

United States Court of Appeals
For the Eighth Circuit

No. 25-1952

Tosun Mahmud Fitol

Plaintiff - Appellee

v.

City of Omaha; Todd Schmaderer, Omaha Police Chief; Officers Jane or John
Doe, 1-21, in their individual capacities as employees of the City of Omaha

Defendants

Justyn Riley, Omaha Police Officer

Defendant - Appellant

Appeal from United States District Court
for the District of Nebraska - Omaha

Submitted: February 10, 2026

Filed: August 31, 2026

Before LOKEN, L.R. SMITH, and STRAS, Circuit Judges.

STRAS, Circuit Judge.

After a flashbang exploded near Tosun Fitol's head during a protest, he sued the officer who threw it. We reverse the denial of qualified immunity on his Fourth Amendment claim and otherwise dismiss the appeal for lack of jurisdiction.

I.

In the wake of George Floyd's death, protestors gathered in cities across the nation. One was Omaha, Nebraska, where Fitol joined a large crowd. He brought a sign paying tribute to Floyd and Zachary Bear Heels, a Native American man who died in Omaha Police Department custody.

Dozens of officers were there that day, including SWAT team member Justyn Riley. His gear included a flashbang, which creates a blinding flash and deafening sound to disorient anyone nearby, and a bodycam. It captured most of what happened that night.

Although the protest had started peacefully, it took a turn for the worse when he and another officer walked toward the crowd to pull back a colleague who had moved too close to the protestors. Water bottles came flying toward them, followed by pepper balls fired back by other officers. Pepper balls led to more water bottles, which then drew more pepper balls. At least until a flashbang dispersed most of the crowd.

Not Fitol, however, who stepped forward to yell at the officers and shake his fist. He began to retreat once officers fired more pepper balls, but the remaining protestors threw rocks. When two landed near Officer Riley, he looked at Fitol and threw a flashbang that went about thirty-five to forty-five feet through the air before detonating near his head.

From there, most of the remaining protestors left, Fitol included. But the flashbang blast had caused chemical burns, ruptured eardrums, a concussion, and even unconsciousness as he was running away. The eardrum injuries were so bad, in fact, that he continues to suffer hearing loss, tinnitus, and balance problems.

As relevant here, Fitol filed a lawsuit in federal district court alleging two constitutional claims against Officer Riley. *See* 42 U.S.C. § 1983. One was interference with his right to peaceably speak and assemble under the First Amendment. The other was a Fourth Amendment excessive-force claim. On summary judgment, the district court allowed both claims to move forward because, in its view, key facts were in dispute. “The question for us is whether . . . it should have.” *Hight v. Williams*, 164 F.4th 672, 675 (8th Cir. 2026).

II.

As usual, “[j]urisdiction comes first.” *Dean v. Bearden*, 79 F.4th 986, 988 (8th Cir. 2023). Summary-judgment denials are generally unappealable because they “do[] not ‘end[] the litigation on the merits.’” *Washington v. City of St. Louis*, 84 F.4th 770, 773 (8th Cir. 2023) (second alteration in original) (quoting *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 86 (2000)); *see* 28 U.S.C. § 1291 (granting appellate courts jurisdiction over “final decisions of the district courts”). “[T]he party who loses must generally wait until the case is over to appeal.” *Washington*, 84 F.4th at 773.

“Collateral orders . . . are different.” *Id.* They are a “small class of [immediately appealable] rulings, not concluding the litigation, but conclusively resolving claims of right separable from, and collateral to, rights asserted in the action.” *Id.* (alteration in original) (quoting *Will v. Hallock*, 546 U.S. 345, 349 (2006)). “Included among them is a decision denying qualified immunity” *Id.* To avoid losing its benefit, which “is an *immunity from suit* rather than a mere defense to liability,” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), any denial can be appealed right away. *See Ferguson v. Short*, 840 F.3d 508, 511 (8th Cir. 2016)

(explaining that “[c]ourts must resolve the matter of qualified immunity as soon as possible”).

Our jurisdiction, however, is more limited than usual. We can decide “[a]bstract issues of law,” but not other matters, like the sufficiency of the evidence or the viability of other claims or non-immunity defenses. *Washington*, 84 F.4th at 773 (quoting *Johnson v. Jones*, 515 U.S. 304, 317 (1995)); see *Smith v. Ark. Dep’t of Corr.*, 103 F.3d 637, 649 (8th Cir. 1996) (explaining that an exception exists for non-collateral issues that are “inextricably intertwined” with collateral ones (quoting *Swint v. Chambers Cnty. Comm’n*, 514 U.S. 35, 51 (1995))). Nor can we consider immunity claims that the district court never addressed. See *Jones v. Coonce*, 7 F.3d 1359, 1365 (8th Cir. 1993) (reviewing only the qualified-immunity claims resolved at summary judgment, not any others).

We have one here, which is the availability of qualified immunity on Fital’s First Amendment claim. To be sure, Officer Riley requested summary judgment on non-immunity grounds, including a lack of retaliatory motive or a reasonable chilling effect on speech.¹ See *Wolk v. City of Brooklyn Center*, 107 F.4th 854, 859–60 (8th Cir. 2024) (listing these elements in addition to whether “the plaintiff engaged in protected activity”). But without at least a “mention[] by the district court” of qualified immunity in connection with the claim, we lack jurisdiction to review it. *Washington v. Wilson*, 46 F.3d 39, 41 (8th Cir. 1995) (explaining that qualified immunity “must at the very least be mentioned by the district court, and preferably reasons affirming or denying [it] should be articulated before this [c]ourt has jurisdiction”); see *Schatz Fam. ex rel. Schatz v. Gierer*, 346 F.3d 1157, 1160 (8th Cir. 2003) (per curiam) (dismissing an interlocutory appeal for lack of jurisdiction

¹In fact, these arguments show why Fital’s First and Fourth Amendment claims are not “inextricably intertwined” with one another. *Swint*, 514 U.S. at 51. They “require[] entirely different analyses,” meaning neither is “coterminous with, or subsumed in,” the other. *Manning v. Cotton*, 862 F.3d 663, 671 (8th Cir. 2017) (citation omitted).

“[b]ecause there was no determination by the district court on the qualified[-]immunity issue”).

III.

What we can review is the denial of qualified immunity on Fital’s Fourth Amendment claim. If we can resolve it on purely legal grounds, like “whether the plaintiff-friendly version of the facts states a constitutional violation [or] the law clearly establishes a right,” we may do so. *Washington*, 84 F.4th at 773 (citation omitted).

The district court addressed it by ruling at summary judgment that “[a] reasonable jury could conclude that [Officer Riley] deployed [the] flashbang . . . to effectuate a seizure.” Fital, for his part, has argued throughout that Officer Riley used excessive force and unreasonably seized him when it happened. Here, those labels are just different ways of describing the same allegedly illegal act.² We have, after all, pointed to the existence of a seizure as the “threshold question” in an excessive-force case. *Dundon v. Kirchmeier*, 85 F.4th 1250, 1255 (8th Cir. 2023) (evaluating the use of force during a protest); see *McCoy v. City of Monticello*, 342 F.3d 842, 846–47 (8th Cir. 2003) (explaining that Fourth Amendment excessive-force claims depend on whether there was a seizure).

Answering it here would require us to decide whether, by throwing the flashbang, Officer Riley “objectively manifest[ed] an intent to restrain” Fital. *Hight*, 164 F.4th at 675 (alteration in original) (emphasis omitted) (quoting *Torres v.*

²It may be different when officers use force on someone they have already seized, like in a few of the cases relied upon by Fital. See *Mitchell v. Kirchmeier*, 28 F.4th 888, 898–99 (8th Cir. 2022); *Brown v. City of Golden Valley*, 574 F.3d 491, 496 (8th Cir. 2009); *Henderson v. Munn*, 439 F.3d 497, 503–04 (8th Cir. 2006); *Kukla v. Hulm*, 310 F.3d 1046, 1050 (8th Cir. 2002). We had assumed in each that a seizure had occurred, which is the disputed issue here, so they cannot clearly establish the law “for purposes of this case.” *Wilansky v. Morton County*, 179 F.4th 633, 641 (8th Cir. 2026) (citation omitted).

Madrid, 592 U.S. 306, 317 (2021)). And if he did, whether it was “objectively unreasonable under the particular circumstances.” *Baude v. Leyshock*, 23 F.4th 1065, 1073 (8th Cir. 2022). Even then, a plaintiff still must show that the law “clearly established that what happened to him” was an unreasonable seizure. *Keup v. Sarpy County*, 159 F.4th 533, 538 (8th Cir. 2025). It can be a steep hill to climb.

For Fitol, it is. Courts have yet to settle whether open-area use of flashbangs disperses crowds or detains those nearby. In other words, missing here is “controlling authority” or “a robust consensus of cases” that “clearly prohibit[ed] [Officer Riley’s] conduct in the particular circumstances before him.” *District of Columbia v. Wesby*, 583 U.S. 48, 63 (2018). Indeed, if anything, our cases generally suggest that the use of these types of devices does not “objectively manifest[] an intent to restrain.” *Hight*, 164 F.4th at 675 (emphasis omitted) (quoting *Torres*, 592 U.S. at 317). Most relevant here is one arising out of the same Omaha protest, which treated the firing of a pepper ball after another officer “pointed [someone] out” as showing an intent to “disperse, not to seize.” *Keup*, 159 F.4th at 537–38.

Other cases toe a similar line. Consider *Wolk*, which involved the use of “tear gas, flashbang grenades, and other crowd-control munitions” against protestors who gathered outside a police station following a shooting. 107 F.4th at 858. Even though the plaintiff “was shot in the knee with a rubber bullet” from “less than 10 feet away,” we granted qualified immunity because it was not clearly established “as of April 2021 that officers effect a seizure when they use force to disperse protestors.” *Id.* at 858–59. Nor would the legality of Officer Riley’s actions have been “beyond debate” nearly a year *earlier*, in May 2020, when he threw a flashbang at Fitol. *Taylor v. Barkes*, 575 U.S. 822, 825 (2015) (per curiam); see *City of Tahlequah v. Bond*, 595 U.S. 9, 13 (2021) (per curiam) (explaining that the law must be clearly established when the incident happened).

A pair of Dakota Access Pipeline protest cases reached a similar conclusion. See *Wilansky*, 179 F.4th at 640–41; *Dundon*, 85 F.4th at 1257. In both, protestors marched toward a police barricade, which prompted officers to use various chemical

munitions and less-lethal bullets to disperse the crowd. *See Wilansky*, 179 F.4th at 637–38; *Dundon*, 85 F.4th at 1254. As relevant here, one involved the firing of a “stinger ball” and a “flashbang embedded in a less-lethal bullet.” *Wilansky*, 179 F.4th at 638 & n.4. Even though the officers “aimed to hit” the plaintiff, “knocked her down,” and “severely injured her arm,” the use of those “dispersal weapon[s]” did not objectively manifest an intent to restrain. *Id.* at 640.

To be sure, we came out the other way in *Marks v. Bauer*, but only because other objective facts backed up the officer’s testimony that he used “force to restrain [the plaintiff’s] movement.” 166 F.4th 1121, 1128 (8th Cir. 2026); *see Keup*, 159 F.4th at 538 (distinguishing *Marks* on this ground). In particular, he had fired a “chemical-filled projectile” from close range right after the plaintiff had tussled with another officer. *Marks*, 166 F.4th at 1125–26. Here, by contrast, Officer Riley threw a flashbang, a different type of device, from much farther away. *See Keup*, 159 F.4th at 538 (drawing similar distinctions).

The Supreme Court has also recognized the uncertainty in the law. In *Torres*, it announced a “narrow” rule that using gunshots to “appl[y] physical force to [a fleeing suspect’s] body and objectively manifest[ing] an intent to restrain her” was a seizure. 592 U.S. at 318. But in doing so, it declined to “opine” about other issues, like whether the use of “pepper spray, flash-bang grenades, lasers, and more” can result in a seizure too. *Id.* at 317; *see Perkins v. City of Des Moines*, 168 F.4th 1100, 1106 (8th Cir. 2026) (citing *Torres* to support the conclusion that hitting someone with a non-lethal “impact round” while clearing out a protest-turned-riot was not a seizure). Maybe they can, but we have yet to clearly say one way or the other if they do.

IV.

We accordingly reverse the denial of qualified immunity on Fitol's Fourth Amendment claim, otherwise dismiss the appeal, and remand for further proceedings.
