UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MBALAMINWE MWIMANZI, Plaintiff, v. JOSHUA WILSON, et al., Defendants.	No. 20-cv-00079 (CRC)

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO AMEND, OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, AND CONTIGENT MOTION FOR PARTIAL SUMMARY JUDGMENT

Officer Joshua Wilson reached inside Mbalaminwe Mwimanzi's buttocks and applied so much force against his anus that Mr. Mwimanzi found it difficult to use the restroom for days. He placed his hands between Mr. Mwimanzi's legs and rubbed and then smashed each of Mr. Mwimanzi's testicles against Mr. Mwimanzi's legs, leaving Mr. Mwimanzi in pain long after the search ended.

It is undisputed that Officer Wilson initiated his search even though Mr. Mwimanzi broke no law, made no suspicious movements, and had been searched twice previously, minutes before Officer Wilson approached him, both times coming up clean. The sole basis for Officer Wilson's actions—conduct that left Mr. Mwimanzi in prolonged pain, caused him deep depression and anxiety, and impaired his relationships with friends and his work—was that Mr. Mwimanzi happened to be present in an apartment subject to a search warrant for drugs.

The Constitution's limitations on police searches would ring hollow if "wrong place, wrong time" displaced individualized suspicion as the predicate for searches. Nor would the Fourth

Amendment's mandates carry force if the ban on "unreasonable searches" did not exclude those akin to sexual assault.

It should be unsurprising, then, that the law has long barred the tactics Defendant Wilson employed. The Supreme Court and the D.C. Circuit, like courts from jurisdictions nationwide, prohibit officers from construing warrants for searching *places* as authorizing searches of the *people found inside*. Officers effecting a search warrant can, at most, conduct a protective pat down or frisk of people in a place subject to a warrant. Yet as precedent makes clear, manipulating someone's testicles or probing inside their buttocks exceeds the scope of this power.

Mr. Mwimanzi originally filed this lawsuit to challenge the manner in which Defendant Wilson searched him. When he learned that Defendant Wilson relied exclusively on the search warrant and Mr. Mwimanzi's presence in the apartment to initiate the search, Mr. Mwimanzi moved to amend the complaint to add an as-applied and narrow facial challenge to the District of Columbia statute and policy that authorized Defendant Wilson to search based on a constitutionally unsustainable rationale. The District of Columbia, the sole defendant Mr. Mwimanzi named on the proposed additional claims, argues that it would be futile to allow these new claims to be pled because of the possibility that in some circumstances, an officer who searches a person based solely on a premises warrant would act in accordance with the Fourth Amendment. Yet the District offers no case where a court upheld a search based on such a rationale. Basic principles of Fourth Amendment law explain why: If officers could search a person based on a warrant in which a magistrate authorized only the search of a place, the constitutional requirement that warrants describe the targets of a search with particularity would have no force. Nor would the probable cause requirement provide much protection if a warrant and affidavit that make no averments about any persons, known or unknown, could be transformed to permit searches of everyone found on

the scene. The District attempts to dodge the application of these principles by urging the Court to read the challenged statute and policy as providing no more authority than the Fourth Amendment itself. But the construction of the statute by the D.C. Court of Appeals forecloses this argument. And the undisputed facts show that Defendant Wilson relied solely on Mr. Mwimanzi's presence in the apartment to justify the search, and nothing Defendant Wilson learned at the scene provided a legitimate basis for it. Because the facts underlying Mr. Mwimanzi's challenge to the District's statute and policy are not in dispute, and the law is equally clear, he should be granted not only leave to amend to add his facial and as-applied challenges, but also summary judgment as to liability on those claims.

Defendants Wilson and District of Columbia, meanwhile, seek summary judgment on Mr. Mwimanzi's original Fourth Amendment claim—challenging the way Defendant Wilson searched him—and his similar battery claim. Unlike Mr. Mwimanzi's challenge to the District's law and policy regarding warrants, both of his manner-of-search claims turn on facts that are squarely in dispute regarding precisely what happened when Defendant Wilson searched Mr. Mwimanzi. Moreover, when the facts are construed in the light most favorable to Mr. Mwimanzi, as they must be on Defendants' summary judgment motion, Defendant Wilson's qualified immunity defense fails: his gratuitous probing and manipulation of Mr. Mwimanzi's most sensitive body parts violated clearly established law in the circumstances here. Accordingly, Defendants' motion should be denied and Plaintiff's motions should be granted.

FACTS

With respect to Plaintiff's contingent motion for partial summary judgment on his proposed claims, the record must be construed in favor of Defendant District of Columbia, as the non-moving party. *Robinson v. Pezzat*, 818 F.3d 1, 9 (D.C. Cir. 2016). With respect to Defendants

District of Columbia's and Wilson's' motion for summary judgment on Mr. Mwimanzi's manner-of-search claims, Mr. Mwimanzi is the non-moving party, and therefore entitled to have the record construed in his favor. *Id.* In light of these principles, Mr. Mwimanzi has highlighted the central areas of factual dispute and agreement below.

Mbalaminwe Mwimanzi has lived in the D.C. area since he and his family immigrated from Tanzania when he was eight years old. Pl.'s Statement of Facts ("SoF") Part II (Pl.'s Statement of Disputed Material Facts) ¶ 1.[1] He graduated high school here, attended some college, and worked here in a variety of different fields such as bricklaying and landscaping. *Id.*

On January 15, 2019, Mr. Mwimanzi visited his friend Margie Whitehead at her home, 769 Quebec Place NW, Apartment 2, to watch television with friends. *Id.* ¶ 2. At around 9 p.m. that night, MPD officers knocked down the door, ran into the apartment, and ordered everyone to the floor. *Id.* ¶ 3. After Mr. Mwimanzi dropped to the floor, officers put handcuffs on his wrists, helped him to his feet, and then, one officer frisked him, completing the inspection without finding any evidence, drugs, weapons, or other contraband. *Id.* ¶¶ 3, 4, 6. As the officer effected the frisk, Mr. Mwimanzi raised no concerns about the officer's manner of doing so. *Id.* ¶ 5.

[1] Plaintiff abbreviates several frequently cited filings. Plaintiff's factual assertions and the supporting evidence are documented in Plaintiff's Statement of Facts (SoF), ECF 30-1. Part I of that document contains Plaintiff's responses to Defendants' Statement of Material Facts Not in Dispute, ECF 27-1 (which in turn is cited as "Defs.' SUMF"). Part II (Pl.'s Statement of Disputed Material Facts), lists the material facts that Defendants do not concede to be undisputed in their filing and which preclude granting Defendants summary judgment on Plaintiff's manner-of-search claims. Part III of Plaintiff's SoF, Plaintiff's Statement of Undisputed Material Facts ("Pl.'s SUMF"), identifies the material facts that Plaintiff contends are not in dispute and on which Plaintiff relies in his contingent motion for partial summary judgment. Defendant District of Columbia's Opposition to Plaintiff's Motion for Leave to Amend the Complaint, ECF 26, is cited to as "Def.'s Opp'n" and Defendant District of Columbia's and Wilson's Motion for Summary Judgment, ECF 27, is cited to as Defs.' MSJ.

After the frisk, Officer Terrence Sutton called Mr. Mwimanzi toward him. *Id.* ¶ 7. Officer Sutton said, "you don't run shit," and referred him to Officer Seijo for a more complete search. *Id.* ¶ 8.

Officer Seijo did not merely frisk Mr. Mwimanzi but searched him. *Id.* ¶ 9. As before, Mr. Mwimanzi did not complain about the manner of the search, and Officer Seijo did not recover any evidence, contraband, or weapons. *Id.* ¶¶ 10, 11.

Mr. Mwimanzi sat down briefly on a chair before Defendant Wilson approached and ordered him to stand up. *Id.* ¶ 13. "Has he been searched," Wilson asked the other officers. *Id.* "A Seijo search," another officer responded. *Id.* Defendants contend that Wilson assumed that phrase meant that Mr. Mwimanzi had not been fully searched. Defs.' Statement of Material Facts Not in Dispute ¶ 17, ECF 27-1 ("Defs.' SUMF"). But at deposition, Defendant Wilson gave conflicting answers about how he reached that determination: at one point he stated that he based it on his knowledge of Officer Seijo's responsibilities that night, Pl.'s SoF Part II (Statement of Disputed Material Facts)) ¶ 15, and another time, when asked if anything led him to his interpretation of "a Seijo search," he said "no," *Id.* ¶ 14. Indeed, Defendant Wilson's answer was surprising, given that he never testified that officers refrained from supplementing their initial assignments with additional duties as searches progressed, and knew based on personal observation that Officer Seijo conducted "effective" searches. *Id.* ¶¶ 15–17.

Despite Defendant Wilson's knowledge, he demanded that Mr. Mwimanzi spread his feet and, when Mr. Mwimanzi spread them about the same length as he had for the other searches, Defendant Wilson told him to spread them wider still. *Id.* ¶¶ 18–19.

Defendant Wilson did not search Mr. Mwimanzi's chest, waistband, or even turn out his pants pockets. *Id.* ¶ 20. Instead, his search focused on two places: Mr. Mwimanzi's buttocks and

his groin. *Id.* ¶ 21. Defendant Wilson reached into Mr. Mwimanzi's buttocks through his jeans and pressed hard on the area around his anus, as if he wanted to penetrate it. *Id.* ¶ 22. He reached between Mr. Mwimanzi's legs, rubbed Mr. Mwimanzi's testicles against Mr. Mwimanzi's legs, and "use[d] the power of his hands to squeeze" each testicle against Mr. Mwimanzi's leg, causing Mr. Mwimanzi to feel intense pain in his groin radiating to his abdomen. *Id.* ¶¶ 23, 36. Defendant Wilson did not feel anything as he probed Mr. Mwimanzi's groin area and ultimately did not recover any evidence, contraband, or weapons. *Id.* ¶ 24, 25. Nonetheless, he repeated the rubbing and squeezing motions at least two times. *Id.* ¶ 26.

Feeling intense pain in his anus and a headache, along with the pain in his testicles and stomach, Mr. Mwimanzi cried out "You're fondling me, buddy" and, as the search continued, repeated his protests: "Again? Again, though? Again! Oh my God, again! Damn, you gonna finger fuck me? Damn, bruh." *Id.* ¶¶ 28, 29. But Defendant Wilson did not heed these complaints; he did not stop when Mr. Mwimanzi began to complain or change the way he was conducting the search as Mr. Mwimanzi continued to object. *Id.* ¶¶ 30, 31. Once Defendant Wilson finished with Mr. Mwimanzi's groin and buttocks, he looked at him with an expression of satisfaction and told him to sit. *Id.* II ¶¶ 32, 33.

The parties agree that Defendant Wilson searched Mr. Mwimanzi's groin. Defs.' SUMF ¶ 18. But Defendants contest that Mr. Mwimanzi gasped, flinched, or told Defendant Wilson to stop. Defs.' Motion for Summary Judgment ("Defs.' MSJ") 8, ECF No. 27. And they do not concede that Defendant Wilson conducted the search in the manner Mr. Mwimanzi described, although neither their briefs nor their statement of undisputed facts offers an alternative account. *See generally* Defs.' MSJ; Def. District of Columbia's Opposition to Pl.'s Mot for Leave to Am. ("Def.'s Opp'n.), ECF No. 26; Defs.' SUMF. At deposition, Defendant Wilson denied searching

Mr. Mwimanzi's buttocks through his clothing and stated that he did "not think" he touched Mr. Mwimanzi's testicles through his clothing. Pl.'s SoF, Part II (Statement of Disputed Material Facts) ¶¶ 34, 35.

In contrast to their disputes about the manner of the search, the parties agree about the facts on which Defendant Wilson relied to initiate it. Defendant Wilson testified that he conducted his search to find drugs and drug paraphernalia and that he had authority to do so based on the search warrant that Officer C. Hyder secured for Ms. Whitehead's apartment that the officers were executing when he searched Mr. Mwimanzi. Pl.'s SoF Part III (Pl.'s Statement of Undisputed Facts ("Pl.'s SUMF")) ¶¶ 8. That warrant, though, said nothing about searches of people. *Id.* ¶¶ 9–11 (citing copy of warrant and affidavit produced as Defs.' Ex. A and Pl.'s Ex. D). Rather, it provided only that MPD had authority "within 10 days of the date of issuance of this warrant to search at any time of the **(day or night)** the designated **Residence** for" drugs, drug paraphernalia, and other enumerated items. *Id.* ¶¶ 10, 11 (emphasis original to warrant). The issuing court based that authorization on a finding of probable cause to believe that "in the **Residence** known as **769 Quebec Place #2 Northwest Washington, D.C. 20010** . . . there is now being concealed property, namely" the items mentioned previously. *Id.* ¶ 9 (emphasis original to warrant). The court did not make any finding that probable cause existed to believe that persons, known or unknown, with possession of the enumerated items would be in the apartment within the 10-day period. *Id.* ¶ 11. Nor did Officer Hyder request such a finding, or assert in his affidavit that probable cause supported such a finding. *Id.* ¶ 12 ("Affiant submits that there is probable cause to believe that inside of the Residence known as **769 Quebec Place #2 Northwest Washington, D.C. 20010** . . . there is now being concealed property." (quoting affidavit; emphasis original)). Indeed, other than

identifying Ms. Whitehead as the lease holder, the affidavit did not mention any individual by name or physical description. *Id.* ¶ 13.

The search caused Mr. Mwimanzi prolonged emotional and physical harm, a point Defendants neither concede nor offer evidence to contest. *See generally* Defs.' SUMF. After Defendant Wilson's search, an ambulance drove Mr. Mwimanzi to MedStar Washington Hospital Center, where he received treatment. Pl.'s SoF Part II (Statement of Disputed Material Facts) ¶ 37. The pain forced Mr. Mwimanzi to take the next day off from work. *Id.* ¶ 43. He continued to feel pain in his buttocks for three days, experiencing discomfort when performing basic activities such as using the bathroom or walking. *Id.* ¶ 38. The pain in his testicles lasted even longer and made it hard for him to wear the safety harness his employer required when he worked, and to perform recreational activities such as bike riding and running. *Id.* ¶ 39. The degree and length of the pain has left Mr. Mwimanzi in fear that he will not be able to father children. *Id.* ¶ 40.

Mr. Mwimanzi feels depression to the point of physical pain when he thinks about the incident. *Id.* ¶ 41. It has caused him to feel anxiety around the police and become distracted when he hears sirens, including at work. *Id.* ¶¶ 42, 43. The search also left him humiliated in front of his friends, straining his relationship with a person who derided that he "acted like a little bitch" during the search, and with Ms. Whitehead, whose home Mr. Mwimanzi has visited less frequently due to the painful memory. *Id.* ¶¶ 44–46. For Mr. Mwimanzi, Defendant Wilson did not conduct a search but committed a sexual assault, and the pain and trauma from that encounter have stuck with him since. *Id.* ¶ 49.

LEGAL STANDARD

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P.

56(a). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In applying this standard, the Court must "examine the facts in the record and all reasonable inferences derived therefrom in a light most favorable to the nonmoving party." *Robinson v. Pezzat*, 818 F.3d 1, 8 (D.C. Cir. 2016).

A motion to amend generally must be granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). While several decisions in this district have held that Rule 16(b)'s good cause standard applies when such motions are filed after a scheduling order's deadline for amending the pleadings, *see, e.g.*, *Lovely-Coley v. District of Columbia*, 255 F. Supp. 3d 1, 5 (D.D.C. 2017), Defendants do not challenge Mr. Mwimanzi's arguments that good cause exists here. *See generally* Def.'s Opp'n.

Instead, the only argument raised in the opposition to Mr. Mwimanzi's motion is that his proposed claims are futile, a factor considered when a motion is adjudicated under Rule 15, though not necessarily if the motion is assessed under Rule 16, *see Lovely-Coley*, 255 F. Supp. 3d at 7 n.3. To prevail on that contention, the District must show that Mr. Mwimanzi's proposed claim "would not survive a motion to dismiss," and a "claim will not survive a motion to dismiss if it fails to plead enough facts to state a claim to relief that is plausible on its face." *Smith v. Cafe Asia*, 598 F. Supp. 2d 45, 48 (D.D.C. 2009) (cleaned up). In applying that standard, "the facts in the proposed amended complaint must be accepted as true, and the plaintiff must receive the benefit of all reasonable inferences." *Food & Water Watch v. U.S. Dep't of Agric.*, 2019 WL 2423833, at *6 (D.D.C. June 10, 2019).

ARGUMENT

I. Mr. Mwimanzi Is Not Only Entitled To Amend the Complaint To Challenge the District's Search Statute, But The Court Should Also Grant Partial Summary Judgment as to Liability on The Proposed Claims.

Under the Fourth Amendment, police officers who possess a warrant that explicitly authorizes only the search of a residence cannot search the people inside the residence based merely on their presence there. Because such a warrant does not name individuals, it does not confer authority to search them. And because presence in a suspicious residence does not establish probable cause or prove that an exception to the warrant requirement has been met, the fact of presence alone cannot supply a basis for police to conduct searches of individuals.

Mr. Mwimanzi's proposed amended complaint contends that D.C. Code § 23-524(g) and the analogous provision, MPD General Order 702.03 § VII(F)(8)(f), (collectively, "the Statute"), authorized Defendant Wilson to search him in contravention of these principles. ECF 24-2 (Am. Compl.) ¶ 38. Specifically, he seeks to add a claim challenging the Statute as applied to him, as well as a narrow facial challenge asserting that the Statute is unconstitutional to the extent it permits searches of people based only on their presence in a residence for which a warrant has been obtained. *Id.* Prayer for Relief ¶¶ (b) & (c). Mr. Mwimanzi has named only the District of Columbia as a defendant on these claims. *Id.* ¶¶ 66–70.

D.C. Code § 23-524(g) provides:

> An officer executing a warrant directing a search of premises or a vehicle may search any person therein (1) to the extent reasonably necessary to protect himself or others from the use of any weapon which may be concealed upon the person, or (2) to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person.

It is undisputed that Defendant Wilson's search of Mr. Mwimanzi is covered by the second clause of this statute. Def.'s Opp'n 9.

The material facts surrounding the initiation of the search are either undisputed or undisputable. Defendant Wilson testified at deposition that he searched (not frisked) Mr. Mwimanzi for drugs, and that the sole reason he did so was the Statute's authorization to search based on Mr. Mwimanzi's presence in a residence subject to a warrant. Pl.'s SoF Part III (Pl.'s SUMF) ¶¶ 3, 8; *see also* Defs.' SUMF ¶ 11. Aside from asserting that Wilson also relied on the facts underlying the warrant (which Mr. Mwimanzi will assume true for purposes of his motion for leave to amend and for partial summary judgment), Defendants toe the same line in their briefs. Def.'s Opp'n 9–11; Defs.' MSJ 7–8. There can be no dispute on the text of the warrant and affidavit. Pl.'s SoF Part III (SUMF) 9–13. Nor can there be any dispute that Defendant Wilson, who was standing right against the apartment door as the lead sergeant knocked and announced before the officers entered, recalled hearing no sounds in the few seconds that elapsed after the officer's announcement and before the door was broken open. *Id.* ¶¶ 1, 2 (citing Wilson Dep.). Further, it is undisputed that Defendant Wilson did not see drugs or drug paraphernalia in Ms. Whitehead's apartment prior to conducting the search. *Id.* ¶ 4 (citing Wilson Dep.). It is also undisputed that Mr. Mwimanzi was not arrested the night of the search and that Defendant Wilson did not ask Mr. Mwimanzi's consent before conducting it. *Id.* ¶¶ 6, 7 (citing Answer).

Because the material facts are undisputed, the question of whether Defendant Wilson had constitutional authority to initiate his search of Mr. Mwimanzi is a pure question of law and therefore appropriate for resolution on summary judgment. Moreover, because Mr. Mwimanzi alleged the material facts on this issue in his amended complaint, ECF 24-2 (Am. Compl.) ¶¶ 37–40, 47–57, the legal inquiry is the same whether considered from the standpoint of futility in amending the complaint or a motion for summary judgment. Accordingly, the analysis for both motions is identical. Mr. Mwimanzi's facial claim turns on whether the Statute authorizes searches

based exclusively on presence in a residence subject to a warrant and if so, whether such searches are constitutional. With respect to the as-applied challenge, because it is conceded that the Statute authorized Wilson to initiate the search, the sole question is whether the Constitution did so as well.

Below, Mr. Mwimanzi combines the discussion of his entitlement to amendment and to summary judgment on his proposed facial and as-applied claims against the Statute. Because the Statute is unconstitutional both on its face and as applied to Mr. Mwimanzi, amendment is not futile, and Mr. Mwimanzi is entitled to summary judgment as to liability on his proposed claims.

A. The Statute is Facially Unconstitutional to the Extent it Permits Officers To Search People Based Solely on Their Presence in a Residence Subject to a Warrant.

The Fourth Amendment, like other constitutional provisions, is a viable basis for a facial challenge to a statute. *See City of Los Angeles v. Patel*, 576 U.S. 409, 415-17 (2015). Although courts sometimes require a showing that the challenged statute is unconstitutional in all its applications, a different approach applies when a facial challenge is brought to a defined subset of applications. *See id.* at 417-19. Specifically, "when addressing a facial challenge to a statute authorizing warrantless searches, the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Id.* at 418; *see also John Doe No. 1 v. Reed*, 561 U.S. 186, 194 (2010) (noting that the claim at issue "obviously has characteristics of both" a facial and as-applied claim and requiring that plaintiff satisfy the facial-challenge standard just "to the extent of [his claim's] . . . reach"); *United States v. Supreme Ct. of N.M.*, 839 F.3d 888, 914 (10th Cir. 2016) ("[F]acial standards are applied but only to the universe of applications contemplated by plaintiffs' claim, not to all conceivable applications contemplated by the

challenged provision."); *see also Lewis v. Gov't of the District of Columbia*, 161 F. Supp. 3d 15, 26–27 (D.D.C. 2015) (applying rule to Fourth Amendment challenge).

Because here Mr. Mwimanzi asks the Court to declare the Statute unconstitutional only to the extent that it permits officers to search people based exclusively on their presence in a residence subject to a warrant, *See* ECF 24-2 (Am. Compl.) Prayer for Relief ¶ (b), his claim "focuses on only the constitutional validity of [a] subset of [the Statute's] applications," *Supreme Ct. of N.M.*, 839 F.3d at 915, and therefore Mr. Mwimanzi need only "satisfy the [Supreme] Court's standard for a facial challenge to the extent of [his claim's] . . . reach," *John Doe No. 1*, 561 U.S. at 194. Moreover, as his claim arises in the Fourth Amendment context, "the proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant." *Patel*, 576 U.S. at 418. Thus, the fact that some searches performed under the challenged Statute might be independently justified by Fourth Amendment exceptions like exigency or consent does not undermine Mr. Mwimanzi's facial challenge. *See id.* at 418-19. In such circumstances, "[s]tatutes authorizing warrantless searches . . . do no work," *id.* at 419, and therefore are not relevant applications. The proper questions here, then, are whether the Statute permits officers to search people based *solely* on their presence in a residence subject to a warrant and, if so, whether that authority is constitutional.

1. The D.C. Court of Appeals has construed the Statute as permitting the type of searches Mr. Mwimanzi challenges. In *United States v. Miller*, 298 A.2d 34 (D.C. 1972), the D.C. Court of Appeals considered the "reasonable limitations" on police authority under § 23-524(g), and the sole constraint the Court recognized was that officers could not search people for objects enumerated in the warrant that the person obviously could not conceal (such as a stolen television). *See id.* at 36 n.6. Quoting a law review article with approval, the court gave an example of a

permissible application of the statute that describes this very case: "an officer could under this provision search persons to locate narcotics which were enumerated in the search warrant and which could be secreted on a person." *Id.* (citation omitted). Thus, the court construed the statute to mean that officers with a warrant to search a residence can, without more, search anyone inside for any item that could be concealed on their person. Such searches are precisely the sort that Mr. Mwimanzi is challenging, and nothing the D.C. Court of Appeals has said about § 23-524(g) since *Miller* suggests that it has retreated from this understanding.

The District's attempts to read the Statute narrowly so as to preclude Mr. Mwimanzi's facial challenge therefore fail. Specifically, the District asserts that the "reasonably necessary" standard for the searches authorized by the Statute was intended to import the entire body of Fourth Amendment law into the Statute, such that the Statute only authorizes searches that the Fourth Amendment does as well. Def.'s Opp'n. 5. But the D.C. Court of Appeals in *Miller* did not endorse this reading and instead construed the Statute's limitations far more narrowly, thereby foreclosing the District's interpretation. Moreover, as a textual matter, the District is simply wrong to assert that the Statute's limitations on searches are the same as the Fourth Amendment's. The Fourth Amendment requires probable cause and either a warrant for the person subject to the search or an exception to the warrant requirement. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) ("Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception."). The Statute mandates neither. Its substitute—allowing officers with a premises warrant to search people whenever "reasonably necessary to find property enumerated in the warrant which may be concealed upon the person," D.C. Code § 23-524(g)—is distinct from the Fourth Amendment's requirements.

The Supreme Court made that clear in *Ybarra v. Illinois*, 444 U.S. 85 (1979). There, the government proposed a rule that mirrors the Statute's, arguing that officers with a warrant to search a place should be able to search anyone on the premises that the police "have a reasonable belief . . . are connected with drug trafficking and may be concealing or carrying away the contraband." *Id.* at 94, 95 (internal quotation marks omitted). The Supreme Court rejected this rule, indicating that it diverged from Fourth Amendment at minimum because it permitted searches based on a standard lower than probable cause. *See id.* at 95–96 & n.10. This holding refutes any suggestion that the text of the Statute is identical to, or an adequate substitute for, the Fourth Amendment's commands.

2. Turning to the question of constitutionality, the Statute's authorization of searches of people based solely on their presence in a residence subject to a warrant violates the Fourth Amendment. Warrants exclusively to search places do not, on their own, authorize the police to search the people found inside. Unlike drawers, cabinets, or other objects located in a place, which officers with a warrant generally can inspect, *see* LaFave, 2 Search & Seizure § 4.10(b) (6th ed.), a person is "clothed with constitutional protection[s] against an unreasonable search or an unreasonable seizure[] [t]hat . . . [is] separate and distinct from" the safeguards enjoyed by the property owner. *Ybarra* 444 U.S. at 91–92. Officers can pierce these protections when they have a warrant to search a person, but only because a neutral magistrate has found probable cause to believe that the enumerated objects could be found on the person, and, to satisfy the particularity requirement, has identified the subjects of the search such that they could "be identified with reasonable certainty," LaFave, 2 Search & Seizure § 4.5(e) (6th ed.); *see also United States v. Clark*, 754 F.3d 401, 410 (7th Cir. 2014). A search warrant issued exclusively to search a place does not provide the people inside these same protections. In such cases, the magistrate determined

only that that "there exists probable cause to search the premises where the person may happen to be," a finding that does not ensure probable cause is "particularized with respect to" the people searched, as the Fourth Amendment mandates. *Ybarra*, 444 U.S. at 91. As to the requirement that warrants carefully identify the subject of the search, a warrant authorizing the search of a person whom it does not name or adequately describe would come perilously close to the "open-ended or general warrants" that the Constitution prohibits. *See id.* at 92 n.4 (internal citations and quotation marks omitted). For these reasons, the Court in *Ybarra* held that a warrant to search a tavern and the bartender, whom it described, gave the police "no authority whatever to invade the constitutional protections possessed individually by the tavern's customers." *Id.* at 92.

The Court in *Ybarra* further concluded that "a warrant to search a place cannot normally be construed to authorize a search of each individual in that place." 444 U.S. at 92 n.4. The District tries to make hay of the word "normally," Def.'s Opp'n 5–6, but the only "exception" the Court even considered in *Ybarra* involved cases where *the warrants themselves* authorized "the search of unnamed persons in a place" and the warrants were "supported by probable cause to believe that persons who will be in the place at the time of the search will be in possession of illegal drugs," 444 U.S. at 92 n.4. *See also* Def.'s Opp'n 6 (discussing observation on *Ybarra* in *United States v. Holder*, 990 F.2d 1327, 1329 n.2 (D.C. Cir. 1993) that references this language). Searches of people conducted under such warrants are backed by probable cause and a magistrate's authorization. By contrast, neither of these protections exists where, as the Statute authorizes and as occurred here, officers search a person based on a warrant that names only a place.

The D.C. Circuit has applied the same categorial limits to warrants to search private homes as the Supreme Court imposed on warrants to search public places in *Ybarra*. In *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976), for instance, the court commended the government for

"recogniz[ing]" that a warrant to search an apartment for drugs "did not authorize the search of all persons who may have been present," *id.* at 181, and cited approvingly *United States v. Haywood*, 284 F. Supp. 245 (E.D. La. 1968), which held that "[a] search warrant for a residence or other premises does not authorize the search of all persons who may be present," 284 F. Supp. at 250. The District attempts to minimize the import of *Branch* by pointing to equivocal language in the court's decision. Def.'s Opp'n. 7–8. But the statements D.C. cites appear in the court's discussion of when a search warrant for a place permits searches of the *property* of non-residents, not the non-residents themselves. 545 F.2d at 182. This issue was also presented in *Walker v. United States*, 327 F.2d 597, 600 (D.C. Cir. 1963), another case the District discusses (Def.'s Opp'n at 7) which concerned a search of a bag and wallet passed between two people, as opposed searches of the individuals. The lawfulness of searches of visitors' property is not at issue here.

The D.C. Circuit is not alone in concluding that search warrants for residences do not encompass the people found inside. The Third and Tenth Circuits have reached similar conclusions. *See Doe v. Groody*, 361 F.3d 232, 243 (3d Cir. 2004) (holding in a case involving a search warrant for a residence that "[a] search warrant for a premises does not constitute a license to search everyone inside"); *United States v. Ward*, 682 F.2d 876, 880 (10th Cir. 1982) (holding that a warrant to search a residence for gambling materials did not justify even a pat-down frisk of the owner-occupant).

Because a warrant to search a residence does not encompass the people inside, officers seeking to search those individuals must establish both probable cause and show that one of the exceptions to the warrant requirement is met. *McNeely*, 569 U.S. at 148. But mere presence in a place subject to a warrant satisfies neither of these requirements. In *White v. United States*, 512 A.2d 283, 286 (D.C. 1986), the D.C. Court of Appeals held that an individual's presence in a

"private home . . . did not give the police probable cause to believe that [he] . . . was committing a crime or concealing property which they were entitled to seize." Noting that the court remanded, the District attempts to turn this holding into dicta. Def.'s Opp'n 10. But the court remanded only after instructing that the rationale discussed above, which the Superior Court had relied on in upholding the search originally, did not pass constitutional muster. *White*, 512 A.2d at 285, 286. Correcting a trial court's error before remanding unquestionably is a holding.

That decision accords with the D.C. Circuit's analysis in *United States v. Reid*, 997 F.2d 1576, 1579 (D.C. Cir. 1993), which held that a person's presence near a place subject to a warrant, plus an officer's intuition that the person posed a threat, barely combined to establish *reasonable suspicion* to conduct a frisk (not a search). *See id.* at 1577 (describing the case as "troubling" and presenting "a particularly close call"). The District emphasizes that the court upheld the frisk and that the court stated that presence near a private residence justifies more suspicion than presence at a public place. Def.'s Opp'n 6 (citing *Reid*, 997 F.2d at 1579). But the District never addresses how presence alone can supply *probable cause* if presence plus other factors only slightly surpass the threshold for *reasonable suspicion*.

The District devotes much of its brief to arguing that police sometimes can search people based on their presence in a residence subject to a warrant, Def.'s Oppn. 5–6, 8; however, the District's main cases involve searches justified not *solely* on presence, but also on specific facts besides presence that both link the individual to the suspected criminal activity on the scene and support an exception to the warrant requirement.

Thus, in *United States v. Miller*, 298 A.2d 34 (D.C. 1972), a case where the police had a warrant to search a gambling den and searched the people therein, the D.C. Court of Appeals held the searches lawful only because the police relied on facts alleged in the warrant *in combination*

with the "occupants' failure to admit the police" for over 30 seconds after they announced "their authority and purpose [and] the sounds of someone running from the door" when the police knocked, *id.* at 35, 36. These facts, the court concluded, gave the police both probable cause to believe the occupants possessed evidence and reason to believe that the occupants were likely to destroy that evidence, an exigent circumstance permitting a warrantless search. *See id.* at 36. Similarly, in *United States v. Holder*, 990 F.2d 1327, 1329 (D.C. Cir. 1993), the court held probable cause justified an arrest not simply because the arrestee was present at a residence subject to a warrant but also because when the officers arrived, the defendant stood "just a few feet from a table full of cocaine," a "proximity to the drugs that clearly reflected his knowledge of, and probably his involvement in, narcotics activity." Moreover, the court upheld the subsequent search of the individual not based on the warrant to enter the home but on the search incident to arrest exception to the warrant requirement. *Id.* Likewise, in *Washington v. District of Columbia*, 685 F. Supp. 264, 276 (D.D.C. 1988) the officers initiated their search not based solely on the plaintiff's presence at the premises subject to a search warrant, but also because he owned both the premises and an incriminating book the officers found on the premises. Although the court did not address whether an exception to the warrant requirement justified this search, that issue does not appear to have been raised, as the plaintiff solely challenged the search on grounds of probable cause. *See id.* ("Because Washington was not named in the search warrant, plaintiff argues, the officers did not have probable cause to search his person or arrest him.").

These cases are all irrelevant to Mr. Mwimanzi's facial challenge because they do not fall within the subset of challenged applications. Where a search is independently justified based on probable cause and exigency or other exceptions to the warrant requirement, rather than the warrant authorizing the search of a place, the Statute simply "do[es] no work," and therefore such

circumstances "are irrelevant to [the court's] analysis because they do not involve actual applications of the statute." *Patel*, 576 U.S. at 419; *see also id.* at 418 ("[T]he proper focus of the constitutional inquiry is searches that the law actually authorizes, not those for which it is irrelevant.").

The District's remaining cases are easily distinguishable from this one. It cites *Germany v. United States*, 984 A.2d 1217, 1229–30 (D.C. 2009), a case about a *frisk* for officer safety based on suspicions that a bystander was armed, not a *search* based on mere presence. The District also cites *Michigan v. Summers*, 452 U.S. 692, 694 (1981); *Muehler v. Mena*, 544 U.S. 93, 102 (2005); and *Los Angeles Cty. v. Rettele*, 550 U.S. 609, 615 (2007), but these opinions all concerned the legality of *detaining*, not *searching*, individuals while executing a search warrant for a home. None of these decisions speaks to the circumstances here.

Binding precedent and Fourth Amendment first principles establish that officers cannot rely on a warrant for searching a residence to search everyone inside. A warrant explicitly for a place does not authorize searches of people. And an individual's presence alone does not establish probable cause or the existence of an exception to the warrant requirement. The Statute, as construed by the D.C. Court of Appeals, permits searches in violation of these principles, and it is unconstitutional to the extent that it does.

B. The Statute is Unconstitutional as Applied to Mr. Mwimanzi.

Even if the District was correct that the Statute may sometimes be constitutionally applied to search people based solely on their presence in a residence subject to a warrant, the Statute cannot constitutionally be applied here: on the undisputed facts there was no reasonable basis to believe the objects of the warrant were to be found on Mr. Mwimanzi, who was merely present watching television in the location for which the warrant was issued.

The warrant itself clearly did not authorize the search of Mr. Mwimanzi. The affidavit did not mention him, assert that the officers had probable cause to believe that he possessed contraband, or request authority to search him. Pl.'s SoF Part III (Pl.'s SUMF) ¶¶ 11–13. And, in issuing the warrant, the judge did not find that probable cause supported a search of Mr. Mwimanzi or authorize such a search. *Id.* ¶¶ 9–11. Put simply, the warrant was in no way "particularized with respect to" Mr. Mwimanzi, and therefore could not serve as a predicate to justify searching him. *Ybarra*, 444 U.S. at 91.

The District argues that three facts supplied Officer Wilson authority to search Mr. Mwimanzi: (1) the possibility that Mr. Mwimanzi could conceal drugs on his body, Def.'s Opp'n 9; (2) his presence in a private residence, as opposed to public place, subject to a warrant, *id.* at 10; and (3) the allegations that multiple drug users and dealers operated on the premises, *id.* But searches of people require a warrant or an exception to the warrant requirement, as well as probable cause. *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). The three facts upon which Defendants rely establish neither.

Regarding the first requirement, the District fails to explain how these facts could bring Mr. Mwimanzi into the scope of a warrant that does not bear his name or contain an adequate description of his person. *See* Def.'s Opp'n. 9–11. Warrants must describe their subjects with particularity. *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984) ("[A] search conducted pursuant to a warrant that fails to conform to the particularity requirement of the Fourth Amendment is unconstitutional."); *see also United States v. Clark*, 754 F.3d 401, 410 (7th Cir. 2014) (holding that a warrant to search a person satisfied the particularity requirement because it left "nothing about its scope to the discretion of the officer serving it"). Accordingly, a warrant solely for a place provides "no authority whatever to invade the constitutional protections

possessed individually by" people who may be present. *Ybarra*, 44 U.S. at 92. The District also fails to identify an exception to the warrant requirement that would justify the search. *See* Def.'s Opp'n. 9–11. Nor could it. Exigent circumstances did not exist because Defendant Wilson saw no drugs on the scene, heard no noises suggesting people were trying to leave, and had no other evidence suggesting an imminent risk of lost evidence. Pl.'s Sof Part III (Pl.'s SUMF) ¶¶ 1–2, 4–5. And as noted, the parties agree that Officer Wilson never sought Mr. Mwimanzi's consent, and never arrested him, which would have permitted a search incident to arrest. *Id.* ¶¶ 6,7. Because Officer Wilson lacked a warrant to search Mr. Mwimanzi, and none of the exceptions to the warrant requirement applied, he could not lawfully conduct the search.

The second, independently sufficient reason why the District fails to justify Officer Wilson's search is that under binding precedent, the facts it identifies do not sum to probable cause. In *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976), the D.C. Circuit held that officers lacked authority to search a man's bag when he entered an apartment while officers were executing a search warrant for that location. There, as here, the warrant authorized a search for drugs, in a private residence suspected of hosting drug transactions, including one the day of the warrant's execution and another expected that night. *Id.* at 178, 179, 181. Yet the D.C. Circuit nonetheless held that a search of a person's shoulder bag, based on his entry into the apartment, was unconstitutional. *Id.* at 181, 182. The District attempts to distinguish this case because, unlike Mr. Mwimanzi, the person searched in *Branch* was not present when the officers began executing the warrant, arriving in the middle of the search instead. Def.'s Opp'n. 7–8. But the court relied on that fact only to emphasize that the appellant was not a resident but a visitor, *Branch*, 545 F.2d at 182—just as Mr. Mwimanzi was (indisputably) here, *see* Pl.'s SoF Part III (Pl.'s SUMF) ¶¶ 13, 14.

The D.C. Court of Appeals' decision in *White v. United States*, 512 A.2d 283, 286 (D.C. 1986), reached a similar conclusion, holding that officers who secured a warrant to search an apartment for drugs based on suspicions that the apartment hosted drug transactions lacked probable cause to search a man due to his presence there. The District attempts to distinguish this ruling by asserting that the premises under suspicion only involved one person selling drugs, not multiple people as was alleged here. Def.'s Opp'n 10. But although the affidavit for the warrant in *White* mentioned only one seller, it noted that there had been at least five buyers in 72 hours before its submission. 512 A.2d at 284 n.1. Thus, that case also involved "multiple unidentified individuals actively participating in drug trafficking activity," Def.'s Opp'n 10, yet the D.C. Court of Appeals nonetheless found authority to search lacking. Nor did the court retreat from that holding in *Germany v. United States*, 984 A.2d at 1229–31, as the court held only that the police had reasonable suspicion to *frisk* based on the particular facts of that case, which included not only the individual's presence at a place subject to a warrant but also his suspicious clothing. The court reached no conclusions about officers' authority to initiate searches, leaving *White*, which speaks directly to that issue, undisturbed.

The circumstances here are also distinct from those at issue in *Holder*, 990 F.2d at 1329, *Washington*, 685 F. Supp. at 276, and *Miller*, 298 A.2d at 36. In each of those cases, the police found probable cause not only based on the individual's location but also based on facts, either recorded in the warrant's affidavit or discovered at the scene, that were specific to the individual searched. Here, neither the warrant nor the affidavit mentioned Mr. Mwimanzi, Pl.'s SOF Part III (Pl.'s SUMF) ¶¶ 11, 12, and nothing on the scene implicated Mr. Mwimanzi in any crime, *id.* ¶ 4–5, 8.

In sum, warrants to search places do not encompass people. The Statute authorizes such searches, and to that extent, it is facially unconstitutional. Based on the undisputed facts, the Statute's application to Mr. Mwimanzi was unconstitutional as well. The Court should therefore grant Mr. Mwimanzi leave to amend and, for the same purely legal reasons based on the undisputed factual record, grant him summary judgment as to liability on his proposed claims too.

II. Defendants Are Not Entitled to Summary Judgment on Mr. Mwimanzi's Claims Arising from the Manner in Which Defendant Wilson Searched Him.

The Fourth Amendment not only prohibits searches initiated without adequate justification but also searches conducted in an unreasonable manner. *See Polk v. District of Columbia*, 121 F. Supp. 2d 56, 66 (D.D.C. 2000). Manner-of-search claims provide an independent basis for constitutional liability, *see id.*, and Mr. Mwimanzi seeks relief on this ground as well, Compl. ¶¶ 61, 62, ECF No. 1. Both Defendants District of Columbia and Wilson seek summary judgment on that theory, Defs.' MSJ 6, as well as on Mr. Mwimanzi's battery claim, *id.* at 8, which involves the same analysis. *See* Compl. ¶¶ 61–65, ECF No. 1.

In reviewing Defendants' motion, Mr. Mwimanzi, as the non-moving party, is entitled to have all reasonable inferences drawn in his favor. *Robinson v. Pezzat*, 818 F.3d 1, 9 (D.C. Cir. 2016). And construed in his favor, the record shows that Officer Wilson fondled and smashed Mr. Mwimanzi's testicles against his legs and probed Mr. Mwimanzi's buttocks with such force as to leave him in pain long after the search ended. Pl.'s SoF Part II (Statement of Disputed Material Facts) ¶¶ 20–31, 36–39. The record further shows that Officer Wilson had no justification for these actions. Defendant Wilson did not point to any specific facts indicating that Mr. Mwimanzi possessed contraband or hid them in such a way as to make Defendant Wilson's aggressive search at all justified; rather, Defendant Wilson conducted his search simply because Mr. Mwimanzi was

present in Ms. Whitehead's apartment when officers were executing a warrant to search it. Pl.'s SoF Part III (Pl.'s SUMF) ¶ 8.

Defendants make no effort to defend the manner in which (crediting Mr. Mwimanzi's testimony) Wilson executed the search. They discuss Defendant Wilson's basis for thinking Ms. Whitehead's apartment hosted drug transactions and his general knowledge that drugs can be found in individuals' groins, but point to nothing in the record suggesting that Defendant Wilson had reason to believe he would find drugs on Mr. Mwimanzi's person at all, let alone deep in his groin or buttocks. *See* Defs.' MSJ 7–12. Indeed, even if Defendant Wilson had lawful cause to initiate his search of Mr. Mwimanzi (which he did not), Defendants would still need to explain why Defendant Wilson's forceful and degrading search was reasonable. On this point, they offer no analysis. *See id.*

Instead, Defendants primarily assert that Mr. Mwimanzi's account of what happened is factually wrong. *See id.* Summary judgment is not the time for such arguments. Mr. Mwimanzi's sworn statements at deposition and in response to interrogatories create genuine disputes about the material facts regarding the way Defendant Wilson conducted the search. At this stage, Mr. Mwimanzi's account must be credited, and when it is, Defendants cannot prevail on the merits of Mr. Mwimanzi's Fourth Amendment and battery claims, or on their defenses of qualified immunity and qualified privilege.

A. The Material Facts of This Case Are in Genuine Dispute.

The parties disagree about the way Defendant Wilson searched Mr. Mwimanzi. This dispute is obviously material to Mr. Mwimanzi's original Fourth Amendment and battery claims. After all, the Court cannot decide if Defendant Wilson searched Mr. Mwimanzi in a reasonable manner if it does not first determine the manner in which Defendant Wilson searched him.

This dispute is also "genuine" under Rule 56 because "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Mr. Mwimanzi described Defendant Wilson's search in detail, first in his responses to Defendants' interrogatories and then in his deposition, both of which he filed on the record, and which qualify as competent evidence to put a fact in genuine dispute. *See* Fed. R. Civ. P. 56(c)(1)(A). Defendants, by contrast, never describe Defendant Wilson's search in any detail at all. *See generally* Defs.' MSJ; Defs.' SUMF. While they concede that Defendant Wilson searched Mr. Mwimanzi's groin—a fact they rightly recognize as undisputed, Defs.' SUMF ¶ 18—they make no statements about how Defendant Wilson searched Mr. Mwimanzi's groin, nor do they comment on whether Defendant Wilson searched Mr. Mwimanzi's buttocks, or if so, how. *See generally* Defs.' MSJ; Defs.' SUMF. By omitting these issues from their statement of undisputed material facts, Defendants implicitly concede that the record does not clearly resolve these points. That concession, combined with Mr. Mwimanzi's competent evidence in support of his detailed account of Defendant Wilson's search, and Defendants' failure to marshal any evidence in support of an alternative narrative, requires a finding that a reasonable jury could accept Mr. Mwimanzi's allegations.

Defendants argue that the video resolves all factual questions in their favor, but they are simply wrong. They contend that Defendant Wilson's body-worn camera footage shows that his search was not "excessive or otherwise inappropriate by police standards," Defs.' MSJ 11–12, yet that footage never shows where on Mr. Mwimanzi's body Defendant Wilson places his hands, and during the portion of the video that recorded the search, the camera is always completely or partially obscured by Mr. Mwimanzi's black leather jacket. *See* Defs.' Ex. D. Contrary to Defendants' assertion, *Scott v. Harris*, 550 U.S. 372, 380 (2007) does not require this Court to

resolve a dispositive motion on such limited video footage. *See* Defs.' MSJ 12. *Harris* held that granting summary judgment based on a video is proper only where one side's "version of events is so utterly discredited by [the video evidence in] the record that no reasonable jury could have believed him." *Id.* at 380. The footage here does not meet that standard; it does not even show the key aspects of what occurred, much less provide a basis for rejecting Mr. Mwimanzi's account. *See Fenwick v. Pudimott*, 778 F.3d 133, 137–38 (D.C. Cir. 2015) (declining to "view[] the facts in the light depicted by the videotape" on an appeal from summary judgment where the video was "blurry and soundless"); *see also Latits v. Phillips*, 878 F.3d 541, 544 (6th Cir. 2017) (stating that, as with any other summary judgment evidence, courts must "view any relevant gaps or uncertainties left by videos in the light most favorable to the [non-moving party]").

To the extent the video reveals anything about the encounter, it supports Mr. Mwimanzi's account, not Defendant Wilson's. While the position of Defendant Wilson's camera prevented the video from capturing meaningful images of what occurred, the recording did pick up the sound, and the statements the parties made during the search corroborate Mr. Mwimanzi's version of what happened. In the recording, Defendant Wilson can be heard telling Mr. Mwimanzi to stand, ordering him to spread his legs, and demanding that he spread them wider, Defs.' Ex. D, just as Mr. Mwimanzi alleged, *see* Pl.'s SoF Part II (Statement of Disputed Facts) ¶¶ 13, 18, 19. The video also confirms Mr. Mwimanzi's testimony that he gasped and told Defendant Wilson to stop as the search unfolded. *Id.* ¶ 27. The recording captures Mr. Mwimanzi's initial complaint of "You're fondling me, buddy," his gasps of "Again? Again, though? Again! Oh my God, again!" and repeated requests for Defendant Wilson to stop, including the exclamation "Damn, you gonna finger fuck me?" *Id.* ¶¶ 28, 29. By establishing that Mr. Mwimanzi expressed shock and indignation at the time of the search, the video suggests that Defendant Wilson's conduct was

sufficiently aggressive to provoke that response. As the non-moving party, Mr. Mwimanzi is entitled to that inference.

Taking a different tack, Defendants attempt to use the video to attack Mr. Mwimanzi's credibility, but that strategy is entirely misplaced at summary judgment, because the responsibility for assessing credibility lies with the jury, not the court on summary judgment. *Anderson*, 477 U.S. at 255. In any event, the purported inconsistencies Defendants try to conjure between the video and Mr. Mwimanzi's deposition are not inconsistencies at all. Contrary to Defendants' assertion, the video does not undercut Mr. Mwimanzi's testimony that he flinched during the search, Defs.' MSJ 8, as the video's poor visuals show nothing useful either way. As for Defendants' assertion that the video contradicts Mr. Mwimanzi's testimony that he gasped, *id.*, the video (which unlike images, captures useful audio) flatly refutes this point. Defendants' argument comes down to the assertion that cries of anguish ("Again? Again, though? Again! Oh my God, again!?") are distinct from gasps—a point requiring a degree of linguistic formalism that a jury could easily reject when assessing Mr. Mwimanzi's credibility. The video likewise refutes Defendants' assertion that Mr. Mwimanzi never told Defendant Wilson to stop. *Id.* As Mr. Mwimanzi testified when Defendants raised this point at deposition, "You are an officer and the words[,] 'You are finger-fucking me. You are fondling me.' That's to stop. . . . That means stop." Pl.'s SoF Part II (Statement of Disputed Material Facts) ¶ 30.

Based on the video, his deposition, and his answers to interrogatories, Mr. Mwimanzi has easily satisfied his burden to support his factual allegations with competent evidence. The dispute that remains is for the jury to resolve.

B. Defendant Wilson's Search Violated Mr. Mwimanzi's Clearly Established Fourth Amendment Rights.

Defendants contest the legal merits of Mr. Mwimanzi's Fourth Amendment claim and invoke qualified immunity to shield Defendant Wilson's actions. Defs.' MSJ 6–11. The qualified immunity defense turns on (1) whether the defendants "violated a federal statutory or constitutional right," and (2) whether "the unlawfulness of their conduct was 'clearly established at the time.'" *District of Columbia v. Wesby*, 138 S.Ct. 577, 589 (2018). A right is clearly established when the "the state of the law [at the time] of the incident gave [the defendants] fair warning that their alleged [misconduct] . . . was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). This rule does not require the proponent to identify "a case directly on point," *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011), but only that either controlling authority or "a robust consensus of cases of persuasive authority" placed the constitutional question beyond debate. *Wesby*, 138 S. Ct. at 589–90.

Independently, qualified immunity must also be denied in the "'obvious case,' where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Id.* at 590 (quoting *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam)); *accord Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377 (2009) ("[O]utrageous conduct obviously will be unconstitutional, this being the reason ... that the easiest cases don't even arise." (cleaned up)). The Supreme Court recently applied this principle to summarily reverse a grant of immunity because a lower court failed to recognize that the "particularly egregious facts" alone should have alerted any reasonable officer that the conduct at issue was unconstitutional. *Taylor v. Riojas*, 141 S.Ct. 52, 53–54 (2020).

Construing the record in the light most favorable to Mr. Mwimanzi, Defendant Wilson violated Mr. Mwimanzi's Fourth Amendment rights in a way that qualified immunity does not shield. Defendants' arguments to the contrary emphasize Defendant Wilson's good faith—a

contention that is irrelevant both to the constitutional inquiry, *see Whren v. United States*, 517 U.S. 806, 813 (1996), and to the qualified immunity one, *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18 (1982), and which rests on inferences drawn improperly in Defendants' favor where the facts are disputed.

Defendants' remaining arguments advance broad generalities about officers' authority to conduct searches to find contraband. But Defendants fail to grapple with the extensive caselaw, including binding precedent, defining when and how officers can conduct searches that, like the one at issue here, involve someone's sensitive body parts. Binding caselaw and a robust consensus of persuasive authority gave Defendant Wilson fair warning that searches like the one he performed on Mr. Mwimanzi violated his constitutional rights in three ways:

1. By fondling his testicles and probing his buttocks so forcefully that the pain lingered for days, for no legitimate investigative purpose;

2. By manipulating his testicles based solely on his presence in a residence subject to a warrant; and

3. By probing his buttocks based solely on his presence in a residence subject to a warrant.

The first of these violations reflects the Fourth Amendment's clearly established prohibition on executing searches in gratuitously, sexually invasive ways. The other two violations of rights arise from the Fourth Amendment's clearly established restrictions on initiating even modest intrusions into particularly private parts of the body. Any one of these violations subjects Defendant Wilson to liability. Resolving all disputes of fact in favor of Mr. Mwimanzi, Defendant Wilson violated clearly established law in all three ways.

1. Defendant Wilson Violated Mr. Mwimanzi's Clearly Established Right Not To Have His Testicles Fondled and Endure an Extremely Painful Probe of His Buttocks for No Legitimate Investigative Reason.

The constitutionality of a search challenged as unreasonably intrusive turns on "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). This specific test accords with the more general rules governing challenges to law enforcement action as unreasonable in execution: A "use of force is excessive and therefore violates the Fourth Amendment if it is not 'reasonable,' that is, if 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' is weightier than 'the countervailing governmental interests at stake.'" *Rudder v. Williams*, 666 F.3d 790, 795 (D.C. Cir. 2012) (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)). Put simply, "[f]orce without reason is unreasonable." *Johnson v. District of Columbia*, 528 F.3d 969, 977 (D.C. Cir. 2008) (footnote omitted).

Here, with respect to the scope and manner of intrusion, Defendant Wilson targeted the most sensitive parts of Mr. Mwimanzi's body and subjected him to gratuitous, humiliating probing. He did not merely inspect Mr. Mwimanzi's buttocks, alone a serious invasion of personal privacy, *see* Section II.B.3, *infra*, but pressed on his anus in a way that felt as if he was trying to "penetrate" it. Pl.'s SoF Part II (Statement of Disputed Material Facts) ¶ 22. When Defendant Wilson turned to Mr. Mwimanzi's groin, he did not probe the exterior of Mr. Mwimanzi's pants pockets, turn those pockets inside out, or otherwise attempt to use less intrusive tactics to locate drugs before turning to more invasive ones. *Id.* ¶¶ 20, 21. The approach he used instead, rubbing Mr. Mwimanzi's testicles, squeezing them against his leg, continuing to probe even after Mr. Mwimanzi told him to stop, and repeating these maneuvers despite not feeling anything incriminating the first time, was needlessly degrading and painful. *Id.* ¶¶ 23–30. Adding to the gratuitous humiliation, Defendant Wilson conducted this search in a public setting, with Mr.

Mwimanzi's friends present, and concluded it by looking at him with an expression of satisfaction. *Id.* ¶¶ 32, 44.

The scope and manner of this search, particularly given its public nature, are facially extreme, a point underscored by "[t]he severe nature of [Mr. Mwimanzi's] injur[ies]," which can show that "excessive force may have been used." *Dormu v. District of Columbia*, 795 F. Supp. 2d 7, 23 (D.D.C. 2011); *see also id.* at 24 (denying officer summary judgment in excessive force claim based in part on this principle). Taking Mr. Mwimanzi's uncontested account of his injuries as true, as the Court must at this stage, Defendant Wilson searched Mr. Mwimanzi's buttocks with such force that he had pain for days while performing activities as basic as using the restroom. Pl.'s SoF, Part II (Statement of Disputed Material Facts) ¶ 38. Defendant Wilson's smashing of Mr. Mwimanzi's testicles caused him pain for even longer, making it hard for him to wear the safety harness required for his job and causing him to question his ability to father children. *Id.* ¶¶ 39, 40. The cumulative effect of the search caused enough physical pain to require medical attention, *Id.* ¶ 37, and resulted in prolonged emotional pain—including feeling so depressed from thinking about the incident that he experiences physical symptoms, *Id.* ¶ 41—that is consistent with "significant distress and often lasting psychological harm" caused by sexual offenses, *Washington v. Hively*, 695 F.3d 641, 643 (7th Cir. 2012).

The governmental interest in this case, seizing illegal drugs, did not legitimate this highly intrusive search. The possibility of finding drugs can only justify even an ordinary search if the police have probable cause to believe that the search will uncover the contraband, which, as discussed in Sections I.B, *supra* & II.B.2, *infra*, Defendant Wilson did not. But even if Defendant Wilson had probable cause to search Mr. Mwimanzi, there was no reason why he needed to do so in such a forceful and humiliating manner. This is not, for instance, a case where an officer saw or

felt potential contraband in an individual's groin or buttocks and needed to apply additional force to recover the item. Defendant Wilson did not feel anything of note when probing Mr. Mwimanzi's groin, Pl.'s SoF, Part II (Statement of Material Disputed Facts) ¶ 24, and a reasonable jury could conclude that he knew a prior search of Mr. Mwimanzi came up empty, Pl.'s SoF, Part II (Statement of Disputed Material Facts) ¶¶ 11, 13–17; Section II.B.2, *infra*. Defendants themselves identify no justification for Defendant Wilson's tactics (as described by Mr. Mwimanzi, an account which at this stage must be credited). They emphasize instead that the search "was limited to areas where [Wilson] could have found the items identified in the Search Warrant." Defs.' MSJ 8. Yet the mere possibility that Mr. Mwimanzi could secrete contraband in his private parts does not justify fondling his testicles or pressing into his buttocks with intense force.

The cases Defendants cite (at Defs.' MSJ 8) do not support such a rule. *Horton v. California*, 496 U.S. 128 (1990), does not discuss the manner in which officers may search locations that could contain the object of their intrusion. And *Saffold Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009), not only fails to support Defendants' argument but also refutes it, as there, the Court held reasonable articulable suspicion to believe that a student possesses contraband does not authorize any manner of search. *See id.* at 374, 376–77.

Facing a chasm between the search Defendant Wilson conducted and the justifications that could support it, Defendants attempt to put the onus on Mr. Mwimanzi and contend that his failure to name a police practices expert precludes a jury from assessing whether the Defendant Wilson's forceful probing of Mr. Mwimanzi's anus, and squeezing and rubbing of his testicles, was reasonable under the circumstances. Defs.' MSJ 8–9. Defendants, however, identify no case holding that plaintiffs must retain an expert to bring excessive force cases under the Fourth Amendment. Nor does Mr. Mwimanzi know of any case where this Court or the D.C. Circuit has

endorsed such a rule. This is likely because "expert testimony is by no means required in all excessive forces cases. Since the question of excessive force is so fact-intensive, the jury will often be in as good a position as the experts to decide whether the officer's conduct was objectively reasonable." *United States v. DiSantis*, 565 F.3d 354, 364 (7th Cir. 2009) (internal citations and quotation marks omitted).

Crediting Mr. Mwimanzi's version of the facts, Officer Wilson committed a constitutional violation—and one clearly established by a consensus of persuasive authority. This Court has held that officers who gratuitously probe people's private parts through their clothing violate the Fourth Amendment. For example, in *Horse v. District of Columbia*, 17-cv-1216 (D.D.C. Sept. 27, 2019), Judge Amy Berman Jackson, in a detailed opinion read from the bench, denied summary judgment to an officer on a Fourth Amendment claim alleging that the officer, while conducting a search incident to arrest, "jamm[ed] his finger into the seat of [Mr. Horse's] jeans" and "pok[ed] him in the anus" through his clothing. Pl.'s Ex. F (Redacted Horse Decl. ¶ 4, 7, *Horse v. District of Columbia* (Jan. 10, 2019) (No. 17-1216)); Ex G (Tr. Status Conf. 73–81, *Horse v. District of Columbia* (Jan. 10, 2019) (No. 17-1216) (hereinafter Horse Op.)). Similarly, in *Dickey v. United States*, 174 F. Supp. 3d 366, 370–71 (D.D.C. 2016), the Court held that, assuming the plaintiff's allegations to be true, an officer violated the Fourth Amendment by fondling the plaintiff's testicles multiple times through clothing while conducting a search incident to arrest. *See also Grissom v. District of Columbia*, 853 F. Supp. 2d 118, 120, 125–26 (D.D.C. 2012) (denying motion to dismiss Fourth Amendment claim where security guard rubbed hand-held metal detector over plaintiff's breasts and genital area over her clothing).

Other courts have similarly held that the Fourth Amendment precludes gratuitously fondling an individual's genitals, or probing their buttocks, through their clothing. *See, e.g.*, *Price*

v. Kramer, 200 F.3d 1237, 1249 (9th Cir. 2000) (holding that police officer violated the Fourth Amendment by "grabbing, pulling, and squeezing [plaintiffs'] testicles" through their clothing during pat down); *McKelvie v. Cooper*, 190 F.3d 58, 61, 63 (2d Cir. 1999) (vacating summary judgment to officers based on "aggressive examination" of plaintiff's "penis, testicles, and anus through his clothing"). Indeed, the Second and Seventh Circuits have reached the same conclusion even under the more demanding Eighth Amendment standard. *See, e.g.*, *Crawford v. Cuomo*, 796 F.3d 252, 257, 258 (2d Cir. 2015) (holding that officer violated prisoner's rights "when he allegedly squeezed and fondled [plaintiff's] penis" through clothing (internal quotation marks and citation omitted)); *Rivera v. Drake*, 497 Fed. App'x 635, 636–38 (7th Cir. 2012) (denying summary judgment on Eighth Amendment claim to prison official who stuck finger in buttocks of plaintiff; plaintiff did not allege that intrusion occurred under his clothing); *Hively*, 695 F.3d at 642, 644 (denying qualified immunity on Eighth Amendment claim to prison official who fondled plaintiff's testicles, both through and under his clothing).

The robust consensus of persuasive authority regarding invasive sexual searches over individuals' clothing is so clear that this Court has previously denied qualified immunity to officers who conducted similar searches in 2013, *Dickey*, 174 F. Supp. 3d at 368, 372, and in 2017, Ex. G (Horse Op.) 79–81—years before Defendant Wilson conducted his.

Even if case law did not firmly preclude the type of search Defendant Wilson performed, Mr. Mwimanzi would overcome qualified immunity for a separate, independent reason: When the record is construed in Mr. Mwimanzi's favor, the unconstitutionality of Defendant Wilson's actions was obvious. The D.C. Circuit's 2008 holding that "[f]orce without reason is unreasonable" gave Defendant Wilson fair notice that to conduct a sexually intrusive, degrading search, he would need at least some justification, *Johnson*, 528 F.3d at 977 (footnote omitted); yet here, Defendants

offer none, *see* Defs.' MSJ 6–11. As Mr. Mwimanzi explained, the intrusion he suffered was not a police search but a sexual assault. Pl.'s SoF (Statement of Disputed Material Facts) ¶ 49. No reasonable officer could believe that the Fourth Amendment tolerated such conduct. *See Dickey*, 174 F. Supp. 3d at 371–72 (affirming this principle).

2. Defendant Wilson Violated Mr. Mwimanzi's Clearly Established Right Not To Endure Manipulation of His Testicles Based Solely on His Presence in a Residence Subject to a Warrant.

Binding precedent establishes Defendant Wilson did not have probable cause to search Mr. Mwimanzi; at most he could have conducted a frisk, but by manipulating Mr. Mwimanzi's testicles, he exceeded what the D.C. Circuit has held a lawful frisk can entail. Thus, even putting aside the violent, degrading nature of Defendant Wilson's actions, his handling of Mr. Mwimanzi's groin exceeded the scope of his constitutional authority.

Section I.B explains why the warrant to search Ms. Whitehead's home, and Mr. Mwimanzi's presence in her apartment, did not provide the probable cause necessary to permit Defendant Wilson to initiate his search. The analysis in that section is dispositive. It becomes even stronger when the record is construed in Mr. Mwimanzi's favor, as it must be in the context of reviewing Defendants' summary judgment motion, and unlike in Section I.B, which concerned Mr. Mwimanzi's summary judgment motion.

In the posture of Defendants' motion, Mr. Mwimanzi is entitled to the inference that Defendant Wilson knew Officer Seijo had previously searched Mr. Mwimanzi and that this search came up empty. Prior to conducting his search, Defendant Wilson asked if Mr. Mwimanzi had been searched before and another officer responded "a Seijo search." Pl.'s SoF Part II (Statement of Disputed Material Facts) ¶ 13. Based on that officer's words ("search" not "pat down") and Defendant Wilson's personal knowledge of the effectiveness of Officer Seijo's searches, *id.* ¶¶ 16,

17, a reasonable jury could conclude that Defendant Wilson knew that Mr. Mwimanzi had been fully and thoroughly inspected. Given that Defendant Wilson knew Seijo hadn't arrested Mr. Mwimanzi, *see* ¶¶ 12, 13, a reasonable jury could also conclude that Wilson realized Seijo found nothing, which in turn further reduced the already paltry basis for probable cause. *Cf. Corrigan v. District of Columbia*, 841 F.3d 1022, 1031 (D.C. Cir. 2016) (concluding that officers who found no "individual or dangerous property" inside a home after one sweep lacked a justification for pursuing a second).

Defendants treat as undisputed Wilson's assertion that he thought Mr. Mwimanzi received only a pat down, but this fact is contested and in the context of Defendants' motion for summary judgment, beneficial inferences flow to the plaintiff. Indeed, Defendant Wilson contradicted himself on the basis for his interpretation at deposition, once testifying that he had no facts to support it, Pl.'s SoF, Part II (Statement of Disputed Material Facts) ¶ 14, and another time stating that he based it on his belief that Officer Seijo had not been assigned to conduct searches, *id.* ¶ 15. Resolving this factual dispute is ultimately for the jury; for now, the Court must construe the issue in Mr. Mwimanzi's favor. So understood, the record shows that Defendant Wilson not only lacked a basis for thinking that Mr. Mwimanzi possessed contraband but also had affirmative reasons to believe he had none.

This fact further distinguishes the search of Mr. Mwimanzi from the ones in several of the cases the District cites in its opposition to Mr. Mwimanzi's motion to amend. Def.'s Opp'n. 6, 8. *United States v. Holder*, 990 F.2d 1327, 1329 (D.C. Cir. 1993), *Washington v. District of Columbia*, 685 F. Supp. 264, 276 (D.D.C. 1988), and *United States v. Miller*, 298 A.2d 34, 36 (D.C. 1972), all involved searches conducted after officers obtained facts on the scene that elevated their suspicions that individuals on site possessed contraband. Here, by contrast, the only facts

Defendant Wilson learned during the execution of the warrant reduced his basis for suspecting Mr. Mwimanzi of concealing illegal items.

Because Defendant Wilson could not search Mr. Mwimanzi, at most he could frisk him. Even assuming he had such authority, the search that occurred here was not the type of protective pat down authorized in *Terry v. Ohio*, 392 U.S. 1 (1968). Under that decision, officers with reasonable suspicion that a suspect is armed may "with sensitive fingers" frisk or pat down "every portion of the [individual's] body" including "the groin area and area about the testicles" to look for weapons. *Id.* at 17 n.13, 30. The Supreme Court has sharply circumscribed the way officers can execute such frisks, holding that they may not pat down a person's pocket by "squeezing, sliding, and otherwise manipulating" its contents. *Minnesota v. Dickerson*, 508 U.S. 366, 378 (1993). In *United States v. Ashley*, 37 F.3d 678, 680 (D.C. Cir. 1994), a case arising from a consent search which the court construed to permit a frisk coextensive with the bounds of *Terry*, the D.C. Circuit held that the constraints the Supreme Court placed on frisks of pockets in *Dickerson* applied with equal force to pat downs of someone's testicles. Thus, officers cannot engage in a "general manipulation of a suspect's private areas" when conducting a frisk. *Id.*

Defendant Wilson's search exceeded this boundary. Viewed in the light most favorable to Mr. Mwimanzi, the record shows that in searching Mr. Mwimanzi's testicles, Defendant Wilson did not use the "continuous sweeping motion" the court approved in *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992). Nor did he engage in the sort of careful pressing on Mr. Mwimanzi's "abdominal area[] in between his watch pockets, the belt and his genitals," that the court upheld in *Ashley*, 37 F.3d at 680 (cleaned up), or the pat-down this Court upheld in *United States v. Smith*, 373 F. Supp. 3d 223, 236 (D.D.C. 2019), where the Court credited the officer's testimony that he never touched a suspect's groin and that his "brief cupping, pressing, squeezing

motions" involved "feeling the shape of a gun inside Defendant's paints." Rather, Defendant Wilson rubbed Mr. Mwimanzi's testicles and forcefully squeezed them against his legs, at least twice, notwithstanding Mr. Mwimanzi's complaints. That "general manipulation" of Mr. Mwimanzi's groin is precisely what *Ashley* precludes.

This analysis demonstrates that when the record is construed in Mr. Mwimanzi's favor, a reasonable jury could find that Defendant Wilson violated his Fourth Amendment rights by manipulating Mr. Mwimanzi's groin, even putting aside the gratuitous way in which he did so (an independent clearly established violation, as explained in Section II.B.1). This analysis also shows that Defendants are not entitled to summary judgment on grounds of qualified immunity. At the time of the search, Mr. Mwimanzi's right not to suffer manipulation of his testicles based solely on his presence at a residence subject to a warrant was clearly established. Binding precedent, including *Ybarra*, *Reid*, and *Branch*, along with a robust consensus of persuasive authority from the D.C. Court of Appeals in *White* and the Third and Tenth Circuits combined to give Defendant Wilson fair notice that he could not search Mr. Mwimanzi based on the warrant to search Ms. Whitehead's home or the facts underlying it. *See* Section I.B, *supra*. And the D.C. Circuit's binding decision in *Ashley* left no doubt that to the extent Defendant Wilson had authority to conduct a frisk, he still could not manipulate Mr. Mwimanzi's testicles, let alone rub them and jam them against his leg so hard that they required medical attention.

The fact that the Statute authorized Defendant Wilson to conduct a search does not unsettle the clearly established Fourth Amendment limitations on his authority. The D.C. Circuit has rejected the similar argument that police officers can assert qualified immunity based on compliance with an agency policy, analogizing it to the 'just following orders' defense. *See Hobson v. Wilson*, 737 F.2d 1, 67 (D.C. Cir. 1984), *overruled on other grounds by Leatherman v.*

Tarrant Cnty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993); *see also Wesby v. District of Columbia*, 765 F.3d 13, 29 (D.C. Cir. 2014), *rev'd on other grounds*, 138 S. Ct. 577 (2018). Moreover, Defendant Wilson had specific notice that the Statute could not sustain an unconstitutional search. In *White*, the D.C. Court of Appeals held that a rationale nearly identical to the one asserted here did not justify a search, even though the government invoked both the Constitution and D.C. Code § 23-524(g) to support it. 512 A.2d at 285, 286. That holding placed officers on notice that such a search, even if purportedly authorized by the Statute (and by implication the General Order) is unconstitutional. Thus, Defendant Wilson cannot obtain qualified immunity based on a Statute that, as applied in the context at issue, is clearly unconstitutional.

Because the record, construed in Mr. Mwimanzi's favor, shows that Defendant Wilson violated his clearly established Fourth Amendment right not to endure manipulations of his groin based only on his presence in a residence subject to a warrant, Defendant Wilson is not entitled to summary judgment on this claim.

3. Defendant Wilson Violated Mr. Mwimanzi's Clearly Established Right Not To Endure an Officer Reaching inside His Buttocks Based only on His Presence in a Residence Subject to a Warrant.

The same principles that precluded Officer Wilson from manipulating Mr. Mwimanzi's groin also barred him from reaching inside Mr. Mwimanzi's buttocks. For the reasons discussed previously, Officer Wilson lacked authority to search Mr. Mwimanzi and at most could have conducted a frisk. And authority to frisk does not encompass the power to reach inside Mr. Mwimanzi's buttocks through his clothing, let alone to do so using the significant force that Defendant Wilson applied. The D.C. Circuit made that clear in *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992), which, like *Ashley*, arose from a consent search for drugs that the court

construed to permit an inspection equivalent to a *Terry* frisk. While acknowledging that the individual could have concealed drugs in various sensitive body parts, the court nonetheless concluded that a *Terry* frisk "does not validate everything up to and including a search of body cavities." *Id.*

The D.C. Circuit identified this constraint in discussing a pat down that occurred through an individual's clothing. *See id.* Other circuits have affirmed that reaching into a person's buttocks, even through clothing, exceeds the bounds of a *Terry* frisk. *See McKelvie v. Cooper*, 190 F.3d 58, 61, 62 n.6 (2d Cir. 1999) (holding by conducting search of "penis, testicles, and anus through [plaintiff's] clothing," officers "went beyond the pat-down or frisk contemplated by *Terry*"); *Rivera v. Drake*, 497 Fed. App'x 635, 636, 638 (7th Cir. 2012) (observing in a case where correctional officer placed finger in plaintiff's buttocks, without plaintiff alleging that it occurred under his clothing, that "we don't see how the defendant's conduct . . . could be thought a proper incident of a pat down or search" (internal citation and quotation marks omitted)).

By reaching into Mr. Mwimanzi's buttocks through his pants, Defendant Wilson violated the limitation on pat downs imposed by the D.C. Circuit as well as other circuits. Mr. Mwimanzi's right not to suffer such an intrusion was clearly established. For the reasons discussed previously, Defendant Wilson had fair notice that he lacked probable cause to search Mr. Mwimanzi. That meant at most he could conduct a frisk. By reaching into Mr. Mwimanzi's buttocks, he exceeded the scope of that power as determined by the D.C. Circuit's binding precedent in *Rodney*. Thus, Defendant Wilson's search of Mr. Mwimanzi's buttocks provides another independent basis for Fourth Amendment liability that qualified immunity does not shield.

C. Defendants Are Not Entitled to Summary Judgment on Mr. Mwimanzi's Battery Claim.

"A battery is an intentional act that causes harmful or offensive bodily contact." *Evans-Reid v. District of Columbia*, 930 A.2d 930, 937 (D.C. 2007) (internal citation and quotation marks omitted). Police officers enjoy a qualified privilege to perform such acts "provided that the means employed are not in excess of those which the actor reasonably believes to be necessary." *Id.* (internal citation and quotation marks omitted). This defense has an objective and subjective component: the officer must "actually believe[]" that the force was reasonable and this belief must itself be reasonable. *Id.* at 938 (citation omitted). On Mr. Mwimanzi's account of the facts, there is no question that Defendant Wilson performed a battery. Nor is there a debate the Defendant Wilson acted within the scope of his employment such that Defendant District of Columbia would be liable under *respondeat superior* for what occurred. *See Blair v. District of Columbia*, 190 A.3d 212, 225 (D.C. 2018). Instead, the sole question is whether Defendant Wilson was privileged.

Regarding the objective component of the test, Defendants recycle the same arguments they made on Mr. Mwimanzi's Fourth Amendment claim. Defs.' MSJ 11–12. Here too, they offer no explanation for why, even if Defendant Wilson had lawful authority to search Mr. Mwimanzi, forcibly probing his buttocks and squeezing his groin was reasonably necessary. Defs.' MSJ 11–12. They also repeat their flawed contention that Mr. Mwimanzi's failure to provide a police practice expert dooms an excessive force claim. Although older D.C. Court of Appeals decisions provided some support for this rule, *see, e.g.*, *Tillman v. Wash. Metro. Area Transit Auth.*, 695 A.2d 94, 97 (D.C. 1997), and that court still requires experts in excessive force cases sounding in negligence, *Scales v. District of Columbia*, 923 A.2d 722, 730 (D.C. 2009), the court's more recent decisions have held that battery claims involving police officers can proceed without policing experts. Indeed, in *Kotsch v. District of Columbia*, 924 A.2d 1040, 1047 (D.C. 2007), the court reversed a trial judge for holding otherwise. *See also Greene v. Shegan*, 123 F. Supp. 3d 88, 92

(D.D.C. 2015) (holding that under D.C. law expert testimony "is not required to prove an assault and battery claim"). Further, the record contains no evidence justifying a search of the type Mr. Mwimanzi described; indeed, Defendant Wilson himself never attempted to defend such a search, instead denying that he touched Mr. Mwimanzi's testicles and buttocks in the manner alleged and going so far as to say that generally, he does not search people's backsides, particularly at the scene (as opposed to at a police station). Pl.'s SoF (Statement of Disputed Material Facts) ¶¶ 34, 35. Thus, the core question at trial will not be whether Defendant Wilson's actions were reasonable but whether they occurred—precisely the type of question reserved for the jury and not resolvable on summary judgment.

Regarding the subjective component, Defendants make passing references to Officer Wilson's good faith, Defs.' MSJ 8, 9, but the facts in the record could lead a reasonable jury to conclude that Defendant Wilson knew that the manner in which he searched Mr. Mwimanzi was unlawful. Construed in Mr. Mwimanzi's favor, the record shows that Defendant Wilson searched him in a sexually intrusive and humiliating way despite knowing he had been searched previously, neither ceased nor changed course when Mr. Mwimanzi cried out in anguish and told him to stop, looked at Mr. Mwimanzi with an expression of satisfaction when the search concluded, and then mocked Mr. Mwimanzi months later when the two encountered each other again. Pl.'s SoF, Part II (Statement of Disputed Material Facts) ¶¶ 13–32, 47, 48. On this record, a reasonable jury could find that Defendant Wilson did not act in good faith. *See Hively*, 695 F.3d at 644 (denying summary judgment on Eighth Amendment excessive force and concluding that subjective element required a jury because "[t]he plaintiff alleges that he complained vociferously to the defendant about the pat down and strip search while they were going on, to no avail").

Defendants must prove both elements of their privilege claim, but a reasonable jury that draws inferences in Mr. Mwimanzi's favor could easily reject either or both of them. Thus, Defendants are not entitled to summary judgment on this claim.

CONCLUSION

The Court should grant Mr. Mwimanzi leave to amend the complaint, grant partial summary judgment as to liability on the claims he adds, and deny summary judgment to Defendants on the remainder.

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Respectfully submitted,
/s/ Michael Perloff
Michael Perloff (D.C. Bar No. 1601047)
Arthur B. Spitzer (D.C. Bar No. 235960)
Scott Michelman (D.C. Bar No. 1006945)
American Civil Liberties Union Foundation
of the District of Columbia
915 15th Street NW, Second Floor
Washington, D.C. 20005
(202) 457-0800
mperloff@acludc.org
Counsel for Plaintiff[*]

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