No. 20-1790

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

E.W., by and through his guardian, RONNITA BRYANT,

Plaintiff-Appellee,

v.

BROADUS WILKINS and MYRON MONTGOMERY, in their individual capacities,

Defendants-Appellants.

On Appeal from the U.S. District Court
for the Eastern District of Michigan,
No. 18-cv-12964, Hon. Arthur J. Tarnow

PLAINTIFF-APPELLEE'S ANSWERING BRIEF

Jonathan R. Marko
MARKO LAW PLLC
1300 Broadway Street
Suite 500
Detroit, MI 48226
313-777-7529
jon@markolaw.com

Elizabeth R. Cruikshank
Kelsi Brown Corkran
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
202-662-9042
erc56@georgetown.edu

Counsel for Plaintiff-Appellee

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STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction over Plaintiff-Appellee E.W.'s federal claims under 28 U.S.C. § 1331. Defendants-Appellants Myron Montgomery and Broadus Wilkins appeal from the denial of summary judgment in their favor, stated on the record on July 15, 2020, and memorialized in an order dated July 22, 2021. For the reasons stated in E.W.'s motion to dismiss the appeal and herein, this Court lacks jurisdiction over this appeal. *See, e.g.*, *Bennett v. Krakowski*, 671 F.3d 553, 559-60 (6th Cir. 2011) ("[B]ecause Defendants' arguments regarding their claim that they are entitled to qualified immunity are based on contested facts that are pertinent to that determination, this court does not have jurisdiction to decide this issue.").

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction to review Defendants' interlocutory appeal of the district court's denial of summary judgment on qualified immunity grounds, where all of Defendants' arguments require drawing impermissible factual inferences in their favor.

2. Whether the district court correctly concluded that genuine disputes of material fact precluded summary judgment on E.W.'s excessive force claim against Defendant Wilkins.

3. Whether the district court correctly concluded that genuine disputes of material fact precluded summary judgment on E.W.'s excessive force claim against Defendant Montgomery.

INTRODUCTION

Early in E.W.'s freshman year of high school, he attempted to reenter the school building after school to retrieve his wallet from a teacher who had been holding it for him while he played basketball. There, he encountered an assistant principal, Defendant Myron Montgomery, who yelled at him to leave. Though E.W. attempted to explain himself, Montgomery refused to listen and instead grabbed the 5'3" 14-year-old, pushed him through two sets of doors, slammed him onto the pavement outside, and drove his knee into E.W.'s chest before walking away. A school police officer observing these events, Defendant Broadus Wilkins, did not believe that E.W. had committed any dangerous or criminal behavior or that E.W. posed any threat to Montgomery or to Wilkins. Nonetheless, he approached E.W. and "swung at" him, hitting him in the face.

E.W. emerged from these assaults with a fractured and dislocated jaw and an injured shoulder, and he experienced lingering pain from both injuries for years. He also suffered lasting psychological wounds and was diagnosed with post-traumatic stress disorder arising from the attacks.

The district court properly concluded that genuine disputes of material fact precluded summary judgment on Defendants' qualified immunity defenses to E.W.'s excessive force claims and that a reasonable jury could find that both Defendants had violated E.W.'s clearly established constitutional rights. In this interlocutory appeal,

Defendants attempt to relitigate the district court's determination that "lingering fact questions" remain regarding their use of force, repeatedly making arguments that require drawing impermissible inferences in their favor instead of taking the facts in the light most favorable to E.W. It is well established, however, that in an interlocutory appeal involving qualified immunity, this Court lacks jurisdiction to evaluate arguments that "drift[] from the purely legal into the factual realm and begin[] contesting what really happened." *Berryman v. Rieger*, 150 F.3d 561, 564-65 (6th Cir. 1998). In any event, the district court correctly determined that the evidentiary record—including video footage undermining Defendants' version of the events—forecloses summary judgment in Defendants' favor.

STATEMENT OF THE CASE

Factual Background

As the district court noted, the parties dispute material facts germane to resolution of the qualified immunity defense. The following facts rely primarily on the district court's recitation of the case and draw all inferences in favor of and construe the evidence in the light most favorable to E.W., the nonmoving party. *See Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 150 (6th Cir. 1995); *see also McDonald v. Flake*, 814 F.3d 804, 813 (6th Cir. 2016) ("[B]ecause we defer to the district court's factual assessments, ideally we need look no further than the district court's opinion for the facts and inferences cited expressly therein.").

At the time of the events of this case, E.W. was a skinny, 5'3" 14-year-old high school freshman. Order Denying in Part and Granting in Part Defs.' Mot. for Summary Judgment, ECF No. 69 ("Order"), PageID.1115. Defendants Montgomery and Wilkins each weighed an estimated 230 pounds. Mot. for Summary Judgment, Ex. 3, ECF No. 53-3 ("Montgomery Dep."), PageID.604; Mot. for Summary Judgment, Ex. 4, ECF No. 53-4 ("Wilkins Dep."), PageID.677. On October 9, 2017, E.W. left his wallet in the care of a teacher while playing basketball after school. Order at PageID.1115. Realizing that he needed his wallet to pay his bus fare home, E.W. headed back to the school building, planning to find either the teacher with whom he had left his wallet or the head principal. *Id.* E.W. attempted to enter the school through the side door, where he encountered an assistant principal, Defendant Montgomery, who appeared "hostile and angry" and who yelled at him to leave the building. *Id.* at PageID.1115-16. E.W. does not recall Montgomery telling him to go through the metal detectors at that time. Mot. for Summary Judgment, Ex. 2, ECF 53-2 ("E.W. Dep."), PageID.569. E.W. said nothing in response to Montgomery's order to leave, but he did as he was instructed. Order at PageID.1116; E.W. Dep. at PageID.571. E.W. then tried again, entering the school through a rear door, where he ran into Montgomery a second time. Order at PageID.1116. This time E.W. explained to Montgomery that he was there for his wallet and asked Montgomery to listen to him, but Montgomery yelled at him to leave the building within three seconds. *Id.*

When E.W. did not leave the building, Montgomery threw the papers he was holding, grabbed E.W., pushed him through the doors, slammed him to the pavement, and drove his knee into E.W.'s chest. Order at PageID.1116; E.W. Dep. at PageID.548. Montgomery described his behavior as an "attempt … to restrain" E.W., Montgomery Dep. at PageID.644, and E.W. perceived that Montgomery was trying to harm him with his knee, E.W. Dep. at PageID.580. After holding E.W. down with his knee for five or six seconds, Montgomery turned around and walked back into the school building. Order at PageID.1116-17; E.W. Dep. at PageID.566. A security camera captured footage of this assault, and that footage was submitted to and reviewed by the district court. Opp. to Mot. for Summary Judgment, Ex. 1, ECF No. 54-2, at PageID.739.[1]

A school police officer, Defendant Wilkins, was watching these events unfold. He "did not see [E.W.] try to assault or injure Montgomery in any way," "strike Mr. Montgomery," "hurt or injure Mr. Montgomery," "physically harm Mr. Montgomery," "do any type of dangerous criminal behavior that would cause [Wilkins] to arrest him," or "try to injure himself." Order at PageID.1118; Wilkins Dep. at PageID.686. He testified that, observing these events, he did not believe that

[1] For the convenience of this Court, E.W. is providing a flash drive containing the security video footage submitted to the district court. A section of that footage is also available online. *See* Tr. of Mot. Hr'g, ECF No. 68 ("Tr."), at PageID.1093 (referring to NBC News, *Security Footage Shows Assistant Principal Slamming Detroit Boy to Ground* (July 6, 2018), https://www.nbcnews.com/news/us-news/security-footage-shows-assistant-principal-slamming-boy-ground-n889496).

E.W. posed any danger to Montgomery's life or safety and that he "didn't see a reason [for Montgomery] to throw [E.W.] on the ground." Wilkins Dep. at PageID.687. And Wilkins testified that, "under the circumstances as [he] [knew] them[,] throwing [E.W.] on the hard concrete on purpose would be excessive force." *Id.*

Yet after Montgomery walked back toward the school, Wilkins approached, told E.W. to "get away from the school," and then "swung at" E.W., hitting E.W. in the face with his forearm. Order at PageID.1116; E.W. Dep. at PageID.548, PageID.590. Wilkins later testified that E.W. never physically threatened him, attacked him, attempted to "body check" him, or tried to hurt him and that E.W. was never under arrest, nor did Wilkins ever intend to put E.W. under arrest. Wilkins Dep. at PageID.686, PageID.691-92.

E.W. suffered lasting injuries from these assaults. At the children's hospital emergency department later that day, it was revealed that E.W. had broken and partially dislocated his jaw and injured his shoulder in the assault from Wilkins and the body slam from Montgomery. Order at PageID.1119; Opp. to Mot. for Summary Judgment, Ex. 6, ECF No. 54-7 ("Radiology Report"), at PageID.947. E.W. took prescribed pain medication for his shoulder for several weeks after the incident and then continued to take over-the-counter medications to treat his ongoing shoulder pain. E.W. Dep. at PageID.536.-37. He was unable to raise his right arm completely over his head until January 2019, more than a year after the assaults, and experienced shooting pain in his shoulder until that time. E.W. Dep. at PageID.537-38. The

injury to his jaw was severe, and it has still not healed completely: E.W. was required to drink his food through a straw during his recovery, and he continues to experience shooting pain in his jaw, particularly when opening his mouth for extended periods of time or chewing certain foods and gum. Order at PageID.1119; E.W. Dep. at PageID.528-30, PageID.545. E.W. was also psychologically scarred by the incident: He can "never have [his] life back that [he] had before"; he distrusts and fears police officers and has lost his dream of becoming one; he struggles to sleep and experiences nightmares; and he feels that he has lost his dignity. Order at PageID.1119; E.W. Dep. at PageID.545. A psychiatrist diagnosed E.W. with post-traumatic stress disorder resulting from the assaults. Order at PageID.1119.

District Court and Appellate Proceedings

E.W., by and through his guardian Ronnita Bryant, sued the Detroit Public Schools, Montgomery, Wilkins, and Securitas Security Services USA, Inc. in Michigan state court, and Defendants removed the suit to the Eastern District of Michigan. Notice of Removal, ECF No. 1, at PageID.1. As relevant here, the amended complaint asserted claims against Montgomery and Wilkins for excessive force under the Fourth and Fourteenth Amendments, as well as various state law claims. Am. Compl., ECF No. 5, at PageID.51-54.

Defendants moved for summary judgment on qualified immunity grounds, Mot. for Summary Judgment, ECF No. 53 ("MSJ"), at PageID.481-503, and the district court held a hearing on the motion on July 15, 2020, Tr. at PageID.1083-113.

The parties hotly contested material facts of the case. For instance, Defendants described the altercation between Montgomery and E.W. as a "tussle," with a "fair reading" being that "they fell together" to the ground, *id.* at PageID.1088, PageID.1097; ascribed to Montgomery the motivation of "eject[ing] a student who had twice purposefully avoided metal detectors when entering the school," *id.* at PageID.1088; downplayed the seriousness and longevity of the injury to E.W.'s shoulder from Montgomery's body slam, *id.* at PageID.1090; and argued that it was "impossible" for E.W. to have received "the type of injury that he suggest[ed] Wilkins caused," *id.*, despite medical records documenting E.W.'s injury.

Meanwhile, counsel for E.W. reiterated that E.W. had explained to Montgomery his reasons for returning to the school building but that Montgomery didn't want to listen and exploded in a fit of rage, *id.* at PageID.1092; that Montgomery had "throw[n] [E.W.] forcibly to the pavement" while E.W.'s hands were up in "fear and helplessness," *id.* at PageID.1093; and that E.W. was standing still when Wilkins walked up to him and swung at his face, *id.* at PageID.1101. The court played security video footage of the attack by Montgomery during the hearing, which reflected E.W.'s version of the facts. *Id.* at PageID.1092-98.[2]

[2] Defendants argued to the district court that the video footage had not been properly filed on the docket, Tr. at PageID.1098, a position they repeat on appeal, Opp. to Mot. to Dismiss Appeal ("MTD Opp."), Dkt. No. 29-1, at 11-13 (Jan. 28, 2021). The district court said E.W.'s method for submitting the video to the court was "not a problem" and that it would consider the method of submission "at most a technical violation that is correctable by filing an Amended Complaint to attach [the

The district court denied Defendants' motion in relevant part at the hearing, stating that "there are clearly issues of fact here." *Id.* at PageID.1111.[3] Before the district court issued an opinion providing its reasoning, Defendants noticed an interlocutory appeal from the denial of qualified immunity and filed their opening brief. E.W. moved to dismiss the appeal for lack of jurisdiction, because Defendants' appeal of the denial of qualified immunity involves only factual issues outside the scope of this Court's review on interlocutory appeal. *See infra* at 15-18 (describing the outstanding factual questions Defendants erroneously present as undisputed and Defendants' efforts to exclude unfavorable record evidence, like the security video footage and an expert report regarding E.W.'s lasting psychological trauma). That motion to dismiss was referred to the merits panel and remains pending.

The district court issued its opinion explaining its denial of summary judgment on July 22, 2021. Order at PageID.1114-1127. The court analyzed E.W.'s claim against Wilkins under the Fourth Amendment, concluding that "in addition to lingering fact questions regarding his use of force, 'it was clearly established that the use of force on a non-resistant or passively-resistant individual may constitute excessive force.'" *Id.* at PageID.1123 (quoting *McCaig v. Raber*, 515 F. App'x 551, 556

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video] to it." Tr. at PageID.1098-99. The district court cited this video evidence in its opinion denying summary judgment. Order at PageID.1118-19.

[3] The district court granted Defendants' motion for summary judgment on E.W.'s state law claims without prejudice, declining to exercise pendent jurisdiction over them, and E.W. refiled those claims with the Wayne County Circuit Court.

(6th Cir. 2013)). As for E.W.'s claims against Montgomery, the district court held that the Fourteenth Amendment right to bodily integrity applied to claims of excessive force by a teacher and denied qualified immunity because fact questions remained as to whether Montgomery "forcibly pushed Plaintiff out of the doors, slammed him into the ground, and drove his knee into Plaintiff's chest for several seconds" and whether E.W. "suffered a serious injury." *Id.* at PageID.1124-27.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction over Defendants' interlocutory appeal, for the reasons stated in E.W.'s motion to dismiss the appeal. Interlocutory review of a denial of qualified immunity is limited to "the district court's *legal* determination that the defendant's actions violated a constitutional right or that the right was clearly established" and does not extend to review of "the district court's determination of … which facts a party may, or may not, be able to prove at trial." *McDonald*, 814 F.3d at 812-13 (citing *Johnson v. Jones*, 515 U.S. 304, 313 (1995)). If a defendant is not "willing to concede the most favorable view of the facts to the plaintiff for the purposes of the appeal," the Court "cannot entertain the defendant's arguments." *Phelps v. Coy*, 286 F.3d 295, 298 (6th Cir. 2002).

Because Defendants have refused to "concede the most favorable view of the facts" to E.W., this Court lacks jurisdiction over their appeal. All of Defendants' arguments about why the force they used against E.W. was not constitutionally excessive require drawing impermissible inferences and reaching credibility

determinations in their favor. Their briefs also raise multiple, unmeritorious, disputes about the content of the factual record, which are properly the purview of the district court and have no place in an interlocutory appeal. And their remaining point involves an apparent attempt to appeal the district court's dismissal of E.W.'s state law claims—that is, they are attempting to appeal on an interlocutory posture the resolution of claims, unrelated to their federal qualified immunity defense, in their favor.

2. In any event, the district court properly denied Defendants' motion for summary judgment on the ground that there are genuine disputes of material facts regarding whether Defendants' use of force was excessive under clearly established law.

A. The district court correctly assessed E.W.'s excessive force claim against Wilkins under the Fourth Amendment "objective reasonableness" standard. Three factors are relevant to this inquiry: "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. Connor*, 490 U.S. 386, 396 (1998). In this Court, the consensus is that officers cannot use force … on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest." *Grawey v. Drury*, 567 F.3d 302, 314 (6th Cir. 2009). Viewing the facts in the light most favorable to E.W., each of the *Graham* factors compels the

conclusion that Wilkins' use of force was excessive because E.W. had committed no crime, posed no threat to Wilkins or others, and was not resisting arrest.

E.W.'s right to be free of excessive force was clearly established at the time of the events of this case. Cases in this circuit "clearly establish the right of people who pose no safety risk to the police to be free from gratuitous violence during arrest." *Shreve v. Jessamine Cty. Fiscal Court*, 453 F.3d 681, 688 (6th Cir. 2006). That is, it has long been "clearly established that [g]ratuitous violence is never reasonable because there is simply no governmental interest justifying gratuitous violence." *Williams v. Maurer* ("*Williams II*"), 9 F.4th 416, 440 (6th Cir. 2021) (alteration in original) (internal quotation marks omitted) (quoting *Walters v. Stafford*, 317 F. App'x 479, 491 (6th Cir. 2009)). Viewing the facts in the light most favorable to E.W., a reasonable jury could conclude that any violence by Wilkins was gratuitous: No use of force was "necessary to effectuate [his] arrest" because he was not being arrested, *Jones v. City of Elyria*, 947 F.3d 905, 917 (6th Cir. 2020), and there was no other basis for Wilkins to use force.

B. The district court correctly found that Montgomery was not entitled to qualified immunity because a reasonable jury could find that he used excessive force against E.W. under clearly established law.

1. The Fourth Amendment objective reasonableness test is the proper standard for evaluating E.W.'s excessive force claim against Montgomery. The analysis of any excessive force claim begins with identification of "the specific constitutional right allegedly infringed by the challenged application of force."

Graham, 490 U.S. at 394. The Fourth Amendment applies to "seizures made by … public school officials." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995); *see also, e.g.*, *Williams ex rel. Williams v. Ellington* ("*Williams I*"), 936 F.2d 881, 887 (6th Cir. 1991). Because "*all* claims" that a government actor used excessive force when attempting to restrain someone "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard," *Graham*, 490 U.S. at 388, and a claim that a school official used excessive force in seizing a student is covered by the Fourth Amendment, E.W.'s excessive force claim against Montgomery should be evaluated for objective reasonableness.

2. A reasonable jury could find that Montgomery's use of force was objectively unreasonable, in violation of E.W.'s clearly established right to be free of excessive force. This Court has repeatedly recognized that its cases "saying that the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law'" clearly establish that right for qualified immunity purposes. *Ortiz ex rel. Ortiz v. Kazimer*, 811 F.3d 848, 851-52 (6th Cir. 2016) . The record supports the finding that E.W. committed no crime, was no threat to anyone, and was not resisting arrest. Drawing all reasonable inferences in E.W.'s favor, Montgomery's use of force against him was gratuitous and thus constitutionally excessive. *See, e.g.*, *id.*

3. If this Court concludes that E.W.'s excessive force claim against Montgomery should be evaluated under the Fourteenth Amendment rather than the Fourth Amendment, the district court correctly found that disputed issues of fact

remain about whether Montgomery's use of force "shocks the conscience" under clearly established law. This Court has adopted a four-part test for evaluating a student's claim of excessive force under the Fourteenth Amendment: (1) whether there was a "pedagogical justification for the use of force"; whether the "force utilized [was] excessive to meet the legitimate objective"; whether the force was "applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm"; and whether there was a "serious injury." *Domingo v. Kowalski*, 810 F.3d 403, 411 (6th Cir. 2016). The district court correctly concluded that material facts going to each of these factors are disputed. And E.W.'s right under the Fourteenth Amendment to be free from force applied in "anger and malice" with no disciplinary purposes was clearly established at the time of the events in this case, *see Webb v. McCullough*, 828 F.2d 1151, 1158 (6th Cir. 1987), precluding summary judgment on qualified immunity grounds.

STANDARD OF REVIEW

This Court reviews a denial of summary judgment de novo. *McCloud v. Testa*, 97 F.3d 1536, 1541 (6th Cir. 1996). Summary judgment is proper if the evidence "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a motion for summary judgment, "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," and "[t]he evidence of the non-movant is to be believed, and all justifiable

inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ARGUMENT

I. For the Reasons Stated in E.W.'s Motion to Dismiss, This Court Lacks Jurisdiction Over Defendants' Interlocutory Appeal.

The denial of summary judgment on qualified immunity grounds "is an appealable 'final decision'" only "to the extent that it turns on an issue of law." *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). But a defendant asserting qualified immunity "may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20. That is, although this Court "may decide an appeal challenging the district court's *legal* determination that the defendant's actions violated a constitutional right or that the right was clearly established," it may not "decide an appeal challenging the district court's determination of … which facts a party may, or may not, be able to prove at trial." *McDonald*, 814 F.3d at 812-13 (citing *Johnson*, 515 U.S. at 313).

Thus, interlocutory appellate review of denials of qualified immunity is limited "to cases presenting neat abstract issues of law." *Johnson*, 515 U.S. at 317. But "[o]nce a defendant's argument drifts from the purely legal into the factual realm and begins contesting what really happened, [this Court's] jurisdiction ends and the case should proceed to trial." *Berryman*, 150 F.3d at 564-65; *see also Bennett*, 671 F.3d at 559-60

("[B]ecause Defendants' arguments regarding their claim that they are entitled to qualified immunity are based on contested facts that are pertinent to that determination, this court does not have jurisdiction to decide this issue."). If a defendant is not "willing to concede the most favorable view of the facts to the plaintiff for the purposes of the appeal," the Court "cannot entertain the defendant's arguments, no matter how meritorious they may be." *Phelps*, 286 F.3d at 298. As Defendants' opening brief and the briefing on E.W.'s motion to dismiss the appeal establish, this appeal presents anything but a "neat abstract issue of law."

Primarily, and dispositively, Defendants refuse to concede E.W.'s version of the facts as required at the summary judgment stage; instead, all of their qualified immunity arguments require the impermissible resolution of disputed facts in their favor. *See* Pls.' Mot. to Dismiss Appeal, Dkt. No. 26 ("MTD"), at 8-11 (Jan. 18. 2021). For instance, Defendants rely on the contention that Wilkins had "knowledge of EW's illegal, aggressive, combative and threatening conduct" to support the argument that his assault on E.W. was not objectively unreasonable. Opening Br. 28; *see also* MTD Opp. 8 (reiterating argument). But they ignore Wilkins' own testimony, which was that on the day of the incident he did not observe E.W. commit any crime or "do any type of dangerous … behavior"; that he never saw E.W. strike, hurt, or injure Montgomery; that E.W. did not "threaten to attack" Montgomery; that Wilkins did not perceive that Montgomery's life or safety was in danger; and that he did not believe that E.W. ever attempted or intended to hurt Wilkins himself. Order at

PageID.1118; Wilkins Dep. at PageID.686-87, PageID.692. Similarly, in arguing that Montgomery did not use excessive force in pushing E.W. through the doors of the school, slamming him to the concrete, and putting a knee on his chest, Defendants claim that Montgomery was "reasonably concerned for the safety of the building." Opening Br. 24; *see also* MTD Opp. 7. But whether Montgomery was in fact "concerned for the safety of the building" or was simply, as E.W. put it, "hostile and angry," Order at PageID.1116, and whether any such concern would have been reasonable, are questions of fact and credibility for the jury. *See, e.g.*, *Goodwin v. City of Painesville*, 781 F.3d 314, 322 (6th Cir. 2015) (noting that it suffices to create an issue of fact to point to "circumstantial evidence that a reasonable jury could find undermines the [party's] credibility"). Defendants' brief is replete with examples of impermissible inferences in their own favor, and their qualified immunity arguments fall apart without those inferences. *See also infra* at 23-24, 35-36 (setting forth other instances of Defendants relying on inferences favorable to their own position). Defendants' insistence on relying on "contested facts that are pertinent to" the qualified immunity determination strips this court of jurisdiction over their appeal. *Bennett*, 671 F.3d at 559-60.

Moreover, as demonstrated by the parties' briefing on E.W.'s motion to dismiss this appeal, Defendants ask this Court to resolve disputes about the content of the factual record, which is impermissible in an interlocutory qualified immunity appeal. *See* Reply to Resp. to Mot. to Dismiss Appeal, Dkt. No. 33 ("MTD Reply"), at 8, 9-10

(Feb. 2, 2021). Defendants dedicate extensive space in their briefing to attempting to keep out video evidence of Montgomery's assault on E.W., MTD Opp. 4-7, 11-13—evidence that the district court reviewed at the hearing on Defendants' motion and considered as part of its determination that disputed facts precluded summary judgment, Tr. at PageID.1092-98; Order at PageID.1118-19. When presented with Defendants' argument that the video was not properly filed and served, the district court disagreed, saying that the court would consider E.W.'s method for submitting the video to the court "at most a technical violation that is correctable by filing an Amended Complaint to attach [the video] to it," that the method of submission was "not a problem," and that the submission could be "clean[ed] up if [the case] goes to trial." Tr. at PageID.1098-99. Defendants' desire to exclude video evidence of the assault on E.W. is understandable—but their effort to persuade this Court to exclude the video falls well outside the jurisdictional scope of an interlocutory appeal. Defendants similarly attempt to appeal the submission of an expert report on the theory that it is "unsworn," MTD Opp. 9, despite never having challenged it in the district court, another indication that their interlocutory appeal depends on disputed issues of fact.

Finally, Defendants' efforts to relitigate E.W.'s state law claims fail because the district court declined to exercise pendent jurisdiction over those claims and dismissed them, so they are not before this Court at this time. *See* MTD 11-12; MTD Reply 8-9.

II. The District Court Correctly Denied Defendants' Motion for Summary Judgment.

Qualified immunity shields a government actor from liability "insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). There are two steps to the qualified immunity analysis, which may be conducted in any order: "In one step, the court determines whether 'the facts alleged show the officer's conduct violated a constitutional right'; in the other, it determines whether the right was 'clearly established' at the time of the events." *Godawa v. Byrd*, 798 F.3d 457, 462 (6th Cir. 2015) (citing *Cass v. City of Dayton*, 770 F.3d 368, 374 (6th Cir. 2014)).

The Court "analyze[s] qualified immunity separately for each defendant." *Peterson v. Heymes*, 931 F.3d 546, 555 (6th Cir. 2019). Interpreting the facts in the light most favorable to E.W., the non-moving party, both Wilkins and Montgomery used excessive force in seizing him, and E.W.'s right to be free from such force was clearly established at the time. The district court correctly found a genuine dispute of material facts foreclosing qualified immunity for both Defendants at the summary judgment stage.

A. Disputed issues of material fact foreclose summary judgment on E.W.'s excessive force claim against Wilkins.

As the district court found, the evidence at the summary judgment phase suffices to create a triable issue of fact regarding whether Wilkins' use of force against E.W. was objectively unreasonable under clearly established Fourth Amendment law.

1. There are disputed factual issues about whether Wilkins' use of force was objectively unreasonable, in violation of the Fourth Amendment.

The Fourth Amendment prohibits "unreasonable searches and seizures" by government officials. U.S. Const. amend. IV. Because the "reasonableness" of a seizure "depends not only on when a seizure is made, but also how it is carried out," the use of excessive force during a seizure can render the seizure unreasonable. *Tennessee v. Garner,* 471 U.S. 1, 8 (1985); *see also Terry v. Ohio*, 392 U.S. 1, 28 (1968) ("The manner in which [a] seizure … [is] conducted is … as vital a part of the [reasonableness] inquiry as whether [it is] warranted at all.").

The district court correctly determined that the evidence adduced is sufficient for a reasonable jury to find that Wilkins' conduct violated E.W.'s right to be free of excessive force. *Graham*, 490 U.S. at 396-97. "Claims alleging the use of excessive force are considered under the Fourth Amendment's 'objective reasonableness' standard." *Godawa*, 798 F.3d at 464 (citing *Graham*, 490 U.S. at 388). Under this standard, a court considers whether the official's actions were "'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their

underlying intent or motivation." *Graham*, 490 U.S. at 397; *see also Kostrzewa v. City of Troy*, 247 F.3d 633, 639 (6th Cir. 2001). Whether an officer has used excessive force depends on three factors: "the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

The ultimate question in the excessive force inquiry is whether the government official "had a legitimate government interest, i.e. justification, to exert force." *Morrison v. Bd. of Trs. of Green Twp.*, 583 F.3d 394, 404 (6th Cir. 2009). In this Court, the "consensus among our cases is that officers cannot use force … on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest." *Grawey*, 567 F.3d at 314. Indeed, "the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law.'" *Ortiz*, 811 F.3d at 852.

Each of the *Graham* factors strongly favors the conclusion that "the nature and quality of [Wilkins'] intrusion on [E.W.]'s Fourth Amendment interest" outweighs "the countervailing governmental interests at stake." *Graham,* 490 U.S. at 396.

The first *Graham* factor, the severity of the crime at issue, "cuts against a finding of justified use of force" where "there was no probable cause that [the plaintiff] had committed any crime at all before." *Wright v. City of Euclid*, 962 F.3d 852, 867 (6th Cir. 2020); *see also Kent v. Oakland Cty.*, 810 F.3d 384, 390-91 (6th Cir. 2016) (fact that plaintiff in excessive force case "was never charged with any crime" "call[ed]

… into question" the use of force against him). Wilkins' own testimony was that he had not observed E.W. commit any crime or "do any type of dangerous … behavior," Wilkins Dep. at PageID.686, much less commit the kind of "sever[e]" crime that might render reasonable the use of force to subdue him, *Graham*, 490 U.S. at 396.

As for the second *Graham* factor, Wilkins' testimony also establishes that E.W. did not "pose[] an immediate threat to the safety of [himself] or others." *Id.* Wilkins testified that he never saw E.W. strike Montgomery, hurt or injure Montgomery, or physically harm Montgomery in any way and that E.W. did not "threaten to attack" Montgomery; that Wilkins did not perceive that Montgomery's life or safety was in danger; and that E.W. did not intend to hurt Wilkins. Wilkins Dep. at PageID.686-87, PageID.692.

The third factor similarly weighs in E.W.'s favor. This Court has made clear that "passive resistance—or no resistance at all—does not justify … use of force." *Wright*, 962 F.3d at 867 (citing *Goodwin*, 781 F.3d at 323); *see Kent*, 810 F.3d at 391. Wilkins' testimony demonstrates that, not only was E.W. not "actively resisting arrest or attempting to evade arrest by flight," *Graham*, 490 U.S. at 396, E.W. had not even done anything to warrant arrest in the first place. Wilkins Dep. at PageID.686; *see also* Order at PageID.1124 ("It is undisputed that Plaintiff was never under arrest, let alone resisting or attempting to evade arrest."). A reasonable jury could readily conclude that Wilkins' use of force—"sw[i]ng[ing] at" E.W. when E.W. was standing still and breaking and partially dislocating his jaw, E.W. Dep. at PageID.590—was

objectively unreasonable in light of E.W.'s lack of dangerousness and failure to commit any crime. This is consistent with the "consensus" position in this Court that officers "cannot use force … on a detainee who has been subdued, is not told he is under arrest, or is not resisting arrest," *Grawey*, 567 F.3d at 314, because such "gratuitous" use of force is "excessive as a matter of law," *Ortiz*, 811 F.3d at 852. *See, e.g.*, *McDowell v. Rogers,* 863 F.2d 1302, 1307 (6th Cir. 1988) (an "unprovoked and unnecessary blow" violates the Fourth Amendment where an arrestee poses no threat and is not trying to escape arrest).

Defendants' primary arguments to the contrary turn on the notion that Wilkins' behavior did not violate the Fourth Amendment because of hypothetical subjective beliefs Wilkins might have held about the dispute between E.W. and Montgomery. For instance, Defendants argue that Wilkins might "reasonably" have "interpreted as threatening" E.W.'s behavior because E.W. had avoided the main door metal detectors; Wilkins observed E.W. "tussling with Montgomery"; and Wilkins had "knowledge of EW's illegal, aggressive, combative and threatening conduct." Opening Br. 27-28. These arguments all directly contradict Wilkins' own testimony—in which he specifically stated that he didn't think E.W. posed any danger or had engaged in any criminal behavior—and, moreover, accepting them would require impermissible inferences in Wilkins' favor about his mental state that are properly the purview of a jury. These contentions further illustrate why this Court lacks jurisdiction to consider this appeal. *See supra* at 15-18. Moreover, they are legally

irrelevant because under the Fourth Amendment objective reasonableness analysis, "the underlying motivations of the officer … should not be examined." *Kostrzewa*, 247 F.3d at 639 (citing *Graham*, 490 U.S. at 397); *see also Phelps*, 286 F.3d at 299 ("The officer's subjective intentions are irrelevant to the Fourth Amendment inquiry.").

Defendants' remaining arguments that Wilkins did not use excessive force require drawing impermissible inferences in Wilkins' favor. Defendants suggest that the evidence is "clear" that "Wilkins stuck his arm out 'straight' meaning *parallel* to EW's face, not perpendicular to (toward) his face" and that "Wilkins intentionally minimized the force he used." Opening Br. 29. But E.W.'s testimony was that Wilkins "walked up to [him] and simply swung at [him]," E.W. Dep. at PageID.590, and the uncontroverted medical records show that E.W. emerged from these assaults with a broken and dislocated jaw, Radiology Report at PageID.947. The evidence adduced would easily permit a reasonable jury to find that the force was excessive, as the district court correctly held.

2. Drawing all reasonable inferences in favor of E.W., Wilkins' Fourth Amendment violation was clearly established when it occurred.

The second step of the qualified immunity analysis requires an examination of "whether the contours of the plaintiff's constitutional rights were sufficiently defined to give a reasonable officer fair warning that the conduct at issue was unconstitutional." *Wright*, 962 F.3d at 869. Cases in this circuit "clearly establish the right of people who pose no safety risk to the police to be free from gratuitous

violence during arrest." *Shreve*, 453 F.3d at 688 ("[B]ecause Sixth Circuit case law supports [the] right not to be struck and jumped on gratuitously, qualified immunity is not available for lack of a 'clearly established' right."); *see also Harris v. City of Circleville*, 583 F.3d 356, 367 (6th Cir. 2009). In this Court, it is "well established that an officer may not use more force than is necessary to effectuate the arrest of a suspect who offers no resistance." *Jones*, 947 F.3d at 917 (citing *Bennett*, 671 F.3d at 562-63). In other words, "it is clearly established that [g]ratuitous violence is never reasonable because there is simply no governmental interest justifying gratuitous violence." *Williams II*, 9 F.4th at 440 (alteration in original) (internal quotation marks omitted) (quoting *Walters*, 317 F. App'x at 491).

Because the law clearly establishes that a gratuitous use of violence violates the Fourth Amendment, the district court was correct to deny Wilkins qualified immunity at the summary judgment stage. *See, e.g.*, *id.*; *Shreve*, 453 F.3d at 688. Viewing the record in the light most favorable to E.W., he was standing outside the school after having been tackled by Montgomery, and Wilkins approached him and "swung at" his face, breaking his jaw. Wilkins himself testified that E.W. had done nothing to warrant arrest and did not pose any safety risk to Wilkins, Montgomery, himself, or others. Under these facts, any violence against E.W. was gratuitous: No use of force was "necessary to effectuate [his] arrest" because he was not being arrested, *Jones*, 947 F.3d at 917, and there was no other basis for Wilkins to use force. At the time of this incident in 2017, it was "well-established … that a non-violent, non-resisting, or only

passively resisting suspect who is not under arrest has a right to be free from an officer's use of force." *Smith v. City of Troy*, 874 F.3d 938, 945 (6th Cir. 2017).

B. Disputed issues of material fact foreclose summary judgment on E.W.'s excessive force claim against Montgomery.

The district court correctly found that Montgomery was not entitled to qualified immunity because a reasonable jury could find that he used excessive force against E.W. under clearly established law. The district court's explanation of why the evidentiary record forecloses qualified immunity under the Fourteenth Amendment "shocks the conscience" standard was correct and suffices to support affirmance by this Court on E.W.'s excessive force claim against Montgomery. However, the district court should have applied the less onerous Fourth Amendment "objective reasonableness" to E.W.'s excessive force claim, which would have led to the same result—a denial of qualified immunity at this stage.[4]

1. The Fourth Amendment provides the proper standard for evaluating E.W.'s excessive force claim against Montgomery.

The analysis of any excessive force claim begins with identification of "the specific constitutional right allegedly infringed by the challenged application of force." *Graham*, 490 U.S. at 394. As discussed above, at 20, the Fourth Amendment prohibits "unreasonable searches and seizures" by government officials, and it does not

[4] This Court "may affirm on any grounds supported by the record even if different from the reasons of the district court." *Abercrombie & Fitch Stores, Inc. v. Am. Eagle Outfitters, Inc.*, 280 F.3d 619, 629 (6th Cir. 2002).

differentiate between different categories of government actors. U.S. Const. amend. IV. A seizure under the Fourth Amendment, in turn, occurs when an official "restrains the freedom of a person to walk away." *Garner*, 471 U.S. at 7. Because the "reasonableness" of a seizure "depends not only on when a seizure is made, but also how it is carried out," the use of excessive force during a seizure can render that seizure unreasonable. *Id.* at 8.

As the Supreme Court has made clear, the Fourth Amendment's "constitutional guarantee" extends to "seizures made by state officers," which specifically "includ[es] public school officials." *Vernonia*, 515 U.S. at 652. Indeed, the Supreme Court has squarely rejected the notion that "school officials are exempt from the dictates of the Fourth Amendment" and has expressly recognized the "limits" the Fourth Amendment "places on the activities of school authorities." *New Jersey v. T.L.O.*, 469 U.S. 325, 332, 336 (1985). The Court has explained that the Fourth Amendment objective reasonableness standard, as applied against school officials, must take into account "the schools' custodial and tutelary responsibility for children." *Bd. of Educ. v. Earls*, 536 U.S. 822, 829-30 (2002). But it has never cast doubt on the notion that school officials are governed by the Fourth Amendment's "prohibition on unreasonable searches and seizures," which "creates … rights enforceable against them." *T.L.O.*, 469 U.S. at 333-34; *see also Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 383 (2009) (Thomas, J., concurring in the judgment in part and dissenting in part) (noting that "public school students retain Fourth

Amendment rights" and that "the underlying command of the Fourth Amendment is always that searches and seizures be reasonable").

Applying *T.L.O.*, this Court has acknowledged that "the standard by which searches and seizures carried out by school officials are scrutinized is whether the search was reasonable under the circumstances." *Williams I*, 936 F.2d at 887; *see also Crochran ex rel. Shields v. Columbus City Sch.*, 748 F. App'x 682, 685 (6th Cir. 2018) (stating that the "Fourth Amendment's 'prohibition on unreasonable searches and seizures' applies to conduct by public school officials" (quoting *T.L.O.*, 469 U.S. at 333)). It has applied the Fourth Amendment's objective reasonableness test to a seizure of a student by a teacher when the teacher put the student in a body sock as a means of "separat[ing] [the student's] person from the environment outside." *Crochran*, 748 F. App'x at 685. A number of this Court's sister circuits have similarly recognized excessive force claims against a range of school officials, including administrators and teachers, under a Fourth Amendment reasonableness standard. *See, e.g.*, *E.C. ex rel. R.C. v. Cty. of Suffolk*, 514 F. App'x 28, 30 (2d Cir. 2013); *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 147-48 (3d Cir. 2005); *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004); *Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1014 (7th Cir. 1995); *Doe ex rel. Doe v. Hawaii Dep't of Educ.*, 334 F.3d 906, 909 (9th Cir. 2003).

Because a claim that a school official used excessive force in seizing a student is covered by the Fourth Amendment, *see Vernonia*, 515 U.S. at 652, that is the proper

constitutional standard for evaluating such an excessive force claim. Indeed, "*all* claims" that a government actor used excessive force when attempting to restrain someone "are properly analyzed under the Fourth Amendment's 'objective reasonableness' standard, rather than under a 'substantive due process' standard." *Graham*, 490 U.S. at 388. That is, "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* at 395; *see also Cty. of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) ("Substantive due process analysis is therefore inappropriate … if [the] claim is 'covered by' the Fourth Amendment.").

There is no question that Montgomery's conduct constituted a "seizure" under the Fourth Amendment because it was an attempt to restrain E.W. *Garner*, 471 U.S. at 7. Defendants have conceded that Montgomery intended to "escort EW out of the building" and to "restrain him." MSJ 8; *see also id.* at 21 ("Both [Montgomery and Wilkins] were attempting to restrain or remove a pupil…."). Montgomery himself also repeatedly described his behavior as an "attempt to restrain" E.W. by "escorting him out of the building." *See, e.g.*, Montgomery Dep. at PageID.644. Accordingly, E.W.'s claim that Montgomery used excessive force in removing him from the school building, slamming him to the ground, and placing a knee on E.W.'s chest must be

reviewed under the "objective reasonableness" standard of the Fourth Amendment rather than the "shocks the conscience" standard of the Fourteenth Amendment.

The district court stated that "[c]ourts have found that 'a student's claim of excessive force by a teacher is properly analyzed under the Due Process Clause of the Fourteenth Amendment, rather than under the Fourth Amendment,'" Order at PageID.1124 (quoting *Gohl v. Livonia Pub. Sch.*, 134 F. Supp. 3d 1066, 1083 (E.D. Mich. 2015)), and therefore evaluated the claim against Montgomery under the Fourteenth Amendment. But the court cited only one trial-level opinion for this proposition. And the Sixth Circuit opinions on which the district court relied in its analysis of the claim against Montgomery nowhere require that excessive force claims against teachers be evaluated as a matter of substantive due process rather than under the Fourth Amendment. *See* Order at PageID.1124-25.

In fact, none of the appellate cases the district court cited involved a dispute about whether an excessive force claim arising out of a seizure of a student ought to be analyzed under the Fourth or Fourteenth Amendment. Several involved the use of force in the context of questionable special-education pedagogical techniques, which were challenged under the Fourteenth Amendment. *See Gohl v. Livonia Pub Schs. Sch. Dist.*, 836 F.3d 672 (6th Cir. 2016); *Domingo*, 810 F.3d 403. Two other appeals cited by the district court for their application of the substantive due process standard raised claims that were explicitly "premised on the alleged violation of a constitutionally protected liberty interest … [in] personal bodily integrity." *Lillard v. Shelby Cty. Bd. of*

Educ., 76 F.3d 716, 724-25 (6th Cir. 1996) (addressing slapping, sexual language and harassment, and humiliation by a teacher); *see also Doe v. Claiborne Cty. ex rel. Claiborne Cty. Bd. of Educ.*, 103 F.3d 495, 500 (6th Cir. 1996) (involving student claim that school board members and administrators were deliberately indifferent to her constitutional right to bodily integrity after she was sexually harassed and assaulted and ultimately statutorily raped by a teacher). One appeal cited for its application of the "shocks the conscience" standard involved the use of force by a substitute teacher against a student as a form of punishment. *Ellis ex rel. Pendergrass v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690 (6th Cir. 2006). And the final appeal cited involved a school principal inflicting blows on a student for no purpose "other than in anger or from malice." *Webb*, 828 F.2d at 1158. In none of these appeals did the plaintiff argue that the excessive force claim should be analyzed under the Fourth Amendment because it involved an attempt to restrain.

2. There are disputed factual issues about whether Montgomery's use of force was objectively unreasonable under clearly established law.

For essentially the same reasons governing the claim against Wilkins, a reasonable jury could find that Montgomery's use of force violated E.W.'s clearly established right against excessive force. Ample evidence in the record supports a jury finding that E.W. had committed no crime, was not a danger to Montgomery or anyone else, and was not resisting arrest both because he was not being arrested and because he was compliant while being dragged out of the school and thrown to the

ground by Montgomery. *See supra* at 21-23. Drawing all reasonable inferences in favor of E.W., the use of force against him was plainly gratuitous and therefore constitutionally excessive. *See, e.g.*, *Ortiz*, 811 F.3d at 852 (slamming or tackling a surrendered suspect and pinning him down is excessive force); *Miller v. Sanilac Cty.*, 606 F.3d 240, 252-54 (6th Cir. 2010) (slamming a non-violent and capitulating suspect against a vehicle); *Champion v. Outlook Nashville, Inc.*, 380 F.3d 893, 903 (6th Cir. 2004) (pressing face-down a non-resisting and surrendered suspect longer than needed); *Phelps*, 286 F.3d at 301-02 (throwing an unresisting arrestee to the floor); *Dugan v. Brooks*, 818 F.2d 513, 516-17 (6th Cir. 1987) (spontaneously striking an arrestee and knocking him to the floor).

These same cases clearly established the right to be free from such excessive force at the time of the assaults on E.W. This Court has repeatedly recognized as much, explaining that its many cases "saying that the gratuitous use of force against a suspect who has 'surrendered' is 'excessive as a matter of law'" are sufficient to overcome qualified immunity. *Ortiz*, 811 F.3d at 851-52; *see also, e.g.*, *Morrison*, 583 F.3d at 408 (finding it clearly established that an official "may not use additional gratuitous force once a suspect has been neutralized," where evidence supported finding that the official "pushed [the plaintiff's] face into the ground absent a legitimate government interest, namely officer safety"). Indeed, "clearly established" circuit case law provides that grabbing a "generally compliant" arrestee, knocking his legs out from under him, and throwing him to the pavement would not be "a

reasonable way to restrain him." *Smoak v. Hall*, 460 F.3d 768, 783-84 (6th Cir. 2006). As with Wilkins, the use of force by Montgomery is even more obviously excessive given that E.W. was not a criminal suspect or arrestee at all but was merely a high school freshman trying to retrieve his wallet after school. *See Morrison*, 583 F.3d at 408 (finding constitutional violation "'obvious' under the general standards of constitutional care"); *cf. Harris v. Langley*, 647 F. App'x 585, 590 (6th Cir. 2016) ("[T]here is no opacity in the Fourth Amendment's prohibition on unprovoked body slams….").

It is irrelevant for qualified immunity purposes that this Court has not previously resolved "whether the Fourth or Fourteenth Amendment governs [E.W.'s] excessive force claim[]" against school officials because "the legal norms underlying [that] claim[] [a]re nevertheless clearly established." *Harris*, 583 F.3d at 367. This circuit's precedent clearly establishes the unconstitutionality of "the gratuitous use of force," regardless of the legal source of the right. *Id.*

3. The district court correctly found that disputed issues of fact remained about whether Montgomery's use of force "shocks the conscience" under clearly established law.

Even if this Court concludes that E.W.'s excessive force claim against Montgomery should be evaluated under the Fourteenth Amendment rather than the Fourth Amendment, disputed issues of material fact foreclose summary judgment. "[P]ublic school children under the disciplinary control of public school teachers" have a "right to be free of state intrusions into realms of personal privacy and bodily

security." *Webb*, 828 F.2d at 1158. This right encompasses "freedom from bodily restraint and punishment," *Ingraham v. Wright*, 430 U.S. 651, 673-74 (1977), and substantive due process claims of this nature are evaluated to determine whether the conduct alleged "shock[s] the conscience," *Webb*, 828 F.2d at 1158.

This Court has adopted a four-part test for evaluating a student's claim of excessive force under the Fourteenth Amendment:

> a) Was there a pedagogical justification for the use of force?; b) Was the force utilized excessive to meet the legitimate objective in this situation?; c) Was the force applied in a good-faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm?; and d) Was there a serious injury?

Domingo, 810 F.3d at 411. As the district court correctly concluded, the material facts relevant to each of these factors are disputed, foreclosing summary judgment.

First, there is no basis in the record from which to conclude that Montgomery had a pedagogical justification for using force against E.W.; indeed, Montgomery testified that his own objective was to "restrain" E.W., not to provide any educational benefit to him. *Cf. id.* (teacher had a "legitimate educational goal of toilet-training and legitimate disciplinary goal of maintaining order and focus in her classroom," which "provided a pedagogical justification for her actions"). Second, even if Montgomery's aim of restraining E.W. and escorting him out of the building could be linked to some legitimate pedagogical purpose, a reasonable jury could readily conclude that there was no need for him to resort to physically grabbing E.W., pushing him through the doors, slamming him to the ground, and pushing his knee into E.W.'s body, and that

substantially less force—indeed, no force at all—might have achieved his same objective. Third, E.W. testified that Montgomery was "hostile and angry" with him and that he believed Montgomery was attempting to cause him harm, E.W. Dep. at PageID.571, and a reasonable jury could find that testimony to be credible and Montgomery's conduct to be rooted in malice. Moreover, as the district court explained at the summary judgment hearing, "the fact that [Montgomery] walked away" from E.W. once the latter was subdued on the ground could indicate to the jury "a lack of good faith" and a malicious use of force rather than one intended to obtain a legitimate benefit. Tr. at PageID.1094. And fourth, a jury could easily find that a shoulder injury that caused shooting pain for over a year and required prescription and over-the-counter pain medication, as well as lasting psychological trauma, was a serious injury under *Domingo*.

As with the claim against Wilkins, Defendants' challenges to the substantive due process claim against Montgomery all turn on drawing impermissible inferences in his favor. Defendants argue that Montgomery had directed E.W. to go through the metal detectors and E.W. refused, Opening Br. 24, but the record does not establish that this interaction ever occurred: E.W. testified that he did not recall Montgomery saying anything to him other than "get out," E.W. Dep. at PageID.570, and Wilkins similarly testified only that he heard Montgomery yelling at E.W. to leave and giving E.W. three seconds to exit the building, Wilkins Dep. at PageID.685. Defendants claim that Montgomery "was reasonably concerned for the safety of the building,"

Opening Br. 24, but whether Montgomery was actually concerned about the building's purported "safety" and whether such a concern would have been reasonable are credibility and fact questions for a jury. Defendants argue that E.W. "resisted" being removed from the building, but E.W. testified that he was trying to get Montgomery to "listen" to his explanation for why he was in the building and that Montgomery immediately began pushing E.W. through the doors, slammed him to the ground, and put his knee on E.W.'s chest; thus, a reasonable jury could plainly find that E.W.'s attempts to explain himself to Montgomery and subsequent disinclination to be bodily removed from the premises were a reasonable reaction to the gratuitous use of force against him. And though Defendants suggest that "no medical evidence of any injury to [E.W.'s] shoulder was presented to the trial court, undermining the severity of E.W.'s injury," Opening Br. 18, 25, E.W. testified that it took him over a year to raise his arm above his head without shooting pain after the body slam, and the district court properly found that there was a dispute of fact about the severity of the injury. When the facts are interpreted in the light most favorable to E.W., they satisfy every prong of the *Domingo* "shocks the conscience" test and thus constitute excessive force.

Interpreting the facts in the light most favorable to E.W., Montgomery's malicious and gratuitous use of force against E.W. was clearly established as a Fourteenth Amendment violation at the time it occurred. In *Webb*, this Court evaluated a claim of excessive force under the Fourteenth Amendment against a

school principal who had grabbed a student, threw her against the wall, and slapped her. 828 F.2d at 1154. Distinguishing the blows at issue from "*disciplinary* blows, inflicted as punishment for the 'proper education and discipline of the child,'" this Court noted that the record did not indicate that the force used in *Webb* was "in any way disciplinary …, nor that the blows arose other than in anger or from malice." *Id.* at 1158 (quoting *Ingraham*, 430 U.S. at 670). The Court thus held that a reasonable jury "could find that under the circumstances, [the principal's] need to strike [the plaintiff] was so minimal or non-existent that the alleged blows were a brutal and inhumane abuse of [the principal's] official power, literally shocking to the conscience." This Court accordingly reversed the grant of summary judgment in favor of the principal.

The facts of *Webb* clearly establish the constitutional violation at issue here. As in *Webb*, the evidence presented in this case would allow a reasonable jury to conclude that Montgomery became "hostile and angry" with E.W. and assaulted him out of malice rather than in pursuit of a disciplinary or pedagogical function. A jury could find that Montgomery's need to use force against E.W. was "so minimal or non-existent" as to render his attack a "brutal and inhumane abuse" of "official power." *Webb* thus sufficiently defined "the contours of [E.W.'s] constitutional rights" to give "fair warning that the conduct at issue was unconstitutional." *Wright*, 962 F.3d at 869.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal for lack of jurisdiction or, alternatively, affirm the decision of the district court.

Respectfully submitted,

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/s/ Elizabeth R. Cruikshank
Elizabeth R. Cruikshank
Kelsi Brown Corkran
Seth Wayne
INSTITUTE FOR CONSTITUTIONAL ADVOCACY & PROTECTION
Georgetown University Law Center
600 New Jersey Avenue NW
Washington, DC 20001
202-662-9042
erc56@georgetown.edu

Jonathan R. Marko
MARKO LAW PLLC
1300 Broadway Street
Suite 500
Detroit, MI 48226
313-777-7529
jon@markolaw.com

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume, typeface, and type-style requirements of Rule 32(a) of the Federal Rules of Appellate Procedure and Rule 32 of the Sixth Circuit Rules. This brief contains 9,612 words, excluding the parts of the document exempted by Fed. R. App. 32(f) and 6th Cir. R. 32(b)(1), as calculated in Version 15.26 of Microsoft Word for Mac 2016. It was prepared in 14-point font using Garamond, a proportionally spaced typeface.

/s/ *Elizabeth R. Cruikshank*
Elizabeth R. Cruikshank

ADDENDUM: DESIGNATION OF RELEVANT DOCUMENTS

ECF No.	Document Description	PageID Range
5	Amended Complaint and Jury Demand	48-61
53	Motion for Summary Judgment	481-503
53-2	Motion for Summary Judgment, Ex. 2, E.W. Deposition Transcript	519-595
53-3	Motion for Summary Judgment, Ex. 3, Myron Montgomery Deposition Transcript	596-671
53-4	Motion for Summary Judgment, Ex. 4, Broadus Wilkins Deposition Transcript	672-709
54-2	Opposition to Motion for Summary Judgment, Ex. 1, Notice Regarding Video Evidence	738-739
54-7	Opposition to Motion for Summary Judgment, Ex. 6, Radiology Report	946-960
65	Notice of Interlocutory Appeal	1080
68	Transcript of Motion Hearing	1083-1113
69	Order Denying in Part and Granting in Part Defendants' Motion for Summary Judgment	1114-1127