasonable detail … the act or acts restrained or required." Restraint in that sense is coercion either to hold one in place or to require other actions.

The term restrain readily encompasses what the intent of law enforcement was in the instant case: to prevent the protestors from remaining on the bridge, to prevent them from moving toward the police barricade, to limit and restrict their ability to continue to protest on the bridge, to deprive them of their liberty to continue their protest on the bridge, and to require them to move.

The principal error in the district court's opinion in this case was its focus on what the protestors were free to do and what they did *after* they were seized. The fact that they were not subsequently taken into custody and were free to leave does not negate the fact that they were seized at the instant they were struck by munitions.

## II. A Seizure Occurs When the Government Restrains a Person's Freedom to Remain as well as Their Freedom to Leave.

Once we understand that a seizure by force may take place only for the length of time that physical force is applied to the subject, as established by *Hodari D.* and *Torres*, it becomes clear that it makes no difference whether an officer seizes the suspect with the intent to force him to stay or to force him to leave. The existence of the seizure does not depend upon what the subject does after the force

has been applied. The Supreme Court recognized this in both *Hodari D.* ("To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity." 499 U.S. at 625, emphasis in original), and *Torres* ("In addition to the requirement of intent to restrain, a seizure by force—absent submission—lasts only as long as the application of force. That is to say that the Fourth Amendment does not recognize any '*continuing* arrest during the period of fugitivity.' The fleeting nature of some seizures by force undoubtedly may inform what damages a civil plaintiff may recover, and what evidence a criminal defendant may exclude from trial. But brief seizures are seizures all the same." 141 S.Ct. at 999, emphasis in original, citations omitted).

That a seizure may interfere with the freedom to *remain* as well as the freedom to *leave* has been recognized by a number of courts. In *Bennett v. City of Eastpointe,* 410 F.3d 810, 834 (6th Cir. 2005), the court reviewed several incidents of racially motivated harassment by police of Black youths on bicycles in a nearly all-white suburb of Detroit. In one incident a Black youth was ordered by an officer to walk his bicycle out of the suburb back into Detroit, while the officer watched to make sure he complied. The court found a Fourth Amendment seizure. The court reasoned:

> Fourth Amendment jurisprudence suggests a person is seized not only when a reasonable person would not feel free to leave an encounter with police,

> but also when a reasonable person would not feel free to *remain* somewhere, by virtue of some official action. (emphasis in original)

In *Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994), a police officer had demanded that tenants vacate their premises. The court recognized that a seizure might arise not only because a person is not free to *leave* a location, but also because they are not free to *remain*. Because the officer had invoked qualified immunity, the court did not determine whether his coercive conduct was sufficient to amount to a seizure but resolved the case on the ground that the law was not clearly established. See also, *Black Lives Matter D.C. v. Trump*, 544 F.Supp.3d 15, 48-49 (D.D.C. 2021) (recognizing argument that seizure resulted when protestors' freedom of movement was restrained when they were forced to leave the area, but affording qualified immunity because law was not clearly established).

In the instant case, law enforcement officers shot appellants with the intent to restrain them from continuing their protest on the bridge and interfered with their freedom to remain. To put it in other words, at the instant appellants were struck, they suffered a termination of their freedom of movement by means intentionally applied, in the language of *Brower*. They were temporarily immobilized and, in some instances, knocked to the ground. When the officers shot the protestors with munitions and water cannons, the latter were clearly not at liberty to ignore the police presence and go about their business of protesting, in

the language of *Bostick* and *Michigan v. Chesternut*. These seizures were complete at the moment physical force was applied to the bodies of appellants. The fact that they were subsequently able to leave the area is irrelevant to the Fourth Amendment analysis.

Consider examples from parallel situations. If a teacher were to expel a student from a classroom, or from a schoolhouse, by physically grabbing them and tossing them out the door, the teacher would have "seized" the student during the period of time they had their hands on him or her. If a bailiff were to grab a spectator in a courtroom and physically throw him out of the room, the bailiff would have "seized" the spectator while physically manhandling him or her. If officials forcefully remove one in attendance from a public meeting, they have seized the person during the period he or she is physically removed. We would not fail to find a seizure in these cases merely because the person might have been "free to leave" after the application of physical force was terminated. Nor would we say there was no seizure because the official's intent was to remove the subject rather than to force them to stay. In these examples the officials in question intend to and do restrain the liberty of the subjects and retrain their freedom of movement.

Moreover, in all three of these examples there would be a seizure if instead of physically grabbing the subjects with their hands the officials forced them to leave by firing projectiles at them. The Court concluded in *Torres*, "This case does

not involve 'laying hands,' but instead a shooting. Neither the parties nor the United States as *amicus curiae* suggests that the officers' use of bullets to restrain Torres alters the analysis in any way … we see no basis for drawing an artificial line between grasping with a hand and other means of applying physical force to effect an arrest." 141 S.Ct. at 997. The Court emphasized that "the focus of the Fourth Amendment is 'the privacy and security of individuals,' not the particular manner of 'arbitrary invasion[ ] by governmental officials." *Id.* at 998 (citation omitted).

The case law has recognized that seizures occurred in circumstances such as the examples just described. In *Wallace by Wallace v. Batavia School Dist. 101,* 68 F.3d 1010 (7th Cir. 1995), a teacher grabbed a student's elbow and wrist to remove her from the classroom. The court found there to be a Fourth Amendment seizure, rejecting the defendant's argument to the contrary, noting that school district policy allowed teachers to restrain students physically in order to protect students and others from physical harm. The court took the school context into account in concluding the seizure had been reasonable. See also, *Price v. Mueller-Owens,* 516 F.Supp. 3d 816, 828 (W.D. Wis. 2021) (use of excessive force to remove student from classroom analyzed as Fourth Amendment seizure); *JL v. Eastern Suffolk Boces*, 2018 WL 1882847 (E.D. N.Y. 2018) *11, ("can be no dispute that" teacher's assistant who tackled student and held his arms so he could not punch

anyone restricted his movement and seized him within meaning of Fourth Amendment); *Muhammad v. Chicago Bd. of Ed.,* 1995 WL 89013 (N.D. Ill. 1995) (excessive force claim against school security officer by member of local school council who was assaulted, struck, beaten and thrown through a metal door, although not arrested, analyzed as a Fourth Amendment seizure, although plaintiff did not allege "that he *was not free to leave,* but rather that he *was not free to stay*.")

In *Salmon v. Blesser,* 802 F.3d 249 (2d Cir. 2015), the court held that allegations that a police officer removed plaintiff from the courthouse by grabbing him by his collar, twisting his arm behind his back, and shoving him toward the door, were sufficient to plead a Fourth Amendment seizure. The decision lucidly illuminates the issue in the instant case. The Second Circuit had earlier held, in *Sheppard v. Beerman*, 18 F.3d 147 (2d Cir. 1994) that an order to leave the courthouse did not constitute a seizure under the Fourth Amendment. In that instance, no physical force was used to eject the person. *Salmon* distinguished *Sheppard* and articulated what made the actions of the officer a seizure:

> *Sheppard* states a general rule that a police order to leave an area, without more, does not effect a seizure of the person so ordered. Nevertheless, where, as here, an official uses physical force to effect the ejection, so that for a time, however brief, he intentionally restrains the person and controls his movements, a plaintiff can plausibly plead a seizure subject to the Fourth Amendment's reasonableness requirement. 802 F.3d at 251.

This logic is directly applicable to the use of force by police to disperse a crowd of protestors. The *Salmon* court stated, "As the Supreme Court has recognized, the 'free to leave' test may not be the best measure of a seizure where a person has no desire to leave the location of a challenged police encounter." *Id.* at 253 (citing *Bostick*). The court specified that a mere official request for a person to leave a public area would not constitute a seizure. However, *Salmon* involved using "painful force to control [plaintiff's] movements." The court held, "Whatever other actions might effect a Fourth Amendment seizure of a person ordered to depart a public area, the intentional use of physical force to restrain the person and control the movements of a compliant person certainly does." *Id.* at 254, citing *Hodari D.* for the meaning of "seizure" as "laying on of hands or application of physical force to restrain movement," the 1986 edition of Webster's defining "seize" as, *inter alia,* "to possess or take by force" and "to take hold of," and 2 Samuel Johnson, *A Dictionary of the English Language* (8th ed. 1799) defining "to seize" as, *inter alia*, "[t]o take hold of; to grip[ ]; to grasp" and "to take possession of by force."

Of particular import to the instant case, the *Salmon* court concluded that it did not matter whether the officer's ultimate purpose "was to secure [plaintiff's] departure from the courthouse or to prevent it," because "For such time as [the officer] held [plaintiff] by the collar and twisted his arm behind his back, [the

officer] was intentionally restraining and controlling [plaintiff's] movements, thereby transforming their encounter, even if only briefly, into a detention, which qualifies as a seizure of [plaintiff's] person." 802 F.3d at 254.

In *Youkhanna v. City of Sterling Heights*, 934 F.3d 508, 523 (6th Cir. 2019), the court adopted the *Salmon* analysis with respect to a claim by a person who had been ejected from a public meeting. The court agreed that where painful force beyond mere "guiding force" is used to make an ejection, there would be a Fourth Amendment seizure. In *Youkhanna*, however, only "guiding force" was used and thus there was no seizure.

In *Heaney v. Roberts*, 846 F.3d 795, 804-05 (5th Cir. 2017), a police officer removed the plaintiff from a public meeting, shoving him and causing him to fall to the floor, then seizing him by the arms and forcibly ejecting him from city council chambers. The court held that the officer had seized the plaintiff under the Fourth Amendment. See also, *Plonka v. Borough of Susquehanna*, 2017 WL 1036478 *3 (M.D. Pa. March 17, 2017) (where police chief placed his hands on plaintiff, twisted his arms behind his back, and maintained control over his movements while pushing him from a city council meeting, there was a Fourth Amendment seizure).

## III. When Law Enforcement Officers Fire Munitions at Protestors to Restrain Their Ability to Remain in a Space the Officers Seize Them Within the Meaning of the Fourth Amendment.

The principles developed in the foregoing argument apply to the use of force by law enforcement officers to disperse individuals from a space. Several courts have determined that individuals struck by projectiles during efforts by law enforcement to disperse a crowd have been seized. In *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. 2012), a campus police officer shot plaintiff in the eye with a pepper ball projectile as police attempted to clear an apartment complex of partying students. The plaintiff collapsed to the ground writhing in pain and was then removed from the scene by other civilians and taken to the hospital. The court reasoned:

> Whether the officers intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates. Regardless of their motives, their application of force was a knowing and willful act that terminated Nelson's freedom of movement. It unquestionably constituted a seizure under the Fourth Amendment. *Id.* at 877-78.

The court held that the force used was unreasonable and constituted excessive force. It further held that it was clearly established that the intentional use of force which terminates an individual's freedom of movement constitutes a seizure and that prior decisions of the Ninth Circuit with respect to the use of pepper spray and projectiles clearly established that the force in this case was constitutionally unreasonable.

In *Ciminillo v. Streicher*, 434 F.3d 461, 466 (6th Cir. 2006), the court held that a plaintiff shot with a beanbag propellant during a riot while walking toward the officer with his hands above his head was seized. He fell to the ground, where officers briefly ordered him to stay and then told him to report to another officer at the end of the street, but he was not arrested. The court ruled that the fact that he had not been handcuffed nor taken to the police station did not preclude a determination that he had been seized. Whether the officer had intended to restrain his movement was ruled to be a disputed question of fact.

In *Mitchell v. Kirchmeier*, 28 F.4th 888, 898 (8th Cir. 2022), this Court held that a protestor shot at by several officers and struck with lead-filled bean bags that shattered his eye socket was subjected to excessive force and a violation of his Fourth Amendment rights. The individual was subsequently arrested. The opinion does not analyze what constituted the Fourth Amendment seizure in the case. The subsequent arrest would, of course, constitute a seizure. The analysis in this brief leads to the conclusion, however, that Mitchell would have been seized by the blast of bean bags if they were fired to stop him from moving forward or with the intent of forcing him to disperse, whether or not he was ultimately arrested.[4] The opinion does not discuss the issue. Nor did this Court reach the merits of the issue of

[4] We note that, according to the opinion, the officers "had been firing lead-filled bean bags at the protestors for some time before they shot Mitchell." *Id.*, at 901. This suggests their intent was to disperse the demonstrators.

whether deploying tear gas to force news reporters to move constituted a seizure in *Qurashi v. St. Charles County, Mo.*, 986 F.3d 831, 839 (8th Cir. 2021). The Court merely held that the law was not clearly established and afforded the officer qualified immunity. The issue of whether the use of physical force to compel someone to move constitutes a seizure is a recurring one and amicus urges the Court to resolve it in the instant case.

In *Puente v. City of Phoenix*, 2022 WL 357351 (D. Ariz. Feb. 7, 2022), the court held that individual plaintiffs struck by munitions, including smoke cannisters, pepper balls, muzzle blasts, and OC bullets, suffered a Fourth Amendment seizure when they were struck. The court reasoned that although they could still walk after they were hit, "their freedom of movement was affected by the officers' intentional actions." *12 In *Alsaada v. City of Columbus*, 536 F.Supp.3d 216, 265 (S.D. Ohio 2021), modified with respect to the terms of the preliminary injunction by *Alsaada v. City of Columbus, Ohio*, 2021 WL 3375834 (S.D. Ohio 2021), the court held that protestors were seized by force and by control when their freedom of movement was terminated by munitions fired by law enforcement to disperse them. On a motion for a preliminary injunction the court found a likelihood of success on the merits "that the deployment of less-lethal munitions constituted physical force that temporarily restrained the protestors").

See also, *NAACP of San Jose v. City of San Jose*, 2021 WL 4355339 (N.D. Cal. Sept. 24, 2021) (individuals shot by munitions fired by officers attempting to disperse the crowd at a protest suffered a Fourth Amendment seizure although they were not taken into custody); *Jennings v. City of Miami,* 2009 WL 413110 (S.D. Fla. 2009) (herding demonstrators by firing tear gas, pepper spray, shotgun-based projectiles, and other weapons constituted a termination of movement and thus a seizure); *Rauen v. City of Miami,* 2007 WL 686609 (S.D. Fla. 2007) (herding demonstrators to disperse them from one area into another by means of batons, pepper spray, OC spray rounds, pepper spray balls, bean bags, and tear gas and constituted termination of their freedom of movement and a seizure); *Otero v. Wood*, 316 F.Supp.2d 612 (S.D. Ohio 2004) (firing into an unruly crowd and striking plaintiff with a wooden baton meant to have been skipped along the ground but in this instance fired directly into plaintiff's face constituted a Fourth Amendment violation for the use of excessive force); *Coles v. City of Oakland*, 2005 WL 8177790 *5 (N.D. Calif. 2005) (using wooden bullets, bean bags, grenades, batons, and motorcycle hits to terminate protestors' freedom of movement and force them away from an area in a single direction constituted a seizure, noting "a person may be seized without becoming completely immobile or being forced to remain in one location," and intent to arrest is not required);

*Marbet v. City of Portland*, 2003 WL 23540258 *10 (D. Oregon 2003) (firing pepper spray and rubber bullets at protestors that restrained their freedom of movement constituted a seizure, rejecting argument that because protestors were able to walk away there was no seizure); *Lamb v. City of Decatur*, 947 F.Supp. 1261 (C.D. Ill. 1996) (allegations that police sprayed labor demonstrators with tear gas stated valid Fourth Amendment claim).

The court below distinguished from the instant case those prior cases where protestors were herded from one location to another or encircled in a particular location. It did so on the ground that under those circumstances, there was a seizure because protestors had no egress available. *Dundon*, at *22. The lower court's analysis was incorrect. It may appear more obvious that persons forced into a location with no egress have been seized. But this is nothing more than the conclusion that one is seized when one is not "free to leave." In fact, for the reasons developed at length above, the protestors in those cases were seized when initially struck by munitions fired with the intent to restrain their ability to remain where they were. Under a proper analysis, that is when the seizure by force occurred. If they were subsequently trapped in a new location, that constituted another seizure by control.

## IV. CONCLUSION

For the foregoing reasons, this Court should hold that law enforcement officers seized appellants within the meaning of the Fourth Amendment when they fired at and struck them with munitions for the purpose of restraining their ability to remain in their location and continue their protest. The Court should then move to analyze the reasonableness of the force employed. On that issue, amicus NPAP agrees with the argument of appellants that the force used was unreasonably excessive and in violation of appellants' Fourth Amendment rights.

Dated: April 29, 2022

Respectfully submitted,
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that, pursuant to Federal Rule of Civil Procedure 32, this brief complies with the type-volume, typeface, and type style limitations because it has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font. This brief contains 5,119 words and is under the 6,500 word limit provided by Federal Rule of Civil Procedure 29(a)(5). The electronic copy of this brief has been scanned for viruses, and found to be free therefrom.

## CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the above and foregoing has been served electronically to counsel of record via operation of the Court's CM/ECF system this 29th day of April, 2022.

/s/ Lauren Bonds