23-151

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Jere Eaton,
Plaintiff-Appellant,
v.
Steven Estabrook and **City of Stamford**,
Defendants-Appellees.

On appeal from the United States District Court
for the District of Connecticut
Case No. 3:21-cv-324-SVN
Hon. Sarala V. Nagala

APPELLANT JERE EATON'S OPENING BRIEF

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June 15, 2023

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this federal civil-rights action under 28 U.S.C. § 1331. It issued its final judgment dismissing Plaintiff Jere Eaton's claims on January 31, 2023. SA 31. Eaton timely appealed. 2 JA 416; Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

Steven Estabrook is not a small man. A six-foot-five ex-Marine, he towers over most people he meets. In riot gear, he's 250 pounds of muscle and armor. And he's not afraid to throw his weight around. "Whatever [force] is being presented to me, I'm going to match or go above it," he says. 1 JA 152. "I can't be afraid of the situation itself. I've got to act immediately to it." 1 JA 171.

In August 2020, Stamford residents organized to protest the death of a young Black man in police custody. It wasn't a large event; the attendees numbered around 40 or 50. Jere Eaton wasn't planning to go. But she was at the police station for a back-to-school event, and Captain Diedrich Hohn asked her to stay. She was a recognized figure in the community and he wanted her help managing the protesters. Somewhat reluctantly, she obliged.

As the march proceeded, police arrested someone near the back of the column. The crowd grew agitated, but with Eaton's help the officers got the situation under control. Then Estabrook slammed into Eaton, yanked her up by the strap of her bra, drove her backward several feet, and threw her into the street. She landed on her back and suffered severe whiplash injuries.

The district court correctly held that Estabrook's use of force was excessive. Two years earlier, this Court had reaffirmed that "protesters enjoy robust constitutional protection" and that officers engaging with

protesters "must comply with the same principles of proportionality attendant to any other use of force." *Edrei v. Maguire*, 892 F.3d 525, 541 (2d Cir. 2018). The district court applied that precedent faithfully.

Yet it granted Estabrook's request for qualified immunity. He argued that because he had heard a "Code 30" on the radio—an extremely urgent request for assistance, he claimed—his need to reach his fellow officers justified using extreme force. The district court agreed that the Code 30 was a "crucial" fact here that distinguished *Edrei* and rendered Eaton's right against such force unclear.

But Estabrook offered no evidence to support his claim that a Code 30 is so urgent. Qualified immunity is his defense, so producing that evidence is his burden. And even if a Code 30 is as urgent as he claims, he still wouldn't be entitled to immunity because he made no effort to limit or avoid using force. He could've pushed past Eaton rather than tackling her. He could've gone around—there was room. At minimum, he could've shouted out a warning. He did none of these. This Court's decisions have long held that resorting immediately to significant, gratuitous force is excessive, so Estabrook had the fair notice that qualified immunity requires. This Court should reverse the district court's decision to the contrary and let Eaton try her case to a jury.

ISSUES PRESENTED

1. **Excessive force.** The touchstone of the excessive-force analysis is whether the force the officer used was reasonably necessary. Estabrook could easily have warned Eaton, gone around her, or just pushed past her, but instead he tackled her without warning and threw her to the ground. Was his use of force excessive?

2. **Qualified immunity—(a).** The district court distinguished *Edrei* on the basis of the "Code 30" call. But the record contains no evidence that Code 30 denotes urgency, and the burden of proof is Estabrook's. Without that "crucial distinguishing fact," did *Edrei* clearly establish Eaton's right against significant force?

3. **Qualified immunity—(b).** Even accepting Estabrook's interpretation of "Code 30," this Court has long held that officers may not use significant force "gratuitously" and must offer a warning first when possible. So would a reasonable officer have gone around Eaton—or at least warned her before tackling her?

4. **State-law immunity.** Connecticut law withdraws immunity when an officer's failure to act subjects an identifiable person to imminent harm and when he acts with malice. Estabrook's failure to warn Eaton subjected her to imminent harm and his deposition testimony bristles with hostility toward the protesters. Could a reasonable jury deny him immunity on Eaton's state-law claims?

STATEMENT OF THE CASE

This is a civil-rights case. 1 JA 6. Eaton alleges that Estabrook, a police officer in Stamford, Connecticut, used excessive force against her at a protest. *Id.* Estabrook and the City of Stamford moved for summary judgment, arguing that Eaton couldn't prove her claims and that they were in any event entitled to immunity. SA 1. The district court (Nagala, J.) granted the motion, holding that a jury could reasonably find Estabrook's use of force excessive, but that he was entitled to qualified immunity and both defendants were entitled to state-law immunity. *Id.*; *Eaton v. Estabrook*, 2023 WL 423122, at *1 (D. Conn. 2023). Eaton appeals the decision as to Estabrook.

STATEMENT OF FACTS

1. The police ask Eaton to attend a protest to help manage the protesters.

Jere Eaton is no rabble-rouser or troublemaker. She doesn't seek out conflict or fan the flames of discord. She's a businesswoman and an entrepreneur. 2 JA 199, 302. She participates in community groups like the NAACP and the League of Women Voters. 2 JA 252, 242. She served on the Mayor of Stamford's Multicultural Council. 2 JA 207–08. She goes to church. 2 JA 290. She's "friendly" with police officers and on a first-name basis with Captain Hohn. 2 JA 289, 261, 268.

On August 8, 2020, her plans didn't include attending a protest. 2 JA 241. In the morning she went to the police department to drop off t-shirts she'd made for a back-to-school laptop giveaway. 2 JA 241–42. She left around lunch for another back-to-school and voter-registration event at her church. 2 JA 242. She returned in the afternoon to continue to support the giveaway at the station. 2 JA 244; 1 JA 117.

Once the event ended, she began preparing to leave. 2 JA 246–47. She knew the protest was coming and found the protesters "very irritating." 2 JA 246. But the officers asked her to "stick around to help" because "protesters would listen to [her] more than they would listen to [the police]." 2 JA 246, 241. She agreed to stay if she could charge her devices inside the station, because her power had been out for eight days. 2 JA 241. The officers readily agreed. 2 JA 246–47. So she charged her devices and made "light conversation" with the officers while they waited for the protest to reach the police station. 2 JA 247–49.

When the first protester arrived, the officers asked Eaton to talk to her because she was one of the leaders of the protest. 2 JA 249–50. Eaton obliged and chatted with her until the rest of the group arrived. 2 JA 250–51. But once the protest began in earnest, Eaton left to give a girl experiencing medical issues a ride to her car. 2 JA 262–63.

As the demonstration outside the police station wound down, Eaton went inside to gather her belongings and go home. *Id.* But Hohn intercepted her: "[W]e need your help," he said. 2 JA 263, 265. The protesters were planning to march back to their starting point, and Hohn wanted Eaton to lend a hand getting them past people dining outdoors along the way. *Id.* Again, Eaton obliged. And her presence was indeed helpful. At one point, she even persuaded protesters to give up a lane of traffic when no police officer had met with success. 2 JA 267.

2. Estabrook tackles Eaton without warning, throws her to the ground, and fells another protester—who lands on Eaton.

The ensuing events were captured on three police body-camera videos: Estabrook's video,[1] Officer 41's video,[2] and Officer 23's video.[3]

Protesters arrive at a Target store on Broad Street. Officer 41 Video 0:56. Attendance has become sparse and low-energy, with some thirty to forty protesters spread out over about a block and a half. *Id.* at

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[1] Estabrook submitted his video as a Dropbox link. 1 JA 47; https://www.dropbox.com/sh/f8erguldpcgl4z5/AADunsgJkoZIpQ-c-9sMbvsCa?dl=0.

[2] Eaton lodged Officer 41's video as a physical exhibit before the district court, 1 JA 104, and before this Court, *see* Dkt. 40.

[3] Estabrook filed Eaton's interrogatory responses as part of the summary-judgment record. 1 JA 84. They link to Officer 23's video, so it was before the district court. 1 JA 94–95; https://drive.google.com/file/d/1EJbTNdqzQfk2bLFM-NY4GOiN5LfKTw5m/view.

0:56–1:37. Toward the back of the procession, some protesters are arguing with an officer; Eaton can be heard telling them they should leave. *Id.* at 1:53–1:56; *see also* 2 JA 226.

A few seconds later, for reasons that are unclear, officers tackle and arrest a protester near the back of the column. Officer 41 Video 2:16–23. The crowd becomes agitated; officers warn them to "get back." *Id.* at 2:21–27. Eaton helps keep protesters and officers apart:

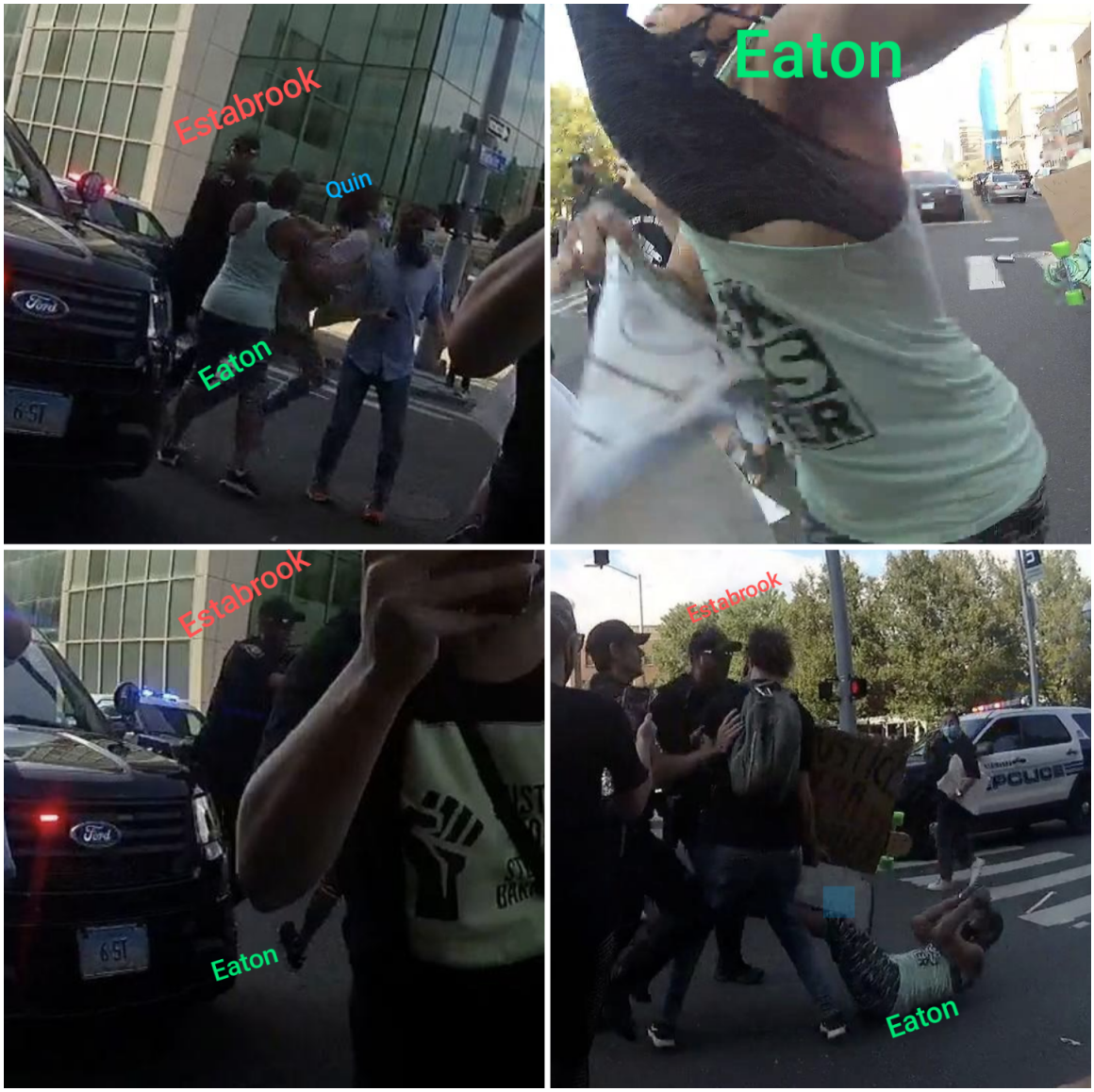
Id. at 2:25–2:46; 1 JA 105.

Within half a minute, the situation begins to stabilize. 2 JA 323–24; Officer 41 Video 2:40–47. Officer 23, who appears to have command responsibility, tells Officer 41 to "put [his] stick down." Officer 23 Video 27:35–38; Officer 41 Video 2:41–43. Eaton recognizes her old neighbor's son, Quin, and takes him to one side to

tell him to "go home." Officer 41 Video 2:47–2:49; 2 JA 341, 343, 325.

During the brief fracas, Hohn calls a "Code 30." 1 JA 37 ¶ 25. "A Code 30 means officers need assistance." *Id.*[4] When Estabrook hears the Code 30, he urges the driver of his car to "come on, come on, come on, come on, GO, GO, GO, GO, GO!" Estabrook Video 0:39–44. He opens his door while the car is still in motion and exits at a flat sprint. *Id.* at 0:43–47. He charges into Quin at full speed, pushes him to one side, grabs Eaton's bra strap, and drives her into the air backward for about 15 feet before throwing her to the ground. Officer 41 Video at 2:49–2:53; 1 JA 109; Estabrook Video 0:47–51; 1 JA 50. Officer 23 sees this and cries in dismay: "No! In a circle! Estabrook! Back up over here!" Officer 23 Video 27:50–58. Estabrook angrily shrugs him off before complying. *Id.*; Officer 41 Video 3:01–03.

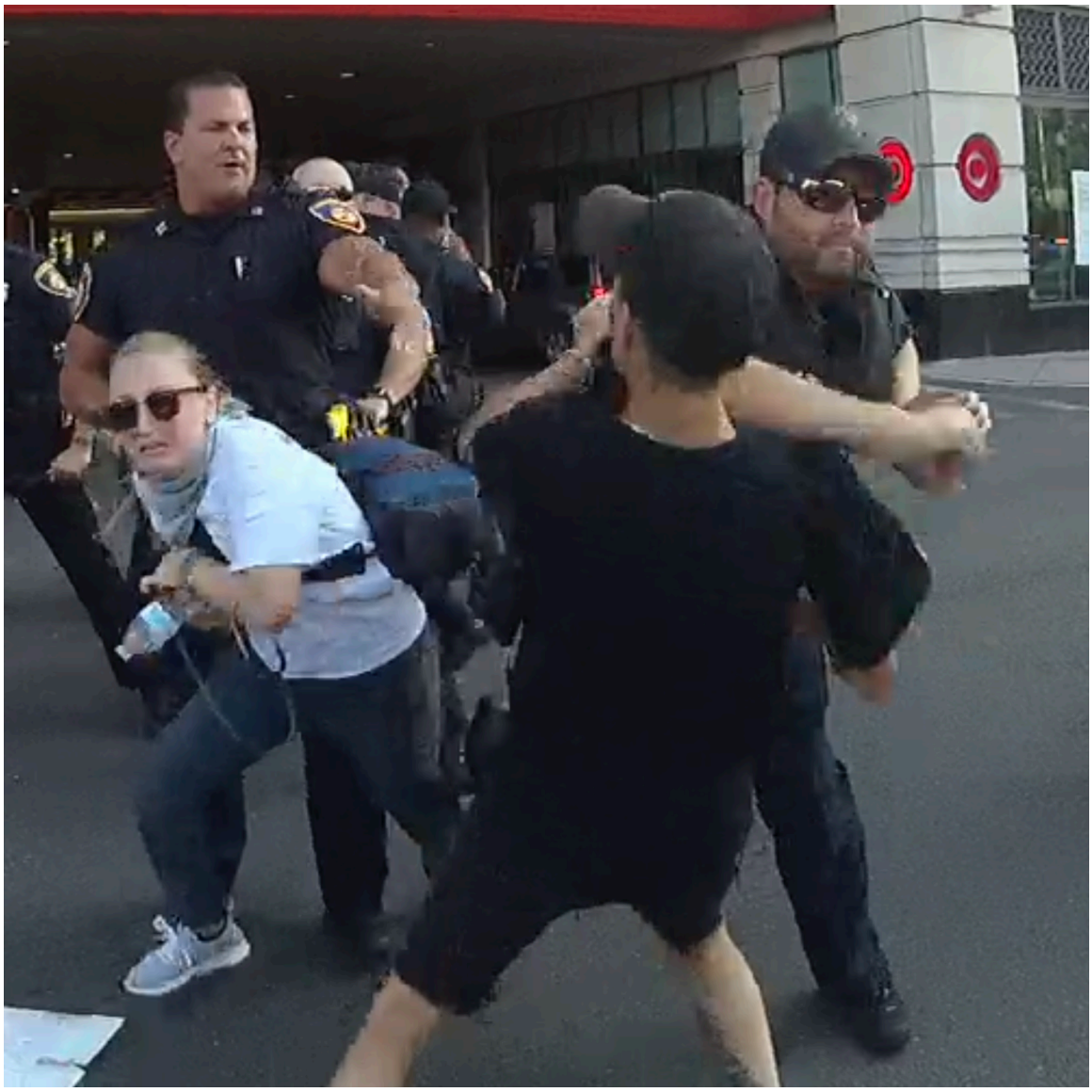
[4] The record is materially ambiguous about what exactly "Code 30" means. In his declaration, Hohn explains that there are three codes—Code 1, Code 2, and Code 3, each denoting increasing degrees of urgency. 1 JA 37. Hohn does not explain the meaning of Code 30 beyond "officers need assistance." *See id.* Nor does any other evidence in the record. 1 JA 27 ¶ 34. Despite this evidentiary gap, the district court "assume[d]" that Code 3 and Code 30 "refer to the same emergency response call." SA 3 n.1. This was likely error: The urgency with which Estabrook needed to respond is an element of his defense, and thus proving it is his burden. *See infra* Part 2.2.



Top left: Estabrook charges into Quin (Officer 41 Video 2:50; 1 JA 106)
Top right: Estabrook grabs Eaton's bra strap (Estabrook Video 0:49; 1 JA 49)
Bottom left: Estabrook drives Eaton backward into the air (Officer 41 Video 2:51; 1 JA 107)
Bottom right: Estabrook throws Eaton to the ground (Officer 41 Video 2:53; 1 JA 108)

As members of the crowd help Eaton to her feet, a protester yells at Officer 41 about the needless violence. Officer 41 Video 3:06–3:11; Officer 23 Video 28:03–06. Another officer starts to maneuver her away by the elbow, but Estabrook jumps in and escalates, trying to wrestle her to the ground. Officer 41 Video 3:06–3:15; Officer 23

Video 28:03–09. And when another protester tries to intervene, Estabrook decks her in the jaw:



Officer 23 Video 28:07; 1 JA 97. That protester goes sprawling and lands on Eaton's head just as she's getting up, compounding Eaton's injuries. *Id.* at 28:07–09; 2 JA 303.

* * *

There were no reports of any shots fired that day. 1 JA 163. No officers injured. 1 JA 163–64. No protesters with dangerous weapons. 1 JA 164; *cf.* 1 JA 122 at 38:24–39:4. Estabrook's job that day wasn't even crowd control. It was blocking traffic. 1 JA 164.

3. The district court holds that Estabrook used excessive force but grants him qualified immunity.

Eaton filed suit, alleging that by charging into her and throwing her to the ground for no reason, Estabrook used excessive force in violation of her constitutional rights. 1 JA 6. She also sought relief under state law. 1 JA 10–12.

The district court held that Estabrook had violated Eaton's Fourteenth Amendment right against excessive force. SA 7–15. It reasoned that based on the video, a jury could reasonably find that Estabrook "acted at least knowingly or recklessly" when he used force against Eaton. SA 9. It also reasoned that since "there were no weapons at the protest, nor were there any reports of shots fired or officers injured," and "there is no evidence that [protesters] actively resisted arrest or attempted to attack the police officers," a reasonable jury could find that the force Estabrook used "was disproportionate to the need of the particular threat." SA 11–12. Bolstering that conclusion, it observed that Estabrook made no "attempt[] to temper his use of force," that he offered the protesters no warning before

barreling into them, and that the other officers who responded to the Code 30 used "much less force." SA 12–13.

Even so, the court granted Estabrook's request for qualified immunity. SA 18. Although it acknowledged that this Court's decision in *Edrei* was almost completely on point, it held that the "Code 30" was the "crucial distinguishing fact" that shielded Estabrook from liability. SA 19. It also held that Estabrook was entitled to state-law immunity from Eaton's state-law claims, and thus granted him summary judgment. SA 23–30.

This appeal followed.

STANDARD OF REVIEW

In ruling on a motion for summary judgment, courts construe the evidence and draw all reasonable inferences in favor of the party opposing the motion. *Rogoz v. City of Hartford*, 796 F.3d 236, 246 (2d Cir. 2015). Summary judgment lies only when the evidence, so construed, presents "no genuine dispute as to any material fact" and the moving party prevails "as a matter of law." Fed. R. Civ. P. 56(a). This Court reviews a district court's grant of summary judgment de novo. *Sloley v. VanBramer*, 945 F.3d 30, 36 (2d Cir. 2019).

SUMMARY OF ARGUMENT

Estabrook tackled Eaton without warning and threw her to the ground, supposedly so that he could reach the officers behind her. The district court correctly held that the force he used was excessive, but it erred in granting him immunity. This Court should reverse.

1. The test for excessive force under the Fourteenth Amendment is largely objective, just as under the Fourth Amendment. In both contexts, the plaintiff must show an intentional act, but she need not show that it was intentionally excessive. Here, video evidence shows Estabrook grabbing Eaton's bra strap, lifting her into the air, and throwing her to the ground. The district court correctly found that his act was intentional under the summary-judgment standard. The main question is whether it was objectively reasonable.

That analysis turns on whether the degree of force he used was justified by the need for force, as perceived by a reasonable officer on the scene. This Court has classified pepper spray and tasers—which cause only minor, transient injuries—as "significant" force. Here, Estabrook's physical force inflicted prolonged muscle and soft-tissue injuries for which Eaton continues to seek treatment. So Estabrook used at least "significant" force.

He had no need to use such force. Eaton had committed no crime. She presented no threat. Estabrook's sole justification is that he was responding to the Code 30 call, but no other officer who responded used such severe force. Nor does Estabrook's stated rationale explain why he didn't try to temper his use of force or shout out a warning as he approached. The district court correctly held that a jury could find his use of gratuitous force without warning excessive.

2. Estabrook is not entitled to qualified immunity. The district court reasoned that the "Code 30" was the "crucial" fact that distinguished *Edrei* and left Eaton with no clearly established right against excessive force, but nothing in the record corroborates Estabrook's claim that a Code 30 is so urgent and serious. The record evidence shows only that Code 30 means "officers need assistance," and Estabrook acknowledges that calls for assistance are often routine and rarely urgent. Qualified immunity is an affirmative defense, so Estabrook bears the burden of showing that Code 30 is of the latter

sort. And he fails to carry that burden, so *Edrei* clearly established Eaton's right against being tackled and thrown to the ground.

Even if a Code 30 did denote the urgency Estabrook ascribes to it, it would not give Estabrook license to use force without limit. This Court's precedents have long established across many contexts that gratuitous force delivered without warning is excessive. Estabrook could have gone around Eaton, and he could have warned her out of his way. He did neither, and qualified immunity is "not so stingy" as to excuse his use of gratuitous force. *Edrei*, 892 F.3d at 540.

3. Nor is Estabrook entitled to immunity under state law. Connecticut law grants public officials immunity for discretionary acts, but it contains an exception for officials who fail to act despite a foreseeable risk of imminent harm to an identifiable person. Connecticut courts have applied this rule to cases of excessive force by police officers. Estabrook failed to give Eaton a warning despite a foreseeable risk of imminent harm to her, so he is not entitled to discretionary-act immunity.

Connecticut law also contains an exception for officials who act with malice. The record teems with evidence from which a jury could infer that Estabrook bore malice toward the protesters that day—after all, they were protesting the police. Whether Estabrook's state of mind deprives him of immunity is for a jury to decide.

ARGUMENT

Estabrook needlessly charged into Eaton and threw her to the ground. This Court's decisions have long established that using such force gratuitously and without warning is unreasonable, so Estabrook is not entitled to qualified immunity. Nor is he entitled to immunity under state law from Eaton's tort claims.

1. Estabrook's takedown of Eaton was unreasonable and violated the Fourteenth Amendment.

Excessive-force claims can arise under the Fourth, Fifth, Eighth, and Fourteenth Amendments. Such claims all share a common, objective core—whether the degree of force used was reasonably justified by the state's interest in using force. *See Lombardo v. City of St. Louis*, 141 S. Ct. 2239, 2241 n.2 (2021) (explaining that the objective standard is the same "[w]hatever the source of law"); *Edrei*, 892 F.3d at 537, 542 n.5. That said, the constitutional text can add a subjective gloss. The Eighth Amendment requires a "malicious and sadistic" state of mind, for example, while the Fourth Amendment doesn't take individual officers' "subjective motivations" into account at all. *Graham v. Connor*, 490 U.S. 386, 398 (1989). The Fourteenth Amendment's standard, like that of the Fourth, is "objective not subjective." *Kingsley v. Hendrickson*, 576 U.S. 389, 395 (2015).

Estabrook wasn't trying to arrest Eaton, so her claim arises under the Fourteenth Amendment rather than the Fourth. *See Johnson v. Newburgh Enlarged Sch. Dist.*, 239 F.3d 246, 253 (2d Cir. 2001). He tackled her intentionally or at least recklessly—that is, he didn't trip into her—so his conduct satisfies the Fourteenth Amendment's minimal mental-state requirement. And tackling Eaton was a significant use of force that wasn't justified by any corresponding state interest in using force, so it was excessive.

1.1. Estabrook tackled Eaton intentionally.

In *Kingsley v. Hendrickson*, the Supreme Court held that the Fourteenth Amendment excessive-force inquiry is largely objective: The plaintiff must show that the force used against her was "objectively unreasonable." 576 U.S. at 395–97. The *act* of using force must still be intentional, knowing, or reckless—negligently inflicted injuries don't count—but the plaintiff need not show that the force was intentionally or knowingly or recklessly *excessive*. *Id.* at 395–96; *Edrei*, 892 F.3d at 536. This minimal mental-state requirement mirrors the Fourth Amendment's objective standard. *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989) (explaining that a seizure occurs when the government terminates freedom of movement through "means intentionally applied" (emphasis omitted)). And so this Court has "repeatedly assessed

excessive force claims" under the Fourteenth Amendment "without looking to subjective intent." *Edrei*, 892 F.3d at 537.

Estabrook argued below that he didn't see Eaton before he "collided" with her, and that his conduct was therefore "inadvertent." 1 JA 44. The district court found this assertion genuinely disputed, SA 9–10, and rightly so: The video evidence—which shows Estabrook grabbing Eaton's bra strap, lifting her into the air, and throwing her to the ground—belies his testimony. Officer 41 Video at 2:49–2:53; 1 JA 106–09; Estabrook Video 0:47–51; 1 JA 48–50.

More importantly, Estabrook's assertion is irrelevant: The excessive-force standard requires only that the *act* be willful, not that it be willfully directed at the person injured. *Cf. Brower*, 489 U.S. at 596 ("A seizure occurs even when an unintended person or thing is the object of the detention or taking[.]"). No one suggests that Estabrook charged into the group of protesters accidentally. He didn't "unintentionally trip[] and fall[]" into Quin and Eaton. *Cf. Kingsley*, 576 U.S. at 396 (describing the type of negligently inflicted injury for which an excessive-force claim is unavailable). He *meant* to barrel into them to get them out of his way. *Cf.* 1 JA 173–74 (in which Estabrook explains that he acted intentionally "to get to the police officers in need"). That's all Eaton needs to show to satisfy the Fourteenth

Amendment. At minimum, Estabrook acted recklessly, and that too suffices to hold him liable. *Kingsley*, 576 U.S. at 395–96.[5]

1.2. Estabrook's use of force was gratuitous and thus objectively unreasonable.

Whether a particular use of force is reasonable is measured by weighing the degree of force used—including the severity of any injuries inflicted—against the need for such force as perceived by a reasonable officer on the scene. *Edrei*, 892 F.3d at 537; *Kingsley*, 576 U. S. at 397. Most excessive-force claims arise in the Fourth Amendment context, but since the objective inquiry is the same "[w]hatever the source of law," courts freely "cross-pollinate" points of doctrine from one context to another. *Lombardo*, 141 S. Ct. at 2241 n.2; *Edrei*, 892 F.3d at 542 n.5.

1.2.1. Estabrook used a significant degree of force when he tackled Eaton and threw her to the ground.

Estabrook barreled headlong into a group of people, grabbed Eaton by the bra strap, lifted her off the ground, seemingly carried her several feet, and threw her to the ground, where she landed on her back and just barely kept her head from hitting the asphalt. Officer 41 Video at 2:49–2:53; 1 JA 106–09; Estabrook Video 0:47–51; 1 JA 48–50. A

[5] For that matter, the record contains evidence that Estabrook acted maliciously. *See infra* Part 3.2. A malicious state of mind is not necessary for liability under the Fourteenth Amendment, but it can "help show that the use of force was excessive." *Edrei*, 892 F.3d at 537 (quotation marks omitted).

few seconds later, he delivered a blow to the jaw of another protester, who went flying and landed on Eaton's head. Officer 23 Video at 28:07–09; 1 JA 97; 2 JA 303.

As a result, Eaton "hurt like hell." 2 JA 283. Her primary-care physician couldn't help her; she had to go to a pain-management specialist. 2 JA 296–97. She receives trigger-point injections and cortisone shots, visits a physical therapist twice a week, takes a muscle relaxant before bed, and still she experiences significant pain in her neck and shoulders. 2 JA 297–99. She's also been referred to an orthopedic surgeon for a "tingling" sensation in her hand, which may reflect nerve damage. *See* 2 JA 299. She can no longer "do[] the repetitive motion of screen printing"—that is, her job—or lift boxes heavier than about 30 pounds. 2 JA 302.

In short, Estabrook used significant force. In *Edrei*, this Court described an acoustic device "capable of" causing pain and hearing loss as a "significant degree of force." 892 F.3d at 543–44 (quotation marks omitted). By that measure, the force Estabrook used could have caused a traumatic brain injury. Eaton was lucky, in that she managed to keep her head from hitting the street, but the soft-tissue injuries she suffered in her neck and shoulders still "fit comfortably" within this Court's conception of "substantial physical injuries." *Edrei*, 892 F.3d at 538 (quotation marks omitted); *see also Johnson*, 239 F.3d at 252 (force causing "head trauma, lacerations, and bruising" was "extremely

violent"); *Robison v. Via*, 821 F.2d 913, 923–24 (2d Cir. 1987). For that matter, this Court has described pepper spray and tasers as "significant force." *Jones v. Treubig*, 963 F.3d 214, 226 (2d Cir. 2020). The physical force Estabrook used here caused injuries far greater and longer-lasting, so it was at least "significant." And so it must be justified by a correspondingly significant need.

1.2.2. Estabrook did not need to use force at all, much less significant force.

Estabrook must show that the significant force he used was both "rationally related" to a legitimate state objective and that it was not excessive in relation to that objective. *Edrei*, 892 F.3d at 535, 537. Courts use several questions to help frame this analysis:

- What degree of threat did the officer reasonably perceive?
- Was the plaintiff actively resisting?
- How severe was the security problem confronting the officer?
- Did the officer attempt to temper or limit the amount of force used?

Id. at 537–38 (citing *Kingsley*, 576 U.S. at 397).

Here, Eaton wasn't resisting at all, let alone resisting "actively." Nothing she did could reasonably be perceived as a threat. Estabrook's sole proffered justification for bulldozing her to the ground was the severity of the security problem—his purported need to "respond to the Code 30 with urgency." SA 11. The district court accepted Estabrook's

representation that a Code 30 is "the most urgent response code requiring an emergency response,"[6] but even so it concluded correctly that a reasonable jury might find the level of force with which he responded "disproportionate." SA 3 n.1, 11–12.

The court first pointed out that just as in *Edrei*, the protesters here were largely nonviolent: No weapons were present, no shots fired, no officers injured. SA 11–12; 1 JA 163–64. It noted too that only Estabrook reacted to the Code 30 with physical violence; other officers managed to respond without throwing protesters to the ground or using comparable force. SA 12; Officer 23 Video 27:25–28:30. (Estabrook, meanwhile, knocked over not just Eaton but a second attendee as well. Officer 23 Video 28:06–09.) Eaton wasn't even a protester—she was there as a liaison at the request of the police, and the district court found that a jury would have to decide whether Estabrook knew that. SA 13.

Estabrook claimed that the crowd was unruly, and the district court agreed that "the protesters here presented a greater threat than in *Edrei*." SA 11. On this point, it appears to have misread *Edrei*: It reasoned that the protesters there "promptly complied with the officers'

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[6] The record reflects only that "[a] Code 30 means officers need assistance," 1 JA 37 ¶ 25; 1 JA 123 at 42:23–43:2; by construing that in favor of Estabrook instead of Eaton, the district court likely erred. And as explained below, it certainly erred in carrying that assumption into the qualified immunity analysis. *See infra* Part 2.2.

requests to move to the sidewalks," *id.* (quotation marks omitted), but in fact they did so only *after* officers used significant force. *Edrei*, 892 F.3d at 530–31. Before that, the protesters there were behaving just like the protesters here: They were in the street, blocking traffic, gathered in a circle watching an arrest, demanding the officers let the arrestees go, being told to "get back" by officers. *Id.* If anything, the protesters in *Edrei* presented a greater threat—they may have thrown a glass bottle. *Id.* at 530, 537. So Estabrook cannot rely on the supposedly restive crowd to distinguish *Edrei*.[7] If the problem posed by protesters in the street "did not justify" the use of significant force there, it did not justify the use of significant force here. *See id.* at 540.

The district court also noted that Estabrook made no attempt to temper his use of force, SA 13, and Estabrook admits he didn't offer any kind of warning, or try telling Eaton to get out of his way, or even announce his presence. 1 JA 172–73. In his view, he didn't "have to" because protesters were "in the middle of the street." 1 JA 173–74. This failure to warn, too, parallels *Edrei*. 892 F.3d at 538. What's more, the video evidence shows Estabrook could have gone around rather than barrel through:

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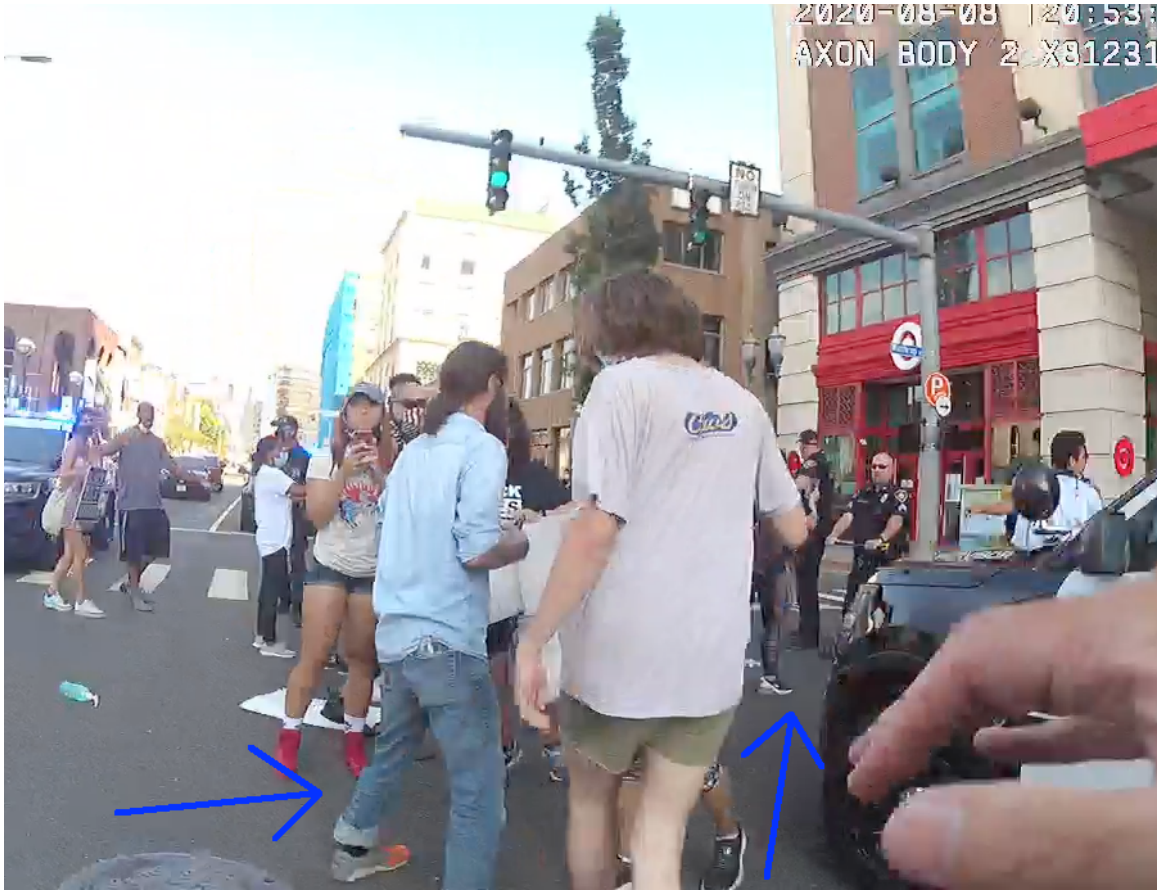
[7] Besides, Estabrook's own evidence about the protesters' behavior is equivocal. For instance, he says protesters were "hitting the motorists' cars," but Hohn recasts this as "knocking on car windows and placing flyers on the windshields." *Compare* 1 JA 44 *with* 1 JA 35.



Estabrook Video 00:47; 1 JA 48. In fact, it probably would've been faster. A jury is entitled to assess whether the "availability of [this] much less aggressive technique" makes Estabrook's immediate resort to force unreasonable. *Brown v. City of New York*, 798 F.3d 94, 103 (2d Cir. 2015).

Estabrook claims the Code 30 communicated such urgent danger that he had a right to do whatever it took to "get to the police officers in need." 1 JA 174. For the reasons explained above, a jury should decide what that Code 30 meant, both in the abstract and in the specific context of a largely peaceful protest. *See supra* nn.6–7. More to the point, even under some urgency or threat, officers do not have "license

to use force without limit." *Jones*, 963 F.3d at 237–38 (quotation marks omitted) (arrestee's initial resistance does not justify disproportionate force); *Lennox v. Miller*, 968 F.3d 150, 156 (2d Cir. 2020) (same); *Frost v. N.Y.C. Police Dep't*, 980 F.3d 231, 254–55 (2d Cir. 2020) (plaintiff's history of aggressive behavior does not justify disproportionate force). The district court correctly held that a reasonable jury could find the force Estabrook used "disproportionate to the need." SA 12.

1.2.3. Because he used significant force gratuitously and without warning, Estabrook used excessive force.

For the reasons above, Estabrook did not need to tackle Eaton and throw her to the ground. His use of force was thus gratuitous. He might argue that he made a mistake, and the law of excessive force does leave room for decisions that are "mistaken, but reasonable." *Jones*, 963 F.3d at 231 (quotation marks omitted). But it's just as likely that he *chose* to use significant force because he was angry: His deposition testimony bristles with hostility toward the protesters—who were, after all, protesting police brutality. *See infra* Part 3.2. So on this record, a jury must decide whether he mistakenly believed the force he used was necessary—and, if so, whether that mistake was reasonable. *Jones*, 963 F.3d at 228, 230–31. At summary judgment, the Court must resolve those questions in Eaton's favor. *Frost*, 980 F.3d at 253.

And that's just what the district court did. It held that given the record evidence on the injuries Eaton suffered, the degree of force Estabrook used, the need for force, and Estabrook's failure to temper or limit his use of force, "a reasonable jury could find the force employed by Estabrook objectively unreasonable." SA 14–15. Just so: It's unreasonable to use a significant degree of force "lightly or gratuitously" against someone who "otherwise poses no immediate threat." *Tracy v. Freshwater*, 623 F.3d 90, 98 (2d Cir. 2010). Here, it's undisputed that Eaton posed no threat. And not only did Estabrook have alternatives to using violence, but every other officer on the scene used those alternatives. Only Estabrook chose to use force. A jury could reasonably find that his choice violated the Fourteenth Amendment.

2. Estabrook is not entitled to qualified immunity.

Qualified immunity is about "fair notice." *Edrei*, 892 F.3d at 540. It shields government agents from liability for violating constitutional rights if those rights were not "clearly established" at the time of the violation. *Camreta v. Greene*, 563 U.S. 692, 705 (2011). It consists of two prongs: Whether the official violated a right and whether that right was clearly established. *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). Courts may address the prongs in any order, but both the Supreme Court and this Court have recognized that addressing the merits first is

"often beneficial." *Id.* Even in novel factual circumstances, officials are not entitled to qualified immunity if their conduct "obvious[ly]" or "egregious[ly]" violates the Constitution. *Taylor v. Riojas*, 141 S. Ct. 52, 54 (2020) (per curiam) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 745 (2002)).

2.1. The test for qualified immunity has two prongs: Whether a right was violated and whether it was clearly established.

Since its 2001 decision in *Saucier v. Katz*, the Supreme Court has consistently explained that qualified immunity has two prongs. *See* 533 U.S. 194, 201 (2001) (setting out the two-step analysis); *Pearson*, 555 U.S. at 236 (allowing courts discretion over "which of the *two prongs* of the qualified immunity analysis should be addressed first" (emphasis added)); *Tolan v. Cotton*, 572 U.S. 650, 656 (2014) (per curiam) ("two prongs"). The first prong is whether the defendant violated a constitutional right and the second prong is whether that right was clearly established. *Tolan*, 572 U.S. at 656.

Two years before *Saucier*, however, this Court set forth its own test—in three parts. *X–Men Sec., Inc. v. Pataki*, 196 F.3d 56, 65–66 (2d Cir. 1999). On top of the Supreme Court's two-part test, this Court asked whether, even if the plaintiff's right had been clearly established, the defendant's conduct was "objectively legally reasonable." *Id.* The *Saucier* Court's attention was trained on a

different error in the Ninth Circuit's analysis, so it didn't address this Court's three-prong test. *See* 533 U.S. at 202. This Court, for its part, reiterated the three-prong test after *Saucier*. *See Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 211–12 (2d Cir. 2003). And so it shows up from time to time in this Court's decisions, *see, e.g.*, *Gonzalez v. City of Schenectady*, 728 F.3d 149, 154 (2d Cir. 2013), and thus also in litigants' briefs and district court decisions.

This Court should lay the errant third prong to rest. Most of the Court's recent cases—whether they grant immunity or deny it—already use the two-prong test. *See, e.g.*, *McKinney v. City of Middletown*, 49 F.4th 730, 738 (2d Cir. 2022); *Hurd v. Fredenburgh*, 984 F.3d 1075, 1084 n.3 (2d Cir. 2021); *Lennox*, 968 F.3d at 155; *Jones*, 963 F.3d at 224. What remains of the third prong has been subsumed into the second. *See, e.g.*, *Bailey v. Pataki*, 708 F.3d 391, 404 & n.8 (2d Cir. 2013). And as Justice Sotomayor pointed out when she sat on this Court, the third prong is superfluous: "[W]hether a right is clearly established is the *same question* as whether a reasonable officer would have known that the conduct in question was unlawful." *Walczyk v. Rio*, 496 F.3d 139, 166 (2d Cir. 2007) (Sotomayor, J., concurring).[8] A

[8] Other judges of this circuit and its sister circuits have made the same point. *See, e.g.*, *Vincent v. Yelich*, 718 F.3d 157, 166 (2d Cir. 2013) ("Absent 'extraordinary circumstances,' '[i]f the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his

redundant third prong is also "contrary to Supreme Court precedent." *Id.* This Court owes fidelity to the Supreme Court's "articulation of the test" as much as to the substance. *See Maldonado*, 568 F.3d at 269.

Ordinarily, one panel of this Court may not overrule another. *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 405 (2d Cir. 2014). But when a prior decision "has been thoroughly undermined" by intervening Supreme Court precedent, this Court recognizes an exception. *Id.*; *see, e.g.*, *Darnell v. Pineiro*, 849 F.3d 17, 34–35 (2d Cir. 2017). That condition obtains here. No Supreme Court case has ever suggested that qualified immunity has a third prong. This Court usually ignores its spurious third prong anyway. It should take the opportunity to formally overrule it and provide clarity to litigants, district courts,[9] and future panels of this Court.

2.2. Eaton's right against being gratuitously slammed to the ground had long been clearly established.

Estabrook tackled Eaton and threw her to the ground on August 8, 2020. 2 JA 360. By that date, this Court had long established that

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conduct.'" (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982))); *Taravella v. Town of Wolcott*, 599 F.3d 129, 138 (2d Cir. 2010) (Straub, J., dissenting); *Maldonado v. Fontanes*, 568 F.3d 263, 269 (1st Cir. 2009); *Grawey v. Drury*, 567 F.3d 302, 309 (6th Cir. 2009).

[9] *Cf., e.g.*, *Boyler v. City of Lackawanna*, 287 F. Supp. 3d 308, 317 n.5 (W.D.N.Y. 2018) (treating the third prong as already overruled), *aff'd*, 765 F. App'x 493 (2d Cir. 2019).

officers may not use significant force against compliant individuals who pose no threat when reasonable alternatives are readily available. Indeed, on every element of the excessive-force analysis, Eaton's authorities date from well before August 2020.[10]

Mental state. In 2015, *Kingsley* held that the mental-state inquiry under the Fourteenth Amendment was largely objective. 576 U.S. at 395. And in 2018, this Court clarified that *Kingsley*'s standard applied not just to pretrial detainees but to protest attendees, too. *Edrei*, 892 F.3d at 540–41.

Degree of force. This Court's decisions have long established that pepper spray and tasers "constitute[] significant force." *Jones*, 963 F.3d at 226 (citing *Tracy*, 623 F.3d at 98). Estabrook's use of force caused injuries far greater and longer-lasting than those devices, so the same cases clearly established that his use of force was also at least "significant." *Tellier v. Fields*, 280 F.3d 69, 86 (2d Cir. 2000) (applying "*a fortiori*" principle of qualified immunity). And as this Court explained in *Lennox* and *Jones*, differences in the "precise method" by which force is delivered will not render an officer immune from liability. *Lennox*, 968 F.3d at 157; *Jones*, 963 F.3d at 225–26.

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[10] Most of Eaton's authorities are Fourteenth Amendment cases, but as this Court held in *Edrei*, Fourth Amendment cases can also clearly establish the law for Fourteenth Amendment purposes because courts freely "cross-pollinate" between the two contexts. 892 F.3d at 542 & n.5.

Severity of the security problem. The security problem here paralleled *Edrei* in all material respects. As in *Edrei*, the protesters here were in the street and blocking traffic, but they were largely nonviolent. *Compare Edrei*, 892 F.3d at 530–31, *with* SA 11–12. As in *Edrei*, the officers here arrested an individual and the crowd took exception. *Compare Edrei*, 892 F.3d at 530–31, *with* Officer 41 Video 2:15–35. As in *Edrei*, the situation was tense but under control. *Compare Edrei*, 892 F.3d at 530 (explaining that officers had to wave off agitated protesters and tell them to "get back"), *with* Officer 41 Video 2:20–45 (officers, with Eaton's help, defuse a crowd agitated about the arrests). So just as in *Edrei*—decided two years earlier—using significant force here was excessive.

Yet the district court denied qualified immunity almost entirely on the basis of this factor. It accepted Estabrook's representation that "Code 30" was the "most urgent police call requiring an emergency response." SA 19, 3 n.1. And so it concluded that the Code 30 call was a "crucial distinguishing fact" that shielded Estabrook from liability under *Edrei*. *Id.*

But the record tells a different story. It shows only that a Code 30 means "officers need assistance." 1 JA 37 ¶ 25; 1 JA 123 at 42:23–43:2. Hohn used those exact words twice—both in his declaration and at his deposition. *Id.* By contrast, Hohn explained that other codes—Code 1, Code 2, and Code 3—represent specific levels of urgency. 1 JA

37 ¶ 25 ("Code 1 requires a routine response; Code 2 requires an urgent response; and Code 3 requires an emergency response."). Stamford police officers use 100 codes with distinct meanings, 1 JA 123, and the record contains no evidence that Code 30 is "the most urgent police call requiring an emergency response." *Cf.* SA 19.

The district court noted this gap in the evidence but resolved it in Estabrook's favor. SA 3 n.1. In so doing, it erred twice over. Not only was Eaton the non-moving party and thus entitled to the benefit of the inference, but on qualified immunity the burden of proof wasn't even hers to bear. *Outlaw v. City of Hartford*, 884 F.3d 351, 356, 370 (2d Cir. 2018). The supposed urgency of Code 30 is a "fact[] necessary to establish [Estabrook's] entitlement to qualified immunity," so proving it was Estabrook's burden. *See id.* He failed to carry his burden and then some: His own evidence shows that calls for assistance are often routine and rarely urgent. 1 JA 37 ¶ 25 (calls "requir[ing] an emergency response" are "only rarely called"). So on this record, the district court should have treated the Code 30 as a call for routine, non-urgent assistance. *See id.* Simply put, in treating the Code 30 as a "crucial distinguishing fact" that unsettled the clear edict of *Edrei*, it erred.

Efforts to temper or limit use of force. Even if the Code 30 did add some threat or urgency to the situation here, *Edrei* clearly established in 2018 that Estabrook should have offered a warning or ordered the crowd out of his way before barreling through them. In

Edrei, the protesters had thrown a glass bottle and this Court still held that the situation "did not justify" the use of significant force without a warning. 892 F.3d at 540. So too here.

And *Edrei* is hardly an outlier. A long line of this Court's cases have established for years that even under heightened threat or urgency, an officer may not use "force without limit"—any use of force still must be "proportionate" and not "gratuitous." *Lennox*, 968 F.3d at 156 (quoting *Sullivan v. Gagnier*, 225 F.3d 161, 165–66 (2d Cir. 2000)); *Jones*, 963 F.3d at 237–38; *Frost*, 980 F.3d at 257 (quoting *Rogoz*, 796 F.3d at 245).[11] And in 2015, this Court also clearly established that using significant force is unreasonable when a "much less aggressive technique" is available. *Brown*, 798 F.3d at 103.

The district court held that a jury could find Estabrook's use of force "disproportionate," especially since he made no "attempt[] to temper his use of force." SA 13. And several "less aggressive" options were open to him, like pushing past Eaton without tackling her, or just going around. *See supra* p.25. So all in all, even if the Court were to accept Estabrook's representation that the Code 30 was an urgent call for help, the line of cases represented by *Brown*, *Lennox*, *Jones*, and *Frost*

[11] *Frost* was decided after the events here, but it held that proposition had been clearly established by October 2012 at the latest. *See id.* at 252; *Jones*, 963 F.3d at 227 (courts can consider decisions published after the date of the conduct at issue to determine when a right was clearly established).

clearly established that his immediate resort to significant force without warning was unreasonable. Estabrook made no effort limit or avoid using force whatever, and qualified immunity is "not so stingy" as to excuse his act of gratuitous violence. *Cf. Edrei*, 892 F.3d at 540.

* * *

The district court characterized the right at issue as whether "a nonviolent but noncompliant protester[] had a right not to be pushed to the ground by a police officer responding to an emergency situation without a preceding warning from the officer to move out of the way." SA 18–19. Much as in *Edrei*, this framing "puts not one but two thumbs on the scale" in favor of Estabrook. *Cf. Edrei*, 892 F.3d at 539. First, it bakes in the district court's erroneous assumption about the meaning of Code 30. Second, it characterizes Eaton as a "noncompliant protester." That latter assumption is "at best arguable." *Cf. id.*

Viewing the record in the light most favorable to Eaton, she was neither a protester nor noncompliant. She was present because Hohn had enlisted her help liaising with the protesters. 2 JA 263. She carried out her task faithfully. 2 JA 267 (she persuaded protesters to give up a lane of traffic); 2 JA 337 (she stayed in the street after the arrest to "keep the other people from coming forward"). And the district court noted that a jury could find Estabrook knew about Eaton's "unique role," SA 13, so for purposes of summary judgment, he did know about

it when he grabbed her by the bra strap, propelled her off the ground, and threw her down several feet away. The district court's characterization of the right at issue was mistaken.

Rather, this Court's decisions have long made clear that even when officers perceive heightened threat or urgency, it is unconstitutional for them to "strike an individual who is compliant and does not pose an imminent risk of harm to others." *Frost*, 980 F.3d at 254–55; *Lennox*, 968 F.3d at 156. *Edrei* made clear that the same principle applies in the protest context,[12] and that even in a tense situation officers must at least issue a warning before resorting to significant force. 892 F.3d at 530–31, 538, 540–41. So a reasonable officer would've known he couldn't use significant physical force against Eaton without warning. Estabrook did so anyway, so he's not entitled to qualified immunity.

[12] Indeed, this Court applied a similar principle as early as 2004. *See Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123–24 (2d Cir. 2004) (vacating grant of summary judgment where reasonable jury could find that officers "gratuitously inflicted pain [on protesters] in a manner that was not a reasonable response to the circumstances").

3. Estabrook is not entitled to immunity from Eaton's state-law claims.

Along with her § 1983 claims, Eaton brought claims against Estabrook under state law. JA 10–11.[13] The district court held that Estabrook was immune from those claims, too. SA 24–27. It held correctly that Connecticut's discretionary-act immunity shields Estabrook from liability unless an exception applies, but then it concluded erroneously that no exception applied. At least two do apply here: (1) an exception for failing to act when so doing subjects an identifiable person to imminent harm, and (2) an exception for acts committed with malice.

3.1. Estabrook's failure to warn Eaton before charging into her deprives him of immunity.

Connecticut law excludes from discretionary-act immunity public officials who fail to act when it is foreseeable that failing to act will cause imminent harm to an identifiable person. *Belanger v. City of Hartford*, 578 F. Supp. 2d 360, 367 (D. Conn. 2008). The exception has three elements: "(1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." *Id.* (quoting *Doe v. Petersen*, 279 Conn. 607, 616 (Conn. 2006)). Both the Connecticut state courts and

[13] Eaton also brought state-law claims against the City, but she doesn't pursue those on appeal.

the District of Connecticut have applied this exception to claims of excessive force. *Odom v. Matteo*, 772 F. Supp. 2d 377, 395 (D. Conn. 2011) (collecting cases from the Connecticut courts); *Belanger*, 578 F. Supp. 2d at 367 (collecting cases from the District of Connecticut).

When a six-foot-five police officer weighing 250 pounds in riot gear barrels headlong into a group of people without warning, the likelihood of imminent harm is obvious. *See* 1 JA 172. The victims are also readily identifiable: They're the people in the officer's way. (Even if Estabrook argues he couldn't see Eaton specifically, the likelihood of harm to anyone behind Quin was also obvious. Besides, the district court held that a reasonable jury "could infer that [Estabrook] was able to see [Eaton] past the men in front of him." SA 9.) Estabrook had a clear duty to warn Eaton and he failed to do so. *See Edrei*, 892 F.3d at 538. Whether he is entitled to immunity anyway is for a jury to decide. *See Santana v. Rohan*, No. CV040830569S, 2005 WL 1634310, at *5 (Conn. Super. Ct. June 7, 2005) ("Whether it is apparent to a defendant that his act or failure to act subjects a plaintiff to imminent harm is a question of fact." (quotation marks omitted)). The district court should not have granted summary judgment.

3.2. Estabrook acted with malice, which also deprives him of immunity.

Connecticut law also permits tort liability against public officials who cause injury out of "malice, wantonness or intent to injure," rather

than negligence. *Belanger*, 578 F. Supp. 2d at 367 (quoting *Spears v. Garcia*, 263 Conn. 22, 36 (2003)). Those are all states of mind, and under Connecticut law summary judgment is "particularly inappropriate" for state-of-mind questions. *Shay v. Rossi*, 253 Conn. 134, 174 (2000), *overruled on other grounds by Miller v. Egan*, 265 Conn. 301 (2003). In other words, whether an officer acted out of malice is "uniquely" a question for the jury. *Clark v. City of Norwalk*, No. X01CV 930146667, 1998 WL 886599, at *10–11 (Conn. Super. Ct. Dec. 10, 1998) (quotation marks omitted).

The record brims with evidence that Estabrook acted with malice. He heard taunts from protesters "the whole day." 1 JA 170. He was "eager" to get out of the police car. 1 JA 162. He claimed that plowing into the crowd was "more than reasonable": "If they get knocked over, that's out of my control." 1 JA 174. He refused to give a warning because the protesters "didn't listen to anything [the police] said." 1 JA 173. When pressed on that point, he offered the following explanation:

> Q. [Y]ou didn't tell them to get out of the way because of how you felt about the protesters that day? …
>
> A. No. I did not tell them, because at that point I'm not giving you a warning at this point.
>
> Q. Why?
>
> A. Because I'm not.
>
> Q. Why?

A. Because I don't have to.

Id. All of this is evidence from which a jury could find malice.

Yet the district court held that the malice exception was unavailable, reasoning that "it is undisputed that Estabrook's 'objective' was 'to get to the officers in need and make sure they were okay.'" SA 26 (quoting 2 JA 367). That fact is too thin a reed to support the district court's decision. True, Eaton doesn't dispute that Estabrook's objective was to get to the officers "[w]hen he heard the Code 30 call." 2 JA 367. And no doubt it remained *one of* his objectives as he barreled into the group of protesters. But every officer who responded to the Code 30 call shared that objective. Only Estabrook threw people to the ground—and he threw not one person but two. *See supra* Part 1.2.2. What's more, if his intent had been only to get to his comrades, it would have been faster to go around. *See supra* p.25. And it wasn't "get[ting] to the officers in need" that kept him from shouting out a warning as he charged into the crowd. *Cf.* 2 JA 367.

In short, a jury could easily infer from this record that Estabrook acted out of malice toward protesters demonstrating against police brutality. And under Connecticut law, that is "uniquely" for the jury to decide. *Clark*, 1998 WL 886599, at *10–11. For this reason, too, the district court erred in dismissing Eaton's state-law claims.

CONCLUSION

For all these reasons, the judgment of the district court should be reversed.

Dated: June 15, 2023

Respectfully submitted,

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This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(g) Local Rule 32.1(a)(4)(A) because it contains 8,834 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the word count feature of Microsoft Word for Mac 16.

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Dated: June 15, 2023

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