No. 16-2184

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RONNIE JACKSON,

Plaintiff-Appellee,

v.

VICKI HEREFORD, ET AL.,

Defendants,

JEFF GUTZMER, in his individual capacity,

Appellant.

Appeal from the United States District Court for the District of Minnesota, Case No. 0:14-cv-02982 – The Honorable John R. Tunheim

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APPELLEE'S BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Appellee respectfully requests oral argument in this case, which presents important questions addressing the scope of this Court's jurisdiction to review interlocutory appeals from the denial of qualified immunity, and the scope of Eighth Amendment protection for prisoners who are punished for requesting medical treatment. Appellee believes oral argument will be of significant benefit to the Court, and requests fifteen minutes to present argument.

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STATEMENT OF JURISDICTION

The district court has federal question jurisdiction over this action pursuant to 28 U.S.C. § 1343 because Appellee Ronnie Jackson asserts federal constitutional claims brought under 42 U.S.C. § 1983.

The district court entered an order granting Defendants' motion for summary judgment in part and denying the motion in part on March 31, 2016. App. Add.83. Relevant here, the district court denied Appellant Jeff Gutzmer's motion for summary judgment on Jackson's Eighth Amendment excessive force claim. App. Add.75. Gutzmer filed a notice of appeal on April 29, 2016. App.20.

This Court lacks jurisdiction to consider this appeal, for the reasons set forth below in the first half of this brief. In sum, this case does not fall among the "small class" of decisions appealable prior to the completion of adjudication in the district court. *See Mitchell v. Forsyth*, 472 U.S. 511, 524 (1985). Rather, the district court's decision turned on "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial," *Johnson v. Jones*, 515 U.S. 304, 319 (1995), "factual controvers[ies]" in the pretrial record including the intent motivating a party's conduct, *id.* at 316, "whether . . . particular conduct occurred," *Behrens v. Pelletier*, 516 U.S.

299, 313 (1996), and "which facts the parties might be able to prove." *Johnson*, 515 U.S. at 305. These quintessential fact issues—inextricably intertwined with the merits—are not immediately appealable, and stand in stark contrast to "legal issue[s] that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Id.* at 313 (quoting *Mitchell*, 472 U.S. at 530, n.10). For the reasons set forth herein, this Court should dismiss this appeal for lack of jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to review the district court's order denying summary judgment on qualified immunity grounds where the district court found that genuine issues of material fact precluded judgment as a matter of law on the question of whether Jackson was placed on the restraint board as punishment for complaining about his medical condition.

Apposite authorities:

Johnson v. Jones, 515 U.S. 304, 305 (1995)
McCaster v. Clausen, 684 F.3d 740, 745 (8th Cir. 2012)
Aaron v. Shelley, 624 F.3d 882 (8th Cir. 2010)
Pace v. City of Des Moines, 201 F.3d 1050, 1053 (8th Cir. 2000)

2. Whether clearly established law prohibits punishing a prisoner by placing him on a restraint board for an extended period of time solely for seeking medical treatment and not for any valid penological purpose.

Apposite authorities:

Hope v. Pelzer, 536 U.S. 730 (2002)
Walker v. Bowersox, 526 F.3d 1186 (8th Cir. 2008)
Treats v. Morgan, 308 F.3d 868 (8th Cir. 2002)

INTRODUCTION

It its clearly established law that prison officials may not shackle an inmate to a restraint board strictly as punishment for requesting medical treatment. The district court concluded that the facts in the record, together with the reasonable inferences drawn from those facts, would permit a jury to conclude that Appellant Jeff Gutzmer did just that—ordering Appellee Ronnie Jackson bound and shacked not for any penological purpose, but rather in retaliation for Jackson's urgent complaints about his medical condition.

This Court has no jurisdiction at this juncture to review the district court's order denying summary judgment. The district court's *legal point* is unassailable: Supreme Court case law, circuit precedent, and even prison guidelines all hold that restraining prisoners as a means of punishment untethered to any penological purpose violates the Eighth Amendment ban on cruel and unusual punishment. The district court's *factual point* is unreviewable: the court's conclusion—that the record would allow a reasonable jury to conclude that Gutzmer unlawfully punished Jackson for seeking medical treatment—lies beyond the purview of this Court's limited jurisdiction to review interlocutory orders

denying qualified immunity. Where, as here, "the heart of t[he] argument is a dispute of fact," instead of a "purely legal issue," the Court may not entertain an interlocutory appeal. *Pace v. City of Des Moines*, 201 F.3d 1050, 1053 (8th Cir. 2000).

Even if this Court were to reach the merits, the district court's decision is correct and should be affirmed. Jackson was placed on a restraint board solely for requesting medical attention. He was not threatening the officers nor threatening harm to himself. He had created no immediate security concerns. Under settled Eighth Amendment jurisprudence, shacking a prisoner and "subject[ing] him to a substantial risk of physical harm, to unnecessary pain[,] . . . to prolonged thirst and taunting, and to a deprivation of bathroom breaks that create[] a risk of particular discomfort and humiliation" after "[a]ny safety concerns ha[ve] long since abated" all operate to violate the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man." *Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958)).

For these reasons, this Court must dismiss the appeal for lack of jurisdiction. If Court reaches the merits, the challenged provisions of the district court's interlocutory order should be affirmed.

STATEMENT OF THE CASE

I. FACTS.

A. Jackson's Incarceration with the Department of Corrections.

Jackson was first committed to the Minnesota Department of Corrections on November 29, 2012 and was admitted to the Minnesota Correctional Facility at St. Cloud. App.634; App.640. Jackson is expected to be released in 2018. App.640.

On December 7, 2012, Jackson was moved to the Minnesota Correctional Facility at Oak Park Heights after agreeing to be transferred in exchange for decreased punishment in relation to alleged disciplinary rule violations. App.172. Once at Oak Park Heights, Jackson was moved to the Administrative Control Unit following an incident where Jackson spit in the face of a correctional officer after the correctional officer called Jackson a "n*****." App.173. Jackson denies that he struck an officer during the same incident. App.173. In

subsequent criminal proceedings, Jackson was found not guilty of hitting the officer. App.173.

In May 2014, all offenders who had been housed in the Administrative Control Unit, including Jackson, were moved to Complex 5 due to construction. App.503. Both the Administrative Control Unit and Complex 5 are segregation units. App.594. The critical events giving rise to this case took place in the Complex 5 unit of the prison. App.27.

B. The Department of Corrections' Policy on the Use of Restraint Boards.

According to the Minnesota Department of Corrections' written policy on the use of restraints, "[o]ffenders who are jeopardizing facility security, demonstrating assaultive behavior, destroying property, or engaging in self-injurious behavior may be placed in pinion restraints to ensure facility security and staff and offender safety when less forceful means have failed." App.337. A "mental health professional . . . must be contacted immediately following an offender's placement" in restraints. App.338. The mental health professional must evaluate "the offender's mental health condition and . . . determine if continued restraint is appropriate or if alternative measures . . . [are] warranted." App.338. Every 30 minutes, "[s]taff must ask the offender if he/she needs to use

the toilet," and offenders must be "permitted to do so, if needed." App.338. Once authorized, "[s]taff must only use the amount of force that is reasonable and necessary to secure order and control . . . ." App.336. Restraints must be removed "when it can reasonably be determined by staff that the offender has calmed down and agrees to refrain from the destructive, assaultive, or self-injurious behavior." App.338.

Prison staff are never allowed to use "force or restraints as a means of punishment." App.334. The use of force is generally discouraged. App.397.

C. Jackson's Medical Condition.

Jackson has been diagnosed with borderline personality disorder. App.172; App.312. In October 2013, during a psychiatric assessment, Jackson was prescribed Effexor. App.220. Effexor has the known side effects of high blood pressure, chest pain, lightheadedness, fainting, trouble breathing, nausea, vomiting, and trembling or shaking that is hard to control. App.236–38.

D. Jackson Complains About His Serious Medical Condition, Prison Officials Respond by Placing Jackson on the Restraint Board.

(1) Jackson experiences medical complications.

On May 13, 2014 around 7:20 a.m., Jackson began experiencing medical complications, including feeling dizzy. App.29; App.173; App.256. Initially, Jackson did not feel the symptoms were serious enough to warrant emergency medical attention. App.29; App.173. Jackson told Correctional Officer Jeremy Thor that he (Jackson) was not feeling well. App.29; App.173. Thor told Jackson he would make the medical staff aware. App.252. No staff followed up with Jackson. App.173.

By 12 p.m., Jackson's medical condition had become serious and was growing steadily worse. App.29; App.173; App.262–68. By this time, Jackson was experiencing "severe chest pains, nausea[], shortness of breath, [and] throwing up." App.173; App.305. Jackson knew these symptoms were listed as serious side effects of Effexor—side effects which, according to health care professionals, require immediate medical attention. App.29; App.236.

(2) Jackson seeks immediate medical attention.

His condition now worsening, Jackson attempted to inform multiple staff members of his deteriorating medical condition to no avail. App.259–264. At approximately 12 p.m., Jackson urgently explained his

medical condition to a nurse making a pill run. App.29; App.173; App.260. The nurse helped alert a correctional officer to Jackson's current state. App.29; App.173. The correctional officer sent the nurse away, however; after Jackson explained to the officer that he was experiencing a medical emergency, the correctional officer stated he would attempt to "catch the nurse." App.30; App.173–74. Neither the nurse nor the correctional officer returned after this conversation. App.30; App.173.

At approximately 12:30 p.m.—with his conditioning still worsening—Jackson pushed the emergency duress button in his cell. App.30; App.174. Correctional Officer McCann answered the duress call. App.30; App.174. McCann told Jackson that a nurse would be called. App.30; App.174.

At 1 p.m. when a nurse had still not arrived, Jackson once more pushed the emergency duress button in his cell and described his symptoms to Officer McCann. App.30; App.174. By this time, Jackson's symptoms had become severe, and included "difficulty breathing, chest pains, high blood pressure, nausea[], spitting up/vomiting, fainting, and dizziness spells." App.30; App.174. McCann assured Jackson again he

would call the nurse and advised Jackson to "lay down [un]til the nurse comes." App.30; App.174. Jackson complied, and lay down. App.30; App.174.

(3) A correctional officer threatens to place Jackson on the restraint board in retaliation for complaining about his medical condition.

Jackson pushed the emergency "duress" button once more at 1:30 p.m. App.30; App.174–75. A correctional officer (Jackson is unsure of the man's identity) responded. App.30; App.174. Jackson was now "beg[ging]," telling the officer, "[p]lease help, I'm feeling worse." App.30; App.174. The officer responded by threatening Jackson, saying "if you don't stop pushing the button and harassing COs [Corrections Officers] on rounds with fake requests for help you'll be placed on the board." App.30; App.174–75. Jackson understood "the board" to mean the restraint board. App.175. Jackson stated that "I'm feeling worse and I'm afraid I'm gonna pass out." App.30; App.175. The correctional officer refused to respond to Jackson. App.30; App.175. His medical condition now growing severe, Jackson feared that he "might suffer a stroke, some other unknown medical malady, or maybe even death." App.178.

(4) As correctional officers ignore Jackson's pleas for help, his condition worsens.

At approximately 1:38 p.m., Jackson fainted and lost consciousness for several minutes. App.31; App.175. After regaining consciousness, Jackson crawled to his toilet, vomited, and sat on top of the toilet. App.31; App.175. Knowing his medical situation was serious—even life threatening—Jackson grabbed a grease container off his counter and began knocking on his cell door "in an attempt to alert the correctional officers that he had recently fainted . . . and [that] the emergency medical situation was dire." App.31; App.175. Jackson's neighbors, Jerrell Brown, Manuel Najera, and Brandon Paul, asked why Jackson was "knocking on his door." App.31; App.175. Jackson explained to these three other prisoners that his medical condition was serious and that prison officials were ignoring his pleas for help. App.175; App.252; App.257.

After hearing Jackson's explanation, Brown, Najera, and Paul began hitting their doors, together with Jackson, in an attempt to get medical attention for Jackson. App.175; App.252 (describing how he "and several other inmates . . . kick[ed] our cell doors" to obtain medical care for Jackson); App.257 (describing how he, Jerrell Brown, and the individual located in cell 118 kicked their doors "to save his life");

App.259 ("Cell 117, 118, 119, and me (cell # ____) began to kick our door until something was done to help Mr. Jackson.").

(5) Sergeant Weber requests assistance from the A-Team.

At approximately 1:48 p.m., Sergeant Donn Weber, upon hearing "pounding and/or kicking" on cell doors, walked toward the sounds. App.31; App.628. When Weber came within view of Jackson, Jackson immediately stopped knocking his door with the grease container. App.175; App.257.[1] The other inmates stopped immediately as well. App.175; App.257. At no point did Weber ever hear or see any other inmates kicking or punching their doors. App.628 ("I do not believe I saw or heard other inmates kicking or punching their doors.").

Upon Weber's arrival, Jackson—who at this point was standing—attempted to inform Weber about his dire medical situation, but due to

[1] On this encounter, Weber's testimony differed dramatically from that of Jackson and the other witnesses. Weber testified that he saw Jackson hitting and kicking his cell door, yelling incoherently, and shouting obscenities and insults. App.628; App.630. Weber further testified that Jackson "refused multiple directives to cease kicking and punching his cell door." App.628. Jackson testified that all inmates—including Jackson—stopped hitting their doors when Weber appeared headed in their direction. App.175. Jackson's testimony refutes the remainder of Weber's testimony as well. App.175.

his severe medical condition instead cried out in pain and slid down to the floor in his cell. App.31; App.175. Instead of calling for the medical staff, Weber responded by radioing the Master Control, initiating the Incident Command System and requesting assistance from the A-Team with a "self-injurious" inmate. App.31; App.175; App.315; App.317. The Incident Command System is a system used to request an emergency response and the A-Team is a "specially trained team of officers who respond to emergencies." App.628. Weber requested assistance from the A-Team after being present for only five to ten seconds and without having a conversation with Jackson. App.31; App.176; App.610. At no point did Jackson exhibit any intention to hurt himself; his intent was simply to seek medical attention. App.31; App.175. Sergeant Weber left immediately after requesting assistance. App.610.[2]

(6) Jackson is placed on the restraint board.

[2] Weber's testimony differed here, once again, in a number of crucial respects. First, Weber testified that he spoke to Jackson. Br. for Appellant at 6 (citing App.629). Somewhat tellingly, Weber offers no testimony on the substance of what, if anything, he said to Jackson. Second, Weber testified that Jackson appeared "angry and uncooperative." *Id.* Once again, however, Weber offered no specifics to back up this boilerplate assertion. Jackson's testimony contradicts both of Weber's allegations. App.175.

The A-Team arrived shortly after Weber requested assistance. App.31; App.176. Jackson had stopped knocking on his door with the grease container—and was not engaged in any negative behavior—when the A-Team's arrived. App.31; App.176; App.257. The A-Team was joined by Lieutenant Jeff Gutzmer—the onsite supervisor and appellant here—and Officer Seedia Jaiteh, who videotaped Jackson's extraction from his cell, medical evaluation, and placement on the restraint board. App.503; App.637. Gutzmer was the only person present who could authorize an offender to be placed on the restraint board. App.55; App.630.

Gutzmer "observed Jackson," who "at no time was . . . acting out of control, acting self-injuriously, nor in a negative manner." App.33; App.176; App.178.[3] Further, Gutzmer "did not observe any other inmates kicking their cell doors." App.503. After making his "own observations of Jackson," App.503, Gutzmer made the decision to put Jackson on the restraint board pending a medical assessment. App.33; App.177. Gutzmer acted "without need or provocation," deciding to place Jackson

[3] In this instance as well, the key testimony differs. Gutzmer testified that upon arriving at the scene, he witnessed Jackson yelling, as well as "hitting and/or kicking his cell door." App.503. Jackson testified to the contrary that he "offered no resistance nor act[ed] in any way out of control." App.176.

on the restraint board due to his "malicious[] and sadistic[]" intent. App.39.

Jackson's demeanor was "calm during and after the medical evaluation." App.486. At no point did Jackson engage in any self-injurious behavior. App.31; App.175; App.178. Jackson's calm demeanor was confirmed by Steven Ayers, a member of the Administrative Team who reviewed the video. App.486. Jackson spoke in "calm full sentences," describing the symptoms he was experiencing. App.226. Nurse Vicki Hereford noticed Jackson was "experiencing visible tremors," one of his described symptoms. App.32; App.177. During the medical assessment, some of the officers "were sitting on the chairs, laughing at . . . Jackson." App.258. Jackson received "virtually no, if any, real medical aid" during the medical assessment, even though Jackson was "still suffering from medical complications which needed a doctor's attention immediately." App.178. Jackson told Hereford that he was feeling chest pain, tightness in his chest, nausea, and dizziness. App.177. Jackson described his pain as a "nine" on a ten-point scale. App.177.

During the course of the examination, Nurse Hereford twice asked Jackson if he was self-injurious. App.178. Both times Jackson responded,

"no." App.178. Hereford asked why Jackson hit his cell door with a can, and Jackson responded, "[b]ecause I needed help." App.178.

Following the examination, Nurse Hereford asked Gutzmer whether it was necessary to place Jackson on the restraint board. App.177. Weber then turned to Gutzmer and, in a low voice, said he wanted Jackson placed on the restraint board because Jackson had been "hitting" his "door all day." App.177. Gutzmer then declared that once Jackson was medically cleared, he would be placed on the board. App.177. A nurse stated that "if he's well enough to hit his door then he's well enough to go on the board." App.177. Nurse Hereford then cleared Jackson to be placed on the restraint board. App.177.

After watching the medical assessment, Gutzmer ordered the placement of Jackson face down on the restraint board. App.179; App.505. Gutzmer directed the A-Team to escort Jackson to cell 114 to be placed on the restraint board. App.179; App.506. While Jackson was escorted to cell 114, he was placed in leg irons and his arms were held in shackles. App.637. Jackson complied with all directions with "no resistance nor act[ed] in any way out of control or self-injurious." App.31; App.176. Upon arrival in cell 114, correctional officers removed Jackson's

pants and socks "for absolutely no reason," even though it was "extremely cold." App.178. Jackson was stripped down to only his underwear. App.179.

Gutzmer subsequently supervised the placement of Jackson on the restraint board. App.506. The placement on the restraint board "intensified" Jackson's original medical conditions "about 100%." App.178–79. Gutzmer left cell 114 a few minutes later, at approximately 2:08 p.m. App.506.

(7) Jackson receives a psychological examination confirming that he poses no harm to himself or others.

Shortly after 2:30 p.m., Jackson—still on the restraint board—received a psychological evaluation from Michelle Saari, a mental health therapist. App.34; App.179. Jackson made clear to Saari that he did not have "thoughts or feelings of harming himself or others," but instead was seeking medical assistance for his "chest pain, dizziness, and physical discomfort." App.305. Saari described Jackson as "calm, cooperative, and appropriate," and as "professional, polite, and friendly in conversation." App.179–80; App.305; App.603. After assessing Jackson, Saari concluded Jackson was "stable" and "not self-injurious" nor a threat to others.

App.34; App.179; App.603. Nevertheless, and despite the Department of Corrections policy to the contrary, Jackson remained on the restraint board. App.179.[4]

(8) Corrections officers refuse to allow Jackson to use the bathroom; Jackson urinates on himself.

After receiving his psychological examination—and after around two hours on the restraint board—Jackson asked to use the bathroom. App.180; App.266. A corrections officer instructed Jackson to wait and Jackson complied without complaint. App.180; App.266. During the next 30-minute check, Jackson again asked to use the bathroom. App.180; App.266. Corrections Officer McElroy informed Jackson that going to the bathroom "constitutes negative behavior" that would start Jackson's time on the board over from the beginning. App.180; App.266. Minutes later, Jackson urinated on himself, and the urine quickly spread from Jackson's

[4] Yet another dispute in the record arises here as well. Numerous officials, including Gutzmer, testified that Jackson repeatedly removed his head strap and yelled while restrained on the board. *See* App.85; App.487; App.508–09; App.681. Jackson testified to the contrary, stating that he "did not offer any resistance, act out, nor say anything, [and was] fully compliant." App.178. In addition, the video evidence, which shows Jackson's head firmly secured to the board in a manner that would make it impossible to remove the head strap, contradicts the officials' testimony. App.660.

middle down to his feet and up to his head. App.180; App.266. At this point, Jackson informed Jarrell Brown—a neighboring inmate—that he was "lying in his urine, and was almost too embarrassed to tell him." App.180; App.253. Jackson was forced to lay in his own urine for over an hour. App.267.

Jackson was finally removed from the restraint board at approximately 5:25 p.m. App.86; App.181; App.395; App.499. Jackson was shackled to the restraint board for around three-and-a-half hours. App.181; App.499.

Jackson suffered severe muscle aches and joint stiffness as a result of being placed on the restraint board. App.181. His limbs were "stretched to their limits" and his head "strapped at an odd 90-degree angle." App.181. Jackson also described intense "humiliation and degradation, plus nausea[]" resulting from being forced to lie in his own urine for an extended period of time. App.181; App.613.

(9) Jackson is not allowed to shower for three days.

Gutzmer placed Jackson on quiet status after his removal from the restraint board. App.181; App.682. An offender who is placed on quiet status is confined to his cell for the first full day after placement.

App.369. However, according to prison policy, inmates placed on quiet status are still allowed to use hygiene products and take showers during scheduled times. App.682. Once Jackson was returned to his cell, he asked Officer Pluff for permission to take a shower, but the request was denied. App.181. Instead, Jackson was left with shampoo and access to a sink. App.181; App.614.

On the second day following his placement on the restraint board, Jackson—still covered in dried urine—asked a correctional officer if he could "take a shower to clean the urine off." App.36; App.182. Jackson was informed that Gutzmer was in charge during the second shift and was the only one who could authorize a shower for Jackson. App.36. The correctional officer, however, informed Jackson that the second shift had "been briefed on the situation" and Jackson "should be allowed to take a shower third shift." App.36. During the third shift, Jackson noticed a neighboring inmate being allowed to shower. App.37. Jackson—currently "unable to eat due to the powerful urine smell resonating from his body"—requested permission to shower from Pluff. App.36–37. Officer Pluff, without explanation, told Jackson that he could not shower that day. App.37; App.182.

It was not until the third shift of the third day following Jackson's placement in restraints—May 15 at 3:09 p.m.—that Jackson was finally allowed to shower. App.37; App.182.

II. PROCEDURAL HISTORY.

After exhausting his administrative remedies, Jackson filed a complaint in the District Court of Minnesota alleging that the Defendants' actions between May 13, 2014 and May 15, 2014 constituted violations of the United States Constitution. App.38–40; App.182. Jackson alleged Eighth Amendment deliberate indifference claims against Defendants Hereford, Gutzmer, Saari, White, McElroy, Pluff, Reishus, and Grandlienard, and Eighth Amendment excessive force claims against Weber and Gutzmer. App.38–40. Jackson sought damages and injunctive relief. App.41–44.

Defendants moved for summary judgment on all claims. App.48. In a Report and Recommendation, the Magistrate Judge recommended granting Defendants' motion for summary judgment. App. Add.60. Jackson objected to the recommendation with respect to his claims against Defendants Herford, Gutzmer, Saari, White, and McElroy. R.184 at 16. The district court granted summary judgment to Defendants

Hereford, White, Saari, Weber, Pluff, McElroy, Reishus, and Grandlienard. App. Add.82. Summary judgment was also granted with respect to Jackson's deliberate indifference claim against Gutzmer. App. Add.83. The district court sustained Jackson's objection, however, and denied the motion for summary judgment with respect to Jackson's excessive force claim against Gutzmer. App. Add.83. The upshot of the district court's order was to allow a single claim—Jackson's excessive force claim against Gutzmer—to proceed to trial, while granting summary judgment in favor of Defendants on all other claims. App. Add.82–83.

The district court denied summary judgment with respect to Jackson's excessive force claim against Gutzmer because the court found there were genuine issues of material fact as to the merits of Jackson's excessive force claim and Gutzmer's qualified immunity defense. App. Add.72–75.

Analyzing Jackson's excessive force claim, the district court recognized that Jackson's version of events—that Jackson was not self-injurious, not punching or kicking his cell door, and was placed on the restraint board as punishment—is "reasonable" and that a "jury could

find it persuasive." App. Add.74. Therefore, the court concluded it "must presume . . . for the purposes of this summary judgment motion" that Jackson's version of events was accurate. App. Add.73. Any factual dispute alleged by another party must be resolved by the trier of fact—the jury—and is inappropriate for adjudication in a summary judgment motion." App. Add.72.

The district court then examined whether "there exist[s] a 'basis for a reasonable officer to believe force was needed at that time to prevent [the prisoner] from endangering himself or others[.]" App. Add.72 (quoting *Thompson v. Zimmerman*, 350 F.3d 734,735 (8th Cir. 2003). The court found after accepting Jackson's account as accurate, "there . . . [is] no reasonable basis to believe that force was necessary to prevent harm." App. Add.72. The court disagreed with the Magistrate's conclusion that "the factual dispute was immaterial . . . [because Gutzmer] . . . had a plausible basis for believing . . . [Jackson was] engaging in potentially self-injurious or out-of-control behavior." App. Add.72–73. The Court determined this was an unacceptable assumption because it "inappropriately require[d] the Court to accept as true Gutzmer and Weber's version of events" and "put[] too much weight on one side of the

scale in another key factual dispute: whether Jackson's neighboring prisoners were kicking and punching their doors." App. Add.72–73.

The district court then examined whether "the injuries sustained [were] 'sufficient for an excessive force claim'?" App. Add.72 (quoting *Thompson*, 350 F.3d at 735). The Court acknowledged that "the Eighth Circuit has recognized that using a restraint board as punishment, and denying the use of a restroom as part of that punishment, can create an injury sufficient for an excessive force claim." App. Add.73 (citing *Walker v. Bowersox*, 526 F.3d 1186, 1188 (8th Cir. 2008). The court noted that this is precisely what Jackson alleges here. App. Add.74. The Court, therefore, concluded that whether the "force was not excessive . . . is an issue to be decided at trial, not on summary judgment." App. Add.73–74 (citing *Walker*, 526 F. 3d at 1188).

Last, the Court analyzed Gutzmer's qualified immunity defense. The court concluded that "if the fact-finder were to find that Gutzmer used the restraint board as punishment and not for incapacitation, he would have acted in violation of clearly established Eighth Circuit precedent interpreting the Eighth Amendment, and Gutzmer's qualified immunity defense would fail." App. Add.75. The court further relied on

Gutzmer's admission that he was aware that the "restraint board was not to be used as punishment." App. Add.75; App.508. The court concluded that Gutzmer's admission, clearly established Eighth Circuit precedent, and Jackson's "reasonable" version of events that a "jury could find . . . persuasive," made Gutzmer's qualified immunity defense inappropriate for resolution at the summary judgment stage. App. Add.74–75.

Gutzmer filed the instant appeal.

SUMMARY OF ARGUMENT

This Court has no jurisdiction to review the district court's denial of summary judgment based on qualified immunity. This case is not among the small class of cases that presents the question of "whether or not certain given facts show[] a violation of 'clearly established' law." *Johnson*, 515 U.S. at 305. Instead, this case presents an issue squarely beyond the scope of this Court's jurisdiction: "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319. Here, resolution of Gutzmer's qualified immunity defense requires the factfinder to resolve numerous disputes, including: what events occurred, whether Jackson was posing a danger to himself, whether Gutzmer's

testimony that he saw Jackson engaging in self-injurious behavior is credible, and whether Gutzmer ordered Jackson restrained with the intent to punish Jackson. These sorts of fact-intensive inquiries foreclose appellate review before final judgment. In cases like this one, "considerations of delay, comparative expertise of trial and appellate courts, and [the] wise use of appellate resources" all counsel against review. *Thomas v. Talley*, 251 F.3d 743, 746 (8th Cir. 2001) (quoting *Johnson*, 515 U.S. at 317).

If the Court determines it has jurisdiction to consider Gutzmer's appeal, the challenged provision of the district court's order should be affirmed. The district court correctly concluded that a reasonable jury could find that Gutzmer ordered Jackson placed on the restraint board in retaliation for Jackson seeking medical attention—and not for acting in a self-injurious manner. Supreme Court and Eighth Circuit precedent clearly establish that punishing a prisoner by placing him in physical restraints without any safety or security justification violates the Eighth Amendment. *See Thompson*, 350 F.3d at 735; *Hope*, 536 U.S. at 738; *Treats v. Morgan*, 308 F.3d 868, 875 (8th Cir. 2002); *Walker*, 526 F.3d at 1188.

STANDARD OF REVIEW

Federal courts have an independent duty to determine subject matter jurisdiction. *United States v. Hays*, 515 U.S. 737, 742 (1995). To the extent this court has jurisdiction to review the district court's order denying summary judgment, the Court's review is de novo. *Bearden v. Lemon*, 475 F.3d 926, 929 (8th Cir. 2007).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO REVIEW GUTZMER'S INTERLOCUTORY APPEAL.

This Court lacks jurisdiction to consider Gutzmer's interlocutory appeal.

A. Framework Governing the Interlocutory Review of Orders Denying Qualified Immunity.

In *Mitchell v. Forsyth*, the Supreme Court reiterated that a "small class" of district court decisions are appealable prior to the completion of adjudication in the district court. *Mitchell*, 472 U.S. at 524 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). This "small class" includes some denials of qualified immunity. *Id.* at 530. The Supreme Court made it clear, however, that district court decisions that deny qualified immunity "are not immediately appealable merely

because they happen to arise in a qualified-immunity case." *Behrens*, 516 U.S. at 313. The immediately reviewable decisions are "explicitly limited" to the appeals which assess "whether or not certain given facts show[] a violation of 'clearly established' law." *Johnson*, 515 at 305. In other words, interlocutory appeals may review "purely legal issue[s]." *Id.* at 313. Conversely, courts of appeals may not conduct an interlocutory review upon "whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Id.* at 319. "[F]actual controvers[ies]" in the pretrial record include the intent behind party's actions, *id.* at 316, "whether . . . particular conduct occurred," *Behrens*, 516 U.S. at 313, or "which facts the parties might be able to prove." *Johnson*, 515 U.S. at 305. These issues of fact are all distinguishable from "legal issue[s] that can be decided with reference only to undisputed facts and in isolation from the remaining issues of the case." *Johnson*, 515 U.S. at 313 (quoting *Mitchell*, 472 U.S. at 530, n.10).

Consistent with the Supreme Court's guidance, this Court has recognized its "limited authority" to entertain an interlocutory appeal after the denial of qualified immunity. *McCaster v. Clausen*, 684 F.3d 740, 745 (8th Cir. 2012). In its review, the Court "must construe the facts

in the light most favorable to" the plaintiff. *Aaron v. Shelley*, 624 F.3d 882, 883 (8th Cir. 2010). "When there is no dispute among the parties as to the relevant facts" or the "record plainly forecloses . . . [a] factual dispute" interlocutory review of the denial of qualified immunity is appropriate upon issues of law. *New v. Denver*, 787 F.3d 895, 899 (8th Cir. 2015) (quoting *Pace*, 201 F.3d at 1056); *Mallak v. City of Baxter*, 823 F.3d 441, 446 (8th Cir. 2016). The "appealable issue" will generally be "whether the federal right allegedly infringed was 'clearly established.' " *White v. McKinley*, 519 F.3d 806, 813 (8th Cir. 2008). In addition, "[o]nly those issues that concern what the official knew at the time . . . are properly reviewed . . . because their review is necessary in order to determine whether a reasonable state actor would have known that his actions . . . would violate the law." *Miller v. Schoenen*, 75 F.3d 1305, 1308 (8th Cir. 1996).

However, disputes over "relevant circumstances and the acts of the parties themselves" lie beyond the scope of this Court's jurisdiction. *New*, 787 F.3d at 900–01. Indeed, if "[a]t the heart of t[he] argument is a dispute of fact," instead of a "purely legal issue," the Court may not hear an interlocutory appeal. *Pace*, 201 F.3d at 1053. "Even if a defendant

frames an issue in terms of qualified immunity, . . . [the Court] should determine whether he is simply arguing that the plaintiff offered insufficient evidence to create a material issue of fact." *White*, 519 F.3d at 813. Material issues of fact that are unreviewable during an interlocutory review include "determination[s] that the evidence is sufficient to permit a particular finding of fact after trial," *Langford v. Norris*, 614 F.3d 445, 455 (8th Cir. 2010) (quoting *Johnson*, 515 U.S. at 314), "genuine issue[s] of material fact surrounding the question of the plaintiff's or a defendant's relevant conduct," *Krein v. Norris*, 309 F.3d 487, 493 (8th Cir. 2002), disputes upon "damages . . . [and] causation," *Miller*, 75 F.3d at 1309, or the intentions behind the party's actions. *Powell v. Johnson*, 405 F.3d 652, 656–57 (8th Cir. 2005).

A genuine material factual dispute exists "[i]f the . . . [plaintiff] challenges the officer's description of the facts and presents a factual account where a reasonable officer would not be justified . . . ." *Arnott v. Mataya*, 995 F.2d 121, 124 (8th Cir. 1993). In such a scenario, the court of appeals "cannot determine, as a matter of law, what predicate facts exist to decide whether or not the officer's conduct clearly violated established law." *Id.* The court of appeals may not avoid the material

factual disputes by "ignoring disputed facts in the record or . . . resolv[ing] factual disputes in th[e] favor" of the defendants. *Wilson v. Lawrence C'nty*, 260 F.3d 946, 951 (8th Cir. 2001).

B. This Court Lacks Jurisdiction over Gutzmer's Appeal of the District Court's Denial of Qualified Immunity.

This Court lacks jurisdiction to consider Gutzmer's interlocutory appeal. The district court correctly framed the fighting issue as one of fact: whether a reasonable factfinder could conclude, based on the conflicting evidence in the record, that Gutzmer ordered Jackson to be placed on the restraint board in retaliation for seeking medical attention, as opposed to engaging in self-injurious behavior. This case presents precisely the sort of disputes over the parties' conduct and intent that operate to foreclose interlocutory review. *See Johnson*, 515 U.S. at 305.

(1) Gutzmer's interlocutory appeal inappropriately ignores facts favorable to Jackson.

First, Gutzmer asks this Court to paper over significant fact disputes that led the district court to deny summary judgment.

In *Aaron v. Shelley*, the plaintiff—a part time police officer in a different city—was arrested by the defendants—two police officers—for impersonating a police officer after confronting four "victims." *Aaron*, 624

F.3d at 883. After the plaintiff brought an action against the defendants claiming he was arrested without probable cause, the defendants' unsuccessfully moved for summary judgment on the grounds of qualified immunity. *Id.* The defendants filed an interlocutory appeal after their denial of qualified immunity "argu[ing] that they [we]re entitled to qualified immunity as a matter of law because, at the time of the arrest, there was arguable probable cause to arrest if they believed everything reported by the four 'victims,' and disbelieved everything . . . [the plaintiff] told them." *Id.* at 884. This Court concluded it lacked jurisdiction, stating that the appeal inappropriately "ignor[ed] facts favorable to . . . [the plaintiff], including a recording of the dialogue between police officers and . . . [the plaintiff]." *Id.*

Gutzmer comparably argues that he is entitled to qualified immunity as a matter of law because he "relied on a report from Weber." Br. for Appellant at 23. This rationale ignores nearly all of the facts favorable to Jackson. Taken in the light most favorable to the nonmoving party, Jackson was threatened with the restraint board if he kept seeking medical assistance, App.30; App.174–75, and was not "acting out of control, acting self-injuriously, nor in a negative manner" in the over ten

minutes Gutzmer observed him prior to having Jackson placed on the restraint board. App.33; App.176; App.178; *see* App.637–638 (describing how the video begins when Jackson was removed from his cell and shows him being placed on the restraint board after ten minutes of filming has already passed). Jackson explicitly stated he did not have "thoughts or feelings of harming himself or others" during his psychological evaluation and acted in a "professional, polite, and friendly" manner. App.305; App.603. Further—similar to *Aaron v. Shelley*—Gutzmer ignores the video recording showing that Jackson "appeared calm during and after the medical evaluation" that occurred prior to his placement on the restraint board. App 485–86.

Moreover, Gutzmer's appeal of the district court's denial of qualified immunity should be rejected because Jackson's plausible version of events demonstrates that a "reasonable officer would not be justified" in using the challenged force. *Arnott*, 995 F.2d at 124.

Crediting Jackson's version of events—which the district court found to be a "reasonable" version of events that a "jury could find . . . persuasive"—Gutzmer "acted in violation of clearly established Eighth Circuit precedent interpreting the Eighth Amendment." App. Add.74–75.

As stated in *Arnott*, a genuine material factual dispute exists "[i]f the . . . [plaintiff] challenges the officer's description of the facts and presents a factual account where a reasonable officer would not be justified . . . ." *Arnott*, 995 F.2d at 124. Therefore, Jackson has created a genuine issue of material fact which may not be reviewed on interlocutory appeal. *Pace*, 201 F.3d at 1053.

The same conclusion is further supported by *Mahamed v. Anderson*, 612 F.3d 1084 (8th Cir. 2010). *Mahamed* involved an appeal brought by a jail officer following the denial of qualified immunity. *Id.* at 1085. The plaintiff—a jail inmate at Sherburne County Jail in Minnesota who "had [previously had] a series of disagreements and altercations with jail staff, repeatedly filed grievances voicing his complaints, and spent a significant amount of time in segregation"—had originally brought suit following the events that occurred in the segregation unit of the Sherburne County Jail. *Id.* The events in dispute occurred after the defendant received a report from a correctional officer that the inmate was "causing a disturbance." *Id.* The defendant went into the inmate's cell, pulled out his taser, told the inmate to lay down (to which the inmate responded by laying on his back), and tased the inmate. *Id.* at 1086–87. The defendant,

however, "paint[ed] a different picture of the events which took place immediately preceding and during the incident than those portrayed by . . . [the inmate] and accepted by the district court." *Id.* at 1086. The defendant alleged that the inmate was "compromising the safety of the corrections officers," *id.*, and maintained that aiming the taser at the inmate was not stopping the prisoner's negative behavior. *Id.* Therefore, the defendant alleged he "used the [t]aser in a good faith effort to restore order and not to maliciously and sadistically punish" the inmate. *Id.*

This Court dismissed the interlocutory appeal challenging the denial of qualified immunity due to lack of jurisdiction even though the defendant "frame[d] his argument as a legal one, claiming he did not violate . . . [the plaintiff's] clearly established constitutional rights." *Id.* at 1086. The Court stated that interlocutory review was inappropriate because the "argument depend[ed] on [the Court's] resolution of numerous factual issues in . . . [the defendant's] favor." *Id.* The Court found "[t]he factual controversies pertaining to . . . [the prisoner's] conduct, . . . [the defendant's] response . . . [and] intent, and . . . [the prisoner's] injuries, are the type of issues best left for trial." *Id.* at 1087.

In this case, too, Jackson and Gutzmer paint dramatically different pictures of the events that transpired before, during, and after Gutzmer authorized Jackson's placement on the restraint board. Gutzmer alleges that after responding to a report that Jackson was "self-injurious," he went to his cell and "observ[ed] . . . Jackson hitting and/or kicking his cell door. App.504. Gutzmer further alleges that Jackson "refused multiple directives to cease kicking and punching his door." App.492. Gutzmer claims—based on his "observations of Jackson's behavior" and Officer Weber's report—that he determined that "the best and least intrusive way to control Jackson's behavior was to place him on the restraint board." App.508. Further, Gutzmer alleges he was "not aware" that Jackson asked to use the restroom while on the restraint board before urinating himself and that he was "not aware" that Jackson "ever asked staff to take a shower on May 13, 14, or 15." App.509.

But crediting Jackson's evidence, Jackson "complied with all directions with 'no resistance' " and "at no time was . . . acting out of control, acting self-injuriously, nor in a negative manner." App.31; App.33; App.176; App.178. Jackson's version of events is reinforced by the video recording taken prior to and during his placement on the

restraint board, App.485–86; App.637, and the psychological evaluation taken subsequent to his placement. App.34; App.179; App.305; App.603. Jackson further testified that he was placed on the restraint board "without need or provocation" due to Gutzmer's "malicious[] and sadistical[]" intent. App.39. Jackson's testimony is once again supported by the threat Jackson received that he would "be placed on the [restraint] board" if he kept seeking medical assistance. App.30; App.174–75. In addition, Jackson alleges he was denied his mandated bathroom breaks while on the restraint board; he was forced to lay in his own urine for over an hour; App.267; App.612–13; and was not allowed to shower for three days." App.36–37; App.182.

Just as in *Mahamed*, the factual controversies pertaining to the inmate's conduct and the officer's response and intent are "the type of issues best left for trial." *Mahamed*, 612 F.3d at 1087. As the district court recognized, accepting Jackson's evidence, as the summary judgment standard requires, there was no valid reason to believe Jackson was a threat to himself, and therefore no valid reason for placing him on the restraint board except as wanton punishment for calling attention to his medical condition.

(2) Issues related to Gutzmer's intent preclude interlocutory review.

Even setting aside the yawning gap between the parties' competing recitations of the relevant historical facts, factual issues related to Gutzmer's intent—a crucial issue under the governing Eighth Amendment standard—further preclude this Court's review.

This Court has repeatedly stated that disputes over a defendant's intent—disputes found to be genuine by the district court—are not immediately appealable after the denial of qualified immunity. *Powell*, 405 F.3d at 656–57; *Thomas*, 251 F.3d at 746; *Austin v. Long*, 779 F.3d 522, 524 (8th Cir. 2015). The Court stated that "controversies over intent are nebulous and take inordinate amounts of time to resolve . . . , [making them] precisely the kind of fact-based questions that *Johnson* sought to avoid." *Powell*, 405 F.3d at 656–57. The Court came to this conclusion due to "considerations of delay, comparative expertise of trial and appellate courts, and [the] wise use of appellate resources . . . ." *Thomas*, 251 F.3d 743, 746 (2001) (quoting *Johnson*, 515 U.S. at 317).

Two cases where interlocutory appeals were rejected for a lack of jurisdiction by this Court are especially relevant. In *Powell*, the interlocutory appeal of the denial of qualified immunity was dismissed

due to a factual dispute over the reason behind the plaintiff's demotion. The plaintiff alleged he was demoted due to complaining about promotion policies, a violation of his constitutional right to free speech. *Powell*, 405 F.3d at 655. The defendant—instead of arguing the "speech was not a protected activity or that . . . [the plaintiff's] right against retaliation is not firmly established"—alleged he demoted the plaintiff because the plaintiff was caught "fixing a ticket." *Id.* This Court held that the question of whether the intent behind the plaintiff's demotion was constitutional was "foreclosed from immediate appeal." *Id.*; *see also Bearden*, 475 F.3d at 930 (interlocutory appeal was denied because there was a "genuine issue of fact" upon the motivation behind the plaintiff's termination). Similarly, in *Mallak*, the interlocutory appeal of the denial of qualified immunity was rejected due to a factual dispute surrounding the reason four law enforcement officers viewed an attorney's private records. *Mallak*, 823 F.3d at 446. There was a factual dispute over the intentions of each of the four law enforcement officers because the officers failed to "conclusively disprove[]" the plaintiff's claim that the officers viewed her records for personal reasons . . . ." *Id.* The Court relied on evidence of pretext, including a "suspicious access pattern" where

searches "correspond[ed] with . . . significant event[s]." *Id.* (quoting *McDonough v. Anoka County*, 799 F.3d 931, 947 (8th Cir. 2015)).

Similarly, in this case, the district court found a factual dispute over why Gutzmer authorized Jackson to be placed on the restraint board—and that conclusion is not reviewable on appeal. Jackson alleges he was placed on the restraint board as punishment for requesting medical assistance numerous times, in violation of the Eighth Amendment. App.39. Gutzmer—instead of arguing that it is lawful to use the restraint board as punishment or that the law on using restraint boards as punishment is not firmly established—alleged he placed Jackson on the restraint board because Jackson was self-injurious. App.508. There are multiple factual disputes informing the intention of Gutzmer when he authorized the placement of Jackson on the restraint board. App. Add.65 ("The accounts given by Weber, Gutzmer, and Hereford differ from Jackson's account in three crucial respects."). And just as in *Mallak*, the "suspicious" timing of when Jackson was placed on the restraint board creates a factual dispute behind the intention of Gutzmer's actions. Jackson was placed on the restraint board directly after seeking medical assistance, around thirty minutes after being told he would be placed on

the restraint board if he persisted in seeking medical assistance. App.30–31; App.174–75. And Gutzmer made the final decision to place Jackson on the board after Weber stated that he wanted Jackson placed on the restraint board because Jackson had been "hitting" his "door all day." App.177. Therefore—just as this Court concluded in *Powell* and *Mallak*—Gutzmer's interlocutory appeal should be dismissed because Gutzmer cannot "conclusively disprove[]" Jackson's claim that he was punished for seeking medical care.

The reasons motivating this Court's unwillingness to review issues of intent apply with full force here. "[C]onsiderations of delay, comparative expertise of trial and appellate courts, and [the] wise use of appellate resources" all counsel against review in this case. *Thomas*, 251 F.3d at 746 (quoting *Johnson*, 515 U.S. at 317). District courts possess a great deal of experience ferreting out questions of credibility over a party's intent, as the district court has done here. What is more, resolving the merits of this appeal would only delay and complicate the ultimate resolution of this dispute. If this Court reviews the merits and affirms, the trial judge will face the difficult task of conforming the issues at trial to both the record evidence and this Court's views of permissible

inferences to be drawn from that evidence. And if this Court reverses, Jackson will immediately appeal the claims he lost below, giving another panel of this Court the unenviable job of reviewing a tightly interwoven set of claims based on the same facts raised here—and doing so consistent with an existing appellate opinion. These considerations remove this case far from the "small class" of district court decisions suitable for appeal prior to the completion of adjudication in the district court. *Mitchell*, 472 U.S. at 524. Instead, this case illustrates the wisdom of the baseline rule vindicating the "historic federal policy against piecemeal appeals." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 9 (1980).

Due to the multiple genuine material factual disputes—including basic historical facts and the intent behind Officer Gutzmer's authorization of the use of the restraint board, Gutzmer's interlocutory appeal should be dismissed for lack of jurisdiction.

II. IF THE COURT DETERMINES IT POSSESSES JURISDICTION, GUTZMER IS NOT ENTITLED TO SUMMARY JUDGMENT ON JACKSON'S EXCESSIVE FORCE CLAIM.

Even if this Court reaches the merits, the challenged provisions of the district court's order should be affirmed. The district court correctly concluded that a reasonable jury could find that Gutzmer ordered

Jackson placed on the restraint board in retaliation for Jackson seeking medical attention—and not for acting in a self-injurious manner. Supreme Court and Eighth Circuit precedent clearly establish that punishing a prisoner in such a manner violates the Eighth Amendment.

A. Summary Judgment Standard.

The district court's order is reviewed de novo. *Bearden*, 475 F.3d at 929. A court may grant summary judgment "only if there is no genuine issue of material fact," *id.*, and "if no reasonable jury could find" for the nonmoving party. *Burgess v. Moore*, 39 F.3d 216, 217–18 (8th Cir. 1994); *Hill v. McKinley*, 311 F.3d 899, 905 (8th Cir. 2002) (quoting *McKnight v. Johnson Controls*, 36 F.3d 1396, 1400 (8th Cir. 1994) ("Judgment as a matter of law is appropriate only when all of the evidence points one way and is susceptible of no reasonable inference sustaining the position of the nonmoving party.")). The moving party "bears the burden of establishing its entitlement" to summary judgment. *Heisler v. Metropolitan Council*, 339 F.3d 622, 626 (8th Cir. 2003). The Court may not "weigh evidence nor make credibility determinations." *Grossman v. Dillard Dept. Stores, Inc.*, 47 F.3d 969, 971 (8th Cir. 1995). This Court is "required to view the evidence in the light most favorable to the

nonmoving party and to give that party the benefit of all reasonable inferences." *Id.*; *see Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994) (describing how the court of appeals must credit the plaintiff's evidence).

B. Eighth Amendment Standard.

The Eighth Amendment "was designed to protect those convicted of crimes," *Whitley v. Albers*, 475 U.S. 312, 318 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)), by implementing a "constitutional limitation upon punishments." *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981). The Eighth Amendment categorically prohibits "cruel and unusual" punishments upon the incarcerated. *Id.* In determining what punishments are "cruel and unusual," the Court must use the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . ." *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)). According to these standards and concepts, "the unnecessary and wanton infliction of pain" is cruel and unusual punishment. *Whitley*, 475 U.S. at 319. There is "no static 'test' " upon what constitutes unnecessary and wanton conduct under the Excessive Force Clause of the Eighth Amendment, *Rhodes*, 452 U.S. at 346, and the words must be interpreted "in a flexible and dynamic

manner." *Id.* at 345 (quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)). Since the creation of the Eighth Amendment, the Supreme Court has made clear its terms "extend[] . . . beyond the barbarous physical punishments at issue in the Court's earliest cases" to include acts that are "not physically barbarous," but "involve the unnecessary and wanton infliction of pain." *Id.* at 345–46 (quoting *Gregg*, 428 U.S. at 173). The "basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Hope*, 536 U.S. at 738 (quoting *Trop*, 356 U.S. at 100).

To determine whether an Eighth Amendment violation has occurred, courts must analyze the circumstances surrounding the use of force by comparing "the threat [of] unrest pose[d] to inmates, prison workers, administrators, and visitors against the harm inmates may suffer if guards use force." *Hudson v. McMillian*, 503 U.S. 1, 6 (1992). The determinative factor "is whether the officer's use of force was reasonable under the circumstances, or whether it was punitive, arbitrary, or malicious." *Treats*, 308 F.3d at 873; *see Edwards v. Byrd*, 750 F.3d 728, 732 (8th Cir. 2014) (quoting *Santiago v. Blair*, 707 F.3d 984, 990 (8th Cir. 2013) ("[T]he core judicial inquiry is 'whether force was applied in a good-

faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.' ")).

"[O]fficers may reasonably use force in a good-faith effort to maintain or restore discipline . . . ." *Walker*, 526 F.3d at 1188. However, it is "well established that a malicious and sadistic use of force by a prison official against a prisoner, done with the intent to injure and causing actual injury, is enough to establish a violation of the Eighth Amendment . . . ." *Williams v. Jackson*, 600 F.3d 1007, 1012 (8th Cir. 2010) (quoting *Faulk v. Charrier*, 262 F.3d 687, 702 (8th Cir. 2001)); *Walker*, 526 F.3d at 1188 ("[O]fficers may reasonably use force in a good-faith effort to maintain or restore discipline but may not use it maliciously or sadistically to cause harm."); *Hudson*, 503 U.S. at 9 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.").

In determining if the officer acted in good faith and was reasonable, the court "may . . . evaluate the need for [the] application of force, the relationship between that need and the amount of force used, the threat 'reasonably perceived by the responsible officials,' and 'any efforts made to temper the severity of a forceful response.' " *Id.* at 7 (quoting *Whitley*,

475 U.S. at 312); *see also Hickey v. Reeder*, 12 F.3d 754, 758 (8th Cir. 1993) ("Whether pain is wantonly and unnecessarily inflicted depends, at least in part, on whether force could have plausibly been thought to be necessary to maintain order in the institution and to maintain the safety of the prison personnel or inmates."). The evaluation should be conducted " 'from the perspective of a reasonable officer on the scene' and in light of the particular circumstances." *Story v. Norwood*, 659 F.3d 680, 686 (8th Cir. 2011). If the analysis reveals the use of force was "arbitrary and purposeless . . . [,] a court permissibly may infer" the force was applied maliciously and sadistically. *Morris v. Zefferi*, F.3d 805, 810 (8th Cir. 2010). "Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' " *Rhodes*, 452 U.S. at 346 (quoting *Gregg*, 428 U.S. at 183); *Hope*, 536 U.S. at 737; *see also Hickey*, 12 F.3d at 758 ("[Qualified immunity . . .], however, does not insulate actions taken in bad faith or actions that amount to a wanton infliction of pain for no legitimate reason."); *Lenz v. Wade*, 490 F.3d 991, 995 (8th Cir. 2007) ("Unnecessary and wanton inflictions of pain, including inflictions of pain without penological justification, 'constitute[ ] cruel and unusual punishment forbidden by the Eighth Amendment.' ").

Arbitrary uses of force—in violation of the Eighth Amendment—include the "punitive use of force on difficult inmates not posing a real threat to other persons or raising security concerns." *Treats*, 308 F.3d at 872. Officers do not have a "blank check to use force whenever a prisoner is being difficult." *Id.* at 875.

In addition, Eighth Amendment precedent requires that an "actual injury" occur in the application of the force, *Cummings v. Malone*, 995 F.2d 817, 822 (8th Cir. 1993), but the injury does not have to be of "great significance," *Howard v. Barnett*, 21 F.3d 868, 873 (8th Cir. 1994), or "lasting." *Treats*, 308 F.3d at 874. The Supreme Court explicitly stated that the "extent of any resulting injury . . . is not . . . a threshold requirement." *Santiago*, 707 F.3d at 990 (quoting *Williams*, 600 F.3d at 1012 (describing how there is no requirement that a "certain quantum of injury . . . [be] sustained")). This Court has determined suffering pain is a "sufficient injury to allow for recovery for an Eighth Amendment violation." *McLaurin v. Prater*, 30 F.3d 982, 984 (8th Cir. 1994); *see Treats*, 308 F.3d at 874 ("No lasting injury is necessary to make out an Eighth Amendment violation, for the infliction of pain is sufficient if it

was inflicted for the purpose of causing harm."); *see also Munz*, 28 F.3d at 800 (describing how a "[r]ib cage contusion" can be a sufficient injury).

C. Qualified Immunity Standard.

Government officials can be protected from liability for civil damages with qualified immunity. *Cole v. Bone*, 993 F.2d 1328, 1332 (8th Cir. 1993). In determining if a government official is protected by qualified immunity, the Court applies a two-step inquiry. *Williams*, 600 F.3d at 1012; *Santiago*, 707 F.3d at 989. A government official is protected by qualified immunity—making summary judgment appropriate for the defendant—if either of the steps are answered in the negative. *McCaster*, 684 F.3d at 747. The government official is not entitled to qualified immunity—making summary judgment inappropriate—if both are answered affirmatively. *Id.*

The first prong of the inquiry asks "whether, '[t]aken in the light most favorable to the party asserting injury, . . . the facts alleged show the [defendant's] conduct violated a constitutional right.' " *Bearden*, 475 F.3d at 929 (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *Smith v. Conway C'nty, Ark.*, 759 F.3d 853, 858 (8th Cir. 2014); *Santiago*, 707 F.3d at 989. "[I]f a violation could be made out on a favorable view of the

parties' submissions," then this prong is satisfied for the nonmoving party. *Crow v. Montgomery*, 403 F.3d 598, 601 (8th Cir. 2005). If this prong is not satisfied, then summary judgment should be granted. *Coleman v. Parkman*, 349 F.3d 534, 538 (8th Cir. 2003).

The second prong of the inquiry asks "whether that right was clearly established at the time of the defendant's alleged misconduct." *LaCross v. City of Duluth*, 713 F.3d 1155, 1158 (8th Cir. 2013). The Eighth Circuit has taken a "broad view" of what passes for clearly established law. *Munz*, 28 F.3d at 799. To satisfy this requirement there does not need to "be a case with 'materially' or 'fundamentally' similar facts . . . ." *Nelson v. Correctional Medical Services*, 583 F.3d 522, 531 (8th Cir. 2009). Even in "novel factual circumstances" the law can be clearly established. *Id.* All that is required for the law to be clearly established is for the legal precedent to make the "unlawfulness . . . apparent." *Morris*, F.3d at 812. The unlawfulness is apparent when "a reasonable official would have known that her actions were unlawful [in that situation]." *McCaster*, 684 F.3d at 746; *Winters v. Adams*, 254 F.3d 758, 766 (8th Cir. 2001) ("Defendants will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have

concluded that the defendant should have taken the disputed action."). In determining if a reasonable official would have been aware of the unlawfulness, warning "may be provided by the Constitution itself or the decisions of the United States Supreme Court and the lower federal courts." *Nelson*, 583 F.3d at 531. If there is no binding legal precedent within the circuit, the court may "look to all available decisional law." *Meloy v. Bachmeier*, 302 F.3d 845, 848 (8th Cir. 2002). In addition to legal precedent, "[p]rison regulations governing the conduct of correctional officers are also relevant" in determining if a reasonable official would be aware a clearly established right. *Treats*, 308 F.3d at 875.

D. Jackson Has Stated an Eighth Amendment Violation and Gutzmer Is Not Entitled to Qualified Immunity.

Jackson has stated an Eighth Amendment violation because Gutzmer's use of force was carried out to punish Jackson for seeking medical attention—not for any valid penological purpose. Gutzmer transgressed a clear line spelled out in both precedent and prison guidelines: prison officials may not shackle prisoners to a restraint board strictly as a means of punishment.

(1) Jackson alleges a violation of a constitutional right.

Jackson has stated an Eighth Amendment claim. App. Add.73–74 (citing *Walker*, 526 F.3d at 1188). The evidence shows that Jackson posed no threat to prison security or himself. App. Add.72; App. Add.74–75; App.31; App.34; App.176; App.179; App.305; App.603. Rather, the overwhelming weight of the evidence corroborates Jackson's account that he was restrained as punishment for seeking medical attention. App. Add.72; App. Add.74–75; App.31; App.34; App.176; App.179; App.305; App.603.

In examining the amount of force applied compared to the alleged threat—or lack of threat—created by Jackson, the district court correctly concluded that Jackson posed no threat to himself whatsoever. *See* App. Add.72. In comparing "the threat unrest poses . . . against the harm inmates may suffer," *Hudson*, 503 U.S. at 6," this Court has made clear that when the inmate is not creating any immediate threat, the infliction of "substantial" pain is an "exaggerated response" that stands in "violat[ion of] . . . [an inmate's] Eighth Amendment right to be free of cruel and unusual punishment," *Hickey*, 12 F.3d at 759. This includes situations where a threat has never existed—like in many cases where,

as here, an "inmate questions orders or seeks redress for an officer's actions," *Treats*, 308 F.3d at 873–74.

This Court's cases show the principle in action. In *Hickey*, an inmate was shot with a stun gun for refusing to sweep his cell. *Hickey*, 12 F.3d at 756. This Court held that the inmate had created "zero" need for force because he was "not physically threatening the officers." *Id.* at 758. While the Court acknowledged that the use of force is "constitutionally permissible when prison security and order, or the safety of other inmates or officers" are in danger, the Court clarified that "summary force has yet to be ratified as the de jure method of discipline where security concerns are not immediately implicated." *Id.* at 759; *see Edwards*, 750 F.3d at 732 (the use of a flashbang grenade and a bean-bag gun upon an inmate who was lying down and not acting aggressively showed the guards used force for the "purpose of inflicting unjustified harm . . . [in] violat[ion of] the Eighth Amendment's proscription of cruel and unusual punishment."); *Treats*, 308 F.3d at 873. ("A basis for an Eighth Amendment claim exists when, as alleged here, an officer uses pepper spray without warning on an inmate who may have questioned his actions but who otherwise poses no threat."); *Smith*, 759 F.3d at 859

("We are bound to follow the holding and reasoning of our *Hickey* precedent, which recognizes prison officials' constitutional ability to use 'force'—including a taser—in a good-faith effort to maintain or restore discipline, but not 'maliciously and sadistically to cause harm' to a nonviolent inmate who is simply slow to comply with a jailer's non-emergency instruction.").

Likewise, this Court has made clear that the same principle applies where the threat has subsided. *See Thompson*, 350 F.3d at 735; *Hope*, 536 U.S. at 738 ("[T]he Eighth Amendment violation [wa]s obvious . . . [because a]ny safety concerns had long since abated by the time petitioner was handcuffed to the hitching post."). In *Thompson*, this Court held there was "no basis for a reasonable officer to believe force was needed at that time to prevent . . . [the inmate] from endangering himself or others" after the inmate had stopped "yelling and kicking the walls." *Thompson*, 350 F.3d at 735. The police officer's testimony that the inmate was still engaging in negative behavior "merely created a credibility issue" that was inappropriate for resolution at summary judgment. *Id.*

This case is squarely controlled by these precedents. Here, viewing the facts in the light most favorable to the nonmoving party, Jackson was placed on a restraint board solely for repeatedly requesting medical attention after being warned not to do so. App.30; App.39; App.174–75; App.267. This was done, notwithstanding the fact that Jackson was not threatening the officers or threatening to harm himself and had created no immediate security concerns. App.31 (describing how Jackson complied with all directions with "no resistance"); App.33 (Jackson was not "acting out of control, acting self-injuriously, nor in a negative manner" at any point); App.176; App.178; App.305 (Jackson explicitly stated he did not have "thoughts or feelings of harming himself or others"); App.486. Jackson and other witnesses testified that Jackson did nothing more than respectfully seek medical attention. App.252; App.256–57; R.137-3 at 2. Therefore, with "security concerns . . . not immediately implicated[,]" the infliction of "substantial" pain by placing Jackson on a restraint board represented an "exaggerated response" in "violat[ion of] . . . [Jackson's] Eighth Amendment right to be free of cruel and unusual punishment." App.180–81; App.253 App.267; App.499; *See Hickey*, 12 F.3d at 759.

The conclusion is buttressed by the fact that Jackson was threatened earlier in the day, laughed at by correctional officers prior to being placed on the board, and not allowed to shower until two days after the incident. App.30; App.36–37; App.174–75; App.182; App.258; *See Estate of Davis by Ostenfeld v. Delo*, 115 F.3d 1388, 1394 (8th Cir. 1997) ("The court's conclusion is also supported by evidence that . . . [the defendant] taunted and threatened . . . [the plaintiff] on the day after the incident."); *Hope*, 536 U.S. at 738 (taunting shacked inmate contributed to Eighth Amendment violation).

Even indulging the assumption that Jackson's action of hitting his door with a grease container could possibly be construed as self-injurious, there is no question that any conceivable threat had passed by the time Jackson was restrained. *See* App.31; App.176; App.257. Indeed, Jackson fully complied with all directives and acted in a calm and respectful manner throughout. App.31; App.176; App.179–80; App.226; App.257; App.305; App.486; App.603. The nurse who gave Jackson a psychological evaluation found that he was not self-injurious. App.34; App.179; App.603. Just as in *Thompson*, there was "no basis for a reasonable officer to believe force was needed . . . to prevent . . . [Jackson] from

endangering himself or others" once he had stopped engaging in any alleged negative behavior. *See Thompson*, 350 F.3d at 735.

Instead, the evidence demonstrates that Gutzmer ordered Jackson placed on the restraint board as punishment for seeking medical attention. First, a Corrections Officer explicitly threatened Jackson, saying "if you don't stop pushing the button and harassing COs [Corrections Officers] on rounds with fake requests for help you'll be placed on the board." App.30; App.174–75. Second, Officer Weber offered incredible testimony falsely suggesting that Jackson was swearing, yelling, punching and kicking his cell door, and refusing directives to stop. App.610; App.628. Third, following Jackson's medical examination, Weber told Gutzmer he wanted Jackson placed on the restraint board because Jackson had been "hitting" his "door all day." App.177. These pieces of evidence, combined with the lack of evidence tending to show Jackson posed any threat, only reinforce that Gutzmer ordered the "punitive use of force on [what he perceived to be a] difficult inmate[] not posing a real threat to other persons or raising security concerns." *Treats*, 308 F.3d at 872; *Edwards*, 750 F.3d at 732; *Santiago*, 707 F.3d at 990.

In a passing footnote, *see* Br. For Appellant at 17, n.1, Gutzmer argues that Jackson has failed to allege an injury sufficient to sustain an excessive force claim. The record belies the point. Jackson suffered severe muscle aches and joint stiffness as a result of being placed on the restraint board. App.181. His limbs were "stretched to their limits" and his head "strapped at an odd 90-degree angle." App.181. In addition, Jackson's placement on the restraint board "intensified" his already serious medical conditions "about 100%." App.179. Finally, Jackson described intense "humiliation and degradation, plus nausea[]" resulting from being forced to lie in his own urine for an extended period of time. App.181; App.611–13.

These injuries are more than sufficient to state an Eighth Amendment claim. The Eighth Amendment injury does not require an injury to be of "great significance," *Howard*, 21 F.3d at 873, or "lasting." *Treats*, 308 F.3d at 874. Indeed, the "extent of any resulting injury . . . is not . . . a threshold requirement." *Santiago*, 707 F.3d at 990. Suffering pain, discomfort, or humiliation is a "sufficient injury to allow for recovery for an Eighth Amendment violation." *McLaurin*, 30 F.3d at 984; *Hope*, 536 U.S. at 738.

Because Jackson suffered an injury as a result of Gutzmer's decision to punish Jackson by placing him on the restraint board, Jackson has stated an Eighth Amendment claim.

(2) Supreme Court and Eighth Circuit precedent clearly establish that the use of restraint boards for punishment violates the Eighth Amendment Excessive Force Clause.

The district court also correctly concluded that clearly established law shows force used arbitrarily as punishment violates the excessive force clause of the Eighth Amendment. This legal rule marks a clear line that prison officials know they must not cross: using force to punish prisoners rather than in response to legitimate safety threats. As the district court correctly summarized, "if the fact-finder were to find that Gutzmer used the restraint board as punishment and not for incapacitation, he would have acted in violation of clearly established Eighth Circuit precedent interpreting the Eighth Amendment, and Gutzmer's qualified immunity defense would fail." *Id.* at 14 (citing *Walker*, 526 F. 3d at 1188).

Supreme Court and Eighth Circuit precedent have clearly established that if "a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly

may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees." *Morris*, F.3d at 810 (quoting *Bell v. Wolfish*, 411 U.S. 520, 538–39 (1979); *Hope*, 536 U.S. at 737 (quoting *Rhodes*, 452 U.S. at 346 ("Among 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.' "). In the Eighth Circuit, it is clearly established that force may be justified to make an inmate comply . . . only if the inmate's noncompliance also poses a threat to other persons or to prison security." *Treats*, 308 F.3d at 875; *id.* at 872 ("The law . . . does not authorize the arbitrary use of force . . . , nor does it justify punitive use of force on difficult inmates not posing a real threat to other persons or raising security concerns."); *see Hickey*, 12 F.3d at 759 ("[S]ummary force has yet to be ratified as the de jure method of discipline where security concerns are not immediately implicated.").

In particular, the Supreme Court and the Eighth Circuit have clearly established that the use of a restraint board creates an "obvious" violation of the Eighth Amendment when used for punishment, instead of incapacitation. *Hope*, 536 U.S. at 738; *Walker*, 526 F.3d at 1188. In *Hope*, prison officials—in a non-emergency situation—subjected an

inmate to "unnecessary pain" by placing the inmate in handcuffs in a "restricted position" for around seven hours. *Hope*, 536 U.S. at 738. The Supreme Court stated this treatment "violated the 'basic concept underlying the Eighth Amendment' . . . [and] amounts to gratuitous infliction of 'wanton and unnecessary' pain that our precedent clearly prohibits." *Id.* And in *Walker*, this Court determined that an inmate being "restrained on a bench . . . [and] suffer[ing] . . . exacerbations of his chronic back pain and post traumatic stress disorder . . . [created a] trialworthy issues as to whether imposing such conditions on . . . [the inmate] was an excessive and disproportionate use of force, amounting to cruel and unusual punishment." *Walker*, 526 F.3d at 1188. Put simply, "mechanical restraints [must] not be used to punish inmates." *Von Collin v. County of Ventura*, 189 F.R.D. 583, 595 (C.D. Cal. 1999) (citing *Spain v. Procunier*, 600 F.2d 189, 198 (9th Cir. 1979)).

The fact that "a reasonable official would have known that [his] actions were unlawful [here]," *McCaster*, 684 F.3d at 746, is further reinforced by the numerous violations of the prison's own written procedures. According to the Department of Corrections' written policy, only "[o]ffenders who are jeopardizing facility security, demonstrating

assaultive behavior, destroying property, or engaging in self-injurious behavior may be placed in pinion restraints." App.337. As already covered, there is no evidence that Jackson was ever a threat to himself; and the evidence cited by Gutzmer allegedly showing that prison officials subjectively believed Jackson was self-injurious is disputed and not credible. *See* App. Add.72; App. Add.74–75; App.31; App.34; App.176; App.179; App.305; App.603. According to prison policy, restraints are supposed to be used only "when less forceful means have failed." App.337. Here, of course, prison officials did not even attempt any less punitive measures. App.508 (Gutzmer "decided to err on the side of safety and placed him on the restraint board."). A mental health professional must evaluate "the offender's mental health condition and . . . determine if continued restraint is appropriate or if alternative measures . . . [are] warranted." App.338. Here, the nurse examining Jackson explicitly found that he was not self-injurious, yet Jackson remained restrained. App.34; App.179; App.603. Prison policy dictates that offenders must be "permitted to [use the bathroom], if needed." App.338. Here, Jackson was outrageously told that a bathroom break would constitute negative behavior restarting his time on the board. App.180; App.266. Restraints

must be removed "when it can reasonably be determined by staff that the offender has calmed down and agrees to refrain from the destructive, assaultive, or self-injurious behavior." App.338. Here, Jackson remained restrained for hours. App.181; App.499. While the evidence of Jackson's self-injurious behavior is at least disputed, there is simply *no evidence* warranting Jackson's continued restraint over the course of hours. Finally, prison staff are never allowed to use "force or restraints as a means of punishment." App.334. The use of force is generally discouraged. App.397. Numerous officials working at the prison—including Gutzmer—knew the restraint board was not to be used as punishment. App.86; App.487; App.508; App.683.

Last, it is clearly established that "courts may [not] dismiss . . . [Eighth Amendment] claims based solely on the de minimis nature of the resulting injury." *Williams*, 600 F.3d at 1012; *see Santiago*, 707 F.3d at 990 ("The Supreme Court recently clarified that the extent of any resulting injury . . . is not in and of itself a threshold requirement for proving this type of Eighth Amendment claim."); *Hudson*, 503 U.S. 1, 7 (1992) (the "absence of serious injury . . . does not end" an Eighth Amendment claim). It is further established that substantial pain—as

Jackson alleges—is a sufficient injury for an Eighth Amendment violation, "regardless of whether an inmate suffers serious injury as a result." *Treats*, 308 F.3d at 872; *see Hickey*, 12 F.3d at 757 (an unlawful amount of pain "can be inflicted with little or no injury"); *Hudson*, 503 U.S. at 9 ("When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated . . . , whether or not significant injury is evident.").

CONCLUSION

For the foregoing reasons, this Court should dismiss Gutzmer's appeal for lack of appellate jurisdiction. In the alternative, this Court should affirm the challenged provisions of the district court's order and remand for further proceedings.

Date: August 18, 2016

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system on the following:

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